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 TO QUASH SUBPOENA *DUCES TECUM* SERVED BY INTEL CORPORATION

I.

On May 10, 2010, non-party Hewlett-Packard Company ("HP") submitted a motion to quash the subpoena *duces tecum* served on it by Intel Corporation ("Respondent" or "Intel") on March 11, 2010.[1] Respondent submitted its Opposition on May 17, 2010. For the reasons set forth below, HP's motion to quash is DENIED. However, the subpoena *duces tecum* served on HP by Intel ("Intel Subpoena") will be limited as described herein. In addition, HP's alternative request for reimbursement of costs for complying with the Intel Subpoena is also DENIED, as further explained below.

II.

HP states the Intel Subpoena includes 58 separate requests for documents that, in some instances, seek documents regarding subjects about which HP previously produced documents in private antitrust litigation. HP explains that Advanced Micro Devices, Inc. ("AMD") and class action plaintiffs previously brought antitrust actions against Intel involving allegations similar to those raised in the instant matter and that because HP produced over 230,000 pages of documents in that litigation, no additional discovery from HP is appropriate in this matter. HP also argues that the Intel Subpoena seeks documents that are already in the possession of Intel itself, and/or are better obtained from some other source more convenient than HP. Based on the foregoing, HP contends that the Intel Subpoena is unduly burdensome.

HP additionally argues that, if the Intel Subpoena is not quashed in its entirety, Intel should be required to reimburse HP for all of its costs and expenses incurred in responding to the Intel Subpoena.

[1] Pursuant to a series of unopposed motions, HP received extensions of time to submit a motion to quash the Intel Subpoena through May 10, 2010.

Respondent states that the Intel Subpoena seeks documents that are definite in scope and relevant to the allegations of the Complaint and Intel's defenses thereto. Respondent explains that it expects to defend a case that is broader than the private litigation and involves more recent time periods, different products, and different alleged conduct. Respondent argues that the Intel Subpoena seeks documents that are not duplicative of documents produced in the AMD litigation because it seeks documents on new topics and new time periods in the FTC's Complaint, and from new witnesses that Complaint Counsel has identified on its trial witness list. Respondent states that on April 19, 2010, it sent HP a letter, attached as Exhibit C to HP's motion to quash, proposing to narrow the Intel Subpoena, using a finite number of custodians and search term protocols. According to Respondent, its April 19, 2010 proposed modification asks for new central processing units ("CPU") documents for a time period more recent than HP's production in the AMD case and from custodians whose files HP did not produce in that case. Thus, Respondent argues, the Intel Subpoena, as modified by the April 19, 2010 letter, is not unduly burdensome.

In addition, Respondent states that, where non-parties are industry participants with an interest in the outcome of the proceeding, non-parties are only entitled to reimbursement for copying costs, not the costs of review and production. Respondent states that it is willing to share one-third of production costs, with HP and Complaint Counsel also bearing one-third of production costs.

III.

A.

Under Commission Rule 3.31(c), "[p]arties 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 defenses of any respondent. . . . [Discovery] shall be limited by the Administrative Law Judge if he or she determines that: [t]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." 16 C.F.R. § 3.31(c). In addition, an Administrative Law Judge may enter an order to protect a party or non-party from undue burden or expense. 16 C.F.R. § 3.31(d).

HP does not argue that the discovery sought by the Intel Subpoena is not relevant, but instead argues only that the request is unduly burdensome because it seeks documents regarding subjects about which HP has already produced thousands of pages of documents. "The burden of showing that the request is unreasonable is on the subpoenaed party." *FTC v. Dresser Indus.*, No. 77-44, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. April 26, 1977). "Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* (enforcing subpoena served on non-party by the respondent). *See In re Kaiser Alum. & Chem. Corp.*, No. 9080, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976) ("Even where a subpoenaed third party adequately demonstrates that compliance

with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.").

Respondent has demonstrated that, as modified by Respondent's April 19, 2010 letter, the Intel Subpoena will not subject HP to duplicative discovery efforts by requiring HP to produce documents that it already produced in the AMD litigation. Respondent's proposal of April 19, 2010 narrows the requested documents relating to CPUs to only new CPU-related documents from either custodians whose files were not produced during the AMD litigation or more recent CPU-related documents than those produced in the AMD case. The April 19, 2010 proposal also reduces the number of GPU and chipset requests and proposes that HP identify six custodians most likely to have responsive documents.

"The law is clear that a recipient of a subpoena *duces tecum* issued in an FTC adjudicative proceeding who resists compliance therewith bears a heavy burden." *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96, at *15 (Mar. 19, 1982). 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. HP has not demonstrated that the Intel Subpoena, as modified by the April 19, 2010 letter, is unduly burdensome. Accordingly, HP's motion to quash the subpoena is DENIED. HP shall comply with the Intel Subpoena, as narrowed by Intel's April 19, 2010 letter, and is not required to produce documents to Intel that it previously produced in the AMD litigation. HP shall produce the required documents no later than June 1, 2010, or such alternative date to which the parties may agree.

B.

HP argues additionally that, if the Intel Subpoena is not quashed in its entirety, Intel should be required to reimburse HP for all of its costs and expenses incurred in responding to the Intel Subpoena. In agency actions, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13. The Commission has held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." *In re Int'l Tel. & Tel. Corp.*, No. 9000, 1981 FTC LEXIS 75, at *3 (March 13, 1981); *see In re North Tex. Specialty Physicians*, Docket No. 9312, 97 F.T.C. 202, 2004 FTC LEXIS 18, at *7 (Feb. 4, 2004) (denying cost reimbursement because the subpoena did not impose an undue burden on the non-party); *In re R.R. Donnelley & Sons Co.*, No. 9243, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena").

To determine whether expenses are "reasonable," the Administrative Law Judge

"should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *In re Int'l Tel. & Tel. Corp.*, No. 9243, 1981 FTC LEXIS 75, at *3 (March 13, 1981) (*citing SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979)). HP has offered no information regarding its size and resources. According to Respondent, HP had sales of over $114 billion last year. HP has not provided an estimated cost of compliance. Accordingly, HP has failed to provide any basis for evaluating whether HP's expenses of compliance with the Intel Subpoena would be unreasonable.

Moreover, even if the subpoenaed party has shown that its costs of compliance are unreasonable, "where the non-party is in the industry in which the alleged acts occurred and the non-party has [an] interest in the litigation and would be affected by the judgment, only the cost of copying, and no other costs of the search, need be reimbursed." *In re Flowers Indus., Inc.*, 1982 FTC LEXIS 96, at *16-17. HP is named in the Complaint as one of the Tier One Original Equipment Manufacturers to whom Intel directed allegedly exclusionary conduct. Complaint ¶¶ 49-52. Thus, it appears that HP has an interest in the litigation.

HP has not demonstrated that its costs to comply with the subpoena would be unreasonable. Accordingly, HP's request for reimbursement of all of its costs and expenses incurred in responding to the Intel Subpoena is DENIED.

IV.

For the reasons stated herein, HP's motion to quash and request in the alternative for costs are DENIED. HP is directed 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.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 19, 2010