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

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INTRODUCTION

In AUO's guidelines reply brief, it has demonstrated why the guidelines cannot support a fine in the amount proposed by either the government or the PSR. The government's protestations to the contrary, Section 3553 and 3571 likewise mandate a much lower fine.

I. THE GOVERNMENT MISCONSTRUES OR IGNORES THE FACTORS THIS COURT MUST CONSIDER UNDER SECTION 3553

A. The Nature and Circumstances of the Offense

Section 3553(a)(1) instructs sentencing courts to consider "the nature and circumstances of the offense." Relying on this provision, the Government tries to justify a fine of $1 billion based on the "nature and circumstances of the offense," stating that "[p]rice-fixing cartels represent a frontal assault on our regime of competition." (GSM at 36). It argues that cartel activity inflicts "far greater economic harm" than other property crimes, and it notes that, in recognition of the seriousness of antitrust violations, Congress has increased penalties for Sherman Act violations. (GSM at 36-37).

But the government's entire argument simply misapprehends the meaning of the "nature and circumstances" inquiry under §3553(a)(1). The question is not how serious antitrust violations are compared to other property crimes. Rather, the question is how this antitrust violation compares to a mine-run antitrust violation. [1]

In fact, the Seventh Circuit recently reversed a district court for imposing a severe sentence based on the very same flawed argument urged by the government here. In *United States v. Bradley*, 675 F.3d 1021 (7th Cir. 2012), the defendant was convicted of engaging in interstate travel to engage with sex with a minor. Based on its view that the crime, in the abstract, was a heinous offense compared to other crimes, the district court imposed a harsh sentence. The Seventh Circuit reversed:

> The problem with this rationale is that it provides little more than what is implicit in the instant offense. 18 U.S.C. § 2423(b) proscribes interstate travel with intent to engage in sexual conduct with a minor. And the district court did not articulate either at sentencing or in its addendum why

[1] Furthermore, district courts are entitled to vary from the Guidelines even "in a mine-run case." *Spears v. United States*, 555 U.S. 261, 267 (2009).

> Bradley's journey required more thought than any other person crossing a state border with intent to commit the instant offense.

Id. at 1025-26.

Other courts have ruled similarly. *See United States v. Burroughs*, 613 F.3d 233, 243 (D.C. Cir. 2010) ("The government points to no facts making the computer restrictions reasonably related to the nature and circumstances of Burroughs's offense that would not also make computer restrictions appropriate for every defendant convicted of the same crimes."); *United States v. Allen*, 488 F.3d 1244 (10th Cir. 2007) (stating that "nature and circumstances" inquiry reflects a recognition that "[d]epending upon the circumstances of its commission the same 'crime' will have a different impact, reflect varying levels of culpability, or portend unlike consequences"); *see also United States v. Saeteurn*, 504 F.3d 1175, 1182 (9th Cir. 2007) (holding that the district court correctly considered the "relative culpability" of other defendants convicted of the same crime when analyzing the "nature and circumstances of the offense").

In setting the statutory minimum and maximum penalties, Congress has already made a determination of the relative seriousness of different crimes. The purpose of the "nature and circumstances" inquiry is to determine the relative seriousness of offenses within the class of offenders who commit the same crime. In short, under §3553(a)(1), the relevant inquiry is "whether the offense committed was more or less heinous than offenses committed by *other defendants convicted under the same statute*." *United States v. Cerno*, 529 F.3d 926, 939 (10th Cir. 2008) (emphasis added).

The government's memorandum offers an imperious lecture about the inherent seriousness of Sherman Act violations. But it has offered no evidence or argument that the offense in this case was more heinous than offenses committed by other defendants under the same statute. Properly construed, the "nature and circumstances" factor of §3553 strongly supports AUO. As AUO pointed out in its opening sentencing memorandum, the government itself argued to the jury that the Crystal Meetings began not out of greed and avarice, but out of the LCD producers' desperation to save their businesses. (RT 4742 :"The LCD producers including AUO were desperate".)

AUO was neither a leader nor an organizer of the Crystal Meetings, unlike Samsung. The government's professed disapprobation of AUO is disingenuous, to say the least, given that the government granted leniency to Samsung despite Samsung's role as the originator and motivator of the conspiracy and its prior antitrust convictions. (*See* AUO's Sentencing Memorandum, Part III at 10.) [2] Indeed, the government ignored its own Leniency Policy to allow Samsung to escape unpunished. *See* Dept. of Justice, Corporate Leniency Policy at A.6. (stating that leniency can be granted to a corporation only if the corporation "*clearly* was not the leader in, or originator of, the activity" (emphasis added)).

Any fine imposed by the Court must also be one that reflects the seriousness of the offense, and promotes respect for the law. 18 U.S.C. §3553(a)(2). The fine proposed by the government would accomplish neither, because rather than promoting competition – the very purpose of the antitrust laws – the proposed fine would cripple competition. The lesser fines imposed on the other participants of the Crystal Meetings have already weakened competition and accomplished for Samsung its original goal – to take out its Taiwanese and Japanese competitors. Even before this prosecution began, Samsung had the largest market share of the LCD producers, according to the government's formula for estimating its volume of commerce. (*See* Hall Declaration, tbl. 1.) And the testimony at trial was that LCD buyers needed other producers because Samsung was "too powerful." *See, e.g.*, Testimony of Piyush Bhargava (Dell), TR 2538; 2798-2800 (Dell needed another supplier besides Samsung because Samsung was too powerful).

Since Samsung received leniency and these prosecutions commenced, its market share has increased yet more. In 2006, the year it received leniency from the Department of Justice, its market share for monitor, notebook, and TV panels 10" or larger was about 24.6%. By 2009, its

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[2] The government also asserts that AUO is "unrepentant" (GSM, at 41: 28), and as support chides AUO for not firing Mr. Chen and Dr. Hsiung. (GSM, at 45:23-24.) Yet the Government has consistently allowed other companies to retain and even promote employees who have pled guilty to antitrust offenses, including defendant companies in this investigation. See D. Levine, "Antitrust Convictions Don't Mean End of Job for Some Executives," http://www.law.com/jsp/article.jsp?id=1202447903832&rss=newswire .

market share had risen to 28.5%. *See* DisplaySearch 2011 market share data (DISP_LCD-000001). Only last month, one stock analyst concluded that "Taiwanese and Japanese companies [had lost their] ability to compete" and that "[s]ince 2000, Taiwanese and Japanese companies have been engaged in a heated price war with Korean companies. However, due to their liquidity crunch, they no longer have the capacity to do so." *See* Exhibit B, "LG Display, Display War in Nearing End. According to Bloomberg, the stock prices of all of the Crystal Meeting participants *except Samsung and LG Display* have hit all-time lows. And only this month, it was announced that authorities have opened an investigation into claims that Samsung is abusing its dominant market position, following complaints filed by Apple regarding Samsung's licensing of certain patents. "Samsung is now being investigated by two antitrust authorities – in Europe and now South Korea – following a complaint by Apple." <http://www.zdnet.com/ south-korea-opens-antitrust-probe-into-Samsung-7000003817/

In sum, the government's cryptic comment that "[p]resumably the government's prosecutions and private civil cases have resulted in a competitive market for TFT-LCD panels" (GSM at 45) demonstrates the government's myopic perspective on this prosecution.

B. The Proposed Fine Would Create Large Unwarranted Disparities

The government claims that its proposed fine would not result in unwarranted sentencing disparities. That claim is utterly belied by the record in this case and by the government's record of other antitrust prosecutions. The $1 billion fine that the government proposes against AUO exceeds by $285 million the *total amount* of fines the government sought against *all other* Crystal Meeting participants, including, of course, Samsung, the largest company and the dominant player in the market. It is 2.5 times larger than the $400 million fine charged to LG. Yet LG is a much larger entity than AUO, with a correspondingly larger volume of affected commerce.[3] Given the size differential, the government proposes to fine AUO five times more per dollar of affected commerce than it agreed to fine LG . The proposed fine is also almost 5 times larger than the fine imposed on another comparable Taiwanese company, CMO.

[3] No matter how measured, AUO is somewhere between 35% to 62% as large as LG. (See Dec. of Robert Hall ¶ 75-77.)

The government maintains that the great gap between its proposed sentence for AUO and those it agreed to levy on the other Crystal Meeting participants rests on new evidence:

> The prior sentences for both corporations and individuals were based on volume-of-affected-commerce figures estimated from the data available at the time. Since then, the government has collected additional data and retained and worked extensively with an outside economic expert. The sentences that the government now recommends for these defendants are the product of a much more complete, rigorous, and detailed calculation of the volume of affected commerce. This is an additional reason that those earlier sentences are not a valid benchmark for the defendants currently before the Court. In sum, other defendants who pled in this case are not similarly situated to AUO, and therefore their sentences cannot support any unwarranted disparity claim.

(GSM at 43).

This argument recognizes that the fine it seeks to impose on AUO is based on a different calculus than the fines levied on the other defendants, but the government claims that the massive increase for AUO is justified by the absence of a "much more complete, rigorous, and detailed calculation of the volume of affected commerce" in the earlier cases—in short, in the government's own view, its earlier oversights let the other defendants off too easily. Even if that were true, the end result would be that AUO would be placed at a great competitive disadvantage vis-à-vis the other LCD manufacturers, an outcome at odds with the objectives of the Sherman Act. But the government's claim of new data lacks a basis in fact. At the LG sentencing in this Court in December of 2008, the government said this:

> [T]he Government believes that this is US commerce that was affected bythis conspiracy . . . We exchanged a lot of sales data. The Government worked with the defendant companies, obviously. We worked with the purchasers who directly purchased these products to get as accurate data as possible regarding the sales. It was a very time consuming, very complex, as you can imagine, process, even getting these three categories, the information that was agreeable to us . . .
>
> We were in a position with the Government to try to determine what we believed affected commerce was in the – here in the US for purposes of the Sentencing Guidelines to try to get to a defined amount that we believe signified the degree of culpability of these defendants and the activity they engaged in. We believe we got that amount using a very reasonable and rational approach, we believe . . . So we believe that we met sort of the purposes of the Sentencing Guidelines here in how we measured US commerce here. And it got us to a fine level that we believe is appropriate …

(RT Dec. 15, 2008, at 34:11-17.)

The factual claim that the government's proposed billion dollar fine is justified by new sales data is one as to which the government bears the burden of proof. The government neither identifies nor offers proof of such new data, no doubt because all of its guidelines calculation are based on information in its possession years ago when it stipulated to the fines of the other Crystal Meeting participants. The DOJ investigation became public in December 2006, nearly six years ago. The fines for the other four companies occurred between two and 3 ½ years after the investigation began. The government had access to the same type of data from each company at the time it agreed to the fines paid as it does now with AUO.

Furthermore, the fine the government proposes for AUO is also wildly disproportionate to those imposed on antitrust defendants in other cases. The fine proposed here is twice as large as the largest fine *ever* imposed on an antitrust defendant. *See* Dept. of Justice, Antitrust Division, "Sherman Act Violations Yielding a Corporate Fine of $10 Million or More," (F. Hoffman La-Roche fined $500 million).[4] It is three times larger than the fine imposed on Samsung in the DRAM investigation ($300 million) and almost 30 times larger than the fine Samsung paid in the CRT investigation ($32 million). *Id.*

Though the government, with great hyperbole, states that this case is "the most serious price-fixing case ever prosecuted by the United States," it provides no evidence to support that assertion, and it is difficult to believe that the conduct in this case was more than two times more egregious than the almost ten-year conspiracy to fix the price of "the vitamins most commonly used as nutritional supplements or to enrich human food and animal feed." *See* Dept. of Justice, Press Release, F. Hoffman La-Roche and BASF Agree to Pay Record Criminal Fines, http://www.justice.gov/atr/public/press_releases/1999/2450.htm. And unlike Hoffman La-Roche, AUO was neither the initiator of the conspiracy nor "leading the conspiracy." *See* Dept. of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, 24th Annual National Institute on White Collar Crime, at 6 ($500 million fine paid "for leading the conspiracy").

[4] http://www.justice.gov/atr/public/criminal/sherman10.html

The disparity is even more stark when the ten-year sentences the government proposes for the individuals are considered. Between 1999 and 2009, only a third of the individuals convicted of antitrust offenses received a prison-only sentence. *See* Howell, Sentencing of Antitrust Offenders: What Does the Data Show? http://www.ussc.gov/About_the_Commission/About_the_Commissioners/Selected_Articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf. The rest of the individuals received probation or split sentences. *Id.*Of those sentenced to prison, the median prison term *never* exceeded *one* year, *id*., and the highest individual prison term during that period was 31 months. *See* Department of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, 24th Annual National Institute on White Collar Crime, at 9.[5] It is simply incomprehensible how Mr. Chen and Dr. Hsiung, Taiwanese citizens, could possibly deserve sentences *ten times* longer than the median sentence for the same offense.

C. Given AUO's True Financial Condition, Which the Government Has Misrepresented, A $1 Billion Fine Would Be Extremely Anti-Competitive In Impact

Section 3572(a) directs the court to consider the defendant's ability to pay a fine, and requires that any fine not be so large that it impairs payment of restitution. Section 8C3.3 of the Sentencing Guidelines allows the Court to reduce any fine if the company lacks the ability to pay or if the fine amount would impair the company's ability to pay restitution. The government contends that AUO has the ability to immediately pay a $1 billion fine because "AUO had net sales of over $12.5 billion, total assets of over $19.6 billion, current assets of $6.6 billion, and cash or cash equivalents of approximately $3 billion." (GSM at 44-45.) The government's analysis of AUO's financial condition is flawed and misleading.

[5] To date, the highest prison term imposed appears to be 48 months. [http://www.justice.gov/atr/public/division-update/2011/criminal-program.html]. But that term was for an American defendant. Foreign defendants have received significantly lower prison terms. *See* DOJ Antitrust Division 2011 Summary [Department of Justice Antitrust Division Update Spring 2011 - Criminal Program - Link: http://www.justice.gov/atr/public/division-update/2011/criminal-program.html].

First, the government mixes up AUO and its affiliated companies, focusing on consolidated results rather than AUO's results. The government relies on AUO's consolidated cash and cash equivalent number of $3 billion. But each of AUO's subsidiaries is an independent legal entity and each subsidiary's cash is used to fund its own operations such as working capital requirement, capital expenditures, debt repayment, etc. (*See* Exhibit C, Dec. of Andy Yang ¶ 8.) Focusing on AUO, the company has cash and cash equivalents of $1.66 billion as of June 30, 2012, but, as demonstrated below, it has debts and obligations that exceed its cash equivalents.

Second, the government's analysis rests on the remarkable proposition that the organization's financial health can be determined by looking at its assets while ignoring its liabilities. In its view, the owner of a home appraised at $500,000 would possess an asset of that value, even if the outstanding balance on the home's mortgage stood at $800,000, putting the residence under water to the tune of $300,000.

The government states that AUO and its affiliates had total assets of $19.6 billion as of the end of 2011 (the more recent corresponding number is $20.02 billion as of June 30, 2012, under ROC GAAP). However, the bulk of these assets are factories, manufacturing equipment, and other physical assets, and many of these are already pledged as collateral on existing debt. (*See id*. ¶ 12.) With respect to AUO's, its current assets are far less than those put forth by the government. To be more specific, AUO's current assets were valued at $5.04 billion as of June 30, 2012, but the government further omits the fact that AUO's current liabilities at the same time were $5.48 billion. Thus, in financial terms, AUO had more than $1 dollar of liability for every $1 dollar of asset. Additionally, a large portion of AUO's current assets consist of product inventory and customer receivables, which cannot be used directly to pay liabilities. (*Id*. ¶ 7, tbl. 3.)

Third, the government focuses on net sales and ignores losses. While AUO had revenues of $11.9 billion in 2011, it suffered losses of $2.67 billion under US GAAP and $2.02 billion under ROC GAAP, has suffered heavy losses nearly every year since 2009, and for the first two quarters of 2012, has losses of $868 million. (*Id*. ¶ 4.) In the first six months of 2012, AUO

spent $5.32 billion on wages and other cash costs and expenses, but had a negative cash flow from operations of $198 million. This means that AUO spent more on operations than it received during that period by $198 million.. (*Id*. ¶¶ 9-10.)

The Government's memo provides no context whatsoever as to how AUO's resources are used. Like other companies, AUO must pay wages and other cash cost and operating expenses. In addition to these, the company must also spend cash for new and replacement investments in property, plant and equipment, which generate cash in the future. In the first half of 2012, AUO spent $361 million on property, plant and equipment for its fabs and other facilities in order to produce new products to meet customers' requirement and remain competitive with other LCD manufacturers; on a consolidated basis, the capital expenditures were $862 million. Financial statements do not typically include forecasts of the amount of future operating costs or future purchases of property, plant, and equipment, although this industry typically requires high levels of both to remain competitive. For example, LGD, one of AUO's competitors in the TFT-LCD industry, spent KRW 2,126 billion ($1.85 billion) on capital expenditures on a consolidated basis in the first half of 2012. (*Id*. ¶ 11.) The lower expenditures reflect the disparity in size between AUO and LGD.

AUO, like other Taiwanese LCD producers, has significant long- and short-term debt. As of June 30, 2012, its (unconsolidated) debt is approximately $6.54 billion. In the next 12 months, AUO must use its cash equivalents to make debt repayments of $1.58 billion, nearly exhausting AUO's total cash balance. (*Id*. ¶ 12.) Total debt due from AUO between 2013 and 2014 is an additional $2.29 billion. (*Id*. ¶ 13.) In addition to these existing debts, AUO faces numerous civil lawsuits and is already in the process of paying over $200 million in the next twelve months to settle two class actions related to the Crystal Meetings. (*Id*. ¶ 14.)

And given AUO's large existing losses and liabilities, its access to additional funding is very challenging. (*Id*. ¶¶ 17-18.) Moreover, any fine imposed is a liability, which is recognized as a loss that would have a negative impact on both AUO's stock price and its ability to raise any

additional equity or debt with banks or investors.[6] (*Id.* ¶ 17.) The fine proposed by the government represents approximately one-third of AUO's entire stock market capitalization. A large liability exceeding AUO's funding resources could impair AUO's ability to fund its current operations, repay its debt obligations, remain competitive, and pay other fines and settlements. (*Id.*)

D. Depending On the Fine Imposed, AUO May Seek A Stay or A Schedule for Payments

At this moment, of course, defendant AUO does not know what fine the Court will impose upon it at the close of the sentencing hearing. The PSR recommends a fine of $500 million, payable immediately, and the government seeks to double that. AUO maintains that (a) that the alternative fine provisions of § 3571 are not available in this case, and thus the maximum fine that the Court may impose is$100 million dollars; (b) that if § 3571 does apply to this case, $285 million is the statutory ceiling for the fine; and (c) that in any case, correctly computed, the guideline range fine is well under the $285 million figure.

The fine demanded by the Government, as well as that recommended by the PSR, would constitute an additional large liability, leading to a substantially negative impact on AUO's share price and AUO's capability of raising additional funding, thereby affecting the company's ability to fund its daily operations, continue to make needed investments in property, plant and equipment, pay its debts, remain competitive and fund other fines and settlements associated with the Crystal Meeting activities. That being so, depending on the fine levied, AUO may seek a stay of the fine or a payment schedule. As the Court is well aware, other defendants in the Crystal Meeting cases—CMO, CPT, Hannstar, LG, and Sharp-- were granted leave to pay their fines over a five year period. The government's brief recognizes that that "installment payments" may be appropriate. (GSM, at 45:1-3.) A request for a stay, if needed, will be addressed in a separate pleading.

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[6] *See* The China Post, *Investors sell off shares in AUO after price-fixing fine report*, Sept. 14, 2012 ("Fears have escalated that the heavy fine will further squeeze AUO's bottom line at a time when Taiwan's major flat panel suppliers are struggling to turn a profit during the current down cycle), http://www.chinapost.com.tw/business/company-focus/2012/09/14/354258/Investors-sell.htm.

II. AUO'S PROBATION SHOULD BE SUPERVISED BY THE PROBATION DEPARTMENT, NOT A PRIVATE COMPLIANCE MONITOR

AUO recognizes that it will be placed on probation, and it looks forward to cooperating with the Probation Department of this district to fulfill its obligations successfully. AUO has already, with the assistance of outside counsel, developed and continues to develop and implement an antitrust compliance program. PSR , at ¶ 33. Neither the Probation Officer nor the government provides any evidence to suggest that this compliance program is deficient or ineffective.

The government suggests, however, that the Court should require AUO to "hire (at its own expense) an experienced, independent antitrust attorney as a compliance monitor to review its current compliance program." (GSM, at 54:4-6.) This measure was not required of any of the other Crystal Meeting participants, including Samsung, which has committed multiple antitrust violations in the past.

Compliance monitors are typically appointed in cases where DOJ negotiates a deferred prosecution or non-prosecution agreement with a company, and the compliance monitor is a condition of non- or deferred prosecution.[7] Usually, monitors are used in cases involving violations of the FCPA. Given that statute's books and records provision, violations are often detected by reviewing the books and records of the company, a task entrusted often to the compliance monitor. The government suggests no reason why a compliance monitor is necessary here in an anti-trust case; indeed, it offers no precedent for such a measure.

The government's demand for a private monitor rests on the shrill hyperbole that unfortunately characterizes much of its sentencing briefing. This case involves an alleged pricing fixing agreement that it own expert at trial testified terminated in January of 22006. There has been no suggestion of wrongdoing of any kind on AUO's part since that time, and its record of community service, as demonstrated by the evidence before the Court, is unchallenged by the government. Yet the government claims that: "AUO has never known any other way of doing business [than collusion] and has never willingly operated lawfully." (GSM, at 53: 14-

[7] *See* http://edition.cnn.com/2008/POLITICS/03/10/ashcroft.corporate.monitor/index.html.

15.) Again, the government demonstrates that its real purpose here is to punish AUO for exercising its constitutional right to test the legal sufficiency of the allegations against it, as it equates that exercise with a "refusal to cease engaging in collusive practices." (*Id*., at 53:22-24.) The absence of the slightest evidence for that serious charge bothers the government not.

The government's demand for the appointment of monitors in corporate cases fell into disrepute at the end of the Bush administration when it became apparent that it was being used as a boondoggle benefitting former high-ranking officials of the DOJ, among them former Attorney General John Ashcroft.[8] The practice need not and should not be revived here. The Probation Department can in its discretion, of course, impose reasonable conditions to ensure that AUO meets its probationary obligations.

CONCLUSION

For the reasons stated above and in AUO's initial sentencing memoranda, the Court should impose a reasonable fine consistent with the sentencing goals of §§ 3553 and 3572 and within the limits set by the Sherman Act and § 3571.

Dated: September 17, 2012

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[8] *See ashcroft.corporate.monitor* at footnote 7.