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DATE: November 28, 2007

1. TO: **Nathanael M. Cousins, Esq.**  
U.S. Department of Justice

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DEPARTMENT OF JUSTICE  
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ANTITRUST DIVISION  
SAN FRANCISCO OFFICE

FROM: William I. Edlund

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November 28, 2007

Via Fax

Nathaniel M. Cousins, Esq.  
U.S. Department of Justice  
Antitrust Division  
450 Golden Gate Avenue  
Room 10-0101  
P. O. Box 36046  
San Francisco, CA 94102

Re: U. S. v. Swanson

Dear Mr. Cousins:

This letter responds to your November 26, 2007 letter asking that we (1) “clarify” the grounds on which Professor Hausman will testify and (2) confirm that he will offer expert opinion at trial. As to the latter, the answer is yes: Professor Hausman will offer expert testimony, as well as percipient testimony about the concealment by Mr. Sadler and Micron of their role in and knowledge of the price-fixing conspiracy alleged against Mr. Swanson, bearing on the Micron witnesses’ credibility and bias.

The Court’s Final Pretrial Order, Dkt. 247 filed November 16, 2007, states at pp. 5-6 that “economic evidence” from Mr. Hausman would be proper “in order to rebut the existence of the alleged conspiracy itself or [to] tend to negate the fact that [the alleged conspiracy] occurred” and, citing *Continental Baking Co. v. United States*, 281 F.2d 137, that “if defendant denies [as Mr. Swanson does] entering into an illegal price fixing agreement, he is permitted to present to the jury his explanation of the factors that brought about similar prices.” See also, ABA Section of the Antitrust Law, *Criminal Antitrust Litigation Handbook* (2d ed. 2006) 255, 308-309.

The testimony of Jerry Hausman about his investigation of the DRAM market during the period 2001-2002 is just such economic evidence that meets those areas identified by the Court’s Order and in the authorities. He will explain:

- the factors that brought about similar prices during that period;
- why DRAMs are a commodity product that traded primarily on the basis of price, being small and light and transported rapidly by air with negligible transportation costs;
- that large volumes of DRAM were bought and sold every day throughout the United States on the basis of price;

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- that there was a near perfect flow of information regarding DRAM pricing;
- that all of this information and low transportation costs resulted in a very efficient arbitrage of DRAM prices;
- that due to the commodity nature of DRAMs and massive investment requirements for their manufacture, companies unable to be competitive routinely exited the market creating intense price competition; and
- that Hynix pricing in the United States had significant economic effects that resulted in Hynix and other suppliers selling at economically irrational levels.

All of these factors are explained in greater detail in the June 17, 2003 Report of Mr. Hausman at pp. 3 through 6, and at his transcribed testimony on June 24, 2003 pp. 52-56, attached to defendant's Notice of Summary Under Rule 16 About Expert Testimony By Jerry Hausman, Dkt. 209, filed October 26, 2007 (which summary further describes his testimony).

Professor Hausman's expert testimony is substantial evidence rebutting the conspiracy claim against Mr. Swanson, by explaining that his conduct was due to economic factors and not illegal agreements. See, *Continental Baking Company v. United States*, 281 F.2d 137, 143-4 (6th Cir. 1960); *United States v. Goodman*, 850 F.2d 1473, 1479 (11th Cir. 1988) and cases cited at fn. 8; *United States v. Louis Trauth Dairies*, 1994 WL 876373 (S.D. Ohio 1994); and Criminal Antitrust Litigation Handbook, *supra*, pp. 308-309 and authorities cited at fns. 197 and 200.

The bolded reference, at p. 1 of your November 26, 2007 letter, to defendant's brief at Dkt. 223 p. 7 is off-point. The government at that time had erroneously argued, in favor of admitting plea agreements, that defense experts *might* offer opinions that no conspiracy existed, making the plea agreements relevant in rebuttal. The defense brief in response simply states at p. 7 that defense experts will *not contest* the existence of a conspiracy. Professor Hausman has no knowledge one way or the other as to whether an illegal agreement actually existed. Rather, Professor Hausman will provide opinion testimony explaining the market factors and the pricing mechanisms that are sound circumstantial evidence that the jury can consider in reaching a decision on the ultimate issues in this case.

We also informed you by supplemental letter dated November 2, 2001, that Professor Hausman will testify that as an expert witness "candor" from those engaging him to provide economic evidence is important to both the fact and substance of his opinion. Professor Hausman will testify that Micron did not disclose to him the facts known to Micron about its participation in any price fixing conspiracy or other illegal agreement or its Amnesty Agreement with the Department of Justice or any of the facts underlying that Agreement. This information

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was critically important to Professor Hausman in the report and testimony he gave when engaged by Micron to make his extensive investigation of the DRAM market.

Thus, not only will Professor Hausman as a percipient witness provide testimony that impeaches the Micron witnesses and bears on their credibility and bias, he will testify that nondisclosure of the alleged conspiracy prejudicially impacts an economic expert in his expert capacity in rendering an opinion that is well founded, complete, objective and honest.

As regards the documents supporting Professor Hausman's opinion, the *Reliant Energy* decision and established practice requires that we provide the government "copies or specification" (Final Pretrial Order at p. 6) of the documents on which the expert's opinion is based, and this we have done in supplying reports and testimony (Dkt. 209, Exhs. B,C), a detailed list attached to our letter of November 21, 2007, and production with that letter of substantial written support. After further review with Professor Hausman, all of the documents available to him regarding his opinions have been made available to the Department of Justice. In response to the questions you raise regarding other documents:

1. Professor Hausman did not retain any work papers, nor did he keep the consulting reports from International Data Corporation, which reflect data about DRAM prices from 1994 to 2002. The latter should be available from IDC at <http://www.idc.com>, and are also referenced in contemporaneous articles such as <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/03-02-2001/0001439352&EDATE=>, referring to IDC's "Worldwide DRAM Demand and Supply, 2000-2001 (IDC #B23114)". If the government needs assistance in locating these reports we will work with you in obtaining them, though the expense should fall on the government for purchase.

2. You have produced from the various corporations involved in this litigation all of the invoices, statements and other pricing data from much of this period and certainly all of the pricing information covering the period 2001-2002.

3. The "data considered" (as Item 15) of the List of Documents contained with our letter, dated November 21, is the last item in the numerous documents produced to you on November 21. It has the title "Data Description" which, as noted in the List, is the "Variable Descriptions as noted on Appendix: Econometric Analysis of DRAM Prices."

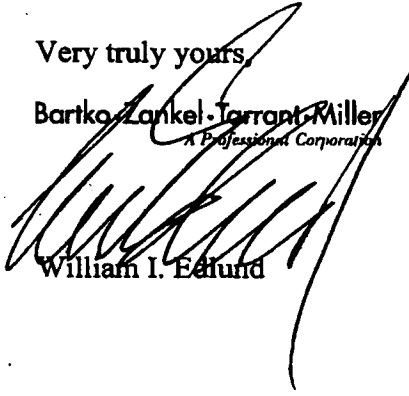
Your assertion that the government does not know the bases for Professor Hausman's testimony is disingenuous. The government has known about and had access to his report and testimony for months and, indeed, the government has fought to keep out of evidence and discovery any confidential materials previously supplied to Professor Hausman. He is not going to rely on any confidential information at trial and your protestations about greater disclosure surely ring hollow.

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As you know, Professor Hausman teaches at MIT in Boston. Because we have provided all of the documents upon which Professor Hausman's opinions will be based and have now confirmed again that Professor Hausman will be offering expert opinion testimony (as well as testimony about Micron's failure to disclose information to him that candor would require in engaging an expert), I trust you will conclude that a further motion will only unnecessarily burden our client and cause additional expense.

Very truly yours,

~~Bartko Zankel Jarrant Miller~~  
A Professional Corporation



William I. Edmund

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cc: John F. McLean, Esq.