

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES,)	
)	
Plaintiffs,)	Civil Action No.
)	05-441-JJF
v.)	
)	
INTEL CORPORATION,)	
)	
Defendant.)	

Teleconference in above matter taken pursuant to notice before Renee A. Meyers, Registered Professional Reporter and Notary Public, in the offices of Blank Rome, LLP, 1201 North Market Street, Wilmington, Delaware, on Wednesday, August 22, 2007, beginning at approximately 4:00 p.m., there being present:

BEFORE:

THE HONORABLE VINCENT J. POPPITI, SPECIAL MASTER

APPEARANCES:

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Teleconference

Page 2

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1 SPECIAL MASTER POPPITI: Counsel, Vincent
2 Poppiti. How are you all?

3 MR. HOLZMAN: James Holzman, Prickett Jones
4 for the Class.

5 SPECIAL MASTER POPPITI: Thank you.

6 MR. SMALL: Daniel Small with Cohen Milstein
7 for the Class.

8 SPECIAL MASTER POPPITI: Thank you.

9 MR. LANDAU: Brent Landau with Cohen
10 Milstein for the Class.

11 SPECIAL MASTER POPPITI: Thank you.

12 MR. HORWITZ: Rich Horwitz and Harding Drane
13 for Intel, and with Your Honor's permission, I may be
14 getting off the call before we are done, depending on
15 how long it goes, but Mr. Drane and my co-counsel will
16 still be on.

17 SPECIAL MASTER POPPITI: That's fine. Thank
18 you.

19 MR. HORWITZ: Thank you, Your Honor.

20 MR. HOCKETT: Chris and Bri Hahn (phonetic)
21 for Intel.

22 SPECIAL MASTER POPPITI: Thank you very
23 much.

24 MS. MULLANEY: Mary Mullaney from Blank

Teleconference

Page 4

1 Rome.

2 SPECIAL MASTER POPPITI: Thank you. I think
3 that rounds us out.

4 The application that is before me I have as
5 DM No. 7. It is Intel's application to tell Class
6 plaintiffs to produce documents responsive to document
7 request for production No. 8 and 9. And although the
8 original pleading was for eight, nine, as well as first
9 set of request for production and request for production
10 Nos. 1 and 2, I think that's changed during the course
11 of your meet and confers and/or during the course of
12 your submittals to me.

13 I have read the July 31st application. I
14 have also read the answering document filed in
15 opposition dated August 7 and the reply dated August 9.

16 So, please.

17 MR. HOCKETT: Chris Hockett. If you would
18 like me to start, I am prepared to do that.

19 SPECIAL MASTER POPPITI: Please do.

20 MR. HOCKETT: Thank you. Thanks for hearing
21 us. We are actually before Your Honor on four requests.
22 They are requests 8 and 9 and the first set of request
23 for production and request one and two in the second set
24 of requests for production. Request 1 and 2 from the

1 second set encompass 8 and 9.

2 SPECIAL MASTER POPPITI: Okay.

3 MR. HOCKETT: And I think this boils down to
4 really just one question, and, that is, whether the
5 ML Lee case decided by Judge Farnan applies here. If it
6 does, I don't think it leaves much question that we are
7 entitled to the discovery that we seek. But if it does
8 apply because it is relevant to the adequacy of the
9 plaintiffs to represent the Class, as Judge Farnan said
10 in ML Lee -- and this is on page 508.

11 SPECIAL MASTER POPPITI: I have that in
12 front of me.

13 MR. HOCKETT: Before allowing a plaintiff to
14 represent the Class, the Court must be convinced that
15 the plaintiffs are willing and financially able to
16 shoulder the burdens of Class representation; thus, the
17 financial status of a proposed representative plaintiff
18 is relevant to the determination of whether that
19 plaintiff is capable of adequately representing the
20 Class, closed quote.

21 SPECIAL MASTER POPPITI: And, counsel, if I
22 understand the Class -- and I want you to frame your
23 comments essentially based on their discussion with you
24 in their answer -- if I understand it, and if I

Teleconference

Page 6

1 overstate it, I am sure I will be told that perhaps I am
2 -- are you all there?

3 MR. HOCKETT: Yes, Your Honor.

4 SPECIAL MASTER POPPITI: It seems to me what
5 they are saying is, as a result of the changes to the
6 rules, that, in certain context, I am not sure what
7 context we are dealing with here yet, it is
8 inappropriate for the Court to consider the financial
9 wherewithal of the Class representatives.

10 Do you agree with that, their view of what
11 they are saying?

12 MR. HOCKETT: If you put it that way, I
13 think I agree that they say we are not entitled to this
14 discovery, and they have -- the plaintiffs have cited
15 two cases which come out the other way from ML Lee and
16 Judge Farnan.

17 SPECIAL MASTER POPPITI: Right.

18 MR. HOCKETT: And we certainly acknowledge
19 that there is a split of authority on this issue. There
20 is a split before Judge Farnan decided the ML Lee case
21 and actually another case where he came out the same
22 way.

23 SPECIAL MASTER POPPITI: Right.

24 MR. HOCKETT: And there is a split of

1 authority after.

2 SPECIAL MASTER POPPITI: It's both before
3 and after, I agree.

4 MR. HOCKETT: And there was a split -- there
5 are cases, and we have cited at least one to Your Honor
6 after the adoption of Rule 23(g), which acknowledged
7 that a Class representative's financial information is
8 relevant to the adequacy determination. The case I am
9 thinking of is called Mascol versus E & L
10 Transportation.

11 So, the defenses that the plaintiffs have
12 raised to this discovery are two: One is that they have
13 a fee agreement which renders the plaintiffs'
14 wherewithal irrelevant; however, Judge Farnan, himself,
15 in ML Lee, dealt with that, and I am sure Your Honor has
16 read that --

17 SPECIAL MASTER POPPITI: I have.

18 MR. HOCKETT: -- and discussed it.

19 The other defense they have is that
20 Rule 23(g)'s adoption in 2003 does away with this issue,
21 but we say that isn't so.

22 Rule 23(g) --

23 SPECIAL MASTER POPPITI: Talk about the
24 first piece of that with respect to the fee arrangement.

Teleconference

Page 8

1 If I understand the state of this record,
2 you have a representation that there is a fee
3 arrangement. We don't know what that is. We don't know
4 what the binding number is and we don't know whether
5 there are any provisions for letting anyone out;
6 correct?

7 MR. HOCKETT: That's correct. Similar to ML
8 Lee, the plaintiffs haven't completely disclosed the fee
9 arrangement, but they have talked about it in
10 hypothetical terms. And as ML Lee says, an agreement by
11 plaintiffs' counsel to advance the cost of litigation
12 does not defeat the relevance of plaintiff's own
13 financial status.

14 So, we don't know what their agreement is.
15 But even if it is what they have hinted at, that's the
16 same thing that Judge Farnan addressed in ML Lee.

17 SPECIAL MASTER POPPITI: Okay.

18 MR. HOCKETT: And then with regard to the
19 arguments related to the adoption of Rule 23(g), 23(g)
20 is, by its terms, explicitly addressed to how courts
21 should evaluate the adequacy of Class counsel. It left
22 intact 23(a), which still requires the Court to consider
23 the adequacy of Class representative.

24 SPECIAL MASTER POPPITI: Right. No language

1 was changed.

2 MR. HOCKETT: That was not changed and the
3 comments underscore that. I am reading the comments in
4 subdivision "G" that came out with the new rule.

5 SPECIAL MASTER POPPITI: I have that right
6 in front of me.

7 MR. HOCKETT: It says, "Rule 23(a)(4) will
8 continue to call for scrutiny of the proposed Class
9 representative while this subdivision will guide the
10 Court in assessing proposed Class counsel as part of the
11 certification decision."

12 So, that, by its terms, was not intended to
13 affect anything related to the analysis of the adequacy
14 of Class representatives to serve as Class
15 representatives, and, thus, we don't think would
16 "impliedly" revoke or undermine the body of case law, of
17 which ML Lee is a part, that says that financial
18 information of plaintiffs is relevant to that
19 determination.

20 As I said, there was a split of authority
21 before and there is a split of authority after ML Lee
22 and after the adoption of Rule 23(g). I have no reason
23 to believe that Judge Farnan has changed his mind on
24 this, and, in fact, I have every reason to believe that

Page 10

1 he, based on what he says in ML Lee, that he will expect
2 to hear testimony on this issue in connection with Class
3 certification.

4 SPECIAL MASTER POPPITI: And let me ask
5 another question with respect to your view of the split
6 of authority, and whether you choose to do it globally
7 in terms of answering or helping with the question or
8 whether you choose to focus on any particular case, it's
9 your choice, but I certainly have the sense that, with
10 respect to the cases that you -- which you each have
11 brought to my attention, they are rather fact driven. A
12 number of them that went the other way, that did not
13 accept the Farnan view, either pre or post Farnan, were
14 looking at different classes, if you will. Some were
15 looking at classes that were not as significant as the
16 Class that is described in this case.

17 Do you agree that that's a fair statement?

18 MR. HOCKETT: This is Chris Hockett. I do
19 agree. There are a couple of different variations. One
20 of the variations relates to the complexity of the case
21 and the size of the alleged Class. And a number of the
22 decisions that have come out, as you put it, in a way
23 opposite of ML Lee, have cited the small size of the
24 Class that was involved in this case and the relatively

1 un-complex nature of those cases to say that the
2 plaintiffs' wherewithal wasn't relevant.

3 A number of those cases have distinguished
4 the cases that have held that the financial information
5 of plaintiffs was relevant by saying, Those were cases
6 that involved a large number of alleged Class members
7 and complex claims.

8 Here, we have a case that where the alleged
9 Class would number in the millions of people. It's a
10 complex case. The class of notification and other costs
11 would be enormous. So, I would say that a number of the
12 cases, for example, the Sanderson versus Winner case in
13 the Tenth Circuit would have come out our way because of
14 what they say about the applicabilities of their ruling
15 only through cases that are much more -- much smaller in
16 nature and scope.

17 SPECIAL MASTER POPPITI: And I think it's
18 not inappropriate to suggest I believe you are looking
19 at language, and let me quote this for the record, and
20 this is from Sanderson case, at page 480, "We are aware
21 that some lower Court decisions have considered the
22 plaintiffs' ability to pay as relevant and proper in the
23 present context." And then it goes on to cite several
24 cases. "However, in both of these cases in which

Page 12

1 antitrust violations were alleged, the plaintiff sought
2 to represent a Class of all new car purchasers in the
3 United States, thus, there was legitimate concern about
4 the ability of plaintiffs to successfully lead a Class
5 of this magnitude."

6 Also, the Court, and it references a case in
7 Ralston, was concerned about its ability to manage the
8 Class. The mentioned considerations are not present
9 here.

10 MR. HOCKETT: The only other thing I would
11 add -- and this is Chris Hockett again -- the only other
12 thing I would add is that there are a number of
13 decisions that take up the issue of the plaintiffs'
14 wherewithal in the context of Class certification and
15 they say that it's not determinative, and we think that
16 is quite a separate issue from whether the financial
17 status and facts related to the Class representatives is
18 discoverable.

19 SPECIAL MASTER POPPITI: Well, and I -- let
20 me ask you, in that context, then, I was struck by the
21 reference to -- let me just pull this case for a moment
22 -- Weikel, and let me read the context in the Class
23 submission. It's a reference to Weikel and the
24 parenthetical is distinguishing ML Lee and concluding

1 that there were a bit there -- I am sorry -- and
2 concluding that where a plaintiff, quote, has no
3 obligation to pay the expenses of litigation regardless
4 of the outcome -- and I am going to want you to address
5 that in a moment -- "there is no possibility the threat
6 of funding revocation will lead to coercion."

7 I guess what I found interesting, and I will
8 want both of you to address this, if you choose, in
9 Weikel, as I read it, I understood that there was a
10 question about the ability of individual members of the
11 Class to be members of the Class, that one individual
12 member, and I believe that member's name, and I am
13 looking at page 399 of the case, was an individual by
14 the name of Lyons, and the Court said, "Defendants argue
15 the fact Lyons did not wish to bear the burden of
16 proceeding at his own at a cost of approximately \$5,000
17 demonstrates he is not suitable to be a Class
18 representative."

19 And then the Court goes on to point out that
20 the facts that it was dealing with, in this case -- and
21 I might add that this was on the merits of
22 certification, it wasn't a discovery -- it was not a
23 discovery case -- the Court pointed out that there were
24 two things that it considered in terms of the factual

Page 14

1 context. One was the plaintiffs, counsel for lead
2 plaintiffs agreed to advance the costs of suit, and
3 perhaps even more importantly, it goes on to read, "In
4 the event this action is not successful, Workman," who
5 happens to be another named Class plaintiff -- "has
6 agreed to reimburse counsel for litigation expenses and
7 have proffered evidence of their ability to do so."

8 So, it seems to me the Court was saying
9 there are a couple factors here, both of which related
10 to, or a number of them, each of them related to
11 finances. One, it said there was a funding agreement;
12 two, even if the plaintiffs were unsuccessful, one of
13 the members of the Class said, "We will do it," and,
14 finally, the member of the Class that said, "We will do
15 it," the Court had some information that there was
16 evidence of its ability to do so.

17 What do you make of all that?

18 MR. HOCKETT: I think the same that you are
19 making of that, which is that there was discovery into
20 the finances of all of the Class representatives, or
21 would be Class representatives so that this
22 determination could be made and it could be explored in
23 the context of the adequacy determination in connection
24 with Class certification proceeding.

1 SPECIAL MASTER POPPITI: One thing I'd like
2 you to address is the view of the Class that, by virtue
3 of adding focus on the Class counsel at 23(g)(1)(b),
4 that it really changed -- it changed the ball game, if
5 you will, and I am specifically referencing their
6 comments in your August 7th correspondence to me at page
7 3, where they seem to be suggesting that the function
8 and role of the Class representatives and the function
9 and role of the Class counsel has changed by virtue of
10 the rule change. And they describe that change rather
11 specifically.

12 I'd like you to address what you believe to
13 be the change that was made by the rules and its impact.

14 MR. HOCKETT: I think the rules, if I am not
15 mistaken, I think these rules were adopted in connection
16 with some innovations that Courts were coming up with in
17 terms of judging the adequacy of Class counsel and
18 making sure that they were adhering to their
19 responsibilities and not just acting with a small group
20 of interests and certainly not with their -- with
21 self-interest in mind. And this was not really
22 addressed to the issue of the adequacy of Class
23 representatives and the duties that they must bear in
24 connection with serving as Class representatives.

Page 16

1 I think it proves too much to say that it
2 doesn't matter what, after Rule 23(g), whether there
3 would be any tension or disagreement between Class
4 counsel and the Class representatives because the Class
5 representatives are going to look out for the interests
6 of the Class.

7 I think the Class representatives have,
8 since the rule was adopted originally, and continue to
9 have duties to represent the Class, and it would be
10 improper to suggest that the relationship between them
11 and Class counsel is now somehow made moot by 23(g).

12 SPECIAL MASTER POPPITI: Okay. Would you
13 address for me the nature -- and we don't know what the
14 agreement is -- but address with me, from your view,
15 what you expect an agreement to fund costs can do just
16 generically and what it can't do.

17 MR. HOCKETT: Well, I think we submitted
18 some authority on that.

19 SPECIAL MASTER POPPITI: You did.

20 MR. HOCKETT: Some of the Class -- counsel
21 cannot agree to advance on a nonrecourse basis, if you
22 will, certain kinds of costs in connection with -- in
23 connection with their representation of a client. And
24 we gave you an opinion from I believe the Oklahoma --

1 SPECIAL MASTER POPPITI: You did.

2 MR. HOCKETT: -- Bar that specify the kinds
3 that they couldn't agree to cover without recourse.

4 There are limits on their ability to stand
5 in front of the cost burden that would ordinarily be
6 borne by the real plaintiff.

7 SPECIAL MASTER POPPITI: Okay. Anything
8 else, then, please?

9 MR. HOCKETT: If Your Honor doesn't have
10 anymore questions for us, I am prepared to pass the mic
11 for now.

12 SPECIAL MASTER POPPITI: I have none at this
13 juncture.

14 MR. LANDAU: Good afternoon, Your Honor,
15 this is Brent Landau for the plaintiff.

16 SPECIAL MASTER POPPITI: Thanks, Mr. Landau.

17 MR. LANDAU: I'd like to start by just
18 talking a little bit about what is the information
19 that's being requested here by Intel. And the key, I
20 think, is that the information requested is of a highly
21 sensitive character. It includes individual consumers'
22 tax returns and bank records, all of which is
23 information that the plaintiffs here have a very strong
24 interest in keeping private -- the plaintiff have a

Page 18

1 strong interest in keeping this type of personal
2 financial information private. And, in fact, courts
3 have recognized, and we have cited some of these in our
4 letter brief, that allowing this type of discovery,
5 which can be characterized, and has been, as oppressive,
6 can be used as a way for defendants in Class actions to
7 discourage meritorious suit. And I think that that's a
8 real concern here.

9 SPECIAL MASTER POPPITI: And let me ask you
10 that against the backdrop of what Judge Farnan did.

11 Do you see, on the face of this opinion,
12 that the records that he permitted, that were required
13 to be produced in his case are different from,
14 significantly different from, not different at all from
15 what's being requested here? You agree with me he did
16 not talk about any heightened standard, did he?

17 MR. LANDAU: No. He didn't talk about a
18 heightened standard, that's true. And I think that it's
19 also true that there was some expansive information
20 ordered to be produced in that case.

21 SPECIAL MASTER POPPITI: So, with respect to
22 the type of information, how is Judge Farnan and ML Lee
23 different from the current circumstance?

24 MR. LANDAU: I am not sure that, with

1 respect to the type of information, it's all that very
2 different. But I think the effect is still important to
3 consider in light of the type of information that it is
4 and the effect that allowing this type of discovery in a
5 case like this one, with individual consumers, could
6 have.

7 But I think that, against that backdrop, the
8 critical issue --

9 SPECIAL MASTER POPPITI: Counsel, let me
10 just ask one other question in that vein: Is it fair to
11 suggest that the Class is, in this case, is significant?

12 MR. LANDAU: When you say "significant," in
13 terms of numbers, it certainly is, or could be
14 significant number of consumers. The Class, as it's
15 been defined, would include all indirect purchasers of
16 Intel X 86 microprocessors.

17 SPECIAL MASTER POPPITI: And, I mean, is it
18 also fair for me to expect that you are saying, if
19 financial information is going to be produced, it's
20 going to shield certain individual from wanting to
21 become a member of the representative Class? Is that
22 what I am hearing you say?

23 MR. LANDAU: I think it's certainly a
24 concern. It's a concern, for example, that the Tenth

Teleconference

Page 20

1 Circuit pointed out in the Sanderson case.

2 SPECIAL MASTER POPPITI: I am aware of what
3 Sanderson said.

4 MR. LANDAU: So I think it's certainly a
5 risk that this type of discovery could chill
6 participation in meritorious type action.

7 SPECIAL MASTER POPPITI: Let me ask you
8 about Sanderson just for a moment because, isn't it fair
9 to say that, with the Court in Sanderson expressing a
10 concern, that the Court in Sanderson was looking at a
11 limited Class, was it not?

12 MR. LANDAU: A Class smaller than this one,
13 you mean?

14 SPECIAL MASTER POPPITI: Yes.

15 MR. LANDAU: Yes, I think that that's true.

16 SPECIAL MASTER POPPITI: Much smaller?

17 MR. LANDAU: Yes.

18 SPECIAL MASTER POPPITI: I don't think that
19 Sanderson said it this way, but Sanderson, do you think
20 it stands for the proposition that if tax returns were
21 going to be required and other financial information was
22 going to be required, there would be no significant body
23 called the representative Class members?

24 MR. LANDAU: I am not sure about that. I

1 didn't read it that way. And I think that the concern
2 that the Court in Sanderson is pointing out about
3 oppressive discovery as a means of discouraging private
4 antitrust actions is one that applies regardless of the
5 size of the case.

6 The discussion about the size occurred in
7 the context of distinguishing some other cases that had
8 been larger than Sanderson was, but I don't think that
9 the size of the proposed Class is something that factors
10 into whether a need to produce the kinds of sensitive
11 financial documents that are being sought here would
12 discourage participation.

13 SPECIAL MASTER POPPITI: Okay. And, in any
14 event, Sanderson, the Sanderson decision was handed down
15 in 1974.

16 MR. LANDAU: Yes.

17 SPECIAL MASTER POPPITI: Long before Judge
18 Farnan did what he did in ML Lee.

19 MR. LANDAU: That's true.

20 SPECIAL MASTER POPPITI: Thank you.

21 MR. LANDAU: But like ML Lee, it was before
22 the 2003 amendment to the Federal Rules of Civil
23 Procedure.

24 SPECIAL MASTER POPPITI: I understand that

Teleconference

Page 22

1 and I expect you will want to spend some time with me
2 discussing that.

3 MR. LANDAU: Well, I think that this is
4 probably an appropriate time to do so.

5 SPECIAL MASTER POPPITI: Okay.

6 MR. LANDAU: I think that that's really a
7 critical issue with respect to a proper interpretation
8 of what ML Lee means for this issue.

9 The concern, as Your Honor knows, in ML Lee,
10 was that the plaintiff could be coerced into complying
11 with an attorney's advice with regard to different
12 options that may be available on legal issues because of
13 the potential threat of funding revocation. And what we
14 have argued is that in Rule 23(g) clarifies that that's
15 not something that would be of concern.

16 SPECIAL MASTER POPPITI: Let me ask you
17 this: If I understand the comments to the Rule, and I
18 am looking at subdivision G.

19 MR. LANDAU: Yes.

20 SPECIAL MASTER POPPITI: It says,
21 "Subdivision G is new, it responds to the reality that
22 the selection and activity of Class counsel are often
23 critically important to the successful handling of a
24 Class action." And I don't think anybody that we are --

1 anybody this afternoon, on this call, or anyone else,
2 would disagree with that.

3 "Until now, Courts have scrutinized proposed
4 Class counsel as well as the Class representative under
5 Rule 23(a)(4). This experience has recognized the
6 importance of judicial evaluation of the proposed lawyer
7 for the Class, and this new subdivision builds on that
8 experience rather than introducing an entirely new
9 element into the Class certification process. Rule
10 34(a)(4) will continue to call for scrutiny of the
11 proposed Class representative, while this subdivision
12 will guide the Court in assessing proposed Class counsel
13 as part of the certification decision."

14 Now, it seems to me that what I think I am
15 reading here is that this is, if you will, codifying the
16 practice and perhaps giving more specific guidance to
17 the Court in some of the subsections of G(1) and (2).

18 Do you disagree with that?

19 MR. LANDAU: I think -- I am not sure, Your
20 Honor, with all due respect, that I totally agree with
21 that.

22 SPECIAL MASTER POPPITI: Well, then, please,
23 tell me where you don't agree.

24 MR. LANDAU: I think that, as a starting

Page 24

1 point, the addition of Rule 23(g) has to have meant
2 something in the context of Class action procedures.

3 SPECIAL MASTER POPPITI: Okay.

4 MR. LANDAU: And, at a minimum, I think what
5 it's doing is clarifying what the rules mean
6 specifically with respect to the role of Class counsel
7 as well as the relationship between Class counsel and
8 Class representative. And some of that is especially
9 evident later in the comments with respect to the
10 comments for paragraph (g)(1)(b), which discusses the
11 fact that the primary responsibility of Class counsel
12 resulting from appointment of Class counsel is to
13 represent the best interests of the Class.

14 SPECIAL MASTER POPPITI: And I see that.
15 What do you make of the language in that same
16 subsection, "The rule thus establishes the obligation of
17 Class counsel, an obligation that may be different from
18 the customary obligation of counsel to individual
19 client"?

20 With such compelling language in other
21 sentences, why do you expect that the committee chose
22 the word "may"?

23 Is this really a rewriting of how attorneys
24 relate to their clients and clients to their attorneys

1 in a Class setting?

2 MR. LANDAU: I am not sure, Your Honor, that
3 it's a rewriting as much as a clarification. But with
4 respect to the use of the word "may," I, obviously,
5 don't know what the authors were thinking, but it seems
6 to me that that's an appropriate word in the context
7 because, ordinarily, there shouldn't be any divergence
8 in the interests of an individual Class member and the
9 Class as a whole.

10 What this comment clarifies is that when
11 there is any disagreement, that that obligation of Class
12 counsel is to the Class as a whole not to an individual
13 client, which is different than the customer obligations
14 of counsel, which, of course, are to do as the client
15 directs.

16 SPECIAL MASTER POPPITI: And, of course,
17 this is all under the umbrella, or could be under the
18 umbrella of the watchful eye of the Court in the sense
19 that if there is a disagreement between, let's say, a
20 number of the representatives of the Class, let's not
21 worry about whether it's a significant number or a
22 number short of being significant, and the counsel for
23 the Class, do you not agree that, in an appropriate
24 setting with appropriate facts to tee it up, the Court

Page 26

1 may have to get involved even in that preliminary
2 dispute?

3 MR. LANDAU: I think, Your Honor, that it's
4 absolutely true that the Court always retains oversight
5 over what Class counsel does --

6 SPECIAL MASTER POPPITI: Okay.

7 MR. LANDAU: -- as pursuant to the Rule and
8 pursuant to its inherent authority. In addition, there
9 were various procedural mechanisms throughout the case
10 to make that happen; for example, any member of a Class,
11 including a Class representative, always has the option
12 to opt out of a Class or to air different views
13 regarding a settlement or other issues that may come up
14 in a case.

15 SPECIAL MASTER POPPITI: Right. Let me pose
16 this question: I think the Rule deals with part of the
17 coin but perhaps not with the flip side of the coin or
18 the commentary to the rule. The commentary to the rule
19 says, in the same vein, "The Class representatives
20 cannot command Class counsel to accept or reject a
21 settlement proposal" -- let me go one sentence before
22 that. "The Class representatives do not have an
23 unfettered right to fire Class counsel."

24 That, of course, is no different than it was

1 before this Rule was changed; is that a fair comment?

2 MR. LANDAU: I think that it's true that,
3 before the Rule was changed, the client didn't have that
4 unfettered right either, but I think that what this Rule
5 amendment does is make that clear, and, to the extent it
6 wasn't before, make it mandatory.

7 SPECIAL MASTER POPPITI: Okay.

8 MR. LANDAU: And I think, in particular,
9 it's worthwhile looking at what Judge Farnan was
10 concerned about in ML Lee, and that was that a plaintiff
11 could be coerced into complying with an attorney's
12 advice with regard to different options that may be
13 available.

14 One example of that, and that's the example
15 in the comment to which you just referred, is if there
16 were a proposed settlement, the Rule makes clear that
17 the Class representatives cannot command Class counsel
18 to accept or reject a settlement proposal. To the
19 contrary, Class counsel must determine whether seeking
20 the Court's approval of the settlement would be in the
21 best interests of the Class as a whole.

22 SPECIAL MASTER POPPITI: And I do understand
23 that and certainly understand that in the context of the
24 language. But let me turn the coin over that I was

Page 28

1 discussing with you just a moment ago.

2 What right does the Class counsel have in
3 terms of -- and I guess it has to be against the
4 backdrop of the retainer agreement, of the retention
5 agreement -- what right does a Class counsel have to
6 say, You know what, I can't deal with you people
7 anymore; I am out of here? How does that work?

8 MR. LANDAU: Your Honor, the initial matter,
9 Your Honor, I don't think that that is something that
10 would be a concern for a few different reasons.

11 SPECIAL MASTER POPPITI: Do you agree with
12 me that a Class -- Class counsel can advise the Court
13 that it would no longer like to represent the Class?
14 And, quite frankly, I haven't looked at cases and it's
15 not discussed in this fashion in your submittals, I am
16 not directed to any language in the Rule, nor do I see
17 any language in the Rule that locks Class counsel in if
18 he or she or the firms want to be out.

19 MR. LANDAU: And, Your Honor, I don't see
20 anything specifically in the Rule about that either, but
21 I think it's worth noting that when an attorney seeks
22 the Court's appointment as Class counsel, they are
23 taking on an obligation not just to their client and to
24 the Class but to the Court as well.

1 SPECIAL MASTER POPPITI: Certainly.

2 MR. LANDAU: And, certainly, there couldn't
3 be any withdrawal of the type you mentioned without
4 permission of the Court.

5 In addition, it's hard to see why --

6 SPECIAL MASTER POPPITI: Was that changed by
7 the Rule, do you expect?

8 MR. LANDAU: No. I don't expect that that
9 would be changed by the Rule. I think that, again, the
10 Rule clarifies the issue and makes clear what the
11 obligations and responsibilities of Class counsel are,
12 but I think that that was something that was an
13 obligation of Class counsel before.

14 One of the things that's new, I think, is
15 that you wouldn't have a situation, in my view, where
16 Class counsel decided to seek leave to no longer serve
17 in that role as a result of a disagreement or difference
18 of opinion with one of the Class representatives because
19 I think that the Rule now makes clear that the
20 responsibility of Class counsel is not just to their
21 individual client but to the Class as a whole. And to
22 the extent that was unclear before, then it's certainly
23 clear now.

24 SPECIAL MASTER POPPITI: Well, I guess my

Teleconference

Page 30

1 questions are really framed against what Judge Farnan
2 was concerned about, and I think what I am hearing is
3 that the circumstance of his concern isn't necessarily
4 changed by a Rule, by this Rule, is it?

5 MR. LANDAU: I think it is, actually, Your
6 Honor, because the concern that Judge Farnan expressed
7 was coercion.

8 SPECIAL MASTER POPPITI: Right.

9 MR. LANDAU: And under the new Rules, the
10 coercion that's important isn't coercion of a Class
11 representative, it's coercion of the Class as a whole
12 because the responsibilities of Class counsel are to the
13 Class as a whole. So there wouldn't be any occasion to
14 exert any sort of coercion on a Class representative
15 because of what the Rule spells out as the obligations
16 of Class counsel.

17 What's important is relationship between
18 Class counsel and the Class, and, as to that, I think
19 the Rule is clear that Class counsel is appointed to act
20 in the best interests of the Class.

21 SPECIAL MASTER POPPITI: I am not sure,
22 though, I understand your response in light of the
23 language that Judge Farnan uses at page 509. It says,
24 "At a minimum, a Court must be satisfied that a

1 plaintiffs' resources are sufficient to preclude the
2 possibility that a plaintiff could be coerced into
3 complying with an attorney's advice with regard to
4 different options that may be available on legal issues
5 in Class action because of the potential threat of
6 funding revocation."

7 Now, it may be that the Class counsel has to
8 jump through a different hoop. It may be that there has
9 to be a more detailed explanation to the Court, and I am
10 not sure that Judge Farnan was focused on, if you will,
11 any breach of the funding arrangement. I think he was
12 focused on just the concern that, at a point in time, if
13 Class counsel is in a position to force, whether it's by
14 leave of Court, if you will, or by virtue of the
15 agreement that you have, that's the concern that I see
16 him raising here. I don't have the context because we
17 don't have any facts in ML Lee.

18 Do you see that differently?

19 MR. LANDAU: I think that there are at least
20 two issues. One is, in light of the amendments to the
21 Rule, there still exists the opportunity for coercion
22 that Judge Farnan was concerned about. And the other
23 is: Is there any real threat here of funding revocation
24 that could be coercive? And, so far, we have been

Page 32

1 talking about that first issue: Is there an opportunity
2 for coercion? And, again, I would go back to the
3 example that the advisory committee gives, which I think
4 would fit into Judge Farnan's concern about whether a
5 plaintiff would comply with an attorney's advice. If an
6 attorney had particular advice to give about a proposed
7 settlement, then I read ML Lee to reflect a concern on
8 Judge Farnan's part that a plaintiff could be coerced
9 into accepting or rejecting a Class settlement through
10 the potential threat of funding revocation. But I think
11 that what the amended Rule makes clear is that there is
12 no opportunity for coercion there because the Class
13 representatives cannot command Class counsel to accept
14 or reject a settlement proposal.

15 So, Class counsel wouldn't need to exert any
16 coercion on a Class plaintiff. Instead, after
17 consulting with the Class representative, it would be
18 Class counsel's responsibility to determine whether
19 seeking the Court's approval of the settlement would be
20 in the best interests of the Class as a whole.

21 But to the extent --

22 SPECIAL MASTER POPPITI: And if there is a
23 disagreement that is substantial enough, there could be
24 a circumstance where Class counsel is no longer in the

1 case. The Class isn't going to go away; fair statement?

2 MR. LANDAU: No. The Class wouldn't go
3 away, but I am not sure I see why Class counsel would go
4 away either because that obligation transcends an
5 individual client relationship.

6 SPECIAL MASTER POPPITI: Do you agree with
7 me that if the Class counsel took a position that was
8 diametrically opposed to what the Class wanted to do,
9 and if that issue were served up, in whatever fashion to
10 the Court, because you are writing on a little bit of a
11 slate that doesn't exist here, and I don't know what
12 determination the Court would make other than a
13 determination that the views are so divergent, it may be
14 in the interest of the Class to have new counsel.

15 I mean, I don't -- do you see the Court
16 literally getting involved in making a judgment that a
17 divergent view, in terms of path forward, the Court is
18 going to weigh in on that judgment and say, Class, you
19 got to go to the way counsel says or -- do you see the
20 Court doing that by virtue of this Rule change?

21 MR. LANDAU: Well, for one thing, I don't
22 think it's a scenario that's very likely to occur in a
23 lot of circumstances.

24 SPECIAL MASTER POPPITI: All right. Well,

Teleconference

Page 34

1 and I understand your comment there.

2 MR. LANDAU: But I do think that, in the
3 context of Class action settlements that have been
4 proposed in various cases, it's not unknown for there to
5 be Class members, whether named plaintiffs or not, who
6 raise an objection to a particular settlement, and in
7 those cases, it's certainly the practice of the Court to
8 consider those objections and Rule on whether -- on what
9 result is in the best interest of the Class.

10 SPECIAL MASTER POPPITI: I understand that
11 and I understand the comment is also in the context of
12 settlement and not in the context of litigation
13 decisions, if you will. I mean, I do understand that.

14 Let me get, though, to another -- to the
15 financial issue here. Expecting that you have in place
16 a fee, of the most reasonable fees, the best example of
17 a financial arrangement that could ever be written, is
18 it fair to say that, in the context of the Class losing
19 the case, and absent any other information with respect
20 to how the Class would satisfy the potential obligation
21 to assume the costs as contemplated by our Local Rule,
22 and certainly the Federal Rule that it stems from,
23 assumes the cost of the defense, the Court should not be
24 concerned about that at all in performing its obligation

1 to make a determination about whether the Class -- the
2 representative parties will fairly and adequately
3 protect the interests of the Class?

4 MR. LANDAU: Initially, Your Honor, I would
5 say that there are a couple different types of expenses,
6 potentially. One is the type of expense that is
7 incurred by the Class representatives and Class counsel
8 as the case goes forward; for example, what Judge Farnan
9 mentioned about giving Class notice in the ML Lee case.

10 SPECIAL MASTER POPPITI: Right.

11 MR. LANDAU: And the separate kind of cost,
12 which is the one, I believe, that you mentioned with
13 respect to the Local Rule and costs at the conclusion of
14 the case. But let me say, first, I am not aware of any
15 circumstances, necessarily, where it would be the
16 obligation of the client to pay those costs.

17 SPECIAL MASTER POPPITI: Who pays them?

18 MR. LANDAU: I think, under the terms of our
19 representations to the Court and our agreements with our
20 clients, it's our responsibility to advance the costs of
21 litigation, and those costs would be -- the payment of
22 those costs would be contingent on the outcome of the
23 case.

24 SPECIAL MASTER POPPITI: How does that

Teleconference

Page 36

1 answer the question that I posed? Namely, the question:
2 If the Class loses and Intel makes a timely application,
3 under the Rule, for assessment of costs, and they win,
4 who pays those costs?

5 MR. LANDAU: I think, Your Honor, that it
6 would be Class counsel that paid those costs. I am not
7 aware of why that wouldn't be true. Intel has cited
8 this Oklahoma Bar Association opinion, but a few things
9 are worth noting about that. One is that it's not
10 final. Another is that it's not binding even in
11 Oklahoma.

12 SPECIAL MASTER POPPITI: Right.

13 MR. LANDAU: Another is that it's not about
14 Class actions, specifically, it's about indemnification
15 for attorneys' fees, principally, and, even as that
16 opinion acknowledges, it's in conflict with an opinion
17 of at least one other State Bar Association. But I
18 think that regardless of who is responsible for those
19 sorts of costs, and I am not persuaded by the citation
20 of that opinion that it has to be the client who is,
21 those are not costs, in my view, that have anything to
22 do with the Class representative's responsibilities to
23 the litigation on behalf of absent Class members in the
24 same way that giving notice to the Class could be

1 because, there, we have --

2 SPECIAL MASTER POPPITI: Let me stop you
3 there for a moment. Why wouldn't that be a concern in
4 terms of -- the structure, for better for worse, the way
5 it's built, says that an individual plaintiff and an
6 individual -- individual plaintiff against individual
7 defendant, a defendant prevails, in that circumstance,
8 the defendant has, absent any other statute that would
9 preclude that, an opportunity under the Federal Rules,
10 and under the Local Rules here in Delaware, to ask for
11 costs; correct?

12 MR. LANDAU: Correct.

13 SPECIAL MASTER POPPITI: And let me just
14 take one step further. And in a Class circumstance
15 where the costs can be extraordinarily substantial and
16 much more substantial than the individual plaintiff
17 against an individual defendant, are you suggesting that
18 the Court should not have any concern whatsoever about
19 the wherewithal of the Class to shoulder any and all
20 obligation that may result from bringing that Class
21 action, one of those being, if you lose, you are going
22 to pay costs, and if I order costs and you don't pay
23 costs, aren't there court-related results that flow from
24 that directed to any of the individual representatives

Page 38

1 of the Class?

2 MR. LANDAU: There may be, but I don't think
3 that those are in their capacity as Class
4 representatives so much as they are in their capacity as
5 plaintiffs who brought the litigation. In other words,
6 it doesn't affect their ability to represent absent
7 Class members.

8 SPECIAL MASTER POPPITI: Okay.

9 MR. LANDAU: It may if we assume that it
10 would be the client and not Class counsel who would
11 ultimately be liable for those costs result in some
12 later separate proceedings to collect those costs, but
13 one of the things, for example, that the Tenth Circuit
14 observed in the Sanderson opinion was that it wrote,
15 "Nor do we see that the defendants have any legitimate
16 concern as to whether plaintiffs will be able to pay
17 their lawyers and will be able to pay a judgment for
18 costs in the event that such a judgment is entered."

19 SPECIAL MASTER POPPITI: I am aware of that
20 language. Let me ask you -- I think I understand your
21 response with respect to the obligation of the Class
22 once this lawsuit is over, I think, but I have some more
23 specific questions with respect to that.

24 Do I understand you, then, to say that, with

1 respect to Rule 23(a)(4), that the Class plaintiffs'
2 financial information is not a relevant consideration
3 ever at all?

4 MR. LANDAU: In determining whether to grant
5 Class certification, Your Honor?

6 SPECIAL MASTER POPPITI: Yes.

7 MR. LANDAU: I think that that's our
8 position, that the financial position of a Class
9 representative is not relevant to the process of Class
10 determination under the amended 2003 Federal Rule.

11 SPECIAL MASTER POPPITI: So, 23(g), from
12 your point of view, trumps 23(a)(4)?

13 MR. LANDAU: I guess I would say that, to
14 the extent that 23(a)(4) could have been interpreted
15 previously because it was silent on this precise issue,
16 could have been interpreted to impose that obligation on
17 the Class representatives or to make that relevant, the
18 amendments to Rule 23(g) clarify that the financial
19 resources that are relevant in this process are the
20 resources of Class counsel. And, in fact, in the text
21 of Rule 23(g), itself, one of the qualifications for
22 Class counsel, under 23(g)(1)(b)(1), are the resources
23 that counsel will commit to representing the Class.
24 It's the final bullet point in that subsection.

Teleconference

Page 40

1 SPECIAL MASTER POPPITI: Yes, I am aware of
2 that. So, I gather you may be suggesting that the
3 financial resources of counsel, itself, may be subject
4 to some inquiry on behalf of the Court?

5 MR. LANDAU: Well, I think that we had that
6 already, Your Honor, when interim Class counsel here
7 submitted their application to be appointed by the
8 Court, and in that application, we represented that we
9 were willing and able to deploy the necessary resources
10 to litigate these actions zealously and effectively, and
11 the Court accepted that application.

12 SPECIAL MASTER POPPITI: Yes. Help me with
13 it, please, because all I had available to me, when I
14 looked at those documents, was that document, itself,
15 and I did not know whether there were any documents that
16 were requested by the Court in addition to what you
17 filed or whether there was anymore detail other than
18 what I see on the Docket.

19 MR. LANDAU: I believe, Your Honor, that
20 there was the mission that may have been made under seal
21 with respect to how we would propose to handle any fee
22 request, but I don't believe that that included
23 information about our financial resources.

24 SPECIAL MASTER POPPITI: And I was aware of

1 the application for fee request being made under seal.

2 MR. LANDAU: Other than that, I don't think
3 that there were any other papers submitted, Your Honor.

4 SPECIAL MASTER POPPITI: Then I guess one
5 final question: You see Rule 1.8(b)(1), "A lawyer shall
6 not provide financial assistance to a client in
7 connection with the pending or contemplated litigation
8 except that a lawyer may advance court costs and
9 expenses of litigation, the repayment of which may be
10 contingent on the outcome of the matter," you read that
11 to mean that if the Class loses and Intel makes an
12 application for costs and the Court awards costs, that
13 there is no prohibition, under Rule 1.8, from counsel
14 assuming those costs; is that the way you read that?

15 MR. LANDAU: That is the way that I read
16 that, Your Honor.

17 SPECIAL MASTER POPPITI: Okay.

18 MR. LANDAU: If I can point out one other
19 issue: Intel's counsel referred to the Mascol case as
20 being one decided after the Rule amendments.

21 SPECIAL MASTER POPPITI: Yes.

22 MR. LANDAU: My reading of that case is not
23 necessarily inconsistent with what we are arguing here.
24 All the Court in Mascol suggested was that other courts

Page 42

1 had found the Class representatives' financial resources
2 to be a relevant factor in determining adequacy,
3 although that particular Court goes on to distinguish
4 those cases, note that plaintiffs' counsel are offering
5 their services in the hopes of recovering costs and
6 attorneys' fees from the defendants and concluded that
7 the Court is satisfied that the financial resource of
8 the plaintiffs will not affect the adequacy of
9 representation.

10 SPECIAL MASTER POPPITI: You would agree
11 with me that that is a merits decision and it was not
12 talking, I think I am correct, just thumbing through it
13 now again, that was not a, in the discovery stage, if
14 you will?

15 MR. LANDAU: That's right. It wasn't in the
16 discovery stage, but it does, I think, indicate that the
17 type of discovery being sought here isn't relevant to
18 that ultimate decision, but, at the very least, I
19 pointed out, because that's the only reference that I
20 have seen so far by Intel to a post 2003 opinion on this
21 issue, and I don't think that it supports their
22 argument.

23 SPECIAL MASTER POPPITI: Thank you.
24 Anything else from the Class, please?

1 MR. LANDAU: Unless Your Honor has other
2 questions, then I don't think I have anything further.

3 SPECIAL MASTER POPPITI: Okay. Thank you.
4 From Intel, please.

5 MR. HOCKETT: Yes, Your Honor. Thank you.
6 This is Chris Hockett again.

7 I think that the plaintiffs' interpretation
8 of Rule 23(g) is exactly wrong, and I think it may even
9 heighten the concern about coercion.

10 23(g) leaves intact the obligation of the
11 Class representative to do his or her thing and look out
12 for the interests of the Class and does not give the
13 Class counsel a trump card that allows it to coerce,
14 without consequence, individual Class representatives
15 because they claim it's in the interests of the Class.

16 I think both, after 23(g), both Class
17 counsel and Class representatives are supposed to be
18 looking out for the interests of the Class, and,
19 therefore, preventing Class representatives from
20 coercion is just as important now as it always has been,
21 indeed, maybe more so if 23(g) makes Class counsel think
22 that they can call the shots.

23 If that's what 23(g) meant, then you
24 wouldn't need Class representatives, you wouldn't need

Page 44

1 any clients at all, but they are there for a reason and
2 they are still occurred by Rule 23(a)(4), and we would
3 argue that they need to be protected in exactly the same
4 way as Judge Farnan expressed in his opinion in ML Lee.

5 With regard to the sensitivity of the
6 information, we certainly acknowledge that it is
7 sensitive. I would point out that, as is typical in
8 cases of this kind, the defendants produce millions of
9 pages of highly sensitive information and that's why we
10 have a protective order, and, of course, anything that
11 the plaintiffs produce here would be covered by it.

12 And I think that's all I have to say.

13 SPECIAL MASTER POPPITI: Okay.

14 MR. LANDAU: Your Honor, may I briefly
15 respond to that?

16 SPECIAL MASTER POPPITI: Sure.

17 MR. LANDAU: I didn't mean to suggest, and I
18 don't think that I did, that Class counsel would have a
19 trump card that would allow them to coerce the Class
20 representatives without consequence.

21 I think, Your Honor, as you pointed out and
22 as you and I discussed, everything that Class counsel
23 does is subject to the oversight of the Court and there
24 are various mechanisms in place to ensure that.

1 I think, as I mentioned, that it's a little
2 bit of a farfetched scenario to think that this is going
3 to be something that comes up with any frequency. I
4 think it's extremely unlikely that there would be a
5 divergence of views or that there would be any
6 opportunity for this sort of situation.

7 What I did mean to suggest is that Rule
8 23(g) establishes that the relationship between Class
9 counsel and Class representative is not an ordinary
10 attorney/client relationship. Class counsel has broader
11 responsibilities that derive from its appointment to
12 that role by the Court that require it to act on behalf
13 of all Class members. And to the extent that a
14 particular client has a view that is not in the best
15 interests of the Class, it would not be appropriate for
16 the -- for Class counsel to simply follow that client's
17 orders because Class counsel has an obligation to the
18 Class as a whole.

19 Class representatives are certainly
20 important in the process, they are critical, in fact,
21 and I would think that any significant decision that
22 Class counsel was making, they would make in
23 consultation with the Class representatives just as you
24 would have in any sort of litigation. But Class actions

Page 46

1 are not the same as ordinary litigation because of the
2 presence of absent Class members and the special role of
3 the Court. And, so, I think that what Rule 23(g) is
4 doing is addressing and clarifying this rather unique
5 situation of how Class counsel is to act. But how it
6 relates to the ML Lee decision and the issue we have
7 been discussing is, in my view, you know, eliminates any
8 opportunity for coercion of a named Class representative
9 by Class counsel in light of the Rule.

10 The only other thing I would add would be,
11 with respect to the production of documents, it's
12 certainly true that the defendants have produced
13 documents; the plaintiffs have as well. What they have
14 in common is that all of those documents are relevant to
15 the subject matter of the case.

16 What we are talking about here is personal
17 financial information of the plaintiffs that isn't going
18 to be relevant, in light of 2003 Rule amendments, to the
19 Class certification decision, and that, as such, there
20 is no reason, and, in fact, it would be improper for the
21 plaintiffs to have to produce that information here.

22 SPECIAL MASTER POPPITI: Okay. Thank you.
23 Just give me a few moments here. I am going to put you
24 on hold, so if all need to be talking about anything,

1 you can do that. And I shouldn't be but just a couple,
2 two or three minutes.

3 MR. HOCKETT: Judge Poppiti, if I can say
4 one last thing? Are you still there?

5 SPECIAL MASTER POPPITI: Yes. Thank you.

6 MR. HOCKETT: Thank you. I just wanted to
7 let you know a timing issue, and this isn't your
8 problem, it's really ours, we are starting -- Class
9 representative depositions are scheduled to start on
10 Friday, so I just wanted to let you know that,
11 obviously, we are -- we would like to have an answer to
12 the -- this question so as to avoid --

13 SPECIAL MASTER POPPITI: Here is what I
14 intend to do: I intend to tell you what my view of it
15 is today, and I think the most efficient way -- because
16 I expected that there was an immediate need, if you
17 will, and, yet, I expect that if there is also a need to
18 take whatever I do up to Judge Farnan, it may be
19 important to have, in addition to the transcript, a
20 document.

21 Rather than putting that document on my desk
22 for purposes of moving it through, I am going to ask the
23 prevailing party to prepare what I would call the form
24 of order, the proposed findings and conclusions and

Teleconference

Page 48

1 recommendations consistent with the way that I have done
2 it in Intel and other cases in the more abbreviated
3 fashion, so that it would be prepared by the prevailing
4 party, approved only as to form, I will give you some
5 time frames on that, so that you have got a document to
6 take to Judge Farnan if there is a decision made by the
7 party that does not prevail to do that. Okay?

8 MR. HOCKETT: Thank you.

9 SPECIAL MASTER POPPITI: I just need a few
10 moments.

11 MR. LANDAU: Thank you, Your Honor.

12 SPECIAL MASTER POPPITI: Counsel, we are
13 back on. Rather than getting into a long recitation of
14 some of my reasons here, I do want to certainly touch on
15 some things that we did discuss, and, at the same time,
16 suggest, for purposes of creating a document for my view
17 that my questions, I think, will -- some of my questions
18 frame part of my reasons for granting the application.

19 I don't think there is any dispute that Rule
20 23(a)(4), as it existed prior to the amendment, which
21 has remained unchanged since the amendment, puts the
22 representative plaintiffs' financial capacity at issue
23 in this jurisdiction, particularly given the facts of
24 this case where there is a substantial Class with an

1 expectation of substantial costs going forward. And I
2 think that the rationale, of course, is laid out in
3 ML Lee.

4 I have no specific information regarding the
5 fee arrangement that counsel, Class counsel has said
6 that it has with the Class. I understand that there is
7 an arrangement where costs and expenses of litigation
8 are being paid in advance, as you go.

9 I think I also understand, and, please,
10 somebody, if Class could correct me if I am wrong, that
11 the nature of the obligation is almost couched in terms
12 of the way the Rule is couched, and, that is, the costs
13 and expenses of litigation are advanced, the repayment
14 of which is contingent on the outcome of the matter, and
15 I don't think I heard anymore detail other than that.

16 It seems to me that, notwithstanding the one
17 case that counsel referenced, that where there is an
18 opportunity in any litigation for the prevailing
19 defendant to apply to the Court for costs and fees --
20 for costs, I am sorry, not fees, that the Court
21 appropriately can entertain issues with respect to
22 whether the Class is able to satisfy any and all
23 obligations as it relates to the prosecution of the
24 lawsuit.

Teleconference

Page 50

1 Having no more information about the fee
2 arrangement, I don't think it's important for me to
3 discuss whether it does or whether it doesn't comply
4 with model Rule 1.8(b)

5 I am mindful of the fact that, at the time
6 that Judge Farnan issued his decision, there were cases
7 that the financial capacity of the plaintiffs were
8 relevant, was relevant, and the financial capacity of
9 the plaintiffs were not relevant. I expect that those
10 cases that went before that said the financial capacity
11 was not an issue, was not relevant, although Judge
12 Farnan didn't discuss all of those cases, I would expect
13 that anything that went before is simply subsumed in a
14 decision that went the other way.

15 In fact, a number of those cases, whether
16 they were before the Judge Farnan decision or after the
17 Farnan decision, I believe are very fact-driven. It
18 seems to me that a number of the cases focus on the size
19 of the Class. Others of the cases focus rather
20 specifically on the financial arrangements that were
21 made in the case, and I think I spoke with you in a
22 little bit of detail about what was said in Weikel where
23 there was not only an arrangement with Class counsel but
24 there was also an arrangement with an individual -- with

1 respect to one individual member of the Class with
2 another member by the name of Workman, and Workman was
3 willing to pay even if the Class lost. So, it's, in my
4 view, fact intensive.

5 The question, then, is whether the changes
6 to the Rule should result in some different approach in
7 this jurisdiction, and I am not satisfied that the
8 changes to the Rule literally swallow the requirements
9 of 23(a)(4).

10 I understand that the responsibility of
11 Class plaintiffs' counsel is described in detail. I
12 also understand that, based on the comments to the Rule,
13 not an insignificant amount of that penned detail in the
14 new Rule was detail that the Court was focused on in any
15 event, whether it was leading up to the consideration of
16 Class counsel, whether it was during the consideration
17 of the actual appointment, and even in terms of the
18 appointment procedures, themselves. Based on my
19 understanding of the comments in the rules, I understand
20 that these, in a sense, were a codification of practice.

21 I do not believe that the Rule obviates
22 Judge Farnan's concern that there could be coercion even
23 if the coercion is something that would be unusual. I
24 don't have any sense from the ML Lee case that Judge

Teleconference

Page 52

1 Farnan was faced with a circumstance where he had a very
2 specific focus regarding coercion and withdrawal of
3 funding. I don't see that in his case. It may not be
4 present here. In any event, he still considered that
5 concern and ruled as he did.

6 For those reasons, I will grant the
7 application. I would ask Intel to prepare the form of
8 order, for the Class to approve it as to form only, and
9 I'd like you to make some suggestion with respect to the
10 timing of that, please.

11 And, please, I don't think it -- it goes
12 without saying that what I am not going to be looking
13 for is a document that argues the position. You have
14 done that in your papers. It's a matter of, perhaps,
15 just changing the papers to look more like the form of
16 document that I am contemplating and not the letter
17 arguments that were advanced.

18 MR. HOCKETT: Thank you. We understand, I
19 think, what you are looking for. May I ask a question?

20 SPECIAL MASTER POPPITI: Please.

21 MR. HOCKETT: When would we expect a
22 transcript of this hearing?

23 SPECIAL MASTER POPPITI: If I know my friend
24 on the phone, you are probably going to get it first

1 thing in the morning if not sooner.

2 MR. HOCKETT: I think we could probably get
3 something to the plaintiffs by tomorrow night.

4 SPECIAL MASTER POPPITI: Okay. If the Class
5 gets it tomorrow night, what can the turnaround time be.

6 MR. HOLZMAN: Tomorrow night California
7 time?

8 MR. HOCKETT: It will probably be tomorrow
9 afternoon California time, evening East Coast time.

10 SPECIAL MASTER POPPITI: If we are going to
11 do time like that, then let's just use East Coast time
12 for purposes of either setting a specific hour deadline
13 or at least some parameters, please. That may be
14 helpful for everyone.

15 MR. LANDAU: I think that if we receive
16 Intel's form of order by 5:00 p.m. East Coast time
17 tomorrow, that we could have something back to them by
18 5:00 p.m. East Coast time on Friday.

19 SPECIAL MASTER POPPITI: Okay.

20 MR. HOCKETT: We would, because of the time
21 difference, we would ask that we get it to you by 8:00
22 East Coast time tomorrow night, just so that we have the
23 day to create the thing. I think it should take longer
24 for us to create it than it should take for you to

Teleconference

Page 54

1 provide comments on it.

2 MR. LANDAU: That would be fine, Your Honor.

3 SPECIAL MASTER POPPITI: Then when, after
4 you all do that, when do you expect I should be able to
5 see it on my desk?

6 MR. HOCKETT: Well, I guess we will need to
7 try to resolve any issues that we have --

8 SPECIAL MASTER POPPITI: Correct.

9 MR. HOCKETT: -- sometime, it sounds like it
10 will be sometime on Monday because -- or over the
11 weekend because the -- we won't receive plaintiffs'
12 comments until the end of the day on Friday.

13 MR. LANDAU: If we are receiving it by 5:00
14 p.m. East Coast time, then, obviously, we have some
15 extra time here on the West Coast to deal with you
16 Friday afternoon if you are open to that.

17 MR. HOCKETT: I am sure that we can be
18 available.

19 MR. LANDAU: Why don't we commit to get
20 something to you, Judge Poppiti, by close of business
21 East Coast time on Monday.

22 SPECIAL MASTER POPPITI: Okay.

23 MR. LANDAU: That sets out where we stand.

24 SPECIAL MASTER POPPITI: All right.

1 MR. HOCKETT: And I hope --

2 SPECIAL MASTER POPPITI: Let me ask this:
3 What I'd like to be in a position to do is -- I don't
4 anticipate that I am going to have to spend a
5 significant amount of time with it. If there are
6 disputes with respect to the form of the order, is it
7 your expectation that I should simply deal with those or
8 would you want to be having a conversation with me?

9 MR. HOCKETT: What I was anticipating would
10 be most convenient for you would be for us to provide
11 competing versions of any sections in controversy.

12 SPECIAL MASTER POPPITI: Okay.

13 MR. HOCKETT: And then you could choose one
14 of those or adapt; is that correct?

15 SPECIAL MASTER POPPITI: That would be the
16 way to do it, and if you are saying end of business on
17 Monday -- I am hoping I can get it out next day, but I
18 have an all day matter that I have to -- I have got an
19 all day mediation, so let me say I will try, by the end
20 of the business -- end of business on the 28th or no
21 later than noon on the 29th.

22 MR. HOCKETT: Thank you, Your Honor.

23 SPECIAL MASTER POPPITI: And if you come up
24 with any other arrangement to do it sooner, then simply

Teleconference

Page 56

1 let me know what that is and I will adjust my commitment
2 to everyone accordingly.

3 MR. HOCKETT: Appreciate that. We will see
4 if we can do it sooner because I think it's in both
5 side's interest to get this finalized.

6 SPECIAL MASTER POPPITI: I agree. Any other
7 matters, then, please?

8 MR. HOLZMAN: I request permission to talk
9 past you, if I might, only to ask Renee for her e-mail
10 address. I think that would help everything.

11 COURT REPORTER: It's
12 reneemeyers1@comcast.net.

13 MR. HOLZMAN: That's all I have. Thank you
14 for the courtesy. I appreciate it.

15 SPECIAL MASTER POPPITI: Not at all. Thank
16 you all.

17 (The hearing was concluded at 5:32 p.m.)

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1 C E R T I F I C A T E

2 STATE OF DELAWARE:
3 :
4 NEW CASTLE COUNTY:

5 I, Renee A. Meyers, a Registered Professional
6 Reporter, within and for the County and State aforesaid,
7 do hereby certify that the foregoing teleconference was
8 taken before me, pursuant to notice, at the time and
9 place indicated; that the teleconference was correctly
10 recorded in machine shorthand by me and thereafter
11 transcribed under my supervision with computer-aided
12 transcription; that the foregoing teleconference is a
13 true record; and that I am neither of counsel nor kin to
14 any party in said action, nor interested in the outcome
15 thereof.

16 WITNESS my hand this 23rd day of August A.D.
17 2007.

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Renee A. Meyers

RENEE A. MEYERS
REGISTERED PROFESSIONAL REPORTER
CERTIFICATION NO. 106-RPR
(Expires January 31, 2008)

