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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUI HSIUNG, et al.,

Defendants.

Case No. 09-cr-00110-SI

REPLY BRIEF IN SUPPORT OF DEFENDANT HUI HSIUNG'S MOTIONS FOR A JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

Date: May 25, 2012
Time: 11:00 a.m.
Judge: Hon. Susan Illston
Courtroom: 10, 19th Floor

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INTRODUCTION

The government does not dispute that this prosecution—which involves foreign defendants who allegedly fixed prices for foreign-made components sold to foreign-based entities and shipped from one foreign nation to another—is a foreign-conduct case. Instead, the government denies that the foreign nature of this controversy triggers any legal consequences. Indeed, if a single theme emerges from the government's opposition, it is that the government would like this Court to avoid engaging with defendants' arguments altogether. Thus, although defendants have pressed their foreign-conduct claims from the outset of this case, the government strains to characterize those arguments as waived. And although binding Supreme Court and Ninth Circuit precedent reveal that this prosecution was flawed in its inception and its execution, the government struggles to write off those cases as inapplicable.

The government has good reason to shrink from the record and from governing law: Defendants have demonstrated that this foreign-conduct prosecution was fundamentally flawed. Post-conviction relief is warranted because the Sherman Act does not apply extraterritorially to criminalize defendants' conduct; because principles of comity require dismissal of the suit; because defendants were improperly convicted on a *per se* theory of antitrust liability; and because the government failed to prove venue.

I. The Sherman Act Does Not Apply Extraterritorially To Criminalize Defendants' Foreign Conduct

The government spills considerable ink arguing that the Sherman Act applies here, but it nowhere does the one thing that the strong presumption against extraterritoriality requires: Identify the particular statement in the Act that "clearly expresse[s]" congressional intent to extend the statute beyond U.S. borders. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"). The two textual arguments the government offers have already been rejected by the

Supreme Court in analogous contexts, confirming that the Sherman Act cannot be stretched to cover defendants' foreign conduct.

First, the government emphasizes that the Sherman Act refers to foreign commerce by prohibiting "restraint[s] of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1; *see* United States' Opposition to Defendants' Joint Motion and Defendant Hui Hsiung's Motion for Judgment of Acquittal, or in the Alternative, for New Trial 39 ("U.S. Opp."). But the Supreme Court has "repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869, 2882 (2010) (quoting *Aramco*, 499 U.S. at 251); *see also New York Central R. Co.* v. *Chisholm*, 268 U.S. 29, 31 (1925) (holding that the Federal Employers' Liability Act, which premises liability on involvement in commerce between "any of the States or territories and any foreign nation or nations," 45 U.S.C. § 51, contains "no words which definitely disclose an intention to give it extraterritorial effect"); *McCulloch* v. *Sociedad Nacional de Marieneros de Honduras*, 372 U.S. 10, 19 (1963) (same). The Sherman Act's reference to foreign commerce is identical to the "boilerplate language which can be found in any number of congressional Acts"—and the Supreme Court has unequivocally held that this language is insufficient to overcome the presumption against extraterritoriality. *Aramco*, 499 U.S. at 251; *see also Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (observing that the Sherman Act contains "boilerplate language" of a type traditionally found not to "override the presumption against extraterritoriality").[1]

[1] In this regard, the Sherman Act differs from the Lanham Act, 15 U.S.C. § 1051 *et seq.*, on which the government relies. U.S. Opp. 39-40. Instead of referring generally to foreign commerce (as does the Sherman Act and the statutes at issue in *Morrison*, *Aramco*, *Chisholm*, and *McCulloch*), the Lanham Act specifically extends to "all commerce which may lawfully be regulated by Congress"—language carefully crafted to reflect an "inten[t] that the statute apply abroad." *Aramco*, 499 U.S. at 252. By contrast, the Sherman Act's "more limited, boilerplate

The government fares no better with its second textual argument, which turns on the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a. U.S. Opp. 42. According to the government, the FTAIA—which provides that the Sherman Act generally does not apply to "conduct involving trade or commerce (other than import trade or commerce) with foreign nations"—would be "superfluous" if the Act had no extraterritorial application in the first place. *Id*. But *Morrison* rejected an identical argument. There, a provision of the Securities Exchange Act of 1934 provided that the Act did not apply to individuals "transact[ing] a business in securities without the jurisdiction of the United States" unless the action violated regulations promulgated to prevent evasion of the securities laws. *Morrison*, 130 S. Ct. at 2882 (quoting 15 U.S.C. § 78dd(b)). Like the government here, the Solicitor General "argue[d] that [this] exemption would have no function if the Act did not apply in the first instance to securities transactions that occurred abroad." *Id.* (internal quotation marks omitted). The Court disagreed:

> We are not convinced. . . . [I]t would be odd for Congress to indicate the extraterritorial application of the whole Exchange Act by means of a provision imposing a condition precedent to its application abroad. . . . At most, the Solicitor General's proposed inference is possible; but possible interpretations of statutory language do not override the presumption against extraterritoriality. *Id.* at 2882-83.

The *Morrison* Court's reasoning applies with even greater force to the FTAIA. After all, by the government's own account, the FTAIA is principally concerned with exempting certain *domestic* conduct from the Sherman Act—rather than extending jurisdiction over *foreign* conduct. U.S. Opp. 41 (explaining that the FTAIA was enacted to "remedy th[e] problem" of applying the

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'commerce' language does not support such an expansive construction of congressional intent." *Id.* Nor does this textual analysis change based on the Ninth Circuit's holding that the Lanham Act continues to have extraterritorial application in the wake of *Morrison*. *See Love* v. *Associated Newspapers, Ltd.*, 611 F.3d 601, 612 n.6 (9th Cir. 2010). *Love* demonstrates that *Morrison* requires courts to reconsider even settled extraterritoriality determinations. In that process, some statutes may, on the basis of their unique language, overcome the presumption against extraterritoriality as articulated in *Morrison*. But the Sherman Act does not.

Sherman Act to Americans whose anticompetitive conduct in the United States affects only export commerce); *see also Hartford Fire*, 509 U.S. at 796-97 n.23 (same). As the floor sponsor of the FTAIA described the statute, "it draws a circle around the antitrust laws and states that nothing outside the circle is covered. *But there is no implication whatsoever that everything inside the circle is covered.*" 128 Cong. Rec. H18,953 (daily ed. Aug. 3, 1982) (statement of Rep. McClory) (emphasis added). In other words:

> It is important to note that [the FTAIA] circumscribes the antitrust laws. . . . We are establishing a rule for noncoverage, not a rule for coverage. It is, in a sense, a tool for defendants but not for plaintiffs. Again, there is no intention to make the converse of [the FTAIA] a legal maxim. It is not necessarily true that every anticompetitive domestic effect resulting from exports or foreign commerce will be actionable as a matter of law. *Id.*

As this analysis demonstrates, *Hartford Fire*'s offhand comment that the Sherman Act applies extraterritorially is no longer good law in light of *Morrison*.[2] But in any event, *Hartford Fire* does not control this criminal case. *See United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435 (1978) (rejecting the government's attempt, in a criminal Sherman Act case, to "re[ly] primarily on . . . *a civil case* to support its position") (emphasis added). The government's only

[2] The government contends that this argument is "directed at the wrong court," U.S. Opp. 39, but the point is that *Hartford Fire* must be construed in light of the facts and context in which it was decided. The dispute in *Hartford Fire* focused on comity, not the extraterritorial application of the Sherman Act, and the parties did not brief the question of congressional intent to extend the Act beyond U.S. borders. The Court's discussion of extraterritoriality was limited to a single sentence that did not consider the statutory text or the strong presumption against extending U.S. law to foreign conduct. *Morrison* has now confirmed that the presumption applies without exception: "When a statute gives no clear indication of an extraterritorial application, it has none." 130 S. Ct. at 2878. This Court need not wait for permission from another tribunal before recognizing that *Morrison* abrogated *Hartford Fire*'s offhand remark about the scope of the Sherman Act. *See Kilgore* v. *KeyBank, Nat'l Ass'n*, 673 F.3d 947, 959 (9th Cir. 2012) (observing that courts in this jurisdiction are bound by prior decisions "unless 'intervening Supreme Court or en banc authority' compels a contrary conclusion") (quoting *United States* v. *Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005)).

response to this—that a statute imposing civil and criminal sanctions must have parallel meanings in both contexts, U.S. Opp. 42—is directly contradicted by Supreme Court precedent concerning the Sherman Act itself.[3] The Court in *Gypsum Co.* specifically approved varying the elements of antitrust liability depending on whether a suit is criminal or civil. 438 U.S. at 438-39. And although the government cites a handful of civil cases that applied the rule of lenity to statutes creating civil and criminal liability, the government offers no authority suggesting that criminal defendants can be deprived of lenity through mechanical application of an interpretation first rendered in the civil context, where the court had no cause to consider that interpretive rule. Indeed, by the government's logic, courts adjudicating civil antitrust disputes would *always* have to consider the rule of lenity—even though this result runs counter to a century of Sherman Act jurisprudence.

Ultimately, the government fails to give due weight to the flexibility and adaptability that have characterized the Sherman Act since it was enacted. "That generality of purpose and function could never have been achieved had the courts interpreted and applied the Sherman Act in the manner of a criminal statute." Phillip E. Areeda & Herbert Hovenkamp, II *Antitrust Law*, ¶ 303b4, p. 41 (3rd ed. 2006). Instead, courts from *Gypsum Co.* on down have rightly interpreted the civil and criminal aspects of the Act separately. *Id.* ¶ 303c, p. 42. Conducting that analysis here, the strong presumption against extraterritoriality—and the additional concern with extending criminal prohibitions beyond U.S. borders—prevents stretching the Sherman Act to criminalize defendants' conduct.

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[3] The government's reliance on *American Banana Co.* v. *United Fruit Co.*, U.S. Opp. 43, is especially puzzling, as the Supreme Court there stated that it would be unimaginable for the Sherman Act to criminalize foreign conduct. 213 U.S. 347, 357 (1909) (Holmes, J.) ("[T]he improbability of the United States attempting to make [anticompetitive] acts done in Panama or Costa Rica criminal is obvious").

The government, faced with its weak extraterritoriality justifications, tries to avoid the issue altogether by claiming the argument waived and by contending that extraterritoriality analysis is unnecessary whenever an overt act has occurred in the United States. U.S. Opp. 37-39. Neither contention has merit.

The government's waiver claim misreads the record, as defendants argued from the outset that the criminal prosecution was flawed because the alleged conspiracy was foreign in all essential respects. Dkt. 177 (Defendant Hsuan Bin Chen's Motion to Dismiss); *see United States* v. *Arlt*, 41 F.3d 516, 523-24 (9th Cir. 1994) (holding that once a criminal defendant has raised an issue, "he is entitled to accept the judge's ruling as final and to take all proper steps he deems necessary to obtain the best possible defense" without waiving his initial objection). More fundamentally, extraterritoriality arguments cannot be waived because they address whether federal law applies to a defendant's conduct at all, and so speak to the authority of a U.S. court to hear the case. For this reason, the Supreme Court has permitted parties to challenge the extraterritorial application of U.S. law even when the issue was not raised or decided below. *See, e.g.*, Mar. 5, 2012 Order in *Kiobel* v. *Royal Dutch Petroleum*, No. 10-1491 (U.S.) (directing the parties to brief the question of the extraterritorial application of the Alien Tort Statute, even though respondents conceded that the issue had not previously been raised or addressed).

The government's claim that a court can avoid extraterritoriality analysis if an overt act occurred in the United States is similarly flawed. *Morrison* answers the suggestion: "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." 130 S. Ct. at 2884. "But the presumption against extraterritorial application would be a craven watchdog indeed it if retreated to its kennel whenever *some* domestic activity is involved in the case"; instead, the presumption must be applied any time the conduct that is the "focus" of the statute occurs beyond U.S. borders. *Id.*

In the case of the Sherman Act, it has long been settled that the focus of the statute is "the illegal agreement itself—rather than the overt acts performed in furtherance of it." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991). A Sherman Act conspiracy becomes complete the moment the illegal agreement is consummated; "an overt act is not required for antitrust conspiracy liability" at all. *United States* v. *Shabani*, 513 U.S. 10, 13 (1994). In light of the statute's focus, proof of a relatively small number of overt acts within the United States cannot defeat the presumption against extraterritoriality—at least where, as here, all the agreements were formed on foreign soil and the overwhelming majority of conduct in furtherance of the conspiracy occurred abroad.

The cases cited by the government are not to the contrary. They involved the general conspiracy statute, which, unlike the Sherman Act, requires proof of an overt act. 18 U.S.C. § 371; *see United States* v. *Angotti*, 105 F.3d 539, 540 n.1 (9th Cir. 1997); *United States* v. *Endicott*, 803 F.2d 506, 508 (9th Cir. 1986). Because of that different statutory focus, cases interpreting the general conspiracy statute do not govern the extraterritorial scope of the Sherman Act. Moreover, even under the general conspiracy statute, an overt act within the United States is an *additional* requirement, not an independent basis to apply the statute extraterritorially. *See United States* v. *Davis*, 608 F.2d 555, 556-57 (5th Cir. 1979).

In short, because the government cannot evade extraterritoriality analysis, and because that analysis demonstrates that the Sherman Act does not apply here, defendants' convictions must be reversed.

II. Principles Of Comity Require Dismissal Of This Suit

The government's arguments regarding comity are similarly misguided. Its main contention is that its decision to bring criminal charges extinguishes a court's power to consider comity altogether. U.S. Opp. 45-46. No doubt the government *wishes* it could place its charging

decisions wholly beyond judicial review, but the Ninth Circuit has never adopted that rule and there is no evidence that the prosecution here reflects considered Executive Branch policy regarding foreign relations. *See United States* v. *Brodie*, 174 F. Supp. 2d 294, 306 (E.D. Pa. 2001) (applying traditional comity analysis notwithstanding the government's argument that the decision to bring criminal charges overrides that analysis).

The government next states that the Ninth Circuit has "indicated" that comity analysis "does not survive intact the FTAIA's enactment." U.S. Opp. 47. But in fact, the Ninth Circuit has said exactly the opposite: "[I]n passing the Foreign Trade Antitrust Improvements Act, Congress did not change the ability of courts to exercise principles of international comity." *McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 813 n.8 (9th Cir. 1988).

Finally, the government maintains that comity is irrelevant unless a suit is "wholly foreign." U.S. Opp. 45. But that claim flies in the face of *Timberlane II*, in which the court declined jurisdiction even though the case involved some domestic elements. *See Timberlane Lumber Co.* v. *Bank of Am. Nat'l Trust & Savings Ass'n*, 749 F.2d 1378, 1384 (9th Cir. 1984) ("*Timberlane II*"). Indeed, if courts could consider comity only in wholly foreign cases, dismissal would be a foregone conclusion because the United States would have no interest in the dispute. Instead, the Ninth Circuit conducts a balancing test to determine whether foreign elements predominate. The balance here tips decidedly in favor of dismissing this suit.[4]

III. Defendants Were Improperly Convicted On A *Per Se* Theory Of Liability, In Violation Of *Metro Industries*

Try as it might, the government also cannot evade *Metro Industries*' bright-line rule that foreign-conduct Sherman Act cases—including this one—must be assessed pursuant to the rule of

[4] The government alternatively suggests that the domestic factors here outweigh foreign elements, but the government does not dispute that this case involves foreign defendants allegedly meeting abroad to fix prices for foreign products sold to foreign-based entities and shipped to foreign nations. On these facts, principles of comity compel dismissal.

reason. The government's suggestion that defendants waived this argument is demonstrably wrong. From the very first substantive filing in this case, defendants argued that *Metro Industries* applies here. Dkt. 177 (Defendant Hsuan Bin Chen's Motion to Dismiss). This Court rejected that argument on several occasions, including in the context of determining appropriate jury instructions. *E.g.*, Dkt. 250 (Order on Motion to Dismiss); Dkt. 607, pp. 43-44 (Dec. 13, 2011 Pretrial Proceeding); RT 4616 (Jury Instructions Conference) (court stating that jurors were "not even going to be told about the rule of reason"). There can be no doubt that defendants vigorously pursued—and clearly preserved—their argument that *Metro Industries* governs this case. *See United States* v. *Varela-Rivera*, 279 F.3d 1174, 1177-78 (9th Cir. 2002).

The government next contends that "*Metro Industries* applies only to cases involving wholly foreign conduct." U.S. Opp. 51. But the dispute in *Metro Industries* centered on a *U.S. plaintiff*'s allegation that a foreign corporation and its *U.S. subsidiaries* engaged in predatory pricing *in the United States* for a product *designed specifically for the U.S. market*. *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839, 841-42, 847 (9th Cir. 1996). Contrary to the government's characterization, *Metro Industries* demonstrates that the presence of domestic elements—including effects in the United States and coordination with U.S. subsidiaries—does not insulate a foreign-conduct case from rule-of-reason analysis.

The government also rehashes its claim that the bright-line rule in *Metro Industries* is dicta because the case featured alternative holdings. The Ninth Circuit has rejected this precise argument. In *Dragor Shipping Corp.* v. *Union Tank Car Co.*, 371 F.2d 722, 726 (9th Cir. 1967), a party argued, as the government does here, that "since the first ground stated in [a prior precedent] was enough to sustain the result there reached, the second ground . . . is dictum which should be disregarded." The Ninth Circuit responded: "We do not agree that the quoted language . . . is dictum. Where an appellate court decision rests on two or more grounds, none can be

relegated to the category of *obiter dictum*." *Id.* (citing *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949)); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 959 (2005) (describing the "general understanding that alternative holdings in a case all count as holdings"). This Court is therefore bound by *Metro Industries*' ruling that *per se* analysis is inappropriate in foreign-conduct cases.

Finally, the government grossly misreads *Metro Industries* by suggesting that when the Ninth Circuit referred to the "rule of reason" it actually meant "jurisdictional rule of reason"—that is, comity. U.S. Opp. 52. This reading is indefensible. *Metro Industries* stated that the Ninth Circuit "appl[ies] rule of reason analysis *to determine whether there is a Sherman Act violation*"—not to determine whether the case is properly proceeding in a U.S. court. 82 F.3d at 845 (emphasis added). Moreover, the court repeatedly contrasted rule-of-reason analysis with a *per se* theory of antitrust liability, and stated that alleged violations involving foreign conduct—including price fixing—"might be more 'reasonable' than a comparable domestic transaction." *Id.* To be sure, *Metro Industries* also discussed comity—but in an entirely separate section of the opinion unrelated to the earlier analysis of the substantive theory of liability (*per se* or rule of reason) triggered by foreign conduct. *Id.* at 845-47. The government's attempt to conflate these separate portions of the opinion should be rejected for what it is—a last-ditch bid to avoid *Metro Industries*' bright-line rule. Because that rule clearly applies here, and because it was violated when the jury convicted defendants on a *per se* theory of liability, those convictions cannot stand.

IV. The Government Failed To Prove Venue

Having mined the eight-week trial transcript, the government now concedes—as it must—that it introduced no direct evidence establishing venue in the Northern District of California. The government also largely retreats from the only venue argument it offered to the jury (which was premised on circumstantial evidence and impermissible evidentiary leaps)—that venue

existed by virtue of HP's Cupertino office between 2001 and 2002. *United States* v. *Pace*, 314 F.3d 344 (9th Cir. 2002) (presence of an office in the district is insufficient proof of venue).

Instead, the government proposes two new theories it never presented to jurors but that it now claims *might have* enabled them to find venue. But it is black-letter law that a criminal conviction cannot be affirmed on a basis not presented to the jury. *See, e.g.*, *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980); *United States* v. *Jackalow*, 66 U.S. (1 Black) 484, 486-87 (1861) (criminal defendants have a constitutional right to a jury determination of venue). And in any event, these new theories find as little record support as the old one. Because the government once again "pil[es] inference on inference" with "no clear preponderance in favor of . . . the existence of each of the links in the chain," *Smith* v. *General Motors Corp.*, 227 F.2d 210, 216 (5th Cir. 1955), a reasonable jury could not have found proper venue in this District.

The government initially attempts to base venue on Michael Wong's conduct, but that argument suffers from three fatal evidentiary flaws. First, a reasonable jury could not have found that Wong was a co-conspirator. *See United States* v. *Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003) (stating that venue can only be based on overt acts "committed by . . . co-conspirators" in the district). An individual becomes a co-conspirator only when he voluntarily and intentionally joins a conspiracy, knowing of its goal and intending to help accomplish it. Dkt. 829, p. 13 (Jury Instructions); *see also, e.g.*, *United States* v. *Wise*, 370 U.S. 405, 416 (1962). Yet Wong, who appeared at trial pursuant to an immunity agreement that removed any motive to lie and that required him to testify truthfully, stated that he never agreed "with any of AUO's competitors or AUOA's competitors to fix prices on LCD panels," nor did he "agree with anyone at AUO [or] AUO America to fix prices on LCD panels." RT 1061. Wong never attended a Crystal Meeting, and no one at AUO told him that he had to follow the prices discussed at those meetings. RT 1094. Wong testified that he used the Crystal Meeting reports as just one source of market

information to help determine how to outbid a competitor to make the largest profit or minimize losses. RT 895; RT 1093-94; RT 1081-82. In view of the "cutthroat" competition between AUO and other suppliers, RT 1091, and the "mind game[s]" that customers and competitors played to achieve a competitive advantage, RT 1067, Wong's goal at all times was simply to gather as much market information as possible to make informed pricing decisions, RT 895.

It is not plausible to think that the jury "disbeliev[ed] [Wong's] denials that he was engaged in price fixing." U.S. Opp. 12. The jury declined to convict each and every lower-level AUO manager charged with conspiracy, even though the government introduced evidence against those managers (but not against Wong, who was not a defendant). Dkt. 851 (Jury Verdict Form). The jury acquitted L.J. Chen and Hubert Lee, despite their leadership in AUO's desktop and notebook display divisions. *See* Ex. 1. And the jury failed to convict Steven Leung, even though direct evidence existed that he (unlike Wong) attended Crystal Meetings and had direct pricing authority for products eventually sold in the United States. *See, e.g.*, Ex. 18; RT 1130-31.[5] These verdicts demonstrate that the jury did not believe criminal liability extended to individuals like Wong, who were far removed strategically and geographically from the core of the conspiracy. Because the government cannot establish that Wong joined a conspiracy to fix prices, it cannot base venue on any actions Wong might have taken in the District.[6]

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[5] One trial witness stated directly that he had agreed to fix prices with both Steven Leung and Hubert Lee, yet the jury still failed to find that either defendant joined the conspiracy. RT 1471-72, 1475-76, 1487. It is unreasonable to hypothesize that this same jury thought Wong was a co-conspirator, when nothing in the record countered Wong's contrary testimony and when the government (which called Wong as its cooperating witness) failed to challenge his denial that he was involved in price fixing.

[6] This Court's admission of certain documents under the co-conspirator exception to the hearsay rule does not change the analysis. First, the Court made no specific preliminary finding regarding Wong. Second, any relevant finding pre-dated Wong's testimony and hinged on inadmissible evidence, including facts alleged in the indictment. Dkt. 678, pp. 2-3 (Order Re: United States' Request for Pre-Appearance Admission of Documents); *see also, e.g.*, *Bourjaily* v.

Second, and in any event, the record refutes the government's assertion that Wong worked in the District throughout the conspiracy and so must have negotiated prices there. Wong began working primarily in Texas when AUOA transferred its headquarters there in 2002. *See* RT 838-39. The vast majority of the 40-plus e-mails the government relies on to show Wong's alleged involvement in the conspiracy were sent or received by Wong while he worked primarily in Texas. Thus, it would not be "unreasonable to infer that, each time Wong sent or received" those e-mails, he did so from outside the District, U.S. Opp. 13—for the natural inference is that he sent or received them from Texas. Moreover, of the handful of e-mails that pre-date the time when Wong began working in Texas, none demonstrates that Wong acted to further the conspiracy.[7] In fact, the government did not even charge AUOA with becoming a conspirator until 2003—and so the government apparently did not think Wong joined the conspiracy before then. *See* Dkt. 8, ¶ 5 (p. 33) (Superseding Indictment); Dkt. 829, p. 12 (Jury Instructions).

Finally, no evidence proves that Wong negotiated sales in the District using prices fixed or affected by the conspiracy; thus, even if the government could show that Wong was a co-conspirator and that he was present in the District, the government failed to establish that any of Wong's acts actually *furthered* the conspiracy. *See* Defendant Hui Hsiung's Motions for a Judgment of Acquittal and for a New Trial 35 ("Hsiung Br.").[8]

United States, 483 U.S. 171, 177-80 (1987) (permitting courts to consider inadmissible evidence in this context); Fed. R. Evid. 104 (a court "is not bound by evidence rules" when it decides whether evidence is admissible). The Court's preliminary finding therefore does not control what a reasonable jury could have found based on the evidence actually introduced at trial.

[7] *See* Exs. 79, 115, 117, 179, 194, 195, 196, 203, and 2025, the only e-mails from among the 44 identified by the government (U.S. Opp. 9, n. 4) that pre-date Wong's time in Texas.

[8] The government offers only one argument to the contrary, suggesting that on a single occasion Wong negotiated prices with Dell after agreeing on prices with LG. U.S. Opp. 12. But the government mistakes coincidence for causality. No evidence at trial established that Wong or any other AUOA employee agreed to fix prices with competitors when exchanging price

The government's second new venue theory—that Evan Huang participated in and furthered the conspiracy from AUOA's Cupertino office, U.S. Opp. 14—finds even less record support. No evidence supports the allegation that Huang knowingly participated in the conspiracy—let alone that he even knew it existed. To be sure, Huang sent one e-mail that included information about competitor pricing, Ex. 112, and another that warned colleagues to be "watchful" because a customer knew that AUO was exchanging price information with competitors, Ex. 172. But this type of price sharing is perfectly legal—even if Huang thought otherwise. *See Wilcox* v. *First Interstate Bank of Or., N.A.*, 815 F.2d 522, 526-27 (9th Cir. 1997). Because Huang's e-mails in no way suggest that he knew about the Crystal Meetings or intended to further any conspiracy to fix prices, venue cannot be based on his conduct.

Finally, the government repeats its allegation that venue can be inferred from HP's office in Cupertino, and adds that Apple, too, was located there.[9] These arguments are foreclosed by

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information in the United States. Indeed, that evidence would have contradicted the government's theory of the case that all price-fixing agreements were reached at Crystal Meetings in Taiwan. In any event, the e-mail the government relies on to try to establish venue was sent by Wong from Texas—halfway across the country from the Northern District. *See* Ex. 88 (statement from Wong that he shared AUO's offer to Dell with LG "*here in Austin*") (emphasis added).

[9] The government's newfound reliance on the location of Apple's procurement office demonstrates how far it has strayed from the evidence in the record to try to prove venue—for the government did not focus on this theory at trial and literally nothing in the record shows that Apple's procurement division was in the District or that price negotiations with Apple occurred there. Nor can the government rely on the judicial notice doctrine to cure this defect. Critically, the government never sought judicial notice of these facts at trial; "[f]or a court . . . to take judicial notice of an adjudicative fact after a jury's discharge in a criminal case would cast the court in the role of a fact-finder and violate defendant's Sixth Amendment right to trial by jury." *United States* v. *Dior*, 671 F.2d 351, 358 n.11 (9th Cir. 1982). Moreover, the location of Apple's panel procurement office and the location of price negotiations cannot be judicially noticed because they are not "generally known." Facts are "generally known" when they "exist in the unrefreshed, unaided recollection of the populace at large." *Lussier* v. *Runyon*, 50 F.3d 1103, 1114 (1st Cir. 1995), approved by *United States* v. *Mariscal*, 285 F.3d 1127, 1132 (9th Cir. 2002). The populace at large is unlikely to know offhand the location or activities of a particular group of people who work for a company that has offices throughout the country, as Apple does.

Pace, which plainly prohibits establishing venue based on office location alone. *See* 314 F.3d at 350-51; Hsiung Br. 32-34. The government attempts to distinguish *Pace* on the ground that it was a wire fraud case. But that is a distinction without a difference. After all, *Pace* noted that the act of "orchestrating" wire fraud—conduct akin to acting in furtherance of a conspiracy—suffices to establish venue, yet *Pace* refused to infer that "orchestrating" acts had occurred in the venue simply because the defendant maintained an office there and authorized his secretary in that office to provide instructions regarding the fraudulent wire transfer. 314 F.3d at 349-50.[10]

Because the government has not carried its burden under the Constitution and the Federal Rules of Criminal Procedure to prove venue, defendants must be acquitted.

CONCLUSION

For the foregoing reasons, and for the reasons stated in his opening brief, Dr. Hsiung requests that the Court enter a judgment of acquittal under Federal Rule of Criminal Procedure 29, or order a new trial pursuant to Federal Rule of Criminal Procedure 33.

Dated: May 11, 2012

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[10] *Pace* also forecloses the government's sweeping contention that receipt of an e-mail or telephone call in the District by an innocent third party establishes venue there. *See* U.S. Opp. 16-17 (citing no Ninth Circuit precedent on point). If that conduct sufficed, the secretary's receipt of communication in the district concerning the wire fraud would have established venue in *Pace*. But *Pace* found venue improper because there was no evidence that the *defendant* was in the district when he communicated with his secretary to orchestrate the wire fraud.