Nos. 12-10500, 12-10514
(consolidated with Nos. 12-10492, 12-10493)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

AU Optronics Corporation,

Defendant-Appellant.

United States of America,

Plaintiff-Appellee,

v.

AU Optronics Corporation America,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California, No. 3:09-cr-00110-SI
District Judge Susan Illston

DEFENDANTS-APPELLANTS' AU OPTRONICS CORPORATION AND AU OPTRONICS CORPORATION AMERICA PETITION FOR PANEL REHEARING

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INTRODUCTION

Pursuant to Fed. R. App. P. 40, defendants AU Optronics (AUO) and AUO America hereby request panel rehearing. The corporate defendants also have submitted a petition for rehearing en banc under separate cover. Their en banc petition calls for reconsideration of the broad legal issues concerning the Foreign Trade Antitrust Improvement Act (FTAIA) decided in the panel's opinion. But even setting all of those issues aside, panel rehearing is necessary to (a) correct factual errors in the panel opinion, and (b) address issues related to AUO's sentence of a $500 million fine arising from the central holding of the opinion.

First, it appears that the panel may have fundamentally misapprehended the evidence in this case. This case was tried on the basis of indirect sales. The government presented evidence that the defendants sold components overseas, and that those components "made their way" into the United States. It argued that the defendants were guilty on that basis. In affirming based only on the "import trade" provision of the FTAIA, however, the panel found that these defendants sold components "directly" into the United States. That is untrue—as the government has conceded, the evidence proved the contrary.

Second, even ignoring that error, AUO is entitled to resentencing under the panel's opinion. In resting the defendants' convictions on import trade alone, the

panel explicitly refused to affirm those convictions based on overseas and indirect sales. But AUO's sentence was indisputably based on overseas and indirect sales. Because the defendants' convictions were not, and could not have been, affirmed on that basis, AUO's sentence is invalid. At a minimum, the panel should accept additional briefing and argument to consider this problem raised by its somewhat unexpected approach to this case.

REASONS FOR REHEARING

Rehearing is justified when a panel overlooks or misapprehends a material point of fact. Fed. R. App. P. 40(a)(2). That is what happened in this case. Moreover, in light of the panel's decision to affirm the convictions on different bases than the convictions were obtained below, AUO's sentence must be reconsidered.

A. Background

One of the primary issues below had to do with the application of the Foreign Trade Antitrust Improvement Act (FTAIA), 15 U.S.C. § 6a. The defendants argued throughout the proceedings that because this case focused on foreign conduct and foreign defendants, the prosecution could only proceed under one of the two exceptions to, or exclusions from, the FTAIA: (1) the import trade exception, or (2) the domestic effects exception. They argued that the government

failed to plead or prove either exception.

The government presented a variety of arguments in response. Its core claim was that, whether or not the FTAIA limited the reach of the Sherman Act, AUO was liable for overseas sales of goods that "made their way" into the United States as components of finished products. In a series of rulings, the district court agreed with the government. It instructed the jury accordingly, denied the defendants' motion for acquittal on the same basis, and also sentenced the defendants based on overseas sales of goods that made their way to the United States.

This panel did not affirm on those grounds. It explicitly declined to reach the broader argument pressed by the government that indirect sales were punishable under the FTAIA. Slip op. at 39-40. Instead, it stated that it was affirming the convictions based solely on direct import sales. *See, e.g.*, id. at 7, 35-36. But the panel's reliance on this ground for affirmance is based on a misstatement of the evidence.

B. Factual Errors

The panel's opinion rests on a false factual claim that AUO sold panels directly into the United States. In the opinion, the same misstatement is made several times, in two basic forms.

First, in explaining its decision to affirm on import grounds, the panel stated that there were "$600 million in panels that AUO and AUOA sold directly in the United States." Slip op. at 41. That is false. The $600 million figure appears to come from government trial exhibit 775 (ER 617; *see also* Govt. Brief at 55-56 (citing Exh. 775). But that exhibit showed only industry wide sales, not any sales by AUO itself.[1] In other words, that exhibit showed only that *other manufacturers* had sold approximately 1% of raw panels directly into the United States over five years, totaling around $600 million.[2]

It appears that the panel mistakenly attributed other manufacturers' sales to AUO. The government has at times argued that AUO could be held vicariously liable for other companies' sales. Even if that could be true as an abstract legal

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[1] As to the entire panel industry, the government estimated (a) $71.8 billion of worldwide sales, (b) $23.5 billion of direct and indirect U.S. sales, and (c) $638 million of direct U.S. sales. As to AUO itself, the government estimated $2.34 billion of indirect U.S. sales. It did not offer any evidence of direct U.S. sales by AUO, and thus did not estimate any sales figure.

[2] At other points in the opinion, the panel appeared to recognize that the $600 million in direct sales *could have* included sales by members of the alleged conspiracy other than AUO. Slip op. at 8 ("[S]ales of panels by Crystal Meeting participants to the United States generated over $600 million in revenue."); *id*. at 35 ("The Crystal Meeting participants earned over $600 million from the importation of TFT-LCDs into the United States."). But these statements are not necessarily inconsistent with the panel's finding that AUO was responsible for all of the direct sales.

matter, it could not be true in this case. The district court refused to give a *Pinkerton* instruction, and the jury made no finding that other companies' direct sales were known or foreseeable to AUO, which would be necessary for vicarious liability. Moreover, if vicarious liability is indeed the basis of the panel's affirmance here, it is certainly not apparent from the panel's opinion, which appears to base liability on AUO's own direct import sales. Those sales never happened.[3]

Second, and relatedly, the panel stated that "[t]rial testimony established that AUO imported over one million price-fixed panels per month into the United States." Slip op. at 35. Again, that is simply wrong—and indeed even more egregiously so than the $600 million statement.[4] The millions of panels per month figure appears to come from the trial testimony of government witness Michael

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[3] The government in its appellate brief also relied on the testimony of HP procurement official Tim Tierney. (Govt. Brief 56 (citing ER1443)). Tierney testified he remembered an occasion where AUO shipped "one, or a few" raw panels directly to the U.S. that were used as samples—"only for qualification," not for production. (ER1445.) Tierney did not testify that HP paid for these panels. Suffice it to say, Tierney did not testify that AUO sold millions of dollars of panels directly into the United States.

[4] Notably, the panel's two misstatements are inconsistent with each other. Obviously, if AUO sold more than a million raw panels per month into the United States over five years, the revenue from such sales would have vastly exceeded $600 million.

Wong. (*See* Govt. Brief at 8 (citing ER 1418, Wong testimony)). Wong testified that AUO sold, at peak, more than a million panels a month to United States-headquartered companies, such as Dell and Apple.

But as the context of Wong's testimony and the evidence as a whole makes clear, these were not sales directly into the United States. While Dell and Apple are headquartered here, they have no manufacturing facilities here. More specifically, the sales Wong described were foreign sales of components to overseas OEMs who resold their finished products to Dell and Apple. And in fact, not all such panels ever made it into the United States—after all, Apple and Dell sell a majority of their consumer products overseas. In short, while it is concededly true that many AUO panels eventually made their way into the United States, it is not true that AUO sold raw panels directly into the United States. Wong was describing indirect sales, not direct sales.

* * * *

The government's own brief on appeal actually described the evidence far more accurately than the panel's opinion.

> During the conspiracy, the participants' TFT-LCD panels reached the United States in two ways. First, 2.6 million raw panels—sold for more than $638 million—were shipped from the conspiring manufacturers to customers in the United States. ER 617; SER 2075-76; *see also* ER 1443. Second, $23.5 billion

> in panels were imported into the United States as part of finished products, such as notebook computers and computer monitors. SER 2078-79.

(Govt. Brief at 8.) The former category consisted of sales by other manufacturers, not AUO. The latter category consisted of indirect sales, not direct import sales. The government never argued that AUO itself sold raw panels directly into the United States, and the evidence showed nothing of the sort.[5] In fact, the evidence showed zero direct sales.

The panel should grant rehearing. Given that the panel appeared to base liability solely on AUO's direct sales of raw panels into the United States, the panel's misstatement of the evidence fundamentally undermines its ruling on the defendants' FTAIA claims. If the panel intended to rule that AUO is vicariously liable for other companies' sales, that is an important legal principle that should be stated directly and clearly. Likewise, if, contrary to all other courts that have considered the question, the panel intended to rule that indirect sales by overseas components manufacturers constitute "import trade," that is an important legal principle that should be stated directly and clearly. Whatever the result, the opinion cannot rest on the fundamentally flawed factual claim that these

[5] In response to the defendants' Rule 29 argument that there was no evidence of direct import sales by AUO, the government responded that the defense claim was "true but irrelevant." (ER 895.)

defendants sold raw panels directly into the United States.

C. Sentencing

Even ignoring those factual errors, however, the logic of the panel's ruling requires resentencing. The sentences of AUO and the other defendants below were based on overseas sales of panels that made their way into the United States. If, as the panel held, the convictions can only be based on direct import sales, then AUO's sentence of a $500 million dollar fine is invalid.

1. Alternative Fine Statute Instruction

The government sought a fine against AUO of one billion dollars in this case. Because that target fine exceeded the hundred million dollar statutory maximum under the Sherman Act, the government proceeded under the Alternative Fine Statute, which permits a fine twice the amount of the amount gained from the charged offense. 18 U.S.C. § 3571(d). Given its billion dollar target fine, the government therefore alleged in the indictment that the charged conspiracy resulted in gross gains of over five hundred million dollars.

Application of the Alternative Fine Statute requires a jury finding. *Southern Union Co. v. United States*, 132 S.Ct. 2344 (2012). The jury was thus required to make a finding of the gross gains (i.e., profits) that resulted from the conspiracy, and it did find gains in excess of $500 million. But the jury's finding was not

based solely on direct sales of raw panels. The jury instructions stated explicitly that the jury could rely on both direct and indirect sales. The jury was told:

> you should total the gross gains to the defendants and other participants in the conspiracy from affected sales of (1) TFT-LCD panels that were manufactured abroad and sold in the United States or for delivery to the United States; or (2) *TFT-LCD panels incorporated into finished products such as notebook computers and desktop computer monitors that were sold in the United States or for delivery to the United States*.

(ER 605, emphasis added.) Under the logic of the panel's ruling, however, the jury should have only considered the gains from alternative (1): i.e., raw panel sales.

The government's arguments to the jury on overcharge, moreover, were based primarily on indirect sales. The government told the jury that it should consider all "sales of LCD panels that *ended up here* in the U.S. in the computer products, monitors, laptops, and televisions." (Tr. 4816, emphasis added.) It put this figure at $23 billion (Tr. 4816-17)—far more than the $600 million in direct sales on which the panel relied. And it said that profits on that $23 billion were easily in excess of $500 million, thus justifying the jury's finding under the Alternative Fine Statute.

Moreover, by the government's own estimates, it is mathematically

impossible that gains from raw panel sales could have exceeded $500 million. As noted above, the government itself estimated that raw panel sales into the United States, by all conspirators over five years, totaled $638 million in gross sales. The profit margin was disputed below, but government experts put the figure at 19%. (ER344.) Even accepting the government's figures as correct, 19% of $600 million is far less than $500 million.

The Alternative Fine Statute allows fines based on a defendant's "pecuniary gain from the offense."[6] Under the panel's opinion, the only offense validly prosecuted under the Sherman Act was the direct shipments of raw panels constituting import trade. Even accepting the government's estimates of sales and profit margins, the gains from direct sales were a fraction of $500 million. In light of its ruling on imports, this Court should remand the case for reconsideration of AUO's $500 million fine.

2. Guidelines Calculations

The same problem also fundamentally undermines the Guidelines "volume of commerce" that the district court used to sentence AUO. Like its fine argument, the government's argument under the Guidelines was that the court

[6] Nor is there any principle of "relevant conduct" under the Alternative Fine Statute that allows fines to be based on anything other than gain from the offense of conviction itself.

should include all "panels that *made their way* into the United States in finished products." (ER323, emphasis added.) Applying U.S.S.G. § 2R1.1, it thus calculated the volume of affected commerce attributable to AUO as "at least $2.34 billion." (*Id*.) It sought a severe fine from the corporation on that basis. (ER362.)

While the district court imposed lighter sentences than the government sought, it nonetheless accepted the government's premise that sentencing should be based on the harm caused by indirect sales. Based on indirect sales, it accepted the government's figures and found a volume of affected commerce of $2.34 billion. (ER 240.) It thus imposed a half-billion dollar fine for the corporation based on the "far-reaching conspiracy" that "caused exactly the damages set out" by the government and probation officer. (ER 245.)

Once again, that ruling cannot be squared with this panel's ruling affirming the conviction. The panel affirmed the conviction solely on direct import sales totaling $600 million. Under that ruling, the district court's finding of $2.34 billion of affected commerce is unequivocally wrong.[7] A mistake in calculating the Guidelines mandates remand, even if it appears that the district court would

[7] U.S.S.G. § 2R1.1 states that the calculation for the volume of affected commerce is limited to the commerce "attributable to an individual participant in a conspiracy." The $600 million figure noted by the panel includes direct shipments by all co-conspirators. The amount attributable to AUO is lower, and since the $600 million represents gross sales, the gain is lower still.

have imposed the same sentence absent the mistake. *United States v. Munoz–Camarena*, 631 F.3d 1028, 1030-31 (9th Cir. 2011). Moreover, arguments for a lesser sentence under § 3553(a) would have a much stronger basis now that the panel has clarified that only direct sales—a tiny sliver of the original case—are a crime under U.S. law.

In short, under the panel's ruling on direct import sales, the Guidelines were incorrectly calculated, and AUO now has a much stronger basis for mitigation. The case should be remanded for resentencing so that the district court can consider these arguments and impose a fine consistent with the panel's ruling.

CONCLUSION

Rehearing is justified because the panel misapprehended the facts of the case. Rehearing is also justified so that AUO can be sentenced on a basis that is consistent with the panel's ruling on direct sales.

Dated: August 25, 2014

Respectfully Submitted,

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CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing reply brief is proportionately spaced, has a typeface of 14 points, and contains 2,743 words.

Dated: August 25, 2014

/s/ Donald M. Horgan
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