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

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

DOCKET NO. 9341
PUBLIC DOCUMENT

**INTEL'S MOTION FOR EXTENSION OF TIME AND FOR LEAVE
TO FILE OVERLENGTH MEMORANDUM IN OPPOSITION
TO COMPLAINT COUNSEL'S MOTION TO ADMIT
EUROPEAN COMMISSION DECISION**

Respondent, Intel Corporation, hereby moves for a 14-day extension of time until April 12, 2010, and for leave to file a memorandum not to exceed 7,5000 words in opposition to Complaint Counsel's Motion to Admit European Commission Decision.

Respectfully submitted,

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Overlength Memorandum in Opposition to Complaint
Counsel's Motion to Admit European Commission Decision

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Dated: March 23, 2010

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**MEMORANDUM IN SUPPORT OF INTEL'S MOTION FOR EXTENSION
OF TIME AND FOR LEAVE TO FILE OVERLENGTH MEMORANDUM IN
OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO ADMIT EUROPEAN COMMISSION DECISION**

Intel respectfully moves for a fourteen-day extension of time until April 12, 2010, and for leave to file a memorandum of up to 7,500 words in opposition to Complaint Counsel's Motion To Admit European Commission Decision ("Motion") into evidence.

On March 17, 2010, Complaint Counsel filed its Motion, asserting that the European Commission ("EC") decision is admissible under FTC Rule 3.43(b) and Federal Rule of Evidence 803(8)(C). In reality, however, there are multiple reasons why the EC decision does not meet the requisite standard of reliability and trustworthiness and should therefore be excluded.

The courts have developed numerous factors to guide determinations of trustworthiness under Rule 803(8)(C), and Complaint Counsel purports to rely on certain of those factors. *See* Mot. at 3. Under the case law, the relevant factors include: "possible motivation problems," the nature and reliability of the evidence before the agency, whether a hearing was held, whether the agency record is ascertainable, whether appropriate procedural safeguards were employed, the timeliness of the investigation, and lack of finality. *See, e.g.,* Fed. R. Evid. 803(8)(C), advisory

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Memorandum in Support of Intel's Motion For Extension
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To Complaint Counsel's Motion To Admit European Commission Decision

committee's notes; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n. 11 (1988); *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1341-42 & n. 4 (3d Cir. 2002).

The first factor mentioned above—suspect or improper motivation—is most significant, and “can outweigh all other trustworthiness factors.” *Gross v. King David Bistro, Inc.*, 84 F. Supp. 2d 675, 678 (D. Md. 2000) (internal quotation marks and citation omitted). Improper motivation is present in various circumstances, including when (1) “the public official or body who prepared the report has an institutional or political bias,” *Coleman*, 306 F.3d at 1342 (citation omitted); (2) “[t]he trustworthiness of the determination is . . . eroded by the [agency’s] obvious disregard of” contrary evidence and “obviously slanted statements contained in the determination,” *id.* (citation omitted); (3) the agency decision is based on one-sided evidence from interested sources, *see Gross*, 84 F. Supp. 2d at 678; and (4) when the agency’s report was “compiled in anticipation of litigation.” *Lewis v. Velez*, 149 F.R.D. 474, 488 (S.D.N.Y. 1993) (citation omitted).

In its opposition to Complaint Counsel’s Motion, Intel intends to show that each of these factors is present here, rendering the EC decision untrustworthy and unreliable. In addressing the factors relating to procedural untrustworthiness, Intel intends to show that the EC’s procedures lacked nearly all of the procedural protections typical of U.S. agency proceedings and is therefore susceptible to various errors and biases:

- the EC staff (“case team”) controls the composition and content of the record, because only it has the power to compel evidence from third parties, and respondents have no such ability;

- there is no separation between investigative, prosecutorial, and adjudicative functions at any stage of the EC proceedings—the case team is responsible for investigating the case, drafting the decision, and recommending the remedy;

- the EC’s oral hearing is not an evidentiary hearing, is not subject to any rules of evidence, and provides no opportunity to confront or cross-examine witnesses;

- the EC does not offer an opportunity for a hearing before a neutral decision maker, because the hearing officer has no authority to decide any questions of substance.

Intel also intends to demonstrate that these procedural flaws and biases produced an unreliable decision in Intel’s case. Unlike Complaint Counsel, which made no effort to show that any finding by the EC was trustworthy, Intel will need to show untrustworthiness by discussing examples of particular findings and the evidence relevant to those findings to demonstrate the EC’s inexplicable disregard of contrary evidence (one of the considerations bearing on the “suspect motivation” factor). For example, the EC completely disregarded authoritative deposition testimony [REDACTED], which Intel obtained through discovery in U.S. litigation, that is directly inconsistent with key factual assertions in the EC decision. The EC based its refusal to consider that testimony on the purported ground that the EC “is not in the position to follow the legal theory in US law that determined the selection of the specific contemporaneous documents by the AMD counsels carrying out the depositions....” EC Dec. ¶ 301. Similarly, Intel will need to show that the EC based its findings on one-sided evidence from biased or interested sources (another relevant consideration).

Thus, Intel will clearly need far more than 2,500 words for its opposition memorandum, which is why it seeks leave to file a memorandum of up to 7,500 words. That request is

reasonable in light of the necessity for a meaningful response from Intel, particularly given the fact that the EC decision is *448 pages long* and contains more than 1,600 paragraphs of allegations. Given that length, it would be unfair and unrealistic to limit Intel's response to the normal 2,500 words when Complaint Counsel has submitted 448 pages of allegations and Intel is required to show the untrustworthiness and unreliability of the proffered document.

Complaint Counsel has also asserted that the EC decision is relevant and material because EC competition law "largely mirrors" U.S. law. Mot. at 6; *see id.* at 6-10. Intel intends to demonstrate, with citations to appropriate authorities and analyses, that Complaint Counsel's assertion is plainly incorrect. EC and U.S. law differ in material respects, and Intel will require additional space to establish this fact. This difference in legal standards affected the EC's creation of its record, and thus the reliability of the factual record underlying its decision.

Intel also intends to show that the decision is inadmissible because any probative value it might conceivably have would be "substantially outweighed by the danger of unfair prejudice" and because admission of the decision would lead to "undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. 3.43(b). Further space is required to discuss the law governing this issue (which Complaint Counsel does not even address in its motion). Admitting the EC decision as evidence will certainly consume an inordinate amount of trial time, effectively necessitating a "trial within a trial" to assess the accuracy of the EC's many findings.

Adequate briefing of all of the foregoing issues will require no less than 7,500 words. Intel therefore requests leave to file an overlength memorandum.

In addition to its pressing need for additional words to address the numerous issues raised by Complaint Counsel's motion, Intel also requires additional time to fully research the many

issues, draft Intel's response, and distill the many lengthy grounds for establishing untrustworthiness into a concise 7,500-word memorandum. Intel also requires additional time to address adequately the difficult confidentiality issues posed by the fact that the EC has apparently provided Complaint Counsel with the non-public, unredacted version of the EC decision. Intel is subject to EC confidentiality rules that preclude Intel from disclosing to this Court any evidence from the EC record (including even an unredacted version of Intel's brief filed in European court challenging the EC decision), absent an independent ground for each specific disclosure. Yet in order to address the applicable trustworthiness factors, Intel necessarily must rely on evidence that was before the EC, which means that it must engage in a time-consuming effort to ensure that its filings in this Court do not disclose any materials from the EC files for which no independent basis for disclosure exists. Complaint Counsel does not labor under any such disability, and of course chose the timing of its motion, whereas Intel had no such luxury.

Notwithstanding its refusal to consent to Intel's request for an extension, Complaint Counsel is unable to identify any material prejudice that would result from a 14-day extension here. As the Court is aware, discovery in this case is ongoing and the trial is set for September 15, 2010. Thus, the modest extension requested by Intel will not adversely affect the progress of the case in any way. Indeed, given that questions of the admissibility of evidence are generally not determined until at or shortly before trial, there is no urgency whatsoever, and every reason to grant Intel adequate time in which to respond to what amounts to a 459-page set of pleadings. Good cause plainly exists for Intel's request for additional time.

CONCLUSION

For all the foregoing reasons, Intel respectfully requests that the Court grant a 14-day extension, to and including April 12, 2010, in which to file Intel's memorandum in opposition to Complaint Counsel's motion to admit the EC Decision, and permit Intel to file a memorandum of up to 7,500 words in length.

Respectfully submitted,

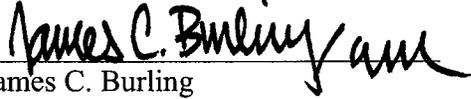
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Dated: March 23, 2010

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**STATEMENT OF ERIC MAHR PURSUANT TO PARAGRAPH 3
OF THE JANUARY 14, 2010 SCHEDULING ORDER**

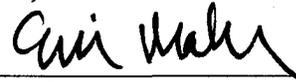
Counsel for Intel Corporation hereby makes the following representations concerning the attached Motion For Extension of Time And For Leave To File Overlength Memorandum In Opposition To Complaint Counsel's Motion To Admit European Commission Decision.

1. Counsel for Intel Corporation have conferred with Complaint Counsel in a good faith effort to resolve by agreement the issues raised by the attached Motion.
2. The conferences took place via conference call on March 21, 2010 between Darren Bernhard, counsel for Intel, and Kyle Andeer, Complaint Counsel.
3. Counsel discussed but were unable to reach an agreement regarding the issues raised in the attached motion.

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Statement Pursuant to Paragraph 3 of Scheduling Order

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Dated: March 23, 2010

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