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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 AU OPTRONICS CORPORATION'S RESPONSE TO GOVERNMENT'S SENTENCING MEMORANDUM: APPLICATION OF THE SENTENCING GUIDELINES; CONDITIONAL REQUEST FOR EVIDENTIARY HEARING** Judge: Hon. Susan Illston Date: September 20, 2012 Time: 10:00 a.m. Place: Courtroom 10, 19th Floor

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I. INTRODUCTION

In its Sentencing Memorandum, the Government did not address the issues raised in Part One of AUO's Sentencing Memorandum concerning the scope and application of § 3571, although it will no doubt do so in its responsive brief.[1] AUO's reply to the Government's opposition on the § 3571 claims thus must await the sentencing hearing. AUO hereby responds to the Government's stated positions on the issues regarding the proper Guidelines calculation. It is also filing a separate reply memo addressing the sentencing factors in §§ 3553 and 3572. AUOA joins in the arguments presented by AUO.

On at least one point, the parties are in accord: the Government bears the burden of proof as to all of "the facts necessary to enhance a defendant's offense level under the Guidelines." (Government's Sentencing Memorandum [hereafter "Govt. Mem."], at page 7). AUO strongly disagrees with the Government, however, as to the legal standard under which those facts must be proved. The statutory maximum for a fine under the Sherman Act is $100 million. The PSR recommends a fine five times the statutory maximum, while the Government seeks a fine ten times as large. To obtain a penalty so disproportionate to that contemplated by the statute AUO is charged with violating, the Government must prove the necessary factual predicates by clear and convincing evidence.

Ordinarily, a district court uses a preponderance of the evidence standard of proof when finding facts at sentencing, such as the amount of loss caused by a fraud. *United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008). However, "where an extremely disproportionate sentence results from the application of an

[1] In footnote 10 at page 25 of the Government's Sentencing Memorandum, the Government claims that because AUO successfully argued that the issue of overcharge had to be submitted to the jury, it is "estopped from arguing that such proof is insufficient or unconstitutional." Although the Court correctly ruled pretrial that the overcharge amount was a jury issue (*see Southern Union Co. v. United States*, __ U.S. __, 132 S. Ct. 2344 (2012), it rejected the defendants' claim that under § 3571, a finding of AUO's overcharge, rather than that of the conspiracy as a whole, was required. (Dkt. 631 at 3.) It is that adverse ruling and the recent *Southern Union* decision that give rise to AUO's sentencing claims concerning the scope of § 3571.

enhancement, the Government may have to satisfy a 'clear and convincing' standard." *United States v. Zolp*, 479 F.3d 715, 718 (9th Cir.2007); *see also United States v. Staten*, 466 F.3d 708, 717 (9th Cir.2006) (explaining that certain sentencing facts must be found by clear and convincing evidence in order to ensure that criminal defendants receive adequate due process); *United States v. Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010) (stating that clear and convincing proof is required when a sentence enhancement depends on, *inter alia*, "the extent of a conspiracy" or would more than double an otherwise relatively short sentence).

The Government offered no testimony at trial as to the volume of AUO's commerce that was affected by the alleged price-fixing agreement. It therefore now bears the burden of proving that affected commerce by clear and convincing evidence. It rests its evidentiary showing entirely on a declaration of Dr. Keith Leffler, who served as its expert witness on economic issues at trial. The Court simply cannot determine AUO's affected commerce by crediting Dr. Leffler's declaration, because (1) that declaration is in important respects in conflict with Dr. Leffler's own trial testimony and the methodology the Government used in four previous sentencing hearings for calculating the volume of affected commerce; (2) Dr. Leffler's declaration is contradicted on numerous critical matters by that of Dr. Robert Hall, who Dr. Leffler himself described at trial as "certainly a very good economist" (RT 3634); and (3) as Dr. Leffler's cross-examination at trial established that, when it comes to expert opinions on economic matters in court cases, Dr. Leffler has often been wrong while never in doubt. The Court cannot credit Dr. Leffler's declaration unless, at a minimum, his opinion as to AUO's affected commerce is subjected to testing at an evidentiary hearing.

Likewise, the Guidelines' presumed overcharge of 10% of affected commerce cannot be utilized without clear and convincing proof that it approximates AUO's actual overcharge in this matter. *United States v. McGowan*, 668 F.3d 601 (2012); *United States v. Hanna*, 49 F.3d 572, 577 (9th Cir. 1995) ("[A] trial court violates a

defendant's due process rights by relying upon materially false or unreliable information at sentencing.") The Government misleadingly suggests that it already proved at trial that AUO reaped an overcharge on the products it sold during the life of the charged conspiracy. (*See* Govt. Mem. at 22-23: "[T]he jury convicted AUO of participating in such a conspiracy, and found beyond a reasonable doubt that AUO and its coconspirators overcharged their customers by at least $500 million.") Not so. Dr. Leffler never offered an opinion at trial about his view of AUO's total overcharges; rather, Dr. Leffler testified that the conspiracy *as a whole* had an overcharge of at least $500 million, a contention that AUO did not contest, as its expert, Mr. Deal, testified only to the absence of an overcharge by AUO. The Court's instructions did not require a finding of an overcharge by AUO; rather they required only that the jury determine whether *any* member or members of the conspiracy overcharged customers by $500 million.[2]

It is in these sentencing proceedings that the issue of an AUO overcharge will be addressed for the first time, and it is one on which the Government bears the burden of proof by clear and convincing evidence. Again, given the conflicting declarations now before the Court, the Government has not met that burden.

Nor can the Court utilize the Guideline's 10% of affected commerce measure of lost consumer opportunities. That figure – the second half of the Guidelines' 20% presumption of pecuniary loss – doubles the fine range, and thus cannot be applied absent clear and convincing proof that the figure is empirically reliable. *McGowan, Hanna*, *supra*. But the Government, rather than submitting evidence to support the accuracy of the 10% measure, simply offers an *ipse dixit*, contending reliance on

[2] *See* RT 4728:"If you find one or both of the corporate defendants – AU Optronics Corporation, and AU Optronics Corporation America – guilty following the presentation of evidence and your deliberations, you must then determine whether the Government has proven beyond a reasonable doubt that any of the defendants or other participants in the conspiracy derived monetary or economic gain from the conspiracy. If you find that any of the participants derived such gain, you will then make findings regarding the total gross gain from the conspiracy."

the 10% proxy is justified by its inclusion in the Guidelines. For all the reasons set forth in AUO's Sentencing Memorandum Part Two and below, that will not do.

Finally, the Government's billion dollar fine proposal is simply unfair and grossly disproportionate to AUO's role in the charged offense. The Government would have AUO pay a fine that is $285 million dollars higher than those paid by the remaining Crystal Meeting corporate participants *combined*, and *twice the highest corporate fine ever before imposed on an antitrust defendant.* The Government claims that this disparity can be justified by new information that it obtained after the sentencing of the other defendants, but it points to no such evidence, and there is none.

Furthermore, in addition to ignoring AUO's characteristics and relative role in the offense, the Government refuses to come to grips with the fundamental objective of this and every other antitrust prosecution: to promote competition. As will be demonstrated in Part Two of AUO's Response, the Government's memorandum misrepresents the financial health of AUO, and thus severely misstates the debilitating effect its proposed fine would have on AUO's ability to compete with other LCD manufacturers. The Government's "presumption" that its handling of this case "has resulted in a competitive market for TFT-LCD panels" (Govt. Mem. at 45) is simply unfounded. To the contrary, the ability of the AUO and the other Taiwanese manufacturers to compete against Korean manufacturing giants Samsung and LG has been greatly weakened. A fine as high as the $500 million proposed by the PSR, to say nothing of the Government's billion dollar proposal, would go far to increasing the dominance of Samsung and LG.

II. THE VOLUME OF COMMERCE PROPOSED FOR AUO IN THE PRELIMINARY SENTENCING REPORT IS GROSSLY OVERSTATED

In its Part Two of it Sentencing Memorandum, AUO demonstrated that the Government's "volume of affected commerce" calculation, adopted wholesale by the PSR, is grossly overstated for several reasons:

- The Government abandons the approach to volume of commerce taken in the sentencing hearings for LG Display ("LG"), Chi Mei Innolux Display ("CMO", Chunghwa Picture Tubes ("CPT") and HannStar Display ("HannStar"), the other Crystal Meeting attendees;

- The Government and Dr. Leffler abandon Dr. Leffler's repeated testimony that Crystal Meeting overcharges ended on January 31, 2006, extending the overcharge period for an additional ten months for no good reason;

- The Government includes all sales of all panel sizes named in the Superseding Indictment in its volume of affected commerce, despite never explaining how a purported target pricing conspiracy would "affect" sales of panels for which no "target price" was agreed to; and

- The Government includes all sales to LG and Samsung, as well as sales to Dell occurring after 2004, despite offering no explanation of (1) why LG and Samsung would knowingly pay AUO overcharges on panel sales subject to Crystal Meeting "target" prices; or (2) why post-2004 Dell sales are "affected" commerce when Dell's retained economic expert was unable to find any overcharges on Dell's panel purchases during that period.

The Government offers a litany of responses: (1) the Government's new approach to calculating the volume of affected commerce is merely an "augmentation" of its earlier approach, and is based upon substantial new information gathered after all other Crystal Meeting attendees has pled and been sentenced; (2) Dr. Leffler purportedly never testified that the alleged conspiracy ended by January 31, 2006; (3) the parties' exchange of pricing and competitive information caused the alleged effect of the Crystal Meetings to propagate to all panel sizes, whether or not they were discussed in meetings; and (4) LG and Samsung paid the same prices as other customers, thus -- according to the Government – "proving" that those companies knowingly paid overcharges to AUO on their panel purchases.[3]

The Government is wrong on all points.

[3] The Government offers no response to AUO's showing that post-2004 sales to Dell should be excluded. The volume of affected commerce should therefore be reduced by $293 million.

A. The Government Should Be Held To Its Repeatedly Endorsed Method for Calculating Volume of Commerce

1. The Government Endorsed and Applied the Same Methodology to Calculating Volume of Affected Commerce From December 2008 Through November 2010

Between 2008 and 2010, LG, CPT, CMO and HannStar – four of the six companies which attended the Crystal Meetings – pled guilty to price fixing and were sentenced to pay fines by this Court. LG – the first Crystal Meeting attendee to plead guilty – was sentenced on December 15, 2008. During that hearing, Michael Scott, who also served as co-counsel for the Government in this case, described the Government's methodology for calculating volume of affected commerce:

> The first category was TFT LCD sales by LG that were directly shipped into the U.S . . . And also, category 2 was TFT LCD sales by LG that were directly billed to a company located here in the United States . . . The third category covered sales of TFT LCD that did not – by LG that did not fall in the first two categories but were purchased by U.S.-based company through foreign-based offices . . . of that amount, we included any TFT LCD purchased by these companies that ended up in final products like notebooks or monitors that were sold back into the United States.

(RT Dec. 15, 2008 (LG Sentencing Hearing) 33:3-14, 22-25.)

Scott told this Court that the Government's methodology captured alleged harm to U.S. commerce:

> [A]s I advised the Court, one very important aspect in this negotiation was trying to determine what volume of U.S. commerce was affected under the Sentencing Guidelines in order to get a base fine . . . We were in a position with the Government to try to determine what we believed affected commerce was in the – here in the U.S. 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 to that amount using a very reasonable and rational approach, we believe, something that we had to negotiate that was the subject of significant negotiation for a long period of time. It wasn't a methodology that was immediately agreed to by any of the defendant companies. So we believe that we met sort of the purposes of the Sentencing Guidelines here in how we measured U.S. commerce here. And it got us to a fine level that we believe is appropriate for this – for this matter, and by the way, Your Honor, taking into consideration of international comity where we have these other international enforcement agencies that most likely

> will be bringing their own actions and measure some commerce themselves and not double-counting that commerce.

(*Id.* at 32:22-25, 35:10-36:2.)

Three additional sentencing hearings were held in the twenty months after LG's plea, and in each one, the Government applied exactly the same methodology: CPT on August 18, 2009 (RT Aug. 18, 2009 (CPT Sentencing Hearing) 12:8-14:4) CMO on February 11, 2010 (RT Feb. 11, 2010 (CMO Sentencing Hearing) 28:14-30:10); and HannStar on July 30, 2010 (RT July 30, 2010 (HannStar Sentencing Hearing) 15:15-16:7). Indeed, the Court asked counsel for the Government to explain the basis for the volume of affected commerce calculation in the LG and HannStar hearings, and the Government explained its three-part methodology. (RT Dec. 15, 2008 (LG Sentencing Hearing) 27:23-34:19; July 30, 2010 (HannStar Sentencing Hearing) 15:7-16:8).

On November 13, 2010 – five months after the Superseding Indictment herein was filed – this Court heard argument in the related civil cases on a pending motion to dismiss based upon the Foreign Trade Antitrust Improvement Act ("FTAIA"). During the hearing, plaintiff's counsel noted the Government's three-part methodology for calculating volume of affected commerce, commenting that the Government "presumably looked at those factors and was comfortable that they adequately reflected public policy and the law that governs." (RT Nov. 3, 2010 (Hearing on Motions to Dismiss) 23:23-24:15).

Days later, the Court asked the Government for its views on the impact of the FTAIA on criminal sentencing, and the Government responded with a letter strongly reaffirming its commitment to the same three-step methodology for calculating volume of affected commerce: "The government believes that these three categories of commerce represent harm caused to U.S. consumers by the LCD cartel. Inclusion of this commerce also has resulted in fines that are commensurate with the scope and impact on U.S. consumers of the LCD cartel." (Government's

November 15, 2010 Letter to the Court, Appendix B to Expert Declaration of Robert Hall, Ph.D.)

2. The Government Abandons Its Earlier Methodology Here

As AUO pointed out in Part Two of its Sentencing Memorandum, the Government has now abruptly abandoned its earlier methodology for calculating the volume of affected commerce, reaffirmed at least five times over nearly two years, considerably inflating its proposed affected commerce calculation in the process.

First, the Government seeks to include panels sold to foreign companies and neither billed or shipped to the U.S., to the extent those panels (in the Government's view) ultimately entered the U.S. as part of a computer monitor or notebook computer. Second, the Government seeks to include sales to foreign system integrators which were ultimately incorporated in HP monitors sold in the U.S. (AUO Sentencing Memorandum, Part Two, Section IIIA.)

3. The Government's Newly Minted Methodology Has a Major Impact on the Defendants' Potential Sentences

The Government denies that its position has fundamentally changed. According to the Government, its new approach is "largely consistent" with its three-step methodology from the sentencing hearings. (Govt. Mem. 12:16-24.) Dr. Leffler's calculation supposedly merely "augments" the plea methodology, the Government insists. (*Id.* at 13:3-6.)

The Government cannot shrug off its gamesmanship so easily. Its newly-minted methodology is not a mere small adjustment. As AUO explained in Part Two of its Sentencing Memorandum, inclusion of sales to foreign-based companies which were neither shipped nor billed to the United States inflates the volume of affected commerce by $371 million. (AUO Sent. Mem. II at 2.) Inclusion of the sales to foreign-based systems integrators which were destined for HP monitors increases the volume of affected commerce by another $286 million. (*Id.*) If the

Court ultimately applies the 20% proxy for overcharge and lost consumer opportunities (which it should not), these two "augmentations" will increase AUO's potential base fine by $131.4 million; depending on the Court's determination of AUO's culpability score, the final impact could be far greater. Similarly, if AUO's full volume of commerce were applied to defendants Mr. Chen and Dr. Hsiung (which it should not be), the Government's improper addition of $657 million in foreign commerce could have a significant impact on those defendants' possible Guidelines prison term. Given these facts, it is imperative that the Government's defense of its change of position be closely and skeptically scrutinized by this Court, and that the Government be required to prove any and all facts by clear and convincing evidence. The Government simply has not met this burden.

4. The Government's Claim to Be Basing Its New Methodology on Late-Acquired Information is a Blatant Fabrication

The Government argues that its new methodology is based upon information it discovered following the various plea hearings as its investigation continued and it prepared for this trial. "[T]he government did not have data" for sales of monitor panels to HP in connection with the plea hearings, it claims. (Govt. Mem. 13:7-9.) Sales to foreign-based companies were disregarded because the Government had "insufficient data from the TFT-LCD suppliers, OEMs, and relevant industry publications." (*Id.* at 13:15-17.) "It is not unusual for a defendant that proceeds to trial to face a more accurate, but higher, volume of commerce as the government develops more information. That does not reflect an inconsistent methodology." (*Id.* at 13:20-22.)

The Government's claims are transparently false.

During the December 2008 plea hearing for LG, Government counsel Mr. Scott informed the Court that the Government based its approach on detailed sales data from LG and purchase data from the company's customers:

> 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 between us.

(RT Dec. 15, 2008 (LG Plea Hearing) 34:11-17.)

It is important to keep in mind that Dr. Leffler's estimation of the affected commerce to foreign-based companies that was neither shipped nor invoiced to the U.S. is not based on those foreign customers' sales data. So the Government cannot excuse its conduct by conjuring up an image of a years-long pursuit of purchase data from a long list of uncooperative foreign-based panel buyers.

Instead, Dr. Leffler bases his estimated sales to foreign-based companies on: (1) sales data from Dell, HP, Apple, IBM and Gateway (all American companies which the Government was free to subpoena at any time); and (2) Gartner Dataquest statistics estimating the percentage of OEM PC sales entering the United States. (Leffler Decl., ¶¶ 3, 24.) Nowhere has the Government claimed that it only recently received sales data from the five largest purchasers of TFT-LCD panels in the United States; Government counsel told this Court during the December 15, 2008 LG plea hearing that as a result of a "time consuming [and] very complex . . . process," the Government had obtained "as accurate data as possible regarding the sales." Indeed, it strains credulity to imagine that the Government would have entered into plea agreements and proceeded to sentencing four companies to fines totaling $715 million had it lacked the basic sales and market data called for by the Sentencing Guidelines. As for the Gartner Dataquest data used to extrapolate those sales to account for foreign-based companies – data through the end of 2006 was available on the Internet as of January 17, 2007, well before even the LG sentencing hearing.[4]

Over and over for four years, the Government has represented, both in presenting plea agreements and in response to specific inquiries from the Court,

[4] http://www.gartner.com/it/page.jsp?id=500384

that its three-step methodology for calculating volume of affected commerce properly captures the alleged harm to United States commerce from the Crystal Meetings. The data used to construct the Government's newly-minted model was available to it throughout those four years. The Government should be held to its word. In order to vindicate defendants' due process rights and avoid unwarranted disparities in sentencing similarly situated defendants, the volume of affected commerce should be calculated using the Government's original three-step methodology.

5. Foreign Sales to Non-U.S. Companies and Sales of Monitor Panels to HP's Foreign Systems Integrators Do Not Fall Within the Scope of the Sherman Act

According to the Government, "Dr. Hall fails to count any AUO sales to non-U.S. companies." (Govt. Mem. at 19:3.) In his declaration, Dr. Leffler echoes the same claim:

> Dr. Hall uses a narrower criterion that excludes LCD panels that were incorporated into finished products imported to the U.S. if those panels are not shown in the AUO database as being purchased by one of his 13 "U.S. companies" . . . Dr. Hall does not explain in any detail how he identified these 13 companies . . . Dr. Hall thus excludes any AUO panels that are included in PCs sold by OEMs such as Toshiba, Sony, Acer, Lenovo, NEC, and Fujitsu.

(Leffler Decl., ¶32 & n. 25; ¶ 34 & n.30.)

The Government misrepresents Dr. Hall's analysis. As Dr. Hall clearly explains in his Declaration, he calculated the volume of affected commerce exactly the same way the Government did in four previous sentencing hearings, including: (1) panels shipped directly to the U.S.; (2) sales billed to a U.S.-based company; and (3) sales to foreign affiliates of U.S-based companies, to the extent they reached the United States in finished products. (Hall Decl., ¶ 20.) Dr. Hall does not arbitrarily exclude all sales to any foreign-based company. Where such sales were shipped or billed to the United States, they were included, as the Government's original methodology directs. Based on that criterion, sales to Sony and Acer are included in Dr. Hall's volume of affected commerce estimate, contrary to Dr. Leffler's claim.

"Nothing in the Guidelines or the case law suggests affected commerce is limited to sales of U.S. companies," the Government claims, "especially when, as here, the foreign companies sold notebook computers and computer monitors in the United States that included AUO's price-fixed panels." (Govt. Mem. 19:8-10.) Nor is the exclusion of such panels consistent with the Court's instructions at trial, according to the Government. (*Id.* at 19:11-17.) The Government challenges the exclusion of foreign sales of monitor panels bound ultimately for HP on the same grounds. (*Id.* at 20:8-23.)

The simplest answer to the Government's argument, of course, is that if exclusion of such commerce were contrary to the Guidelines and case law, the Government would not have excluded such sales through four separate sentencing proceedings as it did.

But the better answer is that, simply put, the Government was right the first through fourth times, and wrong here: sales to foreign companies should be excluded. The Government forgets that the scope of the Sherman Act with respect to such foreign commerce is strictly limited to the boundaries set by the FTAIA. Foreign commerce is only subject to the Act if it: (1) constitutes "import trade or commerce" or (2) "has a direct, substantial and reasonably foreseeable effect" on U.S. domestic or import commerce. 15 U.S.C. § 6a. AUO's sales to foreign-based Original Equipment Manufacturers ("OEMs") and system integrators are plainly not "import trade." Thus, for such sales to be properly within the scope of the Act, the Government must demonstrate that the sales had a direct, substantial and reasonably foreseeable effect on U.S. commerce.

According to the Ninth Circuit, an effect is "direct" if it "follows as an immediate consequence of the defendant's activity." *United States v. LSL Biotechnologies,* 379 F.3d 672, 680 (9th Cir. 2004). Dr. Edward A. Snyder has testified, after a comprehensive study of the TFT-LCD industry, that both monitors and notebooks have a complex and multi-level distribution chain from panel

manufacturer to consumer, with independent parties at each level (as many as six for monitors, five for notebooks), all making separate decisions as to whether or not to pass through cost increases. (AUO Sent. Mem. II, pg. 69-71; Declaration of Edward A. Snyder, ¶¶ 16-17, 19-22.) Based upon his study, Dr. Snyder concludes that passthrough rates would "vary" depending on a variety of different factors with little relationship to the prices firms pay for TFT-LCD panels. (AUO Sent. Mem. II, 71-72; Snyder Decl., ¶¶ 47-49.) The Government has not, and cannot, offer sufficient evidence to demonstrate that any effect which survives the long and winding trip down the distribution chain -- through Original Design Manufacturers ("ODMs"), contract manufacturers, system integrators, OEMs, resellers, distributors and retailers -- had a "direct" effect on U.S. commerce. (Snyder Decl., Exhs. 1.1, 1.2.) For that reason, sales to foreign-based companies are properly excluded from the volume of affected commerce.

Sales of monitor panels to system integrators building monitors for HP fall outside the volume of affected commerce for additional reasons. Timothy Tierney of HP testified at trial about the lack of any direct connection between HP's panel purchases from AUO and the United States market. Purchase orders were issued to AUO from Singapore, not from the United States. (RT 610:5-13.) Tierney was unaware of any U.S.-based HP entity making payments to AUO for panels, or of any panels which were specifically designed for the United States market. (RT 612:5-14.) Tierney was unable to identify any panels shipped by AUO directly to HP facilities in the United States to be assembled into HP consumer products. (RT 613:6-616:24.) Once AUO's panels were sent to HP's hub facility, AUO had no control over when they would be pulled for use, or where the panels would end up after they had been included in a monitor or notebook. (RT 592:14-593:13.) The evidence falls fall short of proving to a clear and convincing standard that panel sales to foreign-based companies, or sales of monitor panels to system integrators building HP monitors, had a direct effect on U.S. commerce. Removing these two

categories of sales reduces Dr. Leffler's calculation of the volume of affected commerce by $657 million.

B. Overcharges -- If Any Existed -- Ended by the Government's Own Testimony No Later Than January 31, 2006, and Sales After That Date Cannot Be Included in the Volume of Affected Commerce

The Government tried this case on the theory that the Crystal Meetings were a "target pricing" conspiracy. Dr. Leffler testified that the effect of such a conspiracy is measured by the degree to which participants did or did not achieve the "target price." (RT 3304:16-23, 4515:21-4516:23; 4518:16-4519:6.) Both in his pre-trial disclosures and in his trial testimony, Dr. Leffler repeatedly took the position that once the companies attending Crystal Meetings stopped settling on purported target prices for panels, any overcharges ended. Specific Crystal Meeting price discussions ended in January 2006. This is consistent with the Government's position in the most recent sentencing hearing before this one – HannStar's sentencing on July 30, 2010. There, the Government told the Court that the conspiracy had ended "on or about January 31, 2006." (HannStar Sentencing Hearing) 13:11-13.)

Now, in hopes of justifying a fine far greater than that imposed on any other Crystal Meeting attendee, the Government has done another about-face, declaring that overcharges persisted for ten additional months, until December 1, 2006. The Government's change of position has an even greater potential impact on the defendants than its abandonment of its earlier methodology for calculating volume of affected commerce. Including sales between February 1 and December 1, 2006 inflates the Government's volume of affected commerce calculation by $958 million, or 41% of the Government's total volume of affected commerce of $2.34 billion (AUO Sent. Mem. II, p. 2), increasing the potential size of AUO's Guidelines base fine by $191.6 million, as well as potentially having a significant adverse impact on the individual defendants' potential Guidelines prison term.

As it did with its change of methodology, the Government's first response is denial. "Dr. Leffler never testified that the conspiracy ended in January 2006," it insists. (Govt. Mem. 15:23.) Dr. Leffler "simply had no need" to examine the later period, because he was merely determining whether total gross gains exceeded $500 million. (*Id.* at 16:16-17.) The task of "calculating overcharges" is "fundamentally different" from determining the volume of affected commerce, the Government claims. (*Id.* at 16:18-20.)

Each of these statements is demonstrably false.

1. When Did Any Overcharges End? Dr. Leffler vs. Dr. Leffler

Dr. Leffler's pre-trial disclosures and trial testimony are discussed at length in AUO's Sentencing Memorandum. (AUO Sent. Mem. II, 20:6-27:25.) Dr. Leffler's original and First Supplemental Disclosures are particularly important, because both offer estimates of total gross gain, rather than merely verifying whether gain exceeded $500 million. Therefore, there would be no reason for Dr. Leffler to disregard any time period which might further increase the purported gain in the way the Government now suggests.

Review of Dr. Leffler's disclosures and testimony shows that he repeatedly presented analyses which were based on overcharges ending in January 2006:

Dr. Leffler's Pre-Trial and Trial Testimony	Dr. Leffler's Sentencing Declaration
Original Disclosure: Dr. Leffler refers to the period after June 2006 as the "post-conspiracy period." (Leffler Disclosure, ¶ 5D, 5E, 38, 40.) He notes that discussions of prices ended after January 2006. (*Id.*, ¶ 37.)	"I did not testify that the overcharges ended on January 31, 2006." Leffler Sentencing Decl., ¶ 29:9-10.
Second Disclosure: Dr. Leffler concludes that his overcharge calculation should include only "those 48 months . . . that LCD prices were discussed," ending in January 2006.	

(Second Disclosure, ¶ 2 & n.2; *see* Leffler Original Disclosure, ¶ 25 (price discussions ended Jan. 2006). Dr. Leffler refers to the period beginning July 2006 as "after the conspiracy ended." (Second Disclosure, ¶ 10.)	
Third Disclosure: Dr. Leffler measures the alleged overcharge through a "before and after" margin analysis. For his "before" analysis, he uses margins for the six and twelve months ending in January 2006. His "after" the conspiracy analysis begins as early as February 2006. (Third Disclosure, ¶ 4 & n.4.)	
Trial Testimony: Dr. Leffler assesses the importance of price discussions by calculating the portion of sales accounted for by panels discussed between October 2001 and January 2006. (RT 3301:9-15.)	
To assess the plausibility of a potential $500 million overcharge (RT 3286:18-25), Dr. Leffler calculates the volume of commerce of all Crystal Meeting participants between October 2001 and January 2006. (RT 3313:2-13.)	
Dr. Leffler purports to calculate average Crystal Meeting prices and "but-for" prices	

in order to estimate overcharges; his estimated overcharges ended in January 2006. (RT 3341:14-3344:4.)	
Dr. Leffler purports to confirm an overcharge by comparing margins for the conspiracy period - October 2001-January 2006 - to margins for the post-conspiracy period, beginning in February 2006. (RT 3356:16-3359:8.)	
Dr. Leffler further purports to confirm an overcharge by comparing margins during the Crystal Meetings to January 2006, the "last time at which there were any target prices" -- the "off switch." (RT 3363:7-14.)	
Dr. Leffler testifies again that the "off switch" for determining the effects of the alleged conspiracy was January 2006: "the last target price at a Crystal Meeting was in January of 2006. And the industry changed. The Crystal Meetings basically ended, and target pricing ended." (RT 3370: 18-25, 3371:9-3372:5.)	
Dr. Leffler concludes that overcharges exceeded $500 million based, in part, upon his comparison between the last six months before January 2006 and six months after target pricing ended, March-August 2006.	

(RT 3374:5-14.)	
Dr. Leffler concludes that AUO was a member of the alleged conspiracy based, in part, upon a comparison between panel prices and costs during and after the Crystal Meeting period, ending in January 2006. (RT 4522:16-4523:21.)	

Indeed, the contradictions continue in the Government's Sentencing Memorandum and Dr. Leffler's sentencing declaration. According to the Government's Sentencing Memorandum, Dr. Leffler compared "margins before and *after the conspiracy period,*" referring to Dr. Leffler's testimony regarding margins for the six months before and six months after January 2006. (Govt. Mem. at 28:21-23.) In his Sentencing Declaration, Dr. Leffler cites to the same testimony comparing "margins before and *after the conspiracy period,*" citing much of the testimony summarized above. (Leffler Decl., ¶ 45.)

Dr. Leffler's insistence that he never testified that overcharges ended in January 2006 is a flagrant misrepresentation of his pretrial disclosures and trial testimony. Having chosen to base its case to a considerable degree on the theory that the so-called target pricing conspiracy ended in January 2006, the Government is now barred by judicial estoppel, the Sixth Amendment and due process from taking a contrary position. (AUO Sent. Mem. II, Sec. IIIB(3)-(5).)

2. AUO's Alleged Sharing of Price and Competitive Information With Its Competitors From February to December 2006 Was Lawful

Next, the Government points to various bits of evidence, insisting that the documents show that the alleged conspiracy continued until December 1, 2006. (Govt. Mem. at 17:2-18:14.) Yet, the Government fails to explain, if the documents

showed what it claims, why Dr. Leffler conceded that no target prices were set at any time after January 2006 (RT 3363:4-18), and overcharges ended at that time.

The lack of a plausible explanation is telling. The evidence relied upon by the Government does not show what it claims.

The Government cites the testimony of Milton Kuan, who attended bilateral meetings after the Crystal Meetings ended in January 2006. The Government fails to acknowledge Kuan's testimony that the meetings were merely intended for the exchange of competitive information. (RT 3738:23-3739:4; 3887:13-15; 3946:10-16.) Kuan testified that he had no authority to agree to or set prices (RT 3821:9-13; 3866:10-13), that the industry had always been competitive (RT 3914:17-22), and said nothing about having reached any price agreements with anyone.

The Government also describes several exhibits, some of which were not introduced into evidence at trial. Exhibit 105 is an AUO email instructing an employee to seek market intelligence about a competitor's pricing plans in conjunction with HP. Exhibit 106 is an email from Steven Leung instructing his team to pass along any market intelligence they have about competitors' pricing intentions. In Exhibit 109, an AUO employee instructs others to confirm the employee's comments to a CMO representative about AUO's pricing intentions; the email is just as consistent with confirming strategic *mis*information to mislead a competitor as it is with exchange of true price information. Exhibit 113 reflects a call from CMO merely asking for HP's position on pricing, and AUO's pricing intentions. Exhibit 188 is an email to defendant Dr. Hsiung in which a competitor attempted to persuade AUO to follow the competitor's pricing strategy. In Exhibit 189, an AUO employee reports that although "some" other manufacturers hope prices will remain flat, "they were aggressive to grab 17" vol[ume] . . . and dropped 19" price." Exhibit 108 is an internal AUO email suggesting that AUO's prices be "align[ed] with other TFT vendors to ensure we are not quoting too low or much too

high," and document AU-MDL-06430178 similarly suggests that AUO's account representative quote a price to Apple similar to LG's price.

None of this evidence is new to Dr. Leffler or the Government. Nevertheless, Dr. Leffler has repeatedly testified that any overcharges ended in January 2006, the final date on which target prices were set. Thus, this evidence is inadequate to justify adding $958 million in 2006 sales to the volume of affected commerce. The Government's showing fails for several additional reasons as well.

First, the exchange of competitive information, including prices, among competitors is not unlawful, as the jury was instructed. *United States v. United States Gypsum Co.,* 438 U.S. 422, 441, n. 16 (1978) (exchange of competitive information "does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less competitive"); *United States v. Citizens and Southern Bank,* 422 U.S. 86, 113 (1975) ("dissemination of price information is not a *per se* violation of the Sherman Act"); *Cement Mfrs. Protective Ass'n v. United States,* 268 U.S. 588, 603-04 (1925); Dkt. No. 829 (Jury Instructions), p. 9). The evidence cited by the Government shows nothing more than that. Nor is pegging one's price to be close to one's competitors unlawful; indeed, that is precisely what competitive companies are *supposed* to do. Evan Huang's email, cited by the Government, stating that "exchanging price information . . . is illegal" does not prove a continuing effect on commerce; it merely expresses an erroneous opinion about United States law. Nor is independently deciding to follow competitors' prices, known in antitrust law as "conscious parallelism," unlawful. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

In arguing that the so-called Crystal Meeting conspiracy continued after the meetings ended, the Government overlooks the most basic element of a Sherman Act violation: an agreement. In order to state a violation of the Act, the Government must plead and prove that the defendant knowingly became a member

of the conspiracy knowing of its goal and intending to help accomplish it. (Dkt. No. 829, p. 11.) Dr. Leffler concedes that the last date on which target prices were agreed to was January 2006. (RT 3363:13-14.) Neither Milton Kuan nor anyone else testified that the bilateral meetings during much of 2006 were intended to fix or stabilize prices; if they had been, it follows that the attendees would have sent representatives who had authority to enter into pricing agreements. They did not.

Finally, even if the bilateral contacts during 2006 could be fairly characterized as a continuation of the Crystal Meetings conspiracy, that is still not sufficient grounds to include an additional $958 million in AUO's volume of commerce. The Guidelines standard is limited to the "volume of *affected* commerce." Thus, only if the bilateral meetings had an influence on prices would those sales be included in the VOC. *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91-92 (2nd Cir. 1999); *United States v. Andreas,* 216 F.3d 645, 677-68 (7th Cir. 2000) (acknowledging that some sales might be made at the market price even while a conspiracy is technically ongoing); *United States v. Giordano,* 261 F.3d 1134, 1146 & n.15 (11th Cir. 2001) (requiring Government to show that "conspiracy was effective to some extent" in order for sales to be included in VOC). The Government points to no such proof of an effect on prices -- and certainly none which is remotely sufficient to meet its burden of clear and convincing evidence.

The Government has produced no evidence showing that, between February 1 and December 1, 2006, AUO had a continuing agreement with anyone to fix or stabilize prices, or that such an agreement did indeed affect prices. Dr. Leffler has conceded that no target prices were set at any time during that latter period, (RT 3363:4-18), and presented no analysis at trial indicating that prices were affected between February 1 and December 1, 2006. Therefore, the Government has failed to carry its burden of proof to show by clear and convincing evidence that sales between those dates should be included in the volume of affected commerce.

C. The Government Offers No Explanation of How a Purported Target Pricing Conspiracy Would Affect Panels as to Which No Target Price Was Agreed To

In important respects, the Government's Sentencing Memorandum is largely an exercise in collective amnesia. One searches in vain for any mention of the theory upon which the Government tried this case.

As AUO showed in its Sentencing Memorandum, witness after witness at trial testified that the Crystal Meetings involved the setting of a "target price" for a specific size and type of panel. ((RT 660:1-2, 14-17, 661:6-9, 668:20-22, 669:6-8, 10-12, 670:4-6, 676:3-5, 7-19, 678:12-20, 679:5-6, 680:5-16, 746:5-8; 809:1-3; 1339:7-1340:2; 1365:9-11; 1365:25-1366:7; 1368:3-8; 1373:20-25; 1378:25-1379:6; 1379:21-1380:8; 1401:3-16; 1404:23-1405:7; 1405:9-12; 1406:15-20; 1407:25-1408:7; 1434:1-5; 1457:21-24; 1458:6-10; 1459:15-25; 1752:2-7; 1763:17-23; 1958:24-1959:9; 1965:21-1966:2; 1969:4-16; 1970:5-12; 3181:13-16; 3298:8-19; 3299:14-23; 3301:9-19; 3302:16-3303:13; 3303:23-3304:10; 3307:8-20; 3308:7-12; 3336:18-3337:20; 3338:2-16; 3339:22-3340:11; 3353:8-14; 3370:18-25; 3373:17-21; 4515:21-4516:23; 4517:7-4518:1; 4535:10-4536:5; 4563:7-4564:3; 4581:4-4582:3.) According to Dr. Leffler, the "effect" of such an alleged conspiracy is measured by the degree to which participants did or did not achieve the "target price." (RT 3304:16-23; 4515:21-4516:23; 4518:16-4519:9).[5]

Nevertheless, in his calculation of the volume of affected commerce, Dr. Leffler includes *all* sales of *all* monitor and notebook panels of sizes listed in the Superseding Indictment, whether those panels were discussed in a relevant Crystal Meeting or not. (Leffler Decl. at ¶ 2.) Dr. Leffler's position that all sales should be

[5] "Target pricing" is referred to only three times in the Government's brief: once in a quotation from a case, and twice in reference to a single competitor's own future pricing plans. (Govt. Mem. 9:5, 21:5, 21:16.) As noted above, there is nothing unlawful about competitors discussing their future pricing plans; indeed, such discussions can under certain circumstances be procompetitive. The Government never mentions "target pricing" in the sense it was used throughout the trial - the Crystal Meeting attendees settling on a "target price" that each company should attempt to achieve.

included squarely contradicts the Government's admission in its post-trial briefing that at least some non-discussed panels "may not have been affected." (Dkt. No. 895, 59:10-12, 60:3-24). By abandoning the Government's post-trial arguments, the Government and Dr. Leffler inflate their volume of affected commerce calculation by many hundreds of millions of dollars.[6] (AUO Sent. Mem. II Secs. III(A)(4)(a); III(C)(1)-(2).)

The Government and Dr. Leffler offer various responses: (1) the case law and the *per se* rule require that all sales be included in the volume of affected commerce; (2) removing the non-discussed panels which the Government admitted only a few months ago "may not have been affected" now "makes no economic sense"; (3) for AUO to simply listen to pricing discussions without mentioning its own intentions has "the greatest impact on AUO pricing"; (4) discussing all panels in every month was unnecessary, since all participants supposedly recognized set relationships between the prices of various sizes and types of panels; and (5) AUO's prices were purportedly *lower* in months when target prices were settled upon that in other months.

The Government is wrong on all counts.

1. Determining the Scope of the Alleged Conspiracy and Eliminating Non-Discussed Panels From the Volume of Affected Commerce is Required By Four Circuits, The Guidelines, and the Per Se Rule

According to the Government, excluding sales of non-discussed panels is contrary to the decisions of all four Circuits that have interpreted the Guidelines phrase "volume of affected commerce." The law is squarely to the contrary: if this case arose in the Second, Sixth, Seventh or Eleventh Circuits, exclusion of non-

[6] The precise effect of this adjustment depends on what other factors are included in the volume of affected commerce. For example, if sales to LG and Samsung, or post-2004 sales to Dell, are categorically eliminated from the volume of affected commerce as they should be (AUO Sent. Mem. II, Secs. III(A)(4)(b), III(D)-(E)), the volume of affected commerce will be reduced by many hundreds of millions of dollars. But if one or both categories of sales are included, those sales must still be adjusted to account for sales of panels falling outside of any possible influence from the Crystal Meeting discussions.

discussed panels would be required. *United States v. Hayter Oil Co., Inc. of Greeneville, Tennessee,* 51 F.3d 1265, 1273, 1276 (6th Cir. 1995) (sales that were "the direct object" of the agreement included; district court must determine sales of "the specific type of goods that were price fixed"); *SKW Metals & Alloys,* 195 F.3d at 90-92 (only sales where conspiracy elevates price included; rejecting "tenuous presumption" that all sales within the period are automatically affected); *Andreas,* 216 F.3d at 677-78 (purpose of volume of affected commerce calculation is to gauge the harm inflicted; sales which were "wholly unaffected" or "sold at the actual market price" excluded); *Giordano,* 261 F.3d at 1146 & n.15 (Government must prove that "the prices charged were affected by the conspiracy" in order for sales to be included).

The Government's position that all sales must be included must be rejected as a simple matter of Guidelines interpretation as well. The Ninth Circuit applies the rules of statutory construction to interpreting the Guidelines. *United States v. Goodbear,* 676 F.3d 904, 910 (9th Cir. 2012). One of those rules, of course, is that statutes (and the Guidelines) must be interpreted in such a way as not to render any words mere surplusage. *United States v. Bendtzen,* 542 F.3d 722, 727 (9th Cir. 2008). Since the Guidelines speak of including the "volume of *affected* commerce," (§ 2R1.1(d)(1)), the Government's position that the word "affected" may be disregarded must be rejected.

The Government also claims that requiring it to prove which classes of transactions were affected by the Crystal Meeting discussions undermines the *per se* rule. (Govt. Mem. 9:7-18.) The Government is wrong for two reasons. First, merely invoking the *per se* rule, which invalidates domestic horizontal price-fixing agreements, begs the question: what product or products were the subject of the purported agreement? Given that the Government chose to try this case on a theory that the participants agreed to "target prices" and then attempted to reach those prices in the marketplace, the logical conclusion is that the panel types and sizes for

which a target price was agreed to by the Crystal Meeting attendees were the subject of the agreement. Second, the *per se* rule is inapplicable to the foreign commerce at issue here, which must be judged by the rule of reason. *Metro Indus., Inc. v. Sammi Corp.,* 82 F.3d 839, 845 (9th Cir. 1996).

2. There Is No Economic Basis for Presuming That Discussions of a Target Price For a Particular Size and Type of Panel Would Necessarily Affect Panels Not Discussed

Next, the Government and Dr. Leffler insist that it "makes no economic sense" to exclude panels which were not discussed from the volume of affected commerce. (Govt. Mem. 21:11; Leffler Decl. 14:13-18.) According to Dr. Leffler, participants in the Crystal Meetings recognized "general pricing relationships among LCD panels of different specifications," making it unnecessary to discuss all panels each month: once target prices for certain bellwether prices were set, the "general pricing relationships" could -- in Dr. Leffler's mind -- be applied to derive target prices for all other panels. (Leffler Decl. 16:22-17:3; Leffler Initial Disclosure, ¶ 34.)

Dr. Leffler's argument can be easily disposed of. If such "bellwether" panels existed upon which all other prices turned, the identity of such panels should be static over the five years of the Crystal Meetings. Certainly Dr. Leffler points to no evidence that bellwether panels changed during the Crystal Meetings era. But it follows from this that the panel sizes and types discussed in Crystal Meetings should remain relatively constant from month to month and year to year: the attendees would discuss the "bellwethers," knowing that all other panels would follow suit, based upon what Dr. Leffler insists were agreed upon pricing relationships.

That is not what happened. The chart below shows the number of months in each year of the Crystal Meeting period that a particular size and type of panel was discussed. As the chart shows, discussed panels varied from one month to the next throughout the five years. Dr. Leffler proposes no candidates for the "bellwether

panels" he claims to perceive, and the data shows that such panels, upon which the price of all other widely differentiated sizes and types of panels manufactured by AUO and the other Crystal Meeting companies purportedly depends, do not exist.

List of Crystal Meeting Price Months by Product
Current or Future Prices Applicable to AUO
October 2001 – December 2006

Product	2001 (3 Mos.)	2002 (12 Mos.)	2003 (12 Mos.)	2004 (12 Mos.)	2005 (12 Mos.)	2006 (12 Mos.)	Total (63 Mos.)
12.1"NB_WXGA					1		1
12.1"NB_XGA	2	6		2	1		11
13.3"NB_XGA	2	4					6
14"NB_WXGA				1			1
14"TV_VGA			1	6			7
14.1"NB_WXGA					1		1
14.1"NB_XGA	3	9	12	9	1		34
15"Monitor_XGA	3	9	12	9	1	1	35
15"NB_SXGA+	1	9	11	9			30
15"NB_XGA	2	8	11	9	2		32
15"TV_XGA			1	6			7
15.2"NB_SXGA			1	2			3
15.2"NB_WXGA			3	4			7
15.4"NB_WXGA				3	3		6
17"Monitor_SXGA	3	9	12	8	2	1	35
17"TV_SXGA			1	5			6
18"Monitor_SXGA	1	7	1				9
19"Monitor_SXGA			8	9	2	1	20
20.1"Monitor_SXGA			2	2			4
20.1"Monitor_UXGA			1	5		1	7
20.1"Monitor_WXGA						1	1
20.1"TV_VGA			3	6			9
21"Monitor_WSXGA+						1	1
23"TV_WXGA						1	1
24"TV_WUXGA						1	1
26"TV_WXGA			1	6			7
30"TV_WXGA			2	6		1	9
All Products	**17**	**61**	**83**	**107**	**14**	**9**	**291**

3. Dr. Leffler's Claim That Merely Listening to Crystal Meeting Discussions Without Disclosing Price Information is Anticompetitive Is Wrong As a Matter of Law and Basic Economics

As it does with most of AUO's arguments, the Government either misunderstands or deliberately mischaracterizes AUO's argument that non-discussed panels must be excluded from the volume of affected commerce.

According to the Government, AUO excludes from the volume of affected commerce all months in which AUO "collected, but did not contribute, specific price information." (Govt. Mem. 20:24-25.)

Not true. Rather, AUO excludes sales of panels of a particular size and type where the relevant Crystal Meeting did not agree to a "target price." This is the inevitable implication of the target pricing theory upon which the Government chose to try this case.

According to Dr. Leffler, "the greatest impact on AUO pricing" occurs when AUO attends a Crystal Meeting, listens to its competitors' remarks regarding their future pricing plans, but does not agree to anything. (Leffler Decl. ¶ 36:4-8.)

Dr. Leffler's claim is absurd for several reasons.

First, the mere exchange of competitive information, including prices, is not unlawful. *United States Gypsum Co.,* 438 U.S. at 441, n. 16 *Citizens and Southern Bank,* 422 U.S. at 113; *Cement Mfrs. Protective Ass'n,* 268 U.S. at 603-04; Dkt. No. 829 (Jury Instructions), p. 9. Therefore, even if AUO provided its own competitive information in addition to listening to the information of others, such conduct was not unlawful.

Second, AUO's mere presence at the Crystal Meetings is not unlawful. *United States v. Corona-Verbera,* 509 F.3d 1105, 1117 (9th Cir. 2007); *United States v. Estrada-Macias,* 218 F.3d 1064, 1066 (9th Cir. 2000); *United States v. Perez-Gonzalez*, 445 F.3d 39, 49 (1st Cir. 2006); *United States v. Nelson-Rodriguez*, 319 F.3d 12, 28 (1st Cir. 2003). An agreement to fix prices requires just that: an agreement. (Dkt. No. 829, p. 11.) Government witness Stanley Park testified at trial that no agreements were reached in 18 of the meetings he attended, and he had no recollection of whether agreements had been reached in 5 more. (RT 2328-2472.)

Third, the profound cynicism of the Government's argument must be noted. Throughout the trial, AUO and the other defendants argued that AUO

representatives attended the Crystal Meetings in order to gather market intelligence and enable AUO to more effectively compete against the other companies: the "meet to compete" theory. (RT 396:6-10; 426:11-15; 443:21-444:2) Counsel for Hsuan Bin Chen described the defense theory in his opening statement:

> The second reason to meet is unique to AUO. And, I'm going to be blunt here. For -- for AUO, and Mr. Chen, and all the executives of the company, this wasn't a game of beanbag. They were trying to win. They were trying to get information from those meetings, from their competitors, to grow the company the way Mr. Nedeau just explained, very well. Meet to compete. Get information from your competitor. Find out when they are building a new fab. Find out what their situation is. Hear what the pricing trends are. And, you know what AUO would do with that information, whatever it did at those meetings? It would use the information to undercut the market. And as you've seen some examples of, we will show you over and over again, including at the very few meetings that Mr. Chen attended, that AUO then sold at prices repeatedly below the prices discussed at the meeting. Cheaper. Not higher. Cheaper. That's what the evidence will show.

(RT 390:1-17.)

Counsel for the Government was dismissive of the defense theory at trial:

> Once again, 'meet to compete' - you've heard that phrase said by some of the lawyers here; some of the defense counsel. It's a catchy phrase, but it's a completely empty one. I think 'meet to cheat' is a more appropriate phrase there. Meet to cheat your customers. Meet to cheat your customers of your products.

(RT 4806:12-17.)

Yet now, having obtained a conviction, the Government argues that even sales made during months when AUO merely attended Crystal Meetings and gathered market intelligence should be added to the volume of affected commerce. But the fact remains, AUO's "meet to compete" conduct was not merely lawful; given that -- by the Government's own admission -- AUO agreed to nothing in these months, AUO's conduct was procompetitive, as AUO explained in its motion for a new trial. *United States Gypsum Co.,* 438 U.S. at 441, n. 16; *Citizens and Southern Bank,* 422 U.S. at 113 ("dissemination of price information is not a *per se* violation of the Sherman Act"); *Cement Mfrs. Protective Ass'n,* 268 U.S. at 603-04; Dkt. No. 829 (Jury Instructions), p. 9). Sales related to months in which AUO merely

listened to the Crystal Meeting discussion without agreeing to any target price cannot be included in the volume of affected commerce.

4. Dr. Leffler Repeats His Earlier Error, Arguing That the Supposed Correlation Between Non-Discussed and Discussed Panel Prices Somehow Proves That the Effect of the Crystal Meetings Spread to Non-Discussed Panels

Next, in hopes of salvaging his conclusion that even non-discussed panels should be included in the volume of affected commerce, Dr. Leffler resurrects an obvious error which he should have corrected once it was pointed out by AUO in its *Daubert* motion: Dr. Leffler's notion that correlation equals causation. Dr. Leffler claims that the effect of the Crystal Meetings must have spread to non-discussed panels because there is "a close fit between the price movements of the panels with price discussions on panels and other panels." (Leffler Decl., ¶ 40.)

But correlation simply does not equal causation. William H. Greene (2008), *Econometric Analysis* (6th^{h} ed.), Upper Saddle River, New Jersey: Prentice Hall, pp. 133-35; Robert S. Pindyck and Daniel L. Rubinfeld, *Econometric Models and Economic Forecasts* (1991), pp. 63-64. In a perfectly competitive market, the prices of each and every competitor would be perfectly correlated. Robert E. Hall & Marc Lieberman, Microeconomics: Principles and Applications, (2008), p. 224; Hal R. Varian, Intermediate Microeconomics: A Modern Approach, (7th ed., 2006), p. 384. If two measures are each influenced by a third phenomenon such as the Crystal Cycle, the two measures will be positively correlated, whether or not any cause-and-effect relationship exists between them. Greene, *Econometric Analysis*, pp. 133-135; Pindyck and Rubinfeld, *Econometric Models*, pp. 63-64.

As counsel for AUO pointed out in the hearing on its motion to bar Dr. Leffler's testimony outright, "this is not an honest disagreement about methodology. This is just flat wrong. This is a fundamental error from introductory statistics class . . . Two of Dr. Leffler's central opinions should not be allowed to go before the

jury based on an error that would make an undergraduate blush." (RT December 23, 2011 (Hearing on *Daubert* Motions) 36:11-13; 37:3-37:5.)

Dr. Leffler is fully capable of recognizing and avoiding this obvious error when it suits his purposes. At trial, he referenced a study he performed of gas prices for the Attorney General of Washington. There, although Dr. Leffler concluded that prices from city to city were quite highly correlated, Dr. Leffler nevertheless found no evidence of collusion, in stark contrast to the sinister connotations he places on mere correlation here. (Keith Leffler, 2007-08 Gas Price Study, pp. 2, 19.)[7]

Dr. Leffler's observation that non-discussed panel prices are highly correlated to the prices of discussed panels proves nothing.

5. Dr. Leffler's Claim That AUO's Prices Were *Lower* In Months When It Purportedly Agreed To Target Prices Than In Other Months Does Not Prove That Non-Discussed Panels Were Affected By the Discussions

Finally, Dr. Leffler argues that AUO's prices for particular panels were in fact lower when they were not discussed in Crystal Meetings than they were in months when those panels were discussed. (Leffler Decl. 16: 1-6.) From this, Dr. Leffler reaches the odd conclusion that the effect of the Crystal Meetings must have spread from discussed to non-discussed panels.

Dr. Leffler's claim illustrates a problem which runs through much of his analysis: an unwillingness to step back from his statistics and ask whether his tentative results actually make good economic (or even common) sense.[8] Here, if

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[7] Available at http://www.atg.wa.gov/uploadedFiles/Another/Safeguarding_Consumers/Antitrust/Unfair_Trade_Practices/Gas_Prices/41708gasstudy.pdf.

[8] The same problem infected Dr. Leffler's regression model, which he used to estimate overcharges. There, he concluded that overcharges for all Crystal Meeting companies for panels between 12.1 and 30 inches -- the panels named in the Superseding Indictment which were the subject of the Crystal Meetings -- were $439 per square meter, while overcharges for *all* panels of all sizes were $479 per square meter. (Leffler Original Disclosure, Table 12.) Dr. Leffler conceded at trial that this was a correct interpretation of his results. (RT 3361:4-8.) Given that this result suggests that the Crystal

Dr. Leffler's result is to be taken seriously, he is asserting that when AUO attended Crystal Meetings, listened to its competitors, disclosing nothing itself, and left the meeting free to price its products competitively in the marketplace -- when it "met to compete" -- its prices were *higher* than when it purportedly agreed with its competitors to charge a consistent supracompetitive price. Dr. Leffler makes no attempt to explain his result because there is no explanation: it is absurd on its face, and should have caused him to question the general validity of his analysis.

A consistent line of case law and the Guidelines themselves require that all panel sales of a size and type not discussed at the relevant Crystal Meeting must be excluded from the "volume of *affected* commerce."

D. The Government Offers No Explanation of Why Samsung or LG Would Knowingly Pay an Overcharge to AUO For TFT-LCD Panels

AUO also pointed out in its Sentencing Memorandum that the Government and Dr. Leffler improperly include sales to LG and Samsung in AUO's volume of affected commerce. The notion that LG and Samsung willingly paid overcharges to AUO makes no economic sense (Hall Decl., ¶¶ 34-36), and such sales should be excluded. Removing such sales from the volume of affected commerce reduces the calculation by a further $118 million. (*Id.,* Appendix I.)

The Government offers two responses: (1) the Crystal Meeting attendees took steps to eliminate internal discounts, and such steps must have been successful, since LG and Samsung paid the same prices as other customers; and (2) LG Display, which manufactured TFT-LCD panels, and the LG entity which purchased panels were legally separate entities.

Both arguments fail.

Meetings *decreased* prices below their but-for level, one would think that Dr. Leffler would have concluded that there was something fundamentally wrong with his regression model, his opinions, or both. But not so; Dr. Leffler continues to cite his badly flawed regression results to support a conclusion that overcharges were substantially more than 10%.

The two exhibits cited by the Government in support of its argument about internal discounts are beside the point. Exhibit 302 is notes from the September 14, 2001 Crystal Meeting, which neither defendant Hsuan Bin Chen nor Dr. Hui Hsiung attended. The notes limit discounts on "internal sales price[s]," but this is a reference to intra-corporate sales, such as from AUO to AUOA, or from one LG or Samsung entity to another. It has nothing to do with sales from one Crystal Meeting attendee to another. Exhibit 306 is notes from the November 15, 2001 meeting. Those notes merely state that manufacturers should "try to gradually reduce such exceptional situations" as "strategic clients, internal clients or exceptional case [sic] resulting from earlier commitments." Once again, this exhibit says nothing about sales among the Crystal Meeting attendees themselves.

The Government does not dispute that a single Samsung corporate entity both manufactured and purchased TFT-LCD panels. Further, the Government seriously exaggerates the degree of separation between LG Display, the panel manufacturer, and LG Electronics. In creating the joint venture LG Display, LG Electronics contributed its personnel and facilities. Thus, after January 1, 1999, the same individuals who had previously manufactured TFT-LCD panels under the LG Electronics brand continued to do so as LG Display. (*See* Plaintiffs' Letter to Hon. Fern M. Smith, Discovery Referee, Jan. 22, 2010 pg. 2, attached as Exhibit 1 to Declaration of Kirk C. Jenkins.) In its decision in connection with the Crystal Meetings, the European Commission treated LG Electronics and LG Display as a single entity.[9] Further, LG Electronics and LG Display have frequently rotated officers between themselves; Bon-Joon Koo, the current Vice Chairman of LG Electronics, was CEO of LG Display,[10] and the current President and CEO of LG

[9] http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3580_3.pdf

[10] http://www.lg.com/global/about-lg/corporate-information/executives/office-bios/bon-joon-koo; http://www.forbes.com/profile/bon-joon-koo/

Display, Young Soo Kwon, was President and CFO of LG Electronics before joining LG Display.[11]

So the question posed by Dr. Hall goes entirely unanswered by the Government: why would Samsung or LG transfer tens of millions of dollars in what it knew (according to the Government's theory) to be overcharges to AUO, an unrelated corporation, to the detriment of its division (Samsung) or affiliate (LG)?

The answer is obvious: neither company would have any reason to do so. Sales to LG and Samsung cannot be included in the volume of affected commerce. Further, inasmuch as Dr. Hall's studies have concluded that LG and Samsung paid prices similar to other customers not involved in the Crystal Meetings, AUO's transactions with LG and Samsung offer strong support to Dr. Hall's view that and overcharges were minimal.

III. THE COURT MAY NOT APPLY THE 20% PROXY FOR OVERCHARGE AND LOST CONSUMER OPPORTUNITIES HERE

Turning to the Guidelines' 20% proxy for overcharge and lost consumer opportunities, AUO demonstrated in Part Two of its Sentencing Memorandum that:

- The 20% proxy is an "eccentric Guideline," entirely lacking in empirical support and not the product of the Sentencing Commission acting in its "characteristic institutional role";
- This case is well outside the "heartland" to which the Guideline was intended to apply, given that the relevant conduct occurred overseas, binding Ninth Circuit precedent requires that it be judged by the rule of reason, and the Guideline is ill-suited to assess any harm to consumers arising from fixing the price of an economic input;
- Lost consumer opportunities would be roughly 1/20th of any overcharge, meaning that the 10% of the proxy intended to measure such losses vastly overstates harm; and
- The evidence unequivocally rules out the possibility of overcharges anywhere near 10%, and actual overcharges in this case were minimal or nothing.

The Government's general defense of the 20% proxy is entirely conclusory. The Government merely asserts that the Guideline was the product of the

[11] http://www.forbes.com/profile/young-kwon/

Commission acting in its characteristic institutional role, and that the case is well within the "heartland" without addressing the thirty years of harsh criticism the 20% proxy has received. With respect to lost consumer opportunities, the Government makes no attempt to defend the proposition which lies at the heart of the Guideline -- that such losses are equal to the overcharge, and 10% of the volume of affected commerce. Instead, the Government vaguely refers to other theoretical costs of a price-fixing conspiracy, without offering any proof of what such costs might be here, or even whether they exist. As for overcharge, the Government invokes Dr. Leffler's badly flawed regression model, insisting that AUO somehow obtained an overcharge in excess of 19% between 2001 and 2006.

Each of the Government's arguments fail.

A. Guideline 2R1.1 Was Not the Result of the Sentencing Commission Acting in Its Traditional Institutional Role

As AUO predicted in Part Two of its Sentencing Memorandum (AUO Sent. Mem. II, Sec. IV(A)), the Government argues that application of the 20% proxy is mandatory, regardless of the facts. (Govt. Mem. at 25:5-26:3.) The Government is wrong. The Court has discretion to deviate from a Guideline where it disagrees with the underlying policy, *Kimbrough v. United States,* 552 U.S. 85, 106-08 (2007), and that discretion is particularly great when dealing with an eccentric Guideline lacking in empirical support such as the 20% proxy. (AUO Sent. Mem. II, Sec. IV(A).)

The 20% proxy is supported by "common sense," the Government claims: "it is self-evident that use of a specified figure avoids the time and expense of a judicial determination of an overcharge." (Govt. Mem. at 26:24-27.) Whether or not that is true in some cases, it is clearly not so here: both AUO's expert economist and the Government's economist have studied and calculated overcharges. To the extent the Court cannot reject the Government's position based on the evidence and

arguments now before it, all that remains is an evidentiary hearing to resolve any remaining issues.

Similarly, the Government makes the conclusory claim that this case is within the "heartland" to which the Sentencing Commission intended § 2R1.1 to apply, but fails to address any of the arguments made by AUO which compel the opposite conclusion: (1) the conduct at issue largely took place overseas, in Taiwan, and the substantive scope of the Sherman Act is sharply limited with respect to foreign conduct by the FTAIA; (2) § 2R1.1 is intended for *per se* offenses, while foreign conduct such as that at issue here is governed by the rule of reason, *Metro Indus.,* 82 F.3d at 844-45; and (3) § 2R1.1 is entirely ill-suited to be applied to alleged price-fixing of an economic input. (AUO Sent. Mem. II at Sec. IV(C)(3).)

B. The Court Should Decline To Apply the Guidelines' 10% Proxy For Lost Consumer Opportunities

In its Sentencing Memorandum, AUO demonstrated that the Guidelines' presumption that lost consumer opportunities are 10% of the volume of affected commerce is simply wrong, absent outlandish factual assumptions not supported here. (AUO Sent. Mem. II, Sec. IV(D).)

Tellingly, the Government makes no attempt to defend the 10% proxy for lost consumer opportunities and discouraged consumers.[12] Instead, the Government points to the statement in the Guidelines' Application Note 3 that the second 10% of the proxy is intended to capture lost consumer opportunities "among other things."

[12] In Part Two of its Sentencing Memorandum, AUO points out that given Dr. Edward A. Snyder's testimony that passthrough of overcharges would vary both across and up and down distribution chains and over time, any lost consumer opportunities would be even further reduced: consumers will not be discouraged by price increases they never see. The Government responds that the Court may disregard passthrough since the Sherman Act protects all levels of the distribution chain. (Govt. Mem. 27:26-28:3.) The Government offers not the slightest proof that multi-billion dollar corporations such as HP, Dell and Apple cut back their purchases as a result of TFT-LCD panel price increases. In fact, both Dell and HP witnesses testified at trial that they continued to purchase panels even when prices rose because they needed to continue manufacturing their products. (RT 509:17-510:2, 2552:24-2555:17.) Accordingly, there is no basis for increasing the base fine to account for non-existent "discouraged manufacturer" OEM cutbacks.

(Govt. Mem. at 27:18-22.) Although the Guidelines offer no examples of what is meant by "other things," the Government suggests two possibilities: price increases imposed by non-conspirators and sales of substitute products or in other related markets. (*Id.* at 27:23-25.) The Government also makes the argument that the "low probability" of cartels being detected somehow justifies the 10% lost consumer opportunities proxy. (*Id.* at 40:1-3.)

The Government is wrong. First, the Government makes no attempt to carry its clear and convincing burden of proof by demonstrating the magnitude of the mythical tertiary losses it describes. There is no evidence that non-Crystal Meeting companies' panel prices increased as a result of the Meetings. There is no evidence that prices of substitute products and "related markets" -- whatever that might mean -- increased either. Even if such evidence existed, the Government certainly has not proven that such increases amount to 19/20ths of any overcharge -- the fraction necessary to justify the Guideline, given Dr. Hall's undisputed analysis of lost consumer opportunities.

Nor can the Government justify applying the 10% proxy for lost consumer opportunities because of the "low probability of detection and successful prosecution" for price-fixing cartels in general. (Govt. Mem. at 40:1-3.) A particular defendant's sentence cannot be determined based on the likelihood of other, unrelated defendants escaping detection and prosecution. *Pepper v. United States,* -- U.S. --, 131 S. Ct. 1229, 1239-40, 1242 (2011); ("sentencing judge to consider every convicted person as an individual," sentence must "suit not merely the offense but the individual defendant"); *United States v. Bragg,* 582 F. 3d 965, 968 (9th Cir. 2009) (each case of sentencing is "a unique case" where sentence cannot be "calibrated mechanically by looking at a chart"); *see Atkins v. Virginia,* 536 U.S. 304, 305 (2002) (punishment excessive unless "graduated and proportioned to the offense").

C. The Court Should Decline to Apply the Guidelines' 10% Presumptive Overcharge, and Instead Apply an Overcharge Multiplier of No More Than 1.89%

Finally, in its Sentencing Memorandum AUO showed that: (1) an overcharge of anything approaching the 10% proxy included in the Guidelines can be definitively ruled out; and (2) there is no evidence supporting any measurable overcharge here. (AUO Sent. Mem. II, Sec. IV(E).)

The Government responds by pointing to Dr. Leffler's regression analysis, which concluded that AUO obtained overcharges on panels between 12.1 and 30 inches of 19.3%, far more than the 10% proxy. (Govt. Mem. at 28:13-24; Leffler Decl. at 19:11-17.)

Dr. Leffler's regression results suffer from the same problem identified above: he makes no attempt to determine whether his model yields a reasonable result, or instead amounts to "garbage in, garbage out." What would have happened if AUO's prices had been 19.3% lower throughout the Crystal Meeting period, and is that "but for" counter-factual plausible? Dr. Leffler has no answer.

Dr. Hall has analyzed the financial performance of the Crystal Meeting attendees, adjusted their prices downward by the Guidelines' 10% presumptive overcharge, and concluded that it is not credible that such an overcharge would have persisted for five years: had prices been 10% lower, the industry would have lost billions, investment and technological advances would have severely contracted, output would have decreased, prices would have then drifted upwards, and investment would have then returned to normal. (AUO Sent. Mem. II 58:4-26.)

Dr. Leffler has blown hot and cold throughout the history of this case in his regard for his own regression model. The model was at the forefront of his initial pretrial disclosure. At trial, Dr. Leffler shrugged off his model as mere "confirmation" of his "real" analysis -- the comparison of margins before and after January 2006. (RT 3710:6-13.) Before the jury, Dr. Leffler merely testified that overcharges were "at least" 2.1%, perhaps out of a justified concern that the jury

would find any suggestion that sophisticated customers such as Dell, HP and Apple had paid enormous overcharges preposterous. But now, Dr. Leffler once again makes the regression the centerpiece of his report, claiming that it confirms that overcharges exceeded 10%.

Even leaving aside the flaw discussed above -- that Dr. Leffler's regression model "discovered" higher panel overcharges on panels which were not involved in the Crystal Meetings than those that were involved -- Dr. Leffler's cross-examination revealed a number of serious errors in his analysis:

- The overcharge result upon which Dr. Leffler bases his claim that overcharges exceeded 10% is not statistically significant to the 95% level typical of the profession (*See* Declaration of Joseph Kadane In Support of AUO Defendants' Motion in Limine to Exclude Overcharge Testimony of Keith Leffler, ¶¶ 13-14);

- The AUO data used by Dr. Leffler in his regression model for 2009 is fictitious. He testified that since there was no data from AUO, he used 2009 data from CMO and simply estimated what AUO *might* have been for 2009. (RT 3590:24-3591:20);

- Dr. Leffler's regression model removes months with low margins when no prices were discussed in the "conspiracy" period, and adds back in the fictitious 2009 AUO data occurring during a deep recession, severely biasing his results (RT 4402:13-4405:2);

- Dr. Leffler's regression model concludes that AUO somehow simultaneously had lower prices than the other Crystal Meeting companies, but nevertheless had higher overcharges -- even though he arbitrarily used exactly the same cost data for AUO and other companies. (*See* Leffler Disclosure, Table 12 & Regression Data Appendix, ¶ 4.)

In arguing that his regression supports an overcharge proxy of 10%, Dr. Leffler overlooks two additional problems with his analysis: (1) his regression estimated *worldwide* overcharges, not overcharges in sales with some nexus to U.S. commerce; and (2) his regression analysis estimates overcharges through January 31, 2006 -- the overcharge end-date Dr. Leffler was convinced applied until sentencing -- not December 1, 2006.

Bruce Deal, the expert economist who testified on AUO's behalf at trial, has done the analysis Dr. Leffler failed to perform. He used Dr. Leffler's data and ran Dr. Leffler's regression model to estimate any overcharge for the period October 1,

2001 through December 1, 2006. Mr. Deal corrected only one aspect of Dr. Leffler's model, removing Dr. Leffler's fictitious 2009 AUO sales data. (Expert Declaration of Bruce Deal, filed herewith, ¶ 7.)

Mr. Deal found that Dr. Leffler's own regression model yielded a *negative* overcharge for the September 1, 2001 through December 1, 2006 period. (*Id.* at ¶ 8.)

There is no basis for applying the Guidelines' 20% proxy for overcharge and lost consumer opportunities. In setting a fine, the Court should apply a multiplier of no more than 1.89%, for the reasons set forth in Part Two of AUO's Sentencing Memorandum.

IV. CONCLUSION

As explained at length in Part Two of AUO's Sentencing Memorandum and above, the volume of affected commerce proposed by the Government and adopted by the PSR is grossly overstated for several reasons. First, the Government abandons the approach to calculating volume of affected commerce which it advocated before this Court in four previous sentencing hearings. Second, the Government and Dr. Leffler abandon Dr. Leffler's repeated insistence at trial that any overcharges ended in January 2006, extending the overcharge period for an additional ten months for no good reason. Third, disregarding its own admission in post-trial motion briefing that panels not discussed in Crystal Meetings might not have been affected, the Government argues that all sales of all panels of the types listed in the Superseding Indictment should be included in the volume of affected commerce, whether or not they were discussed in a relevant Crystal Meeting. Finally, the Government includes all sales to LG and Samsung, as well as post-2004 sales to Dell. However, the Government offers no explanation of why LG or Samsung, who also attended the Crystal Meetings, would pay overcharges to AUO on panel purchases, and offers no defense at all for including post-2004 sales to Dell, when Dell's own expert in the civil cases was unable to find any overcharges on post-2004 purchases. Once these errors are corrected, the Government's volume

of affected commerce calculation falls from $2.3 billion to $150 million. (Hall Decl., Appendix I.)

Further, the Court should exercise its discretion to reject the 20% proxy for overcharge and lost consumer opportunity. The Government points to Dr. Leffler's regression analysis as support for the notion that AUO somehow obtained overcharges in excess of 10%, but when that regression is done correctly, it shows *negative* overcharges. The Government makes no attempt to defend the erroneous proposition that lost consumer opportunities can be anywhere near 10%, and the alternative justifications it suggests for doubling the multiplier all fail.

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