No. 13-10242

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHIU LUNG LEUNG, Steve Leung,
Chao-Lung Liang.

Defendant-Appellant.

Appeal From The United States District Court
Central District No. CR 10-1055 PA

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal raises issues of sweeping international importance. They involve the interpretation and application of federal antitrust law to an alleged foreign conspiracy to fix the prices of flat screen panels used in desktop monitors and notebook computers between 2001 and 2006. The appeal also comes to the Court in an unusual procedural posture because it is directly related to, and will be substantially affected by, another appeal that involves Mr. Leung's original co-defendants. That appeal was argued before a panel of this Court on October 18th of this year, and is now awaiting decision.

The background is as follows. In 2010, the United States Department of Justice filed a superseding indictment against a Taiwanese company, AU Optronics Corporation ("AUO"); its American subsidiary ("AUOA"); and several AUO executives and employees, including defendant Steven Leung, an AUO director of sales. The prosecution arose out of a financial crisis that plagued the nascent TFT-LCD (thin-film transistor liquid crystal display) industry early in the last decade.

Struggling to survive, Korean and Taiwanese LCD manufacturers began meeting in Taiwan in 2001 to discuss their concerns. Over five years of so-called Crystal Meetings, representatives of six different LDC manufacturers met and exchanged pricing information and discussed proposals for price stabilization. During this same period, TFT-LCD technology became ubiquitous in a variety of products. The quality of the technology improved as the price of the products

incorporating it dramatically dropped. As the district court would itself observe in the course of the proceedings below, AUO and its executives "produced an extremely useful product, and it really has changed the world . . . how we function, and how we process information, and how we live our lives, and how we conduct our government." (ER 434-35.)

The 2010 indictment charged the Crystal Meeting participants with conspiring to fix prices in violation of the Sherman Act. Most of the charged companies and executives entered into plea agreements with the government. AUO, AUOA, and their employees, including defendant Leung, did not. In the district court proceedings, they vigorously contested the legal standards under which their foreign conduct was to be judged. The government contended that a foreign agreement to set prices, no matter how reasonable, is a *per se* violation of the Sherman Act, requiring proof of neither an intent to curb competition nor an anti-competitive effect. The defense forcefully disagreed, contending that several sources of law imposed a far greater burden of proof on the prosecution than did its *per se* theory.

In the end, the district court rejected the defendants' legal arguments concerning the offense elements and standard of proof. Following a lengthy jury trial, AUO, AUOA, and two highly placed AUO executives, H.B. Chen and Hui Hsiung, were convicted. The jury acquitted two other executives and was unable to reach a verdict as to defendant Leung.

AUO, AUOA, Mr. Hsiung, and Mr. Chen timely appealed their convictions.

See Ninth Cir. Nos. 12-10492 (Hsiung), 12-10493 (Chen), 12-10500 (AUO), and 12-10514 (AUOA). The appeals were thereafter consolidated and, as noted above, were submitted for decision before another panel following an oral argument held on October 18, 2013. In the meantime, the United States had proceeded with a retrial of defendant Leung. He was convicted and a judgment entered against him in April, 2013.

Mr. Leung's present appeal of his conviction is formally independent of the aforementioned consolidated appeal. At his retrial, however, Mr. Leung preserved the same legal challenges raised by all defendants at the initial trial and advanced in the consolidated appeal. At his retrial, pursuant to an agreement among the parties, the district court adhered to the disputed rulings it had issued at the initial trial, and it did so on the basis of the arguments and evidence presented at that initial trial.

The substance and prejudicial effect of the disputed first-trial rulings thus carried over to Mr. Leung's retrial and remain at issue in the present appeal. Therefore, Mr. Leung here advances nearly all of the same claims raised by his codefendants in the consolidated appeal, and on the same factual and legal bases on which the codefendants rely. Specifically, like his codefendants, Mr. Leung contends that: (1) his conviction must be reversed because the district court refused to follow this Court's holding in *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, (9th Cir. 1996), which requires application of "rule of reason" analysis in foreign antitrust cases; (2) the Sherman Act lacks a clear statement of

extraterritoriality and therefore may not be used to prosecute foreign conduct; (3) the indictment was deficient because it alleged none of the elements required by the Foreign Trade Antitrust Improvement Act ("FTAIA") to trigger application of the Sherman Act in foreign antitrust cases; (4) the evidence at the initial trial was insufficient to prove the required FTAIA elements, a claim that, as explained further below, rests on the same evidentiary basis as was presented by the government at the first AUO trial; and (5) the indictment was deficient for failing to allege the "intent and effects" elements of *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945), and the jury instructions at both trials failed to require a finding of those elements.

In addition, unlike his codefendants, Mr. Leung advances a claim that is specific to his case, viz., that the district court erred in denying his request for an evidentiary hearing to inquire into allegations of juror misconduct and bias, as detailed in a post-trial declaration of one of the retrial jurors.

A final note concerning the substance of this brief is in order. Pursuant to this Court's General Orders, the panel assigned to the consolidated appeal under submission has priority in deciding the issues that are common to that appeal and this one. *See* Ninth Circuit General Order 4.1.a. (stating in part that in appeals involving common issues, the panel that first takes an issue under submission has priority). Mr. Leung recognizes, however, that the panel assigned to his appeal will not have ready access to the briefing or excerpts of record in the consolidated appeals. In any event, he must specifically and thoroughly set forth all of his legal

arguments to defeat any government claim that any of them has been waived. Accordingly, in this brief, Mr. Leung directly incorporates both the factual summary relating to the initial trial as well as the arguments of his co-defendants, modified as necessary, for purposes of presenting the claims which are common to the consolidated appeals and Leung's appeal.[1]

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291.

This appeal is from a final judgment of conviction, entered by the district court orally on April 29, 2013 (Dkt. 1147) and formalized in a written order filed on April 30, 2013. (ER 205; Dkt. 1151.)

The notice of appeal was timely filed. (ER 202; Dkt. 1159.)

BAIL STATUS OF DEFENDANT

The district court sentenced defendant Leung to 24 months of imprisonment. (ER 206.) On August 30, 2013, the district court denied Mr. Leung's motion for release on bail pending appeal. (Dkt. 1189.) Mr. Leung thereafter renewed his bail motion in this Court (Ninth Cir. Dkt. 17), which granted the motion in an order issued on October 23, 2013. (Ninth Cir. Dkt. 22.)[2]

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[1] Mr. Leung may seek leave to file supplemental briefing when the panel considering the consolidated appeal issues its decision.

[2] The district court had also denied Mr. Leung's codefendants' motion for release pending appeal. On December 5, 2013, however, this Court issued an order granting the codefendants' release motion. (Ninth Cir. Nos. 12-10492, 12-10493, 12-10500, 12-10514, Dkt. 84.)

ISSUES PRESENTED FOR REVIEW

I. Whether defendant's conviction must be reversed because the district court refused to follow this Court's holding in *Metro Industries*, which requires application of rule of reason analysis in foreign antitrust cases.

II. Whether the Sherman Act lacks a clear statement of extraterritoriality and therefore may not be used to prosecute foreign conduct.

III. Whether the indictment was deficient because it alleged none of the elements required by the FTAIA to trigger application of the Sherman Act in foreign antitrust cases.

IV. Whether the evidence at trial at the initial trial was insufficient to prove the required FTAIA elements.

V. Whether the indictment was deficient for failing to allege the "intent and effects" elements of *Alcoa*, and whether reversal is also required because the jury instructions at trial failed to require a finding of those elements.

VI. Whether the district court misconstrued the law and thereby abused its discretion in refusing to commence an evidentiary hearing into defendant's allegations of juror bias and misconduct.

STATEMENT OF THE CASE

On June 10, 2010, the United States filed a superseding indictment in the district court against several defendants including AU Optronics Corporation; AU Optronics Corporation of America; and several AUO executives and employees,

including, among others, Hsuan Bin Chen, Hui Hsiung, and Steven Leung. (ER 625-67 .) The superseding indictment alleged in one criminal count that the defendants he had agreed to fix prices in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. (ER 655-66.)

An initial jury trial commenced before the Honorable Susan Illston on January 10, 2012. The jury returned its verdict on March 13, 2012. (Dkt. 851.) The jury found both corporate defendants and Chen and Hsiung guilty. It acquitted two other AUO defendants. (*Id*.) As to defendant Leung, the jury was unable to reach a unanimous verdict.

After denying the convicted defendants' post-trial motions, Judge Illston sentenced them on September 20, 2012. AUO and AUOA were placed on probation, and AUO was ordered to pay a fine of $500 million. (Dkt. 967, 968.) The convicted individual defendants, Hsiung and Chen, were each sentenced to a term of imprisonment of 36 months, in addition to monetary sanctions and other conditions. (Dkt. 965, 966.)

AUO, AUOA, Chen, and Hsiung timely appealed their convictions. (Dkt. 970, 971, 981, 987.) Their appeals were consolidated pursuant to this Court's order issued on December 21, 2012. (Ninth Cir. Nos. 12-10492, 12-10493, 12-10500, 12-10514, Dkt. 11.) On October 18, 2013, the parties presented oral argument in the consolidated appeal and the case was submitted to the panel, consisting of Judges Thomas, McKeown, and visiting district court judge Kendall. (*Id*., Dkt. 59.)

In the interim, the United States proceeded with a retrial of Steven Leung. The retrial commenced before Judge Illston on November 27, 2012. (Dkt. 1044.) On December 19, 2012, the jury returned its verdict finding Mr. Leung guilty. (Dkt. 1091.) After denying his post-trial motions, the court sentenced Mr. Leung to a term of 24 months imprisonment and imposed monetary fines and other conditions. (Dkt. 1149.) Mr. Leung filed a timely notice of appeal on May 2, 2013. (Dkt. 1159.)

STATEMENT OF FACTS

Again, all but one of the claims advanced by appellant Leung in this appeal are founded on rulings made by the district court at his initial trial involving multiple defendants. Those rulings responded to motions, objections, evidentiary proffers, and proposed instructions in which appellant Leung had joined at the initial trial. Furthermore, as noted below, Mr. Leung preserved his challenges to all such rulings before, during, and after his retrial.

Accordingly, the following statement of facts begins by summarizing the relevant developments and evidence at the initial trial because they provide the procedural and substantive bases for nearly all of the trial court's disputed rulings that Leung challenges in the present appeal.

A. The Government's Allegations

The superseding indictment alleged "the defendants and other coconspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the prices of thin-film transistor

liquid crystal display ("TFT-LCD") in the United States and elsewhere." (ER 660-64.)

The indictment focused on a series of "Crystal Meetings" that took place in Taiwan between 2001 and 2006. The government alleged that the defendants met secretly in hotel rooms and other locations in Taipei with representatives of other TFT-LCD manufacturers. (ER 660-64.) It alleged that at these meetings, the participants agreed to fix the prices of TFT-LCD panels. It further alleged that the various manufacturers regularly exchanged pricing information in order to enforce the price-fixing agreement. (ER 663.)

Finally, the indictment alleged that the defendants sold panels "in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in [other] states and countries." (ER 665.) Furthermore, the defendants' activities "were within the flow of, and substantially affected, interstate and foreign trade and commerce." (*Id.*)

B. The Initial Trial

1. Pretrial Proceedings

Most of the claims raised in this appeal were raised by the defense and rejected by the district court prior to the initial trial. The defendants filed two motions to dismiss the indictment. In the first, the defendants argued that the indictment was deficient because it pleaded the case as a *per se* antitrust case rather than a "rule of reason" antitrust case. (Dkt. 177 at 6-8.) They argued that the indictment therefore, among other things, failed to allege the element of intent

required for a rule of reason case. The government argued that this case should be subject to the *per se* rule and thus not subject to the rule of reason. (Dkt. 187 at 2.) The district court agreed with the government and denied the motion to dismiss. (ER 194-96.)

In the second motion to dismiss, the defendants argued that regardless of the application of the *per se* rule, the indictment was deficient because it failed to allege other elements required for cases involving foreign anti-competitive conduct. (Dkt. 258 at 10-18.) In particular, the indictment failed to allege the statutory elements of the Foreign Trade Antitrust Improvement Act and other elements required by case law. In opposition, the government argued that it was not required to plead any such elements because this was not truly a "foreign" case. (Dkt. 281 at 6.) The district court again sided with the government and denied the motion to dismiss. (ER 182-90.)

Prior to trial, in advance of the pretrial motions hearing, the defendants submitted proposed jury instructions that would have required the government to prove the elements of a rule of reason case. (ER 600-610.) Conversely, the government filed a motion in limine aimed at barring the defense from arguing a rule of reason defense. The government argued that the defendants should not be allowed to present any evidence or argument that their actions were reasonable, necessary, or beneficial to the overall market. (Dkt. 484 at 4.) The district court again agreed with the government. It stated that because this was a price-fixing case and thus a *per se* case, arguments about reasonableness "won't be allowed."

(ER 151-52.)

2. The Evidence at Trial

Given the district court's pretrial rulings barring a defense under the rule of reason, the trial focused primarily on the limited issue remaining under a *per se* theory of Sherman Act illegality—whether there was an agreement to set prices. The government argued to the jury that the defendants and their coconspirators had so agreed. The defendants argued that while they had met with competitors and exchanged some pricing information, they had not in fact agreed to fix prices. Rather, they had engaged in a strategic (and often deceptive) plan to obtain market intelligence from competitors. The defendants introduced evidence that they had competed vigorously in the market, had not abided by any price-fixing agreement, and did not charge higher prices or earn higher profits as a result of the meetings.

Those convicted at the first trial disagreed with the jury's conclusion that they agreed to fix prices, just as defendant Leung disagrees with the same conclusion reached by jurors at his individual retrial. Nevertheless, given the demanding standard under which such claims are decided on appeal, none of the convicted defendants have contested the legal sufficiency of the government's evidence showing an agreement. Thus, the trial evidence at both the initial trial and Mr. Leung's trial is substantially irrelevant to the legal claims raised in all the pending appeals, including this one, and therefore can be summarized briefly.

a. Defendants' Business Operations

Defendant-appellant AU Optronics, a Taiwanese corporation, is one of the

world's largest manufacturers of TFT-LCD panels. TFT-LCD panels are used in a wide variety of consumer electronics, including desktop computer monitors, laptop computers, televisions, and cell phones. TFT-LCD is currently the most widely used flat screen technology.

AUO manufactures its panels at fabrication facilities, known as "fabs," in Asia. Its panels are then sold to foreign original equipment manufacturers (OEMs), also known as systems integrators, who in turn assemble them with other components into end products such as computer monitors and laptops. The OEMs then sell end-user products to branded companies in the United States (such as Dell and Hewlett-Packard) and abroad (such as Asus and Proview). The OEMs operate production facilities located primarily in Asia, including Taiwan and China, and the vast majority of AUO's panel sales are to customers located in Asia. In short, AUO manufactures panels in Asia, then ships them to its customers' facilities, also primarily in Asia, and its customers' products are then resold and shipped for sale around the world, in the United States and elsewhere.

AUO has subsidiaries around the world, including AUOA. AUOA's operations are primarily sales support—it operates sales offices in the United States. AUO and AUOA have no manufacturing facilities in the United States. AUO's chief competitors in the TFT-LCD manufacturing business are also located in Asia. These competitors include LG and Samsung in Korea; Hannstar, CMO, and CPT in Taiwan; and other companies located in Japan and China.

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b. Pricing Agreements at the "Crystal Meetings"

The government's core allegation in this case was that AUO met with its competitors at a series of meetings between 2001 and 2006 and agreed to fix the prices of TFT-LCD panels.

The price of TFT-LCD panels is volatile due to changing input prices and changing supply and demand dynamics. In 2001, prices of panels were falling due in part to over-supply. According to Dr. Keith Leffler, the government's economic expert, the industry was in a "desperate" situation with "very, very depressed profits." (AUO RT 4533-35.)[3] Beginning in September of 2001, executives from the six primary TFT-LCD manufacturers—Samsung, LG, CMO, CPT, Hannstar, and AUO—began meeting in hotels in Taipei to discuss industry issues, market conditions, and pricing. The government alleged that at these "Crystal Meetings," the defendants conspired to fix prices.

At the initial trial, the government called as witnesses several Crystal Meeting participants who testified pursuant to plea agreements. For example, it called J.Y. Ho, the former president of CMO. (AUO RT 652.) Ho testified that beginning in September of 2001, he and his top sales executives began attending the Crystal Meetings, where he would discuss "target prices" of panels with competitors in order to "stabilize" prices. (AUO RT 660, 668.) According to Ho, the participants would place a certain product (i.e., a certain panel size) on a

[3] For convenience, defendant Leung refers to the Reporter's Transcript generated at the initial trial, as cited above, as "AUO RT." He refers to the transcript generated at his retrial as simply "RT."

whiteboard, and then would agree to a price for that product for sales in the coming months. (AUO RT 676-78.) Ho attended the first three meetings and later directed his subordinates to attend.

The government also called Brian Lee, a sales manager at CPT. (AUO RT 1236.) Lee testified that in early 2001, panel prices were falling due to over-supply. (AUO RT 1253.) He had some initial discussions with Samsung about setting prices, and Samsung encouraged CPT to meet with other Taiwanese manufacturers to stabilize prices. (AUO RT 1316-17.) The companies then began meeting regularly in hotel rooms to share market intelligence, discuss production utilization, and fix prices. (AUO RT 1257, 1283-85.) According to Lee, the meeting participants would have detailed discussions of market conditions and then reach a "consensus" on what pricing should be for various products. (AUO RT 1316-17.) At subsequent meetings, the participants would discuss how prices had moved to see if the agreement had been implemented. (AUO RT 1324-26.) Lee testified that the participants agreed to keep their meetings confidential. (AUO RT 1297.)

Aside from Ho and Lee, the government called two other executives who also attended the meetings. (AUO RT 2138 (Stanley Park of LG); AUO RT 2917 (C.C. Liu of CPT).) In addition to the witness testimony, the government also presented meeting notes taken by various participants. One such report for the first meeting, authored by Brian Lee, stated:

> Through this exchange session, all makers are hoping that an orderly pricing can be maintained for the short

> term, and production capacity and demand balance can be achieved for the mid and long term, thus prices can be stabilized in order to ensure profitability in the TFT industry.

(Exh. 302T at 1.) The government also introduced meeting notes prepared by AUO attendees. (E.g., Exh. 306T, 308T, 309T, 310T.)

The TFT-LCD manufacturers met approximately monthly for five years. Certain meetings were attended by top executives, while others were attended only by lower-level sales executives. Especially in later years, after concerns were raised that customers might be aware of the meetings, the attendees took steps to preserve the confidentiality of the meetings by meeting in different discrete locations and by sending only lower-level employees.

c. Implementing the Agreements

Although most of the government's evidence at trial focused on the Crystal Meetings themselves, the government also presented some evidence about how the participants implemented pricing agreements.

The government called Michael Wong, who worked in sales for AUOA between 2001 and 2008. (AUO RT 834-39.) Wong negotiated panel sales with companies such as Dell, Apple, and Hewlett-Packard. Wong testified that AUOA employees communicated regularly with their superiors in Taiwan regarding pricing, and that his superiors in Taiwan had ultimate authority to decide what prices to quote customers. (AUO RT 867-70.) Wong's superiors in Taiwan occasionally sent him reports from the Crystal Meetings and instructed him to align prices with competitors'.

Wong also testified that while he was working for AUOA, he began to contact sales employees of other TFT-LCD manufacturers. (AUO RT 882-86.) They would discuss pricing information, including what prices the customers were requesting and what prices the manufacturers were quoting. (AUO RT 888-94, 907-98.) Wong would then convey that information back to his superiors in Taiwan. Many of Wong's communications with Taiwan were labeled "confidential," and at times, his superiors instructed him to erase emails after he had received them. (AUO RT 908.) Later, when Wong learned the FBI was investigating, he called a subordinate and instructed him to erase contact information for competitors from his cell phone and computer. (AUO RT 1042.)

Wong also testified, however, that he did not believe he had done anything wrong. In his view, his contacts with competitors were simply an effort to gather as much market intelligence as possible. (AUO RT 1060-62.) He testified that while he did exchange pricing information with competitors, he never agreed to fix prices with anyone.[4]

3. Defense Evidence

The defense primarily argued at trial that although individual defendants and other AUO representatives attended the Crystal Meetings and had pricing

[4] At one point, one of Wong's employees, Evan Huang, sent Wong an email stating that Apple was suspicious that suppliers were exchanging pricing information, concluding: "This is illegal, especially in the states. We need to be watchful!" (Exh. 172.) The legal opinion of Huang, who has never been accused of price fixing, was simply wrong: as the district court instructed the jury, in itself it is not illegal "for a person to obtain information about a competitor's prices or even to exchange information about prices." (ER 447.)

discussions with competitors, they did not intend to join any conspiracy to fix prices. In support of this argument, the defense presented evidence that AUO did not, in fact, fix prices and that it competed aggressively during the period of the alleged conspiracy.

The defense called an expert witness, Bruce Deal, to testify about AUO's actual pricing during the alleged conspiracy. Deal testified that AUO regularly and repeatedly sold panels at prices below the prices that had supposedly been agreed to at the Crystal Meetings. For example, Deal testified that in October 2001, during the first month of the alleged conspiracy, 76 percent of the panels that AUO sold were sold below the Crystal Meeting price, averaging 5 percent below. (AUO RT 4264.) The next month, AUO sold 79 percent of its panels below the Crystal Meeting price, averaging 6 percent below. (AUO RT 4270-71.) Deal found similar results throughout the period of the alleged conspiracy. (E.g., AUO RT 4280-87.) Deal opined that AUO's actual selling prices were inconsistent with any price-flooring or price-targeting agreement.[5]

In arguing against the charge that agreements had been reached to fix prices, the defense also presented more general evidence that the industry remained competitive despite the alleged conspiracy. The jury heard some evidence, for

[5] In response to Deal's testimony, the government called Dr. Leffler as a rebuttal witness. Leffler testified that although it was not a "perfect" conspiracy, the Crystal Meeting attendees succeeded in raising prices, resulting in a significant overcharge. (AUO RT 4517-19.) Leffler testified, however, that while he disagreed with Deal's interpretation of the data, he did not disagree with the actual pricing data Deal had used. (AUO RT 4575.) It was thus undisputed at trial that AUO had priced below the supposedly agreed-to prices.

example: (a) that manufacturers still competed for market share and that AUO gained market share (AUO RT 3183, 3455); (b) that manufacturers regularly used discounts, rebates, free shipping, and other tools to offer lower effective prices to customers (AUO RT 4218-24); (c) that manufacturers made efforts to keep actual prices hidden from competitors and regularly deceived competitors (AUO RT 531, 1085-89); (d) that purchasers retained substantial bargaining power and often negotiated favorable terms, including one- way price protection and below-contract ultimate pricing (AUO RT 556-664, 2782); (e) that purchasers deceived manufacturers about pricing terms they received from other manufacturers (AUO RT 1068-74); and (f) that profits earned by AUO—the ultimate measure of competitiveness—were not measurably higher during the periods when prices were discussed compared to other benchmarks (AUO RT 4365-68.) Perhaps most importantly, prices of TFT-LCD panels fell considerably during the period of the Crystal Meetings. In fact, prices fell just as fast during the period of the alleged conspiracy as they did after the Crystal Meetings ended. (AUO RT 4295-99.)

4. Instructions and Argument

In its preliminary instructions to the jury, the district court had refused to instruct on the elements of the FTAIA, reserving the right to do so in the final instructions "[a]fter hearing the evidence of the conspiracy's domestic component" (ER 106-07.) By the end of the trial, the district court acknowledged that the evidence had concerned predominantly foreign conduct; the court therefore instructed the jurors on the FTAIA elements. (ER 449.) The district court also

instructed that the Sherman Act could be extended to criminalize foreign conduct if "the conspiracy had a substantial and intended effect in the United States." (*Id.*) But the court further told the jurors that they could convict without finding any effect in the United States so long as they found "that at least one member of the conspiracy took at least one action in furtherance of the conspiracy in the United States." (*Id*.)

The case was submitted to the jury shortly thereafter. After deliberating for over a week, the jury voted to convict Mr. Chen, Dr. Hsiung, AUO, and AUOA. The jury acquitted two other AUO employees, and could not reach a verdict as to Mr. Leung.

5. Post-trial Motions

Following the jury verdict, the convicted defendants filed motions for acquittal under Rule 29 and, in the alternative, for a new trial under Rule 33. (ER 518.) They reiterated claims raised prior to trial and also raised new claims based on issues that had arisen during trial. The district court denied their motion.

6. Sentencing

The district court imposed a fine of $500 million on defendant AUO and a sentence of 36 months imprisonment and a fine of $200,000 on the individual defendants. Those sentences, while severe, were far less than what the government sought. The district court found that the government had clearly proved its *per se* theory of liability, but observed:

> I want to say something else both about the corporations and about the individuals . . . . [V]ery often when one

> comes to the time of sentencing and defendants are asked if there's anything they would like to say, they very often say: oh, I recognize that I made poor choices in this case, and that my judgment was poor, and I apologize for my poor judgment and my bad choices. My response to that is very often that you made far more than bad choices in this case, you committed felonies, and let's get on with it. In this case, though, I think that those explanations actually are quite apt.

(ER 435-36.)

The Court found that

> the business logic of assisting a fledgling industry in another country and in another culture and acting in and for the benefit of [AUO] and others in the industry are offsetting features of this crime . . . . [T]hey go a long way to explain it. [F]or a considerable period of time the defendants thought they were doing the right thing vis-a-vis their industry and their companies. . . . [T]here were a lot of business pressures that they were responding to, and that's what they did. These were poor choices. It was bad judgment. But there was no – there was relatively little personal motivation.

(ER 436-37.) It then reiterated the same point: "I find that there were reasons for committing these acts." (ER 438.)

C. Defendant Leung's Retrial

1. Pretrial Proceedings

Prior to defendant Leung's retrial, the parties submitted pleadings raising questions concerning the continuing effect of the court's rulings at the initial trial. *See*, e.g., Dkt. 995 (joint pretrial conference statement, asserting United States' position that rulings made at initial trial should obtain at second trial as the "law of the case); Dkt. 1006 (United States' trial brief, asserting same position).

Responding to these pleadings at the final pretrial conference, the district court stated, "I believe that the rules are that, barring some changed circumstance, prior rulings ought to apply in this case, as well." (10-30-12 RT at 2.)

Shortly thereafter, defense counsel revisited the point:

> [DEFENSE COUNSEL]: Just as far as the case – the law-of-the- case issue goes, one statement we did want to make is: We understand the Court's making the same rulings, but obviously, we want the record to be clear that we were making – would be making the same objections, the same motions, the same requests for jury instructions that had been denied, just to preserve our record.

(10-30-12 RT 13.) The district court responded, "Oh, yes. That's fine. That's fine." (*Id*.) The court thus expressly confirmed that all of the defense's challenges to its previous rulings, to the extent the court adhered to them in the retrial, would be preserved. (*See also* RT 1628 (defense informs court it makes no waiver of previous objections); RT 1776-77 (defense observes, and court agrees, that initial-trial instructions are law of the case)).

The district court did, in fact, adhere to its initial trial rulings, thereby rejecting Leung's claim that the indictment was fatally flawed for failure to plead the elements of the rule of reason and the FTAIA. As an evidentiary matter, the case was tried as a "per se" price fixing case; evidence and argument relevant to the "rule of reason" remained off limits. And, as to all significant matters, the instructions given at the retrial tracked those given at the first. Compare ER 439-60) (instructions given at first trial) with ER 238-57 (instructions given at Mr. Leung's retrial).

2. The Evidence at the Retrial

Structured and confined as it was by the law of the case, the evidence introduced by the parties at the retrial revisited the themes presented at the initial trial, but focused this time on the activities of defendant Leung. In 2002, Leung was an AUO sales manager in the company's monitor business unit, i.e., the division responsible for the sale of desktop monitors. In 2003, he was promoted to be the division director. He was responsible for major United State monitor accounts, including Dell and Hewlett-Packard.

Mr. Leung first attended a Crystal Meeting on behalf of AUO in May, 2002, and continued to do so on many occasions over much of the alleged conspiracy period. Through witnesses such as C. C. Liu and Brian Lee of CPT, the government sought to show that Leung took an active role during the meetings and appeared to enter into pricing agreements with other company representatives at those times. (See, e.g., RT 459 [Liu], RT 1131 [Lee]).

The government also introduced evidence aimed at showing, *inter alia*, that Mr. Leung had authored Crystal Meeting reports that were circulated to, and approved by, his superiors at AUO; that Leung sent out agendas and reminders concerning the meetings and emphasized their confidentiality; that his reports used the word "consensus" or similar phrasing to describe the discussions at the meetings (*see* Trial Exh. 4A); that he held sales meetings where he gave his staff pricing directives referring to Crystal Meetings discussions; that AUOA account managers received pricing approval from Leung for products offered to U.S.

customers (RT 519 [Wong]); and that he contacted competitor representatives via one-on-one meetings and calls to discuss monitor prices (*see, e.g.*, trial exh. 90, 108). The government also introduced Mr. Leung's self assessment of his 2003 performance for AUO, in which he stated that he had "coordinated TFT industry communications and price stabilization." (Exh. 261; RT 1335).

The defense sought to establish that Leung had never reached an agreement with competitors concerning monitor prices at the Crystal Meetings or elsewhere. Prosecution witness Stanley Park of LG attended about sixty of the meetings. Based on his notes, he testified that actual agreements on prices were concluded on two occasions, neither of them attended by Leung. (RT 987) Hubert Lee, a sales manager and later director of AUO's notebook sales division, attended several Crystal Meetings with Leung and never saw him make such an agreement. (RT 1509) Leung did not have the authority to make such an agreement on his own. (RT 1516 (Lee); RT 1815 (AUO director of product marketing James C. P. Chen); RT 1395 (Renee Wang, special assistant to Leung's superior, L. J. Chen].)

Defense evidence indicated that the Crystal Meetings and other competitor contacts involved the exchange of market information, not the fixing of prices. (RT 1511, 1571 (Hubert Lee).) Thus, Leung's reports concerning the meetings were not viewed by other AUO recipients as pricing directives but rather as relevant information for purposes of an independent decision on price. (RT 1814 (AUO director of product marketing James C. P. Chen).) L. J. Chen, Mr. Leung's superior in the monitor business division, described the involved process by which

product prices were actually determined. (RT 1792, et seq.)

Notwithstanding the defense challenge to the prosecution's case, the jury returned its verdict finding Mr. Leung guilty on December 18, 2012. (Dkt. 1090.)

3. Defendant's Renewal of His Legal Challenges

During the retrial, Mr. Leung renewed his challenges to the sufficiency of the evidence as to all elements of the offense, including the evidence purportedly supporting the "import" and "domestic effects" exceptions to the FTAIA (see Argument IV, below). On December 6, 2012, after the government had rested, the defense unsuccessfully moved for a judgment of acquittal on "any conceivable aspect" pursuant to Fed.R.Crim.P. 29. (RT 1417; *see also* 9 RT 1377-78.) Similarly, after the close of evidence, the defense orally renewed the Rule 29 motion "on all conceivable grounds." (RT 2063.) This motion, too, was denied. (*Id*.)

4. Post-Trial Proceedings and Sentencing

Following trial, Mr. Leung filed another motion under Rules 29 and 33. (Dkt. 133.) In the latter, he advanced a claim of juror bias and misconduct, the subject of Argument VI in this appeal. The claim was founded on a juror affidavit reporting that other jurors had repeatedly discussed the evidence and reached conclusions concerning guilt or innocence prior to the commencement of deliberations, in violation of the district court's instructions.

On April 30, 2013, Judge Illston denied the motions and sentenced Mr. Leung to a term of 24 months in custody. She also ordered payment of a $50,000

fine. (Dkt. 1149, 1156.)

SUMMARY OF ARGUMENT

Defendant presents the following claims on appeal.

First, his conviction must be reversed because the district court erred when it allowed the government to present its case under the *per se* theory of antitrust violations rather than that of the rule of reason. This Court's ruling in *Metro Industries* created a bright-line rule that foreign antitrust cases must be analyzed under the rule of reason, yet in this case, the government neither pleaded nor proved the elements of a rule of reason case.

Second, the conviction must be reversed in light of the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd*., 130 S. Ct. 2869, 2877 (2010). *Morrison* establishes that if a statute gives no clear indication of an extraterritorial application, it has none, and no such indication appears in the Sherman Act.

Third, the government failed to plead the elements required by the FTAIA. The government claimed that the requirements of the FTAIA were merely "jurisdictional," and thus not subject to the requirements of *Apprendi*. That is false, and the indictment should have been dismissed.

Fourth, pleading failures aside, the government's evidence at the initial trial was insufficient to prove the elements of the FTAIA.

Fifth, the government also failed to plead the requisite mens rea of the offense. Because this was a case based on foreign conduct, the government was required to plead and prove that defendant intended to affect domestic commerce

and did so. The indictment contained no allegation of intent, and the district court's instructions at trial also did not require the jury to find the requisite *mens rea* and impact on United States commerce.

Sixth, the district court misconstrued the Rules of Evidence and abused its discretion in declining to hold an evidentiary hearing into substantial allegations of juror bias and misconduct. Specifically, Rule 606(b) does not preclude an inquiry into premature deliberations, particularly where they both constitute a violation of the court's pre-trial instructions and suggest the presence of juror deceit during voir dire.

ARGUMENT

I. DEFENDANT'S CONVICTION MUST BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PLEAD AND PROVE THE ELEMENTS OF A RULE OF REASON CASE AS REQUIRED BY THIS COURT'S RULING IN *METRO INDUSTRIES*

There are two types of cases in antitrust law: rule of reason cases and per se cases. *Per se* cases are limited to certain types of conduct that are so obviously anticompetitive that the mere act of engaging in the conduct is illegal. Rule of reason cases require more. *Metro Industries* states that when the government prosecutes a case based on foreign conduct, it must demonstrate that the defendants violated the rule of reason.

The conduct with which defendant was charged took place almost entirely during a series of "Crystal Meetings" between September 2001 and December 2006 in Taipei, which Mr. Leung did not attend until 2002. There, the named coconspirators allegedly met and conferred about fixing the prices of TFT-LCD

panels. (ER 660-64 [Indictment ¶ 17].) But the government did not plead or prove the elements of a rule of reason case—indeed, it did not even attempt to do so. Instead, it proceeded on a per se theory. Because this case was based on allegations of a foreign restraint of trade, the government's per se theory was legally invalid.

Defendant's argument in this case is simple: *Metro Industries* means what it says, and because *Metro Industries* means what it says, defendant's conviction must be reversed.[6]

A. The District Court's Rulings Below

1. Motion to Dismiss Indictment

At the outset of this litigation, the defendants, including Mr. Leung, filed a motion to dismiss the indictment. (Dkt. 177, 185.) The defendants argued, under *Metro Industries* and *United States v. United States Gypsum Co.*, 438 U.S. 422, 443-44 (1978), that the indictment failed to allege essential elements of a rule of reason offense and should thus be dismissed under Fed. R. Crim. P. 12(b)(3). The indictment contained no allegation that the defendants' conduct adversely impacted American consumers—it did not allege actual injury. Even more obviously, the indictment contained no allegation that the defendants intended to harm commerce or knew that their actions would have anticompetitive effects in the United States—it did not allege mens rea.

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[6] The sufficiency of an indictment is reviewed de novo. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). When an argument for acquittal rests on a question of statutory interpretation, review is de novo. *United States v. Havelock*, 664 F.3d 1284, 1289 (9th Cir. 2012) (en banc).

In response, the government conceded that it had not alleged the elements of a rule of reason case, including the mens rea element. It argued, however, that *Metro Industries* and *Gypsu*m were "inapposite" and "inapplicable" to this case. (Dkt. 187 at 4-5.) The government thus argued that it was not required to allege any rule of reason elements because it was proceeding on a *per se* theory. It similarly argued that it would be "unduly complicated and confusing" for a jury to determine the rule of reason elements. (*Id*., at 8.)

The district court agreed with the government. It declined to apply *Metro Industries*. Instead, it applied the First Circuit's holding in *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). (ER 195-96.)[7] It therefore found that the indictment was "sufficient as pleaded" and denied the motion to dismiss.

2. Pretrial Jury Instruction Requests and Motion in Limine

Prior to the initial trial, the defendants submitted proposed jury instructions based on the rule of reason. They proposed to tell the jury: "Because the conduct at issue in this case occurred primarily overseas, it is judged according to what is called the rule of reason." (ER 600.) Relying on the district's court's earlier order, however, the government moved *in limine* for

> an order prohibiting defendants from presenting any evidence or argument that: (1) the agreements to fix or

[7] As antitrust authorities have recognized, however, the two cases are in conflict. See 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 273b, at 333 (3d ed. 2006) ("*Metro Industries*, requiring rule of reason treatment for all restraints abroad, stands in conflict with the First Circuit's *Nippon* decision . . . .").

> stabilize prices were "reasonable" or justifiable; (2) there were economic, benevolent, or other justifications for the agreements to fix or stabilize prices; (3) the agreements to fix or stabilize prices created real or imagined economic efficiencies for the defendants and their coconspirators; (4) agreements to fix or stabilize prices were necessary to avoid ruinous competition; (5) prices set for TFT-LCDs set by an agreement to fix or stabilize prices were reasonable; or (6) any variations on the foregoing.

(Dkt. 484 at 4.)

Opposing the motion, the defendants once again asserted that "under controlling Ninth Circuit law, this prosecution based on foreign conduct must be decided under a rule of reason analysis." (Dkt. 528 at 3.)

While in part reserving its ruling on the government's motion, the district court ruled that the defendants would not be allowed to present a rule of reason defense:

> And certainly you can't say "Well, there's a price-fixing conspiracy, but it was a reasonable one, and therefore, we're okay." . . . And if there were ever an argument to be made that reasonableness would get you out from under the Sherman Act in this price-fixing case, [the government] can certainly object to that, because that won't be allowed.

(ER 151-52.)

3. Initial Trial Evidence and Final Jury Instructions

Consistent with its pretrial ruling rejecting the applicability of *Metro Industries*, the district court stated during the instructional conference that the jury would not "even be told about rule of reason." (ER 549.1) It instructed the jury that any agreement to fix prices was per se illegal regardless of the reason or pro-

competitive effects.

> [A]ny agreement to raise or lower a price, to set a maximum price, to stabilize prices, to set a price or price range, to set target prices, or to maintain a price is illegal. If you should find that the defendants entered into an agreement to fix prices, the fact that the defendants or their coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense.

(ER 467.)

4. Post-trial Motions

After the initial trial, the defendants, including defendant Leung, moved for acquittal under Rule 29 or a new trial under Rule 33. They again argued that *Metro Industries* requires rule of reason treatment for this case. (Dkt. 878 at 28-32.) The defendants further pointed to substantial additional evidence demonstrating the reasonableness of their actions—evidence that was excluded at trial but would have been admitted if the case had been tried as a rule of reason case. (Dkt. 878 at 39-51.)

The government again argued that *Metro Industries* was inapplicable to this case, and the district court again agreed with the government. (ER 12-13.)[8]

B. The Rule of Reason in Antitrust Law

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Although the statute is

[8] As noted, the district court adhered to the same position during defendant Leung's retrial.

written in categorical terms, the Supreme Court has long held that not every combination or agreement that restrains trade is illegal.

As Justice Brandeis explained a century ago: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). More recently, building on the work of modern antitrust economists, the Court has recognized that "[s]ome activities can only be carried out jointly." *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) (quoting Robert Bork, *The Antitrust Paradox* 278 (1978)). Put differently, sometimes "a certain degree of cooperation is necessary" for businesses to operate effectively. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (quoting *NCAA*, 468 U.S. at 117).

In short, agreements that have pro-competitive and pro-consumer effects are not proscribed by the Sherman Act even though they may technically "restrain trade." Only *unreasonable* restraints of trade are illegal.

In order to determine which restraints of trade are unreasonable and therefore illegal, the Supreme Court has divided antitrust cases into two types: rule of reason cases and per se cases.

> Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," this Court has long recognized that Congress intended to outlaw only unreasonable restraints. As a consequence, most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors,

> including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.
>
> Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se.

State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citations omitted); *accord NFL*, 130 S. Ct. at 2216-17; *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (en banc). Most antitrust cases are rule of reason cases—it is the "default or presumptive" standard. *Safeway*, 651 F.3d at 1133. Only a few narrow classes of cases that are obviously and manifestly anticompetitive are subject to *per se* treatment.

Horizontal price fixing agreements are "ordinarily" subject to *per se* treatment. *NCAA*, 468 U.S. at 100. But even in horizontal price fixing cases, the Supreme Court has held that the rule of reason is sometimes the appropriate mode of analysis. *See id*. ("Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc*., 441 U.S. 1, 18-23 (1979).

Relative to *per se* cases, rule of reason cases have additional requirements of pleading and proof. This Court has set forth several elements that must be pleaded and proven in rule of reason cases. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012). Among other things, a plaintiff in a rule of reason case must show that the defendants "*intended* to harm or restrain trade or commerce" and also that the defendants' conduct "actually injure[d] competition."

Id. (emphasis added); *see also Gypsum*, 438 U.S. at 443-44 (holding that "intent is a necessary element of a criminal antitrust violation").

C. Rule of Reason in Foreign Cases: The Holding of *Metro Industries*

In *Metro Industries*, this Court created a bright-line rule that foreign antitrust cases must be subjected to rule of reason analysis. The holding of *Metro Industries* was plain: "[W]here a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." 82 F.3d at 845.

Metro Industries was an American importer of kitchenware. Sammi Corp. was a Korean exporting company. Metro sued Sammi and two of its American subsidiaries alleging that the defendants had engaged in a naked horizontal market allocation in violation of the Sherman Act. *Id*. at 841-42. Market allocation agreements between competitors are "classic per se antitrust violation[s]." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972)). The plaintiff thus sought *per se* treatment.

This Court rejected the plaintiff's argument and instead applied the rule of reason.

> Even if Metro could prove that the registration system constituted a "market division" that would require application of the per se rule if the division occurred in a domestic context, application of the per se rule is not appropriate where the conduct in question occurred in another country.

Metro Industries, 82 F.3d at 844-45.

Leaving no doubt about its holding, this Court repeated the same point several times. *See, e.g., id.* at 843 ("Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, per se analysis is not appropriate."); *id*. at 844 ("Foreign Conduct Cannot Be Examined Under the Per Se Rule."); *id*. at 845 ("Consequently, where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation."). *Metro Industries* specifically mentioned price-fixing as a practice that should not be viewed as a per se antitrust violation in a foreign context. *Id*. at 845 ("[P]rice fixing in a foreign country might have some but very little impact on United States commerce.").

The holding of *Metro Industries* is plain. It has never been disavowed by this Court. It has been recognized by the leading antitrust treatise. *See* 1B Areeda & Hovenkamp, *supra*, ¶ 273b, at 331 ("[I]n *Metro Industries*, the Ninth Circuit concluded that a rule of reason inquiry is necessary in all cases involving restraints abroad."). It has been echoed by the Fourth Circuit. *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 291-92 (4th Cir. 2002) (stating that *per se* analysis is "inapplicable to foreign restraints that . . . pose very little danger to American commerce" (quoting Areeda & Hovenkamp, *supra*)). Even when judges of this Court have expressed discomfort with the holding of *Metro Industries*, they have nonetheless recognized that it remains binding law. *See United States v. LSL*

Biotechnologies, 379 F.3d 672, 697 (9th Cir. 2004) (Aldisert, J., dissenting) ("Given the binding precedent of [*Metro Industries*] . . . the United States may not rely on a *per se* theory of a Sherman Act violation in this case.").

Furthermore, the argument for application of the rule of reason rather than the draconian *per se* standard is even stronger in this criminal prosecution than it was in *Metro Industries*, a civil action. Absent application of the rule of reason, foreign businesses that enter into price stabilization arrangements which (1) are entirely legal in their home countries; (2) are reasonable in the context of their relevant markets; (3) are not intended to affect United States commerce; and (4) have no substantial anticompetitive impact on United States commerce nonetheless could be subjected to devastating prosecution in American courts, and their executives to years of incarceration in American prisons. Such a result would be perceived by foreign states as "particularly intrusive." ALI, *Restatement (Third) of the Foreign Relations Law of the United States* § 403 (1987); *see also id.* cmt. f. ("[T]he presence of substantial foreign elements will ordinarily weigh against application of criminal [antitrust liability].").

Under *Metro Industries*, this prosecution should have been subject to the rule of reason.

D. The Government's Failure to Plead and Prove Rule of Reason Elements

Rule of reason cases require proof of additional elements. In a rule of reason case, a defendant is not guilty unless the factfinder determines that the defendant's conduct "impose[d] an unreasonable restraint on competition, taking

into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10.

Because these factual findings are necessary to a determination of guilt in a criminal rule of reason case, they are elements of the offense subject to the rule of *Apprendi*. Every fact necessary for a criminal conviction "must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (internal quotation marks omitted); *see also United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005). In short, where rule of reason analysis is appropriate, a criminal conviction cannot be obtained unless the government pleads and proves the rule of reason elements.

1. The Government's Failure to Plead Rule of Reason Elements

The government below conceded that it did not plead this case as a rule of reason case. To the contrary, it insisted that it was not required to do so—it argued that it was entitled to plead only the facts necessary to demonstrate a *per se* violation. But under *Metro Industries*, the indictment was required to allege every element of a rule of reason offense. Its failure to do so "is a fatal flaw requiring dismissal of the indictment." *Omer*, 395 F.3d at 1089; *see United States v. Du Bo*, 186 F.3d 1177, 1179-80 (9th Cir. 1999) (failure to plead an element cannot be held harmless). On that basis alone, the convictions must be reversed.

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2. The Government's Failure to Prove Rule of Reason Elements

As noted, under *Du Bo*, the deficiencies in the indictment could not be deemed harmless error even had the district court embraced the *Metro Industries* rule at trial and required the government to try the case under the rule of reason standard. In any event, the district court took no such ameliorative measures. Rather than changing fields, the court sustained the government's objection to any defense evidence or argument that might support a rule of reason defense. As a result of the district court's refusal to accept that *Metro Industries* means what it says, the government was not required either at the initial trial or at Mr. Leung's retrial to prove essential elements of the offense. Nor were the defendants at either trial permitted to introduce all relevant evidence rebutting the existence of those elements.

Thus, even absent the pleading deficiencies, the district court's trial errors would require reversal because it cannot possibly be said that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). Rather than being required to find proven the elements of a Sherman Act violation under the rule of reason standard, jurors at both trials were told that any price fixing agreement was a crime. Consequently, the government was not required to prove that (1) the defendants had intended to harm commerce; (2) the defendants' conduct actually harmed American consumers; or (3) the defendants' agreement was unreasonable in light of all the surrounding circumstances, including the condition of the

industry, the pricing pressure from purchasers, the prices of LCD panels both before and after the agreement, and so on.

The defendants at both trials were barred by the court's pretrial ruling from introducing relevant evidence to support the claim concerning the reasonableness of their conduct. Even so, the evidence they succeeded in introducing in defending against the government's *per se* theory could well have convinced a properly instructed jury of the defendants' innocence under the rule of reason standard. That evidence included:

- AUO invested tens of billions of dollars in new manufacturing facilities, which substantially lowered costs and contributed to downward pricing pressure (AUO RT 4320-21);
- AUO ran its expensive fabs at high rates of utilization, thus lowering costs (AUO RT 4330-31);
- Per-unit costs in the industry decreased dramatically and production increased dramatically during the period of the alleged conspiracy (AUO RT 3679);
- Per-unit prices fell dramatically during the period of the alleged conspiracy at an even greater rate than after the alleged conspiracy ended (AUO RT 4298-99);
- New competitors entered the market during the period of the alleged conspiracy (AUO RT 4328-29);
- AUO's profits were greater in the one year after the alleged

conspiracy ended than in all of the years of the conspiracy combined (AUO RT 3672.)

Furthermore, had it been permitted, the defendants, including Mr. Leung at his retrial, would have presented a wealth of additional and powerful evidence that their conduct was reasonable under the circumstances and that it actually *benefitted* American consumers. And if this had been tried as a rule of reason case, the defendants would have presented additional evidence demonstrating that during the period of the alleged conspiracy, competition in the industry remained ferocious.

Such evidence, argued and expanded on in a rule of reason context, would have substantially undermined any prosecution allegation that the defendants' conduct had an actual anticompetitive effect. In fact, to the contrary, such evidence could have demonstrated that the defendants' pricing discussions with competitors actually served to enhance competition by stabilizing an industry that would otherwise have collapsed in a time of rapid change. But because the district court ruled that *Metro Industries* was inapplicable, evidence of reasonableness and pro-competitive effects was excluded.

Moreover, if the defendants had been allowed to present a full defense, they could have illustrated precisely why the holding of *Metro Industries* makes so much sense in foreign cases. The defendants could have demonstrated that *per se* treatment is inappropriate for pricing agreements between foreign businesses in the context of a dynamic and rapidly changing market for a technological product.

The assumption in domestic cases is that price fixing "is potentially very dangerous with little or no redeeming virtue." *Metro Industries*, 82 F.3d at 845. But here, the defendants could have presented a strong case that their conduct "pose[d] very little danger to American commerce or ha[d] more persuasive justifications than are likely in similar restraints at home." *Id*. Indeed, the district court acknowledged as much at sentencing:

> [T]he business logic of assisting a fledgling industry in another country and in another culture and acting in and for the benefit of [AUO] and others in the industry are offsetting features of this crime . . . . [T]hey go a long way to explain it. [F]or a considerable period of time the defendants thought they were doing the right thing vis-a-vis their industry and their companies. [T]here were a lot of business pressures that they were responding to, and that's what they did.

(ER 436-37.) That was, after all, the very rationale of *Metro Industries*: Even if domestic price fixing agreements are ordinarily appropriate for *per se* treatment, the same does not hold true for cases like this.

Guided in part by principles of international comity, *Metro Industries* reaffirmed the bedrock principle that only unreasonable restraints of trade are illegal. In antitrust cases based on foreign conduct, the government should be required to prove rule of reason elements, and defendants should be allowed to prove that their conduct actually served consumer welfare "regardless of the inherently suspect appearance." *Id*. at 845. That is precisely what the defendants sought to do but were prevented from doing by the district court's rulings.

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E. The Government's Attempt to Evade *Metro Industries*

In this appeal, as in the consolidated appeals, the government will not argue that it pleaded and proved the elements of a rule of reason case under the rule of *Metro Industries*. It will not argue that the defendants were able to present all relevant evidence showing that their actions, even if suspicious in appearance, were actually reasonable. Instead, the government will repeat the veritable blizzard of arguments it advanced in the district court aimed at evading the plain holding of *Metro Industries*.

1. Dicta

The government argued that *Metro Industries* does not mean what it says because the relevant portions of the opinion are mere dicta. It applied that epithet with little elaboration or explanation. But in this Circuit, "a prior decision has binding effect to the extent that 'it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue.'" *United States v. Cassel*, 408 F.3d 622, 633 n.9 (9th Cir. 2005) (quoting *United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (en banc) (Kozinski, J., plurality opinion)). The statements in *Metro Industries* were not stray remarks. The *Metro Industries* panel focused on the legal issue presented, and it stated—repeatedly—that *per se* analysis is not appropriate in cases based on foreign conduct.

It is true that the opinion in *Metro Industries* at least arguably rested on alternate grounds. First, the Court held that the plaintiffs had not alleged a classic

horizontal market allocation. 82 F.3d at 844. Second, in the alternative, the Court held that even if the plaintiffs had alleged such an agreement, *per se* treatment would not be appropriate for a foreign case. *Id*. at 844-45. But the government may not simply rely on one ground and ignore the other—alternative holdings cannot be dismissed as dicta. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 346 n.4 (1986); *United States v. Bagdasarian*, 652 F.3d 1113, 1118 n.16 (9th Cir. 2011) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." (internal quotation marks omitted)).

As courts and commentators have recognized, the "dicta" label is often used as a cheap tactic for avoiding unfavorable precedent. That was precisely the government's strategy below.

2. Domestic Price Fixing

The government argued that *Metro Industries* does not mean what it says because domestic cases make clear that horizontal price fixing is always subject to *per se* treatment. That argument is faulty partly because the Supreme Court has said that while horizontal market control agreements are ordinarily subject to per se treatment, they are not necessarily subject to per se treatment in every circumstance. *NCAA*, 468 U.S. at 100.

Even more obviously, the government's argument simply misses the point of *Metro Industries*. It is concededly true that horizontal price fixing, like horizontal market division, would ordinarily be subject to per se *treatment—where the conduct in question is domestic*. But, quite obviously, *Metro Industries* held

the same conduct is analyzed under the rule of reason where the conduct in question is foreign. "Even if *Metro* could prove that the [challenged conduct] constituted a 'market division' that would require application of the *per se* rule if the division occurred in a domestic context, application of the *per se* rule is not appropriate where the conduct in question occurred in another country." 82 F.3d at 844-45.

In a related vein, the government has argued that *Metro Industries* does not apply because it involved allegations of horizontal market division rather than horizontal price fixing. That irrelevant factual distinction has no salience to this Court's clear holding. This Court did not hold that only foreign horizontal market allocations are subject to the rule of reason. Rather, it held that "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Id*. at 845.

Nothing in the opinion suggests any basis for distinguishing price fixing from market allocation. In fact, to the contrary, the opinion explicitly mentions foreign price fixing as an example of conduct that should be subject to the rule of reason because "price fixing in a foreign country might have some but very little impact on United States commerce." *Id*.

3. Wholly Foreign

The government argued that *Metro Industries* does not mean what it says because that case involved "wholly foreign" conduct. That is false. Nothing in the opinion indicates that the rule of *Metro Industries* is limited to "wholly

foreign" cases, and in any event, *Metro Industries* itself did not involve "wholly foreign" conduct. The plaintiff was a United States corporation, and it sued both a Korean distributor and also its two American subsidiaries. The plaintiff alleged that both the parent company and its domestic subsidiaries had "engaged in predatory pricing" in the United States. *Id*. at 842. The *Metro* Court also noted that defendant Sammi did "a great deal of business in the United States," that it had substantial assets in the United States, and that the impact of Sammi's conduct was "felt more in the United States than in Korea." *Id*. at 847. The claim that *Metro Industries* involved "wholly foreign conduct" is disingenuous.

The core anticompetitive conduct in this case was foreign, much more so then even in *Metro Industries*: the government's core allegation was that AUO (a foreign company) and other manufacturers (all foreign companies) met overseas and agreed to set prices of TFT-LCD panels for worldwide sale. While it is true that AUO had a domestic subsidiary and some domestic employees, that is no different from *Metro Industries*.

4. Forfeiture

After the initial trial, the government argued that even if *Metro Industries* means what it says, the defendants waived any reliance on *Metro Industries* when they stipulated to the content of the final jury instructions defining the government's *per se* theory. That argument borders on silliness. The defendants, including Mr. Leung, clearly and fully preserved their claim that they were entitled to rule of reason rather than *per se* treatment. After the district court definitively

had ruled against them on multiple occasions, they were required to settle on the language to be given on the government's per se theory, but in doing so never surrendered their rule of reason claim.

It is hornbook law in this Circuit that once a district court has ruled on an issue, a party is not required to make an additional "futile formal objection." *United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010) (internal quotation marks omitted).[9] A party need not object to a particular instruction when the party has already litigated and lost the same issue. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1012 n.10 (9th Cir. 2004). After all, the purpose of the contemporaneous objection rule is to make sure that trial courts have an opportunity to consider issues and correct errors, thereby avoiding the need for appellate review of those errors. Parties are not required to endlessly renew the same objection in order to preserve a claim. This Court does not require objections that would be a "pointless formality." *Norwood v. Vance*, 572 F.3d 626, 629 (9th Cir. 2009).

At the outset of this case, the defendants filed a motion to dismiss the indictment based on *Metro Industries*. In so doing, they clearly and unambiguously presented their claim—and in denying their motion, the district

[9] *See also Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005) (holding that where a district court was "fully informed" of a party's position on an issue, "any further objection would have been superfluous and futile"); *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1062 (9th Cir. 2002) ("Contemporaneous objection is not required where, as here, the trial court definitively ruled on a motion in limine . . . .").

court clearly and unambiguously rejected that claim.[10] Prior to trial, the defendants submitted proposed jury instructions based on the rule of reason. In other pretrial filings, the defendants made clear that they still maintained their *Metro* argument, and the court repeated its refusal to permit evidence, argument, or instruction on a rule of reason theory. In denying the defendants' post-trial motions, the district court stated that it had "already fully considered and rejected" the defendants' *Metro* argument. (ER 12.)

The defendants' claim based on *Metro Industries* was fully and repeatedly preserved. The government's argument to the contrary is yet another desperate attempt to avoid this Court's binding precedent.[11]

F. Conclusion

Defendant Leung's appeal in this case rests on the simple premise that *Metro Industries* means what it says. All of the government's arguments cannot obscure the brute fact that in *Metro Industries*, this Court held that "application of the *per se* rule is not appropriate where the conduct in question occurred in

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[10] Moreover, even if the defendants had forfeited their trial claim—which they obviously did not—they nonetheless fully preserved their pretrial challenge to the indictment by filing a valid pretrial motion to dismiss. *See United States v. Fuentes*, 252 F.3d 1030, 1031 (9th Cir. 2001); *Du Bo*, 186 F.3d at 1179-80 & n.3. There is no case suggesting that once a defendant challenges the sufficiency of indictment with a pretrial motion, he must repeatedly renew the same claim during trial.

[11] *See, e.g.,* Dkt. 258 at 3-4 ("The defendant corporations continue to believe that *Metro Industries* . . . is controlling, but accept that the Court has decided that issue . . . ."); Dkt. 528 at 3 ("Defendants continue to maintain that under controlling Ninth Circuit law, this prosecution based on foreign conduct must be decided under a rule of reason analysis, and that the jury should be so instructed at the close of the evidence." (citing *Metro*)).

another country." 82 F.3d at 844-45. *Metro* requires reversal of defendant Leung's conviction.

II. THE PROSECUTION WAS FATALLY FLAWED BECAUSE THE SHERMAN ACT DOES NOT APPLY EXTRATERRITORIALLY

Although the *Metro Industries* error is reason enough to reverse, there is a deeper reason why the convictions should be overturned: the government cannot use a domestic law like the Sherman Act to punish foreign conduct taken half a world away. The district court concluded otherwise, relying on an anachronistic "effects test" to determine whether and to what extent Congress intended U.S. law to apply extraterritorially. But the Supreme Court resoundingly rejected this "effects test"of extraterritoriality three years ago. *See Morrison v. Nat'l Australia Bank Ltd.*, *supra,* 130 S. Ct. 2869, 2877. In its place, the Court substituted a bright-line rule governing all extraterritoriality inquiries: If "a statute gives no clear indication of an extraterritorial application, it has none." *Id*. at 2878.

The Sherman Act contains no language indicating that it applies beyond U.S. borders. Hence it doesn't. That is especially true in this criminal prosecution, because the robust presumption against extraterritoriality has still greater force when criminal sanctions are on the line. Because the Sherman Act cannot be stretched to criminalize foreign conduct, defendants' convictions must be reversed.

A. The Sherman Act Does Not Apply Extraterritorially

For more than two centuries, the Supreme Court has embraced a strong presumption that U.S. laws do not apply extraterritorially. *See, e.g., Morrison*,

130S. Ct. at 2877; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.); *Rose v. Himely*, 8U.S. (4 Cranch.) 241, 279 (1808) (Marshall, C.J.).

To enforce the presumption, the Supreme Court has long stated that a statute extends beyond U.S. borders only if Congress has"ma[de] a clear statement that [it] applies overseas." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909). *See also Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *New York Cent. R.R. v. Chisholm*, 268 U.S. 29, 31 (1925).

In *American Banana*, the Court recognized that the Sherman Act lacked the requisite clear statement of extraterritorial application, id., at 355-57, and thought it "entirely plain" that foreign conduct fell outside the scope of the Act, *id*., at 357. Nevertheless, the lower courts resisted this conclusion. The Second Circuit eventually ruled, contrary to *American Banana*, that the United States could impose Sherman Act liability based on foreign conduct that was "intended to affect imports and did affect them." *United States v. Aluminum Co. of Am.*, 148 F.2d416, 444 (2d Cir. 1945) (*Alcoa*).

This "effects test," as articulated in *Alcoa*, gained wide acceptance in the lower courts. Indeed, even the Supreme Court indulged this assumption in a case decided nearly two decades before Morrison. In *Hartford Fire Insurance Company v. California*, 509U.S. 764 (1993), a deeply fragmented decision regarding comity, the Court noted in passing—with no analysis of the statutory text or the presumption against extraterritoriality—that "it is well established by

now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Id. at 796.

Then came *Morrison*. In an unequivocal repudiation of the "effects test,"the Supreme Court held that U.S. securities laws do not apply extraterritorially even if effects are felt here. 130 S. Ct. at 2883. Notably, the first court to adopt an"effects test" in the securities context had expressly relied on Sherman Act precedent. *See Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968)(citing *Alcoa*). Thus, the Supreme Court in *Morrison* recognized that it was overturning a test that had prevailed in the lower courts "over many decades." 130 S.Ct. at 2878. And it further understood that the "effects test" stemmed from the belief that Congress would have wanted "to protect American investors." *Id*. (internal quotation marks omitted).

The Court nevertheless held that "using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application." *Id*. at 2881. Rather than attempt to "divin[e] what Congress would have wanted if it had thought of the situation," the Court said it would "apply the presumption [against extraterritoriality] in all cases." *Id*. The *Morrison* approach yielded a straightforward rule, no part of which hinges on U.S. effects: "When a statute gives no clear indication of extraterritorial application, it has none"—period. *Id*. at 2878.

In light of *Morrison*, the extraterritoriality language in *Hartford Fire* is no longer good law; the Court clarified that "in all cases"—without exception

—extraterritoriality must be based on a clear statement in the statutory text rather than on domestic effects. *Id*. at 2881. The question before this Court, therefore, is whether the Sherman Act contains the necessary extraterritoriality language. The answer is that it clearly does not. *See Mannington Mills v.Congoleum Corp.*, 595 F.2d 1287, 1291 (3d Cir. 1979) (observing that "the [Sherman] Act [does not] give[] any clear indication of the scope of the extraterritorial jurisdiction conferred"). Section 1 of the Act lacks any express statement regarding extraterritoriality, providing only that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.7. That text is the beginning and end of the matter: Because Congress gave "no clear indication of an extraterritorial application," the Sherman Act "has none." *Morrison,* 130 S. Ct. at 2878.

To be sure, the Sherman Act refers to "commerce * * * with foreign nations." But *Morrison* squarely held that boilerplate commerce phrases like this do not provide the necessary clear statement of extraterritoriality. The Court emphasized that it had "repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad." 130 S. Ct. at 2882 (quoting *Aramco*, 499 U.S. at251); *see also Chisholm*, 268 U.S. at 31 (statute premising liability on involvement in commerce between "any of the States or territories and any foreign nation or nations," 45 U.S.C. § 51, contains "no words which definitely disclose

an intention to give it extraterritorial effect").

Nor, contrary to the government's argument below, does the Foreign Trade Antitrust Improvements Act (FTAIA) show that the Sherman Act extends beyond U.S. borders. That statute merely provides that the Sherman Act does *not* apply to conduct involving foreign trade or commerce, other than import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. See 15 U.S.C.§ 6a(1)(A).

Indeed, even those courts that have stated that the Sherman Act applies extraterritorially have declined to rest that conclusion on the FTAIA. *See Hartford Fire*, 509 U.S. at 796 & n.23 (finding it "unclear how [the FTAIA] might apply"); *Nippon Paper*, 109 F.3d at 4 ("The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. * * * We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA."). And, more telling still, *Morrison* itself squarely held that a statutory provision similar to the FTAIA does not provide a clear statement of extraterritorial effect. *See id.*, 130 S. Ct. at 2882 (rejecting government's argument that Security Exchange Act had extraterritorial effect based on provision stating that the did not apply to individuals "transact[ing] a business in securities without the jurisdiction of the United States" unless the action violated regulations promulgated to prevent evasion of the securities laws, and noting, "[I]t would be odd for Congress to indicate the extraterritorial application of the whole Exchange Act by means of a provision imposing a condition precedent to its application

abroad.")

Because the Sherman Act contains no clear statement of extraterritoriality, this Court should hold that the Act does not reach the foreign conduct in this case. Accordingly, defendant Leung's conviction must be reversed.

B. At The Very Least, The Sherman Act's Criminal Prohibitions Do Not Apply Extraterritorially

Although *Morrison* abrogates *Hartford Fire*, this Court can avoid deciding that issue because in no event should Hartford Fire—a civil case—be extended to the criminal sphere. Thus, even if *Hartford Fire* remains good law for civil matters, it does not answer the question posed by this criminal prosecution where individual freedoms hang in the balance. *See U.S. Gypsum Co.*, 438 U.S. at 435 (rejecting government's attempt, in a criminal Sherman Act case, to "re[ly] primarily on * * * *a civil case* to support its position") (emphasis added).

The Supreme Court has held that criminal laws do not apply extraterritorially absent an express statement from Congress: "If [criminal] punishment is to be extended [extraterritorially], it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." *United States v. Bowman*, 260 U.S. 94, 98 (1922) (emphasis added). This clear-statement rule parallels the analysis in civil cases, but the presumption against extraterritoriality assumes even greater force with criminal laws. *See United States v. Flores*, 289 U.S. 137, 155 (1933) ("[T]he criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial

effect."); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984) ("[C]ourts have been reluctant to give extraterritorial effect to penal statutes").

This is because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.), and the "law of nations" singles out and specifically disapproves extraterritorial enforcement of criminal prohibitions. *See* Restatement (Third) of Foreign Relations Law § 403, Reporters' Note 8 (1986) (Restatement); *see also United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002) (recognizing that extraterritorial application of penal laws must "compor[t] with principles of international law"). It is not hard to understand why the law of nations disfavors extraterritorial criminal jurisdiction. "[T]he exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive." Restatement § 403, Reporters' Note 8.

Moreover, the risk of intrusion is heightened when a state imposes criminal sanctions through a regulatory statute. As summarized by the Restatement:

> The principles governing [extraterritoriality] apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities law, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Restatement § 403, cmt. f (emphasis added).

Consistent with these principles and concerns, the Supreme Court interpreted the Sherman Act in *U.S. Gypsum Co.* in a manner that adopted completely different constructions of Section One in civil and criminal cases with respect to *mens rea*. The Court acknowledged that "[b]oth civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of conduct proscribed," 438 U.S. at 438-439. But the Court recognized that the same statutory text could yield different requirements based on the enforcement context. Thus, the Court interpreted the statute's criminal aspect, but not its civil aspect, as incorporating a mens rea requirement—despite the fact that the very same language is at issue in both. *Id.*; *see also* Areeda & Hovenkamp, supra, ¶ 303c, at 42 ("The courts should and do vary definitions of an antitrust offense" depending on whether the case is criminal or civil).

Of course, the rule of lenity itself strongly supports a more restrictive view as to the reach of the Sherman Act for purposes of a criminal prosecution. That rule mandates that, where ambiguities lurk in a criminal statute, courts "resolve any doubt in favor of the defendant." *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994). It would be inappropriate to mechanically extend a civil interpretation of a statute to a criminal case if lenity would otherwise compel a different interpretation. *See U.S. Gypsum Co.,* 438 U.S. at 437 (referring to lenity when distinguishing between criminal and civil applications of the Sherman Act). Any ambiguity over whether the Sherman Act covers defendants' foreign conduct must therefore be resolved against the government.

Because the Sherman Act cannot be read to criminalize the foreign conduct at issue here, defendant's conviction must be reversed.

III. THE INDICTMENT WAS DEFICIENT BECAUSE IT FAILED TO PLEAD THE REQUIREMENTS OF THE FTAIA, AND THE DISTRICT COURT CONSTRUCTIVELY AMENDED THE INDICTMENT BY ALLOWING THE GOVERNMENT TO PROCEED BASED ON THEORIES NOT PLEADED

As demonstrated above, the Sherman Act cannot be applied extraterritorially. But even assuming arguendo that the Sherman Act has some extraterritorial application, the scope of that application is clearly *limited* by the Foreign Trade Antitrust Improvement Act. It states:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> > (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
> >
> > > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
> >
> > (2) such effect gives rise to a claim under the provisions of this Act, other than this section.

15 U.S.C. § 6a; *see generally F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161-63 (2004) (discussing the legislative history of the FTAIA).

The FTAIA states that the Sherman Act does not apply to foreign conduct

unless that conduct comes within one of two statutory exceptions: (1) the import trade exception, or (2) the domestic effects exception. *Animal Science Prod. Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011).[12] If neither exception is satisfied, an antitrust action cannot proceed. *See LSL Biotechnologies*, 379 F.3d 672 (affirming dismissal of a civil antitrust action because the pleading failed to allege sufficient domestic effects). In this case, neither exclusion was pleaded in the indictment. The indictment was therefore deficient, and it should have been dismissed.[13]

A. The District Court's Rulings Below

1. Pretrial Challenge to the Indictment

The superseding indictment in this case did not mention or cite the FTAIA. Under the header "Trade and Commerce," the indictment contained the following allegations:

> 19. During the period covered by this Indictment, the defendants and their coconspirators sold and distributed substantial quantities of TFT-LCDs in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in states or countries other than the states or countries in which the defendants and their coconspirators produced TFT-LCDs. In

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[12] Arguably, it is incorrect to label these as "exceptions." *See Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc). Labels aside, the point is that to avoid the limitations of the FTAIA, the government must show either that the defendant engaged in import trade or that the defendant's conduct had the sort of domestic effects required by the statute.

[13] The sufficiency of an indictment is reviewed de novo. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). Claims of constructive amendment are also reviewed de novo. *United States v. Hartz*, 458 F.3d 1011, 1019 (9th Cir. 2006)

> addition, payments for TFT-LCDs traveled in interstate and foreign trade and commerce.
>
> 20. The business activities of the defendants and their coconspirators that are the subject of this Indictment were within the flow of, and substantially affected, interstate and foreign trade and commerce.

(ER 665.)

The indictment clearly alleged conduct involving trade or commerce with foreign nations, thus putting the conduct presumptively within the purview of the FTAIA. But it did not allege that the defendants were involved in import trade or import commerce, pursuant to the import trade exception. It did not allege that the defendants had fixed the prices of TFT-LCDs which were "targeted" to be sold or delivered in the United States. It did not allege that the defendants' conduct had a direct, substantial, and reasonably foreseeable effect on domestic commerce.

Prior to trial, the defendants, including defendant Leung, filed a motion to dismiss the superseding indictment for failure to plead essential elements of the offense. (Dkt. 258 at 10-18.) The defendants argued that because application of at least one exception would be legally necessary to the imposition of any punishment, the FTAIA exceptions constituted elements of the offense for the purposes of the *Apprendi* doctrine. The defendants argued that the indictment did not plead either the domestic effects exception or the import trade exception. They therefore requested dismissal.

In its opposition to the motion to dismiss, the government did not contend that it had alleged either FTAIA exception. Rather, the government argued that it

was not required to plead any FTAIA facts because the FTAIA only concerns a court's jurisdiction and does not create any additional elements of an offense. (Dkt. 281 at 6-8.) At a pretrial hearing, however, the government argued in the alternative that it had sufficiently pleaded the import trade exception. The government never once argued that it had pleaded the domestic effects exception.

The district court denied the defendants' motion to dismiss. The court suggested that the FTAIA might not apply at all to this case. (ER 188-89.) But regardless, the court ruled that the import trade exception had been sufficiently pleaded.

> Thus, it appears that the criminal charges alleged in the indictment are based at least in part on conduct involving "import trade or import commerce" (specifically, the importation of TFT-LCD products into the United States). By its express terms, the FTAIA's exclusionary rule is inapplicable to such import activity conducted by defendants.

(ER 188.) The court never suggested that the government had also pleaded the domestic effects exception.

2. Jury Instructions

Prior to trial, the defendants requested that the jury be instructed as to the elements of the offense at the outset of the case. Based on the district court's prior ruling, the defendants proposed an instruction for the import trade exception. (ER 624.1-624.2.) Because neither the government nor the district court had ever indicated that the case could proceed on a domestic effects theory, the defendants proposed no instruction for that exception.

The government opposed the defendants' proposed import trade instruction. The government argued that the FTAIA did not apply at all, or in the alternative, that the FTAIA is merely "jurisdictional" and thus that any findings required by the FTAIA could be made by the judge rather than the jury. (Dkt. 432 at 2-4 & n.2.) The district court denied the defendants' motion. It determined that after hearing the evidence presented at trial, it would decide whether any FTAIA instruction was appropriate. (ER 106-07.)

At the close of trial, the government conceded that the FTAIA applied and thus that some instruction must be given. In the government's proposed instructions on the elements of the offense, it sought to instruct the jury that it could find the defendants guilty based on either the import trade exception or the domestic effects exception. (ER 518.)

The defense objected to the government's proposed domestic effects instruction because it had not been alleged in the indictment. (ER 519.) It also objected to the government's proposed instruction on the import trade exception because it lacked the concept of "targeting" United States commerce established by the *Animal Science* case. (AUO RT 4623-25.)

Over the government's objection, the district court incorporated the defense's "targeting" language into its FTAIA instructions (ER 482-84), but overruled the defense objection to instruction on the domestic effects exception. (ER 549.2) Its instruction on the conspiracy charge described the FTAIA element as follows:

> And, third, that the members of the conspiracy engaged in one or both of the following activities: A, fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States, or, B, fixing the price of TFT-LCD panels that were incorporated into finished products, such as notebook computers, desktop computer monitors, and televisions; and that this conduct had a direct, substantial, and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States.

(ER 471; Dkt. 825 at 4721.)[14] The jury was thus allowed to convict on either the import trade or the domestic effects theory.

B. The Essential Elements Required by the FTAIA

Throughout the pretrial proceedings, the defense argued under *Apprendi* that the government was required to plead and prove facts necessary for guilt under the FTAIA. The government argued that it was not required to plead or prove any facts under the FTAIA because the FTAIA is merely a "jurisdiction" statute. That is false for two reasons. First, under the Supreme Court's decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the FTAIA is not merely "jurisdictional." Second, even if the FTAIA were a jurisdictional statute, Ninth Circuit precedent makes clear that jurisdictional elements are subject to the rule of *Apprendi*.

1. *Arbaugh's* Bright-Line Rule

The distinction between "jurisdictional" facts and "substantive" facts has always been hard to draw. As the Supreme Court has said, "jurisdiction" is "a

[14] Adhering to its rulings at the initial trial, the district court gave the same instruction at the conclusion of defendant Leung's retrial.

word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). In *Arbaugh*, the Supreme Court sought to clarify the confusion with a "readily administrable bright line" rule. 546 U.S. at 516.

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16 (citations omitted); *see also Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) ("Under *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'").

When Congress enacted the FTAIA, it did not clearly state that the limitation on the Sherman Act's scope was jurisdictional. Therefore, under *Arbaugh's* bright-line rule, the FTAIA must be treated as nonjurisdictional. It is true that, prior to *Arbaugh*, this Court had at least assumed that the FTAIA was jurisdictional. In *LSL Biotechnologies*, decided in 2004, this Court faced a motion to dismiss for lack of subject-matter jurisdiction under the FTAIA. 379 F.3d at 674. Both parties apparently assumed that the FTAIA should be treated as going to the court's jurisdiction rather than the merits, and this Court followed suit in its analysis. *See id*. at 683 ("The FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade."). But any holding to that effect has been fatally undermined by the intervening decisions in

Arbaugh and its progeny. It is therefore no longer binding. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

Other circuits have recognized the impact of *Arbaugh* on the FTAIA, and they have concluded that the FTAIA cannot be deemed jurisdictional. The Seventh Circuit, for example, recently reversed its own prior precedent and ruled that the FTAIA creates additional elements of a claim.

> [T]he interpretation we adopt today—that the FTAIA spells out an element of a claim—is the one that is both more consistent with the language of the statute and sounder from a procedural standpoint. When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The FTAIA, however, never comes close to using the word "jurisdiction" or any commonly accepted synonym. Instead, it speaks of the "conduct" to which the Sherman Act . . . applies. This is the language of elements, not jurisdiction.

Minn-Chem, 683 F.3d at 852; *see also Animal Science*, 654 F.3d at 468-69 (overruling prior precedent that the FTAIA was merely jurisdictional). Those courts are correct: the FTAIA spells out elements of the claim or offense.

2. Jurisdictional Elements under *Apprendi*

But even assuming arguendo that the FTAIA is a jurisdictional statute, it would not matter for this criminal case. In civil cases, facts going to a court's subject-matter jurisdiction may be decided by the court rather than a jury. But in criminal cases like this one, jurisdictional elements must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.

Even before *Apprendi*, this Court held that "the government must prove the

jurisdictional element in a federal criminal statute beyond a reasonable doubt, like any other element of the offense." *United States v. Gomez*, 87 F.3d 1093, 1096-97 (9th Cir. 1996). Some other circuits disagreed, but after *Apprendi*, it is now clear that regardless of label, any fact necessary for punishment must be treated as an element of the offense. *See* 530 U.S. at 494 ("[L]abels do not afford an acceptable answer.").

Other circuits now agree that a " 'jurisdictional element' is simply an element of a federal crime." *United States v. Kincaid*, 571 F.3d 648, 653 (7th Cir. 2009); *see United States v. Pickett*, 353 F.3d 62, 68-69 (D.C. Cir. 2004); *United States v. Vasquez*, 267 F.3d 79, 89 (2d Cir. 2001). And in this Circuit, it is beyond dispute that "a jurisdictional element must be charged in the indictment and proved beyond a reasonable doubt." *United States v. Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002); *see also United States v. Arnt*, 474 F.3d 1159, 1162 (9th Cir. 2007) ("[A]n indictment challenged before trial may be held insufficient for failure to assert an essential jurisdictional element.").

In short, even if it were true that the requisite FTAIA facts could be treated as merely jurisdictional in civil cases, it would still be true that they are essential elements in criminal cases. As such, they must be pleaded in the indictment.

C. The Indictment's Deficiency

The government took a litigation risk in this case when it decided not to plead the FTAIA in the indictment. No doubt it made that decision hoping that it could avoid the burden of establishing the FTAIA elements at trial. The

government's decision not to plead the FTAIA was based on an assumption that it could prevail on an argument that FTAIA elements are jurisdictional, and thus need not be pleaded. The flaws in those arguments were thoroughly exposed over the course of this litigation, to the point that the government stopped pressing them by the end of the initial trial.

But the government is now stuck with its initial litigation position—because it is stuck with its indictment.[15] And the indictment was deficient in a variety of respects.

First, and foremost, the indictment failed to plead the elements of the offense. It is hornbook law in this Circuit that an indictment must "track[] the words of the statute" and "set forth all elements necessary to constitute the offense." *United States v. Milovanovic*, 678 F.3d 713, 727 (9th Cir. 2012) (internal quotation marks omitted). The indictment in this case did not track the language of the statute, and it did not allege the elements necessary to constitute a Sherman Act offense subject to the FTAIA.

Nowhere in the indictment, for example, is there any allegation that the defendants' conduct had a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a(1). Those are the elements necessary to establish the domestic effects exception, and yet they are not mentioned in the indictment. Nor is there any allegation that the defendants "targeted" domestic commerce. As the district court eventually recognized in formulating its jury

[15] The government did not secure a superseding indictment for purposes of defendant Leung's retrial.

instruction on the FTAIA, "targeting" is, at an absolute minimum, required for the import trade exception. The government's failure to plead these essential elements deprived the defendants of their right to grand jury screening of the charges. *See United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997) ("A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the basis of facts which satisfied a grand jury that he should be charged.").

Second, the indictment does not mention, much less cite, the FTAIA. An indictment "must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." Fed. R. Crim. P. 7(c)(1); *see United States v. Gonzalez*, 686 F.3d 122, 128-29 (2d Cir. 2012). Because this case was based on conduct involving foreign commerce, the FTAIA forms a necessary part of the offense. The government's failure to cite the very statute under which it was required to proceed was yet another way in which the indictment was deficient and illegally obtained.

Third, the indictment failed to provide fair notice of the charges. In addition to a bare recital of the statute and the alleged elements, the indictment must include a reasonably specific "statement of the facts and circumstances" so that the accused will be "fairly inform[ed]" of the charges against him. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Nothing in the indictment fairly informed the defendants of the facts and circumstances on which the government would rely to establish the elements of the FTAIA.

Among other things, the indictment did not specify which theory of the

FTAIA the government alleged. The indictment did not state whether the government would attempt to prove the import trade exception, or the domestic effects exception, or both. One of the purposes of the Grand Jury Clause is to "ensure that criminal defendants have fair notice of . . . the theories that the government will present at trial." *United States v. Hartz*, 458 F.3d 1011, 1022 (9th Cir. 2006). The indictment in this case gave no notice of which FTAIA theory the government would attempt to prove at trial.

Prior to trial, the defendants pointed out the deficiencies in the indictment and moved to have it dismissed. At that point, the government could have returned to the grand jury and attempted to establish probable cause of the FTAIA elements (on whichever FTAIA theory it chose to pursue). Had it succeeded in that effort, the government could have returned to trial with a valid charging document. Instead, the government marshaled a variety of shaky legal arguments aimed at justifying its earlier decision not to plead the FTAIA. Those arguments do not withstand scrutiny. The indictment did not validly allege an offense under the FTAIA, and it therefore should have been dismissed.

D. The Requirements of the Import Trade Exception

In denying the defendant's motion to dismiss, the district court ruled that the government had sufficiently pleaded the import trade exception. That ruling was erroneous for all of the formal reasons mentioned above—the indictment did not cite the FTAIA, it did not track the language of the statute (or the import trade exception), and so on.

It was also erroneous because it was based on a mistaken view of what the import trade exception requires. The district court held that because the indictment was based on conduct involving "the importation of TFT-LCD products into the United States," it sufficiently alleged the import trade exception. (ER 188.) But the import trade exception does not apply any time there is a case involving some eventual importation of products into the United States. If that were true, the import trade exception would swallow the rule of the FTAIA.

This Circuit has not yet ruled on the meaning of the import trade exception. Other circuits have reached slightly varying formulations, but the government's indictment was deficient under any reasonable interpretation of the statute.

1. The *Minn-Chem* "Importer" Formulation

In its recent en banc decision in *Minn-Chem*, the Seventh Circuit held that the import trade exclusion applies to transactions between domestic buyers and foreign sellers. Thus, it defined "import trade" as "trade involving only foreign sellers and domestic buyers." 683 F.3d at 855; *see also id*. at 857 (stating that the import trade exclusion applies to foreign corporations who engage in "direct import sales"). Therefore, the civil suit was allowed to proceed because it was based on allegations that domestic plaintiffs had purchased products "*directly* from members of the alleged [foreign] cartel." *Id*. at 855 (emphasis added).

Minn-Chem is a sensibly narrow interpretation of the import trade exception. It is consistent with the most ordinary reading of the statutory text—that "import trade" refers to corporations engaging in import transactions.

And while it is certainly true that the import exception is hardly a model of clarity,[16] because its interpretation affects the scope of criminal liability under the Sherman Act, any ambiguity must be resolved in favor of lenity. *See United States v. Nosal*, 676 F.3d 854, 862-63 (9th Cir. 2012) (en banc). It is also precisely the interpretation that defendants proposed in their motion to dismiss the indictment. (Dkt. 258 at 17.)

In this case, the government did not allege that the defendants were engaged in importing—indeed, the indictment never even used the word "import." The government did not allege that any United States purchasers bought TFT-LCD panels "directly" from the defendants. *Minn-Chem*, 683 F.3d at 855. Rather, the indictment merely alleged that the defendants sold their products into a "continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in states or countries other than the states or countries in which the defendants and their coconspirators produced TFT-LCDs." But placing goods into a worldwide stream of commerce, with some of those goods eventually reaching the United States, is precisely what *Minn-Chem* says is insufficient. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002).

2. The *Animal Science* "Targeting" Formulation

The Third Circuit has treated the import trade exception slightly differently. It has agreed with all other courts that in order to give the entire statute meaning,

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[16] Both courts and commentators have complained that the FTAIA is "cumbersome, ambiguous, and inelegant." 1B Areeda & Hovenkamp, *supra*, ¶ 272i, at 288.

the import trade exception "must be given a relatively strict construction." *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 72 (3d Cir. 2000). But its interpretation appears to be at least slightly broader than the *Minn-Chem* interpretation. The Third Circuit has held that the exception only applies when the defendant's conduct was "directed at an import market"—put differently, "the import trade or commerce exception requires that the defendants' conduct target import goods or services." *Animal Science*, 654 F.3d at 470 (internal quotation marks omitted); *see also Kruman*, 284 F.3d at 395-96.

Even if this Court adopts the *Animal Science* interpretation rather than the *Minn-Chem* interpretation, the allegations were still deficient. The indictment makes no claim that the defendants' conduct was "directed" or "targeted" at United States imports. *Animal Science*, 654 F.3d at 470. Rather, the indictment merely alleges that the defendants sought to fix the price of panels sold worldwide, and that some of the panels were incorporated into products eventually sold in the United States. That is insufficient to constitute "targeting" under the "relatively strict construction" that term has been given by the Third Circuit. *Carpet Group Int'l.*, 227 F.3d at 72.

In upholding the indictment prior to trial, the district court in this case essentially adopted a general "stream of commerce" theory of the import trade exception. That theory is precisely what other circuits have rejected when they have interpreted the FTAIA. The district court later recognized the error of its ways when it incorporated the "targeting" language into its final jury instruction

on the FTAIA, but that remedial measure could not cure the fatal deficiency in pleading. Because the indictment only alleged placement of products into the worldwide stream of commerce, it did not validly state an offense under the import trade exception. Because that was the only FTAIA exception even arguably contained in the indictment, the indictment was fatally defective, requiring reversal.

E. The Constructive Amendment Regarding the Domestic Effects Exception

Prior to trial, the government contended that the indictment had sufficiently (albeit only implicitly) pleaded the import trade exception. But no one then suggested that the government had pleaded the domestic effects exception. Indeed, in none of the proceedings below did the government ever argue that it had pleaded domestic effects as well as import trade. And the district court's ruling denying the defendants' motion to dismiss rested solely on the import trade exception—it never mentioned domestic effects.

Nor could the indictment have been upheld on such grounds. After all, the indictment never used the critical statutory phrase: "direct, substantial, and reasonably foreseeable effect." The indictment never alleged that the domestic anticompetitive harm "follow[ed] as an immediate consequence of the defendant's activity," which is the legal meaning of the term "direct" under the FTAIA. *LSL Biotechnologies*, 379 F.3d at 680. And while the indictment may have alleged a substantial effect on domestic commerce, it never alleged that that effect was reasonably foreseeable to the defendants. It is thus not surprising that the

government never sought to defend the indictment on the grounds that it pleaded the domestic effects exception.

And yet—notwithstanding the admitted failure to plead that theory—the district court allowed the government to obtain a conviction on that theory at trial. Over the defense's objection, the district court's instructions to the jury allowed the jury to convict on *either* the import trade theory *or* the domestic effects theory. Those instructions, given at both the initial trial and Mr. Leung's retrial, worked a constructive amendment of the indictment. The prosecution may not present one theory of guilt to the grand jury and another to the petit jury. *Stirone v. United States*, 361 U.S. 212, 217 (1960); *see also Russell v. United States*, 369 U.S. 749, 768 (1962) (stating that the government is not permitted to "shift its theory of criminality" at various stages of the proceedings). Even setting to one side all arguments about the import trade theory, the domestic effects theory was simply not pleaded. "Nowhere in the indictment is there a statement of facts and circumstances that would support [the] other possible . . . theor[y]" that was ultimately allowed as a basis for conviction at trial. *United States v. Shipsey*, 190 F.3d 1081, 1087 (9th Cir. 1999).

Even had the district court correctly ruled that the import trade exception was sufficiently pleaded, it was still error to instruct the petit jury that it could convict on the domestic effects exception, which was concededly never pleaded. Those instructions worked an impermissible constructive amendment of the indictment, requiring reversal.

IV. THE GOVERNMENT FAILED TO PROVE THE ELEMENTS OF THE FTAIA

Even aside from all of the problems discussed above relating to the indictment, the evidence at the initial AUO trial was insufficient. The government failed to prove beyond a reasonable doubt either that the defendants were involved in import trade or that their conduct had a direct effect on United States commerce. For that reason, the defendants, including Leung, are entitled to a dismissal of the indictment with prejudice.[17]

Defendant Leung is authorized to challenge the sufficiency of the evidence presented at the initial trial in this appeal. He had no right to raise the challenge at the conclusion of that initial trial because, despite his having moved for dismissal under Rule 29 on sufficiency grounds, no judgment was then imposed against him. At the time that such a judgment *was* imposed, i.e., at the conclusion of the retrial, the first trial Rule 29 ruling merged with the final judgment in the retrial, rendering it appealable at that time. *See United States v. Recio*, 371 F.3d 1093, 1104-05 (9th Cir. 2004).

A. Import Trade Exception

The government did not present evidence at the initial trial that AUO was an importer or that AUO's alleged price fixing agreement targeted the United States. Rather, what the evidence at trial showed was that AUO shipped its products to overseas systems integrators, who then combined panels with other components to

[17] Insufficiency claims are reviewed de novo. *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

make end-user products, some of which were eventually imported into the United States by companies other than the defendants. Regardless of whether this Circuit adopts the *Minn-Chem* formulation or the *Animal Science* formulation, such conduct does not qualify as "import trade" for the purposes of the FTAIA.

It was uncontested at trial that during the period of the alleged conspiracy, AUO manufactured absolutely no consumer end-user products. Rather, AUO manufactured TFT-LCD panels that were eventually incorporated—by other foreign manufacturers—into consumer end-user products. Government witness Timothy Tierney of HP described the supply chain in some detail. According to Tierney, panel suppliers such as AUO would ship panels into an overseas warehouse called a "BAX hub." (AUO RT 522-25, 592-95.) Panels would be delivered to independent OEMs, located in Taiwan or China. Those OEMs would then use the panel along with other components to manufacture the end-user product. (*Id.*) None of the OEMs was located in the United States. (AUO RT 1095.) Tierney testified that HP had no manufacturing facilities in the United States that purchased AUO products. (AUO RT 611.) He testified that he was only aware of "a few" of AUO's panels that were ever shipped directly to the United States—and then only for marketing and qualification purposes. (AUO RT 612-16.) In short, AUO was not a importer of TFT-LCD panels.[18] Rather, AUO

[18] In post-trial briefing on this issue, the government relied heavily on Govt. Exh. 775 to support its argument. But that exhibit only shows that panel manufacturers collectively sold a small number—less than 1%—of their panels directly to the U.S. The fact that other manufacturers imported a relatively few panels hardly makes AUO an importer.

sold its products to other companies overseas, who then resold their end-user products globally, including to the United States.

If this Circuit adopts the *Minn-Chem* formulation of the import trade exception, all convicted defendants, including Mr. Leung, are clearly entitled to acquittal. AUO was not engaged in "direct import sales." 683 F.3d at 857. Rather, it shipped its products abroad to OEMs located in other countries. The transactions described in this case were not "trade involving only foreign sellers and domestic buyers." *Id*. at 855. Rather, the transactions involved foreign sellers, foreign intermediary purchasers, and multinational branded companies as importers. Consequently, under the *Minn- Chem* formulation, the government failed to prove that AUO was engaged in import trade.

But even if this Court adopts the *Animal Science* formulation, the government still failed to carry its burden. As the government's own witnesses testified, none of AUO's panels were specifically designed for the U.S. market. (AUO RT 612.) Rather, they were designed to be incorporated into consumer end-user products for sale around the world. Even accepting all of the government's evidence of pricing agreements, those agreements did not "target" the United States. *Animal Science*, 654 F.3d at 470.

AUO placed its panels into the worldwide stream of commerce, and its panels were built into computers and other products which were imported—by other companies—into the United States. If the district court's initial "stream of commerce" interpretation of the import trade exception had been the correct one,

then the government might well have presented sufficient evidence to prove the exception. But that interpretation has no support in the case law, and it would thoroughly undermine the limitations that Congress sought to enact with the FTAIA. Indeed, under the district court's interpretation, there would be no limitations at all. Under any reasonable interpretation of the statute, AUO was not involved in import trade.

B. Domestic Effects Exception

The government also failed to prove the elements of the domestic effects exception at the initial trial because it failed to prove that AUO's conduct had a "direct" effect on domestic commerce. Unlike the import trade exception, the domestic effects exception has already been defined by this Circuit. In fact, in *LSL Biotechnologies*, this Circuit focused in particular on the meaning of the term "direct" under the FTAIA. If that definition is applied to this case, acquittal is required.

The domestic defendant in *LSL* held the patent to a genetically-modified tomato seed, and, through a settlement provision obtained after litigation, it prevented a foreign competitor from developing any rival products. 379 F.3d at 675-76. According to the government's complaint, the foreign competitor was one of the "few firms" in the world "with the experience, track record and know-how" to develop a competing product. *Id*. at 676. And as a result of the defendant's imposed restriction on trade, the defendant came to dominate the market. It held over 70 percent market share. *Id*. at 675.

This Court, however, held that the government's allegations failed to state a claim under the FTAIA because it had not alleged a "direct" effect on United States commerce. It held that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Id*. at 680. Put differently, an "effect cannot be 'direct' where it depends on . . . uncertain intervening developments." *Id*. at 681. Because the government could not allege with certainty that the defendants' conduct had limited domestic competition and adversely affected domestic consumers, the government's complaint was dismissed.

Those principles mandate acquittal in this case as well. Because AUO did not import any products or manufacture any consumer end-user products, the effects of its actions depended entirely on intervening actors—namely, the OEMs who integrated and imported the end-user products. Even assuming that AUO's conduct resulted in higher prices for OEMs, there was no substantial evidence presented that those higher prices were passed on, through the manufacturing chain, to consumers. Moreover, any effects on American consumers were merely the "secondary and indirect effects that are also the by-product of numerous factors relevant to market conditions and the like." *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 561 (D. Del. 2006); *see also In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 456 (D. Del. 2007) ("[T]his speculative chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce required by the FTAIA . . . .").

Simply put, under this Court's interpretation of "direct" for the FTAIA, the

Sherman Act does not cover "antitrust actions alleging restraints in foreign markets for inputs . . . that are used abroad to manufacture downstream products ... that may later be imported into the United States." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1014 (N.D. Ill. 2001). And yet that is all the government proved at the initial trial in this matter. At most, it alleged and proved a restraint in a foreign market for inputs that were used in downstream consumer end-user products and then eventually imported into the United States. Any effects on domestic commerce depended on "intervening developments" and therefore were not direct. *LSL Biotechnologies*, 379 F.3d at 675-76. As with the import trade exception, the government failed to prove the elements of the domestic effects exception. Dismissal of the indictment with prejudice is in order.

V. THE INDICTMENT DID NOT ALLEGE, AND THE JURY WAS NOT REQUIRED TO FIND PROVEN, THE ELEMENTS OF AN INTENT TO NEGATIVELY AFFECT, AND A SUBSTANTIAL EFFECT ON, UNITED STATES COMMERCE

The Sherman Act protects competition in United States commerce, not worldwide commerce. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). This principle was crystallized in Judge Learned Hand's opinion in *Alcoa*, 148 F.2d 416, 444 (2nd Cir. 1945), which held that the Sherman Act could be extended extraterritorially to reach foreign conduct only when that conduct was intended to detrimentally affect American commerce, and did so affect it. *Alcoa* was later cited with approval by the Supreme Court. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact

produce some substantial effect in the United States.").

Defendant Leung has demonstrated above that, in the wake of *Morrison*, the Sherman Act cannot be applied extraterritorially at all. But if the Sherman Act still has extraterritorial application, that application must still be limited by *Alcoa*'s intent and effects test. That test controls in any case where the alleged conduct is "primarily foreign." *Dee-K*, 299 F.3d at 294-95; *see also Hartford Fire*, 509 U.S. at 775-76, 796 (applying the *Alcoa* rule in case where several participants in alleged conspiracy were United States-based entities, all London-based defendants were subsidiaries of American corporations, and at least one key meeting attended by London-based defendants occurred in New York); *Nippon Paper*, 109 F.3d 1, 2, 4 (holding that a Sherman Act prosecution could proceed because the government had specifically alleged that price-fixing activities in Japan "were intended to have, and did in fact have, substantial effects in this country").

The subjective intent element identified in *Alcoa* and *Hartford* is more demanding than the objective "reasonably foreseeable" element found in the domestic effects exception in the FTAIA. While *Hartford Fire* found the relationship between existing case law and the FTAIA unclear, 509 U.S. at 796 n.23, the opinion suggested no retreat from the *Alcoa* test.

A. The Pleading Error Requires Reversal

Prior to trial, the defendants moved to dismiss the indictment for its failure to allege the required intent element; indeed, the superseding indictment did not

even contain the term "intent." (Dkt. 258 at 3.) The government responded that because the indictment alleged "domestic conduct and domestic victims," the case was "out of the realm of the FTAIA and *Nippon*, which concern 'wholly foreign conduct.'" (Dkt. 281 at 1.) In denying the motion to dismiss, the Court ruled that the *Alcoa* intent element was inapplicable because "the conspiracy alleged in the indictment is not based on 'wholly foreign conduct,'" and that, in any case, intent was adequately alleged. (Dkt. 287 at 4-5.) But under *Hartford*, the elements of an intent to substantially affect, and a resulting substantial effect on, United States commerce had to be alleged in the indictment, and they plainly were not. Reversal is required due to this deficiency in pleading. *Omer*, 395 F.3d at 1089.

B. The Instructional Error Requires Reversal

By the time of final instructions in the initial trial, the government had decided to hedge its bets, and proposed an instruction that included the *Alcoa* element as an alternative theory under which the jury could find the Sherman Act applicable to the defendants' foreign contact. The proposed instruction read:

> The Sherman Act applies to conspiracies that occur, at least in part, within the United States. The Sherman Act also applies to conspiracies that occur entirely outside the United States, if they have a substantial and intended effect in the United States. Thus, to convict the defendants, you must find beyond a reasonable doubt one or both of the following: A, that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States, or, B, that the conspiracy had a substantial and intended effect in the United States.

(ER 517.)

Defense counsel objected to the alternative phrasing, noting that the inclusion of the *Alcoa-Hartford Fire-Nippon* language in alternative B was a concession that the anticompetitive intent element was applicable to the case at bar. (ER 544.) Alternative A, however, could be satisfied by the making of a single phone call to or from the United States, relieving the jury of any need to find the required legal factual bases for the extraterritorial application of the Sherman Act.[19] Defense counsel objected: "We're given an instruction here which recognizes that *Hartford* applies. And then we've added to it an appendix which makes *Hartford* meaningless." (ER 545.) Having proffered the *Hartford* language, the government then reiterated its argument that *Hartford* did not apply here at all, because it addressed only "wholly foreign conduct. That is not the situation we face here." (*Id*.) The Court overruled the defense objection and gave the instruction in the alternative requested by the government.[20]

If the Sherman Act can be applied at all to foreign conduct, then the requirements of *Hartford* and *Alcoa* must be met. By relying on alternative A

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[19] The government's argument that, even absent an intended and actual impact within the United States, extraterritorial jurisdiction could be conferred on the district court in this antitrust case by a single conspiratorial act committed within the borders of this country was based solely on *United States v. Endicott*, 803 F.2d 506, 514 (9th Cir. 1986). *Endicott* preceded *Hartford Fire* by seven years and was not an antitrust case, but in any event the opinion made clear that extraterritorial jurisdiction can only be obtained by satisfying the requirements of *Alcoa*. *Id*. (United States jurisdiction "extends to acts occurring outside its territory if those acts are intended to produce detrimental effects in the United States." (emphasis added)).

[20] Adhering, once again, to its rulings at the initial trial, the district court gave the same instruction at the conclusion of defendant Leung's retrial.

rather than alternative B, however, the jury at both the initial trial and Mr. Leung's retrial could have convicted without finding that the charged conduct of the defendants on foreign soil had any substantial effect on United States commerce, or that it was intended to have any such effect.

Where, as here, the jury could have convicted either on a legally defective theory or a legally correct one, and it is impossible to determine upon which theory the guilty verdict rests, reversal is required. As the Supreme Court stated in *Griffin v. United States*, 502 U.S. 46, 59 (1991), when "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." The instructional error cannot be found harmless; reversal is required.

VI. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT REFUSED TO CONDUCT AN EVIDENTIARY HEARING IN RESPONSE TO DEFENDANT'S FACIALLY VIABLE CLAIM OF SERIOUS JUROR BIAS AND MISCONDUCT

A. Standard of Review

This Court reviews the district court's denial of a new trial based on juror misconduct and bias without holding an evidentiary hearing for an abuse of discretion. *United States v. Ruiz Montes*, 628 F.3d 1183, 1187 (9th Cir.2011); *United States v. Navarro–Garcia*, 926 F.2d 818, 822 (9th Cir.1991). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) "Unless the court is able to determine without a hearing that the allegations are without credibility or that the allegations

if true would not warrant a new trial, an evidentiary hearing must be held." *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991).

B. Evidence Relating to Bias and Misconduct

1. Jury Voir Dire

At the commencement of voir dire, the Court was at pains to inform jurors that they were not to discuss the case with one another or anyone else in order to fairly assess the charges and evidence against Mr. Leung. (ER 322-25.) One of the prosecutors himself began his questioning of the jurors with a lengthy statement concerning the importance of impartiality. (ER 360-63.) Defense counsel opened her questioning by stressing the same theme. (ER 384-85.)

In the course of its initial admonitions, the court specifically stated:

> One of the things I will tell you every single time that you leave the courtroom is you may not discuss this matter with each other or with anyone else until the case is over. And one of the promises you'll have to make if you are on the jury is that until the case is completed, you can't talk to people about it, you can't answer questions about it . . .
> . . .
>
> This is something that we are slowly coming to grips with, and sometimes jurors find it hard to follow those rules. And the problem is if the jurors break those rules and do communicate it can cause all kinds of problems in the case, including a mistrial which would mean we'd have to start all over again, which would be a real shame.

(ER 322-24.)

> One of the problems that happens is if you talk about it, you may find that you are making up your mind or you are talking yourself into a position or you are persuading yourself about how you feel about the case.

> And another instruction you will get is you are not to make up your minds until you have heard all the evidence, you must wait until the end after you have heard all the evidence to decide the case.

(ER 324-25.)

The Court's preliminary instructions before the taking of evidence emphasized the same directives, i.e, that jurors were to keep an open mind and to refrain from reaching decisions about the case and talking to other jurors about it until the commencement of deliberations. (RT 158-59 [stressing, *inter alia*, that the prohibition specifically included case discussions with other jurors].) Indeed, the court issued similar directives to the jurors on scores of occasions, usually at the onset of a recess, throughout the trial. (*See* RT 324, 360, 402, 433, 505, 577, 621, 547, 715, 782, 833, 877, 922, 954, 985, 1056, 1090, 1119, 1141, 1187, 1223, 1260, 1270, 1336, 1416, 1516, 1564, 1593, 1613, 1662, 1694, 1726, 1772, 1807, 1847, 1887, 1907, 1949, 2036, 2062.)

Finally, of particular significance, at the time the court gave its initial admonitions at the beginning of voir dire, the court specifically inquired, "Is there anybody here who couldn't promise not to communicate about the case until it's over?" (ER 323.) No juror, including juror C.B, whose presence in the courtroom is confirmed by her short voir dire conducted moments afterwards (ER 327-28) and who is the primary subject of the Simms declaration (see below), indicated that they could not do so. Very shortly thereafter, the court said, "So it will be important that you follow those rules, that there be no communication of any sort [about the case], electronically, orally or any other way until the case is over.

Anybody who can't promise that?" (ER 324.) Only one juror—*not* juror C.B.—responded to the question, with only a request for clarification of the court's directive. *Id*.

2. Motion for a New Trial and the Court's Related Ruling

Following the trial, defendant moved for a new trial under Fed.R.Crim.P. 33. (Dkt. 1133, 1166.) The motion alleged in part that defendant had been deprived of his right to a fair and impartial jury. Defendant supported the claim with the declaration of juror L. Simms. (ER 235.) In her declaration, Ms. Simms described her having heard other female jurors, specifically including juror C.B., repeatedly discussing the evidence in the case well before the commencement of deliberations, indeed, even before the defense had begun to present its evidence. (*Id*.) The discussions, as reported, also supported the conclusion that such jurors had reached conclusions concerning the most fundamental issue, i.e., defendant's guilt or innocence, at this time. (*Id*.) In his new trial argument, defendant contended that this violation of the court's instructions and related evidence of bias entitled him , at a minimum, to an evidentiary hearing on the issue. (Dkt. 1133, 1136 at 1-4.)

The government first opposed the motion on the procedural ground that both the motion and the juror claim were untimely. (Dkt. 1144, at 1-8.) As a substantive matter, the government argued that Fed.R.Evid. 606(b) prohibited consideration of the declaration, relying, *inter alia*, on *Tanner v. United States*, 483 U.S. 107 (1987) and various Ninth Circuit and extra-Circuit authorities. (Dkt.

1144 at 8-11.)

Following defendant's reply, the Court denied the motion in an order issued on May 2, 2013. (ER 1-5.) The court effectively rejected the government's procedural claim but, relying primarily on *United States v. Williams-Davis*, 90 F.3d 490, 504-505 (D.C. Cir. 1996) and *United States v. Tierney*, concluded that Rule 606(b) precluded consideration of the Simms affidavit. (ER 3-4.) Those decisions, too, rested primarily on the Supreme Court's *Tanner* decision.

B. General Principles of Law.

1. Juror Bias

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.1998) (en banc); *see also Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1961). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982)

Consistent with these principles, "the bias or prejudice of even a single juror would violate [the defendant's] right to a fair trial." *Dyer*, 151 F.3d at 973 (citation omitted); *see also Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"). And "the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *Dyer*, 151 F.3d

at 973 n.2 (citation omitted). "Like a judge who is biased . . . the presence of a biased juror introduces a structural defect not subject to harmless error analysis. *Id.*, citing *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991).

"Voir dire plays a critical role in assuring criminal defendants that their Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge cannot fulfill [the] responsibility to remove prospective jurors who may be biased and defense counsel cannot intelligently exercise peremptory challenges." *United States v. Spaar*, 748 F.2d 1249, 1253 (8th Cir.1984). Although "[b]ias can be revealed by a juror's express admission of that fact, ... more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *Gonzalez*, 214 F.3d at 1111-12, citing *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977).

A disqualifying bias may appear on a showing of either *actual* or *implied* bias. *Gonzalez*, 214 F.3d at 1111. "In essence, [a]ctual bias is bias in fact—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *Id.*, at 1112 (internal quotations and citations omitted). If a defendant in the post-trial context shows that a juror "failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," then he has demonstrated actual bias entitling him to a new trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); accord, *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir.2001). Whether a juror is dishonest is a

question of fact. *Dyer,* 151 F.3d at 973.

2. Juror Misconduct

It is established beyond peradventure that a juror commits misconduct that may warrant dismissal when he or she disobeys the trial court's instructions. See, e.g., *United States v. Eldred*, 588 F.2d 746, 752 (9th Cir. 1978); *United States v. Almonte*, 594 F.2d 261, 267 (1st Cir. 1979). An instruction prohibiting premature deliberations, as was given in this case, is vital to protecting a defendant's right to a fair trial for a host of reasons. *See United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993) (discussing reasons). *See also United States v. Jadlowe*, 623 F.3d 1, 17-18 (1st Cir. 2010) (quoting the discussion in *Resko* and deeming post-verdict inquiry into pre-deliberation case discussion cognizable).

3. The Right to a Hearing

In *Smith v. Phillips*, *supra*, the Supreme Court held:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

Id., 455 U.S. at 215. *See also Dyer v. Calderon,* 151 F.3d 970, 974 ("[A] court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances." (citations omitted)); *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) ("[T]he Supreme Court has stressed that the remedy for allegations of jury bias is a hearing, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial.") A similar rule applies where a claim of juror

misconduct is at issue. *Dyer*, 151 F.3d at 978; A*ngulo,* 4 F.3d at 847.

Of course, as *Angulo* observes, an evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias. *Angulo,* 4 F.3d at 847. "[I]n determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source. *Id.* (quoting *Hard v. Burlington N.R.R.*, 812 F.2d 482, 485 (9th Cir.1987)) Here, however, the content of the allegations facially indicate the presence of serious bias and misconduct, as discussed further below.

D. The Jurors' Pre-Deliberation Case Discussions Were Cognizable Notwithstanding Fed.R.Evid. 606(b)

1. The Rule Did Not Bar Consideration of the Juror's Allegations

It is clear that *if* the averments made by Ms. Simms had been confirmed at a hearing, they would have supplied a powerful basis for finding that defendant had been denied his Sixth Amendment right to a fair and impartial jury and a verdict untainted by misconduct, thereby entitling him to a new trial. Thus, the central issue on which Mr. Leung's juror bias and misconduct claim will rise or fall involves the scope of Rule 606(b) itself.

Contrary to the district court's conclusion, Rule 606(b) does not bar consideration of evidence pre-trial discussions and deliberations in violation of a district court's express instructions. That is true for a variety of reasons. *First*, as the government conceded in its briefing below, the text of the Rule *itself* may reasonably be read as "expressly bar[ring] juror testimony related to matters

occurring *during jury deliberations."* Dkt. 1144 at 9:17-18 (emphasis in original). See also 3 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 6:21 (3d ed.2012) ("Because clear language in the provision limits proof of matters occurring 'during the course of the jury's deliberations,' it seems that Rule 606(b) does not apply to misconduct by jurors occurring prior to deliberations.")

Second, while *Tanner* invoked Rule 606(b) in declining to consider post-verdict claims that jurors had been using drugs and alcohol while sitting as jurors during trial, the Court did not expressly address the question whether the rule excludes juror testimony as to all matters occurring before or after deliberations. Thus, as Mueller and Kirkpatrick observe, *Tanner* simply supplied "some argument" that Rule 606(b) may, as a temporal matter, be read so broadly as to exclude evidence of the type Mr. Leung has proffered. 3 Mueller and Kirkpatrick, *Federal Evidence*, § 6:21.

Third, the events and circumstances described by juror Simms in the preset matter are factually distinguishable from those addressed in *Tanner.* That decision involved questions of juror competence based on the jurors' reported physical condition during trial. The Court was not concerned with application of the Rule vis-a-vis pre-deliberation conduct that, again, as here, violated the trial court's express and repeated instructions.

Fourth, this Circuit has recognized that post-trial evidence of juror misconduct may itself be considered as evidence of actual bias. See *United States v. Hayat*, 710 F.3d 875, 885, 889-91 (9th Cir. 2013). *See also United States v.*

Vartanian, 476 F.3d 1095, 1096-97 (9th Cir.2007). Thus, evidence that jurors repeatedly discussed the evidence prior to deliberations and, indeed, even prior to commencement of the defense case in violation of the court's admonitions is evidence of both misconduct *and* bias. Demonstrating the presence of the bias does not reflect an attempt to "impeach the verdict," *see* Fed.R.606(b), but rather an attempt to establish a basis for juror disqualification that existed before the jury was ever sworn.

Fifth, contrary to the government's new trial arguments below, this Circuit has not expressly adhered to a categorical rule barring consideration of pre-deliberation conduct or statements evincing misconduct or bias. Indeed, even after *Tanner*, the Court has suggested that opposite is true. Thus, in *United States v. Henley*, 238 F.3d 1111 (9th Cir.2001), after discussing why racist statements made by a juror were for other reasons not precluded under 606(b), the Court observed:

> In this case, there would be even stronger reason to conclude that Rule 606(b) should not bar juror testimony regarding O'Reilly's alleged racist statements, because the statements in question were made *before* deliberations began and *outside* the jury room. Rule 606(b)'s primary purpose-the insulation of jurors' private deliberations from post-verdict scrutiny-would not be implicated by permitting juror testimony about what O'Reilly allegedly said while carpooling with other jurors.

Henley, 238 F.3d at 1121.

Sixth, notwithstanding the provisions of Rule 606(b) and the decision in *Tanner*, at least one other Circuit has approved a post-verdict inquiry into the fact and substance of pre-deliberation discussions concerning a case as a means of

determining the prejudicial effect of erroneous pre-trial instructions permitting such discussion. *See United States v. Jadlowe*, 623 F.3d 1, 17-18 (1st Cir. 2010). That decision, issued well after *Tanner*, cannot be squared with a reading of Rule 606(b) that preempted inquiry into the juror claim raised in the present matter.

Finally, even if Rule 606(b) is given an expansive reading and applied to juror evidence of juror statements and conduct occurring before deliberations, the court may arguably receive evidence of pre-deliberation discussions to further a bias inquiry without delving into a juror's subjective mental processes existing at any point in time. As Mueller and Kirpatrick observe,

> It seems that jurors should be allowed to testify (and their affidavits should be admissible to prove) that they commenced deliberations in violation of the court's instructions prior to the end of the case. Whether discussions during trial among jurors going to the merits should be allowed has itself become controversial, but if the rule is observed and jurors violate it, their testimony (or affidavits) on this matter does *not* fall within the coverage of Fed. R. Evid. 606(b). The reason is that it does not reveal the effect of anything on their minds or their mental processes, at least so long as the testimony or affidavit does not describe in any detail the statements actually made in such conversations, and instead described the general tenor of such conversations.

Mueller and Kirkpatrick, *Federal Evidence* § 6:21 (footnote omitted).[21]

2. In Any Event, the Juror Allegations Are Cognizable as Evidence of Juror Bias

Putting aside the question whether evidence of the jurors' pre-deliberation

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[21] In the present matter, the Court was thus authorized to consider at least those portions of the Simms declaration that reported the objective evidence of the other juror's pre-trial discussions.

case discussions were cognizable as a general matter, the Ninth Circuit has recognized an independent basis on which the court arguably should have considered it. Specifically, the Circuit adheres to the rule that "[s]tatements [offered in support of an application for a new trial] which tend to show deceit during *voir dire* are not barred by [Rule 606(b)]." *Hard v. Burlington Northern R.R.,* 812 F.2d 482, 485 (9th Cir.1987); *accord*, *Henley, supra*, 1121 (citing *Hard* and stating, "[i]f appellants can show that a juror 'failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause,' then they are entitled to a new trial." [quoting *McDonough Power Equipment, Inc., supra,* 464 U.S. at 556]).

Aware of its central importance to ensuring a fair trial, the district court in this matter directly asked jurors at the start of voir dire whether any could not promise adherence to the rule against talking to others about the case prior to deliberations. None of the jurors, including juror C.B., stated or suggested that they would have any such difficulty. Nor did juror C.B. volunteer anything when counsel engaged other jurors on their ability to remain impartial. *See, e.g.*, RT 100, et seq.

The Simms declaration, however, avers that juror C.B. and others repeatedly broke their promise and defied the court's directive once the evidentiary phase of trial was underway. A truthful answer on voir dire that they could not or would not refrain from communicating with others about the case before deliberations would have provided a valid basis for a challenge for cause. Certainly the district

court should have convened an evidentiary hearing to determine the presence or absence of deceit by juror C.B. and others, as alleged by Ms. Simms, since such deceit, if found, would have compelled the grant of the new trial order sought by Mr. Leung without offending Rule 606(b).

The district court's refusal to convene cannot be reconciled with a correct legal interpretation of Rule 606 or with the law of this Circuit, as set forth in *Hard* and *Henley*. The court's ruling was founded on an error of law and therefore constitutes an abuse of discretion. *See Koon, supra.* Accordingly, defendant's conviction should be reversed and the matter remanded for an evidentiary hearing.

CONCLUSION

For the reasons stated, this Court should reverse defendant's conviction and enter a judgment of acquittal. Alternatively, the Court should reverse and remand with an order that the district court convene an evidentiary hearing to explore defendant's allegations of juror bias and misconduct.

Dated: December 9, 2013

Respectfully submitted,

By /s/ Dennis P. Riordan
Dennis P. Riordan

By /s/ Donald M. Horgan
Donald M. Horgan

Counsel for Defendant-Appellant
STEVEN LEUNG

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for defendant-appellant Leung hereby identify the following related cases, presently on appeal in this Court:

United States v. Hui Hsiung, Ninth Cir. Nos. 12-10492;

United States v. Hsuan Bin Chen, Ninth Cir. Nos. 12-10493;

United States v. AU Optronics Corp., Nos. 12-10500; and

United States v. AU Optronics Corp. America, No. 12-10514.

This Court issued an order consolidating the foregoing appeals on December 21, 2012. (Ninth Cir. Nos. 12-10492, 12-10493, 12-10500, 12-10514, Dkt. 11.) On October 18, 2013, the parties presented oral argument in the consolidated appeals and the case was submitted to the panel, consisting of Judges Thomas, McKeown, and Kendall. (*Id*., Dkt. 59.)

Each of the consolidated appeals arises out of the same case in the district court as this one, raises the same or closely related issues, and involves the same events.

CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 24, 250 words.

Dated: December 9, 2013

/s/ Donald M. Horgan
Donald M. Horgan

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
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I hereby certify that on December 9, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Jocilene Yue

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