

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 Thursday, January 10, 2008, beginning at approximately 11:00 a.m., there being present:

BEFORE:

THE HONORABLE VINCENT J. POPPITI, SPECIAL MASTER

APPEARANCES:

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SPECIAL MASTER POPPITI: Let's see who is on

1 by virtue of doing a roll call and see if we have
2 everybody on at this juncture, please. We will start
3 with the Class.

4 MR. ATHEY: Good morning, your Honor,
5 Clayton Athey with Prickett, Jones & Elliott for Class
6 plaintiffs.

7 MR. LANDAU: Good morning, your Honor. This
8 is Brent Landau from Cohen, Milstein also for Class
9 plaintiffs.

10 SPECIAL MASTER POPPITI: Thank you.

11 MR. COTTRELL: Good morning, your Honor.
12 For AMD, Fred Cottrell, and I will let my co-counsel
13 introduce themselves. I am not sure exactly who is on
14 from O'Melveny.

15 SPECIAL MASTER POPPITI: That's fine.

16 MR. DIAMOND: Good morning, Judge. Chuck
17 Diamond and Linda Smith in Los Angeles for AMD.

18 SPECIAL MASTER POPPITI: Good morning to the
19 both of you.

20 From Intel, please.

21 MR. HORWITZ: Good morning, your Honor.
22 It's Rich Horwitz here in Wilmington from Potter,
23 Anderson. I know at least Laura Shores from Howry and
24 Dan Floyd and Kay Kochenderfer from Gibson, Dunn are on.

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1 I am not sure if others are on as well.

2 MR. FLOYD: This Dan Floyd from Gibson.

3 That's correct, that's who is on.

4 SPECIAL MASTER POPPITI: Are we expecting
5 anyone else then, please?

6 Today is the time we set for argument on the
7 November 9th application, discovery matter No. 8, and it
8 is AMD's application.

9 MR. DIAMOND: I believe it is Intel's
10 application.

11 SPECIAL MASTER POPPITI: It is Intel's
12 application.

13 MS. SMITH: Although, Your Honor, we'd be
14 happy to go first.

15 SPECIAL MASTER POPPITI: I said November 9.
16 It's November 2. That's fine. I was looking at the
17 wrong document. Please.

18 MS. SHORES: Laura Shores, Your Honor, from
19 the Howry firm on behalf of Intel.

20 SPECIAL MASTER POPPITI: Yes. Thank you,
21 Ms. Shores.

22 MS. SHORES: Let me just recap how we got
23 here briefly.

24 AMD issued a press release in August in

1 which it referred to a study prepared by an expert, an
2 antitrust expert who purported to quantify the monopoly
3 profits that Intel gained as a result of the conduct
4 alleged in the complaint.

5 This study was subsequently referred to
6 several times in the press, once by AMD's CEO, at least,
7 and, in fact, one of the articles noted that
8 Dr. Williams, who is the name of they economist was
9 retained to help AMD make its point about the amount of
10 profits Intel earned, allegedly, improperly.

11 So, having seen the press release, we
12 immediately issued a subpoena to the consulting firm,
13 ERS, with which Dr. Williams is affiliated, and ERS and
14 AMD filed a joint response to our subpoena in which they
15 claimed privilege over the materials that we sought, one
16 being the safe harbor and the rules that applies to
17 non-testifying experts, and the other being
18 attorney/client work product.

19 SPECIAL MASTER POPPITI: Before you get into
20 that discussion, let me ask you to focus just briefly
21 for me on the press release, itself, so I can have some
22 understanding as to what you understand it to be.

23 MS. SHORES: Well, it's attached as Exhibit
24 9.

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1 SPECIAL MASTER POPPITI: And I have that in
2 front of me, yes.

3 MS. SHORES: And, so, what I understand it
4 to be is a press release that announces Dr. Williams'
5 findings that resulted from the study that he undertook
6 to quantify Intel's monopoly profits.

7 SPECIAL MASTER POPPITI: Okay. In my
8 reading of it, for purposes of understanding, perhaps,
9 perhaps, what the report does, because I don't have the
10 report in front of me, my understanding is that
11 Dr. Williams used information that he represents to be
12 publicly available information. I suspect that that
13 means public information as to numbers from Intel
14 itself; do you think that's a fair assumption?

15 MS. SHORES: That is what is claimed. It is
16 still, it remains unclear how he got to his results. He
17 made some assumptions about how much of Intel's profits
18 generally are to be attributed to the allegedly illegal
19 conduct, and it's not clear to me at all what the basis
20 for that assumption is and it would surprise, certainly,
21 if that was based on some publicly available
22 information.

23 MR. DIAMOND: This is Chuck Diamond. Just
24 to assure everyone, Dr. Williams is not under the

1 protective order tent, so he, therefore, does not have
2 access to any Intel confidential materials. All of
3 Intel's materials have been designated as confidential.
4 He has not been given anything that has been produced in
5 the litigation.

6 SPECIAL MASTER POPPITI: Okay. Thank you.
7 That's helpful as well.

8 Proceed, please.

9 MS. SHORES: Let me address the safe harbor
10 argument first.

11 First of all, you know, obviously, we don't
12 have any quarrel with the proposition that, under
13 ordinary circumstances, materials used by and advice
14 given by non-testifying experts who were retained for
15 the purposes of trial preparation are exempt from
16 discovery, and if that's what had happened here or what
17 appears to have happened, then we wouldn't be here,
18 obviously. But that is not what it seems occurred.

19 Certainly, that rule does not apply to
20 experts who were retained for the purpose of helping
21 with some public relations campaign or to prepare a
22 study that's, the findings of which were released to the
23 public.

24 The purpose, of course, of the safe harbor

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1 rule is to afford lawyers and their experts a bone of
2 privacy within which they can consult without worrying
3 about having those consultations and the materials on
4 which those consultations are based subject to
5 discovery.

6 SPECIAL MASTER POPPITI: Will you agree with
7 me, however, that the safe harbor rule seems, by virtue
8 of a number of cases that you all have discussed for me
9 and by virtue of some look at some other cases, that the
10 safe harbor permits a ship, if you will, to go in and
11 out of that harbor revealing the identity, for example,
12 of an expert that is not designated to testify at trial,
13 perhaps revealing a report or some work that an expert
14 has done that is not designated to testify at trial, and
15 perhaps even revealing some of the background
16 information of a report where that expert has not been
17 designated for trial, and, yet, with all that
18 information out there, and I might drop a footnote, and
19 even if that expert had been designated for trial,
20 pulling back that designation, a number of courts have
21 said, You can pull back into that harbor?

22 And for purposes of framing that discussion,
23 I am particularly focused on some of the discussion of
24 these principles in both the Delaware case of Callaway

1 Golf and the United States District Court of the
2 District of New Jersey case Biovar Corporation versus
3 Air Technology.

4 MS. SHORES: Let me just, first, let me
5 address that particular issue with respect to the
6 designation and then the withdrawal of the designation.

7 There is a recent case entitled Kelco versus
8 Pharmacia that was authored by Judge Jordan in the
9 District of Delaware in which precisely the opposite
10 result was reached. So, I do believe there is some
11 dispute about whether that particular circumstance
12 results in waiver or not.

13 SPECIAL MASTER POPPITI: And I realize that
14 there is authority going both ways. What I'd like you
15 to do is, in the context of the facts of this case,
16 measure the differences either in the Callaway Golf or
17 in Kelco?

18 MS. SHORES: Well, I think that the
19 principal difference is the use to which Dr. Williams'
20 report was put, and, so, that the purpose of the study
21 seems to have been to publicize its findings to the
22 press. I don't think that they contend otherwise and I
23 think that their conduct and the press release and the
24 various articles in which they are quoted shows that

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1 that's the case. That, to me, shows clearly that they
2 didn't intend the report to be, or anything that he did,
3 to be confidential.

4 SPECIAL MASTER POPPITI: You are not
5 suggesting, at the very front end, because the report
6 was used in a context outside of litigation, that they
7 should not have the protection of safe harbor at all?

8 MS. SHORES: Exactly. That's where I was
9 going, which is our position is really twofold. One is
10 that safe harbor doesn't apply and neither do
11 attorney/client work product because of the purpose for
12 which the report was prepared and used but that, and our
13 other point is that even if there was some privilege, it
14 was waived. I think the cases that you mentioned really
15 go to the latter point, not the former.

16 SPECIAL MASTER POPPITI: Please, do you have
17 any --

18 MS. SHORES: Sure. So let me just turn to
19 the waiver point because I think I have made the safe
20 harbor point, that this expert seems not to have been
21 used for the purpose for which the safe harbor rule
22 applies. They did not treat the report as confidential.
23 To the contrary, they disclosed it, themselves, in a
24 press release and referred to it themselves in several

1 subsequent articles.

2 But, again, even if one somehow reached the
3 conclusion that the report, notwithstanding all of the
4 disclosures that were made about it, was intended to be
5 confidential, this was waived when they disclosed it in
6 the press.

7 I don't think that AMD can quarrel with the
8 proposition that when you disclose portions of an
9 allegedly privileged report or document, that you have
10 waived privilege with respect to the remainder.

11 In fact, it was interesting this -- I feel
12 like I sound like AMD given their position with respect
13 to the interview notes in the last motion.

14 SPECIAL MASTER POPPITI: Right.

15 MS. SHORES: So --

16 SPECIAL MASTER POPPITI: The cases do spill
17 over.

18 MS. SHORES: Yes, they do.

19 So, anyway -- so I think there is no
20 question as to that proposition, that disclosure of
21 portions of a privileged communication or document
22 waives as to the rest.

23 And this rule has been specifically applied
24 to expert findings. The case -- again, this is also

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1 cited by AMD in the last, in connection with the last
2 motion -- the cases most particularly on point on that
3 issue is the Granite Partners case in which --

4 SPECIAL MASTER POPPITI: I am familiar with
5 that, so please discuss that, if you will.

6 MS. SHORES: Yes. This is a case in which a
7 bankruptcy trustee, who issued a public report in
8 connection with a case --

9 SPECIAL MASTER POPPITI: Right.

10 MS. SHORES: -- referred to the findings of
11 an expert, and the Court held, when the other side tried
12 to get access to the expert's findings and what other
13 documents he used to prepare it to reach them, that by
14 including the expert's findings and the publicly
15 disclosed trustee's report, there had been a waiver.

16 SPECIAL MASTER POPPITI: And would you agree
17 with me that the discussion with respect to that
18 suggests that, in fact, although this case doesn't talk
19 about the substantial nature of the information that's
20 provided, in a sense, that's what it's doing, it's
21 using, without using language that the Court used in
22 Dayco Corporation, it is suggesting that you -- you are
23 looking at a substance that is more significant than
24 just a summary; correct?

1 MS. SHORES: Well, you know, I think that
2 the way that it was expressed in Granite Partners were a
3 description of his findings.

4 SPECIAL MASTER POPPITI: I am looking at
5 Granite Partners at page 5, and let me just read it for
6 purposes of framing the question, at page 5, last full
7 paragraph on that page, "Here, the purpose of the
8 trustee's investigation was to ascertain the reasons
9 behind the funds collapse and to report these reasons to
10 the Bankruptcy Court and the public. The outline of the
11 scope of the trustee's investigation of the debtors and
12 proposed budget, outline of investigation stated, The
13 objective of this investigation is to provide the
14 Bankruptcy Court and the parties with a report
15 describing, in detail, and explaining the events that
16 precipitated the funds filing for bankruptcy. The
17 report will inter alia facilitate determinations
18 regarding assets and liabilities of the estate by," and
19 then it goes on.

20 MS. SHORES: Yes, your Honor. I believe
21 that what's being referred to there is the Trustee's
22 actual report.

23 SPECIAL MASTER POPPITI: Okay.

24 MS. SHORES: That was publicly disclosed,

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1 the entire report.

2 SPECIAL MASTER POPPITI: Right.

3 MS. SHORES: And the issue was not whether
4 the other side could get access to the report, of
5 course, because it had already been disclosed in its
6 entirety, the issue, rather, was whether materials used
7 by an expert --

8 SPECIAL MASTER POPPITI: The underlying
9 papers?

10 MS. SHORES: Yes, the expert's underlying
11 papers --

12 SPECIAL MASTER POPPITI: Yes.

13 MS. SHORES: -- were waived, whatever
14 privilege was attached to them was waived when the
15 Trustee's report, publicly disclosed report, included
16 those findings and described them in his report.

17 SPECIAL MASTER POPPITI: Would you not
18 agree, then, and I believe I understand what the Court
19 did, the Courts seem to peel the onion to various steps;
20 I mean, it seems to me that you start with the
21 proposition, at least with respect to the safe harbor,
22 you don't get the name, and if you don't get the name,
23 you don't get a report, and if you don't get the report,
24 you don't get the underlying -- you don't get the

1 underlying information..

2 MS. SHORES: Yes.

3 SPECIAL MASTER POPPITI: Once you have the
4 name, that doesn't necessarily get you to a report of
5 the underlying papers. If you have a name and you have
6 a report disclosed in a certain contact, you may get --
7 where you have the name, you have the report, the
8 question then becomes: Do you get the underlying papers
9 and/or do you get the deposition, for example, of the
10 expert?

11 MS. SHORES: Right.

12 SPECIAL MASTER POPPITI: And it seems to me
13 there the Court begins -- the Courts seem to begin
14 moving from a pure consideration of safe harbor into an
15 analysis that's similar to work product --

16 MS. SHORES: Correct.

17 SPECIAL MASTER POPPITI: -- in terms of
18 waiver/fairness; do they not?

19 MS. SHORES: I agree with that.

20 SPECIAL MASTER POPPITI: What does that do
21 for you in the context of this case, assuming, for the
22 moment, that the safe harbor certainly existed, I am
23 going to posit that it seems to exist, the
24 non-testifying -- the non-designated expert is

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1 considered to be non-designated until such point in time
2 as he or she is.

3 MS. SHORES: I can't quarrel with that
4 proposition.

5 SPECIAL MASTER POPPITI: Okay.

6 MS. SHORES: What our position is is that
7 that's not what's going on in this case.

8 What appears to be the case is that the
9 expert was -- and I am repeating myself, and I realize
10 that -- was retained for an entirely different purpose,
11 and to that degree, we don't think that any privilege,
12 any safe harbor exists. The safe harbor cannot extend
13 to experts who were used to prepare studies for PR
14 purposes. That just can't be the rule given that the
15 purpose of the safe harbor is to provide a zone of
16 confidentiality. It just can't go that far.

17 SPECIAL MASTER POPPITI: Okay.

18 MS. SHORES: Now, to the extent that,
19 somehow, one were to conclude that it did, then I agree
20 with you, then we are into the peeling the onion
21 exercise --

22 SPECIAL MASTER POPPITI: Okay.

23 MS. SHORES: -- whether the amount of
24 disclosure, in this case, we have a couple of page

1 description of its findings, reveals enough about the
2 communication, or the substance of it, a significant
3 portion such that it weighs as to the rest of the
4 report, first of all, and the underlying document,
5 second of all.

6 SPECIAL MASTER POPPITI: And I wouldn't know
7 that if I were inclined to do that analysis until I had
8 an opportunity to measure the report in an in camera
9 setting against the press release information?

10 MS. SHORES: Yes. I think that's correct.

11 SPECIAL MASTER POPPITI: Let me not take you
12 off your track, so if my question does, please tell me
13 you'd like to save it and do another point.

14 MS. SHORES: Okay.

15 SPECIAL MASTER POPPITI: If I were to
16 determine either that there is a waiver, and, therefore,
17 there is no onion to peel, or if I were to determine
18 that it's important to consider peeling an onion in the
19 sense that I would do a fairness analysis to determine
20 how deep the waiver goes, in any event, understanding
21 that we are not yet in a phase in this litigation where
22 expert discovery is either in the offing in the near
23 future and is only ready to commence at some later point
24 in time yet to be designated, for what purpose, to what

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1 end would it be if I were to say, Give it up now, as
2 opposed to, You have got to give it up later expecting
3 that I should be mindful of your concern that, from your
4 perspective, it's being played for the media and not in
5 play for purposes of litigation?

6 MS. SHORES: This is exactly where I was
7 headed. On the timing point, you know, I -- I would say
8 this: AMD is the one who chose to trumpet this report
9 now. If it had decided to wait until, you know, the
10 time at which expert discovery normally occurs and
11 expert disclosures of reports and whatnot occurs, then
12 that would be different. But they are the ones who have
13 decided to put this out there now, and it seems to me
14 that we are entitled to get whatever there is to rebut
15 it now because they did that.

16 Now, with respect to --

17 SPECIAL MASTER POPPITI: By virtue of you
18 saying "rebut it," are you suggesting that the at least
19 initial purpose for which you would use either the
20 report or portions of the report or the report and
21 underlying documents is solely, at least at this
22 juncture, for purposes of saying to the public, This is
23 how the report is flawed?

24 MS. SHORES: I am not prepared to concede

1 that that is the sole purpose or even the main purpose
2 of our request.

3 SPECIAL MASTER POPPITI: How about the
4 initial purpose?

5 MS. SHORES: Well, let me say this: I think
6 that what is relevant from the standpoint of discovery
7 is the usual rules that say, You are entitled to
8 evidence that's relevant, that's calculated to lead to
9 the discovery of admissible evidence.

10 SPECIAL MASTER POPPITI: Understandable.

11 MS. SHORES: So that's what we are doing
12 here. And I think there is no question that evidentiary
13 use is foreseeable from the background materials that
14 AMD used to prepare this, you know, PR generated report
15 and to disseminate it. You know, they couldn't hardly
16 be more relevant as to do with the damages that are
17 alleged to have flowed from Intel's allegedly
18 anti-competitive conduct.

19 SPECIAL MASTER POPPITI: And I expect that I
20 am not going to hear from AMD that it is not relevant, I
21 may, but I expect I am not, at the same time, I, again,
22 come back to my question that, from my perspective as
23 someone on behalf of the Court that is supposed to be
24 managing discovery, even to the point of making

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1 determinations with respect to how remaining discovery
2 could or should be phased, if there is an application to
3 do that or if there is my sense that discovery is
4 getting bogged down and it should be phased differently,
5 if I make the determination that you should see either
6 the portions of the report or the underlying documents,
7 to what disadvantage are you put if I say that that
8 should not occur until such time as expert discovery
9 commences?

10 MS. SHORES: Here is the disadvantage, and
11 let me just give you one, I think, fairly clear example
12 of it.

13 AMD's chief executive officer has referred
14 to this report and trumpeted its findings in the media.

15 SPECIAL MASTER POPPITI: Okay.

16 MS. SHORES: It's my understanding that
17 discovery of fact witnesses, including Mr. Ruiz, will
18 occur before expert discovery. We are entitled to
19 inquire into the basis for his statement, which, in
20 turn, leads you to this publicized expert report. So
21 the disadvantage of waiting until expert discovery would
22 be that we have no way to challenge Mr. Ruiz's statement
23 because that discovery will have concluded. And, you
24 know, these communications, documents may well contain

1 other admissions by AMD that we are entitled to inquire
2 into or find out about or try to establish before the
3 expert discovery begins.

4 SPECIAL MASTER POPPITI: Okay. I understand
5 your position. Any other argument, please?

6 MS. SHORES: The only other thing is, you
7 know, is sort of an EFOS (phonetic) argument rather than
8 a LOGOS (phonetic) argument, they say, you know,
9 generally, that what we are trying to do is to get this
10 for a non-litigation purpose and you can't use discovery
11 for that purpose, but it seems to me that it's
12 inconsistent, to say the least, if not hypocritical, to
13 claim that they retained Dr. Williams' for litigation
14 purpose, then disclosed, notwithstanding that that, what
15 he was retained for, to help with trial preparation,
16 what he was used for was to generate, you know, press
17 comments. That's what it was used for.

18 So, it's our position again that that waived
19 whatever privilege attaches, and it is inconsistent for
20 them to take the position that what they did was for
21 litigation purpose and what we are asking for is not for
22 litigation purpose.

23 That, you know, I just think that they can't
24 have it both ways, and that's what they are trying to

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1 do.

2 SPECIAL MASTER POPPITI: And I understand
3 why you chose to use the word "hypocritical." That may
4 not be your word, it comes from the NXIVM Corporation
5 case. That makes the word --

6 MS. SHORES: Less inflammatory and
7 accusatory. Yes, thank you for clarifying.

8 SPECIAL MASTER POPPITI: You are welcome.
9 Anything else, then, please?

10 MS. SHORES: I don't think I have anything
11 else. I am not sure if anybody else does.

12 SPECIAL MASTER POPPITI: Thank you very
13 much.

14 Who is up for AMD, please?

15 MR. DIAMOND: You have got Diamond this
16 morning.

17 SPECIAL MASTER POPPITI: Thank you,
18 Mr. Diamond.

19 MR. DIAMOND: You know, Judge, it's easy to
20 get lost in sort of the minutia of this when you start
21 focusing on safe harbors and principles at a microscopic
22 level. I'd like to just step back --

23 SPECIAL MASTER POPPITI: Okay.

24 MR. DIAMOND: -- and take a look at this

1 controversy from 10,000 feet. And I note, first, the
2 irony --

3 (Discussion off the record.)

4 SPECIAL MASTER POPPITI: Mr. Diamond, I am
5 sorry.

6 MR. DIAMOND: That's all right. There is a
7 certain amount of irony that Intel has launched a
8 discovery fight in order to get information for it to
9 use in the Court of public opinion, not for any
10 legitimate litigation purposes, but as part of a public
11 relations counter offensive when, during the course of
12 this litigation, they have designated virtually every
13 shred of paper, including the Kleenex from the
14 conference room, subject to a protective order to keep
15 everything out of the public domain so that it wouldn't
16 end up in front of the press.

17 It is clear from their papers, and if you
18 stop to think about it, there is no other reason for
19 this discovery for them other than to be able to go in
20 front of the cameras or sit down with the reporters and
21 debunk Williams.

22 SPECIAL MASTER POPPITI: Let me ask the
23 question at the front end that was part of my
24 conversation with Intel at the back end. Isn't it fair

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1 to say that I have the opportunity to be in control of
2 that?

3 MR. DIAMOND: Well --

4 SPECIAL MASTER POPPITI: I mean, it seems to
5 me if I make the determination either that there is a
6 complete waiver or if I make the determination that the
7 safe harbor exists but there should be some
8 determination as to whether there is a partial waiver
9 and how far the onion should be peeled, because I don't
10 think we are talking about a circumstance where there
11 are exceptional circumstances, at least I haven't heard
12 that argument, I am in a position to say, You get this
13 but you don't get it until the expert discovery is
14 occurring, even understanding the proposition that it
15 may be important to ask a fact witness about the
16 underpinnings of an expert's view. I mean, that would
17 be the circumstance nonetheless by an expert if
18 discovery doesn't occur until later in the process.

19 MR. DIAMOND: You certainly have the ability
20 to control the timing of any discovery, including expert
21 discovery, and I think it's incumbent upon you to do
22 that, but it's incumbent upon you to do that not only as
23 a matter of timing but as a matter of faithfulness to
24 the Federal Rules.

1 Intel is not entitled to expert discovery of
2 every conceivable expert who may be out there that AMD
3 ever talked to, whether for litigation purposes or for
4 non-litigation purposes. And I think that's where
5 Ms. Shores left the tracks here.

6 She turns Rule 26 on its head to create a
7 waiveable privilege with respect to non-testifying
8 consultants and says that every other expert is fair
9 game. Well, that's not right.

10 Rule 26 is not a rule which establishes a
11 privilege for non-testifying consultants. Rule 26 is a
12 rule of relevance. It says, Only certain expert's
13 testimony or certain expert's information is relevant to
14 litigation. And, quite sensibly, it says, The only
15 information about experts that are relevant in discovery
16 are experts that a party is going to confront because,
17 obviously, a party needs the ability to cross-examine
18 the expert at trial in order to impeach his or her
19 conclusions.

20 If the expert never shows up at court, if
21 there is no conceivable threat that the expert will show
22 up in court, and, right now, we have no reason to
23 believe that Williams is going to be a testifying
24 expert, or if the expert was consulted for wholly

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1 non-litigation purposes, there is no reason, under 26,
2 to enable a party to conduct discovery of that expert.

3 SPECIAL MASTER POPPITI: So, for example, if
4 I take your last statement, if the expert, if
5 Dr. Williams were consulted solely for the purpose of
6 doing an analysis and solely for the purpose of mounting
7 a media campaign that you are suggesting is, he is not
8 -- his information, his report, his underlying papers
9 are not available because it has nothing to do with the
10 litigation --

11 MR. DIAMOND: Absolutely. And Rule 26
12 expressly states what experts can be subject to
13 discovery. They are testifying experts.

14 Had AMD's public relations spin masters
15 hired Dr. Williams and charged him with the same task
16 that he was charged with in this case and had released
17 his findings in the same way that they had released
18 them, Intel wouldn't be entitled to take discovery from
19 Dr. Williams. Why would that be relevant to anything in
20 the case if Dr. Williams was not going to testify as to
21 those conclusions to the jury? They don't have to
22 impeach him. They don't have to assail the conclusions.
23 They don't have to rebut them. There is no basis on
24 which to conduct that discovery.

1 And, in fact, the only hook they have now
2 is, Well, we want to take discovery for a non-judicial
3 purpose. We need to go out into the court of public
4 opinion and have our day in the court of public opinion
5 and show that Williams got it wrong.

6 Well, Judge, I don't think that you were
7 employed by Judge Farnan to preside over processes by
8 which parties can get information to conduct public
9 relations battles. You are a discovery master.
10 Discovery is for purposes of litigation. This is all
11 about non- or extra judicial uses of information, and,
12 you know, to my mind, that's the end of the inquiry, you
13 know --

14 SPECIAL MASTER POPPITI: Let me ask this,
15 though: It seems to me that a number of courts have
16 spent a not insignificant amount of time in their
17 analysis of safe harbor issues discussing a safe harbor,
18 discussing a sort of privilege, if you will, and
19 discussing, within the context of safe harbor and that
20 of -- and that sort of privilege, waiver, have they not?

21 MR. DIAMOND: Well, yes. The question
22 really is: Is it -- if you have a close call of
23 somebody who has been designated and then pulled back,
24 you have an issue of, Well, are they non-testifying or

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1 are they testifying? And if someone is labeled
2 testifying, can they re-labeled non-testifying?
3 Obviously, those are dicey issues.

4 We have never steered Dr. Williams into the
5 harbor. Dr. Williams isn't even in the ocean. He is
6 not even involved in the litigation. The only
7 appearance he has made so far has been in the Wall
8 Street Journal.

9 So, it's not a close case of whether
10 somebody is in the safe harbor or out of the safe
11 harbor. It is clearly, as you put it, I mean, he is not
12 even floating. We don't have a whole lot to talk about
13 in terms of whether a privilege has been waived.

14 Let me talk about privilege because I think
15 Ms. Shores gets that absolutely wrong as well. She says
16 that this is all about confidentiality and that the
17 driver here is the parties should be able to consult
18 confidentially with non-testifying experts, but once
19 they become testifying experts, the gloves are off and
20 there really is no reason for confidentiality, and given
21 that the confidentiality is the driver behind all of
22 this, since we have already thrown Williams' conclusions
23 into the public pot, we have waived any right to enjoy
24 the fruits of the safe harbor, well, that's just not

1 right.

2 And their only case support for the
3 proposition -- their only support for the proposition
4 that this is all about confidentiality is a quote in
5 Moore's which doesn't even talk about confidentiality.
6 What Moore's says is that the reason you don't subject
7 experts who are non-testifying experts to what you
8 subject testifying experts to is that, if, otherwise,
9 then everyone, every expert would be subject to the
10 gristmill of discovery and that's inefficient,
11 unnecessary, and serves no purpose.

12 This is not driven by confidentiality that
13 could be waived, and as you correctly pointed out, the
14 cases all say that disclosure and waiver of
15 confidentiality have nothing to do with whether somebody
16 gets to depose an expert or not. We have two Third
17 Circuit cases directly on point in which not only was
18 the expert revealed but his report was furnished. And,
19 clearly, there was a waiver of any confidential
20 information, yet, discovery was not permitted because
21 the party pulled that witness back. So, I mean, this is
22 not about confidentiality and this is not about waiver.

23 You said something which I think is wrong.
24 You said that you understood there is authority going

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1 both ways. There is not. There is not.

2 Granite Partners is off to the side and
3 involves different rules and different considerations,
4 and I will address that in a moment.

5 SPECIAL MASTER POPPITI: And I understand
6 why you said that what I said was wrong. Perhaps it
7 should have been more polished. I think my point was
8 that it seems to me that a number of the Courts take the
9 work product analysis and superimpose it on the rule. I
10 am not suggesting they are right or wrong.

11 MR. DIAMOND: I think Granite Partners
12 clearly does that.

13 SPECIAL MASTER POPPITI: It does, I agree.

14 MR. DIAMOND: But the Kelco case does not.
15 And Kelco, which is the only case that Intel suggests
16 shows that, you know, you can waive this safe harbor,
17 didn't involve the safe harbor at all being waived.
18 That was a case where the fight was over attorney/client
19 privilege documents, and the question was: Did a party
20 waive the attorney/client privilege by showing them to
21 an expert who, at one time, was testifying and then
22 became non-testifying. And the whole issue there is
23 waiver of attorney/client privilege.

24 SPECIAL MASTER POPPITI: Right.

1 MR. DIAMOND: It had nothing to do with safe
2 harbor and waiver of safe harbor. So, to cite that as
3 support for the proposition that there are cases going
4 both ways, I think really is an astounding reach.

5 Granite Partners is a totally different case
6 because it involved claims of work product. It was not
7 a case of safe harbor versus non-safe harbor. The
8 question was whether the accountants who did the
9 underlying study had their findings and conclusions so
10 intimately wrapped up in the charging document, in the
11 complaint, that, essentially, they became the complaint
12 and there was really no way to which the responding
13 party could get behind the complaint than to figure out
14 what they were saying and why they were saying it. And
15 the fight there was over work product. And as we all
16 know, work product is a conditional privilege and it can
17 be waived in cases of necessity.

18 There is no counterpart for that when you
19 are dealing with non-testifying experts, you know,
20 because it is not a privilege that protects something.
21 Rule 26 just simply says, Certain discovery from experts
22 is going to be relevant and certain discovery from
23 experts is not relevant. And, therefore, there is not a
24 question of waiver of non-relevancy. If it's not

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1 relevant, it's not relevant, which sort of brings me
2 back to my starting point: Why do they need to depose
3 Williams for a litigation purpose today? Do I rule out
4 absolutely that Williams will be designated as a
5 testifying expert? No, I don't know. We haven't gotten
6 there.

7 SPECIAL MASTER POPPITI: Right.

8 MR. DIAMOND: But, you know, I, certainly,
9 sitting here today, don't envision that happening. So
10 why, today, should they be entitled to take this
11 discovery? It's ludicrous to say that because Hector
12 Ruiz, in a statement to a reporter, mentioned Williams'
13 conclusion, that they now need to assail the basis for
14 Williams' conclusion as understood by Ruiz. Ruiz is not
15 going to be permitted to get on the stand and testify as
16 to what some economist who doesn't testify as an expert
17 may think or not think. I can't imagine if we got into
18 a fight over whether you are going to let them go down
19 that road in a deposition, you would let valuable
20 deposition time be wasted on whether Hector Ruiz
21 correctly believed in Dr. Williams' conclusions.

22 SPECIAL MASTER POPPITI: We will save that
23 for another day.

24 MR. DIAMOND: It's sort of beyond debate

1 that we wouldn't be allowed to put in Williams'
2 conclusions through Hector Ruiz, and, therefore, nobody
3 had a right to cross-examine Hector Ruiz on what we say
4 anyway. All he knows is \$60 billion.

5 SPECIAL MASTER POPPITI: I understand.

6 MR. DIAMOND: So I think that's a total make
7 wake. So we are back to where we started. So why do
8 they want this? Well, you know, hats off to Intel for
9 their honesty, they want this because they want to
10 counter punch. They want to go to the Wall Street
11 Journal and say, This guy is a jerk, he doesn't know
12 what he is talking about. How could you have possibly
13 listen to AMD when they sold you this bunk?

14 And, well, that's fine, you know, if they
15 want to contest Williams in the Court of public opinion,
16 they should. But they don't get to use the discovery
17 tools for extra judicial purposes. And, right now,
18 that's all we got. That's the only justification.

19 You know, it's a two-way street. There are
20 scores of people at Intel that I would like to depose
21 because, you know, I know I could get some juicy
22 salacious stuff that may not have anything to do with
23 the litigation but reporters would die for it. Do I get
24 to do that? No, I don't think so.

1 SPECIAL MASTER POPPITI: I certainly
2 understand your position.

3 MR. DIAMOND: Yeah. So if I don't get to do
4 it, they don't get to do it.

5 If we designate Williams as a testifying
6 expert and they are going to have to confront his
7 conclusions in front of the jury, I am all with
8 Ms. Shores, we will sit for days deposing Williams, but
9 until that happens, he is not in play, his conclusions
10 are not in play, and there is no basis to twist and
11 contort the Federal Rules and create privileges out of
12 rule of relevancies and do any number of things and
13 misconstrue cases in order to get him into play. It's
14 just not appropriate at this juncture.

15 SPECIAL MASTER POPPITI: Thank you,
16 Mr. Diamond.

17 MS. SHORES: Your Honor, if I might respond
18 to a few points?

19 SPECIAL MASTER POPPITI: If you would,
20 please.

21 MS. SHORES: First of all, I was very
22 surprised to hear Mr. Diamond say that Dr. Williams was
23 not retained for the litigation purpose and that,
24 therefore, he is nowhere near the ocean in which the

1 safe harbor exists. Of course, what that means is that
2 he is not subject to any protection under the rule. He,
3 himself, would, therefore, be a third-party to whom
4 information was disclosed, and we would be totally
5 entitled to get discovery from him.

6 Second, you know, with respect to this idea
7 that Ruiz, on the stand, would not be -- they don't have
8 any intention of trying to correct Williams' conclusions
9 with him on the stand, I mean, that's not the test for
10 whether or not we can ask Mr. Ruiz questions about his
11 public statements. Now, if, particularly as contrary to
12 what Mr. Diamond says, they have everything to do with
13 the litigation. I don't think that he can reasonably
14 take the position that -- I am sorry, Dr. Ruiz'
15 statements about how much Intel earned from its
16 allegedly anti-competitive conduct doesn't have anything
17 to do with the litigation. I don't think that's a
18 credible position if I understood it correctly.

19 And, second, you know, this distinction, we
20 are getting down to the weeds a little bit here, but
21 this distinction about work product and the safe harbor,
22 there are cases that state quite clearly that the two
23 are really the same, that the safe harbor rule is just a
24 specialized application of the work product rule.

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1 And there are also cases, I should say, that
2 the safe harbor protections can be waived. I thought I
3 heard Mr. Diamond suggest otherwise. So, again, I am
4 happy to provide those citations if your Honor would --

5 SPECIAL MASTER POPPITI: I am comfortable
6 with what you said, and I understand exactly what you
7 are saying.

8 I do have, Mr. Diamond, I do have a question
9 with respect to your statement regarding Dr. Williams,
10 and without -- I don't want to put words into your
11 mouth, but if you would respond to the comment that you
12 have suggested that he was not retained for litigation
13 purposes.

14 MR. DIAMOND: Well, I said, "If he were not
15 retained for litigation purposes," if he were retained
16 by the public relations professionals.

17 SPECIAL MASTER POPPITI: Yeah.

18 MR. DIAMOND: The result wouldn't be any
19 different, you know. There have been a lot of people
20 who have said a lot of things about this case and a lot
21 of experts who sort of weighed in as volunteers, and,
22 you know, Intel doesn't have a right to go depose them
23 all.

24 SPECIAL MASTER POPPITI: You are suggesting,

1 then, that if he were not retained for litigation
2 purposes, in any event, certainly, we wouldn't be
3 talking about a Rule 26(4)(b) issue; correct?

4 MR. DIAMOND: Correct. The fact of the
5 matter is, as I put in my declaration, we did retain
6 him, we did retain him to help us with analysis, not
7 specifically necessarily with reference to this case
8 alone, there are other proceedings going on, as you are
9 well aware.

10 SPECIAL MASTER POPPITI: I am.

11 MR. DIAMOND: And we have been charged with
12 developing information for those proceedings.

13 SPECIAL MASTER POPPITI: Okay. In other
14 words, the response to the question is consistent with
15 your declaration, He was retained for litigation
16 purposes?

17 MR. DIAMOND: Yeah. And Miss Shores
18 misunderstood me if she thought I said the question of
19 Intel's illicit monopoly profits is not relevant,
20 clearly, it is. But it, you know, that testimony is not
21 coming in through Dr. Ruiz. He is a very bright guy,
22 and, you know, has a highly impressive resume, but he is
23 not in a position to opine to that and won't be opining
24 to that. I don't know who will be. Maybe Williams, but

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1 likely other people. When we get there, we will find
2 out and Intel will have its right to depose him.

3 SPECIAL MASTER POPPITI: Okay. Unless there
4 are any other comments, I will take the matter under
5 advisement and get back to you in due course.

6 MR. DIAMOND: Thank you very much.

7 SPECIAL MASTER POPPITI: Anything else,
8 please? Thank you all.

9 (The hearing was concluded at 11:52 a.m.)

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C E R T I F I C A T E

STATE OF DELAWARE:
:
NEW CASTLE COUNTY:

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

WITNESS my hand this 10th day of January A.D.
2008.

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