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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff(s),

No. CR 06-0692 PJH

v.

**JURY INSTRUCTIONS**

GARY SWANSON,

Defendant(s).

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**3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW**

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

1 INSTRUCTION NO. 8

2 CHARGE AGAINST DEFENDANT NOT EVIDENCE—PRESUMPTION OF

3 INNOCENCE—BURDEN OF PROOF

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5 The indictment is not evidence. The defendant has pleaded not guilty to the charge. The  
6 defendant is presumed to be innocent and does not have to testify or present any evidence to  
7 prove innocence. The government has the burden of proving every element of the charge beyond  
8 a reasonable doubt.  
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**3.5 REASONABLE DOUBT—DEFINED**

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

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### 3.6 WHAT IS EVIDENCE

The evidence from which you are to decide what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which have been received into evidence; and
- (3) any facts to which all the lawyers have stipulated.

INSTRUCTION NO. 5



DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may explain the water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

1 **3.7 WHAT IS NOT EVIDENCE**

2 In reaching your verdict you may consider only the testimony and exhibits received into  
3 evidence. Certain things are not evidence and you may not consider them in deciding what the  
4 facts are. I will list them for you:

- 5 1. Arguments and statements by lawyers are not evidence. The lawyers are not  
6 witnesses. What they have said in their opening statements, [will say in their]  
7 closing arguments and at other times is intended to help you interpret the  
8 evidence, but it is not evidence. If the facts as you remember them differ from  
9 the way the lawyers state them, your memory of them controls.
- 10 2. Questions and objections by lawyers are not evidence. Attorneys have a duty to  
11 their clients to object when they believe a question is improper under the rules  
12 of evidence. You should not be influenced by the question, the objection, or the  
13 court's ruling on it.
- 14 3. Testimony that has been excluded or stricken, or that you have been instructed  
15 to disregard, is not evidence and must not be considered. In addition some  
16 testimony and exhibits have been received only for a limited purpose; where I  
17 have given a limiting instruction, you must follow it.
- 18 4. Anything you may have seen or heard when the court was not in session is not  
19 evidence. You are to decide the case solely on the evidence received at the trial.
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### 3.9 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness's testimony;
6. the reasonableness of the witness's testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.



## INSTRUCTION NO. 19

TESTIMONY OF WITNESS INVOLVING SPECIAL CIRCUMSTANCES - PLEA  
AGREEMENTS, CORPORATE LENIENCY

## (AFTER ATTACK ON WITNESSES CREDIBILITY)

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You have heard the testimony from Kun Chul (K.C.) Suh, Dae Soo (D.S.) Kim, and Chae Kyun (C.K.) Chung, each of whom pleaded guilty to price fixing for their participation in the alleged conspiracy for which the defendant is on trial. These defendants entered into plea agreements with the government under which they agreed to cooperate with the investigation in this case, and to testify truthfully at any trial if requested by the government. The government took their cooperation into account in recommending favorable sentencing terms to the Court. In evaluating the testimony of these witnesses, you should consider the extent to which or whether their testimony may have been influenced by the benefits and conditions of their plea agreements, giving their testimony the weight you feel it deserves. Their guilty pleas are not evidence against the defendant, and you may consider the pleas only in determining these witnesses' believability.

You have heard testimony from Jean Cha, Kenneth Heller, Jay McBroom, and Michael Peterson whose employer's corporate parent, Hynix Semiconductor, Inc. ("Hynix") entered into a plea agreement with the government. The Hynix guilty plea is not evidence against the defendant. The plea agreement generally provides that Hynix will provide its "ongoing, full, and truthful cooperation" to the United States in proceedings arising from its investigation of price fixing in the DRAM industry, and will use its best efforts to secure the same from its officers, directors and employees and those of its corporate subsidiaries. In return for their cooperation, the government promised not to prosecute these witnesses for their involvement, if any, in the alleged conspiracy for which the defendant is on trial. In evaluating the testimony of these witnesses, you should consider the extent to which or whether their testimony may have been influenced by the government's promise not to prosecute them for their truthful cooperation, giving that promise the weight you feel it deserves as to their believability.

You have heard testimony from Dennis Lee whose previous employer, Infineon Technologies AG ("Infineon") entered into a plea agreement with the government. The Infineon

1 guilty plea is not evidence against the defendant. The plea agreement generally provides that  
2 Infineon will provide its "ongoing, full, and truthful cooperation" to the United States in  
3 proceedings arising from its investigation of price fixing in the DRAM industry, and will use its  
4 best efforts to secure the same from its officers, directors and employees and those of its  
5 corporate subsidiaries. In return for his cooperation, the government promises not to prosecute  
6 this witness for his involvement, if any, in the alleged conspiracy for which the defendant is on  
7 trial. In evaluating the testimony of this witness, you should consider the extent to which or  
8 whether his testimony may have been influenced by the government's promise not to prosecute  
9 him for his truthful cooperation, giving that promise the weight you feel it deserves as to their  
10 believability.

11 You have also heard testimony from Michael Sadler, Steven Thorsen, and Keith  
12 Weinstock, witnesses whose employer, Micron Technology, Inc. ("Micron", entered into an  
13 "amnesty" or "corporate leniency" agreement with the government. Under the government's  
14 leniency program, the first company and its employees to come to the Department (i) report that  
15 they were engaged in illegal anticompetitive activity, (ii) took prompt action to terminate their  
16 part in the anticompetitive activity, (iii) were not a ringleader or originator of the anticompetitive  
17 activity being reported, and (iv) agree to cooperate with the Department in its investigation of the  
18 activity being reported, including testifying at trials of other parties, receive a promise by the  
19 government that it will not prosecute them for the anticompetitive activity being reported. The  
20 non-prosecution agreement is conditioned on Micron and its officers, directors, and employees,  
21 providing "full, continuing and complete cooperation."

22 The fact that Micron and its employees who testified here have been given amnesty from  
23 prosecution for their involvement in the conspiracy to fix prices of DRAMs may not be  
24 considered by you as evidence that the defendant is guilty of price fixing. In evaluating the  
25 testimony of these witnesses, you should consider the extent to which or whether their testimony  
26 may have been influenced by the grant of immunity from prosecution, giving that promise the  
27 weight you feel it deserves as to their believability.  
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1 For these reasons, in evaluating the testimony of these witnesses, you should consider the  
2 extent to which or whether the witnesses' testimony may have been influenced by any of the  
3 benefits they received and, in addition, you should examine their testimony with greater caution  
4 than that of other witnesses.

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1 INSTRUCTION NO. 6

2 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION

3 Some of the documents used during this trial are written in a language other than English.

4 The evidence you are to consider is only that provided through the agreed-upon  
5 translations of documents. Although some of you may know the non-English language used, it is  
6 important that all jurors consider the same evidence. Therefore, you must base your decision on  
7 the evidence presented in the English translations. You must disregard any different meaning of  
8 the non-English words.  
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1 INSTRUCTION NO. 7

2 OPINION EVIDENCE, EXPERT WITNESS

3 You have heard testimony from persons who, because of education or experience, are  
4 permitted to state opinions and the reasons for their opinions.  
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6 Opinion testimony should be judged just like any other testimony. You may accept it or  
7 reject it, and give it as much weight as you think it deserves, considering the witness' education  
8 and experience, the reasons given for the opinion, and all the other evidence in the case.  
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INSTRUCTION NO. 9

SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

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1 INSTRUCTION NO. 10

2 CHARTS AND SUMMARIES IN EVIDENCE

3 Certain charts and summaries have been received into evidence. Charts and summaries  
4 are only as good as the underlying supporting material. You should, therefore, give them only  
5 such weight as you think the underlying material deserves.  
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INTRODUCTION NO. 11

PURPOSE OF SHERMAN ANTITRUST ACT

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint of any business or industry, so that the consuming public may receive better goods and services at a lower cost.



1 INSTRUCTION NO. 12

2 PER SE VIOLATIONS

3 The Sherman Act makes unlawful certain agreements that, because of their harmful effect  
4 on competition and lack of any redeeming virtue, are conclusively presumed to be illegal,  
5 without the inquiry about the precise harm they have caused or the business excuse for their use.  
6 Included in this category of unlawful agreements are agreements to fix prices. Therefore, if you  
7 find that the conspiracy charged in the Indictment existed and that the defendant was a member  
8 of the conspiracy, you need not be concerned with whether the agreement was reasonable or  
9 unreasonable, or the justifications for the agreement, or the harm done by it.  
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12 It is not a defense that the parties may have acted with good motives, or may have thought  
13 that what they were doing was legal, or that the conspiracy may have had some good results. If  
14 there was such a conspiracy, it was illegal. If there was not, the defendant should be found not  
15 guilty.  
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1 INSTRUCTION NO. 3

2 ESSENTIAL ELEMENTS OF THE SHERMAN ACT OFFENSE CHARGED

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4 The Indictment charges a violation of Section 1 of the Sherman Act, which declares  
5 unlawful every conspiracy in restraint of interstate (or foreign) trade or commerce.

6 In order to convict the defendant, the government must prove beyond a reasonable  
7 doubt each of the following:

8 First, beginning on or about April 1, 2001 and ending on or about June 15, 2002, there  
9 was an agreement or mutual understanding between two or more persons to fix the prices of  
10 DRAM sold to certain Original Equipment Manufacturers.

11 Second, that the defendant knowingly—that is, voluntarily and intentionally—became  
12 a member of the conspiracy charged in the Indictment.

13 Third, that the conspiracy either affected interstate commerce or occurred within  
14 the flow of interstate commerce.

15 The type of relationship condemned by the Sherman Act as a conspiracy is often  
16 described as a “partnership in crime,” in which each person found to be a member of the  
17 conspiracy is liable for all acts and statements of the other members made during the  
18 existence of and in furtherance of the conspiracy.

19 In order to establish the existence of a conspiracy, the evidence need not show that  
20 the members of the conspiracy entered into any express, formal, or written agreement; that  
21 they met together; or that they directly stated what their object or purpose was, or the  
22 details of it, or the means by which the object was to be accomplished. The agreement itself  
23 may have been entirely unspoken. What the evidence must show in order to prove that a  
24 conspiracy existed is that the alleged members of the conspiracy in some way came to an  
25 agreement or mutual understanding to accomplish a common purpose.

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1 Direct proof of a conspiracy may not be available. A conspiracy may, however, be  
2 disclosed by the circumstances or by the acts of the members. Therefore, you may infer the  
3 existence of a conspiracy from what you find the parties actually did, as well as from the  
4 words they used.

5 The evidence does not have to establish that the defendant agreed to all the means  
6 or methods set forth in the Indictment or that such means and methods were actually used.  
7 Nor does the evidence have to show that all the persons alleged to have been members of  
8 the conspiracy actually were members. What the evidence must show is that the  
9 conspiracy charged existed at or about the time stated in the Indictment, and that the  
10 defendant knowingly became a member of the conspiracy.

11 In determining whether a conspiracy has been proved, you must view the evidence  
12 as a whole and not piecemeal. You should consider the actions and statements of all the  
13 alleged conspirators.

14 A conspiracy ends only when its purpose and objectives have been accomplished or  
15 all of the parties to the conspiracy abandon it.

16 In your consideration of the evidence, you should first determine whether or not the  
17 conspiracy existed as alleged in the Indictment. If you conclude that the conspiracy did  
18 exist, you should next determine whether or not the defendant knowingly became a  
19 member of that conspiracy.

20 You have heard evidence that some of the DRAM manufacturers attempted to reach an  
21 agreement to reduce DRAM production. Mr. Swanson has not been charged with a conspiracy to  
22 reduce DRAM production and you should not consider that evidence in reaching your decision  
23 on whether or not Mr. Swanson is guilty.

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INSTRUCTION NO. \_\_\_

PERMISSIBLE USE OF PRE-APRIL, 1999 EVIDENCE

(LIMITING INSTRUCTION)

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5       You have heard evidence of events that occurred prior to April, 1999. This evidence  
6 predates the conspiracy period set forth in the indictment, and may not be used to determine  
7 whether the defendant committed the offense with which he is charged. This evidence may  
8 be considered by you as *background information* *[proof of knowledge or absence of mistake*  
9 *or accident]*. The pre-1999 evidence is not evidence that the defendant conspired to fix  
10 prices in this period. The government must prove the defendant's guilt through other  
11 evidence.  
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## INSTRUCTION NO. 17

PRICE FIXING

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4 The indictment charges the defendant with participating in a conspiracy to fix prices from  
5 on or about April 1, 2001 until on or about June 15, 2002. A conspiracy to fix prices is an  
6 agreement or mutual understanding between two or more competitors to fix, control, raise, lower,  
7 maintain, or stabilize the prices charged or to be charged for products or services.

8  
9 A price-fixing conspiracy is commonly thought of as an agreement to establish the same  
10 price; however, prices may be fixed in other ways. Prices are fixed if the range or level of prices  
11 is agreed upon or if, by agreement, various formulas are to be used in computing them. They are  
12 fixed because they are agreed upon. Thus, any agreement to suppress and eliminate competition  
13 by fixing the prices of DRAMs sold to certain OEMs of personal computers and servers is illegal.  
14

15 The aim and result of every price-fixing agreement, if successful, is the elimination of one  
16 form of competition.

17 Therefore, if you find that a price-fixing conspiracy has been established and that the  
18 defendant knowingly participated in it, it does not matter whether the prices agreed upon were  
19 too high or too low or reasonable or unreasonable. It is not for you to determine whether  
20 particular price-fixing schemes are wise or unwise, healthy or destructive.  
21

22 Evidence that the DRAM manufacturers actually competed with other manufacturers of  
23 DRAM has been admitted to assist you in deciding whether they actually entered into an  
24 agreement or mutual understanding to fix prices and whether the defendant joined and  
25 participated in that conspiracy. If the conspiracy charged in the indictment is proved, it is no  
26 defense that the conspirators actually competed with each other in some manner or that they did  
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1 not conspire to eliminate all competition. Similarly, the conspiracy is unlawful even if it did not  
2 extend to all products sold by the conspirators or did not affect all of their customers.

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4 Evidence of the prices actually charged by the companies manufacturing DRAM alleged  
5 to have been part of the conspiracy has been admitted to assist you in deciding whether they  
6 entered into (or continued to participate in) an agreement or mutual understanding to fix prices,  
7 and whether the defendant joined that conspiracy. Such evidence may lead you to conclude that  
8 the defendant never entered into the agreement charged in the indictment. Or it may show that he  
9 made an agreement but failed to live up to it, or started undercutting the other right away, or  
10 offered prices lower than those agreed upon to customers he did not want to lose. Or it may  
11 show that he became convinced that the whole scheme was unwise and should be abandoned.  
12

13  
14 If you should find that the defendant did enter into an agreement to fix prices, the fact that  
15 he did not observe it, or that he may not have lived up to some aspect of the agreement, or that he  
16 may not have been successful in achieving the objectives of the agreement, is no defense. The  
17 agreement to act together is the crime, even if it was never carried out.

18  
19 Similarity of competitive business practices of the companies manufacturing DRAM, or  
20 the mere fact that they may have charged identical prices for the same goods, does not alone  
21 establish an agreement or mutual understanding to fix prices, since such practices may be  
22 consistent with ordinary and proper competitive behavior in a free and open market.

23  
24 A person may lawfully charge prices identical to those charged by competitors and still  
25 not violate the Sherman Act. He may even copy the price lists of a competitor or follow and  
26 conform exactly to the price policies and price changes of competitors; and such conduct,  
27 without more, would not be a violation of the law, unless you find it was done pursuant to an  
28 agreement or mutual understanding between two or more persons, as charged in the indictment.

1           Nevertheless, you may consider such facts and circumstances along with all the other  
2 evidence in determining whether the similarity or identity of prices resulted from the independent  
3 acts or business judgment of the defendants freely competing in the open market, or whether it  
4 resulted from an agreement or mutual understanding between two or more of them.  
5

6           Evidence has been introduced concerning the exchange of information about prices by the  
7 defendant with employees of other companies manufacturing DRAM (and those alleged to be  
8 conspirators). The government claims that such exchanges are part of the evidence establishing  
9 that the defendant entered into an agreement or mutual understanding as alleged in the  
10 indictment. It is not unlawful for a person to obtain information about competitors' prices, or  
11 even to exchange information about prices, unless done pursuant to an agreement or mutual  
12 understanding between two or more persons, as charged in the indictment.  
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15           Nevertheless, you may consider such facts and circumstances along with other evidence  
16 in determining whether there was an agreement or mutual understanding between two or more  
17 persons as alleged in the indictment.  
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1 INSTRUCTION NO. 18

2 TO ACT KNOWINGLY - DEFINED

3 In considering the charge in the indictment, you must determine whether the evidence  
4 shows beyond a reasonable doubt that the defendant knowingly and intentionally became a  
5 member of the charged conspiracy to fix prices. "Knowingly" means the defendant realized what  
6 he was doing and was aware of the nature of his conduct and did not act through ignorance,  
7 mistake, or accident. In order to find that the Defendant acted knowingly, you must find that he  
8 voluntarily and intentionally became a member of the conspiracy charged in the indictment  
9 knowing of its goal and intending to help accomplish it. Knowledge may be proved by the  
10 defendant's conduct and by all the facts and circumstances surrounding the case. In order to  
11 establish the offense charged in the Indictment, it is not necessary for the Government to prove  
12 that the Defendant knew that a conspiracy to fix prices is a violation of the law. Since I have  
13 already instructed you that a conspiracy to fix prices is unreasonable and illegal as a matter of  
14 law, the government does not have to prove that the defendant specifically intended to  
15 unreasonably restrain trade or that such conduct is an unreasonable restraint of trade.

16 It is not in itself unlawful for competitors to engage in price coordination. Price  
17 coordination occurs when competitors recognize that they have shared economic interests and,  
18 consequently, follow each other's conduct in setting prices. As long as the competitors'  
19 decisions to follow each other's conduct are the result of independent business judgment, rather  
20 than an agreement between them, such conduct is not illegal. It is also not unlawful for a  
21 defendant to knowingly charge the same price for a product as the price charged by an alleged  
22 cartel, as long as the decision to charge the same price as the alleged cartel is not the result of an  
23 agreement to do so. Presence at the scene of the crime and knowledge that a crime may be  
24 committed by others are not sufficient to establish a defendant's guilt. Mere association with  
25 conspirators or those involved in a criminal enterprise is insufficient to prove a defendant's  
26 participation or membership in a conspiracy. Presence or a single act will suffice if the  
27 circumstances permit the inference that the presence or act was intended to advance the  
28 conspiracy.



1 INSTRUCTION NO. 7

2 IGNORANCE OF ANTITRUST LAWS NO DEFENSE

3 It is not necessary for the prosecution to prove knowledge of the accused that a particular  
4 act or failure to act is a violation of law.  
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6 Thus, if the jury should find, beyond a reasonable doubt, from the evidence in the case  
7 that the conspiracy charged in the Indictment was knowingly formed and that defendant  
8 knowingly became a member of the conspiracy, as charged, then the fact that defendant may not  
9 have known his conduct was unlawful under the Sherman Act would not be a defense.  
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1 INSTRUCTION NO. 9

2 SHERMAN ACT CONSPIRACY - PROOF OF OVERT ACT UNNECESSARY

3 The evidence need not show that the members of the alleged Sherman Act conspiracy did  
4 any act or thing to further, or accomplish, any object or purpose of the agreement or arrangement  
5 or understanding.  
6

7 What the evidence in the case must show, beyond a reasonable doubt, in order to establish  
8 the offense charged in the Indictment, is that the conspiracy alleged was knowingly formed and  
9 that the defendant knowingly became a member of the conspiracy either at the beginning of, or  
10 afterwards during, the existence of the conspiracy. As stated before, the success or failure of the  
11 conspirators to accomplish or achieve any object or purpose of the conspiracy is immaterial.  
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13 The gist of the crime charged in the Indictment is knowingly making or arriving at an  
14 agreement or arrangement or understanding in unreasonable restraint of interstate trade and  
15 commerce.  
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1 INSTRUCTION NO. 10

2 CONSPIRACY – KNOWING OF AND ASSOCIATION WITH OTHER CONSPIRATORS

3 A conspiracy may continue for a long period of time and may include the performance of  
4 many transactions. It is not necessary that all members of the conspiracy join it at the same time,  
5 and one may become a member of a conspiracy without full knowledge of all the details of the  
6 unlawful scheme or the names, identities, or locations of all of the other members.  
7

8 Even though a defendant did not directly conspire with other conspirators in the overall  
9 scheme, the defendant has, in effect, agreed to participate in the conspiracy if it is proved beyond  
10 a reasonable doubt that:  
11

- 12 (1) the defendant directly conspired with one or more conspirators to carry out at least  
13 one of the objects of the conspiracy;
- 14 (2) the defendant knew or had reason to know that other conspirators were involved  
15 with those with whom the defendant directly conspired; and  
16
- 17 (3) the defendant had reason to believe that whatever benefits the defendant might get  
18 from the conspiracy were probably dependent upon the success of the entire  
19 venture.

20 It is no defense that a person's participation in a conspiracy was minor or for a short  
21 period of time.  
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1 INSTRUCTION NO. 11

2 CONSPIRACY – LIABILITY OF SUPERIORS

3 Defendant was a company official during the time of his alleged involvement in the  
4 conspiracy charged in the Indictment.  
5

6 To find him liable for the act of a subordinate, you must find beyond a reasonable doubt  
7 that he was aware of the existence of the conspiracy, and:

- 8 a. that he knowingly authorized, ordered or consented to the participation of a  
9 subordinate in that conspiracy; or  
10  
11 b. that he was in a position to stop a subordinate who he knew was participating in  
12 that conspiracy from further participation, but failed to do so.

13 A company official who knowingly participates in a conspiracy in this manner is liable to  
14 the same extent as any other member of the conspiracy.  
15

16 In determining the guilt or innocence of the defendant, you should consider this position  
17 within the company, his relationship to his subordinates, any orders, instructions or directions he  
18 might have given or failed to give them, any reports they might have made to him, and the  
19 circumstances surrounding such communications.  
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1 INSTRUCTION NO. 14

2 JURISDICTION AND VENUE FOR ANTITRUST CHARGES

3 Before you can find the defendant guilty, you must find, beyond a reasonable doubt, that  
4 within the five-year period immediately preceding October 18, 2006, some means, methods or  
5 practices were employed by or under the authority of the members of the alleged conspiracy  
6 within the Northern District of California.  
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1 INSTRUCTION NO. 3

2 STIPULATIONS OF FACT

3 The parties have agreed to certain facts that have been stated to you. You should  
4 therefore treat these facts as having been proved.  
5

6 If you find the defendant guilty of participating in the conspiracy charged in the  
7 indictment, the parties have stipulated that within the five year period immediately preceding  
8 October 18, 2006 some means were employed by the members of the conspiracy within the  
9 Northern District of California, and that the conspiracy occurred within the flow of interstate  
10 commerce.  
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**7.1 DUTY TO DELIBERATE**

When you begin your deliberations, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

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**7.2 CONSIDERATION OF EVIDENCE**

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.



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### 7.3 USE OF NOTES

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

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**7.4 JURY CONSIDERATION OF PUNISHMENT**

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

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**7.5 VERDICT FORM**

A verdict form has been prepared for you. [Any explanation of the verdict form may be given at this time.] After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it and advise the Court that you are ready to return to the courtroom.

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**7.6 COMMUNICATION WITH COURT**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing, or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, on the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

### **Special Instruction in Response to Jury Question #1**

To prove a violation of Section 1 Sherman Act, the government must prove beyond a reasonable doubt each of the following elements:

1. That beginning on or about April 1, 2001, and ending on or about June 15, 2002, there was an agreement or mutual understanding between two or more persons to fix the prices of DRAM sold to certain OEMS,
2. That the defendant knowingly - that is, voluntarily and intentionally - became a member of the conspiracy, and
3. That the conspiracy either affected interstate commerce or occurred within the flow of interstate commerce.

The parties have stipulated that the conspiracy affected interstate commerce or occurred within the flow of interstate commerce.

Thus, in order to convict the defendant, the government must prove beyond a reasonable doubt that there was a conspiracy between the dates alleged in the Indictment and that defendant knowingly - that is voluntarily and intentionally - became a member of the conspiracy, knowing of its goal and intending to accomplish it, by knowingly agreeing to or coming to a mutual understanding to either:

- 1) fix or stabilize prices with Mike Sadler in furtherance of the conspiracy, or
- 2) provide assistance to other managers in furtherance of the conspiracy, or
- 3) authorize, order, or consent to the participation of a subordinate in furtherance of the conspiracy.

You are reminded that in following the court's instructions, you must follow all of them and not single out this one or another and ignore others; they are all equally important.

1 INSTRUCTION NO. 13

2 INTERSTATE COMMERCE

3 Section 1 of the Sherman Act applies only to unreasonable restraints of interstate  
4 commerce. The term interstate commerce refers to transactions in goods or services between  
5 persons in one state and persons in another state.  
6

7 To convict any defendant of violating Section 1 of the Sherman Act, the government must  
8 prove beyond a reasonable doubt either that the conspiracy to suppress and eliminate competition  
9 by fixing prices as charged in the Indictment was imposed directly on goods or services within  
10 the flow of interstate commerce or that the restraint affected interstate commerce.  
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12 The restraint charged may have had substantial effects on interstate commerce even  
13 though some or all of the parties to the conspiracy were not engaged in activities in interstate  
14 commerce and even though some or all of the activities may have been done wholly within one  
15 state.  
16

17 The amount, quantity, or value of interstate commerce involved or affected is  
18 unimportant, so long as you find that the conspiracy charged in the Indictment or the activities of  
19 the defendant that were affected by the conspiracy had some effect upon interstate commerce.  
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