LAW OFFICES
COTCHETT, PITRE & McCARTHY
SAN FRANCISCO AIRPORT OFFICE CENTER
840 MALCOLM ROAD
BURLINGAME, CALIFORNIA 94010
TELEPHONE (650) 697-6000
FAX (650) 697-0577

ZELLE HOFMANN
ZELLE HOFMANN VOELBEL & MASON LLP
44 MONTGOMERY STREET - SUITE 3400
SAN FRANCISCO, CALIFORNIA 94104
415-693-0700 MAIN 415-693-0770 FAX

July 6, 2009

VIA ECF

Honorable Joseph C. Spero
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: ***In re Flash Memory Antitrust Litigation*** (Case No. C07-00086 SBA-JCS)

Dear Judge Spero:

The Indirect-Purchaser Plaintiffs ("Indirects") and Defendants (collectively, "the Parties") submit this joint letter pursuant to Your Honor's Orders dated June 12 and 26, 2009, to provide the Parties' disputes and respective positions regarding the following matter: whether and to what extent Defendants should be required to produce transactional data relating to non-United States sales of NAND Flash chips and products containing NAND Flash memory. The Indirects also seek to address in this letter Defendants' production of witnesses for Rule 30(b)(6) depositions before the July 21st deadline to move for class certification. Defendants believe that any request that the Court address this second topic is premature for the reasons set forth in their respective section.

I. Indirect-Purchaser Plaintiffs' Position

The Indirects are forced to file this letter brief because: (1) Defendants refuse to produce any non-U.S. transactional sales data,[1] and yet have failed to provide any detail as to how this data is maintained or why it would be difficult to gather, effectively stalling any real negotiation efforts; and (2) Defendants refuse to produce, prior to class certification, Rule 30(b)(6) deposition witnesses, despite the fact that the Indirects have significantly narrowed the notices

[1] Request No. 4 of the Indirects' Second Set of Requests for Production, served on June 8, 2009, seeks documents reflecting all sales (in transaction-level detail) of flash memory chips and products, regardless of geographic location.

down to four topics.[2] Defendants' failure to support their vague argument of burden in connection with the document requests is inappropriate, and has wasted time. With respect to the Rule 30(b)(6) depositions, the Indirects' good-faith efforts to substantially narrow and limit the scope of topics has been met with stonewalling. Accordingly, Defendants should be ordered to produce the requested non-U.S. transactional sales data in full—without limitation; and, the U.S.-based Defendants should be ordered to produce one or more Rule 30(b)(6) witnesses to testify on the topics of "customer pricing" and "pass through" before July 21st.

A. Defendants Have Stalled the Indirects' Attempts to Negotiate Agreements

For non-U.S. transactional sales data, this Court ordered Defendants to take the two weeks following the June 12th hearing to "get further in depth" (June 12, 2009 Hr'g Tr. at 30:1) and give the issue a "more fulsome treatment" (*id*. at 30:4).[3] Defendants did no such thing. When the parties met and conferred on June 24th, Defendants simply repeated their bare objection to producing non-U.S. transactional sales data, without further support or even an explanation of the state of their non-U.S. data sources. This foreclosed the Indirects from having

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[2] The Indirect Purchaser Plaintiffs' Notices of 30(b)(6) Depositions were served on June 17, 2009. Following the Indirects' efforts to pare these down to only what is most important prior to class certification, they limited the schedule to the following four discrete pricing and pass-through topics:

- Your polices and practices for setting the price of your NAND FLASH MEMORY and NAND FLASH MEMORY PRODUCTS (including, but not limited to, sales to affiliated entities and other defendants in this litigation) during the Relevant Period, including your consideration of any formulas, factors, or guidelines, list prices, negotiated prices, spot market prices, contract prices, classes of trade, distribution channels, discounts or rebates as a basis for setting prices, and the identity and location of documents that relate to the matters specified in this topic.
- The process by which you negotiated, entered into, approved or ratified sales or purchase contracts for NAND FLASH MEMORY and NAND FLASH MEMORY PRODUCTS (including, but not limited to, sales to affiliated entities and other defendants in this litigation) during the Relevant Period, including your policies and practices regarding the negotiation of terms and conditions of such sales contracts, your use of standardized sales or purchase contracts, and the identity, and location of documents that relate to the matters specified in this topic.
- The relationship between the price of NAND FLASH MEMORY sold by you and the price of NAND FLASH MEMORY PRODUCTS sold by you, your affiliates, or any other entity, including, but not limited to: (i) the percentage of the total cost of the NAND FLASH MEMORY PRODUCTS made up by the NAND FLASH MEMORY; and (ii) the effect that a change in the price of the NAND FLASH MEMORY had on the price of the NAND FLASH MEMORY PRODUCTS.
- The extent to which the prices charged for NAND FLASH MEMORY and NAND FLASH MEMORY PRODUCTS were passed on through the distribution chain by you, your affiliates, or any other entity to the final consumer of NAND FLASH MEMORY or NAND FLASH MEMORY PRODUCTS.

[3] In response, defense counsel assured the Court and the Indirects that, "by then [June 24th] we will have more information about how difficult it will be to get the other data [non-U.S. transactional data] that the plaintiffs are asking for." June 12, 2009 Hr'g Tr. at 30:12-14.

any meaningful discussion with the Defendants about limitations on the production, such as whether to accept a narrower production or aggregated data. In the days following the meet and confer, no Defendant followed up with additional information. When the Indirects raised with the Court at the June 26th telephonic hearing that they intended to file a letter brief that day on this subject, defense counsel represented to the Court that they would use the additional week of the Court's recess to try to reach an agreement with the Indirects. Despite the Indirects' written invitations of June 29th and 30th to continue to discuss production of non-U.S. data, not a single Defendant responded. Even within an expedited discovery schedule, Defendants have successfully stalled any production responsive to this request.

The Indirects served Rule 30(b)(6) deposition notices on class issues in the week following the June 12th hearing, in order to take such depositions prior to class certification.[4] Upon serving the notices on June 17th, the Indirects requested an immediate in-person meet and confer to discuss possible agreements in response to these notices—including exploring which local Defendant companies had personnel available to testify on any of the particular topics. Defendants agreed to meet the following week on June 24th. Before hearing from the Defendants, the Indirects further narrowed the notices by topic and Defendants, stating they would only seek depositions at this time of the U.S.-based Defendants—several of which are located in the Bay Area. Despite their agreement to conduct a meaningful meet and confer, Defendants were not prepared to do so. They provided no information on their local offices or whether certain individuals were available to testify on any of the requested topics. Instead, they demanded that the Indirects further limit the scope, which the Indirects did the following day, seeking only four topics. No Defendant responded that week to the Indirects' proposal. The Indirects put Defendants on notice that they would raise this issue with the Court by letter brief on July 1. When the brief for non-U.S. data was continued to July 6, the Indirects told Defendants they would raise this issue at that same time.[5]

B. The Non-U.S. Transactional Sales Data and Limited 30(b)(6) Testimony Is Relevant to Common Impact and Pass-Through on Class Certification

On July 21st, the Indirects will move to certify damages classes under the antitrust, unfair competition, and unjust enrichment laws of 20 states for class members' indirect purchases of

[4] Defendants have said they will argue that the Indirects are somehow foreclosed from pursuing this discovery due to the statement by Mr. Simon at the June 12th hearing that depositions other than the named plaintiffs would "probably" not go forward before July 21st. June 12, 2009 Hr'g Tr. at 8:02. This lone, tentative statement by the Interim Co-Lead Counsel for the Direct-Purchaser Plaintiffs is an inadequate basis to argue foreclosure, especially in light of the fact that Defendants were properly served 30(b)(6) notices within three business days of the hearing.

[5] Defendants have indicated that they view this dispute as not yet "ripe," per the Court's Standing Orders. The Indirects have complied with these Orders by requesting the June 24th in-person meeting, which Defendants agreed to without requiring a 10-day notice period. Despite the in-person meet and confer and the Indirects' continuous urging to discuss their limited proposal with Defendants, no Defendant has shown it is prepared to schedule a deposition under this expedited schedule.

NAND flash memory. These claims are based on allegations of a global conspiracy that targeted and affected the U.S. market. The Indirects bought flash memory finished products in the U.S., many of which were manufactured abroad. The Indirects have the right to prove their case, and demonstrate the Rule 23 requirements, with economic analyses that start with the prices charged by Defendant-manufacturers and finish with the prices paid by the Indirects for finished products in the U.S. The Defendants' global sales data is highly relevant because it is the first place where impact originates and would add value to demonstrating common impact to direct purchasers, and pass-through and common impact to indirect purchasers.

Likewise, deposition testimony that explains the pricing structures of the Defendants and knowledge or awareness of pass-through is highly relevant to class certification. The Indirects seek testimony from the Defendants describing their pricing mechanisms so that they may better understand how pricing decisions were made and how they were implemented. As in all cases of this kind, the Indirects will analyze such pricing mechanisms and how they affected the Indirects. Additionally, the Indirects will test whether pass-through of an alleged overcharge occurs within this market and can be demonstrated with common evidence. Thus, testimony from each Defendant regarding these topics is appropriate in advance of class certification.

C. The Case Law Supports Discovery of the Requested Data and Deposition Testimony

Information about activity in foreign markets is "relevant to show the breadth of the conspiracy, the role that each defendant's executives played in implementing, expanding, enforcing and concealing the conspiracy, and how the conspiracy was maintained for the length of time alleged." *In re Vitamins Antitrust Litig.*, 2001 WL 1049433 at *11 (D.D.C. June 20, 2001) (overruling Special Master and ordering production of "transactional and financial data" relevant to the conspiracy without geographic limitation).[6]

Significantly, an order to compel defendant-manufactures of TFT-LCD flat screens was recently endorsed in this district, in a case much like this one, alleging an international price-fixing conspiracy. *See Order Clarifying Discovery Limits Allowed Under Court's Stay Order* (Dkt. # 618) (May 15, 2008) in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M-07-1827-SI (N.D. Cal.). The *LCDs* court ordered the production of world-wide transactional data prior to class certification, affirming that:

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[6] *See also In re Plastics Additives Antitrust Litig*., 2004 WL 2743591, at *14 (E.D. Pa. Nov. 29, 2004) (ordering production to U.S. plaintiffs of all documents produced to foreign antitrust enforcement authorities, regardless of whether they relate to U.S. markets); *In re Intel. Corp. Microprocessor Antitrust Litig*., 2007 WL 137152, at *9 (D. Del. Jan. 12, 2007) (compelling discovery of defendant's conduct in foreign markets where foreign conduct was also relevant to plaintiff's domestic claims; court noted that while FTAIA limits certain foreign conduct from being actionable under the Sherman Act, it does not prohibit the discovery of information that is related to plaintiffs' domestic claims); *Smithkline Beecham Corp. v. Apotex Corp*., 2006 WL 279073, at *3 (E.D. Pa. Jan. 31, 2006) ("The fact that the United States is the relevant market in [a] case does not necessarily limit discovery to the United States") (quoting *United States v. Dentsply Inter'l, Inc*., 2000 U.S. Dist. LEXIS 6925, *17 (D. Del. May 10, 2000).

> The weight of authority, including from the United States Supreme Court, is that Defendants should produce transactional data for TFT-LCD sales outside the U.S. for the following reasons:
>
> a) the information is relevant to both claims and damages;
> b) Discovery should be liberally granted in anti-trust cases;
> c) The FTAIA Domestic Injury exception applies where the conduct has a direct, substantial and reasonably foreseeable effect on domestic commerce.
>
> (*See id.* at p. 2)

Defendants' failure to engage in meaningful meet and confer regarding Rule 30(b)(6) depositions presents an even more clear-cut violation of the discovery rules. Rule 37(a)(3)(B)(ii) provides for court-ordered corporate testimony where the corporate party fails to designate a witness under Rule 30(b)(6). *See also Commodity Futures Trading Com'n v. Noble Metals Intern.*, 67 F.3d 766, 770 (9th Cir. 1995) (granting motion to compel and sanctions against corporation that made no "good faith effort" to produce 30(b)(6) witnesses when such witnesses were readily available).

D. FTAIA's Potential Bar to Federal Antitrust Damages Does Not Affect the Indirects' Right to Relevant Discovery on State-Law Damages Claims

Although the Indirects' state-law damages claims arise out of the U.S. market, the discovery that is relevant to those claims is by no means limited to the geographic boundaries of the U.S. The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, does not change this fact. While a full discussion of FTAIA-related defenses that Defendants may choose to mount is not presently at issue, the Indirects note that FTAIA's scope is limited in nature. The FTAIA does not preempt or modify state antitrust and unfair competition laws, which, particularly in the wake of *Illinois Brick*-repealer statutes, allow a plaintiff to recover for anticompetitive conduct, including interstate and foreign anticompetitive conduct. Indeed, the history surrounding the enactment of FTAIA indicates that it was merely intended to establish a uniform standard of the domestic effects necessary to trigger the jurisdiction of the federal antitrust laws. *See, e.g., Amarel v. Connell*, 202 Cal. App. 3d 137, 149 (1988) ("The bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist or to the extraterritorial pursuit of evidence in appropriate cases."). Absent a clear expression to the contrary, it must be presumed that Congress did not intend to displace state law. *Id.*

Even if the Court, at the appropriate juncture, chooses to look to FTAIA in determining the reach of the state-law damages claims at issue, the Indirects' complaint demonstrates that these claims fall within either the "import commerce" or "domestic injury" exceptions.[7] Pursuant to the import exception to FTAIA, courts have permitted damage claims for violating the Sherman Act where the defendants directly import price-fixed foreign products into the United States or where defendants' anticompetitive conduct is directed at the United States

[7] *See, e.g.*, Indirect-Purchaser Plaintiffs' First Amended Consolidated Class Action Complaint at ¶ 2.

import market. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n. Inc*., 227 F.3d 62, 71-72 (3d Cir. 2000); *Turicentro, S.A. v. American Airlines, Inc*., 303 F.3d 293, 303 (3d Cir. 2002). In the case at bar, the Indirects allege that Defendants participated in a global conspiracy, the purpose and effect of which was to cause the price of flash memory chips and products that were imported into the U.S. to be artificially inflated. Because Defendants' conduct was directed at the U.S. import market, the Indirects are not precluded from seeking damages for the foreign products imported into the U.S.

Additionally, the Indirects' allegations also come within the ambit of the "domestic-injury exception" to the FTAIA, which allows courts to exercise jurisdiction under the Sherman Act over foreign transactions upon a showing that: (1) defendants' conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce; and, (2) the domestic effect of defendants' foreign conduct gives rise to a Sherman Act claim. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004) (citing 15 U.S.C. § 6a). Here, the Indirects allege that Defendants' foreign price-fixing conduct resulted in higher U.S. prices for flash memory chips and products. Further, as a direct result of Defendants' foreign price-fixing conduct, the Indirects have paid artificially inflated prices on flash memory chips and products. Therefore, Defendants' conduct clearly falls within the reach of the Sherman Act. *See Empagran*, 417 F.3d at 1271 ("a direct, causal relationship, that is, proximate causation," between conduct's domestic effect and plaintiff's claim satisfies the second prong of the domestic injury exception).

E. Defendants Have Not Demonstrated Undue Burden

Under Rule 26 of the Federal Rules of Civil Procedure, it is a responding party's obligation to demonstrate that producing the requested discovery is an undue burden. *See, e.g.*, William W Schwarzer, *et al*., CIVIL PROCEDURE BEFORE TRIAL, [11: 1855] (Rutter Group 2008) ("[T]he burden is on the responding party to show that the electronically-stored information is 'not reasonably accessible because of undue burden or cost.'") (quoting Fed. R. Civ. P.26 (b)(2)(B)). At a minimum, a defendant claiming burden must "identify, by category or type, the sources containing potentially responsive information" that it claims are not "reasonably accessible." *Id.* at [11:1854.5] (citing Adv. Comm. Note to 2006 Amendment to Fed. R. Civ. P. 26(b)(2)(B)). "Enough detail should be provided to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." *Id*. These common-sense rules were developed to prevent responding parties from asserting "undue burden" where none exists. *See Waddell & Reed Financial, Inc. v. Torchmark Corp.*, 222 F.R.D. 450, 454 (D.Kan. 2004).

Furthermore, even assuming Defendants have demonstrated burden (which they have not) the Court may nonetheless order discovery from such sources if the requesting party shows good cause. *See* Fed. R. Civ. P. 26(b)(2). As discussed above, the data and deposition testimony at issue is highly relevant to the Indirects' claims. When dealing with discovery of such crucial and basic significance to a case, courts have held that the information sought is discoverable even if its production is burdensome and expensive. *See, e.g., In re Folding Carton Antitrust Litig.*, 83 F.R.D. 260, 265 (D.C. Ill 1979) (stating that "the information sought by the

interrogatories about purchasing practices is relevant to proof of conspiracy, impact, and class certification. Because the interrogatories themselves are relevant, the fact that answers to them will be burdensome and expensive 'is not in itself a reason for refusing to order discovery which is otherwise appropriate.'") (quoting 4A Moore's Federal Practice § 34.19(2), at 34-106); *see also W.E. Aubuchon Co., Inc. v. BeneFirst*, LLC, 245 F.R.D. 38, 43-45 (D. Ma. 2007); *Vitamins*, 2001 WL 1049433, at *13.

The Indirects have stood ready for nearly one month to meet and confer regarding the scope, timing, and method of production of non-U.S. transactional sales data, yet Defendants have failed to provide any information to allow for a meaningful negotiation. In fact, even with this Court's June 12th Order that they attempt to better understand their non-U.S. sales data, not one Defendant has been prepared to answer any one of the following questions:

- what database(s) would be queried to obtain summary or transactional data;
- whether such database(s) were maintained by the parent corporation or a foreign subsidiary;
- how the various non-U.S. databases are inter-connected (i.e., whether database maps are available);
- whether such data would be limited to flash memory chips only or chips and products;
- what percentage of world-wide sales would be contained in a data pull from the parent corporation's database;
- what search parameters would be used to obtain the summary or transactional data;
- whether their U.S. data productions (provided on June 26th) were queried from a parent corporation database by means of "U.S.-only" filters; or
- why aggregated data is easier to collect than disaggregated transactional data.

The Indirects left the June 24th meet and confer having only heard Hynix make the exact same tentative offer to provide "aggregated" data that it had on June 12th,[8] and Toshiba and Renesas/Hitachi make some representations to seeing if their parent companies maintained sales databases that could potentially be queried on the transactional level. Despite the Indirects' requests, no Defendant followed up with additional information. Samsung and SanDisk opted to remain silent throughout the entire 24-day negotiation period.

[8] Indeed, it is difficult to believe that Defendants will not challenge the adequacy of the Indirects' experts if they do not take non-U.S. transactional information into account in providing their opinions about the flash memory market. This point is illustrated by recent activity in *In Re Static Random Access Memory (SRAM) Antitrust Litig*. There, the *SRAM* defendants (several of whom overlap as Defendants here) were allowed—over plaintiffs' objections—to produce only "aggregated" or "summary" non-U.S. sales data to the indirect-purchaser plaintiffs. Yet, in a meritless *Daubert* motion filed by the *SRAM* defendants, the *SRAM* indirect-purchaser plaintiffs' expert economists are faulted for not having sufficient data to run their econometric models. *See Defs' Not. of Mot. and Mot. to Exclude the Expert Opinions of Mark Dwyer [sic] and Michael J. Harris [sic]* (Dkt. # 706) (May 7, 2009) in *In re Static Random Access Memory Antitrust Litig.*, No. M:07-cv-01819-CW, at 10.

Defendants have likewise failed to provide the Indirects with any details as to why a very limited deposition of a U.S. entity would cause them undue burden. The Indirects have greatly limited the scope of their 30(b)(6) deposition notices by topic and location. They have attempted multiple times—at the June 24th in-person meet and confer, through e-mails, and individual telephone conferences—to discuss with Defendants what options are available to them so they may reach an agreement. Defendants, however, continue to resist producing anyone.

F. Conclusion

Defendants are, in essence, asking the Indirects to negotiate a non-U.S. data production in a total vacuum. They have had 24 days to "get further in depth" on this issue, as they represented to the Court that they would, but instead have failed to do any such thing. Nothing in the federal rules nor in the relevant caselaw requires the Indirects to make such uninformed decisions. Defendants have had ample opportunity to establish what burden may be associated with the production of the requested data, and to share such information with the Indirects in order to explore potential areas for compromise. Because Defendants have refused to avail themselves of these opportunities, this Court should order that they produce the requested data immediately and in full.

Defendants have stalled and ignored the Indirects' repeated requests for a handful of extremely-limited, mostly-local 30(b)(6) depositions. Despite Defendants' successful efforts to delay this discovery thus far, in total disregard to the shortened schedule the parties are all working under, this Court should order each U.S.-based Defendant to produce one or more witnesses to testify within the next ten days on the four topics previously identified.

II. Defendants' Position

This Court's June 24, 2009 Order required the parties to meet and confer on the issue of whether and to what extent Defendants should be required to produce transactional data relating to non-United States sales of NAND Flash chips and products containing NAND Flash memory. After failing to reach an agreement in this meet and confer, and consistent with this Court's Order, the Parties agreed to submit a joint letter to the Court on this issue.

Unrelated to the Court's June 24, 2009 Order, Indirect Plaintiffs have recently served notices of all Defendants' depositions under Fed. R. Civ. P. 30(b)(6), and have sought to take these Rule 30(b)(6) depositions on an expedited basis during the class certification briefing. Even though Indirect Plaintiffs have failed to abide by the Court's meet and confer requirements, they now seek to add this issue to the joint letter required by the Court's June 24, 2009 Order. Defendants address Indirect Plaintiffs' failure to abide by the Court's meet and confer procedures and, for parity of presentation, the numerous problems with Indirect Plaintiffs' demand for expedited depositions below.

A. The Foreign Transactional Data Sought By Indirect Plaintiffs is Irrelevant

Indirect Plaintiffs[9] are not entitled to Defendants' foreign sales data unless they can show such data are "relevant to any party's claim or defense" or "reasonably calculated to lead to the discovery of admissible evidence." Here, the Parties' agreed approach to discovery, which is reflected in this Court's June 24 Order, has been to focus efforts on pursuing discovery that is necessary for the class certification motions scheduled to be filed on July 21, 2009 – just fifteen days away – and the oppositions to follow shortly after that date. Accordingly, the narrow question at this stage is whether Defendants' foreign transactional sales data is relevant to class certification issues. The short answer is that it is not, for the reasons discussed below.

1. Indirect Plaintiffs Do Not Seek Damages Relating to Foreign Sales of NAND Flash

Indirect Plaintiffs have defined their class as "persons and entities currently residing in the United States that . . . ***purchased in the United States***, NAND Flash Memory indirectly from the Defendants for their own use and not for resale." (Consolidated Indirect Purchaser Class Action Complaint, ¶ 164) (emphasis added). Because no Plaintiff is seeking to recover for purchases of Flash or Flash-containing products outside the United States, data on non-U.S. sales is irrelevant to their effort to prove injury or damages.

Further, Defendants have already produced transactional data relating to their sales of NAND Flash to the United States and data reflecting their sales of NAND Flash shipped to outside of the United States but billed to customers in the U.S. Indirect Plaintiffs now seek transactional data relating to entirely foreign sales by Defendants. They seek these data despite the fact that their purported class, as they have defined it, is not seeking to recover damages for the purchase of NAND Flash or products containing NAND Flash outside of the United States. The data the Indirect Plaintiffs seek is therefore irrelevant.

2. Plaintiffs Have Not Received Or Needed Foreign Sales Data for the *DRAM* and *SRAM* Class Certification Motions

It was obvious to earlier courts that this data was irrelevant because plaintiffs did not receive it in the *DRAM* or *SRAM* class actions. In *SRAM*, Judge Smith received two sets of briefs and held two hearings on the issue of whether plaintiffs were entitled to Defendants' foreign transactional data in advance of plaintiffs' class certification motions. Judge Smith denied plaintiffs' request for transaction-level data while adopting Defendants' proposal of producing only aggregated foreign sales data. (Exhibit AA). Judge Smith's order was issued after exhaustive briefing by the parties regarding the jurisdictional limitations imposed by the Foreign Trade Antitrust Improvement Act ("FTAIA") on the scope of plaintiffs' claims. (Exhibit BB).

[9] During the June 26, 2009 telephonic hearing before Your Honor, Direct Purchaser Plaintiffs stated that the issue of whether Defendants should be required to produce foreign transactional data is being raised only by the Indirect Purchaser Plaintiffs. (6/26 Tr. at 27:12-13).

The FTAIA limits the extraterritorial reach of the Sherman Act and sets forth the general rule that foreign commerce is excluded from the scope of the Sherman Act.[10]

Following the same course taken in the *SRAM* litigation, Defendants here offered to provide Indirect Plaintiffs with aggregate foreign sales data, to the extent such data was available in readily accessible databases of the Defendants. Indirect Plaintiffs rejected this offer.

During meet and confer in this case, Indirect Plaintiffs have attempted to deflect attention from the *DRAM* and *SRAM* cases and instead rely on the *LCD* class action in which, according to Indirect Plaintiffs, they received foreign transactional data from certain Defendants. Indirect Plaintiffs' reliance on *LCD* – and attempt to ignore the *DRAM* and *SRAM* cases – is peculiar considering that Indirect Plaintiffs' Complaint is rife with comparisons of the NAND Flash Memory industry to the SRAM and DRAM industries. *See* Indirect Purchaser Plaintiffs' First Amended Complaint [Docket # 481] ¶ 81 (referring to SRAM and DRAM as "closely-related semiconductor industries to that alleged herein"); ¶ 82 (referring to DRAM and SRAM as "related markets"); ¶ 104 (alleging that the NAND Flash conspiracy was "intertwined" with DRAM and SRAM). In contrast, Indirect Plaintiffs do not allege a single similarity the LCD market.

Defendants believe transaction-level data relating to foreign sales are unnecessary for class certification in this case for the same reasons present in the *DRAM* and *SRAM* actions. Indirect Plaintiffs have not explained what is unique about the NAND Flash market that would require a different result.

3. Defendants' Foreign Transactional Data Would Serve No Purpose For Class Certification

In meet and confer sessions, Indirect Plaintiffs have suggested that they seek to recover for sales within the U.S. if they can demonstrate that they were harmed, indirectly, from a foreign upstream sale of NAND Flash by a Defendant, which NAND Flash was then incorporated into downstream products that were imported into the United States. The ability to recover for such sales, however, is highly suspect in light of the limitations set forth in the FTAIA. *See, e.g., United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003, 1014 (N.D. Ill. 2001) ("[t]he FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs (such as AB) that are used abroad to manufacture downstream products (like ethambutol) that may later be imported into the United States. Clearly, the domestic effects in such a case, if any, would obviously not be 'direct,' much less 'substantial' and 'reasonably foreseeable'"); *see also Papst Motoren GmbH v. Kanematsu-Goshu, Inc.*, 629 F. Supp. 864, 869 (S.D.N.Y. 1986).

Furthermore, even assuming Defendants were able to and required to produce transaction-level foreign sales data, it would result in the production of information that would,

[10] Although Plaintiffs are also pursuing state law claims, those claims do not allow for broader discovery than the Sherman Act. *See In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 457 (D. Del. 2007) ("'[f]oreign commerce is pre-eminently a matter of national concern' and therefore, it is important for the Federal Government to speak with a single, unified voice.").

quite literally, have no probative value to the issues related to class certification. By definition, the data sought relates to sales that occurred to third parties outside of the United States. In order to make this information useful, Indirect Plaintiffs would have to serve and obtain discovery from these third parties to demonstrate whether and to what extent these products were, in turn, sold to customers in the United States. It cannot be seriously maintained that Indirect Plaintiffs could get this information in the next two months, much less the next two weeks that would be necessary for it to be useful in a class certification hearing.

4. Defendants Would Suffer An Extreme Burden in Collecting and Producing Foreign Transactional Data

Indirect Plaintiffs' request for worldwide individual transaction-level sales data for more than a decade-long time period would require the production of information for millions of sales, with little to no relevance to this case. The burdens Defendants would suffer in collecting and producing foreign sales data on an individual transaction-level basis has been addressed before and Indirect Plaintiffs' counsel, who were also involved in the *DRAM* and *SRAM* actions, are well aware of the common Defendants' burdens. Again, these burdens were addressed and considered by Judge Smith.

Moreover, as Defendants have explained in meet and confer sessions in this action and during the June 12, 2009 discovery conference, because Indirect Plaintiffs seek worldwide sales data, it potentially would require certain Defendants to collect data housed at affiliates and subsidiaries – entities that are not parties to this case – located throughout the world. That data are often maintained in different formats, languages and currencies. Accessing responsive data for certain Defendants would require the costly restoration of data located on back up tapes. Even for the Defendants for whom such data is relatively accessible, significant time and expense would go into preparing such data. The appropriate data must be located and reviewed to verify that the proper information is being produced and in many cases translated into usable form. Given the low probative value of this data, Indirect Plaintiffs have not offered any reason why this Court should impose on Defendants this added burden of producing transactional data from their operations all over the world.

Discovery in this case will be broad and expensive enough without expanding its geographic scope beyond the Indirect Plaintiffs' own allegations and beyond this Court's jurisdiction to reach for foreign sales numbers. Defendants have already produced millions of pages of *substantive* discovery. Moreover, permitting the discovery of the more than 10 years of detailed worldwide sales data that Indirect Plaintiffs seek would be inconsistent with the FTAIA and the case law interpreting it.[11] For all of these reasons, Defendants respectfully request that the Court deny Indirect Plaintiffs' request for detailed transactional data relating to sales outside the United States.

[11] As disclosed at the last case management conference with Judge Armstrong, Defendants anticipate raising these subject matter jurisdiction defenses with the Court and, if appropriate, invite the Court to defer ruling on these issues until then.

B. The Court Should Not Allow Indirect Plaintiffs to Take Unannounced, Late-Noticed, and Extremely Burdensome Rule 30(b)(6) Depositions on an Expedited Basis

Four weeks after the class certification schedule was set, Indirect Plaintiffs served notices of deposition pursuant to Rule 30(b)(6) on each Defendant, in each case calling for depositions on a broad array of topics in only two weeks time. Defendants should not be required to produce witnesses on these topics for the following reasons: (1) the issues surrounding Plaintiffs' Rule 30(b)(6) deposition notices are not ripe for the Court's consideration because Plaintiffs have failed to follow the meet and confer requirements of this Court's Order Regarding Discovery; (2) Indirect Plaintiffs failed to identify the depositions as necessary class certification discovery in response to this Court's direct question on this point; (3) Indirect Plaintiffs have attempted to impose a schedule for depositions on Defendants without complying with Local Rule 30-1; and (4) Indirect Plaintiffs' Rule 30(b)(6) topics are extremely broad, such that it is not feasible to prepare witnesses on the requested expedited schedule and the topics would serve no purpose for class certification issues.

1. Indirect Plaintiffs Have Failed to Meet and Confer as Required

The Court has made clear it does not wish to hear discovery matters until the parties have fully developed any disputes through the meet and confer process. The Court's Standing Order explicitly and clearly states that a meaningful in-person meet and confer between lead trial counsel must precede any consultation with the Court. *See* Civil Standing Order, November 3, 2008, ¶ 8. Moreover, on June 26, at a hearing on other issues, Indirect Plaintiffs asked: "To the extent there are other disputes that … we don't work out, we could include those in that [July 6] brief, as well?" The Court responded, "I don't know. You go through the process. If you've made it through the process then you can submit a joint letter. Whatever that timing is." The parties have not "made it through the process" by any stretch. This issue is not ripe.

By insisting on adding issues surrounding their 30(b)(6) notices to this letter regarding foreign transaction data, Indirect Plaintiffs are violating the Court's Order and disregarding its admonition to complete the meet and confer process. Instead of following the rules, which require a meaningful in person meet and confer between lead trial counsel after other efforts have been exhausted, Indirect Plaintiffs have made token efforts to appear to comply with the Court's Order, but have not done so.

On June 24, 2009, the parties held a scheduled meet-and-confer regarding foreign transaction sales data. Following that discussion, Indirect Plaintiffs attempted to "confer" regarding Rule 30(b)(6) deposition notices that they had served on June 16, which purported to call for depositions in two weeks time of all ten defendants, on 15 topics covering all aspects of Defendants' flash businesses over a ten year period. As of June 24, no Defendant had responded to the 30(b)(6) notices, and the breadth of the notices made it impossible for the Defendants to engage in any meaningful meet and confer until Indirect Plaintiffs identified which topics they believed were relevant to class certification. Defendants explained these points and the Parties agreed to meet and confer further regarding these notices. Later that day, via email, Indirect Plaintiffs agreed to limit the notice to four topics for now, and requested "informal meet and

confers" on two others related to data, as needed, all "reasonably in advance" of July 21. Those four topics, which address pricing and other issues relating to all of Defendants' purchases and sales of numerous products over a decade, are still extremely broad. Defendants thus responded on June 25 that they needed to discuss the offer with their clients and would arrange additional discussions to meet and confer as to those topics.

As the Court knows, the meet and confer process requires an in person meeting of lead trial counsel, within 10 days of a demand after other efforts to resolve an issue have failed. While Defendants have agreed to meet and confer on Indirect Plaintiffs' requests, and in some cases have done so, there has been no such demand or in-person meeting. Indirect Plaintiffs' position that the June 24 discussion somehow satisfied this Court's requirements is untenable. That meeting was related to other issues and the 30(b)(6) responses were not yet even due. Moreover, Indirect Plaintiffs agree that there had been no efforts to meet and confer prior to June 24, even though the Court's Standing Order requires the parties to meet and confer by letter, phone or email prior to conducting the in-person meet and confer among lead trial counsel. The Parties were unable to have any meaningful meet and confer at the time, and the only agreement that resulted was that there would be future meet and confer discussions, which are currently ongoing.

Indirect Plaintiffs' 30(b)(6) notices raise myriad issues relating to scope, duration, burden, timing, and the like. These issues are defendant-specific. Defendants submit that the Court should defer consideration of the numerous issues surrounding the 30(b)(6) depositions until the Parties have had an opportunity to have meaningful meet and confer discussions to try to resolve their disputes, pursuant to this Court's Order. For parity, however, Defendants address here some of the issues relating to the 30(b)(6) notices.

2. Indirect Plaintiffs Remained Silent in Response to the Court's Direct Question Whether They Needed Depositions

At the June 12, 2009 discovery conference – which was more than three weeks *after* the class certification schedule was set – the Court and Parties addressed what discovery would be necessary for the class certification phase, including the timing and notices of depositions. After discussing other depositions not relevant here, the Court directly asked Plaintiffs if they intended to take any immediate depositions:

> THE COURT: There are – no other deposition is going to take place right away other than that plaintiffs?
>
> MR. SIMON: Before July 21st, probably not. Maybe some 30(b)(6) depositions between July 21st and the time this is heard, but that gives us some time to work it out.

(6/12 Tr. at 7:25 to 8:8.) While Direct Purchaser Plaintiff answered the Court's question, Indirect Purchaser Plaintiffs remained silent. They were similarly silent on their need for Defendants' depositions in the June 9 Joint Letter filed in advance of the Court's June 12

discovery conference, in which Plaintiffs identified the discovery they believed they needed for class certification but again made no mention of Defendants' depositions.

Indirect Plaintiffs failure on at least two occasions to inform the Court, and failure to inform Defendants of the "need" for depositions until after that discovery conference, reveals that such depositions are not essential to Indirect Plaintiffs' class certification motions. In any event, after waiting several weeks to issue these notices, they cannot now demand that this discovery be expedited.

3. Indirect Plaintiffs Failed to Comply with Local Rule 30-1

Plaintiffs' 30(b)(6) deposition notices are improper for another reason. Local Rule 30-1 requires that a party seeking to serve notice of deposition first confer about the scheduling of the deposition with opposing counsel. Loc. R. 30-1. Plaintiffs did not meet and confer with Defendants before serving their 30(b)(6) notices. This tactic directly violated Local Rule 30-1, which was designed to avoid exactly the current situation. For this reason alone, the Court should quash these improper notices and require Indirect Plaintiffs to comply with the rules.

4. The Depositions Would Impose an Untenable Burden on Defendants

In addition to the above deficiencies, Indirect Plaintiffs' notices suffer from a more basic problem: they would be incredibly burdensome to Defendants while imparting minimal, if any, benefit to class certification. The following discussion, by way of example, underscores the reasons for the Court's meet and confer requirements and why it is reasonable and necessary to require Indirect Plaintiffs to comply with them.

As the Court knows well, testimony given at a deposition under Rule 30(b)(6) may bind the party defendant. For this reason, each Defendant will wish to select an appropriate witness on each proper topic or sub-topic, and will need substantial time to prepare each witness. Indirect Plaintiffs have indicated that they wish to take at least some of these depositions before July 21, that is, within the next two weeks.

Defendants cannot identify and adequately prepare 30(b)(6) witnesses on such an abbreviated schedule. Indirect Plaintiffs' proposed deposition topics cover several broad and distinct areas of Defendants' business, including purchasing, sales (including different sales channels), and distribution. In addition, Indirect Plaintiffs seek testimony covering those central aspects of Defendants' NAND flash businesses *for nearly a decade*. That is a big problem. Memories fade and people change jobs and leave the company. All of this multiplies the usual burdens of attempting to find and prepare 30(b)(6) witnesses. The preparation of witnesses within each Defendant company who are knowledgeable both about these different aspects of the NAND flash business, and also about all of the products and distribution channels involved, over the course of more than a decade is extremely difficult and burdensome. Under the abbreviated schedule Indirect Plaintiffs propose, it is practically impossible. That burden is further exacerbated for those Defendants that will likely designate witnesses residing in Japan or Korea.

Should 30(b)(6) depositions go forward on Indirect Plaintiffs' proposed schedule, the result will be deponents who do not understand the issues – requiring later depositions on a more reasonable schedule. Moreover, Defendants would be required to devote substantial time, resources and costs to ultimately meaningless depositions.

Against these significant burdens to Defendants, Indirect Plaintiffs have not shown why their proposed 30(b)(6) depositions are essential to their class certification motion. Notably, Direct Purchaser Plaintiff has served no 30(b)(6) notice, and apparently believes he can move for class certification without doing so. Nor have Indirect Plaintiffs shown why – after waiting four weeks to serve their notices – they should receive these depositions on their unilaterally imposed expedited schedule, thus requiring Defendants to designate witnesses who have not been adequately prepared for their demanding role.

* * * * *

Indirect Plaintiffs served their notices too late to require 30(b)(6) depositions before class certification. Plaintiffs compounded this error by failing to follow Local Rule 30-1 of this Court and this Court's Orders regarding meet and confer. For all these reasons or any of them, Defendants request that the notices be quashed and this issue revisited, if necessary, after resolution of class certification.

Respectfully submitted,

By: /s/ Judith A. Zahid

Francis O. Scarpulla
Judith A. Zahid
ZELLE, HOFMANN, VOELBEL, & MASON LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: (415) 693-0700
Facsimile: (415) 693-0770

By: /s/ Steven N. Williams

Steven N. Williams
COTCHETT, PITRE & MCCARTHY
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

Interim Co-Lead Counsel for Indirect Purchaser Plaintiffs

By: */s/ Michael F. Tubach*

Michael F. Tubach
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Telephone: (415) 984-8700
Fax: (415) 984-8701

Attorneys for: Hynix Semiconductor America, Inc. Hynix Semiconductor, Inc.

By: */s/ Harold Avrum Barza*

Harold Avrum Barza
QUINN EMANUEL URQUHART
OLIVER & HEDGES LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
Telephone: (213) 443-3000
Fax: (213) 443-3100

Attorneys for: Samsung Semiconductor, Inc. Samsung Electronics Company, Ltd.

By: */s/ Craig P. Seebald*

Craig P. Seebald
McDermott, Will & Emery LLP
600 13th Street, N.W.
Washington, DC 20005-3096
Telephone: (202) 756-8411
Fax: (202) 756-8087

Attorneys for: Hitachi, Ltd. Hitachi America, Ltd. Renesas Technology America, Inc. Renesas Technology Corp.

By: */s/ Frank M. Hinman*

Frank M. Hinman
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center, 18th Floor
San Francisco, CA 94111
Telephone: (415) 393-2000
Fax: (415) 383-2286

Attorneys for: SanDisk Corporation

By: */s/ Charles R. Price*

Charles R. Price
LATHAM & WATKINS LLP
555 Eleventh St. NW, Suite 1000
Washington D.C. 20004
Telephone: (202) 637 2200
Fax: (202) 637-2201

Attorneys for Defendants Toshiba Corporation and Toshiba America Electronic Components, Inc.

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