

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

INTEL CORPORATION,

a corporation.

File No. 061-0247

MOTION OF INTEL CORPORATION FOR DISQUALIFICATION OF
COMMISSIONER J. THOMAS ROSCH

Pursuant to 16 C.F.R. § 4.17, Intel Corporation respectfully moves for the disqualification of Commissioner Rosch from participation in any adjudicative proceeding against Intel, including voting on whether to issue a complaint. Commissioner Rosch was Intel's primary outside counsel on antitrust matters for at least six years and personally advised Intel on many antitrust issues and practices, regarding which the Commission has now threatened to sue Intel.

Motions to disqualify a Commissioner from an adjudicative proceeding "shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed." Rule 4.17(c).¹ Intel has no reason to doubt that Commissioner Rosch sincerely believes he can be fair and objective with respect to his former client. But three legal standards require that Commissioner Rosch be recused: Office of Government Ethics (OGE) regulations, recusal standards applicable to judges and FTC Commissioners alike, and legal ethics rules. Commissioner Rosch's participation would raise serious questions about the fairness of the proceeding—whether the result is favorable or unfavorable to Intel.

BACKGROUND

Commissioner Rosch served as Intel's primary outside antitrust counsel from about 1987 until Intel decided to change antitrust counsel in mid-1993. Exhibit A (Declaration of James A. Murray) ¶ 2. He advised Intel on a broad array of antitrust matters, including matters requiring application of many of the same doctrines at issue here: market definition in microprocessors; standards for determining monopoly power; pricing conduct, including predatory pricing and bundling; the "exclusive dealing" doctrine; the scope of any duty to deal with rivals; antitrust

¹ We file under Rule 4.17 because we understand a vote to commence Part 3 proceedings might be imminent. *See* Rule 3.11(a). If the Commission believes a motion under that Rule is premature, the same arguments herein would apply to Part 2 proceedings. *See* Rule 5.1(a).

implications of product design decisions; intellectual property licensing; and various other IP-related antitrust issues. *Id.* ¶ 3. He was also active in developing Intel’s antitrust compliance program. *Id.* Commissioner Rosch acquired substantial confidential information about Intel’s business practices, legal strategies, and antitrust compliance efforts. *Id.* ¶ 12.

Indeed, from 1991 to 1993, Commissioner Rosch represented Intel in an FTC investigation “[t]o determine whether Intel Corporation . . . may be engaging . . . in unlawful tying or exclusive dealing practices or other unfair methods of competition in connection with . . . microprocessors, math coprocessors, and other computer parts.” *Id.* ¶ 9, Attach. 3. The FTC’s subpoena sought documents relating to, among other topics: AMD, pricing and discounting practices, exclusive dealing, and tying and leveraging. *Id.* ¶ 9.

Commissioner Rosch argued to the FTC that AMD was not a credible witness regarding Intel, *id.* ¶ 8, Attach. 2; that an alleged breach of a licensing agreement was beyond the antitrust laws’ reach, *id.* ¶ 7, Attach. 1; and that Intel pricing practices could not be analyzed as an “economic tie,” *id.* ¶ 10, Attach. 4. The FTC did not issue a complaint. *Id.* ¶ 11, Attach. 5. Here, Commissioner Rosch would be asked to decide similar, if not identical, legal issues based on similar factual contentions made by the same company.

Settlement of the current investigation now appears unlikely. The FTC recently expanded its investigation to include new issues involving Intel’s alleged dealings with Nvidia, including: alleged refusals to deal with a rival, product design, bundled pricing, and the interface between antitrust and IP law. *Id.* at ¶ 13, Attach. 6. Moreover, Intel recently learned that the staff’s recommendation to sue Intel is based partly on allegations that Intel engaged in anticompetitive conduct since at least the 1990s. *Id.* ¶ 14.

We understand the Commission will soon vote on whether to issue a complaint and

therefore now move for recusal before any vote to initiate Part 3 proceedings in which Commissioner Rosch may not properly participate.

DISCUSSION

Three relevant legal standards, together and independently, require Commissioner Rosch's recusal.

I. Recusal Under OGE Regulations

Commissioners are subject to the "Standards of Ethical Conduct for Employees of the Executive Branch," 5 C.F.R. § 2635.² Subpart E addresses whether a federal "employee's participation in a particular matter involving specific parties . . . would raise a question in the mind of a reasonable person about his impartiality . . ." § 2635.502(d). If so, an employee may participate only where "in light of all relevant circumstances, . . . the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." *Id.* The regulation identifies the following relevant circumstances:

- (1) The nature of the relationship;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is required to exercise discretion;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter; and
- (6) Adjustments in the employee's duties that would reduce or eliminate the

² See Rule 5.1(a) ("Commissioners . . . of the Federal Trade Commission (FTC) are subject to and should refer to the 'Standards of Ethical Conduct for Employees of the Executive Branch' at 5 CFR part 2635 . . .").

likelihood that a reasonable person would question the employee's impartiality.

Applying these factors compels the conclusions that (i) Commissioner Rosch's representation of Intel "would raise a question in the mind of a reasonable person about his impartiality" and (ii) any Government interest in Commissioner Rosch's participation does not "outweigh the concern that a reasonable person may question the integrity of the agency's programs and operations." *Id.*

The first four factors compel recusal. Regarding factors (1) and (4), Commissioner Rosch personally served as Intel's *lead outside antitrust counsel* for some six years, advising on matters directly related to those presently before the Commission. He cannot erase from memory information about, and his understanding of, Intel's business practices, legal strategies, approach to antitrust compliance, among other subjects relevant here. He gained this information and understanding while he was *the* person outside Intel with the most intimate knowledge regarding application of the antitrust laws to Intel's business. Commissioner Rosch undoubtedly formed impressions about Intel's competitive behavior that will color the way he sees the issues here. A reasonable person would plainly have doubts about Commissioner Rosch's impartiality in judging Intel on the very issues and practices regarding which he previously counseled.

As to factor (2), we understand the Commission intends to pursue remedies such as compulsory licensing of intellectual property and limitations on Intel's design, pricing, and marketing freedom regarding its core products.

As to factor (3), Commissioner Rosch would be one of only three commissioners voting on whether to issue a complaint and one of not more than five to adjudicate the subsequent

proceeding. His decision would call for an enormous amount of discretion in this complex case.

Factors (5) and (6) do not counsel against recusal. There is no way to “assign” or “adjust” the Commissioner’s role: either he will vote or he will not. Recusal will not prejudice the Commission because Commissioner Rosch’s participation is not required for the Commission to act. *See* Rule 4.14(b).

II. Recusal Under Judicial Standards

In Part 3 proceedings, Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary. *American General Ins. v. FTC*, 589 F.2d 462, 463 (9th Cir. 1979). As with court proceedings, FTC administrative proceedings “must be attended, not only with every element of fairness but with the very appearance of complete fairness.” *Texaco v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964).

These standards require Commissioner Rosch’s disqualification because “a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 582, 591 (D.C. Cir. 1970). Judges must be recused even where there is only an *appearance* of partiality, without actual bias. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 865 (1988); *In re Murchison*, 349 U.S. 133, 136 (1955) (recusal rules “may sometimes bar trial by judges who have no actual bias”).

The Federal Judicial Center accordingly instructs that “[a] judge contemplating recusal should not ask whether he or she *believes* he or she is capable of impartially presiding over the case,” but rather whether an outsider could reasonably question his capacity to do so. Federal Judicial Center, *Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144*, Part I, IVA (2002) (emphasis added). “Most courts agree that recusal is warranted whenever a party appears

before a judge who previously represented her in . . . a substantially related matter . . . , and that the judge’s failure to recuse himself in such a circumstances may require reversal.” Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 11.1 (2d ed. 2007). As then-Judge Kennedy wrote, “the [FTC] Commissioner . . . had participated in previous court proceedings involving the same parties. In those proceedings he contended for adoption of a principle that is critical to this case. I have no hesitation in saying this is unacceptable” *American General*, 589 F.2d at 465 (Kennedy, J., concurring in the judgment).

Courts broadly construe whether matters are “substantially related,” emphasizing that judges must not participate in matters where a reasonable observer could question their impartiality. In *Rushing v. City of Georgiana*, for example, the court held that a judge should recuse himself based on prior representation of a party—whether or not the “nature of the controversy” and the “parties to the suit” were precisely the same—because the “same course of events” was involved in both the case the judge had litigated and the case he would preside over. 361 So.2d 11, 12 (Ala. 1978). Similarly, in *Davis v. Neshoba County General Hospital*, the court ordered a new trial in an action against a hospital where the trial judge previously had been the hospital’s attorney and had helped the hospital hire one of the defendant physicians—even though the Judge had no other relationship to the subject of the lawsuit. 611 So. 2d 904, 905 (Miss. 1992).

Where the previous representation is “substantially related” to the current matter, mere passage of time cannot overcome the need for recusal. Flamm, *supra*, § 11.1 (recusal standards generally apply “without regard to such factors as the duration or extent of the prior representation, or when it took place”); *see also Sharp v. Howard County*, 607 A.2d 545, 551 (Md. 1992) (passage of seventeen years did not “attenuate the effect of the earlier legal

representation”). Here, Commissioner Rosch’s previous work as Intel’s principal outside antitrust counselor—including *in a similar investigation by this very agency*—is plainly “substantially related” to the Commission’s renewed consideration of similar allegations against Intel. Commissioner Rosch counseled Intel regarding pricing, sales, and other practices very similar to those at issue presently. Accordingly, under the recusal standards applicable to judges and FTC Commissioners alike, Commissioner Rosch must be disqualified.

III. Recusal Under Ethics Rules

State bar rules govern an attorney’s ethical duties towards his clients. As a member of the California bar,³ Commissioner Rosch is subject to Rule 3-310(E) of the California Rules of Professional Conduct, which provides that a bar member “shall not, without the informed written consent of [a] former client, accept employment adverse to the . . . former client *where, by reason of the representation of the . . . former client, the member has obtained confidential information material to the employment.*” CRPC 3-310(E) (emphasis added). Although no one can know now whether his consideration and decisions in this matter ultimately will be adverse to Intel, the prospect of such adversity requires application of this principle.

This rule binds Commissioner Rosch even though he is now in government service. *See San Francisco v. Cobra Sol’ns, Inc.*, 38 Cal. 4th 839 (2006) (disqualification of entire city attorney’s office where city attorney previously represented present defendant while in private practice). Rule 3-310(E) is designed to “protect against the improper use of client secrets,” *Flatt v. Superior Court*, 9 Cal. 4th 275, 283 (1994), and that is a significant risk when an attorney is adverse to a former client on issues related to a prior representation. *Id.* Thus, courts applying Rule 3-310(E) focus on two questions: (i) whether the attorney had a “direct professional

³ State Bar No. 37668. *See* Attorney Look-Up Page, at http://members.calbar.ca.gov/search/member_detail.aspx?x=37668

relationship with the former client in which the attorney personally provided legal advice and services on a particular legal issue,” and (ii) whether the *legal issue* on which the attorney formerly advised the client is “closely related to the legal issue in the present representation.” *Cobra*, 38 Cal. 4th at 847. When the answer to both is “yes,” the attorney is *presumed* to possess relevant confidential information belonging to his former client and will be automatically disqualified. *Id.*

Courts apply this rule broadly. An attorney’s current and former representations will be considered “closely” or “substantially” related if there is *some* rational connection between the subjects of the two representations. *Jessen v. Hartford Casualty Ins. Co.*, 111 Cal. App. 4th 683, 711-713 (Cal. Ct. App. 2003).⁴ This reflects a “concern ... that limiting the comparison of the two representations to their precise legal and factual issues might operate unrealistically to the detriment of the first client.” *Id.* at 712.

Here, Commissioner Rosch’s representation of Intel satisfies the criteria for applying Rule 3-310. He had a “direct professional relationship” with Intel, in which he “personally provided legal advice and services on a particular legal issue,” *id.* See Murray Decl. Indeed, his advice involved the very practices that are the subject of the staff’s allegations of anticompetitive conduct extending back at least into the 1990s and that we understand are a material part of the staff’s recommendation for a complaint. *Id.* ¶ 14. Moreover, as described above, many of the issues that we understand to be central to the Commission’s current investigation and proposed complaint are substantially related to those on which Commissioner Rosch previously

⁴ A time gap between the former and current representations is irrelevant if the matters are substantially related. See, e.g., *Brand v. 20th Century Ins.*, 124 Cal. App. 4th 594 (Cal. Ct. App. 2004) (12 years between attorney’s representation and lawsuit); *Jessen, supra* (11 years); *River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297 (Cal. Ct. App. 1987) (27 years).

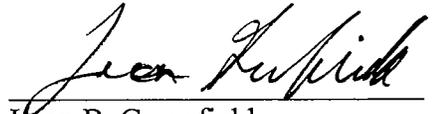
represented Intel (including before the FTC). Under California law, Commissioner Rosch is presumed to possess Intel's confidential information on these topics, and it is therefore improper for him to be adverse to Intel on those matters or to serve in a role where adversity is a possibility.

CONCLUSION

For the reasons set forth above, Intel respectfully requests that Commissioner Rosch be disqualified.

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Attorneys for Intel Corporation

Dated: December 15, 2009

Exhibit A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of
INTEL CORPORATION,

a corporation.**

File No. 061-0247

DECLARATION OF JAMES A. MURRAY

I, James A. Murray, Esq., under penalty of perjury pursuant to 28 U.S.C. § 1746, based on my personal knowledge, information, and belief concerning matters to which I am competent to testify, declare as follows:

1. I am Associate General Counsel with Intel Corporation (“Intel”) in Santa Clara, California. I have been employed by Intel since April 1996 and am a member of the State Bar of California and admitted to practice before various federal courts.

2. I have reviewed documents, including correspondence and legal memoranda, retained by the law firm of Bingham McCutchen LLP in the regular course of business. These documents show that J. Thomas Rosch (“Commissioner Rosch”), while a partner with McCutchen, Doyle, Brown & Enersen, represented Intel as its primary antitrust counsel from at least 1987 until mid-1993, when Intel decided to change antitrust counsel.

3. These documents also show that Commissioner Rosch advised Intel on a broad range of general subject matters involving antitrust issues. Those include, among others: market definition in the microprocessor industry; the standards for determining whether a company has monopoly power; pricing conduct, including predatory pricing and bundled pricing; the scope of the “exclusive dealing” doctrine; the scope of any duty to deal with a rival; the antitrust implications of product design decisions; antitrust issues relating to licensing of intellectual property and patent enforcement; and the scope of Section 5 of the Federal Trade Commission

Act and related remedies. In addition, Commissioner Rosch advised on and participated in Intel's antitrust compliance program.

4. The advice and services provided by Commissioner Rosch to Intel have been identified here only at the subject matter level, so as to maintain Intel's attorney-client privilege and any other applicable privileges, which Intel reserves and does not waive. Likewise, the documents attached to this declaration and referenced below are non-privileged (although non-public) communications between then-attorney Rosch and the FTC staff investigating Intel at the time. Intel has not revealed, and does not intend to reveal, privileged communications in support of its motion for disqualification. *See* Restatement (Third) of the Law Governing Lawyers, § 132 Comment d(iii) (2000) ("A concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. The interests of subsequent clients also militate against extensive inquiry into the precise nature of the lawyer's representation of the subsequent client and the nature of exchanges between them.").

5. The documents reviewed also show that Commissioner Rosch represented Intel before the Federal Trade Commission ("FTC") in an antitrust investigation concerning, among other things, microprocessors.

6. Each of Attachments 1-5, below, is a true and correct copy of a document located in the Bingham McCutchen files. These documents illustrate the scope of the FTC's investigation and Commissioner Rosch's involvement in Intel's efforts to cooperate with that investigation.

7. Attachment 1 is a letter dated July 17, 1991 from Commissioner Rosch to L. Barry Costilo of the FTC Staff concerning Intel's arbitration with AMD. In that letter, Commissioner Rosch wrote at page 9 that "I'm struck--and I think you will be too--by the impossibility, under existing law, of converting AMD's breach of contract claim into an antitrust violation. At bottom, AMD's complaint was not that it was prevented from partnering with

NEC, Fujitsu or anybody else. AMD's complaint instead was that it was prevented from getting the 386, which Intel developed and patented."

8. Attachment 2 is a letter dated August 1, 1991 from Commissioner Rosch to Mr. Costilo of the FTC Staff. In that letter, Commissioner Rosch wrote at page 1 that AMD's "brief and declaration illustrate how much AMD is willing to fantasize about Intel's conduct and its consequences."

9. Attachment 3 is a facsimile dated February 3, 1992 sent from Tom Lavelle of Intel to Commissioner Rosch transmitting a Federal Trade Commission investigative subpoena seeking documents relating to, among other things:

- AMD: All documents relating to "any increase in the supply of any type of Intel microprocessor which is related to the actual or possible introduction of microprocessors by Advanced Micro Devices, Inc. or any other competitor." (Specification 17);
- Pricing and Discounting Practices: "price lists, discounts, and volume purchasing terms" (Specification 16) and all documents relating to "actual or possible contractual or legal constraints on any price changes considered by Intel" (Specification 14);
- Exclusive Dealing: All documents relating to "any efforts . . . to ascertain whether any purchaser . . . was purchasing competing products" (Specification 7) and "any factors . . . Intel . . . took into consideration in determining the supply or allocation of any relevant product to actual or potential customers . . . , including information relating to any customer's purchase of other types of Intel computer parts . . . or the products of Intel's competitors" (Specification 10); and
- Tying and Leveraging: "Intel's . . . practices relating to any actual, possible or alleged tying or leveraging the sale of certain computer parts or enhancements to the sale of other computer parts or enhancements" (Specification 6(a)).

10. Attachment 4 is a letter dated March 11, 1993 from Commissioner Rosch to Mr. Costilo. In that letter, Commissioner Rosch wrote at page 1 that "application of antitrust tying analysis to Intel's licensing efforts would be clearly erroneous." He also wrote at page 3 that Intel's "pricing here bears no resemblance to the pricing in 'economic tying' cases"

11. Attachment 5 is a fax dated July 20, 1993 sent from Commissioner Rosch to Art Amolsch transmitting a newspaper article describing the FTC investigation and noting its

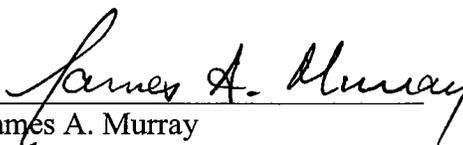
conclusion. That article says that “[t]he FTC had been considering allegations that Intel pressured customers to buy its memory chips along with its microprocessors. The FTC also looked into complaints that Intel had refused to do business with PC companies that bought chips from Advanced Micro Devices, Inc. or Cyrix Corp., two firms that have ‘cloned’ Intel’s microprocessors. ‘It now appears that no further action is warranted by the Commission at this time,’ the FTC wrote.”

12. Documents that I reviewed show that Commissioner Rosch obtained substantial confidential information by reason of his representation of Intel, including information regarding Intel’s business practices, legal strategies, and approach to antitrust compliance.

13. The FTC recently expanded its investigation to include new issues involving Intel’s alleged dealings and competition with Nvidia. Attachment 6 is a true and correct copy of a subpoena duces tecum dated December 4, 2009, which Intel counsel received on December 8, 2009. The subpoena requested, for the first time, that Intel produce documents concerning those issues.

14. During a December 9, 2009 meeting with top FTC officials, I and other counsel for Intel were told that Intel’s conduct dating back to the 1990s was relevant to the FTC’s decision whether the FTC will issue a complaint and what remedy the FTC would seek.

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


James A. Murray

Date: December 15, 2009

Attachment 1

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L. Barry Costilo, Esq.
Attorney
Bureau of Competition
U.S. Federal Trade Commission
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Intel Corporation
FTC File No. 911 0070

Dear Barry:

This submission is responsive to your request for Intel's briefs, brief appendices and proposed findings which bear most directly on (1) the Arbitrator's findings that Intel "decided to frustrate the operation of the relationship by failing to take further products [and] concealed its intentions from AMD in order to keep AMD away from other competitors" (Decision p.3) and that Intel "allow[ed] itself to decide internally to disturb the relationship with AMD and, at the same time, to pretend externally to AMD that the relationship still existed, to hold out a carrot for AMD not for the purpose of extending or nurturing the relationship, but for the self-serving purpose of keeping AMD in the Intel 'camp,' of keeping AMD away from some sort of partnership with another company--say NEC or Fujitsu--where AMD's talents might be used in effective competition against Intel" (Decision p.10); (2) the impact of Intel's supposed "concealment" on AMD; and (3) the market position of Intel's X86 products at the time.

Pursuant to that request, I enclose the following:

- (1) Intel's May 7, 1987 letter describing its defenses and counterclaims;
- (2) Intel's September 30, 1987 Brief On AMD's "Background" Presentation and Appendix thereto;

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- (3) Intel's September 8, 1988 Bench Memorandum on The Implied Covenant of Good Faith and Fair Dealing;
- (4) Intel's September 28, 1988 letter responding to AMD's Reply to Intel's Bench Memorandum;
- (5) Intel's Supplemental Background Contentions, dated January 25, 1990;
- (6) Intel's March 2, 1990 letter respecting the Contract and Amendment and the parties' relationship;
- (7) Intel's May 8, 1990 Opening Background Submission;
- (8) Intel's August 28, 1990 letter summarizing testimony respecting why AMD did not develop more products that Intel found acceptable under the Contract from 1982-1986;
- (9) Intel's September 18, 1990 letter discussing the various claims referred to arbitration;
- (10) Intel's September 18, 1990 letter further discussing why AMD did not develop products that were acceptable to Intel; and
- (11) Intel's September 28, 1990 letter on the same subject.

Additionally, I enclose an Index of the briefs that were filed in connection with the liability phase of the arbitration so that you can order anything else that happens to catch your eye. (The above submissions are numbers 8, 40, 101, 104, 214, 222, 230, 249, 262, 264 and 268 respectively.)

Finally, I enclose Intel Exhibits 448, 665 and 286 and AMD Exhibits 10, 240, 834 and 869, which are relevant to the matters you have identified.

There are a number of things that deserve emphasis before you plunge into this material (and the material AMD submits).

First, AMD is and at all relevant times has been Intel's competitor in the semiconductor industry and, as such,

it certainly had no right to get the 386 from Intel except insofar as the Contract at issue in the Arbitration gave it that right.

Second, the Contract at issue in the Arbitration did not give AMD that right. That is clear from the Contract itself and, indeed, from the Arbitrator's Decision. The Contract was explicitly "a mechanism for exchanging technical information." (AMD Exs. 10,240; emphasis added) As the Arbitrator acknowledged, "the arrangement was a product for product, value for value exchange" and "the concept always was that an exchange or acquisition had to reflect reasonable value." (Decision at 12) Recognizing this, AMD sought specific performance--i.e., it asked the Arbitrator to require Intel to take certain AMD products in exchange for the 386. (Interlocutory Decision at 28-32) The Arbitrator found that Intel had selected sufficient AMD products that if Intel were required to take the products that AMD tendered (e.g., the QPDM, the HDC, the SCSI), AMD would have earned the 386. (Id.) However, the Arbitrator found that Intel was not obligated to take any of these products.

Specifically, the Arbitrator found (1) as to Intel's rejection of the AMD QPDM as a potential exchange product that there was "no agreement on specifications" for that product (Interlocutory Decision p.24), that Intel "believed it had valid business reasons for rejecting" it (Id. at p.27) and that AMD ultimately failed to "perform at the time performance was reasonably due under the contract." (Id. at p.30); (2) as to Intel's rejection of the HDC, that AMD failed to meet any of the "reasonable conditions" for Intel's obligation to take that part, and, more specifically, that "the die size was larger than anticipated, the part was too late and the part offered was not the HDC that Intel had bargained for" (Decision at p.24); (3) as to Intel's failure to timely deliver the 80C31 manufacturing package, that Intel's obligation under the express terms of the contract was to deliver the 80C51, not the 80C31, manufacturing package (Decision at pp. 46-47); (4) as to Intel's refusal to permit AMD to develop the 80C286 for CF points, that Intel did that "for many reasons, most of them legitimate" (Decision at p.69); as to Intel's refusal to accept the SCSI, that "AMD could not have satisfied the conditions of [Intel's] commitment letter no matter what" (Decision at p.84); and (5) Intel properly rejected AMD's 7970 (Decision at p.62) and 9513A (Id. at p.64) for valid business reasons.

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Third, none of the Intel briefs discusses directly the matters which you have identified, but they deserve your close review.

More specifically, Intel did not brief its intent because the issues which AMD tendered to the Arbitrator all had to do with whether Intel had breached its contractual obligations. Intel's position was that, as a matter of law, no implied obligation (including the implied obligation of good faith and fair dealing) could expand the express contractual obligations that it had undertaken and that it had fully performed those express obligations. Thus, on Intel's view of the case its intent was irrelevant and its briefs did not discuss in any detail AMD's supposed "evidence" of Intel's bad intent.

Intel did not brief the impact of its supposed "concealment" because the Arbitrator bifurcated the proceeding into liability and remedies phases. AMD's brief setting forth its claims as to the impact of the supposed "concealment" is not due until August and the deadline for Intel's response has not yet been set. I will send you Intel's brief on the subject just as soon as it is submitted.

And Intel did not brief the market position of the X86 products because that too was irrelevant to the breach of contract claims which were the subject of the arbitration.

Nevertheless, Intel's briefs are very relevant to the Arbitrator's findings concerning its intent because they discuss in detail the reasons why Intel was justified in not doing the things that AMD claimed it should have done. And, you will note, in his analysis of Intel's conduct respecting AMD's specific claims (as opposed to AMD's general good faith and fair dealing claim), the Arbitrator found that almost all of Intel's conduct was justified. Indeed, that is the central curiosity of the Arbitrator's decision: on the one hand, he found that Intel's conduct after the fall of 1984 was driven by a decision to frustrate the contractual relationship; on the other hand (as discussed above), he found that there was a legitimate basis for nearly everything that Intel refused to (or did not) do after that date.

Intel, of course, continues to deny that it ever decided it would not take any AMD products regardless of their value to Intel, and asserts that it was always amenable to

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exchanging products with AMD, but was frustrated because AMD failed to develop and deliver the kinds of products in which Intel was interested; as the Arbitrator acknowledged, "there was no obligation for a party to act 'substantially against its self-interest in deciding to transfer or accept a part.'" (Decision at 62; emphasis the Arbitrator's)

Moreover, after reviewing AMD's "evidence" of Intel's supposed intent (it is appended to AMD's October 6, 1987 Memorandum Re Breaches of the Covenant of Good Faith and Fair Dealing, Implied Obligations and Joint Venture) it's clear to me that AMD did a good deal of violence to the record in its briefs--e.g., attributing to Intel's decision makers the recorded thoughts of employees who lacked decision-making power; ignoring the portions of recorded thoughts which belied the interpretations which AMD placed upon them. If you would like Intel's view of those documents, please let me know. However, as discussed below, the record demonstrates that Intel's supposed intent is irrelevant because Intel's conduct plainly did not implicate the antitrust laws.

Fourth, the Arbitrator's Decision and AMD's briefing demonstrate that even if Intel had concealed an intent to accept no more exchange products from AMD, the impact of such a concealment would have been de minimis. More specifically, the Arbitrator found that Intel's supposed decision to frustrate the contractual relationship was made "in the early to mid-fall of 1984." (Decision pp. 27-28; see also AMD's May 9, 1990 Opening Background Brief at p.75 stating that that decision was made "shortly before the October 5 and 9, 1984 AMD/Intel meetings") According to AMD, Intel told AMD that the contract "had to be changed" in November, 1984. (AMD May 9, 1990 Opening Background Brief at pp. 21-22 and 97) Thus, on AMD's and the Arbitrator's versions of events, if there was any concealment of Intel's supposed decision at all, it was very brief, and any notion that it operated to keep AMD from partnering with NEC or Fujitsu or any other Intel competitor is nonsense.*

* I urge you to press AMD for documents evidencing that NEC, Fujitsu or anyone else solicited AMD after the fall of 1984 to jointly develop products which would compete with Intel's 386 products. AMD has not produced any such document in the arbitration proceedings.

L. Barry Costilo, Esq.
July 17, 1991
Page 6

You will note that AMD sometimes argued in its briefs that Intel's efforts to renegotiate the contractual relationship after November, 1984 were a sham. The Arbitrator did not so find. To the contrary, he repeatedly stated that "Intel was determined to renegotiate the contract." See Decision at pp. 18, 46; Interlocutory Decision at p.25. Indeed, AMD's own briefing on this score is at war with its contention that the negotiations were a sham. For example, AMD claimed that Intel acted "to coerce AMD into accepting new terms very favorable to Intel" (AMD's May 9, 1990 Opening Background Brief at p.85); that "shortly before the October 5 and 9, 1984 AMD/Intel meetings, Intel's management made a firm decision to take no further AMD products under the existing agreement and to negotiate a new agreement" (AMD's June 22, 1988 Statement of Contentions Established In The Background Case at p.52); and that "Intel's most egregious conduct was its tactic of non-cooperation and withholding of performance . . . which was specifically directed at renegotiating a 'new deal' with AMD." (AMD's October 6, 1987 Memorandum Re Breaches of the Covenant of Good Faith and Fair Dealing; Implied Obligations and Joint Venture at p.11)

Fifth, documents in the record which are not mentioned in the briefs (but which I've also enclosed) establish that AMD never considered its relationship or negotiations with Intel to be a deterrent in pursuing a partnership with Intel's competitors. For example, as early as 1983 (a year before Intel supposedly breached the Intel-AMD Contract), AMD's chief product planner made a presentation to AMD's top management and under the title "Intel-Partner and Enemy" he wrote as follows:

"Our Intel relationship is a really frustrating experience, presumably for them as well as for us. . . .

. . . .
Now all this does not make the [Intel-AMD] agreement bad, we just have to recognize what it is, an opportunity for us to get a large amount of business from IBM and other strategic accounts for the next few years. But it is no more than that. If we are going to succeed in the computational marketplace long term, we have to develop and execute a strategy which is independent of Intel.

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July 17, 1991
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. . . .
So what do we do with Intel? . . . develop a strategy which long term makes us independent of them."

(Intel Ex. 448)

A year later, that same AMD executive presented a similar strategic planning report to AMD's senior management. Under the title "Intel-A Wounded Animal," he escalated his plan to seek alternatives to the Intel alliance, writing as follows:

"During the past year our relationship with Intel has deteriorated. As expressed in last year's notes for this meeting, perhaps it was inevitable since we have the same goal of domination of the professional market.

. . . .
We need to develop a strategy for IPD (AMD's Information Products Division) which is as independent of Intel as possible. There are several opportunities which are available to us. First, develop our own microprocessor family. . . . Second, extend our product line by executing the product development agreement with Siemens. It would also be a fairly simple task to change the interface of selected peripherals to work directly with the [Motorola] 68000 family. . . ."

(Intel Ex. 665)

In January 1985, AMD executives met among themselves to discuss the Intel relationship. Tony Holbrook (then AMD's Chief Operating Officer, later its President) wrote the following in his notes of that meeting:

"Major problem - Intel won't take our products. 'Religion' problem. WJS [AMD Chairman, Jerry Sanders] - Consider Moto [Motorola] deal - 32 Bit."

{AMD Ex. 869; although the document is dated "1-10-84," Holbrook testified that the meeting took place in 1985 and he simply misdated his notes; TR 11770-71 (3/11/88)}

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July 17, 1991
Page 8

In September 1985, AMD's Chairman, Jerry Sanders, Holbrook and other senior AMD executives considered a "microprocessor strategy" that included potential strategic alliances with National Semiconductor, Motorola or NEC:

"Intel has every intention of precluding us [AMD] from the iAPX family futures, whether it be the C286 or the 386. . . .

Based on this, the basic assumption of Intel CPU's in our MOS Microprocessor and Microcomputer strategy is no longer valid. Our alternatives include Motorola, National, NEC, and proprietary developments. National is failing and Motorola is disinterested.

NEC could be a good fit. . . . Questions are when will their 286 and 386 be available and how successful will they be, based on relative spec/performance, time to market, and support. Further, we must question how well we can compete against NEC with their product, even in the U.S. and Europe. NEC's 16-bit microcomputer and forthcoming DSP products need similar scrutiny."

(Intel Ex. 286; same as AMD Ex. 537) The action items in that microprocessor strategy document included "Recognize the Intel alliance is dead from a strategic planning standpoint" and "Engage NEC for answers to the questions posed and determine feasibility of a partnership." (Id.)

Sixth, AMD makes no claim that X86 products prior to the 386 ever had any position of dominance in the microprocessor market. To the contrary, AMD's briefing depicts the 8086 as a loser (AMD's May 9, 1990 Opening Background Brief at p.5) and the 80186 and 80286 as being something which AMD did not want if it couldn't get the 386 (Id. at 43-45).

AMD does imply in its briefing that Intel's 386 was so dominant in the industry by the fall of 1984 that Intel had no intention of licensing AMD as a 386 second source. However, the documents relied on prove just the opposite. Take a look, for example, at exhibits 17 and 20 to AMD's October 6, 1987 Memorandum Re Breaches of The Covenant of Good Faith and Fair Dealing, Implied Obligations and Joint Venture. Those documents, prepared in April and December of 1985, show that

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Page 9

throughout 1985 Intel people believed that second sourcing the 386 via AMD might be necessary to make the product successful.

AMD's view of the prospects for the 80386 matched Intel's. Dave Simpson, the manager in charge of AMD's MOS Microprocessor and Peripherals directorate (which included the 8086, 80186 and 80286, and would have included the 80386) reported the 386 state of affairs to Tony Holbrook, AMD's Chief Operating Officer, on November 12, 1984:

3. The 386 will be very late to the market vs. Motorola and National/TI. Intel will need us badly to penetrate the general market. Our ads and early commitment to sourcing will be vital to its success.

[AMD Ex. 834 (copy attached)] Thus, insofar as the record in the Arbitration proceedings speaks at all to the 386's market position during the timeframe relevant in that case, it indicates that the product did not enjoy a dominant market position.

I think any unbiased industry source will tell you that the 386 was not a market success until 1987 (after IBM and Compaq had adopted it and it had survived an introduction which became a disaster when a technological glitch was discovered).

Seventh and finally, after reading the briefs, I'm struck--and I think you will be too--by the impossibility, under existing law, of converting AMD's breach of contract claim into an antitrust violation. At bottom, AMD's complaint was not that it was prevented from partnering with NEC, Fujitsu or anybody else. AMD's complaint instead was that it was prevented from getting the 386, which Intel developed and patented. See, e.g., AMD's June 22, 1988 Statement of Contentions at p.89; AMD's May 9, 1990 Opening Background Brief at pp. 43-45, 109-10, 124; Arbitration Decision at p.11. That, of course, is exactly the same claim which the plaintiffs dressed in antitrust garb--and which the courts rejected--in SCM v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981) and Miller Insituform, Inc. v. Insituform of North America, Inc., 830 F.2d 606 (6th Cir.), cert. denied, 484 U.S. 1064 (1987). The Second Circuit held in SCM that "where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws." 645

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F.2d at 1206. The Sixth Circuit in Miller was even more explicit, holding that "[t]he mere failure to observe state contractual obligations does not rise to the level of misuse of a patent that will render one liable for violation of Section 2 of the Sherman Act." 830 F.2d at 609.

I hope that your review of the enclosed materials and those submitted by AMD will put the AMD aspect of your investigation to rest. However, if you have any further questions or need anything else on this score, please don't hesitate to call me.

Cordially,

J. Thomas Rosch

Attachment 2

file 14763-26
JPD

McCUTCHEN, DOYLE, BROWN & ENERSEN

COUNSELORS AT LAW

THREE EMBARCADERO CENTER

SAN FRANCISCO, CALIFORNIA 94111

TELEPHONE (415) 393-2000

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August 1, 1991

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DIRECT DIAL NUMBER

(415) 393-2202

L. Barry Costilo, Esq.
Attorney
Bureau of Competition
U.S. Federal Trade Commission
Washington, D.C. 20580

Intel Corporation
FTC File No. 911 0070

Dear Barry:

I assume that AMD is sending you its remedies briefs. However, I want to be certain that you have gotten AMD's Opening Brief In Support Of Its 80C286 Damages and the Declaration Of Anthony B. Holbrook In Support Of AMD's 80C286 Damages because they are instructive in two respects.

First, the brief and declaration illustrate how much AMD is willing to fantasize about Intel's conduct and its consequences. The brief and declaration ignore, for example, (1) the fact that the 80C286 was not a new AMD product and thus was never eligible for exchange under the Agreement and (2) the lack of any other legal obstacle to Intel's choosing Harris over AMD to help develop the product. (You will recall that the Arbitrator found that there were legitimate reasons for Intel to have made that decision.) Beyond that, the brief and declaration ask the Arbitrator to find that Intel was responsible for AMD's failure to begin developing its own 80C286 until 1987 despite the fact that AMD knew about Intel's agreement with Harris at least as early as the Fall of 1985.

Second, and most significantly, however, the Holbrook Declaration is fatal to any notion that Intel's alleged "concealment" of its intent from and after the Fall of 1984 had the effect of preventing AMD from joining Intel's competitors in developing competitive architectures. It expressly admits:

L. Barry Costilo, Esq.
August 1, 1991
Page 2

"15. AMD's continuing commitment to the iAPX family would have been the only real choice available to AMD in the fall of 1984. By late 1984, the burgeoning PC market had committed itself to the iAPX architecture and hundreds of millions of dollars of software had been written for that architecture. Moreover, after three years in the AMD/Intel alliance, AMD itself had a substantial investment in the iAPX line. While AMD might have considered switching to another microprocessor family, such as NEC's V-series, Motorola's 68000 family or the Zilog family, I strongly believe, in light of the factors already noted, that AMD would have stayed with the iAPX family."

Holbrook Declaration 7:10-20 (Mr. Holbrook, of course, is AMD's Vice Chairman and was AMD's Executive Vice President and Chief Operating Officer during the relevant period.)

If you have any questions, please don't hesitate to call me.

Cordially,

J. Thomas Rosch

bc: F. Thomas Dunlap
Gary Jones
Terry E. Fenzl

CN000078_R

Attachment 3

FACSIMILE COPY
14763-26
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INTEL FACSIMILE FORM

INTEL CONFIDENTIAL X

URGENT X

PAGE 1 OF 9

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MOB & E

DATE: 2/3/92

FAX MACHINE NO. (415) 393-2286

FEB 3 1992

TO: Tom Rasch

M/S: McCutchen, Doyle

EXT: (415) 393-2000

FROM: Tom Lavelle

M/S: GR1-21

EXT: 765-1141

INTEL CORPORATION
LEGAL DEPARTMENT, GR1-21
3535 GARRETT DRIVE
SANTA CLARA, CA 95052

VERIFICATION NUMBER: (408) 765-_____

PANAFAX NUMBER: (408) 765-1809

SUBJECT: _____

MESSAGE: _____

RECEIVED - GR1-21

FEB - 5 '92

Dates to be Entered

A CONFIRMATION COPY OF THIS DOCUMENT...

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IMPORTANT NOTICE

This information is intended to be for the use of the individual or entity named on the transmittal sheet. If you are not the intended recipient be aware that any disclosure, copying, distribution or use of the contents of this faxed information is prohibited. If you have received this facsimile in error, please notify the sender by telephone immediately so that arrangements can be made for the retrieval of the original document at no cost to you.

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SUBPOENA DUCES TECUM

FACSIMILE COPY

1. TO President Intel Corporation 3065 Bowers Avenue Santa Clara, CA 95051	2. FROM FEB 3 1992 Rec'd. 4:30 UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
---	--

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described below (item Number 6).

3. LOCATION OF HEARING Federal Trade Commission 601 Pennsylvania Avenue, N.W. Room 2229 Washington, D.C. 20580	4. YOUR APPEARANCE WILL BE BEFORE L. Barry Costilo, Esq. or Sarah Oxenham, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION February 17, 1992 at 9:00am
---	---

6. SUBJECT OF INVESTIGATION Intel Corp., File No. 911-0070	RECEIVED - CALEROAR FEB - 5 '92 Date to be Entered 2/17 HRG ENH 15 A HOLIDAY By: rh The attorney whose initials appear below has reviewed the applicable court rules and has verified that the address are correct.
--	---

7. RECORDS YOU MUST BRING WITH YOU Described in attached schedule.	8. RECORDS CUSTODIAN / DEPUTY RECORDS CUSTODIAN Michael E. Antalics (Custodian) L. Barry Costilo (Deputy Custodian)	9. COMMISSION COUNSEL L. Barry Costilo Esq.
--	---	---

DATE ISSUED 1/11/92	COMMISSIONER'S SIGNATURE
-------------------------------	-------------------------------------

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. Ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel (item Number 9).

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation you are entitled to as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

SCHEDULE OF DOCUMENTS TO BE PRODUCED

For the purposes of this subpoena, the following definitions and instructions apply:

I. DEFINITIONS AND INSTRUCTIONS

A. The term "Intel" means Intel Corporation and its officers, employees, agents, representatives, and its divisions, sub units, subsidiaries, affiliates, partnerships and joint ventures.

B. The term "relevant products" means any Intel microprocessors, math coprocessors, or microcontrollers which can be used in IBM-compatible personal computers or systems. Where the subpoena requests documents that show pricing or statistical information for relevant products, documents should be provided which show the requested information separately for each type of microprocessor product, e.g., documents shall be provided showing the information separately for each different Mhz and SX and DX model of the 80186, the 80286, the 80386, and the 80486.

C. The terms "tying" or "leveraging" mean their common usage or similar words or phrases, as well as any actual, possible, alleged or attempted direct or indirect use of the sales or supply of certain computer parts or enhancements to condition, induce, coerce, force, or pressure the purchase of other computer parts, enhancements, or systems. The terms are not necessarily used in their legal sense and do not imply any requirement of market power.

D. The term "documents" means all written, recorded or graphic materials of every kind, prepared by any person including, but not limited to, letters, telegrams, telexes, market plans, analyses, memoranda, reports, contracts, E-mail, studies, calendar or diary entries, minutes, pamphlets, foils, handwritten notes, charts, tabulations, records of meetings, conferences and telephone or other conversations or communications, as well as film, tapes or slides, and all other information compilations, in the possession, custody or control of Intel or to which it has access. The term "documents" also includes drafts of documents, copies of documents that are not identical duplicates of the originals, and copies of documents the originals of which are not in the possession, custody or control of Intel. The term "other information compilations" includes information stored in, or accessible through, computer or other information retrieval systems, including but not limited to E-mail, together with instructions and all other materials necessary to use or interpret such data compilations.

E. The term "plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

F. The terms "relating to" and "related to" mean in whole or in part, constituting, containing, concerning, embodying, reflecting, describing, analyzing, identifying, stating, referring to or dealing with, or in any way pertaining to.

G. The terms "and" and "or" have both conjunctive and disjunctive meanings. The singular form of any word includes the plural form, and vice versa.

H. The term "person" means any natural person, corporate entity, partnership, association, joint venture, government entity or trust.

I. The response to each specification shall be identified by specification number (and, if applicable, subspecification number) and segregated from responses to other specifications. Each page or sheet produced is to be marked in a color other than black (or in some other fashion to make the document distinguishable from photocopies) with corporate identification and consecutive document control numbers, with the exception of original bound pamphlets or books, which may be marked with a single control number. Within the response to a given specification, documents shall be organized according to the file(s) in which they were kept, maintained or found and identified as to file name and the source of the file, by individual name and corporate title (e.g., correspondence file of "Mr. X," Vice President for "Y"). If a document is responsive to more than one specification, reference to the document control numbers may be noted in the response to the latter specification(s) in lieu of submission of additional copies of the document.

J. All documents returned in response to this subpoena will be afforded confidential treatment in accordance with the provisions of Section 21 of the Federal Trade Commission Act (15 U.S.C. § 41 et seq.) and Rule 4.10 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 4.10.

K. If any documents are withheld from production based on a claim of privilege, provide a statement of the specific claim of privilege and all facts relied on in support thereof, including the identity of each document, its author, addressee (including title and organizational affiliation), date, subject matter, all recipients of the original and of any copies, its present location(s), and the specification(s) of this subpoena to

which the document is responsive. If only some portion of any responsive document is claimed to be privileged, all non-privileged portions of the document must be submitted. For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based.

L. If any portion of a document is responsive to the subpoena, submit the entire document, including any document now or previously attached or appended to it.

M. These specifications call for the production of documents hereinafter described that were prepared, sent, received, or in effect at any time between January 1, 1985 through the date of service of this subpoena.

N. For each specification which has an asterisk ("*"), in lieu of providing the responsive documents, the company may supply the requested information in an affidavit prepared and certified by a duly authorized officer of Intel.

O. If Intel believes that the required search or any other part of the subpoena can be narrowed consistent with the Commission's need for documents and information, its representatives are encouraged to discuss possible modifications with L. Barry Costilo at (202) 326-2748. All modifications must be approved in writing by Commission staff.

P. This subpoena requires the production of originals of all subpoenaed documents. As a matter of convenience, the company may submit legible photo copies in lieu of original documents called for, with the reservation of right to insist upon originals.

Q. If any requested documents are no longer available because of loss, destruction, or any other cause, identify such documents to the fullest extent possible, and state the dates and circumstances of their destruction, loss, or other reason for non-production.

II. SPECIFICATIONS

*1. Documents sufficient to show, separately, (a) the identity of all persons who have had responsibilities in or outside of the United States for sales of the relevant products, their corporate titles, and the person to whom they reported; (b) the names and last known addresses of all former employees of Intel who had sales responsibilities for any of the relevant products; and (c) the names and addresses of all former distributors of Intel who sold the relevant products.

2. Copies of all standard contracts between Intel and its distributors.

*3. Documents sufficient to show for the United States and worldwide for each year from 1985 through 1990, Intel's total annual sales in dollars and units for its 80086, 80186, 80286, 80386, and 80486 microprocessors, respectively, and, separately, similar information for Intel's math coprocessors that correspond with such series.

4. All business and marketing plans of Intel, sent or received by any Intel officer, relating to the manufacture, distribution, and marketing of relevant products.

5. All documents relating to the market positions, competitive strengths and weaknesses, and market shares of Intel and its competitor(s) with respect to the relevant products.

6. All documents relating to:

- a. Intel's or any of its distributor's policies or practices relating to any actual, possible or alleged tying or leveraging the sale of certain computer parts or enhancements to the sale of other computer parts or enhancements;
- b. Any actual, possible or alleged use by Intel or its distributors of inducements or benefits (including the prospect of increased supply, faster shipments, or better pricing) as to certain computer parts or enhancements to help sell other computer parts or enhancements; and
- c. Any actual, possible, threatened, suggested, or alleged adverse effects on any customer's supply of relevant products, or on the customer's relationship with Intel,

which is related to the customer's actual or possible purchase of computer parts or enhancements produced by Intel's competitors.

7. All documents relating to any efforts by any person to ascertain whether any purchaser of relevant products was purchasing competing products, the information obtained, and any actions taken or considered by any person in connection with such information.

8. Any admonishments to, or disciplinary action taken or considered against, any Intel employee for actual, possible or alleged tying or leveraging practices.

9. All documents relating to any request or requirement that distributors or brokers of Intel math coprocessors or other computer parts or enhancements notify Intel in advance if they are going to sell a competitor's computer parts or enhancements.

10. All documents relating to any factors, reasons, criteria, or circumstances Intel or its distributors took into consideration in determining the supply or allocation of any relevant product to actual or potential customers (including classes or categories of customers), including information relating to any customer's purchase of other types of Intel computer parts or enhancements or the products of Intel's competitors.

11. All estimates or projections of demand for Intel microprocessors and documents relating to Intel's ability or capacity to meet such demand.

*12. Documents sufficient to show any shortages of the relevant products, the period of time in which there were such shortages, and all reasons for such shortages.

*13. Documents sufficient to describe the locations and capacities of all present and former Intel facilities which have produced various types and models of microprocessors, and of any other sources of production of Intel microprocessors (e.g., contractors).

14. All documents relating to actual or possible contractual or legal constraints on any price changes considered by Intel with respect to the relevant products (including possible Robinson-Patman Act constraints). Documents which are privileged need not be submitted, but must be identified pursuant to instruction K.

*15. Documents sufficient to show the average prices or price ranges for various types of Intel microprocessors and the

quantities sold at such prices or price ranges by Intel or its distributors to different classes or categories of customers (e.g., first tier, second tier, etc.) on a quarterly basis or for any other period for which Intel maintains records.

16. The price lists, discounts, and volume purchasing terms for the relevant products and DRAMs, EPROMs, and cache controllers.

17. All documents relating to any increase in the supply of any type of Intel microprocessor which is related to the actual or possible introduction of microprocessors by Advanced Micro Devices, Inc. or any other competitor.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Janet D. Steiger, Chairman
Mary L. Ascunaga
Deborah K. Owen
Roscoe B. Starek, III
Dennis A. Yao

RESOLUTION AUTHORIZING USE OF
COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION

File No. 911-0070

Nature and Scope of Investigation:

To determine whether Intel Corporation and its subsidiaries or affiliates may be engaging or may have engaged in unlawful tying or exclusive dealing practices or other unfair methods of competition in connection with the marketing, distribution, and sale of microprocessors, math coprocessors, and other computer parts in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, or any other statute enforced by the Commission.

The Federal Trade Commission hereby resolves and authorizes that any and all compulsory processes available to it be used in connection with this investigation.

Authority To Conduct Investigation:

Sections 6, 9, and 10 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, and 50, as amended; F.T.C. Procedures and Rules of Practice, 16 C.F.R. §§ 1.1, et seq., and supplements thereto.

By direction of the Commission.


Donald S. Clark
Secretary

Dated: October 22, 1991

Attachment 4

McCUTCHEM, DOYLE, BROWN & ENERSEN

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TAIPEI
AFFILIATED OFFICE
BANGKOK

March 11, 1993

DIRECT DIAL NUMBER

(415) 393-2202

CONTAINS CONFIDENTIAL
COMMERCIAL INFORMATION

L. Barry Costilo, Esq.
Bureau of Competition
U.S. Federal Trade Commission
Washington, D.C. 20580

Intel Corporation
File No. 911 0070

Dear Barry:

You have asked me to respond to the following two questions having to do with the application of antitrust tying analysis to Intel's efforts to license the invention described in claims 2 and 6 of its '338 patent.

1. Are the '338 patent license and microprocessors separate products for purposes of antitrust tying analysis? (In this respect, you have asked me to comment about the separate product test described in Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1339 (9th Cir. 1984)--i.e., that there are separate products when there is separate demand by customers for the alleged tied and tying products offered by the seller).

2. Assuming that the license and the microprocessors are separate products for purposes of antitrust tying analysis, can the royalty sought by Intel from manufacturers of systems using clone microprocessor products be considered an "economic tie" because of the effect that the royalty would have on competition in the sale of microprocessors?

Preliminarily, I must re-emphasize that in our view, under the patent and antitrust statutory and case law described in our prior letters concerning the '338 patent, application of antitrust tying analysis to Intel's licensing efforts would be clearly erroneous. However, with that caveat, our responses to your questions are as follows:

CN004101_R

L. Barry Costilo, Esq.
March 11, 1993
Page 2

1. Separate Products? I have not been able to find any case law which provides a definitive answer to your first question. Intel is planning to offer a '338 patent license (covering claims 2 and 6) to all system manufacturers, without regard to where they buy their 386/486 microprocessors. That license will enable system manufacturers to use the patented combination whether they buy their microprocessors from Intel, as well as from competitors like Cyrix, AMD or unlicensed sources. Thus, Intel is making the right to implement or induce the implementation of the patented combination separately available from the purchase of Intel microprocessors.

However, as discussed in our prior letters, Intel is estopped from obtaining a royalty for that right from system manufacturers who buy their microprocessors from Intel, and these systems manufacturers therefore do not need Intel's license.

Moreover, as you know from your review of Cyrix's summary judgment briefs in the '386 case pending in Sherman, Texas, Cyrix is claiming that a system manufacturer who buys Cyrix' microprocessors gets an implied license to implement or induce the implementation of the combination patent (by virtue of SGS Thompson's agreement with Intel). AMD is apparently making a similar claim in the tortious interference lawsuit it has filed in the Santa Clara County Superior Court. Intel believes that these claims are wrong, but if they are right, then purchasers of Cyrix microprocessors (manufactured by SGS Thompson) and/or AMD microprocessors likewise do not need Intel's license.

If the implied license issue is decided against Cyrix and AMD (or if a system manufacturer buys from some other microprocessor manufacturer who lacks a license from Intel) then the '338 license that Intel is seeking from the system manufacturers would require the payment of a fee in order to implement or induce implementation of the combination. However, an unlicensed microprocessor manufacturer can (as Cyrix has done already) indemnify customers against having to pay any licensing fees to Intel, and those customers consequently would not need an Intel license either.

Thus, a system manufacturer who chooses to buy clone products may (by virtue of implied licenses or indemnities from the clone microprocessor manufacturers) stand in the same shoes as the system manufacturers who buy from Intel: it will not

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need any license from Intel. If and to the extent that is the case, the "separate product" test in Digidyne would not be met because there will not be separate demand for the putative tying product (i.e., Intel's license).

2. Economic Tie? The answer to your second question is emphatically no. There would be no actionable tie, and that would be so even if a patent license were not involved.

To begin with, it is clear that, as a matter of law, so-called "economic tying" cannot be treated as a per se violation. The Supreme Court has repeatedly stated that per se treatment is inappropriate "where the buyer is free to take either product by itself. . . ." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S.2, 12, n.17 (1984); Northern Pacific Ry. v. United States, 356 U.S.1, 6, n.4 (1958).

There are, to be sure, some cases in which tying has been found despite the fact that the seller has ostensibly made the alleged tied and tying products separately available. But the facts of these cases tend to speak for themselves: in Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318, 1322 (6th Cir. 1992), vacated and remanded on other grounds, ___ S. Ct. ___ (1992), the separate price for the tying product was \$80-160,000 per year as opposed to a package price of \$16,000 per year; in Allen-Myland, Inc. v. IBM Corp., 693 F.2d 262, 269 n.15 (E.D. Pa. 1988), the separate price for the tying product was \$4.58 million as opposed to a package price of \$600,000. Tying analysis was appropriate in those cases because the seller's pricing of the tying product alone at a level many times higher than the pricing of the package made it clear that separate availability was just a sham. The language used by the courts in these cases, such as the Virtual Maintenance line that "all rational buyers" would accept the package, 957 F.2d at 1323, has to be understood in this context. We do not read these cases as otherwise permitting a tying analysis.

The pricing here bears no resemblance to the pricing in "economic tying" cases like Virtual Maintenance and Allen-Myland. In licensing its '338 patent (claims 2 and 6), Intel is going to try to obtain a one percent (1%) royalty based on the system wholesale price. Based on the experience of Intel's Systems Group, the wholesale price of the typical computer system with which the combination would be implemented would be about \$650. Thus, under the license that system would

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Page 4

generate a \$6.50 per system royalty. The price that Intel charges for microprocessors used in those typical systems is about \$77. Thus, a system manufacturer who elected to obtain from Intel only the license to implement or induce implementation of the patented combination would pay in royalties only a fraction of the price it would pay Intel for that right plus Intel's microprocessor (\$6.50 for the license [the putative tying product] vs. \$77 for the "package," including the right covered by the license). Moreover, clone manufacturers can make their microprocessors as attractive a purchase alternative as they are now simply by (i) reducing the price of their microprocessors by the \$6.50 royalty or (ii) indemnifying their customers (as Cyrix has done).

Indeed, the ability to couple their microprocessor sales with the indemnity puts the clone microprocessors in a position to offer essentially the same "package" as Intel does. As a matter of law, that vitiates any "economic tying" claim based on the notion that "all rational buyers" must buy from Intel. Nobel Scientific Industries, Inc. v. Beckman Instruments, 1987-2 Trade Cases (CCH) ¶ 67,808 (D. Md. 1987) at p.59, 366-67, aff'd, 1987-2 Trade Cases (CCH ¶ 67,809 (6th Cir. 1987)).

Beyond that, where a substantial amount of sales of the allegedly tied products are made by the seller's competitors, (as is the case here, of course, with respect to 386 microprocessors), the notion that the seller's pricing of separately available products can be treated as a per se illegal tie has been rejected as a matter of law. See Ways & Means, Inc. v. IVAC Corp., 506 F. Supp. 697, 702-3 (N.D. Calif. 1979), aff'd, 638 F.2d 143 (9th Cir. 1981), cert. denied, 454 U.S. 895 (1982).

Nor can Intel's pricing be condemned under a "monopoly leveraging" theory in lieu of a viable tying theory. Monopoly leveraging is, of course, a controversial theory. Recent cases, however, have made it clear that actionable "monopoly leveraging" cannot occur unless the practice at issue dangerously threatens to create or maintain monopoly power. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), cert. denied. ___ U.S. ___ (1992); Fineman v. Armstrong World Industries, 1992-2 Trade Cases (CCH) ¶ 70,010

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(3rd Cir. 1992).¹ Thus, in cases in which a seller's prices have allegedly been used as a form of monopoly leveraging, the courts have required a showing that the seller's competitor could not possibly compete.

The "price squeeze" cases are a good example. There, typically, a manufacturer who sells its product at wholesale also sells its product at retail; the manufacturer is accused of leveraging a monopoly position in the wholesale market into a monopoly position in the downstream retail market by setting its price to wholesalers "too high." Some courts have held that the seller's wholesale price can be considered unlawful if (i) that price is greater than the seller's retail price so that the competitor wholesaler cannot possibly compete and (ii) that exclusionary result is intended. See, e.g., Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 808-09 (3d Cir. 1984), cert. denied, 477 U.S. 908 (1986).

However, in other "price squeeze" cases courts have required plaintiffs to meet a more stringent test before condemning the vertically integrated defendant's prices. Those courts have required the antitrust plaintiff to show that the defendant could not have made a profit by selling at its own retail price if it had purchased at its own wholesale price. If the defendant could have made a profit under those circumstances, then the pricing cannot legitimately be treated as illegal monopoly leveraging even if the wholesale competitor could not survive at the defendant's wholesale prices. As Judge Breyer explained in Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) that is so because the "squeeze" may actually produce economic benefits:

". . . prices that squeeze the less efficient second-level competitors, even to the point of forcing them from the business, could (by lowering costs) lower prices, or, in any event, save economic resources."

¹ The Supreme Court's recent decision in Spectrum Sports, Inc. v. McQuillen, 1993-1 Trade Cases (CCH) ¶ 70,096 (1993), which holds that single firm conduct cannot be treated as a violation of the Sherman Act unless it "actually monopolizes or dangerously threatens to do so" (p.69,402,) reinforces this conclusion.

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915 F.2d at 24. See also Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 906 (8th Cir. 1985) (holding that there was no Section 2 violation where the defendant's retail price was lower than the price at which it sold the product to the defendant wholesaler because there was no evidence that the defendant's retail price was a "predatory price"; suggesting (at note 8) that the Turner-Areeda marginal cost test could appropriately be used to make that determination). This, we submit, is the more rational test since it does not make the defendant the captive of its competitor's inefficiencies. The market properly goes to the defendant as the more efficient competitor.

Intel's pricing of the right to use or induce the use of its combination invention cannot be condemned under either of these monopoly leveraging tests. There is absolutely nothing to date to suggest that the price which system manufacturers pay for clone microprocessors, minus \$6.50 royalty (the royalty payable for the typical system employing the combination) will be below the marginal costs of the clone competitors such that they will be unable to compete. Much less is there anything to indicate that the prices which system manufacturers pay for Intel microprocessors, minus that \$6.50 royalty, would be below Intel's marginal costs.

To be sure, the clone manufacturers may have to reduce the prices of their microprocessor products in order to compete with Intel for the sale of microprocessors. But that just means that the clone manufacturers cannot free ride on Intel's skill, industry and foresight in developing the '338 combination. Moreover, if and to the extent that the clone manufacturers reduce their prices of their microprocessors because they cannot free ride, consumers are the winners.

As the Supreme Court has just reminded in Spectrum Sports, Inc. v. McQuillen, supra:

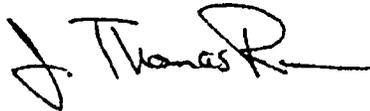
The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."

1993-1 Trade Cases (CCH) at ¶ 70,096 at 69,402. There is no market failure involved here, and, we submit, no basis for protecting the clone manufacturers from the consequences of

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Intel's deriving the full market value of its combination
invention.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Thomas Rosch". The signature is written in a cursive style with a long horizontal stroke at the end.

J. Thomas Rosch

Attachment 5

~~13657-3~~
Moore Farrell Fax 14763-26

McCUTCHEM, DOYLE, BROWN & ENERSEN
COUNSELORS AT LAW
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000
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SAN FRANCISCO
LOS ANGELES
SAN JOSE
WALNUT CREEK

WASHINGTON, D.C.
TAIPEI
AFFILIATED OFFICE
BANGKOK

Fax Cover Page

Date: July 20, 1993 Number of Pages (including cover page): 2
To: Art Amolsch
Fax: 202 347-1882 Voice: _____
To: _____
Fax: _____ Voice: _____
To: _____
Fax: _____ Voice: _____
From: Tom Rosch Telephone: 415 393-2202
Hard Copy to be Mailed: Yes No Name of our Operator: aj (Voice) (415) 393-2334

COMMENTS:

*I thought that you might want to see
all the press that you're getting out here.*

*Best wishes,
Tom*

9 39 70

WARNING:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return this original message to us at the above address via the U.S. Postal Service. Thank you.

** TX CONFIRMATION REPORT **

AS OF JUL 20 '93 9:33 PAGE.1

COMMAND #145

MCCUTCHEN ET AL SF

DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	7/20 09:31	654 003 1202 347 1882	G3--S	01"26	002	OK

McCUTCHEN, DOYLE, BROWN & ENERSEN
COUNSELORS AT LAW
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 San Francisco, California 94111
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SAN FRANCISCO
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WASHINGTON DC
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 AFFILIATED OFFICE
 BANGKOK

Fax Cover Page

Date: July 20, 1993 Number of Pages (including cover page): 2
 To: Art Amolsch
 Fax: 202 347-1882 Voice: _____

Feds dropping antitrust probe against Intel

Trade commission says no laws broken in company's rise

By Tom Abate
EXAMINER TECHNOLOGY WRITER

The Federal Trade Commission dropped its investigation of Intel Corp. Wednesday, but the trust-busting agency is still scrutinizing other possible high-tech monopolies, said a well-placed Washington source.

Art Amolsch, editor of the

newsletter FTC Watch, said the agency's decision probably meant that Intel broke no laws in becoming the dominant supplier of microprocessors, the "brains" inside personal computers.

But even as it closes the books on Intel, Amolsch said the FTC will meet next week to consider allegations that Microsoft Corp. may have used its control of PC operating systems to unfairly promote its word processor and spreadsheet programs over those of its software rivals.

"The closing of the Intel investigation doesn't send any signals"

about lessened interest in antitrust, Amolsch said.

"The FTC is very interested in high-tech, particularly the computer industry, as is the antitrust division of the Justice Department," he said.

Wednesday, the FTC wrote to Intel President Andrew Grove to say the agency was closing its two-year investigation without taking any action.

The FTC had been considering allegations that Intel pressured customers to buy its memory chips along with its microprocessors. The FTC also looked into com-

plaints that Intel had refused to do business with PC companies that bought chips from Advanced Micro Devices Inc. or Cyrix Corp., two firms that have "cloned" Intel's microprocessors.

"It now appears that no further action is warranted by the Commission at this time," the FTC wrote.

Attorney Tom Rosch, who represented Intel before the FTC, said his client became the dominant supplier of microprocessors by investing millions in product devel-

[See INTEL, E-2]

◆ INTEL from E-1

Feds drop Intel antitrust probe

opment, not by unfair practices as alleged by Intel competitors like AMD.

"(Wednesday's) decision shows that the antitrust laws will not penalize those competitive efforts, no matter how loudly some disgruntled competitors may complain," Rosch said.

AMD refused comment, saying the matter was "between Intel and the FTC."

Meanwhile, Amolsch said antitrust authorities, who went after big firms like IBM Corp. and AT&T during the 1980s, are realizing that software and microprocessor monopolies have the potential

to hurt consumers in the '90s.

"The cost of a computer affects the cost of every business," Amolsch said.

He said the FTC commissioners will meet July 21st to hear evidence compiled by the staff, that Microsoft may have used its control over the MS/DOS and Windows computer systems to promote sales of its applications software.

Microsoft spokesman Collins Hemingway dismissed such complaints.

"The area in which we have the most market share on applications is on the (Apple) Macintosh, where we don't control the operating system," Hemingway said. "On a prima facie basis, that makes it hard to argue that we owe our dominant position to control of the system software."

Attachment 6



SUBPOENA DUCES TECUM

1. TO

Intel Corporation
c/o Joseph Kattan
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described in Item 6.

3. LOCATION OF HEARING

Federal Trade Commission
Room NJ-6213
601 New Jersey Avenue, NW
Washington, D.C. 20001

4. YOUR APPEARANCE WILL BE BEFORE

Kent Cox, Esq.

5. DATE AND TIME OF HEARING OR DEPOSITION

6. SUBJECT OF INVESTIGATION

Intel Corporation, File No. 061-0247. See attached compulsory process resolution.

7. RECORDS YOU MUST BRING WITH YOU

See attached definitions, instructions, and specifications. Personal appearance may not be required.

8. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Melanie Sabo, Records Custodian
Kent Cox, Deputy Records Custodian

9. COMMISSION COUNSEL

Kent Cox, Esq. 202-326-2058

DATE ISSUED

December 4, 2009

COMMISSIONER'S SIGNATURE

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 9.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

**SUBPOENA DUCES TECUM TO
INTEL CORPORATION**

SPECIFICATIONS

In accordance with the Definitions and Instructions attached below please provide the following:

1. All final (or last available draft) CSD (Corporate Strategic Discussion), MCM (Management Committee Meeting), MRC (Management Review Committee), or other high-level executive or board presentations, along with any accompanying minutes, relating to one or more of the following topics:
 - a. Graphics
 - b. Licensing or enabling non-Intel integrated graphics chipsets or non-Intel discrete GPUs
 - c. Marketing, pricing, rebates, and sales strategies and analyses relating to Atom, Celeron, and any consumer ultra-low voltage CPUs or platforms
 - d. Marketing, pricing, rebate, and sales strategies and analyses relating to non-Intel integrated graphics chipsets, including, but not limited to, NVIDIA's ION platform.
2. From January 1, 2003 to present, all final (or last available draft) CSD (Corporate Strategic Discussion), MCM (Management Committee Meeting), MRC (Management Review Committee), or other high-level executive or board presentations, along with any accompanying minutes, relating to one or more of the following topics:
 - a. General-purpose GPU computing
 - b. Non-Intel intellectual property utilized by Intel for graphics or general-purpose GPU computing.
3. From January 1, 2008 to present, list and negotiated prices along with any rebates or discounts for Intel's CPUs, chipsets, and platforms used in mobile devices, including, but not limited to, netbooks and laptops. Such products include, but are not limited to, Atom, Celeron, and consumer ultra-low voltage CPUs, and 945 and GS45 integrated graphics chipsets. Such list and negotiated prices should include stand-alone prices for each component as well as bundled or kit pricing for multiple components.
4. All final (or last available draft) sales, marketing, or roadmap presentations provided by to third parties, including, but not limited to, Original Equipment Manufacturers, Original Design Manufacturers, Software Developers, Independent Software Vendors, or companies that produce or manufacture products complementary to Intel CPUs, relating to one or more of the following topics:
 - a. Graphics
 - b. Intel or competitor CPUs, chipsets, and platforms used in mobile devices.
5. All briefing documents provided to David Perlmutter during the course of his transition

to his current position as Executive Vice-President and Co-General Manager of the Intel Architecture Group.

6. All e-mails, with any accompanying attachments, containing one or more of the following key words, or portions thereof (“!” indicates wild card string):
 - a. graphics, gfx
 - b. GP GPU, GPGPU, GP-GPU, “GPU comput!”
 - c. Larrabee, LRB, LRB!, GenX
 - d. DMI, QPI, CSI, PCIE, PCI!, PEG, UMA
 - e. (Nehalem or Arrandale or Clarkdale or Westmere or “Sandy Bridge” or Gesher) AND (MCP or “Multi-chip package”)
 - f. ATI, Saturn, Cross-fire, Crossfire, Nvidia, NV, Cessna, Pluto, CUDA, Ion, SLI, Jensen, Jen-Hsun, Huang
 - g. (Penryn OR “Core 2”) AND (roadmap OR “EOL”)
 - h. Atom and (kit OR bundl! OR ECAP OR rebate OR discount)
7. From January 1, 2000 to present, all licensing agreements between Intel and ATI, Nvidia, or any other graphics company, including, but not limited to, the 2004 Chipset License Agreement and 2004 Cross-Licensing Agreement between NVIDIA and Intel.
8. All filings made by any party, third party, or non-party in *Intel Corporation v. NVIDIA Corporation*, C.A. No. 4373-VCS, Court of Chancery of the State of Delaware, in non-redacted form.
9. All documents produced by Intel in discovery (including without limitation discovery requests, responses, document productions, deposition transcripts, and correspondence among opposing counsel and communications with the Court) in *Intel Corporation v. NVIDIA Corporation*, C.A. No. 4373-VCS, Court of Chancery of the State of Delaware.

DEFINITIONS

- A. The terms “Company” and “Intel” means Intel Corporation and Intel Kabushiki Kaisha, and their respective directors, officers, trustees, employees, attorneys, agents, licensees, consultants and representatives, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, licensees, consultants and representatives of their predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.
- B. “AMD” means Advanced Micro Devices, Inc., and AMD International Sales & Services, Ltd., and their respective directors, officers, trustees, employees, attorneys, agents, licensees, consultants and representatives, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, licensees, consultants and representatives of their predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

- C. "NVIDIA" means NVIDIA Corporation, and its respective directors, officers, trustees, employees, attorneys, agents, licensees, consultants and representatives, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, licensees, consultants and representatives of their predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.
- D. The term "graphics" means computerized rendering of vectors or pixels on displays. The definition includes, but is not limited to, GPUs, Larrabee, GenX, integrated graphics chipsets, and competitive discrete GPU or integrated graphics chipset offerings.
- E. The term "General-purpose GPU computing" means general purpose computation on graphics hardware, such as GPUs. The definition includes, but is not limited to, GP-GPU, GPU compute, and parallel computing.
- F. The term "documents" means all original and nonidentical copies of the original of all written, recorded, transcribed, or graphic matter of every type of description, however and by whomever prepared, produced, reproduced, disseminated, or made, including, but not limited to, analyses, letters, telegrams, memoranda, reports, bills, receipts, telexes, contracts, invoices, books, accounts, statements, studies, surveys, pamphlets, notes, charts, maps, plats, tabulations, graphs, tapes, data sheets, data processing cards, printouts, net sites, microfilm, indices, calendar or diary entries, manuals, guides, outlines, abstracts, histories, and agendas, minutes, or records of meetings, conferences, electronic mail and telephone or other conversations or communications, as well as films, tapes or slides and all other data compilations in the possession, custody or control of Intel as defined above, or to which Intel has access. The term "documents" also includes drafts of documents, copies of documents that are not identical duplicates of the originals, and copies of documents the originals of which are not in the possession, custody or control of Intel. The term "data compilations" includes information stored in, or accessible through, computer or other information retrieval systems, together with instructions and all material necessary to use or interpret such data compilations as set forth in the instructions below.
- G. The term "relating to" means in whole or in part constituting, containing, concerning, embodying, reflecting, discussing, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
- H. The terms "discuss" and "discussing" mean in whole or in part constituting, containing, describing, analyzing, explaining or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely pertaining to the designated subject matter without elaboration. In addition, a document that "discusses" another document includes the other document itself (*e.g.*, a document that "discusses" an agreement or survey includes the agreement or survey itself). Further, these terms include any operating, financial, or comparative data about the designated subject matter where such data are separately set out as in a chart, appendix, table, or graph.

- I. The terms “and” and “or” have both conjunctive and disjunctive meanings; and “each,” “any,” and “all” mean “each and every.”
- J. The term “person” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
- K. The term “communication” means the transmittal of information in the form of facts, ideas, or otherwise.
- L. Whenever the term “sufficient to show” is contained in a Specification, such language requires the return of that group of documents which when viewed together reveals the information sought. The fact that no single document contains the information sought does not relieve Intel of the responsibility to gather and return such additional documents which when viewed together do contain the information requested in the Specification. These phrases encompass those documents that are both necessary and sufficient to provide the information requested. If no single document contains all the information sought, submit additional documents so that the group of documents, when viewed together, is both necessary and sufficient to reveal the information sought. Where “documents sufficient to show” is specified, if summaries, compilations, lists or synopses are available that provide the information, these can be provided in lieu of the underlying documents.

INSTRUCTIONS

The response to this subpoena shall be submitted in the following manner:

1. Unless modified by agreement with the staff of the Federal Trade Commission, the Specifications of this subpoena *duces tecum* (“subpoena”) require a complete search of all the files of Intel. If Intel believes that the scope of either the required search or the subpoena itself can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss such questions and possible modifications with Commission staff. All such modifications to this subpoena must be agreed to in writing by the Commission through its delegated staff.
2. **Scope of Search:** Documents covered by this subpoena are those in the possession, or under the actual or constructive custody or control of the addressee, whether or not such documents were received from or disseminated to any person or entity, including, but not limited to, advertising agencies, attorneys, accountants, directors, officers, and employees. The Specifications below require a complete search of the files of Intel as defined in the Definitions.
3. Unless otherwise stated, the Specifications refer to and call for all documents dated, created, prepared, received, circulated, transmitted or in use from January 1, 2006, to the

date of subpoena compliance.

4. In the Specifications, the present tense shall be construed to include the past tense, and the past tense shall be construed to include the present tense. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.
5. If any portion of a document is responsive to this subpoena, submit the entire document, including any other document now or previously attached or appended to it, or any document previously identified as an attachment or enclosure accompanying the document.
6. If any document called for by this subpoena is withheld based on a claim of privilege, attorney work product or other protection, the claim must be asserted no later than the return date of this subpoena. In addition, pursuant to 16 C.F.R. § 2.8A(a), submit, together with the claim, a schedule of the items withheld stating individually as to each such item:
 - a. the type, specific subject matter, and date of the item;
 - b. the names, addresses, positions, and organizations of all authors and recipients of the item;
 - c. the bates number(s) of the item; and
 - d. the specific grounds for claiming that the item is privileged.

For each document withheld under a claim that it constitutes or contains attorney work product, also state whether Intel asserts that the document was prepared in anticipation of litigation or for trial, and, if so, identify the anticipated litigation or trial upon which the assertion is based, including the names of the parties, forum, and case number. If only some portion(s) of any responsive document is (are) privileged, all non-privileged portions of the document must be submitted. The addressee shall comply with the requirement of 16 C.F.R. § 2.8A(a) in lieu of filing a petition to limit or quash this subpoena solely for the purposes of asserting claims of privilege. 16 C.F.R. § 2.8A(b).

7. If documents responsive to the Specification no longer exist, but you have reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify persons having knowledge of the content of such documents.
8. Forms of Production: The Company shall submit documents as instructed below absent written consent signed by an Assistant Director.
 - (a) Documents stored in electronic or hard copy formats in the ordinary course of

business shall be submitted in electronic format provided that such copies are true, correct, and complete copies of the original documents:

- (i) submit Microsoft Access, Excel, and PowerPoint in native format with extracted text and metadata; and
 - (ii) submit all documents other than those provided pursuant to subparts (a)(i) or (a)(iii) in image format with extracted text and metadata.
 - (iii) electronic format: documents stored in hard copy form may be submitted in image format accompanied by OCR.
- (b) For each document submitted in electronic format, include the following metadata fields and information:
- (i) for documents stored in electronic format other than email: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, and SHA Hash value;
 - (ii) for emails: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, to, from, CC, BCC, subject, date and time sent, Outlook Message ID (if applicable), child records (the beginning Bates or document identification number of attachments delimited by a semicolon);
 - (iii) for email attachments: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, parent record (beginning Bates or document identification number of parent email), and SHA Hash value; and
 - (iv) for hard copy documents: beginning Bates or document identification number, ending Bates or document identification number, page count, and custodian.
- (c) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use of such software or services when producing materials in response to this

Request.

- (d) Submit data compilations in Excel spreadsheet or in delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- (e) Submit electronic files and images as follows:
 - (i) for productions over 10 gigabytes, use IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data;
 - (ii) for productions under 10 gigabytes, CD-R CD-ROMs and DVD-ROM for Windows-compatible personal computers, and USB 2.0 Flash Drives are also acceptable storage formats.; and
 - (iii) **All documents produced in electronic format shall be scanned for and free of viruses. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this Request.**

9. All documents responsive to this Request, regardless of format or form and regardless of whether submitted in hard copy or electronic format:

- (a) shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files, and shall not be shuffled or otherwise rearranged. For example:
 - (i) if in their original condition hard copy documents were stapled, clipped, or otherwise fastened together or maintained in file folders, binders, covers, or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers, or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover, or container from which such documents came; and
 - (ii) if in their original condition electronic documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format;
- (b) shall be marked on each page with corporate identification and consecutive document control numbers;
- (c) shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (*e.g.*, a

chart or graph), makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-colored photocopy, or a JPEG format image);

- (d) shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
 - (e) shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.
10. All documentary materials used in the preparation of responses to the Specifications of this subpoena shall be retained by Intel. The Commission may require the submission of additional documents at a later time. Accordingly, Intel should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation during its pendency, irrespective of whether Intel believes such documents are protected from discovery by privilege or otherwise. *See* 15 U.S.C. § 50. *See also* 18 U.S.C. § 1505.
 11. This subpoena shall be deemed continuing in nature so as to require production of all documents responsive to the Specifications included in this subpoena produced or obtained by Intel up to 14 calendar days prior to the date of Intel's full compliance with this subpoena. Responsive documents generated after that date should be preserved so that they may be provided later if requested.
 12. Questions regarding this response may be directed to Kent Cox at (202) 326-2058. The response to this subpoena should be directed to the attention of Kent Cox, Attorney, and delivered between 9:00 a.m. and 5:00 p.m. on any business day to Federal Trade Commission, Bureau of Competition, 601 New Jersey Avenue, NW, Room 6213, Washington, DC 20001 or to the address subsequently supplied. Hand delivery by courier will be acceptable.
 13. Intel may comply with this subpoena by making a full return of all documents requested in this subpoena prior to the return date and by notifying Kent Cox, (202) 326-2058, not less than ten days prior to the formal return date of Intel's intention to comply with this subpoena.
 14. To furnish a complete response, the person supervising compliance with this subpoena must submit a signed and notarized copy of the attached verification form along with the

responsive materials. Intel need not send a representative to testify with the documents, but the Commission reserves the right to have Intel provide a person to testify as to the adequacy of the return at a later date.

15. All information submitted pursuant to this subpoena is subject to the confidentiality provisions of Section 21(f) of the Federal Trade Commission Act, 15 U.S.C. § 57b-2(f), and Rule 4.10 of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 4.10.

CERTIFICATION

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

Where copies rather than original documents have been submitted, the copies are true, correct, and complete copies of the original documents. If the Commission uses such copies in any court or administrative proceeding, Intel Corporation will not object based upon the Commission not offering the original document.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

DATE: _____

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY
PROCESS IN A NONPUBLIC INVESTIGATION

File No. 061-0247

Nature and Scope of Investigation:

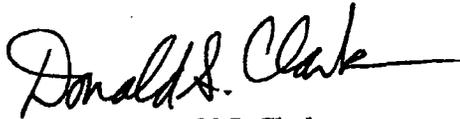
To determine whether Intel Corporation or any other unnamed persons, partnerships, or corporations have engaged or are engaging in conduct that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, through pricing and contracting practices, including but not limited to predatory pricing, loyalty rebates and discounts, exclusionary payments, bundled pricing, exclusive dealing, tying, or other exclusionary practices respecting x86 microprocessors and related products.

The Federal Trade Commission hereby resolves and authorizes that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10 and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50 and 57b-1, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1 et seq., and supplements thereto.

By direction by the Commission.



Donald S. Clark
Secretary

ISSUED: May 29, 2008