

PETER K. HUSTON (Cal. Bar No. 150058)  
MICHAEL L. SCOTT (Cal. Bar No. 165452)  
HEATHER S. TEWKSBURY (Cal. Bar No. 222202)  
E. KATE PATCHEN (N.Y. Reg. No. 41204634)  
Antitrust Division  
U.S. Department of Justice  
450 Golden Gate Avenue  
Box 36046, Room 10-0101  
San Francisco, CA 94102-3478  
Telephone: (415) 436-6660  
Facsimile: (415) 436-6687  
peter.huston@usdoj.gov

Attorneys for the United States

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' RENEWED  
) REQUEST FOR PROPOSED  
) INSTRUCTION RE: EXCHANGE OF  
) PRICE INFORMATION

) Trial Date: January 9, 2012  
) Time: 8:30 a.m.  
) Court: Hon. Susan Illston  
) Place: Courtroom 10, 19th Floor

**INTRODUCTION**

1  
2 Defendants have requested that the Court instruct the jury that a statement contained in  
3 Trial Exhibit 172 relating to a concern that exchanging price information might be illegal is not a  
4 statement of the law. The government offers a limiting instruction that should adequately  
5 address any concern that jurors could take such a statement in an email as an instruction on the  
6 law of price fixing.

7 The government strongly opposes defendants’ renewed request for a general interim  
8 instruction to the jury that the exchange of price information among competitors is legal. As the  
9 government explained in its opposition to defendants’ first request, such an instruction is  
10 premature, and would lead to piecemeal instructions which would fail to provide the jury with  
11 the full picture of what does and does not constitute price fixing. The government once again  
12 respectfully requests that the Court deny defendants’ request for an interim instruction on price  
13 information exchange.

14 However, should the Court be inclined to give the jury an instruction at this time on what  
15 *does not* constitute price fixing, the government requests that the Court balance that instruction  
16 with one that explains what *does* constitute price fixing. Further, given counsel’s suggestions  
17 during the cross-examination of J.Y. Ho that agreements among competitors on “target pricing”  
18 do not constitute illegal price fixing, the government requests that the Court provide a revised  
19 portion of the government’s proposed price-fixing instruction clarifying that such agreements are  
20 a violation of Section 1 of the Sherman Act.

21 Finally, defendants’ proposed instruction on information exchange is unclear and  
22 incomplete, and the government requests that, if the Court is inclined to give any instruction on  
23 price information exchange at this time, it use the language proposed by the government herein.

24 ///

25 ///

26 ///

27 ///

28 ///

1 **ARGUMENT**

2 **I. The Government Does Not Oppose a Limiting Instruction that Trial Exhibit 172**  
3 **Does Not Contain a Statement about the Law**

4 Defendants have requested that the Court instruct the jury that a statement in Trial  
5 Exhibit 172 relating to a concern that exchanging price information might be illegal is not a  
6 statement of the law. The government proposes the following instruction to cure any risk that  
7 the jury would interpret such a statement in an email as an instruction on the law of price fixing:

8 You have seen Trial Exhibit 172, which states that “NYer is suspecting suppliers are  
9 exchanging price information. This is illegal, especially in the states. We need to be  
10 watchful!” I instruct you that the statement contained in this Exhibit regarding the  
11 exchange of price information is not a statement of the law. The Court will instruct you  
12 on the law of the case at the close of evidence, and it is only those instructions which you  
13 should follow during your deliberations.

14 **II. Defendants’ Proposed Jury Instruction on Information Exchange Is Premature,**  
15 **Would Be Prejudicial to the Government, and Should Be Denied**

16 For the reasons previously stated in the government’s opposition to defendants’ proposed  
17 jury instruction on price information exchange filed on January 12, 2012, the government objects  
18 to the Court giving an interim instruction to the jury in this case on price information exchange.  
19 *See* Dkt. 680. So as not to unnecessarily repeat at length arguments that the Court already has  
20 before it, the government summarizes some of its previous points briefly here:

- 21 • Any instruction on the substantive law applicable in a Sherman Act Section 1 case  
22 beyond the basic iteration of the elements of the offense already provided as a  
23 preliminary instruction is premature at this time. Such instructions are appropriately left  
24 for the end of trial, after the evidence in the case has been admitted and the Court can  
25 determine which instructions on the law are appropriate based on all of the evidence.  
26 Instructions on the law should be given as a full set at the close of evidence in the case so  
27 that the jury is able to fully evaluate and consider all aspects of the law they are to apply  
28 during their deliberations.

- 1 • The defendants' proposed instruction is far afield from the types of instructions that  
2 would typically be given to a jury during the course of trial and introduction of evidence.  
3 The types of interim instructions that the Ninth Circuit Jury Instructions Committee has  
4 identified as appropriate for use during trial relate to such matters as trial procedure  
5 (recesses, bench conferences, use of depositions, use of transcripts, foreign language  
6 testimony), stipulations, evidence being admitted for a limited purpose, dismissal or  
7 disposition of charges, and the like. *See* Manual of Model Criminal Jury Instructions for  
8 the District Courts of the Ninth Circuit §§ 2-2.15 (2010). Permitting instructions on the  
9 details of the substantive law in this case before the close of evidence will only encourage  
10 constant interruptions and piecemeal introduction of jury instructions out of context.
- 11 • Should the Court be inclined to give an interim instruction on what is *insufficient* to  
12 constitute price fixing, the government asks that the Court put that instruction in context  
13 by also explaining what is *sufficient* to constitute price fixing. The jurors have not yet  
14 been instructed on the legal definition of price fixing beyond a rough sketch of the  
15 elements of the offense. It would only be appropriate to provide a starting place and  
16 frame of reference by explaining what price fixing is to begin with, and balancing an  
17 interim instruction with both a definition of price fixing and information exchange would  
18 avoid significant prejudice to the government. Therefore, the government requests that if  
19 the Court gives a proposed interim instruction on information exchange as defendants  
20 request, it also give a revised portion of the proposed instruction previously submitted by  
21 the government defining "price fixing," as described below. *See* Dkt. 680 at Appendix A.

22 **III. If the Court Gives an Interim Instruction on Information Exchange, the**  
23 **Government Requests that the Court Give a Portion of a Revised Instruction**  
24 **Reflecting that Target Price Agreements Are One Form of Price Fixing**

25 Defendants pursued an extended line of questioning of J.Y. Ho that appeared to be based  
26 on the belief that agreements among competitors on target pricing do not constitute illegal price  
27 fixing. Trial Tr., vol. 4, 746:5-753:20, January 12, 2012. The government strongly disagrees  
28

1 with that position. Courts have given instructions that explicitly state that agreements on target  
2 prices are illegal. For example, the following was given in *United States v. Andreas*:

3 A price-fixing conspiracy is commonly thought of as an agreement to establish the same  
4 price. However, prices may be fixed in other ways. **Prices are fixed if a target or goal  
5 for prices is agreed upon** or if by agreement various guidelines or formulas are to be  
6 used in computing them. They are fixed because they are agreed upon. Thus any  
7 agreement to stabilize prices, to set a specific price, to maintain a specific price, to  
8 establish a fixed spread between the prices of different sellers, or to set other conditions  
9 of sale relating to price is illegal.

8 Tr. 5585:25-5586:9, ABA Section of Antitrust Law, Cartel and Criminal Practice Committee,  
9 Model Criminal Antitrust Instructions, [http://apps.americanbar.org/antitrust/at-committees/at-](http://apps.americanbar.org/antitrust/at-committees/at-crim/resources/model_jury_instructions.shtml)  
10 [crim/resources/model\\_jury\\_instructions.shtml](http://apps.americanbar.org/antitrust/at-committees/at-crim/resources/model_jury_instructions.shtml) (following *United States v. Michael D. Andreas, et*  
11 *al.*, Crim. No. 96-CR-762 (N.D. Ill. 1996), *aff'd*, 216 F.3d 645 (7th Cir. 2000)) (emphasis  
12 added); *see also Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128, 133-34 (9th  
13 Cir. 1960) (automobile dealers guilty of price fixing for agreeing on a uniform price list that  
14 would be the starting price for bargaining, even though prices were not followed in most  
15 instances); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002)  
16 (Posner, J.) (distinguishing “between the existence of a conspiracy and its efficacy” and holding  
17 that “[a]n agreement to fix list prices is . . . a per se violation of the Sherman Act even if most or  
18 for that matter all transactions occur at lower prices”); *United States v. SKW Metals & Alloys,*  
19 *Inc.*, 195 F.3d 83, 93 (2d Cir. 1999) (Newman, J., concurring) (“Once a seller agrees to fix  
20 prices, he either sells at that price or (unless he is both a price-fixer and an amnesiac) at least has  
21 the fixed price in mind and uses it as a point of departure for himself in deciding what slightly  
22 different price to quote for almost every sale he makes during the period of the conspiracy. As  
23 long as the seller has the fixed price in mind when he decides by how much to depart from it  
24 when quoting a price, his final sale price has been affected by the price-fixing agreement.”);  
25 *Andreas*, 216 F.3d at 676-77 (“Wilson and Andreas contend that ‘affected commerce’ means  
26 only sales that reflect a successful price agreement, meaning sales at or above the target price.  
27 This is clearly wrong.”).

1 Because defendants have called into question whether target pricing agreements among  
2 competitors constitute illegal price-fixing agreements, if the Court elects to give any interim  
3 instructions at this time, the government requests that the Court address this issue by providing a  
4 revised portion of the government's proposed instruction defining price fixing to clarify the law  
5 on target price agreements. The government proposes revising the third paragraph of its  
6 proposed price-fixing instruction with the following language incorporating a portion of the jury  
7 instruction given in the *Andreas* case cited above:

8 A price-fixing conspiracy is commonly thought of as an agreement to establish the same  
9 price; however, prices may be fixed in other ways. Prices are fixed if **a target, goal,**  
10 range, or level of prices is agreed upon by the conspirators. They are fixed because they  
11 are agreed upon. Thus, any agreement to raise or lower a price, to set maximum prices, to  
stabilize prices, to set a price or price range, **to set target prices,** or to maintain a price is  
illegal.

12 See United States' Proposed Jury Instructions 16 (Dkt. 554) (revisions in bold); *Andreas*, 216  
13 F.3d at 676-77, Tr. 5585:25-5586:9. While the government opposes any interim instructions on  
14 the substantive law applicable in this case, if the Court elects to give an instruction on  
15 information exchange as proposed by defendants at this time, an instruction defining price fixing  
16 such as that proposed by the government above is necessary to avoid prejudice to the  
17 government and confusion by the jury.

18 **IV. If the Court Gives an Interim Instruction on Information Exchange, the Court**  
19 **Should Give the Alternative Information Exchange Instruction Proposed by the**  
20 **Government**

21 Finally, if the Court is inclined to give an instruction on information exchange (interim or  
22 otherwise), the Court should *not* give the instruction crafted by defendants. Defendants suggest  
23 that the government's parenthetical reference to the *Gypsum* case in its prior opposition brief  
24 somehow translates into support for defendants' instruction. To be clear, the government  
25 continues to assert that *Gypsum* (a pure information exchange case) is not relevant to this *per se*  
26 case involving direct evidence of price fixing. Defendants' instruction does not even hint at the  
27 government's theory that the regular exchange of price and other information was in furtherance  
28 of an agreement to fix the prices of TFT-LCDs, as well as to implement, monitor, and enforce

1 adherence to fixed prices. Accordingly, if the Court is to give any instruction on information  
2 exchange, it should give the following:

3 Evidence has been introduced concerning the exchange of information about prices  
4 between the defendants and employees of other companies manufacturing TFT-LCDs  
5 alleged to be coconspirators. The government claims that such exchanges are part of the  
6 evidence establishing that the defendants entered into an agreement or mutual  
7 understanding, as alleged in the indictment.

8 It is not unlawful for a person to obtain information about a competitor's prices or even to  
9 exchange information about prices unless done pursuant to an agreement or mutual  
10 understanding between two or more persons as charged in the indictment. Nevertheless,  
11 you may consider such facts and circumstances, along with other evidence, in  
12 determining whether there was an agreement or mutual understanding between two or  
13 more persons alleged in the indictment.

14 Authority: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases*  
15 67, notes (2009); Transcript of Record at 2292-96 (Feb. 22, 2008) *United States v. Swanson*  
16 (N.D. Cal.) (No. CR-06-0692 PJH); ABA Section of Antitrust Law, *Sample Jury Instructions in*  
17 *Criminal Antitrust Cases* 155 (1984).

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

///

///

**CONCLUSION**

1  
2 Defendants' renewed request for an interim jury instruction on the legality of price  
3 information exchange between competitors should be denied. However, should the Court be  
4 inclined to give such an instruction on what *does not* constitute price fixing, the government  
5 respectfully requests that the Court also give an instruction which describes what *does* constitute  
6 price fixing. In light of the cross-examination suggesting that agreements among competitors on  
7 target pricing do not constitute illegal price fixing, the government requests that the Court give a  
8 revised portion of the government's proposed instruction defining price fixing to clarify that  
9 target price agreements are a form of price fixing under the law. Finally, should the Court decide  
10 to give an instruction on information exchange, the government requests that the Court give the  
11 alternative instruction proposed by the government herein, which reflects a more accurate  
12 recitation of the law on information exchange.

13 Dated: January 18, 2012

Respectfully submitted,

14  
15 /s/ Peter K. Huston  
16 Peter K. Huston  
17 Antitrust Division  
18 U.S. Department of Justice  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28