547652

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	**PUBLIC**
INTEL CORPORATION,	)	Docket No. 9341
Respondent.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR A PROTECTIVE ORDER

We ask this Court to deny Intel's motion for a protective order from Complaint Counsel's First Notice of Deposition of Intel. Intel has been unwilling to offer anyone to testify on the basic facts supporting defenses it raised in its Answer and before this Judge at the initial status conference. After we noticed the deposition, Intel refused to negotiate on the terms of the deposition and simply refused to show up at the deposition. After the deposition date, Complaint Counsel informed Intel that it was in default, and Intel then filed this motion and has continued to refuse to produce anyone to testify on any fact related to the Notice.

Intel asserts that such a deposition would be duplicative of its interrogatory answers, that the requests are somehow vague, and that we are seeking legal and not factual testimony. These assertions are not correct. First, we now have Intel's answers to Complaint Counsel's First Set of Interrogatories, and we still do not have the entire factual basis for Intel's Second, Fourth, and Eighth defenses.[1] Intel failed to comply with the basic requirement of Rule § 3.12(b)(1)(i) to identify such facts in its Answer, nor did Intel disclose the factual basis for any of the statements in the first few pages of its Answer.[2] Second, asking for a deposition on the factual basis for

[1] Intel did respond factually to the Interrogatory related to its claimed Seventh Defense, and thus Topic 3 is no longer necessary.

[2] We did not move to strike the defenses because the precedent in this Court is to allow discovery on factual defenses and to address their merits after such discovery. *See, e.g., In*

claims made by Intel could not possibly be vague unless Intel's own assertions in the Answer were vague. Indeed, Complaint Counsel simply quoted Intel's own words from its Answer as the topics for the deposition. If Intel truly believes its own assertions are vague, then it underscores the need for a deposition on these topics. Finally, Intel's objections to the seeking of legal conclusions or expert opinions are irrelevant. We seek only facts, not opinions or legal conclusions and made that clear in the Notice and in repeated discussions with Intel's counsel. Thus, there are simply no legitimate grounds for Intel to refuse to be deposed on the factual basis of some of its claims and affirmative defenses in this case.

ARGUMENT

FTC Rule 3.33(c) provides for the deposition of a corporation or other entity. 16 C.F.R § 3.33(c). The wording of 3.33(c) is nearly identical to that of Federal Rule of Civil Procedure 30(b)(6). The purpose of corporate depositions under both 3.33(c) and 30(b)(6) is to provide "an ***added*** facility for discovery [that will] curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of relevant facts." *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) (citing the Federal Rules of Evidence Advisory Committee)(internal quotations omitted). The Respondent must "make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter." *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999); *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (a respondent has "an ***affirmative*** duty to make available 'such number of persons as will' be able 'to give complete, knowledgeable and binding answers' on its behalf.") (citing *Securities & Exchange Comm'n v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992).

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re Basic Research, LLC, et al., Dkt. 9318, Order on Complaint Counsel's Motion to Strike Respondents' Additional Defenses (Nov. 4, 2004).

Under the circumstances present here, there is no basis under the Rules for Intel to refuse to provide anyone for a § 3.33(c)(1) deposition. Rule § 3.31(c)(1) clearly allows Complaint Counsel to "obtain discovery to the extent that it may be reasonably expected to yield information relevant to . . . the defenses of any respondent." Intel claims, however, that the taking of one deposition will somehow be unreasonably duplicative because its lawyers have answered interrogatories on the same subject or that Complaint Counsel could try to get the same information later from unidentified Intel witnesses that have not been noticed for deposition. Neither of these claims has any basis.

"Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied." *In the Matter of MSC Software Corp.*, Docket No. 9299, (May 8, 2002) (*citing Schering Plough Corp*, 2001 FTC LEXIS 105, *3 (July 6, 2001); *see also Saller v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Blankenship v. Hearst, Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)). A "party seeking to quash a deposition in its entirety has a heavy burden of demonstrating good cause." *Id.* (*citing Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88 (N.D. Tex. 1994); *see also In the Matter of Polypore Int'l*, Docket No. 9327 (Order on Respondent's Motion for Leave) (Feb. 10, 2009).

The very cases Respondent relies on require Respondent to show undue burden by making a "particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gossar v. Soo Line R.R. Co.*, 2009 U.S. Dist. LEXIS 100931, *2 (S.D. Ind. 2009) (*quoting Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981)). Respondent made no such showing. It relied on little more than statements of the law and quotation from the FTC Rules. Respondent did not provide any underlying basis or factual consideration. Intel does not come close to meeting its "heavy burden" here.

1. The § 3.33(c)(1) Deposition Seeks Facts Supporting Intel's Claims and Defenses in its Answer to the Complaint.

The purpose of the 3.33(c) deposition at issue is to discover the facts (if they exist) supporting a few of Intel's defenses and allegations in its Answer to the Complaint. The general answers by Intel's Associate General Counsel in the Answer to Interrogatories simply are not sufficient for Complaint Counsel to prepare its case. For example:

Topic 1 asks for that any relief sought in the Complaint that would "'harm competition, injure consumers, interfere with valid contracts, and abrogate valid intellectual property rights'" (*quoting* from Intel's Second Defense). If Intel has a factual basis for this defense, we are entitled to know what it is. To date, Intel has not disclosed facts, including a single contract or supposed property right, on this topic.

Topic 2 asks for the "matters known or reasonably available to Intel" that Intel's conduct does not "'have a direct, substantial, and reasonably foreseeable effect on U.S. commerce.'" (*quoting* from Intel's Fourth Defense). Intel has provided no facts to support this defense. Instead, Intel has simply cited two opinions in a Delaware action but no facts.

Topic 4 asserts Intel's "legitimate business justifications" for the conduct alleged in the Complaint. To assert a "legitimate business justification" defense, "the defendant must prove that ***it was actually motivated by the asserted legitimate business objective*** and that in pursuing these objectives, it employed the least competitively restrictive alternative available to it." *State of Ill. ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.,* 730 F.Supp. 826, 932 (C.D. Ill. 1990), *aff'd* 935 F.2d 1469 (7th Cir. 1991) (citing cases) (emphasis added). Thus, we are entitled to know what reasons Intel executives had at the time in making the decisions outlined in the

Complaint.[3] The deposition is not targeted at what Intel's counsel may argue legally or what its experts may opine.

Finally, in Topic 5, Intel stated several supposed facts in its preamble to the Answer, such as "Decreasing Prices and Expanding Output" and "Dramatic Increases In Innovation." Intel even touted these supposed facts at the initial status conference with illustrative charts, and yet has refused to produce any witness on these topics. If Respondent does not have facts to support the claims it has already made in open court, it should say so under oath.[4]

The noticed deposition will thus yield information that is not only relevant, but material to the core issues of Respondent's defenses. Intel has not denied this at all.

2. The Noticed Rule 3.33(c) Deposition is Not Unreasonably Duplicative.

Respondent suggests that the Rule 3.33(c) topics are duplicative of information Complaint Counsel might gather from other discovery. For example, Intel suggests that we might be able to uncover this information through the aggregate depositions of multiple, unidentified Intel witnesses, and that we conduct those depositions before noticing Rule 3.33(c) depositions. Respondent, however, makes no showing that such a duplication, if it ever happens, is ***unreasonable***, as required by Rule 3.31(c)(i). By definition, any Rule 3.33(c) deposition will seek some information that could be discovered through other, although less efficient, means.

Rule 3.33(c) depositions, moreover, by their very nature, are not duplicative of other depositions. Respondent's obligation to prepare its designee to testify beyond matters that are within her personal knowledge provides "a qualitative difference in the testimony that one

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[3] Intel's response describing business justifications for conditional volume discounts is a scant three sentences and reads like a summary of abstract economic theory without any particular facts. Resp't Answer, 9.

[4] The remaining vague allegations raised by Intel in its preamble to its Answer can be dealt with through other discovery and mostly do not appear to be within the "matters known or reasonably available" to Intel except through non-Intel documents or testimony, if they are indeed true.

witness may give as an individual and as a Rule 30(b)(6) deponent." *Alloc, Inc. v. Unilin Decor N.V.*, 2006 U.S. Dist. LEXIS 65889, *8 (E.D. Wisc. 2006). Courts specifically reject the notion that a party may "review prior deposition testimony and designate it as *Rule 30(b)(6)* testimony." *Id. at* *8. Rule 3.33(c) expressly reserves that Rule 3.33(c) depositions shall "not preclude taking a deposition by any other procedure authorized in these rules." 16 C.F.R. § 3.33(c). Respondent's notion of duplication and burden, in addition to being unsubstantiated, is little more than an acknowledgement of exactly what Rule 3.33(c) is: an ***additional*** tool for discovery that imposes an ***affirmative*** duty on the respondent. If Respondent's arguments were enough to resist a Rule 3.33(c) subpoena, nothing would remain of the Rule.

Further, the Rule 3.33(c) deposition cannot be considered duplicative of other depositions, because no other depositions have taken place. Intel's refusal to produce even one witness on these topics has delayed discovery in this case. That has been Intel's strategy thus far. Fact discovery closes in less than three months and Intel has only produced a few documents related to three witnesses, some discovery collected in another case, and has delayed discovery in this case. On March 2, Complaint Counsel sent Respondent a list of Intel employees for deposition and proposed specific months in which to schedule groups of the depositions. *See* Attachment A (March 2, 2010 Letter from Kyle Andeer to Darren Bernhard). After nearly three weeks, Respondent had scheduled only seven of these.[5] Waiting until after those depositions have been conducted will not provide adequate time to conduct Rule 3.33(c) depositions within the discovery period. Waiting will also deny Complaint Counsel the opportunity to use other methods of discovery to further investigate Intel's assertions in the 3.33(c) deposition.

Respondent also argues that some of the topics in the 3.33(c) are duplicative of Complaint Counsel's Interrogatories. The fact that a topic could be served as an interrogatory

[5] Respondent has just begun to schedule additional depositions in advance of the status conference this week.

does not preclude the taking of a 30(b)(6) deposition. The cases Respondent cites that substitute interrogatories in the place of 30(b)(6) depositions are distinguishable and turn on facts not present here -- for example, if Complaint Counsel were seeking legal theories and not facts, which we are not.[6] Federal Courts have compelled 30(b)(6) depositions in circumstances similar to the one currently before the Court, "otherwise it is the attorney who is giving evidence, not the party." *Beckner v. Bayer Cropscience*, 2006 U.S. Dist. LEXIS 44197, *25 (S.D.W.V 2006)(ordering the defendant to produce a witness for 30(b)(6) deposition within fourteen days).[7] Written responses crafted by Respondent's Associate General Counsel, which still did not provide the facts we requested, are no substitute for the deposition of a knowledgeable witness. *See Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989). ("Nothing in the Federal Rules of Civil Procedure gives a party the right to not respond or inadequately respond to a Rule 30(b)(6) deposition notice or subpoena request and elect to supply the answers in a written response to an interrogatory . . . Because of its nature, the deposition process provides a means to obtain more complete information and is, therefore, favored.").

3. Complaint Counsel's Topics Satisfy Rule 3.33(c).

Complaint Counsel's Topics "describe with reasonable particularity the matters on which examination is requested." 16 C.F.R § 3.33(c). Respondent asserts that the deposition topics are unreasonably broad and vague. The topics noticed for deposition were taken directly and quoted, word for word, from Respondent's Answer and affirmative defenses, which was signed by Respondent's counsel, thus affirming that the factual statements are true under FTC Rule 4.2(f);

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[6] Those cases deal with topics seeking legal testimony (especially in patent litigation), which are not relevant in this case in which Complaint Counsel is not seeking legal theories in the deposition.

[7] *See also Uniram Tech., Inc. v. Monolithic Sys. Tech., Inc.*, 2007 U.S. Dist. LEXIS 24869 (N.D. Cal. 2007); *Canal Barge Co. v. Commonwealth Edison Co.*, 2001 U.S. Dist. LEXIS 10097 (N.D. Ill. 2001); *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996).

surely Respondent understands its own assertions. If Respondent's own assertions in its Answer to the Complaint are vague, as Intel now admits, that is even more reason for Complaint Counsel to take a 3.33(c)(1) deposition of Intel to discover what its actual defenses are, to the extent those matters are "known or reasonably available to" Intel. Intel should be able to provide witnesses on the affirmative defenses to specific allegations detailed in the Complaint and Intel's own Answer, which allegations Intel claims have been investigated and litigated for nearly a decade. *See, e.g.,* Intel's Seventh Affirmative Defense (Laches).

4. Complaint Counsel Does Not Seek Legal Conclusions or Expert Testimony.

Respondent also argues that some of the deposition topics seek discovery of Respondent's legal issues or expert opinions. This is not correct. Nothing in the Notice mentions legal theories or opinions of experts. Indeed, the plain language of Rule § 3.33(c)(1) (and its counterpart Rule 30(b)(6)) refers to "matters known or reasonably available to the organization." "Matters" are clearly facts, not legal theories. Courts have had no problem understanding this point. *See In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 172 (D.D.C. 2003) (The party "is obligated to produce one or more 30(b)(6) witnesses who were thoroughly educated about the noticed deposition topics with respect to any and all facts known to [the party] or its counsel"); *Int'l Ass'n of Machinists and Aerospace Workers v. Werner-Matsuda (IAMAW)*, 390 F. Supp.2d 479, 487 (D. Md. 2005) (detailing case law on this point).

The cases Respondent relies on to argue that the Rule 3.33(c) deposition notice should be disallowed actually emphasize Complaint Counsel's point – that these kinds of depositions are for facts.[8] Courts that deny depositions on legal issues compel them on factual issues. *See, e.g.*

[8] *King Pharmaceuticals* denied a motion to compel because the deposition did "not seek to elicit underlying facts." *King Pharms., Inc. v. Eon Labs, Inc.*, 2008 U.S. Dist. LEXIS 98299, *3 (E.D.N.Y. 2008). Similarly, the deposition topics in *J.P. Morgan Chase v. Liberty Mut.* sought facts that the deponent specifically identified as having legal import. 209 F.R.D. 361, 363 (S.D.N.Y. 2002). The same was true in *Nicholas v. City of New York.* 2009 U.S. Dist.

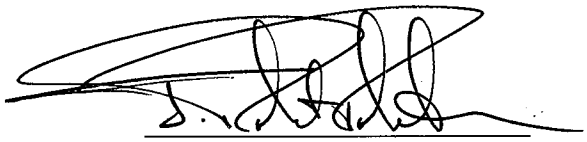
Alloc, Inc. v. Unilin Decor N.V., 2006 U.S. Dist. LEXIS 65889, *5 (E.D. Wisc. 2006)(Denying 30(b)(6) discovery on legal theories but compelling them on factual issues). Complaint Counsel has been clear to Intel that it wants testimony on facts, and Intel has refused to produce anyone for a deposition on these topics.

CONCLUSION

Respondent has failed to offer any witness on any facts for any topic in the § 3.33(c)(1) deposition notice, does not dispute that the deposition would yield relevant information, and has failed to articulate any grounds whatsoever for its claim that the deposition would be unduly burdensome and expensive. Intel's motion should thus be denied, and the deposition should proceed without delay. A proposed order is attached.

March 24, 2010

Respectfully submitted,



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LEXIS 4366. (E.D.N.Y. 2009). *FTC v. Cyberspy* dealt with a subpoena ***to the FTC***, which is expressly disallowed under 3.33(c). 2009-2 Trade Cas. (CCH) P76,772. (M.D. Fla. 2009).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER DENYING INTEL'S MOTION FOR PROTECTIVE ORDER

Upon consideration of the briefs and arguments of the Parties, it is hereby

ORDERED, that Intel's Motion for Protective Order is DENIED, and it is further

ORDERED, that Intel provide a Rule § 3.33(c)(1) witness for deposition on Topics 1, 2, 4, and the assertions in its Answer regarding "Decreasing Prices and Expanding Output" and "Dramatic Increases in Innovation" no later than April 6, 2010.

D. Michael Chappell
Chief Administrative Law Judge

Dated: _____

CERTIFICATE OF SERVICE

I certify that I filed via hand and electronic mail delivery an original and two copies of the foregoing Opposition to Respondent's Motion for Protective Order with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

I also certify that I delivered via electronic and hand delivery a copy of the foregoing Opposition to Respondent's Motion for Protective Order to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing Opposition to Respondent's Motion for Protective Order to:

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Counsel for Defendant
Intel Corporation

March 24, 2010

By: Terri Martin
Terri Martin
Federal Trade Commission
Bureau of Competition

ATTACHMENT A

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March 2, 2010

Via Email & Hand Delivery

Via email

Darren B. Bernhard, Esq.
Howrey LLP
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Washington, DC 20004-2402

Re: *Intel Corporation*, Docket No. 9341

Dear Darren:

Pursuant to our discussions and paragraph 9 of the Scheduling Order, we prepared a preliminary list of Intel personnel that we tentatively plan to depose and the discovery period during which we want to depose them.

As you realize, we both thought it would be a good idea to provide this list immediately even though we have not received any documents from Intel in response to our first document requests. We will work with you to reduce the number of Intel deponents after we have received and reviewed that production.

We understand that some of these individuals are no longer employees of Intel. We ask that you identify those individuals who are now former Intel employees and let us know if you will represent them and if you are authorized to accept service of the subpoena of that person.

The witnesses are listed in four groups. For each deponent we ask you to identify a specific date during the designated period for his or her deposition and the preferred location for the deposition, *i.e.,* the Federal Trade Commission's offices in Washington, D.C. or San Francisco. We generally prefer that the depositions scheduled for a week all be conducted in one of the two offices. We will try to honor your preference for the time and place of each deposition, so long as it is consistent with our discovery needs and staffing plans.

March Depositions. We identified seven individuals whom we will depose the week of March 22. We are prepared to take two depositions a day but, if necessary, we will consider

deposing a couple of these witnesses either late the week of March 15 or early the week of March 29.

April Depositions. We identified approximately thirty individuals whom we will depose in April. At this time we are not sure we will need to take the depositions of all of these individuals.

May Depositions. We identified approximately fifteen individuals whom we will depose in May. At this time we are not sure we will need to take the depositions of all of these individuals.

June Depositions. We identified nine individuals whom we will depose in June.

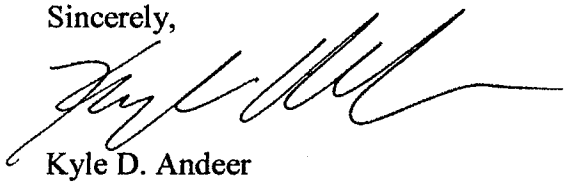
We have identified several individuals as potential deponents largely on the grounds that they appear on Intel's preliminary witness list. We regard it as less likely that we will depose thee individuals (marked with a "*") if Intel does not include them on its April witness list.

We prepared this list for your convenience. Our provision of this list does not limit our discretion to notice the depositions of other Intel directors, officers, or employees. As we have discussed, we expect Intel will prioritize the production of documents from the potential deponents who are named document custodians in this litigation. Also, we will depose these individuals regardless of any agreement we may reach regarding the parties' use of the deposition transcripts from the *AMD* litigation.

We plan to notice the depositions of the "March Depositions" no later than March 12, so we ask that you provide us the proposed dates them by March 10.

Thank you for your cooperation.

Sincerely,



Kyle D. Andeer

Enclosure

Complaint Counsel Preliminary List and Schedule of Intel Depositions

Mar. 9, 2010: Intel Corp. Depo	March 22-April 2	April Witnesses	May Witnesses	June Witnesses
	Cordyn, Martin	Bigbee, Bryant	* *Baker, Robert*	Barrett, Craig
	Friedman, Ron	Boles, Mark	Bhatt, Ajay	Chandrasekher, Anand
	Ganesh, Sudha	Burns, Louis	Bryant, Andy	Gelsinger, Pat
	Hoogenboom, Jeffrey	Cadambi, Bala	Carmean, Douglas	James, Renee
	Reilly, Jeff	Crooke, Robert	Conrad, Deborah	Shervin Kheradpir
	Thornburg, Ron	Dalal, Huzaifa	Johnson, James A.	Maloney, Sean
	Tuhy, David	Dunford, Matt	Kilroy, Thomas	Otellini, Paul
		Eden, Shmuel	* *Loza, Tom*	Perlmutter, David
		Hayak, George	Malinowski, Richard	Rattner, Justin
		Howard, John	* *Marty, Uday*	
		Kyser, Dan	Mentzer, Eric	
		* *Lacey, Tom*	* *Myers, Greg*	
		McGowen, Steve	Pann, Stuart	
		* *Parker, Matthew*	Roehm, Arthur	
		* *Parker, Tim*	Smith, Kevin J.	
		Peleg, Alex	Swope, Will	
		* *Polaski, Alan*	* *Talwalkar, Abhi*	
		Prince, Tim	Taylor, Phil	
		* *Puffer, David*	Valerio, Jim	
		Singh, Amandeep	Walker, Chris	
		Smith, Kevin B.	Whiteside, Don	
		Strong, Rob	Wiley, Paul	
		Tripaldi, Jeff	* *Wolf III, Joe*	
		April 26- May 5		
		Balogh, Steve		
		Grimsrud, Knut		
		Martinez, Alberto		
		Ravencraft, Jeff		
		Ziller, Jason		

* denotes Intel executives that we may not need to depose depending on developments in this matter and other discovery

This list is a preliminary good faith determination of the Intel executives Complaint Counsel believes it will need to depose in this matter. Complaint Counsel reserves the right to depose additional Intel executives that do not appear on this list.