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May 6, 2008

Via E-mail

Hon. Fern M. Smith (Ret.)
JAMS
Two Embarcadero Center
Suite 1500
San Francisco, CA 94111

Re: In Re Static Random Access Memory (SRAM) Antitrust Litigation

Dear Judge Smith:

In preparation for the hearing on May 9, 2008 at 8:30 a.m., Plaintiffs and Defendants respectfully submit this joint letter brief for Your Honor's consideration. We apologize in advance for the length of the brief; however, additional pages were required to fully address all of the issues raised.

Direct-Purchaser and Indirect-Purchaser Plaintiffs' Statement

A. Defendants Should Produce Transactional Data For The Two-Year Period Before And After The Alleged Conspiracy

Defendants have challenged the propriety of Plaintiffs' discovery request seeking SRAM transactional sales data for the *two-year time period* before and after Defendants' alleged price-fixing conspiracy. When drafting their discovery requests, Plaintiffs specifically selected a time period that is clearly warranted under case law and yet sufficiently limited to meet Plaintiffs' expected needs in this case and avoid any unnecessary burden to Defendants. In particular, as Your Honor has repeatedly advised, Plaintiffs' looked to the time period deemed appropriate in the *DRAM* litigation. In that case, the defendants, many of whom are Defendants here, were ordered to produce data for a *two-year time period* before and after the alleged price-fixing conspiracy.

During several meet and confer sessions, Plaintiffs not only pointed Defendants to the *DRAM* case, but Plaintiffs also cited cases to Defendants in which it is recognized that discovery of transactional data is routinely granted for a time period of ***three to six years***. *See, e.g., In re Microcrystalline Cellulose Antitrust Litig.*, 221 F.R.D. 428, 429 (E.D.Pa., 2004) and cases cited therein ("According to plaintiffs, several courts have allowed discovery of data from periods ***before or after*** a conspiracy in order to establish liability and determine damages. . . . Defendants point out that none of the cases cited allowed discovery of transactional data in an antitrust case more than ***six years*** after the alleged antitrust violation ended, whereas courts have permitted approximately ***three years*** of post-violation discovery.") (emphasis added).

The data sought here, which at least shows price trends, is relevant towards issues of both liability and damages. *See, e.g., B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 2003 WL 21939019, *3 (D. Kan. July 22, 2003)("the temporal scope of discovery in antitrust cases should not be confined to the limitations period of the antitrust statutes or the damage period."); *In re Graphics Processing Units (GPU) Antitrust Litig.*, 2007 WL 3342602, *5-7 (N.D.Cal. Nov. 7, 2007) (recognizing the propriety of considering defendants' pre-conspiracy conduct as a "baseline by which to judge defendants' behavior during the alleged conspiracy" – including to track pre-conspiracy pricing).[1]

Additionally, Your Honor should resist any invitation by Defendants to split the difference and grant discovery of only a one-year time period. Plaintiffs did not overreach and seek data for a three-, four-, five-, or six-year period, as case law permits. *See supra*. Plaintiffs, therefore, should not be forced to trade down simply because they took an appropriate position from the outset that is warranted by economics and the law for reasons including to establish a proper pricing benchmark.

Indeed, implicit in Defendants' argument is the recognition that a two-year period before and after an alleged conspiracy is proper. Rather, what Defendants take umbrage with is the fact that they do not believe that the 10-year conspiracy claimed here by Plaintiffs is sufficiently alleged. For example, Defendants first argue that Your Honor should determine "whether [Plaintiffs'] Class Period is reasonable," and then contend that "Plaintiffs' Complaints do not contain factual allegations that suggest the alleged conspiracy spanned a time period longer than that specified by the DOJ subpoena."

First, Defendants' argument is factually incorrect – Plaintiffs' Complaints do contain factual allegations that suggest a conspiracy outside the period that the DOJ focused on. *See, e.g.*, Exh. 1, DPC ¶ 76. Second, and more importantly, Defendants should not be permitted to re-litigate in a discovery motion an argument that they already made and lost before Judge Claudia Wilken. In their motions to dismiss, Defendants argued that Plaintiffs' complaints did not contain factual allegations sufficient to support the claim of a 10-year conspiracy – "the totality

[1] Defendants are wrong when they state that "the data arguably is relevant to damages, not proof of the conspiracy." Plaintiffs have repeatedly explained that changes in price trends before and after the class period help establish the existence of price-fixing (i.e. "proof of the conspiracy"), as well as "but for" pricing (i.e. damages).

of these allegations add up to nothing more than a handful of sporadic interactions and nothing near to the nine-year (or ten year in the case of the IPC) ongoing conspiracy Plaintiffs allege" Exh. 2, Defs. Mot. to Dismiss at 3. Defendants' motion was denied and Plaintiffs' factual allegations were deemed sufficient. It is wasteful for Defendants to use this venue to reargue matters which they have lost before Judge Wilken. Therefore, Your Honor should order production of transactional data for the two-year period before and after the 10-year conspiracy that is actually alleged in Plaintiffs' complaints, and not some other conspiratorial period of Defendants' choosing.

B. Defendants Should be Required to Produce Non-U.S. Transactional Sales Data.

Defendants contend that if price-fixed SRAM or a product containing price-fixed SRAM, such as a cell phone, is manufactured outside the U.S., any transactional sales information concerning those products is outside the scope of discovery in this litigation. That contention is plainly wrong. Such foreign conduct is clearly relevant to Plaintiffs' domestic claims. Indeed, much of that foreign conduct is conduct for which, Indirect-Purchaser Plaintiffs at the very least, are entitled to recover damages.

Defendants have refused to provide Plaintiffs with any information about their sales outside of the United States on the grounds that: (1) such sales are not relevant to the instant litigation; and, (2) the production of such information is barred by *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) because Plaintiffs cannot recover damages for non-U.S. sales. Both arguments are wrong.

To start, as emphasized in the *In re Vitamins Antitrust Litig.*, 2001 WL 1049433 (D.D.C., June 20, 2001), Defendants' foreign transactional sales data is relevant to prove the breadth and scope of Defendants' global antitrust conspiracy. Further, the *Empagran* decision and the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (2000) ("FTAIA") certainly do not preclude the claims of Indirect-Purchaser Plaintiffs given that those claims are premised on state law, not on the Sherman Antitrust Act, which the FTAIA amended. *See Amarel v. Connell*, 202 Cal. App. 3d 137 (1988); *Olstad v. Microsoft Corp.*, 2005 WI 121 (Wis. 2005) (citing *California v. ARC America Corp.*, 490 U.S. 93 (1989)). Moreover, even assuming that FTAIA does apply to the claims at issue here, U.S. purchasers are allowed to recover damages where foreign price-fixed products are imported into the United States or where defendants' foreign conduct has a "direct, substantial and reasonably foreseeable effect" on domestic commerce. *Empagran*, 542 U.S. at 159.

In sum, Defendants' fundamentally misunderstand the difference between: (1) foreign conduct that is *actionable* – because of limitations of *Empagran* and/or the FTAIA; and, (2) foreign conduct that is *discoverable* – notwithstanding the fact that such conduct may not be actionable. This misunderstanding is perhaps best exemplified by the erroneous contention that "Plaintiffs' argument for obtaining non-U.S. sales data rests on the Foreign Trade Antitrust

Improvement Act ("FTAIA")." Although, as explained herein, Plaintiffs may well meet the FTAIA requirements, the FTAIA is actually largely irrelevant to Plaintiffs' right to discovery.

1. Defendants' Transactional Data For Non-U.S. Sales Is Relevant

Many courts have found that 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." *Vitamins*, 2001 WL 1049433 at *11 (overruling Special Master and ordering production of "transactional and financial data" relevant to the conspiracy without geographic limitation). In *Vitamins*, the court also noted that in an international antitrust conspiracy, foreign transactional and financial data should be discoverable because international sales and transactional data will likely form the basis for defendants' market-based explanations concerning the price, output, supply and demand of the price-fixed product. *Id.* at 12. Indeed, it is difficult to believe that Defendants will not challenge the adequacy of Plaintiffs' experts if they do not take non-United States information into account in providing their opinions about the SRAM market.

Moreover, foreign transactional data is regularly produced in antitrust cases, like the instant one, which challenge price-fixing activity by international cartels. *Id.* Discovery is not, as Defendants would urge, limited narrowly to the United States or the United States market. *See 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). Because non-U.S. sales data is clearly relevant to the instant litigation, Defendants should be required to produce it to Plaintiffs.[2]

Indeed, even in the primary case relied up by Defendants, *In re Intel Corp. Microprocessor*, the court analyzed whether the defendants could scale back their discovery production after the court had limited the plaintiffs' claims under the FTAIA. *Intel* held that the FTAIA ***did not*** prohibit discovery.

[2] Defendants' extended discussion about *Empagran* and/or the FTAIA prohibiting a *claim* (e.g. a direct purchaser claim) based on certain foreign anticompetitive conduct because of a supposed lack of subject matter jurisdiction, therefore, does little to advance Defendants' argument as to how or why *Empagran* and/or the FTAIA prohibit *discovery* when, as here, a court already has otherwise properly exercised its jurisdiction over foreign defendants.

> "While the FTAIA does limit certain foreign conduct from being actionable under the Sherman Act, the FTAIA does not prohibit the discovery of information that is otherwise discoverable. Indeed, nothing in the FTAIA suggests it was designed to prohibit the discovery of information that is otherwise discoverable and Intel is unable to cite to any case in support of such proposition. *Id.* at * 12.

2. Discovery Should Be Liberally Granted In Antitrust Cases.

Discovery is usually granted liberally in antitrust cases. The *Intel* court noted that "(t)he broad scope of discovery permitted by Rule 26 has been held to be particularly appropriate in antitrust cases. *Intel,* 2007 WL 137152 at *5 (citing *Dentsply Int'l,* 2000 WL 654286 ("The fact that the United States is the relevant market in this case does not necessarily limit discovery to the United States ... (a) 'general policy of allowing liberal discovery in antitrust cases' has been observed by this Court because 'broad discovery may be needed to uncover evidence of invidious design, pattern, or intent.'")

Similarly, in *Vitamins*, the court noted that courts are generally reluctant to limit discovery to a narrow geographic area. "Where allegations of conspiracy to restrain trade and intent to monopolize are at issue, ... a broad scope of discovery is appropriate, because the conspiracy may involve actors outside of plaintiff's geographic market and the scheme of monopolization may involve an area larger than the plaintiff's own limited sphere of operations." *Vitamins*, 2001 WL 1049433, at *12. *See also Plastics Additives,* 2004 WL 2743591, at *14 ("It is well-settled that courts presiding over antitrust cases generally take a liberal view of relevance in determining scope of discovery.")

3. The FTAIA Does Not Preclude Recovery For Claims Based On Violations Of State Antitrust Law

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,* 202 Cal. App. 3d at 149. ("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.* (citation omitted). *Accord Olstad*, 2005 WI at 154 n. 13 (citing the post-FTAIA United States Supreme Court case of *California v. ARC America Corp.* ("The Supreme Court held that the state [*Illinois Brick*] 'repealer' statutes were not preempted [by the Sherman Act].")).

During meet and confer, despite repeated requests, Defendants did not point Plaintiffs to any case law which would preclude indirect purchasers from recovering for violations of their state antitrust and unfair competition laws. For the first time, in their section of this letter brief,

Defendants have cited the sole case of *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452 (D. Del. 2007). But to reach its conclusion would effectively eviscerate decades of indirect purchaser case law. The *Intel* decision relied on the 1979 United States Supreme Court's decision in *Japan Line, LTD v. County of Los Angeles*, 441 U.S. 434, 448 (1979), which was not even an antitrust case. By doing so, the *Intel* decision necessarily ignored the Unites States Supreme Court's decision in *ARC America,* an indirect purchaser antitrust case that was decided after the enactment of the FTAIA and that expressly held that the Sherman Act did not preempt state antitrust laws. *Arc America*, 490 U.S. at 101.

4. The Discovery Cases Defendants Rely Upon Are Easily Distinguished.

The SRAM case must be distinguished from cases that Defendants rely upon, especially those which involved neither global conspiracies nor global markets. Defendants cite four cases as examples of when the courts place geographic limits on discovery, but none of them is on point.

In re ATM Fee Antitrust Litigation, 2007 WL 1827635 (N.D.Cal., 2007) was an antitrust case arising out of an allegedly unlawful "interchange fee" on a single ATM network within the U.S, not a global conspiracy to fix prices or a cartel case. There was no issue as to whether the defendants had agreed to fix prices, but rather the issues turned on the defendants' pro-competitive justifications for fixed fees. Further, *ATM* can be readily distinguished by its unique procedural posture where discovery was stayed except for the narrow purpose of discovery on the pro-competitive justifications of the defendants' joint venture for purposes of a partial summary judgment on that issue. *Id.* at *1. The opinion cited does not involve an order on the general scope of discovery. *Id.* at *2.

In *In re Rubber Chemicals Antitrust Litigation,* 486 F.Supp.2d 1078 (N.D.Cal., 2007), relied on by Defendants, the documents at issue in the case were documents prepared by the European Commission as part of a leniency program, rather than foreign transactional data relating to a global conspiracy to fix prices. *Id.* at 1083-84. The court held that the European Commission documents should not be produced on grounds of comity, which is not an issue in the SRAM case. *Id.* at 1084.

In *In re Fertilizer Antitrust Litigation,* 1979 WL 1690 (E.D.Wash.), relied on by Defendants, no global conspiracy was alleged. Plaintiffs in *Fertilizer* requested information regarding states that were adjacent to the region where the alleged conspiracy took place. *Id.* at *11. Due to the "remote relevance" of discovery regarding adjacent states, the court denied the plaintiffs' request. *Id.*

The final discovery case relied on by Defendants is *Mr. Frank, Inc. v. Waste Mgmt., Inc.*, 1981 WL 1827635 (N.D. Ill. 1981), a case alleging anticompetitive conduct in the waste disposal market involving portions of Illinois, Indiana, Wisconsin and Michigan, did not involve a global conspiracy or market.

5. Even Assuming The FTAIA Applies to Plaintiffs' Claims, Plaintiffs Can Recover Damages For SRAM and Products Containing SRAM That Are Imported Into the United States.

In their complaints, Plaintiffs have alleged that they paid artificially inflated prices for SRAM and products containing SRAM, which plaintiffs purchased in the United States. Plaintiffs' claims are not barred by the *Empagran* decision, as the claims fall under either the "import" or "domestic injury" exceptions to the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2000) ("FTAIA").

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 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, Plaintiffs allege that Defendants participated in a global conspiracy, the purpose and effect of which was to cause the price of SRAM and products containing SRAM that were imported into the United States to be artificially inflated. Because Defendants' conduct was directed at the United States import market, Plaintiffs are not precluded from seeking damages for the foreign products imported into the United States. Thus, Defendants should be compelled to provide Plaintiffs with foreign transactional information.

Additionally, Plaintiffs' 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. *Empagran*, 542 U.S. at 159 (citing 15 U.S.C. § 6a). Here, Plaintiffs claims clearly satisfy both elements.
To start, Plaintiffs have alleged that Defendants' foreign price-fixing conduct resulted in higher U.S. prices for SRAM as well as for products containing SRAM. Courts in the Northern District of California have consistently held that complaints containing these types of allegations sufficiently allege the necessary "direct, substantial, and reasonably foreseeable effect" on United States commerce. *See e.g., Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1111-12 (N.D. Cal. 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 515629, at * 3 (N.D. Cal. Mar. 1, 2006).

Further, as a direct result of Defendants' foreign price-fixing conduct, U.S. Plaintiffs have paid artificially inflated prices on SRAM and products containing SRAM. 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). Because Plaintiffs are entitled to recover for injuries in the United States involving foreign transactions, discovery concerning non-U.S. sales is germane to this litigation and Defendants should be compelled to produce it to Plaintiffs.

C. Defendants Have Not Demonstrated Undue Burden

Finally, Defendants have also claimed that producing transactional data for: (1) the two-year period before and after the alleged conspiracy; and, (2) non-U.S. sales would be unduly burdensome. However, Defendants have offered little more than a vague argument that they should not be required to produce such data because it would "dramatically increase" their costs. In fact, common sense and experience suggests that production of transactional data would not be unduly burdensome. Defendants are public corporations with the capability and necessity of producing the requested international transactional data. Defendants are *required* to maintain international sales and purchase data in order to fulfill their reporting obligations to government regulatory agencies and effectively manage their businesses, which rely on understanding global supply and demand in the SRAM market. Therefore, it is hard to understand why Defendants claim that production of foreign transactional date is more burdensome than their U.S. transactional data.

It is well-established that under Rule 26 of the Federal Rules of Civil Procedure, it is Defendants' 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) (emphasis in original)). 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." *ld.* 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 at issue is highly relevant to establishing Defendants' liability and calculating Plaintiffs' damages. 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); s*ee also W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38, 43-45 (D. Ma. 2007); *In re Vitamins*, 2001 WL 1049433, at *13.

D. Defendants' Attempt To Have The PSRAM Issue Resolved Is Improper

Your Honor should reject Defendants' procedurally improper and back-door attempt to resolve through a discovery objection a dispositive merits issue that would significantly limit the scope of Plaintiffs' substantive claims.

On April 17, 2008, the Parties and Your Honor participated in an in-person discovery conference. A primary matter addressed at that conference was Defendants' remaining objections to Plaintiffs' Joint RFP No. 1 – a request requiring Defendants to produce SRAM transactional data. Defendants had just recently and reluctantly agreed to produce transactional data for U.S. sales during the class period. Defendants, however, still stood by their objections that they should not produce transactional data for: (1) the two-year time period before and after the alleged conspiracy; (2) non-U.S. sales; and, (3) PSRAM sales. Defendants' objections are, under the Federal Rules of Civil Procedure, self-executing – that is, unless and until Plaintiffs move to compel production, no production of the materials requested by Plaintiffs would be made. This fact illustrates the needless and wasteful nature of Defendants' efforts to have this issue adjudicated now, over Plaintiffs' objections.

On April 17, 2008, the Parties (and Your Honor) specifically acknowledged that there had been more than sufficient meet and confer on Defendants' time-period and non-U.S. sales objections, and all agreed to brief and hear those issues on May 9th. (The Parties' positions on those two objections are set forth above.)

In contrast, however, the Parties (and Your Honor) specifically acknowledged that Defendants' PSRAM objection was more recently raised, and could benefit from further meet and confer. Plaintiffs did not agree (and have not agreed) to have Defendants' PSRAM objection briefed and heard on May 9th.

Since April 17th, Plaintiffs have made it clear to Defendants that the PSRAM dispute should not be briefed and heard on May 9th. Yet Defendants insisted on briefing the issue in their portion of this letter.

Your Honor should not rule on the propriety of Defendants' PSRAM objection at this time.

First, Defendants' attempt to obtain such a ruling is procedurally improper. In response to a request for production, a party may respond in one of two ways before the response deadline: (1) respond by agreement or objection – but in the case of objection face the possibility of a motion to compel; ***or***, (2) affirmatively seek a protective order discharging the obligation to produce. *See* William W Schwarzer, et al. CIVIL PROCEDURE BEFORE TRIAL at [11:11901] (citing Fed. R. Civ. P. 34(b)(2)); *Nelson v. Capital One Bank*, 206 F.R.D. 499, 500 (N.D. Cal. 2001) ("the party responding to written discovery may ***either*** object properly ***or*** seek a protective order") (emphasis added); *Ayers v. Cont'l Cas. Co.*, 240 F.R.D. 216, 221 (N.D. W.

Va. 2007) ("Motions for a protective order must be made before or on the date the discovery is due").

Here, Defendants did not seek a protective order against any portion of Joint RFP No. 1. Defendants instead choose to object and not produce. In response, Plaintiffs first negotiated production of U.S. transactional data, and then (by this letter brief) moved to compel production of transactional data for: (1) the two-year period before and after the alleged conspiracy; and, (2) non-U.S. sales. Plaintiffs have not yet moved to compel the production of transactional data for PSRAM sales.

Because Defendants did not seek any protective order before the deadline to respond to Joint RFP No.1, they cannot now insist upon a ruling from Your Honor that their PSRAM objection is proper. Such a request is an unauthorized motion for protective order that should be denied on this procedural basis alone. *See Ayers*, 240 F.R.D. at 221.

Second, because the Parties have not actually engaged in substantive meet and confer, it is premature to resolve the propriety of Defendants' PSRAM objection. Their objection, as Plaintiffs understand it, is predicated on at least on two grounds: (1) the classification of PSRAM vis-à-vis Plaintiffs' class claims; and, (2) the supposed overlap of claims based on PSRAM purchases with claims at issue in the *DRAM* case (i.e. that DRAM Defendants faced (or still face) claims for PSRAM purchases in the *DRAM* case).

With respect to the latter ground, however, Defendants fail to make clear to Your Honor that even if PSRAM purchases *might* be covered by the *DRAM* litigation (which Plaintiffs do not concede), that still would not resolve this discovery dispute for the simple reason that at least 7 of the 11 Defendants here were not parties in the *DRAM* case.

Further, with respect to the first ground for Defendants' objection (i.e. classification of PSRAM), Defendants waited until May 5th to provide Plaintiffs with any documentary support for their contention that PSRAM is not properly classified as SRAM. This belated production was made despite the fact that Plaintiffs: (1) repeatedly stated that PSRAM is within the scope of their claims; (2) pointed to the Department of Justice's subpoenas which classify PSRAM as SRAM (*see, e.g.,* Exh. 3, Relevant pages of DOJ subpoena to NEC); and, (3) explained that industry analysts, including those tracked by Defendants, and industry associations, including those that Defendants belong to, classify PSRAM with SRAM (*see, e.g.,* Exhs. 4 – 5 respectively, Relevant Pages of Gartner Report; Relevant Pages of SIA Report).

Plaintiffs informed Defendants that their belated production was improper, a clear attempt to sandbag Plaintiffs, and that, in addition to their other objections regarding the PSRAM issues, these late-filed exhibits and declarations should not be submitted with Defendants' section of this letter brief. Exh. 6, May 5, 2008, Email Correspondence Between Plaintiff and Defense Counsel. Plaintiffs repeat here their objection to the submission or consideration of those materials.

In any event, Defendants' statements such as "SRAM and PSRAM are marketed as entirely separate products by those defendants that make both" are simply false. Indeed, a sampling of Defendants' own documentation shows that PSRAM is classified and marketed as a type of SRAM. *See e.g.*, Exhs. 7- 10 respectively, Relevant Pages of 2004 Hynix Product Catalog; Current ISSI Online Product Categories for Asynchronous SRAM; Current Etron Online Product & Technology Description for SRAM; Relevant Pages of 2008 Samsung Product Catalog (and 2005 Press Release describing UtRAM as Samsung's PSRAM.

Thus, it appears that Defendants are not only improperly pursuing a procedurally mistaken motion over Plaintiffs' objections, but are doing so by presenting to Your Honor materials that actually paint an inaccurate picture of both: (1) how PSRAM is classified, including by the Defendants themselves; and, (2) how PSRAM purchases relate to the *DRAM* case. For this additional reason – failure to engage in substantive meet and confer – Defendants' attempt to obtain a ruling on their PSRAM objection is premature and should be denied.[3]

Third, at bottom, Defendants' attempt to have Your Honor rule on the propriety of their PSRAM objection is really a back-door attempt to obtain a discovery ruling that could have a dispositive and significantly limiting effect on the scope of Plaintiffs' substantive claims. This is not an instance where there is agreement about the scope of Plaintiffs' claims, but a dispute about the amount of discovery that should be permitted in the face of such claims. Rather, Defendants simply disbelieve that PSRAM purchases are a part of Plaintiffs' claims, and, therefore, proceed to make their arguments regarding discovery based on that disbelief. But because Defendants' initial assumption about the scope of Plaintiffs' claims is incorrect (or at least disputed) their conclusion about the propriety of their discovery objection is necessarily flawed. For this final reason, Your Honor should not rule on the propriety of Defendants' PSRAM objection. *See, e.g.*, Exh. 11, September 26, 2007 Order Appointing Discovery Master (not authorizing resolution of disputes regarding scope of Plaintiffs' claims).

DEFENDANTS' STATEMENT

On February 27, 2008, Direct and Indirect Purchaser Plaintiffs served a joint document request seeking detailed information about Defendants' worldwide transactional sales data.[4]

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[3] Any argument that Defendants should be able to seek a ruling over Plaintiffs' opposition on this PSRAM dispute because Plaintiffs supposedly sought to obtain a ruling over Defendants' opposition on other disputes is not well taken. To repeat, such an argument not only misunderstands the procedural aspect of Plaintiffs' discovery request (i.e. it is Plaintiffs', not Defendants', right to seek a motion to compel), but it also fails to recognize that with those other disputes the Parties' actually engaged in prolonged meet and confer before Plaintiffs moved to obtain a ruling. The latter simply cannot be said with respect to the Defendants' PSRAM objection.

[4] Specifically, Plaintiffs requested that Defendants' produce "DOCUMENTS sufficient to IDENTIFY each of YOUR sales of SRAM, as well as the following information for each SRAM product involved in each sale: (1) the geographic location of sale, (2) the name, make, model, part, AND serial number, (3) a product description, including the SRAM-type (e.g., slow asynchronous SRAM, fast asynchronous SRAM, synchronous SRAM, PSRAM), (4) the SRAM product's memory capacity (e.g., 128 MB), (5) the quantity OR volume sold, (6) the price, (7) whether the sale was established via a contract, indexed to a spot market, bilateral negotiation, or another means, (8) the net revenue YOU received, (9) the type AND amount of ANY discounts, rebates, OR incentives provided by

Defendants have already produced extensive transactional data for sales in the United States during each Plaintiff group's putative class period.

As your Honor is aware, there are three disputed issues relating to Plaintiffs' request for the production of SRAM transactional sales data:

1. Defendants object to the production of transactional data for all sales of pseudo static random access memory ("PSRAM") because PSRAM is not an SRAM product and, therefore, has no relevance to the parties' claims or defenses nor is it reasonably calculated to lead to the discovery of admissible evidence.

2. Defendants have proposed and are willing to produce SRAM sales data for one year before and one year after each Plaintiff group's putative class period.

3. Defendants object to the production of detailed transactional sales data for sales outside the United States. Neither Direct nor Indirect Purchaser Plaintiffs have asserted claims for purchases outside the United States (nor could they since such claims would be barred on jurisdictional grounds). Additionally, it would be unduly burdensome and expensive for Defendants to gather and produce sales data for likely millions of transactions that have nothing to do with Plaintiffs' claims.

For the reasons set forth below, Defendants respectfully request that the Court deny Plaintiffs' request for these categories of transactional sales data.

ARGUMENT

A. Legal Standard.

Under Federal Rule of Civil Procedure 26(b)(1), a party may only obtain discovery of information that is "relevant to any party's claim or defense" or that is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). This sub-section was designed "to encourage judges to be more aggressive in identifying and discouraging discovery overuse" and "to enable the court to keep tighter rein on the extent of discovery." Fed. R. Civ. P. 26 advisory committee's notes for 1983 and 1993 amendments. "Once an objection to the relevance of the information sought is raised, the burden shifts to the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action." *3Com Corp v. D-Link Sys.*, No. C 03-2177 VRW, 2007 WL 949596, *2 (N.D. Cal. Mar. 27, 2007), quoting *Allen v. Howmedica Leibinger, Inc.*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999); *see also Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 631 (M.D.

YOU, (10) the name AND address of each of customer, (11) a description sufficient to IDENTIFY the type of customer involved (e.g., OEM, ODM, AIB manufacturer, distributor OR retailer), (12) the date of sale and date of shipment; (13) the purchase order number and invoice number; AND (14) the amount actually paid." Plaintiffs' Amended Joint Request for Transactional Data No. 1.

Pa. 1997) ("Once an objection has been raised on relevancy grounds, the party seeking discovery must demonstrate that the request is within the scope of Fed. R. Civ. P. 26(b)").

Narrowly tailoring discovery to only that which is relevant or likely to lead to the discovery of admissible evidence is particularly important in antitrust cases where the plaintiffs' requests for discovery are notoriously broad and result in great expense to defendants. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) ("[T]he problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries,' [and] the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.") (citations omitted); *Kendall v. Visa USA, Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) ("[D]iscovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case."); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976) ("Particularly in antitrust litigation, the long drawn out process of discovery can be both harassing and expensive.").

B. PSRAM Sales Data Is Not Relevant, Nor Is It Reasonably Likely To Lead To The Discovery Of Admissible Evidence.

Static and dynamic random access memories are two technologically distinct types of electronic memory. Dynamic random access memory ("DRAM") is "dynamic" because it must be periodically refreshed with a charge or the information it stores becomes lost. Static random access memory ("SRAM"), by contrast, does not need such periodic refreshing to retain information that it is storing. PSRAM is a dynamic form of random access memory because it must be periodically refreshed to retain information. The name PSRAM (*pseudo* SRAM) derives from the fact that it is a dynamic memory designed to function similarly to SRAM, while not actually being static—hence the "pseudo" in its name.[5] Oliver Decl., ¶¶ 2-3; Mimikopoulos Decl., ¶ 4. Indeed, SRAM and PSRAM are marketed as entirely separate products by those defendants that make both. *See, e.g.*, Mayer Decl., Exs. B-C.[6]

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[5] The principal standard-setting body for memory products, including DRAM and SRAM, is the Joint Electron Devices Engineering Council (JEDEC). In its Dictionary of Terms for Solid State Technology, JEDEC defines PSRAM as "[a] combinational form of a ***dynamic*** RAM that incorporates various refresh and control circuits on-chip (*e.g.*, refresh address counter and multiplexer, interval timer, arbiter). These circuits allow the PSRAM operating characteristics to closely resemble those of an SRAM." *See* Declaration of Heather L. Mayer ("Mayer Decl."), ¶ 2, Ex. A (emphasis added). Although it has a similar interface as SRAM, PSRAM uses the DRAM technological architecture. *See* Declaration of Christos Mimikopoulos ("Mimikopoulos Decl."), ¶ 3. Specifically, the memory cell of a DRAM or PSRAM is substantially smaller than an SRAM memory cell: it has only one or two transistors and one capacitor. An SRAM memory cell, on the other hand, frequently uses six or more transistors. S*ee* Declaration of Negin Oliver ("Oliver Decl."), ¶ 5.

[6] Due to unavoidable delays, Defendants provided the Mimikopoulos Declaration and Exhibits A through C of the Mayer Declaration to Plaintiffs on Monday, May 5th – the second business day after the initial exchange of the parties' arguments on May 1st, but on the same day the parties were scheduled to exchange final inserts for this joint letter. Defendants also provided an approved, but unsigned copy of the Oliver Declaration to Plaintiffs along with their final insert for this joint letter on the afternoon of May 5th, and expect to provide the actual signature for

Consequently, Plaintiffs' request for the production of transactional data for Defendants' sales of PSRAM is overbroad, as it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Both Direct and Indirect Purchaser Plaintiffs have alleged solely a conspiracy to fix the price of ***static*** random access memory. *See* Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("DPC") at 1 (Mayer Decl., Ex. D) ("Defendants conspired to fix, raise, maintain, and stabilize the price of static random access memory ("SRAM") sold in the United States during the class period."); Indirect Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint ("IP SAC") ¶ 156 (Mayer Decl., Ex. E) (Defendants engaged in "a contract, combination, or conspiracy, the effect of which was to raise the prices at which they sold SRAM to artificially-inflated and supra-competitive levels."). Likewise, both sets of Plaintiffs define SRAM for the purposes of their respective Complaints as "all types of ***static*** random access memory sold during the Class Period." DPC ¶ 18 (emphasis added); IP SAC ¶ 5 (emphasis added).

Additionally, several of the Defendants in these class actions were and are also defendants in the *DRAM* class actions pending before Judge Hamilton, and Plaintiffs, here, are represented by most of the same counsel for plaintiffs in *DRAM*. All of the *DRAM* defendants have settled with the *DRAM* direct purchaser class, and in each of their respective settlement agreements, those defendants settled all claims arising from sales of dynamic random access memory, which includes PSRAM. *See* Declaration of Christopher Hales, Exs. A-D. As such, claims arising from PSRAM were either discharged or are currently subject to litigation in the DRAM actions brought by the various States and opt-out plaintiffs.[7] Including PSRAM, here, would lead to a risk of double recovery.

Notwithstanding these undeniable technological facts and the inclusion of PSRAM in the *DRAM* actions, Plaintiffs continue to argue that they are entitled to transactional data for sales of PSRAM. Conspicuously absent from Plaintiffs' Complaints are allegations that, in addition to SRAM, the alleged conspiracy involved PSRAM memory chips, or that Plaintiffs even purchased PSRAM during the Class Period. Indeed, the Direct Purchaser Plaintiffs' Complaint specifically excludes in its definition of SRAM "all types of DRAM sold during the Class Period." DPC ¶ 18. Yet Plaintiffs have failed to explain how any transactional data relating to a

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the Oliver Declaration tomorrow morning. Although these materials were not submitted to Plaintiffs during the initial exchange on May 1st, we informed Plaintiffs that these materials were forthcoming and included the substance of these materials in the argument section of the brief sent on May 1st. Plaintiffs have raised objections about the timing and delay in receiving copies of these materials. In response, Defendants offered Plaintiffs additional time to respond or object substantively to these materials, whether before Plaintiffs finalize and send this letter to your Honor tomorrow, or at any other time between now and the hearing on May 9th. Plaintiffs have refused this offer to respond substantively and have instead opted to simply criticize Defendants' delay. Defendants respectfully submit that these issues should be resolved on their substantive merits.

[7] In an attempt to cure problems related to plaintiffs' lack of antitrust standing under *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the *DRAM* indirect purchasers narrowed their original claims to those individuals who indirectly purchased DRAM used in PCs. That class' definition of DRAM is now limited to that which is used in computers, although DRAM is used in myriad other products, including servers, PDAs, game consoles, and mobile phones. PSRAM is not used for computers, but principally for mobile devices.

form of DRAM is relevant to the allegations in their Complaints, or how such information is likely to lead to the discovery of admissible evidence.

Defendants believe there is no reason to delay resolving this issue. Although Plaintiffs' contend that the parties agreed not to address PSRAM in this briefing and hearing, Defendants' recollection and notes from the in-person conference with your Honor reflect the opposite: that your Honor asked if the parties required more time to address this issue, Defendants answered that this issue could be resolved on the same timeline as the other transactional data issues, and that Plaintiffs did not object or ask for a different timeline for resolution of this issue. Plaintiffs' recent claim that this issue is not ripe for consideration contradicts Plaintiffs' past position on this issue, when Plaintiffs wanted all of these issues adjudicated at the April 4th telephonic hearing with your Honor. While Plaintiffs' meet and confer questions to some Defendants about PSRAM may not have been answered to Plaintiffs' satisfaction that should not prevent a resolution of this issue. Indeed, in light of the indisputable technological nature of PSRAM as a DRAM chip that gives rise to this issue and Plaintiffs' claims for price fixing of a ***static*** RAM chip, Defendants do not see how any of Plaintiffs' questions have any bearing on an ultimate resolution of this issue.

Given that PSRAM is a dynamic, rather than static form of memory, and given that Plaintiffs have failed to identify any basis for the production of such irrelevant data, Plaintiffs' request for information or documents regarding PSRAM should be denied.

C. Defendants' Should Not Be Required To Produce Data More Than One Year Before And One Year After The Putative Class Periods.

The Defendants in this case were served with grand jury subpoenas that requested documents from the period January 1, 1998 to December 31, 2005. In their Complaints, both the Direct Purchaser Plaintiffs and Indirect Purchaser Plaintiffs go back an additional 14 months and define the start of the relevant "Class Period" as November 1, 1996. And in their joint request for production of SRAM transactional data, both sets of Plaintiffs seek data going back yet another two years, to November 1, 1994—all told, more than three years before the commencement of the relevant period for the Department of Justice ("DOJ"). With respect to the end date for their putative Class Periods, the Direct Purchaser Plaintiffs mark that as December 31, 2005 (the same as the DOJ), while the Indirect Purchaser Plaintiffs extend it for an additional year to December 31, 2006. *See* IP SAC ¶ 7. Yet both sets of Plaintiffs seek transactional data through December 31, 2007, a full two years after the end of the DOJ period.

Defendants recognize, of course, that antitrust plaintiffs typically obtain some data outside the alleged conspiracy period. To assess the reasonableness of Plaintiffs' claim for data outside the Class Period, then, the initial question is whether their Class Period is reasonable. Plaintiffs' Complaints do not contain factual allegations that suggest the alleged conspiracy spanned a time period longer than that specified by the DOJ subpoena, and thus it is questionable whether they have any basis to define the Class Period any more broadly for purposes of the civil litigation. Nevertheless, in the spirit of compromise, Defendants have proposed during the meet

and confer conferences to produce sales data (to the extent it exists) from one year before and one year after each Plaintiff group's putative class period. That would result in the production of transactional data from November 1, 1995 to December 31, 2006 for the Direct Purchaser Plaintiffs, and to December 31, 2007 for the Indirect Purchaser Plaintiffs. Plaintiffs have refused this offer. Defendants respectfully submit that this is more than sufficient, particularly where Plaintiffs have alleged nothing that would justify putting Defendants to the burden and expense of producing data or documents for the time period they have selected.

Moreover, whatever the Class Period may be, Plaintiffs have offered no reason why they need four years worth of non-Class Period data to make their statistical comparison. Beyond a limited time period before and after the alleged conspiracy period, any comparison of data would merely be cumulative. Plaintiffs have asserted that they need sales data outside the Class Periods to compare against sales data during the Class Periods in order to demonstrate that there was a change in the pricing of SRAM during the Class Periods. In other words, the data arguably is relevant to damages, not proof of the conspiracy element of Plaintiffs' claims.

For these reasons, to the extent Plaintiffs' request for additional transactional data outside the putative Class Periods is granted, the production of transactional data to each group of Plaintiffs should be limited to, at most, a one year period before and after the putative Class Period identified by that group of Plaintiffs in their Complaint.[8]

D. Neither Direct Nor Indirect Purchaser Plaintiffs Are Entitled To Transactional Data For SRAM Sales Outside The United States.

Plaintiffs seek data on sales of SRAM outside the United States. But because no Plaintiff is seeking to recover for purchases of SRAM or SRAM-containing products outside the United States, data on non-U.S. sales has no relevance to their effort to show injury or calculate damages—all of which would arise from Defendants' *domestic* sales. Nor can non-U.S. sales data help Plaintiffs show that an alleged conspiracy with effects in the United States took place outside the United States; after all, this is simply *sales numbers*, not evidence of meetings or communications.

Plaintiffs' arguments about the relevance and the supposed need for this discovery are based on case law that is wholly inapplicable to this particular dispute. Here, Plaintiffs are seeking discovery solely about Defendants' foreign *sales numbers*; however, the cases cited by Plaintiffs address the discoverability of a more substantive set of foreign discovery, including foreign *conduct* discovery. Indeed, any possible relevance of the foreign sales numbers at issue today pale in comparison to the millions of pages of substantive discovery that Defendants have already produced from their grand jury productions. This distinction is important—particularly

[8] Given how far back in time Plaintiffs seek to reach, some Defendants are unable to produce data prior to 1996 in electronic format without substantial burden because that data is stored in archived systems that are no longer accessible. The data can be retrieved, if at all, only at great expense. If the Plaintiffs wish to go forward with additional production from those Defendants, the Defendants will request the Court to direct the Plaintiffs to bear the burden of restoring and producing the data.

when no Direct Purchaser Plaintiff seeks damages based on foreign direct sales, and the Indirect Purchaser Plaintiffs cannot recover through any such claims.

Plaintiffs' attempt to enlarge the scope of discovery (and, thereby, dramatically increase the cost of discovery in defending this action) should be rejected.

1. The Exceptions to the FTAIA Do Not Provide A Basis For Obtaining Non-U.S. Sales Data.

Plaintiffs' argument for obtaining non-U.S. sales data rests on the Foreign Trade Antitrust Improvement Act ("FTAIA"). That statute defines the extraterritorial reach of the Sherman Act and "promotes the 'certainty in assessing the applicability of American antitrust law to international business transactions . . .'" *Turicentro v. Am. Airlines Inc.*, 303 F.3d 293, 299 (3d Cir. 2002) (quoting H.R. Rep. No. 97-686 (1982)). The FTAIA sets forth the general rule that conduct involving foreign commerce is excluded from the scope of the Sherman Act. There are two exceptions to the rule: for import commerce, and for foreign conduct that causes "domestic injury."[9] As we show below, nothing in the FTAIA provides a basis for discovery of non-U.S. sales data by plaintiffs who seek to recover for wholly domestic injuries.

The import exception to the FTAIA provides that U.S. courts have jurisdiction when defendants directly import into the United States foreign products that are the subject of anticompetitive conduct. *See Turicentro,* 303 F.3d at 303. However, when products are imported into the United States, that (by definition) results in a sale *in the United States*—not outside the United States—and the data on those sales have already been turned over to Plaintiffs. Put another way, the import exception is entirely irrelevant to the question of whether Plaintiffs are entitled to discovery of *foreign* sales data. To the extent Plaintiffs have tried to claim the import exception as a means to recover damages for SRAM that was imported into the United States after Defendants allegedly fixed the price outside the United States, they do not need data on foreign sales to do so.

The same goes for the "domestic injury" exception. That exception provides U.S. courts with jurisdiction over foreign transactions where two conditions are met: (1) The alleged conduct must have a "direct, substantial, and reasonably foreseeable" effect on U.S. domestic

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[9] The full text of the statute provides:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.

commerce; and (2) the domestic anti-competitive effect "gives rise to" the Sherman Act claim at issue. 15 U.S.C. § 6a. But this has no relevance insofar as Plaintiffs are seeking non-U.S. sales data. The exception allows a plaintiff to recover for products whose prices are increased *in the United States* as a result of foreign price-fixing conduct. *See, e.g., Sun Microsys., Inc. v. Hynix Semiconductor, Inc.*, 534 F. Supp. 2d 1101, 1111-12 (N.D. Cal. 2007). If Plaintiffs purchased SRAM in the United States where the Defendants fixed the price outside the United States, they may be entitled to recover under the Sherman Act, but the data on those sales is already in their possession—it is U.S. sales data. Data on non-U.S. sales simply has nothing to do with any effort Plaintiffs might make to satisfy this exception to the FTAIA.

2. Non-U.S. Sales Data Has No Other Relevance to Direct Purchasers' Claims.

The Direct Purchaser Plaintiffs have expressly excluded foreign SRAM sales from their putative class. DPC ¶ 58 ("[a]ll persons and entities who . . . *purchased SRAM in the United States* directly from Defendants . . .") (emphasis added). This is not surprising in light of *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155 (2004) ("*Empagran I*"), where the Supreme Court held that the "domestic injury" exception to the FTAIA did not apply to claims based exclusively on foreign injuries that were independent of any domestic injuries. *Id.* at 169. Consequently, Direct Purchaser Plaintiffs are left solely with the contention that they have alleged a "global" cartel and that this transactional data is, therefore, somehow relevant as proof of its existence.

However, Direct Purchaser Plaintiffs cannot sweep in sales data from outside the United States by simply describing their allegations as involving "global" conduct. The D.C. Circuit's reasoning in the *Empagran* remand is instructive on this issue. The Supreme Court remanded to enable the Court of Appeals to determine the type of causation required to bring global price fixing conduct within the scope of the FTAIA's domestic injury exception. *Id.* at 175. The plaintiffs argued that: (1) Their foreign injuries—derived exclusively from purchases made outside the United States—were dependent on the effects of the global conspiracy in the United States because the price-fixed products (vitamins) are fungible and readily transportable; and (2) Without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and plaintiffs would not have suffered a foreign injury. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) ("*Empagran II*"). The D.C. Circuit rejected that argument, and held that to satisfy the domestic injury exception to the FTAIA—and thus assert a claim under the Sherman Act for a foreign injury—a plaintiff must allege facts sufficient to establish that the foreign injury was proximately caused by the domestic effect of the alleged anticompetitive conduct. *Id.* at 1270-71. The *Empagran II* court concluded that it did not have jurisdiction over the plaintiffs' claims because the higher prices that they paid abroad were directly caused by the foreign effects

of price fixing outside the United States—and not by supracompetitive domestic prices that were, at most, a "but for" cause of the higher foreign prices. *Id.* at 1271.[10]

Plaintiffs rely heavily on cases which allowed the production of foreign discovery requests that were far more substantive than the discrete issue of foreign sales data that is before your Honor. The *In re Vitamins* decision (and the *In re Plastics Additives* decision which relies upon *Vitamins* for its analysis) allowed discovery from outside the United States because the discovery was relevant to show the breadth of the supposed conspiracy and the role that particular executives played in that conspiracy. *In re Vitamins*, No. 99-197TFH 2001 WL 1049433, at *12 (D.D.C. June 20, 2001). In fact, the *In re Intel* decision cited by Plaintiffs makes clear that the court was not addressing the discoverability of foreign sales data and explicitly described the discovery at issue as "Foreign ***Conduct*** Discovery Materials." *In re Intel Corp. Microprocessor Antitrust Litig.*, No. 05-1717-JJF 2007 WL 137152, at *5 (D. Del. Jan. 12, 2007) (emphasis added). The same is true for the *SmithKlein Beecham* decision cited by Plaintiffs, which related solely to the production of foreign conduct discovery materials about communications made by the foreign defendants to standard-setting organizations. *See SmithKline Beecham Corp. v. Apotex Corp.*, No. Civ.A.99-CV-4304, 2006 WL 279073, at *2-3 (E.D. Pa. Jan. 31, 2006).

Plaintiffs seek to conflate what they are seeking here—foreign sales *numbers*—with the more substantive categories of foreign discovery at issue in those other cases. Sales numbers say *nothing* about the identity of any executives or their supposed roles in this alleged conspiracy. Moreover, in their foregoing discussion about the appropriate time periods for production, Plaintiffs make no such arguments. Instead they allege only that Plaintiffs need this data to illustrate and compare "price trends." Plaintiffs already have sufficient sales data—about the sales that are properly at issue in this case—to allow them to make these comparisons, and sales from outside the United States are unnecessary and unduly burdensome. In the *DRAM* civil litigation, the defendants produced transactional sales data for U.S. sales only.

The D.C. Circuit made clear in *Empagran II* that supracompetitive prices paid in foreign countries suggest nothing more than a conspiracy to fix prices in *those* countries. Regardless of whether a global conspiracy exists, foreign sales are not dependent on sales in the United States and vice versa. Likewise, foreign sales data sheds no light on whether or not Defendants

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[10] Federal courts, including the Northern District of California, have universally accepted *Empagran II*'s proximate cause standard for invoking the FTAIA's domestic injury exception, and have consistently held that foreign purchases in allegedly "global" price fixing cases such as this one are not within a United States court's subject matter jurisdiction. *See, e.g.*, *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777 (N.D. Cal. 2007) (U.S. "[p]laintiffs' arguments that 'the domestic and foreign impacts were the product of a single economic relationship' and that 'the price paid for deliveries abroad was actually linked to the collusively-established price set and paid in the United States' gloss over the FTAIA's requirement that it must be the *domestic effects* of the Defendants' anticompetitive conduct, rather than the *anticompetitive conduct* itself, which gives rise to Plaintiffs' foreign injuries"); *In re DRAM Antitrust Litig.*, No. C 02-1486 PJH, C 05-3026 PJH, 2006 WL 515629 (N.D. Cal. Mar. 1, 2006) (dismissing plaintiff's global price fixing claims on the same grounds as in *Empagran II*); *eMag Solutions LLC v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084 (N.D. Cal. July 20, 2005) (dismissing claims that involved purely foreign commerce and products that were purchased outside the United States).

conspired to fix prices in the United States or whether Plaintiffs and the classes that they seek to represent paid higher prices in the United States than they would have paid absent the alleged conspiracy. Indeed, foreign sales data is relevant only to the question of whether prices were fixed in those countries, which is not the subject of Direct Purchaser Plaintiffs' lawsuit and is not within this Court's subject matter jurisdiction.

3. Indirect Purchaser Plaintiffs' Request For Sales From Outside The United States Should Be Denied.

Like the Direct Purchasers, the Indirect Purchaser Plaintiffs assert claims solely on behalf of "[a]ll persons and entities residing in the United States who . . . *purchased SRAM in the United States* indirectly from the Defendants . . ." IP SAC ¶ 132 (emphasis added). They further allege that this SRAM conspiracy "was centered in, carried out, effectuated and perfected mainly within the State of California." IP SAC ¶ 199.

During the meet and confer process, the Indirect Purchaser Plaintiffs have argued that foreign sales data is relevant since they allegedly indirectly purchased SRAM that was sold to manufacturers abroad and then incorporated into downstream products that were imported into the United States. This argument fails for two independent reasons: (1) Indirect Purchaser Plaintiffs' claims are—by definition—indirect and, therefore, are insufficient to meet the FTAIA's "direct, substantial, and reasonably foreseeable effects" test. Nor can they use state laws to circumvent the jurisdictional boundaries drawn by Congress in adopting the FTAIA; and (2) Indirect Purchaser Plaintiffs have no basis for their assertion (offered now simply to justify their expansive requests) that they purchased downstream products incorporating SRAM that was purchased outside the United States.

First, Indirect Purchaser Plaintiffs impermissibly seek to impose various state laws on transactions that have no connection to the United States. Congress adopted the FTAIA and the Federal Trade Commission Act ("FTCA")— which includes a standard substantially similar to the FTAIA's "direct, substantial, and reasonably foreseeable" test and was the model for many state consumer protection statutes—to limit the extraterritorial reach of U.S. antitrust and consumer protection laws. *See In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 457 (D. Del. 2007). Under *Empagran*, the foreign direct purchasers of any SRAM that was allegedly incorporated into Indirect Purchaser Plaintiffs' downstream products would be jurisdictionally barred from themselves asserting a direct purchaser claim under the Sherman Act. Likewise, Indirect Purchaser Plaintiffs' claims based on those same foreign purchases are jurisdictionally barred by the FTAIA. By allowing the Indirect Purchaser Plaintiffs to recover based on those foreign purchases, this Court would be imposing various state laws on foreign transactions between foreign parties that was never intended to be regulated by U.S. law and, more importantly, is affirmatively outside the jurisdiction of U.S. law. Indeed, what Indirect Purchaser Plaintiffs suggest to do with their state law claims would be an impermissible subversion of Congress' intent in passing the FTAIA and FTCA. *Id*. at 457-58.

Courts have long criticized attempts such as this to recover on claims of indirect injuries allegedly incurred in downstream markets in the United States as a result of anticompetitive conduct in foreign upstream markets. In *In re Intel*, the court dismissed both the Sherman Act and California state antitrust and consumer protection claims of a class of consumers who argued that Intel's anticompetitive conduct in foreign markets had caused them to pay higher prices because Intel's chips were sold at artificially higher prices and incorporated into computers that were ultimately imported into the United States, where they were then purchased by the plaintiffs. *Id.* at 456-58. The *Intel* court found that plaintiffs' monopoly claim under the Sherman Act was jurisdictionally barred under the FTAIA because their claim of indirect injury was insufficient to meet the "direct, substantial, and foreseeable effects" test. The court noted that these consumer plaintiffs' claims suffered from both the "twists and turns" of the allegations that had led the court to earlier decline subject matter jurisdiction over the claims of the directly injured party (AMD), as well as the "additional 'forks in the road'" over whether this anticompetitive conduct allowed Intel to charge higher prices for its chips, and whether those price increases were passed on to the PC manufactures, and then to the retailers, and then finally to the consumer plaintiffs. All of these contingencies—the convoluted and indirect path of the microprocessor chip (and its alleged overcharge) to the ultimate downstream product purchased by the plaintiffs in the United States—led the court to also decline subject matter jurisdiction over those indirect injury claims:

> That this speculative chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce required by the FTAIA has been confirmed by other courts who have considered similar allegations concerning the downstream effects on commerce of component products.

Id. (citing *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1014 (N.D. Ill. 2001), *aff'd* 322 F.3d 942 (7th Cir. 2003) ("The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs . . . that are used abroad to manufacture downstream products . . . 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.'")).

Likewise, the *Intel* court rejected the consumer plaintiffs' argument that their state law claims were not limited by the FTAIA or the FTCA. Intel argued that allowing state law claims to reach extraterritorially beyond boundaries expressly set by Congress in the FTAIA and the FTCA would violate the Foreign Commerce Clause and the Supremacy Clause. *Id.* at 457. Quoting the Supreme Court, the *Intel* court explained that "'[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" and therefore refused to allow the assertion of state law claims that would subvert Congress' intent in creating the "direct, substantial, and reasonably foreseeable

effects" tests under the FTAIA and the FTCA. *Id.* (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)).[11]

This is all consistent with the Ninth Circuit's view of what does and does not qualify as a "direct" effect for purposes of invoking the domestic injury exception under the FTAIA. The Ninth Circuit has classified an effect as "direct" only if "it follows as an ***immediate consequence*** of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (emphasis added). Indeed, the Ninth Circuit expressly held that that "[a]n effect cannot be 'direct' where it depends on . . . uncertain intervening developments." *Id.* at 681.

Here, by definition, Indirect Purchaser Plaintiffs' claim of injury by purchasing a downstream product in the United States is at least one (if not, ultimately, several) steps removed from the allegedly price-fixed SRAM sale outside the United States and is not the "immediate consequence" of Defendants' activity required by the Ninth Circuit to invoke the FTAIA's domestic injury exception. To the contrary, Indirect Purchaser Plaintiffs' attenuated indirect claim of injury falls squarely within the Ninth Circuit's prohibition on the extraterritorial application of U.S. law to adjudicate alleged injuries that "depend[] on . . . uncertain intervening developments." For each point along the chain—as the SRAM chip sold outside the United States moves through the hands of a direct purchaser, to a manufacturer, distributor, retailer, and/or reseller—the "effect" of any alleged foreign price-fixed sale becomes more and more indirect, unsubstantial and unforeseeable, and this Court lacks jurisdiction over any such claim as a result.

Second, there is no basis for the Indirect Purchaser Plaintiffs' new construction of their claims to include downstream products that were manufactured abroad and imported into the United States or otherwise allegedly include SRAM purchased outside the United States. Indirect Purchaser Plaintiffs' Second Amended Complaint alleges *no* information on the actual downstream products that they purchased that supposedly incorporate some unidentified type of SRAM memory chip, let alone any indication that these downstream products were manufactured with SRAM that was sold outside the United States. In a phrase that is repeated

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[11] The court's disposition of the state-law indirect purchaser claims in *Intel* is consistent with the bedrock principle of customary international law that legislation of one nation may not infringe the sovereignty of other nations. The sovereign equality of nations – "the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest," A. Cassese, International Law 48 (2d ed. 2005) – precludes a nation from applying its laws extraterritorially, unless the foreign conduct in question causes direct effects in that nation. *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (1945). By expressly limiting jurisdiction under the Sherman Act to foreign commerce that has a "direct, substantial and reasonably foreseeable effect" on markets in the United States, Congress codified this aspect of customary international law. Congress expressly prohibited litigants from asserting U.S. antitrust claims in ways that could interfere with the sovereign authority of foreign nations to regulate conduct within their own borders. *See Empagran I*, 542 U.S. at 165 (applying U.S. antitrust laws to foreign anticompetitive conduct "creates a serious risk of interference with a foreign national's ability to regulate its own commercial affairs."); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). Thus, permitting Indirect Purchaser Plaintiffs to circumvent the FTAIA by imposing individual state laws on foreign commerce would not only be inconsistent with the FTAIA, but would violate directly the same customary international law principles vindicated in the FTAIA.

virtually verbatim, the Indirect Purchaser Plaintiffs allege only that each named Plaintiff "indirectly purchased SRAM from one or more of the Defendants or their co-conspirators during the Class Period." IP SAC ¶¶ 8-105.

Plaintiffs cannot justify their broad discovery requests by simply now proclaiming that they purchased downstream products containing SRAM that was sold outside the United States and, thereby, unilaterally expand the scope of discovery—and recovery—in this action. To allow this justification would open up all component-based indirect purchaser cases to boundless international discovery. To the contrary, before they can compel this discovery, Plaintiffs bear the burden of demonstrating how these foreign sales numbers are relevant to their claims or likely to lead to the discovery of admissible evidence. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."); *3Com Corp*, 2007 WL 949596 at *2 ("Once an objection to the relevance of the information sought is raised, the burden shifts to the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action.")..

Indirect Purchaser Plaintiffs have only just begun to produce information in response to discovery requests served several weeks ago about the downstream products that they purchased. However, nothing in this discovery sheds any light on the claim that the SRAM in these downstream products was initially purchased outside the United States and, if so, where in the world it was purchased.

4. <u>Courts Have Long Limited The Geographic Scope Of Discovery In Antitrust Cases.</u>

Finally, separate and apart from these jurisdictional problems, courts have considered the type of information sought as well as its geographic scope when defining the scope of permissible discovery, and have declined to permit discovery of information that is beyond the geographic scope of a plaintiff's claims. This is particularly true when, as here, production of data from irrelevant jurisdictions would be burdensome and expensive. *See, e.g.*, *In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2007 WL 1827635, at *3 (N.D. Cal. June 25, 2007) (declining to allow discovery of data relating to foreign ATM network since it "pales in comparison to the burden of requiring an antitrust defendant to provide any and all information about its global industry . . ., as opposed to the anticompetitive practice alleged."); *In re Fertilizer Antitrust Litig.*, No. MF-75-1, 1979 WL 1690, at *11 (E.D. Wash. Feb. 2, 1979) (limiting discovery to the five states where the conduct that gave rise to the plaintiffs' claims had occurred); *see also Mr. Frank, Inc. v. Waste Mgmt., Inc.*, No. 80 C 3498, 1981 WL 2050, at *2 (N.D. Ill. Mar. 27, 1981) (limiting the geographic scope of discovery to the four Midwest states where the plaintiff could have been injured); *In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007) (declining to allow discovery relating to an alleged conspiracy in Europe where the plaintiff alleged that the defendants unlawfully excluded it from the U.S. market).

Here, Plaintiffs' worldwide discovery requests are even more broad. Plaintiffs are domestic entities that seek to recover only for United States purchases made at allegedly inflated prices *in the United States*. They purport to represent classes of individuals who purchased SRAM directly or indirectly from the defendants *in the United States.* DPC ¶ 58; IP SAC ¶ 132. Yet they are demanding that Defendants produce data relating to all of Defendants' sales of all types of SRAM throughout the world. Plaintiffs' request for worldwide sales data for all SRAM sales over a thirteen year period would require the production of information for millions of sales, with little to no relevance to this case. Given the passage of time, the burden of collecting this data – which in the case of some Defendants would involve the restoration of backup tapes or even now defunct databases – would be extremely costly and difficult. Plaintiffs have not offered any reason why this Court should impose on Defendants the added burden of producing transaction 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 scope of Plaintiffs' 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 worldwide discovery that Plaintiffs seek would be inconsistent with the FTAIA and the case law interpreting its provisions. For all of these reasons, Defendants respectfully request that the Court deny Plaintiffs' request for transactional data relating to sales outside the United States.

Respectfully submitted,

/s/ Pamela E. Woodside

Pamela Elaine Woodside

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