

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. 07-md-01819 CW

ORDER DENYING
CYPRESS' MOTION
FOR SUMMARY
JUDGMENT OR
PARTIAL SUMMARY
JUDGMENT

Cypress Semiconductor Corporation (Cypress) moves for summary judgment or, in the alternative, for partial summary judgment on all claims brought by the Direct Purchaser (DP) and Indirect Purchaser (IP) Plaintiffs in this class action. The DP and IP Plaintiff classes allege that Cypress and other manufacturers engaged in a price-fixing conspiracy. DP Plaintiffs have brought suit for antitrust violations under the Sherman Act, while IP Plaintiffs have sued under various antitrust and consumer

1 protection statutes and the common law of twenty-seven United
2 States jurisdictions.

3 The Court heard oral argument on this motion on October 14,
4 2010. Having reviewed all of the parties' submissions, and
5 considered their oral arguments, the Court denies Cypress' motion
6 for summary judgment or, in the alternative, partial summary
7 judgment.
8

9 BACKGROUND

10 Direct and Indirect Purchasers allege that Defendant
11 manufacturers engaged in a price-fixing conspiracy related to a
12 product called Static Random Access Memory (SRAM). The facts of
13 this case were described in detail in the Court's prior orders.
14 This order includes additional facts relevant to this motion.

15 From 1998 through 2004, Woung Moo (W.M.) Lee, Senior Manager
16 and Group Leader of the SRAM Marketing Group for Samsung
17 Electronics Co., Ltd. (SEC) from February, 1999 through 2002, and
18 other Samsung¹ personnel held regular meetings with their
19 competitors, including Toshiba, NEC, Mitsubishi, Etron and Hynix.
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21 See Declaration of William H. London (London Dec.), Ex. 1

22 (Samsung's Fourth Supplemental Responses to DP Plaintiffs'
23 Interrogatories at 8-10). In these meetings, Samsung and its
24 competitors exchanged information about SRAM production volume,
25 marketing information, pricing, and major customers, such as
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27 ¹ SEC and Samsung Semiconductor, Inc. (SSI) are collectively
28 referred to as "Samsung."

1 Intel. Id. The meetings were convened at various locations
2 throughout Asia, including in Japan, Korea and Taiwan. Id. at 9-
3 10. Information was often exchanged and notes taken using white
4 boards, or similar means. Id. Hence, the meetings have come to
5 be known in this case as the "White Board" meetings.

6 W.M. Lee had direct communications with certain competitors
7 regarding SRAM, including employees from NEC, Mitsubishi, Etron
8 and Hynix. Id. He generally viewed competitors' production
9 volume information as more important than information about their
10 prices because production volume helped him determine oversupply
11 or shortage in the market, in turn dictating the need to lower or
12 raise prices. Id. at 9. For example, in one communication, W.M.
13 Lee referred to a product oversupply for Intel, and advised that,
14 to avoid this oversupply situation, SEC would reduce production
15 and divert to a different product. London Dec., Ex. 68.

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18 During at least a portion of this time period, Joo Bong Ra
19 worked for Samsung Semiconductor, Inc. (SSI), and reported to W.M.
20 Lee regarding SRAM. Id. at 8. In August, 2000, Ra left SSI, and
21 began working for Cypress. London Dec., Ex. 15 (Ra Dep. 20:20).

22 Cypress did not attend the White Board meetings. Outside of
23 these meetings, however, Samsung and Cypress exchanged information
24 regarding production, pricing and revenue for SRAM. See e.g.,
25 London Dec., Ex. 17. For example, Gary Scotch, a Cypress senior
26 Strategic Account Manager, id., Ex. 19 at 204:16-21, sent an email
27 to Scott Harmel, Cypress' SRAM Product Marketing Manager,
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1 summarizing a lunch meeting with Ra on December 21, 1999, and
2 relaying details regarding Samsung's volume of business, revenue
3 and pricing. Id., Ex. 17. Scotch wrote, "Samsung is actively
4 trying to hold pricing, and has withdrawn previously proposed
5 price decreases." Id. Scotch also wrote, "Some of this info is
6 extremely sensitive so please treat it as such . . . It may be
7 best not to save this on your hard disk." Id.

8
9 Ra, in turn, reported details from the same meeting to W.M.
10 Lee, including information about Cypress' production volume,
11 volume supplied to Intel, and pricing for SRAM. London Dec., Ex.
12 16. Ra indicated that Cypress was planning to produce 1 to 1.5
13 million units of 4M low power SRAM (LPSRAM) per month, mostly for
14 Intel, and provided Cypress' Q100 and Q200 pricing to Intel for 2M
15 and 4M LPSRAM. Id.

16
17 On April 27, 2000, John Bugee, who served as SSI's Worldwide
18 Account Manager for Intel and Cisco accounts from 1998 to 2001,
19 id., Ex. 14 at 10:12-18, provided to his Samsung colleagues,
20 including W.M. Lee and Ra, details regarding Cypress' current
21 pricing. Id., Ex. 51. Bugee also stated, "Intel is applying
22 great pressure for Cypress to reduce their pricing . . . I
23 encouraged Cypress to significantly increase (not decrease) their
24 price." Id.

25
26 On August 10, 2000, Scotch told Antonio Alvarez, Vice
27 President of Cypress' Memory Products Division, and Thomas
28 Surette, Cypress' Business Unit Manager of LPSRAM, that he "spoke

1 to a Samsung source yesterday" and "they are shipping 50k 8M (.25
2 micron I think) in Aug, around \$17." Id., Ex. 4. On the same
3 date, Bugee informed W.M. Lee and other Samsung managers by email
4 that Cypress signed a LPSRAM Purchase Agreement with Intel and was
5 required to give Intel six-months notice of any price increase.
6 London Dec., Exs. 18 & 14 (Bugee Dep. 10:12-18). Bugee reported
7 that, effective Q101, Cypress would increase its price for 2M
8 LPSRAM from \$2.50 to \$3.00 and for 4M LPSRAM from \$5.00 to \$6.00.
9 Id., Ex. 18.

11 In an email on May 17, 2001, Mario Martinez, Cypress'
12 Director for Strategic Marketing, informed Ra, Alvarez and Ahmad
13 Chatila of Cypress that Samsung had agreed to exchange with
14 Cypress historical and forecast numbers regarding SRAM revenue and
15 volume. London Dec., Ex. 86. The email included information
16 about Samsung's SRAM revenue and volume.

18 There is also evidence that Cypress exchanged anticompetitive
19 information with firms other than Samsung, though the trail of
20 documentation is less extensive. On December 26, 2000, Chatila
21 reported to Harmel a host of SRAM-related pricing and production
22 information that he had gathered from a director at IDT. Id., Ex.
23 55. Harmel responded that he "used to hold similar conversations
24 with 4-5 competitors/month (roughly one per week). Samsung, IDT,
25 Micron, and ISSI were my prime choices . . ." Id.

27 On June 25, 2001, Ra, who no longer worked for Samsung, but
28 had moved to Cypress, received an email from Hee Sang Yoon, Sr.,

1 Manager of Strategic Marketing for SRAM at Hynix. Yoon invited Ra
2 to attend a meeting of suppliers to address supply and demand
3 issues in the SRAM market. Id., Ex. 37. Yoon stated, "As you may
4 know, market situation is decided by two side, demand and supply.
5 That means, suppliers can control the market situation if they
6 have accurate information on customer and market demand in
7 general." Id. Ra forwarded the invitation to Alvarez,
8 questioning whether the meeting was legal unless all SRAM
9 manufacturers were invited. Alvarez asked Cypress counsel whether
10 the meeting was legal. Winter's Reply Dec., Ex. 3. Counsel
11 responded that the meeting "[s]ounds questionable at best, illegal
12 at worst." Id. Ra did not accept the invitation, but replied to
13 Yoon that he would like to discuss "the supply/demand issue and
14 way to survive under tough market for SRAM world," and asked Yoon
15 to "stay in touch." London Dec., Ex. 37.

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18 In turn, an email from Ra to Steve Weber, Cypress' Motorola
19 Account Manager, and Surrette on March 21, 2002, suggests that Ra
20 had gained access to some information about Hynix's pricing and
21 was coordinating price increases with various SRAM suppliers. Ra
22 wrote:

23 Just before I discuss this matter with Tom [Surrette],
24 will give you a flexable [sic] price at \$1.00 but
25 please do not release this to disty [sic] yet.
26 Lately, I've been talking to several suppliers as to
27 rasing [sic] the prices for SRAMs. I don't think
28 Hynix will drop further. Id., Ex. 44.

1 An email from Scotch in April, 2002 indicates that he spoke with
2 Etron, and gathered details about its pricing and production
3 volume. Id., Ex. 47.

4 On April 23, 2002 Scotch reported speaking with Etron, and
5 relayed Etron pricing information. Id., Ex. 47. Scotch also
6 stated that Etron failed prequalification requirements to supply
7 parts to Intel, and that development could benefit Cypress. In a
8 March 6, 2002 email exchange regarding negotiations for the sale
9 of SRAM, Chatila of Cypress wrote, "We will not take this business
10 at this time. This kind of price 20 percent lower than lowest
11 customer will cause trouble for all players in industry." Id.,
12 Ex. 55.

13
14 At Cypress, Alvarez and Surrette had pricing authority.
15 London Dec., Ex. 12 (Alvarez Dep. 68:23-71:20); see also, Ra Dep.
16 87:22-25. Scotch did not have "ultimate price authority," though
17 he did have input in regard to pricing with Intel, negotiated
18 prices with buyers within limits, and regularly discussed pricing
19 with Alvarez, Surrette, Chatila, Ra, Bien Irace and Ralph Schmitt.
20 Alvarez Dep. 68:23-71:20; Scotch Dep. 204:16-206:1. Scotch
21 considered discussing pricing with them a basic job
22 responsibility. London Dec., Ex. 19 at 34:6-35:19.

23
24 In the early 1990s Cypress had a relatively small share of
25 the SRAM market. In 1994, Cypress estimated its share at six
26 percent. Declaration of Gary A. Winters (Winters Dec.), Ex. 49.
27 By 2000, Cypress had grown from the ninth-largest to the second-
28

1 largest in the SRAM market in terms of market share. See Winters
2 Dec, Exs. 49 & 14 (Semico Report at 23, 25). Cypress gained
3 market share throughout the period of the alleged conspiracy.
4 Semico Report at 23, 25. According to Alvarez, in the 1990s,
5 Cypress sought to become a leading player in the market for SRAM.
6 Winters Dec., Ex. 48. In the early 2000s SRAM profits shrank, and
7 many manufacturers either consolidated with other companies or
8 exited the SRAM business. Semico Report at 18-20. Cypress
9 purchased Galvan, Inc. in 2000, and Cascade Semiconductors in
10 2003. Id. In 2003, Micron exited the SRAM business, selling its
11 SRAM product offering to Cypress. Id. at 19.

12
13 Alvarez testified that he authorized employees in the Cypress
14 Memory Division to collect competitor data to assist with
15 calculating overall market share. London Dec., Ex. 48 (Alvarez
16 Dep. 28:18-23). He continued that the revenue data made public by
17 third-party publications, such as Isuppli and Gartner, was often
18 nine months old and subject to revisions. Id. at 30:10-22.
19 Isuppli and WSTS were third-parties that received volume
20 information directly from SRAM manufacturers. London Dec., Ex. 38
21 (Surrette Dep. 195:3-196:19). According to Alvarez, the
22 information allowed Cypress to determine whether the company was
23 meeting its goal to increase market share. Surrette testified
24 that WSTS information influenced production planning, and "in the
25 interest of getting information sooner, there were times when we
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1 would exchange such information with competitors." Id. at 197:12-
2 198:19.

3 Additional information was exchanged at technical meetings of
4 the Quad Data Rate (QDR) consortium (composed of Cypress, Samsung,
5 NEC, Renesas, IDT and Micron). London Dec., Ex. 22 (Arcoleo Dep.
6 at 54:21-59:1, 61:23-70:25) & Ex. 23. The information exchanged
7 comprised revenue amounts, and sales capacities and trends with
8 respect to various products in the SRAM market. Id. Cypress'
9 technical representative to the QDR meetings forwarded this
10 information to Alvarez and Surette. London Dec., Ex. 23 &
11 Arcoleo Dep. at 67:10-20, 110:21-116:20.

12 On the other hand, Samsung personnel complained on numerous
13 occasions amongst themselves about Cypress' low SRAM prices, and
14 described Cypress' pricing as aggressive, even extremely
15 aggressive. Winters Dec., Exs. 51-53. In 1998, one senior
16 manager at SEC, Il Ung Kim, described Cypress as "either dum [sic]
17 or non-profit organization." Id., Ex. 53. Kim complained, "I
18 just don't understand why they have to sell those low density SRAM
19 so cheap, especially when they do not have to do [sic] in U.S.
20 markets." Id. In 2002, Mike McCarthy, a director of sales at
21 SSI, questioned in reference to Cypress whether "those guys like
22 being unprofitable." Id., Ex. 52.

23 Dr. Noll and Dr. Levy, whose expert reports are described in
24 greater detail in the Court's prior orders, determined that the
25 SRAM industry exhibited several characteristics that facilitate
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1 collusion. Noll Dec., Ex. A (Noll Report at 19-37); Micheletti
2 Dec., Exs. 1 (Harris Report at ¶¶ 40-43, 49, 64-67, 73-76, 80).
3 According to these experts, the SRAM market is highly
4 concentrated, with significant barriers to entry due to the
5 substantial expense and time required for plant construction and
6 maintenance. SRAM is generally standardized, and thus largely
7 substitutable. Cypress' CEO has referred to SRAM as a commodity.
8 Micheletti Dec., Ex. 3 (Harris Reply Report at ¶ 42). Inelastic
9 demand and contractual terms common in the SRAM market ease the
10 enforcement of price-fixing agreements, increasing the
11 effectiveness of collusion.

12 LEGAL STANDARD

13
14 Summary judgment is properly granted when no genuine and
15 disputed issues of material fact remain, and when, viewing the
16 evidence most favorably to the non-moving party, the movant is
17 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
18 56. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
19 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir.
20 1987). The court must draw all reasonable inferences in favor of
21 the party against whom summary judgment is sought. Matsushita
22 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986);
23 Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558
24 (9th Cir. 1991).

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26
27 Material facts which would preclude entry of summary judgment
28 are those which, under applicable substantive law, may affect the

1 outcome of the case. The substantive law will identify which
2 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
3 242, 248 (1986).

4 "In antitrust cases, these general standards are applied even
5 more stringently and summary judgment granted more sparingly."
6 Beltz Travel Serv. Inc. v. Int'l Air Transport Ass'n, 620 F.2d
7 1360, 1364 (9th Cir. 1980). "[I]n complex antitrust litigation
8 where motive and intent play leading roles, the proof is largely
9 in the hands of the alleged conspirators, and hostile witnesses
10 thicken the plot. It is only when the witnesses are present and
11 subject to cross examination that their credibility and the weight
12 to be given their testimony can be appraised." Id. (quoting
13 Poller v. Columbia Broad. Sys. Inc., 368 U.S. 464, 473 (1962)).
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15 Nevertheless, the Ninth Circuit has held, that

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17 where an antitrust plaintiff relies entirely upon
18 circumstantial evidence of conspiracy, a defendant
19 will be entitled to summary judgment if it can be
20 shown that (1) the defendant's conduct is consistent
21 with other plausible explanations, and (2) permitting
22 an inference of conspiracy would pose a significant
23 deterrent to beneficial procompetitive behavior. Once
24 the defendant has made such a showing, the plaintiff
25 must come forward with other evidence that is
26 sufficiently unambiguous and tends to exclude the
27 possibility that the defendant acted lawfully.

28 In re Coordinated Pretrial Proceedings in Petroleum Prods.
Antitrust Litig., 906 F.2d 432, 440 (9th Cir. 1990).

This framework derives from the Supreme Court's decision in
Matsushita, 475 U.S. at 594. In Matsushita the Court "warned that
permitting the inference of conspiratorial behavior from evidence

1 consistent with both lawful and unlawful conduct would deter pro-
2 competitive conduct--an especially pernicious danger in light of
3 the fact that the very purpose of the antitrust laws is to promote
4 competition." In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th
5 Cir. 1999). Thus, "conduct as consistent with permissible
6 competition as with illegal conspiracy does not, standing alone,
7 support an inference of antitrust conspiracy." Matsushita, 475
8 U.S. at 588 (citing Monsanto Co. v. Spray-Rite Service Corp., 465
9 U.S. 752, 764 (1984)).

11 A court should not "tightly compartmentalize[e]" the non-
12 movant's evidence. Continental Ore Co. v. Union Carbide & Carbon
13 Corp., 370 U.S. 690, 699 (1962). Rather, a court should examine
14 the evidence as a whole to determine whether it reasonably
15 supports an inference that the defendant engaged in a price fixing
16 conspiracy. In re Citric Acid Litig., 191 F.3d at 1097. "As a
17 general rule, summary judgment is inappropriate where an expert's
18 testimony supports the nonmoving party's case." Southland Sod
19 Farms v. Stover Seed Co., 108 F.3d 1134, 1144 (9th Cir. 1997).

21 DISCUSSION

22 I. Existence of a Conspiracy

23 In this case, as in most an antitrust conspiracy cases, the
24 crucial question is whether Cypress' conduct was the result of the
25 company's independent decisions or due to an agreement, tacit or
26 express, with other conspirators. Theatre Enters., Inc. v.
27 Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954).
28

1 "[B]usiness behavior is admissible circumstantial evidence from
2 which the fact finder may infer agreement." Id. Nevertheless,
3 parallel business behavior alone does not constitute an antitrust
4 violation. Id. "The exchange of price data and other information
5 among competitors does not invariably have anticompetitive
6 effects; indeed such practices can in certain circumstances
7 increase economic efficiency and render markets more, rather than
8 less, competitive." United States v. United States Gypsum Co.,
9 438 U.S. 422, 441 n.16 (1978). A number of factors, including
10 most prominently the nature of the information exchanged and the
11 structure of the industry involved, are generally considered in
12 divining the pro-competitive or anticompetitive effects of this
13 type of inter-seller communication. Id. Information exchanges
14 help to establish an antitrust violation when the exchange
15 indicates the existence of an express or tacit agreement to fix or
16 stabilize prices. In re Coordinated Pretrial Proceedings, 906
17 F.2d at 447 n.13.

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19
20 Cypress contends that there is insufficient evidence that it
21 entered into an agreement to fix prices. At the outset, Cypress
22 argues that information was exchanged only among low-level
23 employees without pricing authority. Scotch appears to have been
24 the primary conduit of information about pricing and production.
25 Though Scotch did not have "ultimate pricing authority," Alvarez,
26 a Cypress executive with such authority, admitted that Scotch was
27 involved in setting prices. Scotch relayed regular reports about
28

1 competitors' pricing and production directly to pricing
2 authorities--Surette and Alvarez--as well as to other Cypress
3 personnel, who appear to have played roles in setting prices, such
4 as Ra and Chatila. Scotch considered this a basic part of his job
5 responsibilities. Even without final pricing authority, Scotch
6 did negotiate pricing directly with buyers within limits. While
7 Surette and Alvarez describe Scotch as a low level "sales
8 representative," Scotch was a senior strategic account manager,
9 with greater authority than other sales managers. He exchanged
10 information with other high level managers from competitor firms,
11 and exercised direct influence over the prices that buyers paid
12 for SRAM. These facts evidence that Cypress executives and other
13 managers with influence or ultimate authority over pricing had
14 knowledge of competitive price and production information. From
15 this evidence, a reasonable factfinder could infer that the
16 information impacted pricing.
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19 In these respects, the present case differs from In re Baby
20 Food Antitrust Litigation, 166 F.3d 112, 124-126 (3rd Cir. 1999).
21 The plaintiffs in Baby Food produced evidence that a sales
22 representative and a district sales manager for the defendants
23 exchanged pricing information with the defendants' competitors.
24 In addition, the defendants had memoranda in their files that
25 contained competitors' pricing information. The court found that
26 the district court appropriately disregarded the sales managers'
27 testimony because it was given in another proceeding which did not
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1 involve the product in dispute in the litigation at issue. Id. at
2 126. The court discounted the salesman's testimony because of his
3 self-described status as "a little mouse," who exchanged
4 information with other sales representatives, and had no pricing
5 authority. Id. at 125-26. There was no indication that the
6 salesman communicated the information directly to pricing
7 authorities at the firm, or participated in any discussions to
8 decide what prices would be set. The court declined to infer the
9 existence of even a tacit agreement to fix prices based on the
10 salesman's exchange of price information.

11
12 The present case more closely resembles In re Flat Glass
13 Antitrust Litigation, 385 F.3d 350, 364-69 (3rd Cir. 2004). In
14 that case, the plaintiffs produced evidence that executives and
15 managers were involved in the anticompetitive exchange of price
16 information. The court found that such information exchanges "at
17 a higher level of the flat glass producers' structural hierarchy,"
18 compared to Baby Food, created a reasonable basis for inferring
19 that "the exchanges of information had an impact on pricing
20 decisions." 385 F.3d at 369 (internal quotations and citations
21 removed). see also, Rosefield v. Falcon Jet Corp., 701 F. Supp.
22 1053, 1064 (D.N.J. 1988) (testimony that executives "were aware of
23 the price information exchange and considered the data obtained by
24 sales engineers to set the price of business jets" persuaded the
25 court to find that defendants had "an anticompetitive objective to
26 enter [an] agreement" to exchange price information.).

1 Courts may also consider the structure of an industry to
2 determine whether anticompetitive collusion likely occurred. Here
3 Plaintiffs present evidence that the conditions in the SRAM market
4 facilitate price fixing.² Case law has recognized the
5 susceptibility of certain industries to collusion due to
6 prevailing market conditions. See e.g., United States v.
7 Container Corp. of America, 393 U.S. 333, 337 (1969); Todd v.
8 Exxon Corp., 275 F.3d 191, 208 (9th Cir. 2001) ("Generally
9 speaking, the possibility of anticompetitive collusive practices
10 is most realistic in concentrated industries.").

11
12 In Container Corp. the plaintiffs presented no evidence of an
13 agreement to adhere to a price schedule, and no statistical report
14 on the average costs. The Court found concerted action on the
15 part of the defendants based on reciprocal exchanges of price
16 information concerning specific sales to identified customers.
17 393 U.S. at 334-35. The Court then considered market conditions,
18 and found a sufficient basis upon which to infer that the
19 exchanges of information were anticompetitive. "[T]he corrugated
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22 ² The Court overrules Cypress' objections to Dr. Noll and Dr.
23 Harris' expert testimony. Cypress has objected to their testimony
24 that (1) there are high entry barriers, (2) collusion is easier to
25 monitor because there are frequent SRAM orders, and
26 (3) contractual terms in the SRAM industry enable Defendants to
27 monitor pricing. Cypress objects under Federal Rule of Evidence
28 702, on the ground that the opinions are not "based on sufficient
facts or data." The Court finds that the testimony is
sufficiently supported by the citations to Cypress' 1999 annual
report, academic and industry news reports, and accompanying
exhibits.

1 container industry is dominated by relatively few sellers. The
2 product is fungible and the competition for sales is price. The
3 demand is inelastic, as buyers place orders only for immediate,
4 short-run needs . . . The inferences are irresistible that the
5 exchange of price information has had an anticompetitive effect in
6 the industry, chilling the vigor of price competition." Id. at
7 337. The reciprocal exchange of information and the market
8 conditions in the present case are substantially similar.
9

10 However, the exchange of price and other business information
11 is not invariably anticompetitive. Gypsum Co., 438 U.S. at 441
12 n.16. Without more, the exchange of price information does not
13 raise an inference of a collusive agreement to fix prices. Under
14 Matsushita and Monsanto Co. Spray-Rite Serv. Corp., 465 U.S. 752
15 (1984), a court must consider a defendant's pro-competitive
16 explanation for its exchange of price and other critical business
17 information when a plaintiff relies on circumstantial evidence.
18 In re Coordinated Pretrial Proceedings, 906 F.2d at 440.
19

20 Plaintiffs have not produced direct evidence of an agreement to
21 fix prices, but only evidence from which a reasonable fact finder
22 could infer the existence of a conspiracy to do so.

23 Cypress executives have testified that the exchange of
24 critical business information, including price, was necessary to
25 calculate its market share, and thus assess its progress toward
26 becoming a leading SRAM manufacturer. This explanation is
27 tempered by evidence that one of Cypress' own senior managers
28

1 believed a competitor's pricing, volume of business and revenue
2 information was "extremely sensitive" and possibly should not be
3 saved to his colleagues' hard disks. In 2002, while working for
4 Cypress, Ra, a former Senior Marketing Manager for Samsung,
5 indicated in an email that he had spoken with suppliers about
6 raising prices.³

7
8 Other evidence indicates that Cypress' information exchanges
9 were intended to facilitate price collusion. Cypress, principally
10 through Scotch, communicated extensively with Samsung, the
11 conspiracy's apparent leader. Cypress and Samsung agreed to
12 exchange forecast information, including details about SRAM
13 revenue and volume. They exchanged pricing information as well.
14 In addition, Cypress exchanged such information with other
15 competitors. Alvarez and Surrette testified that this exchange of
16 information with competitors allowed Cypress to access critical
17 information more quickly and more accurately than was otherwise
18 possible. According to W.M. Lee, production volume, even more
19 than pricing, was critical to controlling prices. Yoon of Hynix
20 also indicated that manufacturers could control the market by
21 controlling supply. Cypress has not shown that the information it
22 exchanged with competitors was materially different from the
23
24

25 ³ The Court is not persuaded to disregard this email due to
26 Ra's purported difficulty with the English language. Ra was not
27 provided with an interpreter at his deposition, and numerous
28 emails in the record indicated that Ra regularly conducted
business in English without interpreter assistance. This suggests
that Ra reliably communicated in English when he wrote the email.

1 information exchanged at the White Board meetings. Even if the
2 information helped Cypress determine its market share, a
3 reasonable fact finder could also infer that the information
4 exchange served to facilitate price fixing by Cypress. That
5 Cypress exchanged this information in concert with other
6 competitors tends to show that it was not acting independently.

7
8 Expert evidence also undermines Cypress' asserted rationale.
9 Dr. Noll testified, "There's no pro-competitive effect that can
10 emanate from this kind of exchange of information. This is simply
11 applying standard antitrust economics." London Dec., Ex. 67. Dr.
12 Levy agreed, writing that "the exchange of current and future
13 price and sales information about specific customers has no
14 plausible pro-competitive benefit and benefits a firm that
15 provides such information to its competitors only if it
16 facilitates collusion." Noll Dec., Ex. B (Noll Reply Report at
17 5).

18
19 Notwithstanding Cypress' purported motive for sharing crucial
20 price and business information, Plaintiffs' evidence is
21 "sufficiently unambiguous" and tends to exclude the possibility
22 that Cypress acted lawfully. See In re Coordinated Pretrial
23 Proceedings, 906 F.2d at 440. Plaintiff's evidence raises a
24 material dispute of fact as to whether Cypress agreed to join a
25 conspiracy to fix SRAM prices.
26

27 Nor does evidence that Cypress sold SRAM at prices lower than
28 its competitors disprove that it conspired to fix prices.

1 Container Corp., 393 U.S. at 337 ("The continuation of some
2 competition is not fatal" to a Section 1 Sherman Act case.) That
3 Cypress may have cheated on the alleged conspiracy, angering other
4 competitors, still leaves open the possibility that it would have
5 sold SRAM at even lower prices absent critical knowledge about
6 competitors' pricing and production.

7
8 Cypress further argues, that because there is no evidence it
9 communicated with competitors apart from Samsung and Etron, there
10 is insufficient proof that it agreed to engage in a market-wide
11 conspiracy. Cypress' characterization of the record overlooks
12 some evidence that tends to show that it communicated with
13 Defendant competitors other than Samsung or Etron. Furthermore,
14 Plaintiffs need not produce evidence that Cypress communicated
15 with many or all Defendant competitors to show that it engaged in
16 a conspiracy to fix prices in the SRAM market. There is evidence
17 that Samsung played a substantial role in leading the conspiracy,
18 and that Cypress exchanged critical price and production
19 information with Samsung.

20
21 In the alternative, Cypress seeks partial summary judgment
22 with regard to (1) DP Plaintiffs' claims for damages other than
23 those incurred by class member Intel, and (2) IP Plaintiffs'
24 claims insofar as they seek damages for sales to end-user
25 purchasers of SRAM-containing products that were not sold by
26 Intel. Cypress asserts that Plaintiffs lack evidence supporting
27 the existence of a market-wide conspiracy to fix prices beyond its
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1 pricing to Intel. The Court is not persuaded. Though Cypress
2 insists that it sold a unique SRAM product to Intel, outside of
3 this litigation Cypress' CEO has characterized SRAM as a
4 commodity. Furthermore, there is evidence that an oversupply of
5 SRAM for Intel could lead Samsung to reduce supply and divert
6 production to another type of SRAM, potentially affecting the
7 price or reducing competition as to another product. For these
8 reasons, the Court declines to limit Plaintiffs' case against
9 Cypress to the sale of SRAM and products containing SRAM related
10 to Intel.

12 II. Claims Based on Fast SRAM

13 In its reply brief, Cypress seeks summary judgment on all
14 claims pertaining to the sales of fast SRAM. Because this
15 argument was not raised in Cypress' opening brief, the Court
16 declines to consider it.

18 III. Injury

19 Cypress argues that it is entitled to summary judgment on DP
20 Plaintiffs' claims because they have failed to produce evidence of
21 injury caused by the alleged conspiracy. Cypress' argument is
22 based on the fact that Dr. Levy's analysis of overcharges was
23 limited to a damages subperiod within the class period. The Court
24 rejects this argument, which mirrors arguments in several other
25 motions filed by Cypress and Samsung in the present action. See
26 Order Denying Defendants' Joint Motions to Decertify Plaintiff
27
28

1 Classes and To Exclude Expert Opinions of Dr. Levy and Dr. Dwyer,
2 December 7, 2010.

3 As discussed in that order, DP Plaintiffs have proffered
4 evidence of injury through their expert witnesses: Dr. Roger Noll
5 on liability, and Dr. Armando Levy on damages. Dr. Noll opined
6 that Defendants' activities were indeed collusive and most likely
7 resulted in injury to purchasers in the SRAM market. Dr. Levy, in
8 turn, provided additional evidence of injury through his damages
9 calculations. That Dr. Levy's estimate of damages was limited to
10 a subperiod when the conspiracy was deemed most effective does not
11 negate the existence of injury or the causal connection between
12 the alleged conspiracy and injury outside of the damages
13 subperiod.
14

15 Because DP Plaintiffs have sufficiently established injury,
16 summary judgment based on this argument is unwarranted.
17

18 IV. IP Plaintiffs' State Law Claims

19 Cypress moves for summary judgment on a number of IP
20 Plaintiffs' state law claims, joining arguments made in Parts III
21 and IV of Samsung's Motion for Summary Judgment and/or Partial
22 Summary Judgment in the Indirect Purchaser Actions. The Court has
23 ruled on these arguments in an order issued on December 8, 2010.

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CONCLUSION

The Court denies Cypress' motion for summary judgment or, in the alternative, partial summary judgment. Docket No. 1068.

IT IS SO ORDERED.

Dated: 12/10/2010



CLAUDIA WILKEN
United States District Judge

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