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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AU OPTRONICS CORPORATION, et al., Defendants.	Case No. CR-09-0110 (SI) **DEFENDANT AUO'S SENTENCING MEMORANDUM, PART ONE; SCOPE AND APPLICATION OF 18 U.S.C. SECTION 3571** Date: September 20, 2012 Time: 10:00 a.m. Courtroom: Honorable Susan Illston

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PREFACE

In taking this case to trial, AUO and the other defendants maintained their innocence, principally on legal grounds, and the convicted defendants will do so again on appeal. AUO fully recognizes, however, that for purposes of sentencing this Court will proceed on the premise that the defendants have been fairly convicted of the Sherman Act violation charged in the indictment.

For the purpose of clarity, AUO has divided its sentencing briefing into three memoranda. This sentencing memorandum addresses the threshold question this Court must resolve before sentencing AUO: that is, what is the statutory maximum fine that can be imposed on AUO? AUO also submits a separate sentencing memorandum addressing the complex and important question of how AUO's volume of commerce should be calculated under the applicable sentencing guidelines, and whether the 20% pecuniary loss presumption should be applied. Finally, AUO submits a third sentencing memorandum addressing the Court's ultimate task in sentencing: its required consideration of the factors set forth in 18 U.S.C. §§ 3553 and 3572.

INTRODUCTION

Indisputably, the Court cannot impose a fine in excess of the maximum statutorily permitted in anti-trust cases. While the Court will be called upon to make a guidelines calculation in determining the fine to be imposed on AUO in this matter, that calculation is (a) only advisory and (b) subject to statutory limits. It is for that reason that AUO submits that the initial task to be undertaken by the Court is that of determining the applicable statutory maximum.

Under the Sherman Act, the maximum fine which may be imposed upon a corporate defendant is $100 million. 15 U.S.C. § 1. The Government, however, seeks to impose a fine under 18 U.S.C. § 3571(d), which provides: "If any person derives pecuniary gain from the offense . . . the defendant may be fined not more than the greater of twice the gross gain . . . unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." Relying on § 3571, the Probation Department has recommended a fine of $500 million, five times the maximum stated in the Sherman Act. Based on the public

statements of the head of DOJ's anti-trust division, widely disseminated in an obvious effort to influence this Court's sentencing decision, AUO anticipates the government will demand a fine against it of one billion dollars, ten times that permitted by the Sherman Act.[1]

For two reasons, defendant AUO submits that the alternative fine provisions of § 3571(d) are unavailable to the Court in this proceeding, and thus the maximum fine that can be imposed on AUO is the Sherman Act's ceiling of $100 million. First, because § 3571(d) contemplated calculation of the maximum fine amount by judges rather than juries, it was, and indeed in essence has been found, facially violative of the Sixth Amendment's jury trial right. *Southern Union Co. v. United States*, -- U.S. --, 132 S. Ct. 2344 (2012). Because Congress intended that fact-finding under the alternative fine provisions be conducted by judges, and would have not enacted the statute had it known a requirement of jury findings would be judicially grafted upon § 3571(d), the statute must be declared null and void. Second, even were § 3571(d) still legally valid, imposition of a fine in excess of the Sherman Act limit would have required a jury finding as to *AUO's* gross pecuniary gain from the charged price-fixing conspiracy. The jury made no such finding, rendering the alternate fine provisions unavailable to the Court in this proceeding.

Finally, even were the Court to conclude that it may rely on the alternate fine provisions of § 3571(d), those provisions limit the total in fines that may be imposed on members of the charged conspiracy to one billion dollars-i.e., twice the $500 million found by the jury's verdict to have been the gains reaped by the co-conspirators. Because the Court has already imposed fines in the amount of $715 million on Crystal meeting participants, the maximum fine which can be imposed on AUO in this proceeding is $285 million.

I. THE MAXIMUM FINE THAT CAN BE IMPOSED IN THIS CASE IS THE STATUTORY MAXIMUM OF $100 MILLION UNDER SECTION 1 OF THE SHERMAN ACT

Despite the jury's finding that "the amount of combined gross gains derived from the conspiracy by all the participants in the conspiracy" was at least $500 million, (Dkt. No. 851, p. 3; see Dkt. No. 8, p. 43, 23 (superseding indictment)), the maximum fine which may be imposed

[1] *See* Law 360, DOJ to Push for Stiff Sentences in AUO Cartel Case (June 7, 2012).

against AUO is $100 million, the limit contained in the Sherman Act. That is the maximum fine because (1) Section 3571(d) is facially unconstitutional since Congress clearly intended that the Court, and not a jury, determine the facts necessary for imposition of an alternative fine; and (2) even if Section 3571(d) is not unconstitutional on its face, the gain it refers to is AUO's only, not all coconspirators, and that fact was never found by the jury.

A. The Alternative Fine Statute is Facially Unconstitutional Under *Booker's* Remedial Holding

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Sixth Amendment does not permit imposition of an enhanced sentence based on a sentencing judge's determination of a fact not found by a jury beyond a reasonable doubt. *Id*. at 244 (reaffirming the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). In a separate opinion, a different five-Justice majority then turned to what it called "the remedial question": whether, in light of the Court's constitutional holding, the Sentencing Guidelines had to be struck down in whole or in part, or whether the Guidelines could be salvaged by engrafting a requirement on the statute that all facts must be found by a jury to beyond a reasonable doubt. *Id*. at 245-46. The Court concluded that if Congress had known that any factual determinations had to be made by the jury to a heightened criminal standard, it would have preferred that the Guidelines not survive as a mandatory sentencing system. *Id*. at 247-58. Therefore, the Court excised and invalidated the two provisions of the statute which made the Guidelines mandatory. *Id*. at 258-59.

Before trial in this case the Court, following Booker, ruled that if the Government sought fines in excess of $100 million from the corporate defendants, it would have to present the issue of gross gain to the jury for determination beyond a reasonable doubt. (Dkt. No. 356, Order of July 18, 2011.) Under *Southern Union*, this Court's July 2011 order applying the constitutional holdings of *Booker* and *Apprendi* to the gross gain calculation was correct. The Court did not, however, reach the question of how the remedial *Booker* holding applied to Section 3571(d). That question - whether Congress intended Section 3571(d) to permit juries to determine the facts relevant to imposition of a fine - is now ripe for decision and, for many of the same reasons the Supreme Court relied upon in *Booker*, the answer is "no." Section 3571(d) is facially

unconstitutional, and the maximum fine available to the Government is $100 million. 15 U.S.C. § 1.

1. Congress Intended the Courts, Not Criminal Juries, to Determine Gross Gain Under Section 3571(d)

The Court applies *Booker's* remedial holding by looking at Congress' intent. *Booker*, 543 U.S. at 246; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). The issue is "what 'Congress would have intended'" had it known of the *Booker-Apprendi* rule that certain so-called "sentencing facts" must be found by criminal juries. Booker, 543 U.S. at 246; *Brockett v. Spokane Arcades*, Inc., 518 U.S. 727, 767 (1985); *see Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (striking down entire tuition reimbursement statute because remedying the problem and preserving the statute would "create a program quite different from the one the legislature actually adopted"). Although as a general matter, courts must adopt a reasonable construction of a statute, if one is available, to save a statute from unconstitutionality, *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002), this principle does not give courts "the unfettered prerogative to rewrite a statute in order to save it or to 'ignore the legislative will' behind it." *Id.; Miller v. French*, 530 U.S. 327, 341 (2000). "[W]here Congress has made its intent clear, [courts] must give effect to that intent." *Buckland*, 289 F.3d at 564; Miller, 530 U.S. at 336.

The legislative history of the alternative fine statute makes it clear that Congress wanted the courts, not juries, to make the necessary factual determinations. *See Booker*, 543 U.S. at 249 (considering legislative history of sentencing guidelines to support its holding).

a. The Legislative History of Section 3571(d)

Section 3571(d) originated in an earlier statute, the Criminal Fine Enforcement Act of 1984, codified at 18 U.S.C. § 3623(c)(1), and its successor, the Criminal Fine Improvements Act of 1987, codified as Section 3571(d). The legislative history of both is closely tied to that of the Sentencing Guidelines. Section 3623(c)(1) was enacted by Congress on the same day as the Sentencing Reform Act, which led to the creation of the Guidelines. *See* H.R. Rep. 100-390, reprinted in 1987 U.S.C.C.A.N. 2137, 2139; 130 Cong. Rec. S14226, S14360, H12268. The Criminal Fine Improvements Act of 1987 was an amendment to the Sentencing Reform Act

itself. H.R. Rep. 100-390, 1987 U.S.C.C.A.N. at 2137. Since these statutes involved the same Congress that enacted the Sentencing Guidelines, it is reasonable to conclude that the Supreme Court's holdings about the legislative intent behind the Guidelines apply equally to the Alternative Fine Statute.

Congress clearly intended judges rather than juries to make the factual determinations involved in applying the Alternative Fine Statute. According to the 1984 report of the House Judiciary Committee, the Criminal Fine Enforcement Act was needed because: "Federal judges should be given statutory guidance regarding the imposition of fines. At present, Federal judges are given very little statutory guidance regarding the punishment to be imposed upon convicted offenders." H.R. Rep. 98-906, 1984 U.S.C.C.A.N. at 5434-35. The Committee pointed out that the previous year, Congress had instructed judges to "consider the amount of the loss sustained by the victim" in determining the amount of a fine. *Id*. at 5435. In context, the Committee's words mean "the judge without the jury," not "the judge working together with the jury." *Booker*, 543 U.S. at 249.

According to the Committee, the Criminal Fine Enforcement Act "sets forth those factors that a judge must consider when deciding whether to impose a fine and, if a fine is to be imposed, the amount of the fine." H.R. Rep. 98-906, 1984 U.S.C.C.A.N. at 5445. These factors include any pecuniary loss inflicted upon others as a result of the offense and "the need to deprive the defendant of illegally obtained gains." *Id*. at 5446. Section 3623(c) "authorizes a judge" - not a judge, working together with a jury - "to impose a fine of up to twice the pecuniary gain derived by the defendant from the offense." *Id*. at 5449. The Committee envisioned gross gain being determined by the judge in a post-trial sentencing hearing, cautioning that where "the judge" concluded that determining gain would "require a protracted hearing that would last longer than the trial," the judge could decline to use the statute at all. "The Committee is confident that Federal judges will not abuse this discretion." *Id*. at 5450.

Congressional debates reflect the same understanding and intent. Rep. John Conyers, the House floor manager of the bill, told the House of Representatives that the bill was needed because "the judiciary" did not have "sufficient flexibility" in sentencing. 130 Cong. Rec. 21488,

col. 1. The bill "permits a court" - he did not say "a jury" - to choose among several alternatives in imposing a fine, and sets forth factors which a court must consider in determining "whether to impose a fine and the amount of a fine." *Id*., col. 2. Rep. Rick Boucher echoed the Committee's view that the bill was needed to give "[f]ederal judges . . . statutory guidance regarding the punishment to be imposed upon convicted offenders." *Id*. at 21489, col. 3. Rep. Boucher repeated the point on October 11, just prior to passage. *Id*. at 32311, col. 2. Rep. Peter Rodino made the same point. *Id*. at 21490, col. 3.

Congress' intent was equally clear three years later, when it enacted the Criminal Fine Improvements Act, which created what is now Section 3571(d). "New section 3572(a) sets forth the factors a court must consider in imposing a fine," the House Judiciary Committee wrote. H.R. Rep. 100-390, 1987 U.S.C.C.A.N. at 2142.

b. The Senators' *Amicus* Brief in *Booker*

Three Senators -- Orrin G. Hatch, Edward M. Kennedy and Dianne Feinstein -- filed an *amicus* brief with the Supreme Court in *Booker*. Their views about the intent of Congress regarding sentencing issues in 1984 are illuminating not merely with respect to the Sentencing Reform Act, but the Criminal Fines Enforcement Act as well.

"[I]n adopting a guidelines system," the Senators wrote, "Congress intended to preserve the traditional role of judges in making the myriad factual determinations that judges - rather than juries - have long made in the course of sentencing defendants in noncapital cases in the federal criminal justice system." Amicus Brief, 2004 WL 1950640, *6. "Attempting to substitute a sentencing jury for a sentencing judge in applying the sentencing guidelines . . . would contravene the express terms of the 1984 Act and in all likelihood fundamentally upset the sentencing system established by the Act." *Id*. (emphasis in original).

The 1984 Congress - the same Congress which adopted the Criminal Fines Enforcement Act - intended that courts, not juries, find sentencing facts. "[W]hile the 1984 Act sought to channel the discretion of sentencing judges . . . the Act nonetheless sought to preserve the traditional discretion that the sentencing judges have exercised to consider background information," according to the Senators. *Id*. at *20. "[T]he 1984 Act specifies that the

sentencing guidelines are 'for the use of a sentencing court in determining the sentence to be imposed in a criminal case.'" *Id*. at *23 (emphasis in original). "In enacting the 1984 Act, Congress had no intention of shifting the responsibility for imposing sentence -- including the responsibility for making the sorts of myriad factual determinations that judges have for centuries made in the course of imposing sentence -- from sentencing judges to sentencing juries." *Id*. at *23 (emphasis in original). Three years after the Sentencing Reform Act was passed, with the Guidelines about to go into effect, "witnesses discussed that the guidelines would call for judicial factfinding, by a preponderance of the evidence, to resolve contested issues at sentencing." *Id*. at *25, n. 6, *citing Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong. 1st Sess. 659, 799 (1987).

2. Because Congress' Intent is Clear, Section 3571 Is Invalid Under *Booker's* Remedial Holding

The legislative history of Section 3571(d) is clear that Congress intended the facts required for imposition of an alternative fine to be found by the Court, not by a jury. Because Congress intended courts and not juries to make such findings, Section 3571(d) is facially unconstitutional under the remedial holding of *Booker*.[2]

B. The Gross Gain Referenced in Section 3571(d) is That of AUO, Not All Coconspirators Collectively, and That Fact was Not Found by the Jury

Even if Section 3571(d) is not facially unconstitutional under *Booker*, the maximum fine that can be imposed in this case is $100 million because the jury was not instructed to and did not find beyond a reasonable doubt that AUO gained any particular amount from the conspiracy. The jury verdict answered only three questions with respect to the corporate defendants: (1) guilt or innocence; (2) whether the "participants in the conspiracy" *collectively* derived gains; and (3) whether the six companies who attended the Crystal Meetings *collectively* obtained gains of more than $500 million. Dkt. No. 851, pp. 1, 3. However, the "gain" referred to in the Alternative

[2] Notably, the *Souther Union* dissent of Justices Breyer, Alito and Kennedy argues that Congress intended judges to do the necessary fact-finding in applying Section 3571(d), arguing that juries might have "particular difficulty assessing different estimates of resulting losses," *id*. at 2370, and a system of jury fact-finding could create "serious" administrative problems. *Id.* at 2371.

Fine Statute is that of the individual defendant, not all participants in the alleged conspiracy collectively. Because that fact was not decided by the jury, the "statutory maximum" for *Booker/Apprendi* purposes is $100 million. 15 U.S.C. § 1.

Before trial this Court held that the "gross gain" derived "from the offense" for purposes of the statute meant the total gains obtained by all members of the alleged conspiracy, rather than by the defendant itself, citing *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946). Dkt. No. 631, p. 3. AUO respectfully believes that the Court erred. Pinkerton merely stands for the general proposition that a conspirator may be found guilty of an offense based on the reasonably foreseeable acts of his or her co-conspirators, taken in furtherance of the conspiracy. *Id*. Neither the Court nor the Government has cited any reason why this general liability principle would be determinative as to the meaning of the Alternative Fine Statute, especially given that the Sentencing Guidelines reject the application of *Pinkerton* to the calculation of the base fine. U.S.S.G. § 8C2.4(a)(2) (providing for a base fine equal to the "pecuniary gain *to the organization* from the offense.") As the legislative history discussed below reflects, the "gain" referred to in Section 3571(d) means the gain to an individual.

1. The Legislative History of Section 3571(d)

The Alternative Fine Statute provides:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process. 18 U.S.C. § 3571(d).

Statutory interpretation begins with the plain language of the statute, the specific context in which the language is used, and the broader context of the language as a whole. *Westwood Apex v. Contreras*, 644 F.3d 799, 803 (9th Cir. 2011). When faced with an ambiguous statutory phrase, the court looks to the intent of Congress as revealed in the history and purposes of the statutory scheme. *United States v. Sanford*, -- F.Supp.2d --, 2012 WL 2930770, *8 (D.C.D.C. 2012). Although Section 3571(d) itself does not state whether the "gross gain" which determines the defendant's maximum fine is that derived by the defendant alone, or all participants in the crime, the history and purposes of the statutory scheme make Congress' intent perfectly clear.

a. The Criminal Fine Enforcement Act of 1984 and the Models From Which It Was Drawn

As noted above, Section 3571(d) arises from the Criminal Fine Enforcement Act of 1984, codified at 18 U.S.C. § 3623(c)(1). The 1984 statute provided for a maximum fine of double the gains obtained by the defendant only, not all coconspirators:

If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

The House Judiciary Committee noted two "similar provisions" in Federal law, each of which also tied the defendant's penalty to the defendant's own gain. 18 U.S.C. § 645 (judiciary branch employee fined double the amount he or she embezzles); 18 U.S.C. § 201 (person who pays public official for performance of official act fined three times amount of bribe). The Committee also pointed to two similar provisions of New York law. N.Y. Penal Law § 80.00(1)(B) (fine for felonies double the defendant's gain from the crime); 80.05(5) (fine for misdemeanors double the defendant's gain from the crime). H.R. Rep. 98-906, 1984 U.S.C.C.A.N. at 5449. The Committee reported to Congress that the statute was "derived from the Model Penal Code," citing Code Section 6.03(5), *id*., which provides that an offender may be fined up to "double the pecuniary gain derived from the offense by the offender."

b. The Criminal Fine Improvements Act of 1987

The Criminal Fine Improvements Act of 1987 made only one substantive change to the Alternative Fines Statute, broadening the initial clause describing the circumstances in which the statute may be applied to cover cases when "any person" - rather than simply "the defendant" - gains pecuniary gain from the offense. The House Judiciary Committee explained the reason for the minor change:

> Current law authorizes such a fine . . . if the defendant derives pecuniary gain from the offense or if the offense results in pecuniary gain to another person. New section 3571(d) amends this provision by authorizing the court to impose such an alternative fine if a person other than the defendant derives pecuniary gain from the offense. Thus, if the defendant knows or

> intends that his conduct will benefit another person financially, the court can measure the fine imposed based on twice that benefit.

H.R. Rep. 100-390, 1987 U.S.C.C.A.N. at 2142.[3]

The 1987 Act also reenacted 18 U.S.C. § 3572, which requires judges to make an individualized inquiry of each defendant's circumstances and role in the offense before imposing sentence, including taking into account "the need to deprive the defendant of illegally obtained gains from the offense." 133 Cong. Rec. 29250, col. 2. Section 3572 says nothing about taking into account the total gains obtained by *all* defendants and coconspirators.

2. The Legislative History of Section 3571(d) Offers No Support to the Construction of the Statute Adopted by the Court

According to the construction urged by the Government and adopted by this Court, the minor changes to Section 3571(d) enacted in 1987 changed the scope of defendants' potential maximum fine from merely the defendant's own gain, as provided in Section 3572, to all coconspirators' gains collectively. In nearly every case, the Government's construction represents a massive increase in defendants' exposure. *See* Comments of the ABA Section of Antitrust Law in Response to the Antitrust Modernization Commission's Request for Public Comment on Criminal Remedies, November 14, 2005, p. 12 (difference between gain or loss based on sales of one defendant and the entire market "likely to be huge" and potential maximum fine "could vary dramatically" based on issue).

The Government's proposed construction of the statute is thoroughly implausible in light of the legislative history described above. When Congress enacted the Criminal Fine Enforcement Act of 1984 (which expressly limited the relevant gain to the defendant only), the House Judiciary Committee wrote, and member after member pointed out in floor debates that the legislation represented a major increase in Federal criminal fines. H.R. Rep. 98-906, 1984 U.S.C.C.A.N. at 5433-34, 5436, 5446, 5448-49; 130 Cong. Rec. 21488, col. 1 (Rep. Conyers); *id*. at 21488, col. 3, 21489 (Rep. Gekas); *id.* at 21490, col. 1 (Rep. Boucher); *id*. at 21490 col. 3,

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[3] The jury was not asked to determine to beyond a reasonable doubt whether AUO or AUOA knew or intended that their alleged conduct would benefit their competitors in the Crystal Meetings, nor was there a shred of evidence at trial which would have supported such a finding.

21491, col. 1 (Rep. Rodino); *id*. at 23171, col. 1 (Rep. Rangel).

The Government would have the Court believe that in 1987, Congress intended to enact yet another huge increase in Federal criminal fines, widening the scope of the Alternative Fine Statute and cutting the ties between the statute and the models for it cited in 1984, *but neither the House Judiciary Committee nor a single member of Congress - including the proponents of the 1984 Act - thought the matter was worth mentioning even once*.[4]

3. The Congressional Budget Office Concluded That the 1987 Statute Would Not Affect Revenue Generated by Criminal Fine Collections

The Congressional Budget Office's analysis of the Criminal Fine Improvements Act of 1987 confirms that the statute was not understood at the time of its passage to considerably increase the level of Federal criminal fines. The CBO is the independent, nonpartisan entity which provides written estimates of the cost and revenue implications (usually over a time frame of five years or more) of nearly every bill seriously considered by Congress. After studying H.R. 3483, which became the Criminal Fine Improvements Act of 1987, the CBO concluded that it "would not significantly affect the revenues generated by criminal fine collections." H.R. Rep. 100-390, 1987 U.S.C.C.A.N. at 2148. The CBO's conclusion cannot be reconciled with the Government's theory that H.R. 3483 actually enacted an enormous increase in criminal fines, adopting joint and several liability with respect to criminal fines for the first time.

4. The United States Sentencing Commission Does Not Understand Section 3571(d) to Refer To Gains Obtained by All Coconspirators Either

Nor does the United States Sentencing Commission construe Section 3571(d) as authorizing a fine equal to double the gain obtained by all coconspirators, as opposed to gains to the defendant itself. Pursuant to 18 U.S.C. § 994p, the Sentencing Commission must file a "statement of reasons" with Congress explaining any proposed Sentencing Guidelines amendments. On August 30, 1991, the Commission filed its Supplementary Report on

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[4] Nor did any Member or Committee report mention the *Pinkerton* rule, or suggest any intention that the general rule of joint and several liability among coconspirators was being adopted for criminal fines.

Sentencing Guidelines for Organizations, in which it stated:

> Congress has provided for fines up to twice the pecuniary loss caused by, or twice the pecuniary gain resulting from, an offense. 18 U.S.C. § 3571(d). The proposed guidelines use 2.00 as the minimum multiplier when the culpability score is 10 or more and as the maximum multiplier when the culpability score is 5. *By using a minimum multiplier of 2.00, the guidelines define a class of cases in which the minimum of the guideline fine range will be equal to the statutory maximum fine*. That class of cases will have the following characteristics: (1) pecuniary loss or gain will be used to calculate the base fine; (2) the controlling statutory maximum fine will be based on pecuniary loss or gain; and (3) the culpability score for the organization will be 10 or more. Within this subset of cases that consist of the most culpable organizations, courts will be required to impose the statutory maximum fine.

Supplementary Report, pp. 10-11 (emphasis supplied).

The Guidelines base fine is "the pecuniary gain to the organization from the offense," U.S.S.G. § 8C2.4(a)(2), or, in price-fixing cases, 20 percent of the volume of the defendant's affected commerce. U.S.S.G. § 2R1.1(d)(1) & App. Note 3. Of course, the only way for double the organization's gain to be "equal to the statutory maximum fine" as the Sentencing Commission intended is if Section 3571(d) refers to the defendant's own gain, not the gain obtained by all coconspirators together. The Sentencing Commission further confirms its view of Section 3571(d) in the Application Notes to Chapter 8 of the Guidelines, where the Commission defines "pecuniary gain" as follows: "'Pecuniary gain' is derived from 18 U.S.C. § 3571(d) and means the additional before-tax profit to the defendant resulting from the relevant conduct of the offense." U.S.S.G. § 8A1.2, App. Note 3(h) (emphasis supplied).

5. Since 1987, Courts Have Consistently Understood Section 3571(d) As Referring to the Defendant's Own Gain, Not That of All Coconspirators

Since the statute was enacted in 1987, courts have consistently understood § 3571(d) as establishing a maximum fine equal to twice the defendant's own gain, not that of all coconspirators collectively:

- *United States v. Pfaff*, 619 F.3d 172 (2nd Cir. 2010) involved three defendants' appeals from their convictions for designing, implementing and marketing fraudulent tax shelters. Although the Second Circuit's decision turned on whether one defendant's sentence was imposed in violation of *Apprendi*, the court commented that the defendant's sentence was

imposed pursuant to § 3571(d), "which authorizes . . . a fine of not more than twice the gross pecuniary loss caused by, or gain derived from, *the defendant's* offenses." *Id.* at 174. The fine was reversed by the court because, contrary to *Apprendi*, the jury had not made findings "as to the gain or loss caused by [defendant's] conduct." *Id*. at 175 (emphasis added).

- *United States v. Acuna*, 313 Fed. Appx. 293, 2009 WL 415592 (11th Cir. 2009) was a multi-defendant racketeering case. Citing § 3571(d), the Eleventh Circuit found that "the maximum fine was twice the amount of gross gain that Battle derived from the RICO enterprise." 313 Fed. Appx. at 299, 2009 WL 415592 at *16.
- *United States v. Chusid*, 372 F.3d 113 (2nd Cir. 2004) was an appeal from a conviction for wire fraud and other crimes in connection with a bank swindle. Once again, the Second Circuit described § 3571(d) in terms closely tied to the defendant's own conduct: "Section 3571 provides for a fine which is the greater of $250,000, or twice the resulting gross pecuniary gain to the defendant or loss to the defendant's victims." *Id*. at 117.
- In *United States v. Wilder*, 15 F.3d 1292 (5th Cir. 1994), the defendant had been convicted of defrauding a financial institution and conspiring to defraud a federal agency. Like the Second Circuit, the Fifth Circuit construed § 3571(d) to refer to the gain obtained, or the loss inflicted, by the defendant himself. After quoting the statutory text, the court found that "Wilder must have derived a gross gain or caused gross losses of at least two million dollars to justify the four million dollar fine." *Id*. at 1300; *accord*, *United States v. Leonard*, 37 F.3d 32, 36 (2nd Cir. 1994) (Section 3571(d) authorizes maximum fine of "up to the greater of twice the gain to the defendant" or loss to victim).
- *United States v. Sanford, supra*, 2012 WL 2930770, involved a criminal prosecution for various violations of Federal law in discharging machinery-space bilge waste from a fishing vessel. After an exhaustive examination of the legislative history of § 3571(d), the Court held that the term "gross gain" in Section 3571(d) "means any additional before-tax profit to the defendant that derives from the relevant conduct of the offense." *Id*. at *10.

- *United States v. Bader*, -- F.Supp.2d --, 2010 WL 2681707 (D. Col. 2010) involved a criminal conviction for sale of human growth hormone, as well as conspiracy to distribute a controlled substance. Citing § 3571(d), the Government argued that the maximum fine which could be imposed was "'twice the gross gain' obtained by the defendant." *Id*. at *2.

In contrast, until this Court's pre-trial ruling, no Court had ever held that § 3571(d) encompasses all gains accruing to all participants in a conspiracy. The language, structure and legislative history of § 3571(d) demonstrate that "gross gain" refers to gain obtained by the defendant alone, not by all alleged coconspirators. The Sentencing Commission and a consistent line of caselaw confirms this interpretation. Since the jury was not asked to determine what, if any, gross gain AUO or AUOA obtained as a result of the alleged conduct, the "statutory maximum" for *Booker/Apprendi* purposes is the maximum fine under the Sherman Act itself -- $100 million.

6. The Rule of Lenity Requires Construing Section 3571(d) To Establish a Maximum Fine of Double the Defendant's Gains

The rule of lenity compels the same conclusion. The rule of lenity requires that any ambiguity in the scope of the penalty authorized by the statute must be resolved in the defendants' favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see People v. Materne*, 72 F.3d 103, 106 (9th Cir. 1995) ("[T]he rule of lenity applies where a criminal statute is vague enough to deem both the defendant's and the government's interpretation of it as reasonable"). The Supreme Court "has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.*; *Ladner v. United States*, 358 U.S. 169, 178 (1958). This rule is based upon the concept that "a fair warning should be given to the world in language that the common world will understand, or what the law intends to do if a certain line is passed." *Babbitt v. Sweet Home Chapter of Communities for Great Or.*, 515 US 687, 704 n. 18 (1995); *McBoyle*

v. United States, 283 US 25, 27 (1931).

Until this Court's ruling on the eve of trial, no court anywhere had adopted the Government's broad and unsupported interpretation of § 3571(d). Since the Government's construction is not "unambiguously correct," (indeed, the defendants believe it is clearly wrong for all the reasons above), the rule of lenity applies and requires that the Court find that the maximum possible fine against AUO or AUOA is $100 million.

II. EVEN IF SECTION 3571(d) IS CONSTITUTIONAL AND REFERS TO TOTAL GAINS BY ALL COCONSPIRATORS, PRINCIPLES OF JOINT AND SEVERAL LIABILITY LIMIT AUO'S PERMISSIBLE FINE TO $285 MILLION

Defendant AUO has vigorously argued that the Court may not read a *Pinkerton* principle into 18 U.S.C. § 3571(d)-i.e., in the case of an individual co-conspirator, the alternative fine provisions can be read to reach the gains of the entire price-fixing conspiracy. If this Court holds that the statute may be applied so as to reach the collective gains of the entire conspiracy, however, then it must accept the corollary to that ruling: the fines assessed against the conspirators must be governed by principles of collective contribution. In other words, the fines must be limited by principles of joint and several liability - which means that the government's total fine received from the conspirators collectively cannot exceed $1 billion-twice the jury's finding of conspiracy-wide gains.

Where multiple parties collectively cause an injury, they may be collectively liable. Liability may be several, joint and several, or a hybrid between those two forms. Joint and several is the broadest form of collective liability, and it is the dominant form in American law. *See Restatement (Third) of Torts*, § 17. Federal courts have imported principles of joint and several liability into federal criminal statutes. For example, in some cases, when multiple criminal defendants are liable for a fine, federal courts have imposed joint and several liability for the fine. *See, e.g., United States v. Pruett*, 681 F.3d 232, 237-38 (5th Cir. 2012); *United States v. Radtke*, 415 F.3d 826, 836 (8th Cir. 2005). Although the Ninth Circuit has never

squarely decided the issue,[5] other circuits have held that, under the RICO statute and the federal criminal forfeiture provisions, defendants may be jointly and severally liable. *See United States v. White*, 116 F.3d 948, 951 (1st Cir. 1997); *United States v. Masters*, 924 F.2d 1362, 1370 (7th Cir. 1991).

Joint and several liability, though it is a broad principle of collective responsibility, is nonetheless limited. The injured party may only recover once. In other words, "[t]he plaintiff may not, pursuant to the judgment for that claim, obtain more than the total of the recoverable damages." *Restatement (Third) of Torts*, § 10, cmt b; *see also McKinnon*, 750 F.2d at 1387 ("This means that each defendant is liable to the plaintiff for the whole of the plaintiff's damages, except that the plaintiff may not collect, from all the defendants together, more than those damages.") (citing *Prosser & Keaton on Torts*, § 52).

When federal courts have imported joint and several liability into federal criminal statutes, they have also recognized this "one recovery" limitation. For example, when the First Circuit adopted joint and several liability for the RICO statute, it clarified that the government could recover the total fine only once: "The government can collect its $ 136 million *only once* but, *subject to that cap*, it can collect from any appellant so much of that amount as was foreseeable to that appellant." *United States v. Hurley*, 63 F.3d 1, 23 (1st Cir. 1995) (emphasis added). It subsequently reiterated the same point: "the government can collect [the amount subject to forfeiture] *only once*." *United States v. Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999) (emphasis added, other alteration in original).

When it adopted collective responsibility, the Seventh Circuit also recognized the "one recovery" limitation. *See Masters*, 924 F.2d at 1370 ("Each is fully liable for the receipts of the other members of the enterprise, *subject to the overall ceiling of $ 42,000*.") (emphasis added).

The same principles must be applied here. Even assuming arguendo that liability may be imposed jointly and severally under § 3571(d), it must still be limited by the one recovery rule.

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[5] *See United States v. Garcia-Guizar*, 160 F.3d 511, 527-28 (9th Cir. 1998) (Beezer, J., dissenting).

That is, even assuming that § 3571(d) may be applied based on collective gain by all Crystal Meeting companies, the total collective fine imposed by the government may not exceed twice the collective gain. It may recover the total fine only once.

A contrary interpretation has no support in the case law interpreting § 3571(d) or any other criminal fine or forfeiture statute. No federal fine or forfeiture statute has been interpreted to mean that, in a multi-defendant case, each defendant may be wholly liable for the total financial gain of all defendants collectively, irrespective of whether that gain has been recouped from the other defendants. Such an interpretation of § 3571(d), moreover, would create serious problems under the Excessive Fines Clause. The constitutional avoidance canon thus counsels against such an interpretation. *See Clark v. Suarez Martinez*, 543 U.S. 371, 381-82 (2005).

If § 3571(d) is constitutional, and adopts joint-and-several liability, the jury verdict in this case supports a total collective fine of $1 billion. That is the "overall ceiling" fine amount that the government may collect. *Masters*, 924 F.2d at 1370. The government has already recovered fines totaling $715 million from the other Crystal Meeting participants. Therefore, under the alterative fine provision of §3571, the government may recover only a maximum of $285 million from AUO.

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CONCLUSION

For the reasons stated, the maximum fine which can be imposed on AUO in this matter is $100 million under the Sherman Act. If the Court were to determine that the alternative fine provisions of § 3571(d) are applicable to this matter, the maximum fine under that statute would be $285 million.

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Respectfully submitted,

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