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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA; HSUAN BIN CHEN, aka H.B. CHEN; HUI HSIUNG, aka KUMA; LAI-JUH CHEN, aka L.J. CHEN; SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG; BORLONG BAI, aka RICHARD BAI; TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE; CHENG YUAN LIN, aka C.Y. LIN; WEN JUN CHENG, aka TONY CHENG; and DUK MO KOO, Defendants.	No. CR-09-0110 SI UNITED STATES' OPPOSITION TO DEFENDANTS' JOINT MOTION AND DEFENDANT HUI HSIUNG'S MOTION FOR JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE, FOR NEW TRIAL Date: May 25, 2012 Time: 11:00 a.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

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INTRODUCTION

Defendants' post-trial motions boil down to the argument that "this case had no reason to be proceeding in a U.S. court" because, in their view, they merely engaged in a foreign, procompetitive price exchange with no adverse effects or even actions occurring in the United States. Def. Hui Hsiung's Mots. for J. of Acquittal and for New Trial 1, ECF No. 879 ("Hsiung Mem."). Thus, the Court has no venue, the Sherman Act no application, and the conspiracy no gain. But their view is impossible to reconcile with the evidence that they participated in a price-fixing conspiracy carried out, in part, in the United States – indeed, in this district – that involved and greatly affected U.S. commerce. AU Optronics Corp. ("AUO"), its executives, and their coconspirators colluded on the prices for their thin-film transistor liquid crystal display panels ("TFT-LCDs") and then marketed and sold those price-fixed panels to unwitting U.S. customers. The evidence proved the conspiracy caused billions of dollars of harm to American purchasers and allowed the jury to find beyond a reasonable doubt that the conspirators derived more than $500 million in gain. Putting the price-fixing conspiracy proved at trial beyond U.S. law would be an invitation for price fixers around the world to reap untold ill-gotten gains from U.S. customers while the U.S. government sits powerless to protect its citizens.

Unable to explain away the jury's verdict or the mountain of evidence that supports it, defendants instead present meritless legal arguments for why they should not be held accountable for their conduct. Contrary to defendants' claim, venue is easily established here by the repeated acts in furtherance of the conspiracy in this district, and defendants' claim that the government failed to prove such an act within the statute of limitations is both wrong and irrelevant. The evidence also easily establishes that AUO's U.S. subsidiary, AU Optronics Corporation America ("AUOA") participated in the charged conspiracy. Defendants' activities in the United States, as well as the massive impact their price-fixing conspiracy had in the United States, fully support criminal punishment by this country, and nothing in the Sherman Act or the precedent interpreting it suggests otherwise. And finally, defendants' claim of "flaws" in the government's evidence regarding gain to the conspirators is incorrect and does not undermine the jury's verdict.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2001, prices of TFT-LCDs were plummeting. The major TFT-LCD suppliers in Taiwan and Korea entered into a pervasive and systematic conspiracy to fix the worldwide prices of TFT-LCDs, causing billions of dollars in harm to American consumers of computer monitors and notebook computers. Trial Tr. vol. 17, 2974-75, 2986-87; Trial Tr. vol. 19, 3378. The major suppliers of TFT-LCDs – AUO, Chi Mei Optoelectronics Corporation ("CMO"), Chunghwa Picture Tubes, Ltd. ("CPT"), HannStar Display Corporation ("HannStar"), LG Display Co., Ltd. ("LG"), and Samsung Electronics Corporation ("Samsung") – carried out the conspiracy, in part, through approximately 60 monthly "crystal meetings" in Taiwan. These meetings were memorialized in contemporaneous crystal meeting reports which were introduced at trial. *See, e.g.*, Trial Exs. 12, 302, 404. Senior executives from coconspirators CMO, CPT, and LG testified that the crystal meeting participants reached price agreements. Trial Tr. vol. 3, 660 (J.Y. Ho); Trial Tr. vol. 6, 1243 (Brian Lee); Trial Tr. vol. 13, 2138 (Stanley Park); Trial Tr. vol. 17, 2954 (C.C. Liu).

Defendants Hsuan Bin "H.B." Chen and Hui Hsiung, aka "Kuma," participated in early CEO-level crystal meetings, where Presidents and CEOs of the conspiring companies endorsed the purpose of the meetings to stabilize pricing in the TFT-LCD market. Both attended meetings where price agreements were reached. Trial Tr. vol. 3, 661; Trial Tr. vol. 17, 3018, 3037. They also directed their subordinates to attend the crystal meetings, take notes, and report on the matters discussed and agreed upon. Trial Exs. 15, 20. Dozens of these crystal meeting reports, including reports prepared by defendant Shiu Lung "Steven" Leung of AUO, detailed the pricing agreements. Trial Exs. 4, 306, 308-310, 312-318, 405, 407, 409-411, 415, 417, 419. The conspirators also met one-on-one in Asia and in the United States to police and carry out the conspiracy. Trial Exs. 86, 90, 95, 168, 185, 476, 480, 501, 505, 515. The conspiracy ended only after the FBI raided AUO's U.S. subsidiary, defendant AUOA, in late 2006. Trial Tr. vol. 4, 702; Trial Tr. vol. 5, 1031; Trial Tr. vol. 21, 3795-3796.

The conspirators' efforts to avoid detection demonstrate their awareness of the illegality of the crystal meetings. Participants recognized the need to maintain the secrecy of the meetings,

even within their own companies. Trial Ex. 302. The meetings initially rotated among hotels in Taipei, often not identified until shortly before the meeting. Trial Exs. 6, 305. Attendees staged their arrivals and departures to avoid being seen together. Trial Tr. vol. 7, 1332-33; Trial Tr. vol. 13, 2220-21; Trial Tr. vol. 17, 3007-10. As concerns grew that the clandestine meetings had been discovered by Dell Computers ("Dell") and Hewlett-Packard Company ("HP"), the meetings were moved to teahouses, cafes, and karaoke bars. The crystal meeting reports were designated as "extremely confidential" and for limited distribution, and, eventually, the conspirators were warned to limit "written communication[s], which leave[] traces." Trial Ex. 431. Defendant Hsiung and others, who sent emails reporting on the meetings to subordinates, instructed recipients to delete the emails after reading them. *See, e.g.*, Trial Ex. 89. Finally, when it became clear that the conspiracy had been uncovered, employees of defendant AUOA and coconspirator CPT attempted to rid their files of incriminating electronic evidence. Trial Tr. vol. 5, 1041-44; Trial Tr. vol. 21, 3798-805.

TFT-LCDs are a major component of desktop computer monitors and notebook computers, and large U.S. computer companies such as Dell, HP, and Apple Computers ("Apple") are major purchasers of TFT-LCDs. Trial Tr. vol. 15, 2525. TFT-LCDs account for 70 to 80 percent of the cost of a finished monitor and 30 to 40 percent of the cost of a finished notebook computer. Trial Tr. vol. 3, 525-26; Trial Tr. vol. 15, 2525. AUO and AUOA sold TFT-LCDs to Dell, HP, and Apple, and those price negotiations were conducted primarily in the United States, including in the Northern District of California. Trial Tr. vol. 4, 837-840.

The United States was the biggest market for Dell and HP's products. Trial Tr. vol. 3, 533, 547; Trial Tr. vol. 12, 2073-74; Trial Tr. vol. 14, 2618-19. The U.S. accounted for approximately 40 percent of HP's notebook sales and 30 to 40 percent of HP's monitor sales. Trial Tr. vol. 3, 533. Approximately 60 to 70 percent of all Dell monitors and notebooks were sold in the United States. Trial Tr. vol. 16, 2885-86. The conspirators routinely discussed the United States market and United States customers such as Dell, HP, Apple, and Compaq in their

conspiratorial meetings, including meetings held in the United States between sales representatives of the conspiring companies.[1]

TFT-LCDs manufactured by the conspirator companies came into the United States either as raw panels or as part of finished products assembled overseas. Raw panel shipments into the United States by AUO, CPT, HannStar, Samsung and LGPhilips are summarized by Trial Exhibit 775, which shows imports by year and panel size. Trial Exhibit 775 shows that those companies shipped over $638 million worth of TFT-LCDs directly to the United States.

Dr. Leffler estimated the value of the TFT-LCDs that came into the United States in finished monitors and notebooks during the relevant time period to be $23.5 billion. Trial Tr. vol. 19, 3309-16. These finished products were assembled by "system integrators" for customers like Dell and HP. Trial Tr. vol. 15, 2565-66. The prices for TFT-LCDs used by the system integrators were negotiated in the United States by these customers on a monthly basis. Trial Tr. vol. 15, 2544-45. Four of the six largest conspirator companies, including AUO, set up regional offices next to the large U.S. customers. Trial Tr. vol. 4, 837-39; Trial Tr. vol. 5, 876-79.

On June 9, 2010, a San Francisco grand jury returned a Superseding Indictment charging defendants AUO, its U.S. subsidiary, AUOA, and current and former AUO executives with violating Section 1 of the Sherman Act. Superseding Indictment, ECF No. 8. AUO is headquartered in Taiwan. Trial Ex. 759. AUOA is a California corporation with its principal place of business in Houston, Texas. Trial Ex. 768; Trial Tr. vol. 4, 837-38. Defendant Hsiung was the Executive Vice President of AUO and President of AUOA during the conspiracy. Trial Exs. 1, 190, 768; Trial Tr. vol. 4, 831; Trial Tr. vol. 22, 4024-25. Defendant H.B. Chen was the President and Chief Operating Officer of AUO during the conspiracy. Trial Exs. 1, 762; Trial Tr. vol. 4, 830, 833; Trial Tr. vol. 22, 4031. Defendant Leung was the Director of the Desktop Display Business Unit during the conspiracy. Trial Ex. 1; Trial Tr. vol. 5 at 867.

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[1] *See, e.g.*, Trial Exs. 12, 14, 18-19, 21, 25, 43, 50-51, 62, 81, 83, 85, 86, 88-91, 93-95, 97, 98, 106, 108, 111, 112, 115, 123, 127, 129, 135, 139, 158, 166, 168, 172, 179, 189, 192, 193, 204, 303, 305, 306, 309, 311-313, 317, 326, 328, 337, 406, 409, 411, 414, 418, 420, 428, 433, 435, 439, 447, 472, 501, 505.

The trial began with jury selection on January 9, 2012. During the trial, the jury heard from five people who attended the crystal meetings – J.Y. Ho, Brian Lee, C.C. Liu, Stanley Park, and Milton Kuan. Ho, Lee, Liu, and Park all described price-fixing agreements that were reached at those meetings. Trial Tr. vol. 3, 660 (J.Y. Ho); Trial Tr. vol. 6, 1243 (Brian Lee); Trial Tr. vol. 13, 2138 (Stanley Park); Trial Tr. vol. 17, 2954 (C.C. Liu). The jury also heard from AUOA's former U.S. branch manager, Michael Wong, who testified about collusive competitor contacts in the United States, from a summary witness who testified about the content of incriminating AUO documents, from witnesses from Dell and HP who testified about their procurement efforts to negotiate competitive pricing on TFT-LCDs, and from the government's economic expert on the gain from the conspiracy.

After an eight-week trial, the jury found AUO, AUOA, Hsiung, and H.B. Chen guilty of conspiring to fix the price of TFT-LCDs. Special Verdict Form, ECF No. 851. The jury also found that the conspirators derived gains of at least $500 million from the conspiracy. *Id*. The jury could not reach a unanimous verdict on Steven Leung. *Id*.

REVIEW STANDARD FOR RULE 29 AND 33 MOTIONS

While Rule 29 allows the Court to overturn a jury's verdict and grant a judgment of acquittal based on the insufficiency of the evidence, the defendant "bears a heavy burden." *See United States v. Martinez*, 54 F.3d 1040, 1042 (2d Cir. 1995) (citation omitted). In deciding a Rule 29 motion, the Court must determine whether the evidence, "viewed in the light most favorable to the government, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) (citation omitted). "All reasonable inferences must be drawn in favor of the government, and circumstantial evidence is sufficient to sustain a conviction." *United States v. Fleischman*, 684 F.2d 1329, 1340 (9th Cir. 1982) (citation omitted), *abrogated on other grounds by United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987). The Court must be careful not to weigh the evidence, thereby usurping the role of the jury. *See United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002). "[I]t is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from

proven facts." *United States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977) (citation omitted). The Court must presume that the trier of fact resolved any conflicting inferences in favor of the prosecution. *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir. 2000).

While Rule 33(a) allows the Court to grant a new trial "if the interest of justice so requires," this remedy is to be used sparingly, "only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Rush*, 749 F.2d 1369, 1371 (9th Cir. 1984) (citation omitted); *see also United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1981) (citing cases). Put another way, the Court may grant a new trial only if "a serious miscarriage of justice may have occurred." *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)). In deciding a Rule 33(a) motion based on the weight of the evidence, a court may not "reweigh the evidence and set aside a guilty verdict simply because it feels some other result would be more reasonable." *Martinez*, 763 F.2d at 1313-14.

ARGUMENT

I. THE GOVERNMENT PRESENTED SUFFICIENT EVIDENCE SHOWING THAT VENUE WAS PROPER IN THE NORTHERN DISTRICT OF CALIFORNIA

As to venue, this Court properly instructed the jury that "[b]efore you can find a defendant guilty of committing a crime charged in the Indictment, you must find by a preponderance of the evidence that between September 14th, 2001, and December 1st, 2006, the conspiratorial agreement, or some act in furtherance of the conspiracy, occurred in the Northern District of California" and that "[t]o prove something by a preponderance is to prove it is more likely true than not true." Jury Instructions 8-9, ECF No. 829 ("Jury Instructions").[2] Defendants stipulated to these instructions and do not challenge them now. Stipulated and Party-Proposed Jury Instructions, Stipulated Instruction 18, ECF No. 807.

[2] The transcript contains a typographical or transcription error: "some *fact* in furtherance of the conspiracy." Trial Tr. vol. 27, 4720 (emphasis added). The written final instructions, which went back with the jury during deliberations, accurately state "some act in furtherance of the conspiracy." Jury Instructions 8.

Instead, they contend that the government's proof of venue was insufficient because it failed to show (1) that any member of the conspiracy had any contact with the district, (2) an act in furtherance of the conspiracy in the district, and (3) an act within the statute of limitations period. Defs.' Joint Mem. in Supp. of Mot. for J. of Acquittal or New Trial 8-11, ECF No. 878 ("Joint Mem."). These arguments are meritless. As discussed in detail below, the jury could have readily concluded from the evidence at trial that the conspiracy, while hatched abroad, extended into this district because it is more likely than not that acts in furtherance occurred here. Any number of the factual scenarios presented to the jury could have been considered by the jury in finding venue here. In particular, AUOA employees were located in the district, and the jury could have found, as the Court did, that these same employees participated in, and acted in furtherance of, the conspiracy. Additionally, HP maintained a procurement office in this district from 2001 until mid-2002, and the jury could reasonably have inferred that sales of price-fixed TFT-LCDs to HP were therefore negotiated in this district.

Lastly, there is no requirement that the acts in furtherance occurred in the district within five years of the Indictment's return. Defendants waived any contrary argument by stipulating to the venue instruction requiring overt acts "between September 14th, 2001, and December 1st, 2006," the charged conspiracy period. Stipulated and Party-Proposed Jury Instructions 19. Defendants' stipulation that venue is proper if an act in furtherance occurred in the district at any point during the entire conspiracy period also refutes their constructive amendment and variance arguments. In any event, the evidence showed it is more likely than not that acts did occur within the district between June 9, 2005 and December 1, 2006, as well as at prior times.

A. For a Price-Fixing Conspiracy, Proper Venue Extends to Acts That Advance or Effectuate the Sale of a Price-Fixed Product in the District

Venue is not an element of the charged crime and need only be established by a preponderance of the evidence. *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002). "[D]irect proof of venue is not necessary 'where circumstantial evidence in the record as a whole supports the inference that the crime was committed in the district where venue was laid.'" *United States v. Childs*, 5 F.3d 1328, 1332 (9th Cir. 1993) (citation omitted); *see also United*

States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992); *United States v. Powell*, 498 F.2d 890, 891 (9th Cir. 1974).

To satisfy the statutory and constitutional venue requirements, "the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18. For conspiracies, venue is appropriate in any district where an overt act in furtherance of the conspiracy occurred. *See Hyde v. United States*, 225 U. S. 347, 367 (1912); *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988); *United States v. Schoor*, 597 F.2d 1303, 1308 (9th Cir. 1979); *see also* 18 U.S.C. § 3237(a) (permitting prosecution "in any district in which such offense was begun, continued, or completed"). In addition, because "a conspiracy is a partnership in crime," an "overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) (citation omitted). Thus, contrary to defendants' assertion, it is "not necessary that [the defendant] himself have entered or otherwise committed an overt act within the district." *Meyers*, 847 F.2d at 1411. Indeed, venue may lie in districts "with which the defendant had no personal connection, and which may occasionally be distant from where the defendant originated the actions constituting the offense." *United States v. Angotti*, 105 F.3d 539, 543 (9th Cir. 1997).[3]

The goal of a price-fixing conspiracy is to profit by selling the product at a price greater than would otherwise be competitively possible after reducing or eliminating competition through the price-fixing agreement. Thus, acts in furtherance include not only the reaching of that agreement, but also any acts that help to market or effect the sale of the price-fixed product. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 403-04 (1927) (holding that, for "Question of Venue" in price-fixing prosecution, acts in furtherance include "circulation of price bulletins, and the making of" and "effect[ing] sales within the district"); *Socony-Vacuum*, 310 U.S. at 253 (holding that, for venue purposes, acts in furtherance include "making of sales" at

[3] The Ninth Circuit in *Angotti* further noted, "in such cases the remedy [for any inconvenience] is not to narrow criminal venue, but to permit easy transfer." *Angotti*, 105 F.3d at 544 (citation omitted). In the present case, the defendants never moved this Court for a transfer of venue, even though Rule 21(b) permits transfer to *any* district if it is in the interests of convenience.

enhanced prices). Accordingly, there is no venue requirement that the crystal meetings occurred in this district. Rather, the question presented by the Rule 29 motions is whether, viewing the evidence in a light most favorable to the government and drawing all inferences in favor of the government, any rational juror could have found it more likely than not that some act effectuating the price-fixing agreement or advancing the sale of TFT-LCDs subject to that agreement occurred in this district. The jury could have easily made this finding under any one of the factual scenarios below, which are supported by the record.

B. The Evidence Showed Acts in Furtherance of the Conspiracy in This District

1. AUOA Employees Participated in the Conspiracy and Acted in Furtherance of the Conspiracy in the District

AUOA maintained a presence in this district throughout the relevant time period because major customers were located here. Trial Tr. vol. 4, 838. AUOA at all relevant times had employees, such as Michael Wong and Evan Huang, located in this district to serve U.S. customer accounts in the Bay Area and elsewhere in the United States. *Id.* At trial, approximately 40 emails that were sent to or from AUOA employees, including Wong and Huang, were admitted into evidence.[4] When the Court ruled on the admissibility of many of those emails, it specifically found that those AUOA employees participated in the conspiracy: "The government has established by a preponderance of the evidence that the declarants were members of the conspiracy" and that those emails "were made in furtherance of the conspiracy." *See* Order Re: United States' Request for Pre-Appearance Admission of Documents – Michael Wong 2-3, ECF No. 678.[5] It was reasonable for the jury to reach the same conclusion. As discussed below, the evidence at trial further supports the Court's ruling and enabled the jury to reasonably infer that conduct in furtherance of the conspiracy by both Wong and Huang occurred in this district.

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[4] *See* Trial Exs. 12, 24, 28, 62, 79, 80-81, 83-86, 88-91, 93-95, 98, 108, 112, 115, 117, 123, 125, 126, 129, 133, 158, 166, 168, 172, 179, 188, 192, 193-196, 203, 820, 822, 823, 2025.

[5] The documents subject to the Court's ruling were Trial Exhibits 12, 19, 23-25, 28, 62, 80, 81, 83-86, 88- 90, 93, 95, 98, 108, 112, 123, 125, 126, 129, 133, 158, 166-168, 172, 185. United States' Req. for Pre-Appearance Admis. of Docs. App. A, ECF No. 672.

United States v. Pace, on which defendants heavily rely, does not require a contrary conclusion in this conspiracy case where the test is an act in this district. 314 F.3d 344, 350 (9th Cir. 2002). The defendant in *Pace* was charged with wire fraud, and venue for a wire-fraud scheme may lie "only where there is a direct or causal connection to the misuse of the wires." *Id.* at 350. Thus, venue is appropriate only "where the wire transmission at issue originated, passed through, or was received, or from which it was 'orchestrated.'" *Id.* at 549. The government presented evidence that the defendant received two communications that related to the fraud scheme at his office in the district. But the court found this evidence insufficient to establish that the defendant authorized the wire transfer from inside the district. *Id.* at 350-51. Venue for a price-fixing conspiracy is not so limited, but is proper wherever an act in furtherance of the conspiracy is taken. Moreover, the evidence here showed far more than two communications somewhat related to the conspiracy. Testimony from several witnesses, as well as over 40 emails sent and received by AUOA employees, demonstrated that Wong and Huang were integral to the implementation of the price-fixing agreement.

a. Conduct by Michael Wong Occurred in This District

Wong was employed by AUOA from 2001 until 2008 and became its U.S. branch manager in early 2003. Trial Tr. vol. 4, 825, 854. He testified that his place of employment was in the Bay Area, although he often traveled to AUOA's offices in Houston and Austin. *Id.* at 823, 825, 854. During the time that Wong was employed by AUOA, he had major responsibility for AUOA's customer accounts with HP, Apple, and Dell. Trial Tr. vol. 4, 831; Trial Tr. vol. 5, 856. The negotiations with customers were conducted both through in-person visits and by email and telephone. Trial Tr. vol. 3, 513-14; Trial Tr. vol. 5, 858-59. Defendants' Trial Exhibit D2025, which reflects price negotiations between Wong and Apple, is but one example in the record of price negotiations being conducted by email between AUOA and its customers. Because Wong and Apple both maintained their offices in this district, the negotiations in Trial Exhibit 2025 indisputably took place in this district. [6]

[6] It is a generally known fact within the jurisdiction of this Court that Apple is located in Cupertino, California, which is in the Northern District of California. Defendants did not contest Apple's location, but rather relied on that fact during closing argument, telling jurors that

Wong testified about pricing discussions he had with AUO's competitors in the United States, as well as his knowledge of his AUOA subordinates' contacts with competitors in the United States. Trial Tr. vol. 5, 853, 880-84, 1019-20. Wong personally discussed TFT-LCD pricing with AUO's competitors. Trial Tr. vol. 5, 884, 944. He also testified that, as branch manager of AUOA, he was copied on emails from AUOA employees reflecting pricing communications they had with AUO's competitors. *Id.* at 1006-07. Wong shared information he received and exchanged with competitors with his colleagues in Taiwan, and he believed that providing this information to Taiwan was part of his job. *Id.* at 887-88, 893, 1218.

Although Wong was primarily responsible for the Dell account after he became the AUOA branch manager in 2003, he still received weekly reports from subordinates regarding other customer accounts that he forwarded to his superiors in Taiwan. Trial Tr. vol. 5, 1017. These reports contained information gathered during pricing communications with competitors, including communications about customer accounts in the Bay Area. *See, e.g.*, Trial Ex. 112 (Evan Huang report regarding Apple, which includes competitor pricing information obtained from his contact at CMO). As such, Wong was supervising the collusive conduct of his subordinates from his Bay Area office.

More than 40 trial exhibits in evidence contain emails sent or received by Wong. Those trial exhibits reflect either competitor pricing communications in the United States or Taiwan or the implementation of pricing discussed by Wong or others with competitors in the United States

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"Apple, as you know, is headquartered in Cupertino 40 miles away from here." Trial Tr. vol. 28, 5014. Apple's location is an appropriate subject of judicial notice under Fed. R. Evid. 201(b)(1) and such notice may be taken by a court at any time, including on appeal. *United States v. Trenary*, 473 F.2d 680, 682 (9th Cir. 1973) (rejecting a venue appeal and holding that, "[j]udicial notice may be taken of a map of the area and, considering the time factor, the distance covered and the probable source of the marijuana, it was more reasonable than not that the two drove the car along the coast, by the shortest direct route, to reach Mexico"); *see also United States v. Kelly*, 535 F.3d 1229, 1236-37 (10th Cir. 2008) (noting that the trial record contained "a significant number of geographical references from which a reasonable jury could have inferred that the charged crimes occurred in the District of Utah" and taking judicial notice of the fact that those locations were located in the District of Utah); *United States v. Lavender*, 602 F.2d 639, 641 (4th Cir. 1979) (taking judicial notice of the fact that the Blue Ridge Parkway is located within federal jurisdiction).

or Taiwan – all of which furthered the conspiracy by facilitating the coordination of prices offered by the conspirators to U.S. accounts.

Defendants claim that employees such as Wong were "merely exchang[ing] pricing information with competitors," which is not illegal. Joint Mem. 9. As an initial matter, the jury's conviction of AUO and AUOA for price fixing contradicts that claim and suggests that the jury believed Wong's factual admissions regarding his conduct, while disbelieving his denials that he was engaged in price fixing, as it was entitled to do. *United States v. Heredia*, 483 F.3d 913, 923 n.14 (9th Cir. 2007) ("We have long held that juries are not bound to believe or disbelieve all of a witness's testimony. 'The jury may conclude a witness is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third.'" (citation omitted)). Moreover, regardless of whether Wong admitted that he fixed prices with his competitors, the evidence showed, and Wong admitted, that he aligned with his contact at LG in setting TFT-LCD prices to Dell and, in doing so, obtained higher prices. Trial Tr. vol. 6, 1212-17. More importantly, it is not necessary that the act in furtherance itself be illegal. Any "act performed by any conspirator for the purpose of accomplishing the objectives of the conspiracy" is an overt act, whether it is "innocent or illegal." *United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011); *Braverman v. United States*, 317 U.S. 49, 53 (1942).

In any event, the trial exhibits establish that Wong was directly involved in reaching pricing agreements with competitors and then implementing those agreements to U.S. customer accounts. For example, on August 24, 2004, Wong emailed his supervisors in Taiwan and described his communication with LG regarding pricing to Dell for 19" TN panels. Trial Ex. 85. Two days later, Wong quoted Dell the $305 price he had discussed with LG for 19" panels. Trial Ex. 820. On November 11, 2004, Wong reported to his supervisors that he "[c]onfirmed with [LG] sales here in Austin that their offer [to Dell] in Nov. is $145/15", $160/17" and $260/19"TN." Trial Ex. 88. Four days later, Wong quoted Dell prices identical to those discussed with LG. Trial Ex. 822.

Because Wong (1) was employed by AUOA, (2) worked from an office located in the Northern District of California, and (3) frequently communicated with coconspirators and

customers by email and telephone, it was entirely reasonable for the jury to infer that some such email and telephone communication that furthered the conspiracy was sent or received by Wong in the Northern District of California. Indeed, it would be *unreasonable* to infer that, each time Wong sent or received the more than 40 emails admitted at trial, all of which furthered the conspiracy, he first left his office and exited the district.

Finally, defendants argue that Wong's actions were not acts in furtherance based on the irrelevant and semantic distinction that he was merely "promoting" AUO's products, not "selling" them. Joint Mem. 10. But Wong acknowledged that he had responsibility "for selling LCD panels to H-P" until 2003, which included the time period when HP's procurement was in Cupertino, California. Trial Tr. vol. 5, 860-61. Also, when discussing this early time period, Wong testified that AUO gave AUOA "a lot" of direction in AUOA's *sales* function. Trial Tr. vol. 4, 835. Defendants' Trial Exhibit 2025, which includes price negotiations with Apple in this district, provides evidence of the type of direction Wong received from Taiwan regarding AUOA's sale function. Furthermore, the testimony and exhibits in evidence also belie defendants' argument that Wong was merely "promoting" and not selling TFT-LCDs. As described in detail above, Wong negotiated specific prices with customers on a daily basis, he oversaw his subordinates' negotiations with customers like Apple, HP, and Dell, and Wong was personally responsible for offering prices to AUO's customers. *See, e.g.*, Trial Ex. 2025 (negotiations by Wong with Apple in this district). Moreover, in a price-fixing conspiracy, where the object is to sell price-fixed products, any act to promote or effect such a sale is an act in furtherance. *See Trenton Potteries*, 273 U.S. at 403-04. The jury could easily conclude that such actions were done to effect the sale of those panels and thus, were acts in furtherance of the price-fixing conspiracy.

Accordingly, the evidentiary record of Wong's role and participation in the conspiracy amply supports the jury's finding of venue.

b. Conduct by Evan Huang Occurred in this District

Venue can also be premised on conduct by Evan Huang of AUOA in the Northern District of California.

As noted above, Wong testified that Apple was a major customer of AUO. Trial Tr. vol. 4, 837. AUOA assigned Wong, then Claire Liu, and eventually Evan Huang to sell to the Apple account. Trial Tr. vol. 5, 864. When Huang was responsible for the Apple account, he was located most of the time in Cupertino, California. *Id.* at 864, 1029-30. The evidence demonstrates that Huang, while stationed in Cupertino, engaged in collusive conduct regarding the Apple account.

Huang and other AUOA employees drafted reports regarding the customer accounts for which they were responsible, which they sent to Wong, who, in turn, forwarded them to superiors at AUO in Taiwan. *Id.* at 1015, 1017. These "Weekly Reports" were transmitted via email. *Id.* at 1015; Trial Ex. 112. Trial Exhibit 112 is an example of a Weekly Report regarding the Apple account that Huang prepared. Trial Tr. vol. 5, 1016-17. Wong testified that Trial Exhibit 112 reflects pricing to Apple by LG and CMO and that the source of the competitor pricing information was Huang's contact at CMO. *Id.* at 1018-19. Huang's August 11, 2006 cover email attaching and transmitting the Apple Weekly Report reflects his residence in the Northern District of California – it is signed, "Best regards, Evan Huang, AUO America Office" and includes his local South Bay telephone number, (408) 636-3985.

Two weeks later – on August 25, 2006 – Huang sent another email, Trial Exhibit 172, which was titled "Watchful." Huang sent Trial Exhibit 172 to Wong as well as employees in the AUO notebook business unit while he was working for AUOA in Cupertino, California. Trial Tr. vol. 5, 1029-30. The email reads, "Dear All, NYer is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" Trial Ex. 172; Trial Tr. vol. 5, 1030. Wong testified that NYer was code for the customer Apple. Trial Tr. vol. 5, 1030. This email also contains the same signature block as Trial Exhibit 112, including Evan Huang's South Bay telephone number.

Based on Trial Exhibits 112 and 172, and Wong's related testimony, the jury could reasonably conclude that Huang was a participant in and furthered the conspiracy through his pricing communications with competitors and that, when he became concerned that Apple suspected it, he warned other members of the conspiracy to be careful, thereby seeking to

safeguard it from discovery. He did so while he was stationed in Cupertino, California, in this district. Accordingly, venue is adequately established by this evidence.

2. Procurement Activities by HP and Apple in This District Support Venue

As the Supreme Court observed in its seminal decision on venue in price-fixing prosecutions, "[a]lthough the [manufacturers] were widely scattered, an important market for their manufactured product was within the southern district of New York, which was therefore a theater for the operation of their conspiracy." *Trenton Potteries*, 273 U.S. at 403. Similarly, the theater of operation for defendants' price-fixing conspiracy included this district, where AUO, LG, Samsung, and CMO – all manufacturers based in Asia – set up offices next to major U.S. accounts. Trial Tr. vol. 5, 876-79. The evidence that large customers negotiated the procurement of TFT-LCDs in the United States from offices in the district also supports venue in this district.

The evidence showed that HP negotiated the procurement of TFT-LCDs in the United States out of its Cupertino office until May 2002, when its procurement functions moved to Houston after HP's merger with Compaq. Trial Tr. vol. 3, 496. In addition to AUO (through AUOA), three other conspirator companies – LG, Samsung, and CMO – also had offices in the South Bay near HP. Trial Tr. vol. 5, 876-79. Throughout this period, AUO and its coconspirators were negotiating sales to HP of TFT-LCDs at collusive prices. Indeed, the crystal meeting reports in 2001 and early 2002 show the conspirators discussed prices to HP specifically. Trial Exs. 303, 306, 309, 312.[7] Based on all this evidence, the jury could

[7] Trial Ex. 303 (Sept. 21, 2001 meeting: "After private discussion and consultation with AU, it was decided that we will simultaneously adjust the price upward for Compaq/HP to $160 in Oct."); Trial Ex. 306 (Nov. 15, 2001 meeting: "Those that have not risen to the target price were . . . 14.1" NB . . . CMO/HP was $170 . . . These did not reach the agreed target price."); Trial Ex. 409 (Feb. 6, 2002, meeting: "There was a request for price increases from CM [CMO] Company. According to CM, March HP-destined was increased $20 → $450 → $470 and there was no resistance from HP."); Trial Ex. 309 (Mar. 8, 2002 meeting: "NB makers Dell, Compaq, HP and IBM continue to request for increasing supply and Dell and other indicator companies have already been notified of price increase in April."); Trial Ex. 312 (May 15, 2002 meeting: Listed as an "agenda" item is "Response to New HP asking prices." "Next week, New HP is expected to ask all TFT makers to maintain their prices (unchanged from June to August with a rebate of $4)").

reasonably infer that representatives from major TFT-LCD manufacturers had regular contact with HP's procurement team in Cupertino to negotiate prices for TFT-LCDs up until May 2002.

Similarly, the record evidence reflects that the conspirators were colluding on prices to Apple and that negotiations occurred between AUOA and Apple in this district. For example, in September 2002, Wong negotiated the sale of TFT-LCDs with Apple. Trial Ex. 2025. Wong emailed defendant Leung to confirm what prices Wong was authorized to offer Apple. *Id.*[8]

Lastly, although the government presented ample evidence that the conspiracy's participants were physically located in this district when they acted in furtherance of the conspiracy, a telephone call between a conspirator outside the district and "a knowing confederate, an undercover agent, or an unwitting third-party" in the district also establishes venue, provided the "conspirator used the telephone call to further the objectives of the conspiracy." *United States v. Rommy*, 506 F.3d 108, 119-22 (2d Cir. 2007); *see also United States v. Gonzalez,* No. CR 10-00834 WHA, 2011 WL 500502 at *3 (Feb. 9, 2011 N.D. Cal.) (noting that every circuit to address the issue has held that telephone calls between a nonconspirator within the district and a conspirator outside the district that further the conspiracy establish venue and holding the same). In other words, venue is established when "the conspirator avails himself of modern technology to commit at long distance the identical overt act that he would commit by being in the same room with a person and whispering a conspiracy-furthering message directly into his listener's ear." *Rommy*, 506 F.3d at 122. Accordingly, even if the conspirators were not physically present in the district when they endeavored to sell price-fixed products to customers like HP and Apple, their emails and calls to those customers in the district are sufficient to establish venue.[9] Likewise, emails and calls to Wong by defendants

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[8] During the conspiracy period, sales of TFT-LCD panels to Apple were substantial. AUO sold Apple approximately $150 million in panels. Trial Ex. 835. Total panel sales to Apple by the corporate conspirators totaled over $3 billion. *Id.*

[9] Wong testified that defendant Leung emailed customers in the U.S. about pricing negotiations. Trial Tr. vol. 5, 869. Moreover, defendants Hsiung and Leung were present in the district at times because they traveled to the United States to meet with U.S. customers. Trial Tr. vol. 5, 868, 871. For example, defendant Leung would visit U.S. customers on a quarterly basis, including Dell, Apple, and HP, among others. *Id.* at 868-69.

Leung and Hsiung that furthered the conspiracy, *see e.g.*, Trial Ex. 2025, would support venue here whether or not Wong was, himself, a participant.[10]

C. Proof of Acts within the Limitations Period Is Not Required

Asserting that the government failed to prove an act establishing venue within the five-year limitations period, defendants seek an acquittal or a new trial, arguing that (1) such proof is required for venue and (2) the failure constitutes a fatal variance from the Indictment, and the Court's instruction constructively amended the Indictment. Joint Mem. 11. These arguments are legally and factually baseless.

1. The Evidence Established Venue under the Stipulated Jury Instruction

As an initial matter, there is no requirement that an act establishing venue must occur within the statute of limitations. *United States v. Tannenbaum*, 934 F.2d 8, 13 (2d Cir. 1991) (holding that government need not prove "that the overt act establishing proper venue also must have been committed within the statute of limitations"); *cf. Forman v. United States*, 264 F.2d 955, 956 (9th Cir. 1959) (applying prior requirement of venue within a division of a district and finding overt acts in the division sufficient to establish venue "notwithstanding only the later acts [outside the division] satisfy the requirements of the statute of limitations"). Absent any authority for this requirement, defendants instead point to the Superseding Indictment, which alleged that the "conspiracy charged in this Indictment was carried out, in part, in the Northern District of California, within the five years preceding the filing of this Indictment." Superseding Indictment ¶ 21, ECF No. 8; Hsiung Memo. 32 n.15. But the Superseding Indictment was not considered by the jury. The only guidance the jury had on determining venue was the stipulated jury instruction, which expressly instructed that they need only find by a preponderance of the evidence that "some act in furtherance of the conspiracy occurred" in the district "between September 14, 2001, and December 1, 2006." Jury Instructions 8. And defendants waived any objection to this instruction when they expressly agreed to it – even quoting it to the jury during

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[10] Wong testified about such emails that he and other AUOA employees received from defendant Leung, in which defendant Leung gave instructions "on bottom-line and price range for account managers to negotiate." Trial Tr. vol. 5, 910; Trial Ex. 139.

closing argument. Trial Tr. vol. 28, 5006-10; Fed. R. Crim. P. 30 ("A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate."); *see also United States v. Williams*, 455 F.2d 361, 365 (9th Cir. 1972) (holding that objections to the form of the jury instruction were waived where no objections were made to the instruction as given and no additional instructions were requested).

In any event, the government proved acts in furtherance occurred in the district within the limitations period. AUOA employees Michael Wong and Evan Huang routinely emailed other AUO employees about their communications with competitors and transmitted collusive prices to AUO's customers. Many of these communications occurred within the limitations period. *See, e.g.*, Trial Ex. 112 (August 11, 2006 email from Huang to Wong regarding pricing information Huang obtained from CMO); Trial Ex. 172 (August 25, 2006 email from Huang to AUO employees warning others to be "watchful" because Apple suspected AUO was engaged in illegal activities); *see also* Trial Ex. 188. Thus, the evidence showed acts in furtherance of the conspiracy in this district within the limitations period.

2. There Was No Constructive Amendment or Fatal Variance

Defendants' claim that the Court's instruction or the government's evidence constitutes a constructive amendment or fatal variance is also meritless. A constructive amendment to the Indictment occurs when "the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed on them." *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002) (internal quotations omitted). But it is well established that venue "is not an element of the charged crime," *United States v. Casch*, 448 F.3d 1115, 1117 (9th Cir. 2006), and thus need not be pleaded in the Indictment. *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963) ("Rule 7(c) does not require venue to be pleaded. Since it is waivable, it is not an essential fact constituting the offense charged."). Therefore, venue need not be presented to the grand jury at all, *Carbo*, 314 F.2d at 733, and any allegations regarding venue in the Indictment are mere surplusage. Any claimed inconsistency between the

jury instructions or proof at trial and this surplusage in the Indictment cannot support a finding of constructive amendment.

A fatal variance occurs only when "the evidence offered at trial proves facts materially different from those alleged in the indictment" *and* the variance affects the defendant's "substantial rights." *United States v. Von Stoll*, 726 F.2d 584, 586-87 (9th Cir. 1984) (citations omitted). Where the difference between the proof offered at trial and the events alleged in the indictment is so minor as to not mislead the defendant in preparing a defense, the variance is not fatal. *United States v. Tsinhnahijinnie*, 112 F.3d 988, 991 (9th Cir. 1997). The allegation that the conspiracy was carried out in this district within the five years preceding the Indictment does not invoke defendants' "substantial rights." "Defendants have the right to be tried in the proper forum, not the right to be charged with proper venue." *Carbo*, 314 F.2d at 733.[11] As illustrated above, the evidence shows this was the proper forum. Nor could the government's purported failure to show an act within the limitations period have misled defendants in preparing their defense. *See* Joint Mem. 15-16; Hsiung Mem. 32 n.15 (claiming "[d]efendants prepared and executed their defense based on the Indictment's 2005 to 2010 venue timeframe"). Indeed, defense counsel's actions at every turn refute such a claim.

Defendants stipulated to the instruction given, which allowed the jury to find venue based on any act within the conspiracy period – not the limitations period. In closing arguments, when defense counsel raised the venue issue, he displayed the venue instruction and quoted it as well, including the portion about the 2001 to 2006 conspiracy period. Trial Tr. vol. 28, 5006-07. Not once during closing argument did any of the defense counsel contend that only an act occurring after June 9, 2005 could establish venue. To the contrary, AUO made its venue argument based on the evidentiary record related to the entire conspiracy period. *Id.* at 5006-11 (arguing venue

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[11] *United States v. Durades*, 607 F.2d 818 (9th Cir. 1979), on which defendant Hsiung relies (Hsiung Mem. 32 n.15) does not hold otherwise. In *Durades*, the government charged a single drug conspiracy, but the proof adduced at trial established at least two separate conspiracies and that the defendant participated in only one. *Id.* at 819. While the evidence established venue as to one of the conspiracies, venue was not proper in the district for the second conspiracy – the one in which the defendant actually participated. *Id.* In contrast, here, venue is proper in this district, and thus defendants have not been deprived of their right to be tried "only in a district where venue properly lay." *Id.* at 820.

was not proper because there was no evidence that "any of the supposed conspirators at the Crystal Meetings did anything to further the conspiracy while here in the Northern District of California," merely "having an office . . . is not . . . a crime," there was no evidence of "any discussion of price-fixing occurring in this District," that Wong "denied any involvement in price-fixing"). And, when the government's rebuttal argument on venue relied on evidence from the 2001 to 2002 time period, defendants objected that it misstated the evidence. Trial Tr. vol. 30, 5326. Tellingly, they did not object that the pre-limitations evidence could not establish venue or that reliance on such evidence would amount to a constructive amendment or fatal variance. Accordingly, defendants were not surprised by evidence outside the limitations period that supported venue, and they should not be permitted to use the post-hoc scouring of the charging document to rationalize overturning the jury's well-founded conviction.

D. There Is No Basis for a New Trial

Finally, defendants argue that even if there is sufficient evidence of venue to defeat a Rule 29 claim, the Court, pursuant to Rule 33, should weigh the evidence itself and find that it does not support venue in this district. Joint Mem. 12-13. Although under Rule 33 the Court has more discretion to weigh the evidence and supplant the opinions of the jury with its own, such motions should be granted "'sparingly' and in 'the most extraordinary circumstances.'" *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). This is particularly true in the context of venue. As noted in *Powell*, "[a] new trial on venue grounds raised after the jury has convicted gives the appellant a second bite at the apple to which he is not entitled." 498 F.2d at 891-92. "The ultimate test is whether letting a guilty verdict stand would be a manifest injustice. In other words, there must be a real concern that an innocent person may have been convicted." *United States v. Snype*, 441 F.3d 119, 140 (2d Cir. 2006) (internal quotations and citations omitted). There is no such concern here. *Cf. United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988) (explaining, in double jeopardy case, that venue is "a matter of procedure" and, "[t]hus, the failure to establish venue does not go to guilt or innocence").

As outlined above, the evidence supporting venue in this case is strong. Contrary to defendants' claim, venue in this case does not hang on a tenuous thread, but is instead based on sustained and pervasive conduct in this district throughout the conspiracy. There are numerous conspiratorial acts that indisputably occurred or can be reasonably inferred to have occurred in the Northern District of California, including Michael Wong's sales activities relating to HP and Apple, collusive conduct that the jury could reasonably have inferred took place from Wong's Cupertino office, and collusive conduct by Apple account representative Evan Huang. In addition, the negotiation and procurement of price-fixed TFT-LCDs was conducted by HP's procurement group in Cupertino, California during part of the conspiracy. Accordingly, there is no basis to grant a new trial.

Lastly, in their final effort to persuade the Court to grant a new trial, defendants claim that the government "sandbagged" them by addressing the issue of venue only in its rebuttal closing argument and, in doing so, misstated the evidence, and thereby caused the Court to "direct a verdict." Joint Mem. 13-14. First, the government was under no obligation to address venue in its closing argument, but was free in its rebuttal to respond to AUO's lengthy venue argument during its closing. *See* Trial Tr. vol. 28, 5006-11. Defendants rely on *United States v. Sarmiento*, 744 F.2d 755 (11th Cir. 1984) (Joint Mem. 13), but in that case the court rejected arguments virtually identical to those made by defendants here. The court made clear that defendants have no "right to have every theory the government has about a defendant's guilt before proceeding with their summation." *Id.* at 765. Moreover, it held that the government's decision not to address certain issues in its closing argument did not preclude the government from later addressing them in rebuttal to the defendants' closing argument: "Those issues the defendants, collectively, raised in their closing arguments were fair game for the prosecution on rebuttal." *Id.* The government's limited rebuttal argument on venue in this case responded directly to AUO's argument that "there's not one bit of evidence that the charged conspiratorial agreement or the words of the venue jury instruction occurred in the Northern District of California." Trial Tr. vol. 28, 5010. Thus, there was nothing improper about the government

addressing venue only in its rebuttal closing and highlighting some (but by no means, all) of the evidence relevant to venue.[12]

Second, the government did not misstate the venue evidence. During its rebuttal, the government noted that (1) HP maintained its procurement office in Cupertino until its merger with Compaq in May 2002 and (2) price negotiations affected by the conspiracy were carried out there. Trial Tr. vol. 30, 5326. These statements do not reflect a new theory of venue – indeed, the government had already submitted evidence that supported both assertions. Both Wong of AUOA and Timothy Tierney of HP testified that HP maintained its procurement office in Cupertino, California until mid-2002. Trial Tr. vol. 3, 496 (Tierney); Trial Tr. vol. 4, 838 (Wong). Additionally, Wong testified that he was employed by AUOA from 2001 until 2008, was located in the Bay Area, and "had responsibility for selling LCD panels to H-P before [he] became [AUOA] branch manager" in early 2003. Trial Tr. vol. 4, 825 (employed by AUOA from 2001 until 2008 in the Bay Area); Trial Tr. vol. 5, 860-61 (responsibility for TFT-LCD sales to HP until he became the U.S. branch manager of AUOA); Trial Tr. vol. 4, 837 (became U.S. branch manager in March or April 2003). Accordingly, Wong was located in the Bay Area and had responsibility for sales to HP from 2001 until 2003, including the time from 2001 until mid-2002 when HP's procurement group was located in Cupertino. LG, Samsung, and CMO also had U.S. headquarters in the Bay Area, next to their major U.S. customers. Trial Tr. vol. 5, 876-79. As discussed above, many of these same suppliers reached agreements on the prices they would charge HP during the time period that HP procurement was located in Cupertino.

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[12] Based on the venue argument the government made in its rebuttal, Hsiung mistakenly assumes the jury was limited to this "sole theory . . . that co-conspirators negotiated the sale of price-fixed panels to HP in the Northern District before HP moved its procurement office to Texas in May 2002." Hsiung Mem. 31. But the Court correctly instructed the jury that it is their "duty to apply the law as [the Court] give[s] it" and that the attorneys' statements during closing arguments are not evidence. Trial Tr. vol. 27, 4708, 4710. There is no reason to conclude that the jury was limited by the government's rebuttal argument. Rather, it was told that to convict, it had to find that "between September 14th, 2001, and December 1st, 2006, the conspiratorial agreement, or some act in furtherance of the conspiracy, occurred in the Northern District of California." Jury Instructions 8. No one instructed the jurors that only one specific type of price negotiation could establish venue.

See Tr. Exs. 303, 306, 309, 312, 409. Sales, of course, are the result of price negotiations and those negotiations occurred with HP during the period of the conspiracy. There was no misstatement of evidence.

Nor did the rebuttal closing "misl[ead] the Court into effectively directing a verdict against the defendants on the venue issue." Joint Mem. 14. Defendants claim that, by overruling their objection to the government's summary of the venue evidence, the Court impliedly endorsed the government's view of the evidence. But the Court instructed the jury that their recollection of the evidence controlled and that "what the lawyers have said . . . in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence." Trial Tr. vol. 27, 4710.[13] The jury must be assumed to have followed these instructions. *Heredia*, 483 F.3d at 923. If defendants wanted the Court to repeat that instruction during the government's rebuttal argument, they should have requested it. Moreover, under defendants' theory, the Court would have been unable to rule on the objection at all because overruling it impliedly endorsed the government's view of the evidence, while sustaining it would have endorsed the defendants' view. The unreasonableness of defendants' position refutes their claim that the Court's ruling justifies a new trial.

II. THE GOVERNMENT HAS PRESENTED EVIDENCE SUFFICIENT TO ESTABLISH THAT AUOA VIOLATED SECTION 1 OF THE SHERMAN ACT

AUOA, AUO's U.S. subsidiary, moved for a judgment of acquittal or a new trial on the ground that the government failed to prove that any employee of AUOA participated in a price-fixing agreement. Joint Mem. 55. In particular, AUOA argues that the government failed to prove (1) that defendant Hsiung was acting on behalf of AUOA (as opposed to AUO) on the many occasions when he engaged in conspiratorial conduct and (2) that AUOA U.S. branch manager Wong's conclusory, self-serving denial that he engaged in price-fixing activities trumps the documentary evidence and factual admissions that prove he reached price-fixing agreements

[13] The Court gave similar limiting instructions throughout the trial. *See* Trial Tr. vol. 2, 296, 299, 301; 303; Trial Tr. vol. 19, 3465; Trial Tr. vol. 27, 4708; Trial Tr. vol. 28, 4914-15; Trial Tr. vol. 30, 5278. The Court also stated, "Please do not take anything that I say or do during the trial as indicating what your verdict should be. That is a matter entirely up to you." Trial Tr. vol. 2, 296; Trial Tr. vol. 27, 4709.

on behalf of AUOA. *Id*. at 55-57. AUOA's motions must be denied because the record is overflowing with evidence from which a jury could reasonably have concluded that AUOA participated in the charged conspiracy through defendant Hsiung, Wong, and other AUOA employees.

A. AUOA Negotiated TFT-LCD Sales on Behalf of AUO

AUOA was a "branch office" of AUO in the United States and, as such, was a "tentacle" or "extension of AUO." Trial Tr. vol. 4, 834-35. AUOA acted on behalf of AUO in the United States to develop AUO business with U.S. customers, promote AUO products, and sell AUO products. *Id.* AUO substantially directed AUOA's sales activities, and pricing authority for AUOA's sales in the United States resided with AUO in Taiwan. Trial Tr. vol. 4, 835, 867, 873-74. AUOA would report to AUO what it learned from competitor pricing contacts in the United States and then get AUO's authorization on the pricing to quote to U.S. accounts. Trial Tr. vol. 6, 1228.

Defendant Hsiung was the president of AUOA. Trial Ex. 768.[14] As such, he had overall responsibility and oversight for AUOA, and Wong, AUOA's U.S. branch manager, reported to and took direction from defendant Hsiung. Trial Tr. vol. 4, 870-71. It is well settled that corporations are subject to antitrust liability for acts of their officers and employees within the scope of their employment. *United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972); *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970). There is ample evidence that defendant Hsiung, Wong, and other AUOA employees participated in the charged conspiracy. In particular, pricing discussions between AUO and its competitors were implemented through AUOA in the United States.

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[14] Defendants argue that the government failed to prove that defendant Hsiung furthered the conspiracy by signing Trial Ex. 768. Joint Mem. 56 n.19. No such showing is necessary. Trial Ex. 768 was introduced only to prove that defendant Hsiung was the President of AUOA. As discussed herein, the trial record is replete with other evidence of defendant Hsiung's conspiratorial conduct on behalf of AUOA while serving in that capacity.

B. Defendant Hsiung Engaged in Collusive Communications Regarding AUOA's U.S. Sales

Defendant Hsiung's knowledge of, attendance at, and participation in the collusive crystal meetings were repeatedly demonstrated during trial. J.Y. Ho, Brian Lee, and C.C. Liu all testified about defendant Hsiung's attendance and participation in crystal meetings. *See, e.g.*, Trial Tr. vol. 3, 666-67 (J.Y. Ho); Trial Tr. vol. 8, 1446, 1481 (Brian Lee); Trial Tr. vol. 17, 3037 (C.C. Liu). Additionally, reports of crystal meetings admitted into evidence reflect defendant Hsiung's attendance at crystal meetings. *See, e.g.*, Trial Exs. 308, 309, 310, 314. Moreover, defendant Hsiung received internal reports from others at AUO regarding crystal meetings he did not attend, including reports about pricing consensus reached at those meetings. *See, e.g.*, Trial Exs. 7, 12, 14, 16, 19, 21, 23, 25, 27, 40. Finally, there is evidence of defendant Hsiung's knowledge of, and participation in, collusive bilateral pricing communications and agreements with competitors. *See, e.g.*, Trial Ex. 515; Trial Tr. vol. 14, 2318, 2326-27. Many of those bilateral communications and agreements related directly to U.S. customer accounts serviced by AUOA. *See, e.g.*, Trial Exs. 80, 83-86, 88-89. Based on this evidence, a jury could reasonably infer that defendant Hsiung was acting on behalf of AUOA (as well as AUO) and that collusive pricing agreements were reached when he was involved in communications with competitors about prices that were subsequently communicated by Michael Wong and others at AUOA to U.S. customers, like Dell and HP.

C. Wong Routinely Engaged in Collusive Pricing Communications with Competitors

Likewise, Wong testified at length about the bilateral pricing communications in which he and other AUOA employees engaged throughout the conspiracy. Trial Tr. vol. 5, 879-89. Wong reported the information from such communications to AUO. *See, e.g.*, *id.* at 889. Wong also testified about bilateral pricing communications regarding U.S. customer accounts reflected in numerous trial exhibits, including Trial Exhibits 83-86, 88, 89, 95, and 112. While many of the collusive contacts about which Wong testified related to Dell, AUOA's collusive conduct also extended to other U.S. accounts, such as HP and Apple. *See, e.g.*, Trial Exs. 108 (regarding

HP: "But do align with other TFT vendors to ensure we are not quoting too low or much too high."), 112 (providing information from CMO regarding Apple pricing). Wong specifically testified that AUOA was engaged in a strategy of pricing alignment with its competitors in the United States, which resulted in AUOA negotiating better prices (and receiving higher profits) than otherwise would have been the case. Trial Tr. vol. 6, 1213-14. Wong also received crystal meeting reports for use in his work at AUOA. *See, e.g.*, Trial Exs. 12, 25, 28, 62, 123, 133. Wong testified that crystal meeting reports contained "very good" information that was not available in the United States. Trial Tr. vol. 5, 956. Finally, Wong testified about his instruction to a subordinate to destroy evidence upon learning that the FBI was searching AUOA's offices in Houston, reflecting a consciousness of guilt regarding the competitor contacts engaged in by AUOA employees. *Id.* at 1041-44.

D. Hsiung and Wong Reached Price-Fixing Agreements for AUOA

Contrary to AUOA's assertion, the evidence does demonstrate that, as part of the overall conspiracy, defendant Hsiung and Wong were involved in reaching and implementing agreements on behalf of AUOA with competitors regarding the prices that would be offered to key U.S. accounts. As but one example, Michael Wong contacted his counterpart at LG in November 2004 and "[c]onfirmed with [LG] sales here in Austin that their offer [to Dell] in Nov. is $145/15", $160/17" and $260/19"TN indeed. No masking price." Trial Ex. 88. Wong described that conversation in an email to defendant Hsiung, among others. Wong then sent an email to Shutuan Lillie of Dell offering Dell the identical prices Wong had discussed with LG. Trial Ex. 822. Wong copied defendants Hsiung and Leung on that email.

Dell, however, was apparently unwilling to accept the prices offered by AUOA and LG, and the collusion was escalated to higher levels within each company. C.S. Chung, a Vice President of LG, called defendant Hsiung later in November 2004. *See* Trial Ex. 89. In an email from defendant Hsiung to Wong and L.J. Chen, Hsiung described the conversation as follows:

> [LG's] CS Chung called me and asked about our prices to Dell. ***I disclosed $140/$160/$250/$270 to him and he said that they will offer the same prices to Dell***. He said that he is under Dell's pressure to lower the prices quoting lower offers from some Taiwanese company (not from Samsung). He thought that Hannstar has the low offer ($155 for 17"?). I told him that we should ignore other Taiwanese offers.

Trial Ex. 89 (emphasis added).[15]

Within hours of receiving Trial Exhibit 89 from defendant Hsiung, Wong sent Lillie of Dell an email, offering the very prices discussed between defendant Hsiung and Chung. Trial Ex. 823. Defendant Hsiung was copied on that email.

Based on this evidence, a jury could reasonably infer that defendant Hsiung was acting on behalf of AUOA and that he reached a collusive pricing agreement with Chung of LG because he communicated the pricing agreement to Wong of AUOA, who then communicated it to Dell in the United States. Similarly, despite Wong's self-serving testimony that he did not reach price-fixing agreements, this evidence and other trial exhibits support a reasonable inference that he did. *Compare* Trial Ex. 85 (August 24, 2004 email in which Wong describes a communication with LG regarding a $305 price for 19-inch TN panels to Dell) *and* Trial Ex. 820 (Aug. 26, 2004 email in which Wong communicates a $305 price for 19-inch TN panels to Dell). The jury was free to conclude that Wong was, in fact, fixing prices, even if he denied it. *See Heredia*, 483 F.3d at 923 n.14 ("We have long held that juries are not bound to believe or disbelieve all of a witness's testimony. 'The jury may conclude a witness is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third.'" (citation omitted)).

Accordingly, there is considerable evidence in the record from which a jury could reasonably conclude that defendant Hsiung, Wong, and other AUOA employees participated in the conspiracy on behalf of AUOA and reached illegal pricing agreements. On the basis of this evidence, AUOA's Rule 29 and Rule 33 motions should be denied.

III. THE FOREIGN ASPECTS OF DEFENDANTS' PRICE-FIXING CONSPIRACY DO NOT JUSTIFY EITHER ACQUITTALS OR NEW TRIALS

Defendants declare that this is a "foreign conduct" case to which the Sherman Act either does not apply or applies only in limited circumstances not present here. Hsiung Mem. 5-9; Joint Mem. 27-34. As Hsiung points out, however, "the statute does not define 'foreign conduct' and

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[15] Evidencing a consciousness of guilt, defendant Hsiung directed Wong and L.J. Chen to "erase this mail after reading it." Trial Ex. 89. Wong confirmed that he did so. Trial Tr. vol. 5, 908.

the Supreme Court has never clarified the term." Hsiung Mem. 5. That is not surprising because "foreign conduct" is not a statutory term and it does not, as Hsiung contends, trigger "important legal consequences." *Id.* Rather, the Sherman Act, as interpreted by the courts, governs the legal consequences of the defendants' participation in a conspiracy to fix the prices of TFT-LCDs that involved and greatly affected the import commerce of the United States. In this case, the statute fully supports criminal punishment by the United States for that participation.

Section 1 of the Sherman Act outlaws conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 7 of the Act, added by the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), defines when that prohibition applies to conduct involving trade or commerce with foreign nations. 15 U.S.C. § 6a. The FTAIA provides that Section 1 "shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless such conduct has a direct substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or export trade of a U.S. exporter. *Id.* As the statutory language makes clear, the application of the FTAIA turns on the type of commerce involved and not on the location of the conduct or the nationality of the defendants. Indeed, potentially anticompetitive conduct by U.S. exporters in the United States is precisely the sort of conduct Congress sought to exclude from the Sherman Act, so long as it affects only non-import foreign commerce. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004) (the statute "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets"). Conversely, the FTAIA leaves Section 1 fully applicable to conduct involving U.S. import commerce (what some courts call the import commerce exception) and to conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce (the direct effects exception), even if the conduct takes place entirely outside the United States.

Without specifically addressing the FTAIA, the Supreme Court held in *Hartford Fire Insurance Co. v. California* that "the Sherman Act applies to foreign conduct that was meant to

produce and did in fact produce some substantial effect in the United States." 509 U.S. 764, 796 (1993). Thus, the Sherman Act authorizes antitrust actions "predicated on wholly foreign conduct which has an intended and substantial effect on the United States." *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

The jury was instructed on both of the FTAIA exceptions in the "Elements of the Offense" instruction (Trial Tr. vol. 27, 4721) and on *Hartford Fire* in the "Application of the Sherman Act Instruction" (Trial Tr. vol. 27, 4720-21), and it found beyond a reasonable doubt that the government's evidence sufficed. Defendants make no explicit attack on these jury instructions. Instead, they argue that the evidence was insufficient to meet the FTAIA exceptions (Joint Mem. 18-23), that *Hartford Fire* was wrongly decided or does not apply in a criminal "foreign-conduct" case (Hsiung Mem. 9-17), that principles of international comity require dismissal (Hsiung Mem. 17-19), and that rule of reason analysis was required by *Metro Industries, Inc. v. Sammi Corp.*, 83 F.3d 839 (9th Cir. 1996) (Joint Mem. 27-52; Hsiung Mem. 20-29). Their arguments are meritless and, at bottom, amount to little more than a description of defendants' own vision of how the Sherman Act ought to apply (or not apply) in this case. Nothing in the precedent cited by defendants or the purpose of the antitrust laws justifies such a departure from settled law, and therefore, defendants' motions should be denied.

A. The Evidence Proved the Nexus to U.S. Commerce Required by the FTAIA

The FTAIA leaves the Sherman Act applicable to conduct involving trade or commerce with foreign nations when the conduct either (1) involves import commerce or (2) has a direct, substantial, and reasonably foreseeable effect on import commerce. 15 U.S.C. § 6a. The jury in this case was instructed to find the defendants guilty only if at least one of these conditions was met. Defendants contend that there was insufficient evidence to support the jury's finding under an interpretation of the FTAIA wholly inconsistent with the instruction. Defendants' interpretation of the FTAIA is unsupported by the case law, however, and the evidence relevant to the FTAIA amply supports the verdict.

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1. The Evidence Proved the Conspiracy Involved Import Commerce

As this Court instructed, the jury could convict the defendants if the government proved beyond a reasonable doubt that the conspirators "fix[ed] the price of TFT-LCD panels targeted by the participants to be sold in the United States or for delivery to the United States." Trial Tr. vol. 27, 4721. Defendants concede that the government presented evidence that the conspirators imported more than $638 million in panels into the United States between October 2001 and June 2006. Joint Mem. 21 (citing Trial Ex. 775); *see also* Trial Tr. vol. 17, 3310-11 (Dr. Leffler testified that Trial Exhibit 775 summarizes the panels shipped into the United States by five of the six conspiring firms).[16] But defendants argue this evidence was insufficient, claiming it failed to (1) identify panels imported by AUO in particular (Joint Mem. 21), (2) prove that the conspirators "'targeted' the American import market" (Joint Mem. 19, 21), and (3) show a substantial volume of price-fixed panels were imported (Joint Mem. 20). This argument is meritless.

Defendants' first claim – that the evidence did not identify those panels imported by AUO in particular – is true but irrelevant. The FTAIA provides that (unless specified conditions are met), the Sherman Act "shall not apply to *conduct* involving trade or commerce (other than import trade or commerce) with foreign nations." 15 U.S.C. § 6a (emphasis added). The term "conduct" refers to activity that might violate the Sherman Act, which in this case was a single conspiracy among AUO and other TFT-LCD makers to fix the price of TFT-LCD panels. Thus, that conspiratorial agreement and any acts in furtherance of it by any conspirator are the "conduct" for purposes of the FTAIA. *Socony-Vacuum*, 310 U.S. at 253-54 (explaining that a "conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all'"). Whether the charged conspiracy involved import commerce, therefore, turns not on the acts of any particular defendant, but on whether the price-fixing agreement and all the conspirators' acts furthering that agreement involve import commerce.

[16] Defendants stipulated to the admissibility of the data underlying Exhibit 775. Stipulation as to Admissibility of Certain Evidence, ECF No. 741.

Defendants' second claim similarly misunderstands the import commerce exception. They claim that evidence that the conspirators shipped price-fixed products into the United States does not satisfy the import commerce exception because the government additionally had to prove that conspirators "'targeted' the American import market." Joint Mem. 19, 21. Again, defendants do not challenge the jury instruction on the import commerce exception. Nor could they at this point, since the Court sustained their only objection to the government's proposed instruction – that it failed to include the word "targeted." Trial Tr. vol. 27, 4699-700; *see also* AUO Defs.' Response to United States' Mem. Re Final Jury Instruction 4, ECF No. 814 ("The Court correctly inserted the 'targeted' language in the 'Elements of the Offense' instruction."). Ample evidence allowed the jury to find that the conspirators "fix[ed] the price of TFT-LCD panels targeted by the participants to be sold in the United States or for delivery to the United States." Trial Tr. vol. 27, 4721. $638 million in price-fixed panels did not arrive in the United States by accident. Moreover, the selling of price-fixed panels to U.S. firms was a major focus of the defendants' conspiracy.

Unable to refute this evidence, defendants contend that it cannot sustain the conviction because it fails to show that the conspirators particularly or uniquely targeted United States imports. But that is not what the jury instruction required, nor what the language of the FTAIA requires. Rather, the statute only requires that the conduct at issue "involve" import commerce, and fixing the price of panels made abroad and sold in or for delivery to the United States is conduct involving import commerce. *See Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 n.11 (3d Cir. 2011). The cases on which defendants rely do not support imposing an additional requirement – not present in the statute – that the charged conspiracy particularly or uniquely target the United States.

Defendants read *Animal Science*, which states that "the import trade or commerce exception requires that the defendants' conduct target import goods or services," *id.* at 470, to require that the charged conspiracy be uniquely or particularly directed at fixing U.S. import prices. But read in context, this language from *Animal Science* does not support defendants' argument.

In *Animal Science*, the court distinguished *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.2d 293 (3d Cir. 2002), where the import commerce exception was not met, from *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), where it was. *Animal Science*, 654 F.3d at 470. In *Turicentro*, the defendant airlines were alleged to have "only set the rates that foreign-based travel agents could charge for their services." 303 F.2d at 303. Because no import commerce was restrained by the agreement, the conduct in *Turicentro* did not involve import commerce. In contrast, in *Carpet Group*, the complaint alleged that defendants had conspired to prevent U.S. retailers from importing oriental rugs. 227 F.3d at 72. Defendants' alleged conduct restrained trade in rugs being sold into the United States and was, therefore, conduct involving import commerce.[17]

The *Animal Science* court distinguished conduct that restrains import commerce from conduct that does not. It did not impose an additional requirement that the conduct uniquely restrain import commerce. Fixing the price of products exported to the United States does not become less felonious because defendants also fix prices of products exported to the rest of the world. But under defendants' interpretation of the FTAIA, price fixers outside the United States could immunize themselves from U.S. prosecution merely by extending the scope of their price fixing well beyond the United States. Such an interpretation is contrary to the purpose of the FTAIA. *See* H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494 (import commerce exception was included so there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law"). "Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets." *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 393 (2d Cir. 2002), *abrogated on other grounds by Empagran*, 542 U.S.155. Thus, a global price-fixing conspiracy, such as was alleged and proven here, involves import commerce if some of the price-fixed products were sold into the

[17] Defendants' attempt to distinguish the present case from *Carpet Group* because AUO "manufactured no consumer end-user products" is unpersuasive. Joint Mem. 19. The reasoning of *Carpet Group* did not rely on the fact that the product at issue was a consumer product, but on the fact that the alleged conduct – as here – restrained trade in import commerce. 227 F.3d at 72.

United States, regardless of whether those products were also sold (even predominantly) elsewhere. *See Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, 753 F. Supp. 2d 792, 795 (E.D. Wis. 2010) (finding conspiracy to fix prices of auto parts made in Taiwan and sold and shipped to the United States and other countries "involves import trade or commerce").

Defendants' third claim – that the volume of price-fixed imports in this case is too insubstantial – is also wrong. Defendants argue that only a few TFT-LCDs were shipped to the United States, but the evidence in this case showed that the coconspirators shipped more than 2.6 million TFT-LCDs into the United States, worth more than $638 million. Trial Ex. 775. Any *de minimis* test that defendants might argue is implicit in the import commerce exception is surely met here.

Defendants also assert without explanation that if "merely shipping products into the United States – no matter how small the amount – is sufficient to subject foreign-based conduct to American jurisdiction," the direct effects exception of the FTAIA would be "surplusage" and the *Hartford Fire* test would be a nullity. Joint Mem. 20. But defendants' assertion wrongly conflates the FTAIA and *Hartford Fire* and misunderstands the jury instructions given in this case. *Hartford Fire* governs whether the Sherman Act applies to wholly foreign *conduct*. The jury was separately instructed on that issue and concluded either that the conspiracy involved some domestic conduct or that the conspiracy had a substantial and intended effect in the United States (or both). Trial Tr. vol. 27, 4720-21. This requirement is separate and apart from anything the FTAIA requires. The FTAIA makes the Sherman Act inapplicable to conduct involving certain foreign commerce without regard to where the relevant conduct took place. Thus, for example, absent certain effects on U.S. commerce, the FTAIA may shield from antitrust prosecution a conspiracy of U.S. exporters acting entirely in the United States. *See supra* p. 29.

Similarly, the FTAIA's import commerce exception and its direct effects exception are distinct and neither renders the other surplusage. The import commerce exception applies when the challenged conduct itself involves import commerce, while the direct effects exception applies when the challenged conduct involves non-import foreign commerce that directly affects

import commerce (or commerce within the United States or certain export commerce). In this case, both exceptions apply because the conspirators fixed the price of panels imported into the United States, and also fixed the price of panels sold abroad (in non-import foreign commerce), which affected import commerce in finished products that incorporate those price-fixed panels. That both exceptions are met in this case, however, does not render one surplusage.

2. The Evidence Was Sufficient to Satisfy the Direct Effects Exception

The jury in this case was also instructed that it could convict the defendants if it found beyond a reasonable doubt that the conspiracy had a direct, substantial, and reasonably foreseeable effect on U.S. import commerce. Trial Tr. vol. 27, 4721. The defendants do not dispute the accuracy of the Court's instruction on the effects exception. Nor do they claim that the evidence was insufficient to show a substantial and reasonably foreseeable effect under the instruction given. Defendants' only claim is that the effect that price fixing in TFT-LCDs sold abroad had on import commerce in finished products that incorporated those panels cannot, as a matter of law, be a "direct" effect under the FTAIA. Joint Mem. 21.

The evidence showed that defendants fixed the price of TFT-LCD panels that accounted for 70 to 80 percent of the cost of a finished monitor and 30 to 40 percent of the cost of a finished notebook computer. Trial Tr. vol. 3, 525-26; Trial Tr. vol. 15, 2525. Although often these finished products were assembled abroad by system integrators, many of those finished goods – indeed, 60 to 70 percent of those assembled for Dell, for example – were then imported into the United States. Trial Tr. vol. 16, 2885-86. Thus, the jury could readily conclude from this evidence that the inflated prices for TFT-LCDs charged by defendants and their coconspirators resulted in inflated prices for finished products that were imported into the United States. The effect of that price fixing on import commerce in those finished products is, therefore, direct.

The finding of direct effects on this record is fully supported by *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004). *LSL* defines direct effects as those that "follow[] as an immediate consequence" of the challenged conduct. *Id.* at 680. Here, the effect of the conspiracy is immediate because "the nature of the effect does not change in any substantial way

before it reaches the United States consumer." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011). This effect is easily distinguished from the effect found not direct in *LSL*. There the complaint alleged that an agreement between a U.S. biotech firm and a foreign biotech firm reduced the likelihood of innovations that could result in the development of long-shelf life tomato seeds that would be suitable for farmers in North America. *LSL*, 379 F.3d at 681. As the court noted, this effect – which depended upon the development of seeds that did not yet exist – was too speculative and too dependent on uncertain intervening developments to be characterized as "direct." *Id.* at 681, & n.7. In contrast here, the TFT-LCDs at issue did exist, and they were sold by defendants and their coconspirators to U.S. firms at inflated prices, whereupon, the evidence showed, they were incorporated into finished products that were imported into the United States. The jury need not speculate to understand precisely how a conspiracy to fix the price of the single largest cost component of monitors and notebook computers affects import commerce in those finished products.

Defendants further rely on three district court decisions, but none provides support for their argument. In *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001), defendants allegedly prevented plaintiffs from manufacturing and selling a tuberculosis drug, but the court found no evidence that plaintiffs intended to sell the drug in the United States, and therefore, "no effect on any United States commerce" as required by the FTAIA. 131 F. Supp. 2d at 1007, 1009.[18] *United Phosphorus* is irrelevant because, unlike this case in which the price-fixing agreement substantially impacted U.S. import commerce, the court in *United Phosphorus* found "no evidence linking the foreign anticompetitive conduct and its purported effect." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d at 966.

[18] To the extent that the district court in *United Phosphorus* concluded that the FTAIA "explicitly bars antitrust actions alleging restraints in foreign markets for inputs (such as AB) that are used abroad to manufacture downstream products (like ethambutol) that may later be imported into the United States," 131 F. Supp. 2d at 1014, that court was wrong. The direct effects exception explicitly leaves the Sherman Act applicable to restraints in wholly foreign commerce that nevertheless affect U.S. import commerce. If that exception is read to exclude restraints of wholly foreign commerce in one product that affect U.S. import commerce in a related product, then the exception is largely superfluous.

In *In re Intel Microprocessor Antitrust Litigation*, Advanced Micro Devices ("AMD") alleged that Intel's monopoly conduct caused it to lose sales of its German-made microprocessors to foreign customers. 452 F. Supp. 2d 555 (D. Del. 2006) (*Intel I*). Although the alleged conduct involved entirely non-import foreign commerce, AMD argued that the conduct had a direct effect on U.S. commerce because the lost foreign sales to AMD's foreign subsidiary reduced AMD's profitability, which in turn affected the company's ability to discount to U.S. customers, reduced revenues to its shareholders, and reduced its competitiveness in the United States. *Id.* at 560-61. The court rejected AMD's argument because the alleged effect was premised on "a multitude of speculative and changing factors affecting business and investment decisions." *Id.* at 561. Thus, the link between the alleged restraint in the foreign microprocessor market and AMD's claimed injury in the domestic computer market was insufficient to establish the proximate cause required for the FTAIA's direct effects exception. *Id.*; *see also In re Intel Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452 (D. Del. 2007) (rejecting claim of direct effect based on "same allegations" as in *Intel I*).

Unlike the speculative chain of events that allegedly connected Intel's monopoly conduct in Germany to the reduced competitiveness of AMD in the United States, the effect of defendants' price-fixing conspiracy here proceeded without deviation or interruption from the TFT-LCD manufacturers who fixed the price of TFT-LCDs to inflated prices on monitors and notebook computers imported into the United States. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d at 964 (distinguishing *Intel I*). That the price-fixed panels were housed in a hub until U.S. firms like HP and Dell "pulled" the panels for incorporation into a finished product (Joint Mem. 20), does not undermine the conclusion that the effect of the conspiracy on U.S. import commerce was direct. As this Court has previously held, "an effect does not become 'indirect' simply because the American OEMs use a complex manufacturing process." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F.Supp.2d at 964.

B. The Sherman Act Applies to the Price-Fixing Conspiracy Proven at Trial

Relying on *Hartford Fire* and *Nippon Paper*, this Court explained to the jury that the "Sherman Act applies to conspiracies that occur, at least in part, within the United States" and

that it "also applies to conspiracies that occur entirely outside the United States, if they have a substantial and intended effect in the United States." Trial Tr. vol. 27, 4720. Thus, the Court instructed the jury that it must find beyond a reasonable doubt one or both of the following: "A, that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States, or, B, that the conspiracy had a substantial and intended effect in the United States." Trial Tr. vol. 27, 4720. While the defendants objected to A, they all also agreed that B "is a correct statement of the *Hartford Fire* requirements for establishing extraterritorial jurisdiction over foreign anticompetitive conduct, and should be given." Stipulated and Party-Proposed Jury Instructions 28, ECF No. 807; *see also* Trial Tr. vol. 26, 4618-21 (defense counsel repeatedly invoking *Hartford Fire* and *Nippon Paper*).

Represented by new counsel, Defendant Hsiung now argues that he is entitled to an acquittal because *Hartford Fire* was wrongly decided or does not apply in a criminal case and thus the Sherman Act does not apply to a criminal "foreign-conduct case." Hsiung Mem. 9-17. He does not, however, base the argument on any contention that the evidence was insufficient to support jury findings of either A or B.

This argument is meritless. If a price-fixing conspiracy has the requisite nexus to U.S. commerce, *see supra* pp. 30-37, then the Sherman Act applies if the conduct occurs, in part, in the United States. And *Hartford Fire* held that the Sherman Act applies even to wholly foreign conduct that has an intended and substantial effect in the United States. Hsiung waived his attack on *Hartford Fire* by telling the Court that the *Hartford Fire* instruction expressed in B above "should be given." Stipulated and Party-Proposed Jury Instructions 28. In any case, *Hartford Fire*, which can only be overruled by the Supreme Court, was correctly decided, and its interpretation of Section 1 of the Sherman Act applies fully to a criminal prosecution under that section.

1. The Sherman Act Applies to Conspiracies Occurring in Part in the United States with the Required Nexus to U.S. Commerce

At trial, the government proved that the defendants entered into a price-fixing conspiracy that was carried out, in part, inside the United States, *see supra* pp. 9-16 and had the requisite

nexus with U.S. commerce, *see supra* pp. 27-25. That the conspiracy also involved substantial anticompetitive conduct and effects around the world does not strip the United States of its responsibility and authority to prosecute the conspiracy or this Court of its authority to convict and punish the conspiracy participants. Under settled law, criminal conspiracies occur where any overt act in furtherance of the conspiracy by any coconspirator occurs. "Any conspiratorial act occurring outside the United States is within United States jurisdiction if an overt act in furtherance of the conspiracy occurs in this country." *United States v. Endicott*, 803 F.2d 506, 514 (9th Cir. 1986); *Angotti*, 105 F.3d at 545 ("'[A] conspiracy charge is appropriate in any district where an overt act committed in the course of the conspiracy occurred. It is not necessary that the defendant himself have entered or otherwise committed an overt act within the district, as long as one of his coconspirators did.'" (citation omitted)). As this Court previously explained, where the price-fixing conspiracy "involved overt acts by various co-conspirators both inside and outside the United States," the "concerns raised in *Nippon* regarding Sherman Act violations based on 'wholly foreign conduct' simply do not apply." Order Denying Defs.' Mot. to Dismiss the Indictment 5, ECF No. 287. The evidence proved the conspirators acted in this district and elsewhere.

As a result, defendants' claims that the conspirators mostly acted abroad are irrelevant. *See* Hsiung Mem. 4-9; Joint Mem. 32-34. To the extent defendants propose a test focused on where the conspiracy predominantly occurred, they ignore well-settled principles of criminal conspiracy law. Moreover, such a proposal would leave the criminal liability of participants in a conspiracy to violate U.S. law dependent on how much of their conduct occurred offshore. It would also leave consumers and businesses in the United States at the mercy of every price-fixing conspiracy in which the price fixers were counseled to carry out their conspiracy mostly outside the United States or to target other countries along with the United States. And foreign companies intent on restraining the import trade of the United States can readily act mostly abroad. But they cannot "by so simple a device . . . evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952).

2. Hartford Fire Held That the Sherman Act Reaches Wholly Foreign Conduct with Intended and Substantial Effects in the United States

Hsiung now attacks the intended and substantial effects test he urged the Court to adopt in the jury instructions. Relying on the presumption against extraterritorial application of U.S. law, Hsiung argues that the Sherman Act does not apply extraterritorially, regardless of the foreign conduct's effects in the United States. Hsiung Mem. 9. But in *Hartford Fire*, all nine justices agreed that it is well settled "that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some effect in the United States." 509 U.S. at 796-97 & n.24; *id.* at 814 (Scalia, J., dissenting) ("We have . . . found the presumption [against extraterritoriality] overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially."). Hsiung's attack on *Hartford Fire* is both waived, *see supra* pp. 37, and directed at the wrong court, for "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Accordingly, this Court can summarily reject Hsiung's argument that the "Sherman Act does not apply extraterritorially." Hsiung Mem. 9.

In any event, *ford Fire*'s holding is fully supported by the Sherman Act's language. Section 1 outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1; *cf.* Const. Art. II, Sec. 8 ("Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States"). By formulating Section 1 this way, "Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements.'" *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (quoting *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 558 (1944)). Congress's exercise of "the full sweep of its commerce powers is not without significance in determining whether the Sherman Act applies" to conduct that, while undertaken entirely abroad, is a "restraint[] that operate[s], in the constitutional sense, against the 'foreign commerce' of the United States." *Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc.*, 404 F.2d 804, 815 (D.C. Cir. 1968) (finding the Sherman Act to reach such conduct). Section 1's broadly formulated prohibition of conspiracies "in restraint of

trade or commerce . . . with foreign nations" applies to conduct that involves or affects the United States' domestic or import commerce and was designed to prohibit adverse effects on that commerce. As a result, the *Hartford Fire* Court, like its predecessors, rightly concluded that the presumption against "extraterritoriality" does not bar the Sherman Act's application to conduct affecting the United States. *Cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 252 (1991) (explaining that *Steele* "properly interpreted" the Lanham Act to apply abroad because the "allegedly unlawful conduct had some effects within the United States" and the Act had both a "broad jurisdictional grant" and a "sweeping reach into all commerce which may lawfully be regulated by Congress" (internal quotations and citation omitted)); *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (stating that the presumption against extraterritoriality does not bar extension of the statute to a foreign setting when "failure to extend the statute's reach" over foreign conduct "will result in adverse effects within the United States," and citing as "prime examples" the Sherman Act and Lanham Act).

Hsiung argues that *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010), justifies ignoring the breadth of the Sherman Act's language and overturning *Hartford Fire*. Hsiung Mem. 9-12. In *Morrison*, without overruling any of its precedent, the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 does not provide foreign plaintiffs a cause of action to sue in connection with securities traded on foreign exchanges because that section does not apply extraterritorially. 130 S. Ct. at 2875, 2883. Hsiung cites *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 (9th Cir. 2010), as an example of a court, "[i]n light of *Morrison* . . . revisiting, and in some cases limiting" the extraterritorial reach of federal statutes, in that case, the Lanham Act. Hsiung Mem. 11. But the Ninth Circuit in *Love* did no such thing. Rather, it contrasted the provision at issue in *Morrison* with the "sweeping language" of the Lanham Act, which was "not merely referring to foreign commerce but expressly covering all commerce Congress can regulate." 611 F.3d at 612 n.6. Thus, the court saw "no need to revisit our case law regarding the extraterritorial application of the Lanham Act." *Id.*

The *Love* court relied on the jurisdictional rule of reason analysis originally articulated in *Timberlane I*, *see infra* pp. 45-49, explaining that the Lanham Act applies even where "all relevant acts occurred abroad" if (1) the alleged violation creates "some effect on American Commerce"; (2) the effect is "sufficiently great to present cognizable injury to the plaintiffs"; and (3) "the interests of and links to American foreign commerce" are "sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority." *Love*, 611 F.3d at 612-13. The court also noted that, in the antitrust context, this analysis has been superseded by the FTAIA. *Id.* In any event, *Love*, the only post-*Morrison* Ninth Circuit precedent Hsiung cites, fully supports *Hartford Fire*'s holding that the Sherman Act, containing sweeping language akin to the Lanham Act, applies to wholly foreign conduct with intended and substantial effects in the United States. Indeed, *Love* flatly contradicts Hsiung's claim that *Morrison* provides an excuse to revisit this holding.

Lastly, Congress reaffirmed in the FTAIA the Sherman Act's extension to conduct beyond U.S. borders. The Sherman Act goes "to the utmost extent of [Congress's] Constitutional power." *Se. Underwriters Ass'n*, 322 U.S. at 558. Congress was concerned the Sherman Act might apply to some anticompetitive conduct involving only export or wholly foreign commerce with no impact on the United States. This undesirable outcome, the FTAIA's drafters explained, was exemplified by *Pacific Seafarers*, 404 F.2d 804, which applied the Sherman Act to an alleged conspiracy among U.S. shipping companies to destroy plaintiffs' business of carrying cement and fertilizer between Taiwan and South Vietnam. H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494. Yet, such anticompetitive conduct "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." *Id.* To remedy this problem, Congress enacted the FTAIA. As explained above, *see supra* pp. 27-25, absent a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, the FTAIA makes the Sherman Act inapplicable to "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." 15 U.S.C. § 6(a). This last phrase, however awkward, was deliberately chosen to cover conduct involving "commerce that did not involve American exports but which was

wholly foreign." *Epagram*, 542 U.S. at 162-63. The breadth of this phrase reflects the breadth of Section 1's reach to even wholly foreign commerce. If the Sherman Act had no extraterritorial reach, this deliberate phrase would be rendered largely "superfluous, void, or insignificant" in contravention of the "cardinal" principles of statutory interpretation. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Contrary to Hsiung's suggestion (Hsiung Mem. 14), *Morrison* does not preclude consideration of the FTAIA as an indication of the Sherman Act's reach. The FTAIA is nothing like the provision of the Securities Exchange Act that the *Morrison* Court found too "odd" an indication of extraterritorial application of the whole Exchange Act. 130 S. Ct. at 2882. That extraterritoriality-providing provision, the Court concluded, was best understood as "directed at actions abroad that might conceal a domestic violation, or might cause what would otherwise be a domestic violation to escape on a technicality," but did not indicate the whole act otherwise applied extraterritorially. *Id.* at 2882-83. In contrast, the FTAIA relates to the entire Sherman Act and declares its application to conduct, wherever occurring, involving even wholly foreign commerce that has the requisite effect on U.S. commerce.

3. Hartford Fire's Interpretation of Section 1 of the Sherman Act Applies in a Section 1 Criminal Prosecution

Hsiung makes a narrower argument that, despite *Hartford Fire*, "the Sherman Act's criminal prohibitions do not apply extraterritorially." Hsiung Mem. 12. But Section 1 of the Sherman Act, a criminal statute, contains just a single operative phrase outlawing conspiracies in restraint of trade or commerce among the states or with foreign nations. "Under settled principles of statutory construction, [courts] are bound to apply [*Hartford Fire*'s holding] by interpreting Section One the same way in a criminal case." *Nippon Paper*, 109 F.3d at 9. It is elemental that a statute enforceable both civilly and criminally, once authoritatively construed in a civil setting, cannot be given a different meaning in a subsequent criminal case. *See, e.g.*, *United States v. Thomson/Center Arms Co.*, 504 U.S. 505, 518-19 & n.10 (1992) (plurality

opinion); *Crandon v. United States*, 494 U.S. 152, 158 (1990);[19] *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). As Justice Holmes explained, the Sherman Act's "words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort." *N. Sec. Co. v. United States*, 193 U.S. 197, 401-02 (1904) (Holmes, J., dissenting).

Hsiung relies on *United States v. Bowman*, 260 U.S. 94 (1922), for the proposition that the presumption against extraterritoriality applies differently to criminal statutes. Hsiung Mem. 12. But, like the defendant in *Nippon Paper*, he "misreads the opinion." *Nippon Paper*, 109 F.3d at 6. *Bowman* does not suggest that "a different, more resilient presumption arises in criminal cases," but "merely restated the presumption against extraterritoriality previously established in civil cases like *American Banana*, 213 U.S. at 357." *Id.* The *Bowman* Court regarded *American Banana*, a Sherman Act case, as the appropriate analogy because the antitrust statute "is criminal as well as civil." 260 U.S. at 98. As the First Circuit explained, "[t]his seems to support the notion that the presumption is the same in both instances and leaves little room to argue that the *Bowman* Court was attempting to craft a special, more rigorous rule for criminal proceedings." *Nippon Paper*, 109 F.3d at 6 n.4.

Hsiung's reliance on a comment and reporters' note to Section 403 of the Restatement (Third) of Foreign Relations Law (Hsiung Mem. 13) is similarly misplaced. First, "the Restatement is not an accurate description of the extraterritorial reach of American antitrust law, which has historically tended to assert jurisdiction whenever intended and significant effects are found." 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273c1, at 322 (3d ed. 2006). Second and more fundamentally, Hsiung's reliance on the Restatement reflects the same flaw as his *Bowman*-based argument. The quoted passage "merely reaffirms the classic

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[19] *Thomson/Center* and *Crandon* applied the rule of lenity to statutes – in particular, the terms "make" and "firearm," in the National Firearms Act, 26 U.S.C. § 5845, and 18 U.S.C. § 209, respectively – in a civil setting because the governing standards were set forth in statutes, like the Sherman Act, with criminal applications. Were it permissible to vary the meaning of statutory language in a subsequent criminal action, as Hsiung contends, there would have been no need to do so. *See Thomson/Center*, 509 U.S. at 518 n.10 (explaining that interpreting a criminal statute in a civil setting establishes its "authoritative meaning").

presumption against extraterritoriality – no more, no less. After all, nothing in the text of the Restatement proper contradicts the government's interpretation of Section One." *Nippon Paper*, 109 F.3d at 7.[20]

Hsiung uses the holding in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), that the Sherman Act requires proof of *mens rea* in rule of reason criminal prosecutions to argue that the statute may be construed more narrowly in a criminal setting than a civil setting.[21] Hsiung Mem. 16. But the Court did no such thing. It simply employed the "background rule[] of the common law" that statutory silence "on [the] point . . . does not necessarily suggest Congress intended to dispense with a conventional mens rea element." *Staples v. United States*, 511 U.S. 600, 605 (1994) (discussing *Gypsum*). Because of this "background" common-law rule, the Sherman Act – like many other enactments – has an implied clause stating that, in its criminal applications, *mens rea* must be proven. But there "is simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality." *Nippon Paper*, 109 F.3d at 7. Instead, with respect to the statute's (nonimplied) language that controls in both civil and criminal suits, the fundamental precept that such language has the same meaning in civil and criminal actions retains its full vigor. Had the Supreme Court intended to abandon this well-established principle, it surely would have said so.

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[20] Hsiung also notes that a leading treatise "acknowledg[es] that 'one might perhaps conclude that only acts committed within the United States territory should constitute criminal violations.'" Hsiung Mem. 13 (quoting Areeda & Hovenkamp, *supra*, ¶ 272j, at 322). But he fails to note that the treatise itself concludes: "Today general criminal liability can be and frequently is attached to acts committed entirely outside the sovereign's territory, and the Sherman Act states no obvious reason why it should be treated as any different from other criminal statutes." Areeda & Hovenkamp, *supra*, ¶ 272j, at 322-23.

[21] While *Gypsum*'s *mens rea* requirement "distinguishes some civil antitrust cases (in which intent need not be proven) from their criminal counterparts, the *Gypsum* Court made it plain that intent need not be shown to prosecute criminally 'conduct regarded as per se illegal because of its unquestionably anticompetitive effects.'" *Nippon Paper*, 109 F.3d at 7 (quoting *Gypsum*, 438 U.S. at 440). "This means, of course, that defendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws." 109 F.3d at 7; *see United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991). Thus, for *per se* price-fixing violations, like the conduct proven here, the intent requirement is the same in criminal and civil cases.

Hsiung's extraterritoriality argument ultimately resorts to the rule of lenity. Hsiung Mem. 17. But there is nothing ambiguous about the Sherman Act's meaning in the sense that triggers the rule of lenity. *Cf. Nash v. United States*, 229 U.S. 373, 376-77 (1913) (rejecting the contention that the Sherman Act is unconstitutionally vague); *Nippon Paper*, 109 F.3d at 8 ("In view of the fact that the Supreme Court deems it 'well established' that Section One of the Sherman Act applies to wholly foreign conduct, we effectively are foreclosed from trying to tease an ambiguity out of Section One relative to its extraterritorial application." (citation omitted)). As the Supreme Court has explained, it is appropriate to apply the rule of lenity in a civil setting when the controlling standard is set forth in a criminal statute. *See Thompson/Center*, 504 U.S. at 518-19 & n.10; *Crandon*, 494 U.S. at 158. Thus, if the rule of lenity had any relevance to whether the Sherman Act reaches wholly foreign conduct in a criminal case, the Supreme Court in *Hartford Fire* would have applied it. But the Court did not.

C. Principles of International Comity Provide Defendants No Support

Hsiung argues that, even if the Sherman Act applies, the case should be dismissed because "principles of comity require a court to consider whether a case's link to the United States is 'sufficiently strong, vis-a-vis [links to] other nations, to justify an assertion of extraterritorial authority'" and, according to Hsiung, that link is insufficient here. Hsiung Mem. 17 (quoting *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A. (Timberlane I)*, 549 F.2d 597, 613 (9th Cir. 1976)). His argument fails for three reasons.

First, the conspiracy charged in the Indictment and proven at trial is not wholly foreign and hence does not warrant any consideration of international comity. To the contrary, as alleged in the Indictment and proven by the evidence at trial, this price-fixing conspiracy took place, in part, in the United States and involved or affected U.S. import commerce. *See supra* pp. 9-17, 27-35.

Second, even if international comity concerns might otherwise be relevant, the Department of Justice's decision to criminally prosecute this price-fixing conspiracy definitively resolved these concerns in favor of that prosecution, and "'[i]t is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns.'" *United States*

v. Baker Hughes, Inc., 731 F. Supp. 3, 6 n.5 (D.D.C. 1990). "In our system of government," the Supreme Court observed in a related context, "the Executive is the sole organ of the federal government in the field of international relations, and [it] has ample authority and competence to manage the relations between the foreign state and its own citizens and to avoid embarrass[ing] its neighbor[s]." *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (internal quotation marks and citations omitted). The Court therefore "assume[d]" in *Pasquantino* that before the government brought a prosecution based on a scheme to defraud a foreign government of tax revenue, it "assessed this prosecution's impact on this Nation's relationship with [the foreign nation] and concluded that it poses little danger of causing international friction." *Id.* The Court declined to second-guess that judgment "based on the foreign policy concerns," which it had "neither aptitude, facilities nor responsibility to evaluate." *Id.* (internal quotation marks omitted). The same principle applies here.

In a private antitrust case, a court might have no alternative but to consider principles of comity itself, "for in these cases there is no such opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that the consideration has been outweighed." *Timberlane I*, 549 F.2d at 613. But this is not a dispute between private parties, but a criminal prosecution by an Executive Branch agency – the Department of Justice – charged with enforcement of the criminal laws of the United States. By bringing the charges, the Executive Branch has stated its determination that any international comity concerns are outweighed.[22]

Third, international comity does not counsel against this prosecution. In *Hartford Fire*, the Court's opinion focused on the degree of conflict with foreign law or policy as the primary consideration for international comity. There the Court dismissed concerns of the type advanced by defendants here, that U.S. antitrust law ought not to apply to foreign firms operating in Taiwan or Korea, because there was no "conflict" between foreign law and domestic law in the sense that "compliance with the laws of both countries is . . . impossible." *Hartford Fire*, 509

[22] To date, no foreign government has voiced a concern to the United States about this prosecution or the earlier convictions of foreign companies and individuals for conspiring to fix the price of TFT-LCDs.

U.S. at 799; Areeda & Hovenkamp, *supra*, ¶ 273c, at 336 (the *Hartford Fire* Court "concluded that comity could appropriately bar the exercise of Sherman Act jurisdiction only to avoid a clear conflict with the relevant law of the foreign sovereign"). Here the defendants could have easily complied with both U.S. and foreign law because, like the United States, "Taiwan and Korea both prohibit price-fixing." Hsiung Mem. 19. Instead, they fixed prices of TFT-LCDs for sale or delivery to the United States and affected the prices of finished products imported to and sold in the United States. *See supra* pp. 30-37; *cf. Nippon Paper*, 109 F.3d at 8 (finding "no tenable reason why principles of comity should shield [Japanese defendant] from prosecution" despite wholly foreign conduct because conduct was illegal under Japanese and U.S. law and conspiracy intended to influence prices in the United States).

Hsiung relies on *Timberlane I*'s tripartite "jurisdictional rule of reason" analysis to argue that international comity considerations extend beyond conflict and include weighing the nationality, allegiance, and locations of the parties, the relative significance of the effects of the violation, the relative importance of conduct in the United States to the violation, the foreseeability of the effect, and the extent enforcement by either jurisdiction can be expected to achieve compliance.[23] Hsiung Mem. 18. However, comity's "growth in the antitrust sphere has been stunted by *Hartford Fire*, in which the Court suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible." *Nippon Paper*, 109 F.3d at 8. Similarly, the Ninth Circuit has indicated that *Timberlane I*'s analysis does not survive intact the FTAIA's enactment. *See Love*, 611 F.3d at 612-13 (noting FTAIA supersedes *Timberlane I*); *In re Insurance Antitrust Litigation*, 938 F.2d 919, 932 (9th Cir. 1991) (explaining that if a case "survives the new bar of" the FTAIA "because the conduct has 'a direct, substantial, and

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[23] Hsiung relies on the third part of the *Timberlane I* analysis, which considers comity, but he omits the first two parts of the analysis: (1) "Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?" and (2) "Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?" 549 F.2d at 615. The omission is understandable, though, because the government's evidence and the jury's verdict conclusively answer those questions in the affirmative.

reasonably foreseeable effect' on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction"), *affirmed in part, reversed in part, Hartford Fire*, 509 U.S. at 764; *but cf. Metro Indus., Inc.*, 83 F.3d at 847 (rejecting defendant's comity argument after finding no conflict and considering other *Timberlane I* factors).

In any event, while defendants suggest that mechanically applying the *Timberlane I* factors yields a prosecution only in Taiwan, on the facts of this case, that would be wrongheaded and contrary to the modern international consensus that a price-fixing conspiracy hatched in one country that sufficiently affects the commerce of other countries can be prosecuted by those other countries.[24] The economic reality is that, as a general matter, a conspiracy in one jurisdiction to fix the price of products predominately exported "transfers wealth away from the territory containing the buyers and toward the territory containing the sellers." Areeda & Hovenkamp, *supra*, ¶272, at 325.[25] Thus, where the United States and other countries contain

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[24] In addition to the United States, several jurisdictions have investigated the TFT-LCD price-fixing conspiracy and enforced their competition laws against it. *See* Press Release, Korea Fair Trade Comm'n, KFTC Fines 10 LCD Producers 194 Billion Won for TFT-LCD Int'l Cartel (Oct. 28, 2011) (reporting $175 million fine imposed on ten LCD makers for cartel that "seriously affected the Korean market"), *available at* http://eng.ftc.go.kr/bbs.do?command =getList&type_cd=52&pageId=0201 *(press release no. 47)*; Press Release, The European Comm'n, Antitrust: Comm'n fines six LCD panel producers €648 million for price fixing cartel (Dec. 8, 2010) (reporting € 648 million fine on six LCD makers for "operating a [four year long] cartel" that had "a direct impact on customers in the European Economic area"), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1685&f; *see also* United States Secs. & Exch. Comm'n, AU Optronics Corp. Form 20-F, 84-85 (Apr. 27, 2012), available at http://sec.gov/Archives/edgar/data/1172494/000119312512190328/d338136d20f.htm (reporting that, since December 2006, AU Optronics and certain of its "overseas subsidiaries have become involved in antitrust investigations" by the DOJ, European Commission, Canada Competition Bureau, Taiwan Fair Trade Commission, Korea Fair Trade Commission, and the Japan Fair Trade Commission "concerning the allegations of price fixing" for TFT-LCD Panels.); United States Secs. & Exch. Comm'n, LG Display Co., Ltd. Form 20-F, 13-14 (May 3, 2011), *available at* http://www.sec.gov/Archives/edgar/data/1290109/000119312511123762/d20f.htm (reporting that "investigations by the Canadian Bureau of Competition Policy, the Japan Fair Trade Commission, the Korea Fair Trade Commission, the Federal Competition Commission of Mexico and the Secretariat of Economic Law of Brazil [into TFT-LCD industry] are ongoing").

[25] This reality is reflected in the FTAIA, which, as explained above, *see supra* p. 28, makes the Sherman Act inapplicable to a conspiracy of U.S. exporters to fix the price of their exports to the world, so long as it did not adversely affect U.S. commerce.

the buyers, they may be "more appropriate prosecutor[s]" than the jurisdiction containing the conspiring sellers. *Id.* at 326. Even if the jurisdiction where the crystal meetings took place were to prosecute the defendants for their price-fixing conspiracy – which it has not done to date – such a prosecution might not be sufficient because of the substantial impact on the United States. Absent punishment commensurate with the impact in the United States and elsewhere, the participants might view price fixing TFT-LCDs as economically rational.

A proper consideration of the *Timberlane I* factors, on the whole, heavily favors this prosecution. There is no conflict with foreign law or policy, and the conspiracy had a reasonably foreseeable, direct, and substantial effect on U.S. commerce, *see supra* pp. 34-36. Moreover, the conspiracy involved U.S. parties as participants and victims of the conspiracy, and the conspiracy operated in the United States, *see supra* pp. 19-17. The United States is the largest market for TFT-LCDs, with a third of all computers containing the conspirators' TFT-LCDs coming to the United States. Trial Tr. vol. 19, 3314-35. In all likelihood, no other jurisdiction felt as large an effect as the United States.[26] As the jury found, the conspirators made gains of $500 million or more based on overcharges for TFT-LCDs ultimately destined for the United States. No principle of international comity bars the enforcement of the U.S. laws under these circumstances.

D. The Foreign Aspects of This Case Do Not Require Application of the Rule of Reason

The Superseding Indictment charged a price-fixing conspiracy, which is *per se* illegal under long-standing Supreme Court precedent. *Socony-Vacuum*, 310 U.S. at 122-23; *Trenton Potteries*, 273 U.S. at 396-99. Today, the Supreme Court views price fixing as "the supreme evil

[26] Hsiung contends that a mere showing of some effect in the United States, however, cannot defeat a comity-based dismissal because the "globalization of the economy" yields "an effect in *every* case." Hsiung Mem. 19. Whatever the merit of this argument, it ignores the evidentiary showing and jury finding that the conspiracy in this case had a direct, reasonably foreseeable, and substantial effect on U.S. commerce. *See supra* pp. 35-37. Likewise, his citation of cases with insubstantial or no effects on U.S. commerce ignores the effects on U.S. commerce proven in this case. *Cf. Love v. The Mail on Sunday*, 473 F. Supp. 2d 1052, 1056 (C.D. Cal. 2007) ("[N]o evidence of any effect on American commerce."); *Timberlane Lumber Co. v. Bank of America (Timberlane II)*, 749 F.2d 1378, 1385 (9th Cir. 1984) (noting "minimal effect"; "American commerce has not been substantially affected.").

of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *see also Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) ("No antitrust violation is more abominated than the agreement to fix prices."). And the Court uses "horizontal agreements among competitors to fix prices" as its prime example of conduct satisfying its criteria for applying the *per se* rule because they "have manifestly anticompetitive effects and lack any redeeming virtue." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotations and citations omitted).

Despite the long history of *per se* treatment of price fixing, defendants have moved for a new trial under Rule 33 on the grounds that they were not allowed the opportunity to defend their conduct under a rule of reason analysis. Joint Mem. 27-53; Hsiung Mem. 27. In particular, defendants argue (1) that *Metro Industries, Inc.*, 82 F.3d 839, requires the application of the rule of reason to any case involving foreign conduct and (2) that this Court's alleged failure to allow rule of reason evidence at trial or to instruct the jury on the rule of reason constituted a due process violation. No decision cited by the defendants held that price fixing ceases to be a *per se* violation of the antitrust laws when engaged in by foreign nationals conspiring outside the United States. Defendants' contention that their conduct is not subject to the *per se* rule is without merit.

1. Defendants Have Waived Their *Metro Industries* Argument

As a threshold matter, defendants have waived any argument that the jury should have evaluated this case under the rule of reason. While the government contended pretrial and continues to believe the rule of reason was inapplicable and that reasonableness evidence is irrelevant, the Court did not preclude defendants from offering evidence at trial that would support a rule of reason theory. Final Pretrial Scheduling Order 3, ECF No. 628 (denying the government's motion *in limine* to exclude evidence of any pro-competitive justifications for defendants' conduct). Nor did the Court deny defendants' request that the jury be instructed on the rule of reason. Rather, following the close of evidence, defendants voluntarily relinquished the rule of reason instructions they had proposed at the beginning of trial and stipulated to the price fixing instruction that was ultimately given to the jury. Stipulated and Party-Proposed Jury

Instructions 15. Thus, defendants cannot now claim they were denied the opportunity to defend their conduct under the rule of reason for, at trial, they attempted no such defense. *See United States v. Laurenti*, 611 F.3d 530, 543-44 (9th Cir. 2010) ("waiver occurs when 'the defendant was aware of the omitted element and yet relinquished his right to have it submitted to the jury'" (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997))).

2. *Metro Industries* Does Not Nullify the *Per Se* Rule in Cases Involving Foreign Conduct

Contrary to defendants' interpretation, *Metro Industries* does not require "that this case [must] be alleged and tried pursuant to the rule of reason." Joint Mem. 31; *see also* Hsiung Mem. 21-22. As an initial matter, *Metro Industries* applies only to cases involving wholly foreign conduct and thus does not apply here because the evidence showed the conspirators engaged in both foreign and domestic conduct. *See Metro Industries*, 82 F.3d at 845 (characterizing conduct as occurring outside the United States). As Judge Hamilton explained in *eMag Solutions*, "*Metro Industries* does not hold that a case that alleges a *per se* violation of § 1 of the Sherman Act, but which also involves some 'foreign conduct' – e.g., an agreement involving both foreign and U.S. conspirators, which was hatched in a foreign country, but which was carried out at least partly in the United States – requires application of the 'rule of reason' analysis." *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1060 (N.D. Cal. 2006). Here, the evidence amply proved that the charged conspiracy was carried out in significant part in the United States. *See supra* pp. 9-17.

More importantly, *Metro Industries* did not hold that foreign price-fixing agreements must be examined under the rule of reason. *Metro Industries* concerned a Korean design registration system, which gave Korean producers an exclusive right to export a registered product design for three years. 82 F.3d at 841. The plaintiff claimed the registration system was a *per se* unlawful market division, but the Ninth Circuit disagreed. Finding the Korean registration system was not a "classic horizontal market division agreement" in which competitors at the same level agree to divide up the market for a given product, the court concluded that "the novelty of this arrangement" strongly supported application of the rule of

reason analysis. *Id.* at 844. As this Court recognized in rejecting defendants' motion to dismiss the Indictment, "*Metro Industries* arose in a very different context. The alleged restraint in *Metro Industries* involved a 'previously unexamined business practice.'" Order Denying Defs. Mot. to Dismiss the Indictment and for a Bill of Particulars 5, ECF No. 250. Thus, *Metro Industries* merely held that the *per se* rule did not apply to the specific conduct in that case, which was not price fixing, and the court made clear that its holding did not depend on the fact that the conduct was foreign. 82 F.3d at 844.

The *Metro Industries* court did comment that "application of the per se rule is not appropriate when the conduct in question occurred in another country" because "the potential illegality of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States regardless of the inherently suspect appearance of the foreign activity." *Id.* at 845. But, as Judge Hamilton indicated, that comment "is simply dicta." *eMag Solutions*, 426 F. Supp. 2d at 1060. Moreover, defendants have badly misunderstood the point of this comment in *Metro Industries*.

In making this comment, the court made clear that the reason cases involving conduct in another country are treated differently is that "subject matter jurisdiction over a claim" turns on the effects of the challenged conduct. *Metro Indus.*, 82 F.3d at 843. Thus, *Metro Industries* stated that "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation," *id.* at 845, but the analysis the court applied was the "jurisdictional rule of reason" of *Timberlane I*, not a traditional rule of reason analysis of the legality of the restraint. *Id*. at 845-47. In cases where the Sherman Act is found to reach particular foreign conduct – because the requisite connection to U.S. commerce is established – *Metro Industries* did not state that the legality of that conduct would be judged differently from comparable domestic conduct.

Defendants also misunderstand the nature and purpose of the *per se* rule. They contend that, because the conduct "must be shown to have the requisite U.S. effects in order to be subject to the Sherman Act," the *per se* rule can never have a "role to play when assessing foreign conduct." Hsiung Mem. 27. But the proposed conclusion does not follow from the premise.

The *per se* rule declares certain conduct unreasonable as a matter of law and "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin*, 551 U.S. at 886. The limited inquiry into effect necessary to determine whether the Sherman Act applies to price-fixing conspiracies to restrain foreign commerce may reduce the judicial economy of the *per se* rule, but application of the rule still serves the essential purpose of foreclosing justifications for price fixing and contentions that fixed prices were reasonable. *See* Areeda & Hovenkamp, *supra*, ¶ 273b, at 329-30. Thus, in this case, while the jury considered the effects necessary to determine whether the Sherman Act applies, the *per se* rule still served an essential purpose and was correctly applied.

Defendants erroneously argue that the *per se* rule has "almost without exception been applied solely to, *domestic* price fixing conspiracies." Joint Mem. 31. The United States, however, has long enforced this *per se* rule criminally against international cartels that injure United States consumers. *See, e.g.*, *Nippon Paper*, 109 F.3d 1 (holding that Japanese manufacturer of thermal fax paper could be held criminally liable for conspiring to fix prices of facsimile paper sold in U.S. where conspirators met in Japan and agreed to fix price of fax paper sold in U.S., then used trading companies to export fax paper from Japan to U.S. at the agreed-upon prices); *see also* Scott D. Hammond, Charting New Waters in International Cartel Prosecutions 1 (Mar. 2, 2006) *available at* http://www.justice.gov/atr/public/speeches /214861.pdf ("[T]he most significant trend in the evolution of international anti-cartel enforcement since 1999 has been the more vigorous prosecution of foreign nationals who violate U.S. antitrust law"; between 1999 and 2006, 20 foreign nationals prosecuted and imprisoned in the United States for participation in an international price-fixing conspiracy); Levenstein & Suslow, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy," 71 *Antitrust L.J.* 801, 819 (2004) (listing more than 20 international price-fixing conspiracies prosecuted successfully by the Department of Justice over the last decade).

Defendants do not cite to any precedent adopting their interpretation of *Metro Industries* or applying the rule of reason to a horizontal price-fixing case involving foreign conduct.

Indeed, the Fourth Circuit has expressly rejected the "suggestion" in *Metro Industries* that "the foreign-conduct question affects the substantive analysis of a particular offense under the antitrust laws" and followed "instead the Supreme Court and Congress in treating allegations that an antitrust case involves only foreign conduct as raising a jurisdictional issue." *Dee-K Enter., Inc. v. Heveafil Sdn. Bhd.*, 299 F. 3d 281, 286 n.2 (4th Cir. 2002) (citing 15 U.S.C. § 6a and *Hartford Fire*, 509 U.S. at 795-96).

3. Application of the *Per se* Rule in the Case Does Not Entail Retroactive Application of a Criminal Law

Relying on *Metro Industries*, defendants further contend that they lacked the "fair warning" guaranteed by the Due Process Clause that their conduct was outlawed by the Sherman Act because applying the *per se* rule to this price-fixing conspiracy would be "'a marked and unpredictable departure from prior precedent' that retroactively expands criminal liability." Joint Mem. 52-53 (quoting *Rogers v. Tennessee*, 532 U.S. 451, 467 (1991)); Hsiung Mem. 27-29. But *Metro Industries* does not apply here because (1) the conspiracy involved conduct in the United States, (2) the court's comment, on which defendants rely, is dicta, and (3) that comment, properly understood, is consistent with the way the *per se* rule was applied in this case in conjunction with the jury instructions regarding the application of the Sherman Act and the FTAIA. *See supra* pp. 51-54.

Applying the *per se* rule to this price-fixing conspiracy is a judicial interpretation of the Sherman Act that is neither "unforeseeable, nor an enlargement of the usual and ordinary meaning of the statute." *Poland v. Stewart*, 117 F.3d 1094, 1100 (9th Cir. 1997). The *per se* unlawfulness of price fixing was forcefully stated over eighty years ago in *Trenton Potteries*, 273 U.S. at 396-99, and a more comprehensive statement was provided by *Socony-Vacuum*, 310 U.S. at 122-23. Nor is criminal prosecution under the Sherman Act a departure from past practice; it has been common for a century. *See, e.g.*, *Nash*, 229 U.S. at 376-78 (rejecting the contention that the Sherman Act was too vague to be operative as a criminal law). Defendants' retroactivity argument depends entirely on the proposition that *Metro Industries* swept aside Supreme Court precedent and categorically held that foreign price-fixing conspiracies, when found subject to the Sherman Act, are judged under special substantive rules. Yet *Metro Industries* clearly did not so

hold. Thus, while "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope," *United States v. Lanier*, 520 U.S. 259, 266 (1997), there is nothing novel about prosecuting naked price fixing, which innumerable judicial decisions over the last century have uniformly condemned as a *per se* violation of the Sherman Act.

Defendants do not and cannot cite a single case in which the court refused to apply the *per se* rule to price fixing because the conduct was foreign. In *Rogers*, the Supreme Court rejected a similar due process argument, concluding the state court's abolition of the common law rule barring a murder conviction unless the victim died within one year and a day of the defendant's act was not "an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." 532 U.S. at 466-67. The Court emphasized that rule had "never been relied upon as a ground of decision." *Id.* at 467. Likewise, the supposed rule defendants derive from *Metro Industries* has never been relied on as grounds to bar a price-fixing prosecution. *Metro Industries* could not deprive them of fair warning or mislead them into thinking their conduct was lawful.

Lastly, not only was this criminal prosecution foreseeable under the law, but the conspirators actually foresaw its possibility and tried, though ultimately in vain, to avoid detection. *See supra* p. 3. The conspirators knew that Samsung was prosecuted for antitrust violations in the DRAM industry, another international price-fixing conspiracy prosecuted by the United States, and that a DRAM executive had been sentenced for price fixing.[27] Trial Tr. vol. 11, 1807; Trial Tr. vol.12, 2015; Trial Tr. vol. 13, 2246-48. Not only did the law provide fair warning, but defendants' compatriots did as well. At a July 2004 crystal meeting attended by Hsiung, one participant even pointed "out the fact that 2 years ago there were [cases] *File*[d] against *DRAM* companies for *Anti-trust* law violations for colluding, and coerced [sic] that more

[27] Before the first crystal meeting, non-U.S. citizens had been convicted of violating the Sherman Act and sentenced to imprisonment for participating in price-fixing conspiracies. *See, e.g.*, Scott D. Hammond, Charting New Waters in International Criminal Prosecutions, Address at the National Institute on White Collar Crime 1-5 (Mar. 2, 2006) *available at* http://www.justice.gov/atr/public/speeches/214861.pdf (as a result of price fixing in vitamins, six non-U.S. citizens were sentenced to prison terms, the first on July 23, 1999).

care be given to security both within and without, and that *Written Communication*, which leaves traces, be refrained from as much as possible." Trial Ex. 431 (alterations in translation). And in an email to Wong and all of the employees in the AUO notebook division, Huang warned that Apple "is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" Trial Ex. 172; Trial Tr. vol. 5, 1030.

The application of the *per se* rule to this conspiracy was foreseeable and entirely consistent with 80 years of prior precedent. Thus, there is no Due Process Clause violation.

4. Defendants' Suggestion That Their Conduct Was Not Price Fixing Is Contradicted by the Jury's Verdict

The defendants further contend that the rule of reason applies because they merely exchanged information and did not fix prices. Joint Mem. 45-49. But after being properly instructed on what constitutes price fixing, the jury found beyond a reasonable doubt that the defendants were guilty of participating in the price-fixing conspiracy charged. Trial Tr. vol. 27, 4715-18; Trial Tr. vol. 34, 5403-04. The jury must be assumed to have followed the Court's instructions. *Heredia*, 483 F.3d at 923; *United States v. Brady*, 579 F.2d 1121, 1127 (1978). And the defendants' motions do not attack the sufficiency of the evidence proving the conspiracy's existence and their participation in it. Nonetheless, they suggest that their conduct was really not price fixing. Defendants protest that not all competition was eliminated. Joint Mem. 35-42. Even if true, this is irrelevant to whether the jury was properly instructed and whether defendants were guilty of the crime charged. Moreover, defendants claim that TFT-LCDs became steadily less expensive, which they attribute to "efficiencies created by the Crystal Meetings." Joint Mem. 52. But the jury found that the price-fixing conspiracy substantially raised prices above what they otherwise would have been, and no evidence proffered by the defendants suggested that the conspiracy contributed to the cost reductions associated with new technology and new facilities. Their claim is legally foreclosed by the *per se* rule and, in any event, could not undermine factually the finding beyond a reasonable doubt that the crystal meeting participants derived gross gains from the conspiracy of at least $500 million. Special Verdict Form 3, ECF No. 851. This is hardly a pro-competitive outcome despite defendants' theories to the contrary.

Defendants' comparison of this case to *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588 (1925) is also unpersuasive. Joint Mem. 48-49. Both cases involved meetings among competitors, but the nature and subject of the meetings was quite different. In this case, the conspirators met in secret and discussed and agreed upon their prices. When the association members met in *Cement Mfrs*., counsel was present to steer the discussion away from illegal subjects, and a full stenographic report was kept and turned over to the government. More importantly, "[t]here was no discussion at these meetings of current prices; no comment on conditions or as to the prospect of market, production or prices" and "no evidence that any agreement was reached." 268 U.S. at 601-02. The information exchanged was for the purpose of avoiding fraudulent practices by cement buyers. The defendants here can find no comfort in the Supreme Court's conclusion that there was no "unlawful restraint of trade" in the conduct of that case.

IV. THE JURY'S FINDING OF GAIN FROM THE CONSPIRACY IS SUPPORTED BY SUFFICIENT EVIDENCE

The jury was instructed to determine whether the defendants or other participants derived monetary or economic gain from the conspiracy. Trial Tr. vol. 27, 4728. It found that the gross gain from the conspiracy was "$500 million or more." Verdict 3. This finding is amply supported by the testimony of Dr. Leffler, who testified that the gross gain from the conspiracy was "substantially greater than $500 million." Trial Tr. vol. 18, 3282; Trial Tr. vol. 19, 3380; Trial Tr. vol. 25, 4589. Dr. Leffler's conservative estimate of the sales of TFT-LCDs ultimately entering the United States and affected by the conspiracy was $23.5 billion. Trial Tr. vol. 19, 3309-26. On such a large volume of commerce, a per-panel overcharge of only $4.30 would produce an aggregate gain of $500 million. And yet Dr. Leffler estimated that per-panel margins increased by $53 – more than ten times the amount needed to reach the $500 million figure. Trial Tr. vol. 19, 3360-61. Similarly, his multiple regression analysis estimated total overcharges in excess of $2 billion. Trial Tr. vol. 19, 3378. [28]

[28] Dr. Leffler's opinion that the gross gain was substantially greater than $500 million was not based solely on his empirical analyses. It was also based on his extensive review of the crystal meeting reports and what he characterized as the "scope" of those meetings – "the nature

By contrast, defendants offered no alternative assessment of the gross gains earned by all six crystal meeting companies. Instead, the defendants' expert limited his analyses to AUO's prices and margins and offered no opinion on whether any of the other five companies overcharged their customers (Trial Tr. vol. 24, 4415) even though the jury was instructed to consider the gain not only to AUO but "other participants in the conspiracy" as well. Trial Tr. vol. 27, 4728. In closing argument, AUOA's counsel was explicit: "You only have to think about overcharge if you conclude that AUO was part of a conspiracy . . . and so we're not here to talk about overcharge. I'm not going to address that with you, because I don't think it's relevant." Trial Tr. vol. 28, 4896. Based on Dr. Leffler's unrebutted testimony, the jury had no trouble concluding that the gain from the conspiracy was at least $500 million.

Defendants now claim that Dr. Leffler's analysis is flawed because he assumed that every panel sale made by a crystal meeting company from 2001 to 2006 was affected by the conspiracy. They argue that his failure to distinguish between affected and unaffected panels runs afoul of the requirement in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact increasing the penalty beyond the statutory maximum must be proven to a jury beyond a reasonable doubt. Joint Mem. 23-27.

Defendants misstate the application of *Apprendi* to the gain issue and misunderstand Dr. Leffler's analysis. The jury did not have to find the proportion of panels affected by this conspiracy because it is not *that* fact that increases defendants' maximum fine. Rather, it is the total gain from the conspiracy that increases the maximum fine, and the jury found beyond a reasonable doubt that the gain was at least $500 million.

Defendants' assertion that Dr. Leffler's estimate of the affected commerce is flawed is belied by their failure to challenge that estimate at trial. Defense counsel did not cross-examine Dr. Leffler about that estimate. AUO's expert did not critique that estimate or offer an

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of meetings; when they were occurring; who was attending; what they were talking about." Trial Tr. vol. 19, 3286.

alternative number. And none of the seven defense closing arguments mentioned it. Without contrary evidence or argument, the jury reasonably relied upon it when making its gain finding.[29]

In any event, Dr. Leffler's analysis is not flawed. Dr. Leffler did not, as defendants contend, include every panel sold by the six crystal meeting companies in his analyses. He focused on the 12" to 30" panels designed for computer monitors, notebook computers and televisions. His commerce estimate was limited to these 12" to 30" panels.[30] His margin analyses were limited to these panels.[31] And so were his regression results.[32]

It is true that Dr. Leffler's commerce estimate and his empirical work were based on sales of all 12" to 30" panels, even those not discussed at every meeting. Trial Tr. vol. 19, 3299. But this is not a flaw in his analysis. To the contrary, the fact that Dr. Leffler included all 12" to 30" panels – both those discussed and not discussed – means that he accounted for the possibility that some of the non-discussed panels may not have been affected.

By definition, "overcharges" are the additional earnings, or gains, that companies are able to obtain because of their participation in a conspiracy. Trial Tr. vol. 19, 3278. To estimate the effect on earnings, Dr. Leffler looked at two things. He estimated the effect on prices per panel by comparing actual prices with "but for" prices (the prices that would have been charged but for the crystal meetings). Trial Tr. vol. 19, 3341. He also estimated the volume of affected commerce (which the jury was instructed were panels sold into the U.S. and panels incorporated into finished products sold in the U.S.) because the gains, or effect on total earnings, are a

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[29] Dr. Leffler also testified that his commerce estimate was a conservative one and explained why. Trial Tr. vol. 19, 3316-17. That testimony went unchallenged as well.

[30] The "23.5 billion – is from data about the shipment of finished products, if you will; things that have panels in them; fundamentally, televisions, computer monitors, and notebook computers." Trial Tr. vol. 19, 3310.

[31] Responding to criticism that panels outside the 12"-30" range were included in an earlier analysis, Dr. Leffler testified that "the data I presented to the jury only included products that were discussed at the crystal meetings. It only included the 12 to 30-inch products, in the first place, . . ." Trial Tr. vol. 25, 4558.

[32] His regression results included "all products – 12 to 30 – both for AUO and for everybody." Trial Tr. vol. 20, 3709.

function of the price effect times the quantity of sales. Trial Tr. vol. 19, 3309-26; Trial Tr. vol. 27, 4728-29.

Even if some non-discussed panels were unaffected, that did not bias Dr. Leffler's total overcharge estimate because he included those unaffected panels in his analyses. Including any unaffected panels would have reduced, not increased, his per-panel effect number. And it would have reduced that number by an amount exactly offsetting the larger volume of commerce number. Including all of the 12" to 30" panels had no effect on Dr. Leffler's total overcharge estimates; they would have been the same had he focused solely on the panels discussed at each meeting.[33] In sum, even if defendants' assumption that the non-discussed panels were not affected is correct (and there is no evidence that it is correct), Dr. Leffler's analysis was not flawed because he accounted for that possibility and the jury reasonably relied upon his analyses in finding a gain of at least $500 million.

Furthermore, the panels that were discussed at the meetings were the most significant and best-selling panels. Dr. Leffler calculated that 77 percent of all sales were represented by panels that had a target price discussed in the same month in which they were sold. Trial Tr. vol. 19, 3301. For AUO specifically, a very high percentage (over 90 percent in the early months of the conspiracy) of panels sold were discussed. Trial Tr. vol. 25, 4545. So, even if the jury discounted Dr. Leffler's empirical results by 23 percent to account for non-discussed panels (which, as explained above, it did not need to do), it still would have had ample support for its gain finding because Dr. Leffler's estimates were far above $500 million. His margin analysis showed that per-panel margins increased by $53, more than ten times the $4.30 needed to find a $500 million overcharge. Trial Tr. vol. 19, 3360-61. And his regression analysis generated overcharges in excess of $2 billion, more than four times as much as $500 million. Trial Tr. vol. 19, 3378.

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[33] An example will illustrate this point. Assume that the six companies sold 100 panels, 77 discussed at the meetings and 23 not discussed. Assume also that the meetings increased the price of the 77 discussed panels by an estimated $10 per panel and had no effect on the 23 non-discussed panels. The $10 effect per discussed panel would equate to a $7.70 effect per all 100 panels. So the same overcharge estimate is calculated whether considering solely the 77 discussed panels (77 x $10 = $770) or all 100 panels (100 x $7.7 = $770).

Finally, defendants argue that even the panels that *were* discussed were not subject to an overcharge because the conspiracy was imperfect. Joint Mem. 25-26. But as Dr. Leffler explained to the jury, a cartel can generate an overcharge if the actual prices fall below the target prices because overcharge is defined as the difference between the actual and the "but for" (not target) price. Trial Tr. vol. 19, 3343 ("the fact that the actual price is below the crystal price is – or the target price is equally irrelevant"); *see also* Trial Tr. vol. 25, 4517 (actual prices falling below target prices inconsistent with perfect conspiracy but not inconsistent with a significant overcharge).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny defendants' Rule 29 and Rule 33 motions.

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Respectfully submitted,

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