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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

PLAINTIFF ORACLE AMERICA, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO STRIKE MICRON'S TWENTY-FIRST AFFIRMATIVE DEFENSE

Hon. Phyllis J. Hamilton

Date: July 20, 2011
Time: 9:00 a.m.
Location: Courtroom 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

Trial Date: None set

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INTRODUCTION

Micron does not dispute that it contacted the U.S. Department of Justice ("DOJ") and requested amnesty from criminal prosecution for its admitted role in an international price-fixing cartel among DRAM suppliers two years before President George W. Bush signed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004) ("ACPERA"), into law on June 22, 2004. Nor does Micron dispute that it entered into its amnesty agreement with full knowledge and acceptance of the fact that it would be responsible for both joint and several liability and treble damages in any civil litigations stemming from its admitted role in the illegal DRAM conspiracy. Micron now seeks to shirk this responsibility through retroactive application of ACPERA. Micron's position, however, is based on three arguments that ignore or misstate relevant case law, statutory language, and legislative history indicating that ACPERA was meant only to provide additional incentives for *future* whistle-blowers to report their anticompetitive activities, not a windfall for *past* amnesty applicants.

First, Micron fails to demonstrate that Congress has expressly commanded that ACPERA apply to pre-enactment amnesty agreements. Micron argues that the statute's application to "*any civil action* . . . based on conduct covered by a *currently effective* antitrust leniency agreement" shows that Congress intended for the statute to apply to amnesty agreements entered before its enactment. This argument fails. Both the U.S. Supreme Court and the Ninth Circuit have rejected Micron's argument that general language applying a statute to "any action" is sufficient to permit retroactive application. *See Martin v. Hadix*, 527 U.S. 343, 354 (1999); *see also Scott v. Boos*, 215 F.3d 940, 944 (9th Cir. 2000). To apply retroactively, a law must contain language explicitly permitting it; otherwise, a statute is presumed to apply only to future conduct. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Martin*, 527 U.S. at 353. Further, instead of defining ACPERA's temporal reach, the language cited by Micron merely identifies one of the many substantive requirements that a post-enactment amnesty applicant must satisfy for ACPERA's civil leniency provisions to apply. *See Martin*, 527 U.S. at 353.

Second, Micron argues that applying ACPERA here would not be retroactive because the relevant conduct is "post-enactment litigation activity," not Micron's pre-enactment conduct

seeking amnesty and entering into a leniency agreement with DOJ. But the Ninth Circuit has squarely rejected Micron's argument, holding that the relevant conduct for retroactivity analysis is the underlying conduct giving rise to litigation, not the litigation itself. *See Scott*, 215 F.3d at 940. Moreover, Micron does not dispute that applying ACPERA here would have the effect of depriving Oracle of its statutory rights to hold Micron jointly and severally liable and to obtain treble damages from Micron – rights it concedes Oracle had at the time Micron entered its amnesty agreement – and likewise would dramatically alter, and reduce, the civil liability Micron faced and accepted when it entered DOJ's amnesty program in 2002.

Third, Micron argues that Oracle should be estopped from challenging ACPERA's application here because Micron purportedly provided some limited "cooperation" to Oracle in a prior litigation. Micron, however, previously took the exact opposite position, emphasizing to Oracle in that litigation that any "cooperation" it might provide was neither required nor provided pursuant to ACPERA. And as Micron admits, it did not rely on any representation by Oracle regarding ACPERA's application to that litigation, nor did it provide Oracle with anything Oracle was not entitled to in civil discovery.

For these reasons, Micron's twenty-first affirmative defense fails as a matter of law and, therefore, should be stricken from Micron's Answer.

ARGUMENT

I. The Ninth Circuit Repeatedly Has Held That *Landgraf* Applies A Two-Step Retroactivity Analysis, And Micron's Argument Otherwise Is Simply Wrong

Micron's Opposition can – and should – be readily dismissed because it is based almost entirely on a single, fundamental error of law. Micron contends: "Oracle's error stems from its characterization of the *Landgraf* retrospectivity analysis as consisting of a 'two-part' test. To the contrary, *Landgraf* makes clear that analyzing the temporal reach of a statute requires a ***three-step analysis***." Opp. at 6 (emphasis added). With the exception of its throw-away equitable estoppel argument, Micron hangs its entire Opposition on this "three-step analysis." *Id.* at 6-21.

But Micron is mistaken. Not only does *Landgraf* itself make this clear, but the Ninth Circuit has time and time again held that "[u]nder [*Landgraf*], determination of whether a

regulation or statute is impermissibly retroactive requires a ***two-step analysis***." *Kankamalage v. I.N.S.*, 335 F.3d 858, 862 (9th Cir. 2003) (emphasis added); *see also, e.g.*, *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 939 (9th Cir. 2005) ("[T]he Court articulated a two-step approach for evaluating when the normal presumption against retroactivity should not apply."); *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1998) ("In *Landgraf*, the Court created a two-step inquiry for determining whether to apply a statute to pending cases."); *Phillips v. New Century Fin. Corp.*, Case No. 06-cv-050692, 2006 WL 517653, at *5 (C.D. Cal. Mar. 1, 2006) ("The Court's inquiry into the retroactivity of section 311(a) [of the Fair Credit Reporting Act] is guided by the two-step analysis set forth in [*Landgraf*]").

Moreover, the Ninth Circuit has applied precisely the same two-step analysis Oracle articulated and applied in its Motion: "First, we must determine whether the statute or regulation clearly expresses that the law is to be applied retroactively. If it does, then the statute or regulation may be applied as such. However, if the statute or regulation does not contain an express command that it be applied retroactively, we must go to the second step which requires us to determine whether the statute or regulation would have a retroactive effect." *Kankamalage*, 335 F.3d at 862; *see also* Motion at 7, 10. In addressing these steps, Micron does not dispute that the *Landgraf* test requires an "unambiguous," "express command" in a statute authorizing retroactive application, but it contends that this "express command" is only considered in Micron's invented "third step." Micron again cites no authority for this contention, and its argument is illogical.[1]

[1] The cases cited by Micron actually undermine its argument. Opp. at 7. *Lindh v. Murphy*, 521 U.S. 320, 323-24 (1997) states that "*Landgraf* held that, where a statute did not clearly mandate an application with retroactive effect, a court had to determine whether applying it as its terms ostensibly indicated would have genuinely retroactive effect; if so, the judicial presumption against retroactivity would bar its application." It goes on to catalog the many times that *Landgraf* required an "express command" or "unambiguous directive" to support retroactive application. *Id.* at 325. Similarly, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 40 (2006), held that where a statute lacks an "express provision about temporal reach" (and thus fails the first step of the *Landgraf* test), the court should not automatically construe an ambiguous statutory provision in such a way as to avoid retroactive application, but should complete the rest of the *Landgraf* analysis.

Micron itself acknowledges that, before reaching this supposed "third step," the Court must "determine[] *first*, that the statute is *silent or ambiguous* with respect to its temporal reach." Opp. at 7 (emphasis added). Micron does not explain why the Supreme Court would first find that a statute is "silent or ambiguous" regarding its temporal scope, but then proceed to determine whether that same statute contains an "express command" regarding its temporal scope that "could sustain only one interpretation." Nor does Micron explain how this would even be possible, as the first step necessarily disposes of Micron's invented third step, as they are directed to the very same question.

Micron does not cite a single case – in the nearly 20 years since the Supreme Court issued *Landgraf* – applying a three-step analysis, for which its only authority is a strained reading of *Landgraf* itself. And it does not even acknowledge the overwhelming Ninth Circuit authority to the contrary. Given the fundamental legal error underlying Micron's Opposition, this Court need not tarry long on Micron's arguments and should grant Oracle's Motion.

II. Micron's Affirmative Defense Fails The First Step Of *Landgraf* Because Congress Did Not Direct A Retroactive Application Of ACPERA

"A statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result . . . Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). "The standard for finding that a statute or regulation unambiguously directs retroactive application is a demanding one. The language must be 'so clear that it could sustain only one interpretation.'" *Kankamalage*, 335 F.3d at 862 (quoting *St. Cyr*, 533 U.S. at 316-17 ("[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed *with the requisite clarity* that the law be applied retrospectively.")); *Scott*, 215 F.3d at 944 ("The first step in the *Landgraf* test is whether Congress expressly prescribed the temporal reach of [the statute]."); *see also Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 170 (3d Cir. 1998) ("[I]f Congress seeks to . . . reach[ ] back in time to upset settled expectations, it must do so unequivocally and in a way that assures . . .

that it has seriously considered the consequences of such action."). As explained in Oracle's Motion, there is no such language in ACPERA. Motion at 7-10.

A. The Language Cited By Micron Identifies A Substantive Requirement For Compliance With ACPERA Rather Than Expressing ACPERA's Temporal Scope

Micron erroneously claims that the text of ACPERA unambiguously supports the statute's retroactive application. Micron hangs its textual argument on the following language found in Section 213 of the statute: "any civil action . . . based on conduct covered by a currently effective antitrust leniency agreement." Opp. at 7-11 (citing ACPERA § 213(a)).

But this language has nothing to do with the statute's temporal scope. Rather, it merely identifies one of the three conditions precedent found in Section 213 of ACPERA that a defendant with a post-enactment amnesty agreement must meet at the time a court "impos[es] judgment or otherwise determin[es] liability and damages" to receive civil leniency under the statute. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009). The "currently effective" language means only that the post-enactment amnesty agreement at issue must not have been revoked by DOJ at the time the court considers ACPERA's civil leniency benefits; it says nothing about when that agreement was entered. *See* ACPERA § 213(a); *Martin*, 527 U.S. at 353 (distinguishing between the "substantive limitations" of a statute and their "temporal scope"); *see, e.g.*, *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006) (accepting DOJ's revocation of conditional amnesty agreement and indictment against amnesty applicant that continued engaging in illegal activity). The court must also determine whether such a defendant has satisfactorily provided the level of cooperation set forth in ACPERA, *see id*. § 213(b), and whether that defendant has cooperated in a timely manner. *See id*. § 213(c).

According to Micron, because there is nothing in ACPERA explicitly limiting its coverage only to post-enactment amnesty agreements, the "currently effective" substantive requirement must be read to mean that the statute should be applied retroactively. But this argument ignores the "presumption against retroactivity" that the Supreme Court has observed "is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994). The statute must *contain* an "unambiguous directive" or "express command" evidencing a "clear congressional

intent" to apply the law retroactively. *See id*. at 280; *see also Martin*, 527 U.S. at 354. Micron's reliance on the *absence* of language stating the *opposite* intent is unavailing. *See Scott*, 215 F.3d at 944 (rejecting the argument "that because the limitation in [the statute at issue] is not limited in time, it should apply retroactively to past conduct"); *Bowen*, 488 U.S. at 208 ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language *requires this result*.") (emphasis added).[2]

Further, the very fact that the "currently effective" language could be interpreted to cover pre-enactment leniency agreements actually *raises* retroactivity concerns, rather than disposes of them. Because applying ACPERA to pre-enactment leniency agreements necessarily "attaches new legal consequences to events completed before its enactment," a court must be absolutely certain that is what Congress intended in passing ACPERA. *Landgraf*, 511 U.S. at 270, 280. The language Micron relies on does not satisfy this burden.[3]

Micron also argues that the terms "any civil action" and "all . . . antitrust leniency agreements" establish a clear mandate by Congress to apply ACPERA retroactively.[4] However,

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[2] Micron's laundry list of places in the text of ACPERA where it speculates Congress *could* have provided language specifically barring retroactive application to pre-enactment leniency agreements is irrelevant. Opp. 8-10. Congress is not required to do so because there is a presumption against retroactive application.

[3] Micron's argument regarding the "currently effective" language would lead to an absurd, and obviously unintended, result if correct. Were that language intended to articulate ACPERA's temporal scope, rather than a substantive requirement for compliance, then ACPERA's temporal scope would be limited only to those amnesty applicants with agreements that were "currently effective" at the time the statute was enacted. This would render the statute inapplicable to any amnesty applicant entering an agreement after the statute's enactment, which would defeat the entire purpose of the statute and its civil leniency benefits.

[4] Micron argues that *Cox v. Hart*, 260 U.S. 427, 435 (1922), provides support for retroactive application of ACPERA because it "occupied a status" of a party to a "currently effective" leniency agreement at the time of ACPERA's enactment. Opp. at 12-13 However, *Cox* has no application here. The statute at issue in *Cox* preserved the land rights of certain persons who otherwise would have lost those rights under new legislation. 260 U.S. at 434-35. As a result, the *Cox* court noted that retroactive application of the statute "impairs no vested right and brings into existence no new obligation which affects any private interest." *Id.* at 435. In keeping with its purpose, the statute was specifically worded in the past tense, so as to preserve the rights of individuals who, at the time of enactment, had already carried out the land improvement activities required by the new legislation. *Id.* (applying to "a person who has, prior to survey, taken possession" of the land). There is no such indication in the text of ACPERA that it was meant to apply to entities that already had entered into amnesty agreements at the time of enactment.

both the Supreme Court and Ninth Circuit have rejected the argument that general language applying a statute to "any dispute" or "all agreements" is sufficient to demonstrate Congress's intent to apply a statute retroactively.[5] *See Martin*, 527 U.S. at 353; *Scott*, 215 F.3d at 944. Such terms do not constitute evidence of Congressional intent to "reach[ ] back in time to upset settled expectations." *Mathews*, 161 F.3d at 170. In *Scott*, despite the fact that the statute there applied to "all people" and was "very clear in its mandate," the Ninth Circuit rejected retroactive application because such language could not be viewed as affirmatively defining the statute's temporal reach. *See* 215 F.3d at 944.

In *Martin*, the Supreme Court rejected the same argument Micron makes here on nearly identical language. Just as Micron cites ACPERA's "any civil action" language, the petitioner in *Martin* cited the following language: "In *any action* brought by a prisoner . . . in which attorney's fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent [authorized here]." *Martin*, 527 U.S. at 350 (emphasis added). The Court rejected the petitioner's call for retroactive application based on such language, finding that "Congress [had] not expressly mandated the temporal reach" of the statute by using the "any action" language or by applying the limit to all "awards." *Id.* at 353-54. The Court explained that, just like Micron's cited language in ACPERA, the language at issue in *Martin* only laid out the substantive requirements for the statute to apply, rather than show Congressional intent to define the statute's temporal scope. *Id.* at 354. The Court went on to contrast the above language to the type of language "*Landgraf* [suggested] might qualify as a clear statement that a statute was to apply retroactively: '[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment.'" *Id*. In doing so, it explained that, unlike the language discussed in *Landgraf*, the "any action" language found in the statute at issue "falls short of demonstrating a 'clear congressional intent' favoring retroactive application." *Id.*

[5] For this reason, the authority Micron cites construing the meaning of the term "any" outside of the retroactivity context is inapposite. Opp. 10. Likewise, case law addressing "clear statement" language outside of the retroactivity context has no application here. *Id*. at 21.

As explained in Oracle's Motion, ACPERA's legislative history makes clear that Congress's sole intent in enacting the statute was to encourage criminal conspirators to come forward and blow the whistle on themselves and their co-conspirators in exchange for amnesty. Motion at 4-5, 8-9, and Exhibit 2 (relevant excerpts of ACPERA legislative history). There is no indication that Congress included the "currently effective" language in ACPERA to authorize its retroactive application to pre-enactment amnesty agreements, and such an application is inconsistent with the very purpose of the statute.

B. ACPERA's Sunset Provision Does Not Authorize Retroactive Application Of The Statute

Straining to find any language that resembles the type of explicit expression of temporal reach needed for ACPERA to be applied retroactively under *Landgraf*, Micron resorts to pointing to the "sunset" provision set forth in Section 211 of the statute. However, that provision is purely administrative and irrelevant.

The "sunset" provision has two subsections. Subsection (a) provides that ACPERA "shall cease to have effect 5 years after the date of enactment of this Act." ACPERA § 211(a). Subsection (b) states that ACPERA will continue to apply "[w]ith respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which [ACPERA] shall cease to have effect." The obvious import of this provision is that it sets forth the initial duration of the statute and then grandfathers in leniency agreements that *otherwise qualify* for ACPERA's protection and that are in effect at the time that ACPERA ceases to operate. It says nothing about when application of the statute begins, nor would it make sense for Congress to bury such an important provision in an administrative section dedicated to the statute's *termination*.

Certainly, the "sunset" provision does not qualify as an unambiguous statement – of which there can be only one interpretation – by Congress that ACPERA applies to leniency agreements that predate the statute's enactment.

C. Congress Clearly Intended ACPERA To Be Applied Prospectively Only

The presumption against retroactive application of ACPERA is bolstered by the legislative history. Congress's purpose in enacting ACPERA is clear: the statute is meant to provide an

"additional incentive for corporations *to disclose antitrust violations* by limiting their liability." 150 Cong. Rec. H3654 (statement of Rep. Sensenbrenner) (emphasis added). By limiting such civil liability, Congress intended to eliminate "a major disincentive to self reporting[:] the threat of exposure to a possible treble damage lawsuit by the victims of the conspiracy." 150 Cong. Rec. S3614 (statement of Sen. Hatch). As is set forth in Oracle's motion, this is the rationale its sponsors repeated in support of the bill. *See* Motion at 4-5, 8-9, and Exhibit 2 (relevant excerpts of ACPERA legislative history).

This intent that ACPERA apply prospectively only is reinforced by the fact that Congress also included a provision in the statute increasing criminal penalties for antitrust violations. *See* ACPERA § 215. Retroactive application of increased criminal penalties to an antitrust violator that committed its crimes prior to ACPERA's enactment would undoubtedly face a constitutional challenge. *See Moor v. Palmer*, 603 F.3d 658, 663 (9th Cir. 2010) ("[T]he Ex Post Facto Clause prohibits laws that retroactively increase the penalty for a crime."). If Congress intended ACPERA to be applied retroactively, it would not – and could not – have included such a provision in the statute.

Contrary to Micron's argument, the legislative history is devoid of any suggestion that Congress passed ACPERA out of a concern that conspirators that were already in the DOJ's amnesty program needed further incentives to be more forthcoming with their cooperation. In fact, Micron cites nothing in the legislative history as support for its argument. As Micron recognizes, the requirement to cooperate with civil litigants was created to compensate those litigants who would be harmed by Congress's attempts to bring in new whistle-blowers. It is inconceivable that Congress intended to compound the harm to victims by bestowing a windfall – in the form of dramatically reduced civil liability – on criminal conspirators that already had come forward and accepted joint and several liability and treble damages for their criminal conduct.

Because Congress did not intend ACPERA to apply retroactively, the "inquiry is done," and there is no need to determine whether ACPERA's application here would have an impermissible retroactive effect. *See Mathews*, 161 F.3d at 161.

III. Applying ACPERA To Micron's Pre-Enactment Amnesty Agreement Would Have Impermissible Retroactive Effects

As discussed in Oracle's Motion, eliminating Micron's joint and several liability and treble damages would "attach[ ] new legal consequences" to Micron's conduct and "impair rights" that Oracle previously possessed. *See Landgraf*, 511 U.S. at 270, 280. Micron's efforts to dispute this retroactive effect fall short.

A. When Examining Retroactive Effects, The Court Must Look To When The Underlying Events Took Place, Not When The Lawsuit Was Filed

Micron asserts that there is no retroactive effect here because ACPERA is triggered by litigation events that occurred (or will occur) after ACPERA's passage: namely the filing of a lawsuit and the application of ACPERA at judgment to limit damages. Opp. at 11-15. The Ninth Circuit has squarely rejected this argument. If Micron were correct, no statute would ever have impermissible retroactive effect because statutes are always applied and *litigated* only after they are enacted. The question is whether applying the statute has impermissible retroactive effect on the underlying conduct that the statute regulates – here, Micron coming forward to disclose its criminal conspiracy and entering into a leniency agreement under the law as it existed at the time.

In *Scott v. Boos*, the Ninth Circuit rejected the argument "that the pertinent date [for purposes of retroactivity analysis] is the date of filing, not the date of conduct." 215 F.3d at 949. It stated that "[t]he *Landgraf* test . . . appears to focus on parties' actions, not the date of filing of the claim," and noted that *Landgraf*'s discussion of retroactivity focuses on underlying activity, not lawsuits about that activity, "hold[ing] that the retroactive effect of a statute depends on whether it 'impairs a party's rights when he acted' or 'attaches new legal consequences to events completed before its enactment.'" *Id.* (quoting *Landgraf*, 511 U.S. at 270, 280). The situation here is no different. The timing of Micron's conduct – and not the timing of this lawsuit – is the only conduct relevant for retroactivity analysis.

B. Micron's Alleged Post-Enactment Cooperation To DOJ Does Not Eliminate The Retroactive Effect Of Applying ACPERA Here

Micron suggests that applying ACPERA here would not have a retroactive effect because its cooperation obligations under its "conditional" amnesty agreement with DOJ continued "long

after ACPERA was enacted." Opp. at 2. This argument fails.

As Micron admits, it provided any such cooperation *to the DOJ* pursuant to the requirements of its *pre-enactment* criminal amnesty agreement. *Id.* at 15. Micron's allegation that it continued to provide the cooperation that it was already obligated to provide DOJ after ACPERA was enacted has no bearing on whether ACPERA should be applied retroactively. Qualifying for civil leniency under ACPERA requires a conspirator to *both* turn itself in to DOJ *and* provide a required level of cooperation. *See* ACPERA § 213.[6] Therefore, regardless of whether Micron provided some cooperation to DOJ after enactment of ACPERA, it turned itself in and began providing cooperation two years before the effective date of that statute. Any application of ACPERA to Micron's amnesty agreement would necessarily have to be retroactive.

The cases Micron cites are inapposite. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897), the defendant's continuing illegal activity after passage of the antitrust laws was sufficient, *by itself*, to impose liability, so there was no need to rely on its pre-enactment conduct.[7] Here, Congress was focused on encouraging activity that Micron had performed long before ACPERA's passage – i.e., self-reporting criminal conduct.

C. Eliminating Joint And Several Liability And Treble Damages Has Impermissible Retroactive Effects

As discussed in Oracle's Motion, reducing a defendant's liability has an impermissible retroactive effect because it both alters the consequences of the defendant's actions and interferes with rights the plaintiff previously possessed. Motion at 10-12 (discussing *Landgraf*, 511 U.S. at 283-84; *Scott*, 215 F.3d at 944-45, 947; *Mathews*, 161 F.3d at 164-65).

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[6] The legislative history of ACPERA makes clear that Congress sees the first of those two requirements (the act of coming forward) as the more significant of the two: the reduction of liability was meant to entice conspirators to report their illegal conduct. *See* Section II, *supra.*

[7] Similarly, in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the event that triggered application of the law at issue (the definitive condemnation of a shipping vessel) did not occur until after the law was passed. And in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 40 (2006), the statute's application was triggered by an alien's remaining in the United States after enactment of the statute.

Micron attempts to avoid this inescapable conclusion by incorrectly arguing that changes to the amount of damages a party can recover regulate so-called "secondary" conduct, rather than "primary" conduct, and, therefore, can be applied retroactively. Opp. at 17. However, the cases Micron cites do not apply here, as they only address retroactive application of procedural rules, such as filing rules and rules of evidence. *See Landgraf*, 511 U.S. at 275 (stating that changes to transfer rules, filing rules, and rules of evidence can be applied retroactively); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997) (addressing retroactive application of jurisdictional rules). ACPERA obviously is not a procedural rule.

Retroactively altering the scope of a defendant's liability is not a mere procedural change; it impermissibly affects the substantive rights of all parties. *See, e.g.*, *Mathews*, 161 F.3d at 164-65 (changing liability from treble damages under RICO to compensatory damages under securities laws changed legal consequences of defendants' illegal acts and, therefore, had retroactive effect); *Landgraf*, 511 U.S. at 283-84 (stating that "[t]he extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored" and citing to cases holding that limitations on damages cannot be applied retroactively) (emphasis omitted).[8] Thus, Oracle need not show, as Micron suggests, that its entire cause of action against Micron would be eliminated in order to avoid retroactive application of ACPERA. Simply showing that the amount of liability at issue would change is sufficient.[9]

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[8] The cases Micron cites are inapposite or pre-date *Landgraf* and rely on rules *Landgraf* rejected. Opp. 19. In *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 92-93 (D.C. Cir. 1980), the court relied on "the absence of a provision prohibiting retroactivity," finding an intent to apply the statute retroactively by negative implication. But after *Landgraf*, there must be a clear statement authorizing retroactivity, and approval of retroactivity by negative implication has been rejected. *Landgraf*, 511 U.S. at 263, 280; *Mathews*, 161 F.3d at 167. In *Sampeyreac v. United States*, 32 U.S. 222, 240 (1833), the Supreme Court ruled that a change in jurisdictional rules could be applied retroactively; it did not address retroactive application of a change in liability.

[9] Micron also argues that "the availability of extra-compensatory remedies is a matter of legislative grace that *always* remains subject to amendment by Congress." Opp. 19. But Micron has not demonstrated that Congress intended to limit the liability of pre-enactment leniency applicants. In addition, the cases Micron cites do not address whether changing the scope of liability can be impermissibly retroactive under federal law. *See Smith v. Wade,* 461 U.S. 30, 52 (1983) (holding only that the finder of fact decides whether to award punitive damages); *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 508 (1st Cir. 1996) (same); *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 739 (8th Cir. 1985) (holding only that Missouri state law requires application of punitive damages limitation).

Nor is retroactive application of ACPERA permissible because Oracle could have theoretically recovered damages from Micron's co-conspirators. The concept of joint and several liability derives its value from the fact that it allows a plaintiff to seek its entire recovery from any one defendant, thereby increasing the likelihood that it will recover the full extent of its judgment. Eliminating one such source of recovery undoubtedly impairs the value of that right. Micron's authorities do not say otherwise. In *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974), the Supreme Court approved retroactive application of a law that provided an *additional* source of recovery for the plaintiff, and that did not *eliminate* a source of recovery. And in *In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184, 187 (S.D.N.Y. 2008), the district court did not address retroactivity at all, instead finding only that an agreement not to seek treble damages from a defendant did not interfere with a law firm's ability to represent a class.

IV. Oracle Is Not Estopped From Contesting Retroactive Application Of ACPERA To Micron's Amnesty Agreement

Recognizing the frailty of its position – perhaps best demonstrated by its mistaken articulation of the steps of the *Landgraf* analysis – Micron attempts to avoid the retroactivity analysis altogether by claiming that Oracle is estopped from arguing that ACPERA does not apply to Micron's pre-enactment amnesty agreement because Oracle may have sought cooperation from Micron in an earlier litigation. This argument should be rejected.

Micron all but concedes that it does not meet the Ninth Circuit's requirements for equitable estoppel because whether ACPERA applies retroactively is purely a legal question, not a factual issue.[10] Opp. at 22. Citing to C.J.S. *Estoppel & Waiver*, Micron resorts to asserting a theory of "quasi-estoppel," which it claims "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." *Id*. Micron does not cite a single case applying this theory in the last 50 years, and its

[10] The requirements for equitable estoppel are: "(1) the Party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008).

principal authority is from the 19th century. *Id.* at 22-23. Even assuming that "quasi-estoppel" is an available defense in the Ninth Circuit (or anywhere else today), it does not apply here.

First, reliance is an essential element of estoppel. *See* 31 C.J.S., Estoppel and Waiver § 162 (2011) (estoppel by acceptance of benefits requires detrimental reliance by party asserting estoppel); *see also Hess v. Seeger*, 55 Or. App. 746, 762 (Or. Ct. App. 1982) (same). Micron admits that it never relied on any statements by Oracle regarding ACPERA's application and instead made clear to Oracle that it did not owe Oracle any cooperation under ACPERA: "Oracle had not yet sued Micron . . . [so Micron] *did not owe Oracle any duties under either ACPERA or Rule 26 of the Federal Rules of Civil Procedure*." Opp. at 22 (emphasis added). In fact, to this day, Micron refuses to admit that it violated the Sherman Act, a fundamental requirement for both amnesty and application of ACPERA. *See* Declaration of Jerome A. Murphy (June 24, 2011), **Exhibit A** at 7 (Micron's Responses to Oracle's First Set of Requests for Admission) (denying that Micron's participation in the DRAM conspiracy violated the Sherman Act); *see also* Murphy Decl., **Exhibit B** at 6 (DOJ Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters) (confirming that a leniency applicant must admit to a criminal violation of the antitrust laws before receiving a conditional leniency letter). Micron seems to expect the benefits of ACPERA while at the same time refusing to comply with its underlying requirements.

Second, estoppel does not apply under circumstances where the entity that allegedly accepted benefits "is entitled to them regardless of the transaction in question." 31 C.J.S., Estoppel and Waiver § 162 (2011); *Bankers Trust Co. v. Pacific Employers Insurance Co.*, 282 F. 2d 106, 112 (9th Cir. 1960) (policy holder not estopped from claiming policy procured by fraud despite having sought to obtain money owed under policy). Micron admits in its Opposition that it merely "provided Oracle with material that it had *previously produced in other opt-out cases*," and thus to which Oracle was entitled under the federal rules and the agreement of the parties in the prior cases to coordinate and share discovery. Opp. at 22 (emphasis added); *see also* Murphy Decl., **Exhibit C** (October 27, 2010 Letter from Jerome Murphy to Joel Sanders).

Third, Oracle is not taking a position in its motion to strike that is inconsistent with any prior position. The letter referenced in Micron's Opposition does not state that Oracle believed that ACPERA applied to limit Micron's civil liability – the issue in dispute between the parties – but rather only acknowledged Micron's intent "to take advantage of reduced penalties that *may* be available under [ACPERA]" and informed Micron that it would have to provide cooperation in order to receive any benefits. *See* Sanders Decl., Ex. C at 2 (emphasis added). The letter did not concede the retroactive applicability of ACPERA to Micron's amnesty agreement and, therefore, Oracle cannot be estopped from disputing that applicability here.

Fourth, Micron's Answer does not allege any of the facts it relies on in its Opposition in support of its quasi-estoppel claim, such as Micron's allegation that "Oracle received . . . all known facts relating to the alleged conspiracy, all potentially relevant documents, and access to all relevant witnesses." "[B]are statements reciting mere legal conclusions may not be sufficient" to state a defense, and Micron cannot now improperly attempt to bolster its barebones defense by injecting factual allegations not found within its Answer. *See G & G Closed Circuit Events, LLC v. Nguyen*, No. 10-CV-00168-LHK, 2010 WL 3749284, at *3 (N.D. Cal. Sept. 23, 2010).

For these reasons, this case is distinguishable from Micron's cited authority of *Building Syndicate Co. v. United States*, 292 F.2d 623 (9th Cir. 1961). There, the estopped party made a *factual* assertion that it owned a building in order to receive favorable tax treatment. *Id*. at 625. The IRS relied on that assertion in calculating the tax due. *Id*. Later, when the party was better off claiming not to be the building's owner, it did so, thus reversing its previous position to the detriment of the IRS, which would recover less money in taxes. *Id*. Based on these circumstances, the court determined that this change in position was not allowed. *Id*. at 626. As described above, none of these circumstances is present here.

CONCLUSION

For the reasons set forth above, Micron's twenty-first affirmative defense asserting that ACPERA's civil leniency provisions apply retroactively to its pre-enactment amnesty agreement fails as a matter of law and, therefore, should be stricken from Micron's Amended Answer.

Dated: June 24, 2011

/s/ Jerome A. Murphy

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