

families of operating systems. Intel is alleged to hold a worldwide market share measured as 80% of the market in units and 90% of the market in revenues. Currently before the Special Master is the Motion of Union Federale des Consommateurs – Que Choisir (“QC”) to Intervene for the Limited Purpose of Seeking Modification to Protective Orders (“Motion”) and QC’s Application Pursuant to 28 U.S.C. § 1782 for an Order Requiring Intel and Third Parties to Provide Access to Documents and Deposition Testimony for Use in Foreign Proceedings (§ 1782 Application) (collectively “Applications”). [D.I. 609].¹

BACKGROUND²

QC describes itself as “a French consumer association” that is “solely dedicated to representing the interests of consumers” [D.I. 609, p.3.] with a “demonstrated history of litigation on behalf of consumers in French courts.” [D.I. 609, p.5.] Additionally, QC is:

[a] French consumer association founded in 1951 that is comprised of approximately 170 local associations with more than 124,000 members. [QC] is solely dedicated to representing the interests of consumers, *i.e.*, ensuring that recognition and respect of consumer rights and the free expression of consumer opinions, and defending consumer interests individually and collectively. It is also dedicated to representing consumers’ legal, financial, and moral interests in all appropriate forums. [QC] also publishes a monthly magazine, *Que Choisir*, read by more than 4.5 million readers.

[D.I. 611, p.3](internal citations omitted).

¹ All D.I. references refer to C.A. No. 05-441.

² It is worth noting at the outset that what should have been a relatively straightforward motion practice turned into no fewer than fifteen submittals, accompanied by multiple declarations, and an extensive array of case law and other authority totaling in excess of 3,000 pages. In the Special Master’s view, the volume is in no small part directly related to what appears to be the way in which QC’s requests and positions morphed, as it attempted to grapple with the responses of Intel and third parties.

QC asserts that the Ministry of Justice of France has most recently, by Order dated July 27, 2006, approved it to exercise rights on behalf of consumers pursuant to the French Consumer Code. QC claims that the July 27, 2006 order authorizes it to do the following:

- intervene in criminal proceedings to claim compensation for consumers harmed by the criminal acts being prosecuted (Code, Art. L421-1. . .);
- bring civil proceedings requiring the cessation of unlawful trading practices (Code, Art. 421-6. . .);
- bring representative civil proceedings for damages on behalf of two or more consumers before any court (Code, Art. L422-1. . .); and
- bring a complaint on behalf of consumers before the French Competition Council (Commercial Code Art. L462-1. . .).

[D.I. 609, p.3-4].

QC also advises that it is a founding member of the European Bureau of Consumer Unions (“EBCU”), which represents the interests of more than 40 consumer organizations across Europe.³ QC also informs that, as a French consumer association, it “has been granted permission by the European Commission (the “EC” or “Commission”) to appear as an interested party in the Commission proceedings regarding Intel’s alleged abuse of a dominant position in the market for x86 Computer Processing Units (“CPUs”).” [D.I. 609, p.1].⁴

QC’s applications, at the date of its initial filing, were designed to accomplish two interrelated yet independent goals, namely:

³ The Special Master was not provided with any information about the EBCU’s charter and or authority.

⁴ On July 26, 2007, the EC issued a Statement of Objections to Intel, outlining the EC’s preliminary view of Intel’s alleged infringement of EC Treaty rules on abuse of a dominate position. EC Press Release, issued July 27, 2007. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/314&format=HTML&aged=1&language=EN&guiLanguage=en>. On February 26, 2008, QC applied to the EC Hearing Officer to be heard as an interested third party in the EC proceedings. [See D.I. 611 Ex. 12]. In July 2008, the EC filed supplemental objections against Intel. [See D.I. 866 Ex. 1]. Intel was given eight weeks to reply and has a right to a hearing on the matter at some future date. [See D.I. 866 Ex. 1].

- “assist [] in efficiently participating in the EC proceedings. . .[in order to] influence the outcome of the EC proceedings”; and
- “represent the interests of consumers . . . [in] consumer damages litigation in Europe that is likely to follow the EC proceeding.”

[D.I. 609, p. 1].

In support of its § 1782⁵ Application as it relates to the EC proceedings, QC argued, in substance, that the EC considers QC to have “sufficient interest” in its pending proceedings so as to allow it to intervene [D.I. 609, p. 19] and that “there is no . . . opposition by the EC” to judicial assistance in obtaining the discovery QC seeks. [D.I. 609, p.22].

In support of its § 1782 Application as it relates to civil litigation it intends to bring, QC simply asserts that “a related damages action . . . is within ‘reasonable contemplation’” and that the “evidence examined and marshaled in [Intel] by [QC] is ‘eventually to be used’ by it in its anticipated litigation on behalf of consumers. . . .in one or more Member States of the European Union.” [D.I. 609, pp.20-22]. QC, without providing any support, maintains that, “there is no reason to suspect that a civil court, would be unreceptive to evidence gathering in [this] case. . .”. [D.I. 609, p.22].

In its answering brief, Intel asserts that the EC did not either want or need the assistance of QC since it could seek to obtain the documents itself if it wanted them. [D.I. 766, pp.1, 14-15]. Intel provided correspondence from Mr. Per Hellström, the EC’s Directorate General for Competition, stating, in so many words, that the EC did not need to waste its time. [D.I. 769, Ex. A]. The EC’s correspondence reads in pertinent part:

Having considered your request carefully, I would like to let you know that we do not in principal see any need for the Commission to intervene in these proceedings. Our position as regards [sic] requests under section 1782, for the purpose of using the documents obtained through this provision in proceedings before

⁵ The provisions of 28 U.S.C. § 1782 will be set out and discussed hereinafter at p. 12.

the Commission, has already been made clear in our previous amicus curiae briefs in the *AMD v. Intel* case before the US Supreme Court [essentially saying that the EC does not need the assistance of the United States Courts].

[D.I. 769, Ex. A].

While Mr. Hellström went on to state that the EC would “respond appropriately” to any request from the Court, the message is no different than it was in *Intel v AMD*:

The European Commission respectfully submits that Section 1782 should be read to exclude discovery requests predicated on the Commission's investigation and evaluation of alleged infringement of competition laws. . . .

Other channels exist for the European Commission, as a governmental actor, to obtain information located in the United States if the Commission considers it necessary to do so. It is the Commission's clear preference, for example, to rely on the formal mechanisms that it has carefully negotiated with the United States specifically for the purpose of cooperation in competition law enforcement. . . .

[T]he Commission objects to the potential subversion of limits that the European Union has imposed, in the exercise of its sovereign regulatory powers, on access by an antitrust complainant to the information that the Commission gathers in its investigation, including confidential business information of the target company.

Intel v. AMD, Amicus Brief of the European Commission, 2003 WL 23138389, at *4, 12 (Dec. 23, 2003).

With respect to QC’s plan to bring “litigation on behalf of consumers [D.I. 609, p.20] . . . in one or more Member States of the European Union.” [D.I. 609, p.22], Intel argues that QC, “can only speculate as to whether or when it will ever bring such litigation, who the parties might be, or in what court such claims might be brought.” [D.I. 766, p.2]. Intel also notes that QC “would proceed only if the EC adopts a decision of infringement, and [only] if any appeal of that

decision is affirmed by both the Court of First Instance and the Court of Justice.” [D.I. 766, p.11].⁶

Without having any idea which European Union country QC may have been referring to, Intel was necessarily left to focus on the viability of litigation in France. Intel argued that QC can only bring an action for damages if it is expressly assigned claims by individual persons and further that QC is not permitted to conduct a “public appeal” to solicit assignments to litigate on behalf of individuals. [D.I. 766, p.12]. Intel’s argument is stated best in its own words:

[N]ot only has QC not yet initiated any private damages litigation, but it has not even identified any supposedly injured parties on whose behalf a damages claim might be brought. QC has not even shown that it has – or ever will have – the assignments from individuals that are required before QC has any right to bring any private damages action. While QC asserts that it is “contemplating the eventual institution of damages litigation,” (reference omitted), that is nothing more than speculation.

[D.I. 766, pp.12-13].

Additionally, several Third Parties filed oppositions to QC’s motion and/or joinders to other parties’ oppositions.⁷ The Special Master does not believe it is necessary to explicate the Third Party positions except to the extent specifically relied on herein.

Against what the Special Master can only conclude to be QC’s view of the strength of Intel and the Third Parties’ arguments, QC, in its Reply Brief, stated that it is “[s]ensitive to the concerns expressed and questions raised” [D.I. 793, p.1]. Against this backdrop, QC morphed its position as to the EC and attempted to bring clarity to its litigation plan.

⁶ While the Special Master is mindful that QC may bring an action after the EC rules against Intel, the Special Master is also mindful of the likelihood that a court would stay proceedings pending all appeals.

⁷ Letter to the Special Master from LG Electronics USA, Inc. and LG Electronics, Inc. [D.I. 744]; Joint Answering Brief of Third Parties Dell Inc., Hewlett-Packard Company, and Microsoft Corporation [D.I. 745]; Joint Answering Brief of Toshiba Corporation [D.I. 746];

First, in the wake of the EC letter from Mr. Hellström, QC admitted that the “landscape has changed substantially,” [D.I. 793, p.3] and attempting to put its best face on its initial argument, QC stated that it, “has likely reached the limits of its participation in the EC proceedings absent additional EC hearings.” [D.I. 793, p.3]. QC went in to state that it “is now satisfied that it has done all it can productively at this time with respect to the EC proceedings . . .” [D.I. 793, p.7]. The Special Master believes that it is fair to observe that before it filed its § 1782 application, QC should have done what Intel did, namely it should have sought advice from the EC as to whether the EC wanted QC’s assistance in securing the discovery in this case.

Second, QC acknowledged that it had “not provided details regarding its intended litigation against Intel in Europe” and further admitted that, “it was unable to do so at the time it filed the Motion.” [D.I. 793, p.1]. But, QC, in its Reply Brief, “does so now” and advises that it “intends to initiate litigation against Intel in a collective action either in London, England or Lisbon, Portugal on behalf of French consumers (and either English or Portuguese consumers), as soon as possible after an expected adverse European Commission (“EC”) decision against Intel.” [D.I. 793 p.1]. At the same time, the Special Master is mindful that QC advises that, “[i]t is taking final advice on the advantages and disadvantages of bringing a claim in each of those two venues.” [D.I. 793, p.9].

Finally, in abandoning any expectation that it would pursue litigation in France on behalf of French consumers, QC simply dropped what could be characterized as a tongue in cheek footnote stating that:

As Intel notes there may be significant difficulties in bringing a claim of this nature in France in the current legislative context. QC has decided that for purposes of its Intel case, such an action is

Joinder of Third-Party Distributors [D.I. 747]; Joinder by Acer Corporation [D.I. 748]; Answering Brief of Acer America Corporation [D.I. 749].

not the most appropriate option in the interests of its members and those it will represent.

[D.I. 793, p.9, n.18]. The backdrop of Intel's argument should not, in the Special Master's view, be ignored. Indeed as a French consumer association, QC should have more carefully examined the viability of litigation in the courts of France before it filed its papers.

Against QC's representation that it is still "taking final advice on the advantages and disadvantages of bringing a claim in [England and Portugal]," [D.I. 793 at p.9] QC makes a convoluted, bordering on incomprehensibly vague, argument. It is important to quote QC's argument at length:

On April 2, 2008, just a week before QC moved to intervene, the EC issued its "WHITE PAPER on Damages actions for beach [sic] of the EC antitrust rules." The EC suggested "two complementary mechanisms of collective redress" in antitrust cases, including "representative actions, which are brought by qualified entities, *such as consumer associations*, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims." White Paper, at 4 (emphasis added) (attached as Exhibit 12 to the Declaration of James Venit; D.I. 1053).

Since mid-February of this year, in addition to focusing on its EC participation, QC has considered legal advice regarding its options for a consumer damages collective action, including on issues such as venue, the timing of its intended filing, and the impact of the EC's April 2008 White Paper. (emphasis added)

After careful consideration, QC intends to bring proceedings in a competent European court as soon as possible after the EC has reached an expected adverse decision in its case against Intel. Although the binding effect of that decision may be suspended pending any appeal by Intel against the EC's finding, nevertheless, QC is advised that it will be able to commence proceedings in a European court after the EC's decision has been reached. These proceedings may – depending on the scope of any appeal – be wholly or partially stayed pending the final outcome of any appeal against the EC's decision. [footnote: Intel incorrectly states that QC indicated in its Motion that QC intended to proceed with a private damages action only when an EC decision adverse

to Intel “has been rendered final on appeal.” See 766, p.11 (“QC has indicated in its brief that it intends to proceed in this manner. See [Brief in Support of QC’s Motion] at 9.”) In fact, QC stated only that “[i]n many Member States of the EU, a decision of the European Commission finding an infringement is (after any applicable appeals have been exhausted) conclusive proof in the civil courts of the participation of the addresses of the decision in the unlawful conduct described in the decision.” Opening Brief in Support of QC’s Motion (“QC Br.”, D.I. 854) at 9. (emphasis added)]

Under EC Regulation 44/2001, a defendant (here Intel) shall be sued (with some significant exceptions) in the courts of the place of his legal domicile if he is domiciled in the European Union. (footnote omitted) A company or other legal person is (for the purposes of Regulation 44/2001) domiciled where it has its statutory seat, principle place of business or central administration. Where (as may well be the case for Intel) the defendant is not domiciled within the European Union, the question of whether the Court is competent to hear a claim against it is left to the national laws of each individual member State of the EU.

QC believes that Intel has places of business in a substantial number of member States of the EU and, accordingly may have a wide choice of available jurisdictions in which to bring a claim. Having considered the information available to it carefully, QC has narrowed down the possible European venues for the claim to either the courts of London, England or of Lisbon, Portugal (under a *acção popular* – a popular action). It is taking final advice on the advantages and disadvantages of bringing a claim in each of those two venues. In each venue, QC would represent via a collection action the interests of French consumers, i.e. French purchasers of computers containing Intel’s microprocessors, as well as English or Portuguese consumers in respective venues.⁸ (emphasis added) [footnote: As Intel notes, there may be significant difficulties in bringing a claim of this nature in France in the current legislative context. QC has decided that for purposes of its Intel case, such an action is not the most appropriate option in the interests of its members and those it will represent.* (emphasis added).]

[D.I. 793, pp. 8-9].

Seeing this new argument for the first time, several third parties filed sur-reply briefs and/or joinders.⁹ The Special Master sees no need to explain the argument of each third party that filed a supplemental brief in opposition to QC's morphed position. At the same time, the Special Master believes that the argument of Third Parties Hewlett Packard Company, Microsoft Corporation and Dell, Inc. can best be summarized as follows:

QC. . . suggested that it was contemplating some sort of litigation in some country on behalf of some groups at some future point in time.

[D.I. 835, p.1]. Simply stated, the Third Parties argue that QC's motion is premature and, therefore, not within "reasonable contemplation." [D.I. 835, p.3].

For Intel's part, before responding substantively to QC's newly articulated plan in its Supplemental Opposition, it noted what it characterized as QC's "bait-and-switch" tactics, pointing out that QC has "abandoned ship" on the EC action and a French consumer action. [D.I. 839, pp.1-2]. Intel further notes that QC's complete argument transformation has cost substantial amounts of time and money, as previous efforts to rebut QC arguments were "utter waste[s]." [D.I. 839, pp.1-2]. And, Intel objected to QC raising new requests in its reply brief. [D.I. 839, p.3].

Substantively, Intel argues that QC has not demonstrated that QC has ever brought a claim outside of France or that QC has the authority to do so. [D.I. 839, p.5].

Intel states that:

In its opening brief, QC offered authorities that purportedly stood for QC's authority to pursue a claim in French courts under French law. (reference omitted). In contrast, QC's reply brief points to no authorities suggesting a similar mandate to pursue claims under

⁹ Sur-Reply Brief of Third Parties' Dell Inc., Hewlett-Packard Company and Microsoft Corporation [D.I. 835]; Sur-Reply Brief of CDW Corporation [D.I. 836]; Joinder by Acer America Corporation [D.I. 837]; Supplemental Sur-Reply Brief of Acer America Corporation [D.I. 838]; Joinder of Apple Inc. [D.I. 847].

English or Portuguese laws or in English or Portuguese courts. This failure is not surprising, as QC's statutory authorization from the French government is limited to pursuing claims in French courts, and it lacks authorization under French law to pursue claims outside of France (whether on behalf of French or non-French consumers).

[D.I. 839, p.5] (references omitted). The Special Master views Intel's argument to be that QC cannot claim the status of an "interested person" within the meaning of § 1782.

Intel also argues that QC's reliance on the EC White Paper – which the Special Master views as a proposal, certainly not a law – falls short of demonstrating any basis under either the laws of England or Portugal that would permit QC to institute litigation on behalf of consumers (French or otherwise) in either country. [D.I. 839, p.5, n.2]. To the contrary, Intel asserts the laws of both England and Portugal would not permit QC to bring such an action. [D.I. 835, p.5].

In its supplemental reply brief, QC argues for its final metamorphosis, seeking to "correct[] several misimpressions." [D.I. 864, pp.2-3]. First, while acknowledging that it cannot bring a "follow on" action before the English Tribunal, as QC is not a designated consumer association, QC now asserts that it can bring an action before the English High Court. [D.I. 865 pp.1-3]. Second, by its complete silence on Intel's argument that it can not bring an Acção Popular in the courts of Portugal, it appears to concede that it cannot. Finally, glaringly absent from its supplemental reply brief is any attempt to counter Intel's argument that it does not have the authority to pursue litigation on behalf of French citizens or citizens of other EU countries outside of France. Rather, QC focuses on the laws of England and Portugal.

QC's last "argument" is that it agrees with news organizations that have brought a motion to intervene to de-designate the sealed, confidential documents. [D.I. 864, pp.13-14].

ANALYSIS

Two interrelated threshold questions become:

- Is QC an “interested person” within the meaning of the statute?
- Is QC’s most recently articulated plan of “taking final advice on the advantages and disadvantages of bringing a claim” for damages in either the courts of London, England or Lisbon, Portugal . . .” [D.I. 793, p. 9] within “reasonable contemplation?”

Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004).

The Special Master concludes that the answer to both questions is no. The Special Master further concludes that were the answer to the first question to be yes, the answer to the second question would still be no.

Section 1782 of Title 28 provides in pertinent part:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . The order may be made. . . upon the application of any interested person.

The Special Master is mindful of the twin aims of § 1782, “to provide efficient assistance to participants in international litigation in our federal courts and to encourage foreign countries by example to provide similar means of assistance to our courts.” *In re the Application of Ishihara Chemical Co., Ltd.*, 252 F. 3d 120, 124 (2d Cir. 2001) (internal citations omitted). *See also, Intel*, 542 U.S. at 252. At the same time, the Special Master understands the district courts are expected to guard against the abuse of § 1782. *Letter of Request from Crown Prosecution Serv. Of United Kingdom*, 870 F. 2d 686, 692 (D.C. Cir. 1989).

Before the benefits of § 1782 can be invoked and considered by the Court, three elements must be satisfied. While arranged differently in § 1782, the Special Master prefers to address them in the matter *sub judice* in the following order:

First, whether the application is made by an “interested person”;

Second, whether the discovery is to be used in a proceeding that is within reasonable contemplation; and

Third, whether the person (entity) from whom discovery is sought resides in or is found in the district court to which the application is made.¹⁰

The Special Master will address the first two matters *seriatim*.

A. WHETHER QC IS AN “INTERESTED PERSON” UNDER SECTION 1782

The first inquiry is necessarily staged on whatever authority QC has been granted by the proper authority in France – *i.e.* The Ministry of Economy, Finance and Industry. The inquiry is also set against the backdrop of QC’s assertion that it now is “taking final advice” on becoming a litigant outside of France. [D.I. 793, p.9].

The Special Master believes it is worth repeating here how QC describes itself:

[A] French consumer association founded in 1951 that is comprised of approximately 170 local associations with more than 124,000 members. [QC] is solely dedicated to representing the interests of consumers, *i.e.*, ensuring recognition and respect of consumer rights and the free expression of consumer opinions and defending consumer interests individually and collectively. It also is dedicated to representing consumer “legal financial and moral interests” in all appropriate forums. QC also publishes a monthly magazine, *Que Choisir*, read by more than 4.5 million readers, which details consumer product testing and reviews on the basis of value, safety, energy consumption and other criteria.

[D.I. 611, ¶ 2].

The King declaration advises that QC has the authority to exercise rights on behalf of consumers under the French Consumer Code (the “French Code”), pursuant to the July 27, 2006

¹⁰ While certain third parties assert that they neither reside in nor are they found in the district, given the Special Master’s answers to the above posed questions, the Special Master does not see the need to address this issue and therefore declines to do so.

Order (the “July 2006 Order”), renewing QC’s authority. The August 5, 2006 entry in the Official Journal of the French Republic reads:

The Minister of the Economy, Finance and Industry and the Minister of Justice and Guardian of the Seal,

Having regard to Articles L 411-1 to L 422-3 and R 411-1 to R 422-10 of the Consumer Code concerning authorization of and actions before the courts by consumer associations;

Having regard to the order of 3 April 2001 authorizing UFC Que Choisir;

Having regard to the application of the association;

Hereby order

Art. 1 – The authorization for the Union Federale des Consommateurs-Que Choisir to carry out throughout the country all rights recognized to authorized consumer associations under the Consumer Code is renewed for a period of five years from 21 September 2006.

Art. 2 – The Director of Civil Justice [. . .], the Director of Criminal Justice and of Pardons and the Director General for Competition, Consumer Affairs and Trading Standards are each required, as far as relevant to them, with the implementation of this order, which will be published in the Official Journal of the French Republic.

Done in Paris, 27 July 2006

The Minister of the Economy, Finance and Industry

THIERRY BRETON

The Minister of Justice, Guardian of the Seal

PASCAL CLEMENT

[D.I. 611, Ex. 2].

Although QC does not direct the Special Master to any particular language of the July 2006 Order, there can be no question that the operative enabling language is found in Art. 1, namely:

The authorization of [QC] to carry out throughout the country all rights recognized to authorized consumer associations under the Consumer Code is renewed for a period of five years from 21 September 2006. (emphasis added).

[D.I. 609, at 3-4].

Moreover, curiously QC does not, in its 70 plus pages of briefing plus 4 related declarations and 36 exhibits, address the question of whether the provisions of the July 2006 Order enable it to bring any proceeding or complaint anywhere other than “throughout the country” of France. Nor has the Special Master been directed to any extant Order of the Minister of the Economy, Finance and Industry enabling QC to “carry out rights recognized to authorize consumer associations” outside of “the country.” [D.I. 611, Ex. 2]. Additionally, QC’s self described history of litigation on behalf of consumers is “in French courts.” [D.I. 611, ¶¶ 13-16].

QC has provided absolutely no authority or expert opinion in the form of a declaration, or otherwise, that it may embark on its newly described quest in any country other than France. QC has thus simply failed to meet its burden of demonstrating that it is an interested person.

Although Intel, in its August 20, 2008 Supplemental Opposition Brief, does not squarely address the issue of whether QC is an “interested person,” Intel does directly address QC’s authority to act outside of France in the supplemental declaration of Jean-Pierre Farges (the “Farges Declaration”). [D.I. 771, Ex. A]. Mr. Farges is an advocate at the Paris Bar and a partner and head of the litigation and arbitration practice at the Paris office of Ashurst LLP. [D.I. 771, Ex. A]. In making observations about the Farges Declaration, the Special Master believes

that the most efficient way to consider the Farges Declaration is to set out relevant portions verbatim with the Special Master’s comments juxtaposed to it.

FARGES DECLARATION	SPECIAL MASTER’S COMMENTS/CONCLUSIONS
<p>7. Article 422-1 of the French Consumer Code enables an approved consumer association recognised as a representative association to bring a representative action on behalf of consumers provided that they have received a prior mandate from at least two consumers.</p>	<p>QC, by virtue of the July 2006 Order, has the authority to bring such an action as described in French Courts. At the same time, the Special Master is mindful that QC has abandoned its plan to bring such an action because “there may be significant difficulties in bringing a claim of this nature in France in the current legislative context.” [D.I. 793, p.9 n.18] The Special Master takes this to mean that QC was persuaded by or at least found Intel’s argument compelling. Intel pointed out in its Opposition to the Motion and Application:</p> <p>“QC cannot even identify the parties that would be involved in any European damages proceeding. There is no ‘class action’ provision under French law for QC to bring an action for damages in its own name on behalf of a class of consumers. Under French law, QC may only bring an action for damages if it is expressly assigned claims by individual persons. Moreover, QC is not permitted to use a ‘public appeal’ to solicit assignments to litigate on behalf of individuals. Thus, not only has QC not yet initiated any private damages litigation, but it has not even identified any supposedly injured parties on whose behalf a damages claim might be brought. QC has not even shown that it has – or ever will have – the assignments from individuals that are required before QC has any right to bring any private damages action.” (internal citations omitted) [D.I. 766, p. 12]</p>
<p>8. To the best of my knowledge, there is no French law provision that affirmatively empowers French consumer associations to seek damages through an action for breach of</p>	<p>QC has not directed the Special Master to any French law provision affirmatively allowing it to bring an action outside of France. In the absence of same, the Special Master adopts the</p>

<p>antitrust rules outside France and in particular in other European Countries. This is especially the case when such consumer associations are initiating or launching such an action as opposed to joining an existing action.</p>	<p>conclusion that there is/are none.</p>
<p>9. It must be underlined that the ministry's order of 27 July 2006 which renews the authorisation of QC to act as an approved association expressly provides that this authorisation is given to QC to carry out "<i>throughout the country</i>" all rights recognised to authorised consumer association under the French Consumer Code.</p>	<p>The language of the July 2006 Order is clear, unambiguous and, in the Special Master's view, is subject to no other interpretation, that "<i>throughout the country</i>" means throughout France.</p>
<p>11. As far as I know, French law does not affirmatively authorise QC to represent non-French consumers for purchases made outside France. Therefore, it remains highly questionable that QC could rely on its governmental authorisation as an approved association to act on behalf of Portuguese or English consumers.</p>	<p>Having concluded that the language of the July 2006 Order grants QC to carry out "all rights recognized to consumer associations under the Consumer Code" throughout France, and absent any law to the contrary, the Special Master concludes in the absence of QC providing any authority to the contrary, QC would not be able to act on behalf of any consumer in a court outside of France.</p>

While there is "[n]o doubt litigants are included among, and may be the most common example of, the 'interested person [s]' who may invoke § 1782. . .," given the Special Master's conclusion that QC has not demonstrated that it is authorized to carry out the rights recognized to authorized consumer associations under the Consumer Code outside of France, QC cannot claim to be a litigant. *Intel*, 542 U.S. at 256. Further, the Special Master is mindful that the Supreme Court, in *Intel v. AMD*, instructed that an "interested person" is a broad term that is not limited to litigants. *Intel*, 542 U.S. at 257. QC, has not articulated any status for itself other than the status of a litigant for which it can claim to be an "interested person." QC, in its Opening Brief in Support of its Motion and Application, referenced supporting authority to support its claim that it has the right to pursue a claim in French Courts. [D.I. 609, at 3-5]. But in its Reply Brief and

Supplemental Reply Brief [D.I. 793, 864], QC does not point to *any* authority for the proposition that it has a similar mandate from the Minister of Economy, Finance and Industry to pursue claims outside of France – indeed anywhere in the world.

The Special Master therefore concludes that QC has not demonstrated that it can be a litigant outside of France. Because QC rests its § 1782 application on being a litigant in England or Portugal while setting forth no other basis for being an “interested person,” QC has failed to demonstrate that it is an “interested person” under § 1782.

B. WHETHER QC HAS A PROCEEDING WITHIN “REASONABLE CONTEMPLATION”

The Special Master must next consider whether, on the facts presented, QC does have a proceeding “within reasonable contemplation,” as required by § 1782. In order to better understand the context of QC’s § 1782 request, the Special Master believes a short history of the statute would be instructive.

Section 1782 was first adopted in 1855 to provide federal court assistance in gathering evidence for use in foreign tribunals. Over the years it has been revised and broadened in an effort to keep up with the growth in foreign commerce. In 1964, § 1782 was completely revised. One of the 1964 revisions was to eliminate the requirement that a proceeding be “pending” before a district court could render judicial assistance. See Act of Oct. 3, Pub. L. No. 88-619, § 9, 78 Stat. 997. Although the Senate Report to the 1964 revisions does not specifically comment on the elimination of the word “pending,” the apparent overall intent of the revisions was to facilitate either the gathering of evidence for use in a pending proceeding abroad and/or to assist during the investigative phase of a matter, prior to the institution of litigation abroad. S. Rep. No. 1580 (1964); Hans Smit, *American Assistance to Litigation in Foreign and International*

Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 Syracuse J. Int'l L. & Com. 1, 1026-27, n. 72 (1998).

After the 1964 revisions, the district courts differed in their interpretations of how elimination of the “pending” language impacted the use of § 1782. *Ishihara*, 251 F.3d at 125 (§ 1782 only comes into play when adjudicative proceedings are “pending” or “imminent”) and *Crown Prosecution*, 870 F.2d at 691 (proceedings must be within “reasonable contemplation” for section 1782 to apply).

This conflict was resolved in 2004 when the United States Supreme Court decided *Intel*, 542 U.S. at 241. In *Intel*, the Court rejected the line of decisions represented by *Ishihara* and held that “reasonable contemplation” was the applicable standard. *Id.* at 259.

In *Intel*, AMD sought documents from Intel pursuant to § 1782 for use in a European Commission (“EC”) investigation into antitrust violations by Intel. The documents requested had previously been produced in a private antitrust suit in the District Court in Alabama.¹¹ The District Court denied the application, and the Ninth Circuit reversed. The Supreme Court affirmed, holding that § 1782(a) requires “only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation.” *Intel*, 542 U.S. at 259 (citing *Crown Prosecution*, 870 F. 2d at 691). In so ruling, the Court noted that, when Congress eliminated the “pending” requirement, it must have intended for that revision to have a “real and substantial effect” and that the Congressional revisions recognized that judicial assistance is available during the investigative phase of a proceeding. *Id.* at 243.

¹¹ AMD had first recommended to the EC that the Commission itself seek discovery of the documents from Intel but, in keeping with its stated policy regarding requests pursuant to § 1782, the EC declined to seek judicial assistance in the U.S.

While setting the standard, the decision in *Intel* left open the question of what “reasonable contemplation” means in practice. In *Crown Prosecution*, the case approved by the Supreme Court in *Intel*, the D.C. Circuit found that under § 1782, judicial proceedings in a tribunal must be within reasonable contemplation, although they need not be pending. 870 F. 2d at 694. It then turned to the question it termed “decisive” for proper application of § 1782: “was there sufficient indication that a proceeding in court would eventuate in which the evidence gathered can be weighed impartially?” *Id.* at 691. The Court agreed in substance that requests for information should not be granted merely on the off chance or undocumented assertion that someday, somewhere a judicial proceeding against or on behalf of persons/entities yet unknown may follow, nor should § 1782 requests be used for fishing expeditions or harassment. *Id.* The documents sought in *Crown Prosecution* were for use in an ongoing investigation that was likely to lead to criminal proceedings. *Id.* at 687-88. Thus, the Court understandably and easily concluded that the criminal proceedings were within “reasonable contemplation.” The Court went on to state: “In sum, we agree that, to guard against abuse of section 1782, the district court must insist on *reliable indications* of the likelihood that proceedings will be instituted within a reasonable time.” *Id.* at 692 (emphasis added).

Since *Intel*, courts have had little opportunity to clarify the meaning of “reasonable contemplation” because, in most cases, the statutory requirements are concededly met as the movant is often already a litigant in a pending proceeding and the Court is faced only with the question of whether to exercise its discretion in favor of ordering the discovery sought.

The Special Master concludes, however, for reasons stated herein that QC has not provided even the barest of “reliable indicators” that any proceeding can or will be instituted within a reasonable period. *Id.*

1. Has QC Met Its Burden of Establishing That It Could Bring an Action in Either England or Portugal?¹²

The Special Master concludes that the answer is no, for reasons stated herein.

QC must establish that it has the authority to bring what itself has described as a “collective action in either London, England or Lisbon, Portugal on behalf of French consumers (and either English or Portuguese consumers). . . .” [D.I. 793, p.1].¹³ In this regard, the Special Master turns to a consideration of the declarations of Arundel McDougall for the perspective from England [D.I. 839, Ex. B] and to Jose De Cruz Vilaca for the perspective from Portugal [D.I. 839, Ex. C] both filed in conjunction with Intel’s Supplemental Opposition as well as the supplemental declaration of Vincent Neil Smith [D.I. 865] filed in conjunction with QC’s Supplemental Reply Brief.

a. QC has not established that it can bring a claim in England.

The Special Master turns first to the Statement of Arundel McDougall. Mr. McDougall has been a qualified solicitor since 1978 and is a member of the Law Society of England and Wales certified to practice in both England and Wales. [D.I. 839, Ex. B at ¶2]. He is a partner in the Lisbon office of Ashurst LLP, specializing in commercial litigation. [*Id.* at ¶¶ 2-3]. Among other things, he has read and adopts the “explanations” contained in the July 1, 2008 declaration

¹² QC asserts that Intel has failed to seek declaratory or injunctive relief from a London or Lisbon court to establish that QC does not have standing and/or that the court would refuse to accept the evidence obtained. [D.I. 864, p.5]. The Special Master believes that this position is utterly without merit. Even were the Courts of England and/or Portugal at some point receptive to such a suit, Intel can hardly be expected to take any action in the Courts of either country while QC is “taking final advice.” [D.I. 793, p.9]. Indeed this record does not permit the Special Master to make any judgment whatsoever about the efficiency or timing of any such action.

¹³ As discussed at page 6 above, QC can only bring representative claims on behalf of consumers who have assigned cognizable claims to QC. [D.I. 766, p.12]. QC has provided absolutely no evidence that any consumer has assigned any claims, let alone claims cognizable in either England or Portugal.

of his partner Jean-Pierre Farges discussed above. The Special Master believes it is helpful to quote relevant portions of Mr. McDougall's Statement at length:

13. English law would prevent QC from bringing its proposed claim in an English court. There is only one means by which a representative body in the United Kingdom can pursue a follow-on competition damages action – under Section 47B of the Competition Act 1998. Under that Section, only a “specified body” may bring a representative damages claim on behalf of consumers. Section 47B(1) provides: “A specified body may (subject to the provisions of this Act and Tribunal Rules) bring proceedings before the Tribunal which comprise consumer claims made or continued on behalf of at least 2 individuals.”

The Tribunal in question is the Competition Appeal Tribunal, (“CAT”), the Tribunal Rules are the CAT's Rules, and “consumer claims” are follow-on private actions for competition law damages, which are further defined in Section 47A of the Competition Act 1998, and which would include a claim for damages alleged to be sustained as a result of infringement of Article 82 EC. Thus, the only forum in which proceedings of the nature intended by QC in England can be commenced is the CAT.

14. Section 47A(5) of the Competition Act 1998 provides that without the permission of the CAT, such proceedings cannot be commenced before any challenge to the Commission decision as to infringement on which the proceedings are based (for example, an appeal by an addressee of the decision) is exhausted in the European Court.

15. Rule 40(1) of the CAT's Rules provides:

“Power to Reject”

40. - (1) The Tribunal may, of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, reject in whole or in part a claim for damages at any stage of the proceeding if –

* * *

(b) in the case of proceedings under section 47B of the 1998 Act it considers that the body bringing the proceedings is not entitled to do so, or that an individual on whose behalf the proceedings are brought is not a consumer for the purposes of that section;

* * *

16. Thus, Section 47B Competition Act 1998 is the only means by which a representative body in the United Kingdom can pursue a follow-on competition damages action in the United Kingdom, the body has to be a specified body and the CAT's Rules give the CAT very wide power (to which Section 47B(1) is expressly subject) to reject a claim, including a claim that it considers the representative body is not entitled to bring.

17. QC, however, is not a specified body.

* * *

18. In the United Kingdom, we already have an organization, well known and respected, representing consumers. It is called the Consumers' Association, otherwise known as *Which?* . . . Unlike QC, the Consumers' Association is a "specified body" for the purpose of Section 47B of the Competition Act 1998. [footnote omitted]

19. [T]here is no other course open to it to commence a private action for competition law damages on behalf of others. . . .

* * *

[D.I. 839, Ex. B].

The Special Master concludes that QC has not demonstrated that it is a "specified body" as required by the Competition Act of 1998 and the CAT rules and therefore cannot pursue a § 47B Competition Act follow-on competition damages action in the United Kingdom. While the Special Master is mindful that Mr. McDougall has advised that QC could seek "specified body" status [D.I. 839, Ex. B at ¶ 17], there is nothing in the record before the Special Master to suggest that QC has done so.

Indeed, far from demonstrating that it could bring a follow-on competition damages action, QC in its Reply Supplemental Declaration of Vincent Neal Smith concedes the point and confirms that Mr. McDougall's opinion is correct. Mr. Smith is a solicitor of the Supreme Court of England and Wales and a partner in the firm of Cohen Milstein Hausfeld & Toll LLP, a firm of solicitors associated with counsel of the proposed interveners in this case. [D.I. 865, at ¶ 1].

Mr. Smith states:

5. The Tribunal is competent [under section 47-47A Competition Act 1998] to hear claims for damages which "follow on" from an infringement decision made under its competition law powers by the Office of Fair Trading ("OFT"), the United Kingdom's principle competition authority or the European Commission ("EC"), where those discussions affect trade within the United Kingdom. . . .
6. Under § 47B of the Competition Act 1998, the Tribunal may also hear claims for damages following on from a competition authority's decision brought by representative consumers' associations which have been designated for that purpose by order. However, to date only one organization has been designated the Consumers' Association ("Which?"), in 2005. [footnote omitted]. At present, QC cannot therefore take advantage of this particular statutory procedure to represent consumers before the Tribunal.

Recognizing the problem, QC yet again morphs and floats a different plan. Grounded solely on Smith's representation QC now asserts:

7. The High Court, which is England's general court of civil jurisdiction, is competent to hear all types of claims related to competition law breaches.

[D.I. 865, ¶ 7].

The Special Master declines to consider the merits of QC's newest articulated plan. The parties will recall, subsequent to the Special Master's Order of August 25, 2008, declaring that

the record was closed and that the matter could be decided on the papers, the Special Master by e-mail dated August 28, 2008¹⁴ directed as follows:

Although not prompted by any communication from a party, I have concluded that it is important to permit QC to file its September 3, 2008 brief if it so chooses. At the same time, it is also important to emphasize that the brief which is in the nature of a Reply brief shall not contain materials that should have been included in its earlier filed brief. D. Del. LR 7.1.3 (c)(2).

Prior to the filing of its Supplemental Reply Brief, QC never raised the possibility of bringing any proceeding other than a representative follow-on action. [D.I. 609, 793, 864]. The specter of an action (“all types of claims related to competition law breaches”) in the High Court of England in its final paper on the Motions leaves no opportunity for Intel and/or third parties to weigh in on the issue and thereby perform their advocacy role of informing the Special Master on the issue.

Simply stated, QC’s latest plan is beyond the proper scope of a reply brief. The requirements of D. Del. LR 7.1.3(c)(2) could not be any more clear:

Reply brief. The party filing the opening brief shall not reserve material for the reply brief that should have been included in a full and fair opening brief.

Make no mistake, the Special Master believes that QC’s plans have changed as the time has passed since its opening brief and in the wake of well pled arguments. A reply brief is no place for a new plan.

b. QC Has Not Established That It Can Bring An Action In Portugal.

In this regard, the Special Master turns to the Declaration of José Louis Du Cruz Vilaca. [D.I. 839, Ex. C]. Mr. Vilaca was admitted to the Portuguese Bar Association in 1969 and is a

¹⁴ A hard copy of the email was sent to the parties for docketing purposes on August 28, 2008.

Partner at PLMJ heading its EU and Competition/Antitrust Practice. [D.I. 839, Ex. C at ¶ 2].

Again, the Special Master believes it is helpful to quote from Mr. Vilaca's declaration at some length:

I. IT IS DOUBTFUL THAT QC WOULD BE ABLE TO PURSUE A DAMAGES CLAIM IN PORTUGAL

10. To the best of my knowledge, no "Acção Popular" or similar collective or representative action has ever been filed in Portugal by a foreign consumer association on behalf of foreign consumers as a result of any activity performed outside of Portugal.

* * *

13. Portuguese law provides various rights to national, regional, or local associations in Portugal, including the right to file an "Acção Popular," which is a limited type of class action permitted under Portuguese law. Portuguese law, however, contains no provision that would extend to foreign associations the rights given to national, regional, or local associations (including not only the right to file claims, but also the right to free time on national TV and radio, exemption from court fees, and the right to have their activities sponsored by the government). To the contrary, the express grant of various rights to national, regional, or local associations allows for the conclusion that foreign associations do not have such rights.

14. Accordingly, because QC is not a Portuguese national, regional, or local association, a Portuguese court is likely to conclude that QC does not have the right to pursue an "Acção Popular" in a Portuguese court, on behalf of foreign consumers.

(Id.)

The Special Master is mindful that QC simply fails to address the clear implication of the Vilaca declaration, namely as a French consumer association, QC does not have the same rights of a national, regional or local association of Portugal to file an "Acção Popular."

[D.I. 1145 in C.A. 05-1717].

The Special Master concludes that QC has not demonstrated that it can bring an action in Portugal.

2. Even If QC Could Bring An Action In England Or Portugal, Is The Contemplation Of Such An Action At This Time Within “Reasonable Contemplation” At This Time?

The Special Master concludes the answer is no for reasons stated herein. To conclude otherwise would, in the Special Master’s view, give too expansive a reading to the “reasonable contemplation” requirement of § 1782. QC asserts that it *may* bring suit in either one of two different forums, on behalf of a group of unidentified plaintiffs, for unknown claims, at some point in the future, if (and only if) there is an adverse decision by the EC against Intel. First, the Special Master believes that it is fair to conclude that the Supreme Court in *Intel* necessarily meant to establish an objective,¹⁵ as opposed to a subjective,¹⁶ standard. Second, the Special Master also believes that it is fair to conclude that any objective standard in the context of contemplated litigation must be bounded by some temporal component which is necessarily informed by facts/factors that impact on the timing when the litigation,¹⁷ in which the § 1782 discovery will be used, will be initiated.

¹⁵ A standard that is “based on conduct and perceptions external to a particular person.” Black’s Law Dictionary 1441 (8th ed. 1999).

¹⁶ A “standard that is peculiar to a particular person and based on the persons individual views and experiences.” Black’s Law Dictionary 1441 (8th ed. 1999).

¹⁷ The Special Master is mindful that *Crown Prosecution* went so far as to find that “[i]t is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.” 870 F.2d at 690. By not specifically adopting this language in the holding, it is clear that the Supreme Court in *Intel* did not wish to take § 1782 that far along the spectrum. To hold otherwise would make it virtually impossible for courts to “guard against abuse of section 1782” in this type of situation, as it would allow a person to ask for evidence under § 1782 when he/she was going to bring an action “at an unspecified future time,” as opposed to a reasonable contemplation standard. *Id.*; American Heritage Dictionary (2008).

In the Special Master's view, QC's efforts to articulate a plan to secure § 1782 evidence for use in a reasonably contemplated litigation devolves into its own subjective wish to bring some action against Intel, somewhere, on behalf of unknown persons, at some unknown future time.

QC's wish, in the Special Master's view, has over time been riddled with shallow speculation and changing positions:

- QC speculated that the EC would be interested in being the beneficiary of its § 1782 application. This against the backdrop of the EC having told the Supreme Court in *Intel* that "Section 1782 should be read to exclude discovery requests predicated on the Commission's investigation and evaluation of alleged infringement of competition laws. . . ." *Intel v. AMD*, Amicus Brief of the European Commission, 2003 WL 23138389, at *4, 12 (Dec. 23, 2003). Only after the EC advised the Special Master through its correspondence to Intel [D.I. 769, Ex. A] that it was not interested did QC abandon this position. In the Special Master's view, QC could have done what Intel did, namely it could have asked the EC if it wanted or needed its assistance in securing § 1782 assistance. Rather, in the Special Master's view, QC simply boasted of its "interested third party" status before the EC. [D.I. 611, Ex. 12].
- QC conveyed the distinct impression that it was positioned and poised to bring a follow-on collective damages action in French Courts only to acknowledge under the strength of Intel's argument that "there may be significant difficulties in bringing a claim of this nature in France in the

current legislative context [and] QC has decided that for purposes of its Intel case, such an action is not the most appropriate option. . . .” [D.I. 793, p.9 n.18]. In the Special Master’s view, QC should have more thoroughly explored the viability of its wish to bring an action in the French Courts before it filed its § 1782 Application.

- QC speculated that it was positioned and posited to bring a private, follow-on competition action in Great Britain. [D.I. 793, p.1-3]. After Intel pointed out that QC could not bring that action in the Tribunal, as QC is not a “specified body”, [D.I. 839, Ex. B] QC then changed its position yet again, saying that it could bring an action in the High Court. [D.I. 865, ¶ 7]. In the Special Master’s view, QC should have known that it is not able to “represent consumers before the Tribunal.” [D.I. 865 at ¶ 1].
- QC also speculated that it could initiate an Acção Popular in Portugal. [D.I. 793, p.1, 9]. Intel, through declaration, argued that QC does not have the same rights of a “national, regional or local association” to bring an Acção Popular. [D.I. 839, Ex. C, ¶ 13-14]. QC, in its Supplemental Reply Brief, failed to set forth any authority to rebut Intel’s argument, stating only that Mr. De Cruz Vilaca could only opine that it was “doubtful” that such a claim could be brought. [D.I. 864, p.10]. QC, though, offered no evidence of its own to the contrary.

While QC also claims “with respect to both Portugal and England, there is nothing to stop QC from affiliating with one or more consumer associations to join forces to pursue litigation, possible via a combination of statutory rights to pursue collective action as consumer associations and assignment of individual claims.” [D.I. 864, p.11]. QC supplies no details

regarding this asserted possibility. Moreover, in the Special Master's view, QC's concession that it is considering "final advice" at this stage represents its inability to yet again articulate "reliable indications of the likelihood that proceedings will be instituted within a reasonable time."

Crown Prosecution, 870 F.2d at 692. QC has not articulated a final viable plan within any time frame based on objective facts. Indeed, as it awaits the EC determination, on this record it cannot. In this regard the Special Master is mindful of QC's language regarding possibilities:

given the widespread dissemination of computers containing Intel microprocessors, this is not a case where there is any colorable argument that consumers across the EU would not be affected and have a right to claim redress, particularly where such decisions would be following a determination of Intel's liability by the EC. It is not a stretch to contemplate widespread assignment of consumer claims.

[D.I. 864, p.10].

QC's reliance on the *In re Application of Hill*, 2005 WL 1330769, *5, n.4 (S.D. N.Y. 2005) is misplaced. In *Application of Hill*, the court-appointed liquidators of Akai Holdings and Kong Wah Holdings sought documents under § 1782 from Ernst & Young ("E&Y"), the auditor of both entities, that were missing from the files of Akai and Kong Wah. The liquidators were charged with the responsibility of locating and distributing assets of the companies to the creditors, including through litigation. E&Y resisted the discovery, claiming that the liquidators had failed to identify their proposed claims, legal theories and the pending or imminent proceeding in which they planned to bring any resultant causes of action. The Court rejected that argument finding that the liquidators had asserted serious allegations of fraud and that E&Y was aware of concerns about the integrity of management and related party transactions and, therefore, litigation against E&Y was within reasonable contemplation.

In the matter *sub judice*, QC is not under any mandate to investigate or bring any actions. Rather it purports to be contemplating an action “on behalf of French consumers (and either English or Portuguese consumers).” [D.I. 793, p.1]. “In each venue, QC would represent via a collective action the interests of French consumers, i.e. French purchasers of computers containing Intel’s microprocessors, as well as English or Portuguese consumers in the respective venues.” [D.I. 793, p.9] (footnote omitted). Yet QC points to no specifics. It makes no representations that anyone in England or Portugal has requested QC’s assistance or that any other consumer associations have sought to ally with it. QC can point to no objective facts that assist the Special Master in making some judgment based on reliable indicators about the timing of litigation.

The Special Master also concludes, QC’s assertions to the contrary notwithstanding, that the timing of any potential action is speculative at best. QC concedes that it will have to wait until after an adverse decision against Intel by the EC, which QC states will likely not issue for months, if not into the new year. [D.I. 609, p.7]. QC, however, cannot state with any degree of assurance that the EC is likely to issue its decision in 2008 or early 2009. In July 2008, the EC filed supplemental objections against Intel. [D.I. 866, Ex. 1]. Intel was given eight weeks to reply and has a right to a hearing on the matter at some future date. [D.I. 866, Ex. 1]. Therefore, it appears unlikely that the EC will be able to render a decision within the truncated time frame suggested by QC. By way of example, the first round of objections were filed in July 2007 and the hearing was not until March 2008. [D.I. 866, Ex. 1 and Ex.2]. The Special Master also finds QC’s reference to the article, “French consumer organisation [sic] UFC petitions U.S. judge over Intel antitrust abuse.” [D.I. 866, Ex. 2]. as a basis for asserting that a decision by the EC is “imminent” is misleading. [D.I. 864, p.6-7]. In that article, the EC in fact dismisses press

speculation that a provisional decision had already been made, and insisted that the investigation was ongoing and active.

The single primordial fact in this context is that QC can not bring a follow on collective damages action before there is an adverse decision by the EC against Intel. [See, *i.e.*, D.I. 839, Ex. B at ¶ 14]. Moreover, the Special Master is mindful that any such ruling would not be final until Intel exhausts its rights of appeal. Without more, the Special Master concludes that the view if “*this occurs, then this can occur*” necessarily becomes too speculative, and too remote and not “within reasonable contemplation.”

Because QC has not met the statutory requirements for a request brought pursuant to § 1782, the Special Master declines to analyze the discretionary factors outlined by the Court in *Intel* and the parties in their respective briefs. Further, the Special Master believes that a meaningful discussion of the discretionary factors on the record, as it now stands, would not be possible.

C. WHETHER QC MET ITS BURDEN TO PERMISSIVELY INTERVENE AND MODIFY THE PROTECTIVE ORDER

A party can move to intervene as a matter of right or move for a permissive intervention. Fed. R. Civ. P. 24. QC moves to intervene permissively, pursuant to Fed. R. Civ. P. 24(b). [D.I. 609, p.11]. Whether to grant permissive intervention is within the Court’s discretion. *Kitzmilller v. Dover Area School District*, 2005 WL 578974, at *6 (M.D. Pa., March 10, 2005); *see also Hoots v. Com. Of Pa.*, 672 F.2d at 1133, 1136 (3d Cir. 1982). The Special Master is mindful that permissive intervention is generally an appropriate method for third parties to challenge/modify a protective order. *Pansy v. Borough of Stroudsburch*, 23 F.3d 772 (3d Cir. 1994).

The controlling authority in the Third Circuit for considering a motion to modify a protective order is set forth in *Pansy*. *Id.* at 777-789.¹⁸ In *Pansy*, several newspapers filed a motion to intervene in a settled civil rights action in order to vacate or modify an existing protective order so as to gain access to certain settlement agreements. In *Pansy*, the Court first found that the newspapers had standing to challenge the protective order because, although a successful challenge would not determine whether they would ultimately obtain access to the documents sought, the protective order presented an obstacle to their attempted access under the Pennsylvania right of access laws.

Here, it appears that QC believes that a modification of the protective order would, in and of itself, provide it access to the documents. Modification of a protective order, rather, merely removes the barrier to access by means of some other method of discovery. Because the Special Master has concluded that QC is not entitled to documents pursuant to its § 1782 request, QC lacks standing to seek a modification of the protective order because it has no basis for obtaining the documents even if the barrier of the protective order were lifted.

Moreover, the Special Master concludes that QC's arguments in favor of modification are outweighed by the risks. The Court in *Pansy* approved a balancing test and identified a non-exhaustive list of factors to be considered in determining whether modification of a protective order is appropriate:

T]he court ... must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for

¹⁸ Separately pending before the Special Master is a Motion filed on behalf of The New York Times, Situation Publishing Ltd., Dow Jones & Co., Inc., The Washington Post, the Reporters Committee for Freedom of the Press, and the Computer & Communications Industry Association to intervene for the purpose of unsealing judicial records. This matter is not fully briefed and, therefore, not ripe for consideration.

discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.

Id. at 787. Importantly, the Court noted that “[t]he party seeking to modify the order of confidentiality must come forward with a reason to modify the order.” *Id.* at 790. Only if the moving party can do so should the court engage in a balancing of the interests. *Id.* Having concluded that QC does not have a reason to modify the Protective Order if its § 1782 Application is denied, the Special Master concludes that it is unnecessary to balance the *Pansy* factors. Even if the Special Master were to conduct a *Pansy* balancing analysis, QC has not established that its purported interest in the documents outweighs the need to protect the confidentiality of the materials.

For example, the Special Master concludes that the parties’ reliance on the Protective Order is highly relevant factor in this case, weighing against QC’s modification request. *See Id.* at 789 (“In determining whether to modify an already-existing confidentiality order, the parties’ reliance on the order is a relevant factor.”) As the Third Circuit noted, this factor is more persuasive where trade secrets are involved. *Id.* at 790. The parties here were expected to exchange highly sensitive transaction data documents. In order to do this, the parties, along with the Court, crafted a Protective Order that all believed would protect the confidentiality of the respective documents.

QC asserts that the parties should have foreseen that the protective order would be modified upon application of a third party. [D.I. 793, pp.18-20]. The Special Master does not find this argument to be persuasive. In fact, many third parties, as well as Intel, insist otherwise. For example, the declaration of Ming Wang, in support of Acer America Corporation’s Opposition, stated, “I can unequivocally state that in considering whether or not to produce electronic information and transactional data to AMD, Intel and the Class Plaintiffs – AAC has

heavily relied on the protections listed in the Protective Order in place in this matter, especially the prohibition against the Parties sharing AAC's information with third parties." [D.I. 751, ¶9]. See also, Declaration of Darren Bernard [D.I. 770, ¶ 8]; Third Parties' Supplemental Brief [D.I. 835, p.10] (stating "Third Parties produced confidential documents in this litigation on the assumption that the use and disclosure of those documents would be governed by the Protective Order. . . ."). Indeed, the ability to rely on the Protective Order is essential in cases involving the disclosure of highly confidential business information. Of additional note, at the time the Protective Order was originally drafted, the Special Master recommended against permitting the use of documents for other matters that were pending at that time. The parties have justifiably relied on this conclusion.

QC also asserts that its motion to intervene ought to be granted due to efficiency and comity considerations. [D.I. 793, p.3]. As discussed above in the context of the § 1782 request, however, QC has not identified what action it seeks to use the documents in, what parties it might be representing or what other organizations might be associating with it for purposes of litigation. QC also has failed to provide the necessary assurances regarding how the confidentiality of the documents in question could be maintained in this context.

QC's reliance on *In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333 (E.D. Pa. 2004) in support of its motion is misplaced. In *Linerboard*, the movant sought to intervene in an antitrust action to modify the protective order so that it could obtain documents produced in that action for use in a similar case in which it was a plaintiff. The Court granted modification to allow movant to receive the documents.¹⁹ In *Linerboard*, however, the plaintiffs had voluntarily

¹⁹ The Court also noted that one of the requirements for modifying a protective order to obtain documents for use in another litigation is that the collateral litigation be *bona fide*. The Court

agreed to produce the documents to movant, and only the protective order was preventing them from doing so. That is not the case here.

In sum, the Special Master concludes that QC does not have a reason to modify the Protective Order. Even if it did, the Special Master concludes that the legitimate and compelling importance of protecting the secrecy of confidential business information outweighs any need for QC to have access to those documents. After reviewing the facts, the Special Master concludes that modification of the Protective Order would not be appropriate.

The Special Master's conclusion in this regard should not be read to mean that no set of circumstances could exist that may justify modification of the Protective Order in the future.

D. QC'S ALTERNATIVE REQUEST FOR RELIEF

QC requests that if its motion to intervene and/or § 1782 request were denied, that it be allowed to meet and confer with Intel and third parties about "de-designating" certain materials. [D.I. 793, p.28]. Simply stated, the Special Master concludes, having denied QC's Motion and application, there is nothing more for the Special Master to do.

CONCLUSION

For the reasons set forth above, the Special Master concludes that QC is not entitled to any relief.

IT IS THEREFORE HEREBY RECOMMENDED THAT:

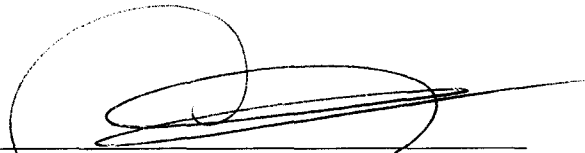
- (a) QC's Motion to Intervene for the Limited Purpose of Seeking Modification to the Protective Order be DENIED;

found that because movant was a plaintiff in similar litigation, it met the requirement of a *bona fide* litigant. On this record the Special Master can not conclude that QC is a *bona fide* litigant.

- (b) QC's Application Pursuant to 28 U.S.C. § 1782 for an Order Requiring Intel and Third Parties to Provide Access to Documents and Deposition Testimony for Use in Foreign Proceedings be DENIED; and
- (c) QC's Alternative Request that is be allowed to meet and confer with Intel and Third Parties should not be considered and therefore DENIED.

THE SPECIAL MASTER'S REPORT AND RECOMMENDATION WILL BECOME A FINAL ORDER OF THE COURT UNLESS OBJECTION IS TAKEN AS PROVIDED BY FED. R. CIV. P. 53.

Entered this 6th day of October, 2008.



Vincent J. Poppiti (DSBA No. 100614)
Special Master