

## Last Man Standing

Technology helps win Gary Swanson's freedom in a criminal price-fixing case.

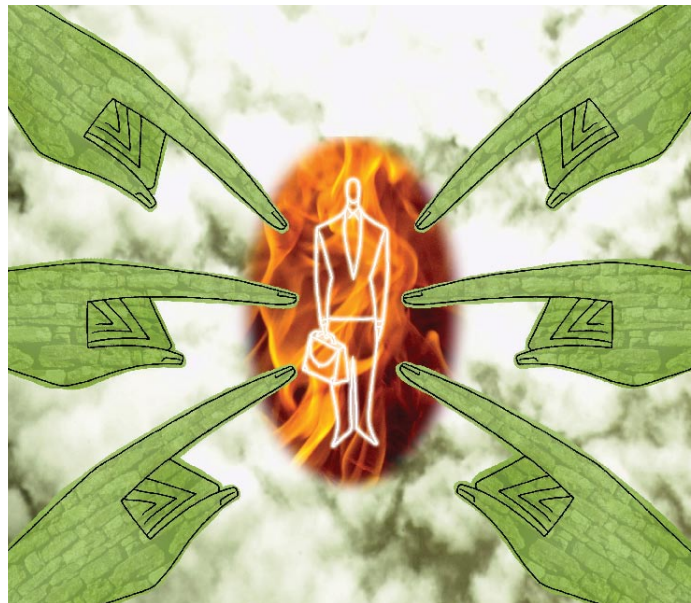
By J. Eric Bartko

In October 2006, Gary Swanson, an executive with computer chipmaker Hynix Semiconductor Inc., was indicted by the United States Department of Justice, charged with joining a criminal conspiracy to fix prices in the Dynamic Random Access Memory industry. *United States v. Gary Swanson*, No. CR-06-00692 PJH, was heard before Judge Phyllis Hamilton, United States District Court, Northern District of California, San Francisco Division.

In related cases, 16 other individuals and four corporations were also charged in conjunction with a massive federal investigation into antitrust violations in the DRAM industry.

The investigation, launched in 2002, netted \$731 million in fines — and guilty pleas — from Hynix, as well as from Samsung, Infineon Technologies AG, and Elpida Memory Inc. It was the second largest antitrust recovery ever recorded. One company, Micron Technologies, was granted amnesty and agreed to testify for the government.

Initially, 16 individuals were criminally charged, and 14 accepted guilty pleas. One individual, Young Bae Rha, a Korean national, chose to remain a fugitive. Swanson, the "last man standing" in the litigation, was a senior sales executive at Hynix America. He



maintained his innocence, and entered a plea of not guilty.

Swanson and his counsel, Jack McLean, chose our firm, Bartko Zankel Tarrant & Miller, to represent him at trial. McLean is a veteran litigator and former Pillsbury Madison & Sutro partner. His experience in antitrust matters spans more than 36 years. As was soon learned, McLean was quite adept at incorporating e-discovery requirements into his legal lexicon.

BartkoZankel is a litigation boutique with an extensive trial practice. With 30 attorneys and 30 support staff, our practice includes business, real estate, and financial institution work.

Within the past year, we have integrated e-discovery management and a complete litigation support department into our infrastructure, including data preservation, collection, processing, review, and production.

BZresources is a subsidiary of the firm, and offers these services outside the firm as well. Our team includes Mark Seo, manager of e-discovery and litigation technologies; Runel Iglesia, litigation support analyst; and Dana Marie Sanchez, senior case manager.

The DOJ's trial attorney team was lead by Niall Lynch, and included Nathaniel Cousins and Charles Reichman.

The three lawyers were based in the antitrust divi-

sion in San Francisco.

### WHAT DOCUMENTS?

Late in November 2006, a conference call with the DOJ attorneys yielded the following information:

- The DOJ would provide more than 1,500 boxes of paper documents.
- The DOJ would produce 280 GB of electronic files, but could not tell us the types of files or whether they were reflected in the 1,500 boxes of paper documents.
- The DOJ would continue to produce responsive documents from ongoing related civil litigation; however, they did not indicate the number of documents, or whether they would produce them in hardcopy or as electronic files or even specify a media type.

In January 2007, a cursory review of the paper documents and the electronic files yielded an estimate that 2.5 million pages of hardcopy and 19 million electronic files would require reviewing.

Assuming that an attorney can review 50 documents per hour, the review would require 400,000 hours — one attorney reviewing for 200 years or 200 attorneys reviewing for one year.

Initial processing proposals predicted costs exceeding \$300,000 to process 280 GBs of e-files and \$780,000 to scan, OCR and code 600,000 documents. Start-up costs for the review were expected to be more than \$1 million dollars, before one document was even reviewed.

To contain those costs and meet the 12-month review target, our litigation support department ([www.bzresources.com](http://www.bzresources.com)) used ingenuity, and a mix of products from three major vendors.

First, we turned to the firm's ex-

isting e-processing systems. Among our tools were Ipro Tech Inc.'s ([www.iprotech.com](http://www.iprotech.com)) line of products, including Ipro e-Scan IT and Ipro OCR, and a full text search engine, dtSearch, from dtSearch Corp. ([www.dtsearch.com](http://www.dtsearch.com)).

We integrated those results with the data processed by our vendors ALC Legal Technologies ([www.alcweb.com](http://www.alcweb.com)) and LDiscovery ([www.ldiscovery.com](http://www.ldiscovery.com)).

Both ALC and LDiscovery also used Ipro eCapture to calculate MD5 Hash Algorithms (which yielded the same results as e-Scan IT), which allowed us to distribute e-processing across the three facilities and accurately identify and remove duplicate files across the entire collection.

We then determined that a hosted document review system was required. Many systems have successfully integrated features that can increase review workflow. After reviewing several systems, we selected iConect Development's iConect.nxt ([www.iConect.com](http://www.iConect.com)). In addition to its complex foldering and search capabilities, we could easily export data and images to our LexisNexis Concordance ([www.lexisnexis.com/concordance](http://www.lexisnexis.com/concordance)) database, which would later be used at trial.

(In previous years, native file review has been optional, but now, all major review tools include this option. Concept searching and integrated near duplicate detection within applications is swiftly becoming the norm.)

Using iConect also helped us maximize the results of our Ipro OCR processing, allowing us to highlight key words from our searches (making review of the text easier and faster). We were also able to easily overlay our DT Search Syn-tax into its search engine, resulting

in faster and more accurate synonym and stem searches.

Two dedicated database analysts (Iglesia and Seo) supported the initial review. Key term searches were performed, and folders were populated for attorney review.

We then turned to the firm's attorneys. All four of our firm's associates and six contract attorneys participated in the review. We used staff attorneys to tag more than 32 issues, from identifying e-mails sent to and from competing companies, to tagging phone records of specific individuals, to identifying expense receipts and personal calendars — all essential to the defense of our client.

Initial document sampling reduced the total population for review to 1.5 million documents, and iConect's ability to rank search results (which helped us prioritize reviewed documents) increased the review rate from 50 documents per hour to 125 documents per hour.

In the 11th month of our review, however, workflow reports indicated that 200,000 documents would not be reviewed on time. Faced with deadlines and cost requirements that could not be supported in the U.S., we enlisted the aid of a Philippine company. (BartkoZankel, saying that it is proprietary information, declines to name the company.) The Philippine team, which worked directly under the supervision of BartkoZankel's litigation associates, recruited and trained 11 reviewers (J.D.s, attorneys and law students). The review was successfully completed on time and with a cost savings of 75% compared to a U.S.-based review.

### TRIAL PREPARATION

Under the direction of McLean and two senior trial attorneys, John

Bartko and Robert Bunzel, field experts were gathered to assist in Swanson's defense:

- Avi Stachenfeld of Visual Advocacy ([www.visualadvocacy.com](http://www.visualadvocacy.com)) created graphics for the opening and closing statements.
- Jury consultants Beth Bonora and Idgi D'Andrea ([www.bonoradandrea.com](http://www.bonoradandrea.com)) assisted with jury selection.
- Winston Krone, of Safir Rosetti ([www.safirrosetti.com](http://www.safirrosetti.com)), an international security, investigations, intelligence consultancy, provided testimony on e-mail preservation.
- Transperfect Translations International Inc. ([www.transperfect.com](http://www.transperfect.com)) provided testimony on the translation of Korean documents.

BZresources' senior database analyst Runel Iglesia imported 1,200 "hot" documents from iConect into Concordance, along with 321 trial exhibits and 210 video clip depositions into Verdict System's Sanction. ([www.sanction.com](http://www.sanction.com)).

Throughout the three-week trial, Iglesia completed daily tasks that provided the trial attorneys immediate access to exhibits for use in cross-examination, including:

- Importing trial transcripts and real time issue tags into Thomson West's Livenote, ([www.livenote.com](http://www.livenote.com)), which then could be sent to Sanction for display.
- Creating and displaying video clips in Sanction taken from the civil depositions.
- Searching the Concordance database for referenced images and sending them to Sanction for display.

#### AT TRIAL

In the courtroom, the BartkoZankel trial team's technology included

presentation of a series of graphics, slides, timelines and exhibits using Adobe System Inc.'s Flash ([www.adobe.com](http://www.adobe.com)), Microsoft Corp.'s PowerPoint, ([www.microsoft.com/powerpoint](http://www.microsoft.com/powerpoint)), LexisNexisTimeMap ([www.casesoft.com/timemap](http://www.casesoft.com/timemap)), and Sanction.

Real-time transcripts were managed in Livenote.

In the opening statement, Bartko began with a 15-slide PowerPoint presentation, including one that questioned the credibility of the prosecution's star witness, Micron vice president, Michael Sadler.

During witness examination, both the prosecution and the defense used Sanction to display, magnify and highlight exhibits.

Using Adobe Flash, Dana Marie Sanchez, a trial specialist and senior litigation paralegal for BartkoZankel displayed a graphic comparing a Korean language document and the company's English translation with BartkoZankel's certified English translation, which significantly differed.

A key issue in the dispute was whether or not Michael Sadler had received a phone call from Gary Swanson at a specific date, when a corroborating Micron witness was in Sadler's office in Boise, Idaho. Using the Prosecution's own exhibit, an FBI graph outlining all phone calls from Sadler to Swanson during a two-year period, Avi Stachenfeld of Visual Advocacy created a PowerPoint Slide emphasizing the defense's assertion that the "call never happened," — a visual that Bartko also used in his closing argument.

#### THE VERDICT

After seven days of deliberation, on March 6, 2008, Swanson's trial ended in a hung jury, 10 to 2 in favor

of acquittal. Juror interviews indicated that none of them had found the DOJ's key witness, Micron's Michael Sadler, to be credible.

Two weeks later, the DOJ announced that it would not retry the case. So, with the help of legal technology, Gary Swanson was the last man standing in this litigation, and is now a free man. **LTN**

---

**J. Eric Bartko** is resources manager at BZresources, a subsidiary of San Francisco-based BartkoZankel. E-mail: [ebartko@bzresources.com](mailto:ebartko@bzresources.com). A version of this story appeared in the August 18, 2008 edition of Incisive Media's *The Recorder* newspaper.