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8 Attorneys for the United States

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 UNITED STATES OF AMERICA) No. CR-09-0110 (SI)
13)
14 v.) UNITED STATES' PROPOSED
JURY INSTRUCTIONS
15)
AU OPTRONICS CORPORATION;) Pretrial Conf.: December 13, 2011
16 AU OPTRONICS CORPORATION AMERICA;) Time: 3:30 p.m.
HSUAN BIN CHEN, aka H.B. CHEN;) Court: Hon. Susan Illston
17 HUIHSIUNG, aka KUMA;) Place: Courtroom 10, 19th Floor
LAI-JUH CHEN, aka L.J. CHEN;)
18 SHIU LUNG LEUNG, aka CHAO-LUNG) Trial Date: January 9, 2012
LIANG and STEVEN LEUNG;)
19 BORLONG BAI, aka RICHARD BAI;)
TSANNRONG LEE, aka TSAN-JUNG LEE)
20 and HUBERT LEE;)
CHENG YUAN LIN, aka C.Y. LIN;)
21 WEN JUN CHENG, aka TONY CHENG; and)
DUK MO KOO,)
22 Defendants.)
23)

1 In addition to the Court’s standard instructions, the United States hereby requests the
2 Court to instruct the jury as set forth in the attached proposed instructions.

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4 DATED: _____

Respectfully submitted,

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Peter K. Huston

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INSTRUCTION NO. 1

THE CHARGE PRESUMPTION OF INNOCENCE

(PRELIMINARY INSTRUCTION)

This is a criminal case brought by the United States government. The government charges the defendants with violating Section 1 of the Sherman Act. The charge against the defendants is contained in the Indictment. The Indictment is simply the description of the charge made by the government against the defendants. The Indictment is not evidence and does not prove anything. The Indictment charges that, beginning on or about September 14, 2001, representatives from companies that manufacture thin-film transistor liquid crystal display panels (“TFT-LCDs”), including defendant AU Optronics Corporation, a Taiwan corporation, engaged in a conspiracy to fix prices of TFT-LCDs in the United States and elsewhere. The Indictment charges that AU Optronics Corporation America, a wholly owned subsidiary of AU Optronics Corporation incorporated in California, and current or former AU Optronics Corporation employees Hsuan Bin Chen, Hui Hsiung, Lai Juh Chen, Shiu Lung Leung, and Tsannrong Lee later joined and participated in the conspiracy, which continued into 2006. The Indictment charges that the conspiracy violated Title 15 of the United States Code, Section 1, known as Section 1 of the Sherman Antitrust Act. The defendants have pleaded not guilty to the charges and are presumed innocent unless and until the government proves the defendants guilty beyond a reasonable doubt. In addition, the defendants have the right to remain silent and never have to prove innocence or present any evidence.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 1.2 (2010).

1 INSTRUCTION NO. 2

2 ELEMENTS OF THE OFFENSE

3 (PRELIMINARY INSTRUCTION)

4 In order to help you follow the evidence, I will now give you a brief summary of the
5 elements of the crime which the government must prove to make its case:

6 *One*, that the conspiracy described in the Indictment existed at or about the time alleged;

7 *Two*, that the defendants knowingly became members of the conspiracy;

8 and

9 *Three*, that the conspiracy described in the Indictment either affected interstate or foreign
10 commerce in goods and services, or occurred within the flow of interstate or foreign commerce
11 in goods and services.

12 These instructions are preliminary, and the instructions I will give at the end of the case
13 will control.

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases* 47 (2009).

1 INSTRUCTION NO. 3

2 GROSS PECUNIARY GAIN

3 (PRELIMINARY INSTRUCTION)

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

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

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24 AUTHORITY: 18 U.S.C. § 3571(d).

INSTRUCTION NO. 4

JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

(PRELIMINARY INSTRUCTION)

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 written evidence is presented in another language, there will be an official court translation of the writing.

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 and 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 party based solely on the use of an interpreter to assist that witness or party.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 1.12 (2010).

INSTRUCTION NO. 5

CHARGE AGAINST DEFENDANTS NOT EVIDENCE PRESUMPTION OF
INNOCENCE BURDEN OF PROOF

The Indictment is not evidence. The defendants have each pleaded not guilty to the charge. A defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, a 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 beyond a reasonable doubt.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.2 (2010).

INSTRUCTION NO. 6

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.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may explain the water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

You should 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.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.8 (2010).

INSTRUCTION NO. 7

STIPULATIONS OF FACT

The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 2.4 (2010).

INSTRUCTION NO. 8

JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Some of the documents used during this trial are written in a language other than English, and some of the witnesses testified in a language other than English. The evidence you are to consider is only that provided through the official court interpreter or agreed-upon translations of documents. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translations and disregard any different meaning of the non-English words.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.19 (2010).

1 INSTRUCTION NO. 9

2 OPINION EVIDENCE, EXPERT WITNESS

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

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

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24 AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 4.14 (2010).

INSTRUCTION NO. 10

CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

During the trial certain charts and summaries were shown to you in order to help explain evidence in the case. These charts and summaries were not admitted in evidence and will not go in 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.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 4.15 (2010).

INSTRUCTION NO. 11

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.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 4.16 (2010).

INSTRUCTION NO. 12

SEPARATE CONSIDERATION OF SINGLE COUNT MULTIPLE DEFENDANTS

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All the instructions apply to each defendant unless a specific instruction states that it applies to only a specific defendant.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.12 (2010).

INSTRUCTION NO. 13

DEFENDANT'S DECISION [NOT] TO TESTIFY

[For defendants who do not testify]. A defendant in a criminal case has a constitutional right not to testify. You may not draw any inferences of any kind from the fact that _____ did not testify.

[For defendants who do testify] Defendant[s] _____ [has/have] testified. You should treat this testimony just as you would the testimony of any other witness.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* §§ 3.3-3.4 (2010).

INSTRUCTION NO. 14

PURPOSE OF SHERMAN ANTITRUST ACT

The purpose of the Sherman Act is to preserve and encourage free and unfettered competition in the marketplace by preventing unreasonable restraint of any business or industry, so that the consuming public may receive better goods and services at a lower cost.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 45 (2009).

1 INSTRUCTION NO. 15

2 PER SE VIOLATIONS OF THE ANTITRUST LAWS

3 The Sherman Act makes unlawful certain agreements that, because of their harmful
4 effect on competition and lack of any redeeming virtue, are conclusively presumed to be an
5 unreasonable restraint on trade and are always illegal, without inquiry about the precise harm
6 they have caused or the business excuse for their use. Included in this category of unlawful
7 agreements are agreements to fix prices.

8 Therefore, if you find that the conspiracy charged in the Indictment existed and that the
9 defendants were members of the conspiracy, you need not be concerned with whether the
10 agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if
11 any, done by it. It is not a defense that the parties may have acted with good motives, or may
12 have thought that what they were doing was legal, or that the conspiracy may have had some
13 good results. If there was, in fact, a conspiracy as charged, it was illegal.

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases 54* (2009); *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992).

INSTRUCTION NO. 16

PRICE FIXING

The Indictment charges the defendants with conspiring to fix prices. A conspiracy to fix prices is an agreement or mutual understanding between two or more competitors to fix, control, raise, lower, maintain, or stabilize the prices charged, or to be charged, for products or services.

The aim and result of every price-fixing agreement, if successful, is the elimination of one form of competition.

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

If you should find that the defendants entered into an agreement to fix prices, the fact that the defendants or their coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense. The agreement is the crime, even if it is never carried out.

If the conspiracy charged in the Indictment is proved, it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all competition. Nor is it a defense that the conspirators did not attempt to collude with all of their competitors. Similarly, the conspiracy is unlawful even if it did not extend to all products sold by the conspirators or did not affect all of their customers.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases 57* (2009).

1 INSTRUCTION NO. 17

2 ELEMENTS OF THE OFFENSE

3 In order to establish the offense of conspiracy to fix prices charged in the Indictment, the
4 government must prove each of the following elements beyond a reasonable doubt:

5 *One*, that the conspiracy described in the Indictment existed at or about the time alleged;

6 *Two*, that the defendants knowingly became members of the conspiracy; and

7 *Three*, that the conspiracy described in the Indictment either affected interstate or foreign
8 commerce in goods or services, or occurred within the flow of interstate or foreign commerce in
9 goods and services.

10 If you find from your consideration of all the evidence that each of these elements has
11 been proved beyond a reasonable doubt, then you should find the defendant guilty.

12 If, on the other hand, you find from your consideration of all of the evidence that any of
13 these elements has not been proved beyond a reasonable doubt, then you should find the
14 defendant not guilty.

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases 47* (2009).

INSTRUCTION NO. 18

SHERMAN ACT CONSPIRACY - PROOF OF OVERT ACT UNNECESSARY

The government does not have to prove that a defendant actually took some overt action to further or accomplish the alleged conspiracy or that the defendant actually fixed prices. What the antitrust laws condemn is the agreement or understanding itself. In other words, the mere agreement or understanding, whether formal or informal, to fix prices constitutes the offense, so it is not necessary for the government to prove that the alleged conspiracy was ever actually carried out or that its purpose was ever accomplished.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 69 (2009).

INSTRUCTION NO. 19

CONSPIRACY EXPLAINED

The type of relationship condemned by the Sherman Act as a conspiracy is often 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 of and in furtherance of the conspiracy. To create such a relationship, two or more persons must enter into an agreement or mutual understanding that they will act together for some unlawful purpose or to achieve a lawful purpose by unlawful means. It is the agreement to act together that constitutes the crime. Whether the agreement actually is carried out or whether it succeeds or fails does not matter.

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. The agreement itself may have been entirely unspoken. What the evidence must show in order to prove that a conspiracy existed is that the alleged members of the conspiracy in some way came to an agreement or mutual understanding to accomplish a common purpose.

Direct proof of a conspiracy may not be available. A conspiracy may, however, 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. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together and discussed common aims and interests, does not necessarily establish the existence of a conspiracy. If actions were taken independently by them, solely as a matter of individual business judgment,

1 without any agreement or mutual understanding among them, then there would be no
2 conspiracy.

3 A conspiracy may vary in its membership from time to time. It may be formed without
4 all parties coming to an agreement at the same time, knowing all the details of the agreement, or
5 knowing who all the other members are. It is not essential that all members acted exactly alike
6 or agreed to play any particular part in carrying out the agreement. The unlawful agreement may
7 be shown if the proof establishes that the parties knowingly worked together to accomplish a
8 common purpose.

9 In determining whether a conspiracy has been proved, you must view the evidence as a
10 whole and not piecemeal. You should consider the actions and statements of all the alleged
11 conspirators. The conspiracy may be inferred from all the circumstances and the actions and
12 statements of the participants. Acts that are by themselves wholly innocent acts may be part of
13 the sum of the acts that make up a conspiracy to restrain trade in violation of the Sherman Act.

14 The evidence does not have to establish that a defendant agreed to all the means or
15 methods set forth in the Indictment or that such means and methods were actually used. Nor
16 does the evidence have to show that all the persons alleged to have been members of the
17 conspiracy actually were members. What the evidence must show is that the conspiracy charged
18 existed at or about the time stated in the Indictment, and that the defendant knowingly became a
19 member of the conspiracy.

20 A conspiracy ends only when its purposes and objectives have been accomplished or all
21 the parties to the conspiracy abandon or terminate it.

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases* 49 (2009).

1 INSTRUCTION NO. 20

2 PERIOD OF CONSPIRACY

3 The Indictment charges that the alleged conspiracy began on or about September 14,
4 2001 and continued until on or about December 1, 2006. The government need not prove that
5 the conspiracy continued for the entire period charged in the Indictment. It is sufficient if the
6 government proves beyond a reasonable doubt that the conspiracy existed during or reasonably
7 near the time period alleged in the Indictment, and that the defendant joined the conspiracy
8 some time during the period alleged in the Indictment and continued to be a member to a time
9 within the period of the statute of limitations.

10 For purposes of this case, the statute of limitations period is from June 10, 2005 through
11 June 10, 2010.

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases* 87 (2009).

INSTRUCTION NO. 21

WITHDRAWAL

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

7 The defendant has the burden of coming forward with a preponderance of evidence that
8 he or it, in the case of the corporate defendants, withdrew from the conspiracy. To prove
9 something by a preponderance of the evidence is to prove that it is more likely true than not true.
10 This is a lesser standard than “beyond a reasonable doubt.” If you find that a defendant has met
11 the burden of coming forward with a preponderance of evidence that he or it withdrew from the
12 conspiracy, then the government must prove beyond a reasonable doubt that the defendant did
13 not withdraw from the conspiracy or did not withdraw from it before June 10, 2005.

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

20 Although a defendant who was a member of a conspiracy may withdraw from the
21 conspiracy, that defendant is still responsible with all other coconspirators for the illegal acts, if
22 any, committed by that defendant or by any other coconspirator while the defendant was a
23 member of the conspiracy, up until the time of the defendant’s withdrawal. If you should find in
24 this case that a defendant withdrew from the conspiracy, and that the defendant’s withdrawal

1 from the conspiracy took place before June 10, 2005, and that the defendant did not later re-
2 enter the conspiracy, you must find the defendant not guilty of the offense charged.

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AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 78 (2009).

INSTRUCTION NO. 22

IGNORANCE OF ANTITRUST LAWS NO DEFENSE

It is not necessary for the government to prove that the defendants knew that a particular act was a violation of law.

Thus, if you should find, beyond a reasonable doubt, from the evidence in the case that the conspiracy charged in the Indictment was knowingly formed and that a defendant knowingly became a member of the conspiracy, as charged, then the fact that the defendant may not have known his conduct was unlawful under the Sherman Act would not be a defense.

AUTHORITY: Devitt & Blackmar, *Federal Jury Practice and Instructions*, § 51A.17 (4th ed. Supp. 1995), and cases cited therein.

INSTRUCTION NO. 23

KNOWINGLY DEFINED

To act “knowingly” means that the defendant acted voluntarily and intentionally, and not because of a mistake, accident, or other innocent reason. Therefore, before you may convict a defendant, the evidence must establish that the defendant joined the conspiracy to fix prices of TFT-LCD panels with the intent to aid or advance the object or purpose of the conspiracy.

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.

But a person who knowingly joins an existing conspiracy, or participates in part of the conspiracy, with knowledge of the overall conspiracy, is just as responsible as if he had been one of the originators of the conspiracy or had participated in every part of it. Likewise, a person who knowingly directs another to implement the details of the conspiracy is just as responsible as if he participated in every part of it, including its origin.

If a defendant deliberately blinded himself, or closed his eyes, to the existence of the conspiracy that would otherwise have been obvious to him, you may infer that the defendant acted “knowingly” to further the conspiracy.

Your determination whether a defendant knowingly joined the conspiracy must be based solely on the actions of the defendant as established by the evidence. You should not consider what others may have said or done to join the conspiracy. Membership of a defendant in this

1 conspiracy must be established by evidence of his or its own conduct by what he or it said or
2 did.

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

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases 71-72 (2009)*.

INSTRUCTION NO. 24

INTERSTATE COMMERCE

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3 The third element of an offense prohibited by the Sherman Act is that the alleged
4 unlawful conduct must involve interstate trade or commerce. The government must prove
5 beyond a reasonable doubt that the conspiracy charged in the Indictment either affected
6 interstate or foreign commerce in goods and services, or occurred within the flow of interstate or
7 foreign commerce in goods and services.

8 The term “interstate commerce” includes transactions that move across state lines or that
9 are in a continuous flow of commerce from the commencement of their journey in one state
10 until their final destination in a different state. “Foreign commerce” means commerce or travel
11 between any part of the United States, including its territorial waters, and any other country,
12 including its territorial waters.

13 The conspiracy charged in the Indictment occurred in the flow of interstate commerce if
14 at least one defendant or one coconspirator, in carrying out the charged conspiracy, crossed state
15 lines, or transported the subject product across state lines or between any part of the United
16 States and any other country. If the conduct challenged in the Indictment involves transactions
17 that are in the flow of commerce, the interstate commerce element is satisfied and the size of
18 any such transaction is of no significance.

19 Although the government must prove beyond a reasonable doubt that the conspiracy
20 charged in the Indictment either affected interstate commerce or occurred within the flow of
21 interstate commerce, the government’s proof need not quantify or value any adverse impact of
22 the charged conspiracy or show that the charged conspiracy had any anticompetitive effect.

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1 Proof of interstate commerce as to one defendant or coconspirator in the conspiracy
2 charged in the Indictment satisfies the interstate commerce element as to every defendant.
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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases* 82 (2009).

1 INSTRUCTION NO. 25

2 VENUE

3 Before you can find a defendant guilty of committing the crime charged in the
4 Indictment, you must find by a preponderance of the evidence that, between September 14, 2001
5 and December 1, 2006, the conspiratorial agreement or some act in furtherance of the
6 conspiracy occurred in the Northern District of California. This district includes San Francisco,
7 San Mateo, Santa Clara, Alameda, Contra Costa, Marin, Sonoma, Napa, Del Norte, Humboldt,
8 Lake, Mendocino, Monterey, Santa Cruz, and San Benito counties.

9 To prove something by a preponderance of the evidence is to prove it is more likely true
10 than not true. This a lesser standard than “beyond a reasonable doubt.”

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases* 85 (2009).

INSTRUCTION NO. 26

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.

You have heard evidence during the course of the trial about the gain derived from the conspiracy. This evidence was presented because, if you find one or both of the corporate defendants, AU Optronics Corporation and AU Optronics Corporation America, guilty following the presentation of evidence and your deliberations, you must 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.

AUTHORITY: 18 U.S.C. § 3571(d); *United States v. Badaracco*, 954 F.2d 928, 938 (3d Cir. 1992) (using gross gain to measure loss was in keeping with Sentencing Guidelines); *United States v. BP Products N.A., Inc.*, 610 F. Supp. 2d 655, 683 (S.D. Tex. 2009) (gross gain should not be reduced to a net sum by deducting costs); *United States v. Cortina*, 733 F. Supp. 1195, 1204 (N.D. Ill. 1990) (basing Guidelines fine on gross pecuniary gain regardless of any losses).

INSTRUCTION NO. 27

CORPORATIONS

Two of the defendants are 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 or apparent 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 or apparent authority. If you conclude that any agent of a corporation, acting within the scope of employment or with actual or apparent 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 or apparent 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. Apparent authority is the authority that outsiders could reasonably assume the agent would have, judging from his position with the company, the responsibilities previously entrusted to him or his office, and the circumstances surrounding his past conduct.

To be acting within the scope of his employment or with actual or apparent authority, the agent first must have intended that his act would produce some benefit to the corporation. The

1 agent's acts or statements need not actually have resulted in any benefit to the corporation. As
2 long as the agent intended to benefit the corporation in some manner, the fact that he may also
3 have acted for other reasons as well, such as for his own personal benefit, is of no consequence.

4 If you conclude that an agent of a defendant corporation, acting on behalf of the
5 corporation and within the scope of his employment or his actual or apparent authority, engaged
6 in price fixing, then it is no defense that the corporation had instructed its employees orally or in
7 writing to comply with the antitrust laws and not to engage in price fixing.

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases 92* (2009).

INSTRUCTION NO. 28

CORPORATE OFFICER INDIVIDUAL LIABILITY

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 the illegal conspiracy by directly participating in the conspiracy and/or indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime. A person is responsible for conduct that he performs or causes to be performed on behalf of a corporation just as though the conduct were performed on his behalf.

To find a defendant liable for the acts of a subordinate, you must find beyond a reasonable doubt that the defendant was aware of the existence of the charged conspiracy, that he knew that the subordinate was participating in the conspiracy, and, finally, that he was in a position to stop the subordinate from participating, but that he failed to do so, or otherwise authorized, ordered, or helped to perpetrate the crime.

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.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 101 (2009).

INSTRUCTION NO. 29

CONSPIRACY KNOWING OF AND ASSOCIATION WITH OTHER CONSPIRATORS

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with other conspirators in the overall scheme, the defendant has, in effect, agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that:

- (1) the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy;
- (2) the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired; and
- (3) the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is not a defense that a person's participation in a conspiracy was minor or for a short period of time.

AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 8.23 (2010), and cases cited therein.

INSTRUCTION NO. 30

ACTS AND STATEMENTS OF COCONSPIRATORS ADMISSIBILITY AND USE

If you find beyond a reasonable doubt that a defendant whose guilt you are considering was a member of the conspiracy charged in the Indictment, then any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of that conspiracy may be considered against the defendant. This is so even if such acts were done and statements were made in the defendant's absence and/or without the defendant's knowledge.

Before you may consider the statements or acts of a conspirator in deciding the issue of a defendant's guilt, you must first determine that the acts and statements were made during the existence and in furtherance of the unlawful scheme. If the acts were done or the statements made by someone whom you do not find to be a member of the conspiracy, or if they were not done or said in furtherance of the conspiracy, then they may be considered by you as evidence only against the person who did or said them.

The reason for allowing this evidence to be admitted and used against a defendant has to do with the nature of the crime of conspiracy. Conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy. Accordingly, the reasonably foreseeable acts, declarations, statements, and omissions of any member of the conspiracy made in furtherance of the common purpose of the conspiracy are deemed under the law to be the acts of all of the members, and all of the members are responsible for such acts, declarations, statements, and omissions.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 107 (2009).

INSTRUCTION NO. 31

TESTIMONY OF A COCONSPIRATOR WEIGHT

The government called certain individuals, claimed by the government to be coconspirators, as witnesses in this case. A coconspirator is a person who unites with another person in the commission of a crime, voluntarily and with common intent.

In the prosecution of a crime, the government is often compelled to present the testimony of witnesses who are coconspirators. Otherwise, it would be difficult, perhaps impossible, to detect or prosecute some wrongdoers. This is particularly so in cases of conspiracy because conspirators do not openly proclaim their intentions. As members of the conspiracy, coconspirators are often the only sources of evidence relevant and important to the case.

A coconspirator is not incompetent to be a witness because of his participation in the crime charged. On the contrary, the testimony of a coconspirator may be received in evidence and considered by the jury even if it is not corroborated by other evidence, and may be given the weight the jury believes it should have. You should keep in mind, however, that the testimony of a coconspirator should always be received with a caution and considered with great care.

A coconspirator's testimony alone may be of sufficient weight to justify your reaching a verdict of guilty, even if the testimony is not corroborated or supported by other evidence, but only if you believe the unsupported testimony beyond a reasonable doubt.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 116 (2009).

INSTRUCTION NO. 32

UNINDICTED COCONSPIRATORS NOT ON TRIAL

The Indictment charges that the defendants conspired with certain persons and companies that are not now on trial. You should not be concerned with or speculate about why certain persons or companies are not on trial or about why any persons or companies have not been charged in the Indictment.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 105 (2009).

INSTRUCTION NO. 33

TESTIMONY OF WITNESS INVOLVING SPECIAL CIRCUMSTANCES PLEA AGREEMENTS, CORPORATE LENIENCY, NONPROSECUTION AGREEMENTS

(AFTER ATTACK ON WITNESS CREDIBILITY)

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5 You have heard the testimony from [names of witnesses], each of whom pleaded guilty
6 to price fixing for their participation in the conspiracy for which the defendants are on trial.
7 These witnesses entered into plea agreements with the government under which they agreed to
8 cooperate with the government's investigation of price fixing in the TFT-LCD industry and to
9 testify truthfully at any trial. Their guilty pleas are not evidence against the defendants, and you
10 may consider their pleas only in determining these witnesses' believability.

11 You have heard testimony from [names of witnesses], whose employers, [names of
12 companies], entered into corporate plea agreements with the government. These plea
13 agreements generally provide that these companies will provide their "ongoing, full, and truthful
14 cooperation" to the United States in proceedings arising from its investigation of price fixing in
15 the TFT-LCD industry, and will use their best efforts to secure the same from their officers,
16 directors, and employees and those of their corporate subsidiaries. The plea agreements of these
17 companies are not evidence against the defendants and may be considered only in determining
18 these witnesses' believability.

19 You have also heard testimony from [names of witnesses], whose employer, Samsung
20 Electronics Corp., entered into an "amnesty" or "corporate leniency" agreement with the
21 government. This agreement provides that if Samsung, its officers, directors, and employees
22 provide "full, continuing and complete cooperation," the government will not prosecute them
23 for anticompetitive activity prior to the agreement. A person who "fails to comply fully with his
24 obligations" under the amnesty or corporate leniency agreement loses his guarantee of

1 nonprosecution. The fact that Samsung and its employees who testified here have been given
2 amnesty from prosecution for their involvement in the conspiracy to fix prices of TFT-LCDs
3 may not be considered by you as evidence that the defendants are guilty of price fixing, and may
4 be considered only in determining these witnesses' believability.

5 Last, you have heard testimony from [names of witnesses], who have entered into
6 nonprosecution and cooperation agreements with the government. These agreements provide
7 that if the witnesses provides "full, continuing and complete cooperation," the government will
8 not prosecute them for any defined act or offenses committed prior to the agreement. A person
9 who "fails to comply fully with his obligations" under the nonprosecution agreement loses his
10 guarantee of nonprosecution. These nonprosecution agreements are not evidence against the
11 defendants, and you may consider the nonprosecution agreements only in determining these
12 witnesses' believability.

13 The wisdom or the propriety of the policy permitting the government to enter into plea
14 agreements, amnesty agreements, or nonprosecution and cooperation agreements is not a proper
15 matter for you to consider. Such agreements are permissible.

16 In evaluating the testimony of these witnesses, you should consider the extent to which
17 or whether their testimony may have been influenced by their agreement, or that of their
18 employer, with the government. In addition, you should examine their testimony with greater
19 caution than that of other witnesses.

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24 AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 4.9 (2010).

INSTRUCTION NO. 34

BACKGROUND EVIDENCE PRECEDING CHARGE PERIOD

Certain documents and testimony have been admitted for the limited purpose of giving you background information. Such background evidence precedes the time period stated in the Indictment.

You should not consider such background evidence in making your determination about the guilt or innocence of the defendants. You should consider it only as a means of helping you understand other evidence in this case.

AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 147 (2009).

1 INSTRUCTION NO. 35

2 PUNISHMENT

3 The question of possible punishment of a defendant is of no concern to you and should
4 not in any sense enter into or influence your deliberations on the guilt or innocence of any
5 defendant. The duty of imposing sentence rests exclusively with me, as the presiding judge in
6 this case. Under your oath as jurors, you cannot allow consideration of the punishment which
7 may be imposed upon a defendant if he or it is convicted to influence your verdict in any way or
8 in any sense enter into your deliberations.

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24 AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust*
25 *Cases* 163 (2009).