MARTHA BOERSCH (SBN 126569)
LAW OFFICES OF MARTHA BOERSCH
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 217-3700
martha@boerschlaw.com

DENNIS P. RIORDAN (SBN 69320)
TED SAMPSELL JONES (MN SBN 034302X)
Riordan & Horgan
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472
Facsimile: (415) 552-2703
dennis@riordan-horgan.com

KIRK C. JENKINS (NO. 177114)
SEDGWICK, DETERT, MORAN & ARNOLD LLP
One North Wacker Drive, Suite 4200
Chicago, IL 60606-2841
Telephone: (312) 641-9050
Facsimile: (312) 641-9530
Kirk.Jenkins@sdma.com

Attorneys for Defendants AU OPTRONICS CORPORATION and AU OPTRONICS CORPORATION AMERICA

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 THREE; APPLICATION OF 18 U.S.C. SECTIONS 3553 AND 3572** Date: September 20, 2012 Time: 10:00 a.m. Courtroom: Honorable Susan Illston

TABLE OF CONTENTS

INTRODUCTION. 1

I. CONSIDERATION OF THE APPLICABLE SENTENCING FACTORS REQUIRES REJECTION OF THE SENTENCE URGED BY THE GOVERNMENT. 4

A. The Nature of the Offense and AUO's Role. 5

B. Application of The 20% Figure in Section 2R1.1 Would Work an Injustice in This Case as it is Far Greater Than Necessary to Comply With the Purposes of Sentencing 7

C. A Fine Within The Sentencing Guideline Range Found by the PSR Would Create Significant and Unfair Sentencing Disparities Among Defendants With Similar Records Who Have Been Found Guilty of Similar Misconduct. 8

D. The Fines Proposed by the Government and the PSR Would Weaken Competition by Permitting Samsung, the Organizer and Leader of the Charged price-Fixing Conspiracy, to Dominate the LCD Industry 10

E. The Court Must Impose a Fine That Does Not Impair AUO's Ability to Pay Restitution and That Comports With the Defendant's Financial Condition. 11

F. The Corporate History and Good Citizenship of AUO 12

G. As an Equitable Matter, the Government Should Not Receive a Fine More Than Twice the Amount Found By the Jury to Represent Conspiracy-Wide Gains. 13

CONCLUSION. 14

TABLE OF AUTHORITIES

CASES

Gall v. United States,
552 U.S. 38 (2007) 2, 4

Kimbrough v. United States,
552 U.S. 85 (1997) 1, 4, 5, 8

Rita v. United States,
551 U.S. 338 (2007) 4

Spears v. United States,
555 U.S. 261 (2009) 4

United States v. Amezcua-Vasquez,
567 F.3d 1050 (9th Cir. 2009) 5

United States v. Carty,
520 F.3d 984 (9th Cir. 2008) 1, 4

United States v. Cortes,
299 F.3d 1030 (9th Cir. 2002) 9

United States v. Grober,
624 F.3d 592 (3d Cir. 2010) 5

United States v. Henderson,
649 F.3d 955 (9th Cir. 2011) 5

United States v. Mitchell,
624 F.3d 1023 (9th Cir. 2010) 5

United States v. Ochoa-Gaytan,
265 F.3d 837 (9th Cir. 2001) 9, 10

United States v. Parker,
462 F.3d 273 (3d Cir. 2006) 9

United States v. VandeBrake,
679 F.3d 1030 (8th Cir. 2012) 8

United States v. Vazquez-Rivera,
470 F.3d 443 (1st Cir. 2006) 8

United States v. Wills,
476 F.3d 103 (2d Cir. 2007) 8

STATUTES

18 U.S.C. § 3553	3
18 U.S.C. § 3553(a)	*passim*
18 U.S.C. § 3553(a)(1), (2)	11
18 U.S.C. § 3572	*passim*
U.S.S.G. § 2R1.1	7, 8

INTRODUCTION

In Parts I and II of its sentencing briefing, defendant AUO has placed before the Court its position on the scope and applicability of the alternative fine provisions of § 3571, as well as its analysis of the relevant Sentencing Guidelines provisions. However the Court disposes of those issues, its ultimate and most important task is to determine the appropriate fine to be imposed on AUO under 18 U.S.C. §§ 3553(a) and 3572.

As the Ninth Circuit has explained, at this junction in the proceedings,

> [t]he overarching statutory charge for a district court is to "*impose a sentence sufficient, but not greater than necessary*" to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment.

United States v. Carty, 520 F.3d 984, 991 (9th Cir. 2008) (en banc) (emphasis added) (quoting 18 U.S.C. § 3553(a)); *see Kimbrough v. United States*, 552 U.S. 85, 101 (1997) (referring to the parsimony provision as the "overarching provision" of the sentencing statute).

In public statements in recent months, the Anti-Trust Division of the Department of Justice has spoken of its intention to seek fines totaling two billion dollars against AUO and AUOA. *See* Law360, DOJ to Push for Stiff Sentences in AUO Cartel Case (June 7, 2012). The government's draconian position reflects not a reasoned application of either the sentencing guidelines or the parsimony principle, but a desire to punish AUO for its temerity in electing to subject the validity of the government's charge to the test of a jury trial. *Id.* (DOJ justifies demand for two billion dollar fine in part because AUO's failure to accept responsibility and plead guilty was "very egregious conduct")[1] For many reasons, however, this was a case that merited trial.

---

1 The Law360 article was not the only use of the media in an attempt to influence these sentencing proceedings. On Friday, August 31st, sometime before 11 a.m. and six hours before the PSR was disclosed to defense counsel, an article was published on the Internet by mLex disclosing the USPO's final PSRs' recommendations of 10 years imprisonment for Dr. Hsiung and Mr. Chen. The article stated that the government was inclined to recommend the same sentence. The unauthorized disclosure of the information in the PSR was in violation of Northern District Local Criminal Rule 32-7(a).

Two of the individual defendants charged with price-fixing were absolved by the jury, whose members also found the government's evidence inadequate to convict a third. Guilty verdicts were returned as to the corporations and the two remaining individuals, but the validity of those convictions turns on a number of issues of law that have yet to be definitively decided by the Ninth Circuit, or indeed any other circuit, as this is the first time that a criminal case brought under the Foreign Trade Antitrust Improvement Act has gone to jury verdicts. That clarity on the meaning of the FTAIA will be obtained as a result of the trial and resulting appeal in this matter is a benefit to the law and to the public.

The defendants before the Court for sentencing have conducted themselves ethically and honorably throughout the course of these proceedings. Although they were not liable to extradition, the individual defendants voluntarily subjected themselves to the Court's jurisdiction in order to contest the accusations against them. In response to subpoenas, the corporations provided documents key to the government's case, and all defendants stipulated to the authenticity of those documents. Consistent with raising a defense that was primarily legal in nature, the defendants called only one witness, an economic expert; the government's own expert agreed that the raw data presented by that defense expert was accurate.

As a matter of law, AUO cannot be affirmatively penalized for exercising its constitutional right to a jury trial. Rather, the Court's task is to make an individualized assessment of the applicability of the relevant sentencing factors to AUO:

> [T]he sentencing judge [must] consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue.

Gall v. United States, 552 U.S. 38, 52 (2007)

In recommending a fine of $500,000,000, the Presentence Report ("PSR") rightfully rejects the utterly extreme position of the government, but the PSR, in accepting the guidelines analysis of the government, is flawed by legal and factual error.

As AUO's companion brief addressing the Sentencing Guidelines explains, in proposing a $2.34 billion VOC for AUO, the Government has abandoned the

methodology employed in fixing the fines of the other companies charged with price fixing in this prosecution, as described in its November 15, 2010 letter to this Court in the related civil matters, in favor of an analysis that would impose on AUO a penalty grossly disproportionate to the nature of the offense and the role AUO played in the charged conspiracy. By embracing the government's inflated VOC figure, the PSR begins with, and works down from, a guideline fine range between $936,000,000 and $1,872,000,000 that is several multiples too high.

Even were the Sentencing Guideline fine range computed by the PSR correct, use of the proposed fine range would be patently unjust, as the PSR itself recognizes. The sentencing guidelines are only one of many factors that the court must consider when imposing sentence. Moreover, the court may reject or vary from a particular guideline based on policy considerations, and it may consider whether application of a sentencing guideline will work an injustice in a particular case. The PSR's guideline range bears little empirical relationship to the seriousness of the offense in this case and vastly exceeds AUO's gain from the offense. The range would not provide just punishment, particularly when compared to the punishment received by coconspirators and in light of the relative role played by AUO in the offense.

Furthermore, the PSR fails to adequately consider a number of mitigating factors that this Court must consider under 18 U.S.C. §§ 3553 and 3572. The disparity in sentences proposed by both the government and the PSR would have an added consequence at odds with the purposes of sentencing in this case – it would cripple AUO's ability to compete with the other charged LCD manufacturers in the future, particularly Samsung, although the preservation of such competition was the ostensible *raison d'etre* of these proceedings.

Furthermore, AUO has already been at least partially punished for the very same conduct by paying significant fines in other jurisdictions, and it faces over 30 civil lawsuits brought by private plaintiffs seeking damages. AUO has paid more than $200 million to settle the class action lawsuits, thus paying out significant amounts already in

restitution. The fine pressed by the government would impair the defendant's ability to make restitution to the alleged victims of the offense and would threaten the very existence of AUO. The Court should reject the fine range proposed by the PSR and the government, as well as the PSR's recommendation of a $500 million fine, and instead fashion a punishment that fits the crime of which AUO stands convicted.

I. CONSIDERATION OF THE APPLICABLE SENTENCING FACTORS REQUIRES REJECTION OF THE SENTENCE URGED BY THE GOVERNMENT

As noted above, the touchstone of post-*Booker* federal sentencing is the parsimony principle: that the sentence imposed must be adequate, but no greater, than that necessary to achieve the goals of the federal sentencing regime. *Kimbrough,* 552 U.S. at 101 (referring to the parsimony provision as the "overarching provision" of the sentencing statute).

In attempting to apply the parsimony principle, a district court should use the Sentencing Guidelines as "the starting point and the initial benchmark." *Gall,* 552 U.S. at 49. But the Guidelines are just one factor of many. A district court "may not presume that the Guidelines range is reasonable." *Id*. at 50; *see Rita v. United States*, 551 U.S. 338, 351 (2007). The district court "must make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 50; *accord Carty*, 520 F.3d at 991. Thus, a trial court has broad discretion in fashioning a sentence that achieves the goal of parsimony.

That general discretion, however, has limitations—two of which are particularly salient in this case.

First, a district court must consider whether a particular Guidelines provision is unsound as an empirical matter. A particular provision of the Guidelines is entitled to less weight if that provision was not the product of a reasoned and studied decision by the Guidelines Commission. Certain provisions are not the product of careful empirical research and thus "do not exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109; *see Spears v. United States*, 555 U.S. 261, 265-66 (2009) ("[D]istrict courts are entitled to reject and vary categorically from

the crack cocaine Guidelines based on a policy disagreement with those Guidelines."). Courts should examine whether the Commission developed a particular guideline "based on research and study rather than reacting to changes adopted or directed by Congress." *United States v. Grober*, 624 F.3d 592, 601 (3d Cir. 2010).

As the Ninth Circuit has since held in several different contexts, the power granted by *Kimbrough* is "not limited to the crack-cocaine Guidelines." *United States v. Henderson*, 649 F.3d 955, 960 (9th Cir. 2011). Rather, "sentencing judges can reject *any* Sentencing Guideline, provided that the sentence imposed is reasonable." *United States v. Mitchell*, 624 F.3d 1023, 1030 (9th Cir. 2010). Moreover, the failure to consider *Kimbrough* arguments constitutes reversible error. *Henderson*, 649 F.3d at 964. A district court therefore must consider whether a provision was "not the result of an empirical study." *Id*. at 962.

Second, even if a particular provision is sound in general, a district court must consider whether that provision will work an injustice in the particular case. There are certain cases where the Guidelines produce a sentence that is substantively unreasonable. There are certain cases, in other words, where the individual circumstances "require a variance under § 3553(a) from a Guidelines sentence." *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1056 (9th Cir. 2009). A district court commits reversible error if it "applie[s] the Guidelines sentence without considering the defendant-specific facts" that make that sentence unreasonable. *Id*. at 1057.

A. The Nature of the Offense and AUO's Role

The government will characterize the charged offense here, as well as AUO's involvement, as price-fixing of the most single-minded and avaricious kind, inflicting nothing but economic damage of the worst sort on the American consumer. But the evidence at trial, even as summarized by the government, did not support that assessment. In the government's closing argument, AUSA Scott described the genesis of the Crystal Meetings as rooted not in greed, but desperation.

> Now, why did these meetings start in the fall of 2001? You saw evidence of the dire market conditions in this LCD industry at that time. (Document displayed)

> There was a serious over-supply of LCD products. According to AUO's own SEC filings around that time, the average LCD prices fell 40 percent between 2000 and 2001. A significant fall in pricing. The LCD producers including AUO were desperate.

(RT 4742.)

Likewise, the record demonstrates that the alleged co-conspirators continued to compete against one another. Dr. Leffler, the government's own expert, testified that the charged conspiracy was not "perfect," meaning that all participants' prices did not reach the alleged Crystal Meeting "target price." (RT 4517:8-1.) The trial record is full of testimony of various companies, including AUO, undercutting other TFT-LCD manufacturers in order to obtain orders. (RT 1371:14-1372:18; 1407:13-1410:1; 1609:1-16; 1615:22-1616:2; 1638:14-19; 1726:15-1727:3; 1736:17-1738:17; 1745:6-1747:9; 1749:2-10; 2109:16-2110:8; 2136:12-7; 2370:6-2371:12; 2372:6-25; 2379:5-2380:10; 2383:10-2384:5; 2405:8-17; 2418:6-13; 2419:6-14; 2438:9-21; 2444:11-2446:12; 2452:8-2453:25; 2465:6-22; 2510:7-13.) Indeed, companies were occasionally criticized at Crystal Meetings for not charging the discussed price. (RT 1371:14-1372:18; 1407:13-1410:1; 1726:15-1727:3; 1736:17-1738:17; 2109:16-2110:8; 2136:12-7; 2405:8-17; 2419:6-14; 2452:8-2453:25; 3032:4-3033:13; 3159:10-3160:9.)

From the start to the finish of Crystal Meeting period, the vast majority of AUO's sales, even of products which had been discussed at that month's Crystal Meeting, were made at prices below the so-called "target price." (RT 4264:12-18; 4267:12-4268:16; 4269:13-4270:5; 4270:6-4272:5; 4274:1-20; 4275:10-4276:9; 4280:5-17; 4280:24-4281:17; 4282:22-4283:9; 4284:2-16; 4285:7-23; 4286:5-4287:13.) The government's expert agreed with that assessment. (RT 3443:7-10.) And it was undisputed at trial that AUO cut the price to the consumer of the products discussed at the Crystal Meetings by 12.4% every year over the life of the charged conspiracy. (RT 4298:7-4899:15.) Given AUO's track record of producing sophisticated and constantly improving technology at consistently reduced prices, its continued existence as a viable and competitive LCD manufacturer is in the interest of the American consumer, and thus

a sentencing factor this Court must consider.

B. Application of The 20% Figure in Section 2R1.1 Would Work an Injustice in This Case as it is Far Greater Than Necessary to Comply With the Purposes of Sentencing

The Guidelines fine in this case is determined by § 2R1.1. Like the Probation Officer, the government relies heavily on that provision to argue that the defendant's fine should be calculated as 20% of the Volume of Commerce ("VOC"), an amount that the government believes generates a Guidelines fine in excess of one billion dollars. In its companion brief, AUO has demonstrated why the 20% loss figure should not be used at all in this case. Were the Court to rely on that percentage to compute the advisory guideline calculation, however, it should then reject that calculation in its determination of an appropriate sentence under §§ 3553 and 3572, as the 20% figure does not accurately reflect the nature and seriousness of the offense and vastly exceeds AUO's gain from the offense.

An examination of § 2R1.1(d)(1) makes clear that it is merely a rule of thumb—a rough approximation—and it is not based on careful empirical study by the Guidelines Commission. The Commission itself admitted as much in the application notes.

> It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.

U.S.S.G. § 2R1.1, Application Note 3.

Thus, as the Commission instructs, the purpose of the 20% figure is simply to save time in cases where it would be too difficult to estimate actual gain and loss. The 20% figure is based on a very rough estimate that the average gain from price-fixing is 10% of selling price—and that doubling that figure will somehow approximate gain plus additional loss from products not purchased. (The logic of that doubling is dubious, to

say the least.) And the Commission also suggests that when the actual overcharge can be determined with reasonable accuracy, that figure—rather than the 20% rule of thumb—should be employed in setting the fine.

Few courts have addressed § 2R1.1 since *Booker* and *Kimbrough*, but at least some have begun to question the legitimacy of that provision. The Eighth Circuit recently affirmed a district court's decision to depart from the Guidelines in an antitrust case based on a policy disagreement with § 2R1.1. As the Eighth Circuit recognized, the specific sentencing provisions in § 2R1.1 were not the product of careful empirical study. Rather, "the Commission's revisions to the antitrust guidelines have largely been in response to Congressional acts." *United States v. VandeBrake*, 679 F.3d 1030, 1038 (8th Cir. 2012). The Eighth Circuit suggested that the antitrust guidelines are no more valid than the crack-powder guidelines questions in *Kimbrough*.

Even as a general matter, for the reasons given above, § 2R1.1(d)(1) should not be given much weight in determining a fine in an antitrust case. That is particularly true in a case like this, where the parties are willing and able to provide evidence that can more accurately determine the actual gain and loss from the offense of conviction. The evidence and argument submitted to the Court in support of AUO's guidelines brief, which AUO incorporates herein, establishes that the 20% heuristic grossly overstates the amount of actual damages to consumers. The use of the 20% in the PSR's guidelines calculation thus results in an advisory calculation which substantially misrepresents the seriousness of AUO's role in the charged offense.

C. A Fine Within The Sentencing Guideline Range Found by the PSR Would Create Significant and Unfair Sentencing Disparities Among Defendants With Similar Records Who Have Been Found Guilty of Similar Misconduct

There is no question that in seeking to impose a just punishment consistent with the dictates of federal sentencing law, a district court may consider the need to avoid unfair disparities in penalty among co-defendants, including disparities between those that pleaded guilty and those that went to trial. *See United States v. Vazquez-Rivera*, 470 F.3d 443, 449 (1st Cir. 2006); *see also United States v. Wills*, 476 F.3d 103, 110 (2d Cir.

2007); *United States v. Parker*, 462 F.3d 273, 277-78 (3d Cir. 2006). Moreover, to impose a much more severe sentence based solely on the defendants' decision to exercise their trial rights would impermissibly penalize the exercise of a constitutional right. *See United States v. Cortes*, 299 F.3d 1030, 1038-39 (9th Cir. 2002); *United States v. Ochoa-Gaytan*, 265 F.3d 837, 843 (9th Cir. 2001).

Imposition on AUO of a fine within the range set forth in the PSR would certainly create significant sentencing disparities among the coconspirator defendants in this case. Four participants in the "Crystal Meeting" price-fixing conspiracy have been sentenced by this court, and none received a fine anywhere near the amount the government proposes for AUO, despite the fact that the volume of commerce for LG is larger than that of AUO. Each of these defendants participated in the same conspiracy as AUO. LG paid the highest fine -- $400 million. Hannstar paid a fine of only $30 million; CMO paid a fine of $220 million; and CPT paid a fine of $65 million.

The government arrived at these fines based on a calculation of each participants' volume of commerce using a specific methodology. Now, however, the government has changed its methodology for calculating AUO's VOC. *See* Expert Declaration of Robert Hall, Ph.D. ¶ 41. There is no logical reason why an economic calculation such as VOC should be determined by methodologies that shift from one defendant to another. This is a clearly result-oriented effort to achieve a fine of over one billion dollars, a proposed fine publicly touted by the Anti-Trust Division almost immediately after the verdict as punishment for AUO's intransigence in insisting upon its constitutional right to a jury trial.

//

//

//

//

D. The Fines Proposed by the Government and the PSR Would Weaken Competition by Permitting Samsung, the Organizer and Leader of the Charged price-Fixing Conspiracy, to Dominate the LCD Industry

Samsung, a coconspirator and repeat anti-trust offender,[2] has received no punishment at all in this case, despite its status as the initiator of the Crystal Meetings and instigator and coordinator of the conspiracy. *See* AUO Trial Exh. 333 at 2 (Samsung hopes that Taiwanese manufacturers can get together to take consistent actions and "Samsung is willing to make necessary accommodations to maintain order"); Testimony of Brian Lee, TR 1634:4 – 1635:9 ("Samsung would bring that stabilization message to others in the industry, including AUO"). Samsung is the one that initiated the conspiracy – it stated that it wanted the Taiwanese LCD producers to stop lowering prices and stealing orders, and that it had deeper pockets and could survive falling prices while the others might not be able to. *Id.* TR 1633:9 – 1634:13. Samsung was also the largest participant in the conspiracy, a very powerful company that dominated the LCD market in 2001. *See id.* TR 1574:23 – 1575:1; TR 1621:4 – 22; TR 2416:19 – 21. And Samsung had by far the largest volume of commerce, using DOJ's own methods of calculation. *See* Expert Declaration of Robert Hall ¶¶ 75, 76 (under DOJ's original method of calculating VOC or under Dr. Leffler's more recent method, Samsung had by far the largest VOC).

And yet Samsung was not fined at all, nor were any of its executives punished, helping it grab a larger share of the LCD market and freeing it to push out competition, achieving through the Antitrust Division's leniency program what it could not accomplish by conspiratorial methods. That fact is borne out by Samsung's market share, which grew from 22.6% of the LCD market in 2005 to 28.55 in 2009 before

---

2 Samsung has two prior criminal antitrust convictions in the United States alone. Samsung pled guilty on November 30, 2005, to a conspiracy to fix prices of Dynamic Random Access Memory ("DRAM") and paid a $300 million fine. *See United States v. Samsung Electronics Co., Ltd.*, No CR 05-0643-PJH. In 2011, Samsung pled guilty to conspiring to fix prices of color display tubes ("CDTs") and paid a $32 million fine. *See United States v. Samsung SDI Company, Ltd.*, No. CR 11-0162-WHA. It also has been fined multiple times for prior anti-trust violations in the European Union, Japan, and Korea.

dropping back somewhat to 25.9 percent in 2010. *See* DisplaySearch 2011 market share data (DISP_LCD-000001).

Imposing a fine of $500 million on AUO, greater than any paid by its larger competitors, can only work to the anti-competitive benefit of those competitors, especially Samsung, a result entirely inconsistent with the very purpose of the antitrust laws. *See, e.g.,* Testimony of Piyush Bhargava (Dell), TR 2538; 2798-2800 (Dell needed another supplier besides Samsung because Samsung was too powerful).

E. The Court Must Impose a Fine That Does Not Impair AUO's Ability to Pay Restitution and That Comports With the Defendant's Financial Condition

Section 3553 requires the Court to consider, as factors when determining punishment, the financial condition of the defendant, the burden the fine will impose on the defendant and anyone dependent on the defendant, and the need to provide restitution to the victims of the offense. *See* 18 U.S.C. § 3553(a)(1), (2), and (4). And Section 3572(b) directs the Court to "impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution."

Even before the imposition of a fine, AUO's financial condition is already very challenging. *See* Expert Declaration of Robert Hall ¶ 79-85. AUO has suffered significant financial losses nearly every year since 2009, having lost $2.9 billion in the last 18 months. *See* AUO 2009Q1 through 2012Q2 Unconsolidated Condensed Financial Statements. AUO, as a leading Taiwanese business, supports over 20,000 people as employees in Taiwan alone, spending approximately $892 million per month on wages, supplies, and other purchases. *See* AUO 2012Q1 through 2012Q2 Unconsolidated Condensed Financial Statements and AUO 2011 Form 20-F, p. 64.

In addition to these obligations, as noted in the PSR, AUO already has been subjected to large fines associated with the same conduct involved in the Crystal Meetings, including approximately $163.5 million to the European Commission and approximately $17.4 million to the Korea Fair Trade Commission. It faces over 30 civil lawsuits involving this same conduct in which the amount of claimed damages against

AUO and other defendants exceeds $4 billion. *See* Letter to Aaron Tam (July 16, 2012). AUO has already settled two class actions, paying $38 million for the direct purchaser class and approximately $170 million to the indirect purchaser class, which included a number of state attorneys general. *Id*.

Once this Court pronounces judgment on AUO and imposes a fine – of whatever amount – accounting principles require AUO to book the total amount of the fine as a liability, even if the fine is payable in installments or not immediately due and payable. *See* Codification Section 450-20-25-2 and 450-20-25-5.

The fine proposed by the PSR, and certainly that proposed by the government, within the guideline range adopted by the PSR may cripple AUO, thus rendering it ineffective to compete against its larger comperitors. AUO's debt is already trading at junk-bond levels (*see* Expert Declaration of Robert Hall ¶ 84) and its stock price has fallen from $20 per share to $3 per share over the past 5 years.[3] Even if AUO were successful at raising such a large sum, the terms would almost certainly be so onerous as to significantly impact AUO's ability to continue as a vibrant competitor in this important technological field.

F. The Corporate History and Good Citizenship of AUO

Section 3553(a)(1) directs the Court to consider the history and characteristics of the defendant when determining an appropriate sentence. The fine proposed by the Government is entirely at odds with the history and characteristics of AUO.

AUO has no prior criminal history – unlike Samsung. *See* Note 2, *supra*. AUO is a leader in the Taiwanese business community, employing more than 20,000 people in Taiwan alone, and 60,000 worldwide. *See* Exhibit A to this Memorandum, the Letter from Ministry of Economic Affairs of Taiwan, Republic of China. It has a long history of charitable and philanthropic activities in Taiwan. After Typhoon Morakot hit Taiwan in 2009, AUO donated more than 63 million New Taiwanese Dollars (approximately $2 million) to typhoon relief. *Id.* Its charitable foundation, the BenQ Foundation, donated

3 Bloomberg reports stock prices of $20 during November 2007 and $3 during August 2012.

an additional 100 million New Taiwanese Dollars to flood relief efforts. *Id*. The BenQ Foundation rebuilt the campuses of two elementary schools and since 2006, AUO and the BenQ Foundation have donated more than 64 million Taiwanese dollars to a scholarship program for low-income families. *Id.* They have contributed approximately 300 million Taiwanese dollars for the construction of the Ming-Da Hall, which currently houses the Electrical Engineering Department of the National Taiwan University. *Id.* AUO and the BenQ Foundation have also been significant financial supporters of agricultural and cultural projects in Taiwan. *Id.* AUO is one of the leaders in the Taiwanese business community of green, environmentally sustainable business practices. *See* Letter to Aaron Tam (July 16, 2012).

AUO's lack of criminal history, its importance to the Taiwanese business community, the number of employees it employs, and its long history of significant charitable activities are all factors that this Court must take into account when determining the appropriate penalty. These factors strongly suggest that any fine within the guideline range adopted by the PSR is grossly excessive, and that the fine proposed in the PSR is "greater than necessary to fulfill the sentencing goals of §§ 3553 and 3572.

G. As an Equitable Matter, the Government Should Not Receive a Fine More Than Twice the Amount Found By the Jury to Represent Conspiracy-Wide Gains

In AUO'S memorandum on the scope of §3571, it asserts that under that statute, the Court is barred as a matter of law from imposing on AUO a fine greater than $285 million, as that amount would result in the maximum conspiracy-wide fine of one billion dollars, twice the amount of the overcharges found by the jury to have been gained by all the Crystal Meeting defendants. AUO incorporates that discussion herein. Even if the Court rejects that claim as a matter of statutory interpretation, its equitable force remains. Why should the government receive more revenue from the defendants under § 3571 than twice the amount of the conspiracy-wide gains, particularly when there are civil claimants seeking redress for their asserted injuries? For that reason alone, the Court should not impose the $500 million fine recommended by the PSR.

CONCLUSION

For the reasons stated above and in AUO's other sentencing memoranda, the Court should impose a fine no greater than the $100 million maximum permitted under the Sherman Act. Alternatively, the fine imposed under § 3571 should be sufficient but no greater than necessary to achieve the sentencing objectives of §§ 3553 and 3572, up to a maximum of $285 million.

Dated: September 11, 2012

Respectfully submitted,

MARTHA BOERSCH
LAW OFFICES OF MARTHA BOERSCH

DENNIS P. RIORDAN
RIORDAN & HORGAN

KIRK JENKINS
SEDGWICK, DETERT, MORAN & ARNOLD LLP

/s/ Martha Boersch
MARTHA BOERSCH

Attorneys for Defendants
AU OPTRONICS CORPORATION and
AU OPTRONICS CORPORATION AMERICA