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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA; HSUAN BIN CHEN, aka H.B. CHEN; HUI HSIUNG, aka KUMA; LAI JUH CHEN aka L. J. CHEN; SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG; BORLONG BAI, aka RICHARD BAI; TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE; CHENG YUAN LIN, aka C.Y. LIN; WEN JUN CHENG, aka TONY CHENG; and DUK MO KOO, Defendants.	No. CR-09-0110 SI UNITED STATES' OPPOSITION TO DEFENDANTS' PROPOSED PRELIMINARY JURY INSTRUCTIONS ON THE ELEMENTS OF THE OFFENSE; UNITED STATES' PROPOSED ALTERNATIVE PRELIMINARY INSTRUCTION Pretrial Conf.: December 13, 2011 Time: 3:30 p.m. Judge: Hon. Susan Illston Place: Courtroom 10, 19th Floor Trial: January 9, 2012

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INTRODUCTION

In this Sherman Act Section 1 case, defendants AU Optronics Corporation and AU Optronics Corporation America (collectively "AUO") have proposed a preliminary jury instruction on the elements of the offense.[1] The government agrees that a preliminary instruction on the elements may be helpful but objects to the erroneous one proposed by AUO. AUO's proposed instruction contains "elements" drawn from the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, and *Hartford Fire v. California*, 509 U.S. 764 (1993), and *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). These novel "elements" are based on a misreading of the cited authority, and their inclusion is contrary to this Court's prior ruling in this case. As the Court previously acknowledged, this case involves domestic conduct and domestic victims. Consistent with the Court's prior ruling, the government proposes its own preliminary instruction based on the Ninth Circuit's standard preliminary instruction that sets out the well-established elements of a price-fixing conspiracy in violation of Section 1 of the Sherman Act. It is premature to instruct the jury beyond this conventional instruction at the outset of trial.

If the Court concludes that an FTAIA instruction is appropriate, it should not give the instruction proposed by AUO. AUO's proposal mischaracterizes the relevant conduct, misleadingly states the meaning of conduct involving import trade or commerce, and omits the FTAIA's exception for conduct involving purely non-import foreign commerce that affects U.S. commerce. Based on the FTAIA's text and decisions interpreting it, the government proposes an alternative instruction that cures these errors. It instructs, in language tailored to the facts of this case, that the Sherman Act applies (1) if the conspirators' conduct involved import commerce in panels, that is, if it included fixing the price of panels made abroad and sold in or for delivery to the United States, or (2) if the conduct affected import commerce in panel-incorporating products, that is, if it included fixing the price of panels incorporated into finished products and

[1] Defendants' Proposed Preliminary Jury Instructions on the Elements of the Offense, and Memorandum in Support of Proposed Instructions ("Defs. Mem.").

that conduct affected commerce in those finished products sold in or for delivery to the United States.

Relying on its strained reading of *Hartford Fire* and *Nippon Paper*, AUO proposes to instruct the jury that proof of a substantial and intended effect on U.S. commerce is required. But, as this Court previously recognized, the price-fixing conspiracy charged here involves acts taken in furtherance within the United States, and thus a *Nippon Paper*-based effect instruction is unwarranted. And even if the Court determines, after the trial evidence is submitted, that there is a factual basis to argue that no conduct took place in the United States, AUO's proposed instruction would still be wrong. An instruction would need to tell the jury to find either acts in furtherance of the conspiracy in the United States or, absent such a finding, that the conspiracy had a substantial and intended effect in the United States.

ARGUMENT

I. At the Outset the Court Should Give a Conventional Sherman Act Jury Instruction

This Court need not instruct the jury on the requirements of the FTAIA and the "substantial and intended effects" test in *Hartford* and *Nippon Paper* because it has already concluded that neither the FTAIA nor that test apply to the facts of this case.

AUO argued in its motion to dismiss the superseding indictment that this prosecution is barred by the FTAIA. This Court denied that motion, holding that the FTAIA did not bar this prosecution because "the superseding indictment clearly alleges a series of overt acts by AU Optronics America within the United States and in furtherance of the conspiracy" and thus "adequately alleges a domestic conspiracy" with domestic victims. *United States v. AU Optronics Corp.*, Crim. No. 09-0110 SI, 2011 WL 1464858, *5 & n.1 (N.D. Cal. Apr. 18, 2011). "The Court simply [could not] conclude that the FTAIA was intended to bar criminal prosecution where, as here, the alleged conspiracy involves conduct in furtherance of the conspiracy both inside and outside the United States." *Id.* AUO also argued that the indictment was defective because it failed to allege a "substantial and intended effect" in the United States as required by *Hartford Fire* and *Nippon Paper*. Again, the Court rejected the argument, finding that, "[u]nlike *Nippon*, . . . the conspiracy alleged in the indictment is not based on 'wholly foreign conduct.'"

Id. at *3. Rather, "the indictment alleges a conspiracy that involved overt acts by various coconspirators both inside and outside the United States." *Id*. Thus, "the concerns raised in *Nippon* regarding criminal Sherman Act violations based on 'wholly foreign conduct' simply do not apply." *Id.*

AUO now seeks an end run around this Court's decision by inserting into its proposed preliminary instruction elements drawn from the FTAIA and *Nippon Paper*. In its previous order, the Court held that in order to establish a criminal Section 1 conspiracy, the government must plead and prove the three traditional elements of a Sherman Act claim. *Id.* at *4 (citing *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992)). Thus, any preliminarily instruction should be based on those elements.

Contrary to defendants' claim, the Court did not "essentially reserve[] ruling" on whether the FTAIA or *Hartford Fire* and *Nippon Paper* allegations were necessary elements of the case. Defs. Mem. 3. Rather, the Court found such allegations were unnecessary and denied AUO's motion. To be sure, the Court also held that, if the FTAIA or the *Nippon Paper* test applied, the superseding indictment would not be dismissed because it alleged both conduct involving import trade or commerce, which would meet any FTAIA requirement, and an "intended and substantial effect" in the United States, which would pass the *Nippon Paper* test. These alternative holdings, however, do not detract from the Court's conclusion that neither the FTAIA nor *Nippon Paper* apply.

Moreover, the intervening decisions outside of this circuit do not require this Court to revisit its prior holding. The cases cited by AUO do not interpret or apply the *Nippon Paper* test. Thus, they provide no basis to reconsider this Court's holding that the *Nippon Paper* test does not apply. Nor do the two intervening decisions interpreting the FTAIA support defendants' position. *Animal Science Prods. Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), simply stands for the proposition that the FTAIA is not jurisdictional but rather concerns the Sherman Act's merits. *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir. 2011), raised the same jurisdiction versus merits issue, but did not decide it for prudential reasons. These cases are inapposite because this Court did not rest its April 18, 2011 Order on the grounds that the

FTAIA was jurisdictional.[2] Instead, it held that FTAIA did not apply because the conspiracy—unlike those in *Animal Science* and *Minn-Chem*—involved conduct in furtherance of the conspiracy both inside and outside the United States that injured domestic purchasers. *AU Optronics*, 2011 WL 1464858, at *5 & n.1. By contrast, in *Minn-Chem*, "all of the anticompetitive conduct identified in the complaint is alleged to have occurred outside the United States." 657 F.3d at 656. In *Animal Science*, "Defendants' allegedly illegal combination activities: (a) took place primarily in China or at unknown destinations which appear to be locales other than the United States." *See Animal Science Prods. Inc. v. China Minmetals Corp.*, 596 F. Supp. 2d 842, 869 (D.N.J. 2008), *vacated*, 654 F.3d 462 (3d Cir. 2011). In sum, these two cases do not fit the facts of this case, and do not undermine the Court's prior order. Accordingly, the Court should give the standard Ninth Circuit preliminary instruction with the three elements it identified in its earlier ruling:

INSTRUCTION NO. **
THE CHARGE—PRESUMPTION OF INNOCENCE
(PRELIMINARY INSTRUCTION)

This is a criminal case brought by the United States government. The government charges the defendants with violating Section 1 of the Sherman Act. The charge against the defendants is contained in the indictment. The indictment is simply the description of the charge made by the government against the defendants. The

[2] The Ninth Circuit and other courts of appeals have treated the FTAIA as a question of subject-matter jurisdiction and thus for the judge, not the jury, to decide. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 679-80 & n.5 (9th Cir. 2004); *see, e.g., United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 951 (7th Cir.2003) (en banc) (concluding that "the legislative history shows that jurisdiction stripping is what Congress had in mind in enacting FTAIA."); *cf. In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008) (declining to resolve whether FTAIA withdraws jurisdiction from the federal courts). We recognize, however, that this Court recently concluded that *LSL Biotechnologies* "cannot withstand" *Arbaugh v. Y & Y Corp.*, 546 U.S. 500, 514 (2006). *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2011 WL 4634031, at *5 (N.D. Cal. Oct. 5, 2011). Instead, it followed *Animal Science*, the first court of appeals decision to hold that the FTAIA is not a jurisdiction-stripping statute, and held that "the FTAIA does not implicate the subject matter jurisdiction of the federal courts." 2011 WL 4634031, at *5.

indictment is not evidence and does not prove anything. The indictment charges that, beginning on or about September 14, 2001, representatives from TFT-LCD manufacturer companies, including defendant AU Optronics Corporation, a Taiwan corporation, engaged in a conspiracy to fix prices of TFT-LCD panels in the United States and elsewhere. The indictment charges that AU Optronics Corporation America, a United States corporation incorporated in California and a wholly owned subsidiary of AU Optronics Corporation, and current or former AU Optronics Corporation employees Hsuan Bin Chen, Hui Hsiung, Lai Juh Chen, Shiu Lung Leung, and Tsannrong Lee later joined and participated in the conspiracy, which continued into 2006. The indictment charges that the conspiracy violated Title 15 of the United States Code, Section 1, known as Section 1 of the Sherman Antitrust Act.

The defendants have pleaded not guilty to the charges and are presumed innocent unless and until the government proves the defendants guilty beyond a reasonable doubt. In addition, the defendants have the right to remain silent and never have to prove innocence or to present any evidence.

(AUTHORITY: *Ninth Circuit Manual of Model Criminal Jury Instructions* § 1.2 (2010))

INSTRUCTION NO. **
PRELIMINARY INSTRUCTION ON THE ELEMENTS

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime which the government must prove to make its case:

One, that the conspiracy described in the indictment existed at or about the time alleged;

Two, that the defendants knowingly became members of the conspiracy; and

Three, that the conspiracy described in the indictment either affected interstate or foreign commerce in goods and services or occurred within

the flow of interstate or foreign commerce in goods and services.

These instructions are preliminary and the instructions I will give at the end of the case will control.

(AUTHORITY: ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 47 (2009))

In any event, the Court need not decide whether to instruct the jury on the FTAIA or the *Nippon Paper* test pre-trial. If, after the evidence is submitted, the Court concludes that an FTAIA instruction or a *Nippon Paper* instruction are warranted, such instructions can be included in the final jury charge.

II. Any FTAIA Instruction Should Properly Define Conduct Involving Import Commerce and Conduct Involving Non-Import Foreign Commerce With Direct, Substantial, and Reasonably Foreseeable Effects on U.S. Commerce

If the Court determines that a preliminary instruction on the FTAIA is necessary, it should not give the one proposed by AUO because it is wrong and misleading in three important respects. First, AUO's proposal wrongly characterizes the relevant conduct by focusing on where the conduct occurred, rather than what commerce the conduct involved, and considering only the defendants' conduct, rather than the charged conspiracy, which includes conduct by all the conspirators. Second, AUO's proposal instructs the jury that proof that the defendants agreed to fix the price of TFT-LCD panels sold around the world, including panels imported into the United States, is insufficient because, in AUO's view, the conduct must be "particularly directed at the American import market." Defs. Mem. 5, 9. To the contrary, a conspiracy of foreign manufacturers to fix the price of products sold in or for delivery to the United States is conduct involving U.S. import trade and commerce regardless of where else the price-fixed products were sold. And third, AUO's proposed instruction erroneously omits the FTAIA's so-called effects exception, which leaves the Sherman Act applicable to conduct involving purely non-import foreign commerce when it affects U.S. commerce, including interstate and import commerce.

As explained below, the government's proposed instruction corrects these errors and should be given if the Court decides to preliminarily instruct the jurors on the FTAIA.

INSTRUCTION NO. **
ALTERNATIVE PRELIMINARY INSTRUCTION ON THE ELEMENTS AND THE FTAIA

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime which the government must prove to make its case:

One, that the conspiracy described in the indictment existed at or about the time alleged;

Two, that the defendants knowingly became members of the conspiracy; and

Three, that the members of the conspiracy engaged in one or both of the following activities:

(A) fixing the price of TFT-LCD panels sold in the United States or for delivery to the United States; or

(B) fixing the price of TFT-LCD panels that were incorporated into finished products such as notebook computers, desktop computer monitors, and televisions, and that this conduct had a reasonably foreseeable, not insignificant effect on trade or commerce in those finished products sold in the United States or for delivery to the United States. In determining whether the conspiracy had such an effect, you may consider the total amount of trade or commerce in those finished products sold in the United States or for delivery to the United States; however, the government's proof need not quantify or value that effect.

A. AUO's Proposal Mischaracterizes the Conduct Relevant to the FTAIA

AUO's erroneous and misleading instruction betrays its misunderstanding of both the text of the FTAIA and the recent decisions applying that statute. The FTAIA provides:

Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect –

> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of 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.

15 U.S.C. § 6a. AUO's proposal would instruct the jury that "[b]ecause the alleged conspiracy predominantly involved conduct which occurred, if at all, in foreign countries, . . . [it] was 'conduct involving trade or commerce with foreign nations'" and, thus, subject to the FTAIA. But, as the statutory language makes clear, the FTAIA distinguishes among anticompetitive conduct, not based on the location of the acts, but on the commerce involved. *See Minn-Chem*, 657 F.3d at 660 ("'The FTAIA differentiates between conduct that 'involves' . . . [import] commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce.'") (quoting *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 72 (3d Cir. 2000)).

A test based on the location of the conspirators' acts would be inconsistent with the FTAIA's purpose. "The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004). Congress's declared purpose in enacting the FTAIA was to "increase United States exports of products and services . . . by modifying the application of the antitrust laws to certain export trade." Export Trading Company Act of 1982, Pub. L. No. 97-290,§ 102(b), 96 Stat. 1233, 1234; *see also* H.R. Rep. 97-686, at 7-8, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494.

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Making the Sherman Act inapplicable when the anticompetitive conduct took place abroad would not have accomplished Congress's goal. Congress specifically sought to exempt conspiracies and joint ventures among U.S. firms that would restrain only their export trade and potentially harm only foreign purchasers. But such business arrangements would undoubtedly involve acts within the United States and likely would occur predominantly on U.S. soil. Thus, the location of the conduct does not determine how the FTAIA applies to this case.

AUO would also erroneously instruct the jury to consider only the *defendants'* conduct when determining whether the conduct involves import commerce.[3] But the language of the FTAIA speaks to whether the Sherman Act applies to conduct involving foreign trade or commerce. Therefore, the term "conduct" must refer to that activity which might violate the Sherman Act, whether it is a price-fixing conspiracy or a joint venture. Here, defendants are charged with a single count of conspiring to fix the price of TFT-LCD panels in violation of Section 1 of the Sherman Act. Thus, the conspiratorial agreement and any acts in furtherance of it by any conspirator are the "conduct" for purposes of the FTAIA. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) (explaining that a "conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all'"); *see also Salinas v. United States*, 522 U.S. 52, 64 (1997) ("[S]o long as they share a common purpose, conspirators are liable for the acts of their co-conspirators.").[4] Whether the charged conspiracy involved import commerce,

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[3] *See, e.g.*, Defs. Mem. 9 ("you must find beyond a reasonable doubt that the *defendants' conduct* involved "import trade or commerce"; "In order to conclude that *the conduct of the defendant* involved import trade or commerce, you must find beyond a reasonable doubt that *defendants' anticompetitive conduct*, if any, was directed at the United States import market"; "the government must establish beyond a reasonable doubt that the *defendants' anticompetitive conduct* targeted United States import goods") (emphasis added).

[4] The government need not prove any act in furtherance because the Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash v. United States*, 229 U.S. 373, 378 (1913). Nevertheless, such acts in furtherance can be considered in determining whether the agreement involved or affected import commerce. *See United States v. Kissel*, 218 U.S. 601, 607-08 (1910); *cf. United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981) ("While a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, it remains actionable until its purpose has been

see infra Section II.B., or affected import or interstate commerce, *see infra* Section II.C., depends on whether the price-fixing agreement and all the defendants' and their coconspirators' acts furthering that agreement involved or affected that commerce.[5]

B. AUO's Proposed Instruction on Import Commerce is Wrong and Misleading

The FTAIA was never intended to—and does not—modify the application of the Sherman Act to restraints of import trade or import commerce. H.R. Rep. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494 ("[I]t is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law").[6] Under the FTAIA, the Sherman Act applies to "conduct involving . . . import trade or import commerce." 15 U.S.C. § 6a. At a minimum, fixing the price of panels made abroad and sold in or for delivery to the United States is conduct involving import trade or import commerce. *See Animal Science*, 654 F.3d at 471 n.11; *Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, 753 F. Supp. 2d 792, 795 (E.D. Wis. 2010).

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achieved or abandoned, and the statute of limitations does not run so long as the co-conspirators engage in overt acts designed to accomplish its objectives.").

[5] AUO's proposed instruction on the elements repeats the same error by stating that the government must prove "that the Defendants' conduct had a substantial and intended effect on United States commerce." Defs. Mem. 8. For the reasons explained below, the cases cited by AUO do not require the government in this case to prove a substantial and intended effect on United States commerce. *See infra* Section III. But even if the effects test articulated in those cases applied, it would require proof that the conspiracy—that is, the conduct of *all the conspirators*—had an intended and substantial effect *in the United States*. *See Nippon Paper*, 109 F.3d at 9 ("Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States."); *Hartford Fire*, 509 U.S. at 796 ("Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

[6] Recognizing that the proposed modifications of the Sherman Act's application to export commerce "appeared to make the amendments inapplicable to transaction that were neither import nor export, i.e., transactions within, between, or among other nations," H. Rep. 97-686, at 9, Congress modified the language of the FTAIA to address "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," 15 U.S.C. § 6a; *see Empagran*, 542 U.S. at 163. "It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not." H. Rep. 97-686, at 10.

AUO proposes to instruct the jury that conduct involves import trade or commerce only if it "was directed at the United States import market" and "targeted United States import goods." Defs. Mem. 9. While courts have used these phrases to explain what conduct involving import commerce means under the FTAIA, using "targeted" or "directed at" in a jury instruction is likely to mislead jurors into thinking that the government must prove that the conspiracy uniquely or primarily targeted U.S. imports. Indeed, AUO itself appears to have been misled by courts' use of these terms. Contrary to AUO's claim, conduct involving import trade or commerce is not limited to conspiracies that are "particularly directed at the American import market." Defs. Mem. 5. That interpretation of the FTAIA would expose American consumers to substantial anticompetitive harm: an Asia-based conspiracy selling price-fixed products to consumers throughout the world would harm American purchasers even if the conspiracy did not uniquely target Americans. Nothing in the statutory language or the case law supports ousting the Sherman Act under such circumstances.

AUO's reliance on *Minn-Chem* is unavailing. In that case, U.S. purchasers alleged that foreign potash producers had fixed prices in Brazil, China, and India, and that those inflated prices in overseas markets "influenced" the price of potash in the United States. 657 F.3d at 653. While the complaint included the conclusory allegation that defendants fixed prices around the world, that allegation, viewed through *Twombly*'s lens, did nothing to establish a plausible inference that defendants fixed the price of potash sold in or for delivery to the United States. *Id.* at 661. It was not enough that the defendants imported potash into the United States, and thus were engaged in import commerce. *Id.* Absent allegations that their conspiratorial agreement restrained trade in those imports, the court found the complaint failed to allege conduct involving import commerce. *Id.* at 662.

AUO reads *Minn-Chem* to hold that a worldwide price-fixing conspiracy, without more, is not conduct involving import trade or commerce for purposes of the FTAIA. But that is not the case. Indeed, the *Minn-Chem* court was careful to note that the complaint failed to make such an allegation. *Id.* at 661 ("Nor does [the complaint] allege, for that matter, that the defendants agreed to worldwide production quotas for all members of the conspiracy or that a

global price was ever set."). Instead, the *Minn-Chem* court found that the alleged conspiracy fixed the price of potash sold abroad, but not potash sold in the United States—that is, it was "directed entirely at markets overseas." *Id.* at 660. Nothing in *Minn-Chem* suggests that a global conspiracy that fixed the price of potash sold in or for delivery to the United States and elsewhere would not be conduct involving import commerce.

Animal Science and *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002), also provide no support for AUO's position. The *Animal Science* court stated that "the import trade or commerce exception requires that the defendants' conduct target import goods or services," but did not say that U.S. imports must somehow be uniquely targeted. 654 F.3d at 470. The court goes on to distinguish *Turicentro*, where the requirement was not satisfied, from *Carpet Group*, where it was. *Id.* The *Turicentro* complaint was defective because it alleged defendant airlines "only set the rates that foreign-based travel agents could charge for their services." 303 F.3d at 303. The airlines' conduct did not target import commerce because no import commerce was restrained by their agreement. In contrast, in *Carpet Group*, the complaint alleged that defendants had conspired to prevent U.S. retailers from importing oriental rugs from foreign manufacturers. 227 F.3d at 72. Defendants' alleged conduct restrained trade in rugs being sold into the United States, and therefore it was conduct involving import commerce.

AUO's proposed instruction is wrong because it suggests that proof of a global price-fixing conspiracy that includes products imported into the United States, without more, cannot support a conviction. Defs. Mem. 9 ("It is similarly not sufficient for the government to establish that the defendants were engaged in global anticompetitive behavior involving products that were eventually imported into the United States."). A global price-fixing conspiracy, though it involves some non-import foreign commerce, also involves import commerce if some of the price-fixed products are sold in or for delivery to the United States. *See Fond du Lac*, 753 F. Supp. 2d at 795 (finding conspiracy to fix prices of auto parts manufactured in Taiwan and sold and shipped to the United States and other countries involved import commerce).[7]

[7] Likewise, contrary to AUO's proposed instruction, Defs. Mem. 9, the transmission of

Under AUO's interpretation of the statute, the government would bear a greater burden when prosecuting a conspiracy to fix the price of products sold in the United States if that conspiracy also fixed the price of products sold elsewhere.[8] Such a result was never intended by Congress when it passed the FTAIA. Moreover, it would turn upside-down the U.S. antitrust laws' concern for American consumers, and not foreign purchasers. *See DRAM*, 546 F.3d at 986.

The government's alternative instruction eliminates any confusion about the meaning of conduct involving import trade or commerce by tailoring the jury instruction to the facts of this case. "Well-tailored and specific instructions" are particularly appropriate in "complex antitrust cases 'where abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex.'" *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1398 (9th Cir. 1984) (quoting *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 466 n.13 (9th Cir. 1964)). Here, the government proposes to instruct the jury that it may convict the defendants if it finds a conspiracy "to fix the price of TFT-LCD panels sold in the United States or for delivery to the United States." Whatever else might constitute conduct involving import trade or commerce, a conspiracy to fix the price of products sold for delivery in the United States as alleged here certainly does so.[9] Thus, if the jury finds such a conspiracy, then

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payments may be relevant to show whether the price-fixed panels were sold for delivery to the United States and thus whether the conduct involved import commerce. It may also be relevant to whether the conduct affected U.S. commerce. *See infra* Section II.C.

[8] The government has successfully prosecuted many participants in global price-fixing conspiracies, including many participants in the TFT-LCD panel price-fixing conspiracy. *See also* Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, No. 03-724 (Feb. 3, 2004) at 1-2 (noting criminal investigation and prosecution of the vitamin cartel resulted in the convictions of twelve corporations and thirteen individuals for price fixing, the imposition of over $900 million in criminal fines, and eleven sentences of imprisonment) (available at http://www.justice.gov/atr/cases/f202300 /202397.pdf); *United States v. Rose*, 449 F.3d 627, 629 (5th Cir. 2006) (affirming conviction for fixing price of a vitamin).

[9] The term "import" has been defined as "a product (or perhaps a service) [that] has been brought into the United States from abroad." *Turicentro*, 303 F.3d at 303. Thus, import trade or

the FTAIA does not preclude defendants' conviction for participation in that conspiracy.

C. Any FTAIA Preliminary Instruction Should Include the Effects Exception in Language Tailored to the Circumstances of this Case

The FTAIA makes the Sherman Act inapplicable to conduct involving non-import foreign trade or commerce but also provides an exception when the conduct has "a direct, substantial, and reasonably foreseeable effect" on (1) "trade or commerce which is not trade or commerce with foreign nations" (that is, trade or commerce within the United States), (2) import trade or commerce, or (3) export trade commerce with foreign nations, of a person engaged in such trade or commerce in the United States. 15 U.S.C. § 6a(1); *DRAM*, 546 F.3d at 985.[10] AUO's proposed instruction on the FTAIA, however, omits this exception entirely.

The government's alternative instruction correctly includes and describes the exception based on the particular circumstances of this case:

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commerce includes trade or commerce in goods or services produced outside the United States which are sold in or for delivery to the United States. This definition finds support in the Export Trading Company Act of 1982, of which the FTAIA is the fourth title. The Act defines "export trade" for purposes of the second title as "trade or commerce in goods or services produced in the United States which are exported, or in the course of being exported, from the United States to any other country." Pub. L. 97-290, § 103(a)(1) (1982). Defendants and their coconspirators need not function as the physical importer of goods for their conduct to involve import trade or commerce. *Animal Science*, 654 F.3d at 470.

[10] This exception also requires that "such effect gives rise to a claim under [the Sherman Act]." 15 U.S.C. § 6a(2). In *Empagran*, 542 U.S. at 174, the Supreme Court held that the effect must give rise to the private plaintiff's claim, and on remand, the court of appeals held the effect must proximately cause the private plaintiffs' claimed injuries, *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005); *accord DRAM*, 546 F.3d at 987-88. But unlike a private antitrust suit, which arises only when the private plaintiff is "injured in his business or property by reason of" the Sherman Act violation, 15 U.S.C. § 15, and which requires a showing of antitrust injury, a government criminal prosecution does not arise out of any effect nor require any injury. In fact, the government can criminally prosecute a *per se* violation of the Sherman Act absent any effect because the offense is the agreement, not its effects. *See Nash*, 229 U.S. at 378 (the Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability"); *Socony-Vacuum*, 310 U.S. at 218 ("price-fixing agreements are unlawful per se under the Sherman Act"). Accordingly, Section 6a(2)'s requirement that the effect give rise to the claim has no application in the context of a criminal prosecution.

> *Three*, that the members of the conspiracy engaged in one or both of the following activities:
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> (B) fixing the price of TFT-LCD panels that were incorporated into finished products such as notebook computers, desktop computer monitors, and televisions, and that this conduct had a reasonably foreseeable, not insignificant effect on trade or commerce in those finished products sold in the United States or for delivery to the United States. In determining whether the conspiracy had such an effect, you may consider the total amount of trade or commerce in those finished products sold in the United States or for delivery to the United States; however, the government's proof need not quantify or value that effect.

In this case, not only did the defendants and their coconspirators fix the price of TFT-LCD panels sold in or for delivery to the United States, proof of which alone would support conviction, *see supra* Section II.B., but they also fixed the price of panels that were incorporated abroad into finished products such as notebook computers, desktop computers monitors, and televisions. Many of these finished products were then imported into the United States and sold within the United States. If the fixing of this set of panels had a direct, substantial, and reasonably foreseeable effect on the trade or commerce in these finished products that were imported into or sold within the United States, then the FTAIA exception leaves the Sherman Act applicable.

The fact that this set of panels was first sold abroad before entering the United States after being incorporated in finished products does not make the effect on the import or interstate commerce in the finished products indirect, insubstantial, or unforeseeable. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 4634031, at *9 (N.D. Cal. Oct. 5, 2011). Rather, treating the price-fixing conspiracy's effects on commerce in these finished products as outside the FTAIA exception "would exclude from the Sherman Act's reach a significant amount of anticompetitive conduct that has real consequences for American consumers." *Id.* Such a result cannot be reconciled with Congress' intent in enacting the FTAIA, *see Hartford Fire*, 509 U.S.

at 796 n.23; *Empagran*, 542 U.S. at 164, nor with the antitrust laws' focus on protecting American consumers, *see DRAM*, 546 F.3d at 986.

To have a direct effect on U.S. commerce, the effect must "follow[ ] as an immediate consequence" of the conduct. *LSL Biotechnologies*, 379 F.3d at 680. Here the effect is an immediate consequence because "the nature of the effect does not change in any substantial way before it reaches the United States consumer." *In re TFT-LCD*, 2011 WL 4634031, at *10. In other words, because the price-fixing conspiracy's effect "did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for televisions, monitors, and notebook computers), the effect 'proceeded without deviation or interruption' from the LCD manufacturer to the American retail store." *Id.* "No intervening events interrupted its journey." *Id.*

The straightforward facts of this case—incorporation of price-fixed panels into finished products sold in or for delivery to the United States—eliminates the need to instruct the jury on the meaning of directness using abstract legal principles. *See Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1398. Rather, the Court should use its "broad latitude . . . in tailoring the instructions to the circumstances of the case" and describe the directness requirement in the terms of this case. *United States v. Espinosa*, 827 F.2d 604, 614 (9th Cir. 1987). The government's proposed instruction does this by requiring proof that the price-fixed panels were incorporated into finished products sold in or for delivery to the United States and thereby affected U.S. commerce in those finished products.

The government's proposed instruction also requires the jury to find that the conspiracy's effect on U.S. commerce in the finished products was substantial and reasonably foreseeable. While the final jury instructions may expand on these concepts, it is enough for the preliminary instruction to inform them that the effect should be considered in the aggregate and that the government need not specifically quantify the effect.

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D. An FTAIA Instruction Makes a Conventional Commerce Instruction Superfluous and Needlessly Confusing

If the FTAIA instruction is given, the Court should not also give the conventional instruction on the required nexus to interstate or foreign commerce in a criminal prosecution under Section 1 of the Sherman Act, 15 U.S.C. § 1. To satisfy that nexus, courts ordinarily instruct juries that, to convict, the government must prove that the conspiracy either affected interstate or foreign trade or commerce in goods and services or occurred within the flow of interstate or foreign trade or commerce in goods and services, *see* Model Jury Instructions 47, 82-83; *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1230 n.2 (8th Cir. 1992). In this context, proof of "indirect," "fortuitous," or unintended actual effects, as well as any "potential" effects had the conspiracy been successful, is sufficient. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329-30 (1991). As proposed above, *see supra* Section I, the Court should give this instruction on commerce as the offense's third element.

If the Court gives the alternative instruction on the FTAIA proposed by the government, the third element on commerce in the conventional instruction is superfluous because a jury finding on the FTAIA necessarily includes a finding satisfying this element. Specifically, if the jurors find that the conspirators fixed the price of TFT-LCD panels sold in the United States or for delivery to the United States, then they have found a conspiracy that, if successful, affected and occurred within the flow of foreign—in this case, import—commerce in those panels. Alternatively, if the jurors find that the conspirators fixed the price of TFT-LCD panels that were incorporated into finished products and that this conduct directly, substantially, and reasonably foreseeably affected trade or commerce in those finished products sold in or for delivery to the United States, then they have found a conspiracy that affected interstate and foreign—again, import—commerce in those finished products.

Moreover, giving two instructions on commerce is likely to confuse the jury, especially where the required effects may differ. For these reasons, the government's alternative instruction puts the FTAIA instruction in the place of the third element on commerce.

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III. A Pre-instruction Should Not Include a "Substantial and Intended Effect" Element

Citing *Hartford Fire* and *Nippon Paper*, AUO proposes that the Court pre-instruct the jury that the government must prove "that the Defendants' conduct had a substantial and intended effect on United States commerce." Defs. Mem. 5-6, 8. But as the Court correctly concluded in its prior order, that requirement applies only where the prosecution is based on wholly foreign conduct. Therefore, it is inapplicable here, where conspirators, including the American subsidiary AUOA, acted in furtherance of the conspiracy within the United States.[11] *AU Optronics*, 2011 WL 1464858, at *3. AUO attempts to reargue this issue, contending that the "substantial and intended effect" requirement applies to this case, which AUO describes as "based to a large extent on foreign conduct." Defs. Mem. 7.[12] But this argument relies on a mischaracterization of both *Hartford Fire* and *Nippon Paper* and should be rejected.

AUO contends that "*Hartford Fire* was based primarily on domestic conduct" because "the suit [in *Hartford Fire*] named both domestic and foreign defendants" and "the primary four defendants in the case were four large domestic insurance companies," Defs. Mem. 6, but this description is disingenuous and misleading. The *Hartford Fire* decision addresses two separate petitions for certiorari by two separate groups of defendants. 509 U.S. at 779. The first petition (91-1111) involved the four domestic defendants that AUO references and involved the scope of the McCarren-Ferguson Act immunity. *Id.* The second petition (91-1128) was filed by only the

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[11] Standing alone, acts within the territory of the United States are not sufficient to satisfy the Sherman Act, which requires that the anticompetitive conduct affect or occur within the flow of interstate commerce or foreign commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). As explained above, *supra* Section II.D., the government's proposed instruction addresses this requirement.

[12] AUO also seems to suggest that the "substantial and intended effects test" of *Hartford Fire* and *Nippon Paper* applies to cases "based *partly or entirely* on foreign commerce." Defs. Mem. 7. But *Hartford Fire* and *Nippon Paper* focus on where the conduct took place. In contrast, the FTAIA concerns conduct involving non-import foreign trade or commerce. *See supra* Section II.A. To be sure, in many instances, conduct that takes place wholly in foreign countries will also involve purely foreign commerce, that is, commerce wholly between or within foreign countries. Consequently, the FTAIA and the test in *Hartford Fire* and *Nippon Paper* may frequently yield the same result.

foreign defendants, specifically London reinsurers and concerned claims based on entirely foreign conduct. *Id.* at 794-95; *see also In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 486 (N.D. Cal. 1989) ("Defendants contend that . . . the conduct complained of in these claims is wholly foreign commerce."), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part*, *Hartford Fire*, 509 U.S. 764. That petition asked: "Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?" 509 U.S. at 779 n.9. If, as AUO contends, the conduct took place inside U.S. territory, the question makes no sense. Nor did the question ask whether mixed conduct—that is, conduct both inside and outside the United States—was beyond the reach of the Sherman Act, for it was already well-established that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). Nothing supports AUO's apparent suggestion that the domestic conduct and domestic defendants involved in the first petition are intertwined with the part of the *Hartford Fire* opinion that discusses the application of the Sherman Act to foreign conduct.

AUO's contention that *Nippon Paper* "involved both foreign and domestic conduct," Defs. Mem. 6, is also misleading. As this Court recognized, the *Nippon Paper* holding unambiguously concerns conspiracies involving wholly foreign conduct. *See Nippon Paper*, 109 F.3d at 2-4 ("The district court, declaring that a criminal antitrust prosecution could not be based on *wholly extraterritorial conduct*, dismissed the indictment. . . . [W]e review de novo the holding that Section One of the Sherman Act does not cover *wholly extraterritorial conduct* in the criminal context. . . . To sum up, the case law now conclusively establishes that civil antitrust actions predicated on *wholly foreign conduct* which has an intended and substantial effect in the United States come within Section One's jurisdictional reach.") (emphasis added); *AU Optronics*, 2011 WL 1464858, at *3. And while the government argued in the alternative in *Nippon Paper* that overt acts occurred within the United States, the First Circuit expressly

declined to address this argument, preferring to treat the conspiracy as strictly an extraterritorial one and thus "hold that activities committed abroad which have a substantial and intended effect within the United States may form the basis for a criminal prosecution under Section One of the Sherman Act." 109 F.3d at 3 n.2.

Because the government has alleged acts in furtherance of the charged conspiracy in the United States, a preliminary instruction requiring the jury to find a substantial and intended effect in the United States is premature. Moreover, even if, after the trial evidence is submitted, the Court determines there is a factual basis to argue that the government has failed to prove any conduct in the United States, AUO's proposed instruction would still be wrong. In that event, the jury would need to be instructed to find either acts in furtherance of the conspiracy in the United States or, absent such a finding, that the conspiracy had a substantial and intended effect in the United States. The government contends that, once the trial evidence is submitted, there will be no factual basis for such an instruction, but, in any event, a preliminary instruction is not appropriate.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court reject AUO's proposed preliminary instructions and that it give instead the standard model jury instruction proposed by the United States.

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Respectfully submitted,

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