

# FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

## DIGITAL EQUIPMENT CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3818. Complaint, July 14, 1998--Decision, July 14, 1998*

This consent order, in conjunction with Digital's sale of certain semiconductor business assets to Intel Corporation, requires, among other things, Digital to enter into or extend certain licensing agreements with Advanced Micro Devices, Inc., and Samsung Electronics Co., Ltd., or other Commission-approved licensees, and to begin the process of certifying International Business Machines, Inc. or other Commission-approved companies to manufacture Digital's Alpha microprocessor devices.

### *Participants*

For the Commission: *Robert Cook, John Horsley, Joseph Krauss, William Baer, David Meyer, Jay Creswell, and Jonathan Baker.*

For the respondent: *Benjamin Crisman, Jr., Skadden, Arps, Slate, Meagher & Flom, Washington, D.C. and Michael Weiner, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y.*

### 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 an agreement between Intel Corporation and Digital Equipment Corporation whereby Intel will acquire certain assets of Digital Equipment Corporation violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and 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. Respondent 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.

2. Digital is an international corporation with worldwide sales of approximately \$13 billion in 1997. Digital designs, develops, manufactures, markets, and sells computer hardware and software systems, including personal computers, workstations, and servers. Digital also designs, develops, manufactures, markets, and sells a variety of semiconductor products, including certain microprocessor products that are generally known, marketed, and sold under the trade name Alpha.

3. At all times relevant herein, Digital 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, Digital 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. THE PROPOSED TRANSACTION*

4. 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. Intel has annual worldwide sales of approximately \$20.8 billion.

5. Intel designs, develops, manufactures, markets, and sells a variety of semiconductor products, including a line of microprocessor products that are generally known, marketed, and sold under the trade names Pentium, Pentium with MMX, Pentium Pro, and Pentium II (the "Pentium microprocessors").

6. Digital and Intel are currently litigating three pending lawsuits involving intellectual property and technology rights relating to microprocessors. Digital initiated that litigation on May 12, 1997, by filing a lawsuit in Massachusetts alleging that Intel has willfully infringed ten Digital patents by making and selling Pentium microprocessors. On May 27, 1997, Intel filed a related lawsuit in California alleging that Digital breached certain contractual duties

and violated Intel's trade secret rights by refusing to return certain technical information about Intel microprocessors. In August and September 1997, Intel filed counterclaims in Digital's Massachusetts lawsuit and a lawsuit in Oregon alleging that Digital willfully infringed fifteen Intel patents by, among other things, making and selling Alpha microprocessors.

7. On October 26, 1997, Digital and Intel executed a proposed Settlement Agreement, which provides for, among other things, the settlement of all pending litigation between Digital and Intel, the cross licensing of Intel and Digital patents for a period of ten (10) years, the sale of Digital's semiconductor business and operations to Intel, the establishment of contractual relationships pursuant to which Intel will serve as an Alpha microprocessor foundry for Digital and supply Alpha microprocessors to Digital, the retention by Digital of all intellectual property rights relating to Alpha microprocessor architecture and technology, and the retention by Digital of those Digital employees supporting the design and development of Alpha products. Since the execution of the Settlement Agreement, Digital and Intel have negotiated all of the subsidiary agreements that are contemplated by, and intended to implement the terms of, the Settlement Agreement (the "Implementing Agreements").

8. The proposed Settlement Agreement and Implementing Agreements provide, among other things, that Digital shall sell, and Intel shall acquire, Digital's semiconductor business and operations, including the facilities and manufacturing assets now used by Digital to produce Digital semiconductor products, including Alpha microprocessors. The proposed Settlement Agreement and Implementing Agreements require Intel to produce and supply exclusively to Digital Alpha microprocessor products for a period of seven (7) years from the closing date of the transactions contemplated by those Agreements, but do not restrict Digital's rights to establish or further develop any relationship or relationships with other semiconductor manufacturers to produce Alpha microprocessor devices, as a foundry for Digital or otherwise. In connection with the proposed Settlement Agreement, Digital also agreed to announce that it would support Intel's forthcoming IA-64 microprocessor devices by building computer systems designed around such devices.

9. The proposed Settlement Agreement and Implementing Agreements further provide, among other things, that Intel shall hire,

and Digital shall facilitate and encourage Intel's efforts to hire, all current employees of the Digital semiconductor business, with the exception of those Digital employees who currently support the design and development of Alpha microprocessor products. Among the Digital personnel to be hired by Intel under the Settlement Agreement are those Digital employees who currently conduct or support Digital's efforts to market and sell the Digital semiconductor product line, including Alpha microprocessor products, to the merchant market for semiconductor devices.

10. The proposed Settlement Agreement and Implementing Agreements further provide that Digital shall retain ownership of all intellectual property and technology rights relating to Alpha microprocessor architecture and devices, and contemplate that Digital will continue to develop the Alpha architecture and future generations of Alpha microprocessor products. Those Agreements also expressly give Digital the right to license Alpha intellectual property or technology rights to third parties, and do not prevent Digital from augmenting or establishing strategic alliances with third parties for the development of Alpha microprocessor technology.

#### *C. THE RELEVANT MARKETS*

11. One relevant line of commerce in which to analyze the likely competitive effects of the proposed Settlement Agreement is the manufacture and sale of high-performance, general-purpose microprocessors that are capable of running the computer operating system software in native mode that is currently being developed and sold by Microsoft Corporation ("Microsoft") under the trade name Windows NT.

12. A second relevant line of commerce in which to analyze the likely competitive effects of the proposed Settlement Agreement is the manufacture and sale of all general-purpose microprocessors.

13. A third relevant line of commerce in which to analyze the likely competitive effects of the proposed Settlement Agreement is innovation in the design and development of high-performance, general-purpose microprocessors.

14. The relevant geographic market in which to analyze the likely competitive effects of the proposed Settlement Agreement is the world.

*D. CONCENTRATION*

15. Intel has market power in the market for the supply of high-performance, general-purpose microprocessors that are capable of running the Windows NT operating system. Intel accounts for nearly 90 percent of dollar sales and nearly 85 percent of unit sales of such microprocessors. Digital accounts for approximately one percent of the dollar sales and unit sales of such devices. Moreover, Alpha microprocessors and Intel Pentium products are today the two closest substitutes -- and perhaps the only two viable devices -- available for computer system manufacturers and computer users who require a microprocessors capable of running in native mode the Windows NT operating systems.

16. Intel also has market power in the market for all general-purpose microprocessors. Intel accounts for nearly 90 percent of dollar sales and 80 percent of unit sales of general-purpose microprocessors. Digital accounts for approximately one percent of dollar sales and unit sales of such devices. No firm other than Intel accounts for more than four percent of dollar sales of microprocessors, and no firm other than Intel accounts for more than 10 percent of unit sales of microprocessors.

17. Digital and Intel are two of the most significant innovation competitors in the design and development of high-performance microprocessors. Even with its comparatively small share of the relevant markets, Digital's Alpha microprocessor represents the greatest technological challenge to Intel, and stands as the most significant threat to Intel's continued market dominance. For the last several years Digital's Alpha devices have consistently demonstrated industry-leading performance as measured by processing speed and related performance criteria generally recognized in the industry. Intel recognizes that the Alpha microprocessor has superior performance characteristics, poses a competitive threat to Intel's products, and establishes performance benchmarks that serve as goals to which Intel aspires in the development of its own future microprocessor products. Indeed, a current major goal for Intel is the development of a new 64-bit Intel microprocessor architecture (known as IA-64) to compete with Digital's current 64-bit Alpha architecture, and the development of new IA-64-based microprocessors (currently known by project names such as Merced and McKinley) to compete with Digital's Alpha devices.

*E. ENTRY CONDITIONS*

18. Entry into the relevant markets would not be sufficiently timely or likely to deter or otherwise correct the anticompetitive effects of the proposed Settlement Agreement.

19. A new entrant would need to develop a relevant microprocessor product, which development requires 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 such a product would require a minimum of two years, and a high-performance microprocessor comparable to Digital's Alpha microprocessors and Intel's Pentium products would likely require at least four years. For example, although Intel began development of its new IA-64 microprocessors in 1994, the first generation IA-64 device known as Merced is not expected to be commercially available before the second half of 1999.

20. New entry into the relevant markets 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 \$200,000 per person per year, in addition to significant costs for foundry services.

21. 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. 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 recent 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 more than a year.

22. In order to enter the market for Windows NT-compatible microprocessors or the market for general-purpose microprocessors, any viable new microprocessor product must be compatible with the Windows NT operating system. Two other microprocessor architectures once enjoyed Windows NT support, but Windows NT support for those rival architectures was recently discontinued because of low system volumes. Any new entrant would likely need a very large volume of system sales in order to succeed in obtaining Windows NT support for the new microprocessor architecture.

*F. EFFECTS OF THE PROPOSED TRANSACTION ON COMPETITION*

23. Unless remedied, the proposed acquisition by Intel of Digital's semiconductor business and operations, including the facilities and assets used for microprocessor manufacturing, and of Digital's semiconductor sales and marketing organization, is likely to create uncertainty regarding the future competitive viability of Alpha and thereby maintain and enhance Intel's market power and thereby increase price and reduce quality and innovation in each of the relevant markets described above in paragraphs 11-14, for reasons that include, but are not limited to, the following:

a. By making it less likely that Digital would maintain the sales force to continue "merchant market" sales of Alpha microprocessors and other products to other OEMs, it would reduce competition between Intel and Digital for such sales; and

b. Putting Digital's supply of Alpha solely in the hands of Intel would give Intel the opportunity to delay production of Alpha microprocessors, impede the development of new generations of

Alpha microprocessors, and otherwise undermine the competitiveness of Alpha.

*G. VIOLATIONS CHARGED*

24. The agreement between Digital and Intel, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed transaction through which Intel Corporation ("Intel") is to acquire certain assets of Digital Equipment Corporation ("Digital"), including the semiconductor fabrication facility at which Digital manufactures its Alpha family of microprocessors; and Digital having represented to the Commission its plans to continue developing and promoting Alpha microprocessors despite the sale of the microprocessor facility; and Digital having licensed Samsung Electronics Co., Ltd. to develop, manufacture and sell Alpha microprocessors and having entered into a Memorandum of Understanding with Advanced Micro Devices, Inc., that contemplates a comparable license; and it now appearing that Digital, sometimes referred to as the "respondent," is willing to enter into an agreement containing an order in order to confirm its future plans for Alpha and to provide for other relief, and respondent having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act; 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 aforesaid draft of 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, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Digital is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 111 Powdermill Road, Maynard, Massachusetts.

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. "*Respondent*" or "*Digital*" means Digital Equipment Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Digital Equipment Corporation and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Intel*" means Intel Corporation, 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.

C. "*AMD*" means Advanced Micro Devices, Inc., 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 One AMD Place, P.O. Box 3453, Sunnyvale, California.

D. "*IBM*" means International Business Machines, Inc., 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 1 New Orchard Road, Armonk, New York.

E. "*Samsung*" means Samsung Electronics Co., Ltd., a Korean corporation with offices located at San #24, Nongaeo-Lee, Kiheung-Eup, Yonginn-Si, Kyungki-Do, Korea.

F. "*Digital's Alpha RISC Architecture*" means the architecture as defined by the current edition, or previous edition, of Digital's Alpha AXP Architecture Reference Manual, published by or on behalf of Digital.

G. "*Digital Alpha Implementation*" means a microprocessor implementation of Digital's Alpha RISC Architecture designed by or for Digital. For purposes of illustration only and without limiting the foregoing, each of the following implementations constitutes a distinct and separate Digital Alpha Implementation: EV4, EV5, EV6, EV67, EV68, EV7.

H. "*Alpha Device*" means a 64-bit microprocessor that implements the same design and circuitry as, and is equivalent in form, fit and function to, a Digital Alpha Implementation, and that 1) conforms to Digital's Alpha RISC Architecture, 2) executes Digital's Alpha instruction set and 3) meets appropriate Digital quality and branding criteria.

I. "*Device Specifications*" means the product specifications for a Digital Alpha RISC Architecture implementation from and after EV56 (e.g., EV56, EV6, EV67, EV68, EV7, etc.), as set forth in the Device Data Sheet and the Device Quality and Reliability Data Sheet to be provided by Digital as amended from time to time, which define the specific functional, performance, electrical, timing, mechanical, environmental, reliability, and other requirements of the Digital Device and which may refer to, and thereby incorporate, other specifications, including without limitation, logic or other design and/or layout specifications.

J. "*Digital Device*" means a semiconductor integrated circuit device meeting the applicable Device Specification and embodying the applicable specific logic design of Digital's Alpha RISC Architecture implementation for EV56, EV6 and for any Future Alpha Implementation as designed and manufactured by or on behalf of Digital.

K. "*Future Alpha Implementation*" means a semiconductor integrated circuit device meeting the applicable Device Specification

and embodying the applicable specific logic design of a Digital Alpha RISC Architecture implementation beyond EV56 and EV6 (e.g., EV67, EV68, EV7, etc.) as designed and manufactured by or on behalf of Digital.

L. "*AMD Device*" means a 64-bit microprocessor designed by or for AMD that 1) conforms to Digital's Alpha RISC Architecture, 2) executes Digital's Alpha instruction set and 3) meets appropriate Digital quality and branding criteria.

M. "*AMD Derivative*" means a 64-bit microprocessor derived from an Alpha Device or AMD Device, that incorporates a modification or improvement designed by or for AMD and 1) conforms to Digital's Alpha RISC Architecture, 2) executes Digital's Alpha instruction set and 3) meets appropriate Digital quality and branding criteria.

N. "*AMD Licensed Products*" means integrated circuits designed by or for AMD including, but not limited to Alpha Devices, AMD Devices and AMD Derivatives. AMD Licensed Products shall exclude SPARC, PA RISC, POWER PC and MIPS families of microprocessors.

O. "*AMD 64-bit Microprocessor*" means an AMD Licensed Product that is a 64-bit microprocessor.

P. "*Samsung Device*" means a fully qualified, packaged and tested semiconductor integrated circuit, that 1) is based upon and conforms to and incorporates Digital's Alpha RISC Architecture, 2) embodies a specific logic design provided to Samsung by Digital corresponding to the Digital Device, including updates by Digital thereto, and 3) conforms to the Device Specification, Branding Standard and Product Qualification Procedures.

Q. "*Samsung Alpha Architecture Device*" means a microprocessor manufactured and designed by or on behalf of Samsung and that 1) conforms to Digital's Alpha RISC Architecture, as specified in Digital's Alpha Architecture Reference Manual, as revised from time to time by Digital, 2) executes Digital's Alpha instruction set, and 3) conforms to the Branding Standard and Product Qualification Procedures.

R. "*Samsung Derivative*" means a semiconductor integrated circuit device embodying the design of Digital's EV56 or EV6 Alpha RISC Architecture implementation (or any Future Alpha Implementation licensed to Samsung) as the case may be, including

updates made thereto by Digital and updates made thereto by Samsung to a Samsung Device, and with such additions, deletions, modifications, improvements and redesigns made by Samsung to a Samsung Device including, but not limited to, design package, testing or die size changes, as result in a final device having any of the following changes (but no other changes) to a Samsung Device:

(i) Change in die size due to mask size change and/or due to employing any CMOS process technology;

(ii) Modification, reduction, addition, or replacement of SRAM cell;

(iii) Change or redesign of cache memory architecture, including necessary implementation to change I/O interfaces;

(iv) Change to form, fit or function of the EV56 or the EV6 Device Specification other than changes or modifications to the EV6 or EV56 "core," which, for purposes of this subsection shall be defined to mean the Samsung Device, excluding the I/O pad ring and caches; and/or

(v) Any change to the Alpha RISC Architecture, or any change not included in (i), (ii), (iii) or (iv) above, to the Device Specification, Product Qualification Procedures or the form, fit or function of the EV56 or EV6 Device Specification, in either case, which has been specifically approved by Digital in its sole discretion, in accordance with the provisions of Section 3.3 (b)(ii) of the Samsung License Agreement referred to in paragraph III.A. of this order.

S. "*Alpha Microprocessor Technology*" means the information, materials, and technology relating to any Digital Alpha Implementation and associated Alpha architectural specification including, but not limited to, layout database and schematics, test programs and vectors, models, design data simulation results, all HAL, PAL, and BIOS codes, design documentation and customer product documentation, and including all updates.

T. "*Software Products*" means Digital commercial software products necessary to generate or optimize binary code for Digital Alpha Implementations.

U. "*CAD Tools*" means Digital CAD Tools, including all updates, applicable to the design, development and manufacture of Digital Alpha Implementations.

V. "*Software Tools*" means Digital software tools as to which Digital has the right to grant a license, including all updates, used to generate or optimize binary code for Digital Alpha Implementations.

W. "*Digital Technology*" means Alpha Microprocessor Technology, Software Products (in both source and object code form), Software Tools (in both source and object code form), FX!32 Software (in both source and object code form) and CAD Tools (in both source and object code form).

X. "*Digital Intellectual Property Rights*" with regard to paragraph II of this order means all patents, patent applications, copyrights, mask works, know-how and trade secrets owned by Digital covering 1) Digital Alpha Implementation, 2) Digital's Alpha RISC Architecture or 3) Digital Technology; and, with regard to paragraph III of this order, "Digital Intellectual Property Rights" has the same meaning as set forth in Section 1.16 of the Samsung License Agreement referred to in paragraph III.A. of this order, covering 1) Digital Alpha Implementation, 2) Digital's Alpha RISC Architecture or 3) Digital Technology.

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

Z. "*Intel/Digital Settlement*" means all transactions and agreements contemplated by, or necessary to implement, the Settlement Agreement Between Digital Equipment Corporation and Intel Corporation, dated October 26, 1997.

AA. "*FX!32 Software*" shall mean the Digital software known as FX!32 for runtime emulation and background binary translation of x86 binaries to native Alpha code and associated documentation, including updates, meaning all corrections, bug fixes, modifications, and enhancements to the FX!32 Software, in both object or source code form, made by or for Digital.

## II.

*It is further ordered, That:*

A. Respondent shall grant a license, by the date this order becomes final, to Advanced Micro Devices, Inc. ("AMD"), or to a licensee that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission and is consistent with the framework of the Memorandum of Understanding entered into between Digital and AMD, dated March 30, 1998 (the "MOU"), which provides, *inter alia*:

1. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license, without the right to sublicense (except as otherwise provided herein) to design, develop, manufacture and have manufactured, and to market, distribute and sell worldwide AMD Licensed Products
2. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license, without the right to sublicense (except as otherwise provided herein), to use, modify, copy, and create derivative works of the Alpha Microprocessor Technology for the purpose of and to the extent required to enable AMD's exercise of the licenses to be granted pursuant to paragraph II.A.1. of this order;
3. The right to grant sublicenses (without the right to grant further sublicenses) to no more than two third parties (as agreed to by Digital and AMD in the MOU) under rights granted to AMD in paragraph II.A.1. above, to manufacture, use and sell AMD 64-bit Microprocessors;
4. The right to provide Infrastructure Partners technology designed or developed by AMD, even if such technology incorporates certain Digital trade secrets or know-how contained in the Alpha Microprocessor Technology, and to grant sublicenses (without the right to grant further sublicenses) such third parties under such technology to make, have made, use or sell products (other than AMD 64-bit Microprocessors) based upon or incorporating such technology. "Infrastructure Partners" shall mean (subject to the terms of the MOU) chipset vendors, BIOS vendors, independent software vendors and other companies in the business of designing and selling products designed to operate with AMD Licensed Products;
5. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to use the CAD Tools, in object code form, and CAD Tool Documentation, for the sole purpose of assisting AMD internally in the design, development and manufacture of AMD Licensed Products and to make copies of the CAD Tool Documentation solely to the extent necessary to enable AMD to implement the terms of internal use licenses. Digital shall also grant AMD a non-exclusive, non-transferable license (without the right to sublicense) to one copy of the source code for each licensed CAD Tool for evaluation purposes only;
6. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense)

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to use internally the Software Products, in object code form, for the sole purpose of assisting AMD in the design, development and manufacture of Alpha Devices, AMD Devices and AMD Derivatives and in the generation and optimization of binary code for Alpha Devices, AMD Devices and AMD Derivatives;

7. Under Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to modify, copy and create derivative works of the Software Tools, in object code and source code form, for internal use only, for the sole purpose of the generation and optimization of software code for Alpha Devices, AMD Devices and AMD Derivatives. AMD shall have the further right to provide and sublicense the Software Tools and modified versions thereof, in object code form, to independent software vendors ("ISVs") for internal use only, for the sole purpose of generating and optimizing the ISVs' own binary code for operation on a computer system having an Alpha Device, AMD Device or AMD Derivative as a central processing unit. AMD and such ISVs will not have the right to market, distribute or sell any Software Tools, and shall not use the Software Tools to develop, market, distribute or sell a product similar to the Software Tools. Digital will also grant AMD a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to one copy of the source code for each licensed Software Tool for evaluation purposes only;

8. Under Digital Intellectual Property Rights, (i) a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to modify, copy and create derivative works of FX!32 Software, in object code and source code form, for internal use only, and (ii) a non-exclusive, non-transferable, perpetual license to reproduce and distribute FX!32 Software, in object code form, either directly or through AMD's authorized distribution channels in conjunction with sales to third parties of Alpha branded products. Digital FX!32 Software Updates shall be furnished by Digital to AMD on a royalty-free basis. Any modification, enhancements or adaptations to FX!32 Software developed by AMD shall be furnished by AMD to Digital under a non-exclusive, perpetual, transferable, royalty-free license, with the right to sublicense in object code or source code form; and

9. Under Digital Intellectual Property Rights, the right to modify or extend Digital's Alpha RISC Architecture, without approval from

Digital, and to produce AMD Devices and AMD Derivatives implemented in accordance with such modified or extended architecture, if Digital fails to establish and implement a roadmap that advances the performance, as measured by speed, of then-current SPECint and/or then-current SPECfp, as appropriate, of the highest Alpha microprocessor by at least 25 percent every three years.

B. Digital shall agree, if requested by the licensee, to submit all disputes of any license agreement described in paragraph II.A. of this order to binding arbitration. Respondent agrees to provide the Commission with ten (10) days notice of an intention to terminate any license agreement described in paragraph II.A. of this order. Other than the above limitations, nothing in this paragraph shall limit Digital's rights to seek redress for any breach of the license agreement described in paragraph II.A. of this order.

C. A purpose of paragraph II of this order is to establish the Commission approved licensee as an independent provider of Alpha Devices in order to promote the Alpha Architecture and Alpha Devices as a viable and competitive microprocessor and to remedy the lessening of competition resulting from the effects of the Intel/Digital Settlement, as alleged in the Commission's complaint. Another purpose of paragraph II of this order is to establish the licensee as an independent provider of innovation in Alpha Device design while maintaining the ability of computer systems based on Alpha Devices supplied by Digital and computer systems based on Alpha Devices supplied by the licensee to run the same software and use the same non-microprocessor components.

D. A condition of approval by the Commission of the licensee shall be the submission by the proposed licensee to the Commission of an acceptable business plan demonstrating that the licensee will use the Alpha Microprocessor Technology to develop, manufacture, market and sell a viable and competitive Alpha Device free of all direct or indirect continuing relationships with Intel in the manufacture or sale of Alpha Devices.

E. A condition of approval by the Commission of the license shall be the submission by Digital to the Commission of an acceptable business plan demonstrating the manner in which Digital shall support the licensee's efforts as required by paragraph II of this order.

F. On reasonable notice to Digital from the licensee, Digital shall provide technical assistance and know-how related to such assistance

to the licensee with respect to the manufacture of, and the provision of technical and engineering support for, all Alpha Devices to be manufactured or sold by the licensee. Such technical assistance shall include, without limitation, consultation with knowledgeable employees of Digital and training at the facilities of Digital. Digital may charge the reasonable costs incurred in providing such technical assistance, including reimbursement (commensurate with the salary and benefits of Digital personnel involved) for the time plus expenses of Digital personnel providing the technical assistance. Digital shall continue to provide such technical assistance until AMD is satisfied that it is capable of producing, and of developing for production, commercially saleable Alpha Devices; provided, however, Digital shall not be required to continue providing such technical assistance and training for more than two (2) years after the date on which the license required by paragraph II.A. of this order is approved by the Commission.

G. Until expiration of the technical assistance obligations of paragraph II.F. of this order, respondent shall take such actions as are necessary to maintain the viability and marketability of the Alpha Microprocessor Technology and Digital's Alpha RISC Architecture and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these intellectual property assets.

### III.

*It is further ordered, That:*

A. Respondent shall grant a license, by the date this order becomes final, to Samsung Electronics Co., Ltd. ("Samsung"), or a licensee that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission and is consistent with the framework of the License Agreement Between Digital and Samsung, dated June 5, 1996, the Supplemental License Agreement entered into between Digital and Samsung, dated April 4, 1998 (the "License Agreement") and the Alpha Marketing and Technology License Agreement entered into between Digital and Samsung, dated April 4, 1998 (the "Marketing Agreement"), which provide, *inter alia*:

1. Under applicable Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license, without the right

to sublicense, to design, develop, and manufacture, and market, distribute and sell worldwide Samsung Devices and Samsung Alpha Architecture Devices;

2. The right to receive from Digital the product technology package as set forth in the License Agreement and Digital know-how (specified in the License Agreement) necessary for the design of Samsung Devices; such technology package may be used by Samsung to design, develop and manufacture Samsung Alpha Architecture Devices and Samsung Derivatives under the terms of the License Agreement;

3. The right to have a third party design a portion of the Samsung Alpha Architecture Device, provided that the third party design is undertaken for and on behalf of Samsung in accordance with the terms and conditions set forth in Section 4 of the License Agreement;

4. Under applicable Digital Intellectual Property Rights, a non-exclusive, non-transferable, perpetual license (without the right to sublicense) to use the CAD Tools, in object code form, and related documentation, for the sole purpose of assisting Samsung internally in the design, development and manufacture of Samsung Devices, Samsung Alpha Architecture Devices, Samsung Derivatives and Other Integrated Circuits in accordance with the terms and conditions set forth in Section 5 of the License Agreement, and to make copies of such documentation solely to the extent necessary to enable Samsung to implement the terms of such internal use licenses; and

5. Under applicable Digital Intellectual Property Rights, the right to reproduce and distribute FX!32 Software, in object code form (including any improvements and derivatives thereto made by Digital) for use with Alpha branded products.

B. Digital shall agree, if requested by the licensee, to submit all disputes of any license agreement described in paragraph III.A. of this order to binding arbitration. Respondent agrees to provide the Commission with ten (10) days notice of an intention to terminate any license agreement described in paragraph III.A. of this order. Other than the above limitations, nothing in this paragraph shall limit Digital's rights to seek redress for any breach of the license agreement described in paragraph III.A. of this order.

C. Digital shall enter into an agreement whereby it shall grant the licensee the non-exclusive right to market and sell the licensee's Alpha Devices under Digital's "AlphaPowered" trademark.

D. Digital shall procure Alpha Devices from the licensee in accordance with Section 8 of the Marketing Agreement.

E. A purpose of paragraph III of this order is to establish the licensee as an independent provider of Alpha Devices in order to promote the Alpha Architecture and Alpha Devices as a viable and competitive microprocessor and to remedy the lessening of competition resulting from the effects of the Intel/Digital Settlement, as alleged in the Commission's complaint. Another purpose of paragraph III of this order is to establish the licensee as an independent provider of innovation in Alpha Device design while maintaining the ability of computer systems based on Alpha Devices supplied by Digital and computer systems based on Alpha Devices supplied by the licensee to run the same software and use the same non-microprocessor components.

F. A condition of approval by the Commission of the licensee shall be the submission by the proposed licensee to the Commission of an acceptable business plan demonstrating that the licensee will use the Alpha Microprocessor Technology to develop, manufacture, market and sell as a viable and competitive Alpha Device free of all direct or indirect continuing relationships with Intel in the manufacture or sale of Alpha Devices.

G. A condition of approval by the Commission of the license shall be the submission by Digital to the Commission of an acceptable business plan demonstrating the manner in which Digital shall support the licensee's efforts as required by paragraph III of this order.

H. Digital shall provide the licensee consulting services and training as described in Section 2.1(c) of the License Agreement.

I. Until expiration of the technical assistance obligations of paragraph III.H. of this order, respondent shall take such actions as are necessary to maintain the viability and marketability of the Alpha Microprocessor Technology and Digital's Alpha RISC Architecture and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these intellectual property assets.

#### IV.

*It is further ordered,* That within six months after the date this order becomes final, Digital shall, subject to the prior approval of the Commission, enter into an agreement with IBM or some other company, whereby Digital will work with IBM or such other

company to evaluate it as a foundry and provide IBM or such other company a report setting forth the steps necessary to become a qualified supplier of Digital Devices, Alpha Devices, and Digital Alpha Implementations to Digital under Digital's quality, performance and production criteria within six (6) months after the date the Commission approves such agreement; provided, however, if Digital demonstrates to the Commission that the agreement is not necessary to achieve this purpose, then Digital need not submit any agreement pursuant to this paragraph IV.

## V.

*It is further ordered,* That respondent shall comply with all requirements of any licenses or agreements entered pursuant to this order, and such licenses or agreements are incorporated by reference into this order and made a part hereof. Any failure by respondent to comply with the requirements of such licenses or agreements shall constitute a failure to comply with this order.

## VI.

*It is further ordered,* That:

At any time after respondent has signed the agreement containing consent order in this matter, the Commission may appoint an Interim Trustee to monitor respondent's performance of its responsibilities as required by this order and by any license or agreement implementing this order, including, but not limited to, any license agreement between Digital and any licensee, as provided in paragraphs II and III of this order. Within ten (10) days after acceptance by the Commission for public comment of the agreement containing consent order, respondent shall submit the name and qualifications of and contract with a person to serve as Interim Trustee.

1. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms and compliance with any other agreement implementing this order, including, but not limited to, any license agreement provided in paragraphs II and III. The Interim Trustee may be the same trustee appointed pursuant to paragraph VII.A. of this order.

2. Respondent's agreement with the Interim Trustee shall confer on the Interim Trustee all the rights and powers necessary to permit

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the Interim Trustee to monitor respondent's compliance with the terms of this order and any other agreement implementing this order, including, but not limited to, any license agreement as provided in paragraphs II and III.

3. The Interim Trustee shall serve until the licensees approved pursuant to paragraphs II and III of this order have received all the technology and assistance provided for in those paragraphs. In no event, however, shall the Interim Trustee serve for more than two (2) years from the date this order becomes final.

4. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of any product or technology covered by this order, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of any product covered by this order. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondent's compliance with paragraphs II and III of this order or any other agreement implementing this order, including, but not limited to, any license agreement as provided in paragraphs II and III in this order.

5. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. Respondent shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages,

claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

7. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee.

8. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and any other agreement implementing this order, including, but not limited to, any license agreement as provided in paragraphs II and III of this order.

9. The Interim Trustee shall evaluate reports submitted to it or the Commission by Digital. The Interim Trustee shall report in writing concerning compliance by respondent with the provisions of paragraphs II and III of this order to the Commission every three (3) months from the date respondent signs the agreement containing consent order until the term of the Interim Trustee expires, as provided above. Such reports shall include at least the following:

a. Whether respondent has executed the licenses and agreements required under paragraphs II and III of this order;

b. Whether respondent has given the Interim Trustee access to records as required by paragraph VI.4. of this order;

c. Whether licensees have issued any sublicenses under paragraphs II and III of this order; the names, addresses, and phone numbers of any such sublicensee; and the purpose and terms under which these persons have been given sublicenses;

d. Whether and the degree to which Digital has provided the technical assistance and know-how to licensees as required under paragraphs II.F. and III.H. of this order;

e. Whether Digital has refused to allow any licensee to sublicense any person;

f. Whether licensees are making any good faith efforts to develop or sell any of the products covered by licenses under paragraphs II and III of this order, and, to the extent such sales have been made, the gross sales levels; and

g. The progress of Digital and any licensee in implementing their Commission-approved business plans and the extent to which the agreement is satisfying paragraphs II.D. and E. and III.F. and G. of this order.

## VII.

*It is further ordered, That:*

A. If Digital has not executed the licenses and agreements, and received the Commission's approval for such licenses and agreements, required by paragraphs II and III of this order, then the Commission may appoint a trustee to grant the licenses or enter into agreements consistent with the terms set forth in paragraphs II and III of this order. The trustee shall have all rights and powers necessary to permit the trustee to enter into the licenses and agreements so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Digital shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by any of the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph VII.A. of this order, Digital shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, who shall be a person with experience and expertise in acquisitions and licenses.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to enter into the licenses and agreements required by paragraphs II and III of this order in order to accomplish the remedial purposes of this order.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to enter into the licenses and agreements required by paragraphs II and III of this order so as to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months from the date the trust agreement is approved by the Commission to accomplish the license required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of license or believes that license can be achieved within a reasonable time, the license period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court); provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Alpha Devices or Digital, or to any other relevant information, as the trustee may request. Digital shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the license. Any delays in licensing caused by the respondent shall extend the time for licensing under this paragraph VII in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the absolute and unconditional obligation of Digital to license at no minimum price; provided, however, that the trustee shall not negotiate any price or terms with AMD less favorable to respondent than those set forth in the MOU referred to in paragraph II of this order. The license shall be made in the manner, and to the licensee or licensees, as set out in paragraphs II and III of this order; provided, however, if the trustee receives bona fide offers from more than one licensee, and if the Commission approves more than one such licensee, then the trustee shall license to the entity or entities selected by Digital from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Digital, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Digital, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The

trustee shall account for all monies derived from the license and all expenses incurred. After approval by the Commission (and, in the case of a court-appointed trustee, by the court) of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Digital and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (based on sales price) contingent on the trustee's accomplishing the license required by this order.

8. Digital shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VII.A. of this order.

10. The Commission (or, in the case of a court-appointed trustee, the court) may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the license required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Alpha Microprocessor Technology.

12. The trustee shall report in writing to Digital and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the license.

#### VIII.

*It is further ordered,* That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondent has granted the licenses and agreements required by the provisions of paragraphs II, III and IV of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II, III and IV of this

