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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE AMERICA, INC.,

Plaintiff,

v.

MICRON TECHNOLOGY, INC. and MICRON SEMICONDUCTOR PRODUCTS, INC.,

Defendants.

Case No. 10-cv-04340 PJH

**PLAINTIFF ORACLE AMERICA, INC.'S NOTICE OF MOTION AND MOTION TO STRIKE THE TWENTY-FIRST AFFIRMATIVE DEFENSE ASSERTED IN DEFENDANTS' AMENDED ANSWER**

Hon. Phyllis J. Hamilton

Date: June 22, 2011
Time: 9:00 a.m.
Location: Courtroom 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

Trial Date: None set

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## NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 22, 2011 at 9:00 a.m., or as soon thereafter as the matter may be called, in the courtroom of the Honorable Phyllis J. Hamilton, United States District Judge, U.S. District Court for the Northern District of California, 3rd Floor, Courtroom 3, 1301 Clay Street, Oakland, CA 94612, the Motion to Strike the Twenty-first Affirmative Defense Asserted in Defendants' Amended Answer (the "Motion") of Plaintiff Oracle America, Inc. ("Oracle") will be heard.

Oracle will and hereby does move this Court for an order striking the Twenty-first Affirmative Defense asserted in Defendants Micron Technology, Inc. and Micron Semiconductor Products, Inc.'s (collectively "Micron") Amended Answer (Doc. No. 47) pursuant to Federal Rule of Civil Procedure 12(f) on the ground that the civil leniency provisions of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237 § 213, 118 Stat. 661 (2004) ("ACPERA"), do not apply to Micron. Oracle's Motion will be based on this notice of motion and the accompanying memorandum of points and authorities, this Court's file on this matter, and such other matters as may be presented at the hearing.

## STATEMENT OF RELIEF SOUGHT

Pursuant to Federal Rule of Civil Procedure 12(f), Oracle moves this Court for an order striking the Twenty-first Affirmative Defense asserted in Defendants' Amended Answer.

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## MEMORANDUM OF POINTS AND AUTHORITIES

## INTRODUCTION

Micron's twenty-first affirmative defense seeking retroactive application of ACPERA to its amnesty agreement with the U.S. Department of Justice ("DOJ") is invalid as a matter of law and, therefore, should be stricken from Micron's Amended Answer (Doc. No. 47).

In 2002, Micron contacted DOJ and sought amnesty from criminal prosecution for its admitted role in a long-standing international price-fixing cartel among DRAM suppliers. In exchange for DOJ's promise to Micron that it would receive "amnesty from any criminal prosecution," Micron provided certain details about it and its co-conspirators' participation in the illegal cartel. Five other major DRAM suppliers and 17 of their executives ultimately pleaded guilty. Micron's co-conspirators were convicted of felonies and collectively paid nearly $1 billion in criminal fines. Micron, on the other hand, was never prosecuted and never paid a penny to the government on account of its amnesty agreement. And now Micron seeks to avoid providing certain civil remedies to its victims by aggressively litigating against legitimate claimants seeking nothing more than what is owed to them under the U.S. antitrust laws. Oracle, formerly known as Sun Microsystems, Inc. ("Sun"), is one such victim.[1]

Between 1998 and 2002, Oracle bought billions of dollars worth of DRAM from Micron and certain of its co-conspirators at artificially-inflated prices set by the cartel. In fact, Micron was one of Oracle's top DRAM suppliers during the conspiracy period. Oracle now seeks to recover those overcharges from Micron under Section 1 of the Sherman Act and Section 4 of the Clayton Act, which provides for treble damages and joint-and-several liability for violations of the Sherman Act.

In its Amended Answer, filed nearly seven months into this litigation, Micron now asserts as its *twenty-first* affirmative defense (which did not appear in its initial Answer) that, in addition to the substantial benefits of the criminal amnesty deal it struck with DOJ in 2002, it also should

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[1] On February 15, 2010, Oracle USA, Inc. merged with and into Sun Microsystems, Inc. Sun Microsystems, Inc., the surviving corporation, was then renamed "Oracle America, Inc." To avoid confusion, we refer to Plaintiff here as "Oracle" throughout.

be permitted to reap the enormous civil leniency benefits of a federal statute – the ACPERA – which was enacted in 2004, some *two years after* Micron entered into its criminal amnesty agreement with DOJ. *See* Micron Am. Answer at 31 (Doc. No. 47). The only way ACPERA could affect Micron's criminal amnesty agreement with DOJ would be to apply the statute *retroactively*. Such an application would relieve Micron from joint-and-several liability and treble damages, both of which are statutory rights granted to Oracle under the federal antitrust laws. In short, Micron seeks to continue to avoid the liability it bears as a result of its admitted and knowing participation in a criminal price-fixing cartel by depriving Oracle of its basic statutory rights and remedies as a victim of that cartel.

The U.S. Supreme Court has emphasized that there is a clear presumption against a retroactive application of a statute and that this presumption can be rebutted only by "clear congressional intent" to the contrary. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 280 (1994). That "clear" intent is not present here. There is no indication, either in the language of the statute or the legislative history, that Congress intended for ACPERA to apply retroactively to corporate criminals, such as Micron, that already had weighed the consequences of coming forward to obtain amnesty from criminal prosecution *as they existed before ACPERA was adopted* and that decided to come forward and accept *those consequences*. And Congress certainly did not intend to provide such criminals with an extraordinary windfall (in the form of eliminating joint-and-several liability and treble damages in civil lawsuits) at such a tremendous expense to their victims. Indeed, the legislative history of ACPERA shows just the opposite, namely, that Congress intended the statute to provide *prospective* assistance to DOJ in identifying and stopping anticompetitive criminal activity. Retroactive application of ACPERA would require this Court to ignore one of the most fundamental tenets of centuries-old jurisprudence and deprive Oracle of basic rights and remedies afforded it under the federal antitrust laws.

For these reasons, Micron's twenty-first affirmative defense should be stricken from Micron's Amended Answer. Addressing this issue now is necessary to determine the scope of discovery and Micron's liability at issue.

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## STATEMENT OF FACTS

On October 25, 2002, Micron admitted its involvement in a price-fixing conspiracy in the DRAM industry and entered into a corporate leniency agreement with DOJ. *See* Micron Amnesty Agreement (attached hereto as Exhibit 1). Micron provided information about the conspiracy in exchange for DOJ not bringing "any criminal prosecution against Micron for any act or offense it may have committed prior to the date of [Micron's amnesty agreement with DOJ] in connection with the anticompetitive conduct being reported." *See id.* at 2. This was the benefit Micron sought and received from DOJ in 2002 when it decided to come forward and admit its role in the DRAM criminal price-fixing cartel. Thus, when Micron entered the DOJ's Corporate Leniency Program in 2002, it was well aware – and accepted – that it would be subject to joint-and-several liability and treble damages in any civil actions brought under the Sherman Act by victims, such as Oracle, seeking redress for Micron's criminal price-fixing conduct.

Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Hynix Semiconductor, Inc., Elpida Memory, Inc., and Infineon Technologies AG, as well as a number of their executives, ultimately agreed to plead guilty to criminal price-fixing charges and paid criminal fines totaling nearly $1 billion. Despite playing a central role in the illegal conspiracy, Micron's amnesty agreement allowed it to escape without pleading guilty, paying any criminal fines, or having any of its executives spend time in prison.

After Micron came forward and admitted its participation in the DRAM conspiracy, Congress found that too few companies involved in illegal cartels were willing to take advantage of the protections afforded by DOJ's Corporate Leniency Program as Micron had. Senator Orrin Hatch explained the reason for this:

> Though the [Corporate Leniency Program] has been successful, a major disincentive to self reporting still exists, the threat of exposure to a possible treble damage lawsuit by the victims of the conspiracy. Under current law, the successful leniency applicant is not criminally charged, but still faces treble damages actions with joint and several liability. In other words, before voluntarily disclosing its criminal conduct, a potential amnesty applicant must weigh the potential ruinous consequences of subjecting itself to liability for three times the damages that the entire conspiracy caused.

150 Cong. Rec. S3614 (2004) (relevant excerpts attached hereto as Exhibit 2). Congress responded to this concern by passing ACPERA. In relevant part, Section 213(a) of ACPERA provides:

> [I]n any civil action alleging a violation of Section 1 or 3 of the Sherman Act or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a clamant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

108 Pub. L. 108-237, § 213(a) (codified at 15 U.S.C. § 1).

Touted as giving "*additional* incentive for corporations to disclose antitrust violations by limiting their liability," ACPERA restricts the civil exposure of new amnesty applicants coming forward after the statute's enactment by eliminating joint-and-several liability and treble damages if the various requirements of the statute are met. *See* 150 Cong. Rec. H3657 (2004) (statement of Rep. Sensenbrenner) (emphasis added). On June 22, 2004 – nearly two years after Micron entered into its amnesty agreement under the DOJ Corporate Leniency Program as it existed in 2002 – President Bush signed ACPERA into law.

On September 24, 2010, Oracle filed suit against Micron seeking to recover the overcharges it paid as a result of Micron's admitted participation in the illegal DRAM price-fixing conspiracy. *See generally* Oracle Compl. (Doc. No. 1). Micron filed its original answer to Oracle's complaint on April 4, 2011. *See generally* Micron Answer (Doc. No. 45). That Answer made no mention of ACPERA. *Id*. Two weeks later, without warning or explanation, Micron amended its answer to include a twenty-first affirmative defense asserting: "Plaintiff's claims based on joint-and-several liability and for treble damages relief are barred, in whole or in part, by the civil leniency provisions of the Antitrust Criminal Penalty Enhancements and Reforms Act of 2004, Pub. L. No. 108-237 § 213, 118 Stat. 661 (2004). Micron is party to a currently effective amnesty agreement with the United States Department of Justice, Antitrust Division." *See*

Micron Am. Answer at 31 (Doc. No. 47).[2]

## ARGUMENT

### I. Legal Standard for Motion to Strike.

Federal Rule of Civil Procedure 12(f) authorizes a court to "strike from a pleading an insufficient defense." A motion to strike should be granted where a defense is invalid as a matter of law. *U.S. v. Cal. Dept. of Transp.*, 693 F. Supp. 2d 1082, 1086 (N.D. Cal. 2009); *see also G & G Closed Circuit Events, LLC v. Nguyen*, No. 10-CV-00168-LHK, 2010 WL 3749284, at *3 (N.D. Cal. Sep. 23, 2010); *Purex Corp., Limited v. General Foods Corp.*, 318 F. Supp. 322, 323 (C.D. Cal. 1970).

### II. Because Applying ACPERA's Civil Leniency Provisions to Micron's Amnesty Agreement Would Require an Impermissible Retroactive Application of the Statute, Micron's Twenty-First Affirmative Defense Should be Stricken as Legally Invalid.

Micron's invocation of ACPERA flies in the face of well-established jurisprudence. There is a clear presumption against a retroactive application of a statute. *See Landgraf*, 511 U.S. at 265; *see also Scott v. Boos*, 215 F.3d 940, 943 (9th Cir. 2000) ("there is a presumption against retroactive application of legislation"). That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Because of this policy against retroactive legislation, a statute is presumed to apply prospectively, and that presumption can be rebutted only "by clear congressional intent" to the contrary. *Landgraf*, 511 U.S. at 280.

In *Landgraf*, the Supreme Court set forth a two-part test for determining whether retroactive application of legislation is permitted. Under the test, a court must first determine

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[2] In a prior antitrust litigation brought against other DRAM suppliers, Oracle, not yet recognizing that Micron's invocation of ACPERA to its amnesty agreement would require an unlawful retroactive application of the statute, sought cooperation from Micron. However, Micron provided no meaningful cooperation and essentially provided only what it was obligated to provide as a defendant in other opt-out cases that had been consolidated with Oracle's prior action for pre-trial purposes, including discovery.

whether Congress has expressly and clearly prescribed the statute's proper reach (*i.e.*, whether it has included "statutory language that is so clear that it could sustain only one interpretation"). *Landgraf*, 511 U.S. at 270; *see also Lindh v. Murphy*, 521 U.S. 230, 328 n.4 (1997)). If the answer is no, then a court must next determine whether retroactive application would improperly add "new legal consequences to events contemplated before its enactment" or "take[ ] or impair[ ] vested rights acquired under existing law." *Landgraf*, 511 U.S. at 270, 280. If the answer to the second question is yes, then a court must decline to apply the statute retroactively.

ACPERA is a federal statute enacted *after* Micron obtained conditional amnesty from DOJ. Therefore, the *Landgraf* test must be applied to determine whether the statute applies retroactively. Micron's defense fails this test because Congress has not expressly indicated that ACPERA should be applied retroactively and applying the statute retroactively here would have new legal consequences for both Oracle and Micron. Micron's twenty-first affirmative defense asserting that ACPERA applies to its pre-dated amnesty agreement therefore is legally invalid and should be stricken from the Amended Answer.

**A. Congress Has Not Expressly Indicated That ACPERA Should Apply Retroactively.**

The first step of the *Landgraf* test, "determin[ing] whether Congress has expressly prescribed the statute's proper reach," *Landgraf*, 511 U.S. at 280, is "a demanding one." *See Kankamalage v. I.N.S.*, 335 F.3d 858, 862 (9th Cir. 2003). The statutory language must be "so clear that it could sustain only one interpretation." *Id*. at 862. It must contain an "unambiguous directive" or "express command" evidencing a "clear congressional intent" to apply the law retroactively. *Landgraf*, 511 U.S. at 263, 280; *see also Martin v. Hadix*, 527 U.S. 343, 354 (1999). Further, the language must make "explicit reference to the statute's temporal reach." *Martin*, 527 U.S. at 353; *see also Lindh*, 521 U.S. at 329.

"Requiring [such] clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272-73. Thus, "if Congress seeks to . . . reach[ ] back in time to upset settled expectations, it must do so unequivocally and in a way that

assures . . . that it has seriously considered the consequences of such action." *Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 170 (3d Cir. 1998). Where there is no such unambiguous command authorizing retroactive application, a statute is presumed to apply prospectively only. *Scott*, 215 F.3d at 948; *see also Hughes Aircraft Company v. United States, ex rel. Schumer,* 520 U.S. 939, 946 (1997) (holding that law is to apply prospectively "unless Congress has clearly manifested its intent to the contrary").

There is no "unambiguous directive" or "express command" from Congress found in the language of ACPERA that clearly sets forth the statute's temporal reach. *See, e.g.*, *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 940 (9th Cir. 2005) (finding the following language sufficient: "[The rules] shall apply to orders to show cause . . . issued before, on, or after the date of the enactment of this Act."); *Oluwa v. Gomez*, 133 F.3d 1237, 1240 (9th Cir. 1998) (finding the following language sufficient: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."). Therefore, ACPERA must be presumed not to apply retroactively.

In fact, it is clear from the legislative history that Congress intended ACPERA to apply prospectively only. *See U.S. v. SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (relying upon the legislative history in interpreting the ACPERA and citing statements of Senator Hatch and other Senators and Representatives). During the Senate floor debate, Senator Hatch stated that ACPERA was passed to provide "increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate with [DOJ]." 150 Cong. Rec. S3613 (2004).[3] Senator Hatch also observed that, under pre-2004 antitrust laws, "a potential amnesty applicant [had to] weigh the potential ruinous consequences" of subjecting itself to treble

[3] In a press release, DOJ's Antitrust Division echoed Congress' views on the purpose behind ACPERA: "The Act . . . enhances the incentive for corporations to self report illegal conduct . . . . The detrebling provision . . . removes a major disincentive for submitting amnesty applications." Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement of Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (June 23, 2004), http://www.usdoj.gov/opa/pr/2004/June/04_at_432.htm. Like Congress, DOJ said nothing about firms already in the leniency program.

1 damages and joint and several liability. . . With [the passage of ACPERA], more companies will
2 disclose antitrust crimes, which will have several benefits." *Id.* at S3614. These statements show
3 that Congress intended ACPERA to incentivize companies that had not yet come forward to
4 confess their participation in cartels to do so.

5 Other Senators, as well as the House sponsors of the bill, issued similar statements, and
6 none of them said anything that would give any indication – let alone a "clear," "express," or
7 "unambiguous" directive – that section 213(a) was intended to apply to companies that already
8 had entered DOJ's Corporate Leniency Program. *See, e.g.*, *id.* at S3615 (statement of Sen. Kohl)
9 ("[Offering reduced civil damages] will result in more antitrust wrongdoers coming forward to
10 reveal antitrust conspiracies, and thus the detection and ending of more illegal cartels."); *id.* at
11 S3619 (statement of Senator DeWine) ("[Offering reduced civil damages] provides a far greater
12 incentive for corporations to cooperate with the Antitrust Division."); *see also* 150 Cong. Rec.
13 H3657 (2004) (statement of Rep. Sensenbrenner) ("This bill creates an additional incentive for
14 corporations to disclose antitrust violations by limiting their liability in related civil claims to
15 actual damages."); *id.* at H3659 (statement of Rep. Scott) ("This title also incorporates a leniency
16 provision that encourages participants in an illegal conspiracy to turn in their co-conspirators.").

17 Although ACPERA provided a powerful incentive for participants in illegal cartels to
18 apply for amnesty (*i.e.*, to attract new applicants to the Corporate Leniency Program in order to
19 uncover new antitrust crimes), no such incentive was needed for companies that already had
20 entered into amnesty agreements prior to enactment of ACPERA. Such companies already had
21 blown the whistle on themselves and their co-conspirators and decided to cooperate with DOJ
22 under the protections afforded them *at that time*, before the statute's enactment. Those
23 protections did not include the elimination of joint-and-several liability and treble damages in
24 civil actions provided subsequently in ACPERA. Thus, retroactive application of ACPERA to
25 companies such as Micron would do nothing to advance Congress' goal of inducing more
26 companies to disclose antitrust crimes. When ACPERA was enacted in 2004, Micron already had
27 weighed the pros and cons of exposing itself to treble damages and joint-and-several liability and
28 still determined that the pros outweighed those specific cons and possibly others.

Micron may not take advantage of ACPERA because, under the first prong of the *Landgraf* test, neither the statutory language nor Congressional intent shows an "unambiguous directive" or "express command" that ACPERA be applied retroactively. Micron's twenty-first affirmative defense should therefore be stricken as legally invalid.

**B. Applying ACPERA Retroactively to Micron's Amnesty Agreement Would Have Impermissible Retroactive Effects.**

Because ACPERA does not include express and unambiguous language indicating that it should be applied retroactively, the Court must go to the second *Landgraf* step and determine whether application of the statute would have an impermissible "retroactive effect" – *i.e.*, one that "takes away or impairs vested rights acquired under existing law," "attaches new legal consequences to events competed before its enactment," or "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. This analysis should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *See id.* at 270. If the statute would have a retroactive effect as described in *Landgraf*, the Supreme Court explained that "our traditional presumption teaches that [the statute] does not govern absent clear congressional intent favoring such a result." *Id.* It already has been established above that there is no such "clear congressional intent favoring" a retroactive application of ACPERA. Therefore, if the Court finds that Micron's intended application of ACPERA would have a retroactive effect like that described in *Landgraf*, then the statute cannot be applied in that manner.

Applying the civil leniency provisions of ACPERA to Micron's earlier amnesty agreement will have a number of impermissible retroactive effects. First, such an application would "attach new legal consequences" to Micron's conduct, both in violating the antitrust laws of the United States and in entering into the Corporate Leniency Program. Prior to passage of ACPERA, Micron indisputably was jointly and severally liable for treble damages caused by its illegal conspiracy, despite the fact that it decided to cooperate with DOJ. Applying ACPERA to Micron's amnesty agreement would mean eliminating that joint-and-several liability and treble

1 damages. Altering the scope of a defendant's liability is precisely the sort of impermissible
2 retroactive effect a court must avoid. *See Mathews*, 161 F.3d at 164-65 (changing liability from
3 treble damages under RICO to compensatory damages under securities laws changed legal
4 consequences of defendants' illegal acts and, therefore, had retroactive effect); *see also Landgraf*,
5 511 U.S. at 283-84 (citing to cases holding that limitations on damages cannot be applied
6 retroactively).

7 Second, applying ACPERA here would dramatically diminish Oracle's pre-existing right
8 to recovery under the U.S. antitrust laws. Prior to passage of ACPERA, Oracle was entitled to
9 hold Micron jointly and severally liable for treble damages. Taking away the right of a plaintiff
10 to recover certain damages is another impermissible retroactive effect. As the Supreme Court
11 observed in *Landgraf*, "[t]he *extent* of a party's liability . . . is an important legal consequence that
12 cannot be ignored." *Landgraf*, 511 U.S. at 283-84. Simply stated, if a statute takes away a
13 party's right to a remedy, it has an impermissible retroactive effect. *See Scott*, 215 F.3d at 944-
14 45, 947 (PSLRA's elimination of securities fraud as a basis for a RICO claim had retroactive
15 effect because "a change from treble damages under RICO to compensatory damages under the
16 federal securities laws must also be seen as impairing a party's rights"); *see also Schwarm v.*
17 *Craighead*, 552 F. Supp. 2d 1056, 1069 (E.D. Cal. 2008) ("[A] statute has a retroactive effect if it
18 takes away a plaintiff's right to a remedy."); *Landgraf*, 511 U.S. at 285 (noting the Court's
19 previous holding that a statute restricting a subcontractor's right to recover damages from a prime
20 contractor had retroactive effect).

21 Because applying ACPERA to Micron's earlier amnesty agreement would have a number
22 of impermissible retroactive effects – not the least of which would substantially limit Oracle's
23 right to recover damages from Micron – it is permissible only if there is a "clear congressional
24 intent favoring such a result." *Landgraf*, 511 U.S. at 280. ACPERA lacks any clear expression
25 of such intent. To the contrary, as discussed above, Congress' clear goal in passing ACPERA
26 was to persuade potential *new* whistle blowers to come forward and report their anticompetitive
27 conduct, not to provide already-admitted violators of the antitrust laws with a tremendous
28 windfall. As a result, application of ACPERA to Micron's amnesty agreement would have

impermissible retroactive effects, namely, impairing Oracle's statutory right to recover treble damages and impose joint-and-several liability. Such an outcome is unsupported by the language of the statute and the Congressional record.

**CONCLUSION**

For the foregoing reasons, Micron's twenty-first affirmative defense based on application of ACPERA's civil leniency provisions fails as a matter of law and, therefore, should be stricken from its Amended Answer.

Dated: May 9, 2011

_____*/s/ Jerome A. Murphy*__________
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