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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION, *et al.*, Defendants.	No. CR-09-0110 SI UNITED STATES' NOTICE OF MOTION AND MOTION FOR ORDER REGARDING FACT FINDING FOR SENTENCING UNDER 18 U.S.C. § 3571(d) Date: July 15, 2011 Time: 11:00 a.m. Judge: Hon. Susan Illston Place: Courtroom 10, 19th Floor

NOTICE OF MOTION AND MOTION RE FACT FINDING

FOR SENTENCING UNDER 18 U.S.C. § 3571(d)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 15, 2011 at 11:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 10, 19th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California, before Honorable Susan Illston, the United States will and hereby does move the Court pursuant to Rules 12(b) and 47 of the Federal Rules of Criminal Procedure and Criminal Local Rules 47-2 for an order regarding fact finding pursuant to 18 U.S.C. §3571(d).

This motion seeks an order that fact finding regarding gain from the offense or loss to the victims should be undertaken in a separate penalty phase after trial, and that the issues in the penalty phase be decided by the Court under a preponderance-of-the-evidence standard and not by the jury under a beyond-a-reasonable-doubt standard. This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, argument of counsel, and such other matters as the Court may consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In the Superseding Indictment, the United States has noticed its intent to seek an alternative fine under 18 U.S.C. § 3571(d) based upon the effect of the price-fixing conspiracy. That code section authorizes fines of up to twice either the offense's gross gain or the victims' gross loss. The Superseding Indictment alleges that such gain or loss is at least $500 million. The United States will prove the gain or loss with testimony and economic evidence on the pecuniary effects of the price-fixing agreement ("effects evidence"). Defendants AUO and AUOA maintain that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires that the effects evidence be introduced at trial along with evidence of defendants' guilt and that the gain or loss must be found by the jury beyond a reasonable doubt. The use of section 3571's alternative fine provision and defendants' reliance on *Apprendi* raise three related procedural questions best resolved now: When should the effects evidence be offered, who should consider that evidence in determining the gain or loss, and what standard of proof should be applied in making that determination.

The effects evidence should be offered and considered in a separate penalty phase only after the jury has found a defendant guilty. The gain or loss caused by the conspiracy is irrelevant to the determination of the defendants' guilt because, as a *per se* violation of the Sherman Act, the charged price-fixing conspiracy is illegal regardless of its success or failure. By allowing the gain or loss to be litigated and thus the effects evidence to be admitted only during the penalty phase, the Court would avoid confusing the jury with an issue irrelevant to the determination of the defendants' guilt. It would also prevent any undue prejudice to the government or the defendants from the effects evidence during the guilt phase, and would save considerable judicial resources.

Consistent with the Sixth Amendment, the Court itself should consider the effects evidence during the penalty phase and make the factual determination of gain or loss by a preponderance of the evidence. While *Apprendi* ruled that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved

beyond a reasonable doubt," *id.* at 490, the "application of *Apprendi*'s rule must honor the 'longstanding common-law practice' in which the rule is rooted." *Oregon v. Ice*, 129 S.Ct. 711, 717 (2009) (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)). At common law, judges had wide discretion to determine criminal fines. Thus, *Apprendi*'s rule should not apply to "the imposition of statutorily prescribed fines"; to hold otherwise "surely would cut the rule loose from its moorings." *Id.* at 719 (dicta); *see United States v. Southern Union Co.*, 630 F.3d 17, 34-36 (1st Cir. 2010) (holding that the Sixth Amendment right to a jury determination of facts does not apply to facts relevant only to fine determinations). As a result, procedurally, the penalty phase should be no different than an ordinary sentencing hearing.

Accordingly, the government asks this Court to order that fact finding regarding gain from the offense or loss to the victims be undertaken in a separate penalty phase after trial, and that the issues in the penalty phase be decided by the Court under a preponderance-of-the-evidence standard and not by the jury under a beyond-a-reasonable-doubt standard.

ARGUMENT

I. Presentation of Evidence on Both Guilt and Gain or Loss in the Same Proceeding Is Unnecessary, Risks Jury Confusion and Undue Prejudice, and Wastes Judicial Resources.

No matter who determines the offense's gain or the victims' loss, the Court has the authority to separate the adjudication of the gain or loss from the guilt phase of the trial and has every reason to do so in this case. "There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial." *United States v. Ameline*, 376 F. 3d 967, 983 (9th Cir. 2004), *amended and superceded by reh'g by* 400 F.3d 646 (9th Cir. 2005), *superceded on reh'g en banc by* 409 F.3d 1073 (citation omitted). Indeed, courts have long exercised their supervisory power to bifurcate trials and order separate jury deliberations in a variety of contexts. *See id*. at 983 n.20 ("[A] district court may bifurcate the guilt and penalty phases, or convene a separate sentencing jury."); *United States v. Blanton*, 476 F.3d 767, 769 (9th Cir. 2007) (separate guilt and sentencing phases); *United States v. Nickl*, 427 F.3d 1286, 1296 (10th Cir. 2005) (separate guilt and penalty phases for purposes of sentencing

enhancements). And the complexity and risk of undue prejudice can make separate adjudications a necessity. *See, e.g, United States v. Feldman*, 853 F.2d 648, 662 (9th Cir. 1988) (holding that, under some circumstances, "trial courts should bifurcate forfeiture proceedings from ascertainment of guilt" because this procedure "preserves the rights of defendants and should clarify issues in complex trials").

Consistent with this precedent, this Court should first conduct a trial at which the jury will determine whether defendants are guilty of price fixing. During this trial, the jury should hear only evidence that is relevant to guilt. If any defendant is found guilty, the Court can then conduct a separate penalty phase, which, as we urge below, should be an ordinary sentencing hearing with the judge acting as fact finder to determine the relevant gain or loss and thus the relevant maximum fine. Regardless of who makes these factual determinations during the penalty phase, evidence related only to gain or loss is irrelevant at trial and only admissible during the penalty phase.

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) (emphasis added). 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 FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 (1990) (holding that *per se* violations of antitrust laws may still be enforced without proof that the violations were harmful or dangerous). Thus, to secure a conviction for this *per se* violation of the antitrust laws, the government does not have to prove the price-fixing conspiracy succeeded or had any anticompetitive effects.[1] *See Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128,

[1] Of course, evidence that defendants and their coconspirators abided by the price-fixing agreement and raised or charged prices accordingly remains relevant to prove there was such an agreement and the defendants joined it.

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").

Once the defendants agreed to fix prices, they were guilty of violating the Sherman Act, and therefore proof of the agreement's effect, if any, is unnecessary.[2] Accordingly, the jury should be instructed:

> 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.

ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases*, p. 57 (2009). Jurors would have a difficult time reconciling this instruction with contested evidence offered on the issue of gain or loss during the guilt phase. Instead, they may be misled into believing that proof of effects is necessary or somehow related to their determination of defendants' guilt.

By permitting the jury to hear effects evidence and consider the gain or loss issue during the guilt phase, the Court risks opening the door to irrelevant evidence, including dueling expert testimony involving multivariate regression analyses, which will only serve to further discombobulate the jury on the issue of whether the defendants are guilty of conspiring to fix prices. Conflating effects evidence with evidence on guilt will only result in prejudice to the government or to the defendants. Any attempt at limiting instructions during trial would yield complicated and seemingly contradictory guidance that risks further confusing jurors. *See, e.g.*, *United States v. Baker*, 10 F.3d 1374, 1388 (9th Cir. 1993) (noting that limiting instructions may not serve to cure confusion and prejudice in antitrust cases involving abstruse legal and economic theories), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). The Court would also need to provide additional confusing jury instructions

[2] By contrast, a private plaintiff seeking civil damages under Section 4 of the Clayton Act must show "injur[y] in his business or property by reason of" the price fixing. 15 U.S.C. § 15.

following the close of evidence in an attempt to clarify which evidence can be considered on the price-fixing charge. Such confusion and prejudice would be avoided by presentation of effects evidence, if necessary, after conviction.

Moreover, inclusion of proof of the gain or loss in the guilt phase will unnecessarily extend an already lengthy trial.[3] By separating the presentation of effects evidence from the guilt phase of trial, the trial would be streamlined and complicated instructions would be eliminated, reducing complexity in both the trial and jury deliberation process.

Furthermore, deferring possibly unnecessary proceedings pending resolution of a potentially dispositive preliminary issue is a "reasonable way to promote clarity and judicial economy." *Jinro Am Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 998 (9th Cir. 2001); *Morris v. Woodford*, 229 F.3d 775, 781 (9th Cir. 2000). Without a separate penalty phase, there would be a risk that the jury would have to sit through and deliberate over evidence relevant to an issue they will not decide. Fact finding on the effects of the conspiracy will only be needed if the jury first finds that defendants fixed prices and if the government ultimately seeks an alternative fine that exceeds the Sherman Act statutory maximum ($100 million for corporate defendants or $1 million for an individual defendant). In other words, the issue of gain or loss only ripens if a defendant is convicted and is moot if the defendants are acquitted. *See, e.g., United States v. Ware*, 709 F. Supp. 1062, 1063 (N.D. Ala. 1989) ("Plainly, a sentencing question does not become ripe for consideration unless and until the defendant is actually convicted of one or more of the charges he faces."). For the Court to extend what will already be a lengthy trial and require the jury to receive confusing and unnecessary instructions and hear what may ultimately be unnecessary effects evidence makes no sense and contravenes the goal of judicial economy.

[3] Trial of the guilt phase of this case will be lengthy, among other reasons, due to the duration of the conspiracy, the large volume of evidence, the number of defendants and co-conspirators, and the fact that many witnesses will likely testify, in whole or in part, through interpreters.

II. Fact Finding Essential Only to a Fine Determination Can Be Undertaken Solely by the Court at Sentencing.

"[S]entencing is the province of the judge, not the jury," and "a sentencing judge may consider evidence other than that considered by the jury at trial." *United States v. Collins*, 109 F.3d 1413, 1421 (9th Cir. 1997) (citation omitted); *see also United States v. Hector*, 577 F.3d 1099, 1101 (9th Cir. 2009) (sentencing responsibility resides with the District Court); *Ball v. United States*, 470 U.S. 856, 864 (1985) (same). And "the proper burden of proof for factual findings used for sentencing [is] . . . the preponderance of the evidence standard." *United States v. Garcia*, 522 F. 3d 855, 860 (9th Cir. 2008) (quoting *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006)). Under these principles, the Court should determine the offense's gain or the victims' loss on a preponderance standard and, having thus determined the maximum fine under 18 U.S.C. § 3571(d), should impose a fine based on the relevant factors Congress prescribed in 18 U.S.C. §§ 3553 and 3572.

Neither the Sixth Amendment nor the rule in *Apprendi* require a contrary result. While *Apprendi* states broadly that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 530 U.S. at 490, neither *Apprendi* nor subsequent Supreme Court or Ninth Circuit decisions have directly addressed the rule's application to monetary sanctions. The Supreme Court recently signaled that fines should be exempt from *Apprendi*. In *Oregon v. Ice*, it held that the Sixth Amendment does not bar judges from finding facts that trigger consecutive sentences. 129 S. Ct. at 714-16 The Court identified "twin considerations – historical practice and respect for state sovereignty" that "counseled against extending *Apprendi's* rule" to an Oregon statute that required concurrent sentences unless the judge made specific factual findings. *Id.* at 717.

In so holding, the Court expressed concern that the "proposed expansion of *Apprendi*" into fact finding traditionally undertaken by judges would invalidate numerous statutes that "permit judges to make a variety of sentencing determinations." *Id.* at 719. In particular, the Court noted that "[t]rial judges often find facts about the nature of the offense or the character of

the defendant in determining, for example, the length of supervised release following a prison sentence, required attendance at drug rehabilitation programs or terms of community service; and *the imposition of statutorily prescribed fines* and orders of restitution." *Id.* (emphasis added). On the very heels of that statement, the Court added: "Intruding *Apprendi's* rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings." *Id.*

The plain implication of this passage is that *Apprendi*'s original justifications (its "moorings") would not warrant "[i]ntruding" the rule into sentencing decisions that are ancillary to the main event: fixing the prison term. *Id*. The Court identified "imposition of statutorily prescribed fines" as an example of one of the "sentencing choices or accoutrements" to which *Apprendi* should not apply. *Id.* Given the multiple references to *Apprendi*, the Court could not have been referring to judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum. By its own terms, *Apprendi* has no bearing on judicial fact finding within statutory maximums, so the Court could not have had in mind such interstitial fact finding when it suggested that the *Apprendi* rule should not apply here. Rather, it must have meant judicial fact finding that increases the statutory maximum fine; otherwise, there would have been no need to mention *Apprendi*.

While the Supreme Court's remarks were not necessary to its holding, "lower federal court[s] . . . are advised to follow the Supreme Court's considered dicta." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129 (9th Cir. 2006) (en banc); *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004) (the Ninth Circuit "give[s] great weight to dicta of the Supreme Court"); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n. 17 (9th Cir. 2000) ("Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding."). And there is more to *Ice* than its dicta. The Court's reasoning relies heavily on the absence of any historical practice of having the jury determine whether sentences are to run consecutively or concurrently. Reasoning that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law," 129 S. Ct. at 718, the

Court found that "[t]he historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently." *Id.* at 717.

Thus, any attempt to expand *Apprendi* to criminal fines is undermined not just by the *Ice* dicta suggesting *Apprendi* may not apply to fines, but also by the underyling rationale of the *Ice* holding itself because historically judges determined criminal fines. As one commentator has noted, in colonial times, juries seldom played a role – let alone an exclusive role – in meting out criminal fines. Rather, assessing fines was more often a judicial function:

> With respect to other forms of punishments, colonial judges, like their English brethren, possessed a great deal of discretion. As in England, the two main forms of noncapital punishment were whippings and fines, and, in both cases, the judge could set the amount or even elect between the two, depending on the nature of the defendant and the crime.

Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L. Rev. 621, 640-41 (2004). Another historian states that criminal fines were "overwhelmingly the most common of the non-capital punishments," while adding: "Also within the discretion of the judge, as with whipping, the precise amount of the fine was established by him and tailored individually to the particular case." Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 350 (1984).[4]

In light of *Ice's* explanation of *Apprendi*'s rule and how *Ice*'s rationale limits its application, the First Circuit recently rejected the argument that the Sixth Amendment requires the jury to find the facts that determine the maximum criminal fine. *Southern Union*, 630 F.3d at 34-36. To the contrary, it concluded that, consistent with a proper understanding of *Apprendi*, judges should make the factual determinations relevant to fines at sentencing. *Id.* Specifically,

[4] *See also* Edwin Powers, *Crime and Punishment in Early Massachusetts 1620-1692: A Documentary History* 204 (Boston, Beacon Press, 1966) ("Magistrates were usually content with the payment of a fine of a few shillings or pounds unless the crime was particularly serious or shocking. A fine was the most common penalty in the seventeenth century – just as it is today. It was common practice to make a fine an alternative to a whipping or other penalty or to combine it with one or more other forms of punishment"); Francis Hilliard, *The Elements of the Law; Being a Comprehensive Summary of American Jurisprudence* 424 (New York, 1848) (reflecting the fact that in mid-nineteenth century America, "the length of imprisonment and amount of the fine [were] usually regulated, in the judge's discretion, by the aggravating or mitigating circumstances of the case").

the defendant had been convicted of knowingly storing a hazardous waste in violation of a statute that authorized a criminal fine of $50,000 for each day of the violation. *Id.* at 32. The exact determination of the total number of days of the violation, while not essential to proving the violation, was legally essential to determining the fine. *Id.* at 32-33. The jury found the defendant guilty without making any specific findings on how many days the hazardous waste was improperly stored. *Id.*

Southern Union argued that, under *Apprendi,* it faced a maximum fine of $50,000 because the jury failed to make the essential finding on the number of days of storage. *Id.* at 32. The court of appeals disagreed. *Id.* Relying on *Ice*, it explained that "historically, judges assessed fines without input from the jury . . . [and] had discretion to determine the amount of any fine imposed." *Id.* at 35. Applying the rule of *Apprendi* to factual determinations essential to the imposition of the fine would "cut the [*Apprendi*] rule loose from its moorings," precisely the result the Supreme Court has cautioned against. *Id.* at 36. Thus, the Court refused to expand *Apprendi*'s rule to facts necessary to fine determinations. *Id.*

The government is aware of two court of appeals decisions that have, however, applied *Apprendi*'s rule to criminal fines. *United States v. LaGrou Distribution Sys., Inc.,* 466 F.3d 585, 594 (7th Cir. 2006); *United States v. Pfaff,* 619 F.3d 172, 175 (2nd Cir. 2010). *LaGrou* was decided before *Ice*, without the benefit of its dicta or reasoning, and rests on the facile observation that *Apprendi* used the word "penalty." 466 F.3d at 594. It offers no further analysis, and its reasoning consists of four bare sentences. While *Pfaff* was decided after *Ice*, there is no indication the court was aware of *Ice*, let alone that it considered that decision's dicta or reasoning. In fact, none of the appellate briefs cited *Ice*. *Pfaff*'s reasoning consists of little more than a recitation of *Apprendi*'s rule, citation to *LaGrou*, and distinction of circuit precedent holding that *Apprendi* does not apply to restitution. 619 F.3d at 174-75. Both the Second and Seventh Circuits failed to appreciate that the "logic and method of [historical analysis in] *Ice* alter any previous broad understanding of *Apprendi*." *Southern Union,* 630 F.3d at 34.

As properly understood, *Apprendi*'s rule should not apply to criminal fines because historically judges had discretion to determine the amount of any fine imposed. *Id.* at 35.

Accordingly, this Court should apply the guidance in *Ice* and follow *Southern Union* to hold that no Sixth Amendment right attaches to the factual determinations necessary to determine the maximum criminal fine. And so, this Court, and not the jury, should make the factual findings that determine the alternative fine under 18 U.S.C. § 3571(d)—specifically, the offense's gross gain or the victims' gross loss—by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, the government requests that the Court order that fact finding regarding gain from the offense or loss to the victims be undertaken in a separate penalty phase after trial, and that the issues in the penalty phase be decided by the Court under a preponderance-of-the-evidence standard and not by the jury under a beyond-a-reasonable-doubt standard.

Dated: June 24, 2011

Respectfully submitted,

/s/

_____

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION, *et al.*, Defendants.	No. CR-09-0110 SI [PROPOSED] ORDER REGARDING FACT FINDING FOR SENTENCING UNDER 18 U.S.C. § 3571(d) Date: July 15, 2011 Time: 11:00 a.m. Judge: Hon. Susan Illston Place: Courtroom 10, 19th Floor

On July 15, 2011, counsel for the United States and counsel for AU Optronics Corporation ("AUO"), AU Optronics Corporation America ("AUOA") appeared before Judge Susan Illston on the government's motion for order regarding fact finding for sentencing under 18 U.S.C. § 3571(d). Having considered the parties' submissions and arguments of counsel, and good cause appearing:

IT IS HEREBY ORDERED that fact finding regarding gain from the offense or loss to the victims for purposes of 18 U.S.C. § 3571(d) shall be undertaken in a separate penalty phase after trial, and that the issues in the penalty phase shall be decided by the Court under a preponderance-of-the-evidence standard and not by the jury under a beyond-a-reasonable-doubt standard.

Dated: _____

_____
United States District Court Judge