

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

INTEL CORPORATION,

a corporation.

File No. 061-0247

MOTION OF INTEL CORPORATION FOR DISQUALIFICATION OF
COMMISSIONER J. THOMAS ROSCH

PUBLIC

Pursuant to 16 C.F.R. § 4.17, Intel Corporation respectfully moves for the disqualification of Commissioner Rosch from participation in any adjudicative proceeding against Intel, including voting on whether to issue a complaint. Commissioner Rosch was Intel's primary outside counsel on antitrust matters for at least six years and personally advised Intel on many antitrust issues and practices, regarding which the Commission has now threatened to sue Intel.

Motions to disqualify a Commissioner from an adjudicative proceeding “shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.” Rule 4.17(c).¹ Intel has no reason to doubt that Commissioner Rosch sincerely believes he can be fair and objective with respect to his former client. But three legal standards require that Commissioner Rosch be recused: Office of Government Ethics (OGE) regulations, recusal standards applicable to judges and FTC Commissioners alike, and legal ethics rules. Commissioner Rosch's participation would raise serious questions about the fairness of the proceeding—whether the result is favorable or unfavorable to Intel.

BACKGROUND

Commissioner Rosch served as Intel's primary outside antitrust counsel from about 1987 until Intel decided to change antitrust counsel in mid-1993. Exhibit A (Declaration of James A. Murray) ¶ 2. He advised Intel on a broad array of antitrust matters, including matters requiring application of many of the same doctrines at issue here: market definition in microprocessors; standards for determining monopoly power; pricing conduct, including predatory pricing and bundling; the “exclusive dealing” doctrine; the scope of any duty to deal with rivals; antitrust

¹ We file under Rule 4.17 because we understand a vote to commence Part 3 proceedings might be imminent. *See* Rule 3.11(a). If the Commission believes a motion under that Rule is premature, the same arguments herein would apply to Part 2 proceedings. *See* Rule 5.1(a).

implications of product design decisions; intellectual property licensing; and various other IP-related antitrust issues. *Id.* ¶ 3. He was also active in developing Intel's antitrust compliance program. *Id.* Commissioner Rosch acquired substantial confidential information about Intel's business practices, legal strategies, and antitrust compliance efforts. *Id.* ¶ 12.

Indeed, from 1991 to 1993, Commissioner Rosch represented Intel in an FTC investigation [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The FTC did not issue a complaint. *Id.* ¶ 11, Attach. 5.

Here, Commissioner Rosch would be asked to decide similar, if not identical, legal issues based on similar factual contentions made by the same company.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

We understand the Commission will soon vote on whether to issue a complaint and

therefore now move for recusal before any vote to initiate Part 3 proceedings in which Commissioner Rosch may not properly participate.

DISCUSSION

Three relevant legal standards, together and independently, require Commissioner Rosch's recusal.

I. Recusal Under OGE Regulations

Commissioners are subject to the "Standards of Ethical Conduct for Employees of the Executive Branch," 5 C.F.R. § 2635.² Subpart E addresses whether a federal "employee's participation in a particular matter involving specific parties . . . would raise a question in the mind of a reasonable person about his impartiality . . ." § 2635.502(d). If so, an employee may participate only where "in light of all relevant circumstances, . . . the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." *Id.* The regulation identifies the following relevant circumstances:

- (1) The nature of the relationship;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is required to exercise discretion;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter; and
- (6) Adjustments in the employee's duties that would reduce or eliminate the

² See Rule 5.1(a) ("Commissioners . . . of the Federal Trade Commission (FTC) are subject to and should refer to the 'Standards of Ethical Conduct for Employees of the Executive Branch' at 5 CFR part 2635 . . .").

likelihood that a reasonable person would question the employee's impartiality.

Applying these factors compels the conclusions that (i) Commissioner Rosch's representation of Intel "would raise a question in the mind of a reasonable person about his impartiality" and (ii) any Government interest in Commissioner Rosch's participation does not "outweigh the concern that a reasonable person may question the integrity of the agency's programs and operations." *Id.*

The first four factors compel recusal. Regarding factors (1) and (4), Commissioner Rosch personally served as Intel's *lead outside antitrust counsel* for some six years, advising on matters directly related to those presently before the Commission. He cannot erase from memory information about, and his understanding of, Intel's business practices, legal strategies, approach to antitrust compliance, among other subjects relevant here. He gained this information and understanding while he was *the* person outside Intel with the most intimate knowledge regarding application of the antitrust laws to Intel's business. Commissioner Rosch undoubtedly formed impressions about Intel's competitive behavior that will color the way he sees the issues here. A reasonable person would plainly have doubts about Commissioner Rosch's impartiality in judging Intel on the very issues and practices regarding which he previously counseled.

[REDACTED]

[REDACTED]

[REDACTED]

As to factor (3), Commissioner Rosch would be one of only three commissioners voting on whether to issue a complaint and one of not more than five to adjudicate the subsequent

proceeding. His decision would call for an enormous amount of discretion in this complex case.

Factors (5) and (6) do not counsel against recusal. There is no way to “assign” or “adjust” the Commissioner’s role: either he will vote or he will not. Recusal will not prejudice the Commission because Commissioner Rosch’s participation is not required for the Commission to act. *See* Rule 4.14(b).

II. Recusal Under Judicial Standards

In Part 3 proceedings, Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary. *American General Ins. v. FTC*, 589 F.2d 462, 463 (9th Cir. 1979). As with court proceedings, FTC administrative proceedings ““must be attended, not only with every element of fairness but with the very appearance of complete fairness.”” *Texaco v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964).

These standards require Commissioner Rosch’s disqualification because “a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 582, 591 (D.C. Cir. 1970). Judges must be recused even where there is only an *appearance* of partiality, without actual bias. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 865 (1988); *In re Murchison*, 349 U.S. 133, 136 (1955) (recusal rules “may sometimes bar trial by judges who have no actual bias”).

The Federal Judicial Center accordingly instructs that “[a] judge contemplating recusal should not ask whether he or she *believes* he or she is capable of impartially presiding over the case,” but rather whether an outsider could reasonably question his capacity to do so. Federal Judicial Center, *Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144*, Part I, IVA (2002) (emphasis added). “Most courts agree that recusal is warranted whenever a party appears

before a judge who previously represented her in . . . a substantially related matter . . . , and that the judge’s failure to recuse himself in such a circumstances may require reversal.” Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 11.1 (2d ed. 2007). As then-Judge Kennedy wrote, “the [FTC] Commissioner . . . had participated in previous court proceedings involving the same parties. In those proceedings he contended for adoption of a principle that is critical to this case. I have no hesitation in saying this is unacceptable” *American General*, 589 F.2d at 465 (Kennedy, J., concurring in the judgment).

Courts broadly construe whether matters are “substantially related,” emphasizing that judges must not participate in matters where a reasonable observer could question their impartiality. In *Rushing v. City of Georgiana*, for example, the court held that a judge should recuse himself based on prior representation of a party—whether or not the “nature of the controversy” and the “parties to the suit” were precisely the same—because the “same course of events” was involved in both the case the judge had litigated and the case he would preside over. 361 So.2d 11, 12 (Ala. 1978). Similarly, in *Davis v. Neshoba County General Hospital*, the court ordered a new trial in an action against a hospital where the trial judge previously had been the hospital’s attorney and had helped the hospital hire one of the defendant physicians—even though the Judge had no other relationship to the subject of the lawsuit. 611 So. 2d 904, 905 (Miss. 1992).

Where the previous representation is “substantially related” to the current matter, mere passage of time cannot overcome the need for recusal. Flamm, *supra*, § 11.1 (recusal standards generally apply “without regard to such factors as the duration or extent of the prior representation, or when it took place”); *see also Sharp v. Howard County*, 607 A.2d 545, 551 (Md. 1992) (passage of seventeen years did not “attenuate the effect of the earlier legal

representation”). Here, Commissioner Rosch’s previous work as Intel’s principal outside antitrust counselor—including *in a similar investigation by this very agency*—is plainly “substantially related” to the Commission’s renewed consideration of similar allegations against Intel. Commissioner Rosch counseled Intel regarding pricing, sales, and other practices very similar to those at issue presently. Accordingly, under the recusal standards applicable to judges and FTC Commissioners alike, Commissioner Rosch must be disqualified.

III. Recusal Under Ethics Rules

State bar rules govern an attorney’s ethical duties towards his clients. As a member of the California bar,³ Commissioner Rosch is subject to Rule 3-310(E) of the California Rules of Professional Conduct, which 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) (emphasis added). Although no one can know now whether his consideration and decisions in this matter ultimately will be adverse to Intel, the prospect of such adversity requires application of this principle.

This rule binds Commissioner Rosch even though he is now in government service. *See San Francisco v. Cobra Sol’ns, Inc.*, 38 Cal. 4th 839 (2006) (disqualification of entire city attorney’s office where city attorney previously represented present defendant while in private practice). Rule 3-310(E) is designed to “protect against the improper use of client secrets,” *Flatt v. Superior Court*, 9 Cal. 4th 275, 283 (1994), and that is a significant risk when an attorney is adverse to a former client on issues related to a prior representation. *Id.* Thus, courts applying Rule 3-310(E) focus on two questions: (i) whether the attorney had a “direct professional

³ State Bar No. 37668. *See* Attorney Look-Up Page, at http://members.calbar.ca.gov/search/member_detail.aspx?x=37668

relationship with the former client in which the attorney personally provided legal advice and services on a particular legal issue,” and (ii) whether the *legal issue* on which the attorney formerly advised the client is “closely related to the legal issue in the present representation.” *Cobra*, 38 Cal. 4th at 847. When the answer to both is “yes,” the attorney is *presumed* to possess relevant confidential information belonging to his former client and will be automatically disqualified. *Id.*

Courts apply this rule broadly. An attorney’s current and former representations will be considered “closely” or “substantially” related if there is *some* rational connection between the subjects of the two representations. *Jessen v. Hartford Casualty Ins. Co.*, 111 Cal. App. 4th 683, 711-713 (Cal. Ct. App. 2003).⁴ This reflects a “concern ... that limiting the comparison of the two representations to their precise legal and factual issues might operate unrealistically to the detriment of the first client.” *Id.* at 712.

Here, Commissioner Rosch’s representation of Intel satisfies the criteria for applying Rule 3-310. He had a “direct professional relationship” with Intel, in which he “personally provided legal advice and services on a particular legal issue,” *id.* See Murray Decl. Indeed, his advice involved the very practices that are the subject of the staff’s allegations of anticompetitive conduct extending back at least into the 1990s [REDACTED]

[REDACTED] Moreover, as described above, many of the issues that we understand to be central to the Commission’s current investigation and proposed complaint are substantially related to those on which Commissioner Rosch previously

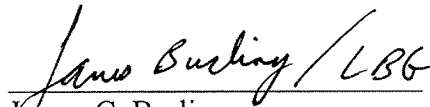
⁴ A time gap between the former and current representations is irrelevant if the matters are substantially related. See, e.g., *Brand v. 20th Century Ins.*, 124 Cal. App. 4th 594 (Cal. Ct. App. 2004) (12 years between attorney’s representation and lawsuit); *Jessen, supra* (11 years); *River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297 (Cal. Ct. App. 1987) (27 years).

represented Intel (including before the FTC). Under California law, Commissioner Rosch is presumed to possess Intel's confidential information on these topics, and it is therefore improper for him to be adverse to Intel on those matters or to serve in a role where adversity is a possibility.

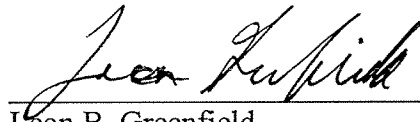
CONCLUSION

For the reasons set forth above, Intel respectfully requests that Commissioner Rosch be disqualified.

WILMER CUTLER PICKERING
HALE AND DORR LLP



James C. Burling
60 State Street
Boston, MA 02109
T: 617-526-6000
F: 617-526-5000
james.burling@wilmerhale.com



Leon B. Greenfield
Eric Mahr
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
T: 202-663-6000
F: 202-663-6363
leon.greenfield@wilmerhale.com
eric.mahr@wilmerhale.com

GIBSON DUNN & CRUTCHER LLP

Robert E. Cooper
333 South Grand Avenue
Los Angeles, CA 90071-3197
T: 213-229-7000
F: 213-229-7520
rcooper@gibsondunn.com

Joseph Kattan, PC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
T: 202-955-8500
F: 202-467-0539
jkattan@gibsondunn.com

Attorneys for Intel Corporation

Dated: December 15, 2009

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**INTEL CORPORATION,

a corporation.**

File No. 061-0247

DECLARATION OF JAMES A. MURRAY

I, James A. Murray, Esq., under penalty of perjury pursuant to 28 U.S.C. § 1746, based on my personal knowledge, information, and belief concerning matters to which I am competent to testify, declare as follows:

1. I am Associate General Counsel with Intel Corporation (“Intel”) in Santa Clara, California. I have been employed by Intel since April 1996 and am a member of the State Bar of California and admitted to practice before various federal courts.

2. I have reviewed documents, including correspondence and legal memoranda, retained by the law firm of Bingham McCutchen LLP in the regular course of business. These documents show that J. Thomas Rosch (“Commissioner Rosch”), while a partner with McCutchen, Doyle, Brown & Enersen, represented Intel as its primary antitrust counsel from at least 1987 until mid-1993, when Intel decided to change antitrust counsel.

3. These documents also show that Commissioner Rosch advised Intel on a broad range of general subject matters involving antitrust issues. Those include, among others: market definition in the microprocessor industry; the standards for determining whether a company has monopoly power; pricing conduct, including predatory pricing and bundled pricing; the scope of the “exclusive dealing” doctrine; the scope of any duty to deal with a rival; the antitrust implications of product design decisions; antitrust issues relating to licensing of intellectual property and patent enforcement; and the scope of Section 5 of the Federal Trade Commission

Act and related remedies. In addition, Commissioner Rosch advised on and participated in Intel's antitrust compliance program.

4. The advice and services provided by Commissioner Rosch to Intel have been identified here only at the subject matter level, so as to maintain Intel's attorney-client privilege and any other applicable privileges, which Intel reserves and does not waive. Likewise, the documents attached to this declaration and referenced below are non-privileged (although non-public) communications between then-attorney Rosch and the FTC staff investigating Intel at the time. Intel has not revealed, and does not intend to reveal, privileged communications in support of its motion for disqualification. *See* Restatement (Third) of the Law Governing Lawyers, § 132 Comment d(iii) (2000) ("A concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. The interests of subsequent clients also militate against extensive inquiry into the precise nature of the lawyer's representation of the subsequent client and the nature of exchanges between them.").

5. The documents reviewed also show that Commissioner Rosch represented Intel before the Federal Trade Commission ("FTC") in an antitrust investigation concerning, among other things, microprocessors.

6. Each of Attachments 1-5, below, is a true and correct copy of a document located in the Bingham McCutchen files. These documents illustrate the scope of the FTC's investigation and Commissioner Rosch's involvement in Intel's efforts to cooperate with that investigation.

7.

REDACTED

8.

REDACTED

9.

REDACTED

10.

REDACTED

11. Attachment 5 is a fax dated July 20, 1993 sent from Commissioner Rosch to Art Amolsch transmitting a newspaper article describing the FTC investigation and noting its

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PUBLIC

In re Intel, File No. 061-0247
Ex. 1 - Declaration of James A. Murray
US1DOCS 7390710v3

conclusion. That article says that “[t]he FTC had been considering allegations that Intel pressured customers to buy its memory chips along with its microprocessors. The FTC also looked into complaints that Intel had refused to do business with PC companies that bought chips from Advanced Micro Devices, Inc. or Cyrix Corp., two firms that have ‘cloned’ Intel’s microprocessors. ‘It now appears that no further action is warranted by the Commission at this time,’ the FTC wrote.”

12. Documents that I reviewed show 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.

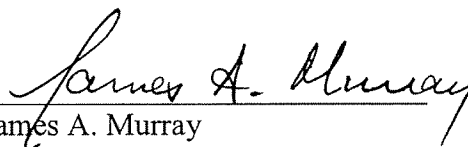
13.

REDACTED

14.

REDACTED

15. I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.


James A. Murray

Date: December 15, 2009

Attachment 5

~~136574-3~~
Fax 14763-26

Moira Farrell

McCUTCHEM, DOYLE, BROWN & ENERSEN

COUNSELORS AT LAW

Three Embarcadero Center

San Francisco, California 94111

Telephone: (415) 393-2000

Facsimile: (415) 393-2286

SAN FRANCISCO
LOS ANGELES
SAN JOSE
WALNUT CREEK

WASHINGTON, D.C.

TAIPEI

AFFILIATED OFFICE
BANGKOK

Fax Cover Page

Date: July 20, 1993 Number of Pages (including cover page): 2

To: Art Amolsch

Fax: 202 347-1882 Voice: _____

To: _____

Fax: _____ Voice: _____

To: _____

Fax: _____ Voice: _____

From: Tom Rosch Telephone: 415 393-2202

Hard Copy to be Mailed: Yes No Name of our Operator: aj (Voice) (415) 393-2334

COMMENTS:

*I thought that you might want to see
all the press that you're getting out here.*

*Best wishes,
Tom*

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** TX CONFIRMATION REPORT **

AS OF JUL 20 '93 9:33 PAGE.1

COMMAND #145

MCCUTCHEN ET AL SF

DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001 7/20	09:31	654 003 1202 347 1882	G3--S	01"26	002	OK

MCCUTCHEN, DOYLE, BROWN & ENERSEN

COUNSELORS AT LAW

Three Embarcadero Center

San Francisco, California 94111

Telephone: (415) 393-2000

Facsimile: (415) 393-2286

SAN FRANCISCO

LOS ANGELES

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TAIPEI

AFFILIATED OFFICE

BANGKOK

Fax Cover Page

Date: July 20, 1993 Number of Pages (including cover page): 2

To: Art Amolsch

Fax: 202 347-1882 Voice: _____

Feds dropping antitrust probe against Intel

Trade commission says no laws broken in company's rise

By Tom Abate
EXAMINER TECHNOLOGY WRITER

The Federal Trade Commission dropped its investigation of Intel Corp. Wednesday, but the trust-busting agency is still scrutinizing other possible high-tech monopolies, said a well-placed Washington source.

Art Amolsch, editor of the

newsletter FTC: Watch, said the agency's decision probably meant that Intel broke no laws in becoming the dominant supplier of microprocessors, the "brains" inside personal computers.

But even as it closes the books on Intel, Amolsch said the FTC will meet next week to consider allegations that Microsoft Corp. may have used its control of PC operating systems to unfairly promote its word processor and spreadsheet programs over those of its software rivals.

"The closing of the Intel investigation doesn't send any signals"

about lessened interest in antitrust, Amolsch said.

"The FTC is very interested in high-tech, particularly the computer industry, as is the antitrust division of the Justice Department," he said.

Wednesday, the FTC wrote to Intel President Andrew Grove to say the agency was closing its two-year investigation without taking any action.

The FTC had been considering allegations that Intel pressured customers to buy its memory chips along with its microprocessors. The FTC also looked into com-

plaints that Intel had refused to do business with PC companies that bought chips from Advanced Micro Devices Inc. or Cyrix Corp., two firms that have "cloned" Intel's microprocessors.

"It now appears that no further action is warranted by the Commission at this time," the FTC wrote.

Attorney Tom Rosch, who represented Intel before the FTC, said his client became the dominant supplier of microprocessors by investing millions in product devel-

[See INTEL, E-2]

◆ INTEL from E-1

Feds drop Intel antitrust probe

opment, not by unfair practices as alleged by Intel competitors like AMD.

"(Wednesday's) decision shows that the antitrust laws will not penalize those competitive efforts, no matter how loudly some disgruntled competitors may complain," Rosch said.

AMD refused comment, saying the matter was "between Intel and the FTC."

Meanwhile, Amolsch said antitrust authorities, who went after big firms like IBM Corp. and AT&T during the 1980s, are realizing that software and microprocessor monopolies have the potential

to hurt consumers in the '90s.

"The cost of a computer affects the cost of every business," Amolsch said.

He said the FTC commissioners will meet July 21st to hear evidence compiled by the staff, that Microsoft may have used its control over the MS/DOS and Windows computer systems to promote sales of its applications software.

Microsoft spokesman Collins Hemingway dismissed such complaints.

"The area in which we have the most market share on applications is on the (Apple) Macintosh, where we don't control the operating system," Hemingway said. "On a prima facie basis, that makes it hard to argue that we owe our dominant position to control of the system software."

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

INTEL CORPORATION,

a corporation.

File No. 061-0247

**[PROPOSED] ORDER GRANTING MOTION OF INTEL CORPORATION FOR
DISQUALIFICATION OF COMMISSIONER J. THOMAS ROSCH**

Respondent Intel Corporation having moved on December 15, 2009, for disqualification of
Commissioner J. Thomas Rosch pursuant to 16 C.F.R. § 4.17;

The Commission having thereafter considered the matter and having determined that
Commissioner Rosch's disqualification is required under applicable legal standards;

IT IS ORDERED that Commissioner Rosch is disqualified from the above-captioned matter and
shall not participate in any adjudicatory proceeding or in any vote concerning the initiation of
such a proceeding with respect to the above-captioned matter.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

PUBLIC

In re Intel, File No. 061-0247
[Proposed] Order