CHRISTOPHER A. NEDEAU (NO. 81297)
NOSSAMAN LLP
50 California Street
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438
Cnedeau@nossaman.com

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

KIRK C. JENKINS (NO. 177114)
SEDGWICK, DETERT, MORAN & ARNOLD LLP
One North Wacker Drive, Suite 4200
Chicago, IL 60606-2841
Telephone: (312) 641-9050
Facsimile: (312) 641-9530
Kirk.Jenkins@sdma.com

Attorneys for Defendants AU OPTRONICS CORPORATION and AU OPTRONICS CORPORATION AMERICA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AU OPTRONICS CORPORATION, et al., Defendants.	Case No. CR-09-0110 (SI) **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTIONS** Date: Tuesday, December 13, 2011 Time: 3:30 p.m. Courtroom: Hon. Susan Illston

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I. INTRODUCTION

The defendants have requested that the jury be instructed on the elements of the charged offense prior to trial, and they have submitted proposed instructions. (Dkt. 411.) The government opposes the defendants' instructions, and it has submitted different instructions. (Dkt. 418.) The divide between the parties' positions is vast but easily stated.

Because all the conspiratorial conduct with which the individual defendants in this case are charged took place in Taiwan, the defense contends that the government must prove elements in addition to those which must be proved in a domestic antitrust case. The government contends that the Court should give the same instructions on the elements of a Sherman Act violation that would be in order if the defendants were accused of conspiring to fix prices at meetings held in San Francisco. The Court will not be called upon to decide a more important issue during the course of this case, as inadequate instructions on the elements of the charged offense would void any judgment of conviction returned by the jury. Defendants submit this memorandum in further support of their proposed instructions and in opposition to the government's instructions.

First, to the extent that the government continues to contend that the Federal Trade Antitrust Improvements Act (FTAIA) exceptions need not be submitted to the jury, that contention is wrong and has already been rejected by this Court's own ruling in the parallel civil proceedings. Second, the government's proposed instructions on the import trade exception are legally incorrect, and the government's proposed instructions on the domestic injury exception may not be given since the government failed to plead that exception in the indictment. Third, the defendants are entitled to an instruction on intent under *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

II. THE NECESSITY OF PRETRIAL DETERMINATION

As a procedural matter, the government suggests that this Court need not instruct on the elements of the FTAIA or *Hartford Fire* prior to trial. The government argues first that this Court has already concluded that there are no such elements of the offense, and in the alternative, it argues that if the issue remains open, it should not be settled until the end of trial. The former contention is false, and the latter is makes no sense.

A. This Court's Prior Ruling Did Not Determine the Elements of the Offense

The defendants request jury instructions describing the elements of the charged offense, including elements based on the FTAIA and *Hartford Fire/Nippon Paper*. The government opposes any such instruction, in part because it says that this Court "has already concluded that neither the FTAIA nor that test apply to the facts of this case." (Govt. Opp. at 2.) That is incorrect. In fact, in the parallel civil proceedings, this Court has already endorsed much of the defendants' position.

1. The Scope of the April 18 Order

With respect to the FTAIA, this Court never indicated that it does not apply to this case. Rather, in its April 18 Order denying the defendants' motion to dismiss for the government's failure to adequately plead the elements of the offense, this Court "conclude[d] that the FTAIA does not require dismissal of the superseding indictment." (April 18, 2011 Order (Dkt. 287) at 7.) That ruling was based on the sufficiency of the allegation in the indictment. This Court determined "that the criminal charges alleged in the indictment are based at least in part on conduct involving 'import trade or import commerce,'" and thus that the exclusionary rule of the FTAIA was "inapplicable to such import activity." (*Id*.) Similarly, with respect to *Hartford Fire/Nippon*, while this Court indicated that the "concerns raised in *Nippon*" were not present in this case, the core rationale for this Court's ruling was that the *allegations* of a substantial and intended effect were sufficient. (*Id*. at 4-5.)

But allegations are not findings. Sufficiency of the allegations aside, the defendants dispute as a factual matter (among other things) that their conduct involved "import trade or commerce." This Court never suggested that the defendants could be found guilty *regardless* of whether their conduct involved "import trade or commerce." That factual dispute must be resolved at trial. The defendants may not be found guilty without a *factual finding* that their conduct involved "import trade or commerce." They similarly may not be found guilty without a *factual finding* that their conduct had a "substantial and intended effect" on domestic commerce Those factual findings must be made by the petite jury, subject to the beyond a reasonable doubt standard. This Court's April 18 Order did not rule to the contrary.

2. The Intervening Civil Ruling

Moreover, in the intervening months, this Court has itself recognized that the limitations of the FTAIA are substantive elements, rather than merely "jurisdictional" limitations, as the government had argued.[1] Relying on the recent decisions in *Animal Science Products, Inc. v. China Minmetals Corp*., 654 F.3d 462 (3d Cir. 2011); *Minn-Chem, Incorporated v. Agrium Inco*.; 657 F.3d 650 (7th Cir. 2011),[2] this Court held that "the FTAIA's language must be interpreted as imposing a substantive merits limitation rather than a jurisdictional bar." *In re TFT-LCD (Flat Panel) Antitrust Litigation*, --- F.Supp.2d ----, 2011 WL 4634031 (N.D. Cal. Oct. 5, 2011) (quoting *Animal Science*). In the civil context, that determination required this Court to address FTAIA issues under the Rule 56 summary judgment standard rather than the Rule 12(b)(1) standard. *See id*. at *5. In the criminal context, that determination means that FTAIA findings are subject to the rule of *Apprendi*.

The defendants' FTAIA argument is straightforward, and it follows directly from this Court ruling in the civil proceedings. This case involves "trade or commerce... with foreign nations." 15 U.S.C. § 6a; *see also In re TFT-LCD Antitrust Litigation*, 2011 WL 4634031 at *2-3 (applying the FTAIA to the parallel civil litigation). Under the FTAIA, such a case may

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[1] Indeed, contrary to its previous arguments, the government now essentially concedes this point. (Opp. at 4 n.2.) The government appears to argue, however, that because the indictment alleged at least one domestic act in furtherance of the conspiracy, the FTAIA does not apply. (*Id*. at 3-4.) That argument again conflates jurisdiction and merits. No one disputes that the government alleged at least one domestic act sufficient to give this court *jurisdiction*. Rather, the dispute is about whether one of the FTAIA exceptions applies, and that is a dispute about the *merits*.

[2] Rehearing was sought in *Minn Chem* on the ground, inter alia, that the decision failed to resolve the issue of whether the FTAIA created a jurisdictional requirement or a substantive element of a Sherman act offense. Last Friday, December 2nd, the Circuit voted to hear the matter en banc.

proceed only if one of the exceptions applies. As this Court has already held, those exceptions go to the "substantive merits"—i.e., to the substantive scope of liability. The same is true of the *Hartford Fire* limitation. For the purposes of *Apprendi* doctrine, therefore, these limitations are elements of the offense.

B. Instructions on The Elements of the Offense Should be Settled Prior to Trial

The government urges this Court to defer ruling on the applicability of the FTAIA and *Hartford Fire* until the end of trial. It argues for a bare-bones instruction at the outset, and it suggests that this Court could instruct on additional elements later if warranted. (Opp. at 6.) Such a procedure would make little sense. Pretrial clarification is necessary for several reasons.

First, the defendants have a constitutional right to prepare a defense, and they cannot effectively do so unless they know what substantive elements the government will attempt to prove at trial. *See Gautt v. Lewis*, 489 F.3d 993, 1002-04 (9th Cir. 2008). *Second*, neither the parties nor this Court can effectively determine what evidence will be admissible at trial without first determining what the substantive elements of the offense are. The probative value of evidence necessarily depends on the substantive law at issue. *See* 1 Mueller & Kirkpatrick, *Federal Evidence* § 4:2 (3d ed. 2007) ("Of course the substantive law is the foundational reference that helps determine what facts are of consequence to the determination of a suit."). *Third*, giving instructions at the close of the evidence regarding the elements of the offense different from those given before opening statements would unnecessarily confuse the jury. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 986-88 (9th Cir. 2002) (reversing a verdict where the trial court attempted to replace an initial faulty instruction with a subsequent instruction, causing juror confusion).

In short, the elements of the offense are what they are. Nothing would be gained and much would be lost by deferring resolution of these issues until the end of trial.

III. THE FTAIA ELEMENTS

The FTAIA generally bars extraterritorial application of the Sherman Act. It states that foreign conduct may be reached only if it comes within one of two exceptions: (1) the import trade exception, or (2) the domestic injury exception. *See* 15 U.S.C. § 6a. As to the import trade

exception, the defendants' proposed instructions are taken directly from case law interpreting the FTAIA, while the government's proposed instructions reflect a much broader view of the exception that has been squarely rejected by the courts that have considered it. As to the domestic injury exception, it cannot be applied in this case because the government failed to plead that theory in the indictment. In any event, the government's proposed instructions on the domestic injury exception are faulty.

A. The Defendants' Proposed Instruction Correctly Describes the "Import Trade or Commerce" Exception

The jury will be required to settle the factual dispute between the parties about whether the defendants' alleged conduct fits within the "import trade or commerce" exception to the FTAIA. In order to settle that dispute, the jury will need to be instructed on the meaning of "import trade or commerce." The defendants fully agree with the government that this is a complex antitrust case, and the "abstract legal principles" involved will not be "self-explanatory to a lay jury." (Opp. at 13 (quoting *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1398 (9th Cir. 1984)). Put differently, "import trade or commerce" is a legal term of art that requires further definition in light of controlling case law.

The defendants' proposed instruction correctly defines that term as it has been interpreted by courts. Indeed, the relevant portions of the defendants' proposed instruction to which the government objects are taken virtually *verbatim* from circuit court opinions interpreting the import trade exception.

First, the defendants' proposed instruction requires the jury to find that the defendants' conduct was "was directed at the United States import market." That language is taken directly from Second, Third, and Seventh Circuit case law. "[T]he relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market.'" *Animal Science*, 654 F.3d at 470 (quoting *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) (quoting *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002))); *accord Minn-Chem*, 657 F.3d at 661 ("[T]he relevant inquiry under the import-commerce exception is whether the defendants' alleged anticompetitive behavior was directed at an import market.")

(internal quotation marks omitted).

Second, the defendants' proposed instruction states that "It is not sufficient, without more, for the government to establish that the defendants were engaged in the United States import market." That language is once again squarely based on case law. *See Minn-Chem*, 657 F.3d at 661 ("Contrary to what the district court seemed to think, it is not enough that the defendants are engaged in the U.S. import market, though that may be relevant to the analysis.").

Third, the defendants' proposed instruction clarifies that it is not sufficient for the government to prove "global anticompetitive behavior involving products that were eventually imported into the United States." Once again, *Minn-Chem* provides the basis for that distinction. *Id*. at 660 ("The court reasoned that because the defendants import potash into the United States and were generally accused of conspiring to fix the price of potash globally, there was a sufficiently 'tight nexus between the alleged illegal conduct and [d]efendants' import activities . . . to conclude that the former 'involved' the latter.' This was error.").

Fourth, the defendants' proposed instruction requires the jury to find "that the defendants' anticompetitive conduct targeted United States import goods." Once again, that language is taken directly from case law. *See Animal Science*, 654 F.3d at 470 ("[T]he import trade or commerce exception requires that the defendants' conduct target import goods or services."); *Minn-Chem*, 657 F.3d at 661 (same)

The government offers a barrage of arguments why the defendants' proposed language is wrong and misleading and confusing—and wrong as a policy matter, because it would "turn upside-down the U.S. antitrust laws' concern for American consumers, and not foreign producers." (Opp. at 13.) But in reality, the government's quarrels are not so much with the defendants' proposed language. Rather, the government real quarrel is with the substantive holdings of circuit cases like *Animal Science* and *Minn-Chem*. What the government asks this Court to do is reject the holdings of those cases, and adopt instead a broad definition of the "import trade or commerce" exception.[3] That broad interpretation runs counter to weight of case

[3] For example, the government relies largely on Judge Adelman's ruling in *Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, 753 F. Supp. 2d 792, 795 (E.D. Wis. 2010). That ruling

law stating that the import trade exception "must be given a relatively strict construction." *Animal Science*, 654 F.3d at 470 (internal quotation marks omitted).

The government's alternate instruction places into high relief its disagreement with *Animal Science* and *Minn-Chem*. The government's instruction states that the defendants may be found guilty if they "fix[ed] the price of TFT-LCD panels sold in the United States or for delivery to the United States." (Opp. at 7.) The government's instruction states, in other words, that a foreign agreement to fix prices of products that eventually, through the flow of stream of commerce, arrive in the United States constitutes "import trade or commerce." And yet that is precisely the legal proposition that *Minn-Chem*, *Animal Science*, *Turicentro*, and *Kruman* reject. Under the government's view, a foreign company that does any *direct or indirect* import business, regardless of impact, could be held liable under the Sherman Act. The government's view "would produce the very interference with foreign economic activity that the FTAIA seeks to prevent." *Minn-Chem*, 657 F.3d at 661 (citing *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 161 (2004)).

Admittedly, this Court is not formally bound by the rulings in those cases, because they have not yet been adopted by the Ninth Circuit. But there can be no doubt that the great weight of authority supports the defendants' narrower view of the import trade exception. Tellingly, while the defendants' proposed instruction closely tracks the language of several leading cases, the government can cite no case law endorsing its proposed instruction. The government seeks to wager months of the Court's time, and as well as the enormous resources all the parties involved must expend on the trial on this important action, on a losing legal proposition

B. Because It Failed to Plead the Domestic Injury Exception, The Government May Not Rely on That Theory at Trial

The government argues that in addition to instructing on import trade exception, this Court should also instruct on the domestic injury exception as an alternate basis of guilt. But that theory was never presented to the grand jury, so it may not be presented to the petite jury.

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represents a broader view of the scope of the "import trade or commerce" exception. It is doubtful, however, whether it remains good law even within the Seventh Circuit.

In their motion to dismiss the indictment, the defendants argued that the indictment had failed to allege that the defendants' conduct had a direct or reasonably foreseeable effect on domestic commerce. The defendants argued, in other words, that the government had failed to allege facts sufficient for application of the domestic injury exception. In its opposition to the motion to dismiss, the government did not dispute that point. Rather, it simply claimed that it was not required to allege any facts under the FTAIA, since the FTAIA is purely jurisdictional. (Dkt. 281 at 6.) This Court, in its April 18 Order, never suggested that the government had sufficiently pleaded the domestic injury exception. Rather, this Court relied solely on the sufficiency of allegations as to the import trade or commerce exception.

The indictment does not allege the elements of the domestic injury exception. Under the Fifth Amendment's Grand Jury Clause, a defendant may not be convicted on a factual theory of liability different than one on which he was indicted, even if that uncharged theory is supported by the evidence. *Stirone v. United States*, 361 U.S. 212 (1960); *see also United States v. Adamson*, 291 F.3d 606, 614-16 (9th Cir. 2002). An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them. In *United States v. Shipsey,* 190 F.3d 1081, 1085-88 (9th Cir. 1999), for example, the Ninth Circuit reversed a conviction because the trial court allowed the government to present a different theory in the petite jury instructions than that charged in indictment. Likewise, in this case, the government cannot present a different theory to the petite jury than it did to the grand jury. By failing to allege the domestic injury exception, the government has waived reliance on that theory.

C. The Government's Proposed Instruction on the Domestic Injury Exception is Wrong as a Matter of Law

Even if the government could rely on the domestic injury exception, the instruction it proposes is legally incorrect. The domestic injury exception to the FTAIA has three basic elements: (1) direct, (2) substantial, and (3) reasonably foreseeable. *See* 15 U.S.C. § 6a(1). The government's proposed instruction describes only the third. For the second element, the government replaces the statutory adjective "substantial" with a watered down double negative:

"not insignificant." Worse yet, the government's proposed instruction eliminates the "direct" element altogether. If a domestic injury instruction is given, all three elements must be properly defined for the jury.

As for the required showing of a direct effect, the government takes the extraordinary position that no instruction is required: "The straightforward facts of this case . . . eliminates [sic] the need to instruct the jury on the meaning of directness using abstract legal principles." (Opp. at 16.) The government essentially argues, in other words, that because the direct effect is so obvious, the jury need not make a factual finding on that element. By that logic, the Court could dispense with instructing on the elements of conspiracy because the government no doubt believes "the straightforward facts of this case" render those instructions unnecessary as well. Needless to say, the defendants dispute the government's factual assertions of directness, and the defendants plan to present contrary evidence at trial. For the purposes of this motion, however, it is enough to say that the government's proposal violates the rule of *Apprendi*. *See also United States v. Gaudin*, 515 U.S. 506, 511-15 (1995) (holding that juries, not judges, must make the determination on the ultimate facts necessary for guilt). In short, the jury must make a finding on directness, and it therefore must be instructed on the legal meaning of "direct effect" under the FTAIA.

The government suggests that finding an intermediate, specific fact can substitute for an ultimate finding of direct effect. The government's proposed instruction would only require proof of the "intermediate evidentiary fact" that "the price-fixed panels were incorporated into finished products sold in or for delivery to the United States and thereby affected U.S. commerce in those finished products." (Opp. at 16; see also Opp. at 7.) The government suggests that if the jury makes that intermediate finding, then the court can make the ultimate finding on directness as a matter of law. But that is precisely what *Gaudin* forbids. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." 515 U.S. at 514. The jury must ultimately apply the law to the facts—it must find a direct effect.

The jury should therefore be instructed on the legal meaning of "direct effect." The Ninth

Circuit has already defined the meaning of the term "direct" in the FTAIA. "[A]n effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). Put differently, "direct" means "proceeding from one point to another in time or space without deviation or interruption." *Id.* (quoting *Webster's Third New Int'l Dictionary* 640 (1982)). "An effect cannot be 'direct' where it depends on . . . uncertain intervening developments." *Id.* at 681. Any instruction should incorporate these definitions.

The jury should also be instructed on the meaning of the term "substantial." Once again, case law provides the best source of definition. "A domestic effect may be 'substantial' if it involves a sufficient volume of US commerce and is not a mere 'spillover effect.'" *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007). Courts have also stated that "ripple effects" are insufficient. *Minn-Chem*, 657 F.3d at 663 (quoting *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 561 (D. Del. 2006)). Again, an instruction on the domestic injury exception should incorporate these definitions.

Thus, should this Court determine that an instruction on the domestic injury exception is appropriate, the defendants propose the following instruction:

> [Four,] that the defendants' conduct had a direct, substantial, and reasonably foreseeable effect on United States commerce.
>
> "Direct" means proceeding from one point to another in time or space without deviation or interruption. An effect is direct if it follows as an immediate consequence of the defendant's activity. An effect is not direct where it depends on uncertain intervening developments.
>
> An effect is substantial if it involved a sufficient volume of United States commerce. If you find that the defendants conduct had only spillover or ripple effects in the United States, you must find the defendants not guilty.[4]

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[4] Finally, if the jury is instructed on the domestic injury exception as an alternative to the import trade exception, the jury must also be instructed that it must find one of the two exceptions unanimously. The two exceptions are two different theories of guilt, not merely two different "means" of accomplishing a single element. *See Richardson v. United States*, 526 U.S. 813, 817 (1999); *Schad v. Arizona*, 501 U.S. 624, 631 (1991).

IV. THE *HARTFORD FIRE* ELEMENT

The government distorts the background and holding of *Hartford Fire*, relying on a bizarre argument about the various questions presented by the parties in their certiorari petitions. The plaintiffs in *Hartford Fire* alleged that domestic insurance companies and foreign reinsurers had acted in concert to restrict the coverage of liability insurance. 509 U.S. 764, 770 (1993). The Supreme Court granted certiorari to address several distinct questions. The domestic insurers presented certain questions, which are irrelevant to this case. *Id*. at 779 n.8. The foreign reinsurers presented a question about the extraterritorial reach of the Sherman Act. *Id*. at 779 n.9. In rejecting the foreign defendants' argument, the Supreme Court stated that the Sherman Act reaches foreign conduct that has a substantial and intended effect on domestic commerce. *Id*. at 796.[5]

Thus, in *Hartford Fire*, while one of the legal questions was raised only by foreign defendants, the case as a whole (i.e., the overall allegations made by the plaintiffs) was based primarily on domestic conduct. By contrast, this case as a whole (i.e., the overall allegations made by the government), is based primarily on foreign conduct. Thus, it is even more important in this case that the jury be required to find a substantial and intended effect on domestic commerce.

The government's argument appears to suggest that the relevant frame of analysis is not the *case as a whole* but rather *the conduct of each individual defendant*. Even if that were true, then at least some of the individuals in this case would be entitled to a *Hartford Fire* instruction. The case in *Hartford Fire* included some domestic defendants and some foreign defendants. This case also includes a domestic defendant (namely AUO-America) and foreign ones—the five individual defendants and AUO. In *Hartford Fire*, the Supreme Court held that the conduct of the foreign defendants could only be reached under the Sherman Act if it had a substantial and intended effect on United States commerce. At a minimum, that would mean that the individual

[5] *Nippon Paper* reiterated the same point: Foreign defendants may be subjected to Sherman Act liability only when their acts have a substantial and intended effect on commerce. In that case, the parties disputed whether the defendants' conduct was "wholly foreign" or not. The First Circuit held that it did not matter—*Hartford Fire* applied either way.

foreign defendants in this case are entitled to an instruction that their conduct can only be reached if it had a substantial and intended effect on United States commerce.

Even assuming the truth of the government's allegations, several of the individual defendants in this case committed no anticompetitive act whatsoever in the United States. Under the government's own view of *Hartford Fire*, their conduct can be reached only if it had a substantial and intended effect on domestic commerce. At a minimum, those individuals are entitled to an instruction to that effect.

CONCLUSION

For the reasons stated above and in the defendants' motion, the Court should preinstruct the jury as requested by the defendants.

DATED: December 6, 2011 NOSSAMAN LLP

By: /s/ Christopher A. Nedeau
Christopher A. Nedeau (No. 81297)

50 California Street
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438

Attorneys for defendants AU OPTRONICS CORPORATION and AU OPTRONICS CORPORATION AMERICA