

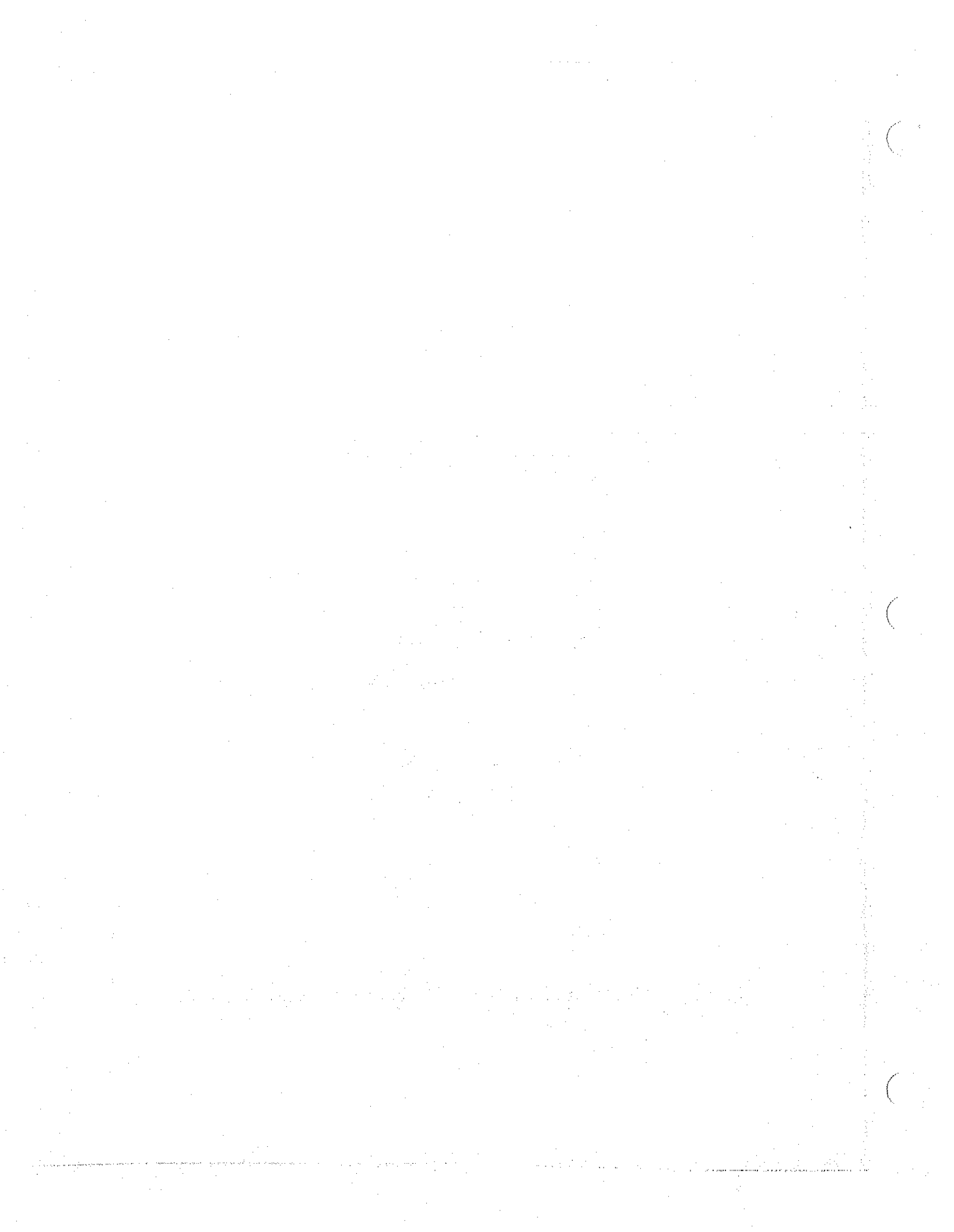
*Phil Paul v.
Intel Corporation*

*Hearing
September 27, 2006*

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION)
MICROPROCESSOR ANTITRUST) MDL No. 1717-JJF
LITIGATION)
ADVANCED MICRO DEVICES, INC.,)
and AMD INTERNATIONAL SALES)
AND SERVICE LTD.,) C.A. No. 05-441-JJF
Plaintiffs,)
v.)
INTEL CORPORATION and)
INTEL KABUSHIKI KAISHA,)
Defendants.)
PHIL PAUL, on behalf of)
himself and all others)
similarly situated,)
Plaintiff,) C.A. No. 05-485-JJF
v.)
INTEL CORPORATION.)
Defendant.)

Wednesday, September 27, 2006
11:00 a.m.
Courtroom 4B
844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

[1] THE COURT: Good morning, be
[2] seated.
[3] All right. If you want to
[4] announce your appearances, that way we'll have
[5] it for the court reporter.
[6] MR. DIAMOND: Good morning, Your
[7] Honor. On behalf of AMD, Charles Diamond of
[8] O'Melveny & Myers. With me is Linda Smith and
[9] Mark Samuels and Fred Cottrell of Richards,
[10] Layton & Finger.
[11] THE COURT: All right. Good
[12] morning to all of you.
[13] MR. MOLL: Good morning, Your
[14] Honor. Peter Moll. With me are my partner
[15] Darren Berhnhard from Howrey, Dan Floyd from
[16] Gibson, I don't know who that gentleman is in
[17] this corner, he sort of followed us and sat at
[18] our table.
[19] MR. HORWITZ: I'm just here for
[20] the beer.
[21] MR. MOLL: And Eva Almirantearena
[22] who is in-house counsel with Intel.
[23] THE COURT: All right. Good
[24] morning to all of you.

APPEARANCES:

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-and-
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Counsel for Defendants

[1] MR. SMALL: Good morning, Your
[2] Honor. Dan Small with Cohen Milstein for the
[3] class plaintiffs. I'm here with Clay Athey, Tom
[4] Dove and Alyson Baker.
[5] THE COURT: Good morning to all of
[6] you.
[7] MR. SMALL: Thank you.
[8] THE COURT: All right. I have
[9] reviewed your proposed agenda for the conference
[10] today and I thought maybe I could give you some
[11] information first and then I'll listen to
[12] anybody that has something they want to present.
[13] The request that we restart the
[14] clock to allow a full six months with the
[15] possibility of a reasonable extension will be
[16] granted, so we'll start that clock next Monday
[17] or so for the six months.
[18] During that period you'll have the
[19] regularly scheduled conferences for purposes of
[20] case management and/or disputes with the special
[21] master. I would ask you if it's possible, he'll
[22] keep me advised of your progress and what I
[23] would appreciate is if we're going to need an
[24] extension, that you let him know in three or

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[1] four months so that we can factor that in our
[2] other planning.
[3] I know sometimes it's unavoidable
[4] that things come up at the last minute and we
[5] understand that, but if we can keep advised with
[6] regard to how things progress it will be
[7] helpful.
[8] I'm going to add language to the
[9] order so that in addition to the ability of the
[10] special master to apportion billings on the
[11] basis of what I'll refer to as fault, that there
[12] can also on application of any party be an
[13] apportionment in the first instance by the
[14] special master of a billing.
[15] And what I'll do if those disputes
[16] occur and they're resolved on a monthly basis by
[17] the special master, at the end of the case,
[18] either after the trial or at the end of the
[19] litigation, I'll review any objections to the
[20] apportionments that were made.
[21] What I'm trying to do is keep you
[22] going so you get a decision, it gets paid and
[23] then we'll look at it. I don't want to look at
[24] it individually, I think it will take up too

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[1] much of your time and you have got important
[2] things to be doing.
[3] With regard to the dispute on the
[4] current protective order, I thought long and
[5] hard about this, and I'm going to divide it
[6] one-third, one-third and one-third.
[7] You know, I feel terrible that
[8] sometimes these appear to be arbitrary
[9] apportionments. They really aren't. You know,
[10] I try to read what was going on, and that's the
[11] best I can come up with.
[12] Now, if somebody wants me to
[13] reconsider that, feel free to file, don't make
[14] it a long paper, but if you think I have really
[15] missed something, let me know, but I'm just
[16] going to take that one and resolve it myself to
[17] get you on track so we don't have anything in
[18] the way of progress that you want to make.
[19] Of importance to you all, I've
[20] selected the immovable trial date. This date,
[21] if you talk to the patent lawyers that come here
[22] or to your local counsel, you'll understand that
[23] a lot of things can move between now and the
[24] trial date, but this trial date will be firm.

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[1] April 27th, 2009, trial will commence.
[2] What I have done in selecting that
[3] date, I have given consideration to the need to
[4] move the case which is typically a plaintiff's
[5] interest. I have given consideration to the
[6] interest of defendants which is typically to be
[7] able to adequately defend and to develop
[8] defenses. I have looked at my own calendar and
[9] I have some idea how long this case would take
[10] to try if it was going to go to trial, so if I
[11] get into 2008, I already have stuff scheduled,
[12] so you're always running up against something.
[13] This gave me the opportunity to
[14] have a clear path to allocate trial time to you
[15] for the whole case or if part of the case is
[16] tried. I think you have heard me say this
[17] before, at least your local counsel have, I
[18] don't push for settlement. If you want to
[19] settle, you can do it privately. We have a
[20] magistrate judge here, you have a special master
[21] in this case.
[22] I really focus on being a trial
[23] judge here. So when I select this date, I'm
[24] thinking we have a trial and I'm presiding at it

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[1] and that's what we're all about. And I'm happy
[2] to preside the trial. So anything you want to
[3] do in between is your business, that's the date.
[4] I think I have touched on all the
[5] main points that I wanted to touch on. This
[6] would be the opportunity for the parties to make
[7] presentations.
[8] **MR. DIAMOND:** Thank you, Your
[9] Honor. If I can begin on behalf of AMD, since
[10] we prepared the agenda there has been some
[11] significant developments in the case; notably I
[12] arrived in town to receive your order, which
[13] provided me with some interesting reading last
[14] evening and —
[15] **THE COURT:** You know, I thought
[16] about that. I thought there you are in that
[17] hotel room all alone and wouldn't it be good to
[18] give you some companionship and what a great
[19] round for appeal. That's what you're probably
[20] thinking the whole time.
[21] **MR. DIAMOND:** I was thinking you
[22] were really very considerate. One of the things
[23] you didn't realize was that I travel with my
[24] partners, but one of my partners happens to be

[1] my wife, so I actually had somebody.
 [2] **THE COURT:** So I made for a
 [3] miserable spouse, and I apologize to you.
 [4] **MR. DIAMOND:** I had someone to
 [5] share the pain.
 [6] But that raises a question that we
 [7] have given considerable thought to about an
 [8] hour-and-a-half this morning which means we
 [9] haven't sorted it all out, but I want to raise
 [10] the question of certification of your decision
 [11] for interlocutory appeal.
 [12] And I know Ms. Smith wants to
 [13] address the question of whether we can encourage
 [14] the recalcitrant third parties who we have been
 [15] negotiating with over subpoenas for the past ten
 [16] months to finally come to the table by imposing
 [17] some kind of deadline for negotiations, but I'll
 [18] let her address that.
 [19] Your Honor, I have discussed this
 [20] briefly with Mr. Moll, so I know AMD and Intel
 [21] take different views on the subject, but the
 [22] question arose as we read your order last
 [23] evening and again this morning as to the impact
 [24] of that concerning ongoing discovery, and the

[1] market.
 [2] By contrast to unlawfully, we have
 [3] to discount that they acquired market power
 [4] through superior skill, industry, or foresight
 [5] which would be lawful.
 [6] The relevant geographic market as
 [7] the parties concede is worldwide. For us, I
 [8] suppose, and obviously this — Intel wants to
 [9] make some concessions that we don't have this
 [10] burden, I would be happy to hear them, but
 [11] absent that I suppose we would be held to the
 [12] burden of showing that Intel acquired its market
 [13] power throughout the relevant geographic market
 [14] unlawfully and that means that we have to show
 [15] that with respect to the 70 percent of the
 [16] relevant geographic market that lies outside of
 [17] the United States that they acquired market
 [18] power in that portion of the relevant market
 [19] unlawfully and not by reason of superior skill,
 [20] industry and foresight.
 [21] We view the foreign conduct as a
 [22] necessary predicate to prove the underlying
 [23] violation giving rise to US damages, and we are
 [24] concerned that if we don't do that, we will be

[1] scope of discovery in this case.
 [2] Clearly we understand that we are
 [3] not entitled to seek on behalf of AMD damages
 [4] for lost sales that would have been made to
 [5] foreign purchasers abroad, understood, the order
 [6] was crystal clear on that account.
 [7] That doesn't necessarily resolve
 [8] the issue of whether Intel's foreign conduct
 [9] should or should not be part of this litigation.
 [10] And for reasons that I can explain to you, it is
 [11] our view that in order to prove a domestic
 [12] violation actionable under Section 2, we do need
 [13] to get in to discuss and make a showing to a
 [14] jury ultimately about Intel's conduct in the 70
 [15] percent of the relevant market that lies outside
 [16] of the US borders.
 [17] I'm happy to discuss why that is
 [18] if you want me to do that this morning. But
 [19] suffice it to say that I expect that Intel will
 [20] hold us up to the burden of proof under Section
 [21] 2 that most people looking at a Section 2 case
 [22] think appropriate, and that is, we have to prove
 [23] that Intel acquired market power unlawfully in
 [24] the relevant geographic and relevant product

[1] accused of a failure of proof ultimately.
 [2] I am not asking the Court to tell
 [3] us today what you had in mind and how you think
 [4] this impacts discovery, but the way we view it,
 [5] the outcome of that issue significantly affects
 [6] whether it makes sense to make a detour to
 [7] Philadelphia and ask the Third Circuit to
 [8] entertain an interlocutory appeal of your order.
 [9] If the order simply says that we
 [10] can't recover damages for sales to foreign
 [11] customers abroad and that's ultimately
 [12] adjudicated as a mistake on the Court's part,
 [13] then I suppose worse case scenario is we have a
 [14] short retrial on the issue of damages following
 [15] an appeal. That's manageable.
 [16] If we are precluded from
 [17] developing the evidence we think we need to
 [18] prove to make out the underlying violation and
 [19] can't get into Intel's conduct outside of US
 [20] borders and that decision is overturned, then
 [21] basically we have to redo this litigation from
 [22] scratch, both in terms of going back and trying
 [23] to do foreign discovery years and years later
 [24] when it would be very difficult to do and

[1] retrying the entire liability case.
[2] Obviously we would like some
[3] vehicle to get clarification as to the impact on
[4] discovery and I think probably what makes the
[5] most sense for us is to file a certification
[6] request under 1292(b) premised on various
[7] constructions of what you intended by your
[8] order, and that would be — that would probably
[9] be an appropriate vehicle to get that resolved.
[10] As I say, I think if the order was
[11] not intended to preclude us from developing
[12] evidence of conduct outside of the United States
[13] and introducing that in support of our US claim,
[14] then certification is not nearly as indicated as
[15] the other situation.
[16] And with Your Honor's permission
[17] we would propose to get something to you in a
[18] week's time to sort of tee up that issue.
[19] **THE COURT:** All right. Let me
[20] hear from Intel.
[21] **MR. MOLL:** Thank you, Your Honor.
[22] Certainly everything that the Court laid out as
[23] far as dates and what the Court intends to do is
[24] agreeable to us, and we accept it and that's

[1] we don't think that was appropriate to grant
[2] 1292(b), but we would be happy to get counsel's
[3] brief and respond to it.
[4] On this issue of discovery and
[5] damages, the statute is clear. Your Honor
[6] quoted the statute in Your Honor's opinion. It
[7] talks about the Sherman act shall not apply to
[8] conduct. That's what the statute says, that's
[9] what the case law says. That's why Your Honor
[10] correctly found that this conduct in the
[11] paragraphs that have been stricken is outside
[12] the scope of this case.
[13] And, therefore, it does affect the
[14] scope of discovery. We said that at the first
[15] hearing before Your Honor that we thought it
[16] would reduce the scope of discovery in 70
[17] percent according to AMD's own complaint, 70
[18] percent of these sales are foreign sales. With
[19] the allegations being stricken and with the
[20] allegation of 70 percent of foreign, it does
[21] have an affect on discovery, and will
[22] dramatically narrow it.
[23] I think the confines of how it
[24] gets narrowed on the parameters and the contours

[1] fine as far as we are concerned.
[2] We had raised an issue on the
[3] allocation of the fees to sort of make the point
[4] that perhaps there are other things that had to
[5] be looked at. We had no intention of bringing
[6] it to Your Honor's attention. We appreciate the
[7] fact that it got resolved and we'll proceed
[8] exactly on the framework that Your Honor just
[9] laid out.
[10] As far as what Mr. Diamond has
[11] just suggested, we obviously oppose any effort
[12] to try to get a 1292(b) certification.
[13] Obviously one of the requirements for a 1292(b)
[14] certification is that there be some sort of real
[15] issue as to whether or not the law is correct.
[16] And here Your Honor relied on a
[17] federal statute, the Foreign Trade Antitrust
[18] Improvements Act, it was passed in 1982, Your
[19] Honor relied correctly so on a United States
[20] Supreme Court opinion, Impagram, which
[21] interprets that act and Your Honor also had the
[22] Intrincinto case. Your Honor also had Third
[23] Circuit opinion. And Your Honor's opinion
[24] really is consistent with all of that law. So

[1] of it are something that are appropriately
[2] addressed when there is an issue before the
[3] Court, when we have something to talk about.
[4] And if there are going to be
[5] discovery issues at the perimeter and
[6] undoubtedly there probably will be, then our
[7] position is they should be brought in the normal
[8] course to the special master and then if there
[9] is an issue or an appeal it can be brought to
[10] Your Honor when Your Honor has something before
[11] him other than dealing with this in a vacuum.
[12] So that's our position on the
[13] 1292(b). And when Mr. Diamond files it, we
[14] would be happy to respond to it.
[15] **THE COURT:** All right. Anyone
[16] else want to be heard?
[17] **MR. SMALL:** Your Honor, Dan Small
[18] for the class plaintiffs.
[19] We're obviously not directly
[20] involved in the issue that has been discussed
[21] with respect to the possible 1292(b) motion, but
[22] I do want to point out that our complaint has
[23] not been responded to yet by Intel necessarily
[24] because of circumstances, but now I believe

[1] Intel's date for responding to the complaint
[2] will be in November. And we have not had the
[3] issue or a similar issue raised in our case that
[4] has been ruled on by the Court in the AMD case.

[5] And I just want to point out for
[6] the Court that we, of course, have state laws
[7] that we're dealing with that specifically
[8] provide for recovery for indirect effects of
[9] antitrust violations, and because there are
[10] state law, we're not dealing with the federal
[11] statute that was at the center of the Court's
[12] opinion as well as the Supreme Court cases
[13] interpreting that statute, so we feel it's an
[14] issue that's going to be different in our case
[15] and one which the Court has not yet addressed.

[16] **THE COURT:** All right. As both
[17] AMD and Intel have acknowledged, there is really
[18] two issues. There is the certification issue of
[19] the order on dismissal, and there is the going
[20] forward, and they overlap as AMD has pointed
[21] out.

[22] The way I think that they ought to
[23] be presented is that AMD ought to propound its
[24] discovery to Intel, because the scope of

[1] argument presents.

[2] Second, I agree with both of you
[3] that the proper way to present the effort for
[4] certification is by a motion with an opening
[5] brief. That will come directly to me and we'll
[6] brief it under the rules, and get you a
[7] decision.

[8] Now, the only question I might
[9] have is if you were successful in convincing me
[10] that the issue ought to go to the Third Circuit
[11] immediately, does that mean that the effort on
[12] the scope of discovery should be delayed until
[13] then? I don't think so. Because I want to get
[14] the case moving on discovery now that we have
[15] the protective order in place and you have the
[16] decision on the motion to dismiss, so I would
[17] say that you put it on a dual track and
[18] Mr. Poppiti and myself will work as quickly as
[19] we can to get you both answers.

[20] **MR. MOLL:** That is fine with us,
[21] Your Honor.

[22] **MR. DIAMOND:** Yes, Your Honor.
[23] Although I point out we have already propounded
[24] our discovery requests, they have been

[1] discovery question in the first instance, that
[2] is the impact of the order on the scope of
[3] discovery in this case now, I assume that some
[4] of that discovery will be objected to because as
[5] has been indicated, it will be broad enough to
[6] cover the foreign discovery, and the dispute
[7] will be presented to the special master who I
[8] believe is prepared to expeditiously address the
[9] dispute. And then if there are objections to
[10] that decision, it will come to me with the
[11] benefit of any fact finding made by the special
[12] master as well as the legal arguments that will
[13] be refined on the basis of the decision.

[14] So that's the first thing. I
[15] think it gets resolved by AMD propounding its
[16] discovery. And if you need — I guess I would
[17] suggest since it's going to be a legal question
[18] in the first instance with some factual
[19] predicates, that somebody request on AMD's
[20] behalf that the time to answer be shortened so
[21] we can get the legal issue joined. In other
[22] words, instead of saying the normal time under
[23] Rule 26 or so, that we get it shortened up by a
[24] ruling of the special master so that the legal

[1] outstanding, they have been responded to, at
[2] least written responses have been provided by
[3] Intel, all of them require responses that
[4] include documents concerning Intel's foreign
[5] conduct. I think —

[6] **THE COURT:** There is nothing you
[7] want to add so all they have to do then is
[8] respond.

[9] **MR. DIAMOND:** They have already
[10] objected, I don't know that we have.

[11] **MR. MOLL:** What we have done, Your
[12] Honor, is counsel in the course of this document
[13] program we have worked out and pursuant to Your
[14] Honor's order on that subject served us with a
[15] — gave us a document request, we gave them a
[16] document request.

[17] When we responded, we responded
[18] with objections in that if the Court grants
[19] Intel's motion on foreign conduct, then we
[20] object to this. So we have a head start and now
[21] it seems to me it's a matter of us —

[22] **THE COURT:** Now you just got to
[23] present the dispute to the special master.

[24] **MR. MOLL:** Right, or sit down and

[1] see if there is any way to narrow it and get it
[2] to the special master. So we can, as Your Honor
[3] expressed the desire to have us do, we can
[4] short-circuit the process.

[5] **THE COURT:** You may be able to
[6] short-circuit — I didn't realize that your
[7] objections contemplated the decision in any
[8] fashion, but you apparently responded in the
[9] alternative.

[10] **MR. MOLL:** We objected, but again,
[11] I think now that we have the decision, we know
[12] where Mr. Diamond is, that it would make some
[13] sense to sit down and see if there is anything
[14] we can agree on and then expeditiously bring it
[15] to the special master.

[16] **THE COURT:** For simplicity you may
[17] want to consider in this discussion a
[18] representative discovery request instead of
[19] presenting the whole package that basically
[20] touch on the heart of the focus, and it will
[21] make a clearer record for you when it comes to
[22] me as well as for other purposes, and give the
[23] special master an opportunity to be more
[24] efficient in addressing the real legal dispute.

[1] order outstanding until we resolve the scope of
[2] the discovery question. You can always amend
[3] your order to require the findings for
[4] certification, I don't think that's a problem.

[5] **MR. MOLL:** Just so I understand,
[6] and we're fine with that, is it plaintiff's
[7] position that they're going to file the papers
[8] and then wait and see how discovery comes out?

[9] **MR. DIAMOND:** We would prefer
[10] holding off having to file our certification
[11] request until after the discovery issue is
[12] resolved.

[13] **MR. MOLL:** We have no problem with
[14] that, Your Honor, if that's fine with the Court
[15] or whatever the Court wants to do.

[16] **THE COURT:** If you two agree, it's
[17] fine with me. It sounds like you agree.

[18] **MR. MOLL:** We try to agree.

[19] **MR. DIAMOND:** We need one
[20] procedural favor.

[21] **THE COURT:** Okay.

[22] **MR. DIAMOND:** We have ten days
[23] from entry of your order to file a motion with
[24] the Third Circuit for an interlocutory appeal.

[1] **MR. MOLL:** That's fine, Your
[2] Honor.

[3] **THE COURT:** Sit down and talk and
[4] get up with the special master.

[5] **MR. MOLL:** Fine, we'll do that.

[6] **MR. DIAMOND:** I think that — I
[7] think we basically have the issue teed up, I
[8] will talk to Mr. Moll this week. And the
[9] special master has already instituted procedures
[10] for us which are fairly rapid fire, so I imagine
[11] the issue will get teed up and decided quickly.

[12] The only thing I would ask the
[13] Court to consider doing is either hold off on
[14] deciding the certification request or perhaps
[15] delaying the date by which we file the
[16] certification request because quite frankly if
[17] the discovery issue turns out in a way favorable
[18] to us, I don't know that we will be asking the
[19] Court to certify.

[20] **THE COURT:** Okay. I thought you
[21] were going to do that —

[22] **MR. DIAMOND:** I think we would
[23] prefer to do it serially rather than
[24] simultaneously, but that means keeping your

[1] If you were to decree that your order is not
[2] final until we resolve the discovery question
[3] such that our ten days doesn't start running,
[4] then we're fine. I just want to make sure we
[5] don't violate any appellant jurisdictional rule.

[6] **MR. MOLL:** Now, Your Honor —

[7] **THE COURT:** This is like the
[8] legislature, but there are ways to — I mean,
[9] wouldn't a motion to reconsider unanswer hold my
[10] order.

[11] **MR. DIAMOND:** I think it would,
[12] yes.

[13] **THE COURT:** So although I want to
[14] be candid for you, it's unlikely I would
[15] grant a motion to reconsider, why don't you put
[16] a one page piece of paper in place that says
[17] you're filing for me to reconsider and that
[18] stops the clock.

[19] **MR. MOLL:** Can we then have an
[20] extension, Your Honor, on that, until after the
[21] discovery —

[22] **THE COURT:** Yes.

[23] **MR. MOLL:** That's fine.

[24] **THE COURT:** You have an extension

[1] to answer the motion.

[2] **MR. MOLL:** Thank you. And it.

[3] **THE COURT:** Premised on the
[4] special master's decision.

[5] **MR. MOLL:** That's perfect.

[6] **THE COURT:** Is that wrong? We are
[7] going to get counsel here. We are going to get
[8] a real counsel now.

[9] **MR. DIAMOND:** There is some
[10] question — I think we want to satisfy ourselves
[11] that we wouldn't be jeopardizing our appellate
[12] rights and that they will be preserved by a
[13] reconsideration. Let's assume that it would, if
[14] there is a problem, Mr. Moll and I will talk
[15] about it and if necessary we will file a short
[16] request for certification.

[17] **THE COURT:** I'm experienced at
[18] appeals for a lot of reasons. A motion to
[19] reconsider essentially stays my order and your
[20] times don't run.

[21] **MR. DIAMOND:** I understand that to
[22] be correct and the time starts to run once you
[23] entered the order even denying reconsideration,
[24] I once survived a late filed surcharge brief to

[1] I want to put a pin in one other issue that your
[2] order engendered and I didn't want our silence
[3] to be taken later on as acquiescence. But on
[4] page 16 of your order, you state accordingly the
[5] Court will dismiss AMD's claims based on alleged
[6] lost sales of AMD microprocessors to foreign
[7] customers and strike the allegations in the
[8] complaint forming the basis of those claims,
[9] namely — and you go on to name the paragraphs
[10] in which we discuss foreign customers.

[11] That raises a question of what
[12] constitutes a foreign customer. Among the
[13] allegations that you struck were allegations
[14] that discuss Sony and LoNovo. Sony and LoNovo,
[15] there may be others, but these are the ones I
[16] know about. Sony and LoNovo although arguably
[17] foreign domicile corporations, meaning the
[18] parent is headquartered outside the United
[19] States, and in the case of LoNovo I don't think
[20] that's necessarily true, but both of them have
[21] manufacturing operations in the United States,
[22] and both of them purchase from both Intel and
[23] AMD microprocessors for use in the United States
[24] incorporated into computers manufactured here.

[1] the United States on that basis.

[2] **THE COURT:** I actually understand
[3] that I can extend the time to appeal, in this
[4] circuit at least there are cases like that, why
[5] don't you all feel comfortable, I'll do whatever
[6] procedurally protects your ability to appeal on
[7] interlocutory basis, and your friends from Intel
[8] aren't objecting to that.

[9] **MR. MOLL:** The only — I have no
[10] objection to filing any motion, any extension
[11] giving Mr. Diamond anything he wants in that.
[12] Obviously, you know, his notion that your order
[13] isn't a final order, hasn't been entered, we
[14] think it is and it should remain that way, and
[15] there is some way to work out the extension he
[16] desires, that's fine with us, we'll work it any
[17] way we can.

[18] **THE COURT:** I think you have got a
[19] lot of opportunities to get it done and stay my
[20] order. If you need to get me on the phone to
[21] talk about if I need to do something for you,
[22] have your local counsel call up and we'll get
[23] you on the phone.

[24] **MR. DIAMOND:** We appreciate that.

[1] Even within the framework of the
[2] ruling we would regard that as part of the
[3] domestic customers and just didn't want our
[4] silence to be taken later on as some sort of
[5] agreement that LoNovo and Sony are purely
[6] foreign purchasers.

[7] **MR. MOLL:** We don't necessarily
[8] agree, but again, these are matters I think that
[9] can get resolved with the special master and
[10] then if necessary brought to Your Honor when
[11] they're properly teed up.

[12] **THE COURT:** I understand your
[13] position, and it's on the record.

[14] **MR. DIAMOND:** Thank you.

[15] **MS. SMITH:** Your Honor, I'm the
[16] better half of the Diamond/Smith group.

[17] **THE COURT:** I'll affirm.

[18] **MS. SMITH:** Thank you, Your Honor.
[19] See, I won one.

[20] **MR. MOLL:** You have heard no
[21] objection from this side either, Your Honor.

[22] **MS. SMITH:** Okay. I'm just going
[23] to speak briefly about the request which I
[24] believe is contested, so we wanted to raise it

[1] here. We had asked for a third-party corporate
[2] subpoena negotiation cutoff.
[3] And let me just quickly because
[4] this could be years, but I'll quickly tell you
[5] that on October 2005 AMD issued thirty-two
[6] subpoenas, then pursuant to the Court's case
[7] management order number one, you imposed a
[8] third-party corporate subpoena cutoff on class,
[9] AMD and Intel. AMD served thirty-three more
[10] subpoenas. The class served thirty-nine and
[11] Intel served sixty-eight.
[12] AMD in the meantime since October
[13] of 2005 has made substantial progress in going
[14] through the protocols and negotiating
[15] individually with each one of these large
[16] corporate entities for production, custodian
[17] lists, search terms corporate or transactional
[18] data, and all the methodology of E discovery
[19] which some people, although not me, have become
[20] steeped in and could probably teach courses on E
[21] discovery at this point.
[22] We have reached deals with several
[23] of the corporate third parties including Hewlett
[24] Packard and IBM. However, no third party will

[1] and you can't get a deal, you can bring a
[2] motion. The problem is that because there are
[3] three parties negotiating with the third party,
[4] that until we have an accord, nothing will
[5] happen.
[6] And, for example, we have an
[7] agreement with IBM and so we have — but they
[8] won't produce to us. It's sort of silly for us
[9] to bring a motion to compel production when they
[10] have reached a full agreement with us, they just
[11] haven't reached a full agreement with Intel. So
[12] it doesn't quite work to say motion practice
[13] will take care of this.
[14] And we're — there is also
[15] differing negotiations. The plaintiffs are very
[16] interested in third-party discovery. The
[17] defendant is less interested, although the third
[18] parties are customers of all of ours and
[19] etcetera cetera.
[20] So we were thinking that by
[21] placing a cutoff date when there is either a
[22] deal that you would be essentially placing this
[23] cutoff on the parties that are in front of you,
[24] Intel, AMD, and the class, to get these deals in

[1] produce without agreement with Intel and the
[2] class. Not surprisingly, shockingly, no third
[3] party wants to produce twice or even three
[4] times, they are going to do this once because
[5] it's massive.
[6] And so what we have done is set up
[7] an elaborate amazing chart with an AMD
[8] negotiator, an Intel negotiator, and a class
[9] negotiator for each one of the seventy — it
[10] turns out there are seventy separate parties who
[11] have been subpoenaed, and that tripartite group
[12] of parties will negotiate with the corporate
[13] third-party the agreement out.
[14] And the reason we're asking the
[15] Court to set a cutoff on these negotiations is
[16] we would like third-party corporate discovery to
[17] bear some relationship to the discovery cutoffs
[18] that the Court envisions and the trial date that
[19] the Court envisions, are on the immovable trial
[20] date. And this could drag on for my lifetime if
[21] not beyond.
[22] The thought was Intel is saying
[23] well, you don't need this because you could just
[24] write a motion, eventually someone will produce

[1] place with the third parties and yet we could
[2] also use it against the third parties to say,
[3] you know, if you can't reach a deal by this
[4] date, then someone is going to move against you
[5] and you're going to be involved in motion
[6] practice.
[7] And that really was the basis,
[8] trying to alleviate the burden on the Court, on
[9] the special master where it will fall to
[10] coordinate this and get it organized so we can
[11] move.
[12] Thank you.
[13] **THE COURT:** All right.
[14] **MR. MOLL:** If I may just briefly,
[15] Your Honor, as counsel indicated, there are
[16] seventy of these third parties. One of them
[17] within the last — fairly recently sent a letter
[18] to both us, and I won't disclose the name of
[19] that company, sent a letter to both us and to
[20] AMD saying they thought they had approximately
[21] 300 million pages, 300 million pages of
[22] documents to produce.
[23] Each of these seventy third
[24] parties is in a different unique situation. And

[1] that's why I told Mr. Diamond, we were going to
 [2] have to oppose any arbitrary deadline for any of
 [3] these people.
 [4] The fact of the matter is that I'm
 [5] sure a number of them who are referenced in a
 [6] number of the paragraphs that Your Honor has
 [7] stricken from the complaint now want to go back
 [8] and read Your Honor's decision and evaluate
 [9] their discovery responses in light of that.
 [10] They are probably going to want to hear where
 [11] the special master comes out and as we define
 [12] the confines of this, and so while I think the
 [13] appropriate, a more appropriate procedure in
 [14] this case given the diversity we have and these
 [15] issues now that they're going to need to look at
 [16] is again to suggest that this issue get teed up
 [17] at the appropriate time by AMD if they want, or
 [18] by Intel and the class and AMD before the
 [19] special master, we can then get into a little
 [20] more of the details than I'm sure Your Honor
 [21] would like to hear about this morning on all of
 [22] these people and make a decision. And if he
 [23] thinks some sort of a deadline is appropriate,
 [24] establish one or have the flexibility to deal

[1] ahead.
 [2] MR. SMALL: Just briefly, Your
 [3] Honor.
 [4] THE COURT: Sure.
 [5] MR. SMALL: In two sentences worth
 [6] we would like to add, Your Honor, on behalf of
 [7] the class is whereas AMD and Intel are preparing
 [8] for trial that will be in April of 2009, we have
 [9] class certification to deal with which will
 [10] hopefully begin in July of 2007. Some very
 [11] significant discovery for that is going to come
 [12] from the third parties, not the least of which
 [13] is transactional data that both the class
 [14] plaintiffs and Intel want, so it would be very
 [15] important to us for class certification purposes
 [16] to be able to get production of that data and
 [17] other materials properly so we can begin
 [18] briefing class certification hopefully in July.
 [19] Thank you, Your Honor.
 [20] THE COURT: All right. Thank you.
 [21] As I see the dispute, it's a
 [22] question of setting a date possibly when any one
 [23] of the parties before me would have to begin
 [24] engaging in a motion practice as opposed to some

[1] with it however he sees fit. And again, with
 [2] ultimate resource to Your Honor.
 [3] MS. SMITH: I think in principle
 [4] that sounds fine. The problem is in practice it
 [5] means seventy, potentially seventy different
 [6] motions. We're not asking the Court to impose a
 [7] deadline for production or to impose any
 [8] parameters on what each third party which is a
 [9] unique entity produces. We're trying to keep
 [10] everyone's feet to the fire, both the three
 [11] parties in front of you and the seventy
 [12] corporate third parties to try to get a deal in
 [13] place.
 [14] The parameters of these deals, a
 [15] lot of them are worked out and need to be
 [16] augmented a little bit, but can go and we're
 [17] trying to get a structure in place. It doesn't
 [18] mean that a little tiny third party may be
 [19] producing 10,000 documents where another party
 [20] may be producing 300 million, they're not going
 [21] to be under the same deadline, but we're trying
 [22] to get the deals done as opposed to the
 [23] production accomplished.
 [24] THE COURT: All right. Yes, go

[1] accommodated practice that everybody has to some
 [2] extent agreed to.
 [3] I'm actually starting to have -- I
 [4] usually don't get this, I'm starting to have
 [5] some guilt about dumping this on Mr. Poppiti.
 [6] It's not a lot of guilt.
 [7] MR. POPPITI: I know that. I know
 [8] that.
 [9] THE COURT: But I'm having a
 [10] pinch.
 [11] But I think that we -- I'll leave
 [12] it to his good judgment in the first instance to
 [13] determine this question. When should we know as
 [14] the case managers on this side of the bench that
 [15] there is going to be a motion practice that has
 [16] to be engaged in where there is some
 [17] accommodating practice that's working.
 [18] In this first instance I'll leave
 [19] that date to be set by the special master. What
 [20] I'll suggest is that that be set by the
 [21] beginning of December. So it's about sixty days
 [22] that you have to talk with each other and get
 [23] back and forth, present your positions to
 [24] Mr. Poppiti, and then he'll decide if there is

[1] an immediate need for a date that determines
[2] it's going to be a motion practice as opposed to
[3] something else. Or if he wants to give a little
[4] more of an extension based on what he's hearing
[5] from you folks and then of course I'll review
[6] it.

[7] So I'm answering your question by
[8] saying in the first instance we should have some
[9] idea by the early part of December by which you
[10] present the special master.

[11] **MS. SMITH:** Thank you, Your Honor.

[12] **THE COURT:** Anything further?

[13] **MR. DIAMOND:** Not on behalf of
[14] AMD.

[15] **THE COURT:** On defendants?

[16] **MR. RIPLEY:** Just briefly, Your

[17] Honor, we read Your Honor's opinion with respect
[18] to the second consolidated class complaint
[19] denying that leave, meaning that the first
[20] amended consolidated class complaint that was
[21] filed by the interclass counsel is the operative
[22] complaint and our response will be due sixty
[23] days from yesterday, we just want to make sure,
[24] and that's the agreement we reached with

[1] **MR. RIPLEY:** November 27 is the
[2] Wednesday after Thanksgiving.

[3] **THE COURT:** The Wednesday after
[4] Thanksgiving.

[5] **MR. RIPLEY:** Sorry, it would be
[6] the Monday, the Monday after Thanksgiving, so
[7] that's the sixtieth day, we're likely to file
[8] before the holiday.

[9] **THE COURT:** So we'll say to make
[10] it real clear on the record, the answer or
[11] response is due no later than November 27th,
[12] 2006.

[13] **MR. RIPLEY:** And we'll be
[14] responding to the first amended consolidated
[15] class complaints.

[16] **THE COURT:** To the first amended
[17] consolidated class complaints.

[18] **MR. RIPLEY:** Thanks for that
[19] clarification, Your Honor.

[20] **THE COURT:** Make it easy,
[21] hopefully.

[22] Anything else?

[23] **MR. MOLL:** No, Your Honor.

[24] **MR. DIAMOND:** We were going to

[1] Mr. Small, but it wasn't the opinion, since that
[2] wasn't really filed, it was attached to a
[3] motion, I just want — so we know exactly that's
[4] the one we can start responding to.

[5] **MR. SMALL:** We agree with
[6] Mr. Ripley that the response to our complaint
[7] should be due sixty days from yesterday and just
[8] so it's clear, our understanding was in our
[9] first status conference with Your Honor, you had
[10] given us leave to file the new complaint to work
[11] out hopefully the problem that we ended up
[12] having to litigate before Your Honor, so we
[13] believe that the sixty days was triggered by the
[14] ruling yesterday on the second class complaint
[15] that was filed.

[16] **THE COURT:** Just so we're not in
[17] any way confused, I don't know what sixty days
[18] is, but it's sometime around the beginning of
[19] December, isn't it?

[20] **MR. RIPLEY:** Yes, Your Honor.

[21] **MR. SMALL:** My calculation of the
[22] sixty days, Your Honor, is November 27, although
[23] I understand from Mr. Ripley they may respond
[24] even earlier than that.

[1] suggest that perhaps the Court set another
[2] status conference just so that we can put it on
[3] our calendars and have it.

[4] **THE COURT:** Did you have an idea
[5] when you would like to do that?

[6] **MR. DIAMOND:** I would suggest in
[7] December.

[8] **MR. SMALL:** I'm sorry, Your Honor,
[9] I should have raised this when I was up here
[10] last time. As part of the status conference
[11] report that we filed with Your Honor, Intel and
[12] the class plaintiffs agreed upon target dates
[13] for briefing. Now that discovery has been moved
[14] back and we just wanted to see if the Court
[15] wanted to hear any thoughts on that or what the
[16] Court's thoughts were about the new proposed
[17] schedule.

[18] **THE COURT:** Well, you know, it
[19] would seem to me there has to be some push on
[20] your dates, but you can probably agree to that
[21] and I will approve it.

[22] **MR. SMALL:** Your Honor, the
[23] proposal in the status conference report is
[24] agreed to by Intel and the class plaintiffs.

[1] THE COURT: That's what we'll put
 [2] in place.
 [3] MR. SMALL: Thank you, Your Honor.
 [4] THE COURT: And that's agreed to?
 [5] MR. MOLL: Yes, Your Honor. We
 [6] have negotiated that, yes, Your Honor.
 [7] THE COURT: All right. I have my
 [8] December calendar. I'm going to leave a note,
 [9] leave fruit instead of an opinion.
 [10] MS. SMITH: Thank you, Your Honor.
 [11] THE COURT: What are you
 [12] thinking — what week are you thinking about you
 [13] want to come back?
 [14] MS. SMITH: The second week or the
 [15] first week.
 [16] THE COURT: Which is the week of?
 [17] MS. SMITH: Yes, if you can fit us
 [18] in.
 [19] THE COURT: And I'm just picking,
 [20] is Thursday okay, the 7th of December?
 [21] MR. DIAMOND: That would be fine.
 [22] MR. MOLL: Thursday is fine, Your
 [23] Honor.
 [24] THE COURT: And we'll do it again,

[1] State of Delaware)
 [2] New Castle County)
 [3]
 [4]
 [5] CERTIFICATE OF REPORTER
 [6]
 [7] I, Dale C. Hawkins, Registered Merit
 [8] Reporter and Notary Public, do hereby certify that
 [9] the foregoing record is a true and accurate
 [10] transcript of my stenographic notes taken on
 [11] September 27, 2006, in the above-captioned matter.
 [12]
 [13] IN WITNESS WHEREOF, I have hereunto set my
 [14] hand and seal this 27th day of September, 2006, at
 [15] Wilmington.
 [16]
 [17] Dale C. Hawkins, RMR
 [18]
 [19]
 [20]
 [21]
 [22]
 [23]
 [24]

[1] that will give you enough time to get travel and
 [2] everything, 11 o'clock in the morning gives you
 [3] enough time to get out?
 [4] MR. MOLL: That's fine, Your
 [5] Honor.
 [6] THE COURT: We will do it December
 [7] 7th, 11:00, and we'll follow the same procedure,
 [8] you will submit a status report and proposed
 [9] agenda.
 [10] MR. MOLL: By Monday the 4th.
 [11] THE COURT: Yes.
 [12] MR. MOLL: Fine.
 [13] THE COURT: Okay. I think that
 [14] takes care of all of that.
 [15] Thank very much.
 [16] (Court adjourned at 11:49 a.m.)
 [17]
 [18]
 [19]
 [20]
 [21]
 [22]
 [23]
 [24]

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