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AU OPTRONICS CORPORATION
and AU OPTRONICS CORPORATION AMERICA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AU OPTRONICS CORPORATION, et al.,

Defendants.

Case No: 09-cr-0110-SI

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Date: December 13, 2011
Time: 3:30 p.m.
Judge: Hon. Susan Illston
Place: Courtroom 10, 19th Floor

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

1.1. DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. Please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

1.2. THE CHARGE—PRESUMPTION OF INNOCENCE

This is a criminal case brought by the United States government. The government charges the defendant with [specify crime[s] charged]. The charge[s] against the defendant [is] [are] contained in the indictment. The indictment simply describes the charge[s] the government brings against the defendant. The indictment is not evidence and does not prove anything.

The defendant has pleaded not guilty to the charge[s] and is presumed innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant has the right to remain silent and never has to prove innocence or to present any evidence.

[In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime[s] which the government must prove to make its case: [supply brief statement of elements of crime[s]].]

1.3. WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness; and

(2) the exhibits which are received in evidence[.] [; and]

[(3) any facts to which the parties agree.]

1.4. WHAT IS NOT EVIDENCE

The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case:

(1) statements and arguments of the attorneys;

(2) questions and objections of the attorneys;

(3) testimony that I instruct you to disregard; and

(4) anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

1.5. DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

1.6. RULING ON OBJECTIONS

There are rules of evidence that control what can be received in evidence. When a lawyer asks a question or offers an exhibit in evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, or the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer would have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

1.7. CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

1.8. CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

1.9. NO TRANSCRIPT AVAILABLE TO JURY

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not have a written transcript of the trial. I urge you to pay close attention to the testimony as it is given.

1.10. TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note taking distract you from being attentive. When you leave court for recesses, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

1.11. OUTLINE OF TRIAL

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The government will then present evidence and counsel for the defendant may cross examine. Then, if the defendant chooses to offer evidence, counsel for the government may cross examine.

After the evidence has been presented, [I will instruct you on the law that applies to the case and the attorneys will make closing arguments] [the attorneys will make closing arguments and I will instruct you on the law that applies to the case].

After that, you will go to the jury room to deliberate on your verdict.

1.12. JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Languages other than English will be used for some evidence during this trial. When a witness testifies in another language, the witness will do so through an official court interpreter. When recorded evidence is presented in another language, there will be an official court translation of the recording.

The evidence you are to consider and on which you must base your decision is only the English-language interpretation or translation provided through the official court interpreters or translators. Although some of you may know the non-English language used, you must disregard any meaning of the non-English words that differs from the official interpretation or translation.

You must not make any assumptions about a witness or a party based solely upon the use of an interpreter to assist that witness or party.

1.13. SEPARATE CONSIDERATION FOR EACH DEFENDANT [MODIFIED]

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so you must analyze what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against one or more other defendants. Each defendant is entitled to have the case decided on the evidence and the law applicable to that defendant, as if the defendant were being tried alone. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant or defendants.

Sources:

Ninth Circuit Model Criminal Jury Instructions (2010 ed.), No. 1.13; ABA Model Jury Instructions in Criminal Antitrust Cases (2009 ed.), No. 2B.1.

INSTRUCTION NO. --- ELEMENTS OF A SHERMAN ACT VIOLATION

The seven corporate and individual defendants are charged in the Indictment with knowingly joining in a single ongoing conspiracy to suppress and eliminate competition by fixing prices in the market for TFT-LCD panels, in violation of Section 1 of Title 15 of the United States Code, commonly known as the Sherman Antitrust Act. In order for one or more defendants to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

One, that beginning on or about September 14, 2001 and ending on or about December 1, 2006, there was an agreement between two or more persons to fix the prices of TFT-LCD panels as charged in the Indictment;

Two, that on or about the various dates set forth in the Indictment, one or more Defendants voluntarily and intentionally became members of the conspiracy knowing that the object of the conspiracy was to suppress and eliminate competition by fixing prices of TFT-LCD panels and intending to help accomplish that goal;

Three, that the Defendants' conduct had a substantial and intended effect on United States commerce;

Four, that the conspiracy described in the Indictment involved import trade or commerce.

Sources:

See Defendants' Proposed Preliminary Jury Instructions (Doc. No. 411).

United States v. United States Gypsum Co., 438 U.S. 422, 434-43 (1978); *United States v. Nukida,* 8 F.3d 665, 670-71 (9th Cir. 1993); *United States v. Brown,* 936 F.2d 1042, 1046 (9th Cir. 1991); *United States v. Romer,* 148 F.3d 359, 364 n. 1. (4th Cir. 1998); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995); *United States v. Fitapelli,* 786 F.2d 1461, 1462 (11th Cir. 1986); 15 USC § 6a; Transcript of Record at 5584 (September 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Transcript of Record at 2289-90 (February 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH).

INSTRUCTION NO. -- FTAIA - IMPORT TRADE OR COMMERCE

Because the alleged conspiracy predominantly involved conduct which occurred, if at all ,in foreign countries, I instruct you as a matter of law that the conduct of AU Optronics Corporation and AU Optronics Corporation America alleged in the indictment was "conduct involving trade or commerce with foreign nations."

Section 6a of the Sherman Act, which is known as the Foreign Trade Antitrust Improvement Act, provides that the Act does not apply to "conduct involving trade or commerce with foreign nations" unless the conduct involved "import trade or commerce." Therefore, before you may find either defendant guilty, you must find beyond a reasonable doubt that the defendants' conduct involved "import trade or commerce." I will now instruct you on how to make this determination.

In order to conclude that the conduct of the defendant involved import trade or commerce, you must find beyond a reasonable doubt that defendants' anticompetitive conduct, if any, was directed at the United States import market.

It is not sufficient, without more, for the government to establish that the defendants were engaged in the United States import market. It is similarly not sufficient for the government to establish that the defendants were engaged in global anticompetitive behavior involving products that were eventually imported into the United States. Rather, the government must establish beyond a reasonable doubt that the defendants' anticompetitive conduct targeted United States import goods.

The transmission of payments for TFT-LCD panels, even if those payments traveled across the United States border, is irrelevant to the question of whether the defendant engaged in conduct involving import trade or commerce; nor does ancillary activity in support of the supposed conspiracy transform the conspiracy into "conduct involving import trade or commerce."

Sources:
See Defendants' Proposed Preliminary Jury Instructions (Doc. No. 411); 15 U.S.C. § 6a; *F. Hoffman-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 162-75 (2004); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 985-86 (9th Cir. 2008); *U.S. v. LSL Biotechnologies,* 379 F.3d 672, 679 (9th Cir. 2004); *Turicentro, S.A. v. American Airlines,* 303 F.3d 293, 301-02 (3d Cir. 2002), *overruled on other grounds, Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011); *Kruman v. Christie's International PLC,* 284 F.3d 384, 394-96 (2d Cir. 2002); *see also U.S. v. Holliday,* 70 U.S. (3 Wall.) 407, 18 L.Ed. 182 (1865) ("Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens and subjects of foreign governments, as individuals").

2.6 DEPOSITION AS SUBSTANTIVE EVIDENCE

When a person is unavailable to testify at trial, the deposition of that person may be used at the trial. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

The deposition of [*name of witness*], which was taken on [*date*], is about to be presented to you. You should consider deposition testimony in the same way that you consider the testimony of the witnesses who have appeared before you. Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.

2.8 TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE

You are about to watch a recording in the [specify the foreign language] language. A transcript of the recording has been admitted into evidence. The transcript is an official English-language translation of the recording.

Although some of you may know the [specify the foreign language] language, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript even if you would translate it differently.

3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

3.2 CHARGE AGAINST DEFENDANT NOT EVIDENCE—PRESUMPTION OF INNOCENCE—BURDEN OF PROOF

The indictment is not evidence. The defendant has pleaded not guilty to the charge[s]. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge[s] beyond a reasonable doubt.

3.3 DEFENDANT'S DECISION NOT TO TESTIFY

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify.

INSTRUCTION NO. --- REASONABLE DOUBT – DEFINED

The law does not require a defendant to prove his or her innocence or produce any evidence at all. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant. It is for you alone to decide whether the government has proven that the defendant is guilty of the crime charged solely on the basis of the evidence and subject to the law as I charge you.

It is not sufficient for the government to establish a probability, even a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond a reasonable doubt. While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt. A "reasonable doubt" is based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Sources:

Ninth Circuit Model Jury Instructions for Criminal Cases, No. 3.5; ABA Model Criminal Antitrust Jury Instructions (2009 ed.), No. 6b; Transcript of Record at 2980 (Nov. 10, 2008), *United States v. Northcutt & Scaglia* (S.D. Fla.) (No. 0:07-CR-60220); Transcript of Record at 1066-67 (Feb. 11, 2002), *United States v. Anderson* (N.D. Ala.) (No. CR-01-PT-302-S); Jury Charge at 18 (May 3, 1995), *United States v. Carlos Seafood, Inc.* (D. Mass.) (No. 94-10025-REK).

3.6 WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness; and

(2) the exhibits received in evidence; and

(3) any facts to which the parties have agreed.

3.7 WHAT IS NOT EVIDENCE

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, will say in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

3.9 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

3.10 ACTIVITIES NOT CHARGED

You are here only to determine whether the defendant is guilty or not guilty of the charge[s] in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

3.18 CORPORATE DEFENDANT [MODIFIED]

AUO and AUO America are both corporations. A corporation is a legal entity, and it may be found guilty of a criminal offense. A corporation is entitled to the same fair trial as a private individual. It is entitled to the same presumption of innocence as private individuals, and it may be found guilty only if the evidence establishes such guilt beyond a reasonable doubt. All persons, including corporations, stand equal before the law.

Under the law, a corporation is a person, but it can only act through its agents – such as its directors, officers, employees, or others acting on its behalf. A corporation is legally bound by the acts and the statements of its agents acting on its behalf, done or made within the scope of their employment or their actual authority. In order for a corporation to be legally responsible for the acts or statements of its agents, you must find that the agent was acting within the scope of employment or with actual authority. If you conclude that any agent of a corporation, acting within the scope of employment or with actual authority, participated in the offense charged in the indictment, then that corporation is liable for that offense.

Acts done within the scope of employment or with actual authority are acts performed on behalf of a corporation and directly related to the performance of the duties the agent has general authority to perform.

To be acting within the scope of his employment, the agent first must have intended that his act would produce some benefit to the corporation. The agent's acts or statements need not actually have resulted in any benefit to the corporation. As long as the agent intended to benefit the corporation in some manner, the fact that he may also have acted for other reasons as well, such as for his own personal benefit, is of no consequence.

A corporation is not capable of conspiring with its own agents to restrain trade. Through its agents, however, it is capable of conspiring to restrain trade with other persons or other corporations.
Sources:

Ninth Circuit Model Criminal Jury Instructions (2010 ed.), No. 3.18; Transcript of Record at 135-36, 141-42 (Feb. 12, 2001), *United States v. Mitsubishi Corp.* (E.D. Pa. (No. 2:00-cr-00033-mk); Transcript of Record at 630-31 (Feb. 9, 1996), *United States v. Mrs. Baird's Bakeries* (N.D. Tex.) (No. 3:95-cr-00294-1); Transcript of Record at 2139 (July 1, 1998), *United States v. Nippon Paper Indus*. (D. Mass.) (No. 95-10388-Ng); Transcript of Record at 37 (Mar. 15, 1990), *United States v. All-Star Industries, Inc.* (S.D. Tex.) (No. H88-29).

INSTRUCTION NO. --- FOREIGN LANGUAGE TESTIMONY & TRANSLATED DOCUMENTS

During the course of trial, certain witnesses testified, in whole or in part, in Mandarin (Chinese) and Korean. When such witnesses testified, interpreters were present to translate the questions posed by counsel into Mandarin (Chinese) or Korean and then translate the responses given by the witness into English. Although some of you may know one or more of these languages, it is important that all jurors consider the same evidence; therefore, you must accept the English translation of the witness's testimony and disregard any different understanding.

During the course of the trial, documents in Chinese and Korean, either in whole or in part, were admitted into evidence. For your benefit, the documents were translated into English. Although some of you may know one or more of these languages, it is important that all jurors consider the same evidence; therefore, you must accept the English translation of the document and disregard any different understanding.

In those instances where the parties disagree on the interpretation of a witness's testimony or the translation of a document, it is up to you, the jury, to decide which translation is correct.

Sources:

Ninth Circuit Model Criminal Jury Instructions (2010 ed.), Nos. 1.12, 2.9, 3.19; Transcript of Record at 2287-88 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH).

4.1 STATEMENTS BY DEFENDANT

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

4.14 OPINION EVIDENCE, EXPERT WITNESS

You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

4.15 SUMMARIES NOT RECEIVED IN EVIDENCE

During the trial, certain charts and summaries were shown to you in order to help explain the evidence in the case. These charts and summaries were not admitted in evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

4.16 CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been admitted in evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

INSTRUCTION NO. - ELEMENTS OF A SHERMAN ACT VIOLATION

The seven corporate and individual defendants are charged in the Indictment with knowingly joining in a single ongoing conspiracy to suppress and eliminate competition by fixing prices in the market for TFT-LCD panels, in violation of Section 1 of Title 15 of the United States Code, commonly known as the Sherman Antitrust Act. In order for one or more defendants to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

One, that beginning on or about September 14, 2001 and ending on or about December 1, 2006, there was an agreement between two or more persons to fix the prices of TFT-LCD panels as charged in the Indictment;

Two, that on or about the various dates set forth in the Indictment, one or more Defendants voluntarily and intentionally became members of the conspiracy knowing that the object of the conspiracy was to suppress and eliminate competition by fixing prices of TFT-LCD panels and intending to help accomplish that goal;

Three, that the Defendants' conduct had a substantial and intended effect on United States commerce;

Four, that the conspiracy described in the Indictment involved import trade or commerce.

Sources:

See Defendants' Proposed Preliminary Jury Instructions (Doc. No. 411).

United States v. United States Gypsum Co., 438 U.S. 422, 434-43 (1978); *United States v. Nukida,* 8 F.3d 665, 670-71 (9th Cir. 1993); *United States v. Brown,* 936 F.2d 1042, 1046 (9th Cir. 1991); *United States v. Romer,* 148 F.3d 359, 364 n. 1. (4th Cir. 1998); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995); *United States v. Fitapelli,* 786 F.2d 1461, 1462 (11th Cir. 1986); 15 USC § 6a; Transcript of Record at 5584 (September 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Transcript of Record at 2289-90 (February 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH).

INSTRUCTION NO. -- CONSPIRACY – ELEMENTS

The two corporate and five individual defendants are charged in the Indictment with conspiring to fix prices in violation of Section 1 of Title 15 of the United States Code. A conspiracy has been described as a "partnership in crime," in which each person found to be a member of the conspiracy is liable for all acts and statements of the other members made during the existence and in furtherance of the conspiracy. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed, or whether the aim of the agreement was achieved or not.

In determining whether a conspiracy has been proved, you must view the evidence as a whole and not piecemeal. You should consider the actions and statements of all the alleged conspirators. The conspiracy may be inferred from all the circumstances and the actions and statements of the participants. In order to establish the existence of a conspiracy, the evidence need not show that the members of the conspiracy entered into any express, formal, or written agreement; that they met together; or that they directly stated what their object or purpose was, or the details of it, or the means by which the object was to be accomplished. Direct proof of a conspiracy may not be available. A conspiracy may be disclosed by the circumstances or by the acts of the members. Therefore, you may infer the existence of a conspiracy from what you find the parties actually did, as well as from the words they used.

Sources:

United States v. Hungerford, 465 F. 3d 1113, 1116 (9th Cir. 2006); *United States v. Montgomery,* 150 F. 3d 983, 998-99 (9th Cir. 1998); *United States v. Arbelaez,* 719 F.2d 1453, 1458 (9th Cir. 1983); *United States v. Perez-Gonzalez*, 445 F.3d 39, 49 (1st Cir. 2006); *United States v. Nelson-Rodriguez*, 319 F.3d 12, 28 (1st Cir. 2003); *United States v. Ruiz*, 105 F.3d 1492, 1499 (1st Cir. 1997); Transcript of Record at 5589-90 (September 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Ninth Circuit Model Jury Instructions for Criminal Cases, No. 8.20.

**INSTRUCTION NO. -- CONSPIRACY –
MEETING WITH COMPETITORS INSUFFICIENT**

Mere presence at meetings with competitors, at which competitors may or may not have discussed prices, is not sufficient to establish a defendant's guilt. Presence without more is not sufficient participation for a person to be said to be a knowing, participating conspirator. Further, silence in itself at such a meeting cannot – on its own – be deemed agreement. There must be a specific understanding among the alleged conspirators that silence will constitute agreement, or clear evidence that the party whose silence is being considered has intended that his silence be deemed as agreement.

Sources:

United States v. Corona-Verbera, 509 F.3d 1105, 1117 (9th Cir. 2007); *United States v. Estrada-Macias,* 218 F.3d 1064, 1066 (9th Cir. 2000); *United States v. Ocampo,* 937 F.2d 485, 489 (9th Cir. 1991); *United States v. Perez-Gonzalez*, 445 F.3d 39, 49 (1st Cir. 2006); *United States v. Nelson-Rodriguez*, 319 F.3d 12, 28 (1st Cir. 2003); *United States v. Ruiz*, 105 F.3d 1492, 1499 (1st Cir. 1997); Transcript of Record at 2993-96 (Nov. 10, 2008), *United States v. Northcutt & Scaglia* (S.D. Fla.) (No. 0:07-CR-60220); Transcript of Record at 2297-98 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH); Transcript of Record at 2328-29 (March 31, 1994), *United States v. Milikowsky* (D. Conn.) (No. 3:93CR-191); Transcript of Record at 5589 (Sept. 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Transcript of Record at 2095 (Sept. 18, 1998), *United States v. True* (W.D. Ky.) (No. 4:97-cr-00011-JHM); Ninth Circuit Model Jury Instructions for Criminal Cases, No. 8.20.

INSTRUCTION NO. -- CONSPIRACY -- PARALLELISM

Further, it is not enough that a defendant acted in similar ways to alleged coconspirators, or perhaps helped one another. Firms in a concentrated market may recognize their shared economic interests and their interdependence with respect to price and output decisions. Rather, you must find that there was a plan to commit the crime alleged in the Indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

Sources:

Bell Atlantic Co. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1966 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); *United States v. Estrada-Macias,* 218 F.3d 1064, 1066 (9th Cir. 2000); *United States v. Montgomery,* 150 F. 3d 983, 998 (9th Cir. 1998); Transcript of Record at 2328-29 (March 31, 1994), *United States v. Milikowsky* (D. Conn.) (No. 3:93CR-191); Transcript of Record at 5587 (September 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Ninth Circuit Model Jury Instructions for Criminal Cases, No. 8.20.

INSTRUCTION NO. -- CONSPIRACY – CORPORATION AND ITS OFFICERS CANNOT CONSPIRE AMONG THEMSELVES

Defendant AU Optronics Corporation America is an indirectly owned subsidiary of Defendant AU Optronics Corporation. The five individual defendants were, throughout the relevant period, officers and/or employees of AU Optronics Corporation. Because a corporation, its parent, subsidiaries and affiliates, its officers and employees are all considered a single unit for purposes of Section One of the Sherman Act, you may not convict any defendant of conspiracy under the Sherman Act based on a finding that they conspired solely with each other. Rather, in order to convict any defendant, you must find that some unrelated company, or one or more individuals not employed by AU Optronics Corporation or AU Optronics Corporation America, was a part of the conspiracy.

Sources:

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 771-72 (1984); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 616, 618 (9th Cir. 1979); *see also Jack Russell Terrier Network of N. California v. American Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005).

**INSTRUCTION NO. -- CONSPIRACY –
CANNOT CONSPIRE WITH GOVERNMENT INFORMANTS**

Samsung Electronics reported its participation in the alleged conspiracy on January 27, 2006. LG Display reported its participation on July 13, 2006. From those dates forward, Samsung and LG acted as government informants.

It is impossible for anyone to enter into a conspiracy solely with a government informant who secretly intends to frustrate the conspiracy. Therefore, you may not convict any defendant if you find that they conspired with Samsung, LG or any of their employees only after the date on which each company became a government informant.

Sources:

Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965); *United States v. Tanner,* 628 F.3d 890, 906 (7th Cir. 2010); *United States v. Romero,* 282 F.3d 683, 689 (9th Cir. 2002); *see United States v. Ritter,* 989 F.2d 318, 321 (9th Cir. 1993); *United States v. Escobar de Bright,* 742 F.2d 1196, 1198-99 (9th Cir. 1984).

INSTRUCTION NO. -- "KNOWINGLY" JOINING THE CONSPIRACY

As previously noted, the second element the government must prove beyond a reasonable doubt for you to find any of the defendants guilty is that that defendant knowingly joined the conspiracy charged in the indictment. To act "knowingly" means to act voluntarily and intentionally, and not because of a mistake, accident, or other innocent reason. Therefore, before you may convict any defendant, the evidence must establish beyond a reasonable doubt that that defendant joined the conspiracy to fix prices with a conscious commitment to a common scheme designed to achieve an unlawful objective.

A person may become a member of a conspiracy without full knowledge of all the details of the conspiracy, the identity of all of its members, or the parts they played in the charged conspiracy. Knowledge of the essential nature of the conspiracy is enough. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a member of the conspiracy. Similarly, mere knowledge of a conspiracy without participation in the conspiracy is also insufficient to make a person a member of the conspiracy.

Sources:

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984); *Toscano v. Professional Golfers' Association,* 258 F.3d 978, 983 (9th Cir. 2001); *United States v. Andreas*, 216 F.3d 645, 669-70 (7th Cir. 2000); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1488 (9th Cir. 1999); *see American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); Transcript of Record at 2028-30 (July 19, 2007), *United States v. Stora Enso N. Am. Corp.* (D. Conn.) (No. 3:06CR323-CFD); Transcript of Record at 2296-97 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH); Transcript of Record at 5593 (September 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762).

INSTRUCTION NO. -- "KNOWINGLY" JOINING CONSPIRACY – AGREEMENT AND PRESENT INTENT

A person who merely pretended to agree but never intended to honor the agreement cannot be found guilty of knowingly joining a conspiracy.

Evidence that AUO actually competed with other manufacturers has been admitted to assist you in deciding whether any defendant knowingly entered into an agreement to fix prices with the necessary conscious commitment to the conspiracy's alleged goal.

Similarly, evidence of the prices actually charged by AUO has been admitted to assist you in deciding whether any defendant knowingly entered into or continued to participate in an agreement to fix prices with the necessary conscious commitment to the conspiracy's alleged goal. Of course, if a defendant never acted in accordance with the agreement, that is evidence you should consider in determining whether or not that defendant ever joined the charged conspiracy in the first place.

Sources:

United States v. Andreas, 216 F.3d 645, 669-70 (7th Cir. 2000); *United States v. Stolt-Nielsen S.A.,* 524 F. Supp. 2d 586, 609 (E.D. Pa. 2007); *see United States v. Bestway Disposal Corp.*, 724 F. Supp. 62, 67 (S.D.N.Y. 1988); Transcript of Record at 2993-96 (Nov. 10, 2008), *United States v. Northcutt & Scaglia* (S.D. Fla.) (No. 0:07-CR-60220); Transcript of Record at 2293-94 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH); Transcript of Record at 2198 (Dec. 4, 2001), *United States v. Taubman,* (S.D.N.Y.) (CR 429 (GBD)); Transcript of Record at 5586-87 (September 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Transcript of Record at 2134 (July 1, 1998), *United States v. Nippon Paper Indus.*(D. Mass.) (No. 95-10388-NG); Transcript of Record at 1777-78 (Nov. 21, 1995), *United States v. Prairie Farms Dairy, Inc.* (S.D. Ind.) (No. EV 94-17-CR).

INSTRUCTION NO. -- "KNOWINGLY" JOINING CONSPIRACY – DEFENDANT'S LIABILITY

Your determination whether any defendant knowingly joined the conspiracy must be based solely on the actions of that defendant as established by the evidence. You should not consider what others may have said or done to join the conspiracy. Membership of any defendant in any conspiracy must be established by evidence of his own conduct – by what he did.

If you find that one or more of the defendants joined the conspiracy, then that defendant is presumed to remain a member of the conspiracy and is responsible for all actions taken in furtherance of the conspiracy until the conspiracy has been completed or abandoned or until the defendant has withdrawn from the conspiracy.

Sources:

Hyde v. United States, 225 U.S. 347, 369-70 (1912); *United States v. Garcia,* 497 F.3d 964, 967 (9th Cir. 2007); *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 837 (11th Cir. 1999); Transcript of Record at 2028-30 (July 19, 2007), *United States v. Stora Enso N. Am. Corp.* (D. Conn.) (No. 3:06CR323-CFD); Transcript of Record at 2293-94, 2296-97 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH).

INSTRUCTION NO. -- CORPORATE OFFICER – INDIVIDUAL LIABILITY

One or more of the individual defendants were officers of AU Optronics Corporation during some or all of the relevant period. In addition, the Indictment alleges that certain defendants participated in the conspiracy by ordering subordinates to perform certain acts. I will now instruct you on how to determine the circumstances under which such defendants can be found guilty.

A corporate officer, such as a president of a company, is subject to prosecution under Section 1 of the Sherman Act whenever he knowingly participates in effecting an illegal conspiracy by directly participating in the conspiracy and/or indirectly or directly authorizing, ordering, or helping a subordinate commit the crime. A person is responsible for conduct that he performs or causes to be performed on behalf of the corporation just as though the conduct were performed on his behalf.

On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers some purpose of the conspiracy, does not thereby become a member of the conspiracy. Moreover, a person is not responsible for the conduct of others performed on behalf of a corporation merely because that person is an officer, employee, or other agent of the corporation.

Sources:

United States v. Wise, 370 U.S. 405, 416 (1962); *United States v. Brown,* 936 F.2d 1042, 1047-48 & n. 4 (9th Cir. 1991); Transcript of Record at 2095-96 (Sept. 18, 1998), *United States v. True* (W.D. Ky.) (No. 4:97-cr-00011-JHM).

INSTRUCTION NO. -- LIABILITY OF SUPERIORS

The individual defendants, Hsuan Bin Chen, Dr. Hui Hsiung, Dr. Lai-Juh Chen, Shiu Lung "Steven" Leung, and Tsannrong "Hubert" Lee, are charged in the Indictment with knowingly joining in a single on-going conspiracy with defendant AUO, and certain of AUO employees, among others, to suppress and eliminate competition by fixing prices in the market for TFT-LCD panels in violation of Section 1 of Title 15 of the United States Code, commonly known as the Sherman Act. A corporate officer is not criminally responsible for illegal acts committed by a subordinate on behalf of that corporation merely because of the officer's status as a supervisor of the subordinate, or solely because of the officer's failure to stop the conduct of his or her subordinates. Rather, a corporate officer is subject to conviction under Section 1 of the Sherman Act whenever he or she (i) directly participates in the conspiracy; or (ii) authorizes, orders or actively participates in the subordinate's perpetration of the crime.

Accordingly, to find any individual defendant guilty of the conspiracy charged in the Indictment based on acts committed by a subordinate, you must find, beyond a reasonable doubt, that each individual defendant (i) was aware of the existence of the conspiracy; (ii) knew that the subordinate was participating in the conspiracy; and (iii) knowingly authorized, ordered or actively participated in the subordinate's perpetration of the crime.

Sources:

Defendant L.J. Chen's Proposed Jury Instruction (Doc. No. 451).

United States v. Wise, 370 U.S. 405, 416 (1962); *United States v. Brown*, 936 F.2d 1042, 1049 (9th Cir. 1991).

INSTRUCTION NO. -- FTAIA - IMPORT TRADE OR COMMERCE

Because the alleged conspiracy predominantly involved conduct which occurred, if at all, in foreign countries, I instruct you as a matter of law that the conduct of AU Optronics Corporation and AU Optronics Corporation America alleged in the indictment was "conduct involving trade or commerce with foreign nations."

Section 6a of the Sherman Act, which is known as the Foreign Trade Antitrust Improvement Act, provides that the Act does not apply to "conduct involving trade or commerce with foreign nations" unless the conduct involved "import trade or commerce." Therefore, before you may find either defendant guilty, you must find beyond a reasonable doubt that the defendants' conduct involved "import trade or commerce." I will now instruct you on how to make this determination.

In order to conclude that the conduct of the defendant involved import trade or commerce, you must find beyond a reasonable doubt that defendants' anticompetitive conduct, if any, was directed at the United States import market.

It is not sufficient, without more, for the government to establish that the defendants were engaged in the United States import market. It is similarly not sufficient for the government to establish that the defendants were engaged in global anticompetitive behavior involving products that were eventually imported into the United States. Rather, the government must establish beyond a reasonable doubt that the defendants' anticompetitive conduct targeted United States import goods.

The transmission of payments for TFT-LCD panels, even if those payments traveled across the United States border, is irrelevant to the question of whether the defendant engaged in conduct involving import trade or commerce; nor does ancillary activity in support of the supposed conspiracy transform the conspiracy into "conduct involving import trade or commerce."

Sources: [*Note: Also included in preliminary jury instructions.*]

See Defendants' Proposed Preliminary Jury Instructions (Doc. No. 411); 15 U.S.C. § 6a; *F. Hoffman-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 162-75 (2004); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 985-86 (9th Cir. 2008); *U.S. v. LSL Biotechnologies,* 379 F.3d 672, 679 (9th Cir. 2004); *Turicentro, S.A. v. American Airlines,* 303 F.3d 293, 301-02 (3d Cir. 2002), *overruled on other grounds, Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011); *Kruman v. Christie's International PLC,* 284 F.3d 384, 394-96 (2d Cir. 2002); *see also U.S. v. Holliday,* 70 U.S. (3 Wall.) 407, 18 L.Ed. 182 (1865) ("Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens and subjects of foreign governments, as individuals").

INSTRUCTION NO. -- INTENT TO CAUSE AN EFFECT ON U.S. COMMERCE

In order to find any defendant guilty, you must also find that that defendant intended by his conduct to cause a substantial effect on United States commerce, and that the defendant's conduct did, in fact, have such an effect.

Sources:

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); *United States v. Nippon Paper Industries Co., Ltd.,* 109 F.3d 1, 4 (1st Cir. 1997); *Dee-K Enterprises, Inc. v. Heveafil SDN BHD,* 299 F.3d 281, 292-93 (4th Cir. 2002); *Eskofot A/S v. E. I. DuPont De Nemours & Co.*, 872 F. Supp. 81, 85 (S.D.N.Y. 1995).

INSTRUCTION NO. -- POSSESSION OF PUBLICLY AVAILABLE INFORMATION

In the TFT-LCD panel industry, as in other businesses, there is a variety of information that is available to manufacturers and sellers of panels from public sources, or from non-public sources other than competitors. Information is available from customers, from media and Internet sources, from industry analysts, and from brokers and others involved in the sale of TFT-LCD panels. For example, a customer has the lawful right to tell a seller the price it has been offered by a competitor of the seller for the purpose of trying to negotiate a better price from the seller. Just as airlines, retailers, and others have the lawful right to rely on information obtained from customers, and from public and other sources other than competitors, managers of a company that manufactures and sells TFT-LCD panels have the lawful right to obtain, rely upon and act on price and other information received from customers, media and Internet sources, industry analysts, brokers, and others involved in the sale of TFT-LCD panels.

Sources:

Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 526 (9th Cir. 1987); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1360 (9th Cir. 1976); *Gray v. Shell Oil Co.*, 469 F.2d 742, 746-47 (9th Cir. 1972); *In re Citric Acid Litigation,* 996 F. Supp. 951, 959 (N.D. Cal. 1998).

INSTRUCTION NO. -- THE EXCHANGE OF PRICING INFORMATION BETWEEN COMPETITORS

As I have explained, it is unlawful for persons to reach agreements to fix prices. However, the publication or exchange of price data and other information among competitors can, in certain circumstances, increase economic efficiency and render markets more, rather than less, competitive. Therefore, evidence that competitors exchanged information or stated their intentions concerning the prices and quantities of a product which they have sold and produced or the prices and quantities of a product which they intended to sell and produce does not by itself prove that there was a conspiracy to fix prices, even if the exchange of information was done by agreement. For this reason, although you may consider whether there were meetings or telephone calls between competitors in deciding whether a conspiracy has been proven, proof of such meetings or calls alone, without more, is not a sufficient basis for inferring a conspiracy.

Moreover, in a competitive economy, business people are permitted to take the pricing and other actions of their competitors into account in order to compete effectively. Therefore, the fact that one business person bases pricing decisions on information learned about competitors is lawful so long as that person does not agree with competitors to behave in some particular fashion when it comes to pricing his or her own products.

Similarly, the fact that a business person knows and is able to take advantage of the fact that some or all the competitors have agreed to raise their prices, does not mean that that person has joined a conspiracy so long as that person does not agree with the competitors to join their conspiracy.

It is not illegal to benefit or take advantage of other persons' unlawful activity so long as the defendant does not become a participant in it. However, if a person does enter into such an agreement, then his or her conduct is unlawful.

Sources: *United States v. United States Gypsum Co.,* 438 U.S. 422, 441 n. 16 (1978); *In re Citric Acid Litigation,* 191 F.3d 1090, 1102-03, 1105 (9th Cir. 1999); *Blomkest Fertilizer, Inc. v. Potash Crop. of Saskatchewan,* 203 F.3d 1028, 1032-33, 1037 (8th Cir. 2000); *In re Baby Food Antitrust Litigation,* 166 F.3d 112, 118-19, 125-26, 133 (3d Cir. 1999); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 51, 53 (7th Cir. 1992); Transcript of Record at 5589 (Sept. 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Jury Charge at 148 (1995), *United States v. Lima* (D. N.J.) (No. CR-95-280); Transcript of Record at 1773 (Nov. 21, 1995), *United States v. Prairie Farms Dairy, Inc.* (S.D. Ind.) (No. EV 94-17-CR); *see generally Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (charging supra-competitive prices in response to other companies' behavior is not, without more, unlawful).

INSTRUCTION NO. -- RULE OF REASON – FOREIGN PRICE FIXING

Because the conduct at issue in this case occurred primarily overseas, it is judged according to what is called the rule of reason. This means that even if you find that one or more defendants and any other coconspirators knowingly agreed to fix the price of TFT-LCD panels in a series of meetings in Taiwan, you may only find any defendant guilty if you find that conduct to be unreasonable.

In making this determination, you must first determine whether the government has proven that the challenged restraint has resulted in a substantial harm to competition in a relevant product and geographic market. If you find that the government has proven that the challenged restraint results in a substantial harm to competition in a relevant market, then you must consider whether the restraint produces countervailing competitive benefits. If you find that it does, then you must balance the competitive harm against the competitive benefit. The challenged restraint is illegal under Section 1 of the Sherman Act only if you find that the competitive harm substantially outweighs the competitive benefit. I will now review each step of the analysis in more detail.

Sources:

State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978); *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *California Dental Ass'n v. FTC*, 224 F.3d 942, 947-54 (9th Cir. 2000); *Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 843 (9th Cir. 1996); *Wisconsin Music Network, Inc. v. Muzak Ltd. P'ship*, 5 F.3d 218, 222 (7th Cir. 1993); *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993); *United States v. All Star Indus.*, 962 F.2d 465, 468 (5th Cir. 1992); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus.*, 889 F.2d 524, 527 (4th Cir. 1989).

INSTRUCTION NO. -- RULE OF REASON – PROOF OF COMPETITIVE HARM

As I mentioned, in order to prove that the challenged restraint is unreasonable, the government first must demonstrate that the restraint has resulted in a direct, substantial and reasonably foreseeable harm to competition. Although it may be relevant to the inquiry, harm that occurs merely to any particular business is not sufficient, by itself, to demonstrate harm to competition generally. That is, harm to a single competitor or group of competitors does not necessarily mean that there has been harm to competition.

Furthermore, the government must show that the harm to competition occurred in an identified market, known as a "relevant market." There are two aspects to a relevant market. The first aspect is known as the relevant product market. The second aspect is known as the relevant geographic market. I will address the question of a relevant market in greater detail momentarily.

It is the government's burden to prove the existence of a relevant market.

If you find that the government has proven the existence of a relevant market, then you must determine whether the government also has proven that the challenged restraint has a substantial harmful effect on competition in that market. A harmful effect on competition, or competitive harm, refers to a reduction in competition that results in the loss of some of the benefits of competition, such as lower prices, increased output, and higher product quality. If the challenged conduct has not resulted in higher prices, decreased output, lower quality, or the loss of some other competitive benefit, then there has been no competitive harm and you should find that the challenged conduct was not unreasonable.

In determining whether the challenged restraint has produced competitive harm, you may look at the following factors: the effect of the restraint on prices, output, product quality and service; the purpose and nature of the restraint; the nature and structure of the relevant market, both before and after the restraint was imposed; the number of competitors in the relevant market and the level of competition among them, both before and after the restraint was imposed; and whether AU Optronics Corporation and its alleged co-conspirators possessed "market power."

The last factor mentioned, market power, has been defined as an ability to profitably raise prices above those that would be charged in a competitive market for a sustained period of time. A firm that possesses market power generally can charge higher prices for the same goods or services than a firm in

the same market that does not possess market power. The ability to charge higher prices for better products or services, however, is not market power. An important factor in determining whether a defendant possesses market power is the defendant's market share; that is, its percentage of the products or services sold in the relevant market by all competitors. If a defendant does not possess a substantial market share, it is less likely that it possesses market power. If a defendant does not possess this kind of power, then it is less likely that the challenged restraint has resulted in a substantial harmful effect on competition in the market.

Sources:

NYNEX v. Discon, Inc., 525 US 128, 139 (1998); *NCAA v. Board of Regents,* 468 U.S. 81, 109 n. 38 (1984); *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1036 (9th Cir. 2001); *Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996).

INSTRUCTION NO. -- RULE OF REASON – MARKET DEFINITION

The government must prove beyond a reasonable doubt that AU Optronics Corporation and its alleged co-conspirators had market power in a relevant market. To make this judgment, you must be able to determine what, if any, economic forces restrain the alleged conspirators' freedom to set prices for or restrict the output of TFT-LCD panels. The most likely and most important restraining force will be actual and potential competition from other firms and their products. This includes all firms and products that act as restraints on defendant's power to set prices as it pleases. All the firms and products that exert this restraining force are within what is called the relevant market.

There are two aspects you must consider in determining whether the government has met its burden to prove the relevant market beyond a reasonable doubt. The first is the relevant product market; the second is the relevant geographic market.

Source:

See ABA Section of Antitrust Law, 1 *Antitrust Law Developments* 65, 555-610 (6th ed. 2007); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996).

INSTRUCTION NO. -- RULE OF REASON – RELEVANT PRODUCT MARKET

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. Thus, for example, if consumers seeking to cover leftover food for storage considered certain types of flexible wrapping material - such as aluminum foil, cellophane, or even plastic containers - to be reasonable alternatives, then all those products would be in the same relevant product market.

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant permanent increase in the price of one product would result in a substantial number of consumers switching from that product to another. Generally speaking, a small but significant permanent increase in price is approximately a five percent increase in price not due to external cost factors. If you find that such switching would occur, then you may conclude that the products are in the same product market.

In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence or absence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of the government and defendant regarding who the respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.

In this case, the government contends that the relevant product market is TFT-LCD panels. By contrast, the defendants assert that the government has failed to allege the proper relevant product market, and that certain alternative technologies are also part of the relevant product market. If you find that the government has proven a relevant product market comprised of products that are reasonably interchangeable, then you should continue to evaluate the remainder of the government's allegations.

However, if you find that the government has failed to prove such a market, then you must find the defendants not guilty.

Sources:

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); *United States v. Microsoft Corp.*, 352 F.3d 34, 52-54 (D.C. Cir. 2001); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1355 (Fed. Cir. 1999); *AD/SAT, A Division of Skylight, Inc. v. Associated Press,* 181 F.3d 216, 227 (2d Cir. 1999); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996).

INSTRUCTION NO. -- RULE OF REASON

In deciding whether the government has proven a relevant product market, you may also consider what the law refers to as "the cross-elasticity of supply" or, in other words, "the extent to which the producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product." Such producers, to the extent that they exist, can increase supply and, therefore, drive prices back to competitive levels - defeating any effort by a would-be monopolist to charge significantly higher prices.

Take two shoe manufacturers, for example. The first manufacturer produces shoes for women, while the second manufacturer produces shoes for men. Generally speaking, men's and women's shoes are not reasonably interchangeable and, therefore, might be thought of as being in separate product markets. However, it is possible that the men's shoe manufacturer could quickly shift its resources to start producing women's shoes if the women's shoe manufacturer raised its prices significantly and vice versa. Although women would not buy men's shoes, nor would men buy women's shoes, the ability of each manufacturer to alter its production could prevent the other manufacturer from raising prices significantly. Thus, in this example, men's and women's shoes would be included in the same market.

If, in determining the parameters of the relevant product market, you find that there are manufacturers of TFT-LCD panels that have the ability to alter their production to manufacture products that can reasonably be substituted with those of AU Optronics Corporation - even though they do not presently compete with the defendant - you may consider whether the existence of these potential alternative suppliers can influence the prices that the AU Optronics Corporation charges for its product and, if so, that amount of the product that these suppliers are likely to produce. However, if you find that no cross-elasticity of supply exists, you may define the market solely on your evaluation of whether the allegedly competing products are reasonable substitutes for each other from the consumer's perspective.

Sources:

AD/SAT, A Division of Skylight, Inc. v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996); *see generally* ABA Section of Antitrust Law, 1 Antitrust Law Developments 576-78 (6th ed. 2007) (collecting cases).

INSTRUCTION NO. -- RULE OF REASON – RELEVANT GEOGRAPHIC MARKET

The relevant geographic market is the area in which the defendant faces competition from other firms that compete in the relevant product market and to which customers can reasonably turn for purchases. When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller.

The government has the burden of proving the relevant geographic market beyond a reasonable doubt. In this case, the government claims that the relevant geographic market is worldwide. In determining whether the government has met its burden and demonstrated that its proposed geographic market is proper, you may consider several factors, including: (1) the geographic area in which the defendant sells and where the defendant's customers are located; (2) the geographic area to which customers can reasonably turn for supply of the product; (3) the geographic area to which customers have turned or have seriously considered turning; (4) the geographic areas that suppliers view as potential sources of competition; (5) whether governmental licensing requirements, taxes, or quotas have the effect of limiting competition in certain areas.

Source:

United States v. Grinnell Corp., 384 U.S. 563 (1966); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024, 1026-27 (10th Cir. 2002); *ReMax Int'l, Inc. v. Realty One, Inc.*, 173 F.2d 995 (6th Cir. 1999); *Morgenstern v. Wilson,* 29 F.3d 1291 (8th Cir. 1994); *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 45 (5th Cir. 1974); *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 626 (5th Cir. 2002); ABA Section of Antitrust Law, 1 *Antitrust Law Developments* 597-610 (6th ed. 2007).

**INSTRUCTION NO. -- RULE OF REASON –
RELEVANT MARKET: NECESSITY OF PROOF**

If, after considering all the evidence, you find that the government has proven beyond a reasonable doubt both a relevant product market and a relevant geographic market, then you must find that the government has met the relevant market requirement and you must consider the remaining allegations of the indictment.

If you find that the government has not proven beyond a reasonable doubt either a relevant product market or a relevant geographic market, then you must find the defendants not guilty.

Source:

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455 (1993); *United States v. Microsoft Corp.*, 253 F.3d 34, 52-54 (D.C. Cir. 2001); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1027 (10th Cir. 2002); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052-53 (8th Cir. 1999).

INSTRUCTION NO. -- RULE OF REASON – EVIDENCE OF COMPETITIVE BENEFITS

If you find that the government has proved that the challenged restraint resulted in substantial harm to competition in a relevant market, then you next must determine whether the restraint also benefits competition in other ways. If you find that the challenged restraint results in competitive benefits, then you also must consider whether the restraint was reasonably necessary to achieve the benefit. If the government proves that the same benefits could have been readily achieved by other, reasonably available alternative means that create substantially less harm to competition, then they cannot be used to justify the restraint.

Sources:

ABA Section of Antitrust Law, 1 *Antitrust Law Developments* 70-74 (6th ed. 2007) (collecting cases).

**INSTRUCTION NO. -- RULE OF REASON –
BALANCING THE COMPETITIVE EFFECTS**

If you find that the challenged restraint was reasonably necessary to achieve competitive benefits, then you must balance those competitive benefits against the competitive harm resulting from the same restraint. If the competitive harm substantially outweighs the competitive benefits, then the challenged restraint is unreasonable. If the competitive harm does not substantially outweigh the competitive benefits, then the challenged restraint is not unreasonable. In conducting this analysis, you must consider the benefits and harm to competition and consumers, not just to a single competitor or group of competitors.

Sources:

Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50 (1977); *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 507 (2d Cir. 2004); *Sullivan v. National Football League,* 34 F.3d 1091, 1111 (1st Cir. 1994); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

INSTRUCTION NO. -- PRICE COORDINATION IS NOT NECESSARILY UNLAWFUL

The defendants and alleged coconspirators may charge the same prices, may copy each other's price lists or may follow and conform exactly to each other's price policies and price changes. Such price coordination occurs when competitors recognize that they have shared economic interests and, consequently, follow each other's conduct in setting prices. Such conduct would not violate the Sherman Act, unless you find it was done pursuant to an agreement between two or more conspirators, as alleged in the indictment. In order to determine whether to find such an agreement, you should consider whether the defendant adopted similar practices because of its independent judgment as to what was in its economic best interest. In deciding this, you should consider whether the practices employed made sense in light of the industry conditions.

Sources:

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993); Transcript of Record at 5587 (Sept. 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762); Transcript of Record at 2027 (July 19, 2007), *United States v. Stora Enso N. Am. Corp.* (D. Conn.) (No. 3:06CR323-CFD); Transcript of Record at 22995, 2297 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH).

INSTRUCTION NO. -- WITHDRAWAL – SHIFTING BURDENS

If you find one or more of the defendants to have been members of the conspiracy charged, the defendant is presumed to have remained a member of the conspiracy and is liable for all actions taken during and in furtherance of the conspiracy until it is shown that the conspiracy has been completed or abandoned, or that the defendant withdrew from the conspiracy.

A defendant has the burden of coming forward with a preponderance of evidence that it withdrew from the conspiracy. To prove something by a preponderance of the evidence is to prove that it is more likely true than not true. This is a lesser standard than "beyond a reasonable doubt." If you find that any defendant has met the burden of coming forward with a preponderance of evidence that he or it withdrew from the conspiracy, then the government must prove beyond a reasonable doubt that the defendant did not withdraw from the conspiracy or did not withdraw from it before June 2006.

Although a defendant who was a member of the conspiracy may withdraw from the conspiracy, that defendant is still responsible with all other coconspirators for the illegal acts, if any, committed by the defendant or by any other coconspirator while the defendant was a member of the conspiracy, up until the time of the defendant's withdrawal. If you should find in this case that any defendant withdrew from the conspiracy, and that the defendant's withdrawal from the conspiracy took place before June 2006, and that the defendant did not later reenter the conspiracy, you must find that defendant not guilty of the offense charged.

Sources:

United States v. U.S. Gypsum Co., 438 U.S. 422, 462-65 (1978); *United States v. Nippon Paper Indus.*, 62 F. Supp. 2d 173, 190-92 (D. Mass. 1999).

INSTRUCTION NO. -- WITHDRAWAL – NECESSARY PROOF

In order for you to find that a defendant withdrew from the conspiracy, the evidence must show that the defendant did an affirmative act inconsistent with the object of the conspiracy and communicated in a manner reasonable calculated to reach its coconspirators. Mere inactivity is not proof of withdrawal. Furthermore, even if a defendant tells others of its intent to withdraw, it has not legally withdrawn if it continued to act knowingly to further the object of the conspiracy.

Evidence that a defendant initiated competition with others, such as intensified price competition or price wars, has been admitted to assist you in deciding whether one or more defendants withdrew from the alleged conspiracy.

Sources:

United States v. U.S. Gypsum Co., 438 U.S. 422, 464-65 (1978); *United States v. Nippon Paper Indus.*, 62 F. Supp. 2d 173, 190-92 (D. Mass. 1999).

INSTRUCTION NO. -- PERIOD OF CONSPIRACY

The indictment charges that the alleged conspiracy began as early as September 14, 2001 and continued until December 1, 2006. The indictment alleges that different defendants joined and participated in the conspiracy during different periods:

AU Optronics Corporation: September 14, 2001 – December 1, 2006
AU Optronics Corporation America: Spring 2003 – December 1, 2006
Hsuan Bin Chen: October 19, 2001 – December 1, 2006
Hui Hsiung: October 19, 2001 – December 1, 2006
Lai-Juh Chen: February 13, 2003 – November 1, 2005
Shiu Lung Leung: May 15, 2002 – December 1, 2006
Tsannrong Lee: January 11, 2002 – December 1, 2006

The government need not prove that the conspiracy existed on those exact dates or that the conspiracy continued for the entire period charged in the indictment. It is sufficient if the government proves beyond a reasonable doubt that the conspiracy existed during or reasonably near the time period alleged in the indictment, and that each defendant joined the conspiracy during the period alleged in the indictment and continued to be a member until on or about the date alleged.

Sources:

Transcript of Record at 2131 (July 1, 1998), *United States v. Nippon Paper Indus.*(D. Mass.) (No. 95-10388-NG); Transcript of Record at 3002-03 (Nov. 10, 2008), *United States v. Northcutt & Scaglia* (S.D. Fla.) (No. 0:07-CR-60220); Transcript of Record at 2033 (July 19, 2007), *United States v. Stora Enso N. Am Corp.* (D. Conn.) (No. 3:06CR323-CFD); Transcript of Record at 2291 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH); Transcript of Record at 1081 (Feb. 11, 2002), *United States v. Anderson* (N.D. Ala.) (No. CR-01-PT-302); Transcript of Record at 5583 (September 8, 1998), *United States v. Andreas* (N.D. Ill.) (No. 96-762).

INSTRUCTION NO. -- STATUTE OF LIMITATIONS

The grand jury returned its indictment of the defendants on June 10, 2010. There is a five-year statute of limitations which applies to the offense charged here. This means that no defendant can be found guilty unless you find beyond a reasonable doubt that the conspiracy existed, and the defendant was a member of it, at some time within the period of the statute of limitations, which, for purposes of this case, is the period beginning June 10, 2005 and continuing until June 10, 2010.

Sources:

United States v. U.S. Gypsum Co., 600 F.2d 414, 417-18 (3d Cir. 1979); *United States v. Therm-All,* 373 F.3d 625, 631-34 (5th Cir. 2004); Transcript of Record at 154-55 (Oct. 31, 1995), *United States v. Lima* (D. N.J.) (No. CR-95-280); Transcript of Record at 2998-99 (Nov. 10, 2008); *United States v. Northcutt & Scaglia* (S.D. Fla.) (No. 0:07-CR-60220); Transcript of Record at 2300-01 (Feb. 22, 2008), *United States v. Swanson* (N.D. Cal.) (No. CR-06-0692-PJH).

INSTRUCTION NO. -- TESTIMONY OF A COCONSPIRATOR – WEIGHT

In this case, [names], who testified as witnesses for the government, entered into plea agreements with the United States. As part of their respective plea agreements, [names] agreed to cooperate with the government in exchange for certain benefits, including a reduction in their sentences.

Under the law, a court may impose a lesser sentence where the government files a motion stating that a defendant has provided substantial assistance in the investigation or prosecution of another person. Such a government motion was bargained for in this case on behalf of [names], and was in fact filed by the government.

You should therefore consider the testimony of [names] with great caution. A witness who realizes he may be able to obtain a lighter sentence may for this reason give testimony favorable to the government. It is for you to determine whether the testimony of [names] was affected by self-interest, by their plea agreement, by their employers' interest in the outcome of this case, or by prejudice or bias against defendant.

You are not to consider the fact that [names] pleaded guilty to similar charges as evidence against any of the defendants here, nor may any inference be drawn against any defendant that there was a conspiracy or that the witness or any defendant was a member of it. This evidence as to their guilty pleas is admissible because it may bear on the credibility of [names].

Sources:

United States v. Tirouda, 394 F.3d 683, 687-88 (9th Cir. 2005); *United States v. Parker,* 241 F.3d 1114, 1120 (9th Cir. 2001); *United States v. Necoechea,* 986 F.2d 1273, 1280 (9th Cir. 1993); *Blumenthal v. United States,* 158 F.2d 883, 891 (9th Cir. 1946); Fed. R. Evid. 801(d)(2)(E); Jury Charge at 19 (July 22, 1997), *United States v. Amcel Corp.* (E.D. Pa.) (No. 96-280); Charge to Jury at 14 (May 3, 1995), *United States v. Carlos Seafood* (D. Mass.) (No. 94-10025-REK); Transcript of Record at 2989-90 (Nov. 10, 2008), *United States v. Northcutt & Scaglia* (S.D. Fla.) (No. 0:07-CR-60220); Ninth Circuit Model Jury Instructions for Criminal Cases, No. 4.9; ABA Model Jury Instructions in Criminal Antitrust Cases (2009 ed.), No. 4C.2.

INSTRUCTION NO. -- WITNESSES NOT PRODUCED BY THE GOVERNMENT

You heard evidence at trial that certain individuals, such as [names] , were allegedly present at the so-called "crystal meetings" when the Government alleges agreements to fix prices were reached. [Names] were described as being well known to the Government. This may have caused you to wonder why [names] were not called by the Government to answer questions in this trial. If you believe that the testimony of [names] would have been important, and if you also believe that it was peculiarly within the power of the Government to have brought him to court to testify in this trial, then you may consider the Government's failure to do so when you decide whether the Government has proven, beyond a reasonable doubt, that any particular defendant is guilty. In other words, you may conclude that the government did not call [name] as a witness because his testimony would have hurt the Government's case.

Source:

Federal Judicial Center, *Pattern Criminal Jury Instructions* 39 (1988).

INSTRUCTION NO. -- THE ALTERNATIVE FINES STATUTE

If you find any defendant guilty of violating the Sherman Act, as charged in the indictment, you must next determine whether (a) the defendant derived pecuniary gain from the offense, or (b) the offense resulted in pecuniary loss to any person. "Pecuniary gain" means the total profit, if any, the defendant obtained from the offense, and "pecuniary loss" means the out-of-pocket loss in money, if any, to any person as a result of the defendant's actions.

If you find beyond a reasonable doubt that the defendant profited from the offense, or that any person sustained an out-of-pocket loss as a result of the defendant's actions, you must determine beyond a reasonable doubt what the amount of that gain or loss is.

Sources:

United States v. Pfaff, 619 F.2d 172, 174 (2d Cir. 2010); *United States v. Acuna,* 2009 WL 415592, *15-16 (11th Cir. 2009); *United States v. Chusid, 372 F.3d 113, 117 (2d Cir. 2004); United States v. Wilder, 15 F.3d 1292, 1300 (5th Cir. 1994); United States v. Bader, -- F. Supp. 2d --, 2010 WL 2681707, *2 (D. Colo. 2010); see United States v. Leonard, 37 F.3d 32, 36-37 (2d Cir. 1994); United States Sentencing Guidelines, § 5E1.2, Application Note 4.*

INSTRUCTION NO. -- VOLUME OF COMMERCE AFFECTED BY THE VIOLATION

If you find AU Optronics Corporation or AU Optronics Corporation America guilty of violating the Sherman Act, as charged in the indictment, you must next determine the volume of said defendant's commerce which was affected by the conspiracy.

You may not presume that all of a corporate defendant's sales during the relevant period were necessarily affected by the conspiracy. If, for example, the conspiracy was ineffective in raising prices beyond what they would otherwise have been, either during a particular period, or even throughout the period charged in the indictment, then those sales were not affected by the conspiracy. The volume of a corporate defendant's commerce affected by the conspiracy is a matter which must be proven to you by the government beyond a reasonable doubt.

In determining the volume of commerce attributable to AU Optronics Corporation America, as distinguished from AU Optronics Corporation, you must weigh the evidence presented at trial as to the sales actually made by AUOA itself, and those in which AUOA's personnel had some substantial involvement.

Sources:

United States v. Giordano, 261 F.3d 1134, 1146-47 & nn. 15-16 (11th Cir. 2001); *United States v. Andreas,* 216 F.3d 645, 676-78 (7th Cir. 2000); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90-92 (2d Cir. 1999); *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000); *United States v. Booker,* 543 U.S. 220, 244 (2005).

7.1 DUTY TO DELIBERATE

When you begin your deliberations, elect one member of the jury as your [presiding juror] [foreperson] who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

7.2 CONSIDERATION OF EVIDENCE—CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.

7.3 USE OF NOTES

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

7.4 JURY CONSIDERATION OF PUNISHMENT

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

7.5 VERDICT FORM

A verdict form has been prepared for you. [*Explain verdict form as needed.*] After you have reached unanimous agreement on a verdict, your [presiding juror] [foreperson] should complete the verdict form according to your deliberations, sign and date it, and advise the [clerk] [bailiff] that you are ready to return to the courtroom.