Nos. 12-10500, 12-10514
(consolidated with Nos. 12-10492, 12-10493)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

AU Optronics Corporation,

Defendant-Appellant.

United States of America,

Plaintiff-Appellee,

v.

AU Optronics Corporation America,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California, No. 3:09-cr-00110-SI
District Judge Susan Illston

REPLY BRIEF FOR DEFENDANTS-APPELLANTS AU OPTRONICS CORPORATION AND AU OPTRONICS CORPORATION AMERICA

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INTRODUCTION

The government's responding brief fully illustrates why this prosecution and the defendants' resulting convictions are so troublesome. The government indicted the defendants on the theory that, despite the fact the agreements charged as a price fixing conspiracy were entered into by foreign parties on foreign soil, the conspiracy should be treated as an entirely domestic crime. For that reason, the government argued vigorously prior to and during trial that the limitations on the extraterritorial reach of the Sherman Act imposed by the FTAIA and the Supreme Court's decision in *Hartford Fire*[1] had no application to this matter. It made the same "entirely domestic" contention in arguing the irrelevance of this Court's ruling in *Metro Industries*[2] that foreign conduct alleged to violate the Sherman Act must be analyzed under the rule of reason.

Yet on appeal the government for the first time embraces the FTAIA and the *Hartford Fire* standards in an attempt to fend off the defendants' challenge to the extraterritorial reach of the Sherman Act and to their claim of the applicability of the rule of reason. The government then pirouettes once more, responding to defendants' claims of instructional error concerning the FTAIA and *Hartford Fire*

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[1] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

[2] *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996).

limitations by again asserting that this is an entirely domestic case to which those legal principles are irrelevant.

Finally, the government now on appeal abandons the "indirect import" theory of affected commerce that it relied on at trial in favor of a "direct import" theory neither found in the indictment nor presented to the jury. Given that the government is entirely undecided as to both the law and the facts on which its prosecution rests, the prison sentences and half billion dollar fine imposed on the defendants are patently unfair and must be vacated.

I. THE GOVERNMENT FAILED TO PLEAD AND PROVE THE ELEMENTS OF A RULE OF REASON CASE AS REQUIRED BY *METRO INDUSTRIES*

A. Introduction

The government agrees with the defendants that: "The Sherman Act does not prohibit all agreements in restraint of trade, but only those that are unreasonable." (GB at 94 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).) The government further agrees that there are two Sherman Act standards for judging whether a given restraint is unreasonable: the *per se* standard, under which a restraint is deemed "unlawful, without regard to [its] rationale or justification and without inquiry into [its] actual effects," and the rule of reason, which requires the factfinder to "weigh[] all of the circumstances of a case in

deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." (*Id*. (quoting *Leegin*, 551 U.S. at 885).)

Finally, the parties are in accord that the entire Sherman Act, including its dual test for reasonability, must be presumed to be inapplicable to foreign conduct, a presumption requiring an express statutory mandate to overcome. (GB at 71-72 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).)[3]

Most importantly, as to the fulcrum issue in this case—whether the *per se* or rule of reason standard applies to the charged conduct of the defendants occurring in Taiwan—the government concedes, as it must, that this Court has already spoken. At page 95 of its brief, the government cites the holding of *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996), that under the Sherman Act, "application of the *per se* rule is not appropriate where the conduct in question occurred in another country." *See also* 82 F.3d at 843 ("Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, *per se* analysis is not appropriate."); *id*. at 844 ("Foreign Conduct Cannot Be Examined Under the Per Se Rule."); *id*. at 845 ("Consequently, where a Sherman Act claim is

[3] *See also* GB at 79 ("[L]egislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.") (quoting 1 Restatement (Third) of Foreign Relations Law § 403 cmt.f, 247-48 (1987)).

based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation.").

This Circuit's rule requires a panel to follow a decision in which the same "legal issue was presented by the case before [the prior panel] and [the panel] made a deliberate decision to resolve the issue.'" *United States v. Cassel*, 408 F.3d 622, 633 n.9 (9th Cir. 2005) (quoting *United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (en banc) (Kozinski, J., plurality opinion)). Nonetheless, the government argues that this panel need not follow *Metro* on four asserted grounds: (1) despite its repeated use of the term "rule of reason," the *Metro* decision did not in fact address the issue of which Sherman Act standard applies to foreign conduct; (2) *Metro* is distinguishable because it involved "wholly foreign" conduct; (3) if *Metro* did hold, as it clearly stated, "that where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation," then the case was wrongly decided and must be disapproved; and (4) the defendants waived the *Metro* issue by not asking for final jury instructions on the rule of reason.

Each of those rejoinders is without merit.

B. *Metro* Clearly Decided the Applicability of the Rule of Reason Standard to Foreign Conduct

The government first claims that *Metro* did not intend to, nor did in fact, address the *per se*/rule of reason dichotomy. According to the government, rather

than holding the rule of reason standard applicable to foreign conduct otherwise within the ambit of the Sherman Act and the FTAIA, *Metro* merely reiterated the *Hartford Fire* test for determining whether and when the Sherman Act has any extraterritorial reach at all. Even a cursory reading of the opinion reveals that contention to be frivolous.

There are two issues that arise when a Sherman Act action rests principally on allegations of foreign conduct: Does the Act have extraterritorial reach that extends to the conduct in question; and, if so, should the legality of the alleged conduct be measured under the *per se* standard or that of the rule of reason? In *Hartford Fire*, the Supreme Court was presented with a claim that the Act did not reach the conduct of Lloyd's of London, a British insurance company. While it addressed the extraterritoriality issue, *Hartford Fire* said nothing about the applicability of the *per se* versus rule of reason standards to foreign conduct; those terms do not appear in the opinion.

Simply because *Metro* cites *Hartford Fire*, the government maintains that *Metro* stands for "nothing more than a restatement of the *Hartford Fire* Court's declaration that 'the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.'" (GB at 95.) But *Metro's* citation to *Hartford Fire* came under the caption heading: *"Foreign Conduct Cannot Be Examined Under the Per Se Rule."* 82 F.3F at 843.

Hartford Fire thus was cited in support of *Metro's* holding on the critical issue of whether it is a *per se* standard or the rule of reason that applies to foreign conduct within the extraterritorial reach of the Sherman Act. ("Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, *per se* analysis is not appropriate."). *Metro Industries* specifically mentioned price-fixing as a practice that should not be viewed as a *per se* antitrust violation in a foreign context. *Id*. at 845.

The *Metro* court's determination that "foreign conduct cannot be examined under the per se rule," *id*. at 844, was central to its resolution of the case. The government's claim that *Metro* did not address the applicability of the rule of reason to foreign conduct is nonsense.

C. *Metro* Did Not Involve "Wholly Foreign" Conduct, and Thus Cannot Be Distinguished on that Basis

As predicted in defendants' opening brief (AOB at 38-39), the government claims that *Metro* can be distinguished from the present case on the ground that it, unlike the case at bar, involved "wholly foreign conduct." (GB at 99.) But nothing in the opinion indicates that the rule of *Metro Industries* is limited to "wholly foreign" cases, and, in any case, the government utterly fails to address the facts establishing that *Metro* involved as much, if not more, domestic conduct as the present case.

(a) As is true here, the defendants in *Metro Industries* were a foreign corporation *and its American subsidiaries*. The plaintiff, an American corporation, alleged that the defendants had disrupted their deliveries to plaintiff in the United States, and blocked its importation of products from another supplier. *Id*. at 841-42. The *Metro* plaintiff further claimed that both the parent company and its domestic subsidiaries had engaged in a market division that constituted a *per se* violation of the Sherman Act, and had damaged *Metro* and its customers in the United States. *Id*. at 842.

(b) The *Metro* Court noted that defendant Sammi did "a great deal of business in the United States," that it had substantial assets in the United States, and that the impact of Sammi's conduct was "felt more in the United States than in Korea." *Id*. at 847.

The government's core allegation in this case was that AUO (a foreign company) and other manufacturers (all foreign companies) met overseas and agreed to set prices of TFT-LCD panels for worldwide sale. This is a case that involved no less "foreign conduct," and no more domestic conduct, than did *Metro*. *Metro* applies to this matter.

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D. The Supreme Court Has Never Held That The *Per Se* Test For Unreasonable Anti-Competitive Restraints Applies to Foreign Conduct

There is no merit to the government's contention that *Metro* was wrongly decided under then-existing Supreme Court precedent. In *Metro*, this Court stated its rationale for applying the rule of reason to an allegation that foreign corporations had entered into a price fixing agreement on foreign soil. *Id.* at 845 ("[P]rice fixing in a foreign country might have some but very little impact on United States commerce."). The Supreme Court has never rejected that rationale for the application of the rule of reason. Indeed, the high court has never addressed the issue of whether any form of foreign conduct within the ambit of the Sherman Act should be subject to *per se* as opposed to rule of reason analysis.

Thus the government's claim that *Metro* was wrongly decided because it conflicts with "Supreme Court precedent holding price fixing *per se* unlawful," (GB at 98 n. 16 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940)), is simply untrue. *Socony*, like every other Supreme Court precedent applying a *per se* standard to allegations of price-fixing, did so solely in the domestic context. Thus, when the government cites *Leegin*, a domestic commerce case, for the proposition that "[c]ertain practices, including 'agreements among competitors to fix prices,' are deemed unreasonable *per se*, and thus unlawful, without regard to their rationale or justification and without inquiry into

their actual effects" (GB at 93), it begs the question that *Metro* answered in the negative: does the *per se* rule apply to foreign conduct?

Furthermore, the government's categorical claims that "no circumstances justify price fixing" and that there are "no possible justifications" (GB at 96-97) for price-fixing is false even in the domestic context. The Supreme Court has at times refused to apply a *per se* analysis to other allegations of domestic price fixing. *NCAA v. Board of Regents*, 468 U.S. 85, 100 (1984) ("Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18-23 (1979). And domestic price fixing is treated differently when its impact involves foreign trade. Price-fixing agreements entered into by parties on American soil which affect only foreign trade are entirely exempted from the reach of the Sherman Act by the operation of the FTAIA, a fact which the government concedes. (GB at 82 n.12 ("[P]rice-fixing with no nexus to U.S. commerce is not prohibited by the Sherman Act . . . ."); *see also* GB at 74, citing H.R. Rep. No. 97686, at 9 (Anticompetitive conduct "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.").)

There is yet another reason to reject the government's claim that the *per se* standard applicable to domestic price-fixing must be inflexibly enforced in the foreign context. Application of the *per se* rule to domestic price-fixing is based on

a presumption—that "horizontal agreements among competitors to fix prices . . . have manifestly anticompetitive effects and lack any redeeming virtue" and are "thus unlawful, without regard to their rationale or justification and without inquiry into their actual effects." (GB at 96, quoting *Leegin*, 551 U.S. at 886.) Application of the *per se* rule short-circuits the fact-finding process, as it prevents a Sherman Act defendant from proving what may be the truth: that the foreign price fixing arrangement being challenged is in fact reasonable and even pro-competitive

But *Leegin,* on which the government heavily relies in its *Metro* response (GB at 94, 96), cautions against the use of such a draconian standard in new fields of economic activity, and encourages reconsideration of the standard's past application in industries now in flux. *Leegin* overruled a nearly one hundred year old precedent holding that vertical minimum price arrangements between manufacturer and distributor constitute a *per* se violation of the Sherman Act.[4] In explaining its refusal to be bound by *stare decisis*, the Court noted that "Congress intended §1 to give courts the ability to develop governing principles of law in the common-law tradition." 551 U.S. at 901 (internal quotation marks omitted). The Court emphasized the limitations which must govern application of the *per se* rule:

> [T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc.* v.*Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9 (1979), and only if courts experience with the type of restraint

[4] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

> at issue, can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason, see *Arizona* v. *Maricopa County Medical Soc.*,457 U. S. 332, 344 (1982).

Id. at 886-87.

The issue of which, if any, price stabilization arrangements among foreign corporations in industries marked by constant and revolutionary technological change "would be invalidated in all or almost all instances under the rule of reason" is not one with which "courts have had considerable experience." Such judicial experience can only be acquired by adopting and applying the rule of reason to foreign conduct until such time as it can be predicted with confidence whether the resulting restraints "would always or almost always tend to restrict competition and decrease output." *Id.* at 886.

The *Metro* rule is controlling here. To the extent that the government claims that *Metro* was wrongly decided, its arguments to overturn *Metro* must be reserved for its petition for rehearing en banc. But even there, its efforts will fail, as *Leegin* makes clear that *Metro* was soundly reasoned and remains good law.

E. Defendants' *Metro* Claims are Fully Preserved

The government argues that the defendants waived any instructional claims on *Metro* because they acceded to final jury instructions that did not include the additional requirements suggested by that case. (GB at 65-66.) To the extent that contention is limited to a claim of *Metro*-related instructional error, it is

meaningless because defendants have made no such claim here on appeal. Their claims here are directed at the government's failure to plead its case as based on the rule of reason and the district court's refusal to permit the defendants to present a defense based on the *Metro* decision. Once those two errors occurred, it would have been pointless to ask for an instruction on a theory of liability both absent from the indictment and as to which the defense had been barred from presenting evidence.

Prior to trial, the defendants fully presented their position that the government should be required to try this as a rule of reason case under *Metro*. The district court unambiguously rejected that position. (ER 146-47.) The defendants subsequently indicated, several times, that while they disagreed with the district court's ruling, they understood that that ruling would be controlling at trial. (ER 1551, 1656.) At the close of the case, the defendants acceded to final jury instructions based the trial court's repeated rejections of the *Metro* holding.

The government now argues that by failing to re-litigate their legal theories at the final jury instruction stage, the defendants waived all claims based on those theories. The government's waiver argument is silly because in this Circuit, a party is not required to re-litigate a legal position once that position has already been considered and rejected by the trial court. *See Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005).

In fact, the irrationality of the government's waiver argument is illustrated by the government's own arguments on the FTAIA. Prior to trial, the government argued that the FTAIA did not apply to this case, and that the FTAIA exceptions did not constitute elements of the offense. (ER 1605-07, 1641-44.) At the end of trial, however, the government proposed jury instructions that listed the FTAIA exceptions as "elements of the offense." (ER 1217.) Now on appeal, the government again argues that the FTAIA exceptions are not elements of the offense. (GB at 44-46.)

The government states that even though it proposed the final FTAIA instructions, it did not actually *agree* with them, and it only accepted them "out of an abundance of caution." (GB at 42 n.4.) It states that it acceded to those instructions "in recognition of" the district court's ruling in the related civil case. (*Id*.) That is a fair point—but the same logic must also be applied to the defendants. The defendants did not agree with every aspect of the final instructions, but they acceded to some in recognition of the district court's prior rulings, which were "explicit and definitive." *United States v. Palmer*, 3 F.3d 300, 304 (9th Cir. 1993).

In short, a party does not waive claims by failing to renew a futile objection. The government's waiver arguments are not only legally faulty, they are also hypocritical.

F. Conclusion

In the caption to its *Metro* argument, the government asserts that "nor would applying the [rule of reason] have mattered." (GB at 93.) But the government makes no effort to demonstrate that the errors claimed by defendants could have been harmless, and for good reason. The failure to allege the rule of reason elements in the indictment "is a fatal flaw requiring dismissal of the indictment." *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005); *United States v. Du Bo*, 186 F.3d 1177, 1179-80 (9th Cir. 1999) (failure to plead an element cannot be held harmless). *Metro* required that this case be tried under the rule of reason, yet the trial court barred the defendants from presenting to the jury evidence or argument in support of the reasonableness of their conduct. Such a trial cannot be deemed to be fair. *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense. ") Reversal is required.

II. THE GOVERNMENT DID NOT PLEAD THE FTAIA EXCEPTIONS

With respect to the FTAIA, the government whistles a new tune on appeal. At trial, the government argued—vigorously and repeatedly—that the FTAIA had no application to this case, and that it was not required to plead or prove the elements of the FTAIA exceptions. Now, apparently realizing the weakness of its earlier legal position, the government reverses courts and attempts to embrace the

FTAIA as a way to salvage these convictions. It concedes that the FTAIA applies, but it earnestly submits that it always meant to follow the FTAIA. It argues—for the first time on appeal—that it intended to plead and prove both FTAIA exceptions. That argument, however, is belied by the record and the government's own prior submissions.

A. The Government's Arguments Below

The indictment did not mention the FTAIA or its exceptions. As the government concedes, "the indictment includes no citation to 15 U.S.C. § 6a." (GB at 44.) Nor does the indictment track the statutory language of the FTAIA, which is required for minimal sufficiency of a criminal count. *See United States v. Milovanovic*, 678 F.3d 713, 727 (9th Cir. 2012). The historical explanation for this failure is obvious: When it drafted the indictment, the government had absolutely no intention of proceeding under the FTAIA. Its own arguments below made its legal position pellucid.

After the defendants moved to dismiss the indictment for failure to plead the elements of the FTAIA, the government responded that it was not required to do so. It offered two reasons for its position. First, it stated that because it alleged "a conspiracy that violated U.S. law on U.S. soil" and this was therefore a domestic case, the FTAIA did not apply at all. (ER 1641.) Second, it argued that the FTAIA was merely a jurisdictional statute. According to the government, the

FTAIA "addresses subject matter jurisdiction, not the merits or elements of the Sherman Act." (ER 1643.) It thus stated that the defendants' reliance on the FTAIA was entirely "misplaced." (ER 1644.) It concluded: "The government has found no authority . . . requiring that the government plead FTAIA exceptions and prove them to a jury beyond a reasonable doubt." (ER 1644.)

Initially, the district court did not clearly side with either the government or the defendant regarding the applicability of the FTAIA. In denying the motion to dismiss, it held that the FTAIA might not apply, but even if it did, the government had implicitly pleaded one of the two exceptions. (ER 183-84.) The defendants thus sought clarification so that they could know, prior to trial, whether the elements of the FTAIA would be at issue in the trial. They thus requested preliminary jury instructions on the elements of the offense, including the FTAIA elements.

Once again, the government argued that it would not be required to prove any facts under the FTAIA. It argued "that neither the FTAIA nor [the *Hartford Fire*] test apply to the facts of this case." (ER 1605.) It argued that the FTAIA only applies to "wholly foreign" conduct, and that because this case involved some domestic conduct, FTAIA "allegations were unnecessary." (ER 1606.) It argued that the district court had already conclusively and correctly ruled that the "FTAIA did not apply" to this case. (ER 1607.)

The government never once argued prior to trial that it had actually pleaded both FTAIA exceptions. Its legal position was clear: The indictment was not required to allege *anything* under the FTAIA because the FTAIA did not apply to this case.

B. FTAIA Exceptions as Elements

Contrary to the government's arguments below, the FTAIA applies whenever a Sherman Act case is based on predominantly foreign conduct. Belatedly recognizing that obvious fact, the government has now abandoned its argument that the FTAIA does not apply to this case. It no longer contends that the FTAIA is merely "jurisdictional" and thus exempt from any pleading requirements. (GB at 42 n.4.)[5] But these concessions make its indictment vulnerable, so the government is left searching for new arguments to save its charging document.

In its appellate brief, the government tries a new argument.[6] It argues (albeit somewhat half-heartedly) that the FTAIA exceptions are affirmative defenses rather than elements. (GB at 44-46.) It argues that it thus was not required to plead anything about the FTAIA because the defendant bore the burden of

[5] Applying a "jurisdictional" label would not help the government anyway. As this Court has repeatedly held, in criminal cases, jurisdictional facts must be pleaded and proven beyond a reasonable doubt. *United States v. Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002).

[6] Like several of the government's FTAIA arguments, this argument is raised for the first time on appeal.

production even if the government bore the ultimate burden of persuasion. This argument is a non-starter.

First and foremost, the government's argument is flatly contradicted by the case law. In *Minn-Chem*, the Seventh Circuit ruled that "the FTAIA sets forth *an element* of an antitrust claim." *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc) (emphasis added). In *Animal Science*, the Third Circuit likewise ruled that "in enacting the FTAIA, Congress . . . articulate[d] *substantive elements* that a plaintiff must satisfy to assert a meritorious claim for antitrust relief." *Animal Sci. Prods. v. China Minmetals Corp*., 654 F.3d 462, 467 (3d Cir. 2011) (emphasis added). The government is now asking this Court to create a circuit split by declaring that the FTAIA exceptions are affirmative defenses rather than elements. No federal court has ever so held, and the government has presented no reason why this Court should be the first.

Case law aside, the government's argument has no support in the text or history of the FTAIA. The FTAIA does not label the exceptions as affirmative defenses. Nor are the exceptions anything resembling the "[c]lassic affirmative defenses" such as self-defense or excuse. *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 723 (9th Cir. 2011). It is true that the foreign defendants can "defend" a Sherman Act charge by contesting the requirements of the FTAIA, but such defenses "are advanced simply to negate an element of the crime." *Id*. FTAIA

defenses are element negation defenses, not affirmative defenses. There is nothing in the FTAIA that suggests that the defendant bears any burden—of production or persuasion—on the exceptions.

As the Third and Seventh Circuits have held, the FTAIA exceptions constitute elements of a Sherman Act claim based on foreign conduct. Like all elements, the FTAIA elements must therefore be presented to a grand jury before a criminal case can proceed.

C. The Indictment's Deficiency

In this case, however, the government did not present the FTAIA elements to the grand jury. Consistent with its pretrial legal position that the FTAIA did not apply, the government did not mention the FTAIA when it drafted the indictment. It did not cite the FTAIA, as required by Fed. R. Crim. P. 7(c)(1). It did not track the language of the statute. It did not allege either of the two FTAIA exceptions. As the defendants have repeatedly and consistently argued, the indictment was therefore deficient because it failed to plead essential elements of the offense.

The government nonetheless argues that the indictment was sufficient because it *implicitly* alleged the FTAIA. Although the indictment did not actually mention the FTAIA, the government claims that the indictment "alleged the facts necessary" to establish the FTAIA elements. (GB at 50.) But an indictment cannot implicitly allege a federal offense. It must, at a minimum, cite and identify

the statute that forms the basis of the charges, as well as each element of that statutory offense. *Du Bo*, 186 F.3d at 1179-80. And even ignoring such formal requirements, the indictment was deficient because the factual allegations in the indictment do not state claims under either FTAIA exception.

1. Import Trade Exception

On appeal, the government makes a critical concession regarding the legal meaning of the import trade exception. In their opening brief, the defendants argued that the import trade exception cannot be read so broadly as to include a "stream of commerce" theory. (AOB at 54-57, 60-62.) As a result, selling raw inputs that are eventually incorporated by foreign third parties into finished products does not constitute "import trade."

After arguing to the contrary below, the government now concedes the point. It concedes that the import trade exception only covers shipments of *raw panels* into the United States. (GB at 47 ("Fixing the price of panels made abroad and sold as raw panels in, or for delivery to, the United States is conduct involving import trade or import commerce."); *id*. at 55 ("The government relied on evidence of price-fixed raw panels imported into the United States for the import commerce exception, not on evidence of panels incorporated into finished products.").

The problem for the government is that the indictment did not allege a conspiracy to fix the price of raw panels shipped into the United States. Rather,

the indictment alleged a conspiracy to fix the price of panels sold abroad and then incorporated into finished products shipped into the United States. The indictment alleged that the conspirators agreed "to fix the prices of TFT-LCDs for use in notebook computers, desktop computer monitors, and televisions in the United States and elsewhere." (ER 1723 ¶ 3.) It alleged that the panels were sold "in a *continuous and uninterrupted flow of interstate and foreign trade and commerce* to customers located in states or countries other than the states or countries in which the defendants and their coconspirators produced TFT-LCDs." (ER 1732 ¶ 19 (emphasis added).) Nowhere did the indictment allege raw panel sales to the United States.

In short, to the extent that the indictment implicitly alleged any FTAIA theory at all, it alleged a stream of commerce or "indirect import" theory. It was on the basis of the indirect import theory that the district court upheld the indictment. The government now concedes that that theory is legally invalid. Even ignoring the failure to cite or quote the FTAIA, that concession is fatal. The indictment did not allege an offense under the FTAIA.

2. Domestic Effects Exception

The government also argues that it sufficiently pleaded the domestic effects exception. (GB at 50-53.) But it raises this argument for the first time on appeal, and the argument is therefore waived. Like all other parties, the government

waives an argument if it fails to raise it first in trial court. *United States v. Leal-Del Carmen*, 697 F.3d 964, 974 & n.8 (9th Cir. 2012); *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987). In response to the defendants' motion to dismiss for failure to plead the FTAIA elements, the government never once suggested that it had, in fact, pleaded the domestic effects exception.

In an attempt to avoid this waiver problem, the government states: "In fact, in response to defendants' motion to dismiss, the government argued, as it does now, that the indictment adequately alleged the elements of Section 1 of the Sherman Act." (GB at 51 n.6.) That response is fatuous. The entire dispute prior to trial was whether elements of the offense included the elements of the FTAIA exceptions. The defendants claimed that FTAIA allegations were required; the government claimed such allegations were not required. Nowhere did the government argue that it had adequately alleged the elements of the domestic effects exception of the FTAIA. Because the argument was not raised below, it is foreclosed on appeal.

In any event, the indictment did not plead the domestic effects exception. That exception requires a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. Those words appear nowhere in the indictment. The government's only response to this obvious lacuna is that "one can reasonably infer" those elements from the factual claims. (GB at 52.) By that logic, the

government would never have to plead actual criminal offenses and their elements at all, so long as it described some set of facts from which "one can reasonably infer" some offense and its constituent elements. That is not the law. *In Du Bo*, for example, the government's failure to allege the required mens rea of "knowingly and willfully" doomed its Hobbs Act indictment (186 F.3d at 1179); this Court did not permit those elements to be "inferred" from the facts alleged.

The defendants' claim is simple: If the government intends to bring a foreign case under the domestic effects exception of the FTAIA, it must allege that the defendants' conduct had a "direct, substantial, and reasonably foreseeable" effect on domestic commerce. 15 U.S.C. § 6a(1). The indictment in this case contained no such allegation. The district court constructively amended the indictment by allowing the petit jury to convict on a theory that was not charged.

D. Notice and Prejudice

As a fallback position, the government suggests that even if it did not properly plead the FTAIA, any error was harmless because the defendants were not misled or prejudiced. "Given that defendants' motion to dismiss the indictment relied heavily on the FTAIA, ER1663-71, they cannot claim to have been misled as to its potential relevance." (GB at 41.) That argument fails for two reasons.

First, while it is true that part of the purpose of the Grand Jury Clause is to provide notice, the primary purpose is to ensure that criminal defendants are not put to trial unless and until a grand jury has found probable cause. *See United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997) ("A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the basis of facts which satisfied a grand jury that he should be charged.").[7] In part for that reason, fundamental defects in an indictment cannot be cured by a bill or particulars—even though a bill of particulars provides notice. *United States v. Fleming*, 215 F.3d 930, 934-35 (9th Cir. 2000). "Refusing to reverse in such a situation would impermissibly allow conviction on a charge never considered by the grand jury." *Du Bo*, 186 F.3d at 1180.

Second, the defendants in this case did not have pretrial notice regarding the applicability of the FTAIA. The defendants moved to dismiss on the basis of the FTAIA, but the government argued that the FTAIA would not apply. The district court issued an ambiguous ruling mostly siding with the government. (ER 183-84.) In order to seek clarification, the defendants sought preliminary jury instructions describing the FTAIA elements. Once again, the government argued

[7] Put differently, the defendants' constitutional rights under the Grand Jury Clause are procedural rights, not merely substantive rights of notice. *Cf. Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner. . . .").

that the FTAIA would not apply at all. The district court punted, stating that it would not determine the applicability of the FTAIA until the close of evidence. (ER 102-03.)

Thus, the defendants did not have notice that the government would ultimately seek to obtain a conviction under the FTAIA. And most importantly, the defendants did not have notice *which* FTAIA theory the government would use. The defendants were misled on precisely this point, because the district court ruled prior to trial that, if anything, the government could only proceed under the import trade exception. At the close of evidence, however, the district court allowed the government to proceed under the domestic effects exception as well.

The government's constantly shifting legal theories made it impossible for the defendants to prepare and present any defense under the FTAIA. But regardless of notice, the fundamental point is simpler: The indictment did not allege the FTAIA exceptions. Those exceptions constitute elements of the offense. Notice or not, in this Circuit, the failure to plead an element of the offense is an error that cannot be deemed harmless. *Du Bo*, 186 F.3d at 1179-80. The deficiencies in the indictment require reversal.

II. THE FTAIA EXCEPTIONS WERE NOT PROVEN BEYOND A REASONABLE DOUBT

As described above, the government's legal position heading into trial was that the FTAIA had no applicability to this case, and that it was not required to

prove any additional elements under the FTAIA. That legal position led to a flawed indictment, and it also led to flawed proof at trial because the government failed to present evidence sufficient to prove the FTAIA elements beyond a reasonable doubt.

A. Import Trade Exception

As discussed above, the government has now (belatedly) conceded that the import trade exception only covers raw panel shipments into the United States, and that it does not cover panels sold abroad for use in finished products. As to the evidence at trial, the government also concedes, as it must, that nearly all of the evidence focused on panels sold overseas. The government has thus conceded that 99% of the conduct in this case cannot be prosecuted under the import trade exception.

The government argues, however, that it presented sufficient evidence of raw panel shipments to uphold a conviction. That argument does not hold water.

1. AUO's Sample Panels

First, citing ER 1443, the government notes that HP procurement official Tierney testified that HP received some raw panels from AUO. (GB at 55-56.) In the entire massive trial record, that is the sole piece of evidence that the government can marshal of raw panel shipments by AUO. Tierney testified that some panels were shipped by AUO as samples for marketing purposes. When

asked how many times that happened, Tierney responded: "I can think of one, or a few." (ER 1445.) He went on to testify that AUO *never* shipped any panels to HP in the United States for production purposes. (ER 1446.)

The sample shipments are a laughably thin reed on which to rest this conviction. There is no evidence that AUO ever intended to fix the price of sample shipments. Indeed, Tierney's testimony makes clear that the sample panels were sent *for free*. The sample panels were not sold—they were given. One cannot fix prices in a promotional giveaway. With respect to those sample panels, there was no agreement to fix prices, no loss, and no criminal conduct.

2. Competitors' Raw Panel Shipments

Second, the government argues that AUO can be held liable for the raw panels shipped to the United States by the other conspirators. (GB at 56-57.) The government's argument rests on a quasi-*Pinkerton* theory of liability: that because the raw panel shipments by other conspirators were "acts in furtherance" of the overall conspiracy, they are covered by the FTAIA. But the government was denied a *Pinkerton* instruction by the district court (Tr. 4648-50), and a conviction may never be affirmed on a theory of liability not presented to the jury. *McCormick v. United States*, 500 U.S. 257, 270 fn. 8 (1991) ("This Court has never held that the right to a jury trial is satisfied when an appellate court retries a

case on appeal under different instructions and on a different theory than was ever presented to the jury.")

More generally, none of the evidence at trial suggested any agreement about raw panel sales to the United States. There is no evidence that AUO knew, much less intended, that its competitors would ship raw price-fixed panels into the United States. Even if some such conspiracy existed, there is no evidence that AUO was a member.

B. Domestic Effects Exception

As for the panels sold abroad to be incorporated into finished products, the government concedes that such conduct can only be covered by the domestic effects exception. That exception requires that the defendants' conduct have a "direct, substantial, and reasonably foreseeable" effect on domestic commerce. But in this case, the government failed to prove beyond a reasonable doubt that that conduct had a "direct" effect in the United States.

In *United States v. LSL Biotechnologies*, this Court stated that for the purposes of the FTAIA, ""an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." 379 F.3d 672, 680 (9th Cir. 2004). Selling raw inputs to upstream finished product manufacturers does not directly and immediately impact the price of the end-user product. Ultimately, the price of the end-user product depends on the elasticity of the demand curve for the product.

If the demand curve is inelastic, then the *producer* rather than the *consumer* will absorb the increased cost of inputs. As with tax increases, producers are not always able to pass on input price increases to consumers. In some cases, price increases simply cut into the producer's profit margins.

The government points to a single piece of evidence—testimony by Stanley Park of LG—that price increases were passed on to consumers. (*See* GB at 59-60 (citing SER 2223).) Park's testimony was simply say-so. Park was not an expert on the shape of the demand curve for consumer electronics, Park did not work for a manufacturer of consumer products for brand companies, and nor did Park have personal knowledge that branded companies actually charged higher prices as a result of higher input prices to OEMs overseas. His testimony, standing alone, cannot prove a direct effect beyond a reasonable doubt.

IV. THE GOVERNMENT FAILED TO PLEAD AND PROVE THE HARTFORD FIRE ELEMENTS

The individual defendants have argued persuasively that the Supreme Court's ruling in *Morrison* abrogated its prior ruling in *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993). The government responds that "*Morrison* provides no basis for ignoring *Hartford Fire*." (GB at 72.) But ignoring *Hartford Fire* is precisely what the government did in this case. In cases based on foreign conduct, *Hartford Fire* requires a "substantial and intended" effect on domestic commerce.

In this case, however, the government did not plead the *Hartford Fire* elements, and the district court's instructions did not require the jury to find those elements.

The government concedes that it did not plead a "substantial and intended effect" on domestic commerce. It further concedes that Part A of the district court's instructions did not require the jury to find a "substantial and intended effect" on domestic commerce. (*See* GB at 63-64, 82-83.) Rather, it argues that it was not required to follow *Hartford Fire* because "*Hartford Fire*'s substantial and intended effects test for extraterritorial application of the Sherman Act does not apply to conspiracies carried out, in part, in the United States." (GB at 84.) The government argues, in other words, that the *Hartford Fire* rule applies only to "wholly foreign" cases.

That is false. *Hartford Fire* itself involved a conspiracy between both foreign and domestic corporations that was carried out in part on United States soil. *See* 509 U.S. at 775-76, 796. Lower courts have consistently held that the *Hartford Fire* rule applies to any case where the conduct is "primarily foreign" but does not apply where the conduct is "primarily domestic." *Dee-K Enters. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 294 (4th Cir. 2002).

Furthermore, as noted above, in its *Metro* response, the government has attempted to avoid the "rule of reason" holding of *Metro* by arguing that the decision simply reaffirmed the *Hartford Fire* rule for establishing the

extraterritorial reach of the FTAIA. (GB at 95: "*Metro* stands for 'nothing more than a restatement of the *Hartford Fire* Court's declaration that 'the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.'") Thus, in the government's own view, *Metro* also required it to plead and prove *the Hartford Fire* elements.

As explicated above, the conduct in this case was no more domestic or less foreign than that at issue in *Metro*. The alleged criminal conduct consisted of (a) meetings between foreign citizens (b) in foreign locations (c) to fix the price of TFT-LCD panels that were produced entirely in foreign countries (d) for sale to foreign OEMs. In short, this case was based on "primarily foreign" conduct. The *Hartford Fire* rule therefore applies, and the government's failure to follow that rule mandates reversal.

V. THE FINE EXCEEDED THE STATUTORY LIMIT

AUO's claim regarding the interpretation of the alternative fine statute, 18 U.S.C. § 3571(d), presents questions of first impression in this Circuit. In answering those questions, the government is placed in the uncomfortable position that the gain under the statute is collective, but the fine under the statute is not collective. Both things cannot be true.

A. Collective Gain

The government argues that under the plain meaning of the statute, the gain must be calculated on collective basis. It relied, first and foremost, on *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004). (GB at 147-48.) *Bonnichsen* dealt not with the alternative fines statute but rather with the Native American Graves Protection and Repatriation Act. Interpreting that law, this Court stated: "'Any person' means exactly that, and may not be interpreted restrictively to mean only 'any American Indian person' or 'any Indian Tribe.'" *Id*. at 874. That holding sheds little light on § 3571(d).

It is true that § 3571 uses the phrase "any person." That phrase was added to cover situations where one person commits a crime with the intent that the gain would flow to a third party, such as when a husband commits a crime for the benefit of his wife, or an employee commits a crime for the benefit of his employer. Prior to the 1987 amendment, such conduct would not have been covered by the statute. Now it is. Nothing in that amendment evinces a congressional intent to impose collective gains in multi-defendant cases.

The Sentencing Commission has determined unambiguously that under § 3571(d), gains should be calculated individually, not collectively. *See* U.S.S.G. § 8A1.2, App. Note 3(h). The government argues that the Sentencing Commission's interpretation is wrong and is not binding. (GB at 151-52.) But this

Court has stated repeatedly that the Sentencing Commission's interpretations of criminal provisions have "persuasive value." *United States v. Schiffbauer*, 956 F.2d 201, 203 n.3 (9th Cir. 1992). On this issue, no case law sheds direct light, and the Sentencing Commission's interpretation is the most apposite authority. This Court should follow that interpretation. Under that interpretation, there was no valid jury finding under § 3571(d), and AUO's fine should have been capped at the Sherman Act maximum of $100 million.

B. Collective Fine

But if this Court disagrees with the Sentencing Commission and determines that the gain is collective, then the fine must also be collective. No reasonable interpretation of the statute would allow for collective gain calculations combined with individual fine assessments based on the entire gain.

With respect to the collective fine limitations, the government faults the defendant for failing "to support its argument with a single case directly on point." (GB at 156.) That is true, but it is equally true of the government's argument. There are no cases directly on point. This is, after all, a question that has never been addressed by any federal court prior to this case.

The closest cases on point are RICO and other forfeiture cases. (*See* AOB at 81-82.) The government argues that those cases are distinguishable because like civil damages, forfeiture statutes are intended only for disgorgement, while

criminal fines are intended to punish. The government is simply wrong about the purpose of forfeiture statutes. As the Supreme Court has recognized, criminal fines and criminal forfeitures are functionally equivalent and constitutionally indistinguishable. *United States v. Bajakajian*, 524 U.S. 321, 327-30 (1998). Any "payment to a sovereign as punishment for some offense" has the same basic purpose and function, regardless of label. *Id*. at 327 (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). Forfeiture cases are the closest authority on point, and they hold unequivocally that collective fines are limited by a "one recovery" rule.

The government's interpretation, if adopted, would produce grossly excessive and unconstitutional fines. The government responds that, even if that problem might arise in some cases, it did not arise here because the fine imposed on AUO was constitutionally reasonable. (GB at 156-57.) But AUO's argument is not that the fine imposed here violates the Eighth Amendment. Rather, AUO's argument is that the canon of constitutional avoidance counsels against an interpretation of § 3571(d) that would regularly produce unconstitutional results. To avoid constitutional difficulties, a "limiting construction" is appropriate. *Skilling v. United States*, 130 S. Ct. 2896, 2929 (2010).

The limiting construction proposed by AUO is both obvious and sensible. If the gain is collective, then the fine is also collective, and AUO should only be liable for the portion not already paid by competitors.

C. Fine Under the Import Trade Exception

The government's concession on appeal regarding the import trade exception to the FTAIA produces another reason why the fine must be vacated. The government has now conceded, for the first time, that the import trade exception covers only raw panel shipments into the United States. (*See* GB 47, 55, discussed above in Argument II.C.) The focus on raw panel shipments fatally undermines the sentences imposed on the defendants.

The jury's verdict and the district court's sentence under the alternative fine statute were based on the government's overcharge estimate of over $2 billion, and the jury's finding of an overcharge in excess of $500 million. (*See* GB at 21-22.) But those overcharge figures were based on estimates that the conspirators fixed the price of $71.8 billion on panels sole worldwide, $23.5 billion of which came into the United States. (*Id*. at 22.) But as the government's own brief admits, only a tiny fraction—less than 1%—of such panels were shipped as *raw panels* to the United States. Over 99% of the panels entered the United States as components of finished products assembled and shipped by third parties. (*See id*. at 8, 22.)

The import trade exception does not cover all worldwide shipments, and it does not cover shipments to foreign third-party OEMs. Neither AUO's sample shipments nor its competitors raw panel shipments can remotely support a half billion dollar loss finding.

The limitations of the FTAIA are substantive elements of the Sherman Act. Consequently, foreign conduct not covered by an FTAIA exception is not a crime under United States law. If only raw panel shipments are covered by the import trade exceptions, then only those shipments constituted criminal conduct. In light of those limitations, the government's estimates of loss "from the offense" are entirely unsupported.

If this Court determines that the import trade exception is the only valid basis for conviction—either because the domestic effects exception was not pleaded in the indictment, or because the domestic effects exception was not proven at trial—then the fine must be vacated and recalculated based only on raw panel shipments to the United States.

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CONCLUSION

For the reasons stated, the convictions of the defendants must be reversed. Alternatively, the fine imposed on AUO must be vacated and the matter remanded for an evidentiary hearing.

Dated: May 13, 2013

Respectfully Submitted,

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CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing reply brief is proportionately spaced, has a typeface of 14 points, and contains 8,566 words.

Dated: May 13, 2013

/s/ Donald M. Horgan
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