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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 UNITED STATES OF AMERICA)

Case No. CR 06-059 PJH

13)
14 v.)

UNITED STATES AND ELPIDA
MEMORY, INC.'S JOINT
SENTENCING MEMORANDUM

15)
16 ELPIDA MEMORY, INC.,)

17 Defendant.)

DATE: March 22, 2006
TIME: 2:30 p.m.
COURT: Hon. Phyllis J. Hamilton

18
19 **JOINT SENTENCING MEMORANDUM**

20 The United States of America and the defendant, Elpida Memory, Inc. ("Elpida"), file this
21 Joint Sentencing Memorandum in support of their recommendation that the Court sentence the
22 Defendant to pay a fine of \$84 million. The parties also request that sentence be imposed as soon
23 as possible, but no later than March 22, 2006, based on the current record, without need of an
24 evidentiary sentencing hearing or a presentence report.

25 **INTRODUCTION**

26 On January 30, 2006, the United States filed an Information charging Elpida with one
27 count of participating in a conspiracy in the United States and elsewhere to suppress and
28 eliminate competition by fixing the prices of DRAM to be sold to certain Original Equipment

1 Manufacturer (“OEM”) customers from on or about April 1, 1999, to on or about June 15, 2002,
2 in violation of the Sherman Antitrust Act, 15 U.S.C. § 1, and one count of participating in a
3 conspiracy to submit collusive, non-competitive, and rigged bids to Sun Microsystems, Inc. on or
4 about March 26, 2002, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. Elpida is
5 scheduled to be arraigned on March 8, 2006. Elpida will waive indictment and plead guilty under
6 Fed. R. Crim. P. 11(c)(1)(C).

7 The United States and Elpida jointly submit this Joint Sentencing Memorandum to request
8 that the Court sentence Elpida on an expedited basis pursuant to Crim. L.R. 32-1(b). This
9 memorandum also outlines the material terms of the Plea Agreement between the United States
10 and Elpida, in the event the Court grants the parties’ request to impose a sentence immediately on
11 March 22, 2006, after accepting Elpida’s guilty plea. In conjunction with this Joint Sentencing
12 Memorandum, the United States and Elpida have filed a Stipulation and Proposed Order for
13 Expedited Sentencing Under L.R. 32-1(b).

14 The United States and Elpida respectfully submit that this Memorandum and the Plea
15 Agreement provide sufficient information for the Court to impose a sentence immediately without
16 a presentence report. In addition, an expedited sentencing would accommodate Elpida’s
17 corporate representative. If the Court finds that the Plea Agreement and this memorandum do not
18 provide sufficient information to allow for the imposition of sentence on the scheduled date of the
19 plea hearing, the parties are prepared to submit additional information requested by the Court. A
20 copy of the Elpida 11(c)(1)(C) Plea Agreement is attached as Exhibit A.

21 In conjunction with entry of the Elpida Plea Agreement and Joint Sentencing
22 Memorandum, Hitachi, Ltd., and NEC Corporation have entered into Cooperation and Non-
23 Prosecution Agreements with the Antitrust Division of the Department of Justice, which are
24 attached as Exhibits B and C.

25 **MATERIAL TERMS OF ELPIDA PLEA AGREEMENT**

26 The material terms of the Elpida Plea Agreement include:

27 1. Elpida will waive indictment, waive all rights as enumerated in the Plea
28 Agreement, and plead guilty under Fed. R. Crim. P. 11(c)(1) to a two-count Information charging

1 it with participating in a conspiracy in the United States and elsewhere to suppress and eliminate
2 competition by fixing the prices of DRAM to be sold to certain OEM customers from on or about
3 April 1, 1999, to on or about June 15, 2002, (the “Relevant Period”) in violation of the Sherman
4 Antitrust Act, 15 U.S.C. § 1, and participating in a conspiracy to submit collusive, non-
5 competitive, and rigged bids to Sun Microsystems, Inc. on or about March 26, 2002, in violation
6 of the Sherman Antitrust Act, 15 U.S.C. § 1. For purposes of the Plea Agreement, “DRAM”
7 means dynamic random access memory semiconductor devices and modules, including
8 synchronous dynamic random access memory (“SDRAM”), Rambus dynamic random access
9 memory (“RDRAM”), and double data rate dynamic random access memory (“DDR”)
10 semiconductor devices and modules. The conspiracy in Count One of the Information directly
11 affected these OEMs in the United States: Dell Inc., Hewlett-Packard Company, Compaq
12 Computer Corporation, International Business Machines Corporation, Apple Computer Inc., and
13 Gateway, Inc. From April 1, 1999 until on or about March 1, 2001, Hitachi, Ltd. (“Hitachi”) and
14 NEC Corporation (“NEC”), corporations organized and existing under the laws of Japan, sold
15 DRAM products into various markets, including the U.S. market. On December 20, 1999,
16 Hitachi and NEC (collectively, “Corporate Founders”) formed Defendant Elpida, a corporation
17 organized and existing under the laws of Japan. The Defendant has its headquarters and principal
18 place of business in Tokyo, Japan. Beginning on or about March 1, 2001, the Defendant sold
19 DRAM products into various markets, including the U.S. market. During the Relevant Period,
20 the sales of DRAM products directly affected by the conspiracy were as follows: NEC and
21 Hitachi respectively sold \$209 million and \$113 million from April 1, 1999 through February 28,
22 2001; and Elpida sold \$103 million from on or about March 1, 2001 through June 15, 2002; sales
23 by Elpida and its Corporate Founders directly affected by the conspiracy aggregated \$425 million.

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25 2. The United States and Elpida agree that the appropriate sentence in this case is a
26 fine of \$84 million and a special assessment of \$800. The fine is to be paid in full within 15 days
27 of the imposition of sentence. Elpida agrees to have its sentence determined under the United
28 States Sentencing Guidelines (“U.S.S.G.” or “Guidelines”), although Elpida understands the

1 Guidelines are advisory, not mandatory. The United States contends that had this case gone to
2 trial, the United States would have presented evidence to prove that the gain derived from or the
3 loss resulting from the charged offense is sufficient to justify a fine of \$84 million, pursuant to 18
4 U.S.C. § 3571(d). For purposes of this plea and sentencing, the Defendant waives its right to
5 contest this calculation.

6 3. The United States will not seek restitution in this case in light of the civil cases
7 filed against Elpida, including *In re DRAM Antitrust Litigation*, No. M-02-1486-PJH, MDL No.
8 1486, in the United States District Court, Northern District of California, and *DRAM Cases*, No.
9 CJC-03-004265, in the Superior Court, San Francisco, California, which potentially provide for a
10 recovery of a multiple of actual damages.

11 4. The United States agrees that it will not bring further criminal charges against
12 Elpida and its officers, directors, and employees (except for Choei Matsushima, Osamu Fujiwara,
13 Akihiko Furusawa, Hiroshi Higuchi, and Dimitrios James (“Jim”) Sogas – who have been
14 specifically excluded from the Plea Agreement) for their participation in the DRAM conspiracy.
15 In return, Elpida and its executives agree to cooperate fully in the ongoing DRAM investigation.
16 Elpida has already produced documents and made available some of its executives, in the United
17 States and overseas, for extensive interviews by Division attorneys and agents. Moreover, Elpida
18 has agreed to make many additional executives available to the United States for interviews and
19 to produce documents located outside the country, which are beyond the jurisdictional reach of
20 the government’s grand jury subpoenas. The documents produced and interviews conducted, as
21 well as additional proffered cooperation, have substantially assisted the Division in furthering its
22 investigation.

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3 **UNITED STATES SENTENCING GUIDELINES CALCULATIONS**

4 The parties agree to the following Sentencing Guidelines calculations, which are based on
5 the DRAM sales in the United States to certain OEMs by Elpida and its Corporate Founders,
6 which aggregate to \$425 million:

7	1.	Base Fine (20% of \$425 million (Volume of Affected Commerce) (§ 2R1.1(d)(1) & § 8C2.4(b))	\$85 million
8			
9	2.	Culpability Score	
10	i.	Base (§ 8C2.5(a))	5
11	ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	3
12			
13	iii.	Prior History (§ 8C2.5(c))	0
14	iv.	Violation of Order (§ 8C2.5(d))	0
15	v.	Obstruction of Justice (§ 8C2.5(e))	0
16	vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0
17			
18	vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g)(2))	-2
19			
20	c.	Total Culpability Score:	6
21	d.	Minimum and Maximum Multipliers (§ 8C2.6)	1.2 - 2.4
22			
23	e.	Minimum and Maximum Fine Range (§ 8C2.7)	\$102 - \$204 million

24 The United States will move, pursuant to § 8C4.1 of the Sentencing Guidelines, for a
25 downward departure from the minimum Guidelines fine to a fine of \$84 million due to Elpida's
26 substantial assistance in the United States' DRAM investigation. Additionally, Elpida has
27 produced relevant documents from the United States and abroad, and has made available several
28 employees for extensive interviews as a condition to the government entering into the Plea

