PETER K. HUSTON (Cal. Bar No. 150058)
MICHAEL L. SCOTT (Cal. Bar No. 165452)
HEATHER S. TEWKSBURY (Cal. Bar No. 222202)
E. KATE PATCHEN (N.Y. Reg. No. 41204634)
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102-3478
Telephone: (415) 436-6660
Facsimile: (415) 436-6687
peter.huston@usdoj.gov

Attorneys for the United States

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 INSTRUCTION RE: EXCHANGE OF PRICE INFORMATION Trial Date: January 9, 2012 Time: 8:30 a.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

INTRODUCTION

Defendants request that the Court give an interim instruction after the first day of trial testimony instructing the jury that "[t]he exchange of price data and other information among competitors or discussions among competitors or concerning the prices and quantities of a product which they have sold is not in itself illegal." Such an instruction is inappropriate in this case. Even if the Court were to conclude that some instruction on price exchange is necessary, now is not the time to deliver it. It should be given as part of the final instructions which would provide the jury with the full picture of what does and does not constitute price fixing. The United States respectfully requests that the Court deny defendants' request.

ARGUMENT

I. Defendants' Proposed Jury Instruction on Information Exchange is Inappropriate in this *Per Se* Price-Fixing Case

Defendants continue their quest to turn this *per se* price-fixing case into a rule of reason case under *United States v. United States Gypsum Co.* Defendants assert that an interim instruction on "[t]he question of the legality of the exchange of price data" is necessary and propose an interim jury instruction based on *Gypsum*. Defendants' Proposed Instruction Re: Exchange of Price Information (Dkt. 675), at 2. However, an instruction regarding the legality of the exchange of price information is not applicable where, as here, the conduct is *per se* illegal. The indictment in this case charged defendants with price fixing, which has repeatedly been held to be *per se* illegal under the Sherman Act, *see United States v. Miller*, 771 F.2d 1219, 1225 (9th Cir. 1985), and evidence has already been admitted during the first day of trial supporting this charge.

As the Court has found, the government has already established by a preponderance of the evidence "that the conspiracy set forth in the indictment existed and involved AUO, AUOA, LG, Chunghwa, Chi Mei, HannStar, and Samsung, as well as the individual defendants." Order Re: United States' Request for Pre-Appearance Admission of Documents – Michael Wong (Dkt. 678), at 2. Further, as the Court noted, "defendants do not contest this point; they have conceded that the government has sufficient evidence to establish that the conspiracy existed and that

defendants were members." *Id*. Moreover, a trial witness, J.Y. Ho, has already testified that the members of the conspiracy agreed to target prices for TFT-LCDs. *See* Transcript of Proceedings, January 12, 2012 ("Tr."), at 660-61, 669-70, 676, 680. Unlike *Gypsum*, this is not a case based solely on the exchange of price information among competitors to which the rule of reason would apply. *Cf. United States v. U.S. Gypsum Co.*, 438 U.S. 422, 429, 441 n.16 (1978) (absent an agreement to fix prices, an exchange of price information is not illegal *per se*, and is judged under the rule of reason). To the contrary, the evidence has shown that this is a full-fledged *per se* price-fixing case to which *Gypsum* does not apply. *See United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991) (intent requirement of *Gypsum* does not apply to charges of *per se* violations of the antitrust laws); *see also United States v. All Star Industries*, 962 F.2d 465, 473 (5th Cir. 1992) (district court did not err by instructing jury in accordance with *per se* rule and refusing defendants' rule of reason instruction). Therefore, defendants' request for an instruction regarding the legality of the exchange of price data should be denied.

II. It Is Premature to Instruct the Jury at This Time

Any instruction on the substantive law applicable in a Sherman Act Section 1 case beyond the basic iteration of the elements of the offense already provided as a preliminary instruction is premature at this time. Such instructions are appropriately left for the end of trial, after the evidence in the case has been admitted and the Court can determine which instructions on the law are appropriate based on all the evidence.

The defendants' proposed instruction is far afield from the types of instructions that would typically be given to a jury during the course of trial and introduction of evidence. The types of interim instructions that the Ninth Circuit Jury Instructions Committee has identified as appropriate for use during trial relate to such matters as trial procedure (recesses, bench conferences, use of depositions, use of transcripts, foreign language testimony), stipulations, evidence being admitted for a limited purpose, dismissal or disposition of charges, and the like. *See* Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit §§ 2-2.15 (2010). Permitting instructions on the details of the substantive law in this case before the close of evidence will only encourage constant interruptions and piecemeal introduction of jury

instructions out of context. The adequacy of jury instructions is determined by examining them as a whole. *See, e.g.*, *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980). They should be given as a full set at the close of evidence in the case so that the jury is able to fully evaluate and consider all aspects of the law they are to apply during their deliberations.

III. If the Court Is Inclined to Give an Interim Instruction on What is Not Price Fixing, the Court Should Also Provide an Interim Instruction on What Is Price Fixing

Defendants ask the Court to instruct the jurors on the law of what types of competitor price exchanges do not constitute price fixing. If the Court is inclined to instruct the jury on what *does not* constitute price fixing, the government respectfully requests that the Court give a more fulsome instruction also explaining what *does* constitute price fixing – and only after full briefing on the legal issues. In particular, if the Court is inclined to give the defendants' interim instruction alone along the lines defendants have proposed, the government requests an opportunity for further briefing. Not only is defendants' proposed instruction inappropriate as a matter of law, but its language is confusing and unclear.

In support of their proposed instruction, defendants point only to one statement by the first witness called in this case – Timothy Tierney, a Hewlett Packard purchasing manager – in response to a question about whether he would discuss prices with his own competitors. Mr. Tierney did not provide the jury with an explanation of substantive antitrust law, nor did he testify about price exchanges among TFT-LCD competitors. He simply stated why he personally would not feel comfortable discussing prices with his own competitors in his own industry. The Court already overruled defense counsel's objections and motion to strike certain portions of Mr. Tierney's response to the question. Tr. 535-36. For Mr. Tierney's statement to warrant an early jury instruction regarding "[t]he exchange of price data and other information among competitors or discussions among competitors or concerning the prices and quantities of a product which they have sold is not in itself illegal" is a tangential stretch at best.

Should the Court be inclined to give an interim instruction on what is *insufficient* to constitute price fixing, the government asks that the Court put that instruction in context by also explaining what is *sufficient* to constitute price fixing. The jurors have not yet been instructed on

the legal definition of price fixing beyond a rough sketch of the elements of the offense. It would only be appropriate to provide a frame of reference and starting place by explaining what price fixing is to begin with. Therefore, the government requests that if the Court gives the defendants' proposed interim instruction, it also give the proposed instruction previously submitted by the United States defining "price fixing," attached hereto as Appendix A. *See* Appendix A, United States' Proposed Jury Instructions 16 (Dkt. 554).

CONCLUSION

Defendants' proposed instruction on information exchange is inappropriate and premature, and the government respectfully requests that the Court deny defendants' request for an interim jury instruction on the legality of price information exchanges between competitors.

Dated: January 12, 2012

Respectfully submitted,

/s/ Peter K. Huston
Peter K. Huston
Antitrust Division
U.S. Department of Justice