ORIGINAL

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

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

ORDER ON NON-PARTY HEWLETT-PACKARD COMPANY'S MOTION FOR RECONSIDERATION AND/OR MODIFICATION OF MAY 19, 2010 ORDER

I.

On May 25, 2010, non-party Hewlett-Packard Company ("HP") submitted a Motion for Reconsideration and/or Modification of May 19, 2010 Order. Respondent Intel Corporation ("Respondent" or "Intel") submitted its Opposition on May 27, 2010. For the reasons set forth below, HP's motion for reconsideration is DENIED. However, the May 19, 2010 Order will be modified as described herein.

II.

By Order dated May 19, 2010, HP's motion to quash the subpoena *duces tecum* served on it by Respondent on March 11, 2010 ("Intel Subpoena") was denied, but the Intel Subpoena was limited, as described in the May 19, 2010 Order, to the reduced scope proposed by Respondent in its April 19, 2010 letter to HP. HP was further ordered to produce the required documents no later than June 1, 2010, or such date as agreed to by HP and Intel.

HP, in its motion for reconsideration or modification, argues that compliance by June 1, 2010 with the Intel Subpoena, as modified by the April 19, 2010 letter and ordered by the May 19, 2010 Order, is not only unduly burdensome, but physically impossible. HP seeks "reconsideration on the grounds that: (1) the ordered June 1 deadline is manifestly unjust and (2) the [Administrative Law Judge ("ALJ")] committed legal error in failing to limit discovery directed to a non-party to what is reasonable under the facts of record given the burden and likelihood of discovering additional, non-cumulative material . . . relevant to the claims and defenses in this case." Motion at 2-3. HP states that the process of collecting, preparing, reviewing, and producing documents in accordance with the May 19 Order is inescapably time-consuming. Therefore, HP requests an extension of time to produce documents responsive to the May 19, 2010 Order. HP also requests that Intel's microprocessor document requests be limited beyond

the terms set forth in Intel's April 19, 2010 proposal and proposes that HP be required to collect, search and produce to Intel only the microprocessor documents that HP has agreed to provide to the FTC.

Respondent argues that HP has failed to meet the standards for reconsideration and that the May 19, 2010 Order, based on the record before the ALJ, correctly denied HP's motion to quash. Respondent states that HP's request to modify the June 1, 2010 deadline for production in the May 19, 2010 Order is not necessary because the Order itself contemplates that the June 1, 2010 deadline can be extended by agreement of the parties and Intel has told HP that it is open to a reasonable extension, subject to agreement with Complaint Counsel. Respondent states that it does not object to an extension of the June 1, 2010 deadline until June 15, 2010, with a rolling production between June 15, 2010 and June 30, 2010, provided that HP agrees to produce a number of deponents on a rolling basis before June 30, 2010, and that Complaint Counsel and the ALJ agree with any extension. According to Respondent, HP has secured Complaint Counsel's agreement that it will not object to an extension of the deadline for deposing HP witnesses to June 30, 2010. Respondent further states that it is willing to accept a document production based solely on its May 25, 2010 search term and graphics/chipset custodian proposal, which further narrowed the scope of the production outlined in the April 19, 2010 letter and incorporated into the May 19, 2010 Order.

III.

A.

A motion for reconsideration of a decision may be made only on the grounds of: (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*, No. 9329, 2009 WL 569722, at *1-2 (Feb. 23, 2009); *In re Int'l Ass'n of Conference Interpreters*, No. 9270, 1996 FTC LEXIS 126, at *1 (April 12, 1996); *In re Champion Spark Plug Co.*, No. 9141, 1981 FTC LEXIS 119, at *1 (November 18, 1981).

Reconsideration motions are not intended to be opportunities "to take a second bite at the apple" and relitigate previously decided matters. *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2; *In re Rambus*, No. 9302, 2003 FTC LEXIS 49, at *12 (March 26, 2003). Moreover, a motion for reconsideration may not be used to rehash rejected arguments. *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2; *LeClerc v. Webb,* 419 F.3d 405, 412 (5th Cir. 2005); *Caisse Nationale de Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1270 (7th Cir. 1996). Nor may a motion for reconsideration raise new arguments. *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2; *Karr v. Castle,* 768 F. Supp. 1087, 1093 (D. Del. 1991), *aff'd sub nom; United States v.*

Carper, 22 F.3d 303 (3d Cir. 1994).

Accordingly, such motions should be granted only sparingly. *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2; *Karr v. Castle,* 768 F. Supp. at 1090; *In re Basic Research*, No. 9318, 2006 FTC LEXIS 7, at *4 (January 10, 2006); *Rambus*, 2003 FTC LEXIS 49, at *11. Courts have granted motions to reconsider where it appears the court mistakenly overlooked facts or precedent which, had they been considered, might reasonably have altered the result, or where reconsideration is necessary to remedy a clear error or to prevent manifest injustice. *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2; *e.g.*, *Karr*, 768 F. Supp. at 1093 (reconsidering order that granted motion to intervene, where order was based on court's mistaken assumption that intervention was unopposed, and reconsidering order holding that certain National Guard regulations violated officer's due process rights because subsequent briefing indicated that court overlooked precedent that might have changed the holding); *Rambus*, 2003 FTC LEXIS 49, at *21-22 (reconsidering order that rejected privilege claim and compelled production of documents, because order's application of criminal procedural standard to determine applicability of crime-fraud exception in civil case impermissibly detracted from "fundamental concepts of due process" and was "manifestly unjust"). *Cf. Basic Research*, 2006 FTC LEXIS 7, at *5-6 (denying reconsideration of order addressing remedies for expert witness' failure to include studies containing fraudulent data on curriculum vitae, because movant failed to meet "heavy burden" of demonstrating a change in law, new evidence, or a need to correct clear error or manifest injustice).

B.

HP's two bases for seeking reconsideration are that the June 1, 2010 deadline is manifestly unjust and that the ALJ committed legal error in failing to limit discovery directed to a non-party. Neither of these arguments has merit.

With respect to the time for production, the Intel Subpoena was served on March 11, 2010. Pursuant to a series of unopposed motions, HP requested and received extensions of time to submit a motion to limit or quash the Intel Subpoena while the parties tried to reach an agreement on the scope of the subpoena. HP cannot legitimately complain about the time constraint it now faces. Additionally, the May 19, 2010 Order directed HP to comply with the Intel Subpoena, as modified by the April 19, 2010 letter, no later than June 1, 2010, or such alternative date to which the parties may agree. Respondent has agreed to accept production of documents on a rolling basis between June 15, 2010 and June 30, 2010.

Respondent conditioned its offer on an agreement by HP to produce a number of deponents on a rolling basis before June 30, 2010, Complaint Counsel's acceptance, and the ALJ's approval. By email dated May 23, 2010, Complaint Counsel has stated that it will not oppose HP depositions being held between June 15, 2010 and June 30, 2010. Respondent's conditioning its agreement to accept documents by June 30, 2010 on HP's

agreement to forego filing motions to quash depositions is a legitimate tactic in negotiations. It is not, however, a condition that is appropriately ordered by the ALJ. Any motion to quash will be considered if and when filed. The dates suggested by Respondent are reasonable considering the circumstances presented here. Accordingly, HP's request for an extension of time for production of documents is granted, and HP shall produce documents on a rolling basis between June 15, 2010 and June 30, 2010, or such date as agreed to by HP and Intel.

With respect to the scope of production, the arguments that HP made in its motion to quash regarding the burden of production were considered and rejected. In its motion to quash, HP argued generally that the Intel Subpoena is unduly burdensome because it seeks documents regarding subjects about which HP has already produced thousands of pages. The May 19, 2010 Order considered and ruled on HP's arguments, finding that HP had failed to carry its "heavy burden" of resisting compliance with a subpoena *duces tecum* issued in an FTC adjudicative proceeding. *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96, at *15 (Mar. 19, 1982).

HP now, in its motion for reconsideration, provides details, with supporting affidavits, on the approximate number of pages it will need to review and the amount of time it believes it will take to produce responsive documents. This evidence was not presented to the ALJ in HP's motion to quash. Furthermore, this evidence was, or should have been, known to HP at the time it filed its motion to quash. Accordingly, HP fails to satisfy the standards necessary to grant a motion for reconsideration. On the facts presented in HP's motion to quash, there was no "legal error in failing to limit discovery directed to a non-party." To consider the arguments and evidence that HP now submits in its motion for reconsideration would be to improperly allow HP "to take a second bite at the apple" and relitigate previously decided matters. *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2. Accordingly, HP's motion for reconsideration is denied.

However, there is nothing in the May 19, 2010 Order that precludes the parties from negotiating to further narrow the scope of production. Respondent has offered to accept production based solely on its May 25, 2010 search term and graphics/chipset custodian proposal, attached as Exhibit C to Respondent's Opposition. Respondent has also stated it 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." These terms are reasonable and are hereby ordered to further narrow the scope of the Intel Subpoena.

IV.

For the reasons stated herein, HP's motion for reconsideration is DENIED. However, Respondent has stated that it is willing to further narrow the Intel Subpoena. Therefore, the May 19, 2010 Order is modified as described above. In addition, the May 19, 2010 Order is modified to provide HP with an extension of time. HP shall produce

documents on a rolling basis between June 15, 2010 and June 30, 2010, or such date as agreed to by HP and Intel.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 28, 2010