UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

MOTION TO ADMIT EUROPEAN COMMISSION DECISION[1]

Complaint Counsel moves to admit into evidence the European Commission's ("EC") decision that condemned Intel's conduct in the CPU markets as a violation of Article 82 of the EC Treaty, the European Union's anti-monopoly law.[2] The EC made detailed findings of fact regarding market definition, Intel's market power, and the existence of Intel's exclusionary arrangements with certain OEMs that are both relevant and material to this case.

By this motion we do not suggest the decision is somehow binding here; this Court will make its own decision based on all the evidence the parties submit. Nor does this motion ask the Court to assess (and the parties need not brief the issue of) the evidentiary weight the Court should give the EC decision. The sole issue presented by this motion is whether the EC decision is admissible

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1 We raise this motion now to ensure that Respondent has a full opportunity to respond to this evidence. In a March 15, 2010, telephone conversation between Darren Bernhard, counsel for Intel, Complaint Counsel was advised that Respondent opposes this motion, and the parties reached an impasse. This motion complies with FTC Rule of Practice, 16 C.F.R. §3.22 (c).

2 We request *in camera* treatment of the confidential version of the decision (CX0243). See Affidavit of Thomas H. Brock Esq. (Attachment A). The confidential version includes some limited redactions that were requested by Intel or a third party as a condition to the EC's release of the decision to the FTC. We must emphasize that many paragraphs in CX0243 are subject to the confidentiality laws of the EC, which should be observed in this litigation. We also submit the public version of the decision as evidence in this matter (CX0244).

evidence.

We believe that, under the law, the EC decision should be considered as part of the evidentiary record in this case. The decision is "[r]elevant, material, and reliable." Rule 3.43(b). It also falls squarely within Rule 803(8)(C) of the Federal Rules of Evidence. The federal courts have consistently admitted the EC's Statement of Objection ("SO") into evidence under Rule 803(8)(C). If a SO, which is the preliminary finding before the Final Decision of the EC, is admissible under the Federal Rules of Evidence, surely the ***final*** EC Decision should be admissible in a hearing governed by the Part 3 Rule and Administrative Procedures Act.

Federal Rule of Evidence 803(8)(C) allows the admission of "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law" such as the EC decision. The U.S. Supreme Court, in *Beech Aircraft Corp. v. Rainey*, held that decisions of administrative law judges and other executive fact-finders are "admissible along with other portions of the report[s]." 488 U.S. 153, 170 (1988). The Court explained that Rule 803(8)(C) allows the admissibility of "factual findings" as well as "conclusions" and "opinions that flow from the factual investigation." *Id.* at 164. The admissibility of evidence covered under Rule 803(8)(C) "is generally favored." *Gentile v. County of Suffolk*, 926 F.2d 142, 148 (2d Cir. 1991).

The federal courts have admitted the EC's Statement of Objections ("SO") pursuant to 803(8)(C). In *Information Resources, Inc. v. The Dun & Bradstreet Corp.*, 1998 WL 851607 (S.D.N.Y. 1998), the Court admitted the EC's SO under Rule 803(8)(C), because "[t]he circumstances do not indicate any lack of trustworthiness, and to the extent that the [SO] represents conclusions, it is 'subject to the ultimate safeguard-the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions.'" *Id*. at *1. And, in a decision published in December 2009, Judge Underhill admitted a SO into evidence despite the fact that the EC had

subsequently *closed* the matter without issuing a final decision. *Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, 2009 WL 5218057, 2009-2 Trade Cases P 76,855, at *9-11(D. Conn. 2009). Courts also have admitted the decisions of other foreign tribunals. For example, the Third Circuit admitted the "recommended decision" of the Japanese FTC as evidence under Rule 803(8)(c). *In re Japanese Elec. Products*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. on other grounds, Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986). The court found that the decision was "unquestionably . . . sufficiently trustworthy for admission under Rule 803(8)(C)." *Id.* 272-74. The Third Circuit held that "such reports of investigations are presumed to be reliable." *Id.* at 265, 273.

I. The EC's Decision Is Trustworthy

Once a party shows that the "evidence" contains "factual findings . . . based upon an investigation made pursuant to legal authority," the "admissibility of such factual findings is presumed." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000). "The burden to show 'a lack of trustworthiness then shifts to the party opposing admission." *Id.* Among the factors to be considered are (1) the finality of the decision; (2) the timeliness of the investigation; (3) special skills or experience of the official; (4) whether a hearing was held and level at which it was conducted, and (5) possible motivation problems. *Id*

The EC's 447 page decision relied on the report of a hearing officer and a 4000 document record that included submissions from Intel, original equipment manufacturers ("OEMs"), and other third parties. Decision ¶37.[3] The EC's factual findings are trustworthy because (1) the decision

[3] The Supreme Court described the European process and analogized it to the Federal Trade Commission:

> If the DG-Competition decides to pursue the complaint, it typically serves the target of the investigation with a formal "statement of objections" and advises the target of its intention to recommend a decision finding that the target has violated European

here is in its final form; (2) the decision is the product of an independent administrative proceeding; (3) there is no indication that the decision was not completed in a timely manner; (4) the decision was based on a record of ascertainable and verifiable facts; and (5) the report was issued by the EC Commissioner for Competition, Neelie Kroes, the highest Commission official directly responsible for antitrust matters.[4] *See EPDM Antitrust Litigation*, 2009 WL 5218057, 2009-2 Trade Cases P 76,855, at *45.

Intel has publicly attacked the EC decision. First, it claims the EC was "predisposed" to rule against Intel. The EC decision was reached after years of investigation and relied on submissions and testimony from OEMs, Intel and other market participants. Intel was given multiple opportunities to submit responses to the EC and present evidence and economic testimony to support its claims. Intel's attack seems to be driven by its unhappiness with the outcome rather than evidence of bias on the part of the EC. Second, Intel accused the EC of "suppressing" *potentially* exculpatory evidence. An independent review of Intel's claims by the EC Ombudsman did not find that the EC suppressed exculpatory evidence.[5] The Ombudsman's report did chastise the EC for "maladministration" for its failure to include the notes of a meeting with Dell in 2006 in its official

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> competition law. EC. *Amicus Curiae* 7. The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. *Ibid.;* App. 18-27. Once the DG-Competition has made its recommendation, the EC may "dismis[s] the complaint, or issu[e] a decision finding infringement and imposing penalties." EC A*micus Curiae* 7.

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 254-55 (2004).

[4] The European Commission Advisory Committee, with representatives from over twenty European countries, also concurred in the decision. Opinion of the Advisory Committee (Sept. 22, 2009) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XX0922%2802%29:EN:NOT.

[5] Decision of the European Ombudsman Closing his Inquiry 1935/2008/FOR (July 14 2009) *available at* http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark.

case file. However, it did not find that Intel's rights were infringed and allowed the decision to stand.

Intel also publicly suggested that the decision is inconsistent with "evidence" that "microprocessor" prices have fallen dramatically over the last decade. Intel has emphasized the same data from the United States Bureau of Labor Statistics ("BLS") in its Answer to the Complaint in this case. That data is irrelevant to this case. The BLS "microprocessor" pricing data aggregates the prices of *any* product classified as a "microprocessor" by a manufacturer participating in the survey – and includes, for example, the billions of embedded microprocessors used in cell phones, cars, and televisions. The inclusion of these non-relevant products renders the BLS data meaningless here. That flaw is compounded by the fact that Intel has *never* submitted its pricing data to the BLS. Respondent's PUBLIC Answers to Complaint Counsel's Requests for Admission 8 (Mar. 1, 2010). The data is both over-inclusive in that it includes the prices of billions of products that are not in the relevant market and under-inclusive in that it does not include Intel's prices.

Nevertheless, for the purposes of this motion, it does not matter whether Intel believes it can refute the evidence contained in the EC decision. That is the purpose of the trial. *See Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1481-83 (D.C. Cir.1991) ("The district court [properly] decided that KAL's trustworthiness objections were more properly addressed to the jury for purposes of evaluating the weight to be accorded" the report.). The only question before the Court at this time is whether the evidence is admissible.

II. The EC Decision Is Material and Relevant

The EC's factual determinations are material and relevant to many of the alleged facts in the Complaint. The EC made findings of fact regarding market definition, Intel's market power, and the existence of Intel's exclusionary arrangements with certain OEM's not to do business, or to do less business, with Intel's competitors.

EC Finding: Intel is a Dominant Firm. The EC's assessment of Intel's market power is relevant to this case. The approach under European law largely mirrors the American approach. *Compare* Decision ¶¶792-912 *with United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001); *In the Matter of Polypore Int'l, Inc.*, Docket No. 9327, Initial Decision at 303 (Mar. 1, 2010) ("Polypore Initial Decision").

The EC found that the demand substitution evidence supported separate markets for (1) x86 CPUs for desktop computers; (2) x86 CPUs for laptop computers; and (3) x86 CPUs for server computers. Decision ¶799 ("customers do not, in general, regard CPUs for desktop computers, CPUs for laptop computers and CPUs for servers as substitutes on the demand side, and indeed, the prices of CPUs for those three different segments vary significantly."); *see also* ¶¶795-798, 815, 833-835. However, the EC found that its analysis would remain unchanged even if the market was x86 CPUs for all computers. The EC found that the evidence did not support Intel's argument that the market should include non-x86 CPUs or embedded CPUs used in non-computer devices. *Id.* ¶¶803-808, 821-824 (non-x86 CPUs); 809-813, 825-830 (embedded CPUs). There was no dispute that the relevant geographic market was worldwide. *Id*. ¶836.

The European market power analysis, like that in the United States, relies on an assessment of market shares and entry barriers. *Compare* Decision ¶840, *with* Polypore Initial Decision at 303-305 (explaining that "monopoly power may be inferred from a firm's possession of a dominant share of a relevant market"). The EC found Intel was dominant in all four relevant markets given its overwhelming market shares and the significant barriers to entry in those markets. Intel's share of revenues in the relevant markets ranged from REDACTED for the overall x86 market, REDACTED for the desktop x86 market, REDACTED for the laptop x86 market, and

for the x86 server market between 1997 and 2008.[6] Decision ¶44-45 (overall); ¶847 (desktop); ¶849 (laptop); ¶851, (server); Charts 1a-4b (excerpted below). Market shares in excess of 70% not only support a finding of "dominance" under European law but they also support a finding of monopoly power under American law. *Compare* Decision ¶ 852, *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a *prima facie* case of market power"); Polypore Initial Decision at 310.

REDACTED

[6] Intel has admitted that its share of the overall market (desktop, notebook, and server) has consistently exceeded 65 percent; that its share of the desktop market has consistently exceeded 70 percent; and that its share of the notebook market has consistently exceeded 80 percent during the relevant time period. Respondent's PUBLIC Answers to Complaint Counsel's Requests for Admission (1-4) (Mar. 1, 2010).

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The EC found that there were significant barriers to entry in the relevant markets. Decision ¶¶853-882. Those entry barriers included the substantial research and development costs, the intellectual property rights, the costs associated with a manufacturing facility, scale economies, and reputation. *Compare* Decision ¶¶854-867 *with Microsoft*, 253 F.3d at 51; Polypore Initial Decision at 272-277 (significant barriers to entry included significant capital investment, technical expertise, and reputation). Intel did not contest the EC's findings on barriers to entry. Decision at ¶881.

Intel argued that regardless of its overwhelming market shares and the significant barriers to entry in these markets, it did not have market power. For example, Intel suggested that the OEMs enjoyed sufficient negotiating leverage to discipline Intel. The EC disagreed and found that Intel is an unavoidable business partner. *Id.* ¶886. OEMs have no choice – they have to trade with Intel. *Compare* Decision ¶¶894, 905 *with* Polypore Initial Decision at 289 ("At a basic level, customers

must have alternative suppliers in order to have any real bargaining power.").

EC Finding: Intel Entered into Exclusionary Arrangements with OEMs. The EC's assessment of Intel's arrangements with Tier One OEMs is also relevant to this case.

The EC found that Intel entered into *de facto* exclusive arrangements with Tier One OEMs in an effort to limit or foreclose the adoption of AMD.[7] The decision relied on a number of Intel and OEM documents to support its findings that Intel had *de facto* exclusive arrangements with Dell, HP, NEC, and Lenovo. Decision ¶926. For example, the EC found that Intel conditioned billions of dollars of rebates to Dell in return for Dell's commitment to purchase CPUs exclusively from Intel. *See* Decision ¶¶187-242; Table 5 (p. 68); Table 6 (p. 69); ¶¶927-950. The *de facto* exclusive arrangement with Dell alone foreclosed AMD from REDACTED of the overall x86 CPU market. Decision ¶182. The EC also detailed Intel's conditioning millions of dollars for exclusivity or near exclusivity at HP, NEC, and Lenovo. Decision ¶¶325-413 and 951-972 (HP); 455-503 and 973-981 (NEC); 508-546 and 962-972 (Lenovo).

The EC addressed Intel's payments to OEMs in exchange for their commitment to delay, cancel or in some other way restrict the release of specific AMD-based products. Decision ¶¶1641-1681. For example, Acer planned to launch both a desktop and notebook based on AMD's 64-bit Athlon in fall 2003. *Id.* ¶415. The EC found that Acer postponed, and later canceled, the launches of these AMD-based products after Intel threatened to reduce its payments to Acer. *Id.* ¶¶418- 435; 1659-1662. The EC also discussed Intel's arrangements with Lenovo and HP to limit the adoption of AMD. *Id.* ¶¶1645-1658 (HP); 1663-1666 (Lenovo). The EC's factual findings would support a violation of either Section 5 or Section 2. *Microsoft*, 253 F.3d at 62 ("the anticompetitive effect of

[7] This claim mirrors U.S. law on this point. *See FTC v. Brown Shoe Co*., 384 U.S. 316, 320-21 (1962) (discussing the legality of exclusive dealing under Section 5 of the FTC Act); *Microsoft*, 253 F.3d at 70 (exclusive and partial exclusive deals entered into by a monopolist can violate Section 2); *LePage's v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003).

the license restrictions is, as Microsoft itself recognizes, that OEMs are not able to promote rival browsers . . ."); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002).

The EC decision contains other relevant factual findings regarding the CPU industry and Intel. For example, there is a helpful description of CPU products and the manufacturing process. Decision ¶¶105-148, Table 4. The EC found that AMD's CPUs enjoyed a performance and price advantage over Intel between 2002 and 2006. Decision ¶¶150-159 (AMD had "CPU of [the] year [for] 3 consecutive years"; "In Dell's perception [AMD's Opteron CPU] generally performed approximately 25% better than the comparable Intel Xeon CPU at the time"). The decision highlights the fact that very few of Intel's sales are documented in a single written contract. Deals worth hundreds of millions and even billions of dollars were agreed to orally and can only be documented by piecing together a number of separate emails and powerpoints. Decision ¶¶167-169.

CONCLUSION

The EC's factual findings are relevant, material and reliable, and hence are clearly admissible as evidence within Rule 3.43(b) of the FTC's Rules of Practice. Accordingly, we respectfully ask that the EC decision be admitted into evidence as CX0243 (in camera) and CX0244 (public).

March 17, 2010

Respectfully submitted,

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Attachment A

AFFIDAVIT

I, Thomas H. Brock, state as follows:

1. I am a Senior Litigator, Office of Director, Bureau of Competition, Federal Trade Commission, and I have entered an appearance in In Re: Intel Corp., Docket No. 9341.

2. The European Commission (EC) issued a decision in a case filed against Intel Corporation, COMP/C-37.990 on May 13, 2009.

3. The public version of the EC decision is available at **http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf** We have designated a copy of this public document as CX 0244. This public version includes redactions of numerous facts relevant and material to the EC decision that Intel, the third parties, or the EC considered confidential.

4. The FTC asked the EC to provide it a complete version of its decision. However, the confidentiality rules of the EC are generally more stringent than those applicable in Part 3 proceedings. The EC had to obtain waivers from Intel and the third parties that had provided the confidential information cited or quoted in the EC decision before the EC released the decision to the FTC.

5. I understand that the EC asked Intel and third parties to identify any objections they had to the release of a complete version of the EC decision to the FTC. This request was made with the understanding that, if the EC released a complete version to the FTC that contained redacted information, the FTC would maintain the confidentiality of all information that had been redacted in the EC's public version of its decision.

6. I understand that, with certain exceptions, Intel and the third parties agreed to the EC's release of a complete version of its decision to the FTC, but only on the condition that the FTC treat as confidential the portions of the decision that the EC had redacted in its public version. In addition, Intel and a third party, NEC, specifically objected to the release of the decision to the FTC unless the EC redacted a few discrete portions of its decision.

7. The EC provided the FTC a copy of its decision, which we have designated as CX 0243. This is a complete version of the EC decision, but with the redaction of the portions of the decision requested by Intel and NEC.

8. The EC released the complete version of its decision to the FTC on the condition that, and based on an express agreement that, this version would be given confidential treatment and would not be publicly released if the FTC submitted this in any proceedings filed against Intel.

9. The FTC and EC regularly exchange information regarding their investigative efforts and enforcement actions. This exchange of information is vital to the efforts of both the EC and the

FTC to enforce the antitrust laws. If the FTC does not maintain the confidentiality of the portions of CX 0243 that the EC redacted in its public version of the decision, it would impede the ongoing cooperative efforts of the FTC and the EC.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on: March 16, 2010

Thomas H. Brock

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER ADMITTING EUROPEAN COMMISSION DECISION

Upon motion of Complaint Counsel and consideration of the arguments in support and in opposition to the motion, it is hereby

ORDERED, that CX0243 meets the standards for *in camera* treatment and is admitted into evidence, and shall be afforded *in camera* treatment indefinitely, and it is further

ORDERED, that CX0244 is admitted into evidence.

_____
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 Motion to Admit European Commission Decision 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 Motion to Admit European Commission Decision 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 Motion to Admit European Commission Decision to:

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March 17, 2010

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