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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' REPLY IN SUPPORT OF 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

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INTRODUCTION

Defendants AU Optronics Corporation (AUO) and AU Optronics Corporation America (AUOA) mischaracterize the government's motion. It is not a *motion in limine* designed to exclude evidence. The government has not requested the exclusion of any evidence AUO or AUOA wish to present at trial; now is not the time to address exclusion of such evidence, nor is this motion the proper vehicle. The government only seeks a ruling on a procedural issue – whether evidence that the government intends to introduce solely for the determination of a fine against the corporate defendants at sentencing under 18 U.S.C. §3571(d) must be incorporated into the *per se* price-fixing trial or whether such evidence can be presented in a separate penalty phase occurring only if a conviction against AUO or AUOA is obtained.

Section 3571(d) states that "where 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." The gross gain or loss from the offense in this case is larger than the $100 million maximum fine allowed against corporations under the Sherman Act, so the government plans to rely on section 3571(d) for purposes of the maximum fine for AUO and AUOA. The government will not be seeking a fine greater than the Sherman Act maximum ($1 million) for the five individual defendants in this case. Accordingly, the section 3571(d) issue relates only to AUO and AUOA.

Presentation of evidence relevant to gain or loss in a post-conviction penalty phase is proper and necessary to prevent jury confusion and unnecessary delay and to expedite both pretrial discovery and the trial itself. Bifurcating the case in this manner is the logical and orderly way to proceed. It will bring evidentiary issues into sharper focus and will enable the Court to more efficiently control the case. For those reasons alone, this Court should grant the government's motion. A separate penalty phase is further supported by the fact that neither *Apprendi* nor the Sixth Amendment requires that section 3571(d) evidence be presented to a jury at all. Following the Supreme Court guidance on the reach of *Apprendi's* rule in *Oregon v. Ice*, the government need only present such evidence to the Court at sentencing. The defendants

point to outdated statements from a Deputy Assistant Attorney General of the Antitrust Division expressing his understanding that section 3571(d) evidence must be presented to the jury. *Ice* altered that previous understanding of *Apprendi's* reach. Regardless of whether the evidence is presented to the Court or the jury, it does not belong in the guilt phase of the trial.

ARGUMENT

I. The Government Has Not Moved to Exclude Any Evidence at Trial.

Defendants assert in their opposition that the government is seeking to bar introduction of evidence allegedly relevant to a "host of issues . . . including 1) whether the defendants agreed to fix prices with a present intent to abide by their agreement; 2) whether the defendants intended, by their alleged conduct, to cause substantial effects in the U.S. economy; and 3) whether the defendants' conduct 'involved import trade or commerce' within the meaning of the Foreign Trade Antitrust Improvements Act (FTAIA)." (Opposition at 2). The defendants also assert that the DOJ is attempting to dispute the admissibility of a "host of transactional and structural data" and *Nippon Paper*/FTAIA evidence. (Opposition at 3-6). The government does not, however, attempt to exclude any such evidence by this motion. While many of the issues and categories of evidence described in defendants' opposition are irrelevant to the issue of guilt in a *per se* criminal trial, the government agrees with the defendants that motions *in limine* now would be premature. Of course, litigating the gain or loss issue for section 3571(d) purposes in a separate penalty phase has evidentiary consequences: Evidence relevant to only this issue would not be admitted during the guilt phase. At this time, though, the government merely seeks a ruling from this Court that evidence relevant *only* for sentencing purposes be presented in a separate proceeding after a conviction is obtained.

II. A Separate Penalty Phase Will Result in Significant Judicial Efficiencies and Avoid Jury Confusion.

A. To Secure a Conviction, the Government Need Not Prove Defendants' Intent to Cause Gain or Loss or That There Was a Substantial Effect in the United States.

The defendants argue that bifurcation will not lessen the burden on the Court, parties, or witnesses because gain or loss evidence substantially overlaps with other evidence that will be

presented in the guilt phase. Their argument has two faulty premises. First, the defendants mistakenly believe that in order to convict, the United States must prove an "intent to effectuate the object of the conspiracy," in other words, an intent to gain through anticompetitive price fixing. (Opposition at 3) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978)). The government has extensively briefed this issue in connection with a motion to dismiss the indictment, and this Court has squarely rejected defendants' position. The Court has correctly recognized that *Gypsum* concerns "the intent requirement in criminal antitrust *rule of reason* cases." (1/29/11 Order (Dkt. 250) at 4-5). In its opinion, the Court stated:

> In *United States v. Brown*, 936 F.2d 1024 (9th Cir. 1991), the Ninth Circuit held that the intent requirement of *Gypsum* does not apply to charges of *per se* violations of the antitrust laws: 'Where per se conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid.' Thus, in a *per se* case the government need not prove a defendant's intent to produce anticompetitive results.

Id. at 5; *see also*, ABA Section of Antitrust Law, Model Jury Instructions in Criminal Antitrust Cases 59 (2009) ("[O]nce a defendant is found to have knowingly joined a conspiracy to commit a *per se* offense, nothing more is required to establish the intent element of a Sherman Act offense.") (collecting cases). The Superseding Indictment alleges that the defendants engaged in a *per se* illegal price-fixing conspiracy. Due to their "pernicious effect on competition and lack of redeeming virtue," price-fixing agreements are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or business excuse for their use. . . . This principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

Second, the defendants mistakenly believe that the government must make a "showing of a substantial effect [i.e. loss] in the United States" in order to secure a price-fixing conviction.

Opposition at 6 (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997)). *Nippon Paper*, as the Court is aware, laid out the standard for cases involving "wholly foreign conduct." Yet the government has alleged that overt acts in furtherance of the conspiracy occurred in the United States. Thus, as this Court has acknowledged, "[u]nlike *Nippon* . . . the conspiracy alleged in the indictment is not based on 'wholly foreign conduct.' . . . Accordingly, the concerns raised in *Nippon* regarding criminal Sherman Act violations based on wholly foreign conduct simply does not apply." (4/18/11 Order (Dkt. 287) at 4-5).

The government is not required to prove either that defendants intended to cause gain or loss or that actual gain or loss was realized to obtain convictions in this case. Rather, all it must show is that defendants agreed to fix the price of their TFT-LCD panels. To allow defendants to bring gain or loss evidence into the guilt phase of trial would contravene the *per se* nature of the violation and thus conflict with decades of antitrust jurisprudence. Defendants' continued efforts to confuse these issues do not bode well for trial and lends further support to the arguments for a separate penalty phase.

B. "Effects Evidence" Economic Models Involving Regression Analyses Designed to Measure Overcharge Are Relevant and Admissible Only for Sentencing Purposes.

Given that the government need not prove that gain or loss occurred to secure a price-fixing conviction, the government intends to introduce evidence that is relevant only to the issue of gain or loss only for section 3571(d) sentencing purposes. Such "effects evidence" includes expert witness testimony from a forensic economist and economic modeling which incorporates multiple regression analyses to determine the overcharge and evidence regarding the volume of affected commerce to which it applies to determine the gain or loss resulting from the conspiracy. This analysis is unnecessary and irrelevant for purposes of determining guilt and the evidence is not the same as the transaction information, price and business data, structural information, enforcement evidence, and *Nippon Paper*/FTAIA evidence that defendants refer to

in their Opposition.[1] For one thing, section 3571(d) calls for a determination of "twice the gross gain or twice the gross loss" *from the offense*. It involves data and analyses to quantify gains or losses from the conspiracy, and thus the gains for all of the conspirators, not just AUO, or the losses of all the conspirators' victims, not just AUO's customers. This evidence would be offered solely to prove issues related to sentencing, not guilt.

Defendants point to the 20% pecuniary loss proxy found in Sentencing Guideline §2R1.1(d)(1) and state in their Opposition that they "gravely doubt whether the government has the slightest intention at this time of offering such 'multivariate regression analysis'" if bifurcation should occur. (Opposition at 7). This statement reveals defendants' misunderstanding of the Sentencing Guidelines' role. Regardless of whether bifurcation occurs, the government will need to prove gain or loss to establish a maximum fine above $100 million under 18 U.S.C. § 3571(d). Calculating a maximum fine is different than calculating a sentencing guideline range, and the government cannot skip the former and proceed directly to the latter. And the government has the burden of proving facts relevant to disputed sentencing factors. *See United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006).

As this Court has recognized in the context of this very conspiracy, multiple regression and correlation analysis by economic experts is generally accepted as the most plausible methodology for proving the gain or loss realized from a price-fixing conspiracy. *See In re TFT-LCD (Flat Panel)* 267 F.R.D. 291, 313 (N.D. Cal. 2010) (citations omitted)*; In re TFT-LCD (Flat Panel)*, 267 F.R.D. 583, 596 (N.D. Cal. 2010). The use of regression analysis and expert testimony, therefore, is a virtual certainty if a conviction is obtained against the corporate defendants in this case. And for reasons discussed in the next section, this "effects evidence" should be presented in a separate penalty phase.

C. Presentation of "Effects Evidence" In a Separate Penalty Phase Reduces Jury Confusion and Will Streamline the Trial.

While the government intends to seek a fine greater than the Sherman Act statutory

[1] Defendants are not specific about the types of evidence that fall under these labels. The economic models used to determine gain or loss may incorporate some of this information.

maximum fine of $100 million against some of the defendants, this remains a *per se* criminal case involving direct evidence of price fixing. This is not a circumstantial civil antitrust case involving, for example, allegations of conscious parallelism with plus factors, like so many of the cases defendants cite. And unlike a civil case, the government need not prove injury or damages to prevail. Just as the government would not be required to prove gain or loss in a bank robbery case, the government is not required to prove either intent to cause gain or loss or actual gain or loss to convict the defendants in this case. If the defendants are convicted, a sentence will be imposed by this Court regardless of whether the government is successful in its attempts to demonstrate the magnitude of the injury.

The proposed bifurcation of guilt and penalty phases seeks to prevent the section 3571(d) issues from overwhelming and confusing the guilt phase of the trial that should focus on whether the defendants entered into the charged price-fixing conspiracy. Bifurcation will impose a logical and orderly structure that will render more manageable the pretrial process and trial itself. This traditional sequence, by which the trial is focused on whether the defendants committed the offense, followed by a sentencing phase that takes place only after a guilty verdict, will allow the Court to rely on an established body of case law as it decides evidentiary and other issues. If, on the other hand, the Court pursues a novel joint guilt and sentencing proceeding, the Court will have little, if any, precedent to guide it.

Contrary to defendants' assertions, the government is not seeking bifurcation because it doubts the jury's ability to weigh complex economic evidence. (A jury would have to weigh such evidence if the Court bifurcates the case but denies the second part of the government's motion asking that the issues be presented to the Court.) If "effects evidence"– evidence, including factual assumptions, expert testimony, volume of commerce data, and economic modeling including results of multivariate regressions – is incorporated into the guilt phase of trial, there is a real risk that the jury will be confused into believing the government must prove economic injury in order to find the defendants guilty of price fixing. This would be unduly prejudiced to the government.

This risk of confusion is underscored by the defendants' continued insistence that it is necessary for the government to prove intended and substantial gain or loss resulting from the price-fixing conspiracy. The government has no doubt that during trial the defendants will continue to press this position. Requiring the United States to present gain or loss evidence at trial will only reinforce the defendants' legally incorrect arguments and magnify difficulties in keeping the jury focused on the relevant facts.

A separate penalty phase reduces the burdens on the Court during pretrial discovery. If "effects evidence" is permitted at trial, the number of disputes over expert disclosures will increase, due to the fact that the government must now bring in experts testifying only on sentencing issues at trial. The *motions in limine* process will also become needlessly complex. The parties will need to argue, and the Court will need to discern, whether evidence is 1) irrelevant and inadmissible as to both guilt and sentencing, 2) relevant and admissible only on the issues of guilt, but not sentencing, 3) relevant and admissible on issues of sentencing, but not guilt, or 4) relevant and admissible on the issues of both guilt and sentencing. By bifurcating the presentation of "effects evidence," the *motions in limine* process is reduced to determining only which evidence is relevant and admissible on issues related to guilt.

A separate penalty phase further reduces the need for additional limiting instructions, determinations of what the limiting instructions must be, and the delay and confusion caused by giving countless such instructions to the jury over the course of a lengthy trial. Defendants point to *United States v. Baker*, which involved over 200 limiting instructions, for the proposition that juries can understand limiting instructions. 10 F.3d 1374, 1388 (9th Cir. 1993). The key issue, though, is not whether the jury can understand these instructions, but whether the trial should be structured so that so many instructions are required in the first place. *Baker* demonstrates just how onerous and burdensome limiting instructions become when evidence irrelevant on certain issues is admitted. If "effects evidence" is permitted at trial, the Court will need to continually instruct the jury on how such evidence is irrelevant to defendants' guilt and will only be relevant should they reach a guilty verdict against AUO and/or AUOA.

A separate penalty phase also decreases the number of witnesses who must be called at trial. The United States intends to call expert witnesses, and potentially fact witnesses, solely to prove gain or loss. The government does not expect to call these witnesses at trial if a separate penalty phase is permitted; therefore, they will not be testifying twice, as defendants allege. Additionally, the government doubts AUO's assertions that it will have to recall numerous witnesses, given that much evidence on whether gain or loss occurred is irrelevant to the issue of guilt.

A separate penalty phase also reduces burdens on the individual defendants. The United States will not be seeking an alternative statutory maximum fine against the individual defendants. None of the individual defendants need sit through testimony on the gain or loss resulting from the conspiracy, nor would they have standing to examine witnesses on this subject. If issues surrounding the alternative fine based on gain or loss are incorporated into the guilt phase, a majority of the defendants in this case will face added delay on issues entirely inapplicable to the price-fixing charge or the sentence that they face if convicted.

Defendants offer no reasons why there should not be a separate penalty phase, save their mistaken assertions that the United States must essentially prove gain or loss at trial and that all the evidence will have to come in during the case-in-chief anyway. It simply makes no sense to add delay and confusion to the trial by incorporating fact-finding relevant only to a sentencing dispute into a complex criminal case. Such a dispute is best undertaken only when it matters, *at sentencing*, especially when the fact-finding on such a dispute can be handled solely by the sentencing judge.

III. Granting the Government's Motion Would Not Deprive the Defendants of Their Sixth Amendment Right to a Jury Trial.

A. Presentation of "Effects Evidence" in a Separate Penalty Phase Does Not Deprive the Defendants of Any Sixth Amendment Right.

The defendants' second argument -- that merely bifurcating a jury trial somehow violates their Sixth Amendment rights (Opposition at 8) -- is meritless. As the government has noted previously, "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 superseded by reh'g by* 400 F.3d 646 (9th Cir. 2005), *superseded on reh'g en banc by* 409 F.3d 1073 (9th Cir. 2005) (citation omitted); *United States v. Nickl*, 427 F.3d 1286, 1296 (10th Cir. 2005) (separate guilt and penalty phases for purposes of sentencing enhancements). In fact, separate hearings before the jury on sentencing factors is the norm in capital cases. *See United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004). Though the government disputes any assertion that a Sixth Amendment right attaches to fact-finding relevant only to fine determinations, presenting such evidence to a jury in a post-conviction penalty phase will not deprive the defendants of any rights, should the Sixth Amendment apply.

B. Judicial Determination of Gain or Loss Does Not Impact Defendants' Right to a Trial by Jury.

In its motion, the government set forth why the Court can itself decide the gain or loss issue under a preponderance-of-the-evidence standard in a separate penalty phase.[2] Defendants brand this position "radical," and argue that it comes "perilously close to a claim that corporations have no Sixth Amendment rights at all." (Opposition at 9). Such statements are as baseless as they are overly dramatic. AUO and AUOA's Sixth Amendment right to a jury trial will remain solidly intact should the Court both bifurcate and rule that *Apprendi* does not apply to fine determinations. The government will still have to prove to a jury beyond a reasonable doubt that defendants violated the Sherman Act, including proving each element of the crime. As noted above, the government's motion does not seek to preclude defendants from presenting evidence at trial relevant to their guilt or innocence. Moreover, the Court will have no power to impose a fine on either AUO or AUOA unless and until a jury finds them guilty.[3] Once that

[2] While the government believes that *Apprendi* does not apply to fine determinations and would welcome a ruling on that important issue now, the more crucial issue raised by the government's motion is bifurcation of the sentencing phase. In fact, if the Court issues a bifurcation order, a ruling on the *Apprendi* issue could be reserved until later in the pretrial process.

[3] Defendants are correct, of course, that corporations, unlike individuals, cannot be imprisoned. Accordingly, a corporation facing only criminal fines does not have a Fifth Amendment right to a grand jury indictment. See *United States v. Armored Transport, Inc.*, 629 F.2d 1313, 1319 (9th Cir. 1980), *cf. Doe v. United States*, 487 U.S. 201, 206 (1988) (corporations have no privilege against self incrimination). But ruling that *Apprendi* does not apply to fines would not affect defendants' Sixth Amendment rights to a jury trial. Nor would it put the corporate defendants in

finding is made, however, the Court can determine the facts relevant to what the maximum fine is and what fine to impose up to that maximum. Such a position is far from "radical." Indeed, as pointed out in the government's motion, it is consistent with historical norms.

Defendants note that the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), eleven years ago was expressed "in sweeping terms." (Opposition at 9). But neither *Apprendi* nor any subsequent Supreme Court or Ninth Circuit decision has addressed the rule's application to monetary punishment. Accordingly, the dicta in *Oregon v. Ice*, 129 S.Ct. 711 (2009), is particularly instructive here, as it was in *United States v. Southern Union*, 630 F.3d 17 (1st Cir. 2010). The government's reliance on *Ice* in the fine context does not seek, as defendants suggest, to overrule *Apprendi*. Rather, *Ice* explains the limits on *Apprendi's* reach. *Apprendi's* rationale and limits, as explained in *Ice*, lead to the inescapable conclusion that the Sixth Amendment does not constrain sentencing courts' ability to determine gain or loss in order to fix a maximum fine under the alternative fine provision.[4] None of the Ninth Circuit cases defendants cite (Opposition at 13-14) applied *Apprendi* to limit a court's ability to impose a fine.

Defendants point to *United States v. LaGrou*, 466 F.3d 585 (7th Cir. 2006), and *United States v. Pfaff*, 619 F.3d 172 (2nd Cir. 2010), as support for their position that *Apprendi* applies to fines. Yet neither of those cases addressed the issue now before the Court -- namely, whether the Supreme Court's rationale in *Ice* limits the reach of *Apprendi* with respect to fines. That

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a different position than individual defendants with respect to fines. Neither individuals nor corporations have a right to a jury determination of the maximum fine.

[4] *Ice* has also been helpful in advancing the understanding of the United States Department of Justice and its Antitrust Division of *Apprendi's* reach and rationale, rendering irrelevant the cited comments of Deputy Assistant Attorney General Hammond (all of which were made well before *Ice* and *Southern Union* were decided). (*See* Declaration of Scott D. Hammond, ¶ 2.) In *United States v. Smith*, Brief for the United States, (No. 10-0583-CR) (2nd Cir 2011), which defendants cite on page 15 of their Opposition, the government conceded that the fine in that case could not be upheld in light of the holding in *Pfaff*, a precedent that the Second Circuit panel hearing that appeal was bound to follow, but which was decided after the sentence was imposed in *Smith*. The considered position of the United States, as stated in our motion and as argued to the First Circuit in *Southern Union*, is that *Apprendi's* rule does not apply to fines.

issue was, however, reached by the First Circuit in *Southern Union*, which concluded that *Ice* did limit the reach of *Apprendi* with respect to fines.

The defendants' attempts to distinguish *Southern Union* fail. They argue that *Southern Union* did not involve the alternative fine statute. (Opposition at 15). But that is a distinction without a difference, and defendants do not even attempt to argue why the distinction should matter.

Defendants also argue that *Southern Union* merely held that *Apprendi* did not apply to "statutorily prescribed fines," whereas the government here seeks to impose fines in excess of those which have been statutorily prescribed. *Id.* They argue that "the government gives no reason why *Southern Union* should be extended to *all* fines." *Id*. These arguments fail for two reasons. First, the court in *Southern Union* repeatedly spoke in general terms about "criminal fines" and did not distinguish between types of criminal fines in reaching its holding. Second, any claim that *Ice* and *Southern Union* are limited to fines within statutorily prescribed limits makes no sense. As set forth in the government's motion (Motion at 7), given *Ice*'s multiple references to *Apprendi*, the Court could not have been referring to judicial fact finding *within* the statutory maximums. By *Apprendi's* own terms, courts are not constrained from making findings within statutory maximums.

Defendants next make the conclusory statement that *Southern Union* "failed to recognize the historical basis for *Apprendi* and its progeny . . . or the factual distinctions between *Apprendi* and *Ice*." (Opposition at 15). Once again, their unsupported conclusion makes it difficult for the government to respond. Unlike *LaGrou* and *Pfaff*, the *Southern Union* opinion contains a lengthy and thoughtful analysis of the *Apprendi* issue and considers all of the major post-*Apprendi* cases. The *Apprendi* discussion in the *Pfaff* opinion is cursory by comparison, while the *LaGrou* opinion deals with *Apprendi* in four sentences.

CONCLUSION

For the reasons set forth above and in the government's memorandum of points and authorities in support of its motion, 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: July 11, 2011

Respectfully submitted,

/s/ Peter K. Huston

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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 DECLARATION OF SCOTT D. HAMMOND IN SUPPORT OF THE UNITED STATES' 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

I, Scott D. Hammond, hereby declare under penalty of perjury as follows:

1. I am the Deputy Assistant Attorney General for Criminal Enforcement of the Antitrust Division of the Department of Justice, a position I have held since February of 2005. Prior to my appointment as Deputy Assistant Attorney General, I had been the Director of Criminal Enforcement since 2000.

2. I have read the Opposition of Defendants AU Optronics Corporation and AU Optronics Corporation America to Government's Motion for Bifurcation and Order Regarding Fact Finding for Sentencing. In that brief, defendants cite comments I made several years ago to the Antitrust Modernization Commission (November 3, 2006), the Organization for Economic Cooperation and Development (October 17, 2006) and the Antitrust Section of the American Bar Association (March 30, 2005), regarding the possible need to prove facts relating to gain or loss under 18 U.S.C. §3571(d) to a jury beyond a reasonable doubt following *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, including *United States v. Blakely*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005). I made those statements without the benefit of the Supreme Court's subsequent guidance in *Oregon v. Ice*, 129 S. Ct. 711 (2009), and the First Circuit's opinion in *United States v. Southern Union Co.*, 630 F.3d 17, 34-36 (1st Cir. 2010). In *Ice* the Court expressed concern about the "proposed expansion of *Apprendi*" into fact finding traditionally undertaken by judges. Following the Supreme Court's decision in *Ice*, the United States has argued that the issue of gain or loss under 18 U.S.C. §3571(d) should be decided by the Court rather than a jury. The First Circuit agreed with this argument in the *Southern Union* case. The position of the Antitrust Division in this case is consistent with the position taken by the United States and taken by the First Circuit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Signed on July 11, 2011 in Washington, D.C.

/s/ Scott D. Hammond

Scott D. Hammond
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