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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

	Case No. C 06-4333 PJH
STATE OF CALIFORNIA, *et al.*, Plaintiff, v. INFINEON TECHNOLOGIES AG, *et al.*, Defendants.	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO VOID DEFENDANTS' JUDGMENT SHARING AGREEMENT** **ORAL ARGUMENT REQUESTED** Hearing Date: November 14, 2007 Hearing Time: 9:00 a.m. Location: Courtroom 3, 17th Floor Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION

Judgment sharing agreements ("JSAs") are an established part of the legal landscape in antitrust cases. They create a contractual right of contribution to mitigate the harsh and coercive effects of joint-and-several liability. JSAs allow a defendant to reduce the risk that, because of rules of joint-and-several liability, it may suffer liability that is grossly disproportionate to its misconduct because plaintiffs decide, arbitrarily or as a litigation tactic, to seek the lion's share of damages from that defendant. Similarly, such agreements allow defendants that may have had a small role in the industry affected by the alleged violation, but that wish to contest liability or damages at trial, to do so without risking a break-the-company judgment.

Federal courts in antitrust cases have routinely and repeatedly upheld JSAs similar to the one at issue here. Indeed, to the best of Defendants' knowledge, every court to rule on a motion seeking to void a JSA in an antitrust case has rejected the same arguments Plaintiffs make in the instant motion. In evaluating such agreements, the courts generally examine whether the JSA prohibits individual settlements or otherwise violates public policy. Under the JSA at issue here, there is no prohibition on any Defendant settling with any Plaintiff at any time on any terms. If a party to the JSA wishes to avoid potential contribution liability, the JSA requires that Defendant to secure from the Plaintiffs a settlement offer to all JSA Defendants on terms that are proportionally equal. Thus, the potential impediment the JSA imposes on settlement is completely within the Plaintiffs' power to overcome; if a Defendant who has chosen to join the JSA wants to settle alone and be relieved of its obligations under the JSA, the Plaintiffs must make a proportionally equal offer to all of the parties to the JSA. If the Plaintiffs do this, any of the Defendants to whom equal treatment has been offered are free to accept or reject the proposed terms. Each JSA Defendant can accept those terms without regard to any of the other parties. The pro-settlement bias of the provision is obvious, whichever way the other JSA parties react to the settlement offer. If the other Defendants do not wish to settle on proportionally equivalent terms, then the single Defendant is free to conclude its individual settlement without any further obligation under the JSA. In that event, the provision has not

frustrated settlement. If the other Defendants accept the offer, then even more of the case is settled, furthering the policy in favor of settlement.

Plaintiffs' motion to void Defendants' Judgment Sharing Agreement should be denied for at least four reasons. First, the JSA at issue here does not prohibit individual settlements or otherwise violate public policy. Second, Plaintiffs' contention that the JSA impermissibly allocates liability for Plaintiffs' claims for civil penalties is irrelevant because the JSA at issue expressly excludes civil or criminal fines or penalties. Third, Plaintiffs' challenge to the JSA is not ripe because Plaintiffs have provided no evidence that the JSA has had any negative effect on any settlement or settlement negotiation. Finally, Plaintiffs do not have standing to bring their Motion because they are not parties to or third party beneficiaries of the JSA, and they have not suffered "injury in fact" sufficient to confer standing.

II. THE TERMS OF THE JUDGMENT SHARING AGREEMENT

Like most JSAs, the one at issue here creates a contractual right of contribution. Declaration of Joel S. Sanders In Support Of Defendants' Opposition to Plaintiffs' Motion to Void Defendants' Judgment Sharing Agreement ("Sanders Decl."), ¶ 2. The agreement allows the parties to settle on any terms at any time. Sanders Decl., ¶ 3. As is typical of JSAs, the one here provides that the parties will allocate responsibility for the damages portion of a judgment based on specified percentages related to their market shares. *Id.*, ¶ 5.

JSAs typically provide a means by which parties to the agreement can settle with the plaintiffs without continuing to have obligations to the other parties to the JSA. This JSA allows a party to do so by (a) obtaining a proportionally equal settlement offer for the other parties to the agreement and (b) obtaining an agreement from Plaintiffs to exclude its sharing percentage from any judgment Plaintiffs seek to enforce against the other parties. *Id.*, ¶ 6. A party may settle without satisfying these provisions, but the other parties will retain the contractual contribution claims against it for its share of a litigated judgment less the amount it paid in settlement. *Id.*[1]

[1] In the event the Court has further questions concerning the terms of the JSA and would like to view it, Defendants will make the Agreement available for *in camera* review.

III. ARGUMENT

A. The Judgment Sharing Agreement Does Not Prohibit Individual Settlements Or Otherwise Violate Public Policy

If the Court decides to reach the merits of Plaintiffs' motion,[2] it should be denied because the JSA does not prohibit individual settlements or otherwise violate public policy. JSAs are commonly used by defendants in antitrust litigation to mitigate an otherwise coercive settlement environment. Such agreements have been consistently upheld by the courts. Indeed, the JSA in this case furthers, rather than impedes, the public policy favoring settlement.

1. Judgment Sharing Agreements Counteract An Otherwise Coercive Settlement Environment

Plaintiffs contend that JSAs "strongly impede[] settlement and the efficient litigation of a complicated class action" and that the supposed "impediment" to settlement created by such agreements violates public policy. Pl. Mot. at 7. But a private arrangement that limits Plaintiffs' ability to manipulate settlements does not violate public policy. On the contrary, rationalization of the settlement process has been recognized by policymakers, scholars, and the courts as one of the benefits of judgment sharing agreements. In the absence of a sharing agreement, plaintiffs in antitrust cases wield arbitrary power in the settlement process through the application of joint-and-several liability with a lack of any statutory authorization for contribution. They can allow some defendants to settle very inexpensively, while continuing to seek from the remaining defendants three times the damages caused by the sales of the settling defendants, less an offset for the cheap settlements. As plaintiffs release their claims against more defendants, therefore, the value of their claims against the remaining defendants increases.[3] "Each defendant dreads being the last to settle, because every time

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[2] As Defendants explain in sections C and D of this Opposition, Plaintiffs' Motion is not ripe and Plaintiffs lack standing to challenge the JSA.

[3] One leading plaintiffs' antitrust litigator explained to the Senate Judiciary Committee in 1982 that plaintiffs' attorneys take advantage of the "tremendous" exposure of the "last defendant to settle" and that they "take small amounts . . . at the beginning of the settlement process" and larger amounts "as time goes [on]." *See Hearings Before the United States Senate Committee on the Judiciary on the Antitrust Equal Enforcement Act*, S. 995, 97th Cong., 1st and 2nd Sessions (1982), at 482 ("*1982 Senate Hearings*"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 221853 (N.D. Ill. 1995) (relying on Senate legislative history to interpret purpose and effect of JSAs)

one defendant settles the expected liability of the remainder increases." Easterbrook, Landes, & Posner, *Contribution Among Antitrust Defendants: A Legal & Economic Analysis*, 23 J. L. & Econ. 331, 365 (1980).

While JSAs may, under some circumstances, change the dynamics of settlement negotiations, they do not prevent settlements from occurring, either theoretically or in practice. The Antitrust Law Section of the American Bar Association, having studied the issue, concluded that, when a JSA is in place, "settlement discussions occur on a more rational basis, with liability logically related to culpability and impact on the plaintiff, and settlement is thus promoted." *Report of the Section on Proposed Amendment to the Clayton Act to Permit Contribution in Damage Actions*, 49 Antitrust L. J. 291, 295 (1980) (emphasis added). As former federal Judge Charles Renfrew testified before Congress:

> We have had those cases where there have been judgment-sharing agreements, and it has not precluded settlement in those cases. It may preclude a coerced settlement or a sweetheart settlement, but I do not know that that is bad.

Hearings Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Monopolies & Commercial Law, on Antitrust Damage Allocation, 97th Cong., 1st and 2d Sessions, at 135 (1982); *see also* Cavanaugh, *Contribution, Claim Reduction, & Individual Treble Damage Responsibility*, 40 Vand. L. Rev. 1277, 1313 (1987) ("Given the incentive to settle, which exist wholly apart from concerns about joint and several liability, it is unlikely that the uncertainty interjected by contribution would significantly alter the percentage of pretrial settlements in antitrust cases"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 221853 (N.D. Ill. 1995) (relying on Judiciary Committee legislative history and Antitrust Law Section of the ABA report to interpret purpose and effect of JSAs); *Cimarron Pipeline Constr., Inc. v. National Council on Compensation Ins.*, 1992 WL 350612, *3 (W.D. Okla. 1992) ("There has been simply no persuasive evidence presented that the Defendants' sharing agreement has had a negative impact upon settlement negotiations.").

2. Courts Have Consistently Upheld Judgment Sharing Agreements

It is for these reasons that Plaintiffs cannot point to a single case in which a court has held that antitrust defendants cannot enter into contracts that create a right to contribution.[4] Indeed, courts consistently uphold such agreements against claims that they violate public policy. *See In re Workers Compensation Ins. Antitrust Litig.*, Master File No. 4-85-1166 (D. Minn. Aug. 24, 1990) (orally denying plaintiffs' motion to declare defendants' judgment sharing agreement invalid) (Sanders Decl., Exh. C); *In re Brand Name Prescription Drugs* 1995 WL 221853 (denying plaintiffs' motion for a declaration that the defendants' judgment sharing agreement was unlawful); *Cimarron Pipeline*, 1992 WL 350612 (denying plaintiffs' motion to invalidate defendant's judgment sharing agreement); *In re Industrial Gas Antitrust Litig.*, Civ. Action No. 80C3470 (N.D. Ill. Oct. 10, 1984) (denying motion to declare judgment sharing agreement invalid) (Sanders Decl., Exh. D). In ruling that such agreements are proper, these courts have recognized "the real threat of otherwise coerced settlements and the benefits of achieving judgment based on some degree of relative fault." *In re Brand Name Prescription Drugs*, 1995 WL 221853 at *4.

Plaintiffs attempt to distinguish *Brand Name Prescription Drugs* and *Cimarron Pipeline*, but the facts of those cases (and the arguments advanced by those plaintiffs and rejected by those courts) are strikingly similar to this case. In *Cimarron Pipeline*, as here, plaintiffs argued that defendants' sharing agreement reduced the incentive to settle and placed restrictions on settlements between the plaintiffs and individual defendants, contrary to the strong policy of the law in favor of settlement. 1992 WL at *2. The Court rejected plaintiffs' argument, noting that there was "simply no persuasive evidence presented that the Defendants' sharing agreement has had a negative impact upon settlement negotiations." *Id*. at *3. Similarly, here, Plaintiffs have provided no evidence that the procedures

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[4] Plaintiffs cite *In re Corrugated Container Antitrust Litig.*, 84 F.R.D. 40 (S.D. Tex. 1979) for the proposition that "allowing antitrust defendants to manufacture a right to contribution against each other strongly impedes both the settlement and the efficient litigation of a complicated class action." Pl. Mot. at 7. But that case involved the question of whether the antitrust laws allowed cross-claims for contribution against other defendants who had entered settlement agreements with the plaintiffs' class, not a contractual agreement for contribution. 84 F.R.D. at 40. It is undisputed that the antitrust laws do not provide an express right of contribution; so that decision has no bearing on the issues raised by Plaintiffs' motion.

established by the JSA for settlement of the signatory Defendants have had any negative impact on settlement. Moreover, the *Cimarron* court specifically noted that the establishment of a contractual right of contribution among antitrust defendants through a JSA does not violate any antitrust policy. *Id.* at *2.

Likewise, in *Brand Name Prescription Drugs*, plaintiffs argued that the defendants' judgment sharing agreement impeded settlement because a settling defendant was free of its sharing obligations only if it secured an agreement from the plaintiffs which carved out the settling defendants' share from any final judgment in the case.[5] 1995 WL at *3. Noting that this type of provision is common in judgment sharing agreements, the Court declined to find the JSA unlawful. *Id*. at *4. Plaintiffs challenged exactly the same type of provision upheld in *Brand Name Prescription Drugs* in the instant motion, advancing the same arguments the *Brand Name Prescription Drugs* court considered and rejected.

In contrast, Plaintiffs can point to only one case (over the course of the decades such agreements have been in existence), *In re San Juan DuPont Plaza Hotel Fire Litig*., 1989 WL 996278 (D.P.R. 1989), that struck down a JSA on public policy grounds. As an initial matter, *San Juan* was not an antitrust case and thus is of little guidance here. But more significantly, in that case, the agreement was invalidated because it "flatly prohibit[ed]" individual settlements between the signatories to the agreement and the plaintiffs. *Id*. at 2 (quoting agreement that provided that "In no event shall any participant negotiate a separate settlement with the Plaintiffs, or any other party to the Litigation."). The JSA in this case contains no such prohibition. Moreover, in that case, the Court expressed concern with "the improper underlying motive and potential ill effects of the entire

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[5] Plaintiffs attempt to distinguish *Brand Name Prescription Drugs* by asserting that that agreement did not "forbid a defendant to settle on any terms that plaintiffs do not offer to all defendants." Pl. Mot. at 11. Plaintiffs have no basis for this claim because the *Brand Name Prescription Drugs* court did not represent that it had set out the entirety of the JSA at issue in that case in its opinion. *See* 1995 WL at *1 (setting out a summary of certain portions of the JSA). In any event, the JSA at issue does not "forbid" a defendant from settling in any circumstance; indeed, the agreement expressly states that any party may settle any DRAM claims on any terms at any time. Pl. Mot. at 3. The agreement only establishes that if a signatory decides to settle without offering a proportional settlement to all other parties to the agreement that party does not obtain a waiver of liability to the other parties on account of a judgment on the DRAM claims settled.

document", *id*. at *3, and pointed to a provision of the agreement which prevented any participant from admitting liability or aiding the plaintiffs. *Id*. The JSA at issue here contains no provision barring any participant from litigating or settling Plaintiffs' claims in whatever manner it sees fit. Sanders Decl., ¶ 4. Indeed, the *Cimarron* court discussed and distinguished *San Juan* on this same ground. 1992 WL at *3. The *San Juan* decision is therefore not relevant here.

3. The Judgment Sharing Agreement Furthers, Rather Than Impedes, The Public Policy Favoring Settlements

In support of their contention that the JSA impedes settlement and thereby violates public policy, Plaintiffs highlight two supposed issues created by the structure of the agreement. First, they claim that "a defendant negotiating settlement must insist that the settlement first be offered to all parties to the agreement in proportion to their Sharing Percentages." Pl. Mot. at 4. Second, they contend that "if not all of the parties to the Defendants' Agreement elect to enter into the settlement, then the settlement agreement must include a provision that any recovery against a non-settling party will be reduced by the Sharing Percentage of the settling parties." *Id*. Plaintiffs' characterization of the agreement is accurate,[6] so far as it goes, but these characteristics of the agreement do not inhibit settlement or violate public policy.

The JSA allows any party to settle on any terms at any time, with or without notice to the other parties. Sanders Decl., ¶ 3. Under the JSA, if a party wishes to settle and avoid potential contribution liability all that party must do is secure from the Plaintiffs a settlement offer to all JSA Defendants on terms that are proportionally equal. *Id*., ¶ 6. Thus, the potential impediment the JSA imposes on settlement is completely within the Plaintiffs' power to overcome – a requirement that they treat all of the parties to the JSA equally. If the Plaintiffs do this, any of the Defendants to

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[6] Plaintiffs' motion quotes from certain portions of the agreement. Defendants note, however, that Defendants allowed Plaintiffs to view certain portions of the JSA in lieu of motion practice before this Court based on Plaintiffs' agreement "not to quote specific language as such in any document (other than internal documents . . .)." Plaintiffs have nevertheless done so here. Sanders Decl., ¶ 11; Exh. B. Moreover, Plaintiffs' purported quotation of the Agreement in their Motion puts a gloss on the language of the Agreement by adding the word "must" to the language concerning negotiation of a joint settlement. Pl. Mot. at 3.

whom equal treatment has been offered are free to accept or reject the proposed terms. Each JSA Defendant can accept those terms without regard to any of the other parties.

This provision furthers, rather than impedes, the public policy favoring settlements of complex litigation, on which Plaintiffs purportedly base their motion. By encouraging the Plaintiffs to allow all of the JSA parties to settle on proportionally equivalent terms, the provision could lead to settlement by many Defendants, not just by a single Defendant. The provision encourages settlement regardless of the way the other JSA parties react to the settlement offer. If the other Defendants do not wish to settle on proportionally equivalent terms, then the single Defendant is free to conclude its individual settlement. In that event, the provision has not frustrated settlement. If the other Defendants accept the offer, then even more of the case is settled, furthering the policy in favor of settlement.

Whittled down to its essence, Plaintiffs' central complaint is that the settlement provision affects their ability to single out a Defendant for more favorable settlement terms than they want to offer to other Defendants.[7] But there is no public policy favoring a plaintiff's ability to manipulate multiple defendants in an effort to extract a settlement ransom. Moreover, case law, scholarly articles, and sound policy support the ability of defendants to create contractual rights of contribution to mitigate the effects of joint-and-several liability. The provision Plaintiffs complain about merely provides a mechanism for a settling defendant to avoid its contractual contribution obligation. If the central aspect of a JSA – a contractual right of contribution – does not violate public policy, then it cannot violate public policy to create a way for settling defendants to avoid that obligation.

Plaintiffs' further argument that they need to offer favorable settlement terms to some Defendants to secure their assistance rings hollow in light of two facts – (1) Plaintiffs have not made a separate settlement offer since the execution of the JSA to any signatory to the JSA (Sanders Decl., ¶ 7) and (2) Plaintiffs' have recently filed settlements with Samsung, the largest player in the DRAM

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[7] Plaintiffs state that they "do not know what other oppressive terms might be in Defendants' Agreement" and that "[i]t is entirely possible that the agreement contains others provisions that offend the law or public policy." Pl. Mot. at 4-5. Plaintiffs' scattershot approach should not be countenanced.

industry, and Winbond. Plaintiffs' decision not to make a separate settlement offer to any signatory to the JSA indicates that they have not perceived the need to secure the assistance of any of those Defendants. Moreover, Plaintiffs' recently filed settlements illustrate that Plaintiffs have already secured cooperation from the biggest Defendant in this case as well as a smaller Defendant. *See, e.g.* Exhibit A to Memorandum of Points and Authorities in support of Preliminary Approval of Class Action Settlements with Samsung and Winbond Defendants, ¶ 19 ("Samsung Settlement Agreement") (setting out Samsung's agreement to cooperate fully with Plaintiffs in this litigation after approval of the agreement). In addition, whatever effect the JSA may have on the allocation of contribution among the signatory Defendants, Plaintiffs' agreement with Samsung makes clear that Samsung is not affected by that allocation because the remaining non-settling Defendants continue to face joint-and-several liability for Samsung's sales. *See* Samsung Settlement Agreement, ¶ 32. This coercive aspect of joint-and-several liability has already heightened the risk to the Defendants of not settling because they face the threat of treble damages imposed not just on any overcharge on their own or each others' sales, but on Samsung's substantial sales as well.

Plaintiffs attempt to analogize to "bar orders" entered in securities cases barring the assertion of contribution rights against settling defendants. But the practice of entering contribution bar orders in cases involving statutory or common law rights of contribution arises from a wholly different situation than contractual rights of contribution. Statutory or common law rights of contribution create a means to apportion liability after a judgment of joint and several liability has been entered. Thus, without a settlement bar order, defendants subject to such a regime face the prospect of continuing and uncertain liability should they settle and subsequently be sued by other defendants for some undetermined amount of contribution. In contrast, parties who agree on contribution levels via contract do so before any judgment is entered or settlement is reached. As such, contracting parties who choose to settle do not face uncertainty should a judgment be entered because their contribution percentage is set forth in the contract by agreement.

Regardless, as set forth above, the JSA at issue accomplishes the same end as a bar order – it reduces uncertainty for Defendants both by creating contractual rights of contribution in the face of joint-and-several liability and by providing a means to settle without incurring liability to co-

Defendants. As Plaintiffs note, unlike the antitrust laws, the securities laws create an express statutory right to contribution among jointly and severally liable defendants. Pl. Mot. at 12 (citing 15 U.S.C. § 77k(f)). Courts have used settlement bar orders in this context to "allow settling parties to put a limit on the risks of settlement" created by this statutory right to contribution. *See In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 494 (11th Cir. 1992) (cited at p. 12 of Plaintiffs' Motion). As Plaintiffs point out, courts have endorsed such bar orders in the securities context because they "insulat[e] the settling defendant from further indeterminate liability." Pl. Mot. at 13 (quoting *South Carolina Natl. Bank v. Stone*, 749 F.Supp. 1419, 1431 (D.S.C. 1990). Similarly, the JSA provides a means for defendants to avoid indeterminate liability by contractually apportioning liability according to agreed upon percentages – and so long as a settling party satisfies the terms of its agreement, it will not have liability beyond its settlement to the other defendants.[8] In so doing, the JSA facilitates settlement.

B. The Judgment Sharing Agreement Does Not Apply To Civil Penalties

Plaintiffs contend that the JSA impermissibly allocates liability for Plaintiffs' claims for civil penalties. Pl. Mot. at 15-16. Plaintiffs are incorrect. The JSA at issue expressly excludes civil or criminal fines or penalties. Sanders Decl., ¶ 8. Plaintiffs' argument is therefore irrelevant.

Upon reviewing the Plaintiffs' Motion and noting their error, Defendants informed Plaintiffs' counsel in writing on October 11, 2007 that the JSA expressly excludes fines and penalties and suggested that Plaintiffs withdraw this argument before Defendants had to file their opposition. *Id.*, ¶ 9; Exh. A. Defendants also offered to provide a declaration or to allow Plaintiffs' counsel to examine the provision of the JSA that states it does not apply to civil or criminal fines or penalties.

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[8] In this regard, Plaintiffs' position that Congress' decision to provide for an express right of contribution in the securities laws may be modified by the courts through the entry of bar order, but that Congress' supposed "decision" not to provide for contribution in antitrust actions should be strictly enforced, is inscrutable. The fact that the antitrust laws do not provide for contribution does not bar parties from contracting among themselves for contribution. *See, e.g., Cimarron*, 1992 WL at *2 (noting that the Supreme Court in *Texas Industries Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) did not hold that there is a policy prohibiting contribution and declining to imply such a policy); *Order of R. Conductors v. Swan*, 329 U.S. 520, 529 (1947) (failure of Congress to amend a statute is "without meaning"). Indeed, had Congress wanted to ban judgment sharing agreements or other forms of contribution agreements, it certainly could have done so. It could therefore just as easily be said that Congress has condoned judgment sharing agreements.

Id. On October 19, 2007, more than one week after Defendants extended this offer (and only three court days before Defendants' Opposition was due), Plaintiffs' counsel examined the relevant portion of the JSA. *Id.*, ¶ 10. Rather than withdraw their argument, Plaintiffs instead submitted an additional brief called "Addendum to Plaintiff States' Motion to Void Certain Defendants' Agreement" ("Addendum") the night before this opposition brief was due.

The Addendum is both procedurally improper and substantively unsupported. As a procedural matter, this Court should strike the Addendum in its entirety. Neither the Federal Rules of Civil Procedure nor the Local Civil Rules for the Northern District of California authorize the filing of such an additional brief after the filing of moving papers and before the submission of an opposition brief.

As a substantive matter, the arguments in the Addendum do not follow from the section of the Judgment Sharing Agreement quoted by Plaintiffs. Plaintiffs quote the Agreement as defining a "DRAM Claim" subject to the Agreement as "exclud[ing] any . . . civil or criminal fines or penalties." Addendum at 1-2.[9] Plaintiffs then argue that this means the Agreement "arbitrarily allocat[es] civil penalties . . . ." Addendum at 3. The Judgment Sharing Agreement does nothing of the kind. *The Agreement explicitly does not allocate fines or penalties among the Defendants.* The bottom line is that the JSA does not in any way affect the Court's ability to determine the fines, if any, to be assessed against any Defendant.

The Plaintiffs posit a hypothetical situation based on a "lump sum" settlement. They then shift ground and argue that this might require an allocation, not among Defendants as they previously argued, but between damages and fines. This argument is fallacious for several reasons. First, a defendant may settle for a "lump sum" that includes fines or penalties only if the States agree to it. The issue will therefore never arise without the States' agreement. Second, even if there is a settlement involving a "lump sum," that fact will have no effect so long as the settlement satisfies the requirements for relieving the settling defendant of its contribution obligations under the

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[9] In their Addendum, Plaintiffs once again disregard their agreement with Defendants according to which they were allowed to view portions of the Agreement, by quoting it in a public filing after agreeing not to do so. *See supra*, fn. 5.

Agreement.[10] Finally, hypothetically, *if* a JSA Defendant settles for a "lump sum," and *if* the settlement did not satisfy the requirements for relieving that Defendant of its contribution obligations, and *if* a judgment were entered against another Defendant who signed the Agreement and that triggered the contribution obligation, then an allocation of the "lump sum" between damages and fines might have to be made among the Defendants for purposes of determining their contribution obligations to each other. But even under this unlikely scenario, the trial court would in any event have to allocate the lump sum settlement between damages – which can be used to offset the judgment against the non-settling defendants – and fines – which cannot be used to offset that judgment. The JSA would have no impact on that.

Indeed, Plaintiffs' real complaint in the Addendum appears to be that they have not been provided with a copy of the Judgment Sharing Agreement. *See* Addendum at 3. But Plaintiffs chose not to bring a motion to compel production of the Judgment Sharing Agreement before the deadline to file motions to compel, and cannot now be heard to complain that they did not receive and review a document that they did not timely move to compel. Plaintiffs' Addendum should be stricken, and their argument that the Agreement impermissibly allocates liability for Plaintiffs' claims for civil penalties should be rejected, as all parties agree that the plain text of the Agreement expressly excludes such criminal or civil penalties or fines.

C. Plaintiffs' Challenge to the Judgment Sharing Agreement Is Not Ripe

Plaintiffs' challenge to the JSA should be denied because it is not ripe for decision. Plaintiffs have provided no evidence that the JSA has had any of the dire effects on settlement that Plaintiffs claim it *might* have at some uncertain point in the future. Rather, Plaintiffs' motion is based entirely on their ungrounded speculation that, *if* they wanted to settle with a selected Defendant, and *if* that Defendant was a party to the JSA, then the JSA *might* interfere with their ability to achieve a settlement. Plaintiffs have presented no evidence – and there is none – that these facts exist.

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[10] As explained above, this can be done by offering a proportionally equal settlement (including proportionally equal "lump sum" terms if the State chooses to use a "lump sum" settlement) and agreeing to exclude the settling Defendant's specified sharing percentage from any damages judgment obtained against the other JSA Defendants.

Plaintiffs are asking this Court to decide hypothetical claims on an anticipatory basis and well-settled law bars this Court from adjudicating such a request. *See, e.g., Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937) (holding that federal courts have no power to render advisory opinions as to what the law ought to be or affecting a dispute that has not yet arisen).

Since the execution of the JSA, Plaintiffs have not made a separate offer of settlement to any party to the Agreement. Sanders Decl., ¶ 7. Unless and until Plaintiffs have tried to settle this case separately with fewer than all Defendants party to the JSA and can show that the JSA has prevented them from doing so, their claims about the JSA are speculative and not ripe for decision, and this Court therefore lacks jurisdiction to decide them. The motion should be denied for this reason alone.

D. Plaintiffs Lack Standing To Challenge The Judgment Sharing Agreement

Similarly, because Plaintiffs are neither parties to nor third party beneficiaries of the JSA, they lack standing to seek its invalidation. A plaintiff seeking to establish standing in federal court must demonstrate "injury in fact" – that is, a concrete and particularized invasion of a legally protected interest – that is fairly traceable to the conduct complained of and is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs here can show no legally cognizable injury that is "fairly traceable" to the JSA. They have neither rights nor obligations under that agreement. *See United Food & Commercial Workers v. Food Employers Council, Inc.*, 827 F.2d 519, 525 (9th Cir. 1987) (only the "parties to the agreement" can seek a declaration concerning the legality of a contractual provision); *Old Republic Ins. Co. v. Sidley & Austin*, 702 F.Supp. 207, 209-212 (N.D. Ill. 1988) (plaintiff who was neither a party to nor a third party beneficiary of, a contract had no standing to seek a declaration about it). Plaintiffs have provided no evidence that the JSA has had or will have any effect on settlement. Indeed, such evidence cannot exist because Plaintiffs have not made a separate settlement offer to any Defendant that is a signatory to the JSA since the execution of the Agreement.[11] Sanders Decl., ¶ 7.

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[11] Plaintiffs' may cite *Cimarron Pipeline Construction* in support of their argument that they have standing to challenge the JSA. In *Cimarron*, the court rejected Defendants' argument that Plaintiffs lacked standing to challenge the JSA at issue there. However, the *Cimarron* court was careful to confine its holding, noting "Plaintiffs contend that the sharing agreement has had and will have certain discernible and measurable effects upon their case. As a result,

[Footnote continued on next page]

Furthermore, the JSA does not restrict Plaintiffs' legal rights to assert and prove their claims in litigation, and to recover the full amount of any judgment from any Defendants held jointly and severally liable. Accordingly, the JSA does not cause Plaintiffs the necessary "formal legal prejudice" needed to confer upon non-settling parties standing to object to a settlement agreement. *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 (9th Cir. 1987). At most, the JSA imposes on Plaintiffs an additional issue to contend with in settlement negotiations. But a mere "tactical disadvantage" does not constitute "plain legal prejudice" and hence does not constitute legally cognizable interest sufficient to confer standing. *Waller*, 828 F.2d at 584.

IV. CONCLUSION

As illustrated by the preceding discussion, Plaintiffs' complaints concerning the JSA are based on a series of fallacies. Plaintiffs contend that the JSA "makes settlement negotiations with fewer than all signatory defendants virtually impossible" (Pl. Mot. at 2), but the JSA allows any signatory to settle on any terms at any time. They argue that the JSA "removes the incentive for a defendant to cooperate with plaintiffs in exchange for a favorable settlement" and "delays the settlement process" (*id*,), but it is difficult to understand how they can press these claim given that (1) they have never offered a separate settlement to any signatory to the JSA since the execution of that Agreement and (2) they have announced a settlement guaranteeing the cooperation of the largest DRAM Defendant, Samsung. They claim that the JSA "saddles any signatory who does not hold out for a settlement agreeable to all signatories with continuing liability to the other signatories" (*id*.), but the JSA only requires that any signatory who wishes to settle and avoid continuing liability obtain a proportionally equal settlement offer for the other parties to the agreement (who need not accept such an offer) and obtain an agreement from Plaintiffs to exclude its sharing percentage from any judgment Plaintiffs seek to enforce against the other parties. Finally, they maintain that the JSA "allows defendants, not

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[Footnote continued from previous page]

this Court finds that, *under the circumstances of this case*, the Plaintiffs do have standing to challenge the validity of the Defendants' sharing agreement. 1992 WL 350612, *1 (emphasis added). In contrast, here, Plaintiffs have provided nothing more than speculation about the supposed effects the JSA might have and because they have not made a separate settlement offer to any Defendant that is a signatory to the JSA, they cannot show any concrete or particularized injury.

the court, to set the terms under which they will suffer legal penalties imposed by statute" (*id*.), but, as Plaintiffs are well aware, the JSA expressly excludes civil or criminal fines or penalties from its terms. Plaintiffs' arguments are contrary to established case law, scholarly opinion and sound policy. A private agreement limiting Plaintiffs' ability to manipulate Defendants does not violate public policy. Indeed, such an agreement is more likely to encourage settlement "on a more rational basis, with liability logically related to culpability and impact on the plaintiff . . ." 49 Antitrust L. J. at 29. For the foregoing reasons, Defendants request that the Court deny Plaintiff's Motion to Void the JSA.

DATED: October 24, 2007

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DECLARATION OF SERVICE

I, Robin McBain, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is One Montgomery Street, Suite 3100, San Francisco, California, 94104, in said County and State. On October 24, 2007, I served the within:

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO VOID DEFENDANTS' JUDGMENT SHARING AGREEMENT; DECLARATION OF JOEL S. SANDERS IN SUPPORT THEREOF

to all interested parties as follows:

☑ **BY ECF (ELECTRONIC CASE FILING)**: Where specified below, I e-filed the above-detailed documents utilizing the United States District Court, Northern District of California's mandated ECF (Electronic Case Filing) service on October 24, 2007. Counsel of record are required by the Court to be registered e-filers, and as such are automatically e-served with a copy of the documents upon confirmation of e-filing.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Declaration of Service was executed by me on October 24, 2007, at San Francisco, California.

/s:/Robin McBain
Robin McBain