

1 NIAL E. LYNCH (State Bar No. 157959)
2 RICHARD B. COHEN (State Bar No. 79601)
3 DINA WONG (State Bar No. 202878)
4 EUGENE S. LITVINOFF (State Bar No. 214318)
5 NATHANAEL M. COUSINS (State Bar No. 177944)
6 Antitrust Division
7 U.S. Department of Justice
8 450 Golden Gate Avenue
9 Box 36046, Room 10-0101
10 San Francisco, CA 94102
11 Telephone: (415) 436-6660

12 Attorneys for the United States

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA)	
)	Criminal No. 03-0368 PJH
16 v.)	
)	Filed January 21, 2004
17 ALFRED P. CENSULLO,)	
)	
18 Defendant.)	
19 _____)	

20 **PLEA AGREEMENT**

21 The United States of America and the defendant, Alfred P. Censullo, hereby enter into
22 the following Plea Agreement pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal
23 Procedure (Fed. R. Crim. P.):

24 **RIGHTS OF DEFENDANT**

- 25 1. The defendant understands his rights:
- 26 (a) to be represented by an attorney;
 - 27 (b) to be charged by Indictment;
 - 28 (c) to plead not guilty to any criminal charge brought against him;
 - (d) to have a trial by jury, at which he would be presumed not
guilty of the charge and the United States would have to prove every essential element of
the charged offense beyond a reasonable doubt for him to be found guilty;
 - (e) to confront and cross-examine witnesses against him and to
subpoena witnesses in his defense at trial;

- 1 (f) not to be compelled to incriminate himself;
2 (g) to appeal his conviction, if he is found guilty at trial; and
3 (h) to appeal the imposition of sentence against him.

4 **AGREEMENT TO PLEAD GUILTY**
5 **AND WAIVE CERTAIN RIGHTS**

6 2. The defendant waives the rights set out in Paragraph 1(b)-(g) above. Further,
7 pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at
8 arraignment to a one-count Information to be filed in the United States District Court for the
9 Northern District of California. The Information will charge the defendant with obstruction of
10 the due administration of justice by altering and withholding documents responsive to a grand
11 jury subpoena in violation of Title 18 U.S.C. § 1503.

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

15 **FACTUAL BASIS FOR OFFENSE CHARGED**

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

18 (a) On or about June 17, 2002, a grand jury sitting in the Northern District of
19 California caused a subpoena *duces tecum* to be served on Micron Technology, Inc.
20 (Micron) relating to an investigation into criminal antitrust violations in the dynamic
21 random access memory (DRAM) industry. Among other things, the grand jury subpoena
22 called for the production of documents relating to any contacts and communications
23 between DRAM competitors relating to the pricing and sale of DRAM.

24 (b) During the time period covered under the grand jury subpoena, the
25 defendant was Regional Sales Manager (RSM) for upstate New York, responsible for
26 customers in his geographic region, including the server division of International
27 Business Machines, Inc. In the course of his employment, the defendant was invited and
28 encouraged to attend weekly RSM telephone conferences with other Micron RSMs

1 responsible for major computer original equipment manufacturer (OEM) customers, also
2 known as core accounts. During these phone calls, the Micron RSMs stated their price
3 recommendations for DRAM sales to major OEM customers and also discussed the
4 prices at which competing DRAM suppliers would sell their products to major OEMs in
5 upcoming price negotiations. During the period covered by the grand jury subpoena, the
6 defendant from time to time recorded in his notebooks handwritten information
7 concerning competing DRAM suppliers' pricing which he obtained during these RSM
8 telephone conferences.

9 (c) Sometime shortly after the grand jury subpoena was served on Micron,
10 Micron notified many of its employees, including the defendant, of the grand jury
11 investigation into criminal antitrust violations in the DRAM industry. After being
12 notified of the grand jury investigation and subpoena, the defendant, with an intent to
13 influence, obstruct, and impede the grand jury investigation, altered his handwritten
14 notations in his notebooks by inserting additional words, phrases, and symbols into his
15 notebooks in an effort to materially change the meaning of the original notes. Many of
16 the entries that were altered by the defendant relate to competitor pricing information
17 responsive to the subpoena. Additionally, the defendant removed and initially withheld
18 14 pages from his notebooks that contained competitor pricing information and obvious
19 alterations that could be detected by the naked eye, and which, if produced, would have
20 alerted the United States that these documents had been altered.

21 (d) The alterations to the defendant's handwritten notations were material to
22 the grand jury investigation. The alterations by the defendant were an attempt to disguise
23 the nature, source, and accuracy of information responsive to the grand jury subpoena
24 concerning contacts and communications between DRAM suppliers relating to the
25 pricing and sale of DRAM, evidence central to any criminal antitrust investigation.

26 **POSSIBLE MAXIMUM SENTENCE**

27 5. The defendant understands that the maximum penalty that may be imposed
28 against him upon conviction for a violation of Title 18 U.S.C. Section 1503 is:

(a) a term of imprisonment for ten (10) years;
(b) a \$250,000 fine; and
(c) a term of supervised release of no more than three years following any sentence of imprisonment. If the defendant violates any condition of supervised release, the defendant could be imprisoned for the entire term of supervised release (18 U.S.C. § 3583(e)(3), and United States Sentencing Guidelines (U.S.S.G.) § 5D1.2(a)(2)).

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. § 5E1.1, the Court may order him to pay restitution to the victims of the offense; and
(b) pursuant to 18 U.S.C. § 3013(a)(2)(A) and U.S.S.G. § 5E1.3, the Court is required to order the defendant to pay a \$100 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

7. Sentencing for the offense to be charged will be conducted pursuant to the U.S.S.G. Manual in effect on November 1, 2002, the agreed-upon date of the offense, pursuant to U.S.S.G. § 1B1.11(b)(1). Pursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used in determining the defendant's applicable Sentencing Guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).

SENTENCING AGREEMENT

8. The Defendant understands that the sentence to be imposed on him is within the sole discretion of the sentencing judge and that, pursuant to Fed. R. Crim. P. 11(c)(3)(B), if the Court does not follow the recommendations of the United States, he will have no right to withdraw his guilty plea once it is entered.

9. Based on the information now known to it, the United States will move the Court for a downward adjustment of two levels for acceptance of responsibility under U.S.S.G. § 3E1.1.

10. The defendant understands that the Court will order him to pay a \$100 special

1 assessment pursuant to 18 U.S.C. § 3013(a)(2)(A) and U.S.S.G. § 5E1.3, in addition to any fine
2 imposed.

3 11. Pursuant to Fed R. Crim. P. 11(c)(1)(B), the United States agrees that if, in its
4 sole and exclusive judgment, it decides that the defendant has cooperated fully and truthfully,
5 provided substantial assistance to law enforcement authorities within the meaning of U.S.S.G. §
6 5K1.1 in any federal antitrust investigation involving any DRAM product sold by Micron, and
7 otherwise complied fully with this Agreement, it will file with the Court a motion under § 5K1.1
8 and 18 U.S.C. § 3553 that explains the nature and extent of the defendant's cooperation and will
9 recommend a downward departure.

10 12. Subject to the ongoing, full, and truthful cooperation of the defendant, as
11 described in Paragraph 13 of this Plea Agreement, and before sentencing in the case, the
12 United States will fully advise the Court and the Probation Office of the fact, manner, and extent
13 of the defendant's cooperation and his commitment to prospective cooperation with the United
14 States' investigation and prosecutions, all material facts relating to the defendant's involvement
15 in the charged offense, and all other relevant conduct. To enable the Court to have the benefit of
16 all relevant sentencing information, the United States may request, and the defendant will not
17 oppose, that sentencing be postponed until his cooperation is complete.

18 **DEFENDANT'S COOPERATION**

19 13. The defendant will cooperate fully and truthfully with the United
20 States in the prosecution of this case, the conduct of the current federal investigation of
21 violations of federal antitrust and related criminal laws involving the manufacture or sale of
22 DRAM in the United States and elsewhere, any other federal investigation resulting therefrom,
23 and any litigation or other proceedings arising or resulting from any such investigation to which
24 the United States is a party (Federal Proceeding). The ongoing, full, and truthful cooperation of
25 the defendant shall include, but not be limited to:

- 26 (a) producing in the United States all documents, including claimed personal
27 documents, and other materials, in the possession, custody, or control of the defendant,
28 requested by attorneys and agents of the United States;

1 (b) making himself available for interviews, not at the expense of the United
2 States, upon the request of attorneys and agents of the United States;

3 (c) responding fully and truthfully to all inquiries of the United States in
4 connection with any Federal Proceeding, without falsely implicating any person or
5 intentionally withholding any information, subject to the penalties of making false
6 statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503);

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

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

16 14. The defendant understands and agrees that the decision of the United States on
17 whether to file a motion pursuant to U.S.S.G. § 5K1.1, as described in Paragraph 11 above, is
18 based on its sole and exclusive decision of whether the defendant has provided substantial
19 assistance. The defendant understands and agrees that the decision will be binding on him. The
20 defendant understands that the decision of the United States on whether to file such a motion, or
21 the extent of the departure recommended by any motion, will not depend on whether convictions
22 are obtained in any case. The defendant also understands that the Court will not be bound by
23 any recommendation made by the United States.

24 **AGREEMENT BY THE UNITED STATES**

25 15. Subject to the full, truthful, and continuing cooperation of the defendant, as
26 described in Paragraph 13 of this Plea Agreement, and upon the Court's acceptance of the guilty
27 plea called for by this Plea Agreement and the imposition of sentence, the United States will not
28 bring further criminal charges against the defendant for any act or offense committed before the

1 date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy
2 involving the manufacture or sale of DRAM or undertaken in connection with any investigation
3 of such a conspiracy (Relevant Offense). The nonprosecution terms of this paragraph do not
4 apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any
5 crime of violence.

6 **REPRESENTATION BY COUNSEL**

7 16. The defendant has reviewed all legal and factual aspects of this case with his
8 attorney and is fully satisfied with his attorney's legal representation. The defendant has
9 thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory
10 explanations from his attorney concerning each paragraph of this Plea Agreement and
11 alternatives available to the defendant other than entering into this Plea Agreement. After
12 conferring with his attorney and considering all available alternatives, the defendant has made a
13 knowing and voluntary decision to enter into this Plea Agreement.

14 **VOLUNTARY PLEA**

15 17. The defendant's decision to enter into this Plea Agreement and to tender a plea of
16 guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises,
17 or representations other than the representations contained in this Plea Agreement. The United
18 States has made no promises or representations to the defendant as to whether the Court will
19 accept or reject the recommendations contained in this Plea Agreement.

20 **VIOLATION OF PLEA AGREEMENT**

21 18. The defendant agrees that, should the United States determine in good faith,
22 during the period that any Federal Proceeding is pending, that the defendant has failed to provide
23 full and truthful cooperation, as described in Paragraph 13 of this Plea Agreement, or has
24 otherwise violated any provision of this Plea Agreement, the United States will notify the
25 defendant or his counsel in writing by personal or overnight delivery or facsimile transmission,
26 and may also notify his counsel by telephone, of its intention to void any of its obligations under
27 this Plea Agreement (except its obligations under this paragraph), and the defendant shall be
28 subject to prosecution for any federal crime of which the United States has knowledge,

1 including, but not limited to, the substantive offenses relating to the investigation resulting in
2 this Plea Agreement. The defendant may seek Court review of any determination made by the
3 United States under this paragraph to void any of its obligations under the Plea Agreement. The
4 defendant agrees that, in the event the United States is released from its obligations under this
5 Plea Agreement and brings criminal charges against the defendant for any Relevant Offense, the
6 statute of limitations period for such offense will be tolled for the period between the date of the
7 signing of this Plea Agreement and six (6) months after the date the United States gives notice of
8 its intent to void its obligations under this Plea Agreement.

9 19. The defendant understands and agrees that in any further prosecution of him
10 resulting from the release of the United States from its obligations under this Plea Agreement
11 based on the defendant's violation of the Plea Agreement, any documents, statements,
12 information, testimony, or evidence provided by him to attorneys or agents of the United States,
13 federal grand juries, or courts, and any leads derived therefrom, may be used against him in any
14 such further prosecution. In addition, the defendant unconditionally waives his right to
15 challenge the use of such evidence in any such further prosecution, notwithstanding the
16 protections of Fed. R. Evid. 410.

17 **ENTIRETY OF AGREEMENT**

18 20. This Plea Agreement constitutes the entire agreement between the United States
19 and the defendant concerning the disposition of the criminal charge in this case. This Plea
20 Agreement cannot be modified except in writing, signed by the United States and the defendant.

21 21. The undersigned attorneys for the United States have been authorized by the
22 Attorney General of the United States to enter into this Plea Agreement on behalf of the United
23 States.

24 ///

25 ///

26 ///

27 ///

28 ///

1 22. A facsimile signature shall be deemed an original signature for the purpose of
2 executing this Plea Agreement. Multiple signature pages are authorized for the purpose of
3 executing this Plea Agreement.

4
5 DATED: December 17, 2003

Respectfully submitted,

6 /s/
7 BY: _____
8 Alfred P. Censullo
9 Defendant

 /s/
BY: _____
Niall E. Lynch
Richard B. Cohen
Dina Wong
Eugene S. Litvinoff
Nathanael M. Cousins
Trial Attorneys
U.S. Department of Justice
Antitrust Division
450 Golden Gate Avenue
10th Floor
San Francisco, CA 94102
Tel: 415.436.6660

10 /s/
11 _____
12 Donald C. Klawiter
13 Counsel for Alfred P. Censullo