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GARY SWANSON

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GARY SWANSON, Defendant.	No. CR-06-0692 PJH **DEFENDANT'S OBJECTIONS TO GOVERNMENT'S PROPOSED COCONSPIRATOR EVIDENCE** Date: January 16, 2008 Time: 1:30 p.m. Courtroom: 3 Trial Date: February 4, 2008 Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION

On October 24, 2007, the government submitted just 17 email exhibits with the Declaration of Niall Lynch, Dkt. 200 Exhs. 23-39, and sought an order for pretrial admission of coconspirator statements. After hearings November 7 and 28, 2007, the Court adopted "a middle road approach," requiring the government to "preview" its coconspirator statement evidence, after which the Court "will determine which statements the government will be permitted *to introduce*." Order, Nov. 30, 2007, Dkt. 250, at 1, emphasis supplied. This approach was earlier described by the Court as

> requir[ing] the government to make a *preliminary showing or summary of its evidence establishing the predicate facts*, while deferring the final decision until conclusion of the presentation of the evidence.

Order, Nov. 16, 2007, Dkt. 248, at 5:7-10, emphasis supplied.

On November 28, the government stated its objectives: "[W]e're not asking for a pretrial ruling on admissibility. What we are trying to do. . .

> is to afford the Court *sufficient information* that a conspiracy existed, identifying the time period and the participants, at least the relevant participants for purposes of this trial, and that the defendant had knowledge of and participated in the conspiracy."

November 28 Tr. at 17:17-24, emphasis supplied. The government, on November 28, estimated that the number of emails to be previewed would be 50 to 60. *Id.* at 32:3-4.

The government in its December 19, 2007 coconspirator statement submission now attaches *93* exhibits of emails and email threads -- totaling hundreds of emails -- over what is described as a single conspiracy spanning *4.5 years back to December 1997*, despite the fact that no individual or company has ever pled guilty to such historical conduct. The government asserts for the first time that there are *94 alleged members of the conspiracy* -- virtually all of the worldwide DRAM sales and marketing executives -- including many from companies not mentioned in the Indictment or earlier Summary and Amended Summary of the Government's Case Against Gary Swanson, which will become a bill of particulars. Of the 14 summaries from persons who will introduce the statements, *9 are unindicted and have never admitted being a*

coconspirator. Comparing the December 19, 2007 Gov't Summary at Attachment 1 (94 alleged conspirators at 9 companies), with the October 10, 2007 Amended Summary (a 5 company conspiracy as to which 15 individuals have been charged or pled guilty), Villarreal Decl. Exhs. 8 and 9, it is obvious that the government is expanding the scope and time period of the conspiracy simply to shoehorn more evidence into the coconspirator exception. That can't be appropriate at this late date.[1]

The introductory burden on the government is daunting as to much of this evidence. It must show "sufficient" predicate facts that the statements were from knowing and participating "members" of a vast, largely uncharged and unproven conspiracy, that Mr. Swanson was contemporaneously a member too, and that each statement furthered the conspiracy. That burden is not satisfied by conclusory characterizations in the Witness Summaries that are not evidence, while the actual "evidence" previewed shows many of the elements are insufficiently established. This brief argues that as a consequence certain "categories" of the emails do not satisfy the "introduction" standard of the Court's middle road approach.

Detailed objections are set forth in the attached Table of Defendant's Objections, while the following legal arguments support the restrictions on use and introduction summarized in the Conclusion to this brief at § V below. A pretrial ruling that limits introduction of certain kinds of statements, until and unless a greater showing is made, can be easily applied to any particular exhibit and should not require document by document rulings at the pretrial conference.

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[1] Two of four companies not previously identified in the October 10, 2007 Amended Summary, NEC and Hitachi, formed Elpida in December 1999, and Elpida's plea agreement terms included NEC and Hitachi sales separately but only back to April of 1999. Similarly, Hyundai in July 1999 acquired 60% of LG, before Hyundai spun off Hynix. But in the latest Gov't Summary dated December 19, 2007, NEC, Hitachi, Toshiba, LG and their employees are alleged for the first time to be *separate* co-conspirators dating back to January 1998.

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II. THE GOVERNMENT'S SUMMARY AND EXHIBITS ARE CONTRARY TO THE COURT'S PROCEDURES AND FINAL PRETRIAL ORDER

A. Procedure for Introduction of Coconspirator Statements and the Middle Road Approach Applied to the Government's Summary.

Pursuant to the Court's November 30 Order, Dkt. 250, at 2:16-17, the government was "to file and serve a summary of each witnesses' testimony and the coconspirator statements to be offered by each witness." Second, "[t]he government must attach to the witnesses' summary all emails to be introduced via that witness, and must highlight the coconspirator statements contained in the emails." *Id.*, at 2:18-19.

The Court's "middle road" preview approach, drawn from *United States v. Cox*, 923 F.2d 519 (7th Cir. 1991), requires "sufficient" evidence of the predicate facts to support ultimate admissibility per this circuit's standards in *United States v. Larson*, 460 F.3d 1200, 1211-1212 (9th Cir. 2006).[2] The purpose of the Court's preview is to permit the parties and the Court to make an assessment "concerning the sufficiency of the Government's evidence on the foundational requirements *before the statements are heard by the jury* . . ." *Cox*, *supra*, 923 F.2d at 527 (emphasis added). "Trial courts may. . . take a kind of middle course by requiring at the outset some showing or summary of *evidence establishing the predicate facts*, while deferring the final decision." Mueller and Kirkpatrick, 4 Federal Evidence § 8:62, p. 5 (3d. ed.), emphasis supplied.

The government's evidence here is insufficient to support introduction of many of the statements, especially those email bits (1) concerning an uncharged conspiracy before April 1999, or (2) by a declarant who is uncharged and has neither admitted or been shown under any standard to have been a "member" of an illegal conspiracy. The "predicate facts" for such statements have just not been sufficiently presented, and the Court should rule now that certain categories of statements do not yet (if ever) qualify under *Larson*, as more particularly explained in

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[2] Admission into evidence of a proffered coconspirator statement under Rule 801(d)(2)(E), Fed. R. Evid., requires the prosecutor to show under Rule 104(a) "by preponderance of the evidence that (1) the conspiracy existed when the statement was made; (2) the defendant had *knowledge of*, and *participated in*, the conspiracy; and (3) the statement was made 'in furtherance of' the conspiracy." *Larson, supra,* 460 F.3d at 1211, emphasis supplied and citations omitted.

the Table of Defendant's Objections filed herewith. At all events, the email statements certainly should not be published to the jury in opening statements.

In a slight of hand that ignores the Court's November 30, 2007 Order, Dkt. 250, at 2:17, that "the coconspirator statements to be offered by each witness" be identified, the Witness Summaries are mostly general narratives punctuated by a few quotes. The government should be precluded from offering any non-email testimony under Rule 801(d)(2)(E) that is not quoted in the 14 Witness Summaries, as this would violate the Court's Order and prejudice the defendant.

B. The Asserted 4-1/2 Year Single Conspiracy Back to December 1997 is No Basis On Which to Admit Historical Emails.

According to the government's new submission, "the conspiracy" for purposes of Rule 801 now (1) goes back years before the indictment's start date, to "at least January 1998" (and Gov't Ex. 25 dates to December, 30 1997) to sweep in a period for which Mr. Swanson was not charged and (2) lobs in for the first time as alleged "coconspirators" *four* new corporate entities and some *dozens* of new individuals, who neither pled nor were ever charged. Gov't Summary at 3:1, and Attachment 1.

As a threshold matter, the Court should use this "preview" stage to winnow out proffered coconspirator statements which, on their face, flunk the first *Larson* element, "that the conspiracy existed when the statement was made." Order, Nov. 30, 2007, Dkt. 250, 2:7.

> Statements of alleged coconspirators made before the time it can be shown by independent evidence that [the defendant] had joined the conspiracy are not admissible to show *his participation.*

United States v. Gee, 695 F.2d 1165, 1169 (9th Cir. 1983), emphasis supplied; *accord, United States v. Segura-Gallegos,* 41 F.3d 1266, 1272 (9th Cir. 1994). Once a defendant is ultimately proved to have joined -- knowledgeably participated in -- an ongoing conspiracy, he is responsible for acts of others done prior to his joining it, *United States v. DiCesare,* 765 F.2d 890, 900 (9th Cir. 1985), but *DiCesare* is *not* a decision whose rule is "for the purpose of applying the coconspirator exception." Gov't Summary at 3:9-10. The rule in *DiCesare* instead reflects the scope of ultimate culpability *after* the defendant has been proven on the merits to have been a knowledgeable participant in the conspiracy. The *Gee* rule governs the admissibility and hence the

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introduction predicate here, where pre-indictment time frame statements are proffered under Rule 801(d)(2)(E).

Attachment 1 to the Gov't Summary lists "conspirators" from companies such as Toshiba, LG, and NEC *not* mentioned in the Indictment or the government's Summaries of the Case Against Gary Swanson that served as a temporary proxy for a bill of particulars for the defense. (Villarreal Decl. Exhs. 7, 8.) The government's pre-1999 email exhibits identify new participants in an uncharged conspiracy, greatly expanding the case and requiring far more proof before such statements are published to the jury under Rule 801(d)(2)(E).[3]

The declarants who have pled guilty, including Chung, Kim, Suh and Kang, all pleaded to conduct beginning in 2001-2002 only, and the corporate pleas limit the conspiratorial conduct to April 1, 1999 to June 2002, and not earlier. (Villarreal Decl. Exh. 9, chart.) There is no sufficient (let alone independent) evidence of the conspiracy in 1998 among nearly 100 members. The government's zeal to use a few emails from that period must be tempered by a rational ordering of proof, fairness and due process. Introducing the historical emails without more requires a leap of predicate facts never tested or proven in this Court, and would greatly increase the chance of mistrial when the government fails to link up an extended conspiracy during the case.[4]

C. The Government's December 19 Summary Violates the Conditions of the Court's Final Pretrial Order Regarding the Use of Pre-Conspiracy Evidence

The Court in its Final Pretrial Order November 16, 2007, Dkt. 247, determined that evidence outside the time period charged in the indictment is relevant and excepted from Rule

[3] For example, Gov't Ex. 40 dated Sept. 25, 1998, to be sponsored by witness Byrd includes price lists for "competitors Toshiba, NEC, Micron, and Siemens" (Byrd-2). Mr. Heller is supposed to testify about pricing discussions 1998-2002 with "Bill Hood of Hitachi, Donna Friery and Jerry Barbaro of NEC" (Heller-2), yet these persons and their companies are uncharged and unidentified in the Indictment and functional bills of particulars heretofore. Gov't Ex. 45, dated Nov. 20, 1998, to be sponsored by witness Palonsky, concerns pricing discussions with "Hynix Japanese DRAM competitors Toshiba and Mitsubishi" (Palonsky-5), yet these again are companies not identified in the Indictment or earlier summaries.

[4] While the co-conspirator exception can perhaps be based upon a conspiracy other than the one charged, *see In re Japanese Electronic Products*, 723 F.2d 238, 263 (3rd Cir. 1983), *rev'd on other grds*, 475 US 574 (1986), the different conspiracy must independently be shown to exist, and to meet all the other *Larson* requirements as applied to nominee coconspirator statements.

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404(b) as "background" – in order for the prosecution "to present a coherent and comprehensible story regarding the alleged pricefixing conspiracy," Order at 14:26-27, and that alternatively it "may be admissible" under Rule 404(b), "depending on the particular piece of evidence and the purpose for which it may be proffered." *Id.* at 15:3-5.

In part because the government "assured Swanson and the court that it is not seeking to alter the time period(s) of the indictment," the Court concluded the "amended summary [filed October 10, 2007] does not constructively amend the indictment." That ruling concerned the 'subject matter' of pre-April 1999 conduct as background, not the admission of emails for the truth of an expanded conspiracy. Now, faced with a weak case in the period charged, the government wants to use disembodied emails beginning in 1997 to incite the jury,[5] and realizes that under Rule 801(d)(2)(E) it must put them forward *not* for background or context or "explanation" -- as underpinned the Court's Final Pretrial Order -- but rather as coconspirator statements that will of course be used "to determine whether or not Swanson committed the charged offense" – a purpose expressly rejected by the Court at 15:7-8 of the Final Pretrial Order.

Any assessment of the *Larson* requirements for admission of the pre-April 1999 statements shows that they are being admitted to inculpate the defendant (see fn. 2 above), and the government now clearly alleges an earlier conspiracy extending from "at least" January 1998 to June 15, 2002 (Gov't Summary at 3:1), which is *not* the one charged. Thus, if the government continues to insist on admitting pre-April 1999 emails as coconspirator statements, then Swanson reasserts and the Court should revisit the earlier determination about constructive amendment. At a minimum, the court should reject these out-of-the-charged-period statements as being inadmissible under Rule 801(d)(2)(E), and prohibit their use in any manner before the jury.

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[5] The government's coconspirator exhibits contain 12 from pre-1999: Exs. 25, 26, 32, 33, 35, 36, 38, 39, 40, 41, 43 and 45.

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III. THE GOVERNMENT'S SUMMARY DOES NOT MEET RULE 801(d)(2)(E) REQUIREMENTS FOR PRELIMINARY INTRODUCTION.

A. All or Most of the Salesmen Emails do not Show Knowledge or Participation by the Declarant.

There "must be independent proof [i.e. independent of the statement itself] of *the defendant's and the declarant's status as members of the same conspiracy*," *United States v. Smith,* 893 F. 2d 1573, 1574 (9th Cir. 1990), emphasis supplied. In general, *Bourjaily v. United States,* 483 U.S. 171, 175 (1987) allows district courts discretion to consider nonadmissible material to arrive at these foundational determinations under Rule 104(a) (*id.* at 179 n.2), and to consider the nominee coconspirator statements themselves in doing so, but the government must also present independent material: "some evidence aside from the proffered coconspirator's statement," *United States v. Miller,* 981 F.2d 439, 442 (9th Cir. 1992).

This means that the government's independent proof of Mr. Swanson's participation -- and thus of declarant participation as well -- must be of participation in the *agreement*, not in the group, which is here a drastically expanded group comprising almost 100 sales and marketing executives in the DRAM industry 1997-2002.

> The scope of the conspiracy is determined by the scope of the agreement between the defendants. The government must show that a defendant joined the agreement, not the group.

United States v. Richardson, 130 F.3d 765, 772-73 (7th Cir. 1997), *jud. vac'd on other grds*, 526 US 813 (1999). The government's burden is compounded since many of the proffered email statements are by third parties who are not on the government's witness list and who have not pleaded guilty.[6] Are the Court and the defense simply to assume without testimony and proof that all these uncharged and nontestifying persons joined an illegal agreement, justifying introduction of out of court statements that are otherwise hearsay? Surely the Court's authority to regulate the

[6] *See, e.g.* Gov't Exs. 25 (declarants Cole, Morrisey), 109 (Harriman), 200 (Soucheiron), 222 (Soucheiron), 66 (McCarthy), 360 (McCarthy), 106 (H.J. Kim), 148 (Addie), 120 (Jay Choi), 99 (H.J. Kim), 103 (Clint Miller), 165 (H.J. Kim), 177 (Radford), 41 (S.J. Woo), 65, 69 (Lauer), and 73 (Grant, Lauer)

order of proof before such statements are published to the jury will prevent this wholesale trampling of the *Larson* requirements.

Of course, exchanges of price information without more is not illegal. *United States v. U.S. Gypsum Corp.*, 438 U.S. 422, 441 n.16 (1978); *In re Citric Acid Litigation*, 191 F.3d 1090, 1103 (9th Cir. 1999); *In re Baby Food Antitrust*, 166 F.3d 112, 126 (3d Cir. 1999); *Order Granting Summary Judgment In Part and Denying Summary Judgment in Part (In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, February 20, 2007), p. 23:16-24. Large swathes of the proffered emails to be sponsored by the US salespersons look mostly like competitors talking about price with the permissible goal of independently setting a price that meets the market and does not lose market share. *See, e.g.,* Gov't Exs. 162, 121, 134, 96, 222, 360, 82, 85, 181, 183, 120, 161, 110, 177, 65.

The Court, on December 17, 2007, noted that a U.S. salesperson such as Mr. Swanson may have a different perspective on the existence of a conspiracy than his superiors in Korea who have pled guilty to making illegal agreements with competitors.[7] The government's "conclusory" statements in the Witness Summaries of uncharged U.S. sales representatives: that Mr. Swanson was "aware" of a conspiracy (Heller-5), or that in exchanging pricing information competitors "reached an understanding" on price (Peterson-3) or did so to "coordinate a pricing among competitors" (McBroom-4) are not "evidence". *The emails say no such thing.* And the "independent" evidence required to reach the predicate fact of 'knowing participation' to support publication to the jury under *Larson*, here comes from government interviews that contain *no* such admissions. (Villarreal Decl. Exhs. 1-5, government interviews of Hynix US salesmen Byrd, Heller, McBroom, Palonsky and Peterson.) [8]

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[7] "…[P]articularly here we have a US American based defendant with a foreign based company, I don't know what all of the issues and defense that going to be raised are, but I would imagine there's going to be a disconnect between the company and the corporate employer and the defendant." December 17, 2007 RT at 117:13-18.

[8] The government also knows better, as Mr. McBroom and other US salespeople have denied under oath in the civil cases knowledge of any agreement being made with a competitor to fix prices. (*E.g.*, Villarreal Decl. Exh. 6, McBroom deposition p. 206.) This fortifies the defense position that such statements must not be introduced absent a sufficient showing by the government in connection with the witness sponsor at trial.

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Larson and other cases require that both declarant and defendant be shown to be knowledgeable participants in the same conspiracy, and declarant intent is the key to demonstrating declarant membership.[9] The Court should use this preview to jettison proffered coconspirator statements from individuals who have neither pled nor been charged with any offense, conspiracy or otherwise, and as to whom the government has not offered colorable evidence that they were knowing participants in the conspiracy.

B. Most if Not All of the Salesmen Emails Do Not Meet the In Furtherance Requirement for Preliminary Introduction.

To be considered "in furtherance" of the conspiracy, the statements cannot be mere narrative or descriptive comment, nor may they be simply "in furtherance" of some *other* agreement or venture – including, of course, the normal operation of legitimate DRAM industry business. A declarant's statement that does not meet the "in furtherance" test , ". . . is not admissible against the defendant under the coconspirator exception unless the declarant was associated with the defendant in a conspiracy or joint venture *having that criminal act as its objective.*

An association of the defendant and the declarant *in some other venture* will not suffice. *United States v. Russo,* 302 F.3d 37, 44 (2d Cir. 2002), *cert. denied,* 537 U.S. 1112 (2003)(emphasis added). *See generally, Iannelli v. U.S.,* 420 U.S. 770, 777 (1975). Many of the proffered emails read like narrative discussions, chit-chat or other long chains of questions and responses furthering the sale and pricing of DRAM products in a competitive market, not statements more likely than not to be in furtherance of a conspiracy. *See, e.g.,* Gov't Exs. 200, 66, 148, 199, 188, 197, 73, 107, and 175.

A review of the alleged coconspirator statements from Mr. Byrd of Hynix demonstrates, by way of example, that many of the emails simply allowed independent pricing decisions based on greater market intelligence: Gov't Ex. 50 (Byrd-3): "I recommend holding at

[9] The government knows that such a showing is mandatory: "The Court: and it would be obvious that the competitor is a member of the conspiracy. I mean, the declarant also has to be a member of the conspiracy in order for the exception to apply? Mr. Lynch: Correct." November 28 Tr. at 13:11-15.

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the current price based on the inputs recvd from the compet."; Gov't Ex. 121 (Byrd-5): "Byrd will testify that information gathered from competitors was useful in understanding market conditions and preventing Hynix from offering a price lower than competitors."; and Gov't Ex. 134 (Byrd-5): "Byrd will testify that there was a directive from Hynix management to gather competitive information in order to resist unnecessary price decreases."

Salesmen's competitive price exchanges are not presumptively illegal. *In re Citric Acid Litigation*, *supra*, 191 F.3d at, 1103. The emails reflecting U.S. salesmen's price exchanges and price comparisons show the market information was used to set prices in a very competitive market, not to fix prices by agreement.

IV. NO PART OF THE EMAILS ARE ADMISSIBLE NONHEARSAY.

Finally, and perhaps most temerarious, the government casually argues that unhighlighted text within the voluminous emails are not "statements," but are rather "relevant" to show "context" that is "not offered for the truth of the matter asserted." Gov't Summary at 5:1-18. This catch-all supposedly applies as well "if the court does not find that the foundational requirements for a coconspirator statement have been satisfied," making even the highlighted statements admissible in the alternative as "nonhearsay." *Id.* at 5:7-9. Heads we win, tails we win. This offhanded assertion, if credited, renders pointless the entire project on which all have been laboring.

It is, moreover, nonsense: *all* of the matter heaped upon the Court is out-of-court assertive conduct: words, spoken or written, which are hearsay unless within a specified variety of nonhearsay. To date, the offered exceptions other than the coconspirator rule have been rejected:

> The court has already determined that emails standing alone are not business records and that they are also not likely to be admitted as embodying present sense impressions.

Nov. 16, 2007 Order, Dkt. 248, at 6:13-15: While courts frequently refer to "context" as a nonhearsay purpose for admission of certain evidence, the government's "background" purpose here goes to the heart of the "truth" of the supposed competitor relationships and the nature of the marketplace. Wielding words like "context" and "background" doesn't substitute for analysis:

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> "[M]erely labeling hearsay declarations as 'not for the truth of the matter asserted' or 'background' does not automatically convert them to admissible evidence, or overcome the prejudicial effect . . . . Particularly, since the original declarants were not shown to be unavailable and many were expected to testify later in the trial, there was no need for such second-hand or hearsay evidence."

Mohammadkhani v. Anthony, -- F.Supp.2d --, 2007 WL 232516 (D. Nev. 2007).

The government intends to use the emails to establish the existence of a conspiracy, and that the declarant and defendant intended to participate (which must be shown in order to meet the *Larson* requirement that both were knowledgeable participants in the same agreement). Declarant perception, narrative and memory are not just material but critical. *See* 5 Weinstein's Federal Evidence s 801.11[1], pp. 801-14-801-15 (2007). It will be incumbent on the government to *particularize* this "not for the truth" pitch and to specify which nominee statements apply, rather than just saying "some" of the statements fit, leaving it to the Court to puzzle and parse this out for itself.

In any event, the present proceeding is about application of Rule 801(d)(2)(E), not about "background" or other claimed nonhearsay uses of the evidence. Other bases for admissibility, with proper consideration of matters such as prejudice under Rule 403, declarant unavailability, and nonhearsay usage, are for treatment *at trial*, as each comes up. They are for another day.

V. CONCLUSION: AT A MINIMUM, UNTIL THE GOVERNMENT ESTABLISHES SUFFICIENT PROOF, EMAILS BEYOND THE CHARGED PERIOD OR OFFERED BY DECLARANTS WHO HAVE NOT ADMITTED THEIR PARTICIPATION, SHOULD NOT BE PUBLISHED TO THE JURY IN ANY MANNER.

A. Consistent with the 7th Circuit Middle Road Approach, Only Coconspirator Statements That Meet a Sufficiency Standard Should be Introduced.

Defendant believes there has been no showing that would justify introduction of any of the coconspirator statements, given the insufficient evidence as to whether Mr. Swanson knew of and participated in an illegal agreement to fix prices, and that each proffered email fails as a consequence as noted in the Table of Defendant's Objections, *infra*.

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Review of the voluminous government submission shows that only witness Suh (Suh-1) is "expected" to testify that the defendant "knew" about agreements with competitors. The short Witness Summary of the testimony of Michael Sadler, the only competitor witness to testify against Mr. Swanson, contains only a conclusion that Swanson and Sadler "reached agreements" to stabilize or raise prices (Sadler-2), which is not evidence or a statement under *Bourjaily*.[10] Thus, at this time all of the coconspirator statements should be excluded because there is insufficient evidence to satisfy the knowing participation predicates of *Larson*, even before one gets to the 'in furtherance' issue.

Even assuming that statements by convicted felons Chung, Kim, Suh, Lee and Kang are sufficient to meet the introductory "sufficiency" standard of *Cox*, since their participation in some conspiracy is admitted and can be noted by the Court per Rule 104(a), statements by others who are *not* charged and have *not* pled guilty are surely not competent coconspirator statements because the government has not shown these persons were knowing members of a conspiracy charged against the defendant and that they intended to further the goal of the alleged conspiracy by their statements. And statements made before April 1, 1999 are not part of the conspiracy charged against Mr. Swanson and are inadmissible hearsay. Thus, the defense at a minimum asks the Court to rule that:

(1) the proffered out of court coconspirator statements made before April 1, 1999 are inadmissible hearsay;

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[10] A few post-April 1, 1999 emails to be sponsored by witnesses Chung and Kim predicate that Mr. Swanson was asked to "contact" Sadler at Micron, or "help ourselves," or "talk with Mike" (Gov't Exs. 94, 166 and 207); that Mr. Swanson should use "diplomacy" at Micron (Gov't Exs. 185, 186); and that Chung noted there was an "unspoken consensus" with Samsung (Gov't Ex. 206). *Nowhere* do the emails ever state that Mr. Swanson was aware of an over-arching illegal agreement, and the summaries' conclusions that Mr. Chung's purpose was that he wanted Swanson to "coordinate pricing strategy with Micron" (Chung-6) or that Swanson "knew about Chung's pricing coordination with competitors" (Chung-3) is not evidence that independently supports Mr. Swanson's knowledge of Mr. Chung's purposes.

(2) the proffered statements by declarants who are not charged or have not pled guilty are not competent coconspirator statements publishable to the jury in the absence of more convincing proof at trial consistent with the court's discretion to regulate the order of proof; [11] and

(3) no out of court statements shall be offered in the government's case in chief under Rule 801(d)(2)(E) that are not included in the witness summaries or attached emails.

B. Emails Should Not Be Published in Opening Statement.

The government's coconspirator email statements lack the foundational facts to justify their publication to the jury. Their meaning will be misused in opening statement as the government has demonstrated in the Witness Summaries that it relies mostly on argument and characterization to support the *Larson* predicates. Given the current state of the record, use of any of those emails bears a high likelihood of confusing and prejudicing the jury if used in advance of a testifying witness who can explain and rebut any improper inferences. Use of the emails in opening needlessly aggravates prospects for mistrial. *See U.S. v. Hernandez*, 779 F.2d 456, 459 (8th Cir. 1985) [coconspirator statements used in opening and risk of mistrial.]

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[11] "[I]t is clear that it is within this court's discretion to determine the order of proof or the showing, if any, that is appropriate prior to the government's introduction of the coconspirator statements. *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983)." Nov. 16, 2007 Order, Dkt. 248, at 4:16-18.