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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 UNITED STATES OF AMERICA)
12)
Plaintiff,) Case No. CR 04-0397 PJH
13 v.)
14 PETER SCHAEFER,)
Defendant.)
15)

16 **PLEA AGREEMENT**

17 The United States of America and Peter Schaefer ("Defendant") hereby enter into the
18 following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal
19 Procedure ("Fed. R. Crim. P."):

20 **RIGHTS OF DEFENDANT**

- 21 1. Defendant understands that he has the right:
- 22 (a) to be represented by an attorney;
- 23 (b) to be charged by Indictment;
- 24 (c) to plead not guilty to any criminal charge brought against him;
- 25 (d) as a citizen and resident of the Federal Republic of Germany
- 26 ("Germany"), to decline to accept service of the Summons in this case, and to contest the
- 27 jurisdiction of the United States to prosecute this case against him in the United States
- 28 District Court for the Northern District of California;

1 (e) to have a trial by jury, at which he would be presumed not
2 guilty of the charge and the United States would have to prove every essential element of
3 the charged offense beyond a reasonable doubt for him to be found guilty;

4 (f) to confront and cross-examine witnesses against him and to
5 subpoena witnesses in his defense at trial;

6 (g) not to be compelled to incriminate himself;

7 (h) to appeal his conviction; and

8 (i) to appeal the imposition of sentence against him.

9 **AGREEMENT TO PLEAD GUILTY**
10 **AND WAIVE CERTAIN RIGHTS**

11 2. Defendant waives the rights set out in Paragraph 1(b)-(h) above, including all
12 jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the
13 jurisdiction of the United States to prosecute this case against him in the United States District
14 Court for the Northern District of California. Defendant agrees to have his sentence determined
15 under the United States Sentencing Guidelines ("U.S.S.G.") and waives all constitutional
16 challenges to the validity of the U.S.S.G. Defendant waives any right he may have to have facts
17 that determine his Guidelines fine and imprisonment ranges under the U.S.S.G. (including any
18 facts used to determine his offense level, volume of commerce, any specific offense
19 characteristic or other enhancement or adjustment under the U.S.S.G.) alleged in an indictment
20 and found by a jury beyond a reasonable doubt. Defendant also waives the right to appeal the
21 imposition of the sentence against him, so long as the sentence imposed is consistent with the
22 recommended sentence contained in Paragraph 8 of this Plea Agreement. Defendant also waives
23 the right to file any collateral attack on his conviction or sentence, including a petition under 28
24 U.S.C. § 2255, at any time after he is sentenced, except for a claim that his constitutional right to
25 the effective assistance of counsel was violated. Further, pursuant to Fed. R. Crim. P. 7(b),
26 Defendant will waive Indictment and plead guilty at arraignment to a one-count Information to
27 be filed in the United States District Court for the Northern District of California. The
28 Information will charge that beginning on or about July 1, 1999, and continuing until on or about

June 15, 2002, Infineon Technologies AG (“Infineon AG”), including its United States-based subsidiary Infineon Technologies North America Corp. (“Infineon NA”), and co-conspirators participated in a conspiracy in the United States and elsewhere to suppress and eliminate competition by fixing the price of dynamic random access memory (“DRAM”) to be sold to certain original equipment manufacturers of personal computers and servers (“OEMs”), in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. The Information will further charge that Defendant, an employee of Infineon NA, joined and participated in the charged conspiracy from on or about April 26, 2001, until on or about June 15, 2002.

3. Defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence to prove the following facts:

(a) For purposes of this Plea Agreement, the “relevant period” is that period from on or about April 26, 2001, to on or about June 15, 2002. During the relevant period, Defendant was an employee of Infineon NA, an entity organized and existing under the laws of the state of Delaware with its principal place of business in San Jose, California. During at least a portion of the relevant period, Defendant’s title at Infineon NA was Vice President for Marketing, Sales & Logistics for Memory Products.

(b) DRAM is the most commonly used semiconductor memory product. DRAM provides high-speed storage and retrieval of electronic information in personal computers, servers, and other devices. In the course of his employment for Infineon NA, during at least a portion of the relevant period, Defendant had certain responsibilities relating to the marketing and sale of DRAM in the United States and also had certain supervisory responsibilities over other employees who had certain responsibilities relating to the sale of DRAM in the United States.

(c) During the relevant period, Defendant participated, to the extent described

1 below, in a pre-existing conspiracy in the United States and elsewhere among certain DRAM
2 producers and their officers and employees. The primary purpose of the conspiracy was to fix
3 the price of DRAM sold to certain OEMs. The conspiracy directly affected these OEMs in the
4 United States: Dell Inc., Hewlett-Packard Company, Compaq Computer Corporation,
5 International Business Machines Corporation, Apple Computer Inc., and Gateway, Inc. In
6 furtherance of the conspiracy, Defendant participated in communications with representatives of
7 other DRAM producers and sellers during which information on pricing was exchanged. The
8 purpose of these communications was to reach an understanding, which was ultimately achieved,
9 to raise or stabilize the price of DRAM to certain OEMs.

10 (d) In addition, during the relevant period Defendant was aware of the existence
11 of the conspiracy among the employees of Infineon NA, and he consented to the participation of
12 one or more of his subordinate employees in that conspiracy.

13 (e) During the relevant period, DRAM sold by one or more of the conspirators,
14 equipment and supplies necessary to the production and distribution of DRAM, and payments
15 for DRAM, traveled in interstate and foreign commerce. The business activities of Defendant
16 and his co-conspirators in connection with the production and sale of DRAM affected by this
17 conspiracy were within the flow of, and substantially affected, interstate and foreign trade and
18 commerce.

19 (f) Acts in furtherance of this conspiracy were carried out within the Northern
20 District of California. Furthermore, DRAM affected by this conspiracy was sold by one or more
21 of the conspirators to customers in this District.

22 **POSSIBLE MAXIMUM SENTENCE**

23 5. Defendant understands that the maximum penalty which may be
24 imposed against him upon conviction for a violation of Section One of the Sherman Antitrust
25 Act is:

- 26 (a) a term of imprisonment for three (3) years (15 U.S.C. § 1);
27 (b) a fine in an amount equal to the greatest of (1) \$350,000, (2) twice the
28 gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross

1 pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18
2 U.S.C. § 3571(b) and (d)); and

3 (c) a term of supervised release of one (1) year following any term of
4 imprisonment. If Defendant violates any condition of supervised release,
5 Defendant could be imprisoned for the entire term of supervised release
6 (18 U.S.C. § 3559(a)(5); 18 U.S.C. § 3583(b)(3) and (e)(3); and U.S.S.G. § 5D1.2(a)(3)).

7 6. In addition, Defendant understands that:

8 (a) pursuant to U.S.S.G. § 5E1.1, this Court may order him to pay
9 restitution to the victims of the offense; and

10 (b) pursuant to 18 U.S.C. § 3013(a)(2)(A) and U.S.S.G. § 5E1.3, this
11 Court is required to order Defendant to pay a \$100.00 special assessment
12 upon conviction for the charged crime.

13 **SENTENCING GUIDELINES**

14 7. Sentencing for the offense to be charged will be conducted pursuant to
15 the U.S.S.G. Manual in effect on the day of sentencing. Pursuant to U.S.S.G. § 1B1.8, the
16 United States agrees that self-incriminating information that Defendant provides to the United
17 States pursuant to this Plea Agreement will not be used to increase the volume of affected
18 commerce attributable to Defendant or in determining Defendant's applicable sentencing
19 guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b). The United States and
20 Defendant agree that the U.S. Sentencing Guidelines may be applied and, if applied, the
21 applicable sentencing guideline is U.S.S.G. § 2R1.1 with a base level of 10, a volume of
22 commerce adjustment of plus seven pursuant to U.S.S.G. § 2R1.1(b)(2)(G); for a total of 17, less
23 a 3-level adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a) and (b), for
24 a total offense level of 14. Further, the United States agrees to make a motion for downward
25 departure pursuant to Paragraph 10 herein and U.S.S.G. § 5K1.1, recommending that Defendant
26 be sentenced to the sentence agreed to below.

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1 the recommended sentence set out in Paragraph 8 above. Subject to the full and continuing
2 cooperation of Defendant, as described in Paragraph 13 of this Plea Agreement, and prior to
3 sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G.
4 § 5K1.1, for a downward departure from the Guidelines sentence in this case. The motion for
5 downward departure is based on cooperation that has already occurred and any additional
6 cooperation that may occur prior to sentencing. Furthermore, the United States will request that
7 this Court impose the fine and term of imprisonment contained in the recommended sentence set
8 out in Paragraph 8 of this Plea Agreement because of Defendant's substantial assistance in the
9 government's investigation and prosecutions of violations of federal criminal law in the DRAM
10 industry.

11 11. The United States and Defendant jointly submit that this Plea Agreement, the
12 record that will be created by the United States and Defendant at the plea and sentencing
13 hearing, will provide sufficient information concerning Defendant, the offense charged in this
14 case, and Defendant's role in the offense to enable the meaningful exercise of sentencing
15 authority by this Court under 18 U.S.C. § 3553. The United States will not object to Defendant's
16 request that this Court accept Defendant's plea of guilty and impose sentence on an expedited
17 schedule as early as the date of arraignment, based upon the record provided by Defendant and
18 the United States, under the provisions of Rule 32(b)(1), Fed. R. Crim. P., U.S.S.G. § 6A1.1, and
19 Criminal Local Rule 32-1(b). The Court's denial of the request to impose sentence on an
20 expedited schedule will not void this Plea Agreement. Should the Court deny Defendant's
21 request to impose sentence on an expedited schedule, the United States agrees that, at the initial
22 appearance or arraignment, it will recommend the release of Defendant on his personal
23 recognizance and without bond, under 18 U.S.C. § 3142, without restriction as to travel, pending
24 the sentencing hearing in this case.

25 12. The United States and Defendant understand that this Court retains complete
26 discretion to accept or reject the recommended sentence provided for in Paragraph 8 of this Plea
27 Agreement.

28 (a) If this Court does not accept the recommended sentence, the United States

1 and Defendant agree that this Plea Agreement, except for Paragraph 12(b) below, shall be
2 rendered void. Neither party may withdraw from this Plea Agreement, however, based
3 on the type or location of the correctional facility to which Defendant is assigned to serve
4 his sentence.

5 (b) If this Court does not accept the recommended sentence, Defendant will be
6 free to withdraw his guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If Defendant
7 withdraws his plea of guilty, this Plea Agreement, the guilty plea, and any statement
8 made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty
9 plea or this Plea Agreement or made in the course of plea discussions with an attorney for
10 the government shall not be admissible against Defendant in any criminal or civil
11 proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, should the
12 Court not accept the Plea Agreement and should Defendant then withdraw his guilty plea,
13 the United States agrees that it will dismiss the Information, without prejudice to the
14 United States' right to indict Defendant on the charge contained in the Information and
15 any other related charges. In addition, Defendant agrees that, if he withdraws his guilty
16 plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period
17 for any Relevant Offense, as defined in Paragraph 14 below, will be tolled for the period
18 between the date of the signing of the Plea Agreement and the date Defendant withdrew
19 his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea
20 Agreement, whichever is greater. For a period of three (3) consecutive days following
21 such a withdrawal of the guilty plea under this subparagraph, the United States shall take
22 no action, based upon either a Relevant Offense or any actual or alleged violation of the
23 Plea Agreement, to revoke Defendant's release on his personal recognizance, to subject
24 Defendant to service of process, arrest, or detention, or to prevent Defendant from
25 departing the United States.

26 **DEFENDANT'S COOPERATION**

27 13. Defendant will cooperate fully and truthfully with the United States in the
28 prosecution of this case, the current federal investigation of violations of federal antitrust and

1 related criminal laws involving the manufacture or sale of DRAM, any other federal
2 investigation resulting therefrom, and any litigation or other proceedings arising or resulting
3 from any such investigation to which the United States is a party ("Federal Proceeding"). The
4 ongoing, full, and truthful cooperation of Defendant shall include, but not be limited to:

5 (a) producing in the United States and at other mutually agreed-
6 upon locations all non-privileged documents, including claimed personal documents, and
7 other non-privileged materials, wherever located, in the possession, custody, or control of
8 Defendant, requested by attorneys and agents of the United States;

9 (b) making himself available for interviews in the United States
10 and at other mutually agreed-upon locations, not at the expense of
11 the United States, upon the request of attorneys and agents of the United States;

12 (c) responding fully and truthfully to all inquiries of the United
13 States in connection with any Federal Proceeding, without falsely implicating any person
14 or intentionally withholding any non-privileged information, subject to the penalties of
15 making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. §
16 1503);

17 (d) otherwise voluntarily providing the United States with any
18 non-privileged material or information, not requested in (a) - (c) of this paragraph, that he
19 may have that is related to any Federal Proceeding; and

20 (e) when called upon to do so by the United States in connection
21 with any Federal Proceeding, testifying in grand jury, trial, and other
22 judicial proceedings in the United States, fully, truthfully, and under oath, subject to the
23 penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand
24 jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and
25 obstruction of justice (18 U.S.C. § 1503).

26 **GOVERNMENT'S AGREEMENT**

27 14. Subject to the full, truthful, and continuing cooperation of Defendant, as
28 described in Paragraph 13 of this Plea Agreement, and upon the Court's acceptance of the guilty

1 plea called for by this Plea Agreement and the imposition of the recommended sentence, the
2 United States will not bring further criminal charges against Defendant for any act or offense
3 committed before the date of this Plea Agreement that was undertaken in furtherance of an
4 antitrust conspiracy involving the manufacture or sale of DRAM or undertaken in connection
5 with any investigation of such a conspiracy ("Relevant Offense"). The nonprosecution terms of
6 this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or
7 securities laws, or to any crime of violence.

8 15. The United States agrees that when Defendant travels to the United States for
9 interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for
10 meetings with counsel in preparation therefor, the United States will take no action, based upon
11 any Relevant Offense, to subject Defendant to arrest, detention, or service of process, or to
12 prevent Defendant from departing the United States. This paragraph does not apply to
13 Defendant's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. §
14 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. §
15 1623), obstruction of justice (18 U.S.C. § 1503), or contempt (18 U.S.C. §§ 401 - 402) in
16 connection with any testimony or information provided or requested in any Federal Proceeding.

17 16. (a) Subject to the full and continuing cooperation of Defendant,
18 as described in Paragraph 13 of this Plea Agreement, and upon the Court's acceptance of
19 Defendant's guilty plea and imposition of sentence in this case, the United States agrees not to
20 seek to remove Defendant from the United States under Section 240 of the Immigration and
21 Nationality Act, based upon Defendant's guilty plea and conviction in this case, should
22 Defendant apply for or obtain admission to the United States as a nonimmigrant (hereinafter
23 referred to as the "agreement not to seek to remove Defendant"). The agreement not to seek to
24 remove Defendant is the equivalent of an agreement not to exclude Defendant from admission to
25 the United States as a nonimmigrant or to deport Defendant from the United States.
26 (Immigration and Nationality Act, § 240(e)(2)).

27 (b) The Antitrust Division of the United States Department of Justice has
28 consulted with the United States Immigration and Customs Enforcement office of the United

1 States Department of Homeland Security (“ICE”). The ICE, in consultation with the United
2 States Department of State, has agreed to the inclusion in this Plea Agreement of this agreement
3 not to seek to remove Defendant.

4 (c) So that Defendant will be able to obtain any nonimmigrant visa that he
5 may need to travel to the United States, the ICE and the Visa Office of the United States
6 Department of State, have concurred in the granting of a nonimmigrant waiver of Defendant’s
7 inadmissibility. This waiver will remain in effect so long as this agreement not to seek to
8 remove Defendant remains in effect. While the waiver remains in effect, the Department of
9 State will not deny Defendant’s application for a nonimmigrant visa on the basis of Defendant’s
10 guilty plea and conviction in this case, and the ICE will not deny his application for admission as
11 a nonimmigrant on the basis of his guilty plea and conviction in this case.

12 (d) This agreement not to seek to remove Defendant will remain
13 in effect so long as Defendant:

- 14 (i) acts and has acted consistently with his cooperation obligations
15 under this Plea Agreement;
- 16 (ii) is not convicted of any felony under the laws of the United States
17 or any state, other than the conviction resulting from Defendant’s
18 guilty plea under this Plea Agreement or any conviction under the
19 laws of any state resulting from conduct constituting an offense
20 subject to this Plea Agreement; and
- 21 (iii) does not engage in any other conduct that would warrant his
22 removal from the United States under the Immigration and
23 Nationality Act.

24 Defendant understands that should the Antitrust Division become aware that Defendant
25 has violated any of these conditions, the Antitrust Division will notify the ICE. The ICE will
26 then determine, in consultation with the Antitrust Division, whether to move to rescind this
27 agreement not to seek to remove Defendant.

28 (e) Defendant agrees to notify the Assistant Attorney General of the Antitrust

1 Division should Defendant be convicted of any other felony under the laws of the United States
2 or of any state.

3 (f) Should the United States rescind this agreement not to seek to remove
4 Defendant because of Defendant's violation of a condition of this Plea Agreement, Defendant
5 irrevocably waives his right to contest his removal from the United States under the Immigration
6 and Nationality Act on the basis of his guilty plea and conviction in this case, but retains his
7 right to notice of removal proceedings.

8 17. Defendant understands that he may be subject to administrative action by federal,
9 state or foreign agencies other than the United States Department of Justice, Antitrust Division,
10 based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in
11 no way controls whatever action, if any, other agencies may take. However, the United States
12 agrees that, if requested, it will advise the appropriate officials of any governmental agency
13 considering such administrative action of the fact, manner, and extent of the cooperation of
14 Defendant as a matter for that agency to consider before determining what administrative action,
15 if any, to take.

16 **REPRESENTATION BY COUNSEL**

17 18. Defendant has reviewed all legal and factual aspects of this case with his attorney
18 and is fully satisfied with his attorney's legal representation. Defendant has thoroughly reviewed
19 this Plea Agreement with his attorney and has received satisfactory explanations from his
20 attorney concerning each paragraph of this Plea Agreement and alternatives available to
21 Defendant other than entering into this Plea Agreement. After conferring with his attorney and
22 considering all available alternatives, Defendant has made a knowing and voluntary decision to
23 enter into this Plea Agreement.

24 **VOLUNTARY PLEA**

25 19. Defendant's decision to enter into this Plea Agreement and to tender a plea of
26 guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises,
27 or representations other than the representations contained in this Plea Agreement. The United
28 States has made no promises or representations to Defendant as to whether this Court will

1 accept or reject the recommendations contained within this Plea Agreement.

2 **VIOLATION OF PLEA AGREEMENT**

3 20. Defendant agrees that, should the United States determine in good faith, during the
4 period that any Federal Proceeding is pending, that Defendant has failed to provide full and
5 truthful cooperation, as described in Paragraph 13 of this Plea Agreement, or has otherwise
6 violated any provision of this Plea Agreement, the United States will notify Defendant or his
7 counsel in writing by personal or overnight delivery or facsimile transmission and may also
8 notify his counsel by telephone of its intention to void any of its obligations under this Plea
9 Agreement (except its obligations under this paragraph), and Defendant shall be subject to
10 prosecution for any federal crime of which the United States has knowledge including, but not
11 limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement.

12 Defendant may seek Court review of any determination made by the United States under this
13 Paragraph to void any of its obligations under the Plea Agreement. Defendant agrees that, in the
14 event that the United States is released from its obligations under this Plea Agreement and brings
15 criminal charges against Defendant for any Relevant Offense, the statute of limitations period for
16 such offense will be tolled for the period between the date of the signing of this Plea Agreement
17 and six (6) months after the date the United States gave notice of its intent to void its obligations
18 under this Plea Agreement.

19 21. Defendant understands and agrees that in any further prosecution
20 of him resulting from the release of the United States from its obligations under this Plea
21 Agreement based on Defendant's violation of the Plea Agreement, any documents, statements,
22 information, testimony, or evidence provided by him to attorneys or agents of the United States,
23 federal grand juries, or courts, and any leads derived therefrom, may be used against him in any
24 such further prosecution. In addition, Defendant unconditionally waives his right to challenge
25 the use of such evidence in any such further prosecution, notwithstanding the protections of Fed.
26 R. Evid. 410.

27 22. Defendant agrees to and adopts as his own the factual statement contained in
28 Paragraph 4 above. In the event that Defendant breaches the Plea Agreement, Defendant agrees

1 that the Plea Agreement, including the factual statement contained in Paragraph 4 above,
2 provides a sufficient basis for any possible future extradition request that may be made for his
3 return to the United States to face charges either in the Information referenced in Paragraph 2 of
4 this Plea Agreement or in any related indictment. Defendant further agrees not to oppose or
5 contest any request for extradition by the United States to face charges either in the Information
6 referenced in Paragraph 2 of this Plea Agreement or in any related indictment.

7 **ENTIRETY OF AGREEMENT**

8 23. This Plea Agreement constitutes the entire agreement between the
9 United States and Defendant concerning the disposition of the criminal charge in this case. This
10 Plea Agreement cannot be modified except in writing, signed by the United States and
11 Defendant.

12 24. The undersigned attorneys for the United States have been authorized by the
13 Attorney General of the United States to enter this Plea Agreement on behalf of the United
14 States.

15 25. A facsimile signature shall be deemed an original signature for the purpose of
16 executing this Plea Agreement. Multiple signature pages are authorized for the purpose of
17 executing this Plea Agreement.

18
19 DATED: November 25, 2004

Respectfully submitted,

20
21 BY:

22 /s/
Peter Schaefer
23 Defendant

24 /s/
Counsel for Defendant
25 Michael J. Shepard
26 Neil A. F. Popovic
27 Heller Ehrman White & McAuliffe LLP
333 Bush Street
San Francisco, CA 94104

/s/
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