

In a sea of guilty pleas, DRAM executive goes to trial

By Dan Levine

RECORDER STAFF WRITER

The bizarre world of criminal antitrust law went on full display Tuesday in a packed San Francisco courtroom.

Jurors heard opening statements in the prosecution of Hynix Semiconductor sales executive Gary Swanson — the only individual accused in the government's vast DRAM price-fixing probe to go to trial. In criminal antitrust cases, the first company to report wrongdoing gets amnesty from the government, while the rest of the companies receive varying degrees of leniency — depending on their level of cooperation.

Such is the case with dynamic random access memory chips. A government probe launched in 2002 led to \$731 million in fines and more than a dozen guilty pleas from executives at companies like Samsung, Infineon Technologies, Hynix and Elpida Memory.

With all the cooperating witnesses involved, Justice Department antitrust attorney Niall Lynch had to quickly inoculate the jury.

"We will need to rely on insiders," Lynch said, including three other executives at Hynix.

"All three gentlemen already agreed to plead guilty, and they accepted responsibil-

ity," the prosecutor said. "You can evaluate their credibility. They were sentenced to prison time and got reduced sentences."

Swanson's attorney John Bartko, of Bartko Zankel Tarrant & Miller, contended that the price-fixing agreements were undertaken at an executive level above Swanson. Those other executives held conferences in Korean, which Swanson doesn't understand, Bartko said.

"What you will not hear from [prosecutors] is that [executives] told Mr. Swanson they entered into those agreements," he said.

The DRAM cases were only the beginning of the government's antitrust crack-down on computer component manufacturing. The DOJ also is investigating similar conduct involving SRAM — or static RAM chips — and flash memory.

Thus, some white-collar practitioners believe the stakes are high for prosecutors: If Swanson is acquitted, it could eat at the government's leverage against other companies and executives.

But other lawyers think the Swanson case is too fact-specific to have any broader impact. Individual defendants in Swanson's situation are known in antitrust circles as "carve-outs," referring to executives not covered by the global settlement

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their company negotiates with the government.

"If you had a carve-out who had facts like Swanson's facts, whatever they may be, I could see a person like that feeling a little more robust about taking the government to the mat," said William Goodman, a San Francisco-based Kasowitz, Benson Torres & Friedman partner who represented a DRAM manufacturer.

"On the other hand, most of the time in carve-out situations, you're going to have some people carved-out where the evidence against them is really strong," Goodman said.

Given the number of companies involved in the government's antitrust investigation — and the multitude of executives — the proceedings in Judge Phyllis Hamilton's courtroom attracted a crush of lawyers. They saw Lynch try to show that price fixing has concrete, real-world consequences — and not just higher prices.

"Once competitors gather round to fix prices, they no longer have an incentive to improve their products," Lynch said.

The government cited numerous communications between Swanson and Micron

Technology sales executive Michael Sadler, which prosecutors contend were conducted for the purposes of price fixing. Micron was the first company to cooperate with the government, and so none of its executives are carved out; Sadler is expected to be a key government witness.

So Bartko targeted Sadler and his company during opening statements, saying the Micron executive wanted

to "kill Hynix." Amnesty was the only salvation for Micron because its own price-fixing behavior was so bad, Bartko said, and Sadler himself withheld critical testimony from the International Trade Commission.

"This is the witness the government brings into the courtroom and asks you to believe," Bartko said. "I submit to you, after cross-examination you will not think he is worthy of belief."

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