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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG, Defendant.	No. CR-09-0110 SI UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE, FOR NEW TRIAL Date: April 29, 2013 Time: 11:00 a.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

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INTRODUCTION

Defendant Steven Leung, who was convicted after a three-week trial in which numerous witnesses and scores of documents unequivocally established his participation in the TFT-LCD price-fixing conspiracy, seeks a new trial based on a claim of juror misconduct and a hodgepodge of evidentiary and legal issues he contends were incorrectly decided by the Court. Leung's post-trial motion is untimely, having been filed months after conviction. Moreover, each issue it raises is without merit.

Leung's claim of jury misconduct is based on a declaration from a single juror, who alleges predeliberation discussions about the evidence by some jurors. Inexplicably, Leung's counsel delayed for *four months* before raising this issue, despite admittedly having communicated with the declarant juror immediately after the verdict was returned. In doing so, they deprived the Court of the opportunity to inquire meaningfully of the declarant juror and the rest of the jury while the facts were fresh in their minds. As a result, the jury misconduct claim is untimely. In any event, courts routinely refuse to consider post-trial allegations about predeliberation juror discussions as a basis for setting aside a verdict. Accordingly, Leung's juror misconduct claim does not provide a basis for a new trial.

The remaining issues in Leung's motion consist of legal and evidentiary issues that were fully briefed or argued at trial. The Court's rulings on the evidentiary issues were correct and well within the Court's broad discretion to admit or exclude evidence. Leung also raises legal issues that were extensively briefed and argued in the first trial. Leung concedes that the Court's rulings on those issues are the law of the case.

Accordingly, whether considered individually or in the aggregate, none of the issues that Leung raises merits a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

I. STEVEN LEUNG'S PARTICIPATION IN THE CONSPIRACY

In September 2001, the major TFT-LCD suppliers in Taiwan and Korea entered into a pervasive and systematic conspiracy to fix the worldwide prices of TFT-LCDs, which was carried out, in part, through approximately 60 monthly "crystal meetings" in Taiwan. The

conspiracy affected sales of LCD panels to major U.S. companies, such as Dell Computer (Dell) and Hewlett-Packard Company (HP).

Steven Leung joined that conspiracy in May 2002, a few months after the crystal meetings began. From the beginning, Leung took an active role in the crystal meeting conspiracy. Among his many roles, he was responsible for collecting information from competitors before the meetings. Trial Exhibit (Tr. Ex.) 181. He coordinated AUO's participation in the meetings. Tr. Exs. 6T, 7T. He personally attended many of these meetings on behalf of AUO. At times, he even hosted the crystal meetings (Tr. Exs. 21, 13) and created PowerPoint presentations to help him lead the group's discussion (Tr. Exs. 150, 152, 153). Leung entered into agreements on behalf of AUO at crystal meetings (Trial Tr. vol. 7 at 1118), he took detailed and meticulous notes of the meetings, (Tr. Exs. 4A, 5A), and he implemented the agreed-upon prices to his major U.S. accounts. *See e.g.*, Tr. Ex. 19 ("General Consensus • Must hold 17" JUN/JUL pricing to maintain overall pricing stability."); *and* Tr. Ex. 193 (Leung emails his sales representatives with the price directive: "17" -- Target maintain pricing."). Finally, he, like all the crystal meeting participants, took steps to conceal the crystal meetings. *See, e.g.*, Tr. Exs. 6T, 134.

In addition to the 60 crystal meetings, the conspirators, including Leung, engaged in collusive one-on-one meetings and telephone communications in Asia and in the United States to police and carry out their conspiracy. Considerable evidence of the agreements that were reached during one-on-one communications was introduced at trial, as well as evidence that Leung implemented such agreements. For example, Exhibit 90 is an email Leung sent in February 2005 in which he wrote:

> Last night, I have discussed with [competitor Chunghwa Picture Tubes (CPT)] to align action for price increase to DELL/HP (CPT is currently US$155-17" and US$188-15" and original plan to keeping flat for MAR in 17" + possible further reduction in 15"). I will have conclusion in this discussion with CPT within today.

Tr. Ex. 90. In an April 2006 email, after getting a request for authorization to offer a price to HP, Leung directed his subordinates to "align with other TFT vendors to ensure we are not

quoting too low or much too high." Tr. Ex. 108. At Leung's instruction and with his approval, his direct and indirect reports coordinated prices to their major customers like Dell and HP.

II. THE TRIALS

On June 9, 2010, a San Francisco grand jury returned a Superseding Indictment charging Steven Leung and others with a one-count violation of the Sherman Act, 15 U.S.C. § 1. The first trial on the indictment began on January 9, 2012. Seven defendants were tried: AUO, its U.S. subsidiary, AUOA, and executives H.B. Chen, Hui Hsiung, Lai Juh Chen, Steven Leung, and Hubert Lee. Richard Bai, the sixth AUO executive charged in the indictment, failed to appear for trial. After an eight-week trial, the jury found the two corporations and the two highest-level executives guilty. Dkt. 851. The jury could not reach a unanimous verdict on Leung. *Id*.

Leung was retried in late 2012. The government called seven witnesses during its case-in-chief, and Leung called several witnesses in his defense case. The jury began its deliberations on the morning of December 18, 2012 and returned a verdict that day. Dkt. 1091.

REVIEW STANDARD FOR RULE 29 AND 33 MOTIONS

Although defendant's motion is styled as one for both a judgment of acquittal under Fed. R. Crim. P. 29 and a new trial under Fed. R. Crim. P. 33, he only advances arguments in support of his request for a new trial under Rule 33.

While Rule 33(a) allows the Court to grant a new trial "if the interest of justice so requires," this remedy is to be used sparingly, "only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Rush*, 749 F.2d 1369, 1371 (9th Cir. 1984) (citation omitted); *see also United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1981) (citing cases). Put another way, the Court may grant a new trial only if "a serious miscarriage of justice may have occurred." *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)). In deciding a Rule 33(a) motion based on the weight of the evidence, a court may not "reweigh the evidence and set aside a guilty verdict simply because it feels some other result would be more reasonable." *Martinez*, 763 F.2d at 1313-14.

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ARGUMENT

I. LEUNG'S MOTION IS UNTIMELY AND SHOULD NOT BE CONSIDERED

Leung unsuccessfully moved for acquittal at the close of the government's evidence. Trial Tr. vol. 9 at 1417. He renewed his motion (again unsuccessfully) at the close of all of the evidence. Trial Tr. vol. 13 at 2063. While those prior motions were timely, the current motion is not.

"A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c)(1). A "motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). There are important policy concerns underlying these deadlines. As the Supreme Court has noted:

> [A]s time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past.

United States v. Smith, 331 U.S. 469, 476 (1947). The jury in this case returned its guilty verdict on December 18, 2012. As such, Leung's Rule 29 and 33 motions were due no later than January 2, 2013. The instant motion, filed on April 14, 2013, is more than three months late.

Under Rule 45, the court can extend the deadlines for good cause on a defendant's motion as long as the motion is made "before the originally prescribed or previously extended time expires." Fed. R. Crim. P. 45(b)(1)(A). The Supreme Court has made clear that parties must strictly comply with these rules. "There is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error." *Carlisle v. United States*, 517 U.S. 416, 421 (1996) (holding "that the District Court had no authority to grant petitioner's motion for judgment of

acquittal filed one day outside the time limit prescribed by Rule 29(c)"). "These time limits were expressly 'framed to resist ad hoc relaxation' and, thus may fairly be characterized as 'rigid.'" *United States v. Canova*, 412 F.3d 331, 335 (2d Cir. 2005) (quoting *Carlisle*, 517 U.S. at 434-36). The Supreme Court has stated that the time limits in Rules 29 and 33 are "admittedly inflexible because of Rule 45(b) 's insistent demand for a definite end to proceedings. These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Eberhart v. United States*, 546 U.S. 12, 19 (2005). "[D]istrict courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id*. at 17 (holding that while the "emphatic" time limits in Rule 33 can be forfeited if not invoked because they are not, strictly speaking, "jurisdictional," once invoked, the court's duty to impose them is "mandatory."). The government invokes those rules here. And because Leung did not comply with Rules 29, 33, and 45, the Court lacks the power to enter an acquittal or order a new trial after a jury verdict. *See Carlisle*, 517 U.S. at 421-22; *Smith*, 331 U.S. at 474-75.

Leung never moved for an extension of time to file the current motion, and the Court never granted one. Leung's counsel hinted at it, to be sure. Immediately after the jury returned its verdict, Leung's counsel indicated, "we have some motions that we'll be wanting to brief, so - . . . We'll need some time for that." Trial Tr. vol. 15 at 2312. The Court set an initial sentencing date of March 29, 2013 and instructed Leung to file his post-trial motion "whenever you want to, but we'll just try to get them resolved substantially in advance" of sentencing to allow the Probation Officer to take them into account in preparing his presentence report. Trial Tr. vol. 15 at 2313. Leung's counsel acknowledged that they could comply with that schedule for filing their post-trial motions. Trial Tr. vol. 15 at 2312.

Even assuming that counsel's vague reference to post-trial motions could somehow be construed as a Rule 45 motion for an extension of time, and assuming that setting a sentencing date of March 29, 2013 could be construed as the Court granting a motion for extension, the current motion is still untimely. Although the Court told Leung's counsel to file their post-trial motion "whenever you want to," "the plain language of the rule does not contemplate open-

ended extensions." *Canova*, 412 F.3d at 345. Moreover, the Court clearly directed Leung's counsel to file the motion "substantially in advance" of the initial sentencing date of March 29. March 29 came and went. Leung did not file any post-trial motions either "substantially in advance" of or by that date. While the Court moved the March 29 sentencing date upon the stipulation of the parties, that stipulation said nothing about any post-trial motions, and the government did not agree to any extension of the filing date.[1] *See* Dkt. 1107. The Court now lacks the authority to allow such motions for two reasons. First, under the express provisions of Rule 45(b)(1)(A), any extension request certainly had to have been made before March 29, 2013 (if not by January 2, 2013 – fourteen days after the verdict). Second, "Rules 29 and 33 do not allow successive extensions of time [and] the district court [has] no right to grant, a second extension." *United States v. Hocking*, 841 F.2d 735, 737 (7th Cir. 1988); *see also Canova*, 412 F.3d at 345 (stating that "although the district court's October 4, 2002 order extending Canova's Rule 33 filing date to October 18, 2002, fell within the prescribed seven-day period, the court's subsequent October 17, 2002 order granting Canova a further extension to October 28, 2002, fell well outside that narrow window. Accordingly, it appears that the district court was prohibited from entering the October 17 order or entertaining the October 28 motion") (internal citations omitted).[2] Thus, Leung's motion is time-barred and should not be considered.

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[1] Defendant did file a motion to continue the sentencing (Dkt. 1103), which made a vague reference to a continuance of post-trial motions so that defendant could obtain his medical records from Taiwan. This motion was never ruled on. Instead, the parties agreed to stipulate to the continuance "to allow the defense to fully prepare for sentencing." Dkt. 1107. This was the sole basis upon which the government agreed to continue the sentencing, and no mention of post-trial motions was made in the stipulation, nor were post-trial motions referenced in defendant's request that the government stipulate to a continuation of the sentencing.

[2] Rules 29, 33, and 45 were amended in 2005 to allow courts to delay their rulings on motions for extensions until after the initial period had expired, without losing the power to do so. The amendments did not, however, alter the requirement that requests for extensions be made *within* the initial period. *See* Fed. R. Crim. P. 45 advisory committee's note (2005) ("The defendant is still required to file motions under Rules 29, 33 and 34 within the seven-day [now 14-day] period specified in those rules. The defendant, however, can consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period.")

II. THERE WAS NO JURY MISCONDUCT WARRANTING A NEW TRIAL

Leung argues that he is entitled to a new trial on grounds of juror misconduct because, according to one juror, three other jurors prematurely discussed the evidence and expressed opinions about Leung's guilt before the close of trial. Dkt. 1133 at 3. Leung's claim of juror misconduct is based on a declaration from juror Loretta Simms. Dkt. 1133-1. Leung purports to have learned about the allegations from Juror Simms at the time of the verdict, Dkt. 1133 at 2,[3] but he did not notify either the Court or the government at that time. Instead, Leung delayed for four months – until April 2013 – before obtaining and filing a one-page declaration from Juror Simms.

Leung's assertion of juror misconduct fails because it is untimely and because it cannot permissibly be based on a declaration of a juror.

A. Leung's Claim of Juror Misconduct Is Untimely

Even if Leung's post-trial motion is deemed to be timely filed, Leung's claim of juror misconduct should be deemed untimely. The claim should have been brought to the Court's attention by Ms. Simms during trial or by Leung immediately after trial. They delayed, however, for four months in coming forward, and it is clear from Ms. Simms's juror declaration that her recollection of material facts is tarnished by the delay. *See* Dkt. 1133-1, ¶ 4 ("I do not remember exactly when these discussions took place . . . ."), ¶ 5 ("Early on in the trial I overheard Ms. Burchard, and at least two other jurors whose names I cannot remember . . . ."), ¶ 7 ("I cannot remember the exact words used. . . .").

As Leung recounts in his moving papers, the Court repeatedly instructed jurors during trial not to engage in such discussions. Had discussions between jurors during trial been occurring with the regularity and frankness suggested by Ms. Simms, it is reasonable to assume that she or other jurors would have come forward and reported them to the Court at that time. In fact, in response to the Court's routine instructions, another juror reported exposure to extraneous information during trial, thereby allowing the Court to ask him and another juror

[3] Members of the government prosecution team observed that Ms. Simms seemed distraught at the time the verdict was delivered and saw Leung's counsel talking to Ms. Simms immediately after court was recessed that day.

about it almost immediately. Trial Tr. vol. 7 at 1025-29. There is no reason to assume that jurors would have treated this alleged disregard of the Court's instructions any differently. Yet, not a single juror made any mention of it during trial, at a time when the Court could have addressed the issue with the jurors. *See United States v. Lakhani*, 480 F.3d 171, 184-85 (3d Cir. 2007) (affirming trial court's refusal to consider a post-verdict juror allegation of improper pressure because she failed to raise it with the Court at a time prior to the verdict).

Likewise, Leung's counsel states that they learned about the alleged juror misconduct almost immediately after trial, but they did nothing to call it to the attention of the Court or the government when it still would have been possible to inquire about it with the jury. When Leung finally did file this motion, his counsel stated that it took them four months to obtain a one-page declaration from Ms. Simms. This inexplicable delay suggests that Juror Simms was unsure or wavered in her allegations, that Leung's counsel spent months overcoming her initial refusal to provide a declaration, or that Leung's counsel was less than diligent in securing the declaration. Any of those scenarios undermines the merits of the misconduct claim. The declaration that was filed is conclusory and lacks specificity on material facts – such as who said what to whom when – that undoubtedly would have been clear had the allegations been made in a timely fashion.

For these reasons, the Court should hold that Leung's claim of jury misconduct is untimely and waived under Rule 33.

B. Leung's Claim of Juror Misconduct Is Barred Because Ms. Simms's Testimony Is Inadmissible

Jurors' statements have traditionally been inadmissible to impeach their verdict. *Tanner v. United States*, 483 U.S. 107, 117 (1987). This rule has an exception for statements alleging that the jury has been subject to "extraneous influence," *id.*, which encompasses such things as "publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of defendant and his counsel." *United States v. Campbell*, 684 F.2d 141, 151 (D.C. Cir. 1982).

Unlike juror statements involving extraneous influences, juror statements related to intra-jury influences are not permitted to undermine a verdict. "[***E*]*vidence of discussions among***

jurors, intimidation or harassment of one juror by another, and other intra-jury influences on the verdict is within the rule, rather than the exception, and ***is not competent to impeach a verdict***." *Id.*(emphasis added). This rule is justified by the need to protect jurors from being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Tanner*, 483 U.S. at 120 (internal quotations and citation omitted). It also promotes the finality of verdicts by preventing jurors, who may later feel remorse about having voted to convict a defendant, to recant their votes. [4] *See Lakhani*, 480 F.3d at 185 (holding that "one major purpose of the rule [against allowing jurors to impeach their own verdict] is to prevent a juror from being able to recant her vote").

This traditional rule is codified in Federal Rule of Evidence 606(b), which prohibits a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." Fed. R. Evid. 606(b). Consistent with *Tanner*, the only exceptions to Rule 606(b) relate to extraneous information, outside influences, and mistake in entering the verdict. *Id.*

Although Rule 606(b) expressly bars juror testimony related to matters occurring *during jury deliberations*, courts have generally applied it (or the common law rule articulated in

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[4] Tellingly, an article that was released on the day of the jury verdict quotes the declarant juror, Loretta Simms, immediately after the verdict. Ms. Simms is reported as appearing "near tears" when she said, "This was a very difficult decision for me. This is nothing I ever want to do again. I applied the law with what we were given." The jury foreman, Mark Lagan, was quoted in the same article as saying that the verdict was "fairly easy" and that the key to the verdict was "the volume of evidence." *AUO Executive Convicted in LCD Price-Fixing Retrial (*updates)*, Mlex, December 18, 2012. Declaration of Brent Snyder ("Snyder Decl."), Ex. A. Another article issued on the day of the verdict noted that Ms. Simms "was visibly upset by the outcome." But the article noted Ms. Simms's statement that "[w]e were told, no matter what we feel, that we have to go by the law, and I applied the law for what we were given." *AUO Exec Found Guilty Of LCD Price-Fixing*, Law360, December 18, 2012. Snyder Decl., Ex. B. By waiting four months to secure the declaration of Ms. Simms, Leung deprived the Court opportunity to follow up with the declarant juror and the rest of the jury while the facts were fresh in their minds.

Tanner) to bar inquiry into post-verdict allegations of predeliberation discussions among jurors. *See United States v. Williams-Davis*, 90 F.3d 490, 504-05 (D.C. Cir. 1996) (analyzing cases). "Preserving the finality of jury verdicts militates strongly in favor of barring post-trial juror assertions of predeliberation discussion." *Id.* at 505.

Thus, courts routinely refuse to consider post-verdict claims of predeliberation discussions by jurors that do not involve allegations of extraneous information. For instance, in *United States v. Davis*, the Ninth Circuit refused to consider allegations of juror misconduct based on a juror's statement that "[f]rom the first day I knew [the defendant] was guilty." 960 F.2d 820, 828 (9th Cir. 1992). The court held that "[t]he juror's statement reflects his personal feelings and beliefs concerning [the defendant] . . . [and] is insufficient to set aside a verdict." *Id.* Many of the statements that Juror Simms alleges she overheard during trial are similar in nature and, based on *Davis*, are insufficient to set aside the verdict.

In *United States v. Pimentel*, the defendants obtained post-trial evidence that some jurors had made up their minds about the guilt of the defendants before the close of the case. 654 F.2d 538, 542 (9th Cir. 1981). The Ninth Circuit held that the trial court had properly refused to consider the evidence: "Testimony of a juror concerning the motives of individual jurors and conduct during deliberation is not admissible. Juror testimony is admissible only concerning facts bearing on extraneous influences on deliberation, in the sense of overt acts of jury tampering." *Id.* (citations omitted); *see also Williams-Davis*, 90 F.3d at 504-05 (affirming the trial court's decision not to hold a hearing regarding post-trial allegations by five jurors that jurors discussed the case before deliberations); *United States v. Tierney*, 947 F.2d 854, 869 (8th Cir. 1991) (affirming trial court's refusal to grant a mistrial for predeliberation discussions by jurors); *United States v. Oshatz*, 715 F. Supp. 74, 76 (S.D. N.Y. 1989) (holding that a juror's testimony that other jurors "had made up their minds" after testimony of government's chief witness was inadmissible as internal matter under Rule 606(b)); *United States v. Shalhout*, 280 F.R.D. 223, 230-31 (D. V.I. 2012) (holding that an alternate juror's allegation that she overheard other jurors comment prior to the close of evidence that the defendants were "already guilty . . .

and you know how – how everybody feels about Arabs . . .” did not warrant a new trial because those statements were barred under Rule 606).

The predeliberation comments and discussions alleged by Juror Simms are no different than the types of post-trial juror allegations that courts routinely hold inadmissible and incompetent to undermine a verdict. This is especially true where, as here, it took several months for Leung to notify the Court or procure Juror Simms’s declaration, despite admittedly knowing of these allegations since the time of the verdict. This Court should follow the rule articulated in *Tanner*, clear Ninth Circuit authority, cases from other circuits, and Rule 606(b) and refuse to consider Juror Simms’s declaration or revisit the jury’s verdict.

III. THE COURT’S EVIDENTIARY RULINGS WERE CORRECT AND DO NOT WARRANT A NEW TRIAL

Leung contends that several of the Court’s evidentiary rulings were incorrect and warrant a new trial. Each of his arguments fails as a matter of law and fact.

“The district court has broad discretion in admitting or excluding evidence.” *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 842 (9th Cir. 1995) (internal quotations and citations omitted). The Court’s rulings on evidentiary issues are reviewed only for an abuse of discretion. *Id.* As discussed below, the Court properly sustained objections to certain questions by Leung, and those rulings did not constitute abuse of discretion or warrant a new trial.

A. Hsiung’s Purported Out-of-Court Statements Were Properly Excluded

During the examination of defense witnesses Hubert Lee and James Chen, Leung’s counsel attempted to elicit testimony that AUO Executive Vice President Hui Hsiung instructed them not to share accurate information at crystal meetings. Trial Tr. vol. 10 at 1508-09; Trial Tr. vol. 12 at 1822-23. The Court sustained objections that the questions sought to elicit hearsay and rejected defense arguments that the questions were relevant to state of mind. The Court’s trial rulings regarding this testimony were correct.

First, Hsiung’s alleged instructions to Lee and James Chen were hearsay. Leung’s counsel was attempting to introduce the testimony to show that Hsiung – who was superior to Lee, James Chen, and Leung in AUO – did not want AUO crystal meeting attendees to provide

accurate information at the meetings. The statements were being offered for their truth: what a very senior executive of AUO wanted crystal meeting attendees to do and not do on behalf of the company at those meetings. This testimony was transparently being offered to demonstrate that AUO (and, thus, Leung) did not engage in illegal conduct at the crystal meetings and that AUO did not authorize Leung to do so.

Recognizing this, Leung's counsel first retreated to the argument that Hsiung's statements were relevant to show the affect on the listener, Hubert Lee. Trial Tr. vol. 10 at 1508-09. Although statements offered to show the effect on a listener are not hearsay, the Court properly recognized that the effect of Hsiung's statements on Lee was not relevant because Lee was not on trial. Additionally, they were not relevant to Leung where there was no evidence whatsoever that Hsiung made any such statements to Leung or that they had any effect on Leung. In fact, the evidence at trial establishes that Leung *did* go to crystal meetings, shared accurate information, and reached pricing agreements, which he then carried out. *See, e.g.*, Trial Exs. 123 (Leung May 14, 2003 crystal meeting report describing a consensus to "Maintain US$190 Target" for 15" monitor panels), 192 (Leung email to Michael Wong on May 29, 2003 instructing him that "AU's current position is to maintain that May pricing of . . . "US$190/15" for DELL in June). So any claimed inference that Hsiung likely made the same statements to Leung that he made to Lee is unreasonable and, in any event, the evidence demonstrates that the statements did not have any effect on Leung's actual actions. He reached agreements at crystal meetings and implemented those agreements to customers. Moreover, whether Hsiung ever made the statement at all is doubtful, given Hsiung's proven, active role in the crystal meetings, and the documentary evidence that unequivocally demonstrates Hsiung reaching agreements with his competitors and implementing those agreements. *See, e.g.*, Tr. Exs. 89, 118. It defies logic that Hsiung would instruct his subordinates to share inaccurate pricing information with the very same meeting participants with whom Hsiung himself reached pricing agreements on behalf of AUO.

After the Court properly sustained objections to the testimony during Lee's examination, Leung's counsel again tried to get Hsiung's statements into evidence through James Chen. Trial

Tr. vol. 12 at 1822-23. Rather than claiming that the statements were admissible to show the effect on the listener, James Chen, Leung resorted to arguing that they were admissible under Federal Rule of Evidence 803(6) to show *Hsiung's* states of mind. *Id.* However, Hsiung's state of mind was no more relevant than Lee's state of mind because Hsiung was not on trial. The relevance of Lee and Hsiung's states of mind becomes even more attenuated when (1) there is no evidence that Hsiung ever made any similar statements to Leung and (2) documents indisputably authored by Leung show that he did, in fact, reach and implement crystal meeting pricing agreements.

Accordingly, the Court correctly excluded Hsiung's alleged statements to Lee and James Chen.

B. The Court Properly Quashed the Subpoenas to FBI Agents

Leung also contends that he is entitled to a new trial because he was not permitted to call a witness from the Federal Bureau of Investigation during the defense case. The intended and explicit purpose of such testimony was to put the government's investigation on trial. Dkt. 1133 at 8. This issue was fully briefed during trial, and the Court issued a thorough opinion quashing the subpoenas served on two FBI Special Agents. Dkt. 1066. In seeking to relitigate this issue, Leung, ignores the fatal flaws that led the Court to quash the subpoenas during trial and raises new arguments that amply demonstrate the time-consuming digression that would have resulted from the testimony.

First, Leung continues to ignore the fact that the subpoenaed agents had little involvement with the government's investigation during the 2006 time period. The Court correctly recognized that when it quashed the subpoenas. Dkt. 1066 at 3. Leung has not disputed this fact.

Second, Leung now admits that he intended to elicit from the FBI agents testimony that Samsung received amnesty from the Antitrust Division. Dkt. 1133 at 9. He attempted to obfuscate that fact during trial. Trial Tr. vol. 10 at 1616. As the Court recognized, however, the introduction of evidence about the Samsung amnesty would necessarily have opened the door to a variety of other evidence, including other convictions and pleas. Trial Tr. vol. 10 at 1620-21.

For that reason, the Court concluded that evidence of the Samsung amnesty would be excluded under Federal Rule of Evidence 403. *Id.* That ruling was correct because, had the evidence been admitted, the government would have been entitled to rebut the appearance of a selective prosecution by introducing the convictions and pleas. It may also have been necessary for the government to put on a rebuttal witness regarding the purpose of the amnesty program and why it is sometimes necessary to provide amnesty in order to incentivize cooperation and prosecute antitrust conspiracies.

Leung's suggestion that the government could have had Samsung employees record calls and carry out other covert investigative activity in Taiwan is mistaken. There are territorial limitations on the government's ability to engage in covert investigative activity, and the testimony that Leung intended to elicit from the FBI agents would have necessitated educating the jury about investigative techniques that were permissible and impermissible in an investigation of conduct occurring in Taiwan. Such testimony would have been confusing and misleading to the jury and, in any event, would have been a waste of time.

Finally, it was undisputed that Leung had quit attending crystal meetings prior to 2006 and that lower-level employees were attending the meetings in 2006. *See* Trial Tr. vol. 6 at 95153. As such, the covert monitoring of crystal meetings advocated by Leung would not have illuminated Leung's conduct and role at earlier crystal meetings, which witnesses described as being different in nature and effectiveness.

C. Leung's Cross-Examination of Brian Lee Was Not Improperly Curtailed

Leung next contends that his cross-examination of Brian Lee was improperly curtailed. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original). Trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see also Davis v.*

Alaska, 415 U.S. 308, 316 (1974) (noting that the extent of cross-examination of a witness is "[s]ubject always to the broad discretion of [the] trial judge"). Moreover, "Confrontation Clause violations are subject to harmless error analysis, because 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'" *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004) (quoting *Van Arsdall*, 475 U.S. at 680-81).

Leung's argument amounts to quibbles about the Court's rulings on objections to a handful of questions from a lengthy cross-examination. Each of those questions was either poorly framed or constituted improper impeachment. Despite sustaining objections to the questions, the Court neither required Leung to terminated prematurely his cross-examination nor limited his ability to explore fulsomely those issues through proper questioning.

For instance, the Court sustained the government's objection because Leung's counsel asked Brian Lee one question during the retrial[5] and then tried to impeach Lee with the answer to a *different* question from the first trial.[6] This was improper impeachment, and the Court properly sustained the objection. Nonetheless, Leung was permitted to ask several other questions related to the subject matter. Trial Tr. vol. 7 at 1129-31. His cross-examination of Lee on this subject was not curtailed in any way.

Likewise, Leung's other objections relate to his attempts to impeach Lee improperly with prior testimony that was either not inconsistent with his testimony during the retrial (Trial Tr. vol. 8 at 1152-53) or failed to consider the extremely different context of the first trial, which involved seven defendants and involved catch-all questioning applicable to the group of defendants rather than only to Leung (Trial Tr. vol. 8 at 1165-71). Under these circumstances, the Court was well within its discretion to sustain the objections it did, and, more importantly, it never limited Leung's ability to continue to explore the topics by asking additional, non-objectionable questions.

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[5] Trial Tr. vol. 7 at 1128: Q. And at that proceeding, sir, you had no recollection of who gave pricing information at any meetings; isn't that correct?

[6] Trial Tr. vol. 7 at 1128-29: Q. Well you testified when asked specifically about whether you could recall any single word Steven Leung said at any of the meetings, you testified you couldn't, isn't that correct?

Moreover, despite the Court having sustained the government's objections based on improper impeachment, Leung took full advantage of exploiting the instances where he did impeach Mr. Lee in his closing argument. Leung's contention now that he was not permitted to make the "contrast clear to the jury" between Lee's testimony in the first trial and the retrial (Dkt. 1133 at 12) is belied by the fact that Leung spent significant time in his closing arguing that very point. *See* Trial Tr. vol. 14 at 2164-90.

Finally, Leung argues that his cross-examination was improperly curtailed because the Court ruled that the form of one question asked on cross-examination was argumentative (Trial Tr. vol. 7 at 1133), but he ignores the fact that he was permitted to ask a non-argumentative series of questions that elicited the same information. Trial Tr. vol. 7 at 1133-34.

Accordingly, the Court's rulings on questions asked during the cross-examination of Brian Lee were correct, and, with the exception of sustained objections to a handful of questions, the Court did not limit the scope of Leung's cross-examination. The Court's rulings did not come remotely close to curtailing Leung's cross-examination or violating the Confrontation Clause.

D. The Court Properly Ruled that the Government Could Impeach Michael Wong with AUOA's Conviction if He Denied Price Fixing

Leung next argues that he was prejudiced by his inability to elicit testimony that Michael Wong never reached any price-fixing agreements, claiming that such testimony would have precluded the government from establishing venue. Dkt. 1133 at 13-14. This argument lacks any merit.

As an initial matter, Leung was told that he could ask Wong whether he reached any price-fixing agreements, but the Court correctly held that, in doing so, he would open the door to impeachment with the AUOA conviction. Trial Tr. vol. 5 at 829-31. If Wong had testified that he did not reach price-fixing agreements, the government could fairly and appropriately have impeached him with AUOA's conviction – a conviction rendered after Wong appeared as the sole testifying witness from AUOA, admitted to routinely communicating about and aligning prices with competitors, and testified about many highly incriminating documents that he sent and received that proved he implemented pricing agreements to customers. Impeachment with

the AUOA conviction would have assisted the jury in assessing the credibility of his denial of involvement in price fixing. Virtually all of the same factual admissions made by Wong during the first trial were made again during the retrial, strengthening the argument that Wong was appropriately subject to impeachment with the AUOA conviction. The Court's ruling that this impeachment would have been permissible was well supported by case law. *See, e.g., United States v. David*, 337 Fed. App'x. 639, 640 (9th Cir. 2009) (holding that a defendant who testified that he "would have never told anyone to falsify a document" had opened the door to evidence of prior conviction for theft involving the falsification of receipts); *United States v. Antonaekas*, 255 F.3d 714, 724-25 (9th Cir. 2001) (holding that a defendant who disavowed involvement with drugs in his testimony had opened the door to evidence that he sold drugs on two prior occasions).

More importantly, acts in furtherance of a conspiracy that support venue include not only reaching price-fixing agreements but also ***any acts that help to market or effect the sale of the price-fixed product***. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 403-04 (1927) (emphasis added) (holding that for purposes of venue in a price-fixing prosecution, acts in furtherance include "circulation of price bulletins, and the making of" and "effect[ing] sales within the district"); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940) (holding that, for venue purposes, acts in furtherance include "making of sales" at enhanced prices). Such sales and marketing activities need not have been carried out by a conspirator, and the agreed-upon venue jury instruction did not state that the acts supporting venue need have been carried out by a conspirator. Trial Tr. vol. 14 at 2084 ("Before you can find the defendant guilty . . . you must find . . . the conspiratorial agreement or some act in furtherance of the conspiracy occurred in the Northern District of California.").

There was ample evidence of sales of price-fixed products in this district that supported venue. For instance, Antoine Simonnet of HP testified that HP had a procurement office in Cupertino, California during parts of the conspiracy and negotiated LCD purchases from that office. Trial Tr. vol. 2 at 211-12. Additionally, there was testimony and emails proving that Evan Huang of AUOA worked in this district during the conspiracy, negotiated sales of panels to

Apple in this district, engaged in collusive contacts with competitors, and warned others at AUOA and AUO that their competitor pricing communications were illegal in the U.S. in order to safeguard the conspiracy. Trial Tr. vol. 4 at 528-29; Tr. Exs. 112 and 172.

Because there was ample additional evidence establishing venue in the Northern District of California by a preponderance of the evidence, the Court's ruling regarding Wong's testimony did not materially prejudice Leung and certainly fell far short of being a serious miscarriage of justice that would warrant a new trial.

IV. THERE WAS NO MISCONDUCT IN THE QUESTIONING OF L.J. CHEN

Leung next claims that he is entitled to a new trial because the government asked L.J. Chen on cross-examination whether he was aware that his counsel, Brian Getz, had been present in the courtroom and whether he was assisting Leung's counsel during trial. Dkt. 1133 at 14. Leung contends that the government did not have a good-faith basis for asking the question and that it unfairly harmed L.J. Chen's credibility with the jury. *Id*. at 15. This objection is meritless.

The government's questioning about Mr. Getz's role in Leung's defense was entirely reasonable because (1) witnesses had testified that they were appearing to testify for Leung at AUO's request; (2) L.J. Chen had been the President of AUO and is currently the President of AUO's Solar Division; (3) Mr. Getz, who represented L.J. Chen in the first trial, was in court each day of the trial except, tellingly, when L.J. Chen took the stand; and (4) the government laid the foundation for the disputed question by establishing that Mr. Getz was L.J. Chen's attorney at the time L.J. Chen testified and that Chen had met with Mr. Getz and Leung's counsel to prepare for his trial appearance:

> Q. How many lawyers did you talk to, to prepare for your testimony here today?
> A. Three
> Q. Who did you talk with?
> A. Dara and Dennis. And also my attorney.
> Q. Your personal attorney. Brian Getz? Is that right?
> A. Yes.

Trial Tr. vol. 13 at 1979:2-8. L.J. Chen later reiterated that Mr. Getz was his personal attorney at the time of his appearance. Trial Tr. vol. 13 at 1980 ("Brian Getz is my friend, besides being my

lawyer."). This testimony, combined with Mr. Getz's presence in the courtroom each day as well as his regular consultations with Leung's counsel during breaks, Trial Tr. vol. 13, 1981:6-8, provided a good-faith basis for questions about the role that L.J. Chen and his counsel were playing in Leung's defense. The questions were intended to establish L.J. Chen's bias.

In light of this testimony by L.J. Chen, it is surprising that Mr. Getz would submit a declaration in which he disputes L.J. Chen's testimony that Mr. Getz was representing L.J. Chen at the time of trial. Dkt. 1136-1 at ¶ 5 ("My previous representation of Lai-Juh Chen ended one week following the jury verdict in March 2012."), ¶ 6 ("I did not prep Lai-Juh Chen for his testimony"). While it is clear that either L.J. Chen or Mr. Getz has provided the Court with testimony that is not accurate, it is irrelevant which one of them is wrong. The germane fact is that, based on L.J. Chen's trial testimony that Mr. Getz represented him, the government had a good-faith basis to believe that Mr. Getz was representing L.J. Chen and to inquire whether Mr. Getz was assisting Leung's counsel.

The government only later learned that Mr. Getz was representing defendant Richard Bai, and was purportedly observing trial on behalf of Bai, who apparently remained in the safe haven of Taiwan over the course of two trials, spanning a year's time, while he considered whether to submit to the Court's jurisdiction for his own trial. Dkt. 1136-1 at ¶ 4 (Getz Decl.) ("I attended the trial and observed trial testimony. My sole purpose in attending was to prepare for the trial of Richard Bai."). Considering that (1) Mr. Bai failed to appear for arraignment over two years ago after promising to do so on multiple occasions, (2) his counsel of record was and has always been Randy Knox,[7] (3) Mr. Getz did not notify the government or the Court of his representation of Mr. Bai until only recently, and (4) Mr. Bai never gave any indication that he intended to come to the U.S. to face the charges, the government understandably expected that Mr. Getz was present in the courtroom during Leung's retrial due to his representation of L.J. Chen (an attorney-client relationship that Dr. Chen confirmed during his sworn testimony).

[7] Indeed, Mr. Bai's former counsel, Randy Knox, contacted the government just a month before the Leung retrial in October 2012. The government had not heard from Mr. Bai's counsel for over a year. Although Mr. Getz apparently began representing Mr. Bai on November 1, 2012 (Dkt. 1136-1 at ¶ 1), the government was not made aware of Mr. Getz's representation of Mr. Bai until February 1, 2013, three months after he had been retained.

Leung also objects that the government asked L.J. Chen about the potential impact that the conviction of AUO executives would have in civil suits against the company. Dkt. 1133 at 15. This question was intended to establish L.J. Chen's bias, and it was no different than similar bias questions asked of other witnesses. *See, e.g.*, Trial Tr. vol. 7 at 1040-41; Trial Tr. vol. 12 at 1830-31. Moreover, contrary to Leung's suggestion, nothing in the question suggested that any AUO executives had been convicted. In any event, L.J. Chen did not answer the question and, instead, was asked another question. Trial Tr. vol. 13 at 1972-74. As a result, Leung's claim of prejudice is baseless.

A new trial would be warranted "only if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial." *United States v. Sayakhom*, 186 F.3d 928, 943 (9th Cir. 1999). No such showing can be made here because, aside from the fact that there was no misconduct, the evidence supporting conviction was overwhelming. Brian Lee, C.C. Liu, and Stanley Park all provided highly incriminating testimony regarding Leung's participation in the crystal meetings, and Michael Wong and Stanley Park also provided testimony about Leung's participation in bilateral pricing alignment discussions that furthered the conspiracy. The defense case provided even further support for Leung's pricing authority and role in the conspiracy. Most telling, Leung wrote document after document that unequivocally established his participation in the conspiracy. Based on that evidence, the jury returned a guilty verdict.

In light of these facts, Leung's claim that two questions demonstrating the bias of a single defense witness somehow warrant a new trial is absurd. The jury's verdict was based on a mountain of evidence, and no arguments raised by Leung's tardy, scattershot post-trial motion, either individually or cumulatively, come close to demonstrating that it would be a serious miscarriage of justice to permit the verdict to stand.[8]

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[8] Leung appears to invoke the cumulative error doctrine. Dkt. 1133 at 1. Suffice it to say, there can be no cumulative error when there has been no error. *United States v. Carreno*, 363 F.3d 883, 889 n.2 (9th Cir. 2004) (noting that the cumulative error doctrine does not apply when there is no error), *vacated and remanded on other grounds*, 543 U.S. 1099.

V. LEUNG'S REMAINING ARGUMENTS DO NOT MERIT CONSIDERATION

Finally, Leung raises arguments regarding whether the government has met its burden of proof regarding the Foreign Trade Antitrust Improvements Act and whether the Rule of Reason applies to this case. Dkt. 1133 at 17. Leung acknowledges that the Court ruled on these issues in connection with the first trial, that there are no changed circumstances that would warrant a different result in this case, and that the arguments are merely being preserved for appeal. *Id.* The Court's prior rulings on these issues are the law of the case, and the government incorporates all of its previous briefing on these issues.

In his FTAIA argument, Leung requests a judgment of acquittal under Fed. R. Crim. P. 29. In deciding a Rule 29 motion, the Court must determine whether the evidence, "viewed in the light most favorable to the government, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) (citation omitted). "All reasonable inferences must be drawn in favor of the government, and circumstantial evidence is sufficient to sustain a conviction." *United States v. Fleischman*, 684 F.2d 1329, 1340 (9th Cir. 1982) (citation omitted), *abrogated on other grounds by United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987). In satisfaction of its burden of proof on this element, the government introduced evidence of sales of panels directly into the United States by the conspirator companies and of sales of panels that were incorporated into finished products targeted for sale in the United States. *See, e.g.*, Trial Exs. 775, 835. The government also introduced testimony from HP witness Antoine Simonnet that HP purchased 10 million monitor panels each year. Vol. 2, 245:17-24. Accordingly, there is no basis to grant a Rule 29 motion on these grounds, considering the evidence the government specifically introduced at trial to satisfy its burden of proof on this element of the offense.

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CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court should deny Leung's Rule 29 and Rule 33 motions.

Dated: April 22, 2013

Respectfully submitted,

/s/ Brent Snyder
Brent Snyder
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