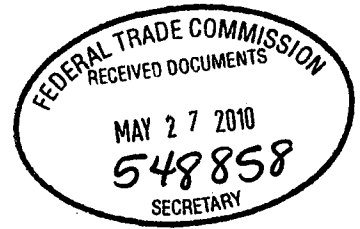


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DOCKET NO. 9341

PUBLIC DOCUMENT

**MEMORANDUM IN OPPOSITION TO HEWLETT-PACKARD COMPANY'S
MOTION FOR RECONSIDERATION AND/OR MODIFICATION OF
THIS COURT'S MAY 19, 2010 ORDER**

Intel Corporation ("Intel") submits this memorandum in opposition to Hewlett-Packard Company's ("HP") motion for reconsideration and/or modification of this Court's May 19, 2010 Order denying HP's motion to quash Intel's subpoena *duces tecum* ("Order").

The Court should deny HP's improper and meritless motion. The May 19 Order, based on the record before the Court, properly denied HP's motion to quash. HP's reconsideration motion is merely an improper attempt "to take a second bite at the apple and relitigate previously decided matters." *In Re Basic Research LLC*, No. 9318, 2006 FTC LEXIS 7, at *4 (FTC January 10, 2006). A party seeking reconsideration bears a "heavy burden," *id.* at 6, that can be met only with "a material difference in fact or law" that "could not have been known to the party moving for reconsideration at the time of such decision," "the emergence of new material facts or a change of law," or a "manifest showing" that the Court failed to consider the facts presented to it. *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *1-2 (FTC Feb. 23, 2009).

HP's motion contains no new law or previously unavailable evidence, nor demonstrates that the Court failed to consider the facts it presented. Instead, without attempting to meet or even acknowledging the applicable standard, HP simply re-hashes the burden argument it raised

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FTC Docket No. 9341
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Company's Motion for Reconsideration

and lost, albeit with some speculative assumptions -- never raised before to Intel or the Court -- about the potential scope of the document review it might require to comply with the Court's Order. That does not come close to satisfying HP's "heavy burden" for reconsideration.

In any event, HP's request to modify the Court's Order is an unnecessary distraction. The Order itself says the June 1 deadline can be extended by agreement of the parties, and Intel has told HP it is open to a reasonable extension, subject to agreement with Complaint Counsel and the Scheduling Order, as described below.

From the beginning and to this day, Intel has sought only the discovery from HP reasonably necessary to defend against Complaint Counsel's allegations focused on HP, and has tried to cooperate with HP to minimize its burden. In response, HP has delayed and continues to refuse to comply with reasonable discovery obligations. The Court properly found HP's objections insufficient to meet its "heavy burden" to avoid the obviously relevant discovery to which Intel is entitled. Nothing has changed. The motion should be denied.

I. BACKGROUND

HP's motion is not only legally insufficient, but factually misleading. HP put itself in the situation it complains about. Any time constraint it now faces is a result of its steadfast refusal to negotiate Intel's subpoena and, instead, to resist any document production and every deposition.

Intel issued its subpoena to HP on March 11,¹ within days after Complaint Counsel identified HP as a centerpiece of its case and served its own subpoena on HP.² On March 18,

¹ HP asked Intel to agree to treat its subpoena as served on March 19, so that it had additional time to evaluate it. Intel agreed.

Intel proposed to HP that the parties engage in three-way negotiations to narrow and consolidate the subpoenas to HP by mutually agreeing to a list of custodians and using mutually agreeable search terms. HP was non-committal and said it would get back to Intel. It did not.

On March 23, HP requested another 14-day extension to evaluate its position. On March 26, Intel, in the interest of cooperation, agreed. On March 30, HP rejected Intel's offer to engage in joint negotiations. Instead, HP requested that Intel defer negotiation of its subpoena until HP completed separate negotiations with Complaint Counsel. Intel said it preferred to move forward on its own, and reiterated its willingness to limit its subpoena to a defined number of identified custodians and search term protocols. On April 6, HP said it was willing to talk to Intel and requested another extension. On April 8, Intel, again cooperative, agreed.

On April 19, Intel sent HP its proposal to substantially narrow its subpoena to: (a) new, more recent CPU-related documents from seven custodians whose files HP had only produced in the AMD litigation up until mid-2005 or 2006; (b) eleven new custodians for CPU-related requests whose files HP had preserved but not produced in the AMD litigation; and (c) six potential custodians regarding a narrowed set of graphics and chipset-related categories. HP Mem., Exhibit B.

On April 26, HP responded to Intel's April 19 letter with an ultimatum. HP demanded that Intel eliminate all requests for any CPU-related documents and refused to negotiate any of Intel's graphics and chipset-related requests unless Intel agreed. On April 29, Intel informed HP

² The Complaint included no allegation of specific conduct related to HP. Indeed, it contained only one mention of HP at all. Compl. ¶ 49. On March 4, 2010, however, Complaint Counsel's interrogatory responses specifically identified HP as a centerpiece of its case and identified which segments of HP's business Complaint Counsel claimed were at issue. On March 8, Complaint Counsel served its own subpoena on HP and, on March 21, identified eleven HP witnesses on its preliminary trial witness list.

that Intel could not agree to HP's request and would require some CPU-related documents. HP promptly cut-off negotiations.

On May 3 and May 5, Intel agreed to two short extensions of time and offered to further narrow its custodian list from its April 19 letter in an effort to reach an agreement. On May 7, however, HP flatly refused to negotiate any production at all unless Intel agreed to eliminate all of its CPU-related requests. Intel told HP that its position was unreasonable and unacceptable. On May 10, HP filed a motion to quash Intel's subpoena in its entirety.

On May 19, this Court denied HP's motion requiring it to produce documents, as narrowed by Intel's April 19 letter, by June 1. The Court reasoned that HP had not challenged the relevance of Intel's subpoena (it still has not) and had not carried the "heavy burden" to show that it was unreasonable (again, it still has not). *See* May 19, 2009 Order at 2-3 (attached to HP Mem. Exhibit A).

On May 22 through 24, HP and Intel negotiated Intel's deposition subpoenas, several of which HP has also moved to quash. Intel offered to withdraw nine of its subpoenas if HP would agree to produce the remaining ten witnesses. *See* May 22 email to HP counsel (attached as Exhibit A). HP then indicated that it might seek relief from the June 1 deadline in the Court's Order and/or ask the Court to reconsider its decision. HP said it thought it would be in a position to begin a rolling production on June 15, although it could not commit to that date. Intel informed HP that it would not object to an extension of the June 1 deadline until June 15 with a rolling production between June 15 and June 30, assuming that HP would also agree to produce the narrowed number of deponents on a rolling basis before June 30 (and that Complaint Counsel and the Court agreed with any extension). HP secured Complaint Counsel's agreement that it

would not object to an extension of the deadline for deposing HP witnesses to June 30. *See* May 23 email from HP counsel (attached as Exhibit B).

On May 25, Intel provided HP with search terms and a graphics custodian proposal, *see* May 25 email to HP counsel (attached as Exhibit C), and reiterated its proposal to work with HP to finalize an agreement on extensions for HP's production and depositions. HP responded by filing this motion.

II. ARGUMENT

Reconsideration is an extraordinary remedy "limited to exceptional circumstances," *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995), and "should be granted only sparingly." *In Re Basic Research*, 2006 FTC LEXIS 7, at *4. A reconsideration motion may not be used to "take a second bite at the apple and relitigate previously decided matters," *id.*, or "rehash rejected arguments or introduce new arguments." *LeClerc v. Webb*, 419 F.3d 405, 412 n.13 (5th Cir. 2005). Rather, reconsideration is appropriate only when the movant demonstrates:

- (a) a material difference in fact or law from that presented to the administrative law judge before such decision, that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision;
- (b) the emergence of new material facts or a change of law occurring after the time of such decision; or
- (c) a manifest showing of a failure to consider material facts presented to the Administrative Law Judge before such decision.

In Re Daniel Chapter One, 2009 WL 569722, *1-2.

HP has not met its "heavy burden," *Basic Research*, 2006 FTC LEXIS 7, at *5-6; indeed, HP simply ignores it. Instead, HP relies solely on *In re Rambus Inc.*, No. 9302, 2003 FTC LEXIS 49 (FTC Mar. 26, 2003). *Rambus* is inapposite. Reconsideration there was based on the finding that the prior ALJ applied the wrong procedural standard in determining whether to apply

the crime-fraud exception to a civil case. *Id.* at *20. HP does not even argue, nor could it, that such a clear error of law occurred here. To the contrary, this Court's May 19 Order stated correctly that "parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." Order at 2 (citing Rule 3.31(c)). The Court ruled that the documents Intel seeks are relevant and, as before, HP fails to challenge this finding. *Id.* Nor does HP demonstrate, or even claim, "the emergence of new material facts or law." *In Re Daniel Chapter One*, 2009 WL 569722, at *1-2.

Instead, HP implicitly argues that this Court failed to consider its burden in responding to Intel's subpoena, as narrowed by Intel's April 19 letter, by June 1. But that is exactly the argument HP raised in its motion to quash - - and exactly the argument the Court rejected: "HP's general allegation that the Intel Subpoena is unduly burdensome is insufficient to carry its burden of showing why the requested discovery should be denied." Order at 3.

The only difference between HP's reconsideration motion and its prior one is that HP now presents speculation from two declarants -- neither of whom claims to have looked at the actual responsive documents possessed by the narrowed custodians -- that the custodians might have a large number of documents, based on "industry standard" assumptions, and that it might take a large effort to produce them if HP chooses to review them page-by-page first. That kind of speculation is no better than the "general allegation" of burden the Court has already rejected, and does not warrant reconsideration. It is also a procedural non-starter. If HP wanted to submit this "evidence," it should have done so with its motion to quash. A reconsideration motion cannot be based on a purported failure to consider evidence not before the Court. *In Re Daniel Chapter One*, 2009 WL 569722, at *1-2.

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Ultimately, this is all beside the point. Despite its speculations about burden, HP notes its willingness to "produce documents on a rolling basis as expeditiously as possible." Mem. at 5 n.5. Intel submits that is exactly what the Court's Order contemplates by allowing the parties to agree on an extension to HP's deadline. Intel has no interest in imposing an unreasonable burden on HP. But neither should HP -- which, as the Court has already observed is a company "in the industry" and "has an interest in the litigation and would be affected by the judgment. . . ." (Order, p. 4) -- continue to deny Intel evidence that it needs to defend itself. In an attempt to balance these needs and interests, Intel has been and remains willing to reach a reasonable accommodation as long as it does not jeopardize its ability to gather the evidence it needs for its defense.

Specifically, consistent with the Court's Order -- and as it told HP when HP first raised this possibility -- Intel does not object to an extension of the June 1 deadline to allow HP to produce responsive documents on a rolling basis, assuming HP also agrees to produce a narrowed list of its subpoenaed witnesses for deposition on a rolling basis between June 1 and June 30 and the Court agrees to this extension.³ To further alleviate HP's claimed time crunch, Intel is willing to accept a production based solely on its May 25 search term and graphics/chipset custodian proposal (see Exhibit C), narrowing the Court-ordered April 19 letter, without the need for attorney review for responsiveness. Combining these proposals, HP would

³ Specifically, Intel would require an agreement by HP to forego further motions as to those 10 witnesses and to produce those it intends to represent at deposition. Intel would also require an appropriate sequencing of document productions, starting with the custodians who are also deponents.

produce all documents, filtered by keyword,⁴ from the files of: (a) eighteen CPU-related custodians; (b) five Intel-suggested graphics custodians as well as any other custodians produced to the FTC. HP would also produce documents responsive to Intel Request Nos. 1-3, 5-6 (communications with the FTC) from its corporate files, as required by the Order. Production according to this method would substantially reduce the time (and cost) estimated by HP and allow it to complete production by June 30.⁵

CONCLUSION

HP's motion for reconsideration should be denied. The Court's Order, Intel's April 19 letter, as modified by its May 25 proposal and the timetable described above, is a fair and reasonable basis for HP to provide the relevant and necessary discovery.

⁴ Intel's May 25 search term proposal categorizes terms into: (a) all custodians; (b) CPU-related custodians only; and (c) graphics and chipset custodians only. Its graphics and chipset custodian proposal offered to accept HP's production of the five custodians listed in its April 19, 2010 letter as well as any other custodians produced to Complaint Counsel. Exhibit C.

⁵ To the extent it is burdensome for HP to review the documents for attorney-client privileged information, Intel is willing to permit HP to use keyword searches to screen out likely privileged material and to retain the ability to clawback any inadvertently produced material -- provided HP can demonstrate that the documents truly contain privileged communications.

Respectfully submitted,

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Attorneys for Intel Corporation

Dated: May 27, 2010

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EXHIBIT A

Emanuelson, David

From: Emanuelson, David
Sent: Saturday, May 22, 2010 2:49 PM
To: 'Henning, Kristofor T.'; Meehan, Coleen M.
Subject: FTC Docket No. 9341: HP Deposition Proposal

Kris and Coleen,

We are willing to offer a compromise to resolve all pending and future disputes regarding depositions of HP witnesses in the FTC matter. This is an offer to compromise, without prejudice to Intel's right to enforce the pending subpoenas, and it expires at the time of the Court's ruling on HP's pending motion to quash the Beyers, Groudan, and Lee subpoenas.

We are willing to forego the following depositions: Ted Clark, Adrian Crisan, David Donatelli, Kevin Frost, Jackie Gross, Todd Kruse, Robert Maus, Scott Stallard, and the Rule 3.33(c)(1) corporate deposition on HP's dual-source strategy.

This offer is subject to HP's agreement to produce the following witnesses before June 15 (unless Complaint Counsel otherwise agrees to later dates): Joe Beyers, Jeri Callaway, Dan Forlenza, Jeff Groudan, Louis Kim, Joe Lee, Robert Skitol, and the Rule 3.33(c)(1) corporate witness on HP's communications with the FTC. HP will also either agree to produce or not oppose the depositions of Mike Winkler and Margaret Franco. If HP cannot accept service for these two, it will provide Intel with the addresses for them to be served.

Intel's document subpoena and related Order are unaffected by this proposal. Please let us know whether you agree.

David T. Emanuelson
Senior Associate

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Amsterdam Brussels Chicago East Palo Alto Houston Irvine London Los Angeles Madrid
Munich New York Northern Virginia Paris Salt Lake City San Francisco Taipei Washington DC

5/26/2010

EXHIBIT B

Emanuelson, David

From: Henning, Kristofor T. [khenning@morganlewis.com]
Sent: Sunday, May 23, 2010 9:26 PM
To: Emanuelson, David
Cc: Meehan, Coleen M.
Subject: FW: Intel: Deposition Schedule for Intel Subpoenas

Per my prior e-mail.

Kristofor T. Henning
Morgan, Lewis & Bockius LLP
1701 Market Street | Philadelphia, PA 19103-2921
Direct: 215.963.5882 | Main: 215.963.5000 | Fax: 215.963.5001
khenning@morganlewis.com | www.morganlewis.com

From: McNamara, Brendan [mailto:BMCNAMARA@ftc.gov]
Sent: Sunday, May 23, 2010 3:41 PM
To: Henning, Kristofor T.
Cc: Andeer, Kyle; Robertson, J. Robert
Subject: Intel: Deposition Schedule for Intel Subpoenas

I am writing to provide you with the Complaint Counsel's position on the scheduling of the depositions that Intel has issued to HP. Complaint Counsel will not oppose HP depositions held between June 15, 2010, and June 30, 2010, provided that HP makes every attempt to make its deponents available before June 15, 2010. Complaint Counsel will consider any request to schedule HP depositions after June 30, 2010, on a case by case basis, but will likely oppose it absent exceptional circumstances.

If you have any questions, please do not hesitate to contact me.

Thanks,

Brendan J. McNamara
Attorney
Bureau of Competition

Federal Trade Commission
601 New Jersey Ave., N.W.
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5/26/2010

notify us immediately by e-mail and delete the original message.

EXHIBIT C

From: Emanuelson, David
Sent: Tuesday, May 25, 2010 10:45 AM
To: 'Henning, Kristofor T.'
Cc: Ostoyich, Joseph; Meehan, Coleen M.
Subject: RE: Graphics

Kris,

Attached, pursuant to our April 19 letter, is a list of search terms to be run against relevant custodians. They have been organized into three categories: (a) terms to be run against all custodians; (b) terms to be run against CPU-related custodians only; (b) terms to be run against graphics/chipsets custodians only.

Relating to the graphics and chipsets custodians, Intel maintains its request that HP identify relevant custodians. However, as a threshold matter, any custodian produced to the FTC should also be produced to Intel according to Intel's search terms. To avoid any potential reharvesting of new custodians, Intel proposes that the graphics and search terms be run against the five custodians listed in our April 19 letter, as well as any additional custodian produced to the FTC.

Finally, responding to your request to limit the production cut-off of Msrs. Hurd, Robison, Bradley, and Clark, our position is that documents from CPU-related custodians should be produced through the end of 2009 and that documents from graphics and chipsets custodians should be produced through May 15, 2010.

Please let us know your position on these terms as soon as possible.

From: Henning, Kristofor T. [mailto:khenning@morganlewis.com]
Sent: Monday, May 24, 2010 1:19 PM
To: Emanuelson, David
Cc: Ostoyich, Joseph; Meehan, Coleen M.
Subject: RE: Graphics

Intel's April 19 letter proposed to use 6 HP custodians on chipsets and graphics issues (p. 2). Intel further proposed 5 potential custodians (p. 3). In an attempt to move as expeditiously as possible, we accepted Intel's proposal and used the 5 custodians Intel itself identified. In our discussion the day after the ALJ's order or after, you have not inquired about additional graphics/chip set custodians. If, based on Intel's discovery taken in the FTC v. Intel proceeding and otherwise, it has a proposal for a 6th HP custodian, please let us know right away. We are happy to discuss the matter further, but given the purported June 1, 2010 deadline in the ALJ's order, we are unable to delay further in our collection efforts. In addition, we still have not received proposed search terms from Intel.

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From: Emanuelson, David [mailto:EmanuelsonD@howrey.com]
Sent: Monday, May 24, 2010 12:43 PM

To: Henning, Kristofor T.
Cc: Ostoyich, Joseph; Meehan, Coleen M.
Subject: RE: Graphics

The whole point of that section of the letter is that we wanted to discuss these custodians with HP based on the knowledge available to HP. We cannot state definitively which are the top six custodians. We have some limited knowledge based on people we know have dealt with Intel but there may be other custodians who have dealt with Nvidia, for example. That the was point of giving you categories, along with suggestions, for the graphics portion (as opposed to defined custodians and no categories for the CPU portion).

From: Henning, Kristofor T. [mailto:khenning@morganlewis.com]
Sent: Monday, May 24, 2010 12:24 PM
To: Emanuelson, David
Cc: Ostoyich, Joseph; Meehan, Coleen M.
Subject: RE: Graphics

What other graphics custodian do you propose? We've already started collecting from your five.

Kristofor T. Henning
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khenning@morganlewis.com | www.morganlewis.com

From: Emanuelson, David [mailto:EmanuelsonD@howrey.com]
Sent: Monday, May 24, 2010 12:21 PM
To: Henning, Kristofor T.
Cc: Ostoyich, Joseph
Subject: Graphics

Kris,

Just to follow up on our call, the graphics issues are still in flux. In our April 19 letter, which is now court order, we proposed six custodians and gave (five) examples of who may be relevant, but we still need to meet and confer based on who HP believes are the relevant custodians. From there, we can work on a deposition proposal.

Thanks,
Dave

David T. Emanuelson
Senior Associate

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

In the Matter of)	
)	
INTEL CORPORATION,)	DOCKET NO. 9341
a corporation)	PUBLIC DOCUMENT
)	
)	

PROOF OF SERVICE OF PUBLIC FILINGS

I, Eric Mahr, hereby certify that on this 27th day of May, 2010, I caused a copy of the documents listed below to be served *by hand* on each of the following: the Office of the Secretary of the Federal Trade Commission (original and two copies) and The Honorable D. Michael Chappell (two copies); and *by electronic mail* to The Honorable D. Michael Chappell (oalj@ftc.gov), Melanie Sabo (msabo@ftc.gov), J. Robert Robertson (rrobertson@ftc.gov), Kyle D. Andeer (kandeer@ftc.gov), Teresa Martin (tmartin@ftc.gov), and Thomas H. Brock (tbrock@ftc.gov):

- (i) A Memorandum in Opposition to Hewlett-Packard Company's Motion For Reconsideration and/or Modification of This Court's May 19, 2010 Order, including Exhibits; and
- (ii) this Proof of Service of Public Filings.

In addition, these documents have been served via electronic mail and will be sent via Federal Express to Counsel for Hewlett-Packard Company:

Kristofor Henning
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921

WILMER CUTLER PICKERING HALE AND
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Attorney for Intel Corporation

Dated: May 27, 2010