UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HÅKAN LANS, Plaintiff, v. GATEWAY 2000, INC., DELL COMPUTER CORP., Defendant.	Case Number 97-2523 (JGP) Case Number 97-2526 (JPG)
UNIBOARD AKTIEBOLAG, Plaintiff, v. ACER AMERICA CORP., et al., Defendants.	Case Number 99-3153 (JGP) **MEMORANDUM SUPPORTING MOTION OF HÅKAN LANS AND UNIBOARD AKTIEBOLAG FOR RECONSIDERATION OF THE COURTS SEPTEMBER 6, 2001 ORDER CONCERNING ATTORNEYS' FEES**

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On August 13, 1999, Mr. Lans' and Uniboard's then counsel, Louis Mastriani, declared under penalty of perjury:

> Inasmuch as I and other counsel to Mr. Lans have been repeatedly informed by Mr. Lans that no assignment had ever taken place with respect to the Lans patent, we are investigating the circumstances surrounding the referenced Assignment.

(Declaration of Louis S. Mastriani in Support of Emergency Motion for Extension Time to Respond to Motions by Gateway, ¶ 3, Tab 16.)[1] This statement is the cornerstone of the Court's Order of September 6, 2001 ("Fee Order") assessing attorneys' fees against Mr. Lans and Uniboard, and not assessing fees against Mr. Mastriani or his lawfirm, Adduci, Mastriani & Schaumberg, L.L.P. ("Adduci"). The Court concluded:

> Lans was in control of all information regarding the assignment since it was executed . . . Lans was able to inform his attorneys of the license to IBM but then . . . conveniently forgot . . . the assignment.
>
> * * * *
>
> The Court cannot escape the conclusion that Lans chose to conceal all information about the assignment, possibly even from his attorneys, until confronted with irrefutable evidence that the assignment had occurred.

Lans v. Gateway 2000, 84 F.Supp.2d 112, 122 (D.D.C. 1999).

Mr. Mastriani's declaration was false. On February 19, 1997 – 8 months before the complaint was filed – Mr. Lans wrote to Mr. Mastriani concerning the IBM licensing agreement:

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[1] "Tab" references are to Exhibits to the Declaration of Forrest A. Hainline III filed in filed in support of this motion.

> As you know the licenses has been signed with a company (UNIBOARD AB) and not with me as an individual (the patent has been transferred to the company and for many years ago and the agreement with IBM was made with UNIBOARD AB).

This document was provided to Mr. Lans and Uniboard's successor counsel by Mr. Mastriani's lawfirm, Adduci, Mastriani & Schaumberg L.L.P. ("Adduci") after the Court entered its September 6, 2001 Memorandum Opinion ("Fee Order"). (Tab 9; Facts ¶ 17.)[2]

This memorandum supports Mr. Lans' and Uniboard's motions for reconsideration of the Fee Order assessing attorney fees against them and not assessing fees against their former counsel. Mr. Lans and Uniboard request that the Fee Order be vacated and any attorney fee award be made solely against Adduci.

SUMMARY OF ARGUMENT

As the Federal Circuit recently confirmed (Tab 1), the Court's Fee Order was interlocutory. As such, the Court can reconsider the Fee Order any time before final judgment.

The Court should reconsider its Fee Order because Mr. Lans and Uniboard were not represented on the motion. Adduci had a conflict of interest that prevented the firm from zealously representing Mr. Lans and Uniboard. Adduci should have advised Mr. Lans to obtain separate counsel.

The Court should vacate its Fee Order because it was based upon fraud. Not only

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[2] "Facts" refers to the separate Statement of Facts Supporting Motion of Håkan Lans and Uniboard Aktiebolag for Reconsideration of the Courts September 6, 2001 Order Concerning Attorneys' Fees.

did Mr. Mastriani declare falsely that he had no knowledge of any assignment to Uniboard (Tabs 9, 16; Facts ¶ 17), but Adduci also concealed that as early as January 1997, they knew about and reviewed the IBM license agreement with Uniboard. Months before Adduci signed the complaints in these actions, the firm represented Uniboard in negotiations with IBM over the scope of the license (Tabs 10-13; Facts ¶¶ 18-20).

Adduci, not Mr. Lans or Uniboard, originated, drove and controlled these lawsuits. Adduci sought out Mr. Lans and persuaded him to allow them to pursue infringers of the U.S. Patent No. 4,303,986 ("'986 Patent"). Mr. Lans told the lawyers that he had neither the time nor the money to pursue infringers of the '986 Patent (Facts ¶ 5). Adduci's contingent fee agreement with Lans not only gave the firm a financial interest in license fees and/or any judgment, but also gave Adduci sole and exclusive discretion both in negotiations and in litigation decisions (Tab 4; Facts ¶¶ 7-9).

Adduci agreed to fund all expenses related to license negotiations and any litigation (Tab 4; Facts ¶ 11). In order to finance the lawsuits, Adduci sold security interests in the case to a group of investors ("'986 Partnership"). Adduci never disclosed the existence of the '986 Partnership to Mr. Lans, and continues to refuse to provide more information about the group than what was provided, perhaps inadvertently, with the transfer of files to successor counsel. (Tabs 5-8; Facts ¶¶ 12-15.) Adduci's obligations to the '986 Partnership conflicted with the firm's obligations to Mr. Lans and Uniboard. From September 1996 through January 1997, Adduci sent approximately 100 letters giving notice of the '986 Patent to potential infringers solely in Mr. Lans' name and without reference to Uniboard (Tab 19; Facts ¶ 11). The '986 Partnership Agreement was finalized on or after February 3, 1997. It appears that Adduci described Mr. Lans as

being the owner of the '986 Patent because the '986 Partnership required an agreement with Mr. Lans to be appended to the partnership agreement (Tab 7; Facts ¶ 14). When Adduci became aware of the IBM license agreement with Uniboard and Mr. Lans' assignment to Uniboard, the firm had an incentive to say nothing about Uniboard both to avoid losing fees for the months that passed since notice was given in Mr. Lans' name, and to avoid potential liability to the '986 Partnership.

Adduci, not Mr. Lans, acted to conceal the existence of the Uniboard assignment during this litigation. First, Adduci never told Mr. Lans that under American law, a patent infringement case must be brought in the name of the patent assignee even if the assignee is not the registered owner of the patent (Facts ¶ 25). Second, as we discuss in detail below, Adduci frustrated Mr. Lans attempts to be forthcoming about the assignment, while assuring Mr. Lans that the statements that Adduci crafted for Mr. Lans' Declarations and responses to interrogatories were correct (Facts ¶¶ 26-29).

It was Adduci, not Mr. Lans (as Uniboard's sole shareholder and officer) who decided, after the Court had dismissed the cases in Mr. Lans' name, to file the later suit in Uniboard's name. Mr. Lans did not know until after the fact that Adduci had filed a separate lawsuit in Uniboard's name.

Finally, Adduci's self interest in having any fee sanction entered solely against the firm's clients prevented it even from informing the Court that Mr. Lans is one of Sweden's most respected scientists. Mr. Lans wanted to testify before the Court so that the Court could fairly assess his credibility. Adduci told him that he could not do so. (Facts ¶ 34.) Of course, if Mr. Lans testified live, it would have been impossible for Adduci to conceal that it had knowledge, months before the complaints were filed, of the

IBM license and the Uniboard assignment.

ARGUMENT

I. THIS COURT HAS DISCRETION TO RECONSIDER THE FEE ORDER

The Federal Circuit clarified that an order granting attorneys' fees without fixing the fee award is an interlocutory order. *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340 (Fed. Cir. Oct. 30, 2001); *Lans v. Gateway*, (Fed. Cir. November 19, 2001) (Tab 1). Motions to reconsider interlocutory orders – in contrast to motions for reconsideration of final judgments – are within the discretion of the trial court, subject to appellate review under the abuse of discretion standard. *See United Mine Workers v. Pittston Co.*, 793 F.Supp. 339, 344-45 (D.D.C. 1992), *aff'd*, 984 F.2d 469 (D.C. Cir.), *cert. den.*, 509 U.S. 924 (1993).

The Advisory Committee Notes to Rule 60(b) of the Federal Rules of Civil Procedure are consistent with this standard. As the Notes explain, "interlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." Federal Rule of Civil Procedure 60(b) Advisory Comm. Notes; *see also Schoen v. Washington Post*, 246 F.2d 670, 673 (D.C.Cir.1957) (Burger, J.) (so long as district court has jurisdiction over an action, it has complete power over interlocutory orders therein and may revise them when consonant with equity); *Langevine v. District of Columbia*, 106 F.3d 1018, 1022-23 (D.C. Cir. 1997); *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000); *Citibank (South Dakota), N.A. v. Federal Deposit Insurance Corporation*, 857 F.Supp. 976, 981 (D.D.C. 1994); *Moore v. Hartman*, 1993 WL 405785 (D.D.C. 1993).

Equity requires reconsideration of the Fee Order.

II. THE COURT SHOULD RECONSIDER THE FEE ORDER BECAUSE MR. LANS AND UNIBOARD WERE NOT REPRESENTED ON THE ATTORNEY FEES MOTIONS

When the issue before the Court is whether the client or the client's attorney should bear the burden of an attorney fee assessment, there is a conflict of interest that requires the attorney to withdraw so that the client may retain non-interested counsel. When the attorney does not withdraw, the client's interests are not represented. *Calloway v. Marvel Entertainment Group,* 854 F.2d 1452 (2nd Cir. 1988). In *Calloway,* defendants sought attorney fees from both the plaintiff and his counsel, primarily for a "facsimile claim" in a copyright infringement case. There was a question as to whether the client or the attorney was responsible for the claim. Fees were assessed against both the lawyer and the client. The client filed a *pro se* appeal that was dismissed because of lack of prosecution.

The Second Circuit took an extraordinary step: "*Sua sponte,* we reinstate Calloway's appeal with regard to Rule 11 sanctions. LeFlore and his firm had a blatant conflict of interest and should have withdrawn as Calloway's counsel in defending the motions for sanctions. Because of this representation, no argument was made on Calloway's behalf that LeFlore was solely responsible for pursuit of the facsimile claim, notwithstanding considerable evidence supporting that view. Nor was an argument made that even if sanctions should be imposed on Calloway, LeFlore and his firm should be jointly and severally liable for them." 854 F.2d at 1456.

Calloway has been eroded in other respects. *Pavelic & Leflore v. Marvel Entertainment Group,* 493 U.S. 120 (1989) reversed the Second Circuit's finding that a

lawfirm can be sanctioned under Federal Rule of Civil Procedure 11. The 1993 amendments to Rule 11, however, removed this restriction. In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991), the Supreme Court held that Rule 11 imposed an objective standard of reasonable inquiry on represented parties who signed papers or pleadings, whether signatures were voluntary or mandated. *Calloway* held that a different standard should apply to represented parties. These decisions do not erode that fundamental notion that a lawyer cannot represent a client when its own interests are fundamentally opposed to the client's.

Adduci had a conflict of interest that prevented it from zealously representing Mr. Lans and Uniboard. Among other things, that conflict prevented it from arguing that the firm or its lawyers should be solely or jointly responsible for any award of fees, and from arguing that Mr. Lans was not advised as he should have been regarding the necessity of identifying the real party in interest before the complaints were filed. Most importantly, it resulted in Mr. Mastriani's submitting a false declaration against Mr. Lans' and Uniboard's interests. This conflict should have caused Adduci to withdraw from representing Mr. Lans and Uniboard in the attorney's fee proceedings.

III. THE COURT SHOULD VACATE THE FEE ORDER BECAUSE IT IS BASED UPON FRAUD

Adduci's self interest led it to both actively mislead the Court, and to conceal information that would have established Mr. Lans' and Uniboard's lack of culpability.

A. Adduci Knew About the IBM License and the Uniboard Assignment as Early as January 1997

Mr. Mastriani declared that Adduci had no knowledge of the assignment to Uniboard until Gateway filed its motion to dismiss (Tab 16). Adduci allowed the Court

to infer that the firm was either ignorant of the Uniboard license agreement with IBM, or at best on the periphery with no knowledge of the details. (*See* Fee Order at 10 and 12-13.) Adduci defrauded the Court.

At least as early as January 1997 - 9 months before the complaint was filed - Mr. Lans discussed with Mr. Mastriani that Uniboard had licensed the '986 Patent to IBM, and that Mr. Lans had assigned some type of interest in the '986 Patent to Uniboard. Mr. Lans provided Mr. Mastriani with a copy of the IBM Agreement and authorized Adduci to represent Uniboard in negotiations with IBM concerning Uniboard's rights under that agreement. On January 22, 1997, Mr. Mastriani wrote Mr. Utterstrom: "There is an important issue that has arisen regarding the extent of the license grant in the IBM agreement." Mr. Mastriani "attached relevant sections of the IBM agreement" to his note to Mr. Utterstrom. (Tab 7; Facts ¶ 16.)

In February 1997 - at least 8 months before the complaint was filed - Mr. Lans was served with process in connection with a declaratory judgment lawsuit filed in the United States involving the '986 Patent. Mr. Lans wrote to Mr. Mastriani on February 19, 1997 concerning this:

> As you know the licenses has been signed with a company (UNIBOARD AB) and not with me as an individual (the patent has been transferred to the company and for many years ago and the agreement with IBM was made with UNIBOARD AB).

(Tab 9, Facts ¶ 17.)

In April 1997 - at least 6 months before the complaint was filed - Mr. Mastriani filed a Declaration under penalty of perjury in an action pending in the United States District Court for the District of Idaho. Mr. Mastriani declared, "I have reviewed and am familiar with the patent license agreement negotiated in Europe in 1989 between a

company wholly owned by Hakan Lans located in Saltsjobasden, Sweden and International Business Machines Corporation ("IBM") located in Purchase, New York, under U.S. Patent No. 4,303,986..." (Tab 10, Facts ¶ 18.)

Adduci had more than mere "familiarity" with the Uniboard-IBM license before it filed any complaint. Adduci *represented Uniboard* in negotiations with IBM over the terms of the license. On April 7, 1997, Mr. Mastriani's law partner, Mr. Schaumberg, sought permission from Mr. Lans to act *on behalf of Uniboard* when an issue arose as to the breadth of the IBM licenses. On April 9, 1997, Mr. Schaumberg wrote to IBM "*on behalf of Uniboard*" to discuss Uniboard's claim that IBM had exceeded the scope of the license agreement. On April 18, 1997, Adduci's Mr. Schaumberg again wrote IBM *on behalf of Uniboard* seeking information about an IBM license to Cirrus Logic:

> Since the MiCrus joint venture with IBM appears to be key to Cirrus Logic's claims, it is important that IBM's licensor, Uniboard, understand the nature of the joint venture and, thereby, the basis for Cirrus Logic's position.

(Tabs 11-13, Facts ¶ 19.)

On August 8, 1997, still months before Adduci filed any complaint, Adduci's Swedish correspondent lawfirm wrote Mr. Mastriani, "The starting point is that HL did ask us – the two firms- to represent him/Uniboard in the collection of licensing fees from the infringers…." (Tab 14, Facts ¶ 20.)

B. It Was Adduci's Responsibility, Not Mr. Lans', to Make Sure That Any Lawsuit Was Filed in the Name of the Proper Party, and to Clarify Any Ambiguity Concerning Ownership of the '986 Patent.

Adduci had an obligation independently to investigate and determine the party in whose name any litigation should be filed. By January 1997, Mr. Mastriani and his firm

had the IBM license agreement and were familiar with its provisions. Knowledge of the IBM license agreement standing alone would require an attorney to inquire as to basis for Uniboard's right to license the Lans patent to IBM. Paragraph 6.1 made IBM's payment to Uniboard contingent upon "receipt by IBM of satisfactory documentary evidence of UNIBOARD's right to grant the said license and immunities." If Mr. Lans could not provide the "satisfactory documentary evidence" to Mr. Mastriani and his lawfirm, then these attorneys had an obligation to contact IBM and obtain the document(s). For Mr. Mastriani and his firm to file patent litigation on behalf of Mr. Lans, knowing of the IBM license agreement and being familiar with its terms, without obtaining the documentary evidence of Uniboard's right to grant the license to IBM, was below the standard of care. (Lehman Declaration, ¶ 10.)[3]

If there was any confusion or ambiguity regarding ownership of the '986 Patent, Adduci had an obligation to clarify the ownership issue by creating and filing appropriate documentation with the Patent and Trademark Office. In this case, because Mr. Lans owned 100% of Uniboard, it would have been a straightforward procedure to create and file an assignment of the Lans Patent rights either from Mr. Lans to Uniboard, or from Uniboard to Mr. Lans. An assignment from Uniboard to Mr. Lans made subject to the IBM License Agreement would have complied with ¶ 9.2 of that agreement. Given Mr. Mastriani's knowledge of the confusion regarding ownership of the Lans patent, he and

[3] Declaration of Bruce A. Lehman filed in support of this motion for reconsideration.

his firm acted beneath the standard of care in failing to prepare and file the necessary clarifying documents. (Lehman Declaration ¶¶ 11-14.)

C. Adduci Had Sole Control of the Litigation, and Unknown to Mr. Lans, Sold Security Interests in the Lans Lawsuit

In the Court's Fee Order, one can read Adduci's success in painting the firm's client Mr. Lans as a grasping putative inventor who duped them. The facts, which Adduci's conflict prevented them from disclosing, are far different.

The idea of pursuing litigation based on the '986 Patent originated with lawyers, not Mr. Lans. In late 1995, Mr. Lans' next-door neighbor Peter Utterstrom, a partner at Advokatfirman Delphi ("Delphi"), asked Mr. Lans if he would agree to meet with his partner and some American lawyer to discuss infringers of the '986 Patent. (Facts ¶ 4.)

Mr. Lans met with Mr. Mastriani and his partner Mr. Schaumberg and Peter Utterstrom and Talbot Lindstrom (an American attorney now living in Sweden) from Delphi on or about May 17, 1996. Mr. Mastriani and Mr. Schaumberg told Mr. Lans that they and their firm were experts in U.S. patent law and in protecting the rights of patent holders. Mr. Lans told these lawyers that he had neither the time nor the money to pursue the project. The lawyers ensured Mr. Lans that his involvement in both time and money would be minimal. (Tabs 2-3, Facts ¶ 5.) Mr. Lans was not the driver behind enforcing the '986 Patent; the lawyers were.

Mr. Lans knows nothing about American law. He accepted Adduci's proposal to represent him in the United States in connection with the '986 Patent and deferred to Adduci's decisions throughout the negotiations and litigation. (Facts ¶ 6.) Mr. Lans signed a Fee Agreement that gave broad control to Adduci in the conduct of both

negotiations and litigation (Tab 4, Facts ¶ 7). The Fee Agreement gave Adduci complete discretion in the conduct of negotiations concerning licensing strategy, limited Mr. Lans' involvement in any litigation, and gave Adduci sole and exclusive discretion in the conduct of litigation (Tab 4, Facts ¶¶ 8-9).

Adduci and Delphi agreed that all expenses of the project, including those arising in litigation, were to be borne by the lawfirm, with 33% of any recovery paid to the Firms (Tab 4, Facts ¶ 10). In order to fund the litigation, Adduci entered into an agreement with third party "investors," to finance the upcoming litigation based on the '986 Patent and formed the '986 Partnership with them in Montgomery, Alabama. The '986 Partnership agreed to advance up to $300,000 to fund the litigation, to be drawn from a letter of credit in increments of $60,000. Adduci agreed to pay the '986 Partnership from proceeds of licensing and the litigation, after repayment of the initial investment, 1% of the net recovery for every $60,000 drawn by Adduci. (Tabs 5-6, Facts ¶ 12.)

Until current counsel substituted for Adduci, Mr. Lans knew nothing about the '986 Partnership. Adduci has refused to provide further information concerning the '986 Partnership to Mr. Lans' successor counsel. (Tab 8, Facts ¶ 15.)

The '986 Partnership was finalized in February 1997, after Mr. Lans signed the Fee Agreement. Because the '986 Partnership demanded Mr. Lans' signed agreement as an exhibit to the Partnership Agreement, it is reasonable to infer that Adduci represented that Mr. Lans owned the '986 Patent. Indeed, in January 1997, Mr. Mastriani had expressed concern that the '986 Partnership might have a question about Adduci's authority to bring the lawsuit it was selling. (Tab 7, Facts ¶¶ 13-14.)

From September 1996 through January 1997, Adduci sent approximately 100 letters giving notice of the '986 Patent to potential infringers solely in Mr. Lans' name and without reference to Uniboard (Tab 19, Facts ¶ 11).

Adduci had a motive to conceal Uniboard's interest in the '986 Patent because such disclosure might have upset the financing of the litigation, and might have subjected Adduci to a suit brought by the '986 Partnership. If Adduci sent out infringement notices in Uniboard's name in February 1997, when Adduci clearly knew about the transfer to Uniboard, the firm risked losing substantial fees if notice to the alleged infringers was not adequate (as this Court ultimately held).

Neither Mr. Mastriani nor any Adduci lawyer ever told Mr. Lans that in America a patent infringement suit must be brought in the name of the assignee of the patent, even if that person or firm is different from the registered owner of the patent. Adduci had control of the litigation and Adduci, not Mr. Lans, decided to sue in Mr. Lans' name rather than in Uniboard's. (Facts ¶¶ 21-23.) Adduci acted as if it were its own client, and decided its own interests would best be served by chancing that the unregistered assignment to Uniboard would never come to light.

Adduci's failure to advise the Court of its financial interest in and control of the litigation, and its relationship with the '986 Partners requires reconsideration of the Fee Order.

D. Adduci Frustrated Mr. Lans' Efforts to Be Truthful

Mr. Lans trusted his American lawyers. He had told them about Uniboard and about IBM, and he trusted that they would represent him appropriately given their

knowledge. What Mr. Lans did not know was that Adduci had its own reasons not to disclose the assignment to Uniboard.

1. Adduci Submitted Interrogatory Responses Contrary to the Information Mr. Lans Provided

The '986 Patent expired on January 9, 1999. On June 16, 1998 Compaq Computer Corp., in a related case, served interrogatories on Mr. Lans, asking if he had ever assigned the patent. The interrogatory responses had to be served on January 29, 1999. It was not until the evening of January 28, 1999, that Adduci sent Mr. Lans its draft interrogatory responses for his review. They arrived in Sweden on January 29, 1999, the day the answers were due. On this short notice, Mr. Lans reviewed them. He commented on the response to Question 10, "I have studied the document and it is correct. However, the response to interrogatory number 10 could maybe be changed from 'I am the sole owner of the '986 patent' to 'The company Uniboard AB is the owner of the '986 patent but the patent is still registered in Hakan Lans name. Consequently, Mr. Lans has the sole right to sign license agreements.'" (Tab 15, Facts ¶ 24.) By the way, this email alone – even without the February 19, 1997 email (Tab 9) and the Adduci-IBM correspondence (Tabs 11-13) -- demonstrates the falsity of Mr. Mastriani's declaration of August 13, 1999, submitted to avoid his firm's liability.

Adduci ignored Mr. Lans' email and served interrogatory answers without Mr. Lans' suggested change. Mr. Lans accepted Adduci's judgment that the more complete response was not necessary. Mr. Lans concluded that the question did not concern the Hakan Lans/Uniboard relationship and that the interrogatory wanted to know if Mr. Lans had done anything with the patent that would make him unable to sign a license. Because

Mr. Lans owns all of Uniboard, he knew that he could sign on behalf of Uniboard. (Facts ¶ 25.)

2. Adduci Misled Mr. Lans as to the Accuracy of his Declarations

On August 4, 1999, Gateway filed its motion to dismiss and attached the assignment to Uniboard in support of its motion. Mr. Mastriani telephoned Mr. Lans to discuss Gateway's motion and the assignment to Uniboard that Gateway had attached to its motion. Although Mr. Lans had told Mr. Mastriani about the assignment in early 1997, he did not have a copy of the document.

When Mr. Mastriani telephoned Mr. Lans, Mr. Lans said that he remembered the document but did not recall the details and did not have a copy. Mr. Lans reminded Mr. Mastriani that they had discussed the assignment in connection with the IBM license and the letters Adduci wrote to IBM. Mr. Mastriani in substance told Mr. Lans, "If you can't recall the details of the document, as a matter of law, that means you don't recall signing the document." Mr. Mastriani prepared a declaration for Mr. Lans to sign and told him that it was consistent with the facts Mr. Lans had provided Adduci and truthful as a matter of law because Mr. Lans could not recall the details. Mr. Lans accepted his American lawyer's advice. (Facts ¶ 26.)

The Court expressed its skepticism about Mr. Lans' record keeping and credibility *Lans I*, 84 F.Supp. at 120. The Court's skepticism served Adduci's interest, and the firm did not even bother educating the Court that Mr. Lans is one of the most well regarded and honored scientists in Sweden. Mr. Lans is best known for his development of the technology underlying the worldwide standard for air traffic control. (Tabs 17-18, Facts ¶¶ 1-3.) *A Beautiful Mind*, a very good film about mathematician John Nash, reminds us

that scientists are not like "normal" lawyers, judges, bureaucrats or others one regularly meets in Washington, DC, who meticulously keep their legal records. Their focus in on scientific endeavors. Although John Nash suffered from a mental illness, he was not so out-of-the-ordinary to other Princeton mathematicians that he was banned from the campus.

3. Adduci Denied Mr. Lans Any Opportunity to Give Testimony at the Hearing For Attorney Fees

When the motions for attorney's fees were filed, Mr. Lans told Mr. Mastriani that he wanted to testify before the Court so the Court could judge his credibility and know the truth. Mr. Mastriani told Mr. Lans that he could not testify (Facts ¶ 29). Adduci could not afford to allow Mr. Lans to testify because he would have revealed Adduci's early knowledge of the Uniboard assignment and IBM license. If Adduci did not have a conflict of interest, the firm would have insisted that Mr. Lans be given the opportunity to testify, as credibility was likely to be an issue. Indeed, where credibility is an issue examination of a live witness should be required. *Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1346-47 (Fed. Cir. 2000); *Prakash v. American University*, 727 F.2d 1174, 1180-81 (D.C. Cir. 1984); *RKO General, Inc. v. Federal Communications Comm'n*, 760 F.2d 215, 221-231 (D.C. Cir. 1981); and *Weahkee v. Perry*, 587 F.2d 1256, 1266-67 (1978). An example of this fundamental principle is found in Federal Rule of Civil Procedure 63. A successor judge may proceed with a trial or hearing only upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. However, in a hearing or trial without a jury, even with a full transcript, a successor judge *shall* at the request of a party recall

any witness whose testimony is material and disputed and who is available to testify again without undue burden. *See, Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corporation,* 576 F.Supp. 107, 125 (D. Del. 1983), aff'd, 740 F.2d 956, 740 F.2d 957, 740 F.2d 958 (3rd Cir. 1984), cert. denied, 469 U.S. 1159 (1985) ("It is difficult to perceive the propriety of an exercise of such power where credibility is involved, the successor judge having neither seen nor heard the witnesses as they testified.")

IV. UNIBOARD FILED ITS LAWSUIT SOLELY UPON ADVICE OF COUNSEL

Adduci, not Uniboard, decided to bring the Uniboard case. However, even if Uniboard had made the decision, the Court's analysis if flawed. The Court ruled that Uniboard should have known that its suit was frivolous and that there was no precedent supporting it. Fee Order at 17. In effect, the Court penalized Uniboard under a Rule 11 standard for advancing a claim "that is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." But Rule 11(c)(2)(A) does not allow a sanction against a represented party for such a violation. Rule 11 establishes the fundamental principle that a represented client cannot be said to know that a case is frivolous. Before the Federal Circuit decided *Lans v. Digital Equipment Corp.,* 252 F.3dat 1327, how could a lay person, particularly a foreign person, know that Uniboard could not bring its lawsuit in good faith given the particular facts present here – ones never before the Federal Circuit before.

The Court penalized a *client* for not understanding *legal principles,* and exonerated the *lawyer* instructing the client as to those principles. Again, one can only conclude that Court accepted Adduci's false portrait of itself as having been duped by Mr. Lans and Uniboard as they engaged it principled advocacy.

Mr. Lans is not a lawyer and has no knowledge of American law. Even though the patent had expired. After the Court dismissed Mr. Lans' cases, Mr. Mastriani told him that the problem could be corrected by substituting Uniboard for him personally. Mr. Lans did not understand and does not remember discussing with Mr. Mastriani that Adduci would file a new lawsuit on behalf of Uniboard. However, Mr. Lans understood that he was bound under the Fee Agreement to defer to Adduci's decisions, and to his judgment in implementing his decisions. Mr. Mastriani never told Mr. Lans that there was any problem under American law in Uniboard's filing the lawsuit. (Facts ¶ 27.) Uniboard should not be punished for following counsel's advice.

In any case, the Court's analysis should be reexamined. The Court penalized Uniboard for advancing a frivolous claim. According to the Court, Uniboard should have known "'the suit was groundless'." Fee Order at 17 (quotation omitted). In contrast, the Court concluded that Adduci should not have known the suit was frivolous. See Fee Order at 20. This is a curious result, given that the decision turned on a legal question.

Rule 11 (b)(2) is instructive here. Monetary sanctions cannot be imposed on a *represented* party, such as Uniboard, for filing a suit that is not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Federal Rule of Civil Procedure 11 (b)(2) and (c)(2)(A). That clearly makes sense, as a represented party should be able to rely on his or her attorney to determine whether there's legal basis to file a suit. And that is exactly what Uniboard did in this case.

CONCLUSION

Even if the Fee Order was final rather interlocutory, equity would demand that the it be reconsidered and set aside:

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here . . . we find a deliberately planned and carefully executed scheme to defraud . . . the . . .Court . . .

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944).

An attorneys' fraud on the Court concerns not only private parties, "It is a wrong against the institutions set up to protect and safeguard the public," *Hazel-Atlas Glass Co.*, 322 U.S. at 246. An attorney is an officer of the Court. *See, Wright & Miller, Federal Practice and Procedure,* § 2870 (2001), citing *Kupferman v. Consolidated Research and Mfg. Corp.*, 459 F.2d 1072 (2nd Cir. 1972) ("An attorney's loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court, and, when he departs from that standard, he perpetrates a 'fraud upon the court' within the savings clause of the rule governing relief from judgment or order").

This case, and this fraud, involves a citizen of Sweden who justifiably looked to American lawyers and American courts to protect his interest. The system failed him. The system failed Uniboard.

The Fee Order against Mr. Lans and Uniboard should be vacated. Any attorney fee award should be assessed solely against Adduci.

Dated: January 14, 2002

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