

business relationships that are so dissimilar to those relevant to the present matter²—that they are not at all “substantially related” to the current proceeding. Further, Intel has identified no basis for a reasonable person to question Commissioner Rosch’s ability to be impartial in adjudicating this proceeding. Accordingly, we deny Intel’s motion to disqualify Commissioner Rosch.³

Background:

Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Federal Trade Commission issued a Complaint on December 16, 2009. The Complaint alleges that, since 1999, Intel has illegally used its dominant market position to stifle competition and strengthen its monopoly in the markets for Central Processing Units (“CPUs”)⁴ and to create a monopoly for Intel in the markets for graphics processing units (“GPUs”).⁵ The Complaint alleges that Intel’s primary competitors in the CPU markets include Advanced Micro Devices (“AMD”) and Via Technologies (“Via”). Other key players allegedly include original equipment manufacturers (“OEMs”) that use CPUs such as Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu. The Complaint alleges that Intel’s primary competitors in the GPU markets include Nvidia and ATI, an affiliate of AMD.

The Complaint alleges, among other things, that Intel carried out an anticompetitive campaign using threats and rewards aimed at the world’s largest OEMs to coerce them not to buy rival CPUs and used exclusive or restrictive dealing to prevent OEMs from marketing machines with rival CPUs. In addition, the Complaint alleges, Intel secretly redesigned key software, known as a compiler, in a way that deliberately stunted the performance of competitors’ CPUs, and then told its customers and the public that software performed better on Intel’s CPUs than on those of its rivals, failing to disclose that the difference was largely or

² The present matter concerns conduct from 1999 to the present.

³ Commissioner Rosch has declined to recuse himself from further participation in the Intel proceeding (Docket No. 9341). Commissioner Rosch’s statement concerning Intel’s disqualification motion is hereby placed on the public record as Attachment A to this opinion (“Statement”).

⁴ The Complaint describes a CPU as a type of microprocessor used in a computer system; that is, as an integrated circuit chip that is often described as the “brains” of a computer system. The Complaint alleges that the microprocessor performs the essential functions of processing system data and controlling other devices integral to the computer system. According to the Complaint, a CPU requires a chipset to communicate with other parts of the computer.

⁵ The Complaint alleges that GPUs originated as specialized integrated circuits for the processing of computer graphics, but that as they have evolved, they have taken on greater functionality. The Complaint alleges that computers may achieve faster performance by offloading other computationally intensive needs from CPUs to GPUs.

entirely due to Intel's creation of a compiler designed to deceive consumers about competing products.

The Complaint also alleges that Intel's CPU dominance was threatened by the innovation of GPU manufacturers, prompting Intel to engage in similar unfair practices that will create a dangerous possibility that Intel will obtain a monopoly in the relevant GPU markets. For example, the Complaint alleges that Intel has, among other things: engaged in deceptive practices relating to competitors' efforts to enable their GPUs to interoperate with Intel's newest CPUs; adopted a new policy of denying interoperability for certain competitive GPUs; established various barriers to interoperability; degraded certain connections between GPUs and CPUs; made misleading statements to industry participants about the readiness of Intel's GPUs; and engaged in unlawful bundling or tying of Intel's GPUs with its CPUs, resulting in below-cost pricing of relevant products.

Intel now moves to disqualify Commissioner Rosch, stating that "Commissioner Rosch served as Intel's primary outside antitrust counsel from about 1987 until Intel decided to change antitrust counsel in mid-1993." Motion at 2. Intel claims that Commissioner Rosch's previous work as Intel's chief antitrust outside counsel—including in connection with a "similar investigation" by the FTC—is "substantially related" to the Intel matter presently before the Commission. *Id.* at 8.

Specifically, Intel asserts 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." Murray Declaration, ¶ 12.⁶ To support its disqualification motion, Intel has submitted several documents, of which the principal ones may be summarized as follows:⁷

⁶ Although Intel has not revealed specific confidences that were shared with then-Attorney Rosch (Murray Declaration, ¶ 4), in light of the nature of his former representation, we assume its claim is true with respect to the time period during which the former representation took place. Thus, given the limited disclosures made by Intel, our review is necessarily limited to a careful examination at the subject matter level of the scope of the former representation as it relates to the scope of the present Intel proceeding. As we explain below, we conclude, after taking a close look at Intel's submissions regarding the scope of Commissioner Rosch's previous representation, that there is no factual nexus between the matters in which Commissioner Rosch advised and the one presently before the Commission and whatever confidences were obtained are not relevant to the instant proceeding.

⁷ Motion, Attachment 5 is not discussed here as it does nothing to support or negate Intel's arguments. A characterization of the FTC's previous investigation by an unnamed newspaper does little to validate the actual matters in dispute at the time. We believe a better source to assess the nature and scope of the previous proceeding is the investigative subpoena, which Intel has submitted as Attachment 3, which we discuss along with Attachment 6 at pp.7-8, *infra*.

Motion, Attachment 1 is a letter, dated July 17, 1991, from then-Attorney Rosch to FTC staff concerning Intel's arbitration with AMD. Murray Declaration, ¶ 7. The arbitration stemmed from Intel's failure to license its 386 microprocessor to AMD. At the heart of the licensing dispute was a contract between the two competitors that called for a "product to product, value for value exchange." AMD sought to specifically enforce the contract—i.e., it sought to require Intel to accept certain AMD products in exchange for Intel's 386 microprocessor. The letter suggests that the events that gave rise to the dispute occurred between 1983 and 1985. The letter is in response to the FTC's request for Intel's briefs and related papers that bore on the arbitrator's findings that Intel dealt unfairly with AMD, the impact of Intel's wrongful conduct on AMD, and the market position of Intel's x86 products at that time. The letter does not address antitrust concerns aside from arguing that the dispute is properly couched as a breach of contract claim as opposed to an antitrust violation.⁸ Attachment 1 makes clear that the focus of the dealings between the FTC and Intel in 1991 related to Intel's obligations to AMD under its license to AMD at that time.

* Motion, Attachment 2 is a letter, dated August 1, 1991, from then-Attorney Rosch to FTC staff concerning the aforementioned arbitration between Intel and AMD. Murray Declaration, ¶ 8. The letter provides additional support for Intel's refusal to license the 386 microprocessor to AMD, noting that AMD's pleadings fail to mention: 1) it attempted to exchange with Intel something that was not a new product and was, therefore, ineligible for exchange under the licensing agreement; and, 2) there was no other legal obstacle to Intel choosing a company other than AMD to develop its product. In this context, then-Attorney Rosch's letter charges that AMD's briefing materials "illustrate how much AMD is willing to fantasize about Intel's conduct and its consequences." The letter also asserts that AMD has essentially conceded that circumstances other than Intel's alleged concealment prevented AMD from joining forces with other companies to develop products that would compete with Intel. The letter's factual discussion relates only to events between 1984 and 1987.

* Motion, Attachment 4 is a letter, dated March 11, 1993, from then-Attorney Rosch to FTC staff concerning the antitrust implications of Intel's efforts to license its '338 patent. Murray Declaration, ¶ 10. The letter addresses: 1) whether Intel's '338 patent license and microprocessors should be considered separate products for purposes of antitrust tying analysis; and, 2) assuming they are separate products, "can the royalty sought by Intel from manufacturers of systems using clone microprocessor products be considered an 'economic tie' because of the effect that royalty would have on competition in the sale of microprocessors." Motion, Attachment 4.

Discussion:

⁸ According to the letter, Intel did not brief either the impact of its conduct on AMD or the market presence of the x86 products.

For the reasons discussed below, we do not believe a reasonable person with knowledge of the relevant facts would question Commissioner Rosch's impartiality. Nor do we find any substantial relationship between the current case and the previous investigation. Finding no basis for recusal, we deny Intel's disqualification motion.

Legal Standard

Pursuant to FTC Rule 4.17, Intel's "motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed." 16 C.F.R. § 4.17(c). Intel argues and Commissioner Rosch has stated his agreement that "Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary." Motion at 6; Statement at 2. In general, we also agree.⁹ Although Intel relies upon three different authorities, the federal judicial recusal standard, 18 U.S.C. § 455, is the relevant standard here.¹⁰ That standard provides in relevant part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

⁹ We find one significant difference between judicial disqualification standards and agency disqualification standards to be noteworthy. Namely, the separation of functions provisions of the Administrative Procedure Act allow an agency or its members to vote on whether to initiate a case or proceeding after reviewing pertinent information. 5 U.S.C. § 554(d). Federal judges, in contrast, may not participate in a decision to initiate any case they may later decide.

¹⁰ As a Federal employee, Commissioner Rosch is subject to the "Standards of Ethical Conduct for Employees of the Executive Branch," 5 C.F.R. § 2635 ("Standards of Conduct"). See also FTC Rule 5.1, 16 C.F.R. § 5.1. We do not separately assess the impact of the Standards of Conduct because the reasonable person impartiality assessment therein mirrors what is contained in 28 U.S.C. 455(a). (The federal statute arguably raises the bar higher by requiring recusal unless the parties' consent is obtained and, unlike the Standards of Conduct, there is no provision for authorizing one's participation in certain circumstances. Because we have determined a reasonable person would not question Commissioner Rosch's ability to be impartial, we do not address whether his participation is otherwise appropriate under the Standards of Conduct.) Moreover, Intel's reliance upon Rule 3-310(E) of the California Rules of Professional Conduct is misguided. On its face, the rule bars attorneys from representing "adverse interests" and thus deals with attorney, not judicial, disqualification. Intel has not explained how or why Congress, the FTC, or even the state of California may have intended for Rule 3-310(E) (or comparable state bar rules, generally) to apply in this circumstance, and we can perceive no such reason.

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy. . . .

28 U.S.C. § 455.

Application of Section 455(a)

We are principally concerned with the Section 455(a) basis for disqualification,¹¹ which arguably could be invoked if Commissioner Rosch served as counsel for Intel in connection with a *substantially related* matter.¹² As discussed below, we find no such substantial relationship. With no other viable potential impediments to his participation, we deny Intel’s motion.

In considering whether matters are substantially related for purposes of judicial recusal, courts have considered both the facts and the legal issues involved. “Initially, the trial judge

¹¹ With respect to the Section 455(b)(1) basis for disqualification, Intel has failed to provide any evidence of personal bias or prejudice. It is not even clear that Intel intended to make such an allegation. Although it references case law on the subject, Intel has not provided any facts that might be in any way relevant to this issue. The theory that Commissioner Rosch may have personal knowledge of disputed evidentiary facts relevant to the present Intel proceeding is similarly unsupported. Commissioner Rosch denies having such knowledge. Statement at 7-8. Given the nature of the prior representation, Intel presumably shared confidential information with its attorney. Nonetheless, the key is whether and to what extent such information relates to the present proceeding. Consequently, Intel’s concerns in this vein are addressed by our inquiry into whether the matters are substantially related. With respect to the Section 455(b)(2) basis for disqualification—as Intel itself concedes—the present matter before the Commission is not the *same* matter in which Commissioner Rosch represented Intel. See, e.g., Motion at 8 (Commissioner Rosch served as lead outside counsel “in a similar [FTC] investigation”). The current Complaint concerns alleged practices that took place from 1999 to the present. Thus, the events which give rise to the present proceeding took place long after (that is, from 6 to 16 years after) Commissioner Rosch ceased to be Intel’s chief antitrust outside counsel. Accordingly, recusal is not warranted under 28 U.S.C. § 455(b)(2).

¹² We note that, although the federal cases Commissioner Rosch discusses with respect to the Section 455(a) standard do not use the term “substantially related,” see Statement 8-9, they do address whether the proceedings in question concern related matters. See, e.g., Cippollone v. Liggett Group, Inc., 802 F.2d 658, 659 (3d Cir. 1986) (length of time between matters, difference in parties and legal issues presented, as well as lack of factual nexus between matters, serve as basis for determination that there was no reason to question the judge’s impartiality); Renteria v. Schellpeper, 936 F.Supp. 691, 694 (D. Neb. 1996) (no reasonable basis to question impartiality absent a showing that “the earlier case was ‘sufficiently related’ to the ‘issues in dispute’ before the judge in the pending case”).

must make a factual reconstruction of the scope of the prior legal representation.” Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d, 221, 225 (7th Cir. 1978). If there is a factual nexus, courts must consider “whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters.” Id. If it is apparent such confidences were shared, the court must determine whether it “is relevant to the issues raised in the litigation pending against the former client.” Id. If all three indicators are present, the matters are substantially related and essentially deemed the same for conflicts purposes, with doubts to “be resolved in favor of disqualification.” Id.¹³

Our review of Intel’s submissions in support of its motion demonstrates to us that Commissioner Rosch’s participation in the prior Commission investigation was limited in scope to addressing the implications of specific licensing disputes and arrangements based on events that took place at various times between approximately 1983 and 1993.¹⁴ These discrete matters are wholly unrelated to the present Intel proceeding, which concerns conduct since 1999. Intel has not demonstrated how the previous licensing disputes relate to the present proceeding beyond potential overlap in broad legal categories. Antitrust matters generally, and in technology industries specifically, often involve similar theories of wrongdoing, such as economic tying, applied to a variety of factual circumstances. However, prior familiarity with legal theories is not enough to disqualify Commissioner Rosch. See Michael v. Intracorp., Inc., 179 F.3d 847 (10th Cir. 1999)(prior knowledge of the type of case or the defenses presented is insufficient to justify recusal). If recusal were automatically to follow such tangential commonalities, the Commission would be unable to rely upon experienced, well-informed professionals to decide complex matters. See Cipollone, 802 F.2d at 659-660 (“If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could be appointed to the bench.”). Further, there are significant differences in time. As stated above, the present Complaint concerns behavior from 1999 to the present, whereas the FTC’s previous investigation in which Commissioner Rosch represented Intel principally focused on conduct that took place from 1985 through 1990. A closer examination of the relevant investigative subpoenas reveals a larger time gap with respect to certain issues. See, e.g., Motion, Attachment 6, ¶ 3 (seeking pricing information for CPUs and

¹³ The Federal agency ethics regulations provide similar guidance addressing when seemingly separate proceedings should be considered the same matter. See, e.g., 5 C.F.R. § 2641.201(h)(5) (factors to consider include whether there is a nexus between the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed); FTC Rule 4.1(b)(1), n.1, 16 C.F.R. § 4.1(b)(1), n.1.

¹⁴ Intel’s reference to Commissioner Rosch’s allusion to “fantasizing” by AMD (see Attachment 2) does not serve as evidence of personal bias or prejudice against Intel. Instead, that letter indicates a certain skepticism towards allegations made by AMD that Intel should consider useful. In any event, as discussed *infra*, its context is limited to factual patterns not relevant to the present proceeding.

GPUs from January 1, 2008 to present) as compared to Motion, Attachment 3, ¶ 3 (seeking sales information for microprocessors from 1985 through 1990).

Of course, there is commonality with respect to several interested parties—namely Intel, AMD, and the FTC. However, there are also important differences. For example, a number of CPU manufacturers have exited the marketplace over the last decade. Moreover, any common ground in terms of interested parties is negated by key differences in the products and allegations at issue. Although the term “microprocessor” was used by Intel then and now, we are not dealing with the same product. Information about a putative “television sets” market two decades ago would have little relevance to the competitive dynamics of the market for the products currently sitting (perhaps it is more accurate to say ‘mounted’) in American family rooms today, though the same words may be used to describe the products. Similarly, there is no *a priori* reason to believe that any information Commissioner Rosch may have gained about the markets for the products at issue—in the matters on which he represented Intel—is relevant to the present matter, and we have searched the Motion in vain for evidence from which to infer such a relationship. Indeed, in the course of this proceeding, Intel has repeatedly asserted that the relevant technologies are constantly evolving. See Intel Submission to Commission at 4, 5, 7, 30, and 38 (Nov. 27, 2009). Further, in the sixteen years since Commissioner Rosch advised Intel, eight generations of Moore’s law (the seminal statement on the evolution of computer chips) have passed. See Wikipedia, Moore’s Law, http://www.en.wikipedia.org/wiki/Moore’s_law#cite.¹⁵ The eight iterations of Moore’s law have produced microprocessors that are approximately 250 times more powerful, and in that time span, competitors and customers have emerged, have vanished, or have been unrecognizably transformed.¹⁶

Taking into account these differences, we find there is no pertinent nexus between the facts at issue in the prior representation and the present Intel matter. Thus, whatever confidences Commissioner Rosch may have obtained in the course of his prior representation, Intel has presented no evidence that they are relevant to the current proceeding. Furthermore, Intel was aware of its prior relationship with Commissioner Rosch when it first learned of the present

¹⁵ Moore’s law, which states that the number of transistors that can be inexpensively placed on an integrated circuit has doubled approximately every two years, is of course named after Gordon Moore, a long-term executive at Intel.

¹⁶ To take only a handful of examples of how these markets have changed, pages 8-9 of Commissioner Rosch’s 1991 letter, attached to the Motion as Attachment 1, dealt with subjects such as whether Intel intended to license AMD as a second source of the 386 microprocessor, whether Intel needed AMD’s cooperation to compete against Motorola and National/TI, and whether AMD was prevented from partnering with companies such as NEC and Fujitsu. The products of these major mainframe manufacturers in the 1980s now exist only in virtual form on the website of the IPSJ Computer Museum. See <http://www.museum.ipsj.or.jp/en/computer/main/0079.html> and <http://museum.ipsj.or.jp/en/computer/os/fujitsu/0013.html>.

matter at least 18 months ago, and nevertheless willingly chose to repeatedly interact with him and other FTC officials throughout the investigative phase without questioning Commissioner Rosch's involvement or whether he might possess confidential information that should not be shared with the staff during the investigative phase. Statement 1, 9-10. As a consequence, it is highly doubtful that, in Intel's own view, Commissioner Rosch actually possesses any confidential information relevant to this matter.

Absent a factual nexus between the matters—and with no evidence of confidential information shared that would be relevant to the instant proceeding—we have determined that the matters in which Commissioner Rosch formerly represented Intel are not substantially related to the present proceeding. Accordingly, we have concluded that a reasonable person with knowledge of the relevant facts would not question Commissioner Rosch's ability to be impartial. Accordingly,

IT IS ORDERED THAT the motion of Intel seeking Commissioner Rosch's disqualification with respect to any adjudicative proceeding against Intel is denied.

By the Commission, Commissioner Kovacic recused, and Commissioner Rosch not participating.

Donald S. Clark
Secretary

Issued: January 19, 2010

Attachment A

**STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON RESPONDENT’S
MOTION FOR DISQUALIFICATION
[REDACTED PUBLIC VERSION]**

*In the Matter of Intel Corporation
Docket No. 9341*

Approximately 18 months ago, the Federal Trade Commission authorized the use of compulsory process to investigate the alleged conduct of Intel Corporation (“Intel”) in the microprocessor markets. Since that time, this Commissioner met with Intel officials on at least three occasions and spent hundreds of hours considering, among other things, the staff’s theories, the applicable case law, and the underlying documents involved in this case in order to determine whether there was a “reason to believe” that a complaint should issue and on what bases. During that period, although it willingly provided the Commission numerous white papers and participated in nearly six hours of meetings with this Commissioner, Intel never suggested (nor did any other participant for that matter) that there was any basis for disqualification. Notwithstanding that fact, on the day before the Commission’s final vote to pursue administrative litigation, Intel moved to disqualify this Commissioner pursuant to 16 C.F.R. § 4.17, “from participation in any adjudicative proceeding against Intel, including voting on whether to issue a complaint.” (Mot. of Intel Corp. for Disqualification of Commissioner J. Thomas Rosch (“Mot.”) at 2.)

Although Intel relies on three different authorities to try to make its case (the federal judicial recusal standard, the Office of Government Ethics regulations, and the California Rules of Professional Conduct), the crux of Intel’s argument is that a reasonable person would conclude that, because this Commissioner served as Intel’s primary outside antitrust counsel from 1987 until mid-1993 – including in conjunction with an FTC investigation opened in 1991 – this Commissioner cannot impartially consider whether Intel’s alleged conduct since 1999

should create antitrust liability. Intel points to no confidential information that this Commissioner possesses from the 1987-1993 representation that is relevant to the Commission's recently issued complaint, which concerns alleged conduct from 1999 forward. Intel points to no public statements that this Commissioner has made that supply any evidence of prejudice. And Intel does not and cannot show that the Commission's recently issued administrative complaint constitutes the same matter in controversy as the investigation that this Commissioner handled on Intel's behalf more than a decade and a half ago. For these reasons and others discussed below, disqualification is not warranted.

DISQUALIFICATION IS NOT WARRANTED UNDER ANY OF THE GOVERNING STANDARDS

Intel argues that this Commissioner is subject to disqualification under three authorities: (1) the recusal standards "applicable to judges and FTC Commissioners alike;" (2) the Office of Government Ethics (OGE) regulations; and (3) Rule 3-310(E) of the California Rules of Professional Conduct. (Mot. at 2, 4-10.) None of these arguments supports disqualification of this Commissioner.

A. Federal Judicial Recusal Standard

Pursuant to Rule 4.17 of the Commission's Rules of Procedure, Intel's "motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed." 16 C.F.R. § 4.17(c). As Intel acknowledges, "Commissioners, acting as judges, are held to the recusal standards applicable to the *federal* judiciary." (Mot. at 6 (emphasis added).) Under that standard, set forth in 28 U.S.C. § 455 ("Disqualification of justice, judge, or magistrate"), disqualification is appropriate where (1) "in private practice he served as lawyer in the matter in controversy," 28 U.S.C. § 455(b)(2); (2) "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the

proceeding,” *id.* § 455(b)(1); or (3) his “impartiality might reasonably be questioned,” *id.* § 455(a). None of those considerations supports disqualification on the facts here.

1. First, Intel does not assert that this Commissioner served as a lawyer “in the matter in controversy” here. *Id.* § 455(b)(2). That would be impossible because the Commission only opened its formal investigation into this matter in 2008 – nearly a decade and a half after Intel says this Commissioner stopped representing Intel. (Mot. at 2.) Moreover, the FTC staff’s 1991 investigation, upon which Intel principally relies (Mot. at 3, 8, 9; Murray Declaration (“Murray Decl.”) ¶¶ 5-9, Attach. 1-5) and in which this Commissioner represented Intel, was a completely separate case from the case initiated by the current complaint. At issue in the investigation initiated in 1991 – nearly eighteen years ago – was whether Intel had illegally *acquired* monopoly power in the central processing unit (“CPU”) markets. (*See* Mot. Attach. 5 (describing investigation as inquiry into whether Intel “broke any antitrust laws in becoming the dominant supplier of microprocessors”).) That is a fundamentally different question from whether, as the current complaint now alleges, Intel has engaged in a course of conduct designed to (1) illegally *maintain* its monopoly power in those CPU markets, and (2) *attempt* to monopolize the graphics markets. *See* Administrative Complaint, *In the Matter of Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009). This Commissioner’s representation of Intel during the investigation initiated in 1991 had nothing to do with monopoly maintenance based on alleged conduct respecting microprocessors, which allegedly began in 1999, and that investigation did not involve the graphics markets alleged in the current complaint at all.

Beyond that, to this Commissioner’s knowledge, Intel did not engage in **[redacted]** during this Commissioner’s representation, and the motion does not contain any evidence that this Commissioner made representations to the Commission staff or anyone else about those

practices. (Mot. at 2.) To be sure, when the FTC initiated its investigation in 1991, this Commissioner did attempt to define the relevant market for microprocessors in which Intel participated (*id.*) as a market in which numerous other microprocessor producers, including IBM and Sun participated. (Likewise, in the FTC’s 1997 suit against Intel, Intel’s then-counsel also defined the relevant market as one in which there were numerous participants beside Intel.) This Commissioner never, however, asserted that the market would remain as it was defined at that time. Similarly, in the investigation initiated in 1991, the Commission staff did inquire about “exclusive dealing” and “bundling,” including “economic tying,” as well as whether Intel engaged in a refusal to license to AMD, but this Commissioner specifically told the Commission staff that antitrust liability would depend on the facts relevant to the particular practice at issue, not that those practices were either legal or illegal under all circumstances. (*Compare* Mot. at 2 *with* Attach. 1 at 3-9 and Attach. 4 at 3, 5.)

Moreover, even if the facts involved in the 1991 investigation and the current complaint were the same, the law governing those facts has not stood still. For example, the principal predatory pricing cases that Intel has thus far invoked in white papers and discussions preceding the current complaint, *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), were not decided until after the 1991 investigation. Judge Wilken’s decision suggesting a modification of predatory pricing standards in *Meijer, Inc. v. Abbott Labs*, 544 F. Supp. 2d 995 (N.D. Cal. 2008), likewise came at a later date. Additionally, since this Commissioner’s representation of Intel ended, there have been several important decisions regarding loyalty discounts and economic tying. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (2000); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2009 U.S. App. LEXIS 23765 (9th Cir. Oct. 29, 2009);

LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003). Finally, the courts have supplied important decisions regarding refusals to license and the implications of product design decisions. See *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997); *C. R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340 (Fed. Cir. 1998). Thus, both the facts and the law applied to those facts have evolved during the ensuing period spanning more than a decade and a half.

Of course, the investigations initiated in 1991 and 2008 respectively were not without certain broad factual similarities: the Commission (as opposed to DOJ or private plaintiffs) initiated both investigations; Intel was the subject of both investigations; both investigations were based on alleged antitrust violations; and both investigations involved markets related to the CPU industry (and the associated market definition questions). But simply because two cases have factual similarities at a high level of factual and/or legal generality does not mean that they qualify as the same “matter in controversy.” If that were so, anytime a Commissioner provided counsel to a firm with monopoly power while in private practice, that firm could always invariably move to disqualify that Commissioner in a future investigation – even more than a decade and a half later – on the ground that the Commissioner was involved in a representation involving the same “matter in controversy.” That is not the law.

Intel implies otherwise. It asserts that disqualification is appropriate because the current action is “substantially related” to this Commissioner’s prior representation of Intel in conjunction with the Commission’s 1991 investigation (Mot. 6-7, Attach. 1). Intel’s claim that the disqualification of a *federal judge* should turn on a “substantially related” analysis is without any precedent. Indeed, after admitting that “Commissioners, acting as judges, are held to the recusal standards applicable to the *federal* judiciary,” (Mot. at 6 (emphasis added)), Intel cites two *state court* decisions (from 1978 and 1992, respectively) that applied the “substantially

related” analysis. (Mot. at 7 (citing *Rushing v. City of Georgiana*, 361 So.2d 11 (Ala. 1978) and *Davis v. Neshoba County General Hospital*, 611 So.2d 904 (Miss. 1992).) Intel’s reliance on these state court decisions is not accidental: Intel does not cite a single federal case applying the “substantially related” standard to evaluate the disqualification of a federal judge or Commissioner because, as far as this Commissioner can ascertain, there are no such cases. *See generally River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1299, 1302 (Cal. Ct. App. 1987) (explaining that “substantial relationship” is a “legal point of significance in attorney disqualification” that is “used in identifying an impermissible conflict of interest in an attorney’s representation of successive clients”) (emphasis added).

In any event, as discussed above, for the same reasons that the 2009 complaint and the investigation initiated in 1991 do not present “the same matter in controversy,” they cannot be said to be “substantially related”: the two separate matters were based on different alleged conduct during different time periods and involved different theories of liability.

2. Second, along the same lines, this Commissioner does not have “personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b)(1). As to “personal bias or prejudice,” Intel contends that disqualification is warranted under *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), because this Commissioner “has in some measure adjudged the facts” in advance of this case. (Mot. at 6.) However, in contrast to the prejudgment cases that Intel cites, Intel does not cite any evidence of prejudgment here.

In *Texaco, Inc. v. FTC*, 336 F.2d 754, 759 (D.C. Cir. 1964), *rev’d on other grounds*, 381 U.S. 739 (1965), for example, the D.C. Circuit held that then-Chairman Paul Rand Dixon was disqualified from participating in an appeal where he delivered a speech that said “[w]e are well

aware of the practices that plague you . . . you know the practices – price fixing, price discrimination, . . . you know the companies” and named the respondents. *See also id.* at 760 (“In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.”). Likewise, in *Cinderella Career & Finishing Schools*, the D.C. Circuit reached the same conclusion in light of a speech that Chairman Dixon gave during the pendency of another appeal before the Commission that, again, strongly implied that the respondent had engaged in the deception at issue in the appeal. 425 F.2d at 589-91 (finding that “Commissioner Dixon has exercised questionable discretion and very poor judgment indeed, in directing his shafts and squibs at a case awaiting his official action”). These cases do not help Intel. To the contrary, Intel asserts that prior to the current complaint this Commissioner had argued that Intel’s previous conduct was lawful. (Mot. at 3, Murray Decl. ¶¶ 5-11, Attach. 1-5.)

Nor does Intel adduce any evidence that this Commissioner has “personal knowledge of disputed evidentiary facts” concerning “this proceeding.” 28 U.S.C. § 455(b)(1). Indeed, as previously noted, such knowledge would be impossible because the conduct that was the subject of the investigation initiated in 1991 is not the subject of the current complaint, which only goes back to 1999. This Commissioner has no knowledge – beyond what the staff has adduced during its Part 2 investigation and what Intel has asserted – about any of Intel’s alleged conduct during the relevant time period. Indeed, it is ironic for Intel to claim that the facts relating to practices that were investigated a decade and a half ago (or the “confidential” information allegedly shared with this Commissioner at or about that time) are the same or even similar to the facts or other information relating to the practices alleged in the current complaint, given Intel’s repeated

assertions that the technology and products in these markets have constantly “evolved” over the years. (*See Intel Submission to Commission at 4, 5, 7, 30 38 (Nov. 27, 2009).*)

Moreover, even if this Commissioner had acquired personal knowledge of disputed evidentiary facts (which, again, he did not), numerous federal courts have held that the passage of a substantial period of time – here more than a decade and a half since his representation of Intel ended – if not determinative, militates against the disqualification of a federal judge. *See, e.g., Cipollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986) (“Even if American Tobacco Company were a party to [this] case, the long passage of time [9 years] since Judge Hunter’s last representation of that Company requires the conclusion that no reasonable person could question his impartiality.”); *Renteria v. Schellpeper*, 936 F. Supp. 691, 696-697 (D. Neb. 1996) (refusing to disqualify federal judge based on representation of parties in prior litigation where same claims were not involved and where the case at issue did not arise until “long after the judge left private practice”). And with good reason: it would be unreasonable to conclude that a decade and a half after his representation of Intel ended, this Commissioner has retained any relevant confidential information in an industry as prone to innovation and research and development as this one.

Numerous other federal courts have likewise so held. *See Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*, 690 F.2d 1157, 1166 (5th Cir. 1982) (recusal not warranted where judge had represented the defendant in unrelated matters at least six years earlier); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-67 (6th Cir. 1979) (recusal not required where trial judge had prosecuted defendant for several unrelated crimes during the period four to thirteen years prior to the time of trial); *Gravenmier v. United States*, 469 F.2d 66, 67 (9th Cir. 1972) (where trial judge was of counsel in prior prosecution six years before present unrelated prosecution,

recusal not required); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir. 1959) (recusal not warranted where trial judge had represented defendant in unrelated matters for a period of four to five years which ended three to four years before judge's decision); *Royal Air Maroc v. Servair, Inc.*, 603 F. Supp. 836 (S.D.N.Y. 1985) (prior representation by trial judge of defendant's parent corporation in unrelated matter twelve years earlier no basis for recusal). *Cf. Schurz Communs. v. FCC*, 982 F.2d 1057, 1061 (7th Cir. 1992) (Posner, J.) (noting that in ruling on a recusal motion based on the judge's involvement in a previous matter, "[t]he lapse of time is of course one factor").

3. Finally, because this Commissioner did not represent Intel in the same matter in controversy and has not otherwise retained relevant confidential information, there is no basis to conclude that this Commissioner's impartiality more generally can reasonably be questioned. Intel itself offers no other independent arguments regarding this Commissioner's impartiality. To the contrary, its past behavior speaks volumes. Indeed, the timing of this motion to disqualify establishes that Intel itself – arguably the “most interested” person – does not truly believe that disqualification is proper. For nearly 18 months, Intel did not question the propriety of this Commissioner's participation (or the FTC's integrity if he were to participate), even though Intel was on notice of the FTC's investigation and this Commissioner's active participation. More specifically:

- Intel's CEO, its current General Counsel, as well as its lead outside counsel, all met with this Commissioner as a prospective decision-maker in this matter in mid-July of 2008. At no time during that meeting did any of the Intel people suggest that there was anything improper about this Commissioner's participation.
- Later, in May of 2009, Intel's lead outside counsel spoke with this Commissioner as a decision-maker in this matter. No suggestion was made during that conversation that there was anything improper about this Commissioner's participation.

- Recently, on December 3, Intel’s current General Counsel and its lead outside counsel met again with this Commissioner as a prospective decision-maker, this time for about two hours. At that meeting, this Commissioner informed Intel that he had tentatively formed a “reason to believe” that a complaint should issue. Again, no suggestion was made that there was anything improper about this Commissioner’s participation in this matter.
- Finally, it is this Commissioner’s understanding that in the several days leading up to the Commission’s decision to vote out a complaint, Intel’s General Counsel had a number of conversations with the Chairman about this matter – including a conversation just a few hours before this motion was filed. At no time during those conversations did Intel ever suggest that this Commissioner’s participation in the matter was in any way improper.

It was not until the day before the Commission issued the administrative complaint – more than 18 months after the Commission authorized the use of compulsory process – that Intel, having unsuccessfully rolled the dice that this Commissioner’s participation would prevent the issuance of a complaint, moved to disqualify this Commissioner from participating.

The law is well established, however, that Intel cannot have its cake and eat it too. Motions to disqualify must be “filed with reasonable promptness after the ground for such a motion is ascertained.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *see also Santiago v. Ford Motor Co.*, 206 F. Supp. 2d 294, 298 (D.P.R. 2002) (“Section 455(a) requires that a party raise the issue of disqualification of the judge at the earliest moment after acquiring knowledge of the facts providing a basis for disqualification.”). This rule exists to prohibit parties from gaming the system. *Schurz Communs.*, 982 F.2d at 1060 (Posner, J.) (“Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them.”); *E. & J. Gallo Winery*, 967 F.2d at 1295 (noting that, although a judge has a self-enforcing duty to recuse himself, “it does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment before bringing the information to

the court's attention"). The Commission therefore "should be less inclined to grant a recusal when," as here, "the movant has waited until the last possible moment to bring up the recusal." *Santiago*, 206 F. Supp. 2d at 298.

For the foregoing reasons, the standards applicable to the disqualification of federal judges (and to FTC Commissioners) do not support disqualification here.

B. Office of Government Ethics Regulations

Intel also argues that the applicable OGE regulations, which the Commission's Rules of Practice incorporate by reference, 16 C.F.R. § 5.1, require this Commissioner's disqualification.

1. To begin with, those regulations apply the same "reasonable person" standard set forth in the body of law governing federal judicial disqualifications described above. *See* 5 C.F.R. § 2635.502(d) (requiring disqualification where an employee's participation in a particular matter "would raise a question in the mind of a reasonable person about his impartiality"). For the reasons discussed above, disqualification is not warranted.

2. Additionally, even if there were a basis to conclude that a reasonable person might question the Commissioner's impartiality, the OGE regulations establish that disqualification would nevertheless be improper for another reason. As Intel concedes, the OGE regulations specifically treat "the interest of the Government in the employee's participation" as a consideration that trumps even whether "a reasonable person may question the integrity of the agency's programs and operations." (Mot. at 4.) Given the circumstances in this case, this second consideration is also fatal to Intel's motion.

When former Chairman Majoras left the Commission in April 2008, the agency was left with just four Commissioners. Additionally, because Commissioner Kovacic recused himself from voting on the motion to issue the administrative complaint, the agency was left with just

three participating Commissioners on this important matter. The disqualification of this Commissioner, based on his representation of Intel more than a decade and a half ago, not only would deprive the Commission of his expertise and experience in handling complex antitrust litigation, but would also leave the Commission with just two active Commissioners as decision-makers on this very important matter. Moreover, there is no guarantee that those two Commissioners would agree, thus creating the risk that the Commission would be left with a 1-1 split on decisions that must be made at the Commission level. Not only would such an outcome be contrary to the public interest, but the result of having just two Commissioners (whether they agree or not) consider a matter of such importance far outweighs whatever impartiality Intel believes lingers here based on a representation that occurred a decade and a half ago.

The circumstances on the horizon will not necessarily improve in this regard. Commissioner Harbour's term expired in September 2009. For the time being, Commissioner Harbour has agreed to hold over until her successor is sworn in. Commissioner Harbour, however, is free to leave at any point regardless of whether her successor is sworn in. Moreover, although the President has nominated two new Commissioners and their hearings have taken place, it is unknown at this time (1) when their confirmations will take place, and (2) whether either of those Commissioners will have her own conflict (based on prior employment or financial assets) with this matter.

As the federal courts have recognized, these circumstances can and should factor into the calculus of whether the disqualification of a presidential appointee is appropriate. *See, e.g., Cheney v. United States Dist. Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J., in chambers) (holding that doubts should *not* be resolved in favor of recusal where recusal would mean the Court would be functioning with fewer than all nine justices and where it would risk the

possibility of a tie vote); *Center for Auto Safety v. FTC*, 586 F. Supp. 1245, 1250 (D.D.C. 1984) (noting, in the context of a regulatory commission, “if one member of such a commission is disqualified or recused, he cannot, under the law, be replaced, and the body may thus be left, as in this case, unable to make an effective decision by virtue of an even split” and that such a consideration should, in appropriate circumstances, bear on the disqualification analysis).

C. California Rules of Professional Conduct

Third and finally, Intel assert that Rule 3-310(E) of the California Rules of Professional Conduct (the bar to which this Commissioner is admitted) requires disqualification. This claim also fails for at least three different reasons.

1. First, the text of the Commission’s Disqualification Rule provides that a motion to disqualify “shall be determined in accordance with legal standards applicable to the proceeding in which the motion was filed.” 16 C.F.R. § 4.17(c). Intel does not cite (and, after much searching, this Commissioner has been unable to locate) any authority that supports Intel’s claim that the standard for a motion to disqualify should be governed by state ethics rules. Instead, the federal common law, *see, e.g., Cinderella Career & Finishing Schools*, 425 F.2d at 591, and the text of the applicable federal regulations, *see* 16 C.F.R. § 5.1 (incorporating OGE regulations by reference), supply the sum total of the law that governs this motion. There is no authority to show that Congress or the FTC intended for the disqualification of Commissioners of federal agencies to turn on the varying state bar rules, state advisory opinions, and state common law – particularly given that membership in any state bar (or any legal training) is not even a prerequisite to serve as a Commissioner in the first place.

2. Second, California did not intend for Rule 3-310(E) to apply in these circumstances. To start with, the rule’s text 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). This Commissioner, of course, accepted his “employment” as a Commissioner before the compulsory process was authorized in this matter. It was therefore impossible for this Commissioner to obtain Intel’s consent at that time. Even if such consent had been possible to obtain, however, Rule 3-310(E) does not clearly contemplate such “consent” in a situation where, in adjudicative proceedings, the Commissioner does not represent anyone, but is instead an arbiter. Here, the drafters intended for the rule to apply to a practicing lawyer who takes on a “representation” “adverse to a former” client.

Any doubt as to whether the rule applies only to cases where an attorney takes on an adverse representation is resolved by the rule’s heading, which is captioned: “avoiding the representation of adverse interests.” CRPC 3-310(E). Consistent with the rule’s text, nothing in that heading suggests that the rule was ever intended to apply to situations where a lawyer serves in a position akin to a federal judge and, therefore, is not “adverse” to either side. *See Gonzales v. Super. Ct. of Los Angeles County*, 3 Cal. 2d 260, 263 (Cal. 1935) (“It is an elementary rule of construction that chapter and section headings in the codes are entitled to considerable weight in interpreting the various sections and should be given effect according to their import, to the same extent as though they were included in the body of the law.”). Indeed, Intel’s citation to *River West*, 188 Cal. App. 3d at 1302-03 (Mot. at 9 n.4), underscores this point: that decision limits the rule that Intel invokes to “successive adverse representations.”

In short, Intel concedes that trying to apply Rule 3-310(E) to this Commissioner in his role as a Federal Trade Commissioner is like trying to pound a round peg into a square hole; it does not fit. (Mot. at 8 (“[N]o one can know now whether [Commissioner Rosch’s] consideration and decisions in this matter ultimately will be adverse”)) If the drafters of

Rule 3-310(E) had intended for the rule to apply to the disqualification of federal officials sitting as judges, the rule would state as much. It does not. The mental gymnastics that are required to shoehorn California's ethics rule into the analysis of when disqualification is appropriate under Commission Rule 4.17 prove too much.

3. Third, even if Rule 3-310(E) did supply a basis for disqualification here, Intel cannot prevail on the merits. As a threshold matter, this Commissioner must possess "confidential" information related to the merits of the pending case. Given that this Commissioner has not served as Intel's counsel for more than a decade and a half and Intel's own repeated descriptions about how quickly the technology and products are evolving, there is no reasonable basis to conclude that this Commissioner possesses any confidential information as Rule 3-310(E) contemplates.

CONCLUSION

For the foregoing reasons, this Commissioner declines to recuse himself from further participation in the Intel proceeding (Docket No. 9341).

December 18, 2009