PETER K. HUSTON (Cal. Bar No. 150058)
MICHAEL L. SCOTT (Cal. Bar No. 165452)
HEATHER S. TEWKSBURY (Cal. Bar No. 222202)
E. KATE PATCHEN (N.Y. Reg. 41204634)
LIDIA MAHER (Cal. Bar No. 222253)
CHRISTOPHER M. RIES (Ohio Bar No. 0080028)
Antitrust Division
United States Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102-3478
Telephone: (415) 436-6660
Facsimile: (415) 436-6687
peter.huston@usdoj.gov
Attorneys for the United States

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>v.<br><br>AU OPTRONICS CORPORATION;<br>AU OPTRONICS CORPORATION AMERICA;<br>HSUAN BIN CHEN, aka H.B. CHEN;<br>HUI HSIUNG, aka KUMA;<br>LAI JUH CHEN aka L. J. CHEN;<br>SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG;<br>BORLONG BAI, aka RICHARD BAI;<br>TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE;<br>CHENG YUAN LIN, aka C.Y. LIN;<br>WEN JUN CHENG, aka TONY CHENG; and<br>DUK MO KOO,<br><br>Defendants. | No. CR-09-0110 SI<br><br>UNITED STATES' PROPOSED JURY INSTRUCTION REGARDING 18 U.S.C. § 3571(d); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PROPOSED INSTRUCTION<br><br>Pretrial Conf. Date: December 13, 2011<br>Time: 3:30 p.m.<br>Judge: Hon. Susan Illston<br>Place: Courtroom 10, 19th Floor |

## INTRODUCTION

The superseding indictment alleges that defendants entered into and engaged in a "conspiracy to suppress and eliminate competition by fixing the prices of thin-film transistor liquid crystal display panels ('TFT-LCD') in the United States and elsewhere" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and that the conspirators derived gross gains of at least $500 million from the conspiracy. Superseding Indictment ¶¶ 2, 23. Under the Alternative Fines Act, 18 U.S.C. § 3571(d), which provides an alternative statutory maximum fine (but not necessarily the fine *actually* imposed) of twice the gross gain from the offense, proof of the latter allegation, or any gross gain in excess of $50 million, would provide a statutory maximum fine above the $100 million maximum provided by the Sherman Act, 15 U.S.C. § 1. On July 18, 2011, the Court held that the government must prove such a gain beyond a reasonable doubt to the jury. (7/18/11 Order, Dkt. 356). Accordingly, unless the Court bifurcates the trial, leaving the gain determination for a second phase, the government requests that, when the Court gives the jury preliminary instructions on the elements of the Sherman Act offense, it also give the instruction proposed below to inform the jury why it will hear effects evidence and what the government must prove for purposes of the Alternative Fines Act.[1]

Specifically, the Court should instruct the jurors that, while no proof of gain is required to find the defendants guilty, the jurors will hear evidence about the gross gain because, if the jurors find either corporate defendant guilty, they will be asked if there was a gross gain from the offense and, if so, what that gain was. The Court should further instruct the jurors that the gross gain from the conspiracy is the additional revenue to all participants in the conspiracy from the affected sales of TFT-LCD panels wherever they were sold, without any reduction for taxes or costs associated with the sales of those products. The proposed instruction correctly states what constitutes gross gain under the Alternative Fines Act, avoids juror confusion about the relevance

[1] From the expert disclosures exchanged by the parties, it appears there may be some disagreement about what the gross gain for purposes of 18 U.S.C. § 3571(d) includes. The parties have agreed to brief the issue, through this motion, in time for the Court to hear argument at the December 13th pretrial conference.

and purpose of effects evidence, and informs the jurors what they will ultimately be asked to determine.

**THE PROPOSED INSTRUCTION**

The government proposes that the Court give the following instruction at the outset of the trial after any preliminary instruction on the elements of the offense:

INSTRUCTION NO. __ GROSS PECUNIARY GAIN

The government does not have to prove that anyone derived monetary or economic gain from the alleged conspiracy or that the conspiracy caused any monetary or economic harm in order for you to find a defendant guilty of the offense. To find a defendant guilty, all that you must find is that the government has proven the elements of the offense, which I previously described.

But you will hear evidence during the course of the trial about the gain derived from the conspiracy. This evidence will be presented because, if you find one or both of the corporate defendants, AUO and AUOA, guilty following the presentation of evidence and your deliberations, you will be asked to determine whether the government has proven beyond a reasonable doubt that any of the defendants or other participants in the conspiracy derived monetary or economic gain from the conspiracy. If you find that any of the participants derived such gain, you will then make findings regarding the total gross gain from the conspiracy.

In determining the gross gain from the conspiracy, you should total the gross gains to the defendants and other participants in the conspiracy from affected sales of TFT-LCD panels anywhere in the world. Gross gain is the additional revenue to the conspirators from the conspiracy. That total gain should not be reduced by any taxes or costs associated with the sales of those products.

**ARGUMENT**

The above instruction is appropriate and necessary for the jury to understand the law and to put the effects evidence it will hear in proper perspective. The superseding indictment alleges a single offense: a price-fixing conspiracy in violation of Section 1 of the Sherman Act. Consideration of effects evidence is unnecessary to the determination of whether defendants committed the charged offense because "[u]nder the Sherman Act, price fixing is per se illegal." *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992). And so, "it does not matter . . . whether [the prices] were too high or low; reasonable or unreasonable; fair or unfair." *Id.* Rather, "[s]ince in a price-fixing conspiracy the conduct is illegal per se, further inquiry on the issues of intent or the anti-competitive effect is not required." *United States v. Society of Indep. Gasoline Marketers of America*, 624 F.2d 461, 465 (4th Cir. 1981); *see also Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128, 133 (9th Cir. 1960) (explaining that the fact that competitors' price-fixing plan "did not ultimately succeed in accomplishing what the parties anticipated" does not "absolve them from their violation of the law"). The offense is committed the moment the conspirators agreed to fix prices because the Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash v. United States*, 229 U.S. 373, 378 (1913). Thus, proof of the agreement's effect, if any, is unnecessary for the jury to find the defendants guilty.

But because the government will rely on the Alternative Fines Act to set a statutory maximum fine for the two corporate defendants, AU Optronics Corporation (AUO) and AU Optronics Corporation America (AUOA), the government will offer evidence of the participants' gain from the offense in its case-in-chief.[2] Absent the proposed instruction, the jury will likely be confused about this effects evidence and mistakenly believe that proof of the conspiracy's effect is relevant to its determination of whether the defendants violated the Sherman Act.

The government's proposed instruction is fully supported by the language of the Alternative Fines Act. That statute provides:

[2] In a bifurcated trial, however, the government would offer this evidence in a second phase only if the jury finds one or both of the corporate defendants guilty in the first phase.

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss . . . .

18 U.S.C. § 3571 (d). The proposed instruction directs the jury to find the total gain derived by the defendants and their co-conspirators from their price-fixing conspiracy regardless of where the product was sold.

Any finding of gain or loss under Section 3571(d) must include the gain to all members of the conspiracy, and not merely these defendants, because the statute provides the maximum fine must be based on twice the gain "from the offense," not gain to the defendant. *Id.* The use of "any person" in the conditional clause reinforces the conclusion that "gain from the offense" is not limited to the defendants' gain because it makes clear that there can be a relevant "gain from the offense" even where the defendants themselves gained nothing. Section 3571(d) amended prior law which had "authorize[d] a fine, notwithstanding the otherwise applicable fine limit, if the *defendant* derives pecuniary gain from the offense or if the offense results in pecuniary loss to another person." H.R. Rep. No. 100-390, at 6 (1987), reprinted in 1987 U.S.C.C.A.N. 2137, 2142 (emphasis added). Section 3571(d) specifically "authorize[d] the court to impose such an alternative fine if a *person* other than the defendant derives pecuniary gain from the offense." *Id.* (emphasis added). "Thus, if the defendant knows or intends that his conduct will benefit another person financially, the court can measure the fine imposed based on twice that benefit." *Id.*; *see United States v. Andreas*, 1999 WL 116218, at *2 (N.D. Ill. 1999) ("The subsection (d) clearly and unambiguously states that '[i]f *any person* derived pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant.' Congress amended subsection (d) to ensure that criminal defendants like Andreas would be liable for their conduct even if they intended to enrich a third party like ADM.") (emphasis in original). Thus, the plain language of the statute, as well as its legislative history, make clear that the gross gain for purposes of Section 3571(d) must include the gain to the defendants *and* their co-conspirators.

Section 3571(d) contrasts with the language used in the Sentencing Guideline applicable to price fixing, which refers to the volume of affected commerce "attributable to the defendant." U.S.S.G. § 2R1.1(b)(2). Nothing in Section 3571(d) suggests a similar limitation. In any event, the gross gain from the offense is used only to calculate the statutory maximum fine. In determining the actual fine imposed, the Court must consider the factors outlined in 18 U.S.C. §§ 3553(a) and 3572(a), as well as the fine calculation set forth in the advisory Sentencing Guidelines, which is based on only the defendant's volume of affected commerce. Moreover, there is nothing anomalous about considering all the conspirators' gains in determining the statutory maximum fine because "a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all.'" *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940). Thus, "[s]o long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." *Salinas v. United States*, 522 U.S. 52, 64 (1997).

Similarly, the gross gain under the Alternative Fines Act includes gains derived by the conspirators from the conspiracy regardless of where the price-fixed products were sold. Section 3571(d) provides that the maximum fine may be based on the gain derived "from the offense." Here, defendants are charged with a single count of price fixing in violation of Section 1 of the Sherman Act. Because the agreement is the offense under the Sherman Act, all gains derived from the agreement must be included in the alternative fine calculation. In this case, the price-fixing agreement enabled defendants and their co-conspirators to charge inflated prices for TFT-LCD panels sold throughout the world, but nothing in Section 3571(d) suggests that the fine should be based on some limited portion of these ill-gotten gains. To the contrary, the conspirators' gain "from the offense" includes overcharges on all of their price-fixed sales.

Finally, the conspirators' gain should not be offset by any losses or other costs associated with the conspiracy because the statute provides the fine should be based on "gross gain" or "gross loss." *See United States v. Bardacco*, 954 F.2d 928, 938 (3rd Cir. 1992) (rejecting an argument that gross gain includes net value of the benefit received as a result of fraud rather than the revenues procured as a result of fraud); *United States v. BP Products North America, Inc.*, 610 F. Supp. 2d 655, 683 (S.D. Tex. 2009) (commenting that "[g]ross pecuniary gain or loss

simply means that the court is not to reduce the [gain or loss] amounts to a net sum"); *United States v. Cortina*, 733 F. Supp. 1195, 1204 (N.D. Ill. 1990) (interpreting "gross pecuniary gain" under then U.S.S.G. § 5E1.2 to indicate that substantial revenues by gambling enterprise should not be offset by any losses that might have also accrued from illegal activity). Accordingly, the government's proposed instruction directs the jury to determine the "gross gain" by totaling the additional revenue to all the conspirators on affected sales without regard to any taxes or costs. The instruction is fully supported by the plain language of the statute.

**CONCLUSION**

For the reasons set forth above, the United States respectfully requests that the Court give the proposed jury instruction on 18 U.S.C. § 3571(d) at the outset of the case.

Dated: November 10, 2011

Respectfully submitted,

*/s/ Peter K. Huston*
Peter K. Huston
Michael L. Scott
Heather S. Tewksbury
E. Kate Patchen
Lidia Maher
Christopher M. Ries
Antitrust Division
U.S. Department of Justice