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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' TRIAL MEMORANDUM Pretrial Conf.: December 13, 2011 Time: 3:30 p.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor Trial Date: January 9, 2012

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Treatises

I. INTRODUCTION

On June 9, 2010, a San Francisco grand jury returned a Superseding Indictment ("Indictment") charging defendants AU Optronics Corporation ("AUO") of Taiwan, its U.S. subsidiary, AU Optronics Corporation America ("AUOA"), and current and former AUO executives, Hsuan Bin "H.B." Chen, Hui Hsiung, aka "Kuma," Lai-Juh "L.J." Chen, Shiu Lung "Steven" Leung, and Tsannrong "Hubert" Lee, with violating Section 1 of the Sherman Act. [1] The Indictment charges that from on or about September 14, 2001 until on or about December 1, 2006, defendants and their coconspirators were engaged in a conspiracy to suppress and eliminate competition by fixing prices of standard-sized thin-film transistor liquid crystal display panels ("TFT-LCDs") sold in the United States and elsewhere.

II. STATEMENT OF THE CASE

A. The Conspiracy

Beginning as early as 2001 and continuing through 2006, representatives from the leading TFT-LCD producers, including AUO, LG Philips LCD Co., Ltd. ("LG"), Samsung Electronics Co., Ltd. ("Samsung"), Chunghwa Picture Tubes, Ltd. ("CPT"), Chi Mei Optoelectronics Corporation ("CMO"), and HannStar Display Corporation ("HannStar"), participated in numerous meetings and conversations during which they discussed and, at times, agreed to fix and stabilize prices of TFT-LCDs used in notebook computers, desktop computer monitors, and televisions. As a result of these discussions and agreements, the members of the conspiracy sold TFT-LCDs to customers in the United States and elsewhere at collusive and noncompetitive prices. LG, Samsung, CPT, CMO, and HannStar and several of their executives have admitted guilt for their participation in the conspiracy.[2]

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[1] The following individual defendants have been indicted but have not appeared in this case: (1) Borlong "Richard" Bai, who was the Director of AUO's Notebook Display Business Group during the conspiracy period; (2) Cheng Yuan "C.Y." Lin, who was Chairman and CEO of Chunghwa Picture Tubes, Ltd. ("CPT") during the conspiracy period; (3) Wen Jun "Tony" Cheng, who was Assistant Vice President of Sales and Marketing at CPT during the conspiracy period; and (4) Duk Mo Koo, who was Executive Vice President and Chief Sales Officer at LG Philips LCD Co., Ltd. ("LG") during the conspiracy period.

[2] In 2006, Samsung informed the Antitrust Division of the LCD conspiracy and requested acceptance into the Antitrust Division's corporate leniency program. Samsung was subsequently

The conspiracy was carried out in large part through a series of regularly scheduled group meetings, referred to as "crystal meetings," that took place in Taiwan among representatives of the corporate conspirators. The conspirators also had one-on-one bilateral meetings in which they monitored each other's compliance with price agreements reached at crystal meetings, and also, at times, reached agreements on pricing of TFT-LCDs, including TFT-LCDs sold to customers in the United States.

While many meetings and contacts among the conspirators took place in Taiwan and Korea, meetings and contacts among competitors in furtherance of the conspiracy also took place in the United States. In addition to the in-person crystal meetings and bilateral meetings, competitors also engaged in various phone and email contacts to further their conspiracy.

The crystal meetings generally took place every month in Taipei, Taiwan. The conspirators rotated responsibility for coordinating, arranging, and hosting each of these monthly meetings, which usually occurred in hotel conference rooms. The meetings followed a typical format that involved discussing the market situation, supply and demand, and shipment, production, and pricing information, among other things. At these crystal meetings, the conspirators would, at times, reach understandings on future pricing for TFT-LCDs. Depending on market conditions and circumstances, the conspirators would decide whether to maintain, increase, or decrease TFT-LCD prices.

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granted conditional leniency.

In December 2008, LG pled guilty to its participation in the LCD conspiracy and paid a $400 million fine. LG employees Bock Kwon and Chang Seok "C.S." Chung also pled guilty and received sentences of 12 and seven months, respectively.

On January 15, 2009, CPT pled guilty and was fined $65 million. CPT employees Cheng Yuan "Frank" Lin, Chih Chun "C.C." Liu, and Hsueh Lung "Brian" Lee also pled guilty and received sentences of nine, seven, and six months, respectively.

On February 11, 2010, CMO pled guilty and was fined $220 million. CMO employees Jau Yang "J.Y." Ho, Chen Lung "C.L." Kuo, Wen Hung "Amigo" Huang, and Chu Hsiang "James" Yang also pled guilty. Ho received a sentence of 14 months; each of the others received a sentence of nine months.

Finally, on August 5, 2010 HannStar pled guilty and was fined $30 million. HannStar employee Jui Hung "Sam" Wu pled guilty and received a seven month sentence.

Each of the individuals who pled guilty received significant downward departures from their applicable Guidelines sentences pursuant to U.S.S.G. §5K2.0 for their full and continuing cooperation in the investigation.

Frequently, participants took notes at the crystal meetings. At times, these notes were prepared into reports which were sent to higher-level sales executives at the corporate conspirators. These notes and reports of the crystal meetings memorialize discussion points and agreements reached during the meetings. Some of these reports also list attendees as well as the date and location of the meeting. The notes and reports also frequently contain charts summarizing the conspirators' pricing agreements.

The crystal meetings continued from 2001 into 2006. The format of the meetings, however, developed and changed over time. From approximately 2001 through mid-2005, senior sales executives, and sometimes CEOs, from the conspirator companies attended the crystal meetings, typically accompanied by lower-level executives and employees. Around May 2005, in part due to concerns about possible detection by major U.S. TFT-LCD purchasers and in an effort to keep the meetings secret, senior-level sales executives gradually stopped attending the crystal meetings. In their place, lower-level marketing employees were instructed to attend and continued to meet on a monthly basis. The lower-level marketing employees generally held the meetings at restaurants and cafés, rather than hotels. The lower-level marketing employees continued to exchange shipment, production, and pricing information in furtherance of the conspiracy.

In early 2006, the crystal meeting participants became further concerned about detection and decided to cease their group meetings and, instead, have back-to-back one-on-one meetings in a round-robin style. The participants in these "round-robin" meetings would decide upon the day or days that they would schedule meetings to take place in cafés and restaurants around the city of Taipei, Taiwan. The participants continued to exchange shipment, production, and, at times, pricing information in furtherance of the conspiracy. The meeting scheduled for December 2006 was called off. The government's investigation became public on December 6, 2006.

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B. Defendants' Participation in the Conspiracy

1. The Corporate Defendants: AUO and AUOA

Defendant AUO is headquartered in Hsinchu, Taiwan. AUO is one of the largest companies in Taiwan, with sales of over $16 billion in 2010. AUO was created in 2001 from the merger of two TFT-LCD-producing companies, Acer Display Technology, Inc. and Unipac Electronics. During the period of the conspiracy, AUO manufactured, marketed, sold, and/or distributed TFT-LCDs in the United States and throughout the world. The TFT-LCDs manufactured by AUO were also incorporated into products sold in the United States and throughout the world. During the conspiracy period, AUO became the largest TFT-LCD manufacturer in Taiwan. Accordingly, AUO was an important member of the TFT-LCD conspiracy. Employees of AUO attended the vast majority of crystal meetings. In addition to participating in crystal meetings, AUO employees engaged in bilateral meetings and contacts with representatives from competitor companies during which they discussed and, at times, reached price agreements. In particular, major U.S. customers such as Dell, HP, and Apple were the subject of bilateral discussions between the conspirators, including AUO.

Defendant AUOA is a California corporation with its principal place of business in Houston, Texas. AUOA, a wholly owned and controlled subsidiary of AUO, provides TFT-LCD sales support to AUO in the United States. AUOA employees participated in the TFT-LCD conspiracy through contacts with competitors in person or by phone in the United States to exchange sensitive competitor information, including pricing information, to major Untied States customers such as Dell, HP, and Apple. AUOA employees reported the pricing information they obtained from competitors in the United States back to AUO headquarters in Taiwan. In addition, AUOA employees located in the United States received crystal meeting reports and competitor pricing information forwarded by AUO employees in Taiwan. The AUOA employees used pricing information obtained from competitors in their negotiations with major customers such as Dell, HP, and Apple.

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2. The Individual Defendants

Defendant H.B. Chen was President and Chief Operating Officer of AUO from 2001 until 2007. Prior to the formation of AUO, H.B. Chen was President of AUO's predecessor, Acer Display Technology. H.B. Chen is charged with participating in the conspiracy from at least as early as October 19, 2001 and continuing at least until December 1, 2006. H.B. Chen attended several important early crystal meetings on behalf of AUO, during which the purpose of the conspiracy was discussed and agreements on price were reached. He had an active role at the crystal meetings and was frequently the highest-level AUO executive and the primary speaker for AUO at the meetings he attended. He also received reports of crystal meetings that he did not personally attend. In addition, H.B. Chen attended bilateral meetings with competitors at which pricing was discussed and, at times, price agreements were reached. In 2007, he became AUO's Vice Chairman and Chief Executive Officer.

Defendant Hui Hsiung, "Kuma," was AUO's Executive Vice President of Sales in charge of all business units of the company from June 2002 until September 2007 and reported to H.B. Chen. He was also President of AUOA. Prior to becoming Executive Vice President in 2002, Kuma was General Manager of AUO's Mobile Display Unit. Prior to the formation of AUO, Kuma served in Acer Display Technology's Marketing and Sales Division and on its board of directors. In September 2007, Kuma became the President and Chief Executive Officer of Qisda Corporation, a company affiliated with AUO. Kuma remains a member of AUO's board of directors, a position he has held since 2002. Kuma participated in the conspiracy from at least as early as October 19, 2001 and continuing at least until December 1, 2006. He attended crystal meetings on behalf of AUO, including several high-level meetings early in the conspiracy. In addition, Kuma received reports from subordinates summarizing crystal meetings and memorializing price agreements reached at the meetings. Kuma also attended bilateral meetings with competitors where pricing was often discussed and, at times, price agreements were reached.

Defendant L.J. Chen was Director of AUO's Desktop Display Business Group from early 2003 through the end of 2005. In that position, he had responsibility for sales of TFT-LCDs

used in desktop monitors. L.J. Chen participated in the conspiracy from at least as early as February 13, 2003 and continuing at least until November 1, 2005. The government does not have evidence of L.J. Chen attending crystal meetings, but his subordinate, defendant Steven Leung, attended a number of crystal meetings on behalf of AUO. L.J. Chen received Leung's reports summarizing the crystal meetings and memorializing price agreements reached at those meetings. L.J. Chen personally attended high-level bilateral meetings with LG executives at which pricing was discussed and, at times, price agreements were reached. He also received reports from his subordinates that referred to bilateral contacts with competitors during which pricing was discussed, including pricing to United States customers. In 2007, L.J. Chen became AUO's Senior Vice President and General Manager of Global Manufacturing and, later that year, AUO's President and Chief Operating Officer. In January 2009, L.J. Chen became President and Chief Executive Officer of AUO.

Defendant Steven Leung was a Senior Manager in AUO's Desktop Display Business Group between 2003 and 2007. In that position, Steven Leung had responsibility for and oversight of sales of TFT-LCDs used in desktop monitors. Steven Leung participated in the conspiracy from at least as early as May 15, 2002 and continuing at least until December 1, 2006. Leung attended crystal meetings on behalf of AUO starting as early as May 2002 and served as a notetaker at the crystal meetings he attended. Leung wrote reports summarizing crystal meetings and memorializing price agreements reached at the meetings and forwarded these reports to other AUO executives, including defendants H.B. Chen, Kuma, L.J. Chen, and Hubert Lee. Leung also participated in bilateral contacts with competitors during which pricing was discussed.

Defendant Hubert Lee was a Senior Manager in AUO's Notebook Display Business Group from 2001 to mid-2002. In that position, he had responsibility for and oversight of sales of TFT-LCDs used in notebook computers. In mid-2002, Hubert Lee became a Senior Manager in the Desktop Display Business Group with responsibility for and oversight of TFT-LCDs used in desktop monitors. Lee was later promoted to Director and eventually transferred back to the Notebook Display Business Group, where he continued to serve through 2006. Lee participated

in the conspiracy from at least as early as January 11, 2002 and continuing at least until December 1, 2006. Lee attended several crystal meetings during which agreements on price were reached and he regularly received and sometimes forwarded crystal meeting reports. Lee also received reports of other AUO employees' competitor contacts, including contacts by employees of AUOA with competitors in the United States.

C. The TFT-LCD Market and the Conspiracy's Overcharge

The market for TFT-LCDs is large. In 2006, annual revenues of large-sized TFT-LCDs was approximately $35 billion. A significant portion of TFT-LCD sales were to U.S. computer companies like Dell, Apple, and HP and eventually ended up in products sold to millions of American consumers. The Indictment alleges that the conspirators derived gross gains from the conspiracy of at least $500 million. Indictment ¶¶ 2, 23.

III. LAW APPLICABLE TO THE SHERMAN ACT OFFENSE

A. An Agreement among Competitors to Fix Prices Is Illegal *Per Se*

Section 1 of the Sherman Act, 15 U.S.C. § 1, declares every contract, combination, and conspiracy in restraint of trade to be illegal. Read literally, Section 1 would preclude all restraints of trade. However, the Supreme Court has always recognized that Section 1 was "intended to prohibit only *unreasonable* restraints of trade." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (emphasis added); *see also United States v. Green*, 592 F.3d 1057, 1068 (9th Cir. 2010). The Supreme Court has also long held, however, that:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). Price fixing is among the practices that courts have deemed to be *per se* unlawful. *Id.*; *see also National Collegiate*

Athletic Ass'n v. Board of Regents, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 (1980) (*per curiam*); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2000) ("No antitrust violation is more abominated than the agreement to fix prices.").

Thus, price-fixing agreements are illegal regardless of any pro-competitive justifications the defendant may offer "'because of their actual or potential threat to the central nervous system of the economy.'" *United States v. Alston*, 974 F.3d 1206, 1208 (9th Cir. 1992) (quoting *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990)). "The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman*, 322 F.3d at 1144. Accordingly, the elements of a criminal Sherman Act price-fixing conspiracy are:

(1) that the conspiracy charged existed at or about the time stated in the indictment;

(2) that the defendants knowingly became members of the conspiracy; and

(3) that the conspiracy involved interstate or foreign commerce.

See Alston, 974 F.2d at 1210.[3]

Defendants cannot legally justify or excuse the price-fixing conspiracy charged in this case with claims that prices were reasonable or because the conspirators were motivated by good intentions or business necessity. *See NCAA*, 468 U.S. at 101 n.23 (good motives will not validate an otherwise anticompetitive practice); *Catalano*, 446 U.S. at 647 (reasonableness of prices is irrelevant); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940) (claims of competitive abuses do not justify a Sherman Act violation); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) (Sherman Act's prohibitions cannot be evaded by good motives). In fact, because such agreements are *per se* illegal regardless of the economic justifications they may be thought to have, no inquiry into the reasonableness of a particular *per se* agreement is permitted. *See Socony-Vacuum*, 310 U.S. at 221-22.

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[3] Defendants have proposed a preliminary jury instruction that alters the traditional elements of a Sherman Act claim based on the Foreign Trade Antitrust Improvements Act ("FTAIA") (Dkt. 411). The government has opposed that proposal. (Dkt. 437).

B. The Agreement Is the Crime

A conspiracy under the Sherman Act is similar to any other criminal conspiracy: a combination of two or more persons or entities engaged in concerted action to accomplish an illegal purpose or to accomplish a legal purpose by illegal means. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465-66 (1921). Unlike the general criminal conspiracy statute, 18 U.S.C. § 371, however, the Sherman Act does not require proof of an overt act in furtherance of the conspiracy. *Nash v. United States*, 229 U.S. 373, 378 (1913) (holding that the Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability"). Instead, the conspiratorial agreement, itself, constitutes the complete criminal offense. *Socony-Vacuum*, 310 U.S. at 226 n.59 ("[I]t is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring.") (citing *Nash*, 229 U.S. at 378); *United States v. Miller*, 771 F.2d 1219, 1226 (9th Cir. 1985).

Therefore, it is not necessary that any overt acts in furtherance of the conspiracy be alleged or proved. *Socony-Vacuum*, 310 U.S. at 224, 224 n.59; *Miller*, 771 F.2d at 1226. Regardless, in this case, the government will introduce evidence of acts that furthered the conspiracy. Any overt acts that the government chooses to introduce need not be illegal *per se* if they were acts committed in forming or furthering the conspiracy. *Chavez v. United States*, 275 F.2d 813, 817 (9th Cir. 1960) ("It is true that an overt act [in furtherance of a conspiracy] in itself may be a perfectly innocent act standing by itself.").

Additionally, other than for sentencing purposes (see section III K, below), the government is not required to prove that the agreement was implemented, nor that it was successful. *E.g.*, *Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 133 (9th Cir. 1960) (citing *United States v.Trenton Potteries*, 273 U.S. 392 at 402 (1927)); *see also Socony-Vacuum*, 310 U.S. at 220-22; *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683-84 (5th Cir. 1981) (holding the *per se* rule condemns conspiracies never implemented, as well as those that fail to achieve their objectives and produce no anticompetitive effects). Once an agreement to fix prices has been made, it is "conclusively presumed that a conspiracy to restrain trade exists, and it is 'immaterial whether the agreements were ever actually carried out,

whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect.'" *Plymouth Dealers' Ass'n*, 279 F.2d at 132 (quoting *Trenton Potteries*, 273 U.S. at 402).

C. Specific Intent Need Not Be Proved[4]

To establish the intent requirement for a *per se* violation of the Sherman Act, the government need only establish "that the defendant knowingly – that is voluntarily and intentionally – became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help." *Alston*, 974 F.2d at 1210. The government need not prove that defendants had a *specific intent* to restrain trade. *Id.* at 1210-11; *see also United States v. Brown*, 936 F.2d 1042, 1045-46 (9th Cir. 1991) ("'Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the per se rule is designed to avoid.'") (citations omitted). Nor does the government need to show that defendants knew what they were doing was illegal. *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); *United States v. Aguilar*, 883 F.2d 662, 673 (9th Cir. 1989) ("It is axiomatic that ignorance or mistake of law is no defense.").

D. Minor Participation Is Sufficient to Establish Participation in a Conspiracy

A defendant "participates" in a conspiracy even if he has only a slight connection to it. "Once a conspiracy has been established, evidence of only a slight connection with it is sufficient to establish a defendant's participation in it." *United States v. Castaneda*, 16 F.3d 1504, 1510 (9th Cir. 1994). "The term 'slight connection' means that a defendant need not have known all the conspirators, participated in the conspiracy from its beginning, participated in all its enterprises, or known all its details." *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001); *see also United States v. Skillman*, 922 F.2d 1370, 1373 (9th Cir. 1990) ("This slight connection may be demonstrated by proof of the defendant's willful participation in the

[4] *See* United States' Motion in Limine #11 to Exclude Evidence or Argument Regarding Lack of Specific Intent to Violate the Antitrust Law, filed 12/6/11 (Dkt. 490) for a more complete analysis of the intent requirement for a *per se* violation of the Sherman Act.

illegal objective with the intent to further some purpose of the conspiracy."). Moreover, the coconspirators need not be interested in the same customers or know of each conspiratorial transaction. *Blumenthal v. United States*, 332 U.S. 539, 556-57 (1947).

Even "a single act may involve a person in a conspiracy if from the act an intent to participate may reasonably be inferred." *United States v. Davis*, 623 F.2d 188, 191 (1st Cir. 1980); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978); *see also United States v. Harris*, 409 F.2d 77, 83 (4th Cir. 1969). Thus, whether a defendant's participation in the conspiracy is major or minor is irrelevant. The only requirement is that the participation be willful and in furtherance of the conspiracy.

E. Those Who Join a Conspiracy Are Bound by All That Has Gone on before, and Participation Continues Absent Affirmative Evidence of Withdrawal

"[A] conspirator who joins a pre-existing conspiracy is bound by all that has gone on before in the conspiracy." *United States v. Saavedra*, 684 F.2d 1293, 1301 (9th Cir. 1982). A conspiracy is deemed to continue as long as its members continue to commit acts in furtherance of the conspiracy. *See United States v. Inryco, Inc.*, 642 F.2d 290, 294-95 (9th Cir. 1981); *United States v. Basey*, 613 F.2d 198, 202 (9th Cir.1979). A defendant's participation is presumed to have continued throughout the conspiracy's entire period unless he produces affirmative evidence of withdrawal through some act to defeat or disavow the object of the conspiracy, communicated in a manner reasonably calculated to reach his coconspirators. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65 (1978); *Hyde v. United States*, 225 U.S. 347, 369 (1912) (holding that participation in conspiracy continues until affirmative withdrawal or conspiracy's conclusion). The burden is on the defendant to introduce sufficient evidence to make a *prima facie* case of withdrawal. *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992); *see also Basey*, 613 F.2d at 202 ("[A defendant's] participation in the conspiracy is presumed to continue until the last overt act of the conspirators unless [the defendant] produces affirmative evidence of withdrawal."). Absent proof that a conspirator has withdrawn from the conspiracy, he is liable for all acts performed in furtherance of the conspiracy by the other

conspirators. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946); *United States v. Long*, 301 F.3d 1095, 1103 (9th Cir. 2002).

F. A Single Conspiracy May Include Sub-agreements

A conspiracy that "contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up" is a single continuing conspiracy. *United States v. Kissel*, 218 U.S. 601, 607 (1910). This is true even though it may embrace many lesser agreements, for example, the elimination of discounts at specific accounts. *See Consolidated Packaging Corp.*, 575 F.2d at 128. The "'general test . . . comprehends the existence of subgroups or subagreements . . . [t]he evidence need not be such that it excludes every hypothesis but that of a single conspiracy; rather it is enough that the evidence adequately support a finding that a single conspiracy exists.'" *United States v. Arbelaez*, 719 F.2d 1453, 1457-58 (9th Cir. 1983) (alteration in original) (citations omitted). A single conspiracy also need not have all the same conspirators throughout the conspiracy. *See, e.g.*, *Saavedra*, 684 F.2d at 1301.

G. *Per Se* Unlawful Agreement Need Not Be Explicit or Formal

The evidence need not show that the members of the conspiracy entered into an express or formal agreement or that they directly stated (either orally or in writing) their object or purpose to be accomplished. Indeed, an exchange of words is not required. *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *Direct Sales Co. v. United States*, 319 U.S. 703, 714 (1943); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226–27 (1939); *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) ("A knowing wink can mean more than words."). Thus, to secure a conviction, the government must show that a defendant, "knowing that concerted action was contemplated and invited, . . . gave [his] adherence to the scheme and participated in it." *Interstate Circuit*, 306 U.S. at 226.

H. Not All Means and Methods Charged in the Indictment Must Be Proved

The evidence need not establish that all of the means or methods set forth in the Indictment were agreed upon or utilized to carry out the conspiracy. *Socony-Vacuum*, 310 U.S. at 249-50; *see also United States v. Kartman*, 417 F.2d 893, 894 (9th Cir. 1969) (holding an

unproven allegation in indictment to be "surplusage . . . unnecessary for the government to prove" when not an element of the charged crime). Nor must the evidence show that all means or methods agreed upon were actually used or put into operation, *see, e.g., Trenton Potteries*, 273 U.S. at 402, or that all persons alleged to have been conspirators were such. *Weiss v. United States*, 103 F.2d 759, 760 (3d Cir. 1939). The government is also not required to prove that the conspiracy continued for the duration charged in the Indictment. *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397, 401 (4th Cir. 1958), *aff'd*, 360 U.S. 395 (1959); *Cooper v. United States*, 91 F.2d 195, 198 (5th Cir. 1937). As stated above, the conspiratorial agreement is itself the complete offense, *e.g., Nash*, 229 U.S. at 378, rendering the charged time period "surplusage" that the government does not have to prove. *See Kartman*, 417 F.2d at 894.

I. Interstate Commerce Requirement

The interstate commerce element in Sherman Act cases is jurisdictional and is established by proof that the conspirators' business activity was either in the flow of interstate or foreign commerce (the "flow" theory) or had or was likely to have a substantial effect on interstate or foreign commerce (the "effects" theory). *United States v. Giordano*, 261 F.3d 1134, 1138 (11th Cir. 2001); *see also United States v. ORS, Inc.*, 997 F.2d 628, 630 (9th Cir. 1993) (discussing both the "flow" and "effect" theories). "[J]urisdiction is established if any one of [the allegations on interstate commerce] satisfies" either the flow theory or the effect theory. *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3d Cir. 1973).

Here the price-fixing agreement involved TFT-LCDs for use in notebook computers, desktop monitors, and televisions sold in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in states and countries other than the states or countries in which the defendants and their coconspirators produced TFT-LCDs.[5]

[5] Because this case involves foreign conduct, the defendants have submitted a proposed jury instruction on the elements of the offense drawn from the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), *Hartford v. California*, 509 U.S. 764 (1993), and *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). [Dkt. 411] As stated in its opposition [Dkt. 432], the government believes that the "novel" elements proposed by the defendants are based on a misreading of the cited authority and contrary to this Court's prior ruling denying Defendants' Motion to Dismiss the Indictment. [Dkt. 287] Consistent with this

J. Corporate and Superior Liability

It is well settled that corporations are subject to antitrust liability for acts of their employees in the scope of their employment. *United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972); *see also Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565-66 (1982) (antitrust liability of association for acts of its agents within their apparent authority). It is equally well settled that such liability is appropriate even where that employee's conspiratorial conduct violates corporate policy or express instructions. *See, e.g.*, *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992); *Portac*, 869 F.2d at 1293; *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972).

In the corporate context, supervisors may also be subject to antitrust liability for their subordinates' actions. A defendant who is aware that his or her subordinates are participating in an illegal conspiracy is legally obligated to prevent any further participation by those subordinates. *United States v. Misle Bus & Equip Co.*, 967 F.2d 1227, 1236 (8th Cir. 1992); *United States v. Gillen*, 599 F.2d 541, 547 (3d Cir. 1979). "When a company president has knowledge that his company is involved in a price-fixing conspiracy and takes no action to stop it, he may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates." *Gillen*, 599 F.2d at 547. Therefore, a company official who knowingly participates in a conspiracy in this manner is liable to the same extent as any other member of the conspiracy. *Misle*, 967 F.2d at 1236.

In this case, the evidence will prove that the conspiratorial acts of the individual defendants and other uncharged employees of AUO and AUOA were performed within the course and scope of their employment at AUO and AUOA. In particular, the evidence will prove that AUO and AUOA employees who participated in crystal meetings and other collusive pricing communications and agreements were acting within the scope of their employment

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Court's prior ruling, the government has proposed the Ninth Circuit's standard instruction that sets out the well-established elements of a price-fixing conspiracy in violation of Section 1 of the Sherman Act. If this Court concludes that an FTAIA instruction is appropriate, the government has proposed an alternative instruction that cures the errors in defendants' proposed instruction.

responsibilities related to the pricing and sale of TFT-LCDs and with the knowledge of, and often at the direction of, their superiors. Upon proof of such facts, AUO and AUOA can be held liable for such acts of its employees, and superiors can be held liable for the acts of their subordinates.

K. The Alternative Fines Act

The maximum fine under the Sherman Act for corporations is $100 million. In the present case, this maximum fine would not reflect the gravity of the offense or achieve the deterrence objective. The Alternative Fines Act, 18 U.S.C. § 3571(d), provides an alternative statutory maximum fine of twice the gross gain from the offense. Under the Alternative Fines Act, "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss . . . ." 18 U.S.C. § 3571 (d). Proof of any gross gain in excess of $50 million would provide a statutory maximum fine above the $100 million maximum provided by the Sherman Act, 15 U.S.C. § 1. On July 18, 2011, the Court held that the government must prove such a gain beyond a reasonable doubt to the jury. (7/18/11 Order, Dkt. 356). The government has requested a preliminary jury instruction on this issue. (Dkt. 418).

IV. PENDING MOTIONS IN LIMINE AND EVIDENTIARY ISSUES

The government has filed a number of separate pretrial motions and oppositions to motions addressing evidentiary issues which are not reiterated here. Those include:

- A memorandum of law and factual proffer regarding coconspirator statements that the government will offer at trial under Federal Rule of Evidence 801(d)(2)(E), and seeking a pretrial ruling on the admissibility of certain written reports of conspiracy meetings containing coconspirator statements. (Filed 11/23/11) [FILED UNDER SEAL];

- A motion seeking a pretrial ruling on the admissibility of trial exhibits that are party admissions of AUO and permitting testimony by an FBI agent regarding the content of those trial exhibits. (Filed 11/25/11) [FILED UNDER SEAL] ;

- A motion to exclude testimony of defense economic experts Drs. Robert Hall, Larry Samuelson, and Richard Schmalensee under Federal Rule of Evidence 702 as both unhelpful and unreliable. (Filed 11/25/11) [FILED UNDER SEAL];

- A motion for an order pursuant to Federal Rule of Criminal Procedure 16(d)(2)(A) compelling AUO to make additional disclosures relating to the expected expert witness testimony of Mr. Bruce Deal concerning the gross gain from the conspiracy and to exclude Mr. Deal's testimony pursuant to Rule 702. (Filed 11/23/11) [FILED UNDER SEAL];

- A motion in limine (#1) to exclude the testimony of Dayle Carlson, a correctional consultant hired by defendant Steven Leung, under Federal Rules of Evidence 401 and 702 as both unhelpful and unreliable. (Filed 12/6/11) [Dkt. 480];

- A motion in limine (#2) to exclude the testimony of Dr. Thomas B. Gold and Dr. Doug Guthrie (two cultural "experts") under Federal Rules of Evidence 401 and 702 as both unreliable and unhelpful and under Rule 403 because its reliance on cultural stereotyping will mislead the jury and confuse the issues. (Filed 12/6/11) [Dkt. 481];

- A motion in limine (#3) to exclude testimony of defendants' expert Ross Young, the founder of DisplaySearch, a TFT-LCD industry market research firm, because it would be unhelpful and unreliable under Federal Rules of Evidence 702 and 401 and a misleading waste of time under Rule 403. (Filed 12/6/11) [Dkt. 482];

- A motion in limine (#4) for a ruling that the guilty pleas, plea agreements, and nonprosecution agreements are admissible and allowing the government to elicit testimony on direct examination of witnesses about the existence and terms of these agreements and to comment upon the agreements in opening statements and closing arguments. ((Filed 12/6/11) [Dkt. 483];

- A motion in limine (#5) for an order prohibiting defendants from introducing at trial any evidence or argument that defendants' agreements with competitors to fix or stabilize prices were reasonable or that such agreements had economic, business, or personal justifications. (Filed 12/6/11) [Dkt. 484];

- A motion in limine (#6) for a ruling that certified copies of public documents filed by AUO and AUOA with the Securities and Exchange Commission and the State of California are self-authenticating and admissible. (Filed 12/6/11) [Dkt. 485];

- A motion in limine (#7) for a pretrial ruling on the authenticity and admissibility of data compilations for daily currency exchange rates between U.S. dollars and the Japanese yen, Taiwan dollar, and Korean yuan maintained and published by the Federal Reserve Board of Governors. (Filed 12/6/11) [Dkt. 486];

- A motion in limine (#8) for an order prohibiting defendants from cross-examining prosecution witnesses with FBI 302s and interview and attorney proffer memoranda prepared by paralegals of the DOJ which were not prepared or adopted, ratified, subscribed, or sworn to by the witnesses. (Filed 12/6/11) [Dkt. 487];

- A motion in limine (#9) for an order prohibiting defendants from playing videos from the civil depositions at trial because playing videos will needlessly delay the

proceedings; and the videos have no probative value not available to defendants through the written transcript. (Filed 12/6/11) [Dkt. 488];

- A motion in limine (#10) for an order pursuant to Federal Rules of Evidence 401, 402, and 403 prohibiting evidence and arguments by defendants aimed at jury nullification. Specifically, evidence or argument about (1) defendants' potential punishment and the collateral consequences a conviction may have on defendants; (2) the government's charging decisions in the investigation that gave rise to the Indictment; and (3) the personal characteristics or other unique circumstances of defendants. (Filed 12/6/11) [Dkt. 489];

- A motion in limine (#11) for an order prohibiting defendants from introducing at trial any evidence or argument that defendants did not intend to violate antitrust laws or restrain trade, or were ignorant or mistaken about the requirements of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Filed 12/6/11) [Dkt. 490];

- A notice of intent to introduce and admit summary charts under Federal Rule of Evidence 611(a) (Filed 12/6/11) [Dkt. 491];

- A notice of intent to introduce and admit summary charts under Federal Rule of Evidence 1006. (Filed 12/6/11) [Dkt. 492];

- A notice of intent to admit business records under Federal Rules of Evidence 803(6) and 902(11), and request for ruling on admissibility. (Filed 12/6/11) [Dkt. 494];

- An opposition to defendants' motion in limine to exclude evidence of preconspiracy events. The government's opposition indicates why evidence of bilateral, collusive pricing communications involving defendants and their coconspirators in the months leading up to the formation of the charged conspiracy in September 2001 is admissible. (Filed 12/9/11) [Dkt. 551];

- An opposition to a motion in limine to exclude lay opinion testimony as to defendants' state of mind. (Filed 12/9/11) [Dkt. 544];

- An opposition to defendant Lai-Juh Chen's motion in limine to admit character evidence. (Filed 12/9/11) [Dkt. 543].

V. OTHER EVIDENTIARY ISSUES LIKELY TO ARISE AT TRIAL

Below are brief outlines of additional evidentiary issues other than those addressed in the government briefs identified above which will be relevant to the trial of this case.

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A. Background Evidence of Preconspiracy Activity by Coconspirators Is Admissible

The government intends to offer evidence of bilateral, collusive pricing communications involving defendants and their coconspirators in the months leading up to the formation of the charged conspiracy in September 2001. For a discussion of the relevant law on this topic, the government refers to and incorporates by reference its opposition to defendants' motion in limine to exclude evidence of preconspiracy events. [Dkt. 551].

B. Use of Circumstantial Evidence to Prove a Sherman Act Conspiracy

Because of the secret and often sophisticated nature of conspiracies, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and a collocation of circumstances." *Glasser v. United States*, 315 U.S. 60, 80 (1942) (internal quotations omitted); *see also United States v. Magana-Olvera*, 917 F.2d 401 (9th Cir. 1990) ("The government need not have shown an explicit agreement; it could have established it from the circumstances."); *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980). In addition, "[c]ircumstantial evidence is sufficient to sustain a conviction, and the government's evidence need not exclude every reasonable hypothesis consistent with innocence." *United States v. Talbert*, 710 F.2d 528, 530 (9th Cir. 1983); *United States v. Miller*, 688 F.2d 652, 663 (9th Cir. 1982).

As a consequence, broad discretion and great latitude are allowed in presenting evidence in a criminal conspiracy case, "and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged." *Nye & Nissen v. United States*, 168 F.2d 846, 857 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949); *see also Schino v. United States*, 209 F.2d 67, 74 (9th Cir. 1953). Evidence is admissible so long as it assists in proving that an illegal conspiracy was knowingly formed or joined. *See Trenton Potteries Co.*, 273 U.S. at 397-99; *Alston*, 974 F.2d at 1210. Accordingly, courts have routinely admitted testimony covering the conspirators' general modus operandi and course of conduct, even if unrelated to specific conspiratorial episodes. *See United States v. McGowan*, 274 F.3d 1251, 1254 (9th Cir. 2001) (same); *United States v. Vallejo*, 237 F.3d 1008, *amended*, 246 F.3d 1150 (9th Cir. 2001); *United*

States v. Burchfield, 719 F.2d 356, 358 (11th Cir. 1983); *United States v. Grande*, 620 F.2d 1026, 1033 (4th Cir. 1980) (witness permitted to testify as to general pattern of bid rigging spanning eight years); *United States v. Dansker*, 537 F.2d 40, 57-58 (3d Cir. 1976).

C. Admission of Coconspirator Statements

As noted above, the government has previously briefed why the statements of coconspirators are admissible nonhearsay under Rule 801(d)(2)(E) and given notice of its intention to offer evidence of such statements. The government will not repeat the discussion of Rule 801(d)(2)(E) here. The statements the government intends to introduce as coconspirator statements are also be admissible under other theories.

1. Nonhearsay – 801(c)

The crystal meeting notes and reports and the statements by other companies within them are circumstantial proof of the conspiracy without reference to the truth of the matter asserted. The statements are relevant merely because the words were said, not because the subject of the statement was true.

Under Rule 801(c), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Where the proponent of a statement does not offer it for the truth of the matter asserted, but for some other relevant purpose, there is no hearsay problem. *Id*; Fed. R. Evid. 801(c) advisory committee note. The Ninth Circuit has repeatedly held that statements between coconspirators are not hearsay where offered as proof of the conspiracy or to establish the purpose and means of the conspiracy and not to prove the truth of the matter asserted. *United States v. Lim*, 984 F.2d 331, 336 (9th Cir. 1993); *United States v. Lopez*, 803 F.2d 969 (9th Cir. 1986); *United States v. Wolfson*, 634 F.2d 1217 (9th Cir. 1980) ("[W]hen a witness is present at a meeting between a group of conspirators, and they orally, in his presence, agree upon the conspiracy, its objectives, and its modus operandi, the witness' testimony about what each of them said is not hearsay."); *Miller*, 771 F.2d at 1233-35 (statements offered to prove declarant's own conduct in furtherance of the conspiracy were nonhearsay); *United States v. Calaway*, 524 F.2d 609, 613 (9th Cir. 1975).

The reports of conspiratorial meetings prove two important purposes separate and distinct from the truth or falsity of the statements within them. First, the fact that these statements were made is circumstantial proof of the conspiracy. One of the most fundamental ways of proving a conspiracy to fix prices is to show what was said between competitors. The fact that competitors were discussing pricing is circumstantial proof of the conspiracy itself. *See Miller*, 771 F.2d at 1233-35. The fact that certain statements were made during meetings of competitors helps establish a conspiracy existed and shows the conspirators' state of mind. Second, where the statements by meeting participants show assent to a pricing proposal, the means and methods of the conspiracy, or the terms of the agreement, the words are not hearsay because they show the "objectives, and its modus operandi" of the conspiracy. *Wolfson*, 634 F.2d at 1218. These statements are a verbal act that gives rise to legal consequences. *Id*. The statements have legal significance merely because they were uttered, not because what was said was true. For these reasons, statements by other companies in the crystal meeting notes are not offered for the truth of the matter asserted are not hearsay under Rule 801(c).

2. Business Record Exception

The business record exception to the hearsay rule provides for the admission of "[a] memorandum, report, record, or data compilation, in any form," if it was (1) made or based on information transmitted by a person with knowledge at or near the time of the transaction; and (2) kept in the ordinary course of business. Fed. R. Evid. 803(6). *Sea-Land Serv., Inc. v. Lozen Intern., LLC*, 285 F.3d 808, 819 (9th Cir. 2002) (quoting *Miller*, 771 F.2d at 1237). Business records meeting these criteria are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6).

The Second Circuit has held that notes taken during telephone conversations were properly admitted as business records because the practice of note taking was a regular business activity, even though the parties were engaged in the irregular business of committing fraud. *United States v. Kaiser*, 609 F.3d 556, 574-75 (2d Cir. 2010). Here, notes taken at meetings between competitors are likewise business records, despite the fact that the meetings' purpose violated competition laws.

The business records exception applies when "the person furnishing the information . . . is 'acting routinely, under a duty of accuracy, with employer reliance on the result, or in short in the regular course of business.'" *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983) (quoting *Clark v. City of Los* Angeles, 650 F.2d 1033, 1037 (9th Cir. 1981)). During the course of the TFT-LCD conspiracy, conspirators regularly took handwritten notes during competitor meetings. Those taking notes had a business duty to accurately report what transpired at the meeting to their superiors. Directly following the meetings, the conspirators wrote reports that they disseminated to others within their respective companies, which the companies relied on in their decision making. *See Pazsint*, 703 F.2d at 424.

Although in 1994 the Ninth Circuit in *Monotype Corp. PLC v. Inter. Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994) held that email messages may fail to satisfy the requirements of the business records exception to the hearsay rule, the facts in *Monotype* are distinguishable from those here.. In *Monotype*, the court held that an email between employees was not a business record because email was "far less of a systematic business activity than a monthly inventory printout." *Id*. (distinguishing *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988) (holding that computer printouts were admissible under 803(6))). In justifying its holding, the *Monotype* court explained that email "is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper *prepared in the course of business*." *Monotype*, 43 F.3d at 450 (emphasis added).

The emails in the present case, however, are distinguishable from the one in *Monotype* in that they were "prepared in the course of business." *Id.* They therefore meet the requirements of Rule 803(6) and are admissible evidence. In *Monotype*, the email at issue was a communication from one employee to another, wherein the sender expressed his opinion that a certain typeface was illegitimate. *Id*. As the *Monotype* court noted earlier in its opinion, the email was "some 'off-hand impression' that [the declarant] put on paper for the review of a few people." *Id*. (discussing a separate but related document). Here, the emails were not "off-hand impressions," but rather reports memorializing meetings that had occurred numerous times over a span of at least five years. In addition, the emails are trustworthy because the conspirator companies relied

on the accurate information contained in the reports to make informed pricing decisions. Because the emailed reports at issue here were made near the time of the meetings they describe, were kept in the ordinary course of business, and display circumstantial guarantees of trustworthiness, they should satisfy the business record exception to the hearsay rule under Rule 803(6).

D. A Coconspirator May Testify about the Existence of an Agreement

Defendants' coconspirators may testify as to whether the coconspirators reached an "agreement," "understanding," or "promise" to fix prices. Courts in criminal antitrust cases have routinely permitted lay witnesses to testify as to whether an agreement was reached, and, if so, what the witness understood the agreement to be. *See, e.g.*, *Misle Bus & Equip. Co.*, 967 F.2d at 1234; *United States v. MMR Corp.*, 907 F.2d 489, 495-96 (5th Cir. 1990) (admitting lay-witness testimony on agreement based on his participation and a factual basis); *United States v. Graham*, 856 F.2d 756, 759-60 (6th Cir. 1988); *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 529 (4th Cir. 1985) (allowing witnesses to testify that defendants "concurred with the [bid-rigging] plan"); *United States v. Metro. Enters. Inc.*, 728 F.2d 444, 447 (10th Cir. 1984) (testimony that conspirators "agreed" on low bidder); *Cargo Serv. Stations Inc.*, 657 F.2d at 680-81 (allowing testimony that conspirators reached an "'implied understanding'" concerning prices); *United States v. Standard Oil Co.*, 316 F.2d 884, 889–90 (7th Cir. 1963) ("[W]itnesses in antitrust cases have uniformly been permitted to testify concerning the existence of agreements and understandings."). In *United States v. New York Great Atlantic & Pacific Tea Co.*, a criminal antitrust case, the Fifth Circuit explained:

> Just as a witness may in a civil suit say, not as a conclusion but as a fact, that he made or entered into an agreement at a certain time and place, so an indictment may charge, and a witness may say, in a criminal case that a defendant made or entered into an agreement at a particular time or in a particular place.

137 F.2d 459, 463 (5th Cir. 1943).

Such testimony satisfies the requirements of Rule 701 – it is rationally based upon the witness's own personal observations, knowledge, and inferences, is helpful to the jury because it describes a key fact in the case, and is not expert testimony. *See, e.g.*, *Misle Bus & Equip. Co.*,

967 F.2d at 1234 (holding that a lay witness may testify regarding the existence of an "agreement," "understanding," "promise," or "commitment" to fix price because "those words have well-established lay meanings and do not demand a conclusion as to the legal implications of conduct") (quoting *United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980)). Furthermore, under Rule 704(a), "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

E. A Coconspirator May Testify as to the Common Meaning of Terms Used by Coconspirators and His Understanding of Their Statements

Defendants' coconspirators should be permitted to provide lay opinion testimony regarding their understanding of certain terms used and statements made by coconspirators, as well as the state of mind of coconspirators. For a discussion of the relevant law on this topic, the government refers to and incorporates by reference its opposition to defendants' motion in limine to exclude lay opinion testimony as to defendants' state of mind. [Dkt. 544]

F. Indefiniteness of Recollection Is Not a Bar to Testimony

The Indictment charges a price-fixing conspiracy that began on or about September 14, 2001. As such, some of the earliest acts of the charged conspiracy go back more than ten years. In light of this passage of time, witnesses may have difficulty recalling precisely certain events, dates, and conversations, and, given the sheer volume of collusive meetings and communications, may have difficulty distinguishing one specific meeting or conversation from another. Some witnesses may qualify their testimony by such expressions as "I think," "I believe," or "to the best of my recollection." Language differences increase the difficulty of precisely recounting statements. Nonetheless, it will be important for the jury to hear about all of the meetings and conversations so that the jury will understand the full scope and nature of the conspiracy.

Federal Rule of Evidence 602 prohibits a witness from testifying to a matter about which the witness does not have "personal knowledge." "A person has personal knowledge of a fact which can be perceived by the senses only if he had an opportunity to observe, and has actually observed the fact." *United States v. Owens*, 789 F.2d 750, 754 (9th Cir. 1986), *rev'd on other*

grounds, 484 U.S. 554 (1988) (internal marks omitted). "[I]t has long been established that 'the result of the witness' observation need not be positive or absolute certainty . . .; it suffices if he had an opportunity of personal observation and did get some impressions from this observation.'" *United States v. Evans*, 484 F.2d 1178, 1181 (2d Cir. 1973) (quoting 2 Wigmore, Evidence § 658 (3d ed. 1940)). Because the witnesses in this case will be testifying about meetings and communications in which they personally participated, the witnesses will have the requisite personal knowledge, and their testimony should not be precluded if it is lacking in certainty or otherwise qualified.

Given the difficulty of recalling conversations precisely, the law permits a witness to testify to the substance or effect of a conversation, or to his "understanding" or "impression" of its meaning, if he cannot recall its details. 7 Wigmore, Evidence § 2097 (Chadbourne Rev. 1978). Testimony in the form of a witness's "impressions" or "beliefs" is admissible so long as the witness has a minimal present recollection of the events to which he is testifying. Exact recollection is not required. 3 Wigmore, Evidence § 726 and 728 (Chadbourne Rev. 1970); McCormick, Evidence, § 910 at 21-22 (2d ed. 1972); Graham, Handbook of Federal Evidence, § 602.2 (1981). These qualifications go to the *weight* of the testimony and *not its admissibility*, and, as such, the testimony is admissible over objection that it is not based upon the witness's personal knowledge. *Walters v. McCormick*, 122 F.3d 1172, 1175 (9th Cir. 1997) (noting that while the witness varied descriptions of events, skepticism as to her testimony is a question of weight rather than admissibility); *Tomlin v. Myers*, 30 F.3d 1235, 1246 n.3 (9th Cir. 1994) ("The description/appearance discrepancies, to the extent any exist, go to weight, and not admissibility . . .."); *United States v. Domina*, 784 F.2d 1361, 1367 (9th Cir. 1986) ("This testimony, like other testimony of witnesses that might be of doubtful reliability, had been considered to involve questions of credibility, not admissibility and, thus, matters for the jury to weigh."); *Tripp v. United States*, 381 F.2d 320, 321 (9th Cir. 1967) (the contention that testimony was vague and uncertain goes to its weight, not its admissibility); *see also United States v. Cranston*, 686 F.2d 56, 60 n.1 (1st Cir. 1982) (witness allowed to testify that he believed telephone call was with a certain individual, although he was not certain).

G. Government May Impeach Its Own Witnesses

Many of the witnesses who will be called by the government are still employed either by defendants AUO and AUOA or their coconspirator companies, which have pled guilty to the charged conspiracy. The corporate defendants and their coconspirator companies are now defendants in the private civil actions pending in this Court. Thus, some witnesses may be biased in favor of defendants AUO and AUOA or may have a motivation in their testimony to minimize the scope and effect of their conduct to protect their employers. Accordingly, the government may find it necessary to impeach some of its own witnesses.

Federal Rule of Evidence 607 permits the government to impeach its own witness using his prior statements. *United States v. Gilbert*, 57 F.3d 709, 711 (9th Cir. 1995). However, in doing so "'the government must not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony.'" *Id.* (quoting *United States v. Gomez-Gallardo*, 915 F.2d 553, 555 (9th Cir.1990)).

Courts routinely permit the government to impeach its own witnesses under this standard. *See, e.g.*, *Gilbert*, 57 F.3d at 711-12 (permitting the government to impeach its own witnesses where the government had evidence of prior inconsistent statements of two witnesses as to firearm possession and where it was clear to the court that the primary purpose in questioning the witnesses was not to impeach their testimony); *United States v. Carter*, 973 F.2d 1509 (10th Cir. 1992) (government permitted to impeach its own witness, not only by referring to his prior inconsistent statements during a police interview, but also by calling the police officer to the stand to testify about the nature and extent of the statements made during the interview session); *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1108 (7th Cir. 1979) (government permitted to impeach witnesses with their prior grand jury testimony, which was admitted into evidence).

H. Prior Consistent Statements

The government may introduce prior consistent statements either as substantive evidence when offered to rebut an implication of recent fabrication or to rehabilitate a witness after his credibility has been impeached.

Under the Federal Rules of Evidence, "[a] statement is not hearsay if--. . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . .." Fed. R. Evid. 801(d)(1)(B). A prior consistent statement of a witness is admissible as substantive evidence when it is offered to rebut an express or implied charge against that witness of recent fabrication or improper influence or motive. *Id.* Courts have admitted prior consistent statements liberally. *See Gaines v. Walker*, 986 F.2d 1438, 1445 (D.C. Cir. 1993); *United States v. Casoni*, 950 F.2d 893, 904 (3d Cir. 1991) ("there need be only a suggestion" that witness consciously altered testimony to allow prior consistent statement into evidence). The trial judge is accorded great discretion in determining the admissibility of evidence under this rule. *United States v. Prieto*, 232 F.3d 816, 819 (11th Cir. 2000); *United States v. Hamilton*, 689 F.2d 1262 (6th Cir. 1983) ("Broad discretion is given to the trial court regarding the admission of prior consistent statements."); *United States v. Mock*, 640 F.2d 629, 632 (5th Cir. 1981).

For prior consistent statements to be admissible under Rule 801(d)(1)(B), the Ninth Circuit requires that:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the supposed motive to falsify arose.

United States v. Beltran, 165 F.3d 1266 (9th Cir. 1999) (quoting *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996)).

Prior consistent statements are generally admissible even if made after the alleged inconsistent statement. *See United States v. Stover*, 329 F.3d 859, 867 (D.C. Cir. 2003). In this circumstance, however, the statement is introduced not as substantive evidence, but for rehabilitation of the witness following cross-examination. *Id.* ("These prior statements would not be offered for the truth of the matter asserted . . . and therefore would not need to satisfy Rule 801(d)(1)(B). They would be introduced to show that the witness did not give statements on

direct that were inconsistent with what he had said before."). The statement sought to be admitted must have a probative value that bears on credibility beyond merely showing repetition; for instance, where the prior statement casts doubt on whether the prior inconsistent statement was in fact made or whether the impeaching statement is actually inconsistent with the trial testimony. *United States v. Pierre*, 781 F.2d 329, 333-34 (2d Cir. 1986). A prior consistent statement may also be introduced to amplify or clarify an allegedly inconsistent statement. *Id.*

I. Use of Leading Questions

1. Government May Ask Leading Questions of Hostile Witnesses and Witnesses Identified with a Defendant

Federal Rule of Evidence 611(c) states that "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Fed. R. Evid. 611(c). With respect to witnesses identified with an adverse party, the government is not required to establish that the witness is hostile; such persons are "automatically regarded and treated as hostile." Fed. R. Evid. 611 Advisory Committee's Notes to 1972 Proposed Rules. Accordingly, the government is permitted to ask leading questions of witnesses in criminal antitrust cases such as this where the witnesses are favorably disposed toward the defendants' industry or identified with the defendants. Although certain witnesses will be testifying pursuant to individual plea agreements or plea agreements that their employers have with the United States, they may nonetheless be hostile because of outstanding civil damage cases brought by customers and close, ongoing business and personal ties with defendants.

In *Esco Corp.*, the court considered the propriety of the government asking leading questions of witnesses employed by the defendant's corporate coconspirator in a price-fixing case. 340 F.2d at 1000. The trial court had permitted the government to asking leading questions because it had found those witnesses to be favorably disposed toward the defendant's industry. The Ninth Circuit affirmed, finding that witnesses "were in truth not favorable to the party calling them (the government), and hence could properly be considered hostile witnesses. As such they were properly and lawfully subjected to leading questions." *Id.* at 1005. Based on

Esco Corp., the government should be given appropriate latitude to lead coconspirators and hostile witnesses whose testimony is instrumental to constructing its case and to attempt to impeach them about those aspects of their testimony that conflict with the government's account of the same events.

Courts also have permitted the use of leading questions in cases in which the witness was inarticulate and evasive, *United States v. Stelivan*, 125 F.3d 603, 608 (8th Cir. 1997), and where the witness is openly hostile, *United States v. Shursen*, 649 F.2d 1250, 1254 (8th Cir. 1981). In addition, courts have permitted the use of leading questions with a witness who has suffered a lapse of memory, in order to attempt to revive a witness' failing memory or to clarify "remarkably hazy" testimony. *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979); *Dege v. United States*, 308 F.2d 534, 537 (9th Cir. 1962). As noted above, given the length of time for which the conduct in this conspiracy continued, some of the earliest acts of the charged conspiracy go back more than ten years. In light of this passage of time, witnesses may have difficulty recalling details about certain events or conversations, and in these circumstances, the government should be permitted to use leading questions to develop the testimony of witnesses with failing or hazy recollections.

2. Government May Use Leading Questions with Foreign Witnesses

Leading questions are also permissible when the witness does not speak English well or where English is not the witness's first language in order to avoid the danger that the witness will misunderstand the questions and therefore answer incorrectly. Federal Rule of Evidence 611(c) specifically provides that leading questions are allowed "to develop" the testimony of the witness. When a witness "does not appreciate the tenor of the desired details," it is a permissible exercise of the court's discretion to allow leading questions. *United States v. Amjal*, 67 F.3d 12, 16 (2d Cir. 1995) (quoting 3 Wigmore on Evidence, § 778 (1970 ed.)) (internal marks omitted).

In *United States v. Rodriguez-Garcia*, the court found that it was not an abuse of discretion for the trial court to allow the government to ask leading questions of its chief witness who did not speak English and was testifying through an interpreter. 983 F.2d 1563, 1570 (10th Cir. 1993). The court reasoned that, although the witness was not hostile or aligned with an

adverse party, leading questions were permissible to develop the witness's testimony. *Id.* The court also noted that the Advisory Committee Notes provide for the use of leading questions where an adult has communication problems. *Id.*

Similarly, in *United States v. Olivo*, the government's primary witness stated that he was uncomfortable in the courtroom, was hesitant to testify, and that he had difficulty understanding English. 69 F.3d 1057, 1065 (10th Cir. 1995). The court, in reviewing the trial court's exercise of discretion in allowing leading questions, found an ample basis in the record for the use of leading questions. *Id.*; *see also United States v. Mulinelli-Navas*, 111 F.3d 983, 990 (1st Cir. 1997) (where a witness "was, at times, unresponsive or showed a lack of understanding," the prosecutor could use leading questions to assist in developing coherent testimony); *Amjal*, 67 F.3d at 15-16 (trial court did not abuse its discretion by allowing the prosecution to use leading questions with a principal witness who spoke little English and testified through an interpreter).

3. Defendants May Not Use Leading Questions When Cross-Examining Witnesses Identified with Them

Although Federal Rule of Evidence 611(c) provides that leading questions should "ordinarily" be permitted on cross-examination, courts have precluded defendants from using leading questions during their cross-examination of prosecution witnesses who are identified with defendants' interests. For instance, in *Mitchell v. United States*, 213 F.2d. 951, 954-56 (9th Cir. 1954) a tax evasion prosecution of a husband and wife, the court affirmed the trial court in precluding leading questions during the cross-examination of a government witness who was employed by the husband and a close friend of the wife. 213 F.2d 951, 954-56 (9th Cir. 1954); *see also United States v. Bensinger Co.*, 430 F.2d 584, 591-92 (8th Cir. 1970), *superseded on other grounds as stated in DCS Sanitation Mgmt., Inc. v. Occupational Safety & Health Review Comm'n*, 82 F.3d 812 (8th Cir. 1996) (in antitrust prosecution of manufacturer and one of its dealers, the manufacturer was precluded from using leading questions to cross-examine a dealer's representative).

Thus, the Court should preclude defendants from asking leading questions on cross-examination of witnesses who are employed by defendants AUO or AUOA. It should also

appropriately limit leading questions on the cross-examination of witnesses who are employed by defendants' corporate coconspirators on the ground that their status as codefendants in the ongoing MDL civil litigation gives those witnesses a unity of interest with defendants regarding the nature and effect of their conspiratorial conduct.

J. Limitations on Character Evidence

1. Character of the Accused

The government has filed a partial opposition to defendant Lai-Juh Chen's motion in limine to admit character evidence, which the government refers to and incorporates by reference. [Dkt. 543]

2. Character Evidence Regarding Testifying Witnesses

Any attempts by defendants to impeach the character of the government's witnesses are governed by Rule 608, which limits impeachment to opinion or reputation evidence regarding a witness's character for "truthfulness or untruthfulness." Fed. R. Evid. 608(a). Evidence regarding character traits that do not bear on truthfulness may not be a subject of questioning. *See, e.g., United States v. Holt*, 486 F.3d 997, 1002 (7th Cir. 2007) (holding that questioning about reprimands for neglect of duty did not bear on truthfulness); *United States v. Rosa*, 891 F.2d 1063, 1069 (3d Cir. 1989) ("Bribery, however, is not the kind of conduct which bears on truthfulness or untruthfulness.").

It is within the discretion of the Court to permit inquiry on cross-examination into specific instances of conduct by a witness "if probative of truthfulness or untruthfulness," but specific instances of conduct by a witness may not be proved by "extrinsic evidence." Fed. R. Evid. 608(b). Thus, if defendants were permitted to inquire on cross-examination about specific instances of conduct and were not satisfied with the witness's answers, they would be required to accept those answers and could not offer extrinsic evidence to rebut them. *United States v. Brooke*, 4 F.3d 1480, 1484 (9th Cir. 1993) (stating that a cross-examiner is "stuck with" whatever answer witness gives when cross-examining about specific instances of conduct to prove character); *see also Wilson v. Muckala*, 303 F.3d 1207, 1216-17 (10th Cir. 2002) (holding that Rule 608(b) properly applied to exclude extrinsic evidence of extra-marital affairs); *United*

States v. Olivo, 80 F.3d 1466, 1470-71 (10th Cir. 1996) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."); *United States v. Herzberg*, 558 F.2d 1219, 1223 (5th Cir. 1977) ("This language prohibits proof by extrinsic evidence even where the prosecutor 'inquires into' prior acts on cross-examination.") (citation omitted).

Moreover, defendants would be required to have a good faith basis to believe that the alleged specific acts of conduct occurred before inquiring about them. *United States v. Whitmore*, 359 F.3d 609, 622 (D.C. Cir. 2004) (stating that "'the general rule . . . is that the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the question relates'") (internal citation omitted), *reh'g denied in part*, 384 F.3d 836 (D.C. Cir.) (per curiam). If the Court determines that defendants do not have a good faith basis that misconduct occurred, they may not ask any questions about the misconduct. Moreover, because the mere mention of misconduct can be prejudicial, some courts have held that attorneys should warn the court and opposing counsel at sidebar before cross-examining a witness about alleged misconduct. *See United States v. Schwab*, 886 F.2d 509, 513-14 (2d Cir. 1989) (holding that it is necessary for attorneys to notify court in advance if they intend to question witness about misconduct under Rule 608(b)).

K. Translation of Foreign-Language Documents

The government intends to offer into evidence foreign-language documents and English translations thereof. Specifically, the government intends to introduce documents that are in Chinese, Korean, and a mixture of English and Chinese or Korean. The English translations of those foreign-language documents have been certified by professional translators. Certified translations have been provided to defendants, and the government and defendants are in the process of trying to reach agreement on the accuracy of these translations and to stipulate to them. In the event of a dispute between the parties as to the correct English translation of a Chinese or Korean document, it is permissible to present the jury with two translations containing both sides' versions and let the jury determine which is more accurate. *See United*

States v. Franco, 136 F.3d 622, 626 (9th Cir. 1998); *see also United States v. Abonce-Barrera*, 257 F.3d 959, 963-64 (9th Cir. 2001) (upholding the admissibility of foreign-language tapes, their transcriptions and translations); *United States v. Salvador Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Armijo*, 5 F.3d 1229, 1234-35 (9th Cir. 1993).

It is also proper for the jury to retain the English translations as well as the foreign language documents during the testimony and deliberations. *See, e.g.*, *Abonce-Barrera*, 257 F.3d at 962 (Spanish tape recordings and English translations given to jury during trial and for deliberations); *Franco*, 136 F.3d at 625 (same); *United States v. Taghipour*, 964 F.2d 908, 910 (9th Cir. 1992) (English-language transcription of tapes primarily in Farsi and originals given to jury during trial and for deliberations); *Henein v. Saudi Arabian Parsons Ltd.*, 818 F.2d 1508, 1512 (9th Cir. 1987) (Arabic government memoranda and English translations admitted into evidence); *see also United States v. Adams*, 759 F.2d 1115 (3d Cir. 1985) (transcripts of audio recordings properly admitted into evidence because the transcripts were a "useful aid to the jurors"). In this case, the jury will have no meaningful way to consider much of the documentary evidence during deliberations unless it is permitted to receive and consider the certified English translations of those documents. Because the certified translations would be useful to the jury, they should be admitted into evidence along with the foreign-language documents.

L. Admissibility of Metadata

The government may seek to introduce evidence regarding metadata associated with certain AUO and AUOA documents at trial. Metadata is often described as "data about data" and is defined as "'information describing the history, tracking, or management of an electronic document.'" *See Lorraine v. Markel Amer. Ins. Co.*, 241 F.R.D. 534, 565-66 (D. Md. 2007) (quoting *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005)). Metadata "'describes how, when and by whom [information about a particular data set] was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information).'" *Id.*

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The metadata fields that the government may introduce vary based upon the type of electronic data available in connection with a particular document. However, some common examples include:

(1) Author/Company
(2) Last Saved By Author
(3) Date Created
(4) Date Modified
(5) Location/Filepath
(6) Title

Not all metadata is generated in the same way. Some metadata is user-created, which means it is created when a person enters and saves information onto a computer's memory system. Other metadata is computer/application-generated, which means it is automatically generated by the computer without the input or even knowledge of the user. *See State v. Armstead,* 432 So.2d 837, 191-192 (La. 1983) (discussing the difference between computer- and user-generated information). Computer-generated information is nonhearsay. *See United States v. Khorozian,* 333 F.3d 498, 506 (3d Cir. 2003) ("[N]either the header nor the text of the fax was hearsay. As to the header, . . . a statement is something uttered by 'a person,' so nothing 'said' by a machine . . . is hearsay."); *United States v. Washington,* 498 F.3d 225, 230-31 (4th Cir. 2007); *Lorraine,* 241 F.R.D. at 565-66. User-generated metadata is only hearsay where it is a statement by a declarant offered for the truth of the matter asserted. *Id.* at 538.

The vast majority of the metadata the government will seek to introduce at trial is computer-generated. Metadata fields such as "Author/Company," "Last Saved By Author," "Date Created," "Date Modified," and "Location/Filepath" are all computer-generated. *See Sprint/United Management Co.,* 230 F.R.D. at 647 (identifying categories as metadata automatically created by Microsoft Office products). The computer or software application, without the input of the user, creates this type of metadata, and thus it is admissible as non-hearsay. *Lorraine,* 241 F.R.D. at 565-66.

The government will only seek to introduce user-generated metadata in connection with AUO or AUOA documents. Because AUO and AUOA documents qualify as admissions of a party-opponent under Rule 801(d)(2), neither the documents nor their metadata are hearsay and

thus should be admissible. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 974 (C.D. Cal. 2006) (electronic documents bearing the corporation's name, logos, and trademarks are admissions under Rule 801(d)(2)).

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Respectfully submitted,

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