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16 IN THE UNITED STATES DISTRICT COURT
 17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| <p>18 THE STATE OF CALIFORNIA et al., 19 Plaintiffs, 20 v. 21 INFINEON TECHNOLOGIES AG et al., 22 Defendants.</p> | <p>Case No. C 06-4333 PJH Related to MDL No. 1486 Addendum to Plaintiff States’ Motion to Void Certain Defendants’ Agreement (re: Settlement) Date: November 14, 2007 Time: 9:00 A.M. Courtroom: 3</p> |
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1 **I. INTRODUCTION**

2 The Plaintiff States have moved for an order voiding an agreement among certain
3 defendants limiting the terms under which they will negotiate and enter into settlements
4 (Defendants' Agreement), and also apparently allocating liability among themselves after
5 trial. That motion was based on the limited portions of the agreement that defendants
6 allowed the States to review. After the motion was filed, defendants contacted the States to
7 inform them that they considered part of that motion to be inaccurate because it did not
8 reflect a specific portion of the Agreement that the States had not been allowed to review.

9 Defendants have now allowed the States to review this additional small segment of
10 their Agreement. In the interest of allowing the Court to be as fully informed as the
11 circumstances allow, the States take the unusual step of submitting this Addendum to their
12 motion to comment on what effect, if any, this additional segment might have on their
13 motion.

14 **II. THE NOW-KNOWN CONTENT OF THE DEFENDANTS' AGREEMENT**

15 In their Motion, the States disclosed their full knowledge of Defendants' Agreement
16 at the time. Having now been allowed by defendants to see a little bit more of the
17 Agreement, plaintiffs can represent to the Court that the Agreement also provides, in
18 substance and effect, that the definition of DRAM Claims used in the Agreement:

- 19 • includes claims by state attorneys general or other state agencies, including *State of*
20 *New York v. Micron Technology, Inc., et al.* (C-06-6436-PJH N.D. Cal.) and *State of*
21 *California, et al. v. Infineon Technologies AG, et al.* (C-06-4333-PJH N.D. Cal.),
22 seeking monetary recovery to the extent such claims are based on state government
23 indirect purchases of DRAM or DRAM-containing products, or seek monetary
24

1 recovery on behalf of other indirect purchasers under the state’s *parens patriae*
2 authority, but

- 3 • excludes any direct-purchase claims or civil or criminal fines or penalties.

4 Pham Decl. ¶ 3.

5 This Addendum addresses what effect this additional information might have on the
6 arguments made in the States’ motion. In particular, it addresses possible effects on the
7 argument, at pages 15 to 16 of the Motion, that Defendants’ Agreement violates public policy
8 by arbitrarily allocating civil penalties.

9 **III. THE DEFENDANTS’ AGREEMENT VIOLATES PUBLIC POLICY BY**
10 **ARBITRARILY ALLOCATING CIVIL PENALTIES**

11 The States’ motion argued that “the Defendants’ Agreement mandates that defendants,
12 not the Court, will determine how penalties are distributed.” Motion at 16. The additional
13 portion of the Agreement the States have now seen might or might not require a qualification
14 of that statement, but it does not appear to negate the argument entirely.

15 The States have never seen the portions of Defendants’ Agreement addressing how
16 the Agreement deals with a judgment after trial. The States presume, but do not know, that
17 the Agreement allocates any such judgment for DRAM claims according to what defendants
18 call the Sharing Percentage. If this is the case, then the qualification that the term DRAM
19 claims, as used in Defendants’ Agreement, does not include civil penalty claims could mean
20 that defendants have not agreed to allocate the portion of any judgment following trial that
21 assesses civil penalties.

22 However, even if this is the case, it still seems apparent that Defendants’ Agreement
23 will affect the allocation of civil penalties in the settlement context. Realistically, any
24 settlement between the States and a defendant will be for a single lump sum including

1 compensatory damages and civil penalties. Every dollar paid for civil penalties will be one
2 less dollar paid for compensatory damages. Under Defendants' Agreement, any reduction
3 in the settlement amount for compensatory damages to one defendant must be made available
4 to all defendants. Therefore, allocating part of a settlement to civil penalties instead of
5 compensatory damages just means a reduction in compensatory damage settlements with
6 every other defendant. As a consequence, the States' incentive in the face of Defendants'
7 Agreement is necessarily to allocate settlements as much as possible to compensatory
8 damages, and not to civil penalties. The amount of compensatory damages paid in any
9 settlement is precisely what Defendants' Agreement seeks to control, and that agreement
10 therefore could have a profound effect on both compensatory damages and civil penalties in
11 the settlement context.

12 Consequently, although the States' knowledge of Defendants' Agreement continues
13 to be sketchy, their original assertion that the defendants' agreement violates public policy
14 by arbitrarily allocating civil penalties still appears to be correct, at the very least in the
15 settlement context.

16 **IV. THE COURT COULD WELL BE ASSISTED BY VIEWING DEFENDANTS'**
17 **AGREEMENT**

18 The very need for this addendum, and the equivocal language in which it is written,
19 highlights the difficulty the States have in presenting their arguments about an agreement
20 they have seen only in part. The States again respectfully suggest that the Court might want
21 to review Defendants' Agreement *in camera* before ruling on this motion.

22 **V. CONCLUSION**

23 The additional language of Defendants' Agreement that the States have now been
24 allowed to view does not undercut the thrust of their arguments on this motion. Conceivably,

1 the Agreement has less to say about the allocation of civil penalties, at least those imposed
2 after trial, than the States were led to believe by the portions they were originally allowed to
3 view. But the fact remains that the Agreement undercuts the settlement process and allows
4 defendants to agree horizontally among themselves on the allocation of their liability.

5 For all of these reasons, again, the Court should void the Agreement.

6 Dated: October 23, 2007

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18
19 I, Charles Kagay, attest that concurrence in the
20 filing of the document has been obtained from
each of the other signatories.

21 SPIEGEL LIAO & KAGAY

22 /s/ Charles M. Kagay
23 Charles M. Kagay