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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AU OPTRONICS CORPORATION, et al., Defendants.	Case No. CR-09-0110 (SI) **DEFENDANTS' PARTIAL OPPOSITION TO GOVERNMENT'S PRELIMINARY INSTRUCTIONS** Date: January 9, 2012 Time: 8:30 a.m.. Judge: Hon. Susan Illston Place: Courtroom 10, 19th Floor

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MEMORANDUM OF POINTS AND AUTHORITIES

On January 6, 2012, the Government filed fifteen proposed preliminary jury instructions. Most are uncontroversial; indeed, eleven of the fifteen are copied word-for-word from instructions which the defendants had lodged with the Court nearly a month earlier; the defendants have stipulated to another; and still another has been resolved by this Court's order of December 23, 2011.[1]

The Government's Instruction No. 3 on Gross Pecuniary Gain, however, should be rejected. The Government's proposed instruction contains language in the second paragraph which is squarely contrary to this Court's order of July 18, 2011, denying the Government's motion for fact-finding on sentencing, as well as the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The instruction contains language in the third paragraph which will create reversible error if the Court gives the defendants' proposed instructions on the Foreign Trade Antitrust Improvement Act ("FTAIA").

Because of the potential for confusion and prejudice arising from the trial of two corporations and five individuals, the Government's Instruction No. 15 on "Separate Consideration for Each Defendant" should be rejected as well, and the Defendants' proposed instruction given.

I. FACTUAL BACKGROUND

A. The Court's *Apprendi* Order

On June 24, 2011, the Government moved for an order bifurcating the trial into a liability phase and a penalty phase, and holding that fact-finding respecting penalty as to the two corporate defendants would be by the Court, and to a preponderance of the evidence standard.

[1] The Government's instructions taken verbatim from the defendants' set are Nos. 1 and 5-14. The defendants have stipulated to the Government's Instruction No. 4. Although the defendants respectfully disagree with the recitation of the elements of the offense set forth in the Government's Instruction No. 2, the defendants acknowledge that the recitation of the elements is taken directly from the Court's order of December 23, 2011.

(Dkt. 333.) The Court declined to bifurcate the trial, and held instead that: "[s]hould the government wish to go beyond [the Sherman] act's authorization and seek a significantly larger fine based upon the establishment of additional facts, it must do so by following *Apprendi*'s mandate, *and by proving those facts to a jury beyond a reasonable doubt.*" (Dkt. 356, p. 6.)

B. The Parties' Cross-Motions for Preinstructions

In November, the parties filed cross-motions for preinstructions – the defendants arguing that the Court should instruct the jury on the FTAIA as part of an explanation of the elements of the alleged offense, and the Government seeking an instruction on gross gain pursuant to the Alternative Fine Statute. The Court granted the Government's motion in part, but delayed a definitive decision on the defendants' motion, finding that it would "consider whether the final instructions should include elements derived" from the FTAIA after "hearing the evidence of the conspiracy's domestic component." (Dkt. 631, p. 2.)

II. ARGUMENT

A. THE GOVERNMENT'S GROSS GAIN INSTRUCTION IS CONTRARY TO THE LAW OF THE CASE, TO *APPRENDI,* AND WILL POTENTIALLY CREATE REVERSIBLE ERROR

The Government now proposes the following instruction on Gross Gain:

> The government does not have to prove that anyone derived monetary or economic gain from the alleged conspiracy or that the conspiracy caused any monetary or economic harm in order for you to find a defendant guilty of the offense. To find a defendant guilty, all that you must find is that the government has proven the elements of the offense, which I previously described.
>
> But you will hear evidence during the course of the trial about the gain derived from the conspiracy. This evidence will be presented because, if you find one or both of the corporate defendants, AU Optronics Corporation or AU Optronics Corporation America, guilty following the presentation of evidence and your deliberations, you will be asked to determine whether the government has proven beyond a reasonable doubt that any of the defendants or other participants in the conspiracy derived monetary or economic gain from the conspiracy. *If you find that any of the participants derived such gain, you will then have to decide whether the total gross gain obtained from the conspiracy was at least $500 million. The evidence need not lead you to a precise determination as long as you find beyond a reasonable doubt that the gross gain was at least that amount.*

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> Gross gain is the additional revenue to the conspirators from the conspiracy. *In determining the gross gain from the conspiracy, you should total the gross gains to the defendants and other participants in the conspiracy from affected sales of TFT-LCD panels sold directly into the United States and sales of TFT-LCD panels incorporated into finished products sold into the United States.* That total gain should not be reduced by any taxes or costs associated with the sales of those products.

The italicized portions of the Government's instruction are revised from the version the Government submitted in its motion for preinstructions. Both revised portions are wrong.

Apprendi and the law of the case are completely clear. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490; Court's order of July 18, 2011, Dkt. 356, pp. 2, 6. The language the Government proposes in paragraph 2 of its Gross Gain instruction totally disregards that standard. It is not sufficient, if the Government is seeking a fine beyond the statutory maximum against the corporate defendants, for the jury to merely find that the gross gain was some unknown amount which is "at least $500 million." The jury must find the exact dollar amount of that purported gain, and it must find it to beyond a reasonable doubt. Anything less squarely violates *Apprendi* and this Court's order.

The language the Government has added to its third paragraph fares no better, since the Government disregards the Court's comment that it will, if appropriate, instruct the jury at the end of the trial on the elements of the FTAIA. In view of that, any instruction given now on gross gain must not contradict the FTAIA; to do otherwise would be to create error if, as the defendants expect, the FTAIA instruction is ultimately given.

The Government would have the Court instruct the jury that all TFT-LCD panels "sold directly into the United States" are included within the calculation of gross gains. But the import exclusion to the FTAIA is not so broad; to fall within the scope of the Sherman Act, conduct must "*target* import goods or services." *Animal Science Prods., Inc. v. China Minmetals Corp.*,

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654 F.3d 462, 470 (3rd Cir. 2011). Thus, if the Court instructs the jury on the FTAIA, the language the Government proposes will not only confuse the jury but constitute error.

The Government would also have the Court instruct the jury that all gains derived from sales of panels incorporated into finished products sold in the United States should be included within "gross gain." But once again, the FTAIA is far narrower. Only conduct which has a "direct, substantial and reasonably foreseeable effect" on United States commerce falls within the scope of the Sherman Act. 15 U.S.C. § 6a(1)(A). It is far from a foregone conclusion that the Government will be able to satisfy this exacting standard for all, or even most, finished products shipped into the United States. The Government's proposed language is confusing and, if the Court ultimately instructs the jury on the FTAIA, reversible error. The defendants have submitted an attached instruction which covers all the information that the jury need be instructed on at this stage of the case.[2]

B. THE COURT SHOULD GIVE THE DEFENDANTS' "SEPARATE CONSIDERATION" INSTRUCTION

The defendants proposed the following instruction:

> Although the defendant are being tried together, you must give separate consideration to each defendant. In doing so you must analyze what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against one or more other defendants. *Each defendant is entitled to have the case decided on the evidence and the law applicable to that defendant, as if the defendant were being tried alone.* The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant or defendants.

The Government's proposed instruction no. 15 on "separate consideration" omits the italicized sentence, which the defendants took from the ABA Model Jury Instructions in Criminal Antitrust Cases, No. 2B.1. The added language is clear, legally accurate and – given

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[2] The defendants believe that no preinstruction at all should given on gross gain, and expressly reserve all objections raised in briefing and argument on the parties' cross-motions for preinstructions. Nevertheless, the defendants recognize that the issue has been resolved by the Court's December 23, 2011 order, and propose the attached instruction as one which is compliant with that order, and the Court's previous orders.

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the strong potential for confusion and prejudice arising from trying two corporations and five individuals simultaneously – absolutely necessary. It should be given instead of the Government's proposal.

III. CONCLUSION

.The Government's third and fifteenth proposed preinstructions should be rejected, and the alternatives proposed by defendants given.

DATED: January 9, 2012 NOSSAMAN LLP

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