Exhibit A

GIBSON, DUNN & CRUTCHER LLP
LAWYERS
A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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October 11, 2007

Direct Dial
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Client No.
T 63440-00007

Emilio E. Varanini
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Charles M. Kagay
Spiegel Liao & Kagay, LLP
388 Market Street, Suite 900
San Francisco, CA 94111

Re: *State of California, et al. v. Infineon Technologies, et al. -- Motion to Void Judgment Sharing Agreement*

Dear Emilio and Charlie:

There is a factual misstatement of which I believe you are unaware in your motion to void the judgment sharing agreement. You argue that the agreement "violates public policy by arbitrarily allocating civil penalties." The agreement, however, does not apply to civil penalties. It specifically excludes fines and penalties, both civil and criminal.

I realize the exclusion is in a portion of the agreement you did not review. Had it occurred to us that you would make an argument specific to fines or penalties, or had you asked us about it, we would have told you about this provision. (We did not understand this to be the purpose of Emilio's question about the definition of "judgment," but in retrospect perhaps the question was an indirect attempt to find out if the agreement applied to fines and penalties.) In any event, if the representations in this letter are not sufficient to satisfy you on this point, we will arrange to provide a declaration or allow you to view the relevant language in the agreement.

In light of this information, we request that you amend your motion to withdraw the argument on civil fines. I think there is no reason to burden us or the court with addressing this

argument now that you are aware of the facts. We look forward to your response so we can plan accordingly.

Very truly yours,

Joel S. Sanders

JSS/smm

100317456_1.DOC

Exhibit B

Nierlich, G. Charles

From: Emilio Varanini [Emilio.Varanini@doj.ca.gov]
Sent: Friday, August 24, 2007 5:13 PM
To: Nierlich, G. Charles; Kathleen Foote
Cc: Sanders, Joel S.; Hess, Joshua D.; Justice Lazarus, Rebecca
Subject: RE: State of California et al. v. Infineon Technologies, et al.

Chip -

Our agreement (see e-mail thread below) regarding no waiver would apply to our caveat as well. So, we have an agreement. Have a good weekend all.

Emilio

>>> "Nierlich, G. Charles" <GNierlich@gibsondunn.com> 8/24/2007 5:04:09 PM >>>
Emilio -

Please confirm that our agreements concerning no waiver would apply to that as well. Assuming that your answer is yes, then we have an agreement. Thanks very much.

- Chip Nierlich

From: Emilio Varanini [mailto:Emilio.Varanini@doj.ca.gov]
Sent: Friday, August 24, 2007 16:32
To: Nierlich, G. Charles
Cc: Sanders, Joel S.; Hess, Joshua D.; Kathleen Foote; Justice Lazarus, Rebecca
Subject: Re: State of California et al. v. Infineon Technologies, et al.
Importance: High

Chip -

We agree to this with the caveat that we will agree not to quote specific language as such in any document (other than internal documents as referenced in your e-mail). If that caveat works for you, then we have a deal. Please let me know ASAP.

Emilio

>>> "Nierlich, G. Charles" <GNierlich@gibsondunn.com> 8/24/2007 4:16:15 PM >>>

Emilio -

I am writing to confirm our agreement concerning the State of California's request for production of the judgment sharing agreement. We have agreed that you and/or another attorney with the California Attorney General's office working directly on this matter may come to the offices of Gibson, Dunn & Crutcher LLP in San Francisco to view the portions of the judgment sharing agreement relating to settlement. We and you agree that this viewing does not and will not constitute production of the judgment sharing agreement, and neither you nor any other attorney with the California Attorney General's office who comes to Gibson Dunn to view the selected portions of the judgment sharing agreement may take or keep any copy of the materials viewed. We and you agree that you may take your own personal notes of your mental impressions or opinions during your viewing of the judgment sharing agreement, but that any such notes shall be treated as highly confidential and attorney work product, and shall not be shared with any person or entity other than those attorneys in the California Attorney General's office working directly on this matter. In any event, you and we agree that you will not quote

any specific language from the judgment sharing agreement in any document (other than a document solely for internal use by attorneys in the California Attorney General's office working directly on this matter) based on your viewing of the selected portions of the judgment sharing agreement. We and you further agree that the viewing of the selected portions of the judgment sharing agreement shall not constitute a waiver by Micron or any other signatory to the judgment sharing agreement of any rights or privileges with respect to the judgment sharing agreement (including the joint defense or common interest privilege), and you specifically agree not to argue to the court that the viewing of the judgment sharing agreement constitutes any waiver of any type. As a result of this agreement, you agree that you will not submit a motion to compel production of the judgment sharing agreement today.

Please respond in writing to confirm your acceptance of these terms. Thank you.

- Chip Nierlich

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"MMS <Gibsondunn.net>" made the following annotations.

"MMS <Gibsondunn.net>" made the following annotations.

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Exhibit C

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil No. 4-85-1166

IN RE: WORKERS' COMPENSATION INSURANCE ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE JAMES M. ROSENBAUM

Minneapolis, Minnesota

August 24, 1990

APPEARANCES

Plaintiffs' Counsel: K. Craig Wildfang
Vance K. Opperman
Andrew McIntosh
William A. Montgomery

For Defendants: James B. Loken
Maureen McGuirl
Michael Brasa
Robert Weinstine
Thomas Harms
Leon R. Goodrich
James R. Safley
Ann Simonett

Court Reporter: Dawn M. Boadwine, RPR, CM

Morning Session

9:15 a.m.

P R O C E E D I N G S

THE CLERK: Your Honor, the matter on the calendar is In Re Workers Compensation. Would counsel please stand and state their appearance for the record?

MR. OPPERMAN: Vance Opperman, Your Honor, for plaintiffs.

THE COURT: Good morning, Mr. Opperman.

MR. WILDFANG: Craig Wildfang for plaintiffs.

THE COURT: Mr. Wildfang.

MR. McINTOSH: Andy McIntosh for plaintiffs.

THE COURT: Morning.

MR. MONTGOMERY: William Montgomery for defendant Twin City Fire Insurance Company.

THE COURT: Mr. Montgomery.

MR. LOKEN: James Loken for defendant the Home Insurance Company.

THE COURT: Mr. Loken.

MS. McGUIRL: Maureen McGuirl for Liberty Mutual Insurance Company.

THE COURT: Ms. McGuirl.

MR. BRESS: Michael Bress for the Travelers Insurance Company.

THE COURT: Mr. Bress.

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MR. WEINSTINE: Robert Weinstine for Fireman's Fund.

THE COURT: Mr. Weinstine.

MR. HARMS: Thomas Harms for Michigan Mutual and workers compensation insurer Grain Association, Your Honor.

THE COURT: Mr. Harms, good morning. You folks sitting taciturn in the back feel you need to make an appearance also, you're welcome to.

MR. SAFLEY: I'll enter an appearance, Your Honor. Jim Safley for defendant.

THE COURT: Mr. Safley.

MR. GOODRICH: Leon Goodrich, St. Paul Fire and Marine.

THE COURT: Mr. Goodrich. Miss Simonett.

MS. SIMONETT: Ann Simonett, Your Honor, for the —

THE COURT: Well, I said it under my breath. I didn't know if you wanted to make it public you were hanging around with this kind of group or not. So, all right. Good morning. Counsel.

MR. OPPERMAN: Your Honor, there are three matters on the calendar. I think the latter two matters are we believe without objection. If there is argument on the latter two matters, Mr. Wildfang will address them. They are our motion for reimbursement of class notice expenses in the amount of $92,000. We've received no objection to that,

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and we've also submitted to the Court our order to advance -- pay past and advance costs for experts.

The amount that we are requesting was filed under seal. We regard that as a matter of litigation strategy. We're not anxious to reveal that amount to our adversaries, but we have of course revealed the amount we are seeking to Mr. Safley, from whose settlement the money would be advanced, and my understanding is he has no objection, either, to that amount or to that order. The item before --

THE COURT: Mr. Opperman, I will be frank to tell you that, ah, I have not seen either the motion for reimbursement or for a motion for advancement.

MR. OPPERMAN: I was told those --

THE COURT: Does not even begin to suggest they were not filed.

MR. OPPERMAN: I'm unable to account for that.

THE COURT: I'm pretty zealous to read what's sent around, and I have not seen it.

MR. WILDFANG: I believe, Your Honor, it has been filed, and I believe Your Honor was copied --

THE COURT: It's nice that you copy me on some of this stuff.

MR. WILDFANG: I apologize if we didn't get it to Your Honor. We can get copies, perhaps, when Mr. Opperman is done.

THE COURT: As far as the motion for reimbur[illegible] of expenses, I think everyone contemplated that they would be encountered, and I will make a relatively cursory review of that to make sure that it seems within reasonable bounds, and there doesn't seem to be opposition. I will take a further look at the motion for advancement of costs on the experts, but I will tell you I have not read or considered any of them up till now.

MR. OPPERMAN: It was my mistake, Your Honor. I thought they had made it to your chambers.

And while that, ah, preliminary matter, if I may be indulged for 30 seconds on a matter of some irrelevancy, I received a call from my daughter last night, who has just been admitted as a freshman to the University of Minnesota Law School. She informed me she had been admitted to Section C, which happened to be the section I was admitted to, and others in this courtroom, and she asked me about her professors, and I just pass this on. One of the professors she asked me about was her procedure professor, a Professor Koond (phonetic).

THE COURT: The name's not familiar to me, nor is the name of most of them.

MR. OPPERMAN: I think the professor was known in our days as Professor Cound.

THE COURT: We were the ones who still read his

book when it was in Xerox form. Sometimes we got it he taught the section, sometimes before.

MR. OPPERMAN: Grades too, Your Honor, but that's, ah --

THE COURT: We got ours. We'll move along, unfortunately.

MR. OPPERMAN: The item before us, Your Honor, is the plaintiffs' motion --

THE COURT: Congratulations, Mr. Opperman. I hope she winds up in a profession where she can do something of use to the republic.

MR. OPPERMAN: Well, I told her I hope her section assignment didn't reflect her grades as they often did in my case.

But in any event, having jumped 25 years, ah, the plaintiffs have before Your Honor the motion that we have filed for the sharing agreement between the six nonsettling defendants. Ah, Your Honor, our basic argument, and I think the briefs on both sides have set forth pretty well the respective positions.

In summary, our arguments are these: We believe there are two strong public policies. One, that anti-trust laws should be vigorously enforced, and as a corollary of that, contribution and contracts that provide for contribution are void for public policy. Second, we believe that there's a

strong public policy that favors settlements, particu
in anti-trust cases, and we believe this agreement
frustrates that --

THE COURT: Mr. Opperman.

MR. OPPERMAN: Yes, sir.

THE COURT: Let me focus on a couple questions that suggest themselves as I kind of reviewed this. Would you consider the sharing agreement, vis-a-vis the most favored nations clauses, in the settlements that have been accomplished?

MR. OPPERMAN: Your Honor, I think --

THE COURT: I guess what I'm asking is, is one kind of the contra-inverse of the other?

MR. OPPERMAN: It is not, for several reasons, and frankly, Your Honor, I thought that defense argued along that line, that that's what they meant by level playing field, rather than the level playing field argument that they make in the brief, is frankly their better argument. Let me demonstrate why that is not equal.

In the case of the settlements that have been preliminarily approved by Your Honor and are before the Court, before and known to all the defendants, the case of those agreements which have a most favored nations clause, to the extent that they have a most favored nations clause, they are easily, they are easily taken care of in subsequent

settlements. The amount of money, for example, that would have to be obtained in any subsequent settlement to make up the difference in the most favored nations clause is miniscule. That is shown by the schedule of the amounts.

But more than that even, Your Honor, not only is it miniscule, for example the last two settlements would require in one case I think $25,000 payment, that's the Travelers case, on the Travelers settlement, and the other, depending on the amount, could be as high as three or 400,000, but no more than that.

More to the point, Your Honor, the most favored nations clause, which is a fairly standard provision in most anti-trust settlements, at least early anti-trust settlements, states that they have to be similarly situated, and it's not unusual to have a variety of settlements of most favored nations clauses where the defendants are not similarly situated, or where the lawsuit has changed a great deal.

THE COURT: On whose side of the table is the determination that it is similarly situated?

MR. OPPERMAN: Almost always, Your Honor, it's a matter of private negotiation, and I believe it would be here, but even if that were, if that were a barrier, all that has to be obtained in subsequent settlements is an amount of money equal to that which would be lost in earlier

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amounts, and very small amounts.

THE COURT: Is it fair to say that there has been very little appellate review of these kinds of agreements?

MR. OPPERMAN: It is fair -- yes, it is, Your Honor.

THE COURT: Is it also fair to say, as I read it, this is one of those things that falls within my sound discretion? In many ways?

MR. OPPERMAN: I believe it falls entirely within the sound discretion of this Court, and I want to make clear something we left out of our brief by inadvertence, we brought to the Court's attention the Puerto Rican Hotel case where an agreement somewhat similar to the ones the defendants have attempted here was voided. We draw from a footnote, there is another unreported case where such an agreement, again somewhat similar, was upheld.

THE COURT: Now, that agreement was a good deal different, at least the San Juan agreement, as I reviewed it. It obviously incorporated certain provisions which are of concern to us here, but it had many things in terms of denial of certain items and unavailability of documents and all kinds of other stuff that basically made it sound like it was a, some sort of a concordat to obstruct litigation, I think is at least one way it could have been looked at.

MR. OPPERMAN: I think that the lawyers who drafted

that were not as artful as the lawyers that drafted the agreement that is now before us. I'm not sure the effect is entirely different. Let me demonstrate a couple of examples, and it did take us an order of the magistrate upheld by Your Honor to even get this agreement.

But now that we've read it, for example, if the defendants wish to settle with the plaintiffs, they can only avoid treble damage, draconian, worse than contribution, they can only avoid that, and I can demonstrate that, they only avoid that if for example they negotiate certain things with the plaintiffs and then get that agreement approved by this Court. One of them is, for example, they have to, they do nothing that violates the defendant joint defense agreement or anything that affects that agreement. They have to make sure they take their sales out of the universe. They have to get claims reduction.

On that point, Your Honor, on the claims reduction point, most of the early settlements in this case, and most early settlements in anti-trust cases in general, contain arguments, and it's been approved in this Court, and the early settlements approved by this Court, at least preliminarily --

THE COURT: Preliminarily.

MR. OPPERMAN: -- preliminarily, the argument while the small amount per market share is being paid, it is

approved in part because the sales of those settling defendants are left in the universe, and so plaintiffs have that entire amount to look toward for future recovery from credit worthy defendants, of great interest to class members, and those are typical provisions, and those are typically approved by courts preliminarily and finally.

That of course is frustrated by the agreement that the defendants have here, which would bind this Court's hands, and our hands, because it requires the defendants to insist on an agreement in any settlement agreement with us, other than a global agreement. On equal terms.

THE COURT: Well, let me move you over a bit. To what extent does it block anything other than global, by its terms, I'll leave aside for the moment by implication, I mean, what if, ah, today sitting in calm deliberation Mr. Montgomery says, you know, it's time for me to get out out on this thing. What happens?

MR. OPPERMAN: Well, Your Honor, ah, my first response to that is that, ah, global settlement, if all parties were in agreement, could be achieved. That's true.

THE COURT: Yup.

MR. OPPERMAN: And I suppose that's an eventuality, and the same eventuality of going to trial and either winning or losing. Secondly, however, we believe that global settlements, and that is an end, is generally

achieved in these cases by sequential settlements to [illegible] point --

THE COURT: Ah, but they foster the dire prospect of somebody whipsawing major international insurance organizations. A prospect that sends cold chills down my spine.

MR. OPPERMAN: I believe, Your Honor, that is a variant of the level playing field argument, and let me address that --

THE COURT: The question I asked, though, is, okay, he decides I've had enough, we want to sue for a separate piece. What happens here?

MR. OPPERMAN: Ah, I can't think of any significant impediment imposed by the agreement, as I read the agreement, if they intersay, and their respective positions, if they are of a mind, and they have worked out whatever draconian or nondraconian impact intersay the agreement has, and they desire at one moment to all settle at the same time on the same terms, I think that single eventuality is left open. And I can't think of a major impediment to that single eventuality.

THE COURT: I want to be clear. What you're saying I think is, is if they separately negotiate, what then is the global agreement? I mean, I'm not --

MR. OPPERMAN: No, no, I thought your question was

if Mr. Montgomery said okay we'd like to do a global settlement.

THE COURT: No, I'm saying what if he says I want to get my client out?

MR. OPPERMAN: Oh, well, I think in the absence of global agreement, I think the sharing agreement prevents that in a variety of ways.

THE COURT: How? What -- other than his own sense and the fact that it exists? What happens? What if he says, well, I want to do it, and I'll make book with these folks later.

MR. OPPERMAN: Let me give you some hypothetical figures. Let's assume for the moment Mr. Montgomery's client has approximately seven percent of the older charge of the entire universe, and Mr. Montgomery says I'd like to settle, and we agree to settle $3 million a point, or some negotiated figure. Ah, the sharing agreement, ah, I think would prevent him from doing that for the following reasons: First, unless we enter into that agreement with regard, and they are willing to do so --

THE COURT: With everybody.

MR. OPPERMAN: -- with everybody else, and they're willing to do it, we're willing to do it, so far hasn't occurred, unless that occurs, what Mr. Montgomery's client faces is these defendants going to trial, we're talking

about the absence of global settlement, in the event [illegible] adverse jury verdict --

THE COURT: Adverse to?

MR. OPPERMAN: To the defendants, those who go to trial, Mr. Montgomery's client is required by the terms of this agreement --

THE COURT: To make a separate contribution.

MR. OPPERMAN: And the separate contribution would not be the seven percent, Your Honor. The separate contribution is his pro rata share of the market share of the six defendants, or those that go to trial. Approximately, in my hypothetical, three times the amount that he would be paying us based on market share.

THE COURT: Okay.

MR. OPPERMAN: I think that's a fairly strong disincentive. There are some other disincentives. In addition to that, there are some things he has to get from us, and then get Your Honor's approval that we may require more money for or may not be able to reach agreement. But I think that is the kind of treble damage, not just contribution, but treble damage effect that has been negotiated between these defendants.

THE COURT: Now I want to talk for a second or ask you a question about that treble damages a little bit differently. If you win, if we go to trial, we can't work

out any kind of a reasonable resolution between now at... trial, we try the case. You have an option or a possibility of trebling your damages. To what extent, if at all, does this pretrial agreement limit your chances for treble damages on a voluntary -- I guess on their earlier settlement basis? To what extent does this agreement deprive the plaintiff class of possible recoveries, if at all?

MR. OPPERMAN: If there's a favorable jury verdict?

THE COURT: Yes, sir.

MR. OPPERMAN: I don't believe it does.

THE COURT: All right. Because then the agreement is null, it has nothing to do with whatever verdict is handed down by this Court.

MR. OPPERMAN: Under the law, in a hundred years of unbroken precedent, and by the very terms of the Sherman Act as amended, in Section 5 of the Clayton Act, treble damages automatic is joint and several liability because this is intentional tort, and seen as such, there's no escaping that rule.

I would further argue, of course, and would at trial, that the existence of this agreement is further existence of the ability of these so-called competitors to agree among themselves to avoid the impact --

THE COURT: I did not raise the question with you

of whether or not this agreement itself is something of a restraint of trade or evidence of collusion, but I trust --

MR. OPPERMAN: But assuming a verdict --

THE COURT: -- you come up with that theory.

MR. OPPERMAN: Assuming a verdict, and that was part of the reason, Your Honor, we fought so hard to get it, assuming a verdict, I don't believe this agreement, ah, number one, would affect the plaintiff's ability to collect, nor do I believe that it would be heard for more than 30 seconds by a court to shield one of the losing defendants from paying all or whatever portion would be collected by the plaintiff on assertion, on their assertion that this was contribution.

I think it's, frankly, Your Honor, after -- certainly after the Supreme Court ruling in Radcliffe, I think it's clear beyond argument that contribution will not be allowed, will not be upheld, and in fact the way that those arguments usually came up prior to Radcliffe, such as in National Beauty in the Eighth Circuit, and one of my favorite cases, Corrugated, in the Fifth, which followed Radcliffe, they came to an opposite conclusion, what happened was defendants would amend their complaints to assert a multiplicity of cross complaints for contribution, so the Court would be presented, as it is presented by this agreement, with the prospect of continual multiple lawsuits. Each one suing the

others for their portion of whatever they had to pay or were found liable. Each in turn suing the others on the same theory, each in turn.

THE COURT: That's all right. In this case I have that provided for my by the plaintiffs.

MR. OPPERMAN: Well, Your Honor --

THE COURT: On the basis of now having assumed everybody else's available rights against everyone else, this case has aspects of a merry-go-round, I can chase the horses till I die.

MR. OPPERMAN: I don't think that'll happen, though, for this reason --

THE COURT: Oh, I hope not, Mr. Opperman.

MR. OPPERMAN: And that's probably the answer to that, but in addition to that, it strikes me that the reason that that is not likely in the case of plaintiffs, is we were postulating here exactly what would cause that to happen. That is, an agreement between the nonsettling defendants that prevents settlement. If plaintiffs settle, the Court will never be confronted with the possibility that this, that our group would be pursuing through its associational arguments, these members of the association on those theories, if there were a settlement. But it is exactly that result that is the impediment to settlement by raising something not allowed in public policy, and clearly

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not, that is achieved or attempted to be achieved by this defendant agreement.

THE COURT: All right. Anything further?

MR. OPPERMAN: No, Your Honor --

THE COURT: I know you'd like to make public policy arguments, and I love to hear them, but public policy arguments is a very broad slate upon which I may write, and, ah, for the nonce I think I can -- I will defer those.

MR. OPPERMAN: Thank you, Your Honor.

THE COURT: Okay. Morning, Mr. Montgomery.

MR. MONTGOMERY: Morning, Your Honor.

THE COURT: Mr. Montgomery, this morning you have been struck as if by a light on a road, and realize the wrongness of your client's ways, and you now have decided that it is time for you to chat with Mr. Wildfang, because you know Mr. Opperman is too tough, but you want to cut a separate deal. Can you get out?

MR. MONTGOMERY: Absolutely, Your Honor, and I'm not, my client would not be subject, as Mr. Opperman suggested, to potential liability to share in a judgment ultimately entered, if one should be entered against the remaining defendants in the case.

THE COURT: Please enlighten Mr. Opperman as to why.

MR. MONTGOMERY: Well, the provisions in the

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agreement that relate to the individual settlement are very clear, they require only that -- either one of two things. If I don't give my confreres notice that I intend to do this, that is to say, to speak individually to the plaintiffs, then I must, in connection with the negotiations with the plaintiffs, I must extract from them two agreements.

One is they must agree to make the offer they make to me or the deal they're willing to make with me available to the, all the other defendants for a period of 45 days.

Two, I must, they must agree with me to take out a, ah, a percentage, ah, representing, depending upon the point in time when these negotiations take place, representing the proportionate sales of my client, so as not to put my confreres in greater jeopardy than they are at the moment.

THE COURT: Because of your having settled.

MR. MONTGOMERY: Right.

THE COURT: All right.

MR. MONTGOMERY: That's a matter of price. They may charge me for that. I'll tell them I'm not willing to pay, but we'll negotiate that.

THE COURT: Assuming the most favored nation agreements that they have made thus far, calling those an upstream agreement, you would be putting in a negotiation for a downstream agreement. Whatever happens to us will be

made available to your colleagues and confreres. All [illegible]

In what respect is that in, first of all, if at all, to what extent is this a restraint or an indication of collusive behavior on your part?

MR. MONTGOMERY: Well, I submit that it isn't at all, Your Honor. In the first place, this is an adversarial response to conduct of the plaintiffs. Plaintiffs have chosen a settlement strategy of ever escalating market share dollar amounts for successively settling defendants. They have not made any real effort to approach the defendants as a whole to try to get a global settlement here. Quite the contrary.

From the very beginning after the Court of Appeals decision came down, they made their settlement strategy very clear: You should rush to their door, because if you don't you'll be left, and it will cost you, ultimately the last person left will be charged an exorbitant and completely out of sight cost of settlement.

THE COURT: What a strange and shocking strategy.

MR. MONTGOMERY: Excuse me?

THE COURT: I said what a strange and shocking strategy.

MR. MONTGOMERY: Well, Your Honor, we didn't come running into court and say, Your Honor, you have to regulate this, you have to stop this from happening, this is unfair.

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That was an adversarial choice on their part.

THE COURT: Okay.

MR. MONTGOMERY: That's part of our adversarial system. They've got some law behind them that gives them the leverage to try to achieve that. Our agreement is an adversarial response to their adversarial position. It's an attempt to permit the defendants to do a variety of things and to balance these, the interests that are involved here as far as the defendants are concerned. One, to rationally consider whether to continue to defend this case --

THE COURT: What provision is made, by the way, if at all, for the collapse of that 45-day provision as we approach trial date?

MR. MONTGOMERY: Well, the 45-day provision is not --

THE COURT: I guess what I'm wondering is, is under the terms of the agreement, assuming we go to trial on the 15th of January, are negotiations over on the first of December?

MR. MONTGOMERY: Yes. No, that period shortens. Under the terms of the agreement, that period shortens.

THE COURT: All of a sudden I had the sense there can't possibly be a settlement after the first of December.

MR. MONTGOMERY: I think it goes down to 48 hours.

THE COURT: That's a much better arrangement.

MR. MONTGOMERY: I can't remember precisely because we had different drafts, but I think it may go down to 24 hours at a certain point. So, no, that is not an impediment to this process. But the interests are to give us the opportunity rationally to consider whether to defend this case and to educate ourselves on the facts which we had not had really full discovery prior to the Court of Appeals decision, and we have become educated on the facts.

We are better able now to make the determination, should we go forward, should we settle, how much is this case worth settling for, and also to balance the interests of a global settlement, which would be desirable in the overall, against the interests of individual settlements, and we clearly provided that each defendant, signatory to this agreement, may enter into individual settlements. Indeed, we've, ah --

THE COURT: Let me swing you back. Mr. Opperman casts as the greatest of spectres the risk that you do settle, you do cut a separate deal, and then you have this terrible overhang of what happens if one or more of your colleagues goes to trial, gets slaughtered, and you wind up having to put in an additional chunk, in fact trebling. Does that exist? Does that prospect exist?

MR. MONTGOMERY: No. The only circumstance under which that would exist is if someone were unintelligent enough to settle separately and not obtain from the

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plaintiffs an agreement that this percentage that the agreement provides, ah, is removed from the plaintiffs' remaining claims against the remaining defendants. That is all that you describe would pertain --

THE COURT: Is that in fact, however, a way for that particular defendant to buy itself out of the real penal aspect of the anti-trust laws?

MR. MONTGOMERY: No, I mean --

THE COURT: I mean, by private agreement, basically, can they obviate the Congress' determination of joint and several liability?

MR. MONTGOMERY: No, we're talking about an individual settlement with the plaintiffs. The plaintiffs are going to extract a price, that's going to be a bargain price. It's going to involve all of the factors that Congress has laid upon them as settlement leverage against defendants. And that's going to be a negotiated deal. They presumably won't, unless there's nothing to their case, which is what I'm going to tell them, they presumably won't. umm, permit such a settling defendant to escape those, ah, costs.

THE COURT: All right. To what extent, if at all, does this agreement allow a nonsettlor to veto or pressure you from making your agreement to get out?

MR. MONTGOMERY: In no way at all. The only thing

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that I have to do, umm -- well, the other way to enga individual settlement negotiations is to get a so-called ten-day notice terminating the effect of the provisions that require that any deal that I reach with the plaintiffs must be offered generally to everybody else. If I give that ten-day notice and I wait that ten days, I can speak to them, and I can make a deal with them that they don't have to offer to everyone else, and there's no way that my confreres can stop me from doing that. We can't stop each other from doing that. That's the way the agreement was built to make sure that we each had the right to enter into an individual settlement.

THE COURT: All right. Do you agree with Mr. Opperman that this is ultimately going to be a determination which lies with my sound discretion?

MR. MONTGOMERY: Well, no, we've raised the argument in our brief that the Court has no jurisdiction to consider the validity of this agreement. Their response to that, and we said that they're in effect seeking declaratory judgment. Their response to that is, well, this falls within your power to manage the proceedings, in effect.

THE COURT: Assuming -- I will tell you that I am probably not real excited about your argument. It seems to me as I look at the law on declaratory judgments, I need a motion or a pleading. I got a motion or a pleading, whethe

or not you want to call it, termed a declaratory judgment, and I get to manage these cases pretty tightly, it seems to me. Somebody's got to.

MR. MONTGOMERY: Well, I'll -- excuse me.

THE COURT: But I will let you make the argument, but I will tell you that I have a hard time with the fact that it's exactly a declaratory judgment, but even terming it that, I've certainly got a motion, everybody seems to know what the problem is, we have the document well identified, and everybody seems to have briefed the questions.

MR. MONTGOMERY: Well, I'll stand on the brief as far as declaratory judgment is concerned. I think the cases they rely on, as we pointed out, are cases in which the party, a party to the agreement was challenging the agreement. They're not a party to this agreement, they're not a beneficiary to this agreement.

Secondly, I question the existence of any controversy here. Sure, they've raised a controversy, they say it's a controversy, but there's no real concrete, as I see it, basis for the controversy.

THE COURT: Let me offer -- let me offer a suggestion that I might suspect would come from, ah, that side of the room. How about, these cases are less likely to settle, and therefore we have a possibility of multiplying

litigation or prolonging it, and that represents a controversy in the sense that the republic is interested in getting this case finished up.

MR. MONTGOMERY: Well, I was about to say, I understand Your Honor has management powers, powers to manage the litigation that's before you. I would submit that those management powers should not be exercised to interfere with the adversarial strategies that are developed either by the plaintiffs, and we have, as I say, we haven't asked you to interfere with those and say, well, they can't do that, that's unfair to try to ratchet up every single defendant, leave the last poor fella hangin' out to dry.

And likewise, I submit that you should not exercise those powers to interfere with our attempt to organize our defense, to give us an opportunity to conduct a rational appraisal of the case, a rational participation in pretrial preparation and, if necessary, trial, a reasoned and voluntary approach to settlement, either individual or joint. And plaintiffs, basically, through their coercive tactics, have tried to deprive us of those, so we've fought back, not by coming into the court and asking for the Court's assistance, but by using what is a very --

THE COURT: What could you have asked other than asking me to compel them to try and seek a global settlement? I mean, realistically --

MR. MONTGOMERY: Well --

THE COURT: -- civil and criminal, and in fact in most of the forests that I've ever heard of, the rapacious wolf pack generally trims to pluck off the smallest and the weakest of the deer until they finally are left with one alone which they can outnumber. I do not of course draw an analogy, but I know the poor victims which are arrayed over here without a single defense lawyer, you know, to stand for them, but having touched on that, you know, everybody knows the train pulls out and you get on board, at least that's what the plaintiff says.

MR. MONTGOMERY: And we haven't come in to complain about that. But by the same token, they should not enlist your aid to leave us with our ballies open by the highway.

THE COURT: All right. Geez, you know, this is one of those cases where my heart is broken on both sides. I have these weak little lambs over here, and these poor little defenseless creatures over here. All right.

MR. MONTGOMERY: Let me, in that regard, let me just give you an example of the kind of situation that potentially is involved here. Michigan Mutual is one of the defendants. Their market share, according to our exhibit here, is .01 percent. I think they wrote something like 15 insurance policies, workers comp insurance policies, in the state of Minnesota in the four-year period in litigation

here. They, ah, their CEO's deposition was taken by ... plaintiffs on August 15th, and in that, ah, the answer to a question was given that their surplus, or their net worth is $222 million.

Now, if Michigan Mutual were the last defendant left in this case, and all the other defendants had settled on the basis that the earlier settling defendants have done, namely without taking out their sales, Michigan Mutual would be exposed to liability for all the sales which are within the scope of the plaintiffs' claim. Treble, after trebling, less the amounts of settlements that had been paid by these other defendants.

Now, the plaintiffs' attorney in this deposition took it upon himself to ask the CEO of Michigan Mutual the following question, on page 34: Do you know whether Michigan Mutual has made any determination of whether or not it can withstand a judgment in this case? Answer: No, I do not. Question: Do you know what would happen in the event that the plaintiffs documented a judgment against Michigan Mutual in excess of your surplus?

THE COURT: I bet the word was docketed.

MR. MONTGOMERY: Excuse me?

THE COURT: I bet the word was docketed.

MR. MONTGOMERY: It says documented in the --

THE COURT: That's close enough. Did the question

pass without objection?

MR. MONTGOMERY: No, there's long colloquy. And I think no answer. But the question was asked. And the point is --

THE COURT: The question was implicit in the filing of the lawsuit.

MR. MONTGOMERY: Exactly. But the point is, whether the other defendants had settled or not, even if the other defendants had not settled, the plaintiffs could have plucked Michigan Mutual out of a hat and gone out to collect a judgment against Michigan Mutual alone, and what we're trying to do here is to permit the process to go forward so that the defendants have the opportunity to make a voluntary choice, an informed choice, as to what the value of this lawsuit is. Whether it's worth further defending, whether it's worth settling, whether it has to be tried to conclusion, or whether either individually or jointly we can and should settle it.

THE COURT: Are you familiar with cases where others of my colleagues have permitted such an agreement to stand?

MR. MONTGOMERY: Oh, yes. Oh, yes. They're cited in our brief.

THE COURT: I know that. Have you read both of the cases which are cited by your colleagues suggesting that

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they can't?

MR. MONTGOMERY: Well, the -- there's the one case, the duPont/Plaza case.

THE COURT: Yes.

MR. MONTGOMERY: That's the only one I'm aware of that they cited.

THE COURT: I understand there's another unpublished one.

MR. MONTGOMERY: He did make some reference to --

THE COURT: That just came to me this morning.

MR. MONTGOMERY: In fact they cited a case that upholds an agreement of this sort, the Saber Shipping (phonetic) case, which they cited in their reply brief, although it holds there's no contribution in anti-trust cases, it denies a motion to dismiss a claim for indemnity or contribution. And then we have -- we have quoted and cited the congressional committees, the United States Department of Justice in its amicus brief in the Texas Industries case --

THE COURT: The case didn't ultimately turn on that one, however.

MR. MONTGOMERY: No, that's correct. What I'm saying is there's a large body of literature supporting the validity of sharing agreements, implicitly at least the Manual on Complex Litigation, and indeed --

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THE COURT: The manual is delightful. The says they exist, and they sometimes come up, and than from that one can argue almost anything, and --

MR. MONTGOMERY: Right. But actually the explanation seems to be used as a -- as either a justification or an explanation that contribution isn't needed, because there's -- there is some way, even though it's short of an actual right of cause of action for contribution, there are some ways that defendants have to try to level the playing field. We're not leveling the playing field with this sharing agreement, I certainly don't want the Court to expect that. We don't expect that we've leveled it; we've tried to tilt it back a little bit.

THE COURT: You still labor under the extraordinar difficulties that confront you on a regular basis. All right. Anything else?

MR. MONTGOMERY: Umm, I think not, I had a whole bunch of notes here. I did want to say --

THE COURT: Got any more good ones, you just read them off.

MR. MONTGOMERY: No, I don't plan to just read my notes off, but I did want to say, this agreement is not going to create any further litigation. Any disputes that we have among ourselves will be settled in accordance with the agreement under arbitration proceedings, and that's --

that was part of the point --

THE COURT: That's one of those famous last words, counsel, and you know it, and so do I.

MR. MONTGOMERY: The idea, of course, was to reduce further litigation and reduce costs and make the whole defense litigation more streamlined. Thank you.

THE COURT: Thank you, counsel. The Court has -- first of all, I indicated yesterday, but I want to make it public and put it on the record, that the Court was pleased at the strong and zealous advocacy shown by both sides in their pleadings, and at the same time very pleased that they reflected the finest kind of litigation among temperate, highly competent, and highly qualified lawyers who were representing their clients and maintaining their role as counsel to a court, and I appreciate the quality work and the pleasing aspect of the pleadings. I don't -- I guess that's about enough. I just wanted to tell you I was happy to see it, and I enjoyed it.

I have read and reviewed the pleadings on all sides. As I indicated, I had not received the other items, but they are not matters really before me at this moment. The Court is not entirely unsympathetic with the plaintiffs' arguments, but for the moment the Court will decline the plaintiffs' invitation to void the defense sharing agreement. I may ultimately determine it appropriate to

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issue a written opinion on these matters, but I will tell you what, in my own mind, mitigates against doing so.

Complex litigation got its name and a manual for very good reason. It is complex. It turns on its very specific axis. I can easily conceive of a situation where there were counsel for plaintiffs who lacked the skill and the ardor of those arrayed before me. I recognize of course that in a class action litigation I'm required to make an independent determination of the competence of counsel. I had no difficulty in doing so in this case. I can imagine a situation where an agreement, particular agreement might be so onerous on its terms or so limiting that it might well make reasoned discussion inconceivable, but that would be a specific agreement, and this is a specific agreement, and in my mind the likelihood of this agreement being more than a general model or based on more than a general model is minimal.

I remain at the present time, and there is a temporal aspect to this, I remain at the present time satisfied that the parties are either considering resolutions short of trial or fairly proceeding toward a trial in a case in which they believe they may have no liability, or fairly balancing the risks to them inherent in such liability as they themselves perceive they may have. And on that basis, I do not deem it appropriate at this time to inveigh myself as

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the Court into the reasoned efforts of competent cour....

I have indicated that I regard there as being a temporal aspect to this order, and that means that I guess I will take a look at this, either on my own or on invitation. These cases are kind enough to supply many invitations, but I think I will try to keep an eye on this myself, as I have in the past, and if I am convinced, as I observe things, that my observations have been incorrect, and the parties are not, have built stone walls around themselves such as they are unable to deal with each other, these matters may be revisited.

I can easily imagine drafting an enormously erudite opinion of probably 30 pages which comes down to the fact that in a specific case there are times you ought to get rid of 'em, and in specific cases there are times they ought to be left, and it doesn't seem like there's that much wisdom that I can possibly generate beyond that, and for the moment, I will decline.

On that basis, the motion is denied. For the present.

I am confident that I will have close and convenient relations with counsel. For those of you who have not had the pleasure of appearing in front of me before, and I will leave the pleasure and that quoted, as we approach trial I think you can expect that we may have pretrials on a rather regular basis so that I might be apprised of how things are

10 moving, if in fact they're moving at all, and make sur
this matter is ready for expeditious resolution.
I should ask, about how long do you think it's going to take to try the case? Mr. Montgomery, you may feel free or anyone else on your squad over there.
MR. MONTGOMERY: Well, that's always a hard question to answer with any specificity.
THE COURT: Oh, it's not that hard. I bet you can handle it.
MR. MONTGOMERY: But I think we have to say, we have to start by saying a month. And that's without knowing what to expect from the plaintiffs.
THE COURT: Mr. Opperman, you find the question very difficult?
MR. OPPERMAN: No, I don't, Your Honor. I think from the plaintiffs' point of view, our main case should take about two weeks.
MR. MONTGOMERY: I must say that with six
11 defendants, or is it seven? With the defendants that we have, ah, there will no doubt be individual presentations, and so two weeks might be a little tight, as well as joint presentations. Two weeks might be a little tight for the defense, but I'm not sure it's possible to give any better estimate right now.
THE COURT: Why don't you kind of, for working

purposes, be thinking it'll probably take us about three weeks altogether. Okay? All right. Kind of focus it that way a little bit. Okay.

Well, that is not an order, that's just some things to chat about and think about a little bit. For the moment, the motion is denied. Thank you, counsel.

(Recess.)

CERTIFIED BY: _____
Dawn M. Boadwine, RPR-CM

Exhibit D

UNITED STATES DIS ICT COURT, NORTHERN DISTR T OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable SUSAN GETZENDANNER

Cause No. 80 C 3479 Date October 10, 1984

Title of Cause In re Industrial Gas Antitrust Litigation

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (seperate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

DOCKETED
OCT 12 1984

Reserve space below for notations by minute clerk

Plaintiffs' motion to void defendants' sharing agreement is denied. The court expresses no opinion as to the enforceability of the agreement as among the parties thereto.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.