

United States District Court  
For the Northern District of California

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

IN RE STATIC RANDOM ACCESS MEMORY  
(SRAM) ANTITRUST LITIGATION

No. M:07-cv-01819 CW  
MDL No. 1819

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTIONS TO  
DISMISS AND DEFERRING  
RULING ON DEFENDANT  
MOSEL VITELIC'S MOTION  
TO DISMISS

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All Defendants have moved to dismiss both the Direct Purchasers' consolidated amended complaint (DPC) and the Indirect Purchasers' consolidated amended complaint (IPC).<sup>1</sup> As directed by the Court the Direct-Purchaser Defendants (DP Defendants) and Indirect-Purchaser Defendants (IP Defendants) have each filed a motion that addresses all of the issues common to the respective group of Defendants. In addition, several Defendants have filed supplemental motions, addressing issues particular to themselves. Both the DP Plaintiffs and IP Plaintiffs oppose the motions. The

<sup>1</sup>Defendants argue that the Court should sua sponte dismiss Plaintiffs' claims against nine foreign companies that were not served before the October 1, 2007 deadline. However, Plaintiffs indicate that they have made good faith efforts to effectuate service. The Court acknowledged that service might not be possible by October 1, 2007. As discussed at the hearing, the deadline for service on foreign defendants is extended to March 21, 2008.

1 motions were heard on December 20, 2007. Having considered the  
2 parties' papers and oral argument on the motions, the Court grants  
3 the motions in part, denies them in part and defers ruling on  
4 Defendant Mosel Vitelic's motion to dismiss the DP Complaint  
5 against it.

#### 6 BACKGROUND

7 According to Plaintiffs' complaints, Defendants are various  
8 corporations that sold Static Random Access Memory (SRAM) to  
9 customers throughout the United States.<sup>2</sup> DP Plaintiffs are  
10 individuals and companies that purchased SRAM directly from one or  
11 more Defendants. DPC ¶¶ 19-21. IP Plaintiffs are individuals and  
12 companies that indirectly purchased SRAM from one or more  
13 Defendants, for end use and not for resale. IPC ¶¶ 8-101. SRAM is  
14 a type of "memory device[]" used in products "ranging from computer  
15 electronics to supercomputers." DPC ¶ 70. SRAM was developed "to  
16 fill two needs: (1) to provide a direct interface with the CPU  
17 (central processing unit) at speeds not attainable by DRAMs<sup>3</sup>; and  
18 (2) to replace DRAMs in systems that require very low battery  
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20 <sup>2</sup>Both sets of Plaintiffs bring claims against Cypress  
21 Semiconductor, Inc., Etron Technology, Inc., Etron Technology  
22 America, Inc., Hynix Semiconductor, Inc., Hynix Semiconductor  
23 America, Inc., Micron Technology, Inc., Micron Semiconductor  
24 Products, Inc., Mitsubishi Electric Corporation, Mitsubishi  
25 Electric & Electronics USA, Inc., NEC Electronics Corporation, NEC  
26 Electronics, America, Inc., Renesas Technology Corporation, Renesas  
27 Technology America, Inc., Samsung Electronics Company, Ltd.,  
28 Samsung Electronics America, Samsung Semiconductor, Inc., Toshiba  
Corporation, Toshiba America, Inc. and Toshiba America Electronic  
Components, Inc. In addition, DP Plaintiffs bring claims against  
Hitachi, Ltd., Hitachi America, Ltd., Integrated Silicon Solution,  
Inc., Mosel Vitelic, Inc. and Mosel Vitelic Corporation.

<sup>3</sup>DRAM stands for Dynamic Random Access Memory.

1 consumption." Id. Plaintiffs further allege that SRAM is  
2 particularly susceptible to price-fixing because it is "a  
3 homogenous product sold . . . primarily on the basis of price;" the  
4 "market is highly concentrated;" and there are "high manufacturing  
5 and technological barriers to entry" into the SRAM market. Id. at  
6 ¶ 71. Plaintiffs further allege that Defendants have created two  
7 trade organizations to develop specific types of SRAM, Quad Data  
8 Rate (QDR) SRAM and high-speed synchronous SRAMs (SigmaRAM).  
9 Id. at ¶ 73. Plaintiffs allege that between 1998 and 2004, the top  
10 nine producers of SRAM controlled between seventy-nine and eighty-  
11 four percent of the market for SRAM. IPC ¶ 132.

12 Plaintiffs allege that between 1996 and 2006<sup>4</sup>, Defendants  
13 conspired to fix and maintain artificially high prices for SRAM.  
14 See, e.g., DPC at ¶¶ 1, 5. According to Plaintiffs, Defendants  
15 carried out this conspiracy through in-person, telephone and email  
16 communications regarding pricing to customers and market  
17 conditions. Id. at ¶ 7. Defendants exchanged product roadmaps,  
18 agreed to limit the supply of SRAM entering the market and  
19 communicated to "insure compliance with and enforce the agreement."  
20 Id. In addition, Defendants "made affirmative misrepresentations  
21 that conditions in the SRAM market were to due to competitive  
22 factors." Id. at ¶ 6.

23 In October, 2006, several companies announced that they had  
24 received grand jury subpoenas related to a United States Department  
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26 <sup>4</sup>The DP Plaintiffs bring claims based on conduct occurring  
27 through 2005 and the IP Plaintiffs bring claims based on conduct  
28 through 2006.

1 of Justice criminal investigation into the SRAM industry.  
2 According to Defendants, Plaintiffs' complaints were filed in  
3 response to these announcements and are based on speculation rather  
4 than any evidence to support their allegations. On February 12,  
5 2007, the Judicial Panel on Multi-District Litigation entered an  
6 order consolidating a number of these actions for pretrial  
7 purposes. Since that time, many other tag-along actions have been  
8 transferred and consolidated into this multi-district case.

9 On May 3, 2007, the Court heard argument on various  
10 Plaintiffs' motions to appoint interim lead counsel and appointed  
11 such for each group of Plaintiffs. An initial case management  
12 conference was held on June 1, 2007. At that conference,  
13 Defendants argued that discovery should be stayed pending an  
14 opportunity to move to dismiss the complaints pursuant to the  
15 Supreme Court's decision in Bell Atl. Corp. v. Twombly, \_\_ U.S. \_\_,  
16 127 S.Ct. 1955, 1964 (2007). Plaintiffs stated their intent to  
17 file consolidated amended complaints.

18 On June 21, 2007, the Court entered a supplemental case  
19 management order, limiting discovery to the documents already being  
20 provided to the Department of Justice for purposes of the grand  
21 jury investigation, postponing initial disclosures and deeming all  
22 documents already produced in the DRAM litigation<sup>5</sup> to be produced  
23 in this case. The DPC and IPC were filed on August 31, 2007. The  
24 DPC alleges a violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

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26 <sup>5</sup>As discussed below, the Department of Justice brought  
27 criminal charges against several manufacturers in the DRAM market.  
28 Some Defendants in this case have entered guilty pleas in the DRAM  
litigation.

1 The IPC alleges a violation of § 1 of the Sherman Act, violation of  
2 California's Cartwright Act, California Business and Professions  
3 Code § 16720, violation of California Business and Professions Code  
4 § 17200, violations of numerous other States' antitrust and unfair  
5 competition laws, violations of numerous other States' consumer  
6 protection and unfair competition laws, and unjust enrichment and  
7 disgorgement of profits.

8 Defendants now move to dismiss both complaints, arguing that  
9 they do not meet the legal standard set out in Twombly and that  
10 they are time-barred. IP Defendants also move to dismiss a variety  
11 of the IP Plaintiffs' state law causes of action for failure to  
12 state a claim.

#### 13 LEGAL STANDARD

14 Dismissal of a complaint can be based on either the lack of a  
15 cognizable legal theory or the lack of sufficient facts alleged  
16 under a cognizable legal theory. Balistreri v. Pacifica Police  
17 Dept., 901 F.2d 696, 699 (9th Cir. 1990). All material allegations  
18 in the complaint will be taken as true and construed in the light  
19 most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792  
20 F.2d 896, 898 (9th Cir. 1986). Although the court is generally  
21 confined to consideration of the allegations in the pleadings, when  
22 the complaint is accompanied by attached documents, such documents  
23 are deemed part of the complaint and may be considered in  
24 evaluating the merits of a Rule 12(b)(6) motion. Durning v. First  
25 Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

26 A complaint must contain a "short and plain statement of the  
27 claim showing that the pleader is entitled to relief." Fed. R.

1 Civ. P. 8(a). "Each averment of a pleading shall be simple,  
2 concise, and direct. No technical forms of pleading or motions are  
3 required." Fed. R. Civ. P. 8(e). The Federal Rules of Civil  
4 Procedure do not require a claimant to set out in detail the facts  
5 upon which it bases its claim. See Twombly, 127 S. Ct. at 1964.  
6 To the contrary, all the Rules require is that the plaintiff "give  
7 the defendant fair notice of what the [plaintiff's] claim is and  
8 the grounds on which it rests." Id. (quoting Conley v. Gibson, 355  
9 U.S. 41, 47 (1957)) (internal quotation marks omitted).

10 Although "a complaint attacked by a Rule 12(b)(6) motion to  
11 dismiss does not need detailed factual allegations, a plaintiff's  
12 obligation to provide the 'grounds' of his 'entitlement to relief'  
13 requires more than labels and conclusions, and a formulaic  
14 recitation of the elements of a cause of action will not do." Id.  
15 The complaint must contain sufficient factual allegations "to raise  
16 a right to relief above the speculative level." Id. at 1965.

17 When granting a motion to dismiss, a court is generally  
18 required to grant a plaintiff leave to amend, even if no request to  
19 amend the pleading was made, unless amendment would be futile.  
20 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
21 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
22 would be futile, a court examines whether the complaint could be  
23 amended to cure the defect requiring dismissal "without  
24 contradicting any of the allegations of [the] original complaint."  
25 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).  
26 Leave to amend should be liberally granted, but an amended  
27 complaint cannot allege facts inconsistent with the challenged  
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1 pleading. Id. at 296-97.

2 DISCUSSION

3 I. Twombly<sup>6</sup>

4 In Twombly, the Supreme Court addressed the "question of what  
5 a plaintiff must plead in order to state a claim under § 1 of the  
6 Sherman Act." 127 S. Ct. at 1964. The Court held that a § 1  
7 complaint that alleges "certain parallel conduct unfavorable to  
8 competition, absent some factual context suggesting agreement, as  
9 distinct from identical, independent action" should be dismissed.  
10 Id. at 1961. In reaching that decision, the Court held, "Without  
11 more, parallel conduct does not suggest conspiracy, and a  
12 conclusory allegation of agreement at some unidentified point does  
13 not supply facts adequate to show illegality." Id. at 1966.

14 Defendants argue that the complaints do not contain any non-  
15 conclusory allegations to support a claim that two or more  
16 Defendants agreed on prices for any SRAM product. Therefore,  
17 Defendants contend that Plaintiffs' complaints should be dismissed  
18 for failure to make "allegations plausibly suggesting (not merely  
19 consistent with) agreement." Id.

20 Plaintiffs counter that Defendants overstate the requirements  
21 of Twombly and that their allegations are sufficient to support

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23 <sup>6</sup>Although there are two separate complaints, IP Defendants  
24 rely almost exclusively on DP Defendants' motion to dismiss for  
25 their argument that the IPC should be dismissed pursuant to  
26 Twombly, apparently reserving their allotted pages for other  
27 arguments related to the IP Plaintiffs' state law claims. DP  
28 Defendants' motion to dismiss the DPC states that it "treats the  
IPC's additional allegations as if they were also alleged in the  
DPC." DP Defendants' Motion at 3 n.1. For purposes of analyzing  
the sufficiency of Plaintiffs' allegations of § 1 violations, the  
Court does the same.

1 their claims. First, Plaintiffs argue that Twombly should only  
2 apply in parallel pricing cases and that where, as here, "a claim  
3 is expressly predicated on the existence of a conspiratorial  
4 agreement, a motion to dismiss must be denied where the complaint  
5 contains even minimal allegations of the agreement's existence."  
6 DP Plaintiffs' Opposition at 7. In other words, Plaintiffs argue,  
7 because their complaints contain allegations of facially anti-  
8 competitive acts, they need not allege the factual context required  
9 by Twombly. Plaintiffs next argue that even if Twombly applies  
10 they have plead sufficient facts to "nudge[] their claims across  
11 the line from conceivable to plausible." 127 S. Ct. at 1974. The  
12 Court addresses the latter argument and does not need to reach the  
13 former.

14 In addition to general allegations of a conspiracy, price  
15 fixing and the susceptibility of the SRAM market to such  
16 violations, Plaintiffs include in their complaints a number of  
17 specific allegations of communications. As noted below, many of  
18 those communications are contained in emails, which are quoted in  
19 both complaints and appended to the DPC.

20 Construed in the light most favorable to Plaintiffs, these  
21 communications support an inference of a conspiracy. For example,  
22 Plaintiffs cite an email from a Hitachi employee to a Samsung  
23 employee asking, "Are you willing to exchange product roadmaps  
24 again?" as evidence that they "had a standing agreement to exchange  
25 their companies' 'highly confidential' SRAM product roadmaps." DP  
26 Plaintiffs' Opposition at 14, citing DPC ¶¶ 11, 80. Defendants  
27 argue that the fact that Hitachi was asking Samsung whether it  
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1 would exchange the roadmaps undermines any inference that there was  
2 a standing agreement. However, another plausible inference is that  
3 the companies had an agreement to exchange the information from  
4 time to time and Hitachi was inquiring whether it was time for the  
5 next exchange. See United States v. Container Corp. of Am., 393  
6 U.S. 333, 335 (1969) (holding § 1 claim based on information  
7 exchange was adequately plead even where there was "an infrequency  
8 and irregularity of price exchanges between the defendants" but  
9 where "the essence of the agreement was to furnish price  
10 information whenever requested").

11 Similarly, Plaintiffs cite various emails in which individual  
12 Defendants consider information obtained from other Defendants.  
13 See, e.g., IPC, Ex. J. (Samsung considering information obtained  
14 from Etron). Defendants fault Plaintiffs for relying upon internal  
15 emails, which do not demonstrate discussion of the prices among the  
16 Defendant companies. However, as Defendants acknowledge, the  
17 exchange of price information alone can be "sufficient to establish  
18 the combination or conspiracy, the initial ingredient of a  
19 violation of § 1 of the Sherman Act." Container Corp., 393 U.S. at  
20 335. Plaintiffs need not allege that Defendants actually discussed  
21 the prices they exchanged. These emails support Plaintiffs'  
22 allegation that Defendants had an ongoing agreement to exchange  
23 price and demand information for SRAM and that Defendants were  
24 aware that the purpose of sharing this information was "to  
25 stabilize or raise the price of SRAM sold in the United States and  
26 elsewhere." DPC ¶ 10.

27 Plaintiffs have further supported those allegations with  
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1 evidence of communications between Defendant companies. For  
2 example, Plaintiffs cite a 1998 email chain between Hitachi and  
3 Samsung discussing monthly updates of revenue and ASP for specific  
4 products. DPC ¶ 11. While acknowledging that such allegations are  
5 sufficient to support a finding of conspiracy in certain  
6 circumstances, Defendants fault Plaintiffs for failing to allege  
7 the manner in which these information exchanges actually impacted  
8 the SRAM market. DP Defendants' Motion at 10, citing Container  
9 Corp. of Am., 393 U.S. at 337. Although the "exchange of price  
10 data and other information among competitors does not invariably  
11 have anti-competitive effects," United States v. United States  
12 Gypsum Co., 438 U.S. 422, 443 n.16 (1978), "a civil violation can  
13 be established by proof of either an unlawful purpose or an  
14 anticompetitive effect." Id. at 436 n.13.

15 In Container Corp., the Supreme Court recognized that "[p]rice  
16 information exchanged in some markets may have no effect on a truly  
17 competitive price." 393 U.S. at 337. But, the Court found that  
18 the market for corrugated containers was one in which the "exchange  
19 of price data tends toward price uniformity" because the industry  
20 is "dominated by relatively few sellers . . . [t]he product is  
21 fungible . . . , the competition for sales is price [and] demand is  
22 inelastic." Id. Therefore, in the corrugated container market, "a  
23 lower price does not mean a larger share of the available business  
24 but a sharing of the existing business at a lower return." Id. As  
25 described above, Plaintiffs allege that Defendants shared the  
26 information to stabilize or raise the price of SRAM. Further,  
27 Plaintiffs allege that the market for SRAM is conducive to price-

1 fixing because

2 SRAM is a homogenous product sold by Defendants and  
3 purchased by Plaintiffs and members of the class  
4 primarily on the basis of price. The SRAM market is  
5 highly concentrated with Defendants accounting for a  
6 large portion of all SRAM sales in the United States.  
7 Moreover, the market for the manufacture and sale of  
8 SRAM is subject to high manufacturing and technological  
9 barriers to entry.

10 DP Complaint ¶ 71. Plaintiffs also allege, "Beginning in 1998 and  
11 continuing through much of 2001, SRAM prices rose, due to the  
12 effects of the industry-wide collusion alleged herein . . . During  
13 2000 alone, the average selling price of SRAM in the United States  
14 increased by 35%." IP Complaint ¶ 146. These allegations are  
15 sufficient to support an inference that the market for SRAM is also  
16 one in which exchanging price information can lead to "interference  
17 with the setting of price by free market forces." Container Corp.,  
18 393 U.S. at 337.

19 Defendants criticize Plaintiffs' allegations on several other  
20 bases. First, Defendants argue that Plaintiffs may not rely upon  
21 the guilty pleas entered by various Defendants in the DRAM  
22 litigation because any such reliance is necessarily based upon an  
23 impermissible inference that "the existence of a DRAM price-fixing  
24 conspiracy plausibly implies that such a conspiracy exists for  
25 SRAM." DP Defendants' Motion at 16. However, Plaintiffs allege  
26 that the same actors associated with certain Defendants were  
27 responsible for marketing both SRAM and DRAM. Although the  
28 allegations regarding the DRAM guilty pleas are not sufficient to  
support Plaintiffs' claims standing on their own, they do support  
an inference of a conspiracy in the SRAM industry.

1 Next, Defendants argue that the Department of Justice grand  
2 jury investigation into the SRAM industry and related subpoenas  
3 served on various Defendants are not relevant to Plaintiffs'  
4 claims. The Court agrees that the existence of the investigation  
5 does not support Plaintiffs' antitrust conspiracy claims. As the  
6 court found in In re Graphics Processing Units Antitrust  
7 Litigation,

8 It is unknown whether the investigation will result in  
9 indictments or nothing at all. Because of the grand  
10 jury's secrecy requirement, the scope of the  
investigation is pure speculation. . . . The grand jury  
investigation is a non-factor.

11 2007 WL 2875686, \* 12 (N.D. Cal.). Allegations regarding the SRAM  
12 investigation do not support Plaintiffs' antitrust claims.

13 Defendants also argue that Plaintiffs' allegations regarding  
14 Defendants' participation in various trade organizations cannot  
15 properly be viewed as support for their antitrust conspiracy  
16 claims. Again, these allegations cannot alone support Plaintiffs'  
17 claims, but such participation demonstrates how and when Defendants  
18 had opportunities to exchange information or make agreements.

19 Finally, Defendants argue that Plaintiffs' reliance on an SRAM  
20 antidumping proceeding before the International Trade Commission  
21 (ITC) regarding SRAM imports from Korea and Taiwan is  
22 impermissible. As Defendants point out, Micron's decision to  
23 challenge its competitors' pricing for SRAM undermines any  
24 inference that a conspiracy existed. The Court agrees that, as  
25 currently plead, the 1997 antidumping proceeding does not tend to  
26 support a finding of an antitrust conspiracy.

27 Nonetheless, the Court finds that Plaintiffs have plead  
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1 sufficient facts plausibly to suggest a § 1 price-fixing  
2 conspiracy. They have plead that Defendants had an ongoing  
3 agreement to exchange price information and intended that this  
4 exchange would lead to price stabilization or increases. Further,  
5 Plaintiffs have alleged that the SRAM market was one in which such  
6 information exchanges would lead to price stabilization or  
7 increases.

8 II. Sufficiency of Allegations Against Particular Defendants

9 DP Defendants also argue that, even if Plaintiffs' overall  
10 allegations are sufficient to survive a motion to dismiss, the  
11 complaint should be dismissed because Plaintiffs have failed to  
12 allege how each individual Defendant participated in the alleged  
13 conspiracy. In particular, DP Defendants argue that Plaintiffs  
14 have failed to allege sufficient facts with respect to DP  
15 Defendants Cypress Semiconductor, Hitachi America, Hynix  
16 Semiconductor America, Micron Technology, Micron Semiconductor  
17 Products, Mitsubishi Electric & Electronics USA, Inc., NEC  
18 Electronics America, Inc., Renesas Technology American, Inc.,  
19 Toshiba America, Inc. and Toshiba America Electronic Components,  
20 Inc. See DP Defendants' Motion, Att. A.

21 Defendants' arguments fail because they rely upon the standard  
22 for a motion for summary judgment. Although Plaintiffs will need  
23 to provide evidence of each Defendants' participation in any  
24 conspiracy, they now only need to make allegations that plausibly  
25 suggest that each Defendant participated in the alleged conspiracy.  
26 Further, Defendants' arguments tend to repeat the issues already  
27 discussed regarding the sufficiency of Plaintiffs' allegations

1 under Twombly.

2 Defendants Mosel Vitelic and Integrated Silicon Solution, Inc.  
3 have each filed a supplemental motion to dismiss the DPC; Defendant  
4 Mitsubishi Electric & Electronics USA, Inc. has filed a  
5 supplemental motion to dismiss the IPC; and Defendant Etron  
6 Technology America, Inc. has filed a supplemental motion to dismiss  
7 the DPC and the IPC. To the extent these parties' supplemental  
8 motions are based on issues that have already been addressed, the  
9 Court does not address them separately. For example, the Court  
10 does not address these Defendants' arguments that Plaintiffs have  
11 alleged only that they were involved in information exchanges. As  
12 discussed above, the information exchanges are, in this case,  
13 sufficient to raise a plausible inference of an antitrust  
14 conspiracy. Therefore, the Court does not address separately  
15 Integrated Silicon Solution's, Mitsubishi's or Etron's motion.

16 Mosel argues that Plaintiffs' claims against it are time-  
17 barred. According to Mosel, it stopped producing SRAM by May, 2001  
18 and sold off its entire inventory by January, 2003. Further, the  
19 only communication in which Mosel participated that is cited in the  
20 complaint occurred in 2001. Therefore, the Court is inclined to  
21 find that Plaintiffs' claims against Mosel are time-barred.

22 However, to do so, the Court must rely upon the declaration of  
23 Michael Li filed in support of Mosel's supplemental motion. As  
24 Plaintiffs note, the documents supporting Mosel's allegation that  
25 it ceased producing SRAM in 2001 constitute extrinsic evidence,

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1 which the Court may not consider in deciding a motion to dismiss.<sup>7</sup>

2 Nonetheless, Plaintiffs should not be allowed to pursue their  
3 claims against Mosel, particularly in light of Mosel's minimal  
4 participation in the SRAM market, if they can easily be proved to  
5 be time-barred. Therefore, the Court defers ruling on Mosel's  
6 separate motion to dismiss in order to allow DP Plaintiffs to  
7 depose Li regarding the information in his declaration and to  
8 produce any evidence that they have in support of an argument that  
9 their claims against Mosel are not time-barred. DP Plaintiffs  
10 shall file a supplemental opposition to Mosel's motion of no more  
11 than seven pages within one month of the date of this order. Mosel  
12 may file a response of no more than three pages one week  
13 thereafter.

#### 14 III. Time Bar

15 Defendants argue that Plaintiffs' claims are time-barred by  
16 the four-year statute of limitations for antitrust claims. 15  
17 U.S.C. § 15(b). As Defendants note, such consideration is only  
18 appropriate on a motion to dismiss if the time bar "is apparent on  
19 the face of the complaint." DP Defendants' Motion at 22, quoting  
20 Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

21 However, as Plaintiffs note, they have alleged communications  
22 within the statute of limitations. See DPC ¶¶ 107-114; IPC  
23 ¶¶ 155r-155u. Further, Plaintiffs allege that Defendants  
24 fraudulently concealed the conspiracy. See DPC ¶¶ 170-74; IPC

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26 <sup>7</sup>The email attached as exhibit 3 to the declaration is  
27 properly submitted. Plaintiffs quote the email in the complaint.  
28 Therefore, the Court may consider the remainder of the email chain  
as submitted by Mosel.

1 ¶¶ 160-61. Defendants argue that Plaintiffs cannot claim  
2 fraudulent concealment and also rely on allegations concerning the  
3 DRAM investigation and guilty pleas. However, as Plaintiffs point  
4 out, the fact that they might have been aware of a potential price-  
5 fixing conspiracy in the DRAM market in 2002 is not enough to  
6 support a finding that they were on notice of a potential  
7 conspiracy in the SRAM market at that time. Defendants' motions to  
8 dismiss on these grounds are denied.

9 IV. California State Claims on Behalf of Non-California Residents

10 IP Defendants next argue that IP Plaintiffs' California law  
11 claims on behalf of all non-California IP class members should be  
12 dismissed.<sup>8</sup> Plaintiffs counter that it is premature to address  
13 choice of law issues at this stage because resolution of such  
14 issues will require rigorous factual analysis.

15 Plaintiffs may not bring California claims on behalf of non-  
16 California residents whose claims do not arise out of conduct that  
17 took place in California. Plaintiffs argue that all Plaintiffs'  
18 claims are based on conduct that took place in California, but  
19 Plaintiffs have not alleged specific conduct that occurred in  
20 California. These claims are dismissed with leave to amend. If  
21 Plaintiffs can allege specific California conduct underlying out-  
22 of-state Plaintiffs' claims, they may continue to assert California  
23 state law claims on behalf of those Plaintiffs. Even if Plaintiffs  
24 are able to make these allegations, Defendants will have an

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26 <sup>8</sup>Because the remaining sections apply only to IP Plaintiffs'  
27 claims, all further references to the parties and the complaint  
28 refer only to the IP parties and the IP claims.



1 opportunity to raise this issue again when Plaintiffs move for  
2 class certification.

3 V. State Antitrust and Consumer Protection Claims

4 IP Defendants also argue that various state law antitrust and  
5 consumer protection claims fail as a matter of law.<sup>9</sup>

6 A. Pennsylvania Claims

7 First, Defendants argue that Plaintiffs' claim that Defendants  
8 have violated "Pennsylvania common law" must fail because  
9 Pennsylvania does not have an antitrust statute and its law does  
10 not allow for recovery of damages for antitrust violations.

11 Plaintiffs counter that the Pennsylvania Supreme Court has stated  
12 that conduct such as price-fixing is "unlawful at common law" as  
13 well as a violation of the Sherman Act. Shuman v. Bernie's Drug  
14 Concessions, Inc., 409 Pa. 539, 544 (1963); Schwartz v. Laundry &  
15 Linen Supply Driver's Union, 339 Pa. 353, 359 (1940).

16 However, Defendants cite two more recent Pennsylvania  
17 decisions that expressly state that neither statutory nor common  
18 law antitrust actions for money damages exist in Pennsylvania.  
19 See, e.g., XF Enters. v. BASF Corp., 47 Pa. D. & C. 4th 147, 150-51  
20 (Pa. Comm. Pl. 2000) ("No court to date has held that a private  
21 remedy is available for damages under Pennsylvania's common law on  
22 antitrust violations"); Stutzle v. Rhone-Poulenc S.A., 2003 WL  
23 22250424, \*2 (Pa. Comm. Pl. 2003)(same).

24 Plaintiffs further argue that the availability of antitrust

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25  
26 <sup>9</sup>As stated above, this section applies only to the IP  
27 Plaintiffs and Defendants. Therefore, all further references to  
28 Plaintiffs and Defendants in this section apply only to the IP  
parties.

1 damages is "strongly suggested" by Collins v. Main Line Bd. of  
2 Realtors, 452 Pa. 342 (1973). There, the Pennsylvania court held,

3 The appellants are entitled to the equitable remedy of  
4 injunction to prevent the carrying out of the illegal  
5 contract or combination. The record, however, does not  
6 provide any legal basis for an award of damages.

7 Id. at 352 (plurality opinion) (internal citation omitted).

8 Plaintiffs argue that this quote demonstrates that the  
9 Collins plaintiffs "had simply not presented sufficient evidence to  
10 establish damages, not that they lacked a legal ground to obtain  
11 them." IP Plaintiffs' Opposition at 18. However, as Defendants  
12 point out, the case states that the plaintiffs lacked a legal  
13 rather than an evidentiary basis for their claims. Further, in  
14 more recent cases, lower courts in Pennsylvania have rejected  
15 Plaintiffs' interpretation of Collins. See, e.g., XF Enters., 47  
16 Pa. D. & C. 4th at 149-50 (noting, "No court to date has held that  
17 a private remedy is available for damages under Pennsylvania's  
18 common law on antitrust violations. . . . There have been 13  
19 antitrust bills introduced in the General Assembly since 1987. Any  
20 one of these bills, if made law, would have provided the private  
21 right of action which plaintiff now suggests this court should  
22 recognize.").

23 The Court grants Defendants' motion to dismiss the  
24 Pennsylvania common law claim.

#### 25 B. South Dakota Antitrust Claims

26 Defendants next move to dismiss Plaintiffs' claim based on a  
27 violation of South Dakota's antitrust statute. S.D. Codified Laws  
28 § 37-1-3.1. Defendants argue that the South Dakota antitrust

1 statute only applies to activities that "affect trade or commerce  
2 wholly within the state." State v. Fullerton Lumber, 35 S.D. 410,  
3 422 (1915). However, as Plaintiffs point out, Fullerton Lumber was  
4 decided well before 1977, when the statute was revised to prohibit  
5 a "contract, combination or conspiracy between two or more persons  
6 in restraint of trade or commerce any part of which is within this  
7 state is unlawful." S.D. Codified Laws § 37-1-3.1 (emphasis  
8 added).

9 Defendants respond that, despite the intervening change in  
10 law, no South Dakota court has overruled the holding in Fullerton  
11 Lumber. However, Defendants cite no case holding that the  
12 limitations of Fullerton Lumber survived the statutory amendment.  
13 The Court finds that the language in the operative statute directly  
14 contradicts Fullerton Lumber and therefore controls.

15 Defendants also argue that, even if Plaintiffs' claim is not  
16 barred by Fullerton Lumber, Plaintiffs have not alleged facts  
17 sufficient to make the claim. Defendants argue that the operative  
18 statutory language is ambiguous because it is not clear whether the  
19 "any part" requirement refers to the conspiracy or to the affected  
20 trade or commerce. Because the earlier South Dakota antitrust  
21 statute limited its application to conspiracies that impacted  
22 intrastate trade or commerce, it makes sense that the legislature's  
23 intention was to alter that limitation with the 1977 revision. Cf.  
24 In re New Motor Vehicles Cd'n Exp. Antitrust Litig., 350 F. Supp.  
25 2d 160, 172 (D. Me. 2004 ) (finding that "it is logical to assume  
26 that the state intended its antitrust coverage to be as broad as  
27 possible"). Further, the South Dakota legislature has an interest  
28

1 in protecting its residents from paying supra-competitive prices.  
2 Therefore, the Court interprets the current version of the statute  
3 to require that part of the affected trade or commerce take place  
4 within South Dakota.

5 Defendants argue that Plaintiffs have not plead that trade or  
6 commerce in South Dakota was impacted by the alleged conspiracy.  
7 However, Plaintiffs have alleged that Defendants "produced,  
8 promoted, sold, marketed, and/or distributed SRAM in each of the  
9 states identified herein," which includes South Dakota. IPC ¶ 125.  
10 Plaintiffs also allege that the conspiracy "substantially affected  
11 commerce in each of the states identified herein" and bring claims  
12 on behalf of two South Dakota residents. Id. at ¶¶ 28, 47, 125.  
13 This is sufficient to support a claim that the conspiracy affected  
14 commerce, at least part of which was within South Dakota.

15 Defendants' motion to dismiss the South Dakota antitrust claim  
16 is denied.

17 C. Alaska Consumer Protection Claims

18 Defendants argue that Plaintiffs' claim under the Alaska  
19 Unfair Trade Practices and Consumer Protection Act (AUTPCPA) must  
20 be dismissed because the Alaska antitrust statute expressly  
21 provides that only the state attorney general may bring indirect  
22 purchaser actions for monetary damages. Plaintiffs counter that  
23 the Alaska Supreme Court has held that private parties may sue  
24 under AUTPCPA for conduct that also violates the Alaska antitrust  
25 statute and that no court has held that the antitrust statute's  
26 standing restriction should be applied to the AUTPCPA, which  
27 clearly provides that any "person" who has been injured may bring a  
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1 suit.

2 As the DRAM court noted, there is no authority directly on  
3 point. Therefore, the DRAM court elected "to adopt the  
4 interpretation that will wreak the least amount of havoc on the  
5 existing law in Alaska." 2007 U.S. Dist. LEXIS 44354, \*112 (N.D.  
6 Cal.). This Court also recognizes that the Alaska legislature has  
7 chosen to allow only the attorney general to sue for money damages  
8 based on indirect purchaser antitrust claims. Therefore, the  
9 result that appears most consistent with existing Alaska law is  
10 that the AUTPCPA does not provide a provide a basis on which  
11 Plaintiffs may bring a suit for money damages under Alaska law.  
12 Defendants' motion to dismiss the AUTPCPA claim is granted.  
13 Because Plaintiffs' claims are barred as a matter of law, this  
14 claim is dismissed without leave to amend.

15 D. Idaho Consumer Protection Claims

16 Defendants argue that in State ex rel. Wasden v. Daicel Chem.  
17 Indus., Ltd., 141 Idaho 102, 108-09 (2005), the Idaho Supreme Court  
18 expressly held that indirect purchasers may not bring suit under  
19 the Idaho Consumer Protection Act. Plaintiffs do not oppose this  
20 argument. Based on the Idaho Supreme Court's clear holding, the  
21 Court grants Defendants' motion to dismiss Plaintiffs' Idaho  
22 Consumer Protection Act claim. Because Plaintiffs' Idaho claim is  
23 barred as a matter of law, dismissal of this claim is without leave  
24 to amend.

25 E. Montana Consumer Protection Claims

26 Plaintiffs allege that "Defendants have engaged in unfair  
27 competition or unfair or deceptive acts or practices in violation

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1 of Montana Code § 30-14-101 et seq.". IPC ¶ 229. Defendants argue  
2 that this claim should be dismissed because Montana does not allow  
3 private consumer protection claims to be brought as class actions  
4 and because such claims are limited to purchases made for personal,  
5 family or household purposes. See id. Plaintiffs counter that  
6 Defendants only address the requirements of Title 30, Chapter 14,  
7 Part 1 of the Montana Code and that they also bring claims under  
8 Title 30, Chapter 14, Part 2, which does not contain those  
9 limitations. However, as Defendants point out, Plaintiffs'  
10 complaint tracks the language of Part 1, which prohibits "Unfair  
11 methods of competition and unfair or deceptive acts or practices in  
12 the conduct of any trade or commerce." Id. at 30-14-103. In  
13 contrast, Part 2 prohibits specific activities, similar to federal  
14 anti-trust violations. See, e.g., id. at 30-14-205(1) ("It is  
15 unlawful for a person or group of persons, directly or indirectly:  
16 (1) to enter an agreement for the purpose of fixing the price or  
17 regulating the production of an article of commerce"). Further,  
18 Parts 1 and 2 are separate statutes that were enacted at different  
19 times, have different titles and different legislative histories.

20 The Court grants Defendants' motion to dismiss the Montana  
21 claim as currently plead. Plaintiffs may plead a claim under Part  
22 2 in their amended complaint.

23 F. New York Consumer Protection Claims

24 Defendants argue that Plaintiffs' claims under New York's  
25 General Business Law § 349 must be dismissed because New York  
26 courts require that conduct be "consumer-oriented" to be actionable  
27 under that statute. For example, in Paltre v. Gen'l Motors Corp.,

1 810 N.Y.S.2d 496, 498 (2006), the court held that consumers who  
2 purchased or leased vehicles "failed to set forth a viable cause of  
3 action to recover damages for deceptive business practices" based  
4 on allegations of price-fixing among automobile manufacturers  
5 "because the alleged misrepresentations were either not directed at  
6 consumers or were not materially deceptive."

7 Plaintiffs argue that these cases do not preclude their claims  
8 because Plaintiffs allege specific deceptive conduct by Defendants.  
9 Plaintiffs allege that Defendants concealed the conspiracy and  
10 "publicly provided pre-textual and false justifications regarding  
11 their price increases." IPC ¶ 160. However, there is nothing to  
12 suggest that Defendants must have provided false justifications for  
13 price increases to the IP Plaintiffs. Rather, any such  
14 justifications would have been directed at the DP Plaintiffs.

15 The Court grants Defendants' motion to dismiss claims brought  
16 under § 349. If Plaintiffs are able to allege any  
17 misrepresentations directed at Indirect Purchasers, they may re-  
18 plead this claim.

19 G. Pennsylvania Consumer Protection Claims

20 Defendants argue that Plaintiffs' Pennsylvania Unfair Trade  
21 Practices and Consumer Protection Law (UTPCPL) claims must be  
22 dismissed for two reasons. First, Defendants argue that the UTPCPL  
23 does not apply to price fixing. In addition to twenty enumerated  
24 acts prohibited by the UTPCPL, the statute has a catch-all  
25 provision which prohibits "[e]ngaging in any other fraudulent or  
26 deceptive conduct which creates a likelihood of confusion or of  
27 misunderstanding." 73 P.S. § 201-2(4)(xxi). Plaintiffs contend  
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1 that their allegations are covered by this catch-all because they  
2 have alleged deceptive conduct. Defendants argue that the catch-  
3 all requires a plaintiff to allege the elements of common law  
4 fraud. However, the provision was amended in 1996 to cover  
5 deceptive conduct. See Christopher v. First Mutual Corp., 2006 WL  
6 166566, \*3 (E.D. Pa). Although the Pennsylvania courts are divided  
7 on whether a plaintiff must meet the heightened pleading standard  
8 for fraud following the 1996 amendment and the Pennsylvania Supreme  
9 Court has not addressed the issue, the Court notes that the  
10 amendment would have been without meaning if the catch-all still  
11 covered only fraudulent conduct.

12 Nonetheless, Plaintiffs have not plead any conduct by  
13 Defendants which can be interpreted as deceptive conduct creating a  
14 likelihood of confusion or of misunderstanding on Plaintiffs' part.  
15 See id. (finding no actionable deceptive conduct where "[t]here  
16 were no representations and no contact between" the parties).

17 Further, Defendants note that the UTPCPL limits the class of  
18 plaintiffs who may pursue private actions to those who purchased or  
19 leased "goods or services primarily for personal, family or  
20 household purposes." 73 P.S. § 201-9.2. Plaintiffs do not respond  
21 to this argument and the Court notes that Plaintiffs' complaint  
22 contains no allegations regarding the purposes for which Plaintiffs  
23 purchased products containing SRAM.

24 Defendants' motion to dismiss the Pennsylvania UTPCPL claims  
25 is granted with leave to amend. Plaintiffs may re-plead these  
26 claims if they can allege deceptive conduct creating a likelihood  
27 of confusion or misunderstanding and that they purchased the



1 products containing SRAM for personal, family or household  
2 purposes.

3 H. Rhode Island Consumer Protection Claims

4 Defendants move to dismiss Plaintiffs' claims under the Rhode  
5 Island Unfair Trade Practices and Consumer Protection Act arguing  
6 first that Plaintiffs' allegations do not constitute "[u]nfair  
7 methods of competition and unfair or deceptive acts or practices"  
8 as defined by the act. See R.I. Gen. Laws §§ 6-13.1-1(5).

9 Plaintiffs counter that their claims are covered by provisions in  
10 the statute similar to the catch-all in the Pennsylvania UTPCPL.  
11 The Rhode Island statute enumerates specific types of unfair  
12 practices and goes on to prohibit "[e]ngaging in any other conduct  
13 that similarly creates a likelihood of confusion or of  
14 misunderstanding" and "[e]ngaging in any act or practice that is  
15 unfair or deceptive to the consumer." R.I. Gen. Laws § 6-13.1-  
16 1(xii), (xiii). However, as discussed in the section regarding the  
17 Pennsylvania statute's catch-all provision, Plaintiffs have not  
18 plead any conduct that creates a likelihood of confusion or  
19 misunderstanding for indirect purchasers. See George v. George F.  
20 Berkander, Inc., 92 R.I. 426, 429 (1961) ("It is our well-settled  
21 law that a finding of unfair competition must be predicated upon  
22 conduct on the part of the respondent that reasonably tended to  
23 confuse and mislead the general public into purchasing his product  
24 when the actual intent of the purchaser was to buy the product of  
25 the complainant.").

26 Further, the remedy in the Rhode Island statute is limited to  
27 those who purchase or lease "goods primarily for personal, family  
28

1 or household purposes." R.I. Gen. Laws § 6-13.1-5.2(a). As  
2 discussed above, Plaintiffs have made no such allegations.

3 Defendants' motion to dismiss the Rhode Island claims is  
4 granted with leave to amend. Plaintiffs may re-plead these claims  
5 if they can allege deceptive conduct creating a likelihood of  
6 confusion or misunderstanding and that they purchased the products  
7 containing SRAM for personal, family or household purposes.

8 I. Wyoming Consumer Protection Claims

9 Defendants next argue that Plaintiffs' claims under the  
10 Wyoming Consumer Protection Act (WCPA) must be dismissed because  
11 the act does not extend to antitrust violations. In particular,  
12 Defendants note that the enumerated prohibitions in the WCPA  
13 concern fraudulent marketing practices such as false designation of  
14 origin or false representations about the quality of goods.  
15 Plaintiffs counter that the WCPA contains general language  
16 prohibiting "unfair" or "deceptive" trade practices. Wyo. Stat.  
17 § 40-12-105(a)(xv).

18 However, as Defendants point out, the Wyoming Supreme Court  
19 held that the WCPA "was drafted primarily to protect consumers from  
20 unscrupulous and fraudulent marketing practices" and declined to  
21 extend the reach of the WCPA where the legislature has elsewhere  
22 addressed the problems identified by a plaintiff. Herrig v.  
23 Herrig, 844 P.2d 487, 495 (Wyo. 1992). Here, Plaintiffs make no  
24 allegations about Defendants' marketing practices. Further,  
25 Wyoming has an antitrust statute that allows indirect purchasers to  
26 seek injunctive relief but not money damages. See Wyo. Stat. § 40-  
27 4-114.

1           Because the Court finds that Plaintiffs' WCPA claims are  
2 deficient as a matter of law, it dismisses them with prejudice and  
3 does not reach the other grounds on which Defendants challenge  
4 them.

5 VI. Unjust Enrichment Claims

6           Plaintiffs bring a claim for unjust enrichment on behalf of a  
7 nation-wide class. Defendants argue that this claim must be  
8 dismissed because unjust enrichment law varies widely from State to  
9 State.<sup>10</sup> Further, Defendants argue that allowing this claim would  
10 circumvent the Supreme Court's holding in Illinois Brick Co. v.  
11 Illinois, 431 U.S. 720 (1977), by allowing all Plaintiffs to  
12 recover money damages, regardless of whether the States in which  
13 they live allow such recovery for antitrust violations.

14           Although Defendants' arguments demonstrate that Plaintiffs  
15 from certain States might be precluded from recovering damages on  
16 an unjust enrichment theory, they do not provide grounds for  
17 dismissing the claim for all Plaintiffs. Defendants also argue  
18 that Plaintiffs' failure to identify which States' common law  
19 supports their claims deprives Defendants of adequate notice of the  
20 claims. Indeed, until Plaintiffs indicate which States' laws  
21 support their claim, the Court cannot assess whether the claim has  
22 been adequately plead. Therefore, the Court dismisses Plaintiffs'  
23 unjust enrichment claim with leave to amend. If Plaintiffs re-  
24 plead this claim, they must identify which State's or States' law  
25 they rely upon.

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26  
27 <sup>10</sup>As discussed above, all references to Plaintiffs and  
28 Defendants in this section concern only the IP parties.

## CONCLUSION

1  
2 For the foregoing reasons, Defendants' motions to dismiss are  
3 GRANTED in part and DENIED in part (Docket Nos. 309, 310, 311,  
4 314, 315). The Court DEFERS RULING on Defendant Mosel Vitelic's  
5 motion to dismiss (Docket No. 307). Plaintiffs may file amended  
6 complaints within twenty-one days of the date of this order.<sup>11</sup> As  
7 discussed at the hearing, the parties shall meet and confer to  
8 discuss any necessary modification to the currently scheduled date  
9 for a hearing on Plaintiffs' motions for class certification and a  
10 further case management conference.

11 The parties' requests for judicial notice are GRANTED (Docket  
12 Nos. 315-2, 319-3). Judicial notice of the documents attached to  
13 those requests is proper because they are easily verifiable. See  
14 Fed. R. Evid. 201.

15 DP Plaintiffs' objection to the declaration of Michael Li  
16 filed in support of Defendant Mosel Vitelic, Inc. and Mosel Vitelic  
17 Corporation's supplemental motion to dismiss is SUSTAINED in part  
18 and OVERRULED in part (Docket No. 318). To the extent Plaintiffs'  
19 objections are based on the email attached as exhibit 3 to the  
20 declaration, the objections are overruled. Because Plaintiffs  
21 quote the email in their complaint, the Court considers the  
22 remainder of the email chain as submitted by Mosel Vitelic. To the  
23 extent Plaintiffs object to the remainder of the exhibits as the

24  
25 \_\_\_\_\_  
26 <sup>11</sup>DP Plaintiffs shall not include any claims against Defendant  
27 Mosel Vitelic in their amended complaint. If necessary after  
28 ruling on Mosel's motion to dismiss, the Court will grant DP  
Plaintiffs leave to amend their complaint to re-allege such claims.

1 improper introduction of extrinsic evidence on a motion to dismiss,  
2 the objections are sustained.

3 IT IS SO ORDERED.

4

5 2/14/08

6 Dated: \_\_\_\_\_



\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

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