Nos. 13-17408, 13-17618

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

BEST BUY CO., INC., et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

HANNSTAR DISPLAY CORPORATION,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

OPENING BRIEF OF DEFENDANT-APPELLANT-CROSS-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant-Cross-Appellee HannStar Display Corporation, a nongovernmental corporate party, certifies that it has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In today's world of sophisticated consumer electronics and global supply chains, there are millions of electronic parts that are bought, sold, and assembled outside the United States before eventually entering the U.S. market as a component of a larger finished product. This appeal, from a judgment after the trial of a price-fixing case, arises from the district court's failure to distinguish between two very distinct and different transactions along the global supply chain: (1) the admittedly price-fixed sale of a thin-film-transistor liquid crystal display ("TFT-LCD") panel between a foreign seller and a foreign buyer; and (2) the sale to a U.S. buyer of a television, computer or other finished product that contains the price-fixed TFT-LCD panel as one of its many parts.

It would seem uncontroversial to say that these two transactions are quite different. The former is a purely foreign transaction that is presumptively immune from Sherman Act liability pursuant to the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, while the latter is a type of import commerce that is undisturbed by the FTAIA and subject to the Sherman Act. Yet, the district court erred in treating these as the same. What resulted was a judgment entered against Appellant-Cross-Appellee HannStar Display Corporation ("HannStar"), despite Appellees-Cross-Appellants' failure to prove anything more than HannStar's admitted participation in a foreign conspiracy that fixed the prices

of TFT-LCD panels sold outside the United States. This was a dramatic expansion of the "import commerce" exclusion under the FTAIA and an equally dramatic expansion of the extraterritorial reach of the Sherman Act—well beyond what has been recognized in the law or contemplated by Congress in enacting the FTAIA.

The district court's other fatal error was its failure to distinguish between the six different entities suing as plaintiffs, who were instead lumped together as "the Best Buy Plaintiffs." There was no evidence at trial of individualized injury incurred by each of the six plaintiffs and, as a result, a failure to establish the required element of injury-in-fact.

HannStar was entitled to judgment as a matter of law, and the district court's judgment should be reversed.

STATEMENT OF JURISDICTION

The Best Buy Plaintiffs alleged violations of the Sherman Act, 15 U.S.C. § 1, and the Minnesota Antitrust Act of 1971, Minn. Stat. 325D.52, *et seq.* Defendant-Appellant-Cross-Appellee's Excerpts of Record ("ER") 859 (Dkt. No. 309). The district court had jurisdiction over the Sherman Act claim under 28 U.S.C. § 1331 and jurisdiction over the state law claim under 28 U.S.C. § 1332, or alternatively, 28 U.S.C. § 1367.

The Best Buy Plaintiffs and HannStar proceeded to trial. The jury returned a special verdict on September 3, 2013, and the district court entered judgment the

next day. ER 12-16, 19. HannStar filed a motion for judgment as a matter of law, on October 2, 2013. ER 898 (Dkt. No. 608). The district court denied the motion for judgment as a matter of law on November 20, 2013, and entered an amended judgment the same day. ER 11, 17-18. HannStar filed a timely notice of appeal on November 22, 2013. ER 20-21. Plaintiffs filed a notice of cross-appeal on December 20, 2013. ER 22-23. This court has jurisdiction under 28 U.S.C. § 1291.[1]

STATEMENT OF ISSUES

1. Did the district court err in denying judgment as a matter of law because the Best Buy Plaintiffs failed to prove that HannStar's conduct either: (a) involved import trade or commerce; or (b) satisfied the "domestic effects" exception to the FTAIA?

2. Did the district court err in denying judgment as a matter of law because each of the six Best Buy Plaintiffs failed to prove individual injury-in-fact?

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[1] After judgment was entered, the Best Buy Plaintiffs sought nearly $18 million in fees and costs. Their motion was referred to a Special Master, who recommended an award of just under $1.8 million, which the district court adopted. *See* ER 909 (Dkt. No. 685). The Best Buy Plaintiffs and HannStar cross-appealed the fees and costs award. *Id.* (Dkt. Nos. 687, 690). Those cases are currently pending before this Court and were related to this appeal. *See Best Buy Co. et al. v. HannStar Display Corp.*, Nos. 14-16144, 14-16184.

ADDENDUM

An addendum containing pertinent statutory provisions appears at the end of this brief.

STATEMENT OF THE CASE

A. Background

In March 2000, HannStar began producing TFT-LCD panels in Taiwan. ER 507-08. TFT-LCD technology was then a new technology that used thin film transistors to produce slim display panels for various applications. ER 416. From 2000 through 2006, HannStar primarily produced TFT-LCD panels for televisions, personal computer ("PC") monitors, and notebook PCs. ER 507-08.

Competition in the TFT-LCD panel industry increased rapidly. By 2001, prices for TFT-LCD panels had dropped 60 percent and the active players in the industry also included AU Optronics Corporation ("AUO"), Chi Mei Optoelectronics Corporation ("Chi Mei"), Chunghwa Picture Tubes, Ltd. ("Chunghwa"), Quanta Display, Inc., Hitachi Displays, Ltd., Toshiba, Sharp Corp., Sanyo, Samsung, and LG Display Co., Ltd. ("LG"). ER 42-43, 82-83. HannStar, however, was a latecomer to the industry, and it remained one of the smallest manufacturers of TFT-LCD panels. ER 114-17. HannStar made and sold only large TFT-LCD panels to foreign direct purchasers, who then incorporated those panels into finished products that were shipped and sold around the globe. ER

441-42, 444-45, 507-08, 696-97. HannStar did not sell any finished products containing TFT-LCD panels. *Id.* HannStar also did not manufacturer TFT-LCD panels smaller than 4 inches, and concentrated production in large panels. ER 59.

The Crystal Meetings. Faced with stiff price competition, in September 2001, executive-level employees from four TFT-LCD panel manufacturers—AUO, Chi Mei, Chunghwa, and HannStar—met in Taipei, Taiwan and agreed on a price that they would collectively quote to their customers. ER 40, 69. They also agreed to continue meeting on a regular basis to set the prices of TFT-LCD panels sold to their customers. ER 38-45. Executives from Samsung and LG subsequently joined the meetings. ER 69. The meetings became known as the "crystal meetings" and Samsung, LG, AUO, Chi Mei, Chunghwa and HannStar regularly attended them over the course of the next five years. ER 763. Toshiba did not participate in any of the crystal meetings. ER 185-86.

Discussions at the crystal meetings were limited to the prices of large TFT-LCD panels, which were sold and incorporated into PC monitors, notebook PCs, and televisions. ER 70-71. Small panels, which are used for application in cellphones, Blackberrys, iPhones, or personal digital assistants (PDAs), were never discussed. ER 58-59, 70-71, 126. And while the crystal meetings participants discussed the retail prices of finished products incorporating TFT-LCD panels, they did not reach agreements as to the retail prices of any panel-containing

products, as increases in panel prices were generally absorbed by the finished products manufacturers. ER 96-98.

HannStar's Criminal Plea. The crystal meetings ended in early 2006. ER 105. Subsequently, Samsung self-reported to the government and an investigation ensued. ER 282-83. The government secured numerous criminal pleas by participants in the crystal meetings, including HannStar. ER 741-62. HannStar pled guilty to a single count of violating Sherman Act § 1 and paid a $30 million dollar fine for its role in a conspiracy to fix the prices of TFT-LCD panels sold worldwide. HannStar admitted that between September 14, 2001 and January 31, 2006, it:

> participated in a conspiracy with major TFT-LCD producers, the primary purpose of which was to fix the price of certain TFT-LCD sold in the United States and elsewhere. In furtherance of the conspiracy, the defendant, through its officers and employees, engaged in discussions and attended meetings, including group meetings referred to by some of the participants as 'crystal meetings,' with representatives of other TFT-LCD producers. During these discussions and meetings, agreement were reached to fix the price of certain TFT-LCD to be sold in the United States and elsewhere.

ER 748-49. Consistent with the fact that it was one of the smallest TFT-LCD panel manufacturers in the industry, HannStar's fine was notably less than the fines paid by other crystal meeting participants that pled guilty. ER 404-05.

The Best Buy Plaintiffs' Action Against HannStar. Civil litigation also ensued, and the numerous cases filed against the manufacturers of TFT-LCD panels were consolidated into an MDL in the Northern District of California before Judge Illston. In October 2010, Plaintiffs—four Best Buy entities located in Minnesota, one Best Buy entity incorporated in Bermuda and located in China, and one Best Buy subsidiary in Washington—filed a complaint against HannStar and numerous other TFT-LCD panel manufacturers alleging that they had engaged in a conspiracy to fix the prices of panels in violation of Section 1 of the Sherman Act and the Minnesota Antitrust Act of 1971. ER 809 (Dkt. No. 1). In June 2011, a First Amended Complaint was filed dropping the Best Buy entity in China and adding a new Best Buy entity formed under Virginia Law. ER 813-14 (Dkt. No. 37). In August 2012, the Best Buy Plaintiffs filed a second action alleging the same two claims against Toshiba Corporation, Toshiba Matsushita Display, and Toshiba America Electronic Components, Inc. (collectively, "Toshiba"), Koninklijke Philips Electronics N.V., and Philips Electronics North America Corporation. *See* Case. No. 12-cv-4114 (N.D. Cal.) (ECF No.1, Aug. 3, 2012). Both of the actions by the Best Buy Plaintiffs were consolidated into a single case that was deemed related to the underlying MDL. *See id.* (ECF No. 40, Dec. 13, 2012). The Best Buy Plaintiffs did not purchase any price-fixed TFT-LCD panels. ER 249, 257-58. Instead, the Best Buy Plaintiffs sued to recover overcharges on

finished products that they had purchased for retail sale, under both federal law (based on a narrow exception to the prohibition against indirect purchaser claims for violations of the Sherman Act) and Minnesota state law. *See* ER 809 (Dkt. No. 1).

Trial Proceedings. The Best Buy Plaintiffs proceeded to trial against Toshiba and HannStar. Their theory of the case was that the conspiracy to fix the prices of TFT-LCD panels actually dated back to a golf outing in Taiwan that took place in March 1998. ER 27. This was before the crystal meetings first began in 2001 and before HannStar began manufacturing *any* products. ER 32-33, 507.

The Best Buy Plaintiffs dedicated the majority of the six week trial to trying to prove Toshiba's involvement in the conspiracy. As for HannStar, the Best Buy Plaintiffs' evidence largely consisted of testimony that HannStar participated in the crystal meetings, a fact that HannStar admitted in its opening statement. ER 31-32. The testimony of numerous witnesses established that the crystal meetings were only ever attended by the following companies: AUO, Chunghwa, Chi Mei, Samsung, LG, and HannStar. ER 41, 69, 72-73, 91-92.

Sonia Chen, a Samsung employee located in Taiwan, testified that between 2002 and 2003, HannStar was also present at "vendor parties"—meetings involving only lower-level employees from TFT-LCD manufacturers. ER 152-54. Participants at the vendor meetings included AUO, Chi Mei, Chunghwa, HannStar,

LG, Sharp, and non-party Hydis. ER 154. These vendor parties, however, did not involve formal discussions or agreements on price. ER 173-74.

The Best Buy Plaintiffs also offered the criminal pleas of LG Display Co. Ltd., LG Display America, Inc., Sharp Corp., Chunghwa Picture Tubes, Ltd., Hitachi Displays Ltd., Epson Imaging Devices Corp., Chi Mei Optoelectronics, and HannStar as evidence of their participation in the TFT-LCD panels conspiracy. *See* ER 396-401, 764-77.

Other evidence confirmed that HannStar was viewed as a minor player in the TFT-LCD panel industry with an undeniably weak market position. ER 114-15, 117-18, 121, 729, 735. Various witnesses from Samsung did not even acknowledge HannStar as being a real competitor with Samsung between 1998 and 2004. ER 198, 692. Michael Hanson, a former Samsung manager who oversaw sales of TFT-LCD panels to Dell, further testified that he never spoke with anyone at HannStar, must less exchanged competitive information with HannStar. ER 209-10. And even in 2005, near the end of the conspiracy period, Samsung still did not consider HannStar to be a major TFT-LCD panel maker. ER 183.

The evidence established only that HannStar produced large panels for use in notebooks, PC monitors, and some televisions. ER 167-68, 507-08, 711, 717, 720, 723, 726, 733-35, 737, 739. The Best Buy Plaintiffs presented no evidence that HannStar ever sold anything directly to any of them, as they only purchased

finished products that contained TFT-LCD panels, and HannStar made only the panels themselves. ER 257-58, 507-08, 735. In fact, Pamela Freeman, a "Best Buy" employee who oversaw merchandising of Plaintiffs' private label TFT-LCD finished products, acknowledged that HannStar was only a panel supplier, and that she visited HannStar abroad to become better aware of panel costs so that she could negotiate lower prices for the finished TFT-LCD monitors purchased "by Best Buy." ER 697, 702-05.

Toshiba presented the only evidence regarding actual transactions involving HannStar. Toshiba purchased TFT-LCD panels from HannStar for incorporation into PC monitors from 2002 to 2004, before Toshiba established a joint venture with Matsushita (Toshiba Matsushita Display) to produce its own TFT-LCD panels. ER 447, 514. HannStar, however, was always the smallest supplier of TFT-LCD panels to Toshiba's PC division. ER 514. Toshiba bought TFT-LCD panels for its televisions from AUO, Chi Mei, LG, Samsung, Sharp, and one or two other smaller vendors, but never from HannStar. ER 434-35.

Plaintiffs' witness Wendy Fritz, a "Best Buy" senior vice president, testified that between 1998 and 2006, "Best Buy" "dealt with" the following vendors for finished products that contained TFT-LCD panels: Toshiba, HP, Sony, Gateway, Sharp, Panasonic, Samsung, LG, Philips, and NEC. ER 249. Fritz testified that between 1998 and 2006, "Best Buy" held approximately 30 percent of the market

share in television and laptop sales. ER 245-46. This equated to approximately $32 billion worth of finished products paid for by "Best Buy." ER 245-46, 257-58. Fritz also testified that the Best Buy Plaintiffs entered into Vendor Master Agreements with vendors for the supply of finished products over a three- to five-year period without providing any specificity as to which Best Buy Plaintiff, which vendors, and which finished products. ER 247-48. Fritz testified that these agreements were entered into in Minneapolis, Minnesota. *Id.* The Best Buy Plaintiffs also entered into Annual Program Agreements for a more specific category of product over a more discrete time period. *Id.*

Mona Pal, a witness for Toshiba, testified that the Best Buy Plaintiffs were the number one customer of Toshiba's American PC subsidiary in terms of sales volume. ER 427. According to Pal, Best Buy Plaintiffs implemented their own value equation for demanding the prices they would pay to Toshiba for notebook PCs. Pal testified that the value Plaintiffs assigned to an individual component such as a TFT-LCD panel bore no relationship to Toshiba's actual cost for the input. ER 428-30. Once Toshiba agreed on a price at which the Best Buy Plaintiffs would purchase notebook PCs, that price would never increase, regardless of fluctuations in costs of the inputs. ER 431.

Experts and Damages. The experts for the Best Buy Plaintiffs opined little about the extent of HannStar's contribution to the overcharges paid by the Best

Buy Plaintiffs on finished products containing TFT-LCD panels. Dr. Douglas Bernheim acknowledged that his task was merely to analyze the Best Buy Plaintiffs' overall damages caused by the entire price-fixing conspiracy, without regard to whether and to what degree, that harm stemmed from HannStar or Toshiba. ER 267. He opined that the TFT-LCD panels conspiracy contributed to a 20 percent overcharge on panel prices. ER 269-70. His estimate of direct damages incurred by the Best Buy Plaintiffs as a result of the conspiracy totaled $ 287.5 million, which included all "direct purchases" of finished products that incorporated price-fixed panels. ER 320-31. Bernheim also opined that his overcharge estimate included "all the panels that are sold to companies that are making finished products, . . . irrespective of where the companies that made the products eventually sold them." ER 345. He opined that his overcharge percentage estimate was not limited to the panels that were incorporated into products bought by the Best Buy Plaintiffs, but rather the overall global sales and purchasers. ER 343-44.

The Best Buy Plaintiffs' second expert, Dr. Alan Frankel, opined that the Best Buy Plaintiffs' indirect damages from August 1998 to December 2006 amounted to $485.7 million and that indirect damages from October 2001 to December 2006 amounted to $404.9 million. ER 381-83. Dr. Frankel's analysis of pass-through damages incurred due to the TFT-LCD panel conspiracy included

finished products purchased from Dell, Sony, and Apple, but not HP or Vizio. ER 363. Dr. Frankel's analysis, however, mistakenly assumed that the Best Buy Plaintiffs' purchases of Dell products occurred during the conspiracy period, when in fact they did not purchase finished products from Dell until after 2006. ER 387.

Defendants' expert Dr. Dennis Carlton opined that the competition in the LCD industry from 1998 to 2006 rendered it impossible for a conspiracy to impose an overcharge of 20 percent, which was Dr. Bernheim's opinion. ER 461-62. Dr. Carlton's best estimate on the overcharges across all LCD panels was between 0.4 and 1.9 percent. ER 463.

The defense's other expert, Dean Edward Snyder, testified that while Toshiba had affiliated entities at both the panel making stage and the finished product making stage of the vertical chain, HannStar only made panels. ER 480. Dean Snyder also opined that the damages to the Best Buy Plaintiffs for direct purchases of finished products containing price-fixed TFT-LCD panels amounted to $8,105,134 for the period of August 1998 to December 2006, and $7,471,943 million for September 2001 to December 2006. ER 533-537, 783. Dean Snyder opined that indirect damages to the Best Buy Plaintiffs for purchases of finished products containing price-fixed TFT-LCD panels amounted to $996,834 and $946,055 for same two time periods respectively. ER 784.

At the close of evidence, Toshiba and HannStar moved for judgment as a matter of law, and the district court denied the motion. ER 561-62.

The Jury's Special Verdict. Over Toshiba's and HannStar's objections, the court presented the jury with the following special verdict questions, and the jury returned the following answers:

> Question 1: Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that Toshiba knowingly participated in a conspiracy to fix, raise, maintain or stabilize the prices of TFT-LCD panels?
>
> _____ **X** _____
> Yes No
>
> Question 2: Did Best Buy prove, by a preponderance of the evidence in accordance with the instructions given to you, that HannStar knowing participated in a conspiracy to fix, raise, maintain or stability the prices of TFT-LCD panels?
>
> **X** _____ _____
> Yes No
>
> . . .
>
> Question 3: Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that the conspiracy involved TFT-LCD panels and/or finished products (e.g., notebook computers, computer monitors, televisions, camcorders, cell phones and digital cameras containing TFT-LCD panels) imported into the United States?
>
> **X** _____ _____
> Yes No

Question 4: Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that the conspiracy involving these imported TFT-LCD panels and/or finished products produced substantial intended effects in the United States?

X	
Yes	No

Question 5: Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that the conspiracy involved conduct which had a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States?

	X
Yes	No

. . .

Question 8: Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that it was injured as a result of the conspiracy in which one or both of the defendants knowingly participated?

X	
Yes	No

. . .

Question 9: For Best Buy's direct purchases only, what is the amount of damages Best Buy proved, by a preponderance of the evidence and in accordance with the Court's instructions, that it suffered as a result of the conspiracy?

$ 7,471,943

(Please fill in a dollar amount total)

> Question 10: For Best Buy's indirect purchases only, what is the amount of damages Best Buy proved, by a preponderance of the evidence and in accordance with the Court's instructions, that it suffered as a result of the conspiracy?
>
> $ 0
>
> (Please fill in a dollar amount total)

ER 13-16. Toshiba and HannStar had made the following relevant objections to the special verdict form, and in particular, the questions set forth above: (1) the verdict form did not require the jury to identify the ownership or control relationships between the alleged conspirators and the entities that sold finished products to the Best Buy Plaintiffs; (2) Questions 3 and 4 misstate the application of the Sherman Act to import commerce; (3) Question 4 incorrectly states the substantial effects test under *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); (4) Question 5 misstates the requirements of the FTAIA; and (5) Question 8 is compound and ambiguous. ER 563-64; 571.

Post-Trial Proceedings. The district court entered judgment for Toshiba against the Best Buy Plaintiffs, and for the Best Buy Plaintiffs against HannStar in the amount of $7,471,943. ER 19. Subsequently, HannStar filed a renewed motion for judgment as a matter of law. ER 896 (Dkt. No. 593). Relevant to this appeal, HannStar contended that the Best Buy Plaintiffs failed to prove the requisite individual injury-in-fact as to each of the Best Buy entities. *Id.*

Additionally, HannStar contended that the Best Buy Plaintiffs had failed to prove that the TFT-LCD panels conspiracy satisfied the requirements of the FTAIA. *Id.*

HannStar also filed a motion to vacate the judgment on the ground that the $229,000,000 in settlements received by the Best Buy Plaintiffs from other parties should offset any damages award against HannStar. ER 898 (Dkt. No. 608). The Best Buy Plaintiffs filed a motion to amend the judgment to reflect the treble damages in the amount of $22,415,829. ER 896 (Dkt. No. 596).

B. The District Court's Post-Trial Motions Order

The district court denied HannStar's renewed motion for judgment as a matter of law. ER 1. The court held that because all parties treated the Best Buy Plaintiffs as a single entity throughout the trial, and that there was evidence that "Best Buy" has purchased approximately $32 billion worth of TFT-LCD finished products during the relevant period, the jury did not need to make individual findings of injury as to each of the Best Buy Plaintiffs. ER 6-7.

The district court also rejected HannStar's FTAIA argument, interpreting the jury's special verdict as having found import commerce "satisfying the FTAIA and bringing the conspiracy within the ambit of the Sherman Act" and further finding that the Best Buy Plaintiffs had presented sufficient evidence to satisfy the requirements of the FTAIA. ER 9. Specifically, the district court's conclusion was premised on evidence that the TFT-LCD panels conspiracy "controlled well

over 90% of the TFT-LCD market, [and] charged supra-competitive prices for TFT-LCD panels" and that "those panels were incorporated into billions of dollars[']worth of finished products . . . that were imported into the United States and sold to United States companies and consumers." ER 9-10.

The district court subsequently entered an amended judgment reflecting trebled damages totaling $22,415,829, but also applying a settlement offset such that "the Best Buy plaintiffs may recover no damages from HannStar." ER 17-18.

HannStar filed a timely notice of appeal. ER 20-21. The Best Buy Plaintiffs subsequently filed a notice of appeal on December 20, 2013. ER 22-23.

SUMMARY OF ARGUMENT

The district court committed two distinct errors in denying HannStar's motion for judgment as a matter of law:

First, the district court misunderstood the jury's special verdict answers to conclude that the jury found "import trade or import commerce" within the Sherman Act's scope when, in fact, the jury found there was no import commerce and the evidence requires that conclusion. This mistake led the district court to ignore the jury's dispositive finding that the Best Buy Plaintiffs had not proved a "direct, substantial and reasonably foreseeable effect" on United States commerce, as is required to establish a Sherman Act violation based on non-import foreign commerce.

A party like HannStar that fixes the price of an input and makes only the initial foreign sale has not engaged in "import trade or import commerce," regardless of whether a finished product that contains the input is later imported and sold in the United States. This Court has recognized that "not much imagination is required to say that [import trade or commerce] means precisely what it says." *United States v. Hsiung*, 758 F.3d 1074, 1090 (9th Cir. 2014). It is limited to transactions between a foreign seller and a domestic buyer, or conduct that directly restricts the American import market. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012) (en banc); *Animal Science Prods. Inc. v. China Metals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011).

Until this case, no other court has adopted such a vast interpretation of the FTAIA's import commerce exclusion. In litigation filed by another opt-out plaintiff from the TFT-LCD MDL, who asserted price-fixing claims for small panels, the Seventh Circuit recently held that the foreign sale of a price-fixed input to a foreign manufacturer is *not* import commerce and does not otherwise constitute the type of conduct that satisfies the FTAIA's domestic effects exception, as the jury in this case properly found. *See Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2014 U.S. App. LEXIS 22408, at *9 (7th Cir. Nov. 20, 2014).

The district court, in entering judgment, applied the Sherman Act to wholly foreign conduct by HannStar that caused direct foreign injury but only derivative domestic injury through the sale of panel-containing finished products. The result is a radical expansion of the FTAIA's import commerce exclusion that allows the Sherman Act to reach the types of foreign conduct far beyond what Congress contemplated, and what the Supreme Court and other courts have allowed. Left to stand, this interpretation of the FTAIA's import commerce exclusion essentially writes the statute out of existence. "Nothing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers." *Id.* at *22. But where, as here, a conspiracy fixes only the price of the component sold abroad and not the price of anything sold to the United States, the injury is predominantly one to *foreign* buyers and the Sherman Act does not apply. *See id.* Defining such conduct as "import commerce," as the district court erroneously did, would "enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer,' a primary concern motivating the [FTAIA]." *Id.* at *24.

Second, there was no evidence at trial differentiating each of the six different corporate entities suing as Plaintiffs. Over HannStar's objections, the district court

instructed the jury and used a special verdict form that also made no distinctions between these six different Plaintiffs. The result was a combined verdict that awarded damages to all six Plaintiffs, none of whom had met their individual burden of proving injury-in-fact, as required to state a Sherman Act claim, or Article III standing for that matter.

For each of these independent reasons, the district court's decision below should be reversed and HannStar should be granted judgment as a matter of law.

STANDARD OF REVIEW

This court "review[s] de novo a denial of a motion for judgment as a matter of law to determine whether substantial evidence supported the prevailing party's claims." *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014). Substantial evidence is the relevant evidence that "reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* (citation and internal quotation marks omitted). "'It is error to deny a judgment [as a matter of law] when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party.'" *Id.* (quoting *Erickson v. Pierce Cnty.*, 960 F.2d 801, 804 (9th Cir. 1992)) (alteration in original).

ARGUMENT

I. Plaintiffs Were Required, But Failed, To Satisfy The Requirements Of The FTAIA

The FTAIA provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless" certain enumerated requirements are satisfied. 15 U.S.C. § 6a. That language creates a multi-step analysis. First, conduct involving pure import trade or commerce is untouched and is subject to the Sherman Act. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) ("*Empagran*"); *Hsiung*, 758 F.3d at 1090. Second, the FTAIA places all foreign conduct that *does not* involve import trade or commerce (often referred to as "non-import trade or commerce") presumptively beyond the scope of the Sherman Act. *Empagran*, 542 U.S. at 162. Third, through its "domestic effects" exception, the FTAIA then brings some wholly foreign non-import trade or commerce *back* within the Sherman Act's reach if that "conduct *both*: (1) sufficiently affects American commerce, *i.e.*, it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful. . . ." *Id.* (emphasis in original). Though it defines the extraterritorial reach of the Sherman Act, the FTAIA is not a jurisdictional statute. Rather, it is a "component of the merits of a

Sherman Act claim involving nonimport trade or commerce with foreign nations." *Hsiung*, 758 F.3d at 1087.

HannStar is entitled to judgment as a matter of law because the jury found, and the evidence clearly shows, that: (a) it did not engage in import trade or commerce, and (b) its wholly foreign conduct did not have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce.

A. The Import Commerce Exclusion Did Not Apply

A careful reading of the special verdict demonstrates that the jury found there to be no import commerce. Regardless, there was insufficient evidence at trial that either HannStar or the TFT-LCD panels conspiracy engaged in import trade or commerce within the meaning of the FTAIA. The district court erred in refusing to grant judgment as a matter of law.

1. Foreign Sales of Inputs Are Not Within The Import Commerce Exclusion, Even If Those Inputs Are Incorporated Into Finished Products Subsequently Imported Into The United States

The FTAIA specifically "differentiates between conduct that 'involves' [import] commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce. *To give the latter provision meaning*, the former must be given a relatively strict construction." *Carpet Grp. Int'l v. Oriental Rug Importers*, 227 F.3d 62, 72 (3d Cir. 2000) (emphasis added), *overruled on other grounds by Animal Sci. Prods.*, 654 F.3d at 466. This Court has not specifically defined the

outer bounds of what constitutes "import trade" for purposes of the FTAIA, but observed that "not much imagination is required to say that this phrase means precisely what it says." *Hsiung*, 758 F.3d at 1090. Citing definitions of import commerce from other circuits, this Court recognized that direct sales of TFT-LCD *panels* "between the foreign defendant producers of TFT-LCDs and purchasers located in the United States" do constitute import trade. *Id.* But such transactions are markedly different from those at issue here—which involve sales of components from foreign defendant sellers to foreign purchasers who subsequently incorporate the cartelized components into finished products that might be sold into the United States down the vertical stream of commerce.

The other circuits that have addressed the definition of import commerce have recognized that it encompasses a narrow subset of conduct. In the Seventh Circuit, import commerce is limited to "transactions that are *directly* between [U.S.] plaintiff purchasers and the defendant cartel members." *Minn-Chem*, 683 F.3d at 855 (finding foreign conduct fell "outside the arena of simple import transactions as to require application of the FTAIA" even though it contributed to the "inflated benchmark prices" confronted by U.S. purchasers). As the *Minn-Chem* court explained, "[i]mport trade and commerce are excluded at the outset from the coverage of the FTAIA" because "[t]he applicability of U.S. law to transactions in which a good or service is being sent *directly into the United States*,

with no intermediate steps, is both fully predictable to foreign entities and necessary for the protection of U.S. customers." *Minn-Chem*, 683 F.3d at 854 (emphasis added).

The Seventh Circuit's recent decision in *Motorola* solidifies the issue. There, the court held that the foreign sales of price-fixed inputs (LCD panels) that are incorporated into finished products (cellphones) abroad, but then imported into the United States by the foreign buyer, is *not* import trade or commerce within the meaning of the FTAIA. 2014 U.S. App. LEXIS 22408 at *8. Motorola's foreign subsidiaries bought the panels, incorporated them into cellphones, and then sold and shipped them to plaintiff Motorola for resale in the United States. *Id.* at *5. The Seventh Circuit held that this conduct was properly evaluated under the FTAIA's domestic effects exception, because the "ripple effect" of the conduct on the U.S. cellphone market "was modest," and "the immediate victims of the price fixing were [Motorola's] foreign subsidiaries." *Id.* at *10-11.

The Second Circuit's decision in *Kruman v. Christie's International PLC* is also instructive. *See* 284 F.3d 384 (2d Cir. 2002), *abrogated on other grounds by Empagran*, 542 U.S. at 164. There, two of the world's largest auction houses allegedly conspired to fix the prices of their auctioneering services in markets outside the United States. *Id.* Some of the goods that were purchased or sold at the auctions run by the defendants "may ultimately have been imported by

individuals into the United States," but the defendant's conduct still did not amount to import commerce because "the object of the conspiracy was the price that the defendants charged for their auction services, *not* any import market for those goods." *Id.* at 395-96 (emphasis added). The Second Circuit explained that the "text of the FTAIA clearly reveals that its focus is not on the plaintiff's injury, but on the defendant's conduct, which is regulated by the Sherman Act." *Id.* at 399. Because the conduct "was not the imposition of high prices pursuant to an illicit agreement, but the alleged agreement by the defendants to fix prices in foreign auction markets," it did not fall under the import commerce exception. *Id.*

The Sixth and Third Circuits have applied similarly narrow definitions of import commerce that require a foreign seller and a U.S. buyer on the two ends of the anticompetitive transaction. In *Carrier Corp. v. Outokumpu Oyj*, the Sixth Circuit limited the import commerce exclusion to transactions involving goods manufactured abroad and sold in the United States. 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012). Similarly, the Third Circuit observed that, to trigger the import commerce exclusion, "[g]enerally, the conduct must involve a United States purchaser or seller" and it must "*directly* increase[] or reduce imports into the United States." *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 302-03 (3d Cir. 2002), *overruled on other grounds by Animal Science Prods.*, 654 F.3d at 467 (emphasis added); *see also* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law:*

An Analysis of Antitrust Principles and Their Application ¶ 272i (4th ed. 2013) ("Purely foreign commerce involves transactions between a foreign buyer and a foreign seller. . . . [I]mport commerce involves transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States.").

"[T]he FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Empagran*, 542 U.S. at 169 (emphasis in original). Interpreting the FTAIA's "import commerce" exclusion to extend to purely foreign sales of inputs, as the district court did, would not only swallow the separate "domestic effects" exception but also "enormously increase the global reach of the Sherman Act," and "create friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition officer,' a primary concern motivating the [FTAIA]." *Motorola*, 2014 U.S. App. LEXIS 22408, at *24 (citations and internal quotation marks omitted) (alterations in original). "The principles of prescriptive comity require us to respect the sovereign authority of foreign nations and to construe ambiguous statutory language in a way that avoid unreasonable interference with such authority." *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007) (citing *Empagran*, 542 U.S. at 164).

2. The Jury's Special Verdict Found There Was No Import Commerce

The district court misinterpreted the jury's answers to the special verdict form as amounting to a finding that the Best Buy Plaintiffs had proved conduct involving import commerce. To the contrary, the jury's answers to the special verdict questions can only be read as finding that the TFT-LCD panels conspiracy did *not* involve import commerce.

Question 2 of the special verdict form asked whether the Best Buy Plaintiffs had proved that HannStar "knowingly participated in a conspiracy to fix, raise, maintain or stabilize the prices of TFT-LCD panels." ER 13. The jury answered "Yes." *Id.* Question 4 asked whether "the conspiracy involving these imported TFT-LCD panels and/or finished products produced substantial intended effects in the United States." ER 14. Again, the jury answered "Yes." *Id.* But when asked in Question 5 whether the Best Buy Plaintiffs had proved "that the conspiracy involved conduct which had a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States," *the jury answered "No." Id.*

The only way to understand those answers is that the "substantial intended effects" in the United States that the jury found (Question 4) were not "direct" (Question 5). That conclusion necessarily means that the jury found there was no "import trade or commerce" either. Import commerce has a direct effect in the United States by definition. It involves "transactions that are *directly* between

[U.S.] plaintiff purchasers and the defendant cartel members." *Minn-Chem*, 683 F.3d at 855.

The district court was led astray by the jury's "Yes" answer to Questions 3. But read closely, that answer *does not* contradict the jury's clear finding that the TFT-LCD panels conspiracy it found had no *direct* effects in the United States and therefore necessarily did not involve import trade or commerce either. Question 3 asked whether Best Buy had proved "that the conspiracy involved TFT-LCD panels *and/or finished products* . . . imported into the United States." ER 14. (emphasis added). The "and/or finished products" language in Question 3 allowed the jury to answer "Yes" to that question despite its simultaneous conclusion that the conspiracy involved no *direct* effects in the United States. The jury heard evidence that "finished products" containing TFT-LCD panels were ultimately imported into the United States, and those downstream imports were "involved" in an ordinary causal sense. But these were *indirect* effects of a conspiracy which directly related only to the price of *panels* which were sold and incorporated into finished products abroad. *See Motorola*, 2014 U.S. App. LEXIS 22408, at *6, *9-10. The jury's "Yes" answer to Question 4, which asked whether "the conspiracy involving these imported TFT-LCD panels and/or finished products produced substantial intended effects in the United States," is similarly consistent with its finding in Question 5 that those effects (while substantial) were not "direct."

The jury understood the facts clearly, and spoke as clearly as the special verdict form would permit. Read in conjunction with the answers to Questions 2 and 5, the jury's "Yes" answers to the compound interrogatories in Questions 3 and 4 indicate that the jury only found that the cartelized TFT-LCD panels were later incorporated into finished products destined for the United States. This is insufficient to satisfy the import commerce exclusion. *See Motorola*, 2014 U.S. App. LEXIS 22408, at *8.

The district court actually understood all this and harmonized the jury's special verdict answers in precisely this way. The court reasoned that the jury's "Yes" answers to Questions 3 and 4 could be reconciled with its "No" answer to Question 5 because there was evidence that TFT-LCD panels "were incorporated into billions of dollars[']worth of finished products. . . that were imported into the United States and sold to United States companies and consumers." ER 9-10. In other words, the jury's answers indicate that it found (consistent with the evidence) that the TFT-LCD panels conspiracy involved the price-fixing of *panels* only, but also that many of these panels eventually were incorporated into finished products imported into the United States.

Despite correctly harmonizing the jury's answers, the district court erroneously concluded the jury had found that the Best Buy Plaintiffs' claims are based on import commerce exempt from the FTAIA. The opposite is true—the

only way to reconcile the jury's answers to the special verdict form is to conclude that it found the conspiracy had an intended and substantial effect in the United States but that effect was *indirect*, via the incorporation abroad of price-fixed panels into finished products that were ultimately imported into the United States. This is not "import trade or import commerce," as a matter of law.

3. There Was Insufficient Evidence the TFT-LCD Panels Conspiracy Involved Import Commerce

The evidence would require that conclusion even if the jury had not been wise enough to reach it. The evidence at trial was insufficient to support any conclusion that the TFT-LCD panels conspiracy involved import trade or commerce.

There was no evidence that HannStar directly imported panels into the United States. The little evidence offered at trial relating to HannStar indicated that it manufactured only TFT-LCD panels, and that it did so in Taiwan. ER 257-58, 507-08, 735. There was no evidence that HannStar directly sold TFT-LCD panels to any American buyers, much less to the Best Buy Plaintiffs, who only purchased finished products. ER 245-46, 257-58. Indeed, the evidence established only that: (1) HannStar sold TFT-LCD panels to Toshiba Matsushita Display ("TMD") from 2002 through 2003; and (2) HannStar supplied TFT-LCD panels to Toshiba Corporation's PC division from April 2002 to September 2004. ER 235, 441, 444-45, 447, 513-14. There was no evidence of *where* these transactions took

place, but TMD's operations purely existed abroad. ER 443-44. This evidence suggests that the transactions between HannStar and TMD could only have taken place outside the United States. ER 450-51.

What evidence there was at trial was largely devoted to demonstrating the magnitude of the Best Buy Plaintiffs' purchases from Toshiba of finished products that contained TFT-LCD panels, and Toshiba's participation in the price-fixing conspiracy vis-à-vis its vertically integrated supply chain. *See* ER 126-28, 135-36, 189-92, 235, 427, 430, 434-49. The jury's finding that Toshiba did not participate in the conspiracy left a dearth of evidence regarding whether other members of that conspiracy actually imported TFT-LCD panels. What remained were snippets of evidence that HannStar had sold TFT-LCD panels to Toshiba that Toshiba then incorporated into finished products. ER 235, 441, 444-45, 447, 513-14. But this evidence says nothing about whether HannStar itself engaged in import commerce, for "[t]he relevant inquiry [under the FTAIA] is whether the conduct of the defendants—not the plaintiffs—involves import trade or commerce." *Kruman*, 283 F.3d at 395.

The only evidence of TFT-LCD panels themselves being sold in the United States by anyone was evidence of sales of panels by "Samsung" and "Toshiba" to "Dell." ER 197-200. But the Best Buy Plaintiffs did not even purchase any finished products from Dell until after 2006, which is after the alleged conspiracy

period. ER 251-52. Those transactions—regardless of whether they involve "import commerce"—cannot serve as the basis for the Best Buy Plaintiffs' claims against HannStar.

4. There Was No Conspiracy To Fix The Prices Of Finished Products

At most, Plaintiffs presented evidence that finished products containing TFT-LCD panels were sold, perhaps as import commerce, by someone other than HannStar to unspecified Best Buy entities. That evidence is insufficient to prove import commerce exempt from the FTAIA because there was no evidence that the importation of finished products into the United States was an object of the conspiracy. The FTAIA looks to the object of the conspiracy for determining the applicability of the import commerce exclusion. *See Kruman*, 284 F.3d at 395-96 (holding that defendants had not engaged in import commerce because "the object of the conspiracy was the price that the defendants charged for their . . . services, not any import market for those goods"). Here, the evidence established that the only object of the TFT-LCD panels conspiracy was to fix the prices of TFT-LCD panels. There was never an allegation of a finished products conspiracy, and no evidence from which any finder of fact could find a conspiracy to fix the prices of finished products. Indeed several of the conspirators, including HannStar, did not even make finished products. ER 441-42, 444-45, 507-08, 696-97. The agreements reached at the crystal meetings and the vendor parties did not involve

the prices of finished products, much less finished products that were imported into the United States. ER 70-71, 96-98. The evidence relating to the agreements to fix the prices of TFT-LCD panels at the crystal meetings revealed only agreements regarding the price of the panels, and discussions of the retail price of finished products occurred in the context of ascertaining the supply and global demand for those panels. ER 96-98, 681, 686, 688. The criminal pleas establish only that HannStar and the other TFT-LCD panel manufacturers agreed to fix the prices of panels that were sold worldwide.[2] *See* ER 396-401, 748-49, 764-77.

The evidence here surely was insufficient to prove that HannStar or the TFT-LCD panels conspiracy imported or sold panels in the United States, but it

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[2] Though the criminal plea agreements indicate that "the primary purpose of which was to fix the price of certain TFT-LCD sold in the United States and elsewhere," these admissions are neither conclusive, nor sufficient to establish that the object of the TFT-LCD panels conspiracy was a U.S. import market, as opposed to merely setting the prices of TFT-LCD panels that were incorporated into finished products to be sold worldwide. Additionally, "[e]vidence of a plea of guilty is not conclusive in a civil action, but may be explained by the party concerned. The clear trend of authorities is that evidence of a guilty plea is admissible against a party in a subsequent civil proceeding but that it may be explained and is not conclusive, the weight of the evidence being for the trier of the facts." *State Farm Mut. Auto. Ins. Co. v. Worthington*, 405 F.2d 683, 687 (8th Cir. 1968); *see also Wells v. Coker*, 707 F.3d 756, 763 (7th Cir. 2013) ("[E]vidence related to an earlier guilty plea [is] rebuttable; it may be explained and contradicted." (citation and internal quotation marks omitted)). Given the lack of evidence that HannStar or its co-conspirators actually agreed upon or even discussed the final destination of the TFT-LCD panels or the finished products that contained those panels, the criminal pleas are in and of themselves insufficient to establish anything other than an agreement to fix the prices of TFT-LCD panels.

also did not establish that the conspiracy engaged in import commerce by directly affecting the U.S. import market. This case therefore is also distinguishable from those where courts have concluded that a defendant's conduct targeted the United States import market by "directly increase[ing] or decreas[ing] imports in the United States," *Turicentro*, 303 F.3d at 303, and thus triggered the import commerce exclusion.

For example, in the *Carpet Group* case from the Third Circuit, an association of oriental rug importers and wholesalers collectively pressured their foreign suppliers to refrain from selling rugs directly to U.S. retailers, in order to preserve their stronghold on the U.S. import market for oriental rugs. 227 F.3d at 64-65. The defendants' conduct fell within the import commerce exclusion because they "intended their alleged conduct to subvert commercial activities that solely impacted domestic commerce." *Id.* at 72. The specific object and effect of the conspiracy was to restrict the U.S. import market. *Id.* at 72.

In contrast, here, the evidence established that the only object of the TFT-LCD panel conspiracy was to fix the prices of TFT-LCD panels. The conspiracy did not specifically target or restrict output in any import market, much less that of the United States. In fact, the evidence indicated that the conspiracy was not concerned with any import markets, for its sole objective was to fix the prices of all TFT-LCD panels, regardless of where the finished products incorporating those

panels were eventually shipped or sold. By merely participating in a conspiracy to fix the prices of TFT-LCD panels—a conspiracy that did not target a U.S. import market—HannStar did not engage in import commerce. *Cf. Animal Sci. Prods.*, 654 F.3d at 470 ("[T]he relevant inquiry is whether the defendants' alleged anticompetitive behavior was *directed at* an import market." (citations, internal quotation marks omitted, and emphasis added)); *In re Vitamin C Antitrust Litig.*, 904 F. Supp. 2d 310, 317 (E.D.N.Y. 2012) (finding that a foreign conspiracy to fix the prices of vitamin C involved import commerce because discussions involved "volume of sales and exports to the United States" and "sales contracts [] show[ed] that defendants specifically contracted for the delivery of vitamin C to locations within the U.S.").

Even if HannStar and other members of the panels conspiracy contemplated that the United States would be the final destination of the finished products containing their TFT-LCD panels, the Seventh Circuit in *Motorola* held that such conduct still does not give to a Sherman Act claim under a "target" theory. *See* 2014 U.S. App. LEXIS 22408, at *17-18. The court reasoned that characterizing foreign price-fixing of inputs (which are integrated into U.S.-bound finished products) as conduct that targets the American domestic market "is just inflated rhetoric to describe what is obvious, that firms engaged in the price fixing of a component are critically interested in the market demand for the finished product. .

. .” *Id.* at *18. The court also held that such an application of the target theory would present a much more fundamental problem. It would nullify *Illinois Brick*’s indirect purchaser rule—which precludes indirect purchasers from recovering damages under the Sherman Act—by allowing a domestic purchaser of finished products (like the Best Buy Plaintiffs) to recover damages for overcharges incurred by a foreign direct purchaser in a foreign purchase of a price-fixed input. *See id.* at *18-19. It would also place domestic indirect purchasers in a better position than the foreign direct purchaser, who is barred under the FTAIA from seeking relief under the Sherman Act. The district court’s formulation here gave rise to this unworkable result.

B. Substantial Evidence Supported the Jury’s Finding that HannStar’s Conduct Did Not Satisfy the FTAIA’s Domestic Effects Exception

Because HannStar’s participation in the panels conspiracy was not conduct involving “import trade or import commerce,” the only way liability under the Sherman Act could attach is if the TFT-LCD panel’s conspiracy satisfied the FTAIA’s domestic effects exception. But, as discussed above, the jury found that the domestic effects exception did not apply in answering “No” to Question 5 of the special verdict form. This finding was supported by substantial evidence.

Foreign non-import conduct may nevertheless come back within the reach of the Sherman Act if it: (1) “has a direct, substantial, and reasonably foreseeable

effect" on domestic commerce;[3] *and* (2) "such effect gives rise to a claim" under Section 1 of the Sherman Act. 15 U.S.C. § 6b. "Conduct has a 'direct' effect for purposes of the domestic effects exception of the FTAIA 'if it follows as an immediate consequence of the defendant[s'] activity.'" *Hsiung*, 758 F.3d at 1094 (quoting *United States v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004)). "An effect cannot be 'direct' where it depends on such uncertain intervening developments." *LSL Biotechnologies*, 379 F.3d at 681.

Here, the damages claimed by the Best Buy Plaintiffs as a result of the overcharges on panels were indirect, as they purchased only finished products containing panels and purchased no TFT-LCD panels directly from the conspirators. The evidence at trial established that HannStar only produced TFT-LCD panels, and sold those panels to foreign manufacturers of finished products. ER 441-42, 444-45, 507-08, 696-97. Accordingly, the TFT-LCD panels conspiracy, and HannStar's participation in it, is not foreign conduct that satisfies the domestic effects exception, as the extent of the Best Buy Plaintiffs' damages stemming from their indirect purchases of TFT-LCD panels is the type of domestic effect that depends on "intervening developments." *LSL Biotechnologies*, 379 F.3d at 681.

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[3] The FTAIA also brings certain types of export trade or commerce back within the reach of the Sherman Act, but those provisions of the FTAIA are not applicable to this case.

The Seventh Circuit recently recognized as much in *Motorola*. There, the court held that the defendants' participation in a foreign conspiracy to fix the prices of TFT-LCD panels sold directly to Motorola's foreign subsidiaries was not conduct that fell under the FTAIA's domestic effects exception, even though those TFT-LCD panels were incorporated into cellphones and sold to plaintiff Motorola in the United States. 2014 U.S. App. LEXIS 22408, at *10. Though the court assumed that such conduct exhibited a direct, substantial, and reasonably foreseeable effect, it held that the domestic effects exception did not apply because the domestic effect of the anticompetitive conduct did *not* give rise to a Sherman Act claim—the second requirement of the FTAIA's domestic effects exception. Motorola was an indirect purchaser of TFT-LCD panels from the defendants; its injury was therefore derivative of the direct harm to the immediate victims of the defendants' price-fixing conduct—Motorola's foreign subsidiaries. *See id.* at *10-13. As an indirect purchaser, Motorola lacked standing to pursue damages under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). Consequently, Motorola's "derivative injury" did not give rise to a claim under the Sherman Act and the FTAIA's domestic effects exception did not apply. *See* 2014 U.S. App. LEXIS 22408, at *10-13.

Here, the jury properly found that the panels conspiracy did not involve conduct that satisfied the FTAIA's domestic effects exception. *See* ER 14.

Because the evidence established that HannStar participated only in a conspiracy to fix the price of TFT-LCD panels sold abroad, and the Best Buy Plaintiffs had purchased only finished products, the conspiracy did not have a "direct" effect on domestic commerce because as any damages suffered by the Best Buy Plaintiffs' purchases were derivative and indirect injuries, and not an "immediate consequence" of HannStar's foreign conduct. *Hsiung*, 758 F.3d at 1094. Even if it were, the domestic effects exception would not save the Best Buy Plaintiffs' claims because such indirect injury does not give rise to a Sherman Act claim. *See Motorola*, 2014 U.S. App. LEXIS 22408, at *10-11.

II. Plaintiffs Failed To Prove Individual Injury-In-Fact

The judgment must be reversed due to another fundamental problem: throughout the trial, the Best Buy Plaintiffs presented evidence that treated all *six* entities as one, and made no attempt to distinguish whether and to what extent each of the individual six Best Buy entities suffered individual injuries caused by the anticompetitive conduct of HannStar and the TFT-LCD panels conspiracy. This generalized approach was insufficient to prove the more stringent requirements of antitrust standing under Section 4 of the Clayton Act, let alone basic, Article III standing. Basic Article III standing requires "proof of injury-in-fact, causation, and redressability." *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)). But "[t]he doctrine of

antitrust standing requires an inquiry beyond that performed to determine standing in the constitutional sense." *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 448 (9th Cir. 1985). A plaintiff must be the "proper party to bring a private antitrust action," and "this determination . . . requires an evaluation of the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them." *Id.* at 448-49 (citing *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.1 (1983)). "[A]n antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation." *Gerlinger*, 526 F.3d at 1255 (citation and internal quotation marks omitted).

Here, there was absolutely no evidence regarding the particularized, individual antitrust injury (or the amount of damages) suffered by each of the six separate Best Buy Plaintiffs—(1) Best Buy Co., Inc.; (2) Best Buy Purchasing LLC; (3) Best Buy Enterprise Services, Inc.; (4) Best Buy Stores, L.P.; (5) Bestbuy.com, LLC; and (6) Magnolia Hi-Fi, Inc. The fact that the Best Buy Plaintiffs treated all six of these entities as one throughout trial is inconsequential, as each of these individual plaintiffs still had the burden of establishing individualized injury-in-fact. *See Westwood Lumber Co. v. Weyerhaeuser Co.*, No. CV 03-551 PA, 2003 WL 24892052, at *3 (D. Or. Dec. 29, 2003) ("[E]ach Plaintiff also had to show it personally sustained injuries as a result of Defendant's

anti-competitive conduct."); *In re Toyota Motor Corp. Unintended Acceleration, Marketing, Sales Practices, and Prods. Liability Litig.*, 826 F. Supp. 2d 1180, 1188 (C.D. Cal. 2011) ("Whether the domestic plaintiffs have established Article III standing is irrelevant to whether foreign Plaintiffs have done so because *each Plaintiff must allege his or her own injury in fact*." (emphasis added) (citing *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975))); *In re Apple iPhone Antitrust Litig.*, 11-cv-6714, 2013 U.S. Dist. LEXIS 116245, at *18-20 (N.D. Cal. Aug. 15, 2013) (requiring individualized showings of injury-in-fact as to each plaintiff to satisfy Article III standing).

The lack of distinction between the six Best Buy Plaintiffs throughout the course of the trial, and especially in the damages estimations, precluded the jury from finding that each of the six individual Best Buy Plaintiffs actually suffered antitrust injury. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (requiring that "every class member must prove at least some antitrust impact"); *cf. Bise v. Int'l Brotherhood of Elec. Workers AFL-CIO Local 1969*, 618 F.2d 1299, 1305 (9th Cir. 1979) (upholding damages award only where "there was sufficient evidence of causal connection between the Union's conduct and the actual injuries sustained by *each of the plaintiffs*"). There was no evidence as to the nature of each of the Best Buy Plaintiffs' individual injury, whether the injury flowed from the TFT-LCD panels conspiracy or was directly caused by it, or

whether the individual injury is even of the type the antitrust laws were intended to prevent. *See Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (antitrust injury requires a showing of (1) unlawful conduct; (2) causing injury to the plaintiff; (3) that flows from that which makes the conduct unlawful; and (4) that is of the type the antitrust laws were meant to prevent). The Best Buy Plaintiffs failed to establish the requisite individual and particularized antitrust injury as to each plaintiff. The judgment should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Dated: December 17, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants-Cross-Appellees state that the following cases are related actions raising closely related issues:

- *Best Buy Co., Inc., et al. v. HannStar Display Corp.*, Cross-Appeals Nos. 14-16144, 14-16184;
- *United States v. Leung*, No. 13-10242;
- *United States v. Hui Hsiung*, Nos. 12-10492, 12-10493, 12-10500, 12-10514.

s/ Belinda S Lee
Belinda S Lee

ADDENDUM

Section 1 of the Sherman Act, 15 U.S.C. § 1

Every 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a

Sections 1 to 7 of this title 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 sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) Dec 17, 2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Belinda S Lee

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)