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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 GARY SWANSON,

19 Defendant.

No. CR-06-0692 PJH

20 **MEMORANDUM IN SUPPORT OF**
21 **INSTRUCTION FOR MULTIPLE**
22 **CONSPIRACIES**

23 Date:
24 Time:
25 Courtroom: 3

26 Trial Date: February 4, 2008
27 Judge: Hon. Phyllis J. Hamilton

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1 February 20, 2008. Those two other conspiracies shown by some of the evidence so far are these:
 2 Micron, with its Senior Vice President World Wide Sales Mike Sadler, (1) led a conspiracy with
 3 Infineon, Samsung and others to use anti-competitive means and put price pressure on and kill
 4 Hynix, ridding the market of its price-cutting competitor (and defendant Swanson); and (2) led a
 5 conspiracy with four Japanese and Taiwanese competing DRAM manufacturers (and encouraged
 6 Infineon and Samsung to go along) in a worldwide restraint on production.

7 Micron executives knew that Hynix was vulnerable¹, had serious financial difficulties²,
 8 should be dead³ and in bankruptcy⁴, and that it would be beneficial to Micron if Hynix were driven
 9 out of the market.⁵ Toward that purpose, Micron coordinated with Infineon and Japanese
 10 manufacturers to initiate and proceed with trade law proceedings⁶ with the goal of getting rid of
 11 Hynix.⁷ To support those efforts, Micron continued to grow its databank of DRAM prices⁸,
 12 including price information gathered by Micron sales staff, from a Hynix distributor, competitors
 13 and, OEMs served by Hynix.⁹ Consistent with its high level coordinated trade law program¹⁰,

14
 15 ¹ Hynix was "viewed as vulnerable because they were financially weak." (Sadler 1228:19-1229:5)

16 ² Hynix was "in a difficult financial position," was "heavily indebted," and was "in a great deal of trouble" (Appleton 1578-1579)

17 ³ Hynix "was on the verge of collapse" (Sadler 1263-1264) and "should be dead." (Appleton 1610:6-13; Exh. A73, p.2; Sept. 7, 2001, "Micron Confidential Information" to "All Micron Team Members")

18 ⁴ "Hynix should be bankrupt by now." (Appleton 1609:10-21; Exh. A73, p.1, Sept. 7, 2001 "Micron Confidential Information" to "All Micron Team Members")

19 ⁵ Micron wanted to cause Hynix as much "pain" as possible "to force them out of business" (Sadler 1229:6-9) and Sadler "thought it would be beneficial to Micron, if Hynix were driven out of the market." (Sadler 1244:15-17). Micron supported "consolidation in the industry" which means "removing the weaker players from the market" and Hynix was "the weakest player." (Sadler 1243:9-15).

20 ⁶ Sadler talked with his counterpart in Infineon about "their interest to work together with us" in a joint effort to coordinate trade proceedings against Hynix; his purpose was to "reach out to Infineon" to have it join with Micron. (Sadler 1239:7-11) In October 2001, Micron was "coordinating efforts between the Japanese suppliers and Micron on trade proceedings against Hynix." (Sadler 1320:2-7) This was not discussed with Swanson. (Sadler 1320:8-11)

21 ⁷ "It's always been a goal of ours to try and - in a period of market weakness, for the weakest competitor to be forced out of business. Without question." (Sadler 1243:9-12; 1229:8-14) And the "weakest player at that time was Hynix" (Sadler 1243:13-15) It also was Infineon's "goal" to see other competitors go out of business and "even today," as a Micron executive reporting to Mike Sadler, former Infineon President du Preez favored the "elimination of Hynix as a competitor." (du Preez 1743: 9-18; 1762: 12-16)

22 ⁸ Micron staff collected "price information from our sales force, distributors, customers and so forth, to help us in preparation of the petition." (Sadler 1209:8-16). The information about the Korean competitors was to be kept "Confidential" (Radford 1731: 4-10). Sadler instructed the Micron sales team that Micron need "competitive price information" for a trade law proceeding, including the "countervailing duty case that was filed in 2002 against Hynix." (Sadler, 1268:22-1270:16) Swanson was not told about this (Radford 1731: 25-1732: 2).

23 ⁹ Micron gathered information directly from a "distributor for Hynix" which was put into the Micron database for use in connection with trade proceedings against Hynix. (Sadler 1270:21-1271:14) Sadler did not tell Swanson

1 Micron and its ally Samsung kept the price pressure on Hynix to cause its demise¹¹, and, during
 2 Micron's acquisition negotiations, to keep the prices (and the value of Hynix) down so that Micron
 3 could buy it as cheaply as possible.¹²

4 After Hynix had announced publicly in July 2001 that it would reduce its production and
 5 close its Oregon plant for re-tooling,¹³ Sadler's "idea" was to organize a world wide production
 6 agreement¹⁴ with Infineon, Samsung and the Japanese/Taiwanese competitors controlling 15% of
 7 the market.¹⁵ Sadler, the originator of the "anti-competitive" idea to "restrain production,"¹⁶ led
 8 Micron's effort to "get an agreement to cut supply."¹⁷ The Taiwanese and Japanese competitors
 9 "agreed" with Micron,¹⁸ which agreement Sadler knew was "absolutely illegal."¹⁹ This production
 10 restraint agreement was "completely decoupled or different" from the pricing discussions which
 11

12 that Micron "was gathering information" from Hynix's own distributor "to be used against Hynix in a trade
 proceeding." (Sadler 1271:15-19)

13 ¹⁰ Micron "was coordinating efforts" between the Japanese competitors to "plan trade proceedings against
 Hynix." (Sadler 1319:4-10, 1320:2-7) Sadler "facilitated" a "coordinated effort against Hynix on trade proceedings"
 14 with Infineon (Sadler 1241:18-1242:4), all of which was discussed at "the executive committee level" at Micron.
 (Sadler 1240:14-1241:5) "Micron wanted to be ready at all times to pull the trigger in the anti-dumping case." (Sadler
 15 1269:18-21). Sadler did not tell Swanson in any of his calls that "Micron was coordinating with Japanese suppliers to
 bring trade proceedings against Hynix" (Sadler 1320:8-11) or that Micron was gathering information for the trade law
 16 proceedings. (Sadler 1181: 13-20)

17 ¹¹ During "high level meetings" in 2001 and 2002 between Samsung and Micron, Y.W. Lee, Appleton and
 Sadler discussed "driving Hynix out of the business." (Sadler 1243:5-8; 23-1244:4) Both Micron and Samsung
 18 thought it would "be beneficial if Hynix exited the market." (Sadler 1244:15-21) Sadler did not tell Swanson about
 their "shared goal of driving Hynix out of the market." (Sadler, 1244:22-25) Prices were driven down from 50% to
 over 75% during 2001. (A153, Price chart, Hausman 1785: 8-1786: 9)

19 ¹² Micron's goal was to acquire the Hynix "assets as cheaply as possible." (1602: 13)

20 ¹³ On July 3, 2001, Hynix announced publicly a 20% cut in production and shortly after that it was "shutting its
 Eugene, Oregon facility." (Sadler 1248: 5-8; 1250: 11-14)

21 ¹⁴ Sadler testified: "It was my idea." (1259: 5-7)

22 ¹⁵ Sadler had discussions in July 2001 with Y. Lee, D. Mackowiak and H.J. Kim of Samsung about "oversupply
 in the market" (1252: 13-21) and during the Summer 2001 with Kau, who could speak on behalf of Nanya, Winbond,
 Mosel and Power Chip about taking "supply out of the market" (Sadler 1254:7-15). Sadler had told Infineon in
 September about Micron's willingness to cut production if Hynix were refinanced. (Sadler 1265: 4-9).

23 ¹⁶ Sadler, who was the "originator" of the "idea" (Sadler 1260: 25-1261:7) decided he would "lead an effort to
 get an agreement with the competitors to cut supply." (Sadler 1253: 23-25)

24 ¹⁷ Sadler concluded that Appleton "would be receptive to something illegal like this trip because of the
 desperate situation." (Sadler 1256: 14-16) Appleton arranged for Sadler to meet with the CEO of Infineon, endorsing
 25 the Infineon meeting "for the purpose of reaching an agreement to restrict production." (Sadler 1256: 17-21) He did
 not talk with Swanson about the trip or his unlawful purpose in arranging it. (Sadler 1259: 2-4)

26 ¹⁸ Kau, representing the four Taiwanese and Japanese competitors with 15% of the total market supply, agreed
 that they "would go along with what Micron wanted to do." (Sadler 1254: 11-15) Samsung's Y. Lee said "this was
 27 not the right time" (1262: 9-12)

28 ¹⁹ Sadler knew it was "absolutely unlawful" (Sadler 1258: 24- 1259: 1) and "slam dunk" illegal. (Sadler 1261:
 15-20) He did not involve Swanson "in any way with respect to that activity" (Sadler 1261: 21-23)

1 are the basis for the conspiracy charged by the government.²⁰ Shortly before and coincident with
2 the worldwide trip, Micron and Hynix engaged in merger negotiations.²¹

3 When the acquisition failed, Micron's CEO was "very unhappy" and angry.²² Micron
4 revived its kill Hynix campaign.²³ Sadler was enthusiastic about this²⁴ because Micron's view was
5 that weak players should exit the market.²⁵ After further discussions at the CEO level, Micron and
6 Infineon went forward with the ITC trade proceeding to stop Hynix from any further refinancing.²⁶
7 Micron planned to then acquire the Hynix assets it wanted through bankruptcy.²⁷

8 Neither of these two conspiracies share a "common denominator" or common purpose with
9 the government's indictment of Swanson or the bill of particulars. While there are some of the
10 same actors, parts of the same time frames, much of the same geographies, and the same products,
11 there are completely different goals and participants. There can be no "unifying purpose,"
12 between, on the one hand, the goal of the government's price fixing conspiracy (to increase or
13 stabilize prices) and, on the other hand, the conspiracy to kill Hynix (to lower prices and keep the
14

15 ²⁰ It is uncontradicted that the worldwide trip was "decoupled or different from the pricing discussions"; it
16 involved "a different level and a different discipline" and was among "higher position" executives. (Sadler 1258: 22-
23) It did not involve Swanson (Sadler 1256: 6-8; 1259: 2-4)

17 ²¹ The negotiations started in "early fall of 2001, and then they continued on through
probably April time frame of 2002." (Appleton 1592: 5-10)

18 ²² After Hynix's creditor rejected the Micron acquisition effort, CEO Appleton was "very unhappy" and was
reported to have "anger at Hynix." (Sadler 1277: 5-11; 1277: 25-1278: 3) After this happened, "there was a Kill
Hynix campaign inside Micron." (Sadler 1278: 4-6) Micron wanted to acquire the assets of Hynix then "via
19 bankruptcy proceeding." (Sadler 1277: 7-12)

20 ²³ Sadler told Hynix on May 23, 2002 that he had "specific instructions from top management to kill Hynix."
There was no exaggeration about the "goal of killing Hynix." (Sadler 1280: 11-21) Sadler told his sales team that
"they should undermine Hynix's plan so that their immediate future continues to look hopeless for them." (Sadler
1280: 22-1281: 2)

21 ²⁴ A few days before Micron was subpoenaed, Sadler wrote one of his personal friends that he was "having a lot
of fun right now on Hynix seek and destroy mission." (Sadler 1306: 10-18)

22 ²⁵ Micron's general view was that the "weakest supplier in the marketplace," which was Hynix, would "become
a victim, if you will of consolidation" and "certainly, that would have benefitted Micron." Micron's view then and
23 now is that it benefits Micron "for the weak players to be consolidated out of the business." (Sadler 1303: 17-1304: 1)

24 ²⁶ In May 2002, Micron CEO met with Infineon's CEO. Appleton viewed Infineon as an "ally" who "wished to
join us [Micron] in the petition [to the ITC] on the case." (Appleton, 1619:23-1620:5) Hynix trade creditors would
25 not refinance if there were "substantial trade proceedings going on against the company." (Sadler 1242: 5-9) The
"purpose" of the "trade proceeding was to prevent Hynix from being refinanced further" (Appleton, 1620:20-24) and
26 Infineon joined Micron in filing a petition. (Appleton, 1620:4-5) Sadler did not tell Swanson that Micron's
"sentiment" was "to drive Hynix out of business or acquire assets in bankruptcy." (Sadler 1188: 25-1189: 3)

27 ²⁷ Micron "would acquire the assets that we wanted from Hynix through a bankruptcy proceeding" (Sadler
1304: 7-13). Sadler does not consider Swanson an asset of Hynix because assets are only "hard assets, not human
28 resources"; but he recognizes that Swanson had "an important role." (Sadler 1305: 2-15)

1 price pressure on Hynix to cause it to sell cheap or force it to exit from the market) or the
2 conspiracy to restrict production.

3 When the defendant has shown “some foundation in the evidence” and his theory is
4 “supported by law,” he is entitled to an instruction on multiple conspiracies. *United States v.*
5 *Linn*, 880 F2d 209, 217 (9th Cir. 1988), quoting from *United States v. Echeverry*, 759 F2d 1451,
6 1455 (9th Cir. 1985) (ruling that a defendant’s entitlement to the instruction on “multiple
7 conspiracies, exists only if the theory is ‘supported by law and has some foundation in the
8 evidence.’”); *see also*, *United States v. Anguiano*, 873 F2d 1314, 1317 (9th Cir. 1989). This case
9 is unlike *Anguiano*, where a single defendant was charged and tried for two separate conspiracies
10 in both of which he was the central figure (873 F2d 1317-1318); defendant Swanson is charged
11 with having joined with eight corporations, dozens of other individuals (both named and unnamed
12 conspirators), many of whom have pleaded guilty, or confessed to guilt, which evidence is before
13 the jury, in a single continuing conspiracy to increase or stabilize prices.²⁸ The evidence strongly
14 supports the two other inconsistent and opposed conspiracies. To permit the jury to decide this
15 case without an instruction to further avoid the “evidentiary spillover” from these diametrically
16 contradictory conspiracies would be highly prejudicial. In the absence of an instruction, there can
17 only be irreparable prejudice arising from the probability that the jury may misconstrue or
18 misunderstand the evidence about (1) the conspiracy to kill Hynix with its price war and
19 dramatically declining prices; (2) the conspiracy to restrict worldwide production, as somehow
20 supporting the government’s contrary overall single conspiracy to increase or stabilize prices.

21 Determining prejudice is not mechanical. The government has brought a monster world
22 wide cartel case against a U.S. sales executive with no price authority who was the U.S. “face” of
23 the domestic subsidiary of its Korean parent. With only unbelievable evidence supporting the

24 ²⁸ In addition to the eight parent and subsidiary corporations identified in the October 10,
25 2007 Amended Summary of Government’s Case Against Gary Swanson (now a bill of particulars),
26 the government has named over 90 individual coconspirators at 9 companies (U.S. Summary of
27 Witnesses’ Testimony and Coconspirator Statements, Attachment , filed under seal, December 19,
28 2007. The government’s enormous case here (already involving 5 corporate guilty pleas,
confessions and 17 individual pleas) compares to the eight separate conspiracies and 32
coconspirator defendants in *Kotteakos*, *see United States v. Duran*, 189 F3d 1071, 1082 (9th Cir.
1999).

1 defendant's asserted "direct participation" in an agreement with Sadler to fix prices, the
2 government's case --and the jury-- is left with what he "should have known" through elliptical
3 remarks by Koreans using English as a second language, and "mutual understandings" -- words
4 first placed in the witnesses mouths by the government.²⁹ The defense properly presented
5 evidence of the multiple conspiracies to show bias, motive to lie, and to attack credibility, and
6 nowhere in the case law is it stated that the defendant having been mischarged in the offence
7 cannot introduce such evidence on pain of losing a multiple conspiracy instruction.

8 "If it is possible under the evidence for the jury to find that multiple conspiracies existed,
9 then the court should instruct the jury on the issue." *United States v. Eubanks*, 591 F2d 513, 518
10 (9th Cir. 1979), citing *United States v. Perry*, 550 F2d 524, 533 (9th Cir. 1977). Here it is not only
11 "possible" for the jury to find multiple conspiracies, but those conspiracies are clearly "supported
12 by law."³⁰ The evidence here about each of the conspiracies is not "easily compartmentalized."
13 *United States v. Duran*, supra, 189 F3d at 1082 (where, unlike the present case, two conspiracies
14 "involved discrete events separated by time, distance, purpose, method of operation, and
15 personnel" and there "was little risk that the jury was unable to keep the conspiracies separate").
16 The evidence of the several conspiracies overlaps and mingles with the government's single and
17 long-running conspiracy given the nature of the charge. The goals are different, the participants
18 shift about, transactions and events converge and deviate, and the goals vary and change in
19 different time periods, but it defies reality to think the jury can keep these conspiracies "separate."

20 Circuit Judge Ely, specially concurring in the "superb majority opinion for which my Sister
21 Hufstedler is principally responsible" in *Eubanks*, emphasized that "the danger of guilt by
22 association at a multiple defendant trial intensifies as the number of possible conspiracies grow."

23
24 ²⁹ "I don't recall using the word 'mutual understanding' in speaking" and did not use it "before this case
25 started" (Peterson, 439: 15-26). Dennis Lee could not recall using the term "before he was interviewed by the
26 government" (Lee, 659: 21-660: 2). Sadler did not use the term "mutual understandings" to describe his asserted
27 conversations with Swanson until after the government began its investigation (Sadler 732: 19- 733: 5).

28 ³⁰ As Areeda and Hovenkamp put it: "'naked' output agreements are illegal *per se*" (Vol. XII, Antitrust Law, §
2006, p. 75) and "[c]learly, a 'naked' agreement among two rivals to drive a third rival out of business could be a *per se*
violation of § 1." (Vol. XIII, § 2205, p. 238) There is no redeeming feature to rescue this conspiracy to get rid of
Hynix by price pressure, intentional interference with financing arrangements, and perjurious and illegally motivated
trade law proceedings.

1 591 F2d 523. While this is not a joint trial of four defendants as in *Eubanks*, the government has
2 presented guilty pleas of several individuals and corporations and confession/amnesty by Micron
3 and its executives. As Judge Ely also noted in quoting Justice Jackson, *Krulewitch v. United*
4 *States*, 336 U.S. 440, 453 (1949), “when the trial starts, the accused feels the full impact of the
5 conspiracy strategy... As a practical matter, the accused often is confronted with a hodge podge of
6 acts and statements by others which he never have authorized or intended or even known about,
7 but which helped to persuade the jury of existence of the conspiracy itself.” 591 F2d 524. This is
8 one of those “exceptional” proceedings which “call for use of every safeguard to individualize
9 each defendant in his relation to the mass.” (524 F2d 524, note 2; quoting *United States v.*
10 *Kotteakos* 328 U.S. at 772-773).

11 Without a multiple conspiracy instruction, the prejudice is serious and irreparable. We
12 respectfully request the multiple conspiracy instruction in the attached exhibit be given.

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14 DATED: February 20, 2008

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By 

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