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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE AMERICA, INC.,

Plaintiff,

v.

MICRON TECHNOLOGY, INC. and MICRON SEMICONDUCTOR PRODUCTS, INC.,

Defendants.

CASE NO. 10-cv-04340 PJH

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSE NO. 21

Hearing Date: July 20, 2011
Hearing Time: 9:00 a.m.
Location: Courtroom 3, 3rd Floor

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INTRODUCTION

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") reduces the civil damages exposure of a participant in an alleged conspiracy who is a party to a "currently effective" amnesty agreement with the Antitrust Division of the Department of Justice. *See* Declaration of Joel S. Sanders (June 10, 2011), **Exhibit A**, ACPERA, sec. 213(a). Defendants Micron Technology, Inc. and Micron Semiconductor Products, Inc. (collectively, "Micron") are parties to a "currently effective" amnesty agreement. Sanders Decl., **Exhibit B**, Micron Amnesty Agreement (Oct. 2, 2002). To ensure that the Court and plaintiff Oracle America, Inc. had sufficient notice of ACPERA's damages limitation, Micron included reference to the limitation in its amended answer (Docket Entry 47 at 31 (Apr. 18, 2011)), even though it is not technically an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1).

Oracle's motion to strike the reference to ACPERA's damages limitation from Micron's amended answer is premised on the argument that it would somehow be impermissibly "retrospective" to apply the statutory damages limitation in this lawsuit—which was filed *after* ACPERA was enacted—because Micron's leniency agreement antedates passage of ACPERA. This contention, however, ignores the text and structure of ACPERA, and misrepresents its operation.

ACPERA could not be clearer: The statutory damages limitation applies in *all* civil antitrust suits against a party to a "currently effective" antitrust agreement with the Justice Department, whether conditional or final. "Currently effective" means that the agreement is in effect (*i.e.*, has not been revoked) when the civil leniency provision is invoked, as Micron's agreement was when Oracle filed this lawsuit—again, *after* ACPERA was enacted. In view of this clear statutory language, there is no need to go further. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (if "Congress has expressly prescribed the statute's proper reach, . . . there is no need to resort to judicial default rules").

Furthermore, the actual *conduct* regulated by ACPERA all occurred or would occur in this case *after* the statute's 2004 enactment. Oracle's filing of this lawsuit triggered Micron's duty to cooperate with Oracle in discovery in this case—including by "providing a full account" of all known potentially relevant facts, "furnishing all [potentially relevant] documents," and making key

witnesses available to testify. **Exhibit A**, sec. 213(b). When and if the time comes to assess damages, this Court may determine whether Micron "has provided satisfactory cooperation to [Oracle] with respect to the civil action," entitling Micron to civil leniency. *Id.* These actions, like this entire lawsuit, post-date ACPERA's enactment.

As the cases Oracle cites in its motion to strike make clear, "[i]n determining whether a statute's terms would produce a retroactive effect, . . . and in determining a statute's temporal reach generally, . . . normal rules of construction apply." *Lindh v. Murphy*, 521 U.S. 320, 325 (1997); *see also Landgraf*, 511 U.S. at 280. Here, a careful reading of ACPERA "remove[s] even the possibility of retroactivity" (*Lindh*, 521 U.S. at 325) because the statute regulates *only* post-enactment conduct.

Rather than examine ACPERA's text, structure, or operation in practice, Oracle simply *presupposes* that application of the statutory damages limitation in this case would be retrospective because ACPERA was "enacted . . . two years after Micron entered into its criminal amnesty agreement with DOJ." Oracle Br. 3 (emphasis omitted). But Micron's obligations under that agreement did not cease on the date it was signed; rather, they continued long after ACPERA was enacted. Thus, while Micron's agreement was signed before ACPERA's enactment, it remained "currently effective" after ACPERA was enacted to regulate civil lawsuits such as this one, which also was filed after ACPERA's enactment. Micron provided the requisite cooperation to the government, and stands ready to do the same for Oracle; the *quid pro quo* for that cooperation is a limitation on Micron's civil damages exposure. Enforcing that limitation raises no specter of retrospectivity.

FACTUAL BACKGROUND

Micron is a leading manufacturer of semiconductors for servers and personal computers, including dynamic random access memory ("DRAM"). In or before June 2002, the Antitrust Division of the U.S. Department of Justice launched a criminal investigation into allegations of price-fixing in the DRAM industry. Shortly thereafter, Micron announced that it was cooperating with the investigation, and in October, Micron entered into an amnesty agreement with the Antitrust Division. *See* **Exhibit B**, Micron Amnesty Agreement. In exchange for Micron's cooperation with its

investigation, the Antitrust Division agreed not to bring criminal charges against Micron or its directors, officers, or employees. *See id.* at 2-3.

Micron's amnesty agreement was "conditional" and depended on Micron's continued cooperation with the government through the close of its investigation. **Exhibit B** at 1. Indeed, the agreement could be voided "at any time" if Micron breached its duty to cooperate. *Id.* at 2. Pursuant to these continuing cooperation obligations, over the next several years, Micron voluntarily produced voluminous documents and made available for interviews all personnel requested by the government. Notably, in February 2008, long after ACPERA was enacted, Micron voluntarily made several senior executives (including its CEO and Vice-President for Sales and Marketing) available to testify at the government's request at the criminal trial of an executive at Hynix Semiconductor, Inc., another participant in the alleged conspiracy. *See United States v. Swanson*, No. CR-06-0692 (N.D. Cal.) (Hamilton, J.). Finally, in March 2008, the Antitrust Division notified counsel for Micron that it had concluded its investigation, making its amnesty agreement "final." Sanders Decl., ¶ 5.

During the same time period, Micron defended against a variety of civil cases, many of which were consolidated in this Court, relating to conduct covered by Micron's amnesty agreement. In 2002, customers who had purchased DRAM chips from members of the alleged conspiracy brought direct and indirect purchaser class-action lawsuits against Micron and other DRAM manufacturers alleging violations of the Sherman Act and state antitrust laws. Many state attorneys general also sued. In 2006 and 2007, Oracle (then operating as Sun Microsystems) and other plaintiffs opted out of the DRAM class action and filed individual lawsuits against members of the alleged conspiracy. At that time, counsel for Oracle in this action, Crowell & Moring LLP, represented most opt-out plaintiffs.

Oracle did not initially name Micron as a defendant in its suit, but instead entered into a tolling agreement. Although Oracle thus had not "triggered" application of ACPERA by filing a "civil action" against Micron "based on conduct covered by [Micron's] currently effective antitrust leniency agreement" (**Exhibit A**, sec. 213(a)), its counsel nevertheless sent Micron a letter (on behalf of Oracle and another opt-out plaintiff), demanding Micron's cooperation. *See* Sanders Decl., **Exhibit C** (Sept. 12, 2006 letter). Because the other opt-out plaintiffs in the consolidated cases *had*

sued Micron, thus triggering Micron's cooperation obligations under ACPERA with respect to *those* plaintiffs, and because Crowell & Moring jointly represented most opt-outs, Micron provided and Oracle received substantial amounts of information relating to its claims. That information included, among other things, an explanation of the relevant facts to the extent known to Micron, all discovery that Micron had previously produced to plaintiffs in the DRAM class action, and witness interviews with eight key Micron employees. *See* Sanders Decl., ¶ 6 & **Exhibit D** (Micron cooperation letters).

After invoking ACPERA and receiving Micron's cooperation, Oracle settled its claims with the other defendants in the prior civil action and has now sued Micron. Although conceding that it previously "sought cooperation from Micron" (Oracle Br. 6 n.2), it has now declined Micron's repeated offers of additional cooperation in this litigation. *See* **Exhibit D**. Oracle has also filed the instant motion to strike Micron's reference to ACPERA in its answer.

ANALYSIS

Prior to ACPERA, all participants in an alleged conspiracy could be held, in a civil antitrust action, jointly and severally liable for three times the damages caused by the entire conspiracy. *See* 15 U.S.C. § 15; *Burlington Indus., Inc. v. Milliken & Co.*, 690 F.2d 380, 394 (4th Cir. 1982). By enacting ACPERA, Congress re-calibrated the remedies available for antitrust violations in order to provide an additional incentive for alleged conspirators to cooperate both with the government and with plaintiffs in civil litigation. Under ACPERA, a cooperating defendant's civil liability is reduced, by operation of law, to actual damages so long as it is a party to a "currently effective" antitrust leniency agreement and provides adequate cooperation to civil plaintiffs in "any civil action . . . based on conduct covered by" that agreement. *See* **Exhibit A**, sec. 213(a). That cooperation is specified in the statute and extends through discovery and trial. It includes providing plaintiffs with access to (1) all known "potentially relevant" facts, (2) all "potentially relevant" documents, and (3) officers, directors, and employees who may be needed for interviews, depositions, and trial testimony. *See id.*, sec. 213(b).

Although ACPERA limits civil plaintiffs' ability to recover from the cooperating defendant, plaintiffs receive in exchange valuable information that makes it easier to prove their allegations and recover damages against all other members of the alleged conspiracy. *See id.*, sec. 213(a), (b). And

ACPERA explicitly preserves plaintiffs' *total* potential recovery under the antitrust laws; they can still collect three times the amount caused by the entire conspiracy from any non-cooperating defendant. *See id.*, sec. 214(3). ACPERA thus regulates *post-enactment litigation* to incentivize amnesty applicants to cooperate and facilitate plaintiffs' eventual recovery, in exchange for a limitation on the damages that may be assessed against the cooperating defendant.

Because Micron is a party to a "currently effective" amnesty agreement, it amended its answer to add reference to ACPERA so as to alert the Court and Oracle of its intention to seek civil leniency. Docket Entry 47 at 31 (Apr. 18, 2011). Oracle now moves to strike that reference, effectively asking the Court for a premature assessment of its potential recovery against Micron.

As Oracle's own authorities make clear, "[m]otions to strike are not favored and should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *United States v. Cal. Dep't of Transp.*, 693 F. Supp. 2d 1082, 1086 (N.D. Cal. 2009) (internal quotation marks omitted). It is not appropriate to weigh facts on a Rule 12 motion, "unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *McArdle v. AT&T Mobility LLC*, 657 F. Supp. 2d 1140, 1150 (N.D. Cal. 2009) (internal citation omitted).

Oracle acknowledges that, in the previous litigation, "Oracle . . . sought cooperation from Micron" pursuant to ACPERA. Oracle Br. 6 n.2. Although Oracle claims that it would be an "extraordinary windfall" if Micron's exposure were limited to actual damages in this case (Oracle Br. 3), that civil leniency is the statutory *quid pro quo* for the cooperation Micron has provided (and will continue to provide) under the statute. Moreover, while Oracle complains—falsely, and without any evidentiary support—that "Micron provided no meaningful cooperation" (Oracle Br. 6 n.2), that *factual* matter cannot be resolved on a Rule 12(f) motion. Rather, this Court must assess Micron's cooperation, both in the past and in the future, when it comes time to apply the ACPERA damages limitation. *See In re TFT-LCD Antitrust Litig.*, 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009).

Oracle also implies that it requested cooperation in the previous litigation, but has declined to do so in this case, because it did not previously realize that "Micron's invocation of ACPERA to its amnesty agreement would require an unlawful retroactive application of the statute." Oracle Br. 6

n.2. Of course, the premise is false—ACPERA "applies" to this lawsuit, not the amnesty agreement—as is Oracle's bald conclusion that invocation of ACPERA here raises any retrospectivity concerns. More fundamentally, Oracle cannot avoid the civil damages limitation of ACPERA by waiving or foregoing its cooperation opportunity; if Oracle requests no cooperation, then Micron will have fully complied with the statute (and be entitled to the damages limitation) by providing none. If on the other hand Oracle wishes cooperation, Micron stands ready, willing, and able to cooperate. *See* **Exhibit D**.

I. ACPERA Raises No Retrospectivity Concerns Because The Statute On Its Face Applies To Post-Enactment Litigation Activity

Oracle's attempt to show that it would be retrospective to apply ACPERA in this litigation has no support in the text or structure of the statute. Micron's leniency agreement remains "currently effective" and was "entered into . . . on or before" ACPERA's sunset date. **Exhibit A**, secs. 211(b), 213(a). The statute requires nothing more. In addition, this case was filed after ACPERA was enacted, and any cooperation by Micron or assessment of damages could only occur after ACPERA's effective date. Under the plain language of the statute, ACPERA raises no problems of retrospective application here.

Oracle resists this straightforward conclusion by arguing that there is no "'unambiguous directive' or 'express command' from Congress found in the language of ACPERA that clearly sets forth the statute's temporal reach." Oracle Br. 8. As an initial matter, Oracle errs in asserting that, when Congress addresses issues of timing, it must speak in "statutory language that is so clear that it could sustain only one interpretation." *Id.* at 7 (citing *Landgraf*, 511 U.S. at 270). Oracle's error stems from its characterization of the *Landgraf* retrospectivity analysis as consisting of a "two-part" test. *Id.* at 6. To the contrary, *Landgraf* makes clear that analyzing the temporal reach of a statute requires a *three-step* analysis:

> **[1]** When a case implicates a federal statute enacted after the events in the suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. *If Congress has done so, of course, there is no need to resort to judicial default rules.*
>
> **[2]** When, however, the statute contains no such express command, the court must determine whether the statute would have retroactive effect, *i.e.*, whether it would

> impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.
>
> **[3]** If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280 (numerals, paragraph breaks, and emphasis added).

Under the three-step approach, a court does not apply the presumption against retrospectivity (or require a "clear statement") until the *third* step of the analysis, and then only *after* a court determines *first*, that the statute is silent or ambiguous with respect to its temporal reach, and *second*, that applying the statute would have an impermissible retrospective effect.

In another case, the Supreme Court rejected a similar attempt by a plaintiff to "put the cart before the horse" by requiring a "clear statement" before any examination of the statutory language at issue:

> [Petitioner] urges application of the presumption against retroactivity as a tool for interpreting the statute at the first *Landgraf* step. But if that were legitimate, . . . the final two steps in the *Landgraf* enquiry would never occur . . . . It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do.

Fernandez-Vargas v. Gonzales, 548 U.S. 30, 40 (2006); *see also Lindh*, 521 U.S. at 325 (rejecting argument that "in the absence of an express command regarding temporal reach, this Court must determine that temporal reach for itself by applying its judicial default rule governing retroactivity, to the exclusion of all other standards of statutory interpretation").

Oracle bases its entire submission on "put[ting] the cart before the horse." After invoking the inapposite "clear statement" rule, it then proceeds to cite excerpts from floor statements in the legislative history in support of its position that ACPERA cannot apply to civil leniency agreements that were entered into prior to ACPERA's enactment date. *See* Oracle Br. 8-9. What is missing from Oracle's analysis is any mention of the *text* of ACPERA itself, which demonstrates that ACPERA applies in any litigation involving a party to a "currently effective antitrust leniency agreement." **Exhibit A**, sec. 213(a). Because Micron is a party to a "currently effective antitrust leniency agreement," this case is decided by the "first" and "cardinal canon" of statutory construction—"courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

A. Step One: Congress Has Expressly Prescribed ACPERA's Temporal Reach

1. The Text And Structure Of ACPERA Make Clear That Micron Is Eligible For Civil Leniency Protection

ACPERA's damages limitation applies in "any civil action alleging a violation of section 1 . . . of the Sherman Act . . . based on conduct covered by a *currently effective* antitrust leniency agreement." **Exhibit A**, sec. 213(a) (emphasis added). This provision does not limit its reach to agreements that become effective after the enactment date; rather, it merely requires that (a) a plaintiff file a civil lawsuit based on conduct covered by the agreement, and (b) the agreement be "currently effective" at the time the defendant seeks to limit its liability. Had Congress wanted to limit ACPERA to post-enactment agreements, it would have required just a few words to do so. Congress instead elected not to include such a limitation. To the contrary, it used broad language covering all agreements that are "currently effective" at the time a civil action is filed or a defendant's cooperation assessed. Courts routinely presume that Congress's choice of words is intentional and interpret statutes accordingly. *See, e.g.*, *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 177 (1994); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975).

The "currently effective" language is not the only place where ACPERA addresses timing issues; it does so in *four other places* as well.

First, ACPERA specifically addresses the timing issue that is Oracle's chief (indeed, only) concern—when must an amnesty applicant enter into an agreement with the government to be eligible for civil leniency under ACPERA? The statute contains a "sunset" provision that initially provided that ACPERA was to expire five years after the date of enactment. **Exhibit A**, sec. 211(a). That provision makes clear that "an applicant who has *entered into* an antitrust leniency agreement *on or before the [sunset] date*" is eligible for protection under ACPERA. *Id.*, sec. 211(b) (emphases added). The statute contains no comparable "sunrise" language that would limit ACPERA's scope to agreements entered into "on or after" the enactment date. *Cf. U.S. Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314-15 (1908) (statute applicable to contracts "hereafter" entered into is limited to post-enactment agreements). Congress's decision *not* to include such a limitation to the plain words of the statute must be respected. *See, e.g.*, *Ark. Best Corp. v. Comm'r*, 485 U.S. 212, 217 (1988).

Indeed, since the initial enactment of ACPERA, Congress has amended this provision twice, in order to push out the "sunset" date from five to six years, and then to sixteen. *See* Antitrust Criminal Penalty Enhancement and Reform Act–Amendment, Pub. L. No. 111-190, 124 Stat. 1275 (2010); Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Pub. L. No. 111-30, 123 Stat. 1775 (2009). But despite the opportunity to do so, on neither occasion did Congress further restrict the universe of agreements covered by ACPERA to those "entered into" on or after the enactment date. This Court must honor this deliberate—and *repeated*—choice by Congress. Thus, contrary to the core contention of Oracle's brief, on which the rest of its analysis depends, ACPERA addresses when an amnesty agreement must be "entered into" to qualify for leniency and provides a clear answer—"on or before the [sunset] date." Because Micron's amnesty agreement was "entered into" before the sunset date, which has not yet arrived, it is entitled to the civil leniency provisions of ACPERA at the conclusion of this litigation.

Second, ACPERA defines the term "antitrust leniency agreement" as a "leniency letter agreement, whether *conditional or final*, between a person and the Antitrust Division . . . ." **Exhibit A**, sec. 212(2) (emphasis added). Under the statute's plain language, protection under ACPERA extends to any party to a "conditional" amnesty agreement—and indeed, even to a "*final*" amnesty agreement—as of the date ACPERA was enacted. On ACPERA's enactment date, Micron was a party to a "conditional" amnesty agreement. That agreement then became "final" when the Antitrust Division concluded its investigation into alleged price-fixing in the DRAM industry in March 2008, *after* ACPERA was enacted, and *after* Micron provided substantial ongoing cooperation with the Antitrust Division, including by making executives available to testify in the *Swanson* criminal trial in this Court in February 2008. Up until March 2008, Micron's amnesty agreement with the Antitrust Division could be revoked "at any time" for failure to cooperate. *See* **Exhibit B**, Micron Amnesty Agreement, at 2.

These substantial, real-world obligations that Micron undertook after ACPERA was enacted and before its leniency agreement became "final" belie Oracle's attempt to frame ACPERA as a statute concerned *solely* with the discrete date that an amnesty applicant initially entered into an agreement with the government. Rather, "conditional" leniency agreements continue to impose

obligations on applicants, and only those "conditional" applicants who remain in the government's good graces throughout related civil litigation will have a "currently effective" agreement in place at the time that a court assesses damages under ACPERA. If Congress's only purpose in enacting ACPERA was to provide incentives for a participant in a cartel to initially disclose the existence of a conspiracy, it would not have explicitly made ACPERA applicable to "conditional" amnesty agreements, or required that such agreements remain "currently effective" throughout the civil case. Congress's recognition that leniency agreements impose ongoing obligations on applicants confirms that it is not retrospective to apply ACPERA in cases involving pre-enactment agreements. *See, e.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897) (holding that Congress could regulate action taken pursuant to pre-enactment agreements under the Sherman Act because even "[a]ssuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act").

Third, Congress made civil leniency available to an amnesty applicant named as a defendant in "*any* civil action" based on conduct covered by an amnesty agreement. **Exhibit A**, sec. 213(a) (emphasis added). The Supreme Court has held that "any" is a word of inclusion, not exclusion. *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Congress could easily have limited civil leniency to that subset of civil actions based on conduct covered by post-enactment agreements; instead, it made ACPERA's protections available in "any" civil action based on an agreement that is "currently effective." That choice must be respected.

Fourth, and finally, Congress addressed timing issues yet again in a stand-alone section of ACPERA labeled "Timeliness." **Exhibit A**, sec. 213(c). That section provides that, in cases where a Sherman Act defendant initiates cooperation with the Antitrust Division only after a civil action or state proceedings have been filed against it, a court shall consider the timeliness of the applicant's cooperation with civil plaintiffs in determining whether or not to grant civil leniency. *Id.* Again, the section did not exclude or otherwise limit civil leniency protections for amnesty agreements that were already in place prior to enactment of the statute.

Oracle's approach to retrospectivity, which has no basis in the statutory text or structure, proceeds instead from the false and unproven premise that it *must* be relevant to (indeed, dispositive of) the retrospectivity analysis that Micron entered into a leniency agreement with the government prior to ACPERA's enactment. Under *Landgraf* and its progeny, however, Oracle needs to substantiate its assumption that application of ACPERA *depends* on the timing of a leniency agreement through careful attention to what Congress *actually said* about the statute's temporal reach. *Landgraf*, 511 U.S. at 280; *Lindh*, 521 U.S. at 325. Here, Congress specifically considered (in several places) the question of which agreements would be operative under ACPERA and did not exclude those that predate ACPERA—to the contrary, it included all "currently effective" agreements "entered into . . . on or before the [sunset] date." Because Oracle is incorrect that ACPERA is silent as to its "temporal reach," (Oracle Br. 8), there is no need to inquire whether the statute would have retrospective effects or to apply the presumption against retrospectivity.

2. The Operation Of ACPERA Confirms Its Prospective Application

The operation of ACPERA further confirms the conclusion that the statute applies prospectively to post-enactment litigation activity, not the date that an amnesty applicant enters into an agreement with the federal government. As the Supreme Court has counseled, an "uncontroversially prospective statute[] . . . 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" *Landgraf*, 511 U.S. at 270 n.24 (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)). ACPERA is "uncontroversially prospective" because it regulates the cooperation obligations of an amnesty applicant and the assessment of damages in an antitrust case—*neither* of which has yet occurred here. At most, application of ACPERA in this case *presupposes* that Micron entered into a leniency agreement at some earlier date—because it needs to be a party to a "currently effective" agreement to be entitled to civil leniency. But this Court has no need under ACPERA to inquire precisely *when* Micron's agreement was executed. And even if it did, and it were fair to say in this limited sense that ACPERA "draws upon antecedent facts for its operation," that does not transform a forward-looking statute into a retrospective one. *Landgraf*, 511 U.S. at 270 n.24; *see also McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993) ("a statute does not operate retroactively simply because its application requires some reference to antecedent facts").

"The determination of whether a statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date." *McAndrews*, 989 F.2d at 13 (citing *Cox*, 260 U.S. at 434-35); *see also Travenol Labs., Inc. v. United States*, 118 F.3d 749, 752 (Fed. Cir. 1997) (same). The text of ACPERA points to two possible "trigger" dates. First, the statute is "triggered" at the time that an antitrust plaintiff files suit, because an amnesty applicant's cooperation obligations commence upon the filing of "any civil action . . . based on conduct covered by a currently effective antitrust leniency agreement." **Exhibit A**, sec. 213(a), (b). Second, the statute is "triggered" at the time that a court, at the conclusion of an antitrust case, "determines, after considering any appropriate pleadings from the [plaintiff]," whether the defendant has "provided satisfactory cooperation to the [plaintiff] with respect to the civil action." *Id.*, sec. 213(b). Both of these triggering events occurred in this case only after ACPERA was enacted.

The facts of this case bear substantial similarity to those in *Cox v. Hart*, one of the historical antecedents to *Landgraf*. In that case, the issue was whether a party could take advantage of a law permitting occupation and use of unsurveyed desert land to anyone "who has, prior to survey, taken possession of [the land] . . . and has reclaimed or has in good faith commenced the work of reclaiming the same[.]" 260 U.S. at 430. The party seeking the statute's protection had "taken possession of" and "reclaimed" the land prior to the statute's enactment, and a competing claimant argued that applying the statute to her would be impermissibly retrospective. *Id.* The Supreme Court disagreed, because a person who "[took] possession" and "reclaimed" the land prior to the enactment date, "no less than one who acted subsequently, is within the words of the proviso," and "[n]o reason is perceived why the words employed should not be given their natural application." *Id.* at 435. The Court concluded that "this does not give the proviso a retroactive operation"; rather, "[t]he language in terms applies to one who at the time of the enactment occupied a particular status, *viz.*, the status of a person who has done the things enumerated." *Id.*

The same result obtains here. When ACPERA was enacted (and thereafter), Micron "occupied a particular status"—specifically, party to an effective antitrust leniency agreement. Thus, applying ACPERA to this post-enactment lawsuit "does not give the proviso a retroactive operation."

Cox, 260 U.S. at 435. Indeed, Oracle's argument is one step further removed from the rule articulated in *Cox*, because a court never needs to "draw" upon the effective date of Micron's leniency agreement for the "operation" of ACPERA, any more than it need determine when Micron was incorporated, when it sold DRAM chips, or a host of other antecedent factual matters. Rather, this Court need only determine, if and when it comes time to assess damages in this case, whether Micron's cooperation with Oracle was sufficient. The cooperation and damages assessment are both *prospective* activity, and thus Oracle's concerns about *retrospective* application are misplaced.

Micron's position finds additional support in Chief Justice Marshall's seminal decision in *United States v. Schooner Peggy*, 5 U.S. (2 Cranch) 103 (1801), also cited favorably in *Landgraf*. In that case, a lower court issued a decree condemning a French vessel that had been seized in American waters. While on appeal to the Supreme Court, the United States and France entered into a treaty that provided for the restoration of captured property "not yet definitively condemned." *Id.* at 107. Although the ship in question had been seized and a court order issued prior to enactment of the treaty, the Supreme Court found that the statute's language provided for restoration of the property, because the ship was not "definitively" condemned until Supreme Court review was exhausted. *Id.* Chief Justice Marshall reasoned that when "a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* at 110. Although the Court acknowledged the rule that "a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties," a law affecting matters of national importance "ought always to receive a *construction conforming to its manifest import*." *Id.* (emphasis added); *see also Landgraf*, 511 U.S. at 273 (explaining *Schooner Peggy* as "simply a response to the language of the statute"). Likewise here, the plain text of ACPERA compels the conclusion that Micron, a party to a "currently effective" leniency agreement, is eligible for civil leniency protection in "any civil action" relating to "conduct covered" by the amnesty agreement—including Oracle's post-enactment lawsuit.

Similarly, in *Trans-Missouri Freight Association*, the Court found that it was not impermissibly retrospective to apply the recently enacted Sherman Act in cases involving agreements that were entered into prior to the statute's enactment date. 166 U.S. at 290. In *Trans-Missouri*

Freight, railroad companies entered into an agreement, one year before the Sherman Act was enacted, to create an association to fix the prices of freight transportation. *Id.* at 291, 294. The association argued that the Sherman Act was impermissibly retrospective as applied to its pre-enactment agreement. *See id.* at 342. The Supreme Court rejected this argument, because the agreement continued in effect after the Sherman Act was enacted, and thus, it was not retrospective to apply the newly-enacted law to the continuation of the unlawful conduct. *See id.* ("Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act"). Likewise, while Micron's leniency agreement was "first entered into" prior to ACPERA's enactment date, the "continuation" of obligations under the leniency agreement could be regulated after ACPERA became law. As noted above, Micron's leniency agreement continued to impose obligations on Micron after the enactment of ACPERA—notably, providing the Antitrust Division with substantial cooperation and making top executives available to testify in the prosecution of a Hynix executive. Therefore, as the original Sherman Act could apply in lawsuits involving unlawful agreements that predated its enactment but remained in effect, so can ACPERA (effectively an amendment to the Sherman Act) apply in lawsuits involving leniency agreements that predate its enactment but remain in effect.

More recently, in *Fernandez-Vargas*, the Court considered whether an immigration statute that foreclosed certain previously available forms of relief to aliens who reentered the country illegally after a prior deportation applied to an alien who reentered before the statute's effective date. 548 U.S. 30. The statute provided that if "the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal," the prior order of removal will be reinstated, the alien "is not eligible and may not apply for any relief" from removal, and "the alien shall be removed . . . at any time after the reentry." *Id.* at 34-35. Because the statute on its face applied to any alien who "has reentered the United States illegally," the Court found that "[c]ommon principles of statutory interpretation fail to unsettle the apparent application of [the law] to any reentrant present in the country, whatever the date of return." *Id.* at 41-42. The Court found this "facial reading . . . confirmed" in part by the fact that "the text of th[e] provision . . . show[s] that it applies to [the alien] today not because he reentered . . . at any . . .

particular time, but because he *chose to remain* after the new statute became effective." *Id.* at 42-43 (emphasis added). In other words, the "trigger" for application of the law was not the antecedent fact of the alien's reentry, but the post-enactment fact of the alien's continued unlawful presence in the country.

The same textual approach, applied here, entitles Micron to ACPERA's protection. As in *Fernandez-Vargas*, the "trigger" for application of ACPERA is not the antecedent fact that Micron entered into an amnesty agreement, but rather Oracle's post-enactment decision to file a lawsuit against Micron (and any judicial determination of damages that might occur in this lawsuit). ACPERA's operation, like that of the laws at issue in *Cox*, *Schooner Peggy*, and *Fernandez-Vargas*, confirms that the statute applies to prospective litigation activity.

3. Applying ACPERA To This Case Would Further The Statute's Purposes

Oracle suggests that this Court should not apply ACPERA according to its plain language because doing so would not further the purposes of the statute. Oracle Br. 8-9. But the purpose of an enactment cannot override its text. *See, e.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993); *Van Orden v. Perry*, 545 U.S. 677, 731-32 (2005). Thus, even if Oracle were correct that the only purpose underlying ACPERA were "to incentivize companies that had not yet come forward to confess their participation in cartels to do so" (Oracle Br. 9), applying the damages limitation to unintended situations that fall within its plain text would still be required by law.

In any event, incentivizing initial cooperation with law enforcement is *not* the sole purpose underlying ACPERA. To the contrary, as noted above, the statute also provides an additional incentive for parties to "conditional" amnesty agreements to continue to cooperate with the Antitrust Division throughout its investigation until their agreements become "final." Micron's duty to cooperate with the government under its "conditional" amnesty agreement persisted *for years* after ACPERA was enacted, until its amnesty agreement became final in March 2008. Indeed, the very excerpts of legislative history cited by Oracle show that members of Congress cared at least as much about incentivizing *cooperation* with the Antitrust Division as they did about the initial *disclosure* of the cartel. *See, e.g.*, 150 Cong. Rec. S3610-02, S3613 (2004) (ACPERA provides "increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators *and cooperate*

with [DOJ]") (statement of Sen. Hatch; emphasis added); *id.* at S3619 (ACPERA's civil leniency provisions "provide[] a far greater incentive for corporations *to cooperate with the Antitrust Division*") (statement of Senator DeWine; emphasis added). Anti-competitive conduct is not revealed, explained, understood, and successfully prosecuted in a day. It takes time, which is why ACPERA provides an incentive for a "conditional" amnesty applicant to continue to cooperate with the government, to ensure that it has a "currently effective" agreement in place if and when a court assesses damages.

Moreover, Congress did not intend merely to create incentives to cooperate *with the government*; to the contrary, the statute explicitly conditions the damages cap on "satisfactory cooperation" *with plaintiffs in related civil actions*. **Exhibit A**, sec. 213(b). The legislative history confirms that this was a central concern animating passage of the statute, and that legislators believed that such cooperation would help antitrust plaintiffs fully recover for their injuries. *See, e.g.*, 150 Cong. Rec. 150 Cong. Rec. S3610-02, S3614 ("The legislation requires the amnesty applicant to provide full cooperation to the victims as they prepare and pursue their civil lawsuit. . . . I expect that the total compensation to victims of antitrust conspiracies will be increased because of the requirement that amnesty applicants cooperate.") (statement of Sen. Hatch); 150 Cong. Rec. H3654, H3659 (2004) ("The Department of Justice will only grant . . . leniency [under ACPERA] if the company provides adequate and timely cooperation to both the government and any subsequent private plaintiffs in civil suits") (statement of Rep. Scott); *id.* at H3660 (statement of Rep. Conyers).

The availability of the ACPERA damages limitation provides a powerful incentive for parties with existing amnesty agreements to cooperate not only with government entities but also in the civil actions that inevitably follow public disclosure of the underlying facts. Micron has repeatedly offered Oracle that very cooperation in this case. *See* **Exhibit D**. It would not be an "extraordinary windfall" (Oracle Br. 3) to provide Micron with the statutorily-mandated reduction in civil damages in exchange for the substantial cooperation required by statute. Rather that is the *quid pro quo* enacted by Congress. And the ultimate determination whether Micron satisfactorily cooperated with Oracle, and thus whether Micron's damages are limited under ACPERA, lies in the future at the end of this litigation—not in the past.

B. Step Two: Application of ACPERA In Civil Actions Commenced After Its Enactment Has No Impermissibly Retrospective Effect

Because enforcement of ACPERA's civil damages limitations to this case plainly involves post-enactment activity, there is no need to inquire whether applying the statute to Micron would have an impermissible retrospective effect; that is, whether it would, among other things, "take[] away or impair[] vested rights acquired under existing law," or "attach[] new legal consequences to events completed before its enactment." Oracle Br. 10 (quoting *Landgraf*, 511 U.S. at 280). But application of this test further confirms that ACPERA raises no retrospectivity issues.

Oracle claims that applying ACPERA in these cases would attach new legal consequences to pre-enactment conduct because it "eliminate[s] . . . joint-and-several liability and treble damages" for Micron's alleged anti-competitive activity. Oracle Br. 10. But *Landgraf* makes clear that statutes that regulate "secondary conduct," or conduct in litigation, do not raise the same retrospectivity concerns as statutes that regulate "primary conduct," or the conduct that gives rise to a cause of action. 511 U.S. at 275; *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (distinguishing for retrospectivity purposes between statutes that "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties"). Because the "primary conduct" of which Oracle complains remains just as actionable under the antitrust laws today as it was before ACPERA was enacted, the application of a different remedial scheme to those claims (*i.e.*, "secondary conduct") does not make the statute impermissibly retrospective. And Oracle makes no argument, nor could it, that *its own* "primary conduct"—its purchase of DRAM chips from Micron and others—would have been any different had ACPERA been the law at the time.

The fact that Congress has not eliminated Oracle's *cause of action* distinguishes this case from *Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000), on which Oracle relies, which held that Congress's effective extinguishment of a cause of action was impermissibly retrospective. *See id.* at 944-45 ("the PSLRA has retroactive effect because prior to the PSLRA a plaintiff had a RICO claim based on a defendant['s] alleged securities fraud, while afterwards a plaintiff does not"). ACPERA, by contrast, merely reduces an antitrust plaintiff's potential recovery against a cooperating defendant

(without disturbing potential total recovery against co-conspirators). Plaintiffs' cause of action against Micron and the other members of the alleged conspiracy remains intact.

Oracle complains, however, that applying ACPERA in this case would "dramatically diminish Oracle's pre-existing right to recovery under the U.S. antitrust laws." Oracle Br. 10-11. The underlying premises are that ACPERA reduces Oracle's potential recovery under the antitrust laws, and that that reduction in potential extra-compensatory damages is an impermissible retrospective effect. Neither is correct.

First, ACPERA's civil leniency provisions do not reduce the total amount that a plaintiff may recover in damages; rather, they merely adjust *who* is liable. The text of ACPERA explicitly provides that a plaintiff may still seek three times the amount of damages caused by the entire unlawful conspiracy from any party "other than that of the antitrust leniency applicant." **Exhibit A**, sec. 214(3). Indeed, ACPERA's co-sponsors in Congress touted the fact that the statute did not reduce potential damages as one of its signature benefits. *See* 150 Cong. Rec. S3610-02, S3614 ("because all other conspirator firms would remain jointly and severably liable for three times the total damages caused by the conspiracy, the victims' potential total recovery would not be reduced by the amendments Congress is considering") (statement of Sen. Hatch); *id.* at S3615 ("while a party that receives leniency would only be liable for the portion of the damages actually caused by its own actions, the rest of its non-cooperating co-conspirators would remain jointly and severally liable for the entire amount of damages, which would then be trebled, to ensure that no injured party will fail to enjoy financial redress") (statement of Sen. Leahy).

Thus, Oracle's claims of "entitlement" to treble damages and joint-and-several liability (Oracle Br. 10-12) amount to a mere policy disagreement with Congress that its total recovery under the antitrust laws would be maximized if Micron were jointly and severally liable for the entire amount authorized by statute, rather than if Micron served as a conduit of information that could be used against it and its co-conspirators at trial. This policy disagreement over the best means of ensuring recovery against multiple defendants is not a cognizable "vested right" that could trigger the presumption against retrospectivity. *See, e.g.*, *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974) (fee statute had no retrospective effect because "there was no change in the substantive

obligation of the parties"; rather, applying the statute retrospectively "merely serve[d] to create an additional basis or source for the . . . potential obligation to pay attorney's fees").

Second, parties have no "vested right" to recover more than actual damages in litigation; rather, the availability of extra-compensatory remedies is a matter of legislative grace that *always* remains subject to amendment by Congress. *See*, *e.g.*, *Smith v. Wade*, 461 U.S. 30, 52 (1983) ("punitive damages . . . are never awarded as of right, no matter how egregious the defendant's conduct"); *see also, e.g.*, *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 508 (1st Cir. 1996); *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 739 (8th Cir. 1985). That principle applies with particular force here, where Oracle filed its lawsuit six years *after* ACPERA was enacted. Having chosen to file a lawsuit in a post-ACPERA world, Oracle can hardly complain that the procedural rules governing damages were adjusted mid-stream. *Cf. Martin v. Hadix*, 527 U.S. 343, 354 (1999) (addressing "recurring question in the law" of "[w]hen should a new federal statute be applied to *pending cases*") (emphasis added); *Landgraf*, 511 U.S. at 283 (same). Moreover, Oracle cannot attempt to establish any "right" to treble damages or joint and several liability unless and until it proves Micron's liability for *actual* damages in this lawsuit, a contingency which has not yet ripened and which once again illustrates that ACPERA applies *prospectively* in this case to a *future* assessment of damages—one that may never materialize if Micron prevails at trial.

The distinction between legislative changes in "remedies" and legislative changes in "rights" flows from the distinction between primary and secondary conduct in *Landgraf* and its progeny. "Retroactive modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability," because "[s]uch modifications do not transform a legal act into an illegal act, or render one responsible to safeguard someone previously thought to act at his peril." *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir. 1980). Rather, "[m]odification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known." *Id.* at 93-94; *see also Sampeyreac v. United States*, 32 U.S. 222, 240 (1833) (a law that operates on preexisting causes of action does not raise due process concerns, "so far as it applies to the remedy, and does not affect the right"). Thus, while Oracle emphasizes that Micron supposedly was "well aware—and accepted, that

it would be subject to joint-and-several liability and treble damages in any civil action" (Oracle Br. 4), Oracle undoubtedly was "well aware," and "accepted," that Micron would *not* be subject to such liability when it filed suit against Micron in 2010—after the enactment of ACPERA.

Indeed, at least one district court has recognized that a law firm that accepted cooperation under ACPERA in exchange for an agreement not to pursue treble damages against the cooperating entity "ha[d] not waived the plaintiffs' rights" or "disposed of the claims" in that case. *In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184, 187 (S.D.N.Y. 2008). Rather, as in that case, applying ACPERA in this litigation would "merely reduce[] the amount of damages that [Oracle] may seek directly from [Micron]," while "expressly reserv[ing] [Oracle's] right to seek treble damages from each of the other [members of the conspiracy], who remain potentially jointly and severally liable for the total damages caused by the alleged conspiracy, including those attributable to [Micron]." *Id.* In short, Oracle is too blunt when it claims that "if a statute takes away a party's right to a remedy, it has an impermissible retroactive effect." Oracle Br. 11. Reducing a *remedy* does not eliminate a *right*—and in this instance, Oracle's total potential recovery was not reduced by *one dollar* when ACPERA was enacted.

ACPERA reflects Congress's considered judgment that it would increase the likelihood of a plaintiff's recovery under the antitrust laws to eliminate one potential *source* of make-whole damages—a cooperating defendant—and in exchange give a plaintiff the ability to enlist that defendant's aid in obtaining information outside the formal discovery process. Oracle has already received substantial cooperation from Micron in connection with other antitrust cases that also are governed by ACPERA, which undoubtedly assisted Oracle in settling civil cases against other members of the alleged conspiracy. That Oracle ultimately decided to settle those cases, and thus cannot use any *future* cooperation from Micron in this litigation as evidence against those alleged co-conspirators, was a strategic litigation decision that cannot create a judicially enforceable "vested right." *Cf. Fernandez-Vargas*, 548 U.S. at 44 ("vested rights" for purposes of retrospectivity analysis "describe[] something more substantial than inchoate expectations and unrealized opportunities"). Nor would it be retrospective for Micron to perform its cooperation obligations under ACPERA in

this case, as it has repeatedly expressed its willingness to do, or for this Court to assess potential damages at the close of trial.

C. Step Three: Any Clear Statement Requirement Is Satisfied Here

Even if this Court were to find that (a) ACPERA is silent as to its temporal reach, and (b) ACPERA has an impermissible retrospective effect, Congress nevertheless spoke with sufficient clarity here to overcome any presumption against retrospectivity that may apply.

"Clear statement" requirements do not require the use of any "set phrase[s]" or magic words. *Maldonado-Galindo v. Gonzales*, 456 F.3d 1064, 1067 (9th Cir. 2006). Rather, the purpose of a "clear statement" rule is simply to "ensure[] that Congress has specifically considered [an issue] and has intentionally legislated on the matter." *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (internal citation omitted); *Landgraf*, 511 U.S. at 272-73 ("[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits").

Here, Congress has "specifically considered" and "intentionally legislated" on the topic of what types of leniency agreements are covered under ACPERA: *all* "currently effective" agreements. Moreover, Congress went further and specified *when* such agreements must be "entered into": "on or before" the sunset date. Micron's agreement fits all the statutory criteria. Indeed, Oracle cites approvingly to several Ninth Circuit cases for the proposition that the language "before, on, or after the date of enactment" is sufficiently clear to overcome the presumption against retrospectivity. Oracle Br. 8 (citing *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 940 (9th Cir. 2005); *Oluwa v. Gomez*, 133 F.3d 1237, 1240 (9th Cir. 1998)). Oracle simply ignores the fact that ACPERA contains *substantially similar* language on the *precise* issue of timing it identifies: "With respect to an applicant who has *entered into* an antitrust leniency agreement *on or before the* [sunset] date," ACPERA's civil leniency provisions "shall continue to have effect." **Exhibit A**, sec. 211(b). Under Oracle's own authorities, no further language is needed to show that Congress was aware of the concerns about timing it raises and addressed them in the statute itself.

II. Oracle Is Barred By Principles Of Equitable Estoppel From Challenging ACPERA's Application To This Case

Oracle admits that "[i]n a prior antitrust litigation brought against other DRAM suppliers, Oracle . . . sought cooperation from Micron" under ACPERA, and Micron provided Oracle with material that it had previously produced in other opt-out cases (Oracle Br. 6 n.2; *see also* **Exhibit C**)—even though Oracle had not yet sued Micron and thus did not owe Oracle any duties under *either* ACPERA *or* Rule 26 of the Federal Rules of Civil Procedure. The information that Oracle received included all known facts relating to the alleged conspiracy, all potentially relevant documents, and access to all relevant witnesses requested for interviews and depositions. *See* **Exhibit D**. Under principles of equitable estoppel, Oracle cannot now raise the retrospectivity issue to prevent application of ACPERA's limitations on damages.

In this context, the doctrine of equitable estoppel provides that "a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects." *First Am. Disc. Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1016 (D.C. Cir. 2000) (quoting *Kaneb Servs., Inc. v. FSLIC*, 650 F.2d 78, 81 (5th Cir. 1981)). This doctrine precludes Oracle's retrospectivity argument here.

Oracle may argue that equitable estoppel applies to misrepresentations of fact, not inconsistent positions of law. But that is incorrect. Although equitable estoppel *may* be based on a party's misrepresentation of fact, another type of estoppel, sometimes called "quasi-estoppel," "has its basis in election, waiver, ratification, affirmance, acquiescence, or acceptance of benefits," and "applies when it would be unconscionable to allow a person to maintain a position that is inconsistent with one to which . . . he or she accepted a benefit." 31 C.J.S. *Estoppel and Waiver* § 146 (2010). "Quasi-estoppel is a species of equitable estoppel, but unlike equitable estoppel, it does not require . . . as a necessary ingredient the concealment or misrepresentation of existing facts." *Id.*

The Supreme Court has repeatedly applied this type of equitable estoppel where one party seeks and obtains the benefits of a *legal rule*, but later attempts to avoid its burdens. For example, in *Electric Co. v. Dow*, 166 U.S. 489, 492 (1897), the parties agreed to submit their dispute to a jury

under the General Mill Act, which provided for recovery in the amount of the jury's verdict, plus a fifty percent increase. The plaintiff was awarded a verdict, at which point the defendant challenged the validity of the fifty percent markup. *See id.* The Court concluded that the defendant was estopped from raising this claim, because it "accepted the powers and rights conferred by the act . . . , and joined in the proceedings for the assessment of damages." *Id.* "It must, therefore, be deemed to have agreed that the damages should be assessed in the manner provided for in the act." *Id.*

Other examples abound. *See, e.g.*, *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 502 (1955) (party who sought and obtained order from Federal Power Commission that served as condition of merger could not later challenge that order while retaining its benefits); *Exch. Trust Co. v. Drainage Dist.*, 278 U.S. 421, 425 (1929) (party who sought and obtained annexation of government land and enjoyed its benefits could not later challenge the validity of assessments made on that land as result of acquiring title); *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 411 (1917) ("appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them"); *Winslow v. Baltimore & Ohio R.R.*, 208 U.S. 59, 62 (1908) (noting that party could not "ratify [a] condemnation [of land] by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled"); *First Am. Disc. Corp.*, 222 F.3d at 1016 (party accepting financial benefits of CFTC rule could not later challenge the rule as procedurally invalid).

Indeed, the Ninth Circuit applied this theory of estoppel in *Building Syndicate Co. v. United States*, 292 F.2d 623 (9th Cir. 1961). In that case, a corporation took depreciation deductions for eighteen years on the basis that it was the owner of a piece of commercial real estate. *Id.* at 625. The corporation later defaulted and transferred its assets to a nominal successor corporation, which proceeded to claim an added deduction on the basis that it was not the same entity as the previous owner. *Id.* The court noted that it had previously "passed approvingly" on the doctrine of quasi-estoppel, which "is sometimes expressed in the language of the rule or maxim that one cannot blow both hot and cold." *Id.* at 626 (citing *Tozzi v. Lincoln Nat'l Life Ins. Co.*, 103 F.2d 46 (9th Cir. 1939)). The Ninth Circuit thereby found the corporation's tax claim equitably estopped: "Having

received a tax benefit over a period of 18 years by its assertion of ownership, appellant should not now be permitted to receive a further very substantial benefit by changing its position." *Id.* at 626.

The same result obtains here, where Oracle challenges application of the very statutory damages provision that it earlier invoked to obtain cooperation in aid of its claims against other, non-cooperating members of the alleged conspiracy. Because Oracle has already accepted *benefits* by invoking a legal rule, including access to all documents and witnesses at Micron's command that could assist it in litigating its claims, Oracle must now live with the *costs* of that rule.

To be sure, Oracle contests the adequacy of Micron's cooperation, but that factual issue cannot be resolved at this time. Rather, Micron's cooperation obligations under ACPERA in this litigation remain ongoing and this Court cannot determine the adequacy of that cooperation unless and until the case proceeds to judgment. *See In re TFT-LCD Antitrust Litig.*, 618 F. Supp. 2d at 1196. In the meantime, Micron stands prepared to provide Oracle with all of the cooperation that ACPERA requires. *See* **Exhibit D**. Oracle cannot, however, accept the benefits of Micron's past cooperation while avoiding the costs of ACPERA by claiming that the statute would be impermissibly retrospective. Such gamesmanship is forbidden under principles of equitable estoppel.

CONCLUSION

Oracle's motion to strike Micron's twenty-first affirmative defense should be denied. The future application of ACPERA's civil leniency provisions in this case will raise no problem of retrospectivity.

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Respectfully submitted,

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