

IN THE MATTER OF

INTEL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9288. Complaint, June 8, 1998--Decision, Aug. 3, 1999*

This consent order, among other things, prohibits Intel Corporation, the California-based manufacturer and marketer of microprocessors, from withholding or threatening to withhold advance technical information, basing product supply decisions upon the existence of an intellectual property dispute, and refusing to deal with certain customers as a means of coercing intellectual property licenses to their rival microprocessor and related technologies. In addition, the consent order requires the respondent to publish this order on its web site in a manner that provides reasonable notice to interested parties.

Participants

For the Commission: *John Horsley, Michael Antalics, Richard Parker, William Baer, Jeremy Bulow, Thomas Iosso, Jay Creswell, David Reiffen, and Steven Nelson.*

For the respondent: *Michael Sohn, Arnold & Porter, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Intel Corporation ("Intel") has engaged in a pattern of conduct, as described herein, that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. The Respondent

1. Intel Corporation ("Intel") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2200 Mission College Boulevard, Santa Clara, California. For the fiscal year ended December 31, 1997, Intel reported revenues of approximately \$25 billion and profits of approximately \$6.9 billion.

2. Intel designs, develops, manufactures, markets, and sells a variety of semiconductor products, including microprocessor devices. A microprocessor is the central processing unit of a computer system. Often described as the "brains" of a computer system, the microprocessor serves the essential functions of processing system data and controlling other devices integral to the system. Intel's microprocessor products include a family of devices that are marketed and sold under the trade names Pentium, Pentium with MMX, Pentium Pro, and Pentium II (the "Pentium microprocessors").

3. At all times relevant herein, Intel has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Intel has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

B. Intel Has Monopoly Power

4. One line of commerce relevant to Intel's conduct is the manufacture and sale of all general-purpose microprocessors, including current-generation microprocessors. The relevant market also includes future-generation microprocessors and technologies for current-generation and future-generation microprocessors. In addition, narrower markets may be contained within the market for general-purpose microprocessors.

5. The relevant geographic market is the world.

6. Intel has monopoly power in the market for general-purpose microprocessors. Intel's market dominance is reflected in its own market studies, which indicate that sales of Intel microprocessor products have accounted for approximately 80 percent of the total dollar sales of general-purpose microprocessors worldwide for each of the last five years.

7. Entry is difficult and unlikely to correct Intel's monopoly power.

8. A new entrant would need to develop a relevant microprocessor product, requiring substantial capital expenditures and several years of engineering work. The entry cost required for developing a new high-performance microprocessor would likely exceed \$250 million. The development of a high-performance microprocessor product comparable to Intel's current Pentium II device or the Alpha microprocessor products currently sold by Digital Equipment

Corporation ("Digital") would likely require at least four years. For example, although Intel began development of its new 64-bit Intel microprocessor architecture (known as "IA-64") in 1994, the first generation IA-64 device known as Merced is not expected to be commercially available until the year 2000.

9. New entry is also deterred by the minimum viable scale requirements for a modern semiconductor fabrication facility. The cost of developing, building and equipping such a facility is approximately \$1.6 billion. An entrant could not expect to begin shipping revenue microprocessor products for at least four to five years after starting the construction of such a facility. A new entrant could avoid significant fixed costs in buildings or equipment by contracting with an existing microprocessor producer to provide manufacturing and development services, but even such "fabless" entry would require approximately six months and a commitment of approximately 30 staff to the manufacturing area at a cost of approximately \$200,000 per person per year, in addition to significant costs for foundry services.

10. A new entrant would also have to establish both product reputation and technical compatibility with a computer operating system and the applications software desired by a significant number of computer users. Buyers of computer systems and microprocessor components demand highly reliable products, and regard product reputation to be an essential purchasing criterion. Consumers also demand computer systems and microprocessor components that are capable of running the computer operating systems and applications software programs that are desired by computer end-users. Accordingly, a new entrant must attract support from software developers, who are generally reluctant to devote development resources to an unproven microprocessor product for which there is no demonstrated demand. Furthermore, consumers typically have many existing software applications that were written for a particular microprocessor architecture; thus, it would often be costly for consumers to switch to a new and incompatible microprocessor architecture and computer systems manufacturers to switch and risk alienating such consumers. The need simultaneously to secure a large number of users in order to make the product attractive to software developers and to secure the efforts of software developers in order to make the product attractive to users is often referred to as "network

effects." The importance of these network effects is illustrated by Intel's success in obtaining commitments from many computer manufacturers and software vendors to build computers and write software for Intel's new 64-bit Merced microprocessor, even though the product will not be available for nearly two years.

C. Intel Refused to Deal With Certain Customers as a Means of Coercing Licenses to Their Rival Microprocessor Technology

11. As more fully set forth below in paragraphs 15-37, Intel has entrenched, and threatens to continue entrenching, its monopoly power in the relevant lines of commerce by, among other things, denying or threatening to deny technical information about Intel microprocessor products to Intel customers who have developed and patented innovations in microprocessor technology, as a means of coercing those customers into licensing their innovations to Intel.

12. Intel promotes and markets its microprocessors by providing customers with technical information about new Intel products in advance of their commercial release. Intel regards such advance technical information to be proprietary and provides it subject to formal non-disclosure agreements, which prohibit recipients from disclosing such information to any unauthorized person or from using it for any unauthorized purpose. Subject to such restrictions, however, Intel makes such information widely available to customers, including manufacturers of personal computers, workstations, and servers. Such relationships have substantial commercial benefits for both parties: Intel's customers benefit because the advance technical information enables them to develop and introduce new computer products incorporating the latest microprocessor technology as early as possible, and Intel benefits because those customers design their new computer systems so as to incorporate, and effectively endorse, Intel's newest microprocessor products.

13. On at least three occasions, however, Intel suspended its established commercial relationships with particular customers, refusing to provide technical information about Intel products for the purpose of forcing those customers to grant Intel licenses to microprocessor-related technology developed and owned by those customers. Intel's conduct threatened to injure, and did injure, the ability of those targeted customers to remain competitive in

developing and bringing to market in a timely manner computer systems based on Intel microprocessors.

14. A natural and probable effect of Intel's conduct is to diminish the incentives of those three Intel customers -- as well as other firms that are Intel customers or otherwise commercially dependent upon Intel -- to develop new innovations relating to microprocessor technology. Intel's coercive business tactics effectively undermine the patent rights of such firms and reduce their incentives to develop new technologies relating to microprocessors. The nature and effects of Intel's conduct are illustrated, but not necessarily exhausted, by three cases described below in paragraphs 15-37.

1. Intel's Conduct Toward Digital Equipment Corporation

15. Digital Equipment Corporation ("Digital") is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal executive offices located at 111 Powdermill Road, Maynard, Massachusetts. Digital designs, develops, manufactures, and sells computer hardware and software systems, including personal computers, workstations, and servers. For the fiscal year ended June 30, 1997, Digital reported worldwide sales of approximately \$13.7 billion.

16. Digital designs, develops, manufactures, markets, and sells computer system products that incorporate Intel microprocessors. Sales of Intel-based computers constitute a substantial part of Digital's business, accounting for approximately \$2 billion of Digital's revenues for 1997. Accordingly, Digital is a significant customer of Intel, having purchased approximately \$250 million worth of Intel microprocessors for each of the last few years. Intel also expects Digital to increase the volume of its microprocessor purchases over the next few years.

17. Digital also designs, develops, manufactures, markets, and sells some semiconductor products, including microprocessor products that are generally known, marketed, and sold under the trade name Alpha. Although they have only a small share of the market, Digital's Alpha microprocessors are technologically significant. Alpha microprocessors are widely regarded to be the highest performing general purpose microprocessors available, having performance superior to any of Intel's products in terms of accepted

industry benchmarks for processor performance. When Intel engineers confirmed the performance of Digital's third generation Alpha product, they declared a "strategic emergency" and undertook to analyze the "miracles" of Alpha performance. Alpha also provides the only alternative microprocessor platform that competes with Intel's microprocessor architecture in running the Windows NT operating system. A current major goal for Intel is the development of its IA-64 microprocessor architecture to compete with Digital's current 64-bit Alpha architecture, and the development of Merced and other IA-64-based microprocessors to compete with Digital's Alpha devices.

18. In 1995 Intel introduced the Pentium Pro microprocessor, which closed some of the substantial performance gap between Intel's Pentium microprocessors and Digital's Alpha microprocessors. After examining the Pentium Pro device, Digital concluded that Intel was using Digital microprocessor technology in violation of Digital's patent rights. On May 12, 1997, Digital sued Intel for patent infringement, alleging that Intel's Pentium microprocessors infringed ten Digital microprocessor patents.

19. Intel responded to Digital's lawsuit by publicly denying Digital access to any of the Intel technical information needed to continue developing in a timely and efficient manner new computer systems incorporating new Intel microprocessors. Among other things, Intel:

- Demanded return of technical information and refused to supply any additional technical information needed by Digital to design computer systems products incorporating Intel's newest microprocessors, even though that information was available to similarly situated computer manufacturers that buy microprocessors from Intel, and even though Intel had no reasonable belief that Digital had ever misused, could misuse, or would misuse that information;
- Demanded return of microprocessor prototypes and refused to supply additional prototypes, even though such prototypes were available to similarly situated computer manufacturers that buy microprocessors from Intel, and even though Intel had no reasonable belief that Digital had misused, could misuse, or would misuse Intel's prototypes;

- Acted to create uncertainty about Digital's future source of supply of Intel microprocessors, including the orchestration of a scene in which a Digital employee was publicly ejected from a widely attended industry meeting sponsored by Intel without any advance warning; and
- Otherwise engaged in conduct to create a perception in the computer industry that Digital was no longer capable of bringing to market in a timely manner new computer system products that incorporate Intel's latest microprocessor technology. Because product life cycles for computer systems can be as short as six months, any delay in the introduction of a new product can have a significant adverse effect on the commercial prospects for that product.

20. Intel's conduct as described in paragraph 19 was not reasonably necessary to serve any legitimate, procompetitive purpose.

21. The conduct described in paragraph 19 had a significant adverse impact on Digital's ability to develop and bring to market in a timely manner new computer systems based on Intel microprocessors, and would have posed an even more significant long-term threat to Digital's business if Digital had not agreed to license its microprocessor technology to Intel.

2. Intel's Conduct Toward Intergraph Corporation

22. Intergraph Corporation ("Intergraph") is a Delaware corporation headquartered in Huntsville, Alabama. Intergraph develops, manufactures, markets, and sells computer hardware and software products. Intergraph's flagship products are computer workstations designed for sophisticated graphics applications such as computer-aided design, computer-aided engineering, computer-aided manufacturing, computer-aided animation, and other computer graphics, multimedia and digital media functions.

23. In 1987, Intergraph purchased the Advanced Processor Division of Fairchild Industries, which had developed a family of microprocessor devices known by the trade name Clipper. Until 1993, Intergraph continued to develop Clipper microprocessor technology for use in Intergraph's computer systems.

24. Beginning in late 1992, however, Intergraph shifted its focus away from Clipper-based computer systems and became one of the

first computer manufacturers to develop a family of workstations and servers based on Intel's Pentium microprocessor and Microsoft's Windows NT operating system. As an early adopter of Intel's microprocessor architecture for workstations, Intergraph provided Intel with feedback that was essential for Intel's penetration of the workstation market and otherwise validated the use of Intel's products (and their use in Windows NT-based workstations) for what was at the time a new market segment for Intel. Intergraph became the first computer systems manufacturer to offer a workstation based on Intel's Pentium Pro microprocessor, and the first to offer a single- and dual-processor 3D graphics workstation based on Intel's microprocessors.

25. By 1994, Intel-based systems represented nearly three-quarters of Intergraph's hardware unit sales, and this figure had increased to 100 percent in 1996. Over the years, Intergraph has designed many new computer systems based on new Intel microprocessors that have proved to be popular with consumers. Intergraph was the leading seller in revenue of Windows NT workstations for the first quarter of 1997.

26. In 1996, Intel demanded a royalty-free license to Intergraph's Clipper microprocessor technology as a condition for Intergraph continuing to receive technical information that Intergraph required to continue developing Intel-based workstations in a timely and efficient manner.

27. When Intergraph said it could not agree to such a demand, Intel refused to provide Intergraph with important information relating to graphics technology, contributing, along with subsequent Intel conduct, to a significant delay of Intergraph's development of a graphics workstation.

28. In 1997, Intergraph began asserting that certain third parties using Intel-based computer technology were infringing certain Intergraph patents. When some of those manufacturers in turn sought indemnification from Intel against Intergraph's claims for patent infringement, Intel increased pressure to force Intergraph to grant Intel a royalty-free license to Intergraph's microprocessor-related patents.

29. When Intergraph again refused, Intel cut off Intergraph's access to any of the Intel technical information necessary to continue developing in a timely and efficient manner new computer systems incorporating new Intel microprocessors. Among other things, Intel:

- Cut off technical information that Intergraph needed in order to design systems based on Intel's newest chips, even though that technical information was widely available to similarly situated computer manufacturers that purchase Intel microprocessors, and even though Intel had no reasonable belief that Intergraph had misused, could misuse, or would misuse Intel's technical information;
- Demanded return of microprocessor prototypes and refused to supply additional prototypes, even though such prototypes were widely available to similarly situated computer manufacturers that purchase chips from Intel, and even though Intel had no reasonable belief that Intergraph had misused, could misuse, or would misuse Intel's prototypes;
- Failed to inform Intergraph of a bug Intel had previously discovered in an Intel chip that Intergraph was purchasing, and interfered with Intergraph's efforts to seek assistance from a third party after Intergraph discovered the bug. As a result, Intergraph was forced to redesign, refabricate and retest an entire motherboard, which caused significant product delays;
- Acted to create uncertainty about Intergraph's future source of supply of Intel microprocessors; and
- Otherwise engaged in conduct to create a perception in the computer industry that Intergraph was no longer capable of bringing to market in a timely manner new computer system products that incorporate Intel's latest microprocessor technology. Because product life cycles for computer systems can be as short as six months, any delay in the introduction of a new product can have a significant adverse effect on the commercial prospects for that product.

30. Intel's conduct as described in paragraphs 26 through 29 was not reasonably necessary to serve any legitimate, procompetitive purpose.

31. The conduct described in paragraphs 26 through 29 had a significant adverse impact on Intergraph's ability to develop and bring to market in a timely manner computer systems based on Intel microprocessors, and would pose an even more significant long-term threat to Intergraph's business if a United States District Court had not

issued a preliminary injunction in April 1998 enjoining Intel from engaging in such conduct.

3. Intel's Conduct Toward Compaq Computer Corporation

32. Compaq Computer Corporation ("Compaq"), a Delaware corporation headquartered in Houston, Texas, is the largest manufacturer of personal computers in the world. Compaq designs, develops, manufactures, and sells a full line of computer system products, including personal computers, workstations, and servers. Compaq reported revenues of approximately \$24.6 billion for the fiscal year ended December 31, 1997.

33. Compaq designs, develops, manufactures, markets, and sells computer system products that incorporate Intel microprocessors. Such Intel-based computers constitute a significant part of Compaq's business, accounting for the majority of Compaq's revenues. Compaq is Intel's largest dollar and volume customer for microprocessor products, having purchased more than \$2 billion worth of Intel microprocessors during 1997.

34. In November 1994, Compaq sued another computer systems manufacturer, Packard Bell Electronics, Inc. (now Packard Bell NEC, Inc.) for using patented Compaq technology in Packard Bell computer systems. Intel, the supplier of the infringing components, intervened on Packard Bell's side, because Intel believed that it had an obligation to indemnify Packard Bell.

35. In response to Compaq's assertion of its intellectual property rights, Intel cut off technical information that Compaq needed in order to design systems based on Intel's newest chips, even though that technical information was widely available to similarly situated computer manufacturers that purchase Intel microprocessors, and even though Intel had no reasonable belief that Compaq had misused, could misuse, or would misuse Intel's technical information.

36. Intel's conduct as described in paragraph 35 was not reasonably necessary to serve any legitimate, procompetitive purpose.

37. The conduct described in paragraph 35 had a significant adverse effect on Compaq's ability to develop and bring to market in a timely manner computer systems based on Intel microprocessors, and would have posed an even more significant long-term threat to Compaq's business if Compaq had not agreed to license its technology to Intel.

D. Elements of Violations of Law

38. As set forth in paragraphs 4-10, Intel has monopoly power in the market for general-purpose microprocessors and in narrower markets contained therein.

39. As set forth in paragraphs 11-37, Intel has engaged in exclusionary conduct by cutting off and threatening to cut off valuable commercial relationships with certain of its customers as a means of coercing licenses to their patent rights in rival microprocessor and related technologies. In each instance, Intel's conduct had a significant adverse effect on the ability of the targeted customer to develop and bring to market in a timely manner computer systems based on Intel microprocessors, and would have posed a more significant long-term threat to the businesses of those customers if they had not agreed to license their technologies to Intel or, in the case of Intergraph, won an injunction against Intel's conduct. Because patent rights are an important means of promoting innovation, Intel's coercive tactics to force customers to license away such rights diminishes the incentives of any firm dependent on Intel to develop microprocessor-related technologies. Because most firms who own or are developing such technologies are vulnerable to retaliation from Intel, the natural and probable effect of Intel's conduct is to diminish the incentives of the industry to develop new and improved microprocessor and related technologies. Consequently, Intel's conduct entrenches its monopoly power in the current generation of general-purpose microprocessors and reduces competition to develop new microprocessor technology and future generations of microprocessor products.

40. Intel has willfully maintained its monopoly power in the general-purpose microprocessor market, and narrower markets contained therein, through exclusionary conduct that was not reasonably necessary to serve any legitimate, procompetitive purpose.

41. Intel also had the specific intent to attempt to monopolize both the current generation and future generations of general-purpose microprocessors, and narrower markets contained therein, and its actions create a dangerous probability that it will accomplish these objectives.

E. Violations of Law

42. Intel's conduct constitutes unlawful monopolization, unlawful attempts to monopolize, and unfair methods of competition, all in violation of Section 5 of the Federal Trade Commission Act.

Commissioner Swindle dissenting.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Intel Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Mission College Boulevard, Santa Clara, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Intel*" or "*respondent*" means Intel Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Intel, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Commission*" means the Federal Trade Commission.

C. "*Advance Technical Information*" or "*AT Information*" means confidential product information regarding a general purpose Intel microprocessor of the type necessary to enable a customer to design and develop systems incorporating those microprocessors in time for introduction into the marketplace by the official release date for such microprocessors, namely (1) the electrical, mechanical, and thermal characteristics of such microprocessor, (2) samples of such microprocessor, (3) errata and workarounds or fixes thereof for such microprocessors, (4) technical support for items (1) – (3) at a level equivalent to that provided at a time period immediately prior to the event which engendered the IP Dispute, and (5) other equivalent enabling information. For purposes of this order, it shall be presumed that disclosures of AT Information no later than 6 months before the official release date of a microprocessor are sufficient to enable a customer to design and develop a system within the time prescribed herein, and that AT Information does not include detailed microprocessor design information not generally provided to respondent's customers, nor information relevant solely to designing semiconductors.

D. "*Intellectual Property Dispute*" or "*IP Dispute*" means any circumstance where a customer of respondent has (1) directly or indirectly asserted or threatened to assert any patent, copyright or trade secret right concerning computer technology against respondent or any other customer of respondent where the asserted infringement

relates to a product supplied by respondent; or (2) refused a request by respondent to license or otherwise convey the rights to a patent, copyright or trade secret right to respondent.

II.

It is further ordered, That,

A. Except as otherwise provided in paragraph II.B. below, for a period of ten (10) years from the date this order becomes final, subject to the proviso set forth in this paragraph, respondent shall cease and desist from taking the following actions or threatening to take the following actions: (1) impeding, altering, suspending, withdrawing, withholding or refusing to provide access by any microprocessor customer to AT Information for reasons related to an Intellectual Property Dispute with such customer if at the time of such IP Dispute such customer is receiving AT Information from respondent or (2) basing any supply decisions for general purpose microprocessors upon the existence of an IP Dispute. Provided, however, that any obligation set forth in this paragraph II.A. shall be inapplicable with regard to any AT Information or product supply decision specific to any Intel microprocessor that the customer has asserted is infringing its patent, copyright or trade secret rights unless that customer agrees in writing not to seek an injunction against the manufacture, use, sale, offer to sell, or importation of all Intel microprocessors that are based upon the same core microarchitecture (e.g. P5, P6) as the Intel microprocessor that is the subject of the assertion of infringement; provided further, however, that respondent shall not take action prohibited in this paragraph II.A. for the reason that such customer is seeking or has sought compensation, damages or any other legal or equitable remedies other than injunction as herein provided.

B. Nothing in paragraph II.A. of this order shall be construed to:

1. Prohibit respondent from seeking all available legal or equitable remedies with regard to any of its patent, copyright, trade secrets, mask work, trademark, or other intellectual property; provided that a dispute as to such remedies or compensation sought for the AT Information shall not affect respondent's obligation to continue to provide the AT Information to a customer as provided in paragraph II.A. above;

2. Prohibit respondent from withholding AT Information or demanding the return of previously provided AT Information from a customer based on business considerations unrelated to the existence of the IP Dispute, including but not limited to a customer's breach of an agreement between the customer and respondent regarding the disclosure or use of the AT Information;

3. Limit respondent's right to make product (including sample) supply decisions based upon business considerations unrelated to the existence of the IP Dispute, including but not limited to constrained product (including sample) supply, customer's order rate and payment history, or customer's breach of an agreement between the customer and respondent regarding the supply or use of such products;

4. Require respondent to provide AT Information or supply general purpose microprocessors to a customer to facilitate the design or development of a type of system (e.g., server, workstation, desktop, mobile unit) that such customer has not designed or developed or demonstrated plans to design or develop within the preceding year;

5. Prohibit respondent from restricting the use of AT Information to the customer's design and development of computer systems that incorporate the microprocessor to which the AT Information pertains;

6. Require respondent to disclose AT Information or supply general purpose microprocessors, when such AT Information or products (including samples) are not otherwise available for disclosure or supply to respondent's customers; or

7. Otherwise limit respondent's intellectual property rights, including the disposition of those rights.

III.

It is further ordered, That:

A. Within five (5) days of the date this order becomes final, and for a period of thirty (30) days thereafter, respondent shall publish this order on its World Wide Web site. Notice of such publication shall be made in a manner calculated to be viewed by all of respondent's customers. For purposes of this provision, notice will be deemed satisfactory if it is made by providing a direct link to the order from a notice in the following language: "FTC and Intel Settle Antitrust Litigation" posted as the first link under the "In the News" section of the "developer's" page (developer.Intel.com) as the Intel site is constituted on the date this order is signed. In the event that

Intel changes its site structure, an equivalent notice in terms of ease of access and conspicuousness must be provided. After such thirty (30) day period, respondent shall maintain a link from the "developer's" page (or its equivalent) to the order in a manner that provides reasonable notice to interested parties.

B. Within ten (10) days after the date on which any person becomes a director or corporate officer, respondent shall provide a copy of this order to such person.

C. Within sixty (60) days after the date this order becomes final, respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which respondent is complying and has complied with this order.

D. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order, and setting forth in detail any action taken in connection with the activities covered by this order.

E. For a period of five (5) years after the date this order becomes final, respondent shall maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by paragraph II. of this order.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment, sale, or reorganization resulting in the emergence of a successor corporation or association, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

213

Statement

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from them, to interview officers, directors, or employees of respondent, who may have counsel present.

VI.

It is further ordered, That this order shall terminate on August 3, 2009.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

Today, the Commission accepts the proposed settlement in this matter without modification. Our colleague, Commissioner Swindle, remains unpersuaded "that the conduct at issue in this case demonstrably threatened to harm the consuming public" because he "cannot accept that it could appreciably affect -- much less stem -- the immense tide of invention and improvement that continuously drives this industry." We respectfully disagree with Commissioner Swindle for two simple yet fundamental reasons.

First, we continue to have reason to believe that Intel, which the majority has reason to believe is a monopolist, engaged in "conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.) (*quoting* III P. Areeda & D. Turner, Antitrust Law ¶ 626 at 83 (1978)). Nothing in the public comments submitted to the Commission leads us to depart from our initial judgment.

Second, requiring "demonstrable" harm to competition after pretrial settlement has no legal basis because it has no practical basis. Settlement of the case necessarily prevents us from making any final judgment about the actual evidence of harm to competition from Intel's conduct.

STATEMENT OF COMMISSIONER ORSON SWINDLE

Shortly after the Commission accepted the consent agreement in this matter, I released a statement outlining my concerns about the case and asking for public comments addressing certain issues.¹ My statement invited views and information on three basic questions. Unfortunately, the handful of public comments on the proposed settlement did not address these queries in any meaningful way.

In a nutshell, my previous statement posed these questions:

(1) Notwithstanding its extremely large share of an alleged market for general-purpose microprocessor sales, does Intel genuinely possess monopoly power in that market?

(2) Even if one were to assume that Intel has the monopoly power claimed by the complaint, does the information available provide reason to believe that Intel's alleged abuse of that power² entrenched Intel's monopoly position in current-generation microprocessors and diminished the incentives of firms commercially dependent on Intel to develop innovations relating to microprocessor technology? Is the result of this likely to be a reduction in "competition to develop new microprocessor technology and future generations of microprocessor products"?³

(3) Will the proposed order against Intel present the Commission with significant noncompliance and enforcement problems because the order's prohibitions turn on whether Intel takes certain actions "for reasons related to" or "base[d] . . . upon the existence of" an intellectual property dispute -- criteria that, as I pointed out, could "enmesh the Commission in expensive, and perhaps intractable, enforcement proceedings"?

I am unable to vote in favor of the consent order because I continue to lack reason to believe that Intel's actions against Digital,

¹ My statement can be found on the Commission's website at <www.ftc.gov/os/1999/9904/swindle.htm>.

² The complaint charges that this abuse took the form of a curtailment of the supply of technical information and prototypes to Digital, Intergraph, and Compaq.

³ Complaint, ¶¶ 14, 39. My questions with regard to this issue also included whether the complaint spelled out a coherent theory of harm to consumers. In other words, even if one were to grant that Intel took actions that harmed *Digital*, *Intergraph*, and *Compaq* as alleged by the Commission, would the evidence in hand have shown that the particular injury to those three firms was reasonably likely to translate into harm to consumers overall?

Intergraph, and Compaq would have adversely affected competition and innovation in the ways charged in the complaint.

My concerns with regard to the first and third issues listed above have diminished to some extent. As to the allegation of monopoly power, some of the factors that once appeared to threaten Intel's hegemony have ebbed in recent months, and there is less reason to think that Intel's large market share overstates its power in general-purpose microprocessors.⁴

Nor would I choose to dissent if my only remaining concern were the enforceability of an order whose key terms rely too much on ascertainment and proof of the respondent's state of mind. Because the order does not appear to chill any procompetitive activity on Intel's part, and because of my faith in the ability of our staff to detect genuine instances of noncompliance, I could put aside my reservations about the order's "for reasons related to" and "base[d] . . . upon" language if I were in agreement with the complaint's underlying theory of violation -- viz., that Intel's conduct is likely to cause a reduction in "competition to develop new microprocessor technology and future generations of microprocessor products."

It is upon the plausibility of that theory, however, that I part ways with the majority. As I said in April, even if one concedes that Intel has monopoly power, I cannot comfortably translate its actions vis-à-vis three customers into the threat to microprocessor innovation depicted in the complaint. Indeed, even if one were to characterize Intel's alleged conduct as aggression against customers rather than self-defense,⁵ it seems a considerable stretch to expand that conduct into a case about chilling innovation and otherwise reducing technological competition. I am not aware of any substantial

⁴ The inroads made by Intel's microprocessor competitors into the sub-\$1000 personal computer segment seemed to pose a threat to Intel as recently as six months ago. After what first appeared to be gains in market share, however, those competitors' aggressive marketing efforts have yielded mixed results. (Of course, one can legitimately ask whether the competitors failed to sustain those gains because of Intel's dominance or, as appears at least as likely, because of their own management and strategic shortcomings.)

My increased comfort with asserting that Intel possesses monopoly power is also tempered by the breathtaking pace of cost reductions and major technology improvements in the microprocessor business, which I would not normally associate with an industry in the clutches of a firm wielding monopoly power. One could almost as easily characterize Intel as a firm that had the enormous good fortune to have caught a wave early and learned to ride it better than anyone else.

⁵ In my April statement, I noted that the Commission's pursuit of this action could send the message that, in the FTC's view, a monopolist embroiled in commercial disputes with its customers "cannot resort to 'self-help' . . . but must instead hire lawyers and take its disputes through lengthy and expensive litigation . . ."

evidentiary support for the theory that Intel's customers or others in the industry canceled development projects, cut research and development, or otherwise reduced innovation in response to Intel's conduct.

I therefore remain unpersuaded that the conduct at issue in this case demonstrably threatened to harm the consuming public. Whatever injury Intel might have visited on Digital, Intergraph, and Compaq, I cannot accept that it could appreciably affect -- much less stem -- the immense tide of invention and improvement that continuously drives this industry.⁶

Accordingly, because I still lack reason to believe that Intel's alleged conduct constituted a violation of Section 5 of the Federal Trade Commission Act, I dissent.

⁶ In their responsive statement, my colleagues assert that there is neither a legal nor a practical basis for "requiring 'demonstrable' harm to competition after pretrial settlement," since "[s]ettlement of the case necessarily prevents [the Commission] from making any final judgment about the actual evidence of harm to competition from Intel's conduct." Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson. I acknowledge, of course, that pretrial settlement cuts short the accumulation and evaluation of evidence that a complete trial would have permitted -- although we should keep in mind that *this* case was settled after extensive pretrial discovery. In any event, in questioning whether Intel's conduct demonstrably *threatened* to harm consumers, I merely meant to express my doubts about whether Section 5's "reason to believe" threshold has been crossed.

IN THE MATTER OF

NOVARTIS CORPORATION, ET AL.

Docket 9279. Interlocutory Order, August 5, 1999

ORDER GRANTING APPLICATION FOR STAY OF PART IV OF ORDER

On July 19, 1999, respondents Novartis Corporation and Novartis Consumer Health, Inc. (collectively "Novartis") applied for a stay pending appeal of Part IV of the Commission's order of May 13, 1999, as modified by order dated July 2, 1999, (hereinafter "Order") which imposes a corrective advertising requirement. Complaint counsel opposes the granting of a stay. For the reasons stated below, the Commission grants the application and stays the enforcement of Part IV of its Order pending a ruling disposing of the petition for review recently filed by Novartis in the United States Court of Appeals for the District of Columbia Circuit. All other provisions of the Order will remain in effect during the pendency of the appeal.

Commission adjudicative orders (except divestiture orders) take effect "upon the sixtieth day after" their date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate by ... the Commission" or "an appropriate court of appeals." 15 U.S.C. 45 (g)(2). A party seeking a stay must first apply for such relief to the Commission. Novartis has done so in its July 19 application.

Commission Rule 3.56(c), 16 CFR 3.56(c), sets out the applicable legal standard for the granting of a stay pending appeal. An applicant for a stay must address the following four factors: (1) "the likelihood of the applicant's success on appeal"; (2) "whether the applicant will suffer irreparable harm if a stay is not granted"; (3) "the degree of injury to other parties if a stay is granted"; and (4) "why the stay is in the public interest." *Id.*

We consider each of these prongs in turn.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

Novartis' assertions of a likelihood of success on the merits merely revisit arguments that we have already considered and rejected in our May 27, 1999 opinion and in our order of July 2 denying its petition for reconsideration. Novartis first claims that consumer