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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GARY SWANSON, Defendant.	No. CR-06-0692 PJH (JCS) **DEFENDANT'S OPPOSITION TO GOVERNMENT'S RENEWED MOTION TO EXCLUDE TESTIMONY BY DEFENDANT'S EXPERTS HAUSMAN AND KRONE** Date: December 17, 2007 Time: 9:00 a.m. Courtroom: 3 Trial Date: February 4, 2008 Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION AND APPLICATION OF *DAUBERT* PRINCIPLES

The government's Renewed Motion to Exclude Testimony ("Renewed Motion") challenges two of the three defense experts -- economist Jerry Hausman and computer forensics specialist Winston Krone. Both will be available on December 17, 2007 for direct and cross-examination and to satisfy any questions the Court has regarding their opinions and methodology per Federal Rule of Evidence 702, which as this Court recently observed:

> permits testimony by experts qualified by "knowledge, skill, expertise, training, or education," to testify "in the form of an opinion or otherwise" based on "scientific, technical, or other specialized knowledge" if that testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. The expert's testimony must be based on "sufficient facts or data," it must be "the product of reliable principles and methods," and the expert must have "applied the principles and methods reliably to the facts of the case." *Id.*

Redfoot v. B.F. Ascher & Co., 2007 WL 1593239, * 3 (N.D.Cal. 2007). The expert admissibility determination requires a "difficult, two-part analysis" of reliability and relevance. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (*Daubert II*).

As to Professor Hausman, the government's Renewed Motion runs to both prongs, and as to Mr. Krone only as to reliability. The reliability inquiry is governed by a multi-factor test that considers

> (1) whether the proffered theory or **technique has been tested**, (2) whether the theory or technique has been subjected to **peer review and publication**, (3) the **known or potential rate of error** of the technique or theory when applied, and (4) the **"general acceptance"** of the theory or technique in the scientific community. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 593-4. [C]ourts have also found the following factors relevant in assessing the reliability of expert testimony: (1) whether the expert is proposing to testify about matters growing directly out of **independent research** he or she has conducted or whether the opinion was developed expressly for purposes of testifying; (2) whether the expert has unjustifiably **extrapolated from an accepted premise** to an unfounded conclusion; (3) whether the expert has adequately accounted for **obvious alternative explanations**; (4) whether the expert is being as **careful as he would be in his regular professional work**; and (5) whether the **field of expertise claimed by the expert is known to reach reliable results** for the type of opinion offered.

In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, 2007 WL 4170276, *3 (N.D.Cal. 2007, Breyer, J) (emphasis added), citing *In Re Silicone Gel Breast Impl. Prod. Liab. Lit.,* 318 F.Supp.2d 890 (N.D. Cal. 2004), citing Fed.R.Evid. 702 Advisory Committee Notes.

As to relevancy or 'fit' (*Daubert,* 509 U.S. at 591), "[t]he trial court 'must ensure that the proposed expert testimony . . . logically advances a material aspect of the proposing party's case.' *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1315 (9th Cir. 1995). '[T]he standard for fit is higher than bare relevance.' *In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 745 (3d Cir. 1994)." *Redfoot v. B.F. Ascher & Co., supra*, 2007 WL 1593239, * 3.[1]

Finally, "the district court must still weigh the balancing factors of Federal Rule of Evidence 403," which permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.*, 2007 WL 1593239 at * 4, citing *Daubert,* 509 U.S. at 595.

Here, reliability, relevance and Rule 403 considerations all militate in favor of admitting testimony from both experts. These witnesses are highly qualified and the expertise they possess is based on well-known and validated principles. Surely the non-conspiratorial reasons for parallel pricing in the marketplace (Professor Hausman) and the email practices of the defendant (Mr. Krone) are highly relevant subjects in this prosecution, where *most of the prosecution evidence is emails about price.* The experts' opinions are known to the government and fully disclosed, despite the continued objections to data related to Professor Hausman, where the

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[1] Under FRE 401 proffered evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence helpful in evaluating the credibility of a witness is of consequence to the determination of the action. *Evidence is relevant* to a matter of consequence to the determination of the case *if it has a mere tendency* to impeach a witness's credibility by a showing of bias or coercion.

United States v. Hankey, 203 F.3d 1160, 1171 (9th Cir 2000) (emphasis added) [expert testimony admitted in criminal case].

defense has gone the extra mile. The skilled government team at trial can readily pursue vigorous cross-examination of the defense experts as to any concerns that their opinions raise.

II. TESTIMONY FROM PROFESSOR HAUSMAN IS RELIABLE AND RELEVANT

A. Defendant Has Complied With Rule 16 Obligations.

At pages 3-4 of its Renewed Motion, the government maintains there are "four reasons" why defendant's disclosures re Professor Hausman are "deficient." None of the reasons holds up.

1. Price Data.

In Professor Hausman's 2003 "Appendix: Econometric Analysis of DRAM Prices" (accompanying Bunzel Decl., Exh. A, Dkt. 209) that was filed October 26, 2007 in this action as part of defendant's original disclosure and summary, he states "I collected quarterly data from 1994-2002." That quarterly data is set forth with numeric specificity in table form in that filing. (Bunzel Decl., Exh. J.) In defendant's supplemental disclosure, dated November 21, 2007, it is specified that the data comes from "Consulting Reports from International Data Corporation (IDC, Framingham, MA 01701)."

The government by letter dated November 26, 2007, Exh. 4 to its Renewed Motion, raised questions regarding the IDC reports, and the defendant responded by letter dated November 28, 2007, Exh. 5 to the Renewed Motion at p. 3, that Professor Hausman did not retain copies of the underlying IDC pricing data but it could be obtained from IDC directly.

Following receipt of the Renewed Motion that continues to imply the government cannot get the data itself, a staff librarian at the Bartko firm (with no more and likely much less information than the government team) easily contacted IDC and reached terms on contracting to purchase the IDC DRAM pricing and market data for the 1999-2002 years relevant to the current case, for $10,000. (Bunzel Decl., ¶ 14.) We so advised the government in writing and asked that it withdraw the objection as to the IDC data, which the government has stubbornly refused to do. (Bunzel Decl., Exhs. M, N.) There is no question that the defense has timely provided

"specification" of these records as required by this Court's Order, consistent with *United States v. Reliant Energy*, 2007 WL 640839 at *2 (N.D. Cal. 2007).[2]

2. Work Papers.

In our November 28, 2007 letter, Renewed Motion Exh. 5, p. 3, counsel advised the government that Professor Hausman has retained no work papers. Obviously, this statement is qualified by the reports and analysis Professor Hausman made in 2003 already in the record in this case, including "Appendix: Econometric Analysis of DRAM Prices" (accompanying Bunzel Decl., Exh. A, Dkt. 209.) Professor Hausman's summary and proffer below, and his testimony at the hearing December 17, 2007 are and will be that the Econometric Analysis is the final version of his work papers supporting the June 17, 2003 Report and his June 24, 2003 testimony before the ITC. The logarithmic calculations themselves are for ease of reference again attached at Bunzel Decl., Exhibit J. Any fair reading of the Econometric Analysis and supporting calculations reveals that Professor Hausman made, and the government has, a detailed roadmap to the application of the established economic theories underlying his opinion that the known characteristics of the DRAM marketplace drive price similarities among competitors.

3. Other Documents.

Attached as Exhibits C, D, E, F, G, H, I and K to the Bunzel Decl. are extensive data and materials that the defendant provided to the government with our November 21, 2007 supplemental disclosure letter (*Id.,* at Exh. B), pursuant to this Court's Final Pretrial Order. The government's Renewed Motion at p. 3:23-6 raises three documentary concerns. The first is the IDC reports, discussed above at § II A 1. The second are the SEC filings of Micron, which were produced with the November 21, 2007 letter and are re-attached at Bunzel Decl., Exhs. G and H. The third is a report known as "IC Insights, Inc., 2003 (The McClean Report)", which is properly specified in the defense November 21, 2007 letter attachment (Bunzel Decl., Exh. B.).

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[2] And we have done more. At great expense, we ordered and contracted to pay for the subject reports and will offer to make them available to the government. (Bunzel Decl., ¶ 15.) At some point, the zeal of a public officer to win at all costs should be moderated by reason and justice. As to the IDC reports, that point has surely been reached.

The government complains that this latter document can only be obtained through a subscription service, Renewed Motion at 3:25-6. That is correct (Bunzel Decl., ¶ 13.) We have attached at Bunzel Decl., Exh. L the url link to the IC Insights' website, which describes the McClean Report that now "in its 11th year" is a "highly acclaimed study that thoroughly examines the integrated circuit industry" and "is available in a three-ring binder or on CD-ROM." The government can obtain it as readily as the defense.[3]

4. No Report For This Case.

Citing no authority, and ignoring plenty, the government finally complains at p. 4:2-6 that Rule 16 requires a report in this case. As a practical matter, this *Daubert* exercise and the summary and proffer immediately below, eliminate any conjured prejudice against Professor Hausman reciting opinions based on independent analysis not prepared for this litigation. Moreover, the government in its zeal to silence strong defense evidence ignores that *Daubert* and the Rule 702 Advisory Committee Note recognize that the reliability of expert opinions is *enhanced* where the experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation" as opposed to where they "have developed their opinions expressly for purposes of testifying." Rule 702 Notes of Advisory Committee on 2000 Amendments, citing *Daubert II*, 43 F.3d at 1317.

B. Summary and Proffer of Professor Hausman's Testimony.

The government argues at p. 2 of its Renewed Motion that the "bases and reasons" for defense expert Jerry Hausman's testimony are not disclosed. This is disingenuous. What follows is a summary of Professor Hausman's qualifications, opinions and the "bases" for his reasoning, with reference to the materials that the government *already* has. After being awarded degrees at Brown (A.B. *summa cum laude*, 1968, Phi Beta Kappa) and Oxford (B.Phil. 1972, Ph.D 1973), as a Marshall scholar, Professor Hausman began teaching at M.I.T., where since 1992 he has been the MacDonald Professor. He has been a Visiting Professor at Harvard, Oxford, Beijing,

[3] It would appear that the 2003 McClean Report was cited by Professor Hausman only as a data source confirming the escalating cost of new DRAM fabrication facilities. (Bunzel Decl., Exh. A, Dkt. 209, Report at fn. 1 page 2.)

and numerous other universities, and has edited most of the major professional economics journals. Professor Hausman has served on and testified before many governmental commissions (including the Federal Trade Commission in 2005) and has authored over 200 professional papers, reports and books on economics, competition and antitrust as well as having done academic research and consulting in the semi-conductor and DRAM industry for over 25 years. (Bunzel Decl., Exh. A, Dkt. 209, CV.) In short, Prof. Hausman's fellowships, honors and awards reflect his status as one of the preeminent United States economists specializing in econometrics, competition and antitrust.[4] As to relevant testimony and opinions:

- Prof. Hausman was engaged by Micron Technologies, Inc. ("Micron") to investigate and give his opinion in connection with an ITC proceeding that covered the same time period as charged in this case. There was no written engagement agreement.

- The scope of the engagement was to study and give his independent opinion about the structure of and activities in the DRAM market in the United States 2000-2002 and the effect of subsidies to Hynix.

- In conducting his analysis, Prof. Hausman reviewed those documents identified at Bunzel Decl., Exhs. C-K, on which his opinions are in part based.

- Michael Sadler was one of the Micron executives with whom Professor Hausman discussed the DRAM market.

- None of the Micron executives or representatives disclosed to Prof. Hausman that Micron and the Department of Justice had entered an agreement in which Micron admitted to price fixing activity in violation of the Sherman Act in the DRAM industry in the United States during the period of his investigation or disclosed to him anything about Micron participating in any conspiracy or agreements to violate the Antitrust Laws with respect to DRAMs during that period.

- Prof. Hausman will testify that as an expert witness "candor" from those engaging him to provide economic evidence is important to both the fact and substance of his opinion. Complete, honest and truthful information was critically important to Professor Hausman in the report and testimony he gave when engaged by Micron to make his investigation of the DRAM market.

- Prof. Hausman investigated the structure, characteristics and activity in the DRAM market in the United States during 2000 to June 2002.

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[4] The John Bates Clark Medal, awarded to Prof Hausman in 1985 (CV p. 1) is "awarded biannually to an outstanding economist under the age of 40 – a distinction said to be predictive of, and perhaps even more prestigious than, receipt of the Nobel in economic science." *New York Times Book Review*, October 21, 2007, p. 13.

- Prof. Hausman's work preceded and was independent of this litigation.

- Prof. Hausman authored a report about the results of his engagement by Micron, dated June 17, 2003, and he testified at the ITC June 25, 2003 (Bunzel Decl., Exh. A, Dkt. 209.)

- Prof. Hausman's work papers for this engagement are the Appendix to his ITC report with the regression equation computer output and there are no other work papers. (Bunzel Decl., Exh. A, Dkt. 209, June 17, 2003 Report ("Report") Appendix: Econometric Analysis of DRAM Prices; Bunzel Decl., Exh. J, calculations.)

- The methodologies used by Prof. Hausman are tested, subject to peer review and publication, have known potential error rates, and are generally accepted. (*Id.*)

- No one claimed in the ITC proceeding (including opposing experts) that the data or methodologies used by Prof Hausman were inaccurate or unreliable.

- Prof. Hausman concluded that the DRAM industry is among the most dynamic in the world with rapid technological change and requirements of massive investments by producers to remain competitive. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 2.)

- DRAM prices were constantly decreasing during the studied period, with factories running at full capacity and inventory levels kept low. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 4.)

- DRAM demand is inelastic in the short run. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 4.)

- The DRAM market is extremely competitive. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 5.)

- DRAMs are small and light and transported rapidly by air with negligible transportation costs. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 3.)

- There is a near-perfect flow of information regarding DRAM pricing world-wide. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 4.)

- Large volumes of DRAM were bought and sold every day throughout the United States on the basis of price. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 3.)

- Free flow of information and low transportation costs resulted in a very efficient arbitrage of DRAM prices. (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 4.)

- DRAM producers unable to be competitive have routinely exited the market creating intense price competition (Bunzel Decl., Exh. A, Dkt. 209, Report, p. 5.)

- Prof. Hausman concluded that DRAMs are a commodity product that traded primarily on the basis of price.

- The market characteristics described above are in the expert opinion of Prof. Hausman the most likely factors that brought about similar prices for DRAMs sold by Hynix, Micron, Infineon, Samsung and others in the United States 1999-2002.

- Prof. Hausman also concluded that Hynix pricing in the United States had significant economic effects that resulted in Hynix and other suppliers selling at economically irrational (low) levels. (Bunzel Decl., Exh. A, Dkt. 209, June 24, 2003 Testimony ("Testimony"), p. 56.)

- Professor Hausman has no knowledge of whether an illegal price-fixing agreement existed among Micron and other DRAM producer companies during the period of the investigation, but based on his investigation, his opinion was that the price parity in the marketplace likely resulted from the competitive economic factors he analyzed in the market.

- Professor Hausman has been told that the Department of Justice is charging that Mr. Swanson joined and participated in a conspiracy to fix prices of DRAMs sold to the major OEMs during April 2001 to June 2002 (which period was included in the period he investigated). The economic factors Professor Hausman analyzed negate the existence of such a price fixing conspiracy.

This summary will be similar to Professor Hausman's testimony at the *Daubert* hearing and at trial. And his testimony and opinions are reliable and relevant.

C. Professor Hausman's Expert Opinions Are Reliable.

The government's claim that Hausman's testimony is "not reliable" and is not based on "scientific, technical or other specialized knowledge" borders on the irresponsible. First, as noted above and unlike experts engaged in many cases, his opinion was not "developed expressly for purposes of testifying" in support of Mr. Swanson. *See In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, supra*, 2007 WL 4170276, at *3, citing *In Re Silicone Gel Breast Impl. Prod. Liab. Lit., supra*, 318 F.Supp.2d at 890 (citing Fed. R. Evid. 702 Advisory Committee's Notes). Indeed, if anything, Professor Hausman's opinion is more reliable than a specifically engaged expert witness because his investigation and analysis was made after he was engaged by Micron, whose senior executives are the main witnesses upon which the government relies in their case *against* Mr. Swanson. Professor Hausman's proffered testimony strongly and positively meets each of the factors presented in a Daubert analysis:

His technique has been tested. The econometric model used by Professor Hausman is fully described, is well accepted in the profession and is discussed at length in standard

handbooks. (*See, e.g.* J. Hausman, "Specification and Estimation of Simultaneous Equation Models" in Handbook of Econometrics, Vol. 1, Ed. Z Griliches and M. Intriligator (1983), and numerous articles authored by Professor Hausman. (Bunzel Decl., Exh. A, Dkt. 209, Report, Appendix: Econometric Analysis of DRAM Prices, p. 2, fn. 2.)

His theories and techniques have been subject to peer review and publications. Professor Hausman's CV lists dozens of peer reviewed articles in the standard and well accepted professional literature and over 200 published articles, papers and professional presentations. (Bunzel Decl., Exh. A, Dkt. 209, CV.)

Error rate is understood. Professor Hausman explained (and the government was given) the parameter estimates from the model which was the basis for his conclusion. Professor Hausman noted that the model "fits the data well, explaining over 98% of the observed variation in DRAM prices. In addition, the model passes the test of overidentifying restrictions, which indicates that the model is specified correctly and that the instruments are valid." (Bunzel Decl., Exh. A, Dkt. 209, Report, Appendix: Econometric Analysis of DRAM Prices, pp. 2-3.)

The methodologies are generally accepted. Professor Hausman's analysis and work is classic and accepted (see particularly the 60 papers of publications listed under "Econometrics" and "Applied Micro Analysis" at the witness' CV pp. 7-12. (Bunzel Decl., Exh. A, Dkt. 209, CV.) Professor Hausman also has been teaching econometrics and competition for the past 35 years at Massachusetts Institute of Technology. He has testified and made presentations before courts, agencies, and professional societies as well as conducting academic research in the semiconductor and DRAM industry since the early 1980's. He is probably the premier economist on this subject matter in the United States. There can be no doubt that Professor Hausman's field of expertise is well "known to reach reliable results for the type of opinion offered." *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, *supra*, 2007 WL 4170276 at *3.

The government complains that Professor Hausman used "worldwide" selling prices. Of course he did, because DRAMs are a commodity product, selling primarily on the basis of price. More significantly, Professor Hausman's Report and his testimony focused on the United

States and the "presence of Hynix in the market place" and its impact upon "prices for DRAMs in the United States and world wide" (Bunzel Decl., Exh. A, Dkt. 209, Testimony, p. 51.)

The government also complains that Professor Hausman's independent investigation and analysis should not be considered reliable because he did not consider Micron's "price fixing conduct violative of the Sherman Act" or the "guilty pleas by four DRAM manufacturers and 15 DRAM employees." (Renewed Motion p. 6:9-14, repeating verbatim arguments made in original motion p. 7:4-10). Of course, this is a key point: Micron did not disclose to him or to the ITC their concealed misconduct. Professor Hausman will be subject to cross-examination by the government and it can expose these facts.

In sum, Professor Hausman's methods and bases easily meet the first *Daubert* prong.

D. Professor Hausman's Expert Opinions Are Relevant and Helpful.

The Court's Final Pretrial Order, Dkt. 247 filed November 16, 2007, states at pp. 5-6 that "economic evidence" testimony from Mr. Hausman is proper "in order to rebut the existence of the alleged conspiracy itself or [to] tend to negate the fact that [the alleged conspiracy] occurred" and, citing *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960), that "if defendant denies [as Mr. Swanson does] entering into an illegal price fixing agreement, he is permitted to present to the jury his explanation of the factors that brought about similar prices." *See also*, ABA Section of the Antitrust Law, Criminal Antitrust Litigation Handbook (2d Ed. 2006) 255, 308-309.

Professor Hausman's expert testimony is just such substantial evidence rebutting the conspiracy charged against Mr. Swanson, by opining that parallel pricing in the DRAM market Mr. Swanson faced in this country is explained by economic factors and not illegal agreements. *Continental Baking, supra*, 281 F.2d at 143-4; *United States v. Goodman*, 850 F.2d 1473, 1479 (11th Cir. 1988) and cases cited therein at fn. 8; *United States v. Louis Trauth Dairies*, 1994 WL 876373 (S.D. Ohio 1994); and Criminal Antitrust Litigation Handbook, *supra*, pp. 308-309

and authorities cited at fns. 197 and 200.[5] See also *Ohio Valley Electric Corporation v. General Electric Company*, 244 F.Supp. 914, 952 (DCNY 1965) [defendant's economic data as to costs, profits, and capacity showing "that uniform price movements in this industry" do "not indicate conspiracy" is evidence that "certainly must be permitted."]; *In Re Polypropylene Carpet Antitrust Litigation*, 93 F.Supp.2d 1348, 1355 (ND Ga. 2000) [opinion testimony regarding "climate of the polypropylene market during the relevant time period" is testimony that "may be helpful to the trier of fact."]

The government seriously over-reaches at p. 5 of its Renewed Motion by arguing that a prior and irrelevant defense brief, Dkt. 223 at p. 7, meets the issue of this motion. That brief responded to the government's motion at Dkt. 179 seeking to permit evidence of plea agreements, in which the government had argued that the plea agreements would rebut potential defense experts who might contest the existence of "a conspiracy." *Id.* at 9.[6] As we have explained to the government (*see* letter dated Nov. 28, 2007, Exh. 5 to government's Renewed Motion), the comment in the earlier brief meant that Professor Hausman is in no position to opine that the DRAM companies and their overseas executives did not reach illegal agreements or conspire to fix prices contrary to the pleas. He can't know that and his opinion does not seek to contradict the pleas of other parties.

Instead, Professor Hausman's testimony rebuts the charge *against Mr. Swanson*, a U.S. salesperson who struggled daily with competitive price wars, and is sound circumstantial

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[5] The government at its Renewed Motion at p. 5 seeks to distinguish application of *Continental Baking* by citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228-31 (1940). The government ignores that the primary reason given by the Court in *Socony-Vacuum* for excluding defense offers of proof into other causes for price stability, was that the additional evidence sought was "cumulative" since "the record is replete with evidence showing the condition of the oil industry" at times relevant to the indictment. *Id.* at. 229-30. Here by contrast, the government seeks to strip the defense of the *only* expert economic and market evidence offered. Application here of the later and more directly relevant *Continental Baking* holding is not disturbed by *Socony-Vacuum*.

[6] The Court ruled that the plea agreements are admissible in any event. Final Pretrial Order pp. 18-19, noting that the plea agreements are *not* admissible to show the defendant's guilt. Whatever relevance (we see none) that defendant's brief in opposition to the plea agreement motion has now, defendant surely did not mislead the Court or obtain any benefit from the earlier statement.

explanation that the "economic factors" Mr. Swanson faced drove price similarities in a highly commoditized market, and not any illegal agreement he made or participated in. *See United States v. Chas. Pfizer & Co., Inc.*, 281 F.Supp. 837, 847 (S.D.N.Y. 1968), *rev'd on other grounds*, *United States v. Chas. Pfizer & Co, Inc.*, 426 F.2d 32 (2nd Cir. 1970) [in order to show defendants were following "an economically dictated practice of conscious parallelism of prices, rather than engaging in any illegal conspiracy to fix prices" defendants may offer "explanatory economic evidence," citing *Continental Baking*.]

Hundreds of the government's proposed trial exhibits directly concern the very close pricing between the competing DRAM companies, and the charge against the defendant is that he participated in price stabilization and price-fixing. The government wants to argue that the emails sent to Mr. Swanson and his actions concerning pricing must mean he "joined" a conspiracy, and it impermissibly seeks to exclude relevant other explanations for Mr. Swanson's conduct concerning close pricing in the DRAM market. The government ignores the statement in this Court's Final Pretrial Order that under such circumstances, Mr. Swanson

> "is entitled to present to the jury his explanation [through expert testimony] of the factors that brought about similar prices."

That should be the beginning and end of the relevance inquiry on the *Daubert* motion.[7]

E. Professor Hausman's Percipient Testimony is Admissible.

The government argues at p. 7 of its Renewed Motion that percipient testimony of Professor Hausman -- Micron and Sadler concealing material information from him *regarding the subject of this very case* -- is either extrinsic under Rule 608(b), or excludable as confusing or cumulative under Rule 403. The government's case citations to *Brown v. Gutierrez*, 2006 WL 3065574, *3 (N.D.Cal. Oct. 27, 2006) and *United States v. Chu*, 5 F.3d 1244, 1249 (9th Cir. 1993)

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[7] Expert testimony will also be helpful to the trier of fact in rebutting government witnesses. *Alcala v. Woodford,* 334 F.3d 862, 876-879 (9th Cir. 2003) [affirming writ allowing an expert psychologist to impeach the one critical witness implicating the defendant]. Expert testimony is properly used for impeachment, to attack credibility, and to provide circumstantial evidence contradicting an opposing witness. *United States v. Hankey, supra,* 203 F.3d at 1170-75 (9th Cir. 2000) prosecution expert on gangs was "certainly helpful to the jury" in explaining why the witness "would lie on Hankey's behalf."]

are off-point, because Professor Hausman's percipient testimony is not offered to demonstrate Mr. Sadler's or other Micron executives' general "character for truthfulness," which is the subject of Rule 608(b) and these cases.

Rather, the concealment here is relevant to *credibility*, *bias* and *motivation* of Micron and Mr. Sadler to do whatever it takes to destroy Hynix, including concealing information about contemporaneous alleged price-fixing from the ITC tribunal and Micron's own expert witness. This creates substantial reasonable doubt about whether any Micron contacts with Mr. Swanson were for price-fixing purposes (as the government contends Mr. Sadler, its key and sole competitor witness, will testify) or rather for gathering information to support an ITC proceeding *planned* and *conceived* during the indictment period -- a program so important to Micron that it would conceal its own inconsistent conduct to assure a punishing result against Hynix. In sum, Rule 608(b) does not apply where the purpose of the testimony is to show bias, credibility and motivation. *U.S. v. Abel*, 469 U.S. 45, 50-51 (1984).[8]

Nor is the testimony from Professor Hausman about concealment cumulative. First, the importance of candor to an esteemed expert is not something Micron executives can testify to at all.[9] Second, we do not know until trial what Mr. Sadler or others at Micron will say regarding the concealment, and how Professor Hausman's testimony may impeach the government's witnesses. And third, even if Micron witnesses admit concealment, it could be downplayed or colored as collateral by witnesses whose amnesty and cooperation the government has contracted, as opposed to testimony coming from an impartial witness such as Professor Hausman.[10] The

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[8] "Bias, of course, covers all varieties of favor. *See* 3A Wigmore, Evidence, § 945 at 782, (Chadbourn rev. 1970)." *United States v. Hankey, supra,* 203 F. 3d at 1171. "*Proof of bias is almost always relevant* because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony." *United States v. Abel, supra,* 469 U.S. at 52, emphasis added.

[9] *See* fn. 7 above.

[10] Permitting extrinsic evidence to contradict collateral direct-examination "testimony has been justified on the grounds that the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment by asserting the collateral-fact doctrine." 2A Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure*, § 6119 at 116 (1993). *Dorn v. Burlington Northern Santa Fe R.R. Co.,* 397 F.3d 1183, 1193-94 (9th Cir. 2005) [abuse of discretion to exclude testimony that would rebut, if not impeach, plaintiff's expert].

Court at trial will be readily able to rule on the admissibility of Professor's Hausman's percipient testimony under the correct standard -- which is Rule 607 and not Rule 608(b) as the government contends:

> Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness' credibility in terms of his general veracity. In contrast, the concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.

U.S. v. Castillo, 181 F.3d 1129, 1132 (9th Cir. 1999).

Impeachment by contradiction is governed by the common law rules, subject to Rule 403 considerations. *Id.* at 1133. Micron's concealment is neither collateral nor confusing, but was rather concealment of the co-conspirator conduct *alleged in this case*, highly germane to motivation, bias and credibility. Rule 403 should hardly apply to exclude evidence of such material concealment:

> 'Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted as scenarios, or unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.' quoting *United States v. Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983.

United States v. Hankey, supra, 203 F.3d at 1172.

In sum, the time to determine the admissibility of Professor Hausman's percipient testimony about concealment is at trial, not in a *Daubert* motion.

III. COMPUTER EXPERT KRONE'S OPINIONS ARE RELIABLE AND RELEVANT

A. Summary and Proffer of Krone's Testimony.

Winston Krone is presently and has been a Managing Director of SafirRosetti, a national firm of which he is also Director of Computer Investigations. In that capacity he has consulted about and led many investigations concerning the analysis of electronic evidence, computer privacy and intellectual property rights, combining forensic and traditional investigation

techniques and technology. He was educated at Oxford University (BA in Law), took his graduate law work at Guildford School of Law, and became a Solicitor, United Kingdom, High Court, practicing with Baker & McKenzie for four years. He was admitted to the California bar in 1998. He also worked with the U. S. State Department where he served as Senior Legal Officer in Kosovo, Rwanda and Bosnia. He has specialized training in computer investigation, software applications for analysis of computer mirror images and has done graduate work in computer science and computer forensics at the University of New Haven (Bunzel Decl., Exh. O, Dkt. 210, pp. 6-7.)

Mr. Krone's opinion is that Gary Swanson received over 11,662 emails during a one year period of the 17-month period relevant to Mr. Swanson's indictment, and opened less than 49% of them (5,557 were opened). His opinion is also that during a longer two-year period June 29, 2001 to July 1, 2003 (covering also the one year after the charges against him – to which the government objects), he opened 12,945, or less than 55%. To support his opinion he will testify to the following:

- Based upon Hynix backup tapes that were delivered by Hynix counsel to his firm, Mr. Krone arranged to restore those tapes and to extract the underlying data to a computer.

- Mr. Krone determined that the underlying Hynix data on the tapes had been obtained at three separate times in 2001, 2002 and 2003, and had been converted into the datafiles on the tapes in a manner consistent with automated conversion, which gives Mr. Krone a high degree of confidence that the data on the tapes is the same as the underlying data from which the tapes were made.

- Mr. Krone's firm used a forensic software product called EnCase (version 5) to analyze and review the data in the restored files. This permitted analysis without changing, and thus preserving, the underlying metadata, and to search those files for any files with the name "Swanson" or any similar derivatives of the Swanson name.

- The results of that search produced two Swanson PST files that were Outlook mailboxes, and two Swanson Lotus Notes mailboxes. One of the Lotus Notes mailboxes was not functioning and could not be opened.

- Mr. Krone's firm used a software program, Paraben E-mail Examiner, which could analyze the individual emails within the three functioning mailboxes into separate fields within each email.

- The two Outlook mailboxes contained emails dated from June 29, 2001 to July 1, 2003. Each of the individual Outlook emails contained metadata which included a field entitled "Status". The emails were searched for "Status = U" (for unread) and "Status = Not U" (for read). This allowed Mr. Krone to perform a number count of all Outlook emails with status U for unread.

- Mr. Krone tested the Paraben program by searching it against a fixed control sample of emails where his firm already manually counted the "read/unread" items. This confirmed the accuracy of the Paraben program.

- The functioning Lotus Notes mailbox contained emails for the period October 1999 through May 10, 2001. The individual Lotus Notes emails did not contain any metadata that would allow a determination of the status of the individual emails as read or unread. Using the Paraben program, Mr. Krone's firm determined that there was no field comparable to the Outlook field which could be flagged as "read/unread". Mr. Krone's firm opened the Lotus Notes mailbox using a Lotus Notes program, and determined that all of the Lotus Notes E-mails were marked "Unread". This was consistent with a recognized problem of Lotus Notes mail that has been transferred to another location.

- Based upon this investigation of the Outlook mailboxes and a further manual check, Mr. Krone determined that during the period June 29, 2001 through July 1, 2003, there were 23,557 emails remaining in the inbound Swanson mailboxes of which 10,612 were status unread. Accordingly, Mr. Krone determined that slightly more than 45% of the emails in Mr. Swanson's mailboxes were status "unread."

- Mr. Krone also has determined that the one Outlook mailbox with emails dated from June 29, 2001 to the close of the day June 14, 2002, contains 11,662 incoming emails remaining in the Swanson mailbox, of which 6,015 were status unread. Accordingly, Mr. Krone determined that 51.5% of the emails in that mailbox were status "unread."[11]

- Mr. Krone was requested to determine specifically, with respect to 24 government trial exhibits selected by Swanson trial counsel, whether they were read or unread by Mr. Swanson. He determined that 23 were unopened and 1 was opened. (Bunzel Decl., Exh. P, letter dated November 7, 2007 and chart).

B. Mr. Krone's Testimony Is Reliable and Relevant.

The government's case is based in very large part upon email traffic and presently includes over 200 trial exhibits containing electronic mail. Mr. Swanson was sent well over twenty-five thousand emails during the relevant period, and Mr. Krone's testimony will better

[11] The government raises at p. 9:18-20 of its Renewed Motion the objection that the post-indictment period data is not relevant. Accordingly, Mr. Krone has now analyzed the data for the approximate 1 year period within the indictment time-frame, resulting in the unread percentage of 51.5%.

inform the jury about the volume of Mr. Swanson's email traffic and will tend to prove that nearly half of that electronic mail was not opened by him. This is both direct and circumstantial evidence supporting Mr. Swanson's defense that he had little or no knowledge about many of the reports, communications and simply loose gossip contained in the emails relied upon by the government and purportedly sent to him. Depending upon the court's rulings at pre-trial and during the actual trial, there may be other email traffic subject to similar or other infirmities.

The methodology employed by Mr. Krone in his investigation and analysis is well accepted and has been tested in hundreds of cases. The EnCase software used by Mr. Krone's firm is standard in the field:

> Reports from the field indicate that computer data acquired and processed with EnCase has been successfully admitted into evidence in thousands of trials and preliminary hearings throughout the world. There are no known instances of sustained objections to EnCase-based computer evidence on authentication grounds related to the use of EnCase.

(Bunzel Decl., Exh. Q, EnCase Legal Journal (2d Ed. June 2001), p 45.) The most recent edition of that Legal Journal confirmed the consistent and unbroken line of authorities admitting EnCase-based evidence, and includes numerous appellate and trial court decisions affirming the validity of using EnCase software. (Bunzel Decl., Exh. R, EnCase Legal Journal (April 2007) pp 59-87.) The other software product used by Mr. Krone, Paraben E-Mail Examiner, is also widely used by law enforcement officials and other forensic experts.[12]

Mr. Krone made appropriate checks on his analysis, and there can be no responsible question about Mr. Krone's forensic capabilities, the technology he used or his methodology in making his investigation. As the Court of Appeals recently ruled, reliability is "not the correctness of the expert's conclusions but the soundness of his methodology" and that it is helpful if it "will assist the trier of fact." *Stillwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007), quoting *Daubert II* and Rule 702. With the government's heavy reliance upon email traffic, reliable expert opinion about a user's practice in reading (or not reading) that email is pertinent.

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[12] Paraben email recovery software is routinely used by the Dept. of Justice. (*See* DEA Microgram Bulletin, March 2006, p. 10, Bunzel Decl. Exh. S.)

The government's claim that Mr. Krone's "proffered testimony is inherently unreliable" (Renewed Motion p, 7:17-19) is simply a disguised speculation that a user (here Mr. Swanson) may be able to manipulate an email communication from "read" to "unread" or to change the status of an email by hiding an opening of the mail after it was archived. While these are matters for cross-examination of Mr. Swanson or Mr. Krone, they do not reach or detract from the methodology Mr. Krone used to reach his conclusion. This is not, as asserted by the government, an issue of "reliability" (Renewed Motion p. 9, Bendall Report, pp. 3-7) but, as the government's expert's four possible "scenarios" suggest, simply hypothesizing a theoretical manipulation by the user. The *Daubert* "gate keeping" role is no substitute for "[v]igorous cross-examination," *Daubert*, 509 U.S. 579, 596 (1993), and Mr. Krone's testimony is methodologically sound, technically supported and unequivocal.[13]

The government also complains that Mr. Krone examined only 24 of the government's many trial exhibits and determined that only 1 of those 24 had been opened. Based on defense strategy, trial counsel made a selection of certain trial exhibits, which it asked Mr. Krone to investigate. (Bunzel Decl., Exh. P.) We are not familiar with any authority, and the government has cited none, requiring trial counsel to instruct an expert to investigate more than is needed to meet defendant's purpose. The government has resources and an expert who apparently is continuing his analysis of all of the Swanson's email traffic. The government may make such arguments and offer such opinion as a part of its case.

The government's final complaint is that there could be a change in the read/unread status when Hynix changed its program and users' messages "migrated" in June 2001 from one system (Lotus Notes) to another (Outlook). (Renewed Motion 9:13-17, Bendall Report p. 7, fn. 2.) We have no evidence that any messages "migrated" as the government informed its expert. The electronic data strongly suggests that Hynix stopped using Lotus Notes and began using

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[13] See also, *Olin Corporation v. Certain Underwriters at Lloyd's London*, 468 F.3d 120, 134 fn.5 (2nd Cir. 2006) [cross-examination is "an appropriate way of attacking" expert testimony, "rather than complete exclusion."]; *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1352 (9th Cir. 1987) ["The weakness in the underpinnings of [expert] opinions may be developed upon cross-examination and such weakness goes to the weight and credibility of the testimony." (citations).]

Microsoft's Outlook. This change would have preserved all messages. Moreover, the Lotus Notes (covering generally the period *before* Swanson is alleged to have joined the conspiracy) were not searchable for read/unread and Mr. Krone has addressed this issue (Bunzel Decl., Exh. O, Dkt. 210, pp. 4-5).

The only remaining complaint by the government is that it would be "unfairly prejudice[d]" by Mr. Krone's opinion about the number of emails that were "read" and "unread". (Renewed Motion p. 10:8-10.) In view of the government's heavy reliance on emails, it is not surprising that the government dislikes Mr. Krone's conclusion. But that is a matter for argument and cross-examination. It does not implicate the standards of reliability or accepted methodology.

IV. CONCLUSION

For the foregoing reasons, the government's motion to exclude defendant's experts should be denied in the interests of justice.

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