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

IN THE

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HUI HSIUNG,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HSUAN BIN CHEN,

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

HSUAN BIN CHEN'S AND HUI HSIUNG'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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BAIL STATUS OF DEFENDANTS

The district court and this Court initially denied bail pending appeal. Mr. Chen and Dr. Hsiung accordingly began serving their 36-month sentences on February 12, 2013. However, after hearing oral argument, the panel granted bail pending appeal. Mr. Chen and Dr. Hsiung were released on bail on December 9, 2013.

INTRODUCTION AND RULE 35.5 STATEMENT

This case raises vitally important questions regarding the government's power to prosecute foreign conduct under a *per se* theory of criminal antitrust liability. Until the panel released its opinion last month, this Court's decision in *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), had settled the central question whether *per se* or rule-of-reason analysis applies. *Metro Industries* held that, in contrast to domestic conduct, foreign conduct can never be declared *per se* illegal: Instead, "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. This is a sound rule, grounded in the differences between foreign and domestic industry and the general need for caution when extending U.S. laws to foreign conduct.

Nevertheless, the panel apparently would have decided *Metro Industries* differently. But instead of urging en banc reconsideration, the panel took a short

cut: It effectively overruled *Metro Industries*, insisting that the Court could not possibly have meant what it said in that decision. That approach contravenes not only *Metro Industries*, but also this Court's case law preventing three-judge panels from rewriting binding circuit precedent. If the panel's decision is permitted to stand, it will provide a model for future panels that want to circumvent this Court's case law without en banc review. The panel's decision teaches that all that is necessary to depart from prior precedent is a reference to intervening authority (never mind whether that authority actually creates a conflict) and a reimagining of the prior holding (never mind the actual language of the opinion). Rehearing is necessary to restore uniformity to this Court's antitrust law and its rules concerning the *stare decisis* effect of circuit precedent. Fed. R. App. P. 35(b)(1)(A).

The panel further erred in refusing to consider the argument that the Sherman Act does not extend extraterritorially to punish this foreign conduct at all. Rather than grapple with Supreme Court precedent demonstrating that this prosecution could not proceed in a U.S. court, the panel deemed the issue waived. Because that ruling is out of line with this Court's waiver rules and the Supreme Court's extraterritoriality doctrine, rehearing should be granted.

Finally, the panel approved jury instructions that contravene extraterritoriality precedents and interpreted the Foreign Trade Antitrust

Improvements Act (FTAIA) in conflict with other circuits. The case should be reheard on these grounds as well.

In short, this case raises "questions of exceptional importance" regarding both substance (the limits of U.S. law) and procedure (a panel's authority to discard circuit precedent). Fed. R. App. P. 35(b)(1)(B). The petition for rehearing should be granted.

FACTS AND PROCEDURAL HISTORY

In 2010, the government charged AU Optronics Corporation (AUO), AUO America, and company executives Hsuan Bin Chen and Hui Hsiung with conspiring to fix prices of thin-film transistor liquid-crystal display (TFT-LCD) panels in violation of Section One of the Sherman Act, 15 U.S.C. § 1. The government alleged that the defendants, along with other Taiwanese and Korean manufacturers of TFT-LCD panels, had agreed on prices at so-called "Crystal Meetings" in Taiwan and Korea. ER 1728. The government further contended that this foreign conduct had an effect on domestic commerce because some of the TFT-LCD panels eventually wound up in the United States. ER 1730.

Mr. Chen and Dr. Hsiung—both Taiwanese citizens living in Taiwan—voluntarily traveled to the United States to face the charges. Once here, they moved to dismiss under *Metro Industries*. ER 1691-93; ER 1681-82. Their

argument was simple: The government was proceeding under a *per se* theory of antitrust liability, but *Metro Industries* held that "Foreign Conduct Cannot Be Examined Under the Per Se Rule." 82 F.3d at 844. The district court denied the motion, declining to follow *Metro Industries* in favor of a First Circuit decision suggesting that *per se* analysis can apply to foreign conduct with substantial and intended domestic effects. ER 189-191. Defendants then moved to dismiss because the indictment did not even allege a substantial and intended domestic effect. ER 1648-63, ER 1646-47. The court denied that motion, too, concluding that the case did not implicate extraterritoriality principles at all. ER 184.

The evidence at trial proved otherwise. The conspiracy charge centered on pricing discussion at dozens of Crystal Meetings—not one of which occurred in the United States. ER 1332-33, 1335, 1431-32. The participants in those meetings were foreign residents who worked at companies incorporated and headquartered overseas. ER 616, 1724-25. The TFT-LCD panels were all manufactured abroad, sold almost exclusively to foreign companies, and shipped to foreign locations to be integrated into consumer goods. ER 1311, 1326, 1367-68, 1438-42, 1461. While some of these finished products eventually came into the United States through the stream of commerce, the overwhelming majority of panels remained overseas. ER 1312-13.

By the trial's end, the district court acknowledged that the evidence had concerned predominantly foreign conduct, necessitating jury instructions on the extraterritorial application of the Sherman Act. ER 600. Over the defendants' objection, the court told jurors they could convict if they found "at least one member of the conspiracy took at least one action in furtherance of the conspiracy in the United States." *Id.* Alternatively, the court instructed that the Sherman Act applied extraterritorially if jurors concluded "the conspiracy had a substantial and intended effect in the United States." *Id.*

The jury subsequently voted to convict. In post-trial motions, defendants renewed their argument that their convictions were improperly based on a *per se* theory of liability, contravening *Metro Industries*' holding that foreign conduct necessitates rule-of-reason analysis. They further contended that, in light of the strong presumption against extraterritoriality and the trial's focus on foreign individuals and events, the Sherman Act could not reach beyond U.S. borders to criminalize their foreign conduct. The district court rejected these claims. Thereafter, it imposed a 36-month term of imprisonment and $200,000 fine on both Mr. Chen and Dr. Hsiung.

The panel affirmed the convictions. Although it acknowledged *Metro Industries*' language that "application of the *per se* rule is not appropriate where

the conduct in question occurred in another country," it refused to "read the case as controlling." ADD21. It offered a mishmash of reasons why, some focused on contending that *Metro Industries* is no longer good law, and others suggesting the case could not have truly meant what it said. Ultimately, the panel believed it had rounded up enough "ambiguity" to rewrite *Metro Industries*, overruling its legal analysis and rendering it a relic confined to its facts. *Id.*

The panel further rejected the argument that the Sherman Act could not be extended extraterritorially, deeming this claim waived. ADD16. And the panel held that the district court had not erred in instructing the jury that the Sherman Act can apply extraterritorially based on a single overt act in the United States, because the panel thought separate instructions on the FTAIA cured the problem with the erroneous extraterritoriality instruction. ADD17-19. In sum, the panel ruled that the foreign aspects of this case made no difference whatsoever to the defendants' legal arguments.

REASONS WHY REHEARING SHOULD BE GRANTED

I. THE PANEL EFFECTIVELY—AND IMPROPERLY—OVERRULED *METRO INDUSTRIES*

Arguments for rehearing don't get more straightforward than this: Read *Metro Industries*, and then read the panel decision. The two cannot be reconciled. The three judges assigned to hear this case clearly disagree with *Metro Industries*'

rule that foreign conduct must be assessed under the rule of reason. But that disagreement provides no grounds to overrule the case; only this Court sitting en banc may discard circuit precedent. None of the justifications the panel offered to avoid that requirement withstand scrutiny. By rewriting *Metro Industries* instead of following it, the panel establishes a dangerous precedent with ramifications extending beyond the havoc it wreaks on antitrust law: this Court's decisions will be binding only when a three-judge panel deigns to be bound. Rehearing is warranted.

1. *Metro Industries* held that Sherman Act cases premised on foreign conduct must be analyzed under the rule of reason. Indeed, it articulated that bright-line rule some *five times*. At the outset of the opinion: "*[P]er se* analysis is not appropriate" when considering foreign conduct. 82 F.3d at 843. And again, in the title of the section setting forth the rule: "Foreign Conduct Cannot Be Examined Under the Per Se Rule." *Id.* at 844. And yet again, in the first sentence of the section: "Even if Metro could prove that [a restraint] would require application of the *per se* rule if [it] occurred in a domestic context, application of the *per se* rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-845. And still once more, after justifying the rule: "[T]he potential illegality of actions occurring outside the United States requires

an inquiry into the impact on commerce in the United States, regardless of the inherently suspect appearance of the foreign activities." *Id.* at 845. Then a final time: "[W]here a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis." *Id.*

The panel read all this language to "have created some ambiguity" regarding whether foreign conduct can be deemed *per se* illegal. ADD21. But *Metro Industries*' holding is clear: All Sherman Act cases based on foreign conduct require rule-of-reason analysis, even if the conduct is *per se* illegal in the domestic arena. The panel had no authority to decline to "read the case as controlling" simply because it would have decided *Metro Industries* differently. *Id.*

2. In efforts to avoid the "unassailable" rule that "a three-judge panel may not overrule a prior decision of the court," *Miller* v. *Gammie*, 335 F.3d 889, 899 (9th Cir. 2003), the panel claimed that *Metro Industries* "is 'clearly irreconcilable' with Supreme Court precedent." ADD21 (quoting *United States* v. *Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1112 (9th Cir. 2012)). But this exception permitting unilateral panel action based on intervening higher authority is exceedingly narrow. "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority

to 'cast doubt' on the prior circuit precedent." *Lair* v. *Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted). Even "strong signals" from the Supreme Court do not suffice. *United States* v. *Green*, 722 F.3d 1146, 1150 (9th Cir. 2013). This "high standard" was not even close to satisfied here. *United States* v. *Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011).

To conclude otherwise, the panel cited Supreme Court cases holding that price fixing is *per se* unlawful in the domestic sphere. ADD20-21. The panel's main case for this point— *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)—predated *Metro Industries* by some 56 years. To put it mildly, it is not "intervening" authority. *See Miranda B.* v. *Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003) (refusing to revisit circuit precedent in light of Supreme Court case decided before that circuit precedent). Even more importantly, *Metro Industries* specifically considered precedents applying *per se* analysis to domestic conduct and held that these rules could not be extended to foreign conduct. As the decision explained, "[t]he conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets." 82 F.3d at 845 (quoting 1 Phillip Areeda & Donald F. Turner, *Antitrust Law* 237 (1978)). Thus, "[*e*]*ven if*" a particular restraint "would require application of the *per se* rule if [it] occurred in a domestic context, application of

the *per se* rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-845 (emphasis added).

The Supreme Court has never considered—let alone rejected—*Metro Industries*' reasoning that foreign conduct necessitates different standards of antitrust liability. As the panel itself recognized, the recent cases it cited merely "reiterate[]" and serve as "confirmation" of the *Socony-Vacuum* principle that *domestic* price fixing is *per se* unlawful. ADD20-21. But where an intervening decision does "nothing more than confirm" a holding that "existed when [this Court] decided" the precedent that has allegedly been superseded, the decisions "are *not* 'clearly irreconcilable.'" *United States* v. *Flores-Mejia*, 687 F.3d 1213, 1215 (9th Cir. 2012) (quoting *Miller*, 335 F.3d at 900) (emphasis added).

Indeed, the only recent Supreme Court majority opinion the panel cited actually reinforces *Metro Industries*' logic.[1] In *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, the Supreme Court overruled its precedent applying *per se* analysis to vertical price fixing in the domestic context. 551 U.S. 877, 893 (2007). *Leegin* explained that the *per se* rule is appropriate only when a "court can predict with confidence that [a restraint] would be invalidated in all or almost

[1] The other decision cited by the panel was a *dissent*, which cannot possibly constitute intervening binding authority, and which said nothing about foreign conduct. ADD20 (citing *F.T.C.* v. *Actavis*, 133 S. Ct. 2223, 2239 (2013) (Roberts, C.J., dissenting)).

all instances under the rule of reason." *Id.* at 886-887. *Metro Industries* held that courts lack that confidence when considering foreign conduct because "the conventional assumptions * * * are not necessarily applicable in foreign markets." 82 F.3d at 845 (internal quotation marks omitted). The Supreme Court's recent shift away from *per se* standards of liability thus confirms the correctness of the *Metro Industries* rule.

3. The panel's grab bag of other reasons to ignore *Metro Industries* likewise fails. First, seizing on the fact that *Metro Industries* alternatively held that the particular restraint in that case would not warrant *per se* treatment even in the domestic sphere, the panel characterized the separate foreign-conduct ruling as "wholly superfluous, and unnecessary." ADD22. But "where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *Miranda B.*, 328 F.3d at 1186 (citation omitted); *see also United States* v. *Bajakajian*, 84 F.3d 334, 337 n.6 (9th Cir. 1996) (alternative holdings constitute "binding precedent").

Nor does anything in *Metro Industries* suggest the foreign-conduct holding was meant to be "limited to the unique facts" of the case. ADD22. The panel

emphasized that *Metro Industries* was "not a price-fixing case," ADD21, but the trigger for the *Metro Industries* rule is *foreign* conduct, not any particular *type* of conduct. *See* 82 F.3d at 845 ("where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis"). Indeed, *Metro Industries* specifically singled out "price fixing in a foreign country" as an illustration of the type of conduct to which the bright-line rule would apply. *Id.* As this Court has observed, a "broad rule" like the one announced in *Metro Industries* "must be applied in the many factually distinct situations that come before the lower courts," *Musladin* v. *Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009) (internal quotation marks omitted). The panel therefore had no basis to confine the decision to its facts.

Moreover, limiting *Metro Industries* to its facts creates bad law. *Metro Industries* properly recognized that the rationale undergirding the *per se* theory of liability—that the conduct "in most of its manifestations, is potentially very dangerous with little or no redeeming virtue" —is (as this Court put it) wholly "inapplicable to foreign restraints that, in many instances, either pose very little danger to American commerce or have more persuasive justifications than are likely in similar restraints at home." 82 F.3d at 845 (internal quotation marks omitted). And the wisdom of the *Metro Industries* rule has only become more

apparent over time, as the Supreme Court has emphasized the need for restraint not only in the *per se* application of the Sherman Act, *see Leegin*, 551 U.S. at 886-887, but also in the extension of domestic laws to the foreign context in general, *see* Part II, *infra*.

Finally, while the panel stated that "[t]he conduct here did not occur in a solely foreign bubble," ADD23, it notably stopped short of holding that this Sherman Act prosecution was not based on foreign conduct. And for good reason: This case involves more foreign conduct than *Metro Industries* itself, which concerned a U.S. plaintiff's allegations that the defendant and its U.S. subsidiaries had caused injury in the United States by engaging in predatory pricing and blocking the import of a product designed for the U.S. market. 82 F.3d at 841-842, 847. Because this case falls squarely within *Metro Industries*' holding that "Foreign Conduct Cannot Be Examined Under the Per Se Rule," *id.* at 844, the panel had no authority to instead conclude that foreign price-fixing is "subject to *per se* analysis under the Sherman Act." ADD20.

* * *

In attempting to bypass *Metro Industries*, the panel decision conflicts not only with that opinion, but also with this Court's precedent establishing what constitutes the law of the circuit and when that law may be overruled by a three-

judge panel. Rehearing is necessary to restore certainty regarding the precedential effect of this Court's case law.

II. THE PANEL DECISION CONTRAVENES RECENT EXTRATERRITORIALITY PRECEDENTS

The panel's analysis of the foreign conduct in this case suffers from yet an even more fundamental problem: the Sherman Act cannot be stretched to criminalize defendants' foreign actions at all. The panel skirted this issue by deeming the extraterritoriality argument waived, but its analysis finds no grounding in the record, law, or logic. Review is warranted to give effect to the Supreme Court's recent declaration that when a statute like the Sherman Act "gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

1. The Supreme Court has recently reshaped extraterritoriality doctrine by adopting a more muscular presumption against extending U.S. law beyond our nation's borders. The only way "to rebut the presumption" is for a statute to "evince a clear indication of extraterritoriality." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (internal quotation marks omitted). That rule should have controlled this case: The Sherman Act contains no clear statement of extraterritorial effect, and it therefore cannot be extended to criminalize defendants' conduct half a world away.

In rejecting this argument, the district court invoked the Supreme Court's statement in *Hartford Fire Ins. Co.* v. *California* 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," 509 U.S. 764, 796 (1993). ER199. But *Morrison* unequivocally repudiated this "effects test" of extraterritoriality, holding that courts must "apply the presumption [against extraterritoriality] in all cases" rather than attempt to "divin[e] what Congress would have wanted if it had thought of the situation." 561 U.S. at 261. This Court has recognized that *Morrison* radically recalibrated how courts assess the extraterritorial reach of U.S. law, requiring reconsideration of prior extraterritoriality determinations. For example, in *United States* v. *Chao Fan Xu*, the Court held that the Racketeer Influenced and Corrupt Organizations Act does not apply extraterritorially under *Morrison*, even though foreign conduct had previously been penalized under the anachronistic "effects" test. 706 F.3d 965, 974 (9th Cir. 2013). Because that reasoning applies equally here, defendants' convictions cannot stand.

2. Rather than grapple with the obvious problems with the district court's opinion, the panel claimed the extraterritoriality argument had been waived because defendants proposed jury instructions at the end of trial requiring the jury to find a substantial and intended effect on U.S. commerce. ADD16. But by

then, the district court had "repeatedly held" that the Sherman Act applies extraterritorially. ER199. Defendants were "entitled to accept the judge's ruling as final" without waiving the extraterritoriality claim. *United States* v. *Arlt*, 41 F.3d 516, 523-524 (9th Cir. 1994). Indeed, the district court understood as much when it rejected the extraterritoriality argument on the merits—rather than on grounds of waiver—in denying defendants' post-trial motions. ER199. Because this Court's "waiver rules do not apply where, as here, the district court nevertheless addressed the merits of the issue," the panel erred in declining to consider the extraterritoriality claim. *Petersen* v. *Boeing Co.*, 715 F.3d 276, 282 n.5 (9th Cir. 2013) (internal quotation marks omitted).

The panel's waiver ruling is all the more troubling because extraterritoriality principles protect not just individuals, but sovereignties. Confining U.S. law to its proper geographic scope "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664. For this reason, the Supreme Court and this Court have found it necessary to consider extraterritoriality when that issue was not even pressed or passed upon in the lower courts—as was the case in both *Kiobel* and *Chau Fan Xu*. Certainly extraterritoriality should be considered here, where the argument

was erroneously rejected below. The Court should grant rehearing and rule that the Sherman Act does not criminalize foreign conduct.

III. THE PANEL'S APPROVAL OF THE JURY INSTRUCTIONS DEPARTS FROM PRECEDENT

Even if the district court had been correct that the Sherman Act reaches foreign conduct if it has a substantial and intended effect on U.S. commerce, defendants' convictions were improper because the jury was not required to find a substantial effect. By concluding that the jury instructions nevertheless "pass[] legal muster," ADD19, the decision falls all the farther afield from Supreme Court precedent.

The district court instructed jurors that the Sherman Act applies extraterritorially if "at least one member of the conspiracy took at least one action in furtherance of the conspiracy in the United States." ER600. The panel appeared to recognize that this breathtaking one-overt-act theory of jurisdiction is wrong; if the Sherman Act applies extraterritorially at all, there must at least be a substantial and intended effect on U.S. commerce. ADD17-18. But the panel nevertheless concluded that "the jury instructions as a whole belie the assertion that the jury could have convicted on the basis of one, unintentional domestic act." ADD18. For support, the panel pointed to the jury instructions on the FTAIA requiring jurors to find that the defendants "fix[ed] the price of TFT-LCD

panels targeted by the participants to be sold in the United States or for delivery to the United States." *Id.*[2] Because "[t]here is no way that the defendants could have unintentionally designated or chosen the United States market as a target of the conspiracy," the panel concluded that "the instructions as a whole" ensured that the jury convicted on proper grounds. ADD19.

There is just one problem: even if the FTAIA "targeting" instruction assured that jurors found the defendants *intended* to have an effect on U.S. commerce, it nowhere required that any effect be *substantial*. Under the panel's decision, jurors can convict any time conspirators target the United States and commit one overt act here, even if domestic effects are insubstantial or non-existent. And there is a real risk the jury convicted on that basis here. As the panel acknowledged, "[t]he effect of foreign conduct in the United States was a central point of controversy throughout the trial." *Id.* Because the panel's decision cannot be squared with precedent holding that there must be a

[2] The district court alternatively instructed on the FTAIA's domestic-effects exception, but the panel observed that there was "a significant question regarding whether the effects were sufficiently direct to uphold a verdict based on" that exception, ADD40. Accordingly, the domestic-effects exception—which in any event requires only a "reasonably foreseeable" effect rather than an "intended" effect, ADD19—provides no assurance that the jury did not improperly convict on the basis of the one-overt-act instruction.

substantial—and not just an intended—effect on U.S. commerce if the Sherman Act is to be extended extraterritorially, rehearing is warranted.

IV. THE PANEL'S FTAIA RULING WARRANTS REHEARING AND RESENTENCING

Mr. Chen and Dr. Hsiung adopt and incorporate by reference the arguments raised in AUO's and AUOA's petitions for rehearing. Moreover, just as the panel's FTAIA holding requires a reduction in AUO's fine, it also requires that Mr. Chen and Dr. Hsiung be resentenced. The panel affirmed defendants' convictions solely based on direct sales into the United States. ADD33-36. But the district court imposed the sentences after calculating the global sales of panels that eventually wound up here, which doubled defendants' offense level. ER239-240, 242-243. Because the panel declined to find that conduct sanctionable, at a minimum Mr. Chen and Dr. Hsiung should be resentenced.

CONCLUSION

The panel's decision runs roughshod over precedent from this Court and the Supreme Court demonstrating that the foreign nature of a case triggers critical limits on the application of U.S. law. Rehearing should be granted to restore uniformity in this important area of the law, and to restore this Court's rules about overruling circuit precedent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Circuit Rule 35-4 that the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 4,199 words.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I certify that the foregoing Petition was filed with the Clerk using the appellate CM/ECF system on August 25, 2014. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Neal Kumar Katyal
Neal Kumar Katyal