Defending "The Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial *United States v. Swanson*

Robert H. Bunzel and Howard Miller

Gary Swanson, a senior sales executive of Hynix America, was indicted for conspiring to fix Dynamic Random Access Memory (DRAM) computer chip prices in violation of Section 1 of the Sherman Act.[1] He was represented by the authors, and was tried before a jury earlier this year.[2]

The government investigation of the DRAM cartel began in early 2002, and by the time of the Swanson trial, four companies, Samsung, Infineon Technologies, Hynix, and Elpida Memory, and fourteen out of sixteen "carved out" individuals, had pled guilty resulting in fines and penalties of over $731 million.[3] The four-week trial ended with a hung jury, and a mistrial was declared on March 6, 2008, after seven days of deliberations. According to juror interviews and contemporaneous press reports, ten jurors favored acquittal and none found the government's key witness credible.[4] Shortly thereafter, on March 19, 2008, the government announced its decision not to retry the case and the court granted the government's motion to dismiss the indictment with prejudice.

Despite the high stakes and huge investment of government resources, defendants in criminal antitrust cases, such as those flowing from the DRAM investigation, can mount a credible defense and even win against the odds when the defense team directly takes on the government's evidence and witnesses.[5] Three critical lessons, gleaned from the successful defense of Mr. Swanson, illustrate how charges of criminal antitrust violations can be defeated.

First, the defense team can and must credibly challenge and undercut the testimony of the prosecution's key witnesses, who likely will have received immunity in exchange for the incriminating testimony.

Second, to provide a convincing, alternative explanation of the government's evidence, such as writings with sinister implications, the defense must gather useful information from an intelligent search of all the documents that the government produces.[6]

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[1] 15 U.S.C. § 1.

[2] United States v. Gary Swanson, No. CR-06-00692 PJH (N.D. Cal. filed Oct. 18, 2006) (Hamilton, J).

[3] Press Release, U.S. Dep't of Justice, Three Executives Indicted for Their Roles in the Dram Price-Fixing & Bid-Rigging Conspiracy (Oct. 18, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/October/06_at_710.html.

[4] *See* Dan Levine, *Hung Jury in Chip Price-Fixing Case*, Recorder, Mar. 7, 2008, at 1, *available at* http://www.bztm.com/pdf/Swanson_Recorder_2008.03.07.pdf.

[5] "'Criminal cartel enforcement is the Division's top priority . . . .'" Press Release, U.S. Dep't of Justice, *supra* note 3. Thomas Barnett recently stated that "By all measures, the Division's cartel enforcement program had a banner year that broke new ground." *Message from the AAG*, Spring 2008, at 1, *available at* http://www.usdoj.gov/atr/public/231424.pdf. However, since 1996, "not even half of all criminal antitrust defendants who have gone to trial have been convicted." F. Joseph Warin et al., *To Plead or Not to Plead: Reviewing a Decade of Criminal Antitrust Trials*, Antitrust Source, July 2006, at 1, http://www.abanet.org/antitrust/at-source/06/07/Jul06-Warin7=20f.pdf.

[6] One critical discussion of the recent KPMG fraudulent tax haven suit focuses on the onerous and expensive task associated with a "mountain of discovery" and "near-ceaseless document production." Defense counsel there estimated that the cost of a "proper defense," given as many as 5 million produced pages and 2,000 trial exhibits with 150,000 pages, should be $15–$20M for at least one defendant. Julie Triedman, *Buried Alive*, Am. Lawyer, Fall 2007, at S80.

Third, the defense team must distinguish and distance its defendant from the others who have pled guilty, received jail terms, and paid fines and other penalties for criminal conduct.

Attacking Amnesty and Undermining the Credibility of Immunized Witnesses

The Antitrust Division's Corporate Leniency Program attracts as many as two violator-applicants each month.[7] The program offers corporations, their officers, and their employees amnesty in exchange for their full and candid cooperation. There is a great incentive for corporations to participate: companies and protected officers and employees can avoid fines, felony convictions, and prison time, as well as treble damages in follow-on civil cases.[8] The program is viewed as an invaluable tool for identifying and curbing illegal activity. To be eligible, the reporting corporations must meet six conditions:

The amnesty program is viewed as "an invaluable tool" and "huge, huge source of cases for the Division."

1. The Department of Justice has not already received information on the illegal activity from any other source;[9]
2. The corporation took effective action to stop its participation in the illegal activity once it discovered the activity;
3. The corporation offers full cooperation with the Antitrust Division and reports the "wrongdoing with candor and completeness";
4. The whole corporation must come forward, not merely some individuals;
5. The corporation needs to make restitution with the victims where possible; and
6. The corporation could not have "clearly" been an instigator or leader of the activity.[10]

The DRAM investigation was publicly launched by subpoenas issued in June 2002, and Micron sought amnesty quickly, becoming a corporate participant in the Antitrust Division's Leniency Program. Micron executives provided lengthy interviews to the government to obtain individual amnesty and to discharge their cooperation obligations under the Program. Michael Sadler, Micron's Senior Vice President for Marketing, was the only co-conspirator identified by the government's bill of particulars to say he directly fixed a specific price with Mr. Swanson. Pursuant to the Leniency Program, he was immunized from prosecution as long as he cooperated with the government. All of the government's "open file" interview notes were turned over to the defense as part of the government's mammoth production. How the Swanson defense team successfully challenged the immunized witness' credibility was pivotal to its success.

Using the government's interview notes of Mr. Sadler in cross-examination at trial, the defense caused him to admit that he had told the government of a worldwide tour he initiated to seek the cooperation of other manufacturers to restrict production. Mr. Sadler had described this trip to the

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[7] Joseph E. Harrington, Jr., Corporate Leniency Program and the Role of the Antitrust Authority in Detecting Collusion, Paper for the Symposium: Towards an Effective Implementation of New Competition Policy 23–24 (Jan. 31, 2006), *available at* http://www.econ.jhu.edu/People/Harrington/Tokyo.pdf. *See also* Donald C. Klawiter & J. Clayton Everett, *The Legacy of* Stolt-Nielsen*: A New Approach to the Corporate Leniency Program?*, Antitrust Source, Dec. 2006, at 4 ("The Leniency Program is now considered the Division's most powerful tool for deterring and prosecuting cartels."), http://www.abanet.org/antitrust/at-source/06/12/Dec06-Klawiter12=19f.pdf.

[8] Lisa Phelan, Chief, National Criminal Enforcement Section, U.S. Dep't of Justice, recently stated that the Amnesty Program "has been a huge case generator" and a "huge, huge source of cases for the division," Lesson VII: Navigating the Department of Justice Corporate Leniency Program, ABA Brownbag Audio (Apr. 30, 2008), *available at* http://www.abanet.org/dch/committee.cfm?com=YL508000.

[9] When the DOJ has received some, but insufficient information, it applies substantially the same six conditions to allow latitude regarding the role of the participating amnesty applicant. U.S. Dep't of Justice, Corporate Leniency Policy 2–3 (Aug. 10, 1993), *available at* http://www.usdoj.gov/atr/public/guidelines/0091.pdf. For a summary history of the Leniency Program, see Klawiter & Everett, *supra* note 7, at 1–6.

[10] U.S. Dep't of Justice, Corporate Leniency Policy, *supra* note 9, at 1–2.

DOJ as "slam-dunk" illegal, and acknowledged that he was an "originator of that idea."[11] All of this was placed before the jury, and while the government urged this conduct was 'different' than the conspiracy alleged in the indictment of Mr. Swanson, it later became clear that the jury was highly skeptical of the bona fides of Micron—and Mr. Sadler—as a consequence.[12]

The government relied heavily on Mr. Sadler's testimony. He testified that he discussed pricing at two "core accounts" with Mr. Swanson, and that those discussions "set a benchmark" for discussions with other customers.[13] Based on their discussions, Mr. Sadler concluded he had an "understanding" with Mr. Swanson that Micron and Hynix were "on the same page."[14] Mr. Sadler also testified that on one occasion Mr. Swanson confirmed to him that Hynix was going to raise certain prices and that Mr. Sadler responded indicating that Micron would do the same.[15] As a key witness, and the only competitor who allegedly engaged in conspiratorial activity directly with Mr. Swanson, the defense cautioned the jurors that they should seriously question Mr. Sadler's credibility.

Our complete review of the government's production uncovered a number of documents that colored Mr. Sadler's testimony as self-interested, including evidence of Mr. Sadler's contradictory view of Hynix as a vicious competitor, not a price fixer,[16] which is what he earlier testified in an International Trade Commission (ITC) proceeding that concerned the same time period as the alleged conspiracy. A trial graphic that was used in the opening statement suggested that Mr. Sadler had been willing to say different things in different fora:

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[11] Transcript of Record at 1260–61, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 12, 2008).

[12] *See* Posting of Jury Foreperson to http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_M/threadview?bn=12140&tid=276347&mid=276353 (Mar. 10, 2008) (post-trial impressions of how amnesty may have been misplaced). Micron witnesses also testified that they would like to see Hynix destroyed. This was consistent with earlier speculation that "Hynix's competitors initiated a 'price war' to try to force Hynix to go under." James H. Mutchnik & Christopher T. Casamassima, United States v. Hynix Semiconductor, Inc.*: Opening The Door To The Inability-To-Pay Defense?*, Antitrust Source, Sept. 2005, at 3, http://www.abanet.org/antitrust/at-source/05/09/Sep05-Mutchnik9=27.pdf.

[13] Transcript of Record at 1113–14, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 12, 2008).

[14] "Q. Now, you indicated in your example about when prices were going up, that Mr. Swanson told you that prices were going up and you said, 'Yeah, we are on the same page.' What did you mean by that expression? . . . .

A. That's my slang terminology to say, 'Yeah, I agree with you.'"

Id. at 1121–22.

[15] "Q. And was that part of the reason why you wanted to make sure that was correct and you called Mr. Swanson?

A. Yes. As I recall, it was, again in a strong market environment when prices were going up and this was a very significant—significant amount of increase. And of course it was significant in my mind now because there was a specific price mentioned.

Q. And what did you say in response to his indication that he would be raising prices in a significant way?

A. I said, 'Yeah. Sounds good to me'. Or 'Just wanted to confirm that's what you were doing,' or something along those lines.

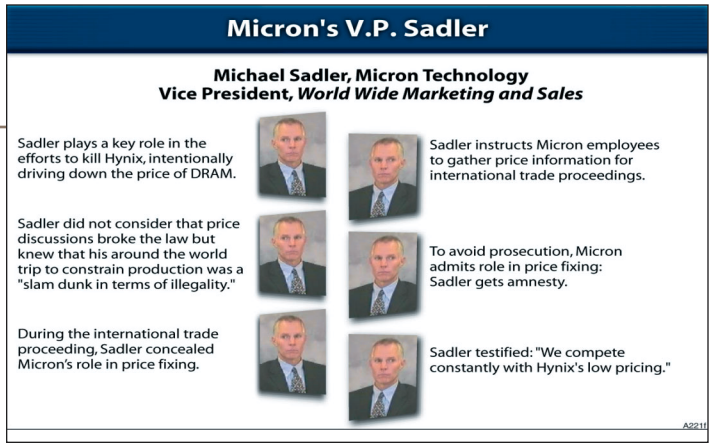
Q. Now, when you said 'Sounds good to me', what did you mean to convey to him?

A. That we were going to do the same thing."

Id. at 1128.

[16] "Although the government may seize an enormous volume of documents from targets pursuant to grand jury subpoenas, most of them may never be read as prosecutors make their cases based on cooperation from amnesty applicants and their witnesses and still other co-conspirators who may subsequently plead guilty and also cooperate." William J. Blechman, *Why* Twombly *Does Not (and Should Not) Apply to Hard-Core Cartels*, Antitrust Source, Oct. 2007, at 6 n.34, http://www.abanet.org/antitrust/at-source/07/10/Oct07-Blechman10-18f.pdf.

The key government witness "had been willing to say different things in different fora."

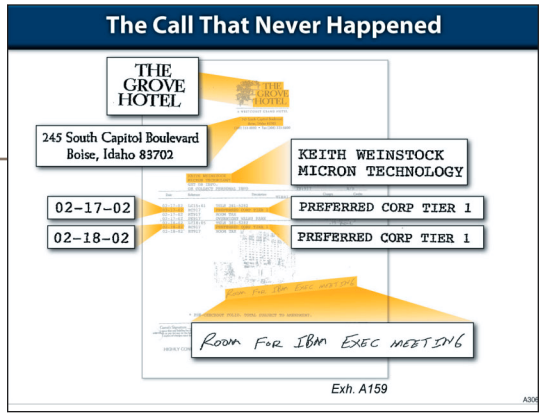


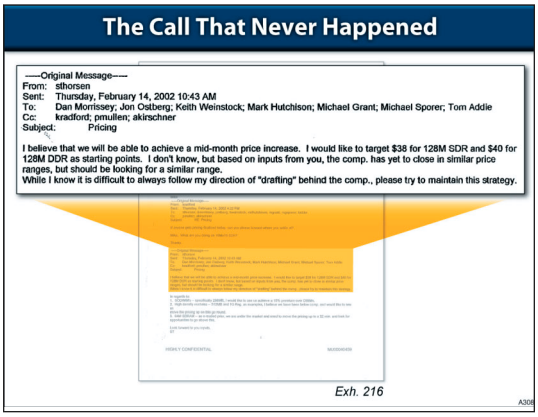
A cornerstone of Mr. Sadler's testimony was an alleged phone call in which Mr. Swanson supposedly gave him a future Hynix price of $40 for a DRAM product to be sold to IBM. Mr. Sadler's story was corroborated at trial by another Micron executive who testified that he was present in Sadler's office at the time and heard the conversation on a speakerphone. The story they presented together was sufficiently detailed, was cross-corroborated, and fit the government's theory—in all it appeared credible. But this specificity also allowed the defense to establish that the particular call could not have happened.

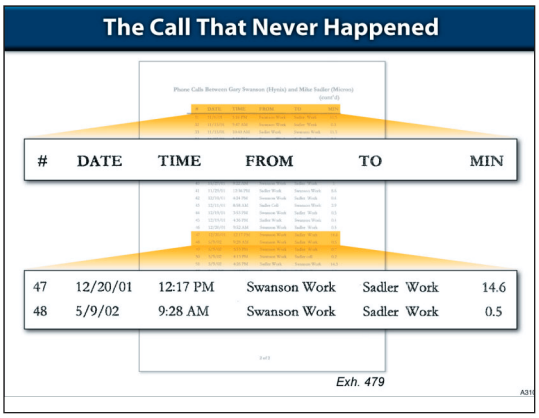
The corroborating Micron witness, who had responsibility for IBM, was based on the East Coast. He testified that he was present in Mr. Sadler's office at Micron headquarters in Boise, Idaho, at the time the phone call took place. Extensive searches of the government's document production reflecting the prices charged to IBM for that product established a timeframe when the $40 price range was obtained. Other records within the production universe, including travel and hotel receipts for the corroborating witness, further pinned down the only time when the telephone call could have taken place.

Through an FBI expert, the government had presented a large chart, detailing fifty-plus phone calls between Mr. Sadler and Mr. Swanson. Using the government interview notes at trial, Mr. Sadler on cross-examination admitted he told the DOJ that over a two-year period, there was only one call between them in which Mr. Swanson reportedly agreed to a specific future price. Using the government's own FBI-sponsored telephone log chart, we established that there were *no* phone calls between Mr. Sadler and Mr. Swanson at the only time (February 2002) when (i) the corroborating witness was in Boise and (ii) the product that was the subject of the call was in the $40 range. Graphics were presented in closing to highlight that *the defense* had proved "beyond a reasonable doubt" that the critical telephone call on which the government had pinned its conviction goal had *not happened*:

"The Call That Never Happened"







Last, but not least, the defense emphasized in closing the court's jury instructions relating to the credibility of immunized witnesses under the amnesty program:

> [Y]ou should consider the extent to which or whether their testimony may have been influenced by the grant of immunity from prosecution. . . . [and] whether the witnesses' testimony may have been influenced by any of the benefits they received and, in addition, *you should examine their testimony with greater caution than that of other witnesses*.[17]

The trial result and post-trial juror reactions indicated that this graphics evidence was significant to undercutting the government's case.[18]

Debunking Cryptic E-Mails

At the heart of any price-fixing case is an alleged agreement to collude. In this case, a conspiracy was easily established by the earlier guilty pleas, and the only question was whether Mr. Swanson had knowingly joined that conspiracy intending to further its objectives. The government put to the jury a broad variety of e-mails to and from the defendant that included vague, obscure, or coded words, and argued they reflected illegal mutual understandings showing knowledge of the conspiracy by Mr. Swanson and efforts by him to assist it.

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[17] Jury Instruction 19, United States v. Swanson, No. CR 06-0692 PJH (N.D. Cal. Mar. 10, 2008) (Document 337, at 10–11).

[18] The Antitrust Division philosophy, according to the Director of Criminal Enforcement, "has always been that, whenever possible, we will tilt our program in favor of finding ways to make companies eligible for our program rather than looking for ways to keep them out." Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Cornerstone of an Effective Leniency Program, Remarks to the ICN Workshop on Leniency Programs 19 (Nov. 22–23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm. The jurors in the *Swanson* case, on a pragmatic basis, were apparently concerned about the 'free ride' to an admitted conspirator.

In cross-examination, the defense team successfully challenged these writings by presenting detailed and more plausible, less sinister interpretations. This was only possible because the defense had been able to locate contradictory documents through an intelligent search of a document dump that had the effect of leaving the defense drowning in paper. The government's codeword focus also allowed the defense in both opening and closing to tell the jury what was *not* an agreement: competitors can legitimately talk to each other and even exchange price information without violating antitrust laws, absent agreement.

The government's opening statement conditioned the jury that there would not be direct writings showing illegal agreements.[19] As noted above, the government focused heavily on numerous superficially incriminating e-mails supported by testimony that permitted strong inferences of the defendant's participation in the conspiracy.[20] This evidence included such problematic statements as: "if [the competitor] leads the charge, [the defendant's company] can follow"; the defendant being instructed to employ "diplomacy" with competitors; advising the defendant that competitors are in the "same mood" on price; the defendant being told there is price "consensus" with competitors; and other Hynix executives noting that competitors are in the "same suit" on pricing.[21] All of the government witnesses testified pursuant to plea agreements, corporate cooperation agreements, or under amnesty immunity. Several of those witnesses testified that they had reached "mutual understandings" with competitors on price, and that they had told the defendant about their pricing discussions. When pressed on cross-examination, however, they acknowledged that the term "mutual understanding" was the government's language, not theirs. They confirmed that this phrase had been introduced into their vernacular during government interviews and trial preparation, which permitted the defense to defuse much of the "mutual understanding" sting.[22] Through deliberate word-by-word cross-examination and strategic use of searched records offering parallel, legitimate explanations, the defense was able to refute the government's effort to shoehorn loaded terms into the nebulae of "agreement" or "mutual understanding."

The prosecution's reliance on "mutual understandiings" was undermined by detailed cross-examination.

The defense theme of permissible communications on price was reinforced by the jury instructions,[23] and the *Swanson* case teaches how carefully crafted instructions are of great importance

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[19] "You have to remember this is an illegal agreement so, of course, it wouldn't have been written down. People wouldn't have wanted to leave a paper trail." Transcript of Record at 319–20, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 5, 2008).

[20] Judge Hamilton ruled that employee/employer e-mails are in themselves not admissible as business records, *see* Order at 17–18, United States v. Swanson, No. CR 06-0692 PJH (N.D. Cal. Nov. 16, 2007) (Final Pretrial Order, Document 247), but were admissible if they were proved up under the co-conspirator exception to the hearsay rule, Federal Rule of Evidence 801(d)(2)(e). This allowed for advance screening by the defense and the court of each co-conspirator statement before testimony by its author or recipient, including information from the government as to how and why the statement met the standards for the exception. *See* United States v. Swanson, No. CR 06-0692 PJH, order at 7 (N.D. Cal. Jan 22, 2008) (Third Addendum to Final Pretrial Order, Document 283). This procedure was of great assistance to the orderly presentation of the evidence.

[21] Transcript of Record at 934–35, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 11, 2008). See the government's filed co-conspirator evidence summaries at Exhibits 23-29 to Declaration of Niall E. Lynch, United States v. Swanson, No. CR 06-0692 PJH (N.D. Cal. filed Oct. 14, 2007) (Documents 200 and 201), and Exhibits A-H to Notice of Filing, United States v. Swanson, No. CR 06-0692 PJH (N.D. Cal. filed Feb. 28, 2008) (Document 324).

[22] "Q. Now, this term 'mutual understanding,' is that a term that was developed between you and the government during your interview sessions, or is that a term that you used before you were interviewed with the government? . . . .

A. [Peterson] Yeah. I don't remember ever saying the word mutually—a 'mutual understanding.'"

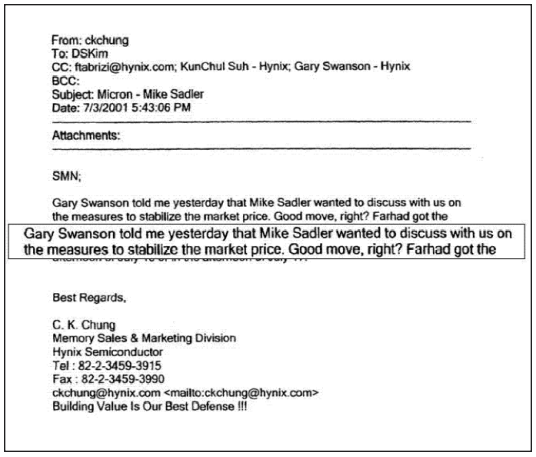
Transcript of Record at 439, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 5, 2008).

[23] "It is not unlawful for a person to obtain information about competitors' prices, or even to exchange information about prices, unless done pursuant to an agreement or mutual understanding . . . ." Jury Instruction 17, United States v. Swanson, No. CR 06-0692 PJH (N.D. Cal. Mar. 10, 2008) (Document 337, at 23).

in antitrust jury trials. The court gave preliminary instructions about permitted price discussions before opening statements, and the same but more detailed instructions were shown in graphics and read slowly by the defense to the jury at the trial's closing.[24] The instructions made clear that price exchanges with competitors only violate the Sherman Act *if* done pursuant to an agreement or mutual understanding.

Rather than avoiding potentially troublesome documents or ignoring these phrases, defense counsel highlighted them to the jury. Both in the opening statement[25] and closing argument,[26] we urged that it would be a great injustice to convict a defendant for knowing that his company's senior executive was in a "common mood" with a competitor's executive who had pled guilty. To further emphasize the ambiguous nature of the code-word evidence, the defense elicited testimony from a government witness, a Korean Hynix executive, that there were "delicate differences" between his native language and English, and that these differences might have affected his intention and understanding of the government's code words.[27] Based mostly on documents contained in the government's production, we contextualized each troublesome term in the government e-mails by showing that at the time of each e-mail or other communication there was an equally likely, potentially benign, purpose or meaning. This approach showed that Mr. Swanson might have known his competitors were 'aligned' on product or pricing issues, yet he did not perceive that an agreement or mutual understanding on price existed.

For example, two of the more troublesome e-mails, Exhibits 128 and 182, seemed to show that (i) Mr. Swanson told his Korean colleagues that a competitor wanted to "meet to discuss the measures to stabilize the market price," and (ii) Mr. Swanson knew another competitor had "agreed to gap-based pricing."



From: ckchung
To: DSKim
CC: ftabrizi@hynix.com; KunChul Suh - Hynix; Gary Swanson - Hynix
BCC:
Subject: Micron - Mike Sadler
Date: 7/3/2001 5:43:06 PM

Attachments:

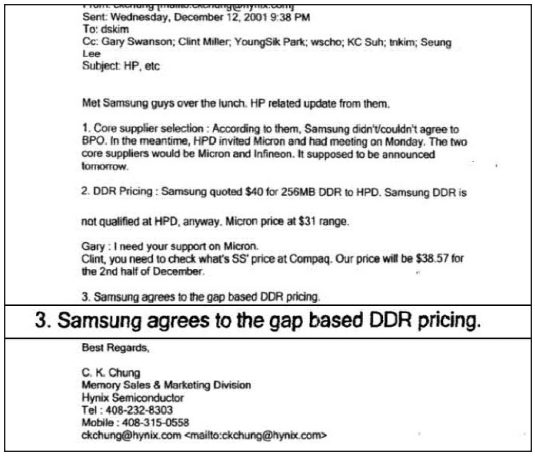
SMN;

Gary Swanson told me yesterday that Mike Sadler wanted to discuss with us on the measures to stabilize the market price. Good move, right? Farhad got the

Gary Swanson told me yesterday that Mike Sadler wanted to discuss with us on the measures to stabilize the market price. Good move, right? Farhad got the

Best Regards,

C. K. Chung
Memory Sales & Marketing Division
Hynix Semiconductor
Tel : 82-2-3459-3915
Fax : 82-2-3459-3990
ckchung@hynix.com <mailto:ckchung@hynix.com>
Building Value Is Our Best Defense !!!



Sent: Wednesday, December 12, 2001 9:38 PM
To: dskim
Cc: Gary Swanson; Clint Miller; YoungSik Park; wscho; KC Suh; tnkim; Seung Lee
Subject: HP, etc

Met Samsung guys over the lunch. HP related update from them.

1. Core supplier selection : According to them, Samsung didn't/couldn't agree to BPO. In the meantime, HPD invited Micron and had meeting on Monday. The two core suppliers would be Micron and Infineon. It supposed to be announced tomorrow.

2. DDR Pricing : Samsung quoted $40 for 256MB DDR to HPD. Samsung DDR is not qualified at HPD, anyway. Micron price at $31 range.

Gary : I need your support on Micron.
Clint, you need to check what's SS' price at Compaq. Our price will be $38.57 for the 2nd half of December.

3. Samsung agrees to the gap based DDR pricing.

3. Samsung agrees to the gap based DDR pricing.

Best Regards,

C. K. Chung
Memory Sales & Marketing Division
Hynix Semiconductor
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Mobile : 408-315-0558
ckchung@hynix.com <mailto:ckchung@hynix.com>

[24] "They are fixed because they are agreed upon." Transcript of Record at 2793, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 22, 2008). *See also id.* at 2296, 2152.

[25] "What the government would like to do in the context of any international company is to say, if some American representative doesn't look carefully at their e-mail—like the e-mails I told you about Mr. Swanson telling his staff before they talked to Korea, they have to talk to him first—then that person may wind up sitting here just like Mr. Swanson." Transcript of Record at 355, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 5, 2008) (Defense Opening Statement by John Bartko).

[26] "You know, ladies and gentlemen of the jury, if you can be convicted of a crime in the courts of the United States because somebody tells you they are in the same mood and you're supposed to know it means an agreement, and the witness who sent the e-mail says otherwise, and he's required to cooperate with the government, and the e-mail itself says there wasn't agreement, it says they're in serious consideration, if that's a crime and you can be convicted of it in the courts of the United States we're all in peril." Transcript of Record at 2217–18, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 22, 2008).

[27] Transcript of Record at 844, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 8, 2008).

The defense's response to these e-mails was threefold. First, the e-mails' authors were cross-examined, and it was established that Mr. Swanson did not attend any meeting to stabilize price, and that any "agreement" on gap pricing was nothing more than concurrence among competitors that new products should command an undefined market premium, or 'gap' over existing product pricing reflecting the development costs for new products. Second, other documentary evidence uncovered by the electronic document review was introduced to place the troublesome e-mails in a more sympathetic context. Third, Mr. Swanson testified in detail about each of the challenging e-mails, offering an explanation for the events that countered a criminal agreement on price. Substantial preparation ensured that Mr. Swanson was a congenial, soft-spoken witness who maintained eye contact with the jury.

Creating Distance from Guilty Pleas

Another major challenge was to distinguish Mr. Swanson from the executive and corporate guilty pleas, which in addition to the $731 million in fines and penalties had also resulted in 3,185 days of combined jail time.[28] In order to distance Mr. Swanson from those admitting guilt, including Hynix and several of its executives, the defense solicited admissions from those government witnesses that they had greater knowledge than Mr. Swanson of conduct the government claimed was criminal, and that they had concealed significant facts from him.

Each of the government's nine witnesses was an employee of companies that had either pled guilty or worked for Micron, which participated in the DOJ's Leniency Program. Accordingly, each of these witnesses was obligated to cooperate with the government (and none of them was willing to be interviewed by the defense). Three of Mr. Swanson's Korean superiors testified for the government as part of their plea arrangements that imposed prison time, fines, plus ongoing cooperation in the case against Mr. Swanson.

To support its argument of complicity, in its opening statement the government produced building floor plans showing that Mr. Swanson sat a few feet away from Korean executives who had pled guilty. They also used visual presentations of Hynix organization charts showing Mr. Swanson as a senior executive in the direct line of reporting between executives who either pled guilty or who would testify that they had reached "mutual understandings" on price with competitors. Because the plea agreements were admissible[29] (with exceptions for the amount of penalties or fines) and would create an inescapable conclusion of global wrongdoing, the defense acknowledged the pleas and the conspiracy from the beginning, and asked the jury to hold an open mind as to why persons in the same company might have different levels of knowledge and participation. The court's carefully crafted jury instructions stated:

> In considering the charge in the indictment you must consider whether the evidence shows beyond a

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[28] Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Address at the 56th Annual Spring Meeting of the ABA Section of Antitrust Law 14 (Mar. 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/232716.pdf.

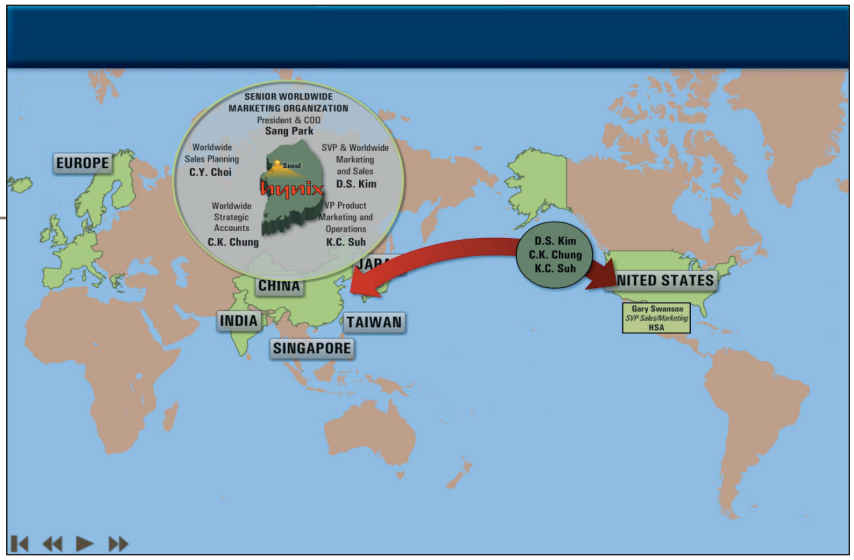
[29] In the Ninth Circuit a plea agreement may only be "considered by the jury in evaluating witness credibility" and shall not be considered as substantive evidence of the defendant's guilt. United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981). Courts recognize the jury's possible misuse of evidence of a witness's guilty plea and caution that trial courts must be "sensitive to the possibility of prejudice, and therefore both trial and reviewing courts have responsibility to insure that evidence of the plea is being offered by the prosecutor and used by the jury only for a permissible purpose." *Id.* at 1005. Admission of a plea agreement to assess a testifying witness's credibility is a "permissive purpose," where an appropriate limiting instruction has been given to that effect. United States v. Smith, 790 F.2d 789, 793 (9th Cir. 1986). Thus, the plea deals all came in.

> reasonable doubt that defendant *knowingly* and *intentionally* became a member of the charged conspiracy to fix prices.[30]

and:

> Presence at the scene of the crime and knowledge that a crime may be committed by others are not sufficient to establish a defendant's guilt. *Mere association* with conspirators or those involved in a criminal enterprise is insufficient to prove a defendant's participation or membership in a conspiracy.[31]

While the defense conceded the existence of price fixing, we sought to create "distance" between Mr. Swanson and the others who pled guilty or acknowledged wrongdoing. The goal was to create a bubble for Mr. Swanson in between the Korean executives who pleaded guilty and his salesmen who testified to reaching "mutual understandings." This was done on several levels, including use of the geographic separation between the U.S. subsidiary and the Korean parent, and individual separation between Mr. Swanson and the 'inner circle' Korean Hynix executives, through a series of trial graphics such as:



The defense created "distance" between the accused and the "inner circle" of Korean executives.

Although the Korean Hynix witnesses spent considerable time at the company's San Jose office, we succeeded in establishing the image of a foreign, hence distant, conspiracy in which Mr. Swanson was not knowingly involved beyond a reasonable doubt.

Second, we drew attention to the "delicate differences" between Korean and English, and how speakers use and understand the same English words differently. We pointed out how this had a direct bearing on Mr. Swanson's being a *knowing* and *intentional* participant in the conspiracy, which the government was required to prove. The defense repeatedly questioned Korean witnesses about conducting important international meetings almost exclusively in Korean, despite the presence of Mr. Swanson and other U.S. executives who did not read or speak Korean. While many meetings attended by Mr. Swanson were conducted in English, questions were deliberately raised for the jury about what could have been said in the Korean language meetings that was *not* said in the English language meetings.

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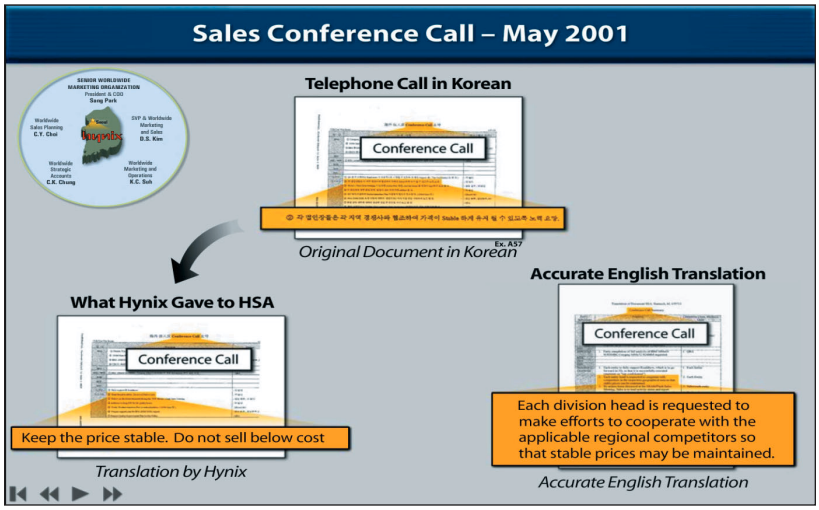
[30] Final jury instructions, Transcript of Record at 2296, United States v. Swanson, No. 3:06-00692 PJH (N.D. Cal. Feb. 22, 2008) (emphasis added).

[31] *Id.* at 2297–98 (emphasis added).

Third, and most importantly, we offered evidence that Mr. Swanson and other Americans were not privy to important Korean corporate communiqués, highlighting the importance of the "inner circle" illustrated in the above trial graphic. We used to advantage an important directive distributed to Mr. Swanson and the U.S. sales force at the beginning of the indictment period. This was a summary of a May 2001 international conference call, led by the parent company president, memorialized in an original Korean language version sent with an English translation. The company-provided English translation for the U.S. subsidiary offered a benign directive "to not sell below cost." However, an accurate government-stipulated forensic translation of the same Korean words, showed that the original Korean language version actually instructed company executives (who understood Korean) to "cooperate with the applicable regional competitors" to stabilize prices. A graphic was used to illustrate this dichotomy:



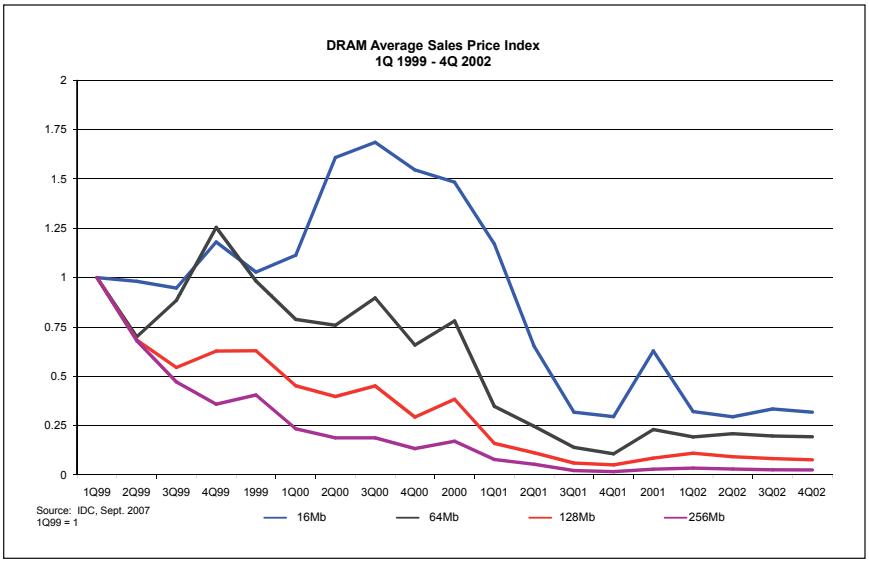
These Korean documents were identified from an original government production that included 55 million electronic pages and 1,123 boxes of hardcopy materials. By initially focusing primarily on Hynix and Micron documents, we sorted and prioritized over 19 million pages, from which over 580,000 pages of documents were selected for further issue and relevancy review by trial counsel. Nuances and subtleties inherent in verbal communications made it necessary to marry high-tech forensic data analysis with traditional fact investigation—eyes on paper.

The review attorneys were guided by issue matrices developed under the direct supervision of trial counsel. Even with a highly sophisticated and reliable forensic process, the review and judgment of trial counsel were necessary to develop the materials that permitted effective direct and cross-examinations.

In the end, some 1,500 Korean language documents required preliminary translations, and then a narrower subset received certified translations—which, with interaction between the government and defense-retained experts, resulted in favorable stipulated translations.

Finally, the inference that Mr. Swanson must have known about anticompetitive agreements between his company and other DRAM makers was refuted by market and expert testimony. Mr. Swanson (and other witnesses) testified that in 2001 and 2002, the DRAM market was no-holds barred and very competitive on price, since DRAMs were a fungible commodity product. The defense introduced testimony that Mr. Swanson and Mr. Sadler had both testified at the 2002–2003 ITC proceeding (which Micron brought against Korea, based on Hynix's alleged "under selling" DRAMs at artificially low prices through government subsidy), about the high degree of price competition between the companies.

To support our position, the defense called Professor Jerry Hausman of MIT, who had testified as an expert witness on behalf of Micron before the ITC. Professor Hausman testified about the level of competition in the marketplace at the time, and submitted a chart (replicating what he had done in the ITC proceedings for the same time period.) This 'corroborated' Mr. Swanson's view and state of mind: he did not know the DRAM producers were colluding to stabilize price, but rather it appeared to him that Hynix was fighting for survival in a highly competitive declining market.[32]



Conclusion

The challenges in defending Mr. Swanson are similar to those faced in many large, white-collar, data-intensive cases where other individuals and corporate coconspirators have pled guilty or obtained amnesty in the face of the overwhelming power and resources of the United States.[33]

The ability to launch an effective defense rests in these cases on a defense counsel's ability to sift through and manage, analyze, and assimilate vast amounts of data and documents so as to painstakingly distinguish the defendant at trial from others pleading guilty, and to attack in cross-examination the government's immunized witnesses and often cryptic written evidence.

In the end, the *Swanson* case teaches that (i) the government, after a robust investigation as in DRAM, that produces huge fines, penalties, and jail sentences, will insist on trial against the last man standing, and (2) such a defendant can prevail.

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[32] The government tried, without success, through a *Daubert* hearing, to block Professor Hausman's expert testimony, arguing it was not admissible to "justify" illegal agreements, yet that was not the offered purpose. As Judge Hamilton confirmed in pretrial rulings, Professor Hausman's testimony was admissible to show the reasonableness of Mr. Swanson's perception and lack of knowledge about anticompetitive price-stabilizing agreements, since the same would not be readily apparent to someone like the defendant engaged in daily intense competition in a steeply declining market. *See* United States v. Swanson, No. CR 06-0692 PJH, order at 3 (N.D. Cal. Dec. 18, 2007) (Second Addendum to Final Pretrial Order, Document 266) (citing Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir 1960)).

[33] As District Judge Lewis A. Kaplan has noted, we have moved "from a system in which prosecutors prosecuted and courts and juries decided guilt or innocence to a system in which prosecutors as a practical matter threaten business entities with unbearable extrajudicial consequences and thus exact acquiescence in the government's demands." Lewis A. Kaplan, *Some Reflections on Corporate Criminal Responsibility*, Antitrust Source, Oct. 2007, at 1, http://www.abanet.org/antitrust/at-source/07/10/Oct07-Kaplan10-18f.pdf.