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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA, )

Case No. CR 06-0692 PJH

14 )  
15 Plaintiff, )

**OPPOSITION OF UNITED STATES  
TO MULTIPLE CONSPIRACY  
JURY INSTRUCTION**

16 v. )

17 ) Trial Date: Feb. 4, 2008

Time: 8:30 a.m.

18 GARY SWANSON, )

Place: 17th Floor, Courtroom 3

19 Defendant. )  
20

Judge: Hon. Phyllis J. Hamilton

21 **I. INTRODUCTION**

22 The Government opposes a jury instruction on multiple conspiracies. As detailed below  
23 when, as here, there is no danger of variance prejudicial to the Defendant such an instruction is  
24 unsupported as a matter of law. In addition, a multiple conspiracy instruction is improper - and  
25 apparently unprecedented - in a single-defendant trial. Defendant's theories of "multiple  
26 conspiracies," to the extent they have been thus far explained, are unsupported by law and have  
27

1 no foundation in evidence. Defendant catalogues examples of Hynix’s competitors seeking to  
2 gain a competitive advantage over his employer. There is nothing on the record to suggest that  
3 any of these activities rose to the level of an illegal conspiracy, and there is nothing on the  
4 record to suggest that Defendant was involved in any of them. Finally, a multiple conspiracies  
5 instruction runs a significant risk of confusing the jury.

## 6 **II. ARGUMENT**

### 7 **A. There is no Possibility of Prejudicial ‘Spillover’ in a Single Defendant Trial**

8 As set forth in *U.S. v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004), “the question of  
9 whether an instruction on multiple conspiracies is warranted is related to the issues of  
10 “spillover” or transference of guilt that are raised by trial severance. . . .” The instruction “may  
11 be required where the indictment charges several defendants with one overall conspiracy, but the  
12 proof at trial indicates that a jury could reasonably conclude that some of the defendants were  
13 only involved in separate conspiracies unrelated to the overall conspiracy charged in the  
14 indictment.” *U.S. v. Anguiano*, 873 F.2d 1314, 1317-18. The possibility of transference or  
15 “spillover” of guilt from one defendant to another may dictate that such an instruction be given.  
16 Indeed, the instruction “is designed precisely to cure the problem of Kotteakos ‘spillover.’” *Id.*  
17 n.2 (citing *U. S. v. Kotteakos*, 328 U.S. 759 (1946)).

18 Because Defendant is standing trial alone there would be no need for a multiple  
19 conspiracy instruction even if he could successfully allege alternative conspiracies supported in  
20 fact. “[A] multiple conspiracies instruction is generally designed for trials involving multiple  
21 defendants engaged in multiple conspiracies, not for trials of lone defendants. . .” *Id.* at 1318.  
22 Other courts are in accord. The “single/multiple conspiracy analysis does not apply to the trial  
23 of a single defendant.” *U.S. v. Corey*, 566 F.2d 429, 431 n. 3 (2d Cir. 1977) (citing *U. S. v. Sir*  
24 *Kue Chin*, 534 F.2d 1032, 1035). “We have been cited to no case which involves only one  
25 defendant and where a claim of multiple conspiracies has been sustained.” *Id.* Nor has  
26 Defendant cited to any such case.

1           **B. Defendant’s Alternate Conspiracies are Unsupported by Law and Fact**

2           Because it is well-established that a single conspiracy may involve several  
3 subagreements or subgroups of conspirators, Ninth Circuit “precedents require a multiple-  
4 conspiracies instruction only in the event that the evidence showed other conspiracies that were  
5 unrelated to or separate from the conspiracy charged. . .” *Fernandez*, 388 F.3d 1199, n.34 (9th  
6 Cir. 2004). “A multiple conspiracies instruction is required only if the defendants’ theory of the  
7 charged conspiracy or conspiracies is supported by law and has some foundation in the  
8 evidence.” *Id.* at 1247 (citation and internal quotation marks omitted).<sup>1</sup> Defendant’s proffered  
9 conspiracies lack foundation in evidence and, even on a different record, would find no support  
10 in law.

11                           **1. Coordination of Trade Proceedings is not Conspiratorial and is**  
12                           **Protected Under *Noerr-Pennington***

13           Throughout the proceedings Defendant has suggested that Micron and Infineon’s gathering  
14 of information for and petitioning of the United States International Trade Commission and other  
15 trade tribunals constituted a “conspiracy” to drive Hynix out of business. The record contains no  
16 evidence of any concerted activity to drive Hynix out of business, and at most sporadic - and  
17 legal - interaction among competitors on trade proceedings.<sup>2</sup> The unilateral actions of one  
18 DRAM manufacturer in bringing a trade petition cannot constitute a “conspiracy.” Nor, for that  
19 matter, can joint petitioning activity. This is because joint petitioning activity is protected under  
20 the Petition Clause, U.S. Const. amend. I, cl. 6, as recognized by the *Noerr-Pennington* doctrine.  
21 *See Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961);  
22 *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Coordination of trade proceedings  
23 is not illegal: “Joint efforts to influence public officials do not violate the antitrust laws even

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24  
25 <sup>1</sup>Defendant cites to the correct standard even if the case he cites in support, *U.S. v. Linn*, has been  
abrogated by *Florida v. White*, 526 U.S. 559 (1999).

26 <sup>2</sup> Mike Sadler, for example, recalls a single conversation with Peter Schaefer of Infineon on the  
27 possibility of their companies joining hands in trade proceedings. (Sadler 1238:7-18).

1 though intended to eliminate competition. Such conduct is not illegal either standing alone or as  
2 part of a broader scheme. . . .” *Id.* at 660-61.

3 There is a “sham” exception to the broad First Amendment protection recognized by  
4 *Noerr-Pennington*. But Defendant would be hard-pressed to argue that the petition Micron  
5 successfully filed with the ITC was “objectively baseless.” *See Professional Real Estate*  
6 *Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49 (1993).

## 7 **2. There was no Conspiracy to Restrict Production**

8 Defendant suggests that there was a conspiracy to restrict production of DRAM. The  
9 record is clear, however, that although this possibility was briefly explored by some DRAM  
10 manufacturers, no agreement was ever reached<sup>3</sup> and concerted reduction in DRAM capacity  
11 never occurred. Even if there had been a successful conspiracy to restrict output, Defendant has  
12 thus far been silent as to how the existence of such a conspiracy could mislead a jury such that  
13 there would be danger of a prejudicial variance from the conspiracy set forth in the indictment.  
14 Defendant is on trial for a single count of price fixing. Because there has been no suggestion  
15 whatsoever of any participation of Defendant in the exploratory but unsuccessful efforts of  
16 certain DRAM competitors to restrict output,<sup>4</sup> there is no danger that the jury will convict  
17 Defendant for this attempt to restrict output.

18 Similarly, there has been no suggestion that Defendant participated in any attempts to  
19 “Kill Hynix” or engaged in fraudulent merger activities to disadvantage Hynix. Accordingly,  
20 even if, against all evidence, DRAM manufacturers somehow “conspired” to achieve these aims  
21 and even if “conspiring” to achieve them were in fact illegal, there is not the slightest danger that  
22 the jury would convict defendant for any these activities.

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24  
25 <sup>3</sup>Mike Sadler relates how Samsung rejected the idea: “I didn’t even get as far as suggesting it. I probed  
him on his interest level and he indicated no interest. And that was as far as it went.” (Sadler 1262:5-8).

26 <sup>4</sup>Indeed, Mike Sadler specifically denied that the Defendant was involved “in any way” in the unsuccessful  
27 attempt to restrict output. (Sadler, 1261:21).

1 **III. CONCLUSION**

2 Because a multiple conspiracies instruction is not designed for a single-defendant trial,  
3 and because there is nothing on the record to indicate that there was a conspiracy other than the  
4 one charged in the indictment, Defendant's request for such an instruction should be denied.

5  
6 DATED: February 21, 2008

Respectfully submitted,

7 /s/ Niall E. Lynch

8 Niall E. Lynch  
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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that I filed this document electronically on February 21, 2008, through the Electronic Case Filing portal of the U.S. District Court, Northern District of California. Under N.D. Cal. Local Rule General Order 45, all parties appearing in this matter will receive an electronic copy of this filing.

Dated: February 21, 2008

/s/ Nat Cousins