DENNIS P. RIORDAN (NO. 69320)
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
Tel: (415) 431-3472
Fax: (415) 552-2703
dennis@riordan-horgan.com

KIRK C. JENKINS (NO. 177114)
SEDGWICK LLP
1 North Wacker Drive, Suite 4200
Chicago, IL 60606
Tel: (312) 641-9050
Fax: (312) 641-9530
kirk.jenkins@sedgwicklaw.com

JOHN D. CLINE (NO. 237759)
LAW OFFICES OF JOHN D. CLINE
235 Montgomery Street, Suite 1070
San Francisco, CA 94101
Tel: (415) 322-8319
Fax: (415) 524-8265
Cline@JohnDClineLaw.com

Attorneys for Defendants
AU OPTRONICS CORPORATION and
AU OPTRONICS CORPORATION AMERICA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. AU OPTRONICS CORPORATION, et al., Defendants.	Case No: 09-cr-0110-SI **DEFENDANTS' JOINT REPLY IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR NEW TRIAL** Judge: Hon. Susan Illston Place: Courtroom 10, 19th Floor

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION[1]

At the core of the government's response is an emotional appeal that the defendants are malefactors who deserve to "be held accountable for their conduct." (Govt. Opp. at 1.) But the United States government does not possess the general roving authority to punish foreigners simply because it is of the opinion that they deserve to be held accountable. The government's authority is limited, for very good reason, in a variety of ways. In this case, the government strayed far beyond the bounds of its authority.

The government failed to try this case in a district where venue was proper. It now attempts to cure its own error by relying on a variety of legally dubious and factually unsupported theories that were never presented to the jury. The government failed to prove that this case fits within the specific limitations on foreign antitrust prosecutions enacted by the FTAIA. It now attempts to distort the plain meaning of that statute, and it continues to pursue diffuse arguments that the FTAIA does not apply to this case. The government failed to prove the elements of a rule of reason case, as required by binding Ninth Circuit precedent in *Metro Industries*. It now attempts a flat-earth argument aimed at denying the utterly pellucid holding of that case, and also advances the even more preposterous contention that the defendants have not preserved their *Metro* claim.

The questions presented in this motion are legal questions about whether it was appropriate to try the defendants in this country, and in this Court, and under a standard created for domestic antitrust cases. In the government's zeal to pursue its own sense of just accountability worldwide, it has repeatedly ignored the legal limits on its own power.

II. THE GOVERNMENT FAILED TO ESTABLISH PROPER VENUE

It was no doubt extremely convenient for the San Francisco branch of the Antitrust Division of the Department of Justice to try this matter an elevator's ride away from its offices instead of in Houston, where HP indisputably negotiated LCD prices with the alleged coconspirators. (*See, e.g.*, RT 493-94 (Tierney testimony).) But "[q]uestions of venue in criminal cases . . . are not merely matters of

[1] The Court previously granted the defendants leave to jointly file their Rule 29 and Rule 33 motions. (Dkt. 887.) Based on the Court's prior order, the defendants do not believe that their joint reply, comprising a total of 34 pages, exceeds the limits imposed by the Local Rules and have not separately moved for leave. The defendants filing this joint pleading – AUO, AUOA, H.B. Chen, and Steven Leung – join in the arguments set forth in the reply of Dr. Hui Hsiung, separately filed.

formal legal procedure. They raise deep issues of public policy . . . ." *United States v. Johnson*, 323 U.S. 273, 276 (1944). The defendants had a constitutional right to have the jury decide the venue issue on the evidence and legal theory submitted to it, and none other. The government's opposition makes plain that right was not honored in this case.

At trial, the government argued one—and only one—theory of venue to the jury: that in furtherance of the conspiracy, AUO conducted price negotiations with HP's Cupertino procurement office in 2001 and 2002. (RT 5325-26.) In their post-trial motions, the defendants demonstrated that there was no evidence in the record supporting this theory. No doubt for that reason, the government virtually abandons its sole trial theory in its Opposition.

In an effort to salvage its case, the government for the first time in its post-trial filing presents a scattershot assortment of at least a half dozen alternate theories: that Michael Wong negotiated prices with Apple in the Northern District, that he negotiated prices with Dell in the Northern District, that Evan Huang negotiated prices with Apple in the Northern District, and so on. (Govt. Opp. at 10-15.) For reasons discussed below, all of these alternate theories are both legally flawed and factually unsupported. But regardless of those problems, the simpler point is that *none of these theories was presented to the jury at trial*.

Both the Supreme Court and the Ninth Circuit have repeatedly emphasized that a court reviewing a jury verdict may not affirm a conviction on a theory never presented to the jury.

> This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.

McCormick v. United States, 500 U.S. 257, 270 n.8 (1991); *accord United States v. Dann*, 652 F.3d 1160, 1170 n.3 (9th Cir. 2011); *see Chiarella v. United States*, 445 U.S. 222, 236 (1980) ("We cannot affirm a criminal conviction on the basis of a theory not presented to the jury.").

The government repeatedly argues that the jury in this case "could have" found all of its alternate theories because some evidence to support them was present in the record. But the government tacitly concedes that it never argued any of these alternate theories at trial. That concession is fatal to all of its newly minted alternate theories.

A. The Record Contains No Evidence Supporting the Only Theory of Venue Presented to the Jury, and the Government Misled the Court and Jury in Representing the Contrary

As noted in the defendants' post-trial motions, the government presented the jury with a single theory of venue in its rebuttal argument:

> HP, which was a major victim of this crime, had a procurement office in Cupertino from the beginning of the charged conspiracy time until HP and Compaq merged in May of 2002. And negotiations for LCD panels were carried out there. Cupertino, which is in Santa Clara County, is in the Northern District of California. The conspirators' negotiation of price-fixed panels with HP in Cupertino were acts in furtherance of this conspiracy. (RT 5326.)

When that assertion was objected to by the defense, the government assured the Court in front of the jury that such evidence had been admitted into the trial record. Now that the government's response has been filed, the following facts remain undisputed:

1. No witness who worked for HP in the window between the alleged commencement of the conspiracy in September of 2001 and May of 2002 testified at trial.
2. No witness testified that price negotiations *of any kind* took place at HP's Cupertino office between September of 2001 and May of 2002, much less "negotiation of price-fixed panels." The government blatantly misstates the testimony of Mr. Tierney, then a Compaq employee, in asserting the contrary at page 15 of its opposition. At the page cited by the government (RT 496), Tierney states that HP had procurement offices in Cupertino and Grenoble, France in the relevant time period, but says nothing about price negotiations occurring there. Furthermore, no witness testified that price negotiations were necessarily and solely conducted at procurement offices, as opposed to other HP sites, during this time period.
3. AUOA employee and government witness Michael Wong never stated that he or any other AUO or AUOA employee conducted price negotiations with HP during the window asserted by the government. When asked by the prosecutor to whom AUO was "selling" at that time, he corrected her and stated that, rather than selling, he was promoting AUO's

products with HP and others. (RT 834.) Wong did expressly testify that AUOA conducted sales negotiations with HP in Houston. (RT 861-863)

4. There are no business records placed in evidence specifically establishing that AUO products were ever shipped into, or were paid for from, the Northern District by HP in 2001 and 2002, or any time thereafter.

The government claims that the fact that other alleged coconspirators had offices in the Northern District necessarily establishes that they negotiated the prices of price-fixed products in the Northern District with HP between September 2001 and May 2002. (Govt. Opp. at 15: "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.") But that same cited testimony established that these three companies also had offices in Texas at that time. Had Samsung actually negotiated prices with HP in the Northern District during the relevant time frame, the government could easily have called a witness from Samsung to so testify, as the company was the presumed amnesty applicant and had entered into a cooperation agreement with the government. No witness from Samsung was called. The government did call witnesses from alleged coconspirators CMO (J.Y. Ho), CPT (Brian Lee, Milton Kuan and C.C. Liu), and LG (Stanley Park), but none testified that prices were negotiated with HP in the Northern District in 2001 and 2002.

The preponderance of the evidence standard requires the government to prove that a factual proposition is more likely to be true than not. That standard was not met in this case because the government utterly failed to offer evidence to prove its factual allegations. The absence from the trial record of any direct evidence on the subject of whether price negotiations were conducted by the alleged coconspirators with HP in the Northern District between 2001 and 2002 cannot establish that it is more likely than not than such negotiations *did* in fact take place. The government misrepresented the state of the record on its sole venue theory to both the Court and the jury, and did so in rebuttal argument when the defense had no opportunity to set the record straight. Such unfairness requires that the jury's verdict be set aside, whether it be under Rule 29 or Rule 33.

B. The Government Failed to Prove that Michael Wong and Evan Huang were Coconspirators or that They Committed an Act in Furtherance of the Conspiracy

1. The Government Misstates the Law and Facts in Its Coconspirator Arguments

To establish venue, the government at a minimum had to prove that a member of the charged conspiracy committed an act in furtherance of the conspiracy in the Northern District. *Hyde v. United States*, 225 U.S. 347 (1912); *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003). In its opposition, the government's chief candidates for acting coconspirators are Michael Wong and Evan Huang, although it failed to argue to the jury a venue theory concerning either AUOA employee. Indeed, the government failed to mention Huang in either its initial or rebuttal arguments. Before turning to the evidence concerning either Wong or Huang, it should be noted that the government's newly improvised venue arguments are based on several fundamental legal errors.

The government contends that this Court can find that the jury reasonably concluded that Michael Wong and Evan Huang were coconspirators based on the Court having made the same ruling in a pretrial admissibility ruling. (Govt. Opp. at 9.) That contention is fatuous as a matter of law and misleading as a matter of fact.

As a matter of law, a preliminary ruling on the admissibility of evidence under Fed. R. Evid. 104(a) is much different than an ultimate ruling based on trial evidence. As the government repeatedly argued in its pretrial filings, rulings under Rule 104(a) are "based on proffers of counsel, affidavits, or other *inadmissible* evidence." (Govt. Mot. Regarding Coconspirator Statements at 4 (emphasis added) (filed under seal, Order at Dkt. 442).) For example, the defendants conceded that, for admissibility purposes, each of them could be found a coconspirator based simply on the fact that they were named in the indictment, although an indictment is utterly inadmissible as proof of guilt at trial. For the purposes of venue, however, a determination that a person is or is not a coconspirator must be based solely on admissible evidence actually presented at trial. As discussed below, the only evidence presented at trial, including the testimony of Michael Wong, was unavailable to the Court at the time of its pretrial ruling, and directly refutes the notion that Wong or Huang were coconspirators.

Furthermore, the government misrepresents the facts concerning the Court's admissibility ruling. Prior to trial, the government moved to admit statements of various AUO employees under the

coconspirator exception to the hearsay rule. In its initial motion to admit coconspirator statements, it argued that several employees were coconspirators—Steven Leung, Sylvania Hung, Morris Wong, Alex Yeh, and Irene Chang—but it did not argue that Michael Wong or Evan Huang were putative coconspirators. (Govt. Mot. Regarding Coconspirator Statements.) The government subsequently requested pre-appearance admission of various documents, and again argued that many were admissible under the coconspirator exception. (Dkt. 672.) But once again, it made no specific argument, and cited no evidence, regarding Wong or Huang. Wong and Huang were the declarants in only two of the emails the government sought to admit. (*See* Dkt. 672-1, App. A (listing Wong as declarant for Exh. 83 and Huang as declarant for Exh. 172).)

Following those motions, this Court made a general ruling that some AUO employees were coconspirators. (Dkt. 678.) It did so in part on the ground that they had acted within the scope of their employment for the defendants whom the Court had found to be coconspirators (Dkt. 678 at 3), a finding, as noted above, based largely on inadmissible information such as the indictment. The Order did not make a specific finding as to whether Wong or Huang were putative coconspirators. Indeed, the Order only mentioned Wong because the government was seeking to admit the documents during his testimony—and the Order did not mention Huang at all. The government disingenuously suggests that this Court "specifically found" that Wong and Huang were coconspirators, and that it admitted "approximately 40 emails" on that basis. (Govt. Opp. at 9.) In fact, at most, the record demonstrates that this Court admitted two emails based on some implicit and preliminary finding that Wong and Huang were coconspirators.

The most glaring legal deficiency in the government's "coconspirator" claims is the failure to even mention, much less apply, the legal definition of what does, and does not, constitute proof that a person participated in the alleged price-fixing conspiracy. According to the Court's instructions, to meet its evidentiary burden as to Wong and Huang, the government had to prove that both joined the Crystal Meeting price-fixing conspiracy "voluntarily and intentionally. . . knowing of its goal and intending to help accomplish it." (RT 4721.) It could not do so by merely showing that they might have "happen[ed] to act in a way which furthers some object or purpose of the conspiracy," because an

employee who has no knowledge of a conspiracy is not a coconspirator, and even an employee who has knowledge but does not intentionally participate is not a coconspirator. (RT 4726.)

The government also could not meet its burden by merely showing that Wong and Huang "obtain[ed] information about a competitor's prices or even [e]xchang[ed] information about prices," because, as the Court instructed, such conduct is not unlawful "unless done pursuant to an agreement or mutual understanding between two or more persons to fix prices as charged in the indictment." (RT 4719.) Nor would the facts that Wong and Huang "charge[d] the same prices' as competitors," "cop[ied] each other's price lists," or "follow[ed] and conform[ed] exactly to each other's price policies and price changes," in themselves prove the two were coconspirators, because "such conduct would not violate the Sherman Act, unless…it was done pursuant to an agreement between two or more coconspirators, as alleged in the Indictment." (RT 4718.)

2. Michael Wong and Evan Huang Were Not Proven To Have Joined the Charged Crystal Meeting Price-Fixing Conspiracy

a. Wong

An examination of the government's "coconspirator" argument (Govt. Opp. at 10-13.) reveals that it contains not a single assertion concerning the crucial fact the prosecution was obliged to prove: that Wong, knowing of the goal of price-fixing agreement reached at the Crystal Meetings, "voluntarily and intentionally" joined that agreement, "intending to help accomplish it." (RT 4721.) The reason for the absence is obvious. The government offered Wong to the jury as a wholly honest witness bound by his sworn promise "to cooperate fully and truthfully with the United States in connection with its investigation of possible violations of federal antitrust and related criminal laws involving the manufacture or sale of TFT-LCD." (RT 851-52 & Exh. 774.) Wong had testified on cross-examination that: (1) he never agreed with any of AUO's competitors or AUOA's competitors to fix prices on LCD panels (RT 1061); (2) he never agreed with anyone at AUO or AUOA or any of the individual defendants to fix prices on LCD panels (*id.*); and (3) no one from AUO ever told him he had to follow the prices discussed at the Crystal Meetings or that AUO or AUOA was bound by those prices (RT 1094). On re-direct, the *government* elicited Wong's testimony that he did not know whether AUO personnel in Taiwan were meeting with competitors in Taiwan to fix prices. (RT 1227-28.) All of the

evidence in the record bearing on the crucial issue of whether Wong knowingly agreed to join the alleged Crystal Meeting conspiracy supports the conclusion that he did not.

The government argues that the jury was not required to view Wong as a truthful witness, although the government proffered him as such, or to accept his testimony that he never agreed to fix prices. (Govt. Opp. at 12.) Be that as it may, there is simply no evidence in the record to support a contrary conclusion.

The government correctly notes that Wong testified that he discussed prices with competitors and then shared that information with other AUO and AUOA employees. (Govt. Opp. at 11.) The government then asserts that Wong "admitted that he aligned prices with his contact at LG" during negotiations with Dell. (Govt. Opp. at 12.) Wong admitted no such thing. Far from admitting to price agreements, Wong instead testified that he simply gathered as much information about the market as he could from all possible sources to determine how low he needed to price panels in order to get business without "leaving profit on the table." (RT 1212-17.) The government's contention that Wong admitted to a crime stretches the record beyond recognition.

Under the law described by this Court's instructions to the jury, all of the acts Wong admitted to were entirely lawful.[2] As such, they cannot prove that Wong was a coconspirator; rather, his participation in the charged conspiracy must be proven by other evidence. No such evidence exists. Wong was not proven to be a coconspirator, and so any acts he might have undertaken in the Northern District cannot satisfy the venue requirement.

b. Huang

That the government has had to strain the bounds of credulity in order to defend against the defendants' venue claim is well illustrated by its resort to a claim that Evan Huang joined the alleged Crystal Meeting price-fixing conspiracy. The government did not even mention Evan Huang in its closing argument, much less do so in the venue context. Again, the reasons are obvious. There is not a shred of evidence in the record to support an assertion that Huang even was aware that the Crystal

[2] The Court instructed that it is lawful to obtain information about a competitor's prices or even exchange information about prices (RT 4719), as well as to charge the same prices as competitors, to copy their price lists, and to follow and conform exactly to competitors' price policies and price changes. (RT 4718.)

Meetings were being held; *a fortiori*, there is nothing to suggest that he knew of their content and purpose, and consciously decided to accomplish their goal. The information-gathering by Huang on the prices offered by competitors was completely legal, as long as he was not proven to have knowingly and intentionally joined the charged conspiracy. Because there was absolutely no proof that he had done so, the government's "coconspirator" argument as to Huang collapses.

C. The Court Cannot Take Judicial Notice that Apple Negotiated Prices in the Northern District

The government failed to prove that Wong and Huang were coconspirators, a deficiency fatal to its venue showing. But the prosecution also failed to prove that any act in furtherance of the conspiracy was committed in the Northern District, by a coconspirator or anyone else.

The absence of evidence of price negotiations between AUO and HP in 2001 and 2002 is demonstrated above. The record evidence is clear that after May of 2002, AUO negotiated with HP in Houston.[3] As to Dell, Michael Wong testified that Dell negotiations were conducted in Austin, Texas (RT 858), as the very evidence cited by the government in its Opposition makes clear. (Govt. Opp. at 12, referring to Exhibit 88, describing an Austin-based conversation by Wong with LG employees "here in Austin" concerning prices quoted to Dell.)[4]

That being so, the government's claim that negotiations concerning allegedly price-fixed LCDs occurred in the Northern District now centers on Apple. The government contends that Wong and Apple must have negotiated prices in the district because both AUOA and Apple had offices in Cupertino during the conspiracy. (Govt. Opp. at 10-11.) Because the location of Apple's procurement office is not part of the record the government asks the Court to judicially notice that fact now. Judicial notice of this fact, however, would be inappropriate. As Dr. Hsiung notes in his reply, a court may not judicially notice a fact after the record has been closed.

---

[3] Following the merger with Compaq, and through 2006, HP based all of its LCD procurement groups for notebooks and monitors in Houston, Texas, at the headquarters of its business entity. (RT 496-497.) AUOA's employees responsible for the HP account were based in Houston. (RT 861.)

[4] Exhibit 88 was sent by Wong to L.J. Chen, whom the jury determined was not a member of the charged conspiracy.

But even aside from the *location* of the office, the gaping flaw in the government's argument is that the record also contains no evidence that *price negotiations* were conducted there. Even if it were proper to simply assume that Apple had a procurement office in Cupertino, this Court cannot judicially notice the fact that there were price negotiations between AUOA and Apple conducted at that office. Just as the Court cannot take judicial notice that sales negotiations were conducted in Cupertino, it equally cannot judicially notice that such negotiations involved price-fixed LCDs. The government has not demonstrated that this factual proposition is "not one subject to reasonable dispute." Fed. R. Evid. 201(b). Indeed, the government has not even asked the Court to judicially notice the locus of Apple's price negotiations, and could not rationally do so.

Two weeks ago, on April 28, 2012, The New York Times ran a lengthy front-page article concerning Apple's financial operations. The article detailed how "Apple and other California-based companies have moved financial operations to tax-free states," such as Nevada, thereby successfully avoiding hundreds of millions of dollars in California state taxes. The defendants do not bring this news report to the Court's attention as affirmative evidence that no act in furtherance of the charged conspiracy was committed in the Northern District; that issue must be decided only on the trial evidence before the jury. Rather, the defendants cite it as an example of why the government cannot demonstrate that there is no reasonable dispute as to a factual proposition for which the government offered no proof whatsoever – i.e., that price negotiations by Apple were necessarily carried out in Cupertino, California.

Additionally, while the government did gain admission of Apple's records of its purchases from AUO (Exh. 835), those records were never displayed to the jury, and they contain no indication that the LCDs purchased were shipped into the Northern District or paid for from Cupertino. Were it the case that LCD price negotiations were conducted in Cupertino, the government easily could have called an Apple employee (such as Praveen Rathore, who was on its witness list) to testify to that fact, but did not. Especially given that the government was allowed to reopen its case to cure its venue defect, this failure is glaring. Therefore, the prosecution failed to prove that an act in furtherance of the conspiracy was committed in the Northern District.

D. Venue Cannot Rest on a Vicarious Liability Theory on Which the Jury Was Never Instructed

For the first time, the government suggests a vicarious liability theory of venue, *viz.*:

> [V]enue 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."

(Opp. at 16 (citing *United States v. Rommy*, 506 F.3d 108, 119-22 (2d Cir. 2007), and *United States v. Gonzalez*, No. CR 10-00834, 2011 WL 500502 at *3 (N.D. Cal. Feb. 9, 2011).)

In other words, even if no coconspirator commits an act in furtherance of the conspiracy within the district where the case is tried, venue may lie there if a coconspirator outside the district directs a non-conspirator within the district to take an act in furtherance of the conspiracy. This is a vicarious liability of venue. In order to find venue under this theory, the jury would have required instruction on it. Aside from the above-described lack of evidence that even non-conspirators such as Wong and Huang committed an act in furtherance of the conspiracy in the Northern District, the absence of any instruction on the *Rommy* theory, or even a request for such instruction by the government, precludes reliance on the theory to support a finding of venue. *McCormick,* 500 U.S. at 269-70 n.8.

Further, even if the government could now rely on this vicarious liability theory, it did not present any evidence at trial to support it or even mention such a possibility in its closing. In order to establish such a theory, the government would have had to prove that a coconspirator directed the actions of some third party. In other words, the government would have been required to demonstrate that a co-conspirator affirmatively urged the innocent party to behave in a particular way. *See United States v. Ben Zvi*, 242 F.3d 89, 97 (2d Cir. 2001). The government presented no evidence establishing that a coconspirator affirmatively directed and controlled price negotiations with U.S. customers. To the contrary, Michael Wong testified that Steven Leung (who was not even proven to be a coconspirator) did not always exercise control over his team's price negotiation decisions (RT 910-11; *see also* Exh. 139), and other managers gave their teams even less direction (RT 911-12).

Vicarious liability is a fact-intensive concept. It would have required a specific finding of fact by the jury, and the jury could not have made such a finding without proper instruction from this Court.

The government did not present sufficient evidence to prove a vicarious liability theory, and regardless, the jury made no such finding. As a result, it cannot be used now as a *post hoc* rationalization to save the verdict.

E. The Government Was Obliged to Prove an Act within the Limitations Period

Relying on *United States v. Tannenbaum*, 934 F.2d 8, 13 (2d Cir. 1991), the government argues that a venue-conferring act need not have occurred within the limitations period. But the rule of *Tannenbaum* has never been adopted by the Ninth Circuit,[5] and it makes little sense. The purpose of venue is to ensure that a defendant is tried in the district "where the crime was committed." *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002). It cannot be sufficient that a defendant committed some other crime—an older, time-barred crime—in that district. A time-barred act in furtherance of a conspiracy could not establish the crime, and it therefore cannot establish venue either. Moreover, the *Tannenbaum* rule is in tension with Ninth Circuit law that venue must be independently established as to each count. *See United States v. Corona*, 34 F.3d 876, 879-81 (9th Cir. 1994). There is no reason to give the government the additional "forum shopping option" that would result from allowing time-barred acts to establish venue. *Id*. at 880 (quoting *United States v. Walden*, 464 F.2d 1015, 1020 (4th Cir. 1972)).

Even assuming *arguendo* that *Tannenbaum* is correct, it remains true that in this case, the government specifically alleged in the indictment that it would prove a venue-conferring act within the limitations period. In general, when the government alleges a specific theory of the offense, it is held to that theory even if the law would allow a broader theory. *United States v. Shipsey*, 190 F.3d 1081, 1087 (9th Cir. 1999). More specifically, when the government alleges that an offense was committed during a particular time frame, it must prove those allegations. *See United States v. Laykin*, 886 F.2d 1534, 1542 (9th Cir. 1989); *United States v. Cecil*, 608 F.2d 1294, 1296-97 (9th Cir. 1979).

---

[5] With an oblique "cf." cite to *Forman v. United States*, 264 F.2d 955, 956 (9th Cir. 1959), the government attempts to suggest that the Ninth Circuit has endorsed something like the *Tannenbaum* rule. That is false. *Forman* dealt with a challenge based on the wrong *division within a district*, not the wrong *district*. The Ninth Circuit has always held that a different standard applies because there is no robust legal right to be tried in the proper division. "[T]he constitutional provisions [regarding venue] relate only to the 'state and district' where the offense is committed. There is no constitutional prohibition against the trial being had in a division of the district other than the division in which the offense was committed." *McNealy v. Johnston*, 100 F.2d 280, 282 (9th Cir. 1938).

The government does not and cannot dispute the contents of its own pleading. Instead, it relies heavily on an argument that the defendants forfeited any right to raise this issue because they did not object to the final jury instructions describing a different time frame. (Govt. Opp. at 17-18.) But even if application of plain error doctrine were appropriate here, it would make no difference, for the Ninth Circuit has held that constructive amendment of an indictment constitutes plain error. *Shipsey*, 190 F.3d at 1087. In fact, the Ninth Circuit has suggested, though never explicitly held, that a constructive amendment might "always require[] reversal, even under plain error review." *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001); *see United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991); *see also United States v. Choy*, 309 F.3d 602, 607-08 (9th Cir. 2002) (holding that a material variance constitutes plain error). There is no published Ninth Circuit case where the court has found a constructive amendment but affirmed a conviction simply because a defendant failed to object to jury instructions.

The government cannot evade its own failure to prove what it alleged in the indictment simply by invoking the forfeiture doctrine. The government alleged that it would establish venue with an act within the limitations period. Just as the government cannot now rely on theories never argued to the petit jury at trial, it also cannot rely on theories never argued to the grand jury.

F. The Government's Unfair Tactics Concerning the Venue Issue Deprived the Defendants of Due Process, Requiring a New Trial

None of the venue theories belatedly advanced by the government in its rebuttal argument or in its Opposition is supported by sufficient evidence. At a minimum, the defendants' insufficiency arguments are substantial and were fully worthy of the jury's consideration. Had the defense arguments been presented to the jury, an acquittal on the ground of insufficient evidence of venue would have been an entirely reasonable outcome. But jurors heard none of the defense arguments presented in these post-trial motions, because the only venue theory offered by the government at trial came in rebuttal, when the government misrepresented the state of the record on HP negotiations to both the Court and the jury, at a time when the defense had no opportunity to set the record straight. The government now adds to that unfairness by presenting this Court with venue theories never presented at trial, although it was the jury that was constitutionally required to decide the venue issue.

One component of due process is the prohibition of unfair surprise. A defendant may not be convicted based on a legal theory "that was neither subject to adversarial testing, nor defined in advance of the proceeding." *Sheppard v. Rees*, 909 F.2d 1234, 1237 (9th Cir. 1989). The government's tactics on the venue issue violated that Due Process guarantee, yet another reason why the defendants' convictions must be set aside under both Rule 29 and Rule 33.

III. BECAUSE THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE EXISTENCE OF EITHER FTAIA EXCLUSION TO BEYOND A REASONABLE DOUBT, ACQUITTAL, OR ALTERNATIVELY, A NEW TRIAL, IS REQUIRED

Next, the defendants showed that because the superseding indictment alleges "trade or commerce . . . with foreign nations," the Sherman Act applies, if at all, only if the government alleges and proves one of two exclusions: (1) conduct involving import trade or commerce; and (2) conduct having a direct, substantial and reasonably foreseeable effect on United States commerce. Even if the government had properly alleged either exclusion in the indictment – which it did not – the government failed to prove either exclusion at trial. Any relatively minor shipments of panels into the United States are not "imports" within the meaning of the FTAIA, and whatever effect panel prices might or might not have had on the price to consumers of monitors, notebooks and televisions was not "direct" as a matter of law. (Defs. Mot. at 16-23.)

A. The Conduct Alleged in the Indictment is "Trade or Commerce . . . With Foreign Nations"

The government responds that evidence "that the conspirators mostly acted abroad [is] irrelevant." (Govt. Opp. at 38.) "Under settled law," the government claims, "criminal conspiracies occur where any overt act in furtherance of the conspiracy by any coconspirator occurs . . . . To the extent defendants propose a test focused on where the conspiracy predominantly occurred, they ignore well-settled principles of criminal conspiracy law." (*Id.*)

The "test" which the government derides is plainly set forth in the FTAIA itself: "[The Act] shall not apply to conduct involving trade or commerce . . . with foreign nations" unless one or both of the statutory exceptions is satisfied. 15 U.S.C. § 6a; *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 162 (2004). The phrase "trade or commerce . . . with foreign nations" includes transactions between foreign and domestic commercial entities. *Id.* at 158, 162-63 (finding that conduct which is "in

significant part foreign" is "trade or commerce with foreign nations" within the FTAIA); *Turicentro, S.A. v. American Airlines Inc.,* 303 F.3d 293, 301-02 (3d Cir. 2002); *see Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd,* 299 F.3d 281, 290-93 (4th Cir. 2002) (rejecting argument that *Hartford Fire* limited to "wholly foreign" conduct). Conduct directed at reducing the competitiveness of a foreign market involves foreign trade or commerce regardless of whether some of the conduct occurred in the United States. *Kruman v. Christie's Intl.,* 284 F.3d 384, 395 (2d Cir. 2002), *cert. dismissed,* 539 U.S. 978 (2003), *abrogated on another point in Empagran,* 542 U.S. 155.

The authorities cited by the government in support of its argument that a single domestic act is sufficient for Sherman Act jurisdiction offer no support. *United States v. Endicott,* 803 F.2d 506, 514 (9th Cir. 1986) related to a firearms conspiracy. No antitrust issues were involved, and the opinion never mentions the FTAIA. Nor did *United States v. Angotti,* 105 F.3d 539, 545 (9th Cir. 1997) have anything to do with the substantive scope of the Sherman Act – it involved the making of false statements in obtaining a loan, and addressed venue, requiring at minimum an overt act (*e.g.,* making a false statement) in the district for venue to lie there.

B. The Weight of the Evidence Fails to Show That AUO Was Engaged in "Import Trade or Commerce"

The Court instructed the jury that in order to satisfy the import exclusion of the FTAIA, the government was required to prove that defendants "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." (Dkt. 817 at 10 [Final Jury Instructions].) In their opening brief, the defendants showed that the evidence was insufficient to support any such finding for two reasons: (1) there was no evidence that the defendants "targeted" a United States import market – particularly in view of the small fraction of TFT-LCD sales accounted for by shipments to the United States; (2) even if shipping products into the United States constituted, without more, "targeting" an import market – which it does not – the government failed to prove that AUO specifically, as opposed to the Crystal Meeting participants in general, made any such shipments.

"[F]ixing the price of panels made abroad and sold in or for delivery to the United States is conduct involving import commerce," the government responds, citing *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 n.11 (3d Cir. 2011).

Animal Science Products says nothing of the kind. "[T]he import trade or commerce exception 'must be given a relatively strict construction,'" the court found. *Id.* at 470; *Carpet Group Intl. v. Oriental Rug Importers Ass'n,* 227 F.3d 62, 72 (3d Cir. 2000). The court illustrated the proper construction of the import exception by contrasting *Turicentro,* which involved allegations that defendants, including a number of United States airlines, had targeted a foreign market, with *Carpet Group,* which involved allegations that defendants had attempted to prevent certain parties from participating in the import market for oriental rugs. "[T]he import trade or commerce exception requires that the defendants' conduct target import goods or services," the Third Circuit held. *Animal Science Prods.,* 654 F.3d at 470. The court remanded for a determination of "whether the plaintiffs adequately allege that the defendants' conduct is directed at a U.S. import market and not solely whether the defendants physically imported goods into the United States." *Id.* at 471.

The government points to no evidence in the record that the defendants' sales specifically "targeted" any United States import market, and none exists. Timothy Tierney of Hewlett Packard was unaware of any HP facility in the United States which issued purchase orders for panels (RT 611-12). Tierney recalled no panels which were designed specifically for the United States. (RT 612; *see In re Static Random Access Memory (SRAM) Antitrust Litigation,* 2010 WL 5477313, *7 (N.D. Cal. 2010) (permitting claims to proceed to the extent they involve chips specifically designed for United States market).) No TFT-LCD panels were manufactured in the United States. (RT 1095:3-15.) The market for large area panel shipments directly to the United States was comparatively unimportant during the relevant period, consisting – even assuming that government economist Dr. Keith Leffler correctly calculated the value of panels shipped into the United States – of a mere 0.889% of total worldwide TFT-LCD sales.[6] (*Compare* RT 3313:3-12 to Exh. 775.)

Nor does the government cite any persuasive authority in support of its sweeping expansion of the import exclusion. The snippet from the FTAIA legislative history quoted by the government is a statement made by a testifying attorney, not by any member of Congress, and the Committee report at

[6] The government mischaracterizes the defendants' point, suggesting that the defendants argued a *de minimis* limitation to the import exclusion. (Govt. Opp. at 33.) In fact, the defendants' point is that the extraordinarily limited scope of the market for panels shipped directly into the United States makes any suggestion that the defendants "targeted" the United States import market implausible in the extreme.

issue is entirely consistent with *Animal Science*'s holding that to be covered by the Sherman Act, conduct must "target" an import market. H.R. Rep. No. 97-686, at 3, 9, *reprinted in* 1983 U.S.C.C.A.N. at 2494. Nowhere in the legislative history is there any suggestion that merely shipping products into the United States, regardless of the aims of a conspiracy or the relative size of the American market, is sufficient.

Far from supporting the government's view, *Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, 753 F.Supp. 2d 792 (E.D. Wis. 2010) supports the strict construction of the exclusion set forth in *Animal Science Products, Carpet Group* and *Turicentro*. *Fond du Lac* involved a conspiracy which clearly *did* target a United States import market. Plaintiffs there alleged that defendants controlled over 95 percent of the United States market, and that the overwhelming majority of defendants' products were sold in the United States. *Id.* at 795. Defendants were alleged to have both agreed to set the price of their auto parts in the United States and to limit the availability of such parts. *Id.* at 795-96. The evidence suggested that defendants had "agreed to form a strategic alliance to jointly develop the world's largest single market" – the United States. *Id.* at 797.

The government's claim that *any* shipments into the United States are sufficient to trigger liability, regardless of how substantial those sales are and what the aims of the alleged conspiracy were purported to be, would represent a major expansion of American regulatory authority, eviscerating Congress' intent and decades of case law. Given that the United States is the largest market in the world for the vast majority of products, almost any alleged international cartel could be pursued under the import exclusion under the government's view; it would seldom, if ever, be necessary to prove that a defendant's conduct had a direct, substantial and reasonably foreseeable impact on American commerce.

Nor can the government's claim be reconciled with *Hartford Fire Ins. Co. v. California,* 509 U.S. 764 (1993), which limits prescriptive jurisdiction over primarily foreign conduct to that which has a *substantial* and intended effect on United States commerce. The government argues that *Hartford Fire* applies only to "wholly foreign" conduct, but the courts have repeatedly found to the contrary, including in *Hartford Fire* itself. *Dee-K,* 299 F.3d at 294-95 (4th Cir. 2002); *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783, *4 (N.D. Cal. 2007); *see Hartford Fire,* 509 U.S. at 775-76, 795-96 (several participants in alleged conspiracy were United States-based entities, all London-based

defendants were subsidiaries of American corporations, and at least one key meeting attended by London-based defendants occurred in New York); *In re Ins. Antitrust Litig.,* 938 F.2d 919, 922-23, 939 (9th Cir. 1991), *rev'd on other grounds sub nom. Hartford Fire*, 509 U.S. 764; *In re Uranium Antitrust Litig.,* 617 F.2d 1248, 1254 (7th Cir. 1980) (twenty domestic and nine foreign corporations allegedly fixed worldwide prices, partly in meetings in United States).

Finally, the defendants pointed out that even if merely shipping panels into the United States constituted "import commerce," the government had offered no proof of such shipments by AUO. (Defs. Mot. at 21.) The government concedes that this is so, but insists that the point is "irrelevant," arguing that the United States shipments of other Crystal Meeting participants can be imputed to AUO. (Govt. Opp. at 30.)

The government cites no authority holding that the acts of other parties can be imputed to a defendant for purposes of satisfying either FTAIA exclusion. The courts have repeatedly held that it is the defendants' own acts, not those of others, which are relevant for purposes of applying the import exclusion. *Kruman,* 284 F.3d at 395; *Carpet Group,* 227 F.3d at 71; *McLafferty v. Deutsche Lufthansa AG,* 2009 WL 3365881, * 3 (E.D. Pa. 2009); *CSR Limited v. Cigna Corp.*, 405 F. Supp. 2d 526, 539 (D.N.J. 2005). Dr. Leffler admitted that he never bothered to calculate the volume of panels shipped by AUO into the United States. (RT 3665:3-22.)

C. The Weight of the Evidence Fails to Show That Defendants' Alleged Conduct Had a Direct, Substantial and Reasonably Foreseeable Effect on United States Commerce

The Court instructed the jury that in order to satisfy the second exclusion from the FTAIA, the government was required to prove beyond a reasonable doubt that defendants had fixed "the price of TFT-LCD panels that were incorporated into finished products such as notebook computers, desktop computer monitors, and televisions, and that this conduct had a direct, substantial, and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States or for delivery to the United States." (Dkt. 817 at 10 [Final Jury Instructions].) In their opening brief, the defendants argued that the evidence was insufficient as a matter of law because allegedly fixing the price of a component later incorporated into a consumer product could not be a "direct" effect within the meaning of the FTAIA. An effect is "direct" under the statute if it "follows as an immediate

consequence of the defendant's activity." *United States v. LSL Biotechnologies,* 379 F.3d 672, 680 (9th Cir. 2004).

Because of the uncertainties involved in tracing the impact of any alleged overcharges from sale of a component part through the final sale of the consumer product, several courts have held that the overseas sale of an input which is incorporated into a consumer product and imported into the United States by one or more third parties is not a sufficiently "direct" effect to satisfy the FTAIA.

For example, the plaintiffs in *In re Intel Corp. Microprocessor Antitrust Litigation,* 476 F. Supp. 2d 452 (D. Del. 2007) argued that Intel's unlawful overcharges for microprocessors had caused the manufacturers of personal computers and other consumer products to raise their prices, ultimately injuring the consumer plaintiffs. *Id.* at 454. The court pointed out that for plaintiffs to have been harmed, any overcharge would have to be passed from an initial sale, to OEMs, to retailers, and then on to consumers. "[T]his speculative chain of events is insufficient to create the direct, substantial and reasonably foreseeable effects on commerce required by the FTAIA." *Id.* at 456. Similarly, the court in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001), *aff'd,* 322 F.3d 942 (7th Cir. 2003) held that effects on domestic U.S. sales of ethambutol were not a "direct" effect of the defendant's alleged interference with the plaintiff's manufacture of AB, the key ingredient of ethambutol. *Id.* at 1007, 1013-14. "The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for input . . . that are used abroad to manufacture downstream products . . . that may later be imported into the United States," the court held. *Id.* at 1014; s*ee also Pabst Motoren GMbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.,* 629 F. Supp. 864, 869 (S.D.N.Y. 1986) (restraint on sale of drive motors in Japan does not have a direct anticompetitive effect on United States commerce based on subsequent sales of motors in United States since jurisdiction "is not supported by every conceivable repercussion of the action objected to on United States commerce").

The government argues that defendants' TFT-LCD panels "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." (Govt. Opp. at 34.) For that reason, the government claims, the jury could "readily conclude" that increases in the price of panels would necessarily result in increased prices for finished products. *Id.*

This Court's decision in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F. Supp. 2d 953 (N.D. Cal. 2011), illustrates the fatal shortcoming in the government's proof. There, the court emphasized that plaintiffs had presented evidence that alleged overcharges "were 'passed through' to American consumers, regardless of how the LCD panels ultimately found their way into the United States," citing the expert report of Dr. Janet S. Netz. "They claim that this 'pass through' constitutes a direct effect under the FTAIA." *Id.* at 963.

In sharp contrast, there is no evidence whatsoever relating to passthrough here, and there is therefore no evidence of a "direct" effect, let alone a "substantial" or "reasonably foreseeable" one. Although Timothy Tierney of HP testified that the price his company paid for TFT-LCD panels "affected the competitiveness of [HP's] product when it entered the market," (RT 508:25-509:9), he never testified whether any increase in panel prices was fully or partially passed through to the next level of distribution, or whether increased panel prices were offset in HP's cost structure by decreases in other panel prices, or if the company simply absorbed increases in panel prices itself, without passing through the costs. Nor did Piyush Bhargava of Dell offer evidence of passthrough. Indeed, Bhargava testified that between 60 and 70 percent of the time during the relevant period, Dell purchased panels from manufacturers at below-market prices and increased the price itself before reselling the panels to system integrators. (RT 2633:20-2634:13.) Nor did Dr. Leffler offer any opinion regarding passthrough.

There is insufficient evidence in the record to show that any foreign sales of TFT-LCD panels resulted in a "direct, substantial and reasonably foreseeable" effect on United States commerce when such panels were incorporated into computer monitors, notebooks and televisions and eventually shipped into the United States. Entry of judgment of acquittal, or at minimum a new trial, is required.

IV. THE JURY'S FINDING OF A $500 MILLION OVERCHARGE IS UNSUPPORTED BY THE EVIDENCE

The defendants next argued that there is insufficient evidence to support the jury's finding of an overcharge by all the Crystal Meeting participants collectively of more than $500 million. (Defs. Mot. at 23-27.) This conclusion follows necessarily from the preceding argument, since the government's

failure of proof with respect to both exceptions to the FTAIA necessarily infects both the jury's guilt findings and its gain calculation. (*Id.* at 18, 23.)

A. Dr. Leffler Erroneously Assumed That Panels Not Discussed During Crystal Meetings Were Affected by the Crystal Meeting Discussions

But even leaving that issue aside, the overcharge calculation is unsupported by Dr. Leffler's flawed analysis. Dr. Leffler's analysis involved several steps: (1) total worldwide sales of large-area TFT-LCD panels by all Crystal Meeting participants between 2001 and 2006 were $71.8 billion (RT 3313:3-12); (2) since roughly 32.7% of worldwide personal computer shipments were delivered in the United States during the period, Dr. Leffler assumed that roughly the same percentage of large-area panel sales ended up in the United States after having been incorporated in consumer products (RT 3314:21-3316:3); and (3) multiplying these numbers yields an estimated value of $23.5 billion in affected commerce. (RT 3316:7-3317:20.) Dr. Leffler estimated that $500 million in total overcharges represented 2.1% of his affected commerce calculation, and opined that total overcharges exceeded 2.1%. (RT 3320:24-3325:14.)

Dr. Leffler's reasoning is built on a completely unsupported premise – that worldwide sales of panels between 12.1 and 30 inches is the relevant measure of commerce. Dr. Leffler included the substantial sales of large area panels not discussed during the Crystal Meetings in his calculations, but never explained why he believed such sales were affected by the conspiracy. Further, he unilaterally decided that all sales of panels which *were* discussed were necessarily affected, despite the voluminous evidence of companies, including AUO, failing to charge the Crystal Meeting price, and undercutting one another to land orders. (Defs. Mot. at 25.)

B. The Government's Defense of Dr. Leffler's Analysis Lacks Merit

The government concedes that Dr. Leffler simply assumed that non-discussed panels were nevertheless somehow affected by the Crystal Meetings. (Govt. Opp. at 57, 59.) But rather than showing why Dr. Leffler's assumption was justified in its view, the government argues that Dr. Leffler's assumption was harmless.

The government first attempts to hide the flaw in Dr. Leffler's analysis by rewriting his testimony, claiming that Dr. Leffler concluded that overcharges were more than $2 billion. (Govt. Opp.

at 57.) In fact, Dr. Leffler repeatedly limited his opinion to the single issue of whether overcharges were more than $500 million. (RT 3279:7-11, 3282:18-20, 3286:5-11, 3321:4-7, 3325:3-3326:20, 3374:5-14, 3709:10-23, 3710:10-3711:10, 4583:14-18, 4588:5-8, 4589:11-15.) He made no attempt to quantify the exact amount of any overcharge. (RT 3279:7-11, 3321:4-7, 3710:10-3711:10, 4583:14-18.) Dr. Leffler's regression analysis – the sole basis cited by the government for its $2 billion overcharge claim – is not only riddled with errors, as demonstrated by Bruce Deal[7] (RT 4400:21-4405:12), but was characterized by Dr. Leffler himself as merely "confirmation" of his $500 million overcharge conclusion. (RT 3710:6-3711:10.) Aware that Dr. Leffler's testimony did not support a $2 billion overcharge claim, the government did not seek this in the verdict form submitted to the jury. It should not be permitted to do so now.

Next, the government makes the bizarre claim that the defendants failed to challenge Dr. Leffler's analysis at trial. (Govt. Opp. at 58.) As the government knows full well, the defendants offered a point-by-point response to Dr. Leffler's analysis, pointing out the flaws in his margin analysis and regression (RT 4376:24-4406:13), and specifically pointing out that panel sales between 12.1 and 30 inches could not reasonably be included in an overcharge analysis if the sales took place in a month where no "target price" was discussed. (RT 4246:22-4250:18.) Indeed, the government was sufficiently concerned about the defendants' criticism of Dr. Leffler's inclusion of non-discussed panels in his volume of commerce calculation that it caused Dr. Leffler to address the subject in his rebuttal testimony. (RT 4542:25-4546:3.)

Next, the government insists that Dr. Leffler's inclusion of non-discussed panels in his volume of "affected" commerce is actually a virtue of his analysis rather than a fatal flaw, meaning "that he accounted for the possibility that some of the non-discussed panels may not have been affected." (Govt. Opp. at 59.)

[7] Dr. Leffler's regression analysis – which was at the forefront of Dr. Leffler's pretrial report, then receded into a confirmatory afterthought in his trial testimony, and now once again takes center stage in the government's post-trial briefing – somehow concluded that the Crystal Meeting participants overcharged customers on panels smaller than 12.1 and larger than 30 inches (in other words, panels not involved in this case) by more than they did on the 12.1-30 inch panels. (RT 3661:2-8; *see* Table 12 from Dr. Leffler's pretrial report, shown as a demonstrative at trial.) And yet, neither Dr. Leffler nor the government seems to see this embarrassing result as an indication that something is badly wrong with Dr. Leffler's analysis.

Nonsense. As noted above, Dr. Leffler's testimony was limited to a single question – was the alleged overcharge more than $500 million? He testified that for the answer to be "yes," it was merely necessary to find an otherwise unexplained overcharge of more than 2.1%, or $4.30 per panel. (*See infra* at 22-23, RT 3325:17-3326:8.) Those two figures – 2.1%, or $4.30 – were dependent on his calculation of $23.5 billion in affected commerce, which in turn depended on including every panel sale between 12.1 and 30 inches from 2001 to 2006. If including non-discussed panels was an unsupported assumption – which it was – then every conclusion that followed from that assumption necessarily falls.

Next, the government argues that Dr. Leffler properly analyzed the overcharge, despite his inclusion of non-discussed panels, in two steps: first, he compared the prices per panel to "but for" prices which would have prevailed absent the Crystal Meetings; second, he compared the total difference between actual and "but for" prices to the volume of affected commerce to estimate the overcharge. (Govt. Opp. at 59-60.)

Far from mitigating his errors, Dr. Leffler's approach exacerbated them. Dr. Leffler's "but for" price was not based on reasoning or analysis; it was "a hypothetical . . . not what [he] actually calculated to be a but for price." (RT 4583:19-23.) Dr. Leffler was unable to calculate a "but for" price since he was never asked to calculate a precise overcharge. (RT 4583:7-4584:11.) Nevertheless, if a particular panel sale was not affected by the Crystal Meetings – either because it was of a size and application not discussed that month, or because AUO or some other participant simply disregarded the "target price" that month in order to land an order – *the "but for" price should be the same as the actual price*. Thus, Dr. Leffler reached his overcharge conclusion by comparing a fictional "but for" analysis to a grossly overstated estimation of affected commerce. The resulting opinion is worthless, and thoroughly inadequate to support the verdict.

The government next points to Dr. Leffler's conclusion that 77% of all 12.1-30 inch panel sales consisted of panels discussed during that month's Crystal Meeting. (RT 3301:9-19.) From that, the government concludes that even if Dr. Leffler's calculations were reduced by 23% - the share of sales involving non-discussed panels – the total overcharge would still be over $500 million in view of Dr. Leffler's analysis of margins. (Govt. Opp. at 60.)

Not so. The government's argument implicitly assumes that if Dr. Leffler's volume of affected commerce was overstated by at least 23%, then his margin calculations and his regression estimates were overstated by the same percentage, and no more. Given that Dr. Leffler never corrected his margins and regressions to remove the effect of non-discussed panels, there is no basis for that assertion in the record.

Moreover, as defendants showed at trial, Dr. Leffler's inclusion of non-discussed panels in his volume of commerce was far from the only crippling flaw in his analysis:

- From July through December 2008 (near the end of the post-Crystal Meetings period Dr. Leffler studied), rather than using AUO's actual prices adjusted for discounts to properly calculate margins, Dr. Leffler used prices from Chi Mei Optoelectronics Corporation – which had pled guilty to price fixing prior to this trial[8] (RT 4378:1-4380:21);
- Because Dr. Leffler did not have certain AUO-specific cost data available, he instead used published cost data which was not specific to AUO. In addition, rather than using costs for the size and type of panel whose price he was studying, Dr. Leffler used scaled data for a single panel, the 17 inch SXGA monitor (RT 4380:23-4386:11);
- Dr. Leffler calculated margins in dollars rather than as percentages, artificially increasing the difference between margins within and outside the Crystal Meeting period (RT 4394:12-4395:18);
- Dr. Leffler artificially increased the difference in margins by including much of the 2008-2009 recession in his post-Crystal Meeting data (RT 4397:3-4398:12);
- Dr. Leffler artificially increased the purported "overcharge" in his regression model by removing the so-called "conspiracy meeting" months when he was unable to locate any target prices (RT 4401:25-4403:22); and
- Just as he did with his margin analysis, Dr. Leffler failed to account for the 2008-2009 recession in his regressions (RT 4403:23-4405:2).

[8] Although Dr. Leffler complained that AUO's 2008 price data was "faulty," Bruce Deal explained that any issues with the data were easily remedied by making some "relatively straightforward adjustments." (RT 4380:2-5.)

After correcting each of these errors, Bruce Deal concluded that Dr. Leffler's own model generated almost identical margins during the Crystal Meeting period and afterwards, and a negative overcharge. (RT 4399:21-4400:20, 4404:22-4405:2.)

C. Dr. Leffler Erroneously Assumed That All Panels Discussed During the Conspiracy Were Affected by the Target Pricing, Despite the Voluminous Evidence of Vigorous Competition for Orders

Finally, with respect to panels which were discussed during Crystal Meetings but were frequently subject to vigorous competition for orders anyway (Defs. Mot. at 26), the government points to Dr. Leffler's claim that virtually anything AUO could have done – pricing above, equal to, or below the Crystal Meeting prices – would have been consistent (in his view) with an "imperfect" conspiracy. (Gov. Opp. at 61; RT 4581:13-4582:3.) As defendants pointed out in their opening brief, Dr. Leffler's comments are mere conclusion, entirely devoid of analysis, and therefore worthless as expert opinion. *In re Silberkraus,* 336 F.3d 864, 871 (9th Cir. 2003); *Western Parcel Express v. United Parcel Service of America, Inc.,* 65 F. Supp. 2d 1052, 1060 (N.D. Cal. 1998). Mere evidence of similar pricing between competitors is not sufficient, without more, to support an inference of conspiracy. *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,* 203 F.3d 1028, 1032-33 (8th Cir. 2000) (meeting prices of competitors not unlawful); Dkt. 817 at 7:15-18 [Final Jury Instructions]. In this case, evidence of dissimilar pricing would, in Dr. Leffler's view, still be consistent with an imperfect conspiracy.

There is insufficient evidence in the record to show that the Crystal Meeting participants as a group overcharged their customers between 2001 and 2006 by more than $500 million. The jury's finding on this issue must be set aside.

V. BECAUSE THE INDICTMENT ALLEGES PREDOMINANTLY FOREIGN-BASED CONDUCT WHICH MUST BE JUDGED BY THE RULE OF REASON, JUDGMENT OF ACQUITTAL – OR AT MINIMUM, A NEW TRIAL – IS REQUIRED

A. *Metro Industries* Required That This Case Be Charged and Tried, If at All, Pursuant to the Rule of Reason

As discussed above, the superseding indictment alleges substantially foreign-based conduct. The Ninth Circuit has squarely held that where a case turns on substantially foreign-based conduct, the rule of reason must be applied as a matter of law. *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996). Accordingly, in order to properly allege a violation of the Sherman Act substantially

based on foreign conduct, a plaintiff must allege *mens rea* – that the conduct was undertaken with the knowledge that anticompetitive effects would most likely follow, and that such effects did in fact follow. *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978). Since the superseding indictment does not allege the *mens rea* required by *Gypsum,* it should have been dismissed.

The government responds that because the defendants neither sought to introduce evidence demonstrating that their conduct was reasonable, nor sought rule of reason jury instructions, the defendants' rule of reason argument based on *Metro Industries* has been waived. (Govt. Opp. at 50-51.)

The government is wrong. Because the superseding indictment alleges substantially foreign conduct, but fails to allege *mens rea,* the indictment fails to allege an offense. *Gypsum,* 438 U.S. at 444. A claim that an indictment fails to state an offense can be raised for the first time on appeal, and cannot be waived. *United States v. Kahlon,* 38 F.3d 467, 469 (9th Cir. 1994); *United States v. Buchanan,* 574 F.3d 554, 565 (8th Cir. 2009). The defendants have repeatedly argued that the indictment was defective because it alleged only foreign conduct subject to the rule of reason. (Dkt. 177 [Defendant Hsuan Bin Chen's Motion to Dismiss based on *Metro Industries*]; Dkt. 528 [Defendants' Opposition to Government's Motion *In Limine*].) The court has repeatedly rejected defendants' arguments. (Dkt. 250 [Order on Motion to Dismiss]; Dkt. 607 at 43:16-44:1 [December 13, 2011 pretrial proceeding]; RT 4616:5-6 [instructional conference – jury not to be told about rule of reason].) Once the Court had unequivocally held that neither argument nor evidence pursuant to the rule of reason would be permitted, no more was necessary in order to preserve the error for review. *United States v. Varela-Rivera,* 279 F.3d 1174, 1177-78 (9th Cir. 2002); *United States v. Arlt,* 41 F.3d 516, 523-24 (9th Cir. 1994).

The government next argues that the *Metro Industries* rule of reason holding does not apply to price fixing agreements, which the government claims have long been held to be subject to the *per se* rule. (Govt. Opp. at 49-51.) But as the defendants pointed out in their opening brief, the *per se* rule has been applied to price fixing almost exclusively in *domestic* cases. (Defs. Mot. at 31.) *Metro Industries* states a bright line rule in foreign-conduct cases, applying across the board to all types of restraints: "application of the *per se* rule is not appropriate where the conduct in question occurred in another country . . . 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." 82 F.3d at 844-45. Indeed, the *Metro Industries* court couched the primary insight upon which its holding rests in terms of the difficulty in determining the domestic effect of a foreign price fixing conspiracy:

> Domestic antitrust policy uses *per se* rules for conduct that, in most of its manifestations, is potentially very dangerous with little or no redeeming value. That rationale would be inapplicable to foreign restraints that, in many instances, pose very little danger to American commerce or have more persuasive justification than are likely in similar restraints at home. For example, price fixing in a foreign country might have some but very little impact on United States commerce.

Id. at 845, *quoting* 1 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 237 (1978).

The government next claims that *Metro Industries* only applies to "wholly foreign" conduct. (Govt. Opp. at 51.) Not so. *Metro Industries* involved a foreign-based trading company, its American subsidiaries, and stainless steel steamers purchased for export to the United States. *Metro Industries,* 82 F.3d at 841-42, 847. Neither the language nor the logic of *Metro Industries* is limited to wholly foreign, as opposed to substantially foreign, conduct.

The government next claims that when the *Metro Industries* court held that foreign conduct was judged by the rule of reason, the court meant "the 'jurisdictional rule of reason' of [*Timberlane Lumber Co. v. Bank of America,* 549 F.2d 597 (9th Cir. 1976)], not a traditional rule of reason analysis of the legality of the restraint." (Govt. Opp. at 52.) In fact, the *Metro Industries* court could hardly have stated its holding more clearly:

Thus, 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 activities. Consequently, 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.

According to the government, the language quoted above is "dicta" which has never been followed by another court, and was expressly rejected by the Fourth Circuit in *Dee-K Enterprises.* But as the defendants explained in briefing their motion to dismiss based on *Metro Industries,* alternative holdings are not *dicta. Woods v. Interstate Realty Co.,* 337 U.S. 535, 537 (1949); *Best Life Assur. Co. of Cal. v. C.I.R.*, 281 F.3d 828, 833 (9th Cir. 2002); *United States v. Wright,* 496 F.3d 371, 375 n.10 (5th

Cir. 2007); *United States v. Fulks,* 454 F.3d 410, 434 (4th Cir. 2006). The holding in *Metro Industries* has never been overruled by the Ninth Circuit, and has indeed been recognized as binding Ninth Circuit law by one eminent judge writing in dissent. *LSL Biotechnologies,* 379 F.3d at 697-98 (Aldisert, J., dissenting, and discussing issues not raised in majority opinion) ("Given the binding precedent of this court, however, the United States may not rely on a per se theory of a Sherman Act violation in this [foreign conduct] case"). And as the defendants explained in their opening brief, far from rejecting *Metro Industries* wholesale as the government argues, the Fourth Circuit in *Dee-K Enterprises* strongly endorsed the reasoning on which *Metro Industries* rests: that the assumptions about anticompetitive effect upon which the *per se* rule is based are not necessarily applicable to foreign conduct. (Defs. Mot. at 34; *Dee-K Enterprises,* 299 F.3d at 291-92.)

B. The Standards Which Govern Any Extraterritorial Scope of the Sherman Act Cannot Be Reconciled With the *Per Se* Rule

According to the government, the defendants "misunderstand the nature and purpose of the *per se* rule." The "limited inquiry into effect" needed to determine whether the Sherman Act applies to foreign conduct is purportedly compatible with application of the *per se* rule, which "foreclos[es] justifications for price fixing and contentions that fixed prices were reasonable." (Govt. Opp. at 53.)

The government's argument amounts to a thinly veiled claim that *Metro Industries* was wrongly decided. As such, it should be addressed to an *en banc* Ninth Circuit panel, not this Court.

Nevertheless, the government's argument is incorrect. In traditional domestic *per se* cases, no overt act need be pled or proven; the offense is complete if an agreement is made with the necessary intent. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *United States v. Miller,* 771 F.2d 1219, 1226 (9th Cir. 1985). For that reason, no allegation that the alleged agreement caused harm to competition is necessary. *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 5 (1958). Reasonableness of the agreed prices is not a defense in a domestic *per se* case. *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397-98 (1927).

On the other hand, foreign conduct can be prosecuted, if at all, only based upon a showing that the conduct "was meant to produce, and did in fact produce, some substantial effect in the United States." *Hartford Fire,* 509 U.S. at 796; *United States v. Aluminum Co. of America (Alcoa),* 148 F.2d

416, 444 (2d Cir. 1945). Since neither an intent to harm competition nor actual harm to competition is a necessary element of the *per se* rule, *United States v. Brown,* 936 F.2d 1042, 1046 (9th Cir. 1991) (showing of *Gypsum* intent is not required in domestic *per se* case); *Northern Pac. Ry. Co.,* 356 U.S. at 5 (no allegation that restraint harmed competition necessary in *per se* case), the *Hartford Fire* rule cannot be reconciled with domestic *per se* standards.

C. None of the Three Reasons Which Lead to *Per Se* Condemnation of a Market Restraint Apply Here

As defendants showed in their opening brief, the *per se* rule has no place in evaluating foreign conduct because the reasons developed by the courts for condemning certain practices in domestic conduct *per se* are simply inapplicable to conduct occurring overseas. (Defs. Mot. at 33-42.)

First, the courts have little or no experience with determining whether foreign conduct similar to the Crystal Meetings "facially appears to be [conduct] that would always or almost always tend to restrict competition and decrease output" in United States commerce, the sole concern of the United States antitrust laws. *See Natl. Collegiate Athletic Ass'n v. Board of Regents,* 468 U.S. 85, 100 (1984) (defining the types of practices to which the *per se* rule is applied). The only example either party has cited, *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), involved an alleged foreign conspiracy specifically targeting United States commerce, rather than a foreign-based industry selling products in a worldwide market. *Id.* at 3.

The government responds that it has "long enforced this *per se* rule criminally against international cartels." (Govt. Opp. at 53.) But the government cites only one case to support this proposition – *Nippon Paper.* More importantly, the government entirely misses the point. Practices are defined as *per se* violations when courts have analyzed the harm they cause to United States competition so often that the courts can confidently predict that such a practice will always, or nearly always, be condemned under the rule of reason. *See Arizona v. Maricopa Co. Medical Society,* 457 U.S. 332, 344 (1982). The government offers neither analysis nor authority for the proposition that courts have encountered alleged foreign cartels selling products to a worldwide market so frequently that they can predict with confidence what effect such conduct would necessarily have on United States commerce.

The defendants also showed in their opening brief that neither of the two remaining reasons which support application of the *per se* rule to a particular restraint are applicable here either. There is substantial evidence that the Crystal Meetings did not restrict competition in United States commerce, (Defs. Mot. at 36-41), and output indisputably increased many times over in the TFT-LCD industry between 2001 and 2006. (*Id.* at 41-42.) The government offers no response to either point.

D. If This Case Had Been Properly Tried Pursuant to the Rule of Reason, Defendants Would Have Shown That Their Contacts with Competitors Enhanced Overall Efficiency and Made the TFT-LCD Industry More Competitive

Finally, the defendants showed that if this case had been properly charged and tried pursuant to the rule of reason, they would have presented substantial evidence demonstrating that their conduct made the market more, rather than less competitive. (Defs. Mot. at 42-49.) During the 2001-2006 period, TFT-LCD monitors and televisions grew considerably in market share, gaining widespread consumer acceptance. (*Id.* at 43-44.) Declining prices and aggressive innovation characterized the industry throughout the relevant period, further demonstrating the procompetitive nature of competitor contacts. (*Id.* at 49-52.) One witness after another testified that the TFT-LCD industry was highly competitive during the relevant period, and AUO was one of the most aggressive competitors in the industry. (RT 531:6-16; 574:14-575:2; 1061:21-1062:9, 1615:22-1616:2; 3183:6-20.) Largely because of the considerable market power enjoyed by large scale buyers such as Hewlett-Packard and Dell, as well as the private auction-like structure of sales communications, every TFT-LCD manufacturer had dozens of employees – from salesmen in the field to high-level executives – aggressively seeking competitive market information, both to determine what the market price actually was, and to combat large customers' abuse of their market power. (Defs. Mot. at 45-49.) The law has long recognized that such exchanges of market information can be procompetitive, and should be analyzed under the rule of reason. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 906 F.2d 432, 447 n.13 (9th Cir. 1990); *see Cement Mfrs.' Protective Ass'n v. United States,* 268 U.S. 588, 603-04 (1925) (exchange of competitive information to prevent customers from perpetrating a fraud upon sellers is not anticompetitive).

The government responds that any contention that the conduct at issue had procompetitive benefits is contradicted by the jury's verdict. (Govt. Opp. at 56.) Once again, the government misses

the point. Although the jury was instructed that exchanges of competitive information are not *per se* illegal, (Dkt. 817 at 8-9 [Final Jury Instructions]), the jury was instructed to consider the evidence solely in a negative light – whether or not the information exchanges facilitated a price fixing agreement (Dkt. 817 at 7-8 [Final Jury Instructions]) – rather than being instructed to assess the potential procompetitive benefits of the exchanges.

Under binding Ninth Circuit law, the conduct alleged by the indictment must be judged pursuant to the rule of reason, not *per se.* Since the indictment did not plead the elements of a Sherman Act violation under the rule of reason, judgments of acquittal must be entered. At minimum, a new trial is required.

E. The Government Fails to Address the Defendants' Due Process Arguments

The government attempts to sweep aside the defendants' Due Process arguments based on retroactive overruling of *Metro Industries*. It reiterates its arguments that *Metro Industries* only applies to wholly foreign conduct, and it again attempts to characterize the critical portion of *Metro Industries* as "dicta." Those arguments are tenuous, for the reasons described above. Indeed, the very fact that the government feels compelled to apply the "dicta" label—in direct contravention of the Ninth Circuit's case law regarding the definition of "dicta"—is telling. The government is apparently aware that it is treading on thin ice.

The government settles on this claim: "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." (Govt. Opp. at 55.) And yet the converse is equally true. The government does not and cannot cite a single post-*Metro* case in which the court has applied the per se rule where the conduct was foreign. That failure is itself dispositive of the government's claim.

Metro Industries itself could not be more clear: "*per se* analysis is not appropriate" for Sherman Act cases based on foreign conduct. 82 F.3d at 843. The government is entitled to argue that the Ninth Circuit's conclusion was unwise. It is entitled to argue that the Ninth Circuit's conclusion was inconsistent with other decisions in other circuits. It is entitled to argue that the Ninth Circuit's conclusion should be overruled. But under the Due Process Clause, it is not entitled to argue that the Ninth Circuit's conclusion should be overruled retroactively.

Finally, and bizarrely, the government argues that anti-retroactivity can be ignored because the defendants "actually foresaw" the possibility of criminal prosecution. (Govt. Opp. at 55.) The government's argument confuses the fair warning requirement with mistake of law doctrine. The fair warning requirement is governed by an objective standard, not a subjective standard. *See United States v. Lanier*, 520 U.S. 259, 266-67 (1997). The fact that a person might (falsely) believe that certain conduct would subject him to prosecution does not relieve the government of its obligation to pass a valid and prospective law proscribing that conduct. The government's suggestion to the contrary, aside from being factually unsupported, is legally absurd.

VI. THE COURT SHOULD GRANT JUDGMENT OF ACQUITTAL IN FAVOR OF AUOA

The government cites a record "overflowing" with evidence that AUOA agreed to fix prices. (Govt. Opp. at 24.) In the end, though, it relies on the actions of just two purported AUOA agents--Dr. Hui Hsiung and Michael Wong.

The government describes now-familiar evidence concerning Dr. Hsiung--principally his attendance at Crystal Meetings and his emails to Wong. That evidence does not show that Dr. Hsiung agreed to fix prices. More significantly for these purposes, the government points to no evidence that Dr. Hsiung engaged in the cited conduct on behalf of AUOA (rather than AUO).[9] It cites no testimony, no exhibit--nothing to show that Dr. Hsiung did anything wearing his AUOA "hat" except for signing Government Exhibit 768, on which the government expressly disclaims reliance. (Govt. Opp. at 24 n.14.)

The government touts the fact that Dr. Hsiung "had overall responsibility and oversight for AUOA, and Wong, AUOA's U.S. branch manager, reported to and took direction from defendant Hsiung." (Govt. Opp. at 24.) But the government ignores the evidence cited in our opening brief, which shows that Dr. Hsiung supervised AUOA in his capacity as an AUO officer. The government's own exhibits (Exhs. 1, 808) confirm that, as does the undisputed testimony of government witness Wong (RT 871). For the Court to find on this record that Dr. Hsiung took any action (other than signing Government Exhibit 768) on behalf of AUOA, it would have to indulge the "suspicion or speculation"

[9] The government does not dispute that it had the burden of proving that Dr. Hsiung was acting on behalf of AUOA at relevant times. *See, e.g., Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997).

that, according to the court of appeals, "does not rise to the level of sufficient evidence." *United States v. Hernandez-Orellana*, 539 F.3d 994, 1004 (9th Cir. 2008) (quotation omitted); *see, e.g., United States v. Andrews*, 75 F.3d 552, 556 (9th Cir. 1996); *United States v. Dinkane*, 17 F.3d 1192, 1196 (9th Cir. 1994).

That leaves Michael Wong. The government urges the Court to disregard Wong's adamant denials that he agreed to fix prices. (Govt. Opp. at 23, 27.) But the government called Wong as its immunized, cooperating witness. His agreement with the government required him to testify "fully, truthfully, and under oath, subject to the penalties of perjury." (Exh. 774 at 2.) On direct examination, the government never asked Wong whether he fixed prices. On redirect it made no effort to challenge his denials, but instead elicited that he did not know whether AUO personnel in Taiwan were meeting with competitors in Taiwan to fix prices. (RT 1227-28.) Wong never attended a Crystal Meeting. He had no authority to set prices. No one ever told him that he had to follow a Crystal Meeting price or that AUO was bound by a Crystal Meeting price. (RT 1094.) Unsurprisingly, no witness testified that he agreed with Wong to fix prices.

In the face of this record, the government still insists that it proved Wong engaged in price-fixing. (Govt. Opp. at 25-27.) But the evidence the government cites amounts to nothing more than Wong exchanging pricing information with his competitors and relaying what he learned to AUO in Taiwan. Under this Court's instructions, that conduct is entirely lawful. (Dkt. 829 (Final Instructions) at 7-8.) It becomes unlawful only if it is done as part of a price-fixing agreement, and there is no evidence that Wong participated in such an agreement. In effect, the government asks the Court to bootstrap evidence of lawful conduct into a finding of illegality--but that would contravene the Court's instructions and decades of settled antitrust law.

The government did not prove that Dr. Hsiung did anything on behalf of AUOA except sign a single innocuous document in August 2001, almost two years before the government contends AUOA joined the alleged conspiracy. It did not prove that Michael Wong agreed to fix prices. Because it did not establish that any agent of AUOA entered into a price-fixing conspiracy, the Court should grant the company's motion for judgment of acquittal.

VII. CONCLUSION

For the reasons stated, the Court should grant the defendants acquittal under Rule 29 and/or should order a new trial under Rule 33.

Respectfully submitted,

Dated: May 11, 2012

RIORDAN & HORGAN

By: */s/ Dennis P. Riordan*
Dennis P. Riordan (No. 69320)

RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
Tel: (415) 431-3472
Fax: (415) 552-2703

Dated: May 11, 2012

SEDGWICK LLP

By: */s/ Kirk C. Jenkins*
Kirk C, Jenkins (No. 177114)

SEDGWICK LLP
1 North Wacker Drive, Suite 4200
Chicago, IL 60606
Tel: (312) 641-9050
Fax: (312) 641-9530

Attorneys for Defendants
AU OPTRONICS CORPORATION and
AU OPTRONICS CORPORATION AMERICA

Dated: May 11, 2012

LAW OFFICES OF JOHN D. CLINE

By: */s/ John D. Cline*
John D. Cline (No. 237759)

LAW OFFICES OF JOHN D. CLINE
235 Montgomery Street, Suite 1070
San Francisco, CA 94101
Tel: (415) 322-8319
Fax: (415) 524-8265

Attorneys for Defendant
AU OPTRONICS CORPORATION AMERICA

Dated: May 11, 2012

COOLEY LLP

By: */s/ Michael Attanasio*
Michael Attanasio (No. 15529)

COOLEY LLP
4401 Eastgate Mall
San Diego, CA 92121
Tel: (858) 550-6020
Fax: (858) 550-6420

Attorneys for Defendant
H.B. CHEN

Dated: May 11, 2012

CASHMAN LAW OFFICES

By: */s/ Dennis Cashman*
Dennis Cashman (No. 133390)

CASHMAN LAW OFFICES
Pier 9, Suite 100
San Francisco, CA 94111
Tel: (415) 956-9900
Fax: (415) 956-9210

Attorneys for Defendant
STEVEN LEUNG