UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUN MICROSYSTEMS INC.,

Plaintiff,

v.

HYNIX SEMICONDUCTOR INC., et al.,

Defendants.

_____/

No. C 06-1665 PJH

FINAL PRETRIAL ORDER

Pursuant to Rule 16(e) of the Federal Rules of Civil Procedure, this final pretrial order is hereby entered and shall control the course of the trial unless modified by a subsequent order. The joint pretrial statement of the parties is incorporated herein except as modified by the court's ruling on the pretrial motions and objections.

I. MOTION FOR EXCLUSION ORDER AND ADVERSE INFERENCE INSTRUCTION

The Hynix defendants assert that plaintiff should be charged with spoliation of relevant evidence, and they seek an order precluding Sun from presenting such evidence at trial, as well as a corresponding adverse inference instruction to be given to the jury. Having read all the papers submitted and carefully considered the relevant legal authority and the parties' oral arguments, the court hereby DENIES defendants' motion. While it is well-recognized that a federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence (including the ability to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior), sanctions for breach of a duty to preserve evidence are generally imposed where a party has "notice that the destroyed evidence was potentially relevant to [future] litigation" that is

"probable," rather than a mere possibility. See, e.g., Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993); Unigard Security Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363 (9th Cir. 1992). Here, the court finds insufficient evidence to conclude that plaintiff had notice of probable future litigation during the time frame urged by defendants. Thus, no duty to preserve evidence was triggered until, at the earliest, the litigation holds were issued in 2005. As to the scarcity of emails produced after the duty to preserve was triggered, the court furthermore finds defendants' motion too non-specific to support the extraordinary relief they request.

II. MOTION TO SEAL SUN-SAMSUNG SETTLEMENT AGREEMENT

Administrative motion to seal the Sun-Samsung settlement agreement is GRANTED.

III. DAUBERT MOTIONS

Plaintiff:

1) Motion to Exclude Testimony of Charles Weisselberg is GRANTED.

2) Motion to Exclude Testimony of Drs. O'Brien and Cox is DENIED.

3) Motion to Exclude Testimony of Drs. Murphy and Topel is DENIED.

Defendants (collectively):

1) Defendants' Motion to Exclude Testimony of Boris J. Steffen is DENIED.

2) Defendants' Motion to Exclude Testimony of Dr. Robert Marshall is DENIED.

III. MOTIONS IN LIMINE

Plaintiff:

1) Motion to exclude evidence and argument pursuant to Federal Rules of Evidence 401, 402, 403 and 408 is GRANTED in part and DENIED in part. Specifically:

   a. Motion to exclude evidence of Sun's purchases of "legacy" DRAM is DENIED.

   b. Motion to exclude evidence of Sun's qualification process is DENIED.

   c. Motion to exclude evidence of defendants' financial condition and market shares during the conspiracy period is DENIED, with the

understanding that defendants will not employ such evidence in support of a 'ruinous competition' defense.

d. Motion to exclude evidence of Sun's settlements with other defendants and third parties is GRANTED, insofar as such evidence is submitted for liability purposes. All parties, however, are free to make an offer of proof at trial with respect to the introduction of such evidence for purposes other than liability.

2) Motion to exclude evidence and argument pursuant to Federal Rules of Evidence 401, 402, 403, 602, 605, 801 and 802 is GRANTED in part and DENIED in part. Specifically:

a. Motion to exclude evidence of purported "undercharges" during the conspiracy period is DENIED. Although not admissible on the issue of offset, some evidence related to undercharges may be introduced on the issue of impact with a proper limiting instruction to be prepared by the parties.

b. Motion to exclude evidence of Sun's purported failure to mitigate damages is DENIED.

c. Motion to exclude evidence of treble damages and attorney's fees is GRANTED.

d. Motion to exclude evidence of purported "pass-on" of overcharges incurred by Sun to its customers is DENIED on mootness grounds, in view of plaintiff's voluntary dismissal of all state law claims.

e. Motion to exclude evidence of Nanya's non-indictment is DENIED.

f. Motion to exclude evidence of the criminal trial of Gary Swanson is GRANTED.

3) Motion to exclude evidence and argument pursuant to Federal Rules of Civil Procedure 26 and 37, and court orders, is GRANTED in part and DENIED in part. Specifically, the motion to exclude defendants' declarations submitted in support of summary judgment and Daubert motions is

GRANTED, as the declarations are inadmissible. To the extent, however, that the content contained within the declarations otherwise meets the requirements for admissibility and was properly disclosed to plaintiff, the content may come in and the motion is DENIED.

4) Motion to exclude evidence and argument regarding adverse inferences based on Fifth Amendment invocations is DENIED. However, prior to admission of any Fifth Amendment testimony or the granting of any request for an adverse inference based thereon, the parties must comply with the preliminary protocol established by the court in regard to Fifth Amendment testimony, set forth in detail below. The court furthermore defers ruling on the substance of any specific issues raised with respect to Fifth Amendment testimony, until such time as the parties have complied with the preliminary protocol.

Hynix Defendants:

1) Motion to exclude evidence of plea agreements is GRANTED in part and DENIED in part. Specifically:

   a. Motion to exclude evidence of Hynix's plea agreement is DENIED, however, only paragraphs 3-4 of the plea agreement will be admitted.

   b. Motion to exclude evidence of the Hynix employee "carveout" plea agreements is DENIED, although as stated above, only paragraphs 3-4 of the plea agreements will be admissible.

   c. Motion to exclude evidence of Samsung, Infineon and Elpida plea agreements is DENIED. While the plea agreements themselves constitute hearsay, such evidence is admissible pursuant to the catch-all exception stated in Federal Rule of Evidence 807, as the plea agreements contain sufficient indicia of reliability and are relevant to establish the existence of an underlying DRAM conspiracy. However, only those paragraphs of the plea agreements that correspond directly to Samsung, Infineon and Elpida's admissions of conspiratorial

conduct will be admitted. Moreover, in the event such evidence is introduced, a limiting instruction shall issue prohibiting consideration of the evidence for purposes of Hynix's or Nanya's liability for or participation in any such conspiracy.

d. Motion to exclude evidence of Micron's statement of conduct is DENIED, however, only those paragraphs of the statement of conduct that correspond directly to Micron's admissions of conspiratorial conduct will be admitted.

2) Motion to exclude evidence and argument regarding Fifth Amendment invocations is DENIED. However, prior to admission of any Fifth Amendment testimony or the granting of any request for an adverse inference based thereon, the parties must comply with the preliminary protocol established by the court in regard to Fifth Amendment testimony, set forth in detail below. The court furthermore defers ruling on the substance of any specific issues raised with respect to Fifth Amendment testimony, until such time as the parties have complied with the preliminary protocol.

3) Motion to exclude evidence of various collateral proceedings and other investigations, including evidence of (a) Department of Justice investigations and litigation related to SRAM and Flash Memory; (b) the Gary Swanson trial; and (c) other lawsuits and cartels, is GRANTED.

4) Motion to exclude evidence of (a) the incarceration and length of sentence served by the individual Hynix employees who pled guilty to price-fixing; (b) the post-incarceration employment and salary changes of those employees; (c) the employees' employment status and compensation paid during or after their incarceration; and (d) whether Hynix paid any fines, criminal penalties, or legal fees as a result of the employees' pleas, is DENIED, as such evidence is relevant to the question of bias. However, plaintiff cannot solicit information as to the length of incarceration, or as to the amount of any fines, penalties or legal fees paid.

5) Motion to exclude plaintiff's expert, Dr. Halbert White, from offering any opinion or testimony as to causation at trial is GRANTED, although some degree of overlap between Dr. White's damages opinion and causation issues is permissible. To the extent defendants also seek to preclude plaintiff from referring to the time periods used by Dr. White in his expert report as the "Plea Period" and "Conspiracy Period," the motion is DENIED.

Nanya Defendants:

1) Motion to exclude evidence and argument regarding Fifth Amendment invocations is DENIED. However, prior to admission of any Fifth Amendment testimony or the granting of any request for an adverse inference based thereon, the parties must comply with the preliminary protocol established by the court in regard to Fifth Amendment testimony, set forth in detail below. The court furthermore defers ruling on the substance of any specific issues raised with respect to Fifth Amendment testimony, until such time as the parties have complied with the preliminary protocol.

2) Motion to exclude evidence and argument that defendants conspired to reduce output of DRAM during the relevant time period is DENIED.

3) Motion to exclude evidence or argument of (a) Elpida's and Samsung's admissions regarding participation in bid-rigging activities in connection with Sun's on-line auctions; and (b) Hynix's or Nanya's participation in such bid-rigging activities is GRANTED, as the prejudicial nature of the evidence outweighs its probative value pursuant to Federal Rule of Evidence 403.

4) Motion to exclude evidence or argument regarding foreign purchases of DRAM or DRAM-containing products by plaintiff's foreign subsidiaries has been and is WITHDRAWN.

5) Motion to exclude expert report and testimony of Dr. Francis X. Diebold is DENIED.

IV. FIFTH AMENDMENT TESTIMONY/CO-CONSPIRATOR PROTOCOL

Plaintiff seeks to rely at trial on certain Fifth Amendment invocations made by defendants' employees and witnesses, and intends to seek a corresponding request for an adverse inference instruction based on those invocations. As the court had occasion to recently reiterate, adverse inferences based on a party's invocation of the Fifth Amendment are permissible in certain situations. Baxter v. Palmigiano, 425 U.S. 308 (1976). Adverse inferences may only be drawn, however, when independent evidence exists of the fact to which the party refuses to answer. See, e.g., LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391 (7th Cir.1995); Peiffer v. Lebanon Sch. Dist., 848 F.2d 44, 46 (3d Cir.1988). Thus, an adverse inference can be drawn when silence is countered by independent evidence of the fact being questioned, but that same inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint. See Nat'l Acceptance Co. v. Bathalter, 705 F.2d 924, 930 (7th Cir.1983). In addition, adverse inferences should be drawn where there is a "substantial need" for the information, and there is no other way of obtaining the information. See Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1265 (9th Cir. 2000).

In order to streamline the process whereby plaintiff intends to satisfy the foregoing foundational inquiry, and to promote the efficient resolution of this issue in advance of its presentation to the jury, the court adopts the following preliminary protocol to be met at trial: to the extent plaintiff seeks to introduce the Fifth Amendment testimony of any witness at trial and request an adverse inference thereupon, plaintiff must preliminarily (a) identify the witness; (b) identify each precise statement in the witness' testimony from which plaintiff seeks an adverse inference (on a one question, one answer basis); (c) state the relevance of each statement to the issues in the case; and (d) describe plaintiff's substantial need for the introduction of the statement and corresponding adverse inference. Plaintiff must also state the mechanism through which plaintiff proposes to introduce the testimony in question (e.g., live testimony, videotaped deposition testimony). Plaintiff shall submit the foregoing information, organized in chart form, to the court and opposing parties no later than 4:00 p.m. on the day prior to introduction of the Fifth Amendment testimony from which plaintiff

seeks the adverse inference. Plaintiff shall keep in mind that the court will not allow cumulative testimony.

Once plaintiff has complied with this preliminary protocol, the court will hold a hearing at 8:00 a.m. the following day (i.e., the same day on which plaintiff seeks to introduce the Fifth Amendment testimony for which they submitted their preliminary showing) in order to hear all parties' arguments as to the admissibility of the evidence for which plaintiff seeks an adverse inference. The court will immediately thereafter, and prior to the start of trial, issue its ruling as to admissibility.

Finally, although not raised as a separate issue via the parties' in limine motions, the court is mindful of the preliminary attention that must be paid to the admission of any co-conspirator statements by a party. Under Bourjaily v. United States, 483 U.S. 171 (1987), "an accused's knowledge of and participation in an alleged conspiracy are preliminary facts that must be established before extra-judicial statements of a co-conspirator can be introduced into evidence." See also United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 458-59 (9th Cir. 1990)(applying Bourjaily standards to civil antitrust case). Thus, to the extent that any party wishes to rely on co-conspirator statements at trial, the court establishes the following preliminary protocol for the admission of any such statements:

No later than 4:00 p.m. on the business day prior to calling the witness(es) seeking to introduce such statement(s) at trial, the party seeking to introduce such statement(s) must deliver to chambers and to opposing parties two copies of a chart and any related materials delineating: (1) the identity of the testifying witness; (2) a statement describing the witness; (3) a summary of the evidence showing that the witness knew about and participated in the conspiracy; (4) the emails to be introduced via that witness, identifying within the email the specific co-conspirator statements to be introduced via that witness; (5) the identity of the declarant of each specific co-conspirator statement; and (6) a summary of the evidence showing that each declarant of the co-conspirator statement(s) knew about and participated in the conspiracy. The court will hear all arguments regarding the introduction of co-conspirator statements the following day prior to trial (in conjunction with

the Fifth Amendment testimony protocol). While the court will issue a ruling as to the evidentiary admissibility of co-conspirator statements prior to trial, however, the court will reserve any ruling as to whether a statement was made "in furtherance" of a conspiracy until after the statement has been introduced at trial.

V. BIFURCATION REQUEST

The Nanya defendants' request to bifurcate the trial is DENIED, as defendants have not established that bifurcation is warranted.

VI. WITNESSES

No additional witnesses may be added to the witness lists of either party. The parties shall follow this court's Trial Rules with respect to notifying each other of which witnesses will be called each day.

VII. EXHIBITS

The parties shall stipulate to the admissibility of exhibits, where possible. In addition, the parties shall meet and confer about the process to be used to facilitate the use of exhibits by the court and the jury, utilizing the same audio-visual service if possible. With respect to all trial exhibits for which sealing and some corresponding action on the part of the court (i.e., closing the courtroom) is requested, the parties shall file a request to seal identifying the specific trial exhibits sought to be filed under seal, and the compelling reasons that warrant the filing or submission of such material under seal. The parties shall submit their request with respect to their own exhibits no later than **May 25, 2009**, although they may submit a sealing request pertaining to third party documents no later than **June 1, 2009**.

In addition, with respect to those exhibits that are the subject of pending motions to seal filed in connection with the parties' earlier motions and requests, and in order to assist the court in adjudicating all outstanding matters on the docket, the parties are instructed to submit no later than **May 25, 2009** a joint request that identifies the specific exhibits previously requested to be filed under seal (along with corresponding docket number) and for which sealing continues to be requested, along with a similar statement establishing the compelling reasons that warrant sealing.

VIII. DISCOVERY EXCERPTS

If depositions are used in lieu of personal appearances by witnesses, and provided the requisite showing has been made, counsel shall re-enact the deposition rather than simply read it into the record. Deposition transcripts will not be given to the jury to read. Video taped depositions may be presented to the jury. The parties must provide the equipment.

IX. VOIR DIRE

The parties may submit a revised jury questionnaire containing no more than 40 questions no later than **June 3, 2009.** In the absence of a suitable questionnaire, the court will incorporate appropriate questions from the proposed questionnaire into its own voir dire of the panel.

X. JURY INSTRUCTIONS

The parties are responsible for case jury instructions, as well as their own limiting instructions. The parties must jointly submit, no later than **June 3, 2009**, a revised joint set of jury instructions. The court will resolve no more than 15 disputed jury instructions, 5 per party.

XI. VERDICT FORMS

A revised joint verdict form must be submitted by **June 3, 2009**.

XII. TRIAL SCHEDULE AND TIME LIMITS

Trial will take place over 4 weeks on Monday, Tuesday, Thursday and Friday, from 8:30 a.m to 1:30 p.m. Plaintiff will be permitted 27 hours trial time and each defendant will be permitted 20 hours trial time, excluding jury selection and closing argument.

IT IS SO ORDERED.

Dated: May 20, 2009

PHYLLIS J. HAMILTON
United States District Judge