IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Motorola Mobility, Inc.	)	No. 1:09-cv-06610
	)	
v.	)	Hon. Joan B. Gottschall, J.
	)	
AU Optronics Corporation, et al.	)	

EXHIBITS CITED IN
MOTION FOR RECONSIDERATION

TABLE OF EXHIBITS

Exhibit Number	Description
	Declaration of Jeffrey M. Davidson
1	Plaintiff Motorola Inc.'s Brief in Opposition to Defendants' Motion to Dismiss Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6)
2	Order Granting Defendants' Joint Motion to Dismiss
3	Motorola's Second Amended Complaint for Damages and Injunctive Relief
4	Plaintiff Motorola, Inc.'s Brief in Opposition to Defendants' Motion to Dismiss Second Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6)
5	Transcript of Proceedings
6	Order Denying Defendants' Joint Motion to Dismiss the Second Amended Motorola Complaint
7	Motorola's Third Amended Complaint for Damages and Injunctive Relief
8	Defendants' Joint Motion for Summary Judgment Addressing Plaintiffs' Sherman Act Claim for Injuries in Foreign Markets
9	Plaintiff Motorola Mobility Inc.'s Opposition to Defendants' Joint Motion for Summary Judgment
10	Order Denying Defendants' Joint Motion for Summary Judgment on Motorola's Foreign Injury Claims
11	Plaintiff Motorola Mobility LLC's Opposition to Defendants' Motion to Certify Under 28 U.S.C. § 1292(b)
12	Declaration of Stephen P. Freccero in Support of Defendants' Joint Motion for Summary Judgment Addressing Plaintiff's Sherman Act Claim for Injuries in Foreign Markets
13	Errata to Expert Report Professor Dennis W. Carlton
14	B. Douglas Bernheim, Ph.D. Deposition Excerpts
15	Bruce Brda Deposition Excerpts
16	Angela M. Ford Deposition Excerpts
17	Tracy Guo Deposition Excerpts
18	K.L. Khoo Deposition Excerpts (November 10, 2011)
19	K.L. Khoo Deposition Excerpts (November 11, 2011)
20	Theresa M. Metty Deposition Excerpts
21	Janet Robinson Deposition Excerpts
22	Durgesh Singh Deposition Excerpts
23	Sharon Storm Deposition Excerpts
24	E.L. Tay Deposition Excerpts
25	Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffmann-La Roche Ltd. v. Empagran SA*, 542 U.S. 155 (2004) (No. 03-724)
26	Brief for the United States, *United States v. AU Optronics Corp et al.*, Case No. 12-10492, Dkt. No. 42-1 (9th Cir. April 5, 2013)

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Motorola Mobility, Inc.	)	No. 1:09-cv-06610
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v.	)	Hon. Joan B. Gottschall, J.
	)	
AU Optronics Corporation, et al.	)	

DECLARATION OF JEFFREY M. DAVIDSON IN SUPPORT OF MOTION FOR RECONSIDERATION

I, Jeffrey M. Davidson, declare:

1. I am an attorney with the law firm of Covington & Burling LLP, attorneys of record for Defendants Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., and Samsung Electronics America, Inc. in the above-captioned matter. I have personal knowledge of the matters discussed below and if called upon to do so, I could and would testify to these facts.

2. Attached hereto as **Exhibit 1** is a true and correct copy of Plaintiff Motorola Inc.'s Brief in Opposition to Defendants' Motion to Dismiss Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), dated April 16, 2010 and filed as Docket No. 35, *Motorola, Inc. v. AU Optronics Corp.*, No. 09-cv-5840 SI (N.D. Cal.) (Motorola Docket No. 35).

3. Attached hereto as **Exhibit 2** is a true and correct copy of Order Granting Defendants' Joint Motion to Dismiss, dated June 28, 2010 and filed as Motorola Docket No. 41.

4. Attached hereto as **Exhibit 3** is a true and correct copy of Motorola's Second Amended Complaint for Damages and Injunctive Relief, dated July 23, 2010 and filed as Motorola Docket No. 49.

5. Attached hereto as **Exhibit 4** is a true and correct copy of Plaintiff Motorola, Inc.'s Brief in Opposition to Defendants' Motion to Dismiss Second Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), dated September 27, 2010 and filed as Motorola Docket No. 64.

6. Attached hereto as **Exhibit 5** is a true and correct copy of a Transcript of Proceedings, dated November 3, 2010 and filed as Docket No. 2143, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 07-md-1827 SI (N.D. Cal.) (MDL Docket No. 2143).

7. Attached hereto as **Exhibit 6** is a true and correct copy of Order Denying Defendants' Joint Motion to Dismiss the Second Amended Motorola Complaint, dated March 28, 2011 and filed as Motorola Docket No. 77.

8. Attached hereto as **Exhibit 7** is a true and correct copy of Motorola's Third Amended Complaint for Damages and Injunctive Relief, dated July 22, 2011 and filed as MDL Docket No. 3173.

9. Attached hereto as **Exhibit 8** is a true and correct copy of Defendants' Joint Motion for Summary Judgment Addressing Plaintiffs' Sherman Act Claim for Injuries in Foreign Markets, dated April 3, 2012 and filed as Motorola Docket No. 312.

10. Attached hereto as **Exhibit 9** is a true and correct copy of Plaintiff Motorola Mobility Inc.'s Opposition to Defendants' Joint Motion for Summary Judgment, dated May 18, 2012 and filed as Motorola Docket No. 357.

11. Attached hereto as **Exhibit 10** is a true and correct copy of Order Denying Defendants' Joint Motion for Summary Judgment on Motorola's Foreign Injury Claims, dated August 9, 2012 and filed as Motorola Docket No. 430.

12. Attached hereto as **Exhibit 11** is a true and correct copy of Plaintiff Motorola Mobility LLC's Opposition to Defendants' Motion to Certify Under 28 U.S.C. § 1292(b), dated September 13, 2012 and filed as Motorola Docket No. 445.

13. Attached hereto as **Exhibit 12** is a true and correct copy of the Declaration of Stephen P. Freccero in Support of Defendants' Joint Motion for Summary Judgment Addressing Plaintiff's Sherman Act Claim for Injuries in Foreign Markets (Freccero Declaration), dated April 3, 2012 and filed as Motorola Docket No. 313.

14. Attached hereto is as **Exhibit 13** is a true and correct copy of Freccero Declaration Exhibit C, errata to Appendix A to the Expert Report of Defendants' Expert, Professor Dennis W. Carlton, dated February 29, 2012.

15. Attached hereto as **Exhibit 14** is a true and correct copy of excerpts of Freccero Declaration ¶ 221, excerpts from the deposition transcript of Motorola expert witness B. Douglas Bernheim, Ph.D., dated February 1, 2012.

16. Attached hereto as **Exhibit 15** is a true and correct copy of excerpts of Freccero Declaration ¶ 223, excerpts from the deposition transcript of Motorola witness Bruce Brda, dated November 17, 2011.

17. Attached hereto as **Exhibit 16** is a true and correct copy of excerpts of Freccero Declaration ¶ 227, excerpts from the deposition transcript of Motorola witness Angela M. Ford, dated July 26, 2011.

18. Attached hereto as **Exhibit 17** is a true and correct copy of excerpts of Freccero Declaration ¶ 228, excerpts from the deposition transcript of Motorola witness Tracy Guo, dated December 14, 2011.

19. Attached hereto as **Exhibit 18** is a true and correct copy of excerpts of Freccero Declaration ¶ 232, excerpts from the deposition transcript of Motorola 30(b)(6) witness K.L. Khoo, dated November 10, 2011.

20. Attached hereto as **Exhibit 19** is a true and correct copy of excerpts of Freccero Declaration ¶ 233, excerpts from the deposition transcript of Motorola witness K.L. Khoo, dated November 11, 2011.

21. Attached hereto as **Exhibit 20** is a true and correct copy of excerpts of Freccero Declaration ¶ 239, excerpts from the deposition transcript of Motorola witness Theresa M. Metty, dated July 15, 2011.

22. Attached hereto as **Exhibit 21** is a true and correct copy of excerpts of Freccero Declaration ¶ 241, excerpts from the deposition transcript of Motorola 30(b)(6) witness Janet Robinson, dated August 3, 2011.

23. Attached hereto as **Exhibit 22** is a true and correct copy of excerpts of Freccero Declaration ¶ 246, excerpts from the deposition transcript of Motorola witness Durgesh Singh, dated June 8, 2011.

24. Attached hereto as **Exhibit 23** is a true and correct copy of excerpts of Freccero Declaration ¶ 247, excerpts from the deposition transcript of Motorola 30(b)(6) witness Sharon Storm, dated November 11, 2011.

25. Attached hereto as **Exhibit 24** is a true and correct copy of excerpts of Freccero Declaration ¶ 249, excerpts from the deposition transcript of Motorola 30(b)(6) witness E.L. Tay, dated November 22, 2011.

26. Attached hereto as **Exhibit 25** is a true and correct copy of Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffmann-La Roche Ltd. v. Empagran SA*, 542 U.S. 155 (2004) (No. 03-724).

27. Attached hereto as **Exhibit 26** is a true and correct copy of Brief for the United States, *United States v. AU Optronics Corp et al.*, Case No. 12-10492, Dkt. No. 42-1 (9th Cir. April 5, 2013).

28. Exhibits 1-12 are court papers forming part of the record in this matter. Exhibits 13-24 are discovery materials that were before the MDL court in connection with its ruling on Defendants' Joint Motion for Summary Judgment on FTAIA grounds. Exhibits 25-26 are legal materials attached for the Court's convenience.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 20th day of September, 2013 at San Francisco, California.

Jeffrey Davidson

EXHIBIT 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: *Motorola, Inc. v. AU Optronics Corporation, et al., C 3:09-05840 SI*	Case No. M 07-1827 SI MDL No. 1827 **PLAINTIFF MOTOROLA, INC.'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(b)(1) AND FED. R. CIV. P. 12(b)(6)** Date: June 4, 2010 Time: 9:00 a.m. Crtrm.: 10 Judge: Honorable Susan Illston

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Defendants have moved to dismiss a portion of Plaintiff Motorola, Inc.'s ("Motorola") antitrust claims (that portion based on imports of price-fixed products into the United States) on grounds that this Court lacks subject matter jurisdiction to hear such claims under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA").[1] In addition, Defendants seek dismissal of Motorola's state law antitrust claims and claims based on purchases of non-TFT-LCD products. Their arguments are without merit.

I. INTRODUCTION

Six Defendants in this case have pled guilty and admitted to this Court that they participated in a price-fixing conspiracy involving LCD panels that impacted U.S. commerce. Two of the Defendants explicitly admitted that their conspiracy targeted and injured the plaintiff here, Motorola, a U.S. company based in Schaumburg, Illinois. In doing so, Defendants have conceded that this Court has subject matter jurisdiction over the illegal conduct underlying their guilty pleas.

Now, Defendants attempt to backtrack on their earlier acknowledgement of subject matter jurisdiction and argue that this Court is not permitted to hear Motorola's civil antitrust claims based on the very same conduct covered by the guilty pleas. Indeed, Motorola seeks to recover only those overcharges incurred in connection with deliveries of price-fixed LCD panels into the United States and to locations abroad for inclusion in Motorola mobile wireless devices specifically destined for import into, and sale and use in, the United States. In this respect, Motorola seeks damages only from imports of price-fixed products into the United States.

Defendants' claim is based on a skewed application of the FTAIA to Motorola's complaint. In particular, Defendants wrongly claim that Motorola's assertion of subject matter jurisdiction rests solely on the "domestic injury exception" to the FTAIA. That is not the case; the claims at issue here are based on imports of price-fixed products into the United States, which are specifically excluded from application of the FTAIA. Defendants make their assertion only as a ruse to make a generic FTAIA rebuttal argument that has worked in some other

[1] The full text of the FTAIA is set forth at Appendix A attached hereto.

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antitrust cases. Their argument fails, however, because the facts here differ from those in the cases on which Defendants rely, which have nothing to do with imports. Indeed, Defendants fail to point to a single instance of a court dismissing a plaintiff's antitrust claims, where – like here – there are guilty pleas specifically admitting that the plaintiff was targeted by an illegal cartel, and that plaintiff seeks to recover only those damages caused by purchases of price-fixed products destined for sale and use in the United States.

In arguing that Motorola should not be permitted to recover overcharges incurred in connection with purchases of price-fixed LCD panels abroad for incorporation in products bound for the U.S. market, Defendants essentially ask this Court to adopt a blanket rule that no cartelist can ever be held civilly liable under the U.S. antitrust laws if its price-fixed goods are first delivered somewhere outside the United States before being added to finished products intended for consumption in the United States. Stated another way, Defendants request that this Court assume that, when Congress adopted the FTAIA, it deliberately chose to exclude from the reach of U.S. courts illegal conduct involving the intentional delivery of price-fixed products into a chain of import commerce to the United States.

Defendants' interpretation of the law would leave the U.S. antitrust laws and U.S. courts toothless in today's global economy where most, if not all, consumer electronics – even those manufactured by a U.S. company for sale to U.S. consumers – are manufactured outside of the United States. Foreign cartelists, such as Defendants, would be permitted to escape all civil liability in the United States simply by assuring that their price-fixed products first stop somewhere abroad before continuing their journey into the United States. In addition, that interpretation would give Defendants free license to keep their illegal cartel going, as no U.S. court would possess the subject matter jurisdiction necessary to enjoin them from such conduct, relief Motorola seeks in this case. In Defendants' view, this outcome would be true even where – as here – the United States was, and continues to be, a specific target of a cartel and accounts for a significant proportion of the cartelists' revenues.

Defendants' position contradicts both the plain language and the legislative history of the FTAIA, as well as case law applying the statute. First, contrary to what Defendants claim, the

FTAIA does not even apply to their conduct. The statute specifically exempts from its application conduct involving the import of price-fixed goods into the United States, which are the facts in this case. As a result, the FTAIA does not bar this Court from exercising subject matter jurisdiction over Defendants' anticompetitive conduct.

Second, even if this Court were to find that the FTAIA does apply, Defendants' conduct had such a "direct, substantial, and reasonably foreseeable" adverse effect on U.S. import commerce that subject matter jurisdiction exists under an explicit exception set forth in the statute. As Motorola alleges (and as the evidence thus far has shown), Defendants specifically targeted U.S. import commerce, even monitoring the U.S. street prices of goods containing their price-fixed LCD panels just to make certain that their global cartel was effective. Moreover, Defendants knew that when they fixed the prices of LCD panels sold to Motorola, a large number of those panels were to be incorporated into Motorola mobile wireless devices destined for sale and use in the United States. It was precisely that conduct by Defendants that caused the antitrust injuries to Motorola that are at issue here.

In fact, this Court recently denied similar FTAIA-related motions to dismiss in a case involving many of the same defendants and the predecessor technology to LCD, cathode ray tubes ("CRT"). *See In re Cathode Ray Tube (CRT) Antitrust Litigation*, MDL No. 1917, Case No. M:07-cv-5944-SC (N.D. Cal. Mar. 30, 2010) (Docket No. 665) at 17-18.

Defendants also wrongly argue that Motorola's state law TFT-LCD antitrust claims and claims based on purchases of non-TFT-LCD products fail because Motorola's allegations are deficient. Their state law arguments ignore that Defendants engaged in conspiratorial behavior in California, regularly sold LCD panels and products in that state, and that most Defendants have significant business operations centered there, such that California has a strong interest in ensuring that its own laws apply. Defendants also ignore that Motorola regularly transacts business in and has substantial contacts with all the states listed in its complaint and, therefore, is entitled to the protections of their laws. Similarly, with respect to Motorola's non-TFT-LCD product claims, Defendants overlook that such claims are plausible because both TFT and non-TFT technologies were produced by the same manufacturers and were substitutes for each other,

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as well as the fact that subsequent discovery has confirmed that the very same cartel specifically targeted prices of such non-TFT-LCD products.

For these reasons, the Court should deny Defendants' motion in its entirety.

II. STATEMENT OF FACTS

A. Motorola's Ties To The United States.

Motorola is a U.S. company based in Schaumburg, Illinois that manufactures mobile wireless handsets. *See* Amend. Compl. ¶ 23. It is an admitted victim of Defendants' illegal conspiracy to fix prices of LCD panels. *See id*. ¶¶ 5, 105, 109, 180. It brings this action to recover the overcharges it paid for price-fixed LCD panels delivered and/or billed to it in the United States. *See id*. ¶¶ 6, 149, 165. Motorola also seeks overcharges incurred as a result of deliveries of price-fixed LCD panels to its overseas affiliates and electronics manufacturing services ("EMS") and original design manufacturer ("ODM") providers that were incorporated into finished Motorola mobile wireless devices specifically destined for sale and use in the United States. *See id*. ¶¶ 24, 26.[2]

During the Conspiracy Period, Motorola, from its Illinois headquarters, directed and approved the prices and quantities of LCD panels purchased by its foreign affiliates and EMS and ODM providers. *See id*. ¶¶ 25-26. Motorola procurement and manufacturing teams based in the United States were responsible for all phases of procurement of LCD panels for the company worldwide, including, at various times, evaluating, qualifying, and selecting LCD panel suppliers, drafting requests for quotes for LCD panels, negotiating agreements with LCD panel suppliers, coordinating purchases of LCD panels to meet worldwide production goals, overseeing quality control, and managing stocks of LCD panels. *See id*.

Motorola conducted a substantial volume of business throughout the United States during the Conspiracy Period, including selling significant quantities of mobile wireless devices containing LCD panels to customers in California, Illinois, Arizona, the District of Columbia,

[2] Motorola's foreign affiliates have all assigned their rights in any claims arising from Defendants' illegal price-fixing conduct to Motorola, and Motorola has accepted their assignments. *See id*. ¶ 24.

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Hawaii, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, Tennessee, and Wisconsin. *See id.* ¶¶ 11, 12, 170, 180, 188-199, 201-202. Motorola also had a substantial presence in each of these states, including maintaining facilities there. *See id.*

B. <u>Defendants' Focus On U.S. Imports.</u>

Defendants are all foreign-based manufacturers of LCD panels, with substantial presences in the United States, including offices and sales agents located in California. *See id.* ¶¶ 10, 28-59, 171. Collectively, they control the enormous U.S. market for LCD panels, shipping millions of LCD panels and LCD-containing products, worth billions of dollars, into the United States each year, and deriving a substantial portion of their revenues from such sales. *See id.* ¶¶ 63-64, 132, 134-35. Each Defendant has shipped LCD panels directly into the United States. *See id.* ¶ 134. In addition, Defendants spend large sums on advertising their products in the United States, and all maintain marketing, sales, and account management teams specifically designated to handle U.S. customer accounts and the U.S. market. *See id.* ¶ 132.

Six Defendants named in this action – LG Display (together with its U.S. subsidiary based in California, LG Display America, Inc.), Sharp, Chunghwa, Epson, and Chi Mei – have pled guilty and paid a total of $831 million in criminal fines for their roles in the illegal conspiracy that injured Motorola. *See id.* ¶¶ 4, 10, 146.[3] Two of those Defendants – Sharp and Epson – specifically have admitted to fixing the prices of LCD panels sold to Motorola. *See id.* ¶¶ 5, 105, 109. In their pleas, each Defendant admits that its employees engaged in conspiratorial meetings, conversations, and communications in the United States, including California, and that it sold LCD panels affected by the illegal conspiracy in the United States. *See id.* ¶¶ 5, 10, 81, 85, 97-105, 109, 138, 171. The U.S. Department of Justice's (the "DOJ") investigation of the cartel is ongoing and additional guilty pleas are expected from other Defendants. *See id.* ¶ 147.

[3] In addition, a number of Defendant executives have pled guilty, paid fines, and spent time in prison for their roles in the conspiracy. *See id.* ¶¶ 99-101, 103-04, 146.

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Defendants focused their conspiracy on the United States because of the size of the U.S. LCD market, directing their illegal conduct at LCD panels intended for importation into and ultimate consumption in the United States. *See id.* ¶ 133. They knew that U.S. companies, such as Motorola, intended to, and did, incorporate many of the price-fixed LCD panels sold by Defendants into finished products specifically destined for sale and use in the United States. *See id.* ¶¶ 17, 133, 135. Defendants also knew that, because LCD panels are the most expensive and significant component of LCD-containing products, price increases for such panels necessarily resulted in increased prices for LCD-containing products sold in the United States. *See id.* ¶ 135. In this regard, Defendants knowingly and intentionally sent price-fixed LCD panels into a stream of commerce that led directly into the United States with the intent of producing a substantial adverse effect in the United States in the form of artificially-inflated prices for LCD panels and LCD-containing products. *See id.* ¶¶ 17, 133.

Moreover, Defendants routinely monitored the effect their price-fixing had on the prices of LCD-containing products sold in the United States, such as mobile wireless devices, knowing that their conspiracy would elevate those prices in addition to the prices of LCD panels. *See id.* ¶¶ 135-36. They also used LCD-containing product prices in the United States as a benchmark for establishing, organizing, and tracking their price-fixing of LCD panels. *See id.* ¶ 136.

III. ARGUMENT

A. This Court Has Subject Matter Jurisdiction Over Defendants' Conduct.

1. This Court's Subject Matter Jurisdiction Over Defendants' Conduct Affecting Motorola Is Already Established By Defendants' Guilty Pleas.

A number of Defendants expressly have admitted to fixing the prices of LCD panels sold to Motorola. *See id.* ¶¶ 5, 105, 109. In doing so, they have submitted to the jurisdiction of this Court and admitted that their illegal conduct affected significant volumes of U.S. commerce. In fact, Defendants never questioned this Court's ability to preside over their guilty pleas, nor did they question the DOJ's ability to seek criminal sanctions against them based on their violations of the Sherman Act.[4] Thus, when this Court determined that it had subject matter jurisdiction to hear the guilty pleas offered by Defendants and enter a judgment of conviction, it necessarily found that it also had jurisdiction over civil claims arising from that very same illegal conduct.

The guilty pleas here are premised on the fact that they only cover conduct for which the DOJ and U.S. courts are permitted to exercise jurisdiction under the U.S. antitrust laws. As the DOJ and Defendant LG Display's counsel explained at the plea allocution of LG Display, and as this Court accepted, for purposes of determining the volume of commerce affected in assessing the criminal fine against LG Display, the DOJ considered three categories of conduct: (1) LCD sales that were directly shipped into the United States; (2) LCD sales that were directly billed to a company located in the United States; and (3) LCD sales to a company based in the United States through its foreign affiliates that ended up in finished products that were sold back into the United States. *See* Transcript of Hearing, *United States v. LG Display Company, et al.*, Case No. 08-cr-803 (N.D. Cal. Dec. 15, 2008) at 32-36. These are the identical categories of sales from Defendants for which Motorola seeks recovery in this case.

Contrary to what Defendants claim, Motorola's amended complaint does not seek damages for purchases that have no ties to the United States. Motorola only seeks to recover overcharges incurred as a result of deliveries of price-fixed LCD panels: (a) to it in the United States or for which it was billed in the United States, and (b) to it and its affiliates and EMS and ODM providers abroad which were incorporated into finished Motorola products destined for sale and use in the United States. Overcharges incurred as a result of deliveries of price-fixed LCD panels to Motorola affiliates and EMS and ODM providers abroad that never entered the United States are not sought in this action.

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[4] The Sherman Act is applied the same way in both criminal and civil cases. *See United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) ("[I]n both criminal and civil cases, the claim that Section One applies extraterritorially is based on the same language in the same section of the same statute . . . . Words may sometimes be chameleons, possessing different shades of meaning in different contexts, . . . but common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.") (citations omitted).

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Nor does Motorola, as Defendants claim, attempt to establish subject matter jurisdiction over Defendants' conduct by relying solely on the "domestic-injury exception" to the FTAIA. *See* Amend. Compl. ¶¶ 15, 139-40, 149, 166. That argument is nothing more than a red herring. As discussed in detail below, the FTAIA does not apply because Defendants' conduct involved U.S. import trade or import commerce. *See infra* § B; *see also* 15 U.S.C. § 6a ("Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (*other than import trade or import commerce*) with foreign nations") (emphasis added). Defendants have skewed the allegations in Motorola's complaint in an effort to recycle an FTAIA argument that has worked in some other antitrust cases. However, none of the cases they cite in opposition to this phantom "domestic-injury exception" argument remotely address facts like those alleged by Motorola, where a plaintiff, who is an admitted victim of a price-fixing conspiracy, seeks to recover only those overcharges stemming from purchases of products sent to and/or billed in the United States.

For instance, two of the cases cited by Defendants involve *foreign* plaintiffs with *no* U.S. ties seeking damages for *wholly-foreign* injuries in a U.S. court. *See Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005) (foreign vitamin purchasers with no contacts with the United States seeking damages for purchases made abroad for distribution abroad); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008) (British purchaser of memory chips seeking damages for purchases made abroad). In fact, in its recent class certification order, this Court specifically noted that one of those cases is "inapposite" to the facts here. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827, Case No. M:07-cv-01827-S (N.D. Cal. Mar. 28, 2010) (Docket No. 1642) ("Indirect Certification Order") at 21-22 (citing *In re DRAM*).

And the remaining cases cited by Defendants involve situations where – unlike here – the plaintiffs sought to recover overcharges in U.S. courts attributed to purchases of price-fixed products abroad that *never* entered the United States. *See Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009) (U.S. purchaser of computer chips seeking damages for products delivered to its European affiliates that were incorporated into

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finished products intended only for sale abroad); *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777 (N.D. Cal. 2007); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437 (D.N.J. 2007). Without conceding that those cases were rightly decided, Motorola does not even make claims based on the types of transactions addressed in those decisions.[5]

In fact, Defendants fail to point to even a single instance of a plaintiff in Motorola's position being denied access to U.S. courts and to the protections of the U.S. antitrust laws. None of the courts in the cases they cite found jurisdiction lacking in a situation – like here – where the defendants admitted to specifically targeting a plaintiff, and where that plaintiff brought civil antitrust claims seeking to recover only those overcharges attributable to the same illegal conduct underlying the defendants' guilty pleas, i.e., sales of price-fixed products shipped to or billed in the United States or sales of such products for incorporation into finished products destined for the United States.

For a court to hold otherwise would be to permit all foreign entities that knowingly and intentionally send price-fixed products into the United States (and that plead guilty to such conduct) to escape all civil liability under the U.S. antitrust laws simply by sending their products into the United States through a distribution channel specifically established to do so, if the first step in that distribution channel begins outside the United States. Such a holding effectively would immunize such entities from liability in the United States even where, as here, the United States has been, and continues to be, one of their most important markets, accounts for a significant proportion of their revenues, and was a major focus of their illegal conduct.

Congress never contemplated such a broad application of the FTAIA.[6] Indeed, statutes should not be interpreted in a manner that would create such an extreme or absurd result,

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[5] Motorola does not concede that it could not and would not seek such claims in the appropriate fora. In addition, although Motorola does not assert the same argument made by the plaintiff in the *Sun* case here, it does not agree with the outcome of that case and, therefore, does not waive its right to raise such an argument in the future or to seek relief based on the types of purchases at issue in the *Sun* case at the appropriate time.

[6] As one Congressman put it: "[The FTAIA] . . . does not address our . . . import trade since imports invariably have an impact on our domestic trade." 128 Cong. Rec. H4981-82 (1982). Moreover, the legislative record of the FTAIA states: "it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain

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especially where legislative history exists that counsels the exact opposite result.[7] Further, such an interpretation would leave the U.S. antitrust laws toothless in today's modern business environment where most, if not all, consumer electronics are manufactured outside of the United States, including those manufactured by a U.S. company for sale to U.S. customers.

The broad application of the FTAIA requested by Defendants also would give them free license to continue their illegal behavior. If, as Defendants claim, this Court lacks subject matter jurisdiction over the conduct at issue here, it would not have the power to enforce Motorola's request for injunctive relief. *See* Amend. Compl. ¶ 168. Defendants would be able to continue to send price-fixed LCD panels into the United States through a chain of commerce that begins abroad without facing consequences in the United States for that conduct.

That result would be especially inequitable here, because it would allow Defendants to escape liability in the United States for the artificially-inflated prices they admittedly caused U.S. companies, such as Motorola, to pay. It would also directly conflict with Defendants' guilty pleas and allocutions at their sentencing hearings, including Defendants' own sworn statements to this Court. In particular, Defendants' guilty pleas provide that the U.S. government will not seek restitution solely because Defendants will pay damages in related civil actions – civil actions in which Defendants now claim this Court has no jurisdiction. In relevant part, the guilty pleas state:

> In light of the civil class action cases filed against the defendants, including *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M:07-1827 SI, MDL No. 1827, in the United States District Court, Northern District of California, which potentially provide for a

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covered by the law." H.R. Rep. No. 97-686, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 (internal quotation marks omitted).

[7] *See United States v. Brown*, 333 U.S. 18, 27 (1948) (statute should be read to avoid "an interpretation resulting in patently absurd consequences"); *United States v. Fejes*, 232 F.3d 696, 701 (9th Cir. 2000) (rejecting proposed construction of statute that would immunize defendants from criminal liability "because nothing in the statute or its legislative history suggests that Congress intended such an absurd result"); *see also United States v. Rocha-Leon*, 187 F.3d 1157, 1159 n.3 (9th Cir. 1999) (stating that "interpretation that 'is consistent with the language of the statute and avoids absurd results' is preferred when 'nothing in the language or history' of the statute 'suggests Congress intended the absurd results possible under [the other proposed] construction'") (alternation in original).

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> recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offenses charged in the Information.[8]

Moreover, at their sentencing hearings, Defendants specifically represented to this Court that they should not be required to pay restitution because they would compensate U.S. victims of their illegal activities in related civil actions.[9] Now, Defendants claim that no U.S. court has jurisdiction to hear civil claims brought by those same victims to obtain the compensation Defendants previously used as a shield against restitution in sworn representations to this Court. Such a result would make a mockery of this Court's plea and sentencing proceedings, and would be patently unfair to Defendants' victims, including Motorola.

2. <u>The FTAIA Does Not Apply To Defendants' Conduct.</u>

The FTAIA does not apply to conduct – like that at issue here – involving the importation of price-fixed goods into the United States.[10] As this Court recently acknowledged in its order approving class certification, "[t]he plain language of the FTAIA exempts 'import trade or import commerce' from the statute." *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No.

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8 *See* Plea Agreement, *United States v. LG Display Company, et al.*, Case No. 08-cr-803-SI (N.D. Cal. Dec. 8, 2008) (Docket No. 10) at ¶ 12; *see also* Plea Agreement, *United States v. Sharp Corporation*, Case No. 08-cr-802-SI (N.D. Cal. Dec. 8, 2008) (Docket No. 9) at ¶ 12; Plea Agreement, *United States v. Chunghwa Picture Tubes Ltd.*, Case No. 08-cr-804-SI (N.D. Cal. Jan. 5, 2009) (Docket No. 10) at ¶ 12; Plea Agreement, *United States v. Epson Imaging Devices Corporation*, Case No. 09-cr-854-SI (N.D. Cal. Oct. 9, 2009) (Docket No. 7) at ¶ 12; Plea Agreement, *United States v. Chi Mei Optoelectronics Corporation*, Case No. 09-cr-1166-SI (N.D. Cal. Feb. 2, 2010) (Docket No. 9) at ¶ 12. Motorola, although separately represented, is a member of the class actions referred to in the guilty pleas.

9 *See* Transcript of Hearing, *United States v. LG Display Company, et al.*, Case No. 08-cr-803 (N.D. Cal. Dec. 15, 2008) at 20, 41; Transcript of Hearing, *United States v. Sharp Corporation*, Case No. 08-cr-802 (N.D. Cal. Dec. 16, 2008) at 23; Transcript of Hearing, *United States v. Chunghwa Picture Tubes Ltd.*, Case No. 08-cr-804 (N.D. Cal. Jan. 14, 2009) at 11, 18.

10 *See Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000) ("[T]he initial sentence of [the FTAIA], along with its 'import trade or commerce' parenthetical, provides that the antitrust law shall apply to conduct 'involving' import trade or commerce with foreign nations (provided, of course, that jurisdiction is found to exist under the Sherman Act itself)."); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd*, 299 F.3d 281, 287 (4th Cir. 2002) ("Because this case involves importation of foreign-made goods, however – conduct Congress *expressly exempted* from FTAIA coverage as 'involving . . . import trade or import commerce . . . with foreign nations' – the FTAIA standard obviously does not directly govern this case, even though it may constitute an effort to 'clarify the application of United States antitrust laws to foreign conduct' in other circumstances.") (emphasis in original) (citation omitted).

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1827, Case No. M:07-cv-01827-S (N.D. Cal. Mar. 28, 2010) (Docket No. 1641) ("Direct Certification Order") at 21. Defendants do not refute this. Rather, in conclusory fashion,[11] they argue that this Court must take a very narrow view of what qualifies as "importation," and assert that their illegal conduct does not meet that standard.[12] Their limited approach is unsupported by case law and contradicts how Defendants define "importation" in other contexts.

As the cases examining what qualifies as conduct involving "import trade or import commerce" explain, such conduct entails much more than just physically bringing a product directly into the United States:

> Even a 'relatively strict' construction of [the phrase] 'involves import commerce,' . . . is broad enough to encompass anticompetitive conduct by entities other than import merchants . . . " and that "the [language of the FTAIA] makes clear that *not only import commerce*, *but conduct involving import commerce*, is never removed from the reach of the Sherman Act.

See In re Air Cargo Shipping Servs. Antitrust Litig., Case No. 06-cv-1775, 2008 WL 5958061, at *12-14 (E.D.N.Y. Sept. 26, 2008) (emphasis added). As a result, the relevant inquiry is not whether Defendants directly imported price-fixed goods into the United States, but whether Defendants' price-fixed products were imported into the United States as they intended.

The single case Defendants rely upon to try to support their narrow definition of importation, *Turicentro v. American Airlines Inc.*, 303 F.3d 293 (3d Cir. 2002), is factually inapposite. The case dealt with a conspiracy to "fix commissions paid to foreign travel agents located outside the United States." *Id.* at 302. The defendant air carriers and their trade association were involved "*only* in unlawfully setting extra-territorial commission rates" that *foreign-based* travel agents could charge for their services. *Id.* at 303 (emphasis added). The illegal transactions were completed by the *foreign* travel agents *entirely* outside of the United States in the *foreign* locations where the travel agents were paid. *See id.* The conduct was only

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[11] *See* Defendants' Joint Motion to Dismiss Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) (Docket No. 26) ("MTD") at 8.

[12] They make that argument even though every Defendant has shipped LCD panels directly into the United States. *See* Amend. Compl. ¶ 134.

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intended to, and *only* did, impact commerce entirely outside of the United States, and therefore, was "only tangentially, if at all, related to import commerce." *See In re Air Cargo Shipping*, 2008 WL 5958061 at *15. The price-fixed commissions at issue in *Turicentro* – unlike the price-fixed LCD panels and LCD-containing products here – never made their way into the United States. Thus, the court in *Turicentro* was not required to consider whether the type of conduct at issue here involves "import trade or import commerce."

As the case law shows, whether a defendant's conduct involves "import trade or import commerce" must be determined on a case-by-case basis. *See CSR Ltd. v. CIGNA Corp.*, 405 F. Supp. 2d 526, 539 (D.N.J. 2005) ("Our Court of Appeals has applied a common-sense interpretation of 'import trade or import commerce.'"). When illegal conduct is "directed at an import market" and/or at "the trade in and subsequent movement of [ ] goods that were purchased and sold" in or into the United States, such conduct involves import trade and commerce. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002).

In fact, in complaints recently filed with the U.S. International Trade Commission (the "ITC"), a number of Defendants agreed with a broader interpretation of "importation." In those complaints, Defendants Samsung and Sharp both alleged illegal conduct resulting from "[t]he importation into the United States, *sale for importation into the United States*, and/or sale after importation in the United States of . . . LCD devices" by the other manufacturer and by other entities on its behalf.[13] In doing so, they acknowledged that more than directly sending LCD panels and LCD-containing products into the United States adversely affects U.S. import trade and commerce; selling products "for importation" into the United States also has such an effect.

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[13] *See In the Matter of Certain Liquid Crystal Display Devices and Products Containing the Same*, Investigation No. 337-TA-631, Complaint of Samsung Electronics Co., Ltd. (December 21, 2007) (Docket No. 2586) at 1 (emphasis added) ("First Samsung ITC Complaint"); *see also In the Matter of Certain Liquid Crystal Display Modules, Products Containing the Same, and Methods for Using the Same*, Investigation No. 337-TA-634, Complaint of Sharp Corporation (January 30, 2008) (Docket No. 2594); *In the Matter of Certain Liquid Crystal Display Devices and Products Containing the Same*, Investigation No. 337-TA-699, Complaint of Samsung Electronics Co., Ltd. (December 1, 2009) (Docket No. 2698); *In the Matter of Certain Liquid Crystal Display Modules and Products Containing the Same, and Methods for Making the Same*, Investigation No. 337-TA-702, Complaint of Sharp Corporation (January 8, 2010) (Docket No. 2705).

Indeed, in one such complaint, one of the specific examples given of a "sale for importation into the United States" was the sale of infringing LCD panels to Motorola for incorporation into RAZR2 mobile phones in Singapore that were later sold into the United States. *See* First Samsung ITC Complaint at 12-14. Thus, "sale for importation into the United States" logically and clearly includes – even in Defendants' view – an initial sale into a distribution chain that is set up to, and does, result in the importation of affected goods into the United States.

The very statute upon which Defendants' ITC claims rest, the Tariff Act of 1930 (the "Tariff Act"), broadly defines "import trade" as including "[t]he importation into the United States, the *sale for importation* [into the United States], or the sale within the United States after importation" of infringing products. *See* 19 U.S.C. § 1337(a)(1)(B)-(E) (emphasis added). Those activities – which include the sale of products abroad for later importation into the United States – establish the ITC's jurisdiction under the Tariff Act. *See id*. That is, those very acts allow the ITC to regulate products affecting U.S. trade and commerce. *See id.*

Likewise, in civil patent lawsuits brought in federal court, Defendants have embraced a broad definition of "importation." In one such case, Defendant LG Display, then known as LG Philips LCD Co., Ltd, asserted that Defendants Chi Mei and AU Optronics directed infringing LCD panels into the "the United States . . . through established distribution channels involving various third parties, knowing that these third parties will use their respective nationwide contacts and distribution channels to import into, sell, offer for sale, and/or use these products in . . . the United States." *LG Philips LCD Co., Ltd. v. Chi Mei Optoelectronics Corporation, et al.*, Civil Action No. 06-726-JJF (D. Del.) (Docket No. 54) ¶¶ 6, 8. According to LG Display, those distribution channels/networks are "designed to exploit the U.S. market" and are "comprised of the largest original equipment manufacturers . . . and the largest chain retail outlets in the United States." *LG Philips*, Civil Action No. 06-726-JJF (Docket No. 57) at 2. In other words, Defendants intentionally use large manufacturers of LCD-containing products, such as Motorola, to import their LCD panels into the United States and take advantage of the U.S. market. In addition, when identifying Chi Mei's and AU Optronics' wrongful conduct, LG Display included

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both "importing" and "causing to be imported" infringing LCD products. *See LG Philips*, Civil Action No. 06-726-JJF (Docket No. 54) ¶ 16.

Here, Defendants' conduct involved "import trade or import commerce" that falls squarely under the reach of the Sherman Act and within the subject matter jurisdiction of this Court.[14] During the Conspiracy Period, Defendants sent millions of LCD panels and LCD-containing products, worth billions of dollars, into the United States through distribution chains established to accomplish exactly that result. *See* Amend. Compl. ¶ 132. A substantial portion of Defendants' revenues were derived from the U.S. market, making it a major focus of their business operations and plans. *See id*. ¶¶ 132-36. Because of the importance of the U.S. market, one of the largest in the world, Defendants aimed their illegal conduct, at least in part, at LCD panels intended for incorporation into finished products, such as Motorola mobile wireless devices, specifically destined for sale and consumption in the United States. *See id*. ¶¶ 133, 135-36.

In fact, when high-level executives based at Defendants' Asian headquarters reached the illegal agreements on LCD panel prices sold to Motorola referenced in their guilty pleas, they did so knowing that a substantial portion of those price-fixed LCD panels would be incorporated into Motorola mobile wireless devices (and other LCD-containing products manufactured by other companies) that would be imported into the United States. *See id*. ¶ 135. Indeed, Defendants closely monitored the effect their price-fixing had on the prices of LCD-containing products sold in the United States. *See id*. They did so knowing that such prices affected demand for LCD panels, as well as the prices Defendants would be able to charge for LCD panels. *See id*. ¶ 136.

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[14] According to the U.S. Supreme Court in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, the only other categories under which Defendants' foreign conduct could fall is conduct involving either: (1) "export activities," or the export of goods or services from the United States; or (2) wholly-foreign transactions "conducted *entirely outside* the United States . . . that have *no point of contact* with [the United States]." *See* 542 U.S. 155, 161 (2004); *see also Dee-K Enterprises,* 299 F.3d at 290 (emphasis added). Here, Defendants plainly did not engage in conduct involving export commerce, as they sent and/or directed price-fixed LCD panels into the United States, rather than out of the United States. Nor can Defendants' conduct be deemed to have involved only wholly-foreign commerce, as their price-fixed goods did, in fact, enter the United States in large volumes, just as Defendants intended.

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In this respect, Defendants used the pricing of LCD-containing products in the United States as a benchmark for establishing, organizing, and tracking their price-fixing of LCD panels. *See id.*

Thus, Defendants knowingly and intentionally sent price-fixed LCD panels into a stream of commerce that led into the United States, one of their most important markets and a major source of their revenues. In this respect, their anticompetitive conduct was directed at imports into the United States and had the intended effects of causing price-fixed LCD panels to enter the United States and inflating the prices of finished LCD-containing products destined for the United States. As a result, this Court has subject matter jurisdiction under the Sherman Act over Defendants' illegal conduct involving import trade or import commerce.

3. Even If The FTAIA Applies, This Court Has Subject Matter Jurisdiction Over Defendants' Conduct Because That Conduct Had A "Direct, Substantial, And Reasonably Foreseeable" Effect On U.S. Import Commerce.

Even if this Court accepts Defendants' argument that the FTAIA applies to their illegal conduct – i.e., that their conduct is found not to involve "import trade or import commerce" – subject matter jurisdiction nevertheless exists under the statute, because that conduct had a "direct, substantial, and reasonably foreseeable" effect on U.S. import commerce, and that same effect gave rise to Motorola's antitrust claims.

The FTAIA's "direct, substantial, and reasonably foreseeable" jurisdictional test is meant to be "simple and straightforward." *See* H.R. Rep. No. 97-686, at 2. An effect on U.S. commerce is considered "substantial" if it involves a sufficient volume of United States commerce and is not merely a "spillover effect." *See Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007). It is considered "reasonably foreseeable" if it is a natural consequence of the conduct at issue. *See* H.R. Rep. No. 97-686, at 9 ("the test is whether the effects would have been evident to a reasonable person making practical business judgments"). And, it is "direct" if it "follows as an immediate consequence of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). In applying the "direct, substantial, and reasonably foreseeable" test, a court "must examine the location of the effects of Defendants' alleged decisions and actions, rather than the

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location of the decisions and actions themselves." *CSR*, 405 F. Supp. 2d at 546. Thus, "while the analysis of the 'trade or commerce (other than import trade or import commerce) with foreign nations' prong [of the FTAIA analysis] focuses exclusively on defendants' conduct, the analysis of the 'direct, substantial, and reasonably foreseeable' prong focuses exclusively on the geographical effect of defendants' conduct." *Turicentro*, 303 F.3d at 305 n.13.

This Court held previously that a "direct, substantial, and reasonably foreseeable" effect is sufficiently alleged where a plaintiff avers that: (1) "defendants' conduct resulted in higher prices in the United States;" (2) "defendants have already pled guilty to charges in the United States that they participated in an international conspiracy to fix prices;" and (3) defendants were engaged in a "large volume . . . of commerce" in the relevant product. *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, Case No. 02-cv-1486, 2006 WL 515629, at *3 (N.D. Cal. Mar. 1, 2006). Here, Motorola alleges that Defendants' unlawful conduct, which is the subject of a number of guilty pleas, was intended to cause – and did in fact cause – large volumes of price-fixed LCD panels to enter the United States. *See* Amend. Compl. ¶¶ 132-36. In particular, Defendants sold millions of price-fixed LCD panels, worth billions of dollars, to Motorola, knowing and intending that a significant portion of those panels would be incorporated into Motorola mobile wireless devices destined for import into, and sale and use in, the United States. *See id*. Such allegations establish that Defendants' conduct had a "direct, substantial, and reasonably foreseeable" effect on U.S. import commerce.

And it is precisely that "direct, substantial, and reasonably foreseeable" effect on U.S. import commerce that Motorola claims gave rise to the antitrust injuries at issue in this case. Motorola's allegations of causation are not limited, as Defendants claim, to general assertions that its injuries arose from a "global market," "worldwide conspiracy," and "global procurement strategy," or vague averments that "U.S. and foreign prices are higher for the same reason." Rather, Motorola specifically alleges that Defendants' illegal conduct had a "direct, substantial, and reasonably foreseeable" effect on U.S. import commerce in the form of price-fixed LCD panels being knowingly and intentionally sent into a chain of commerce leading directly into the United States, and that the injuries at issue here resulted directly from Motorola's purchases of

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such price-fixed products. *See id*. ¶¶ 15, 27, 140, 149, 166. In this regard, the effect on U.S. import commerce stemming from Defendants' illegal conduct was the "direct cause" of Motorola's injuries. *See In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 539-40 (8th Cir. 2007) (requiring the effects of price-fixing scheme to be the "direct cause" of the plaintiff's injuries). There cannot be a more "proximate" connection between effect and injury than that. As a result, the requirements of the jurisdictional test set forth in the FTAIA are met here.

Further, use of the term "direct" in the FTAIA does not, as Defendants claim, mean that a plaintiff can never satisfy the statute's jurisdictional test by alleging that a defendant's illegal conduct also caused elevated prices for LCD-containing products sent to the United States. Defendants' claim that such purchases are too far removed from their illegal conduct to be "direct" is based on mischaracterizations of the cases on which they rely and fundamental errors in legal analysis.[15]

The cases Defendants cite as support for their position do not, as they claim, focus on the proximity between the conduct and effect at issue, or on a distinction between components and finished products. Rather, they focus on the degree to which alleged anticompetitive effects are contingent upon speculative intermediary factors. And, as this Court recently recognized in its orders approving class certification, the cases cited by Defendants are both procedurally and factually distinguishable from the situation here, in that they were "decided upon a full factual record" and "did not involve imports." *See* Direct Certification Order at 21-22; *see also* Indirect Certification Order at 21.

For instance, in the main case on which Defendants rely, *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001), the plaintiffs attempted to establish subject matter jurisdiction under the FTAIA by alleging *only* hypothetical effects in the United States that *may* result from the defendants' illegal conduct. *See id*. at 1013. The court rejected their claim, noting that "there is *no* factual basis by which [the plaintiffs] can claim that there is a

[15] *See* MTD at 9.

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link between [the] alleged misconduct in claimed foreign [up-stream product] markets and the supply or price of [down-stream products] in the United States." *Id*. (emphasis added). The plaintiffs failed to allege *any* concrete adverse impact on the domestic down-stream market stemming from their alleged exclusion from the foreign up-stream markets. *See id*.[16] Thus, the court ruled that the plaintiffs' bare-boned allegation that a down-stream product "*may* later be imported into the United States" was not sufficient to establish subject matter jurisdiction under the "direct, substantial, and reasonably foreseeable" test set forth in the FTAIA. *See id*. at 1014 (emphasis added).[17]

Unlike in *United Phosphorus*, the effects at issue in this case are not based on events that "may" happen at some future point in time; they are concrete and do not depend on the potential for hypothetical intervening factors to occur. The cost of LCD panels constitutes a significant portion of the cost of LCD-containing products, like mobile wireless devices. *See* Amend. Compl. ¶ 135. Therefore, artificially-inflated LCD panel prices necessarily cause higher prices for such down-stream products sent to the United States. *See id*. Thus, fixing the price of LCD panels has a "direct" effect on the prices paid for LCD-containing products. There is no speculation involved.

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[16] The plaintiffs in *United Phosphorus* were unable to assert: (1) that they intended to make the down-stream product for sale in the United States; (2) that they were prevented from making a single sale of the down-stream product in the United States; (3) that they would be able to obtain the required FDA authorization needed to provide the down-stream product in the United States; or (4) that the prices a third-party charged for the down-stream product in the United States would be affected if the plaintiffs were permitted to participate in the foreign up-stream market. *See id*. at 1013.

[17] Defendants take this language out of context in an attempt to use it as support for their position. However, another case they cite, *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F. Supp. 2d 452 (D. Del. 2007), demonstrates that this language is not meant to be read so expansively, but rather only addresses situations where a claim is based entirely on allegations of speculative effects on U.S. commerce. In that case, the court, citing to the exact same language, acknowledged that a "*speculative* chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce required by the FTAIA." *See id*. at 456 (emphasis added). The claims in another case cited by Defendants, *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, also failed because of a lack of concrete allegations that the defendants' conduct had any effect whatsoever on U.S. commerce. *See* 629 F. Supp. 864, 869 (S.D.N.Y. 1986). Moreover, this Court recently found both the *Intel* and *Papst* cases "inapposite" where there are claims involving imports. *See* Indirect Certification Order at 21-22.

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Additionally, in making this argument, Defendants improperly attempt to equate the term "direct" used in the FTAIA with the term "direct" used by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its progeny to explain which entities in a chain of commerce have standing to bring federal antitrust claims. The direct/indirect purchaser distinction addressed in *Illinois Brick* focuses on standing, while the FTAIA deals with subject matter jurisdiction. These issues are separate and distinct. *See eMAG Solutions, LLC v. Toda Kogyo Corp.*, Case No. 02-cv-1611, 2005 WL 1712084, at *11 (N.D. Cal. July 20, 2005) ("Antitrust standing is an issue separate from the jurisdictional question [under the FTAIA].").

Standing is a Clayton Act issue, while subject matter jurisdiction is a Sherman Act issue; the FTAIA amends only the latter. Standing focuses on a plaintiff's position, while subject matter jurisdiction focuses on a defendant's conduct. *See Kruman*, 284 F.3d at 397-98. Standing under *Illinois Brick* is a judicially-created barrier to bringing suit by some entities, despite a court's jurisdiction to hear suits brought by other entities, while subject matter jurisdiction is a fundamental necessity for bringing a claim – where it is lacking, a court is not permitted to hear the claim and, therefore, the issue of standing never arises. *See id*. As a result, this Court must first determine whether it has subject matter jurisdiction over the "conduct" at issue in this case. If it does, then – and *only* then – should it determine issues related to standing.[18] Defendants' attempt to conflate these two issues demonstrates that they lack legal footing for their position on how the FTAIA's "directness" requirement should be applied to allegations involving down-stream products sent to the United States. In turn, their argument should be rejected.

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[18] In conclusory fashion in footnote 10 of their Motion, Defendants assert that standing is an alternative basis for dismissing a portion of Motorola's claims. They do so, however, without even applying – or even mentioning for that matter – the seminal test for antitrust standing set forth by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529-546 (1983) ("*AGC*"). As *AGC* makes clear, a direct purchaser of price-fixed products, such as Motorola, who is the intended target of a supplier's anticompetitive activity, has standing to sue under the U.S. antitrust laws. *See id*. at 541. Moreover, because such an argument "implicates many of the same issues as the jurisdictional analysis under the Foreign Trade Antitrust Improvements Act," if this Court finds that Motorola's claims are cognizable under U.S. law, it necessarily follows that Motorola has antitrust standing to pursue those claims. *See In re Air Cargo*, 2008 WL 5958061, at *15-16 (citations omitted).

Likewise, Defendants also conflate the subject matter jurisdiction/standing distinction when they argue in a footnote that Motorola's allegations that it was injured in connection with purchases of LCD panels through its ODM and EMS providers fail to satisfy the requirements of the FTAIA.[19] As this Court previously held under similar circumstances, the issue of whether ODM and EMS providers are agents of and/or controlled by Motorola such that Motorola's purchases through those entities qualify as "direct" under *Illinois Brick* is a factual determination that is more properly addressed at summary judgment. *See Sun Microsystems*, 534 F. Supp. 2d at 1115-16, 1118.

For the reasons set forth above, Defendants' illegal conduct had a "direct, substantial, and reasonably foreseeable" effect on U.S. import commerce that was the proximate cause of, and gave rise to, Motorola's antitrust injuries. Defendants' conduct is therefore subject to this Court's subject matter jurisdiction.

B. <u>Motorola's State Law Antitrust Claims Are Not Barred By The FTAIA.</u>

The FTAIA does not, as Defendants claim, simply displace the state antitrust laws at issue in this case. For example, in *Amarel v. Connell*, the California Court of Appeal pronounced:

> Defendants cite the Export Trading Company Act of 1982 (15 U.S.C. § 4001 et seq.) and the Foreign Trade Antitrust Improvement[s] Act of 1982 (15 U.S.C. § 6a) as evidencing congressional intent to fully occupy the field of foreign commerce. We disagree . . . . Absent a clear expression to the contrary, it must be presumed Congress did not intend to displace state law . . . . Thus, the most the Foreign Trade Antitrust Improvement[s] Act does to state law is to establish an "effects" test for application of the state's antitrust and unfair competition laws to export activity.

202 Cal. App. 3d 137, 148-49 (Cal. Ct. App. 1988). Regardless, even if the jurisdictional requirements set forth in the FTAIA govern, for the same reasons set forth above, those requirements have been met with respect to Motorola's state law claims.

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[19] *See* MTD at 14-15, n.9.

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C. Motorola Has Alleged Sufficient Contacts With The Relevant States, As Well As Sufficient Facts In Support Of Its Claims Based On Non-TFT-LCD Purchases.

In addition to the argument Defendants raise with respect to application of the FTAIA, they also seek dismissal of Motorola's state law antitrust claims on grounds that Motorola has failed to allege sufficient contacts with the relevant states, as well as Motorola's claims based on purchases of non-TFT-LCD panels. In response to those assertions, Motorola adopts the entire argument set forth by AT&T in its opposition to the motion to dismiss setting forth identical arguments filed by Defendants in *AT&T Mobility LLC, et al. v. AU Optronics Corporation, et al.*, C 3:09-04997 SI (N.D. Cal. Feb. 19, 2010) (Docket No. 35). Moreover, Motorola notes that, during the Conspiracy Period, it conducted a substantial volume of business and had a significant presence in each of the states listed in its Amended Complaint, including selling LCD-containing mobile wireless handsets and maintaining facilities in those states. *See* Amend. Compl. ¶¶ 11, 12, 170, 180, 188-199, 201-202. Given Motorola's extensive business and presence in each of those states, it is entitled to the protections of their laws. *See id.*

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IV. CONCLUSION

For the reasons stated above, Motorola respectfully submits that the Court should deny Defendants' motion to dismiss in its entirety.

DATED: April 16, 2010

Respectfully submitted,

By: */s/ Jason C. Murray*

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APPENDIX A

Foreign Trade Antitrust Improvements Act of 1982

15 U.S.C. § 6a

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

1. such conduct has a direct, substantial, and reasonably foreseeable effect:
   - A. on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
   - B. on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
2. such effect gives rise to a claim under the provisions of sections 1 to 7 of [the Sherman Act], other than this section.

If sections 1 to 7 of [the Sherman Act] apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.

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EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION
_______________________________________/

No. M 07-1827 SI
MDL. No. 1827

This Order Relates To:

MOTOROLA, INC,

Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.
_______________________________________/

No. C 09-5840 SI

ORDER GRANTING DEFENDANTS' JOINT MOTION TO DISMISS

On June 23, 2010, the Court held a hearing on defendants' motion to dismiss the complaint. For the reasons set forth below, the Court GRANTS defendants' joint motion to dismiss and GRANTS plaintiff leave to amend the complaint.

BACKGROUND

On October 20, 2009, plaintiff Motorola, Inc. ("Motorola") filed an individual complaint in the Northern District of Illinois against numerous domestic and foreign defendants for violations of state and federal antitrust laws. Pursuant to the Judicial Panel on Multidistrict Litigation's April 20, 2007 transfer order consolidating pretrial proceedings for a number of actions and this Court's July 3, 2007 related case pretrial order #1, the case was designated as related to MDL No. 1827, M 07-1827, and transferred to this Court.

The amended complaint, filed on January 29, 2010, alleges a global price-fixing conspiracy by suppliers of liquid crystal display (LCD) panels. Motorola is a provider of mobile wireless telecommunications services and sells mobile wireless devices and two-way radios; both of these products incorporate LCD panels. Amended Compl. ¶¶ 23, 25. Motorola brings suit based on its own purchases of LCD panels and products, as well as purchases made abroad by a number of Motorola subsidiaries that have assigned their claims to Motorola. *Id*. ¶ 24.[1] Motorola brings this action to recover its damages for purchases made during the conspiracy period (1996-2006). The amended complaint alleges that "[D]efendants' and their co-conspirators' conspiracy raised the price of LCD Panels above the price that would have prevailed in a competitive market." *Id*. ¶ 6. Motorola alleges that during the conspiracy period, hundreds of millions of its products contained LCD panels. The complaint notes that a number of defendants have pled guilty to participating in an LCD panel price-fixing conspiracy, and that in their pleas, defendants Sharp and Epson specifically identified Motorola as a customer that was overcharged for LCD panels. *Id*. ¶¶ 4-5.

The amended complaint also alleges that during the conspiracy period,

> [T]he domestic U.S. and worldwide purchasing process at Motorola was managed and overseen by a supply chain organization, including procurement and manufacturing teams, based in Motorola's northern Illinois operations. From its Illinois headquarters, Motorola directed and approved the prices and quantities of LCD Panels purchased throughout the world and incorporated into Motorola mobile wireless devices and two-way radios. These procurement and manufacturing teams based in the United States were also responsible for all phases of procurement of LCD panels, including at various times, evaluating, qualifying, and selecting LCD Panel suppliers, drafting requests for quotes for LCD Panels, negotiating agreements with LCD Panel suppliers, coordinating purchases of LCD Panels to meet worldwide production goals, overseeing quality control, and managing stocks of LCD Panels.

Id. ¶ 25. "Motorola also negotiated LCD Panel prices with Defendants on behalf of its ODMs and EMS[2] providers who assembled mobile devices for delivery to Motorola. The price of those LCD Panels was likewise artificially-elevated, causing damage to Motorola." *Id*. ¶ 26.

Motorola's first claim for relief seeks treble damages and injunctive relief under Section 1 of the

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[1] The Motorola subsidiaries that have assigned their claims to Motorola Inc. are Motorola Asia Limited, Motorola (China) Investment Limited, Hangzhou Motorola Cellular Equipment Co. Ltd., Motorola (China) Electronics Limited, Motorola Electronics Pte. Ltd., and Motorola Trading Center Pte. Ltd. *Id*. ¶¶ 1, 24.

[2] The amended complaint states that "ODM" means any original design manufacturer of an LCD Product, and "EMS provider" means any electronics manufacturing services provider of an LCD Product. *Id*. ¶¶ 21-22.

Sherman Act, and Sections 4 and 16 of the Clayton Act. The second claim for relief seeks treble damages under California's Cartwright Act. "In the alternative," to the federal and Cartwright Act claims, the third claim for relief alleges violations of the Illinois Antitrust Act. *Id*. ¶ 179. "In the further alternative" to the first three claims, the fourth claim for relief alleges claims under California's Unfair Competition Law, as well as the antitrust, consumer protection, unfair trade and deceptive practices laws of thirteen other states, the District of Columbia, and Puerto Rico. *Id*. ¶ 187.

LEGAL STANDARDS

I. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. As the party invoking the jurisdiction of the federal court, the plaintiff bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78 (1994) (citation omitted). A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either "facially" or "factually." *Thornhill Publishing Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When the complaint is challenged for lack of subject matter jurisdiction on its face, all material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

II. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 544, 555.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig*., 536 F.3d 1049, 1055 (9th Cir. 2008).

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

I. Foreign Trade Antitrust Improvements Act (FTAIA)

Defendants contend that the Court lacks subject matter jurisdiction over Motorola's claims to the extent they are based on foreign purchases of LCD panels and products. Motorola concedes that it cannot assert any claims based on the sale of LCD panels to Motorola subsidiaries abroad if the panels never entered the United States. What is in dispute is whether Motorola can seek to recover based on foreign-sold panels that were subsequently incorporated into Motorola products that Motorola and others – but not defendants – shipped to and sold in the United States.

The Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a ("FTAIA"), enacted in 1982, amends the Sherman Act and "excludes from [its] reach much anti-competitive conduct that causes only foreign injury." *F. Hoffman-LaRoche, Ltd. v. Empagran (Empagran I)*, 542 U.S. 155, 158 (2004). The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." 15 U.S.C. § 6a. The FTAIA then "provides an exception to this general rule, making the Sherman Act applicable if foreign conduct '(1) has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (2) such effect gives rise to a [Sherman Act] claim.'" *In re Dynamic Random Access Memory (DRAM)*

Antitrust Litig., 546 F.3d 981, 985 (9th Cir. 2008) (quoting *Empagran I* and 15 U.S.C. § 6a). This exception is known as the "domestic injury exception" of the FTAIA. *Id*. The Supreme Court has explained that the FTAIA,

> initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."

Empagran I, 542 U.S. at 162 (quoting 15 U.S.C. § 6a, emphasis in original).

Empagran I involved vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. *Empagran I*, 542 U.S. at 159. The Supreme Court held that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm." *Id*. "[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive injury has caused." *Id*. at 165 (emphasis in original).

A. Imports

Motorola first asserts that the products at issue are "imports" that are not subject to the FTAIA. The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." 15 U.S.C. § 6a. In other words, Sherman Act claims based on "imports" are not barred by the FTAIA. "The Foreign Trade Antitrust Improvements Act does not define the term 'import,' but the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad." *Turicentro, S.A. v. American Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002).

Motorola contends that the relevant inquiry to determine whether something is an "import" is not whether defendants directly imported price-fixed goods into the United States, but "whether

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Defendants' price-fixed goods were imported into the United States as they intended." Opposition at 12:15-16. Motorola primarily relies on *In re Air Cargo Shipping Services Antitrust Litigation*, Case No. 06-cv-1775(JG) (VVP), 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008) (Report and Recommendation). In that case, the plaintiffs alleged that domestic and foreign airlines conspired to price-fix airfreight shipping services. In analyzing whether the plaintiffs' price-fixing claims were permitted under the Sherman Act, the *Air Cargo* court first identified the relevant conduct. *Id*. at *12-13. Noting that "'[t]he relevant inquiry is whether the conduct of the defendants – not the plaintiffs – involves import trade or commerce,'" the court found that the relevant conduct was "defendants' global conspiracy to fix the prices charged for the service of transporting air cargo from abroad into the United States." *Id*. at *13 (quoting *Kruman v. Christie's Intern. PLC*, 284 F.3d 384, 395 (2d Cir. 2002)). Second, the court concluded that the relevant conduct constituted "import commerce" because "the conspiracy alleged targeted the transportation of goods by airfreight, a primary vehicle of modern import commerce. . . . It follows that conduct directed at fixing the cost of airfreight necessarily affects the commerce in the goods transported by airfreight. The inseparable connection between airfreight and the commerce in imported goods is sufficient to draw the conclusion that the defendants' price-fixing conduct targeting such a primary channel of import trade and commerce 'involves import trade or import commerce' within the meaning of the FTAIA." *Id*. at *14.

Here, the relevant conduct is defendants' alleged price-fixing of LCD panels, which were sold both in the United States and abroad. Unlike *Air Cargo*, however, there is no "inseparable connection" between foreign-purchased LCD panels or products containing LCD panels, and import commerce. A number of courts have held that the FTAIA's "import commerce" exclusion applies only where the defendants are directly involved in the importation of goods or services into the United States. In *Turicentro*, foreign travel agent plaintiffs sued an airline trade association and United States airline members, alleging that the defendants conspired to lower their sales commissions. The plaintiffs argued that the defendants "imported" their travel agent services for the purposes of selling airline tickets. *Turicentro*, 303 F.3d at 303. The Third Circuit held that the defendants' conduct did not involve "import commerce" because "Defendants did not directly bring items or services into the United States." *Id*.

The court reasoned:

> The alleged conspiracy in this case was directed at commission rates paid to foreign travel agents based outside the United States. That some of the services plaintiffs offered were purchased by United States customers is not dispositive under this inquiry. Defendants were allegedly involved only in unlawfully setting extra-territorial commission rates. Their actions did not directly increase or reduce imports into the United States.

Id.

Similarly, in *Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corporation*, __ F. Supp. 2d __, No. CIV. 05-4376 (GEB), 2010 WL 1324918 (D.N.J. Apr. 1, 2010), a third party intermediary purchased the defendants' goods overseas, resold them to the plaintiffs in the United States, and assigned its rights to the plaintiffs. *Id*. at *27-28. In analyzing the plaintiffs' argument that the goods were "imports," the court stated that "the term 'importer' employed in the introductory language of the FTAIA would be best read as referring to the 'main force' behind the physical movement of goods to the United States; such inquiry is, by definition, unamenable to any hard-and-fast rule and must be resolved on a case-by-case basis." *Id*. at *33. The court held that if the defendants were not the importers, and the actual importers were various intermediaries and end-consumers, the goods were not "imports" under the FTAIA. *Id*. at *36.[3]

"The dispositive inquiry is whether the conduct of the defendants, not plaintiffs, involves 'import trade or commerce.'" *Turicentro*, 303 F.3d at 303. Motorola does not allege that the foreign-purchased products were imported into the United States by defendants; to the contrary, the complaint alleges that the foreign-purchased products were brought to the United States by Motorola affiliates. Although Motorola argues that defendants "intended" for the foreign-purchased LCD panels and products to be brought to the United States, Motorola has not cited any authority adopting such an expansive definition of "import." In the Court's view, a definition that depends on intent would be difficult to apply. Moreover, given the global nature of the economy, defining "imports" as goods that foreign companies "intended" to ultimately make their way into the United States for resale would potentially sweep in much conduct excluded by the FTAIA.

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[3] In *Air Cargo*, there was a factual question as to whether some of the defendants were the actual importers of the goods, and thus the court granted the plaintiffs leave to amend the complaint. *Id*. at *42.

Motorola also relies on the definition of "import trade" contained in the Tariff Act of 1930. That statute defines "import trade" as including "[t]he importation into the United States, the sale for importation [into the United States], or the sale within the United States after importation" of infringing products. 19 U.S.C. § 1337(a)(1)(B)-(E). In addition, Motorola argues that various defendants in this case have embraced a broad definition of "importation" in civil patent lawsuits brought in federal court. However, neither the Tariff Act's definition of "import trade" nor positions that defendants have taken in unrelated litigation arising under different statutes is relevant to evaluating whether a good is an "import" under the FTAIA.

Motorola has not made factual allegations sufficient to claim that its foreign purchases represent "imports" excepted from the FTAIA.

B. Domestic injury exception

Alternatively, Motorola argues that its foreign purchases fall under the "domestic injury" exception to the FTAIA. Under this exception, foreign conduct is actionable if it "(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.'" *Empagran I*, 542 U.S. at 159 (quoting § 6a) (alteration in *Empagran I*). In situations like this one, where a global price-fixing conspiracy is alleged to have affected prices both in the United States and abroad, courts have held that "the 'gives rise to' language of § 6a . . . requires a plaintiff to establish a direct or proximate causal relationship" between the alleged anticompetitive effects in the United States and the plaintiff's alleged foreign injury. *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 987-88 (9th Cir. 2008) (relying on *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd. (Empagran II)*, 417 F.3d 1267, 1271 n.5 (D.C. Cir. 2005)).

Motorola argues that defendants' conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce because defendants sold millions of price-fixed LCD panels to Motorola, knowing and intending that a significant portion of those panels would be incorporated into Motorola mobile wireless devices destined for import into, and sale and use in, the United States. Motorola relies on allegations such as the following: "The activities of defendants and their co-conspirators, as described herein, involved U.S. import trade or commerce and/or were within the flow of, were intended

United States District Court
For the Northern District of California

to, and did have a direct, substantial and reasonably foreseeable effect on U.S. domestic and import trade or commerce. In particular, defendants' and their co-conspirators' conspiracy directly and substantially affected the price of LCD Panels and products which contained LCD Panels ('LCD Products') purchased in the United States. These effects give rise to Motorola's antitrust claims." Amended Compl. ¶ 15.

While defendants dispute whether Motorola's allegations meet the first prong of the "domestic injury" exception, they also argue that the Court need not even address that question because Motorola has failed to plead facts sufficient to show, under the second prong of the exception, that any such domestic effects "gave rise to" Motorola's Sherman Act claims based on foreign purchases. The Ninth Circuit has held that the "gives rise to" language of § 6a of the FTAIA requires a plaintiff to establish proximate cause between the alleged anticompetitive effects in the United States and the plaintiff's foreign injury, where foreign purchases are alleged. *DRAM*, 546 F.3d at 987-88. In *DRAM*, a British computer manufacturer, Centerprise, sued American and foreign manufacturers and sellers of DRAM. Centerprise claimed that the domestic effect of the defendants' anti-competitive behavior – higher DRAM prices in the United States – gave rise to its foreign injury of having to pay higher DRAM prices abroad because the defendants could not have raised prices worldwide and maintained their global price-fixing arrangement without fixing the DRAM prices in the United States. *Id.* at 984. The district court held that Centerprise had sufficiently alleged that the defendants' conduct had a "direct, substantial and reasonably foreseeable" effect on U.S. domestic commerce, but had not sufficiently alleged that such domestic effect gave rise to Centerprise's foreign injury. The Ninth Circuit affirmed:

> The defendants' conspiracy may have fixed prices in the United States and abroad, and maintaining higher U.S. prices might have been necessary to sustain higher prices globally, but Centerprise has not shown that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad. Other actors or forces may have affected the foreign prices. In particular, that the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad.

Id. at 988. The Ninth Circuit also held that a "direct correlation between prices does not establish a sufficient causal relationship." *Id.* at 989-90 (citing *Empagran II* at 1271 n.5, and *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 539-40 (8th Cir. 2007), for proposition that proximate cause is not met by allegations that "there was a single global price kept in equipoise by the maintenance of super-competitive prices in the U.S. market").

Defendants argue that Motorola has not alleged how any domestic effects caused its foreign injuries. Defendants also argue that the alleged effects on import commerce could not have proximately caused the alleged foreign injuries as a matter of law. Defendants contend that Motorola's foreign injuries occurred when the panels were purchased abroad, before Motorola imported those panels (as contained in finished products) into the United States. Defendants argue that no foreign injury could be caused by something that occurred after that injury was allegedly suffered. *See In re Hydrogen Peroxide Antitrust Litig.*, __ F. Supp. 2d __, Civil Action No. 05-666,, MDL Docket No. 1682, 2010 WL 1388183, at *3 (E.D. Pa. Mar. 31, 2010) (the "FTAIA imposes a two-step dance, first with one foot (the domestic effects) and then with the other (the foreign antitrust injury). We hold that under the FTAIA the domestic effects must occur first and then proximately cause the foreign antitrust claim.").

The Court agrees with defendants that the amended complaint does not allege any facts showing how Motorola's foreign injuries were proximately caused by any domestic effects of defendants' conduct.[4] Similar to the complaint in DRAM, Motorola's complaint generally alleges that defendants engaged in a "global conspiracy" that impacted "global prices" and that Motorola's foreign affiliates "suffered injury as a result of defendants' antitrust violations." Amended Compl. ¶¶ 2, 24, 27. Under *DRAM*, these allegations fall far short of alleging that the domestic effect of defendants' conduct gave rise to Motorola's foreign injuries. Motorola also relies on defendants' criminal pleas; however, these criminal pleas, which admit to criminal antitrust violations in the Northern District, have no bearing on whether the domestic effects of defendants' conduct *caused* Motorola's foreign injuries. Accordingly, the Court GRANTS defendants' motion to dismiss Motorola's foreign injury claims, with leave to amend.[5]

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[4] The Court finds it unnecessary to resolve whether Motorola has sufficiently alleged a domestic effect. In addition, in light of the dismissal of the federal claims based on foreign-sold products, the Court does not address the parties' arguments about whether Motorola's claims based on foreign-sold panels contained in finished products that it purchased from intermediary non-party manufacturers should be dismissed because they are barred by the indirect purchaser standing doctrine.

[5] In light of the Court's dismissal of the federal claims based on foreign purchases, as well as the dismissal of the state claims for failure to plead contacts sufficient to meet Due Process, the Court does not separately address defendants' arguments that the Court lacks jurisdiction over Motorola's

II. Contacts with states/due process

Defendants move to dismiss all of Motorola's state law claims on the ground that the complaint does not allege sufficient contacts between the respective states and Motorola's claims to satisfy Due Process. In particular, defendants argue that Motorola's failure to allege that it bought the products at issue in California, or in any of the other states whose laws it seeks to invoke, requires dismissal of the state law claims. Defendants rely on several cases in which courts have dismissed state antitrust claims, either for lack of standing or on due process grounds, where the plaintiffs did not allege that they purchased price-fixed products in those states. *See, e.g., Pecover v. Electronic Arts Inc.*, 633 F. Supp. 2d 976, 984 (N.D. Cal. 2009) (dismissing antitrust claims under laws of 18 states in which plaintiffs did not purchase products); *In re Graphics Processing Units Antitrust Litig.* ("*GPU*"), 527 F. Supp. 2d 1011, 1027-29 (N.D. Cal. 2007) (dismissing for lack of standing antitrust claims under laws of states in which plaintiffs did not purchase products, and striking all references to a nationwide class under California law because extraterritorial application of California law would violate due process). Defendants also argue that Motorola does not explain why or under what circumstances the Court would apply, "in the alternative" to federal law and the Cartwright Act, the Illinois statute, or "in the further alternative," the laws of the numerous other states.

To decide whether the application of a particular State's law comports with the Due Process Clause, the Court must examine "the contacts of the State, whose law [is to be] applied, with the parties and with the occurrence or transaction giving rise to the litigation." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (emphasis added); *see also Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985) (Due Process requires a "significant contact or significant aggregation of contacts" between the plaintiff's claims and the state at issue). In a price-fixing case, the relevant "occurrence or transaction" is the plaintiff's purchase of an allegedly price-fixed good. *See GPU*, 527 F. Supp. 2d at 1028-29.

With regard to California, Motorola contends[6] that the application of California law comports

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foreign injury claims under state law.

[6] Motorola incorporates by reference the arguments made by AT&T in opposition to defendants' motion to dismiss AT&T's state law claims on the same Due Process grounds. Accordingly, this order discusses AT&T's arguments as if they were advanced by Motorola in the first instance. However, as

with Due Process because defendants did business in California, and certain defendants maintained offices and/or sales agents in California. However, these allegations do not provide a link between Motorola's claims that it purchased price-fixed products and California. Motorola also relies on various defendants' plea agreements, which state that "acts in furtherance of this conspiracy were carried out in the Northern District of California." The plea agreements state that the "acts in furtherance" of the conspiracy were sales of TFT-LCD panels and products to customers within the Northern District. *See, e.g.*, Plea Agreement at 4, *United States v. LG Display Co.*, (Docket No. 14 in CR 08-803). However, the fact that some defendants have admitted to selling price-fixed goods to customers in this District does not establish the requisite connection with California because those plea agreements do not state, nor has Motorola alleged, that any defendants sold products to *Motorola* in California.

In addition, Motorola argues that there is a sufficient nexus between its claims and all of the various state laws because it conducts a substantial amount of business in each of the states. Again, however, the fact that Motorola has a presence in the various states does not establish a link between Motorola's antitrust claims and the States. Motorola also argues that it expects that defendants will assert, as a defense under the various state laws, that Motorola passed-on the alleged overcharges when it sold the finished products to end consumers. Motorola does not cite any authority for the proposition that Due Process can be satisfied by the location of a plaintiff's resale of a product.

The Court agrees that in order to invoke the various state laws at issue, Motorola must be able to allege that " the occurrence or transaction giving rise to the litigation" – which is Motorola's purchase of allegedly price-fixed goods – occurred in the various states. *Allstate Ins. Co.*, 449 U.S. at 308. The Court GRANTS defendants' motion to dismiss all of the state law claims and GRANTS Motorola leave to amend the complaint to allege contacts with each State – here, purchases of price-fixed goods – in order to satisfy Due Process. In addition, if Motorola decides to plead claims "in the alternative" or "further alternative" in the amended complaint, Motorola shall explain under what circumstances Motorola would pursue the alternative claims.

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defendants' note, some of AT&T's arguments – such as the fact that one of the AT&T plaintiffs is headquartered in California – do not apply to Motorola.

III. Allegations regarding non-TFT technology

The amended complaint alleges that the conspiracy had the effect of "raising, fixing, maintaining, and/or stabilizing the prices of" LCD panels that utilized three different technologies: TFT panels, color super-twist nematic ("CSTN") panels, and monochrome super-twist nematic ("MSTN") panels. Amended Compl. ¶¶ 19. The amended complaint's factual allegations regarding a price-fixing conspiracy all relate to TFT-LCD panels, and there are no allegations specifically regarding price-fixing CSTN-LCD or MSTN-LCD panels.

Defendants contend that Motorola has not alleged any facts to support its assertion that the alleged conspiracy encompassed LCD panels using CSTN or MSTN technology. These two super-twist nematic panel technologies (also referred to as "STN" or "passive matrix") are older technologies with slower response times than TFT-LCD panels (referred to as "active matrix"). Defendants contend that Motorola does not support its broader conspiracy claims with any factual allegations that are separately and specifically directed to STN panels. Defendants also note that neither the class cases nor the DOJ's investigation into the LCD industry have alleged any price-fixing conspiracy related to STN LCD panels.

In response, Motorola adopts the entire argument set forth by AT&T in its opposition to defendants' joint motion to dismiss the same allegations of a broader conspiracy in AT&T's amended complaint. Opposition at 22:6-9. As such, Motorola responds that the complaint satisfies *Twombly* because in light of the admitted conspiracy to fix the price of TFT-LCD panels, it is plausible that defendants also conspired to fix the prices of STN-LCD panels because these panels are close substitutes for TFT-LCD panels. Motorola also cites information, not contained in the complaint, in support of its assertion that STN-LCD panels are close substitutes for TFT-LCD panels. *See* Docket No. 51 in 09-4997 (Murray Decl. Ex. 7). In reviewing a motion to dismiss, however, the Court cannot consider information that is not contained in the complaint. *See Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993).

Motorola also relies on cases in which courts have held that an admitted conspiracy to fix the price of one product makes plausible the allegation that the same defendants also conspired to fix the price of a related product. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661

(7th Cir. 2002); *In re SRAM Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008); *In re Chocolate Confectionary Antitrust Litig*. 602 F. Supp. 2d 538, 576-77 (M.D. Pa. 2009). However, as defendants note, in these cases there were specific factual allegations to support the conspiracy claims with respect to the specific products or markets at issue, in addition to allegations concerning guilty pleas with respect to the other products or markets. For example, in *SRAM* the complaint contained allegations about the susceptibility of the SRAM market to collusion, as well as specific communications between the defendants about the price and demand for SRAM. 580 F. Supp. 2d at 902. Judge Wilken held that the plaintiffs could rely on the guilty pleas entered by numerous defendants in the DRAM litigation because "the same actors associated with certain Defendants were responsible for marketing both SRAM and DRAM." *Id*. at 903. However, Judge Wilken also noted that "[a]lthough the allegations regarding the DRAM guilty pleas are not sufficient to support Plaintiffs' claims standing on their own, they do support an inference of a conspiracy in the SRAM industry." *Id*.; *see also In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d at 661 (reversing summary judgment in favor of defendants where plaintiffs adduced evidence of agreement to fix prices of high fructose corn syrup, as well as admission by one defendant that it fixed prices on two related products during overlapping time period); *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d at 551-52, 557 (allegations of price-fixing in Canadian chocolate market supported allegations of price-fixing in U.S. chocolate market where plaintiffs alleged specific anticompetitive conduct in U.S. as well as integration of the two markets).

"To state a claim under Section 1 of the Sherman Act, . . . claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which if true, will prove" a conspiracy. *Kendall v. VISA U.S.A. Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Here, the amended complaint does not contain any specific factual allegations that defendants conspired to fix prices of STN-LCD panels, and the Court cannot infer the existence of such an expanded conspiracy based solely on allegations of price-fixing in the TFT-LCD market. The Court GRANTS defendants' motion to dismiss and GRANTS plaintiff leave to amend.

United States District Court
For the Northern District of California

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendants' joint motion to dismiss and GRANTS Motorola leave to amend the complaint. (Docket No. 26 in C 09-5840 SI, and Docket No. 1560 in M 07-1827 SI). The amended complaint shall be filed no later than **July 23, 2010.**

IT IS SO ORDERED.

Dated: June 28, 2010

Susan Illston

SUSAN ILLSTON
United States District Judge

EXHIBIT 3

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[Additional counsel listed on signature page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

This Document Relates to
Case No. 09-cv-5840-SI

MOTOROLA, INC.,

Plaintiff,

v.

AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA, INC.; CHI MEI CORPORATION; CHI MEI OPTOELECTRONICS CORPORATION; CHI MEI OPTOELECTRONICS USA, INC.; CMO JAPAN CO. LTD.; NEXGEN MEDIATECH, INC.; NEXGEN MEDIATECH USA, INC.; CHUNGHWA PICTURE TUBES LTD.; TATUNG COMPANY OF AMERICA, INC.; HANNSTAR DISPLAY CORPORATION; LG DISPLAY CO. LTD.; LG DISPLAY AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA, INC.; SHARP CORPORATION; SHARP ELECTRONICS CORPORATION; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONICS COMPONENTS, INC.; TOSHIBA MOBILE DISPLAY CO., LTD.; TOSHIBA AMERICA INFORMATION SYSTEMS, INC.; EPSON IMAGING DEVICES CORPORATION; EPSON ELECTRONICS AMERICA, INC.,

Defendants.

MASTER FILE NO. 07-m-1827 SI
CASE NO. 09-cv-5840 SI
MDL NO. 1827

SECOND AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

(1) VIOLATION OF THE SHERMAN ACT PURSUANT TO 15 U.S.C. § 1

(2) VIOLATION OF THE ILLINOIS ANTITRUST ACT, 740 ILLINOIS CODE 10/3

(3) BREACH OF CONTRACT

(4) UNJUST ENRICHMENT

DEMAND FOR JURY TRIAL

Plaintiff Motorola, Inc., for its complaint against defendants AU Optronics Corporation, AU Optronics Corporation America, Inc, Chi Mei Corporation, Chi Mei Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co. Ltd., Nexgen Mediatech, Inc., Nexgen Mediatech USA, Inc., Chunghwa Picture Tubes Ltd., Tatung Company of America, Inc., HannStar Display Corporation, LG Display Co. Ltd., LG Display America, Inc., Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba Corporation, Toshiba America Electronics Components, Inc., Toshiba Mobile Display Co., Ltd., Toshiba America Information Systems, Inc., Epson Imaging Devices Corporation, and Epson Electronics America, Inc. hereby alleges as follows:

I. <u>INTRODUCTION</u>

1. Motorola, Inc., a U.S. company based in Schaumburg, Illinois, brings this action to recover damages incurred as a result of a long-running conspiracy by suppliers of liquid crystal display panels ("LCD Panels") which occurred through bilateral and multilateral meetings held in the United States and abroad to fix the prices of LCD Panels sold to U.S. customers, including Motorola. As set forth in detail below, the conspirators utilized their U.S. affiliates, they targeted U.S. companies and consumers, and their conduct directly involved U.S. import trade and commerce. In addition, the conspiracy had a direct, substantial and reasonably foreseeable effect on U.S. domestic and import commerce through a consistent pattern of conspiratorial conduct in the United States to sell Motorola LCD panels at illegally inflated prices. That effect on U.S. domestic commerce, and U.S. import trade and commerce, proximately caused injury to Motorola in the form of supra-competitive prices for LCD panels delivered to Motorola in the U.S. and abroad and it resulted in billions of dollars of damages to Motorola, damages Motorola now seeks to recover by this action.

2. From at least January 1, 1996 through at least December 11, 2006 ("the Conspiracy Period"), through hundreds of in-person meetings, telephone calls, emails, and other communications in the United States and abroad, defendants and their co-conspirators conspired with the purpose and effect of fixing, raising, stabilizing, and maintaining prices for LCD Panels.

Senior executives of the defendants instructed their subordinates in the United States to communicate with employees of their competitors to exchange pricing and other competitive information to be used in fixing prices for LCD Panels sold to U.S. companies. The defendants' employees engaged in these illegal communications in the United States and utilized that information to increase the prices U.S. customers paid for LCD Panels.

3. The U.S. market for LCD Panels and products containing those panels has always been one of the largest and most-profitable markets for defendants and their co-conspirators, so they purposely set about fixing prices to unlawfully maintain and increase their profits from sales to U.S. manufacturers and consumers. Defendants and their co-conspirators delivered LCD Panels to U.S. manufacturers in the United States to be incorporated into consumer products made in the United States. Defendants and their co-conspirators also delivered LCD Panels to U.S. companies that the defendants knew would incorporate those LCD Panels into consumer products manufactured by U.S. companies through their subsidiaries abroad to be imported and sold into the United States. Defendants knew and intended for these sales to have an effect on U.S. domestic and import commerce.

4. Defendants and their co-conspirators, using their U.S. affiliates, salespeople, and contacts entered into supply agreements with Motorola in Illinois to sell Motorola LCD Panels at unlawfully inflated prices. They maintained sales, service, and design offices in the United States (sometimes working in Motorola's own U.S. offices) to effectuate their scheme and they monitored U.S. sales of LCD Products, such as Motorola's wireless handsets, to make sure the cartel was effectively exploiting the U.S. market through its sales to Motorola, and to monitor compliance with the cartel's unlawful pricing and bid-rigging.

5. The purchase orders issued to the defendants based on these pricing agreements contained provisions requiring the defendants to comply with all applicable laws and regulations in the performance of the contract. The defendants, by their agreements to fix prices to Motorola, violated those terms.

6. As described more fully below, for some portion of the LCD panels it purchased from defendants and their co-conspirators, Motorola, Inc., the U.S. parent corporation, directed

one or more of its foreign affiliates and facilities, through an automated scheduling system, controlled entirely by Motorola, Inc. in the United States, to take delivery of panels outside the United States, place them into mobile wireless handset and other products, then deliver them to the United States for further manufacturing, and then deliver them for sale to Motorola, Inc.'s U.S. customers. For these purposes, those foreign affiliates and facilities acted as the representatives and agents of Motorola, Inc., and indeed as a single enterprise with Motorola, Inc., and had no discretion or power over what price, quantity, or specification of LCD Panel to purchase, or what LCD supplier to choose. These entities manufactured and sold phones at the direction of Motorola, Inc. Any injury suffered as a result of any delivery of LCD Panels to Motorola's foreign affiliates and facilities is ultimately an injury to Motorola, Inc., and was proximately caused by defendants' and their co-conspirators' unlawfully inflated prices for LCD Panels sold to Motorola, Inc. and other conspiratorial conduct in the United States.

7. At least seven LCD Panel manufacturers have admitted in criminal proceedings to participating in this conspiracy and conducting illegal price-fixing operations in the United States: defendants LG Display Co. Ltd. (and its wholly-owned subsidiary, LG Display America, Inc.), Sharp Corporation, Chunghwa Picture Tubes, Ltd., Epson Imaging Devices Corporation, Chi Mei Optoelectronics Corporation, and HannStar Display Corporation. On or about November 12, 2008, LG Display Co. Ltd., LG Display America, Inc., Sharp Corporation and Chunghwa Picture Tubes, Ltd. agreed to plead guilty and pay a total of $565 million in criminal fines for their roles in the conspiracy to fix the price of LCD Panels. On or about August 25, 2009, Epson Imaging Devices Corporation agreed to plead guilty and pay a $26 million criminal fine for its role in the conspiracy to fix the price of LCD Panels. On or about December 9, 2009, Chi Mei Optoelectronics Corporation agreed to plead guilty and pay a $220 million criminal fine for its role in the conspiracy. And on or about June 29, 2010, HannStar Display Corporation agreed to plead guilty and pay a $30 million criminal fine for its role in the conspiracy.

8. In their respective pleas, Sharp and Epson specifically identified Motorola as a customer that was overcharged for LCD Panels. Sharp admitted to targeting Motorola (and other U.S. companies) and overcharging Motorola for LCD Panels it purchased. Epson also admitted

to targeting Motorola and overcharging Motorola for LCD Panels it purchased. Both Sharp and Epson further admitted that acts committed in furtherance of its conspiracy were carried out in the United States.

9. Motorola brings this action to recover damages resulting from defendants' and their co-conspirators' price-fixing conspiracy, which during and after the Conspiracy Period artificially raised the price of LCD Panels above the price that would have prevailed in a competitive market. During and after the Conspiracy Period, hundreds of millions of Motorola's products, including mobile wireless handsets, two-way radios, and other products, contained LCD Panels. Motorola thus suffered damages as a result of defendants' and their co-conspirators' conspiracy, and is entitled to treble damages and injunctive relief to remedy these injuries.

10. Motorola brings this action seeking federal injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Motorola also seeks to recover damages under Section 4 of the Clayton Act, and under state antitrust, consumer protection, unfair trade, deceptive trade practices and contract laws. Motorola also seeks to recover the costs of suit, including reasonable attorneys' fees. These damages, costs, and fees are for the injuries that Motorola suffered as a result of the defendants' and their co-conspirators' conspiracy to fix, raise, maintain and stabilize the prices of LCD Panels.

II. <u>JURISDICTION AND VENUE</u>

11. Motorola brings this action under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to obtain treble damages and injunctive relief against all defendants.

12. Motorola also brings this action pursuant to the Illinois Antitrust Act, 740 Illinois Code 10/1 et seq, for injunctive relief and damages that Motorola sustained due to defendants' and their co-conspirators' violation of Section 3 of the Illinois Antitrust Act (the "Illinois Antitrust Law"). With its headquarters and substantial operations in Illinois, Motorola has a significant presence in Illinois. In addition, during and after the Conspiracy Period, Motorola

purchased LCD Panels and LCD Products in Illinois. Motorola procurement teams based in Illinois, evaluated, qualified, and selected all of Motorola's LCD Panel and LCD Product suppliers. U.S. procurement teams also negotiated all prices, specifications, and quantities for all purchases of LCD Panels and LCD Products from Motorola offices in Illinois. Moreover, representatives from defendants' U.S. subsidiaries and affiliates negotiated and supported sales to Motorola from their sales offices in Illinois and other parts of the United States. For these reasons, Motorola is entitled to the protections of the Illinois Antitrust Law.

13. Motorola also brings its claims for breach of contract and unjust enrichment under the law of the State of Illinois.

14. Pursuant to 28 U.S.C. §§ 1331 and 1337, the Court has jurisdiction over Motorola's claims under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act.

15. Pursuant to 28 U.S.C. §1367, the Court has supplemental jurisdiction over Motorola's claims under the Illinois Antitrust Law, as well as its claims for breach of contract and unjust enrichment. These state law claims are so related to Motorola's claims under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act that they form part of the same case or controversy.

16. The activities of defendants and their co-conspirators, as described herein, directly involved U.S. import trade or commerce. In addition, the activities of the defendants and their co-conspirators were within the flow of, were intended to, and did have a direct, substantial, and reasonably foreseeable effect on U.S. domestic and import trade or commerce. In particular, defendants' and their co-conspirators' conspiracy directly and substantially affected the price of LCD Panels and products which contained LCD Panels ("LCD Products") purchased in the United States. These effects give rise to Motorola's antitrust claims.

17. The activities of defendants and their co-conspirators, as described herein, were within the flow of, were intended to, and did have a direct and substantial effect on commerce in Illinois. In particular, defendants' and their co-conspirators' conspiracy directly and substantially affected the price of LCD Panels and LCD Products purchased in Illinois. These

effects also give rise to Motorola's antitrust claims. Motorola maintained its headquarters, including its global procurement team, in Illinois during and after the Conspiracy Period.

18. This court has jurisdiction over each defendant named in this action under both Section 12 of the Clayton Act, 15 U.S.C. § 22, and section 2-209 of the Illinois Code of Civil Procedure, 735 Illinois Code 5/2-209. Each defendant conducts substantial business in Illinois. In addition, defendants and their co-conspirators purposely availed themselves of the laws of the United States and Illinois insofar as they manufactured LCD Panels for sale in the United States, including Illinois, or which were incorporated into LCD Products defendants and their co-conspirators knew would be sold to customers in the United States and Illinois. Defendants' and their co-conspirators' conspiracy affected this commerce in LCD Panels and LCD Products in the United States and in Illinois.

19. Venue is proper in the Northern District of Illinois under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391, because each defendant is either an alien corporation, transacts business in this District, or is otherwise found within this District. In addition, venue is proper in this District under 28 U.S. §1391 because a substantial part of the events or omissions giving rise to this claim occurred in this district. Defendants and their co-conspirators knew that price-fixed LCD Panels and LCD Products containing price-fixed LCD Panels would be sold and shipped into this District.

III. DEFINITIONS

20. "LCD Panel" means liquid crystal display panel. Liquid crystal display panels use glass plates and a liquid crystal compound to electronically display an image. The technology involves sandwiching a liquid crystal compound between two glass plates called "substrates." The resulting screen contains hundreds or thousands of electrically charged dots, or pixels, that form an image. As used herein, "LCD Panel" refers to both liquid crystal display panels and modules consisting of liquid crystal display panels combined with a backlight unit, a driver, and other equipment that allow the panel to operate and be integrated into a mobile wireless handset, television, computer monitor, or other product. During and after the Conspiracy Period, LCD Panels used in handheld devices included three different technologies:

thin film transistor panels ("TFT panels"), color super-twist nematic panels ("CSTN panels"), and monochrome super-twist nematic panels ("MSTN panels"). The defendants' and their co-conspirators' price fixing conspiracy alleged herein had the effect of raising, fixing, maintaining, and/or stabilizing the prices of LCD Panels using TFT, CSTN, and MSTN technology in LCD Products, including mobile wireless handsets and two-way radios.

21. As used herein, the term "OEM" means any original equipment manufacturer of an LCD Product.

22. As used herein, the term "ODM" means any original design manufacturer of an LCD Product.

23. As used herein, the term "EMS provider" means any electronics manufacturing services provider of an LCD Product.

IV. THE PARTIES

A. Motorola

24. Motorola, Inc. is a Delaware corporation with its principal place of business in Schaumburg, Illinois. Motorola is a leading manufacturer of mobile wireless devices, creating the first commercial handheld cellular phone in 1983.

25. Motorola, Inc. brings this action on behalf of itself and its affiliates, including Motorola Asia Limited, Motorola (China) Investment Limited, Hangzhou Motorola Cellular Equipment Co. Ltd., Motorola (China) Electronics Limited, Motorola Electronics Pte. Ltd., and Motorola Trading Center Pte. Ltd. (collectively "Motorola"). Each of these affiliates has assigned to Motorola, Inc., all of its rights, title, and interest in and to all claims, demands, and causes of action arising out of or relating to the conduct and transactions that are the subject of this action. Motorola, Inc. has accepted these assignments and assumed all of the rights and liabilities related to these assigned claims. Motorola, Inc. created these affiliated entities in accordance with local laws in China and Singapore requiring U.S. companies to create separate subsidiaries when doing business in those countries. The entities were established to operate Motorola Inc.'s manufacturing facilities in Tianjin, China; Hangzhou, China; and Singapore, and

to distribute LCD Panels to Motorola's EMS providers. To the extent such claims are not already in the possession of Motorola, Inc., Motorola is in the process of securing assignments of claims from its affiliates in Germany, Ireland, Brazil, Mexico, and the United Kingdom.

26. During and after the Conspiracy Period, Motorola, Inc. manufactured LCD Products for the U.S. market at its own facilities in Illinois, Florida, New York, as well as its foreign facilities located in Tianjin, China; Hangzhou, China; and Singapore. A substantial portion of the LCD Products manufactured at the Tianjin, Hangzhou, and Singapore facilities were for Motorola's largest U.S. customers, including U.S. mobile carriers such as Sprint, AT&T, Verizon, and T-Mobile. Motorola, Inc. also manufactured LCD Products for other markets in China, Singapore, Brazil, Germany, Ireland, Mexico, and the United Kingdom.

27. Motorola, Inc. has the following ownership interests in each of the above affiliate entities and related manufacturing facilities:

- Motorola's manufacturing facility in Tianjin, China is operated by Motorola Asia Limited, Motorola (China) Investment Limited, and Motorola (China) Electronics Limited. Motorola, Inc. owns 99.99% of Motorola Asia Limited. The only reason Motorola, Inc. does not own 100% of Motorola Asia Limited is because Chinese law requires at least some portion of a Chinese corporation to be Chinese owned. In turn, Motorola Asia Limited owns 100% of Motorola (China) Investment Limited, and Motorola (China) Investment Limited owns 100% of Motorola (China) Electronics Limited.
- Until it closed in December 2008, Motorola's manufacturing facility in Singapore was operated by Motorola Electronics Pte. Ltd. Motorola, Inc. owns 100% of Motorola Electronics Pte. Ltd.
- Motorola's manufacturing facility in Hangzhou, China is operated as a joint venture with a Chinese company, Eastern Communications, Co. Motorola owns 50% of the facility through its ownership interests in two joint ventures that together own the Hangzhou facility. Motorola's interests in those joint ventures

are owned by Motorola (China) Investment Limited, which is in turn wholly owned by Motorola Asia Limited.

- In November 2003, Motorola, Inc. began purchasing LCD Panels for use by its EMS providers in building products on behalf of Motorola through its wholly-owned Singapore subsidiary, Motorola Trading Center Pte. Ltd.

28. As is described in more detail below, during and after the Conspiracy Period Motorola paid artificially-inflated prices for the LCD Panels that it purchased. Those inflated prices were the direct result of defendants' and their co-conspirators' illegal price-fixing conspiracy.

B. Defendants

1. AU Optronics

29. Defendant AU Optronics Corporation is one of the largest manufacturers of LCD Panels. Its corporate headquarters are at No. 1, Li-Hsin Rd. 2, Hsinchu Science Park, Hsinchu 30078, Taiwan. During the Conspiracy Period, AU Optronics Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

30. Defendant AU Optronics Corporation America, Inc., is a wholly-owned and controlled subsidiary of defendant AU Optronics Corporation. Its corporate headquarters are at 9720 Cypresswood Drive, Suite 241, Houston, Texas. It also has facilities located in San Diego and Cupertino, California. During the Conspiracy Period, AU Optronics Corporation America, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

31. Defendants AU Optronics Corporation and AU Optronics Corporation America, Inc., are referred to collectively herein as "AU Optronics." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant AU Optronics Corporation America, Inc., was a member of the conspiracy because, among other reasons, of its status during the Conspiracy

Period as the alter ego or agent of AU Optronics Corporation. AU Optronics Corporation dominated or controlled AU Optronics Corporation America, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

2. Chi Mei

32. Defendant Chi Mei Corporation is one of the world's largest manufacturers of LCD Panels. Its corporate headquarters are at No. 11-2, Jen Te 4th St., Jen Te Village, Jen Te, Tainan 717, Taiwan. During the Conspiracy Period, Chi Mei Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

33. Defendant Chi Mei Optoelectronics Corporation is one of the world's largest manufacturers of LCD Panels and a wholly-owned subsidiary of Chi Mei Corporation. Its global headquarters are at No. 3, Sec. 1, Huanshi Rd., Southern Taiwan Science Park, Sinshih Township, Tainan County, 74147 Taiwan. During the Conspiracy Period, Chi Mei Optoelectronics Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

34. Defendant Chi Mei Optoelectronics USA, Inc., formerly known as International Display Technology USA, Inc., is a wholly-owned and controlled subsidiary of Chi Mei Corporation. Its corporate headquarters are at 101 Metro Drive Suite 510, San Jose, California. During the Conspiracy Period, Chi Mei Optoelectronics USA, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

35. Defendant CMO Japan Co., Ltd., formerly known as International Display Technology, Ltd., is a subsidiary of Chi Mei Corporation. Its principal place of business is at Nansei Yaesu Bldg. 3F, 2-2-10 Yaesu, Chuo-Ku, Tokyo 104-0028, Japan. During the Conspiracy Period, CMO Japan Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

36. Defendant Nexgen Mediatech, Inc., is a wholly-owned and controlled subsidiary of Chi Mei Corporation. Its principal place of business is at No. 11-2, Jen Te 4th St., Jen Te Village Jen Te, Tainan 717 Taiwan. During the Conspiracy Period, Nexgen Mediatech, Inc., marketed, sold and/or distributed LCD Products manufactured by Chi Mei Optoelectronics Corporation throughout the United States and elsewhere.

37. Defendant Nexgen Mediatech USA, Inc., is a wholly-owned and controlled subsidiary of Chi Mei Corporation. Its principal place of business is at 16712 East Johnson Drive, City of Industry. During the Conspiracy Period, Nexgen Mediatech USA, Inc., marketed, sold and/or distributed LCD Products manufactured by Chi Mei Optoelectronics Corporation throughout the world.

38. Defendants Chi Mei Corporation, Chi Mei Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co., Ltd., Nexgen Mediatech, Inc., and Nexgen Mediatech USA, Inc., are referred to collectively herein as “Chi Mei.” They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendants Chi Mei Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co., Ltd., Nexgen Mediatech, Inc., and Nexgen Mediatech USA, Inc., were members of the conspiracy by virtue of their status during the Conspiracy Period as the alter egos or agents of Chi Mei Corporation. Chi Mei Corporation dominated or controlled Chi Mei Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co., Ltd., Nexgen Mediatech, Inc., and Nexgen Mediatech USA, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

3. Chunghwa

39. Defendant Chunghwa Picture Tubes Ltd. is a leading manufacturer of LCD Products. Its global headquarters are at 1127 Hopin Rd., Padeh City, Taoyuan, Taiwan. During the Conspiracy Period, Chunghwa Picture Tubes Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

40. Defendant Tatung Company of America, Inc. (“Tatung America”) is a California corporation with its principal place of business at 2850 El Presidio Street, Long Beach, California. During the Conspiracy Period, Tatung America manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

41. Defendants Chunghwa Picture Tubes Ltd. and Tatung America are referred to collectively herein as “Chunghwa.” They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. During the Conspiracy Period, Chunghwa Picture Tubes Ltd. and Tatung America were closely affiliated, commonly owned, controlled and dominated by Tatung Corporation, and functioned as a single enterprise and/or alter egos. Chunghwa is a subsidiary of Tatung Company, a consolidated consumer electronics and information technology company based in Taiwan. Chunghwa’s Board of Directors includes representatives from Tatung Company. The Chairman of Chunghwa, Weishan Lin, is also the Chairman and General Manager of the Tatung Company. Tatung America is also a subsidiary of Tatung Company. Currently, Tatung Company owns approximately half of Tatung America. The other half is owned by Lun Kuan Lin, the daughter of Tatung Company’s former Chairman, T.S. Lin.

4. HannStar

42. Defendant HannStar Display Corporation (“HannStar”) has its headquarters at No. 480, Rueiguang Road, 12th Floor, Neihu Chiu, Taipei 114, Taiwan. During the Conspiracy Period, HannStar manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

5. LG Display

43. Defendant LG Display Co., Ltd., formerly known as LG Philips LCD Co., Ltd., is a leading manufacturer of LCD Panels and/or LCD Products. It was created in 1999 as a joint venture by Royal Philips Electronics NV and LG Electronics, Inc. LG Display Co., Ltd. has its principal place of business at 20 Yoido-dong, Youngdungpo-gu, Seoul, 150-72 1, Republic of Korea. LG Display Co., Ltd. also maintains offices in San Jose, California. During the Conspiracy Period, LG Display Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

44. Defendant LG Display America, Inc., formerly known as LG Philips LCD America, Inc., is located at 150 East Brokaw Rd., San Jose, California. During the Conspiracy Period, LG Display America, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

45. Defendants LG Display Co., Ltd. and LG Display America, Inc., are referred to collectively herein as "LG Display." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant LG Display America, Inc., was a member of the conspiracy by virtue of its status during the Conspiracy Period as the alter ego or agent of LG Display Co., Ltd. LG Display Co., Ltd. dominated or controlled LG Display America, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

6. Samsung

46. Defendant Samsung Electronics Co., Ltd. has its principal place of business at Samsung Main Building, 250-2 ga, Taepyung-ro Chung-gu, Seoul, Republic of Korea. During the Conspiracy Period, Samsung Electronics Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

47. Defendant Samsung Electronics America, Inc., is a wholly-owned and controlled subsidiary of Samsung Electronics Co., Ltd. Its principal place of business is at 105 Challenger

Road, Ridgefield Park, New Jersey. During the Conspiracy Period, Samsung Electronics America, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

48. Defendant Samsung Semiconductor, Inc., is a wholly-owned and controlled subsidiary of Samsung Electronics Co., Ltd. Its principal place of business is at 3655 North First Street, San Jose, California. During the Conspiracy Period, Samsung Semiconductor, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

49. Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Semiconductor, Inc., are referred to collectively herein as "Samsung." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendants Samsung Electronics America, Inc., and Samsung Semiconductor, Inc., were members of the conspiracy by virtue of their status during the Conspiracy Period as the alter egos or agents of Samsung Electronics Co., Ltd. Samsung Electronics Co., Ltd. dominated or controlled Samsung Electronics America, Inc., and Samsung Semiconductor, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

7. Sharp

50. Defendant Sharp Corporation has its principal place of business at 22-22 Nagaike-cho, Abeno-ku, Osaka 545-8522, Japan. During the Conspiracy Period, Sharp Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

51. Defendant Sharp Electronics Corporation is a wholly-owned and controlled subsidiary of Sharp Corporation. Its principal place of business is at Sharp Plaza, Mahwah, New Jersey. During the Conspiracy Period, Sharp Electronics Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

52. Defendants Sharp Corporation and Sharp Electronics Corporation are referred to collectively herein as "Sharp." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant Sharp Electronics Corporation was a member of the conspiracy by virtue of its status during the Conspiracy Period as the alter ego or agent of Sharp Corporation. Sharp Corporation dominated or controlled Sharp Electronics Corporation regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

8. Toshiba

53. Defendant Toshiba Corporation has its principal place of business at 1-1, Shibaura 1-chome, Minato-ku, Tokyo, 105-8001, Japan. During the Conspiracy Period, Toshiba Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

54. Defendant Toshiba Mobile Display Co., Ltd., formerly known as Matsushita Display Technology Co., Ltd., has its principal place of business at Rivage Shinagawa, 1-8, Konan 4-chome, Minato-ku, Tokyo, 108-0075, Japan. During the Conspiracy Period, Toshiba Mobile Display Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

55. Defendant Toshiba America Electronic Components, Inc., is a wholly-owned and controlled subsidiary of defendant Toshiba Corporation. Its corporate headquarters are at 19900 MacArthur Blvd., Ste. 400, Irvine, California. During the Conspiracy Period, Toshiba America Electronic Components, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

56. Defendant Toshiba America Information Systems, Inc., is a wholly-owned and controlled subsidiary of Toshiba America, Inc. Its principal place of business is at 9470 Irvine Boulevard, Irvine, California. During the Conspiracy Period, Toshiba America Information Systems, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

57. Defendants Toshiba Corporation, Toshiba Mobile Display Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc., are referred to collectively herein as "Toshiba." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendants Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc., were members of the conspiracy by virtue of their status during the Conspiracy Period as the alter egos or agents of Toshiba Corporation. Toshiba Corporation dominated or controlled Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

9. Epson

58. Defendant Epson Imaging Devices Corporation ("Epson Japan") has its principal place of business at 4F Annex, World Trade Center Building, 2-4-1 Hamamatsu-cho, Minato-ku, Tokyo 105-6104 Japan. The company was originally formed as a joint venture between Seiko Epson Corporation and Sanyo Electric Co., Ltd. but is now a wholly-owned subsidiary of Seiko Epson Corporation. Up until December 28, 2006, Epson Japan was known as Sanyo Epson Imaging Devices Corporation. During the Conspiracy Period, Epson Japan manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

59. Defendant Epson Electronics America, Inc., ("Epson America") is a wholly-owned and controlled subsidiary of Seiko Epson Corporation. Its principal place of business is at 2580 Orchard Parkway, San Jose, California. During the Conspiracy Period, Epson America manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

60. Defendants Epson Japan and Epson America are referred to collectively herein as "Epson." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant

Epson America was a member of the conspiracy by virtue of its status during the Conspiracy Period as the alter ego or agent of Epson Japan. Epson Japan dominated or controlled Epson America regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

C. Agents and Co-Conspirators

61. The actions in this Complaint were authorized, ordered, or done by the defendants' respective officers, agents, employees, or representatives while actively engaged in the management of each defendant's business or affairs.

62. Each defendant acted as the agent or joint venturer of or for the other defendants with respect to the acts, violations and common course of conduct alleged herein. Each defendant that is a subsidiary of a foreign parent acts as the United States agent for LCD Panels and/or LCD Products made by its parent company.

63. Various persons and entities, some identified and some not yet identified, participated as co-conspirators in the violations alleged herein and performed acts and made statements in furtherance thereof. When Motorola establishes the identities of such co-conspirators, Motorola will seek leave to amend this complaint to add such co-conspirators as defendants. These co-conspirators are believed to include, without limitation, LG Electronics, Inc., LG Electronics USA, Inc., Hydis Technologies Co., Ltd., NEC LCD Technologies, Ltd., Royal Philips Electronics N.V., Philips Electronics North America Corp., Ltd., IPS Alpha Technology, Ltd., Mitsui & Co., Ltd., Mitsubishi Electric Corporation, Panasonic Corporation, and Panasonic Corporation of North America.

V. THE MARKET FOR LCD PANELS AND LCD PRODUCTS

64. During and after the Conspiracy Period, defendants, or one or more of their subsidiaries, sold LCD Panels in the United States through and into interstate and foreign commerce, including through the Northern District of Illinois.

65. During the Conspiracy Period, defendants collectively controlled the market for LCD Panels, both globally and in the United States.

66. Defendants' business activities substantially affected interstate trade and commerce in the United States and caused antitrust injury in the United States.

67. LCD Panels are utilized in televisions, computer monitors, notebook computers, mobile wireless handsets, digital cameras, and numerous other electronic products. LCD Panels were the principal form of display screen used in mobile wireless handsets and two-way radios manufactured during and after the Conspiracy Period.

68. LCD Panels use liquid crystal to control the passage of light. More specifically, an LCD Panel is made of two glass sheets sandwiching a layer of liquid crystal. When voltage is applied, the liquid crystal is bent, allowing light to pass through to form a pixel. The combination of these pixels forms an image on the panel.

69. LCD Panels have no independent utility, and have value only as components of other products, such as mobile wireless handsets, desktop computer monitors, notebook computer displays, laptop displays, and televisions. The demand for LCD Panels thus derives directly from the demand for such products. In the case of LCD Panels used in mobile wireless handsets, the demand for LCD Panels derives directly from the demand for mobile wireless handsets.

70. The market for LCD Panels is enormous, in part because of the extraordinarily high demand for mobile wireless handsets and other LCD Products. For example, demand for mobile wireless handsets grew exponentially during the Conspiracy Period. In 1997, worldwide shipments of mobile wireless handsets totaled approximately 100 million units. This number ballooned to over one billion units by 2006. This increased demand for mobile wireless handsets drove a similar increase in the demand for LCD Panels during the Conspiracy period. Shipments of LCD Panels for mobile wireless handsets grew from approximately 400 million panels in 2001 to over a billion panels in 2006.

71. The market for LCD Panels and the market for LCD Products, such as mobile wireless handsets, desktop computer monitors, notebook computers and televisions, are inextricably linked and intertwined because the LCD Panel market exists to serve the markets for LCD Products, such as mobile wireless handsets. The market for LCD Panels and the markets

for LCD Products such as mobile wireless handsets, desktop computer monitors, notebook computers and televisions are, for all intents and purposes, inseparable in that one would not exist without the other.

72. Motorola participated in the market for LCD Panels during and after the Conspiracy Period through its purchases of LCD Panels and LCD Products. Motorola paid a higher price for LCD Panels and LCD Products purchased from defendants, their co-conspirators, and others than it would have absent the conspiracy.

VI. DEFENDANTS ENGAGED IN PRICE FIXING OF LCD PANELS IN THE UNITED STATES AND THEY PARTICIPATED IN PRICE FIXING MEETINGS OVERSEAS TO INCREASE THE PRICE OF LCD PANELS SOLD IN THE UNITED STATES

73. During the Conspiracy Period, the defendants were aware that the U.S. market for LCD Products was one of the largest in the world. Defendants regularly solicited updated information from potential purchasers of LCD Panels, including Motorola, about the type and quantity of LCD Panels needed for the manufacture of LCD Products for sale in the United States. Defendants maintained sales offices and sales agents in the United States to market their LCD Panel manufacturing capabilities to U.S. companies, including Motorola, and to support Motorola and other U.S. customers throughout the duration of the purchasing relationship.

A. Defendants Were Well Aware That LCD Panels Sold To Motorola Would Be Imported And Sold In The United States.

74. During the Conspiracy Period, defendants helped Motorola design, plan, and execute development programs for Motorola devices containing LCD Panels for the U.S. market and, therefore, knew that such devices would be imported into the United States. For example, Samsung employees worked in Illinois and throughout the U.S.—often in Motorola facilities—on the design and engineering of Motorola devices sold in the U.S. market. Samsung's offices in Illinois provided design and engineering support to Motorola, including weekly phone calls between Samsung engineers in the U.S. and Motorola engineers in the U.S., and regular Samsung visits to Motorola offices in Illinois. In addition, Samsung engineers collaborated with Motorola engineers on quality issues relating to Motorola devices sold in the U.S. market. For

instance, in 2003, Samsung and Motorola engineers worked together to resolve issues that people wearing polarized sunglasses were having viewing certain Samsung LCD Panels—a problem in "cell phones for the US Market" according to engineers at Samsung.

75. Toshiba employees worked in Illinois and throughout the U.S. on the design and engineering of Motorola devices sold in the U.S. market. Toshiba provided design and engineering support to Motorola for the Triplets, Razr, and Razr II phone models.

76. Sharp and Epson engineers also collaborated with Motorola engineers on quality issues relating to Motorola devices sold in the U.S. market. For instance, in 2004 and 2005, Sharp, Epson, and Motorola engineers worked together to resolve issues with certain Sharp and Epson LCD Panels used in Motorola devices sold in the U.S. market that were causing lenses over the displays to malfunction and dust to accumulate.

77. As a result of these and other activities, defendants knew that when they sold LCD Panels to Motorola, they were likely to be imported into the U.S., and the prices would have an effect on U.S. commerce.

B. Defendants Engaged In Bilateral And Multilateral Meetings And Communications With Competitors To Inflate Prices Of LCD Panels And LCD Products.

78. The defendants conspired to raise the prices of LCD Panels sold into the United States. The LCD Panel conspiracy alleged herein was effectuated through a combination of group and bilateral discussions at all levels of defendants that took place in the United States, as well as in Japan, South Korea, Taiwan, and elsewhere. Defendants' conspiracy included agreements to fix, raise, maintain and/or stabilize the prices of both TFT-LCD Panels and STN-LCD Panels. Defendants fostered a culture of corruption within their companies whereby employees at every level—from the very top executives all the way to lower-level sales representatives—engaged in frequent and continuous communications with employees at every level of their competitors. Senior executives at defendants made it clear to their subordinates that they were required to engage in these illegal exchanges of supply, production, and pricing information as a part of their employment. The lower-level employees funneled the competitive

information up to their superiors who utilized that information—along with the pricing information they, themselves, were able to collect through their own illegal competitor contacts—to set prices for LCD Panels at artificially-inflated levels. The constant communications between defendants at all levels allowed defendants to conspire to set average prices across the entire industry, as well as conspiring to fix the prices of the particular LCD Panels sold to specific U.S. customers, such as Motorola, Dell, Hewlett-Packard, Apple, and others.

1. Defendants Engaged In Illegal Communications About Pricing In The United States.

79. This culture of corruption permeated defendants' U.S. operations and sales. In fact, the top sales executive at Samsung in Korea during the Conspiracy Period, H.S. Kim, instructed his direct reports in the United States to obtain competitive information from their counterparts at other LCD Panel suppliers in the United States. That information was ultimately used by Mr. Kim and others at Samsung to set artificially-inflated prices for LCD Panels charged to Samsung's U.S. customers.

80. Bilateral and multilateral discussions in the United States began at least as early as 1997, when the defendants began discussing pricing for STN-LCD panels. For example, Brian Graham of Sharp communicated with representatives of Samsung regarding Sharp's STN-LCD prices for NEC as early as 1997. By 1998, Mr. Graham was quoting both TFT-LCD Panel prices and STN-LCD Panel prices to Dell, and received price quotes for both technologies from a single sales team at Sharp in Japan. Members of this sales team communicated with Sharp's competitors and obtained information about competitors' prices that was shared with Mr. Graham for purposes of fixing prices for Dell.

81. Thereafter, Michael Hanson of Samsung and Brian Graham of Sharp met in the United States and agreed to fix the prices for LCD Panels sold to various U.S.-based OEMs at that time. In following years, both Messrs. Hanson and Graham also met and agreed to fix prices for LCD Panels with their U.S. counterparts at defendants LG Display, Toshiba, and AU Optronics, and at other LCD Panel suppliers. They met at restaurants and bars in the United

States and frequently communicated by telephone while in their offices in the United States. Mr. Hanson alone had over 500 telephone calls with his counterparts at competitor LCD Panel suppliers. The competitive information these individuals learned from their counterparts was passed along to their superiors—including executives in Asia—for use in setting the LCD Panel prices charged to defendants' U.S. and other customers. Other U.S. employees and account managers at defendants had similar conversations related to various U.S. customers, including Motorola. These communications in the United States were meant to advance the conspiracy's presence in and control over the U.S. market for LCD Panels and LCD Products.

82. For OEMs in the United States, such as Motorola, defendants' U.S. affiliates led the LCD Panel price negotiations, with pricing directions coming from Asia where the defendants were also engaging in conspiratorial acts to affect the price of LCD Panels and LCD Products. Many of the defendants' conspiracy meetings and conspiracy communications took place in the U.S., involved the U.S. affiliates of the defendants, and directly targeted U.S. import commerce and U.S. OEMs. But in addition to these conspiratorial acts committed in the U.S., defendants' conspiratorial conduct included discussions in Japan, South Korea, and Taiwan in which they agreed to illegally increase the prices of LCD Panels sold in the United States and around the world. And, defendants' conspiracy included discussions regarding the retail prices for LCD Products sold by their own corporate subsidiaries and affiliates that manufactured LCD Products, such as mobile wireless handsets. Defendants' conspiratorial acts in Asia were a necessary and integral part of the conspiracy to increase the price of LCD Panels and LCD Products in the U.S. market.

2. Defendants Engaged In Illegal Communications About Pricing With Regard To Small LCD Panels.

83. As part of the larger conspiracy to raise the price of LCD Panels, defendants engaged in bilateral communications specifically regarding prices for small LCD Panels used in mobile devices and two-way radios. These discussions usually took place between sales and marketing employees in the form of telephone calls, emails and instant messages. The

information gained in these communications was then shared with supervisors and used to determine the price to be offered the defendants' customers.

84. These bilateral communications between defendants routinely involved LCD Panels used in mobile wireless devices and other handheld products. Examples include:

- Samsung's H.B. Suh admitted that in the course of bilateral discussions with Samsung's co-conspirators, including Sharp, Toshiba, Epson and others, Mr. Suh discussed pricing for STN-LCD panels. Mr. Suh engaged in these bilateral discussions regarding STN-LCD panels as part of his broader effort to extend and implement the agreements reached at the Crystal Meetings in Japan, described more fully herein. Mr. Suh's goal in these bilateral discussions was to reach understandings with these companies regarding prices for mobile wireless handset manufacturers.
- In 2002, LG Display and AU Optronics met to discuss their price and quantity expectations for the LCD Panel sales for the next year. Meeting notes from this bilateral discussion indicate LG Display and AU Optronics believed "price is too rapidly falling" for LCD Panels for mobile wireless devices. They discussed their prices, quantities, and profits on LCD Panels for mobile wireless devices, and promised to continue exchanging market information.
- Similarly, at least as early as 2003, Samsung and Sharp discussed pricing for LCD Panels for mobile wireless devices, and agreed to fix the price on LCD Panels for Motorola and other customers. For at least three years, H.B. Suh of Samsung and Yoshihiko Kitayama of Sharp met in person and talked by telephone to discuss pricing on LCD Panels for Motorola and other customers.
- In 2003, LG Display and Chunghwa arranged a meeting at Chunghwa's office in Taiwan to discuss market strategy and market intelligence and discuss cooperation. The planned agenda included pricing strategy for 2002 and 2003 and small and medium size LCD Panels market.

- In 2003, LG Display and Chi Mei met to discuss their price and quantity expectations for the LCD Panel sales for the next year. Meeting notes from this bilateral discussion indicate LG Display and Chi Mei discussed the market for small and medium size LCD Panels.
- Samsung and Toshiba discussed pricing for LCD Panels for mobile wireless devices, and agreed to fix the price on LCD Panels for Motorola and other customers. H.B. Suh of Samsung and Makoto Chiba of Toshiba met in person and talked by telephone to discuss pricing on LCD Panels for Motorola and other customers.
- Samsung and Epson discussed pricing for LCD Panels for mobile wireless devices, and agreed to fix the price on LCD Panels for Motorola and other customers. H.B. Suh of Samsung and Takaaki Ito of Epson met in person and talked by telephone to discuss pricing on LCD Panels for Motorola and other customers.

3. Defendants Engaged In Illegal Bilateral And Multilateral Communications About The Pricing Of TFT-LCD Panels.

85. In the early years of the conspiracy, beginning in at least 1996, representatives of the Japanese-based defendants, such as Sharp and Toshiba, met and agreed to fix the prices for LCD Panels generally, as well as to specific OEMs; they also agreed to limit the amount of LCD Panels each would produce.

86. In early 1998, high level representatives at various LCD manufacturers, including Sharp, Toshiba, Samsung, NEC, LG, and Mitsubishi, met to discuss projected sales volumes. The companies agreed that they needed additional meetings to head off the projected higher level of competition between the companies. The companies met again later in 1998 to discuss their projected sales plans to limit competition between them.

87. Beginning in 1999, high level representatives of Samsung met with counterparts at LG and other companies to discuss pricing trends and other aspects of the LCD Panel market.

88. From early 2001 through at least 2006, officials from defendants Samsung, AU Optronics, Chunghwa, Chi Mei, HannStar, LG Display, and Sharp, met periodically in Taiwan to discuss and reach agreements on LCD Panel prices, price increases, production, and production capacity, and did in fact reach agreements increasing, maintaining, and/or fixing LCD Panel prices and limiting their production. The group meetings these defendants participated in were called “Crystal Meetings.” Each defendant attended multiple meetings with one or more of the other defendants during this period. The Crystal Meetings occurred in Taiwan; other similar meetings took place in South Korea, Japan, and the United States on a regular basis throughout this period.

89. The Crystal Meetings were highly organized and reflected the culture of corruption at the defendant companies, with meetings among multiple levels of company representatives. Meetings among defendants’ high-level executives were called “CEO” or “Top” meetings; those among defendants’ vice presidents and senior sales executives were called “Commercial” or “Operational” meetings; and those among lower level sales representatives were call “Working Level” meetings.

90. The CEO meetings occurred quarterly from approximately 2001 to 2006. The Commercial meetings occurred monthly during that same period, and the Working Level meetings occurred frequently over the same time period. The purpose and effect of these meetings was to stabilize or raise prices. Each meeting followed the same general pattern, with a rotating designated “chairman” who would use a projector or whiteboard to put up figures relating to the supply, demand, production, and prices of LCD Panels for the group to review. Those attending the meetings would take turns sharing information concerning prices, monthly and quarterly LCD fab output, production, and supply, until a consensus was reached concerning the participants’ prices and production levels of LCD Panels in the coming months or quarter.

91. During all of these meetings, defendants exchanged information about current and anticipated prices for their LCD Panels, and supply, demand, and production levels of LCD Panels. The participants reached agreement concerning the specific prices to be charged in the coming weeks and months for LCD Panels. Defendants set these prices in various ways,

including, but not limited to, setting "target" prices, "floor" prices, and the price range or differential between different sizes and types of LCD Panels. Defendants limited the production of LCD Panels in various ways, including, but not limited to, line slowdowns, delaying capacity expansion, shifting their production to different-sized panels, and setting target production levels.

92. During the Crystal Meetings, defendants also agreed to engage in bilateral communications with those defendants not attending these meetings. Certain defendants were "assigned" other defendants not in attendance and agreed to and did in fact communicate with non-attending defendants to synchronize the price and production limitations agreed to at the Crystal Meetings. Participants at the Crystal Meetings contacted Japanese defendants (such as Sharp and Toshiba) to relay the agreed-upon pricing and production limitations. Some of these meetings and communications took place in the U.S., and specifically targeted U.S. commerce and U.S. OEMs.

4. Defendants Engaged In Illegal Bilateral And Multilateral Communications About The Pricing Of STN-LCD Panels.

93. During the Conspiracy Period, LCD Panels used in certain applications, including notebook PCs and mobile wireless handsets, included both TFT-LCD Panels and STN-LCD Panels. STN-LCD Panels included CSTN-LCD Panels and MSTN-LCD Panels. Certain defendants, their corporate affiliates, and other members of the conspiracy manufactured both TFT-LCD Panels and STN-LCD Panels, including defendants Samsung, Sharp and Epson. The same individuals at the defendants who were engaged in bilateral communications and group meetings regarding TFT-LCD Panel prices also had pricing responsibilities for STN-LCD Panels.

94. Defendants' conspiracy included agreements to raise fix, raise, maintain and/or stabilize the prices of both TFT-LCD Panels and STN-LCD Panels. Specifically, defendants engaged in bilateral discussions in which they exchanged information about STN-LCD Panel pricing, shipments, and production. These discussions usually took place between sales and marketing employees in the form of telephone calls, emails and instant messages. The

information gained in these communications was then shared with supervisors and taken into account in determining the price to be offered defendants' customers for STN-LCD Panels.

95. As noted above, Samsung's H.B. Suh admitted that in the course of bilateral discussions with Samsung's coconspirators, including Sharp, Toshiba, Epson and others, Mr. Suh discussed pricing for STN-LCD Panels. Mr. Suh engaged in these bilateral discussions regarding STN-LCD Panels as part of his broader effort to extend and implement in Japan the agreements reached at the Crystal Meetings. Mr. Suh's goal in these bilateral discussions was to reach understandings with these companies regarding prices for TFT-LCD Panels and STN-LCD Panels used in mobile wireless handsets sold handsets to AT&T.

96. Specifically**,** Mr. Suh was asked:

> Q. When you spoke with competitors about pricing of mobile display panels, ***did those discussions include, from time to time, TFD, TFT, and color STN?***
>
> A. ***Sometimes, yes***. (Dep. of H.B. Suh at 286:15-286:21 (emphasis added).

97. Defendants began communicating regarding STN-LCD Panel prices as early as 1997, when STN-LCD Panels were more common in applications such as notebook computers. Sharp's Brian Graham, who engaged in bilateral discussions with defendants Samsung, Toshiba and LG at which he exchanged pricing information prior to quoting prices to Dell, also communicated with representatives of Samsung regarding Sharp's STN-LCD Panel prices for NEC as early as 1997.

98. By 1998, Mr. Graham was quoting both TFT-LCD Panel prices and STN-LCD Panel prices to Dell, and received price quotes for both technologies from a single sales team at Sharp in Japan. Members of this sales team communicated with Sharp's competitors and obtained information about competitors' prices that was shared with Mr. Graham for purposes of fixing prices for Dell.

99. By 2001, Sharp employees were engaging in bilateral discussions with competitors to share price information for both TFT-LCD Panels and STN-LCD Panels used for mobile wireless handset applications. For example, a March 29, 2001 email from Sharp's Masa

Fukada to Ming Shi of Sharp shows Mr. Fukada communicating future "competitor price" data for both STN-LCD Panels and TFT-LCD Panels from Epson, Hitachi, Matsushita, NEC and others.

100. Other defendants initiated similar discussions regarding the prices of STN-LCD Panels in furtherance of the conspiracy. In November 2004, Epson's Masanobu Matsumura met with representatives of Toshiba to discuss Toshiba's price quotes for Motorola, including Toshiba's prices for CSTN-LCD Panels sold to Motorola for the Razr phone. Mr. Matsumura stated at this meeting that Epson did not want to start a price war and planned to keep prices higher than what Toshiba planned to submit. Epson employees responsible for selling CSTN-LCD Panels to Motorola also engaged in bilateral discussions with "top management" employees at Sharp. In 2006, Toshiba employees met with representatives of Sharp and discussed Sharp's plans to sell CSTN-LCD Panels to Nokia.

101. In some instances, defendants quoted mobile wireless handset vendors a single price for an LCD module that included both a TFT-LCD Panel and an STN-LCD Panel. For example, defendants quoted Motorola a single price for LCD modules used in the Razr phone, which modules included both a TFT-LCD Panel and an CSTN-LCD Panel. Defendants Sharp and Epson have admitted fixing prices for TFT-LCD panels sold to Motorola for the Razr phone. Because Sharp and Epson quoted prices to Motorola for the entire Razr module, their admitted agreements to fix prices for Motorola included an agreement to fix the price of the CSTN-LCD Panels included in the Razr module.

102. In other instances, defendants quoted some mobile wireless handset vendors a single price for a LCD module that included both a TFT-LCD Panel and a MSTN-LCD Panel. For example, in 2003, SonyEricsson manufactured a phone that contained a TFT-LCD Panel in the primary display and a MSTN-LCD Panel in the subdisplay, and sought a single price quotation for the both the TFT-LCD Panel and the MSTN-LCD Panel from defendants. Thus, defendants' agreement to fix the price of TFT-LCD Panels included an agreement to fix the price of MSTN-LCD Panels sold in the combined TFT-LCD Panel/MSTN-LCD Panel modules sold for mobile wireless handset applications.

103. In addition, defendants Toshiba and Samsung also engaged in communications with each other and with Epson and Sharp at which agreements were reached regarding the price of LCD modules sold to Motorola for the Razr phone, which included agreements to fix the price of the CSTN-LCD Panels included in those modules.

104. Defendants' bilateral discussions extended to other mobile wireless handset manufacturers that requested a single price for LCD modules that included both a TFT-LCD Panel and a STN-LCD Panel. For example, SonyEricsson, which sold substantial volumes of handsets to AT&T, requested a single price for a module that included both a TFT-LCD Panel and an STN-LCD Panel. Epson employees were asked by management to obtain pricing information for these combined modules from other defendants for use in setting Epson's prices to SonyEricsson.

105. Thus, because a number of mobile wireless handsets, including the Motorola Razr phone, included both TFT-LCD Panels and STN-LCD Panels, and because mobile wireless handset manufacturers often requested a single price for LCD modules that included both types of panels, defendants' bilateral discussions and agreements with respect to TFT-LCD panel prices inevitably included and/or affected the prices of STN-LCD panels in those modules.

C. Defendants Have Been Charged With And Have Pled Guilty To Participating in Price-Fixing Meetings In The U.S. And For Fixing The Price Of LCD Panels And LCD Products Sold In The U.S.

106. In December 2006, authorities in Japan, South Korea, the European Union, and the United States revealed the existence of a comprehensive investigation into anti-competitive activity among LCD Panel manufacturers. In a December 11, 2006, filing with the Securities and Exchange Commission, defendant LG Display disclosed that officials from the South Korea Fair Trade Commission and Japanese Fair Trade Commission had visited the company's Seoul and Tokyo offices and that the United States Department of Justice ("DOJ") had issued a subpoena to its San Jose office.

107. On December 12, 2006, news reports indicated that in addition to LG Display, defendants Samsung, Sharp and AU Optronics were also under investigation.

108. At least one of the defendants has approached the Antitrust Division of the DOJ to enter into a leniency agreement with respect to defendants' conspiracy to fix prices of LCD Panels. In order to enter into a leniency agreement under the Corporate Leniency Policy of the DOJ, this defendant has reported defendants' price-fixing conspiracy to the DOJ and has confessed its own participation in defendants' price-fixing conspiracy. The DOJ Antitrust Division's investigation of the remaining defendants is ongoing and is expected to result in additional guilty pleas and criminal fines from the other defendants to this action. However, a number of defendants and their executives have pled guilty to price-fixing, as alleged more fully herein.

109. Defendant Chi Mei Optoelectronics has admitted and pleaded guilty to participating in the conspiracy from September 2001 to December 2006 to fix the price of LCD Panels sold worldwide, including the United States and California in particular, and to participating in meetings, conversations and communications in Taiwan to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to agreed-upon prices. In connection with its guilty plea, Chi Mei Optoelectronics has agreed to pay a criminal fine of $220 million.

110. LG Display has admitted and pleaded guilty to participating in the conspiracy from September 2001 through June 2006 to fix the prices of LCD Panels sold worldwide, and to participating in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices. In connection with its guilty plea, LG Display has agreed to pay a fine of $400 million, the second-highest criminal fine ever imposed by the DOJ's Antitrust Division, for its participation in the conspiracy.

111. Chung Suk "C.S." Chung, an executive from LG Display also pleaded guilty to participating in the conspiracy to fix the prices of LCD Panels sold worldwide from September 2001 through June 2006. Specifically, Mr. Chung admitted that he participated in meetings,

conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreed to fix the prices of LCD Panels at certain predetermined levels, issued price quotations in accordance with the agreements reached, exchanged pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, and authorized, ordered, and consented to the participation of subordinate employees in the conspiracy. In connection with his guilty plea, Mr. Chung has agreed to serve a 7-month prison term and pay a criminal fine of $25,000.

112. Bock Kwon, an executive from LG Display, also pleaded guilty to participating in the conspiracy to fix the prices of LCD Panels sold worldwide, including the United States and California in particular, from September 2001 through June 2006. Specifically, Mr. Kwon admitted that he participated in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreed to fix the prices of LCD Panels at certain predetermined levels, issued price quotations in accordance with the agreements reached, exchanged pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, and authorized, ordered, and consented to the participation of subordinate employees in the conspiracy. In connection with his guilty plea, Mr. Kwon has agreed to serve a 12-month prison term and pay a criminal fine of $30,000.

113. In addition, Duk Mo Koo, former Executive Vice President and Chief Sales Officer from LG Display, has been indicted for participating in the conspiracy to fix the prices of LCD Panels sold worldwide, including the United States and California in particular, from December 2001 through December 2005. Specifically, Mr. Koo has been charged with participating in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, including the Crystal Meetings that took place in Taiwan. Mr. Koo has also been charged with agreeing to fix the prices of LCD Panels at certain predetermined levels, issuing price quotations in accordance with the agreements reached, exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, authorizing, ordering, and consenting to the participation of subordinate employees in the conspiracy, accepting payment for the supply of LCD Panels sold

at collusive, noncompetitive prices to customers in the United States, and taking steps to conceal the conspiracy and his conspiratorial contacts.

114. Chunghwa has admitted and pleaded guilty to participating in the conspiracy from September 2001 to December 2006 to fix the price of LCD Panels sold worldwide and to participating in meetings, conversations and communications in Taiwan to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to agreed-upon prices. In connection with its guilty plea, Chunghwa has agreed to pay a criminal fine of $65 million.

115. In addition, two current executives from Chunghwa, Chih-Chun “C.C.” Liu and Hsueh-Lung “Brian” Lee, and one former executive from Chunghwa, Chieng-Hon “Frank” Lin pleaded guilty to participating in the conspiracy from September 2001 through December 2006. Specifically, Mr. Liu, Mr. Lee and Mr. Lin admitted that they participated in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreed to fix the prices of LCD Panels at certain predetermined levels, issued price quotations in accordance with the agreements reached, exchanged pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, and authorized, ordered, and consented to the participation of subordinate employees in the conspiracy. In connection with their guilty pleas, Mr. Lin has agreed to serve a 9-month prison term and pay a criminal fine of $50,000; Mr. Liu has agreed to serve a 7-month prison term and pay a criminal fine of $30,000; and Mr. Lee has agreed to serve a 6-month prison term and pay a criminal fine of $20,000.

116. In addition, two former Chunghwa executives, Cheng Yuan Lin and Wen Jun Cheng, have been indicted for participating in the conspiracy to fix the price of LCD Panels sold worldwide from December 2001 through December 2005. Specifically, Mr. Lin and Mr. Cheng have been charged with participating in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, including the Crystal Meetings that took place in Taiwan. Mr. Lin and Mr. Cheng have also been charged with agreeing to fix the prices of LCD Panels at certain predetermined levels, issuing price quotations

in accordance with the agreements reached, exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, authorizing, ordering, and consenting to the participation of subordinate employees in the conspiracy, accepting payment for the supply of LCD Panels sold at collusive, noncompetitive prices to customers in the United States, and taking steps to conceal the conspiracy and their conspiratorial contacts.

117. Defendant Sharp has admitted and pleaded guilty to participating in the conspiracy with unnamed co-conspirators to fix the price of LCD Panels sold to Dell from April 2001 to December 2006, to Apple Computer from September 2005 to December 2006, and to Motorola from the fall of 2005 to the middle of 2006, and to participating in bilateral meetings, conversations and communications in Japan and in the United States with unnamed co-conspirators to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices. Defendant Sharp participated in multiple Working Level meetings, as well as bilateral discussions with other defendants, during which it discussed and reached agreements with other defendants on prices for LCD Panels during the Conspiracy Period.

118. Defendant Sharp also participated in multiple bilateral discussions with other defendants, including Samsung, Toshiba, and Epson, during the Conspiracy Period. Through these discussions, Sharp agreed on prices, price increases, production quotas, and production limits for LCD Panels. Because Samsung, Toshiba, and Epson were Sharp's primary competitors in the sale of LCD Panels used in mobile wireless handsets, Sharp knew that it could not have fixed the prices of LCD Panels incorporated into such handsets—as Sharp admitted it did in its guilty plea—unless it reached agreements with Samsung, Toshiba, and Epson to do the same.

119. Defendant Epson Japan has admitted and pleaded guilty to participating in the conspiracy with unnamed conspirators to fix the price of LCD Panels sold to Motorola. Epson Japan has admitted and pleaded guilty to participating in the conspiracy from 2005 through 2006 to fix the prices of LCD Panels, and to participating in meetings, conversations and communications in Japan and the United States to discuss the prices of LCD Panels, agreeing to

fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices. In connection with its guilty plea, Epson Japan has agreed to pay a fine of $26 million.

120. Defendant Epson America is a wholly-owned and controlled subsidiary of defendant Epson Japan and Epson Japan was represented by co-conspirator Mitsui & Co., Ltd. ("Mitsui") at one of the bilateral meetings. Mitsui served as an agent of, and under the direction of, Epson Japan and Epson America. Epson Japan and Epson America, through their agent, were parties to the agreements made at those meetings and acted as co-conspirators. In addition, to the extent Epson America distributed LCD Panels or LCD Products to direct purchasers, it played a significant role in the conspiracy because defendants wished to ensure that the prices for such products paid by direct purchasers did not undercut the pricing agreements reached at these various meetings. Epson America was an active, knowing participant in the alleged conspiracy, and acted as Epson Japan's agent for selling LCD Products in the United States.

121. In addition to the participation in the conspiracy outlined through the guilty pleas, other as yet uncharged conspirators also participated in the conspiracy. Defendant Toshiba also participated in the conspiracy by entering into joint ventures and other arrangements to manufacture or source LCD Panels with one or more of the defendants that attended the Crystal Meetings. The purpose and effect of these joint ventures by Toshiba and others was to limit the supply of LCD Panels and fix prices of such panels at unreasonably high levels and to aid, abet, notify and facilitate the implementation of the price-fixing and production-limitation agreements reached at the meetings. During the Conspiracy Period, Toshiba sought and formed strategic partnerships with other LCD manufacturers which allowed it to easily communicate and coordinate prices and production levels with other manufacturers as part of the overall conspiracy alleged herein. For instance, Toshiba formed HannStar in January 1998 as a manufacturing joint venture. In 2001, Toshiba and Matsushita formed a joint venture, Advanced Flat Panel Displays, which merged their LCD operations. In April 2002, Toshiba and Matsushita formed a joint venture, Toshiba Mobile Display, formerly known as Toshiba Matsushita Display Technology Co., Ltd., which combined the two companies' LCD development, manufacturing,

and sales operations. In 2006, Toshiba purchased a 20% stake in LG Display's LCD Panel manufacturing facility in Poland. The operation and management of these many different joint ventures afforded Toshiba and the other defendant joint-venture partners' regular opportunities to communicate with each other to agree on prices, price increases and production limits and quotas for LCD Panels that each defendant manufactured and sold.

122. Co-conspirator Hydis Technologies Co. Ltd. ("Hydis") participated in multiple lower level meetings between at least 2002 and 2005. In addition, Hydis had a bilateral meeting with a Taiwanese defendant at least as recently as 2005. Through these discussions, Hydis agreed on prices and supply levels for LCD Panels.

123. Co-conspirator Mitsubishi Electric Corporation ("Mitsubishi") participated in multiple lower level meetings in 2001 with Chi Mei, Chunghwa, Samsung, and Unipac Electronics (later AU Optronics). Through these meetings, Mitsubishi agreed on prices and supply levels for LCD Panels.

124. Co-conspirator Mitsui had at least one bilateral meeting, which included a discussion about customers and future pricing, with a Taiwanese defendant in 2001. Mitsui was acting as an agent for co-conspirator Epson Japan in this discussion. Mitsui and Epson Japan agreed on prices and supply levels for LCD Panels.

125. Co-conspirator NEC LCD Technologies, Ltd. ("NEC") participated in meetings or discussions during the Conspiracy Period with at least one other defendant or co-conspirator, which included discussions about prices for LCD Panels.

126. Co-conspirator IPS Alpha Technology, Ltd. ("IPS Alpha") is a joint venture among Hitachi Displays, Ltd., Toshiba Corporation, and Panasonic Corporation ("Panasonic"), and one or more of the partners in this joint venture participated in the meetings described above. As a result, IPS Alpha was represented at those meetings and was a party to the agreements entered into by its joint venture partners at these meetings. As explained above, the agreements at these meetings included agreements on price ranges and output restrictions. The joint venture partners had substantial control over IPS Alpha's production levels and the prices of LCD Panels

the joint ventures sold both to the joint venture partners and other non-affiliated companies. Thus, IPS Alpha and Panasonic were active, knowing participants in the alleged conspiracy.

127. When Motorola refers to a corporate family or companies by a single name in its allegations of participation in the conspiracy, it is to be understood that Motorola is alleging that one or more employees or agents of entities within the corporate family engaged in conspiratorial meetings on behalf of every company in that family. In fact, the individual participants in the conspiratorial meetings and discussions did not always know the corporate affiliation of their counterparts, nor did they distinguish between the entities within a corporate family. The individual participants entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families. As a result, each entire corporate family was represented in meetings and discussions by their agents and each was a party to the agreements reached in them.

D. Defendants Negotiated With Motorola In The United States And Entered Into Agreements With Motorola To Sell LCD Panels At Prices Illegally Raised Through Their Conspiracy.

128. During and after the Conspiracy Period, Motorola purchased LCD Panels directly from the defendants. Motorola used those LCD Panels to manufacture a number of different types of LCD Products, including mobile wireless handsets, two-way radios, and other products ("Motorola devices"). Defendants' illegal conspiracy increased the prices of LCD Panels that the defendants shipped directly to Motorola in the United States as well as the prices for LCD Panels Motorola purchased through its manufacturing subsidiaries. The illegally-inflated prices the defendants charged Motorola for these LCD Panels affected the costs of each LCD Product Motorola manufactured. As described more fully herein, those inflated LCD Panel costs affected both the price at which Motorola sold its products and the number of products it could sell, which drove down Motorola's profits.

129. During and after the Conspiracy Period, procurement teams at Motorola based in the U.S. negotiated the prices, conditions, and quantities that governed all Motorola purchases of LCD Panels around the world for inclusion in Motorola devices. Motorola's U.S. procurement

teams evaluated, qualified, and selected the LCD Panel suppliers that serviced Motorola around the world; drafted all requests for quotes for LCD Panels that would be purchased by Motorola facilities worldwide; reviewed the responses to the requests for quotes; selected which LCD Panel suppliers would supply each part to Motorola; and awarded each LCD Panel supplier a specific share of Motorola's overall business.

130. Motorola's U.S. procurement teams negotiated the terms of each such purchase with U.S.-based and foreign-based employees of LCD Panel suppliers. It did so as follows:

- At the initiation of a potential order, Motorola's U.S. procurement teams contacted the U.S.-based employee of the LCD Panel suppliers regarding the new opportunity. The teams provided the potential supplier's U.S. representative with preliminary specifications, such as the display size, volumes, and expected dates.
- Motorola's U.S. procurement teams developed the requests and preliminary specifications for LCD Panels in collaboration with U.S. representatives of the LCD Panel suppliers.
- Managers on Motorola's U.S. procurement teams, through face-to-face meetings and by correspondence, negotiated the terms of purchases for LCD Panels with the U.S. representatives of the LCD Panel suppliers and awarded the share amounts to the selected LCD Panel suppliers.

131. The purchase order contracts between Motorola and the LCD Panel suppliers in for the purchase of LCD Panels contain provisions required the defendants to comply with all laws and regulations in the performance of the contract.

132. The prices Motorola's U.S. procurement teams agreed upon with employees of the LCD Panel suppliers directly and immediately impacted Motorola's business plans, including its most basic business choices involving the production, pricing, and sales of its own products. Based in part on those LCD Panel prices, Motorola set its contracts with its own customers, made purchasing decisions for other components incorporated into Motorola devices, and planned product development and sales opportunities.

133. After the prices for LCD Panels were negotiated and agreed upon between Motorola's U.S. procurement teams and the U.S.-based employees of LCD Panel suppliers, a supply chain organization at Motorola based in Illinois directed an automatic scheduling process that translated the product demand for Motorola devices in the United States into the quantity requirements for the LCD Panels that would be incorporated into such devices. The quantity requirements were based on orders made to Motorola's U.S. business operations teams in the United States by Motorola's U.S. customers. This schedule-sharing process was entirely directed by Motorola, Inc. from the U.S. In addition to price, Motorola, Inc. also controlled the amount and timing of LCD Panel orders by its foreign affiliates and subsidiaries. Motorola's foreign affiliates and facilities were not authorized to negotiate the price of LCD Panels, nor did they determine the total quantity of LCD Panels ordered. The foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States.

134. In this respect, during and after the Conspiracy Period, Motorola, Inc. and its foreign affiliates and facilities operated as a single enterprise for the purpose of procuring LCD Panels. Motorola, Inc. directed all aspects of the purchase of LCD Panels for inclusion in Motorola devices by its foreign affiliates and facilities. The foreign affiliates and facilities acted as Motorola, Inc.'s agents for the purpose of transmitting purchase orders for LCD Panels to the LCD Panel suppliers at prices and for quantities that were determined by Motorola in the United States and in manufacturing Motorola devices on behalf of Motorola, Inc. These are actions that Motorola Inc. could have and would have otherwise conducted itself. At all relevant times, Motorola, Inc. controlled the price, quantity, and specifications at which its foreign affiliates purchased LCD panels, and Motorola, Inc. also controlled the timing of the purchases and the purposes for which they were used. The Motorola U.S. pricing teams and the U.S. procurement managers were responsible for final approval on pricing, conditions, and projected quantities for purchase of LCD Panels. The purchasing process at Motorola for the components of LCD Products for the U.S. market was managed and overseen by the supply chain organization and the procurement teams based in Motorola's U.S. operations.

135. After Motorola, Inc.'s foreign affiliates and facilities completed the manufacture of Motorola devices at the request of Motorola, Inc. for sale in the United States, those devices were imported into the United States by Motorola, Inc.

136. As part of the manufacturing process, Motorola's mobile devices were shipped to Fort Worth, Texas for final assembly and packaging.

137. Motorola suffered the entire injury resulting from these artificially-inflated prices, and the injury from the purchase of these price-fixed panels is ultimately borne by Motorola, Inc. in the United States.

E. Defendants Agreed To Provide Motorola LCD Panels In Compliance With Applicable Laws And Regulations.

138. During and after the Conspiracy Period, Motorola and its LCD suppliers, including Epson, Samsung, Sharp, and Toshiba, entered into contracts for the sale of LCD Panels and/or LCD Products by which the LCD suppliers agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay the LCD suppliers a price negotiated by Motorola and each LCD supplier. These contracts between Motorola and its LCD suppliers included purchase orders issued by Motorola to its LCD suppliers.

139. Pursuant to each of these contracts, Motorola's LCD suppliers agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders, for example:

- Motorola's purchase order with Epson in 2006
- Motorola's purchase order with Samsung in 2004
- Motorola's purchase order with Sharp in 2005
- Motorola's purchase order with Sharp in 2006
- Motorola's purchase order with Toshiba in 2006
- Motorola's purchase order with AUO in 2006.

140. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under its contracts with its LCD suppliers. Motorola paid its LCD suppliers, including Epson, Samsung, Sharp, and Toshiba, for all LCD Panels and/or LCD Products delivered to Motorola.

141. As set forth in the above allegations, Epson, Samsung, Sharp, and Toshiba did not comply with the terms of their contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola.

F. Defendants Concealed That The Prices Motorola Negotiated For LCD Panels And LCD Products Were Illegally Increased By The Defendants' Conspiracy.

142. Motorola did not discover and could not have discovered, through the exercise of reasonable diligence, the existence of the conspiracy alleged herein until after December 2006, after the investigations by the DOJ and other antitrust regulators became public, because defendants and their co-conspirators actively and fraudulently concealed the existence of their contract, combination or conspiracy. Because defendants' agreement, understanding and conspiracy were kept secret, Motorola was unaware of defendants' unlawful conduct alleged herein and did not know that it was paying artificially high prices for LCD Panels and the products in which they were used.

143. The affirmative acts of defendants and their co-conspirators alleged herein, among others, including acts in furtherance of the conspiracy, were wrongfully concealed and carried out in a manner that precluded detection. The conspirators knew their activities were illegal. After one Crystal Meeting, Brian Lee of Chunghwa wrote that LG Display had reminded the meeting participants to "take heed of the antitrust law." Even Huang of AU Optronics wrote an internal meeting report to others at AU Optronics where he reminded them that their price information exchange with other suppliers "is illegal, especially in the states. We need to be watchful!" Genichi Watanabe testified at deposition that he did not create written records of meetings discussing price with competitors because he was worried about antitrust laws. Stanley Park recorded in his notes after a conspiracy meeting that "based on the DRAM companies being

sued in violation of the antitrust laws for their price fixing about two years ago, we need to pay more attention to security internally and otherwise, and must try to refrain from written communication which would leave trails."

144. Therefore, the Defendants and their co-conspirators kept their conspiracy communications strictly confidential. A Chunghwa conspiracy meeting attendee included in his Crystal Meeting notes that recipients should "keep it confidential" because the information "cannot be released to outside strictly!" An LG Display communication regarding a Crystal Meeting noted to recipients, "Do not reveal this meeting to outsiders, not even to colleagues; keep a low profile. To cultivate an atmosphere for price up." The conspirators also kept their meeting locations secret. During one Crystal Meeting, it was said that the location of the next meeting would not be disclosed until the day before, so that the Defendants would prevent the meeting information from being disseminated.

145. As alleged above, defendants had secret discussions about price and output. Defendants agreed not to publicly discuss the existence or the nature of their agreement. In fact, the top executives who attended the CEO and Commercial Crystal Meetings agreed to stagger their arrivals and departures at such meetings to avoid being seen in public with each other and with the express purpose and effect of keeping them secret. Moreover, when the participants in those meetings became fearful that they might be subject to antitrust scrutiny, they agreed to meet one-on-one for the so-called Round Robin meetings.

146. Moreover, defendants repeatedly gave pretextual justifications for the inflated prices of LCD Panels in furtherance of the conspiracy.

147. There have been a variety of other purportedly market-based explanations for price increases. The first was supply and demand. In early 1999, Omid Milani, a marketing manager for NEC, stated that "demand by far is outstripping our supply capability" and predicted that "prices will continue to increase until a reasonable balance is achieved." Bock Kwon, Vice President of LG Philips' Sales Division, and Yoon-Woo Lee, President and CEO of Samsung's Semiconductor Division, also falsely reported in 1999 that price increases were due to "acute" shortages.

148. Another false rationale provided by defendants was undercapitalization. In 1999, Joel Pollack, a marketing manager for Sharp, stated: "Prices have dropped at a steady rate over the past couple of years to the point where it was difficult to continue the necessary level of capitalization. The [low prices] have starved the industry."

149. A third rationale for the steep price hikes of 1999 was offered by Yoon-Woo Lee, CEO of Samsung. He claimed that the demand for larger panels was reducing the industry's capacity because each display used more square inches of motherglass substrate.

150. Increased demand was repeatedly cited by defendants throughout the Conspiracy Period. On February 4, 2001, Bruce Berkoff, Executive Vice-President at LG Philips was quoted in News.com as saying that price increases were due to shortages. He claimed, "demand grew so fast that the supply can't keep up." Koo Duk-Mo, an executive at LG Philips, similarly predicted in 1999 that prices would rise 10 to 15 percent due to increased demand for the holiday season. In 2005, Koo Duk-Mo of LG Philips stated "[w]e are seeing much stronger demand for large-size LCD televisions than expected, so LCD TV supply is likely to remain tight throughout the year."

151. Hsu Jen-Ting, a Vice-President at Chi Mei, and Chen Shuen-Bin, president of AU Optronics, offered another rationale for the 2001 price hike in an interview for the Taiwan Economic News in October 2001. They blamed "component shortages due to the late expansion of 5th generation production lines and new demand from the replacement of traditional cathode ray tubes with LCD monitors."

152. These explanations were all pretextual and each served to cover up the conspiracy. As a result of defendants' fraudulent concealment of their conspiracy, the running of any statute of limitations has been tolled with respect to Plaintiff's claims.

Unbeknownst to Motorola, the prices Motorola's U.S. procurement teams agreed to with U.S.-based employees at the U.S. affiliates at LCD Panel suppliers were artificially inflated as a result of the defendants' and their co-conspirators' illegal agreements to sell price-fixed LCD Panels. Defendants fixed those prices despite the fact that Motorola specified in its purchase orders for

LCD Panels that LCD Panel suppliers were required to comply with all laws and regulations in providing the LCD Panels to Motorola.

VII. EFFECT ON U.S. COMMERCE AND INJURY TO MOTOROLA

A. Defendants' Conduct Involved Import Trade Or Import Commerce

153. Defendants' illegal conduct involved U.S. import trade or import commerce. Defendants intentionally sent price-fixed LCD Panels to Motorola's foreign facilities knowing that they would subsequently be imported into the United States, one of their most important markets and a major source of their revenues. In this respect, they directed their anticompetitive conduct at imports into the United States with the intent of causing price-fixed LCD Panels to enter the United States market and inflating the prices of Motorola devices destined for the United States. Such conduct was meant to produce and did in fact produce a substantial effect in the United States in the form of higher prices being paid for such products by U.S. companies, U.S. consumers, and Motorola, Inc. itself.

154. The U.S. LCD market is enormous and was a major focus of and very important to the conspiracy. Defendants and others shipped more than 400 million LCD Panels, including those incorporated into LCD Products, into the United States during the Conspiracy Period for ultimate sale to U.S. consumers. During the Conspiracy Period, the value of LCD Panels imported into the United States was in excess of $50 billion. Defendants shipped millions of LCD Products worth billions of dollars into the United States each year during the Conspiracy Period. As a result, a substantial portion of defendants' revenues was derived from the U.S. market. Defendants spent hundreds of millions of dollars on advertising their products in the United States. Most, if not all, defendants had marketing, sales, and account management teams specifically designated to handle U.S. customer accounts and the U.S. market for LCD Panels and LCD Products. During the Conspiracy Period, every defendant shipped LCD Panels directly into the United States.

155. Because of the importance of the U.S. market to defendants and their co-conspirators, LCD Panels and LCD Products intended for importation into and ultimate

consumption in the United States were a focus of defendants' illegal conduct. The defendants knowingly and intentionally sent price-fixed LCD Panels and LCD Products into a stream of commerce that lead immediately and directly into the United States. Many LCD Panels were intended for incorporation into finished products specifically destined for sale and use in the United States. Furthermore, this conduct by defendants was meant to produce and did in fact produce a substantial effect in the United States in the form of artificially-inflated prices for LCD Panels and LCD Products.

156. When high-level executives based at defendants' Asian headquarters agreed on prices, they knew that their price-fixed LCD Panels would be incorporated into LCD Products sold in the United States. The defendants knew and intended that a significant portion of the products they sold to Motorola would be imported directly into the United States and thus would cause harm to Motorola and, ultimately, U.S. consumers. At all times, defendants were fully aware that the artificially-inflated prices they set would govern the deliveries of LCD Panels to Motorola's manufacturing facilities abroad and that a large percentage of those LCD Panels would be incorporated into Motorola devices and immediately shipped into the United States for sale and ultimate consumption in the United States. Examples of defendants' knowledge of Motorola's place in the U.S. market and significant sales here include:

- In a 2003 internal presentation, Samsung's Jason Yun reported Motorola as having the largest market share in North America, with major customers Alltel, AT&T, Cingular, Sprint, Verizon, T-Mobile and Cricket Wireless.
- In a 2004 Epson report, Fumiiyuki Funabashi of Seiko Epson's Business Development Division analyzed the North American sales forecasts for the Motorola Razr VS.
- In a July 2005 internal sales presentation, LG Display discussed a "Motorola project bound for America," with three million units for the Motorola Razr. The presentation informed the LG Display small panels sales teams that Motorola was scheduled to mass produce phones for the American market in September 2005.

- In a 2006 internal presentation, LG Display discussed the U.S.-bound Razr and the handset market demand for North America for 2006.
- In a 2006 Quarterly Business Review presentation to Motorola, Toshiba's Overseas Sales Division submitted a mobile phone market demand analysis with the number of mobile phones shipped to North America.
- In 2006, Toshiba discussed Motorola sales routes with Motorola, including the routes for the LCD Products for the U.S.

157. Specifically, defendants were aware that Motorola's facilities in Tianjin, China; Hangzhou, China; and Singapore manufactured LCD Products for the U.S. market. Therefore, when defendants delivered LCD Panels to those facilities, they knew, intended, and expected that the LCD Panels would be incorporated into Motorola devices intended to be sold in the United States.

158. Further, defendants knew that the U.S. market was Motorola's primary market for Motorola devices. Defendants also knew that Razr phones were one of Motorola's most successful products and, therefore, a large number of Razr phones manufactured by Motorola would be sold in the United States. In fact, Motorola sold 40% of its Razr phones during the Conspiracy Period in the United States. Thus, defendants knew and intended that, when they sold LCD Panels for inclusion in Razr phones, a large number of those phones would be sold in the U.S. market. In fact, defendants Epson and Sharp have both admitted to price-fixing in the United States specifically with respect to LCD Panels sold to Motorola for incorporation into Motorola Razr phones.

159. Moreover, because LCD Panels are—and were throughout the Conspiracy Period—the most expensive and significant component of LCD Products, defendants knew that price increases for LCD Panels would necessarily result in increased prices for LCD Products sold in the United States. Many defendants manufactured LCD Products and sold them in the United States. In fact, defendants routinely monitored the effect their price-fixing had on the prices of such LCD Products sold in the United States.

160. Defendants also monitored the prices for LCD Products sold in the United States, which they often referred to as "street prices," because defendants were aware that the conspiracy would elevate those prices in addition to the prices of LCD Panels. In addition, defendants used LCD Product pricing in the United States as a benchmark for establishing, organizing, and tracking their price-fixing of LCD Panels.

161. Defendants have acknowledged that their commercial activities involving intentionally sending LCD Panels and LCD Products into the United States involved American import trade and import commerce. In a series of complaints filed with the U.S. International Trade Commission over the past few years, defendants Samsung and Sharp have both alleged infringing conduct based on "[t]he importation into the United States, sale for importation into the United States, and/or sale after importation in the United States of . . . LCD devices" by the other (and by other entities on its behalf). *See In the Matter of Certain Liquid Crystal Display Devices and Products Containing the Same*, Investigation No. 337-TA-631, Complaint of Samsung Electronics Co., Ltd. (December 21, 2007) (Docket No. 2586); *In the Matter of Certain Liquid Crystal Display Modules, Products Containing Same, and Methods for Using the Same*, Investigation No. 337-TA-634, Complaint of Sharp Corporation (January 30, 2008) (Docket No. 2594); *In the Matter of Certain Liquid Crystal Display Devices and Products Containing the Same*, Investigation No. 337-TA-699, Complaint of Samsung Electronics Co., Ltd. (December 1, 2009) (Docket No. 2698).

162. Likewise, in a civil patent lawsuit brought in federal court, one Defendant acknowledged that other defendants' commercial activities involving intentionally sending LCD Panels and LCD Products into the United States involved American import trade and import commerce. In the case, defendant alleged infringing conduct on the part of the other defendants stemming from their sending infringing products into "the United States . . . through established distribution channels involving various third parties, knowing that these third parties will use their respective nationwide contacts and distribution channels to import into, sell, offer for sale, and/or use these products in . . . the United States." *See LG Philips LCD Co., Ltd. v. Chi Mei Optoelectronics Corporation, et al.*, Civil Action No. 06-726-JJF (D. Del.) (Docket No. 54) ¶¶ 6,

8. According to defendant, those distribution channels/networks are "designed to exploit the U.S. market" and are "comprised of the largest original equipment manufacturers . . . and the largest chain retail outlets in the United States." *LG Philips*, Civil Action No. 06-726-JJF (Docket No. 57) at 2.

163. Defendants who have entered guilty pleas in connection with the LCD conspiracy have acknowledged that their illegal activities impacted imports into the United States and had a substantial effect on American import trade and import commerce. Those defendants have expressly admitted that "[LCD Panels] affected by [their] conspiracy [were] sold by one or more of the conspirators to customers in [the Northern District of California]."

B. Defendants' Conduct Had A Direct, Substantial, And Reasonably Foreseeable Effect On U.S. Domestic And Import Trade Or Commerce That Gave Rise To Motorola's Antitrust Claim.

164. Defendants' illegal conduct had a direct, substantial, and reasonably foreseeable effect on U.S. domestic and import trade or commerce in the form of higher prices for LCD Panels (prices that were the product of collusion) being negotiated and agreed to between defendants and Motorola, Inc. in the United States. The prices reached, which were tainted by collusion, directly and immediately impacted Motorola's business in the United States. These same negotiations and agreements in the United States resulted in the delivery of LCD Panels to Motorola's foreign affiliates and facilities at the higher prices determined in the United States, thereby causing overcharges to be incurred and directly giving rise to antitrust claims.

165. Defendants and their co-conspirators delivered the LCD Panels and LCD Products to Motorola at prices and to locations specified in the agreements negotiated between the parties. Motorola's purchases of LCD Panels at issue in this case fall into three categories: (1) LCD Panels delivered by the Defendants to Motorola in the United States; (2) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices imported into the U.S. by Motorola and later sold by Motorola to customers in the United States; and (3) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices sold to Motorola customers abroad. Motorola is entitled to recover the overcharges incurred on

all these purchases of LCD Panels in U.S. courts, as well as on purchases made after the Conspiracy Period to the extent that defendants' and their co-conspirators' conspiracy caused a lingering artificial inflation of prices.

166. First, the defendants and their co-conspirators delivered LCD Panels directly to Motorola facilities in the United States. Motorola then incorporated those LCD Panels into LCD Products in the United States that were then sold to U.S. customers. The approximate total volume of those purchases during the conspiracy period is $61 million.

167. Second, Motorola also directed the defendants and their co-conspirators to deliver LCD Panels to Motorola's manufacturing facilities in Tianjin, China; Hangzhou, China; and Singapore for incorporation into LCD Products that were manufactured for importation and sale in the United States. The approximate total volume of those purchases during the conspiracy period is $ 1.75 billion.

168. Third, Motorola also directed the defendants and their co-conspirators to deliver LCD Panels and LCD Products to Motorola's facilities abroad for manufacture and sale in foreign markets. As alleged above, Motorola's U.S. procurement teams negotiated the prices, chose the vendors, and determined the quantities for all these purchases of LCD Panels. The approximate total volume of those purchases during the conspiracy period is $4.37 billion.

169. The purchases falling into the first two categories above are what the guilty pleas entered by defendants are premised upon. As the DOJ and defendant LG Display's counsel explained at the plea allocution of LG Display, and as this Court accepted, for purposes of determining the volume of commerce affected in assessing the criminal fine against LG Display, the DOJ considered three categories of conduct: (1) LCD sales that were directly shipped into the United States; (2) LCD sales that were directly billed to a company located in the United States; and (3) LCD sales to a company based in the United States through its foreign affiliates that ended up in finished products that were sold into the United States.

170. In fact, these are the same categories of purchases for which defendants have promised—both in their guilty pleas and during sworn allocutions before this Court at their sentencing hearings—to compensate U.S. victims of their illegal activities in related civil

actions. That promise was the reason why the U.S. government did not seek restitution for such purchases and why this Court accepted defendants' guilty pleas without requiring restitution to be paid.

171. In addition, the affected commerce at issue in defendant Epson's guilty plea appears to have been calculated using the first two categories listed above. Epson pleaded guilty specifically to fixing the prices of LCD Panels incorporated into Motorola Razr phones between the fall of 2005 and the middle of 2006. During that time period, Motorola purchased approximately $100-130 million worth of LCD Panels from Epson for delivery in the United States or for delivery abroad for inclusion in Razr phones that were then sold in the United States. The volume of affected commerce covered by Epson's plea is $110 million. Similar purchases appear to have been considered when determining the affected commerce at issue in defendant Sharp's guilty plea. Like Epson, Sharp also admitted to fixing the price of LCD Panels incorporated into Motorola Razr phones.

172. Motorola is entitled to recover all purchases falling in all three categories because the artificially inflated prices of these purchases were set in negotiations between Motorola and the defendants at Motorola's headquarters in the United States, and other locations, and were ordered by Motorola's subsidiaries at Motorola's direction.

173. Moreover, Motorola, Inc. was injured by the increased price paid for price-fixed LCD Panels that were included in Motorola devices brought into the United States for sale to U.S. companies and consumers. In fact, the entire injury caused to Motorola by defendants' price-fixing of such LCD Panels is ultimately borne in the United States by Motorola, Inc. Thus, any injury suffered as a result of the delivery of price-fixed products to Motorola's foreign affiliates or subsidiaries at prices negotiated by Motorola, Inc. in the United States for incorporation into Motorola devices sent to the United States resulted in an injury to Motorola, Inc. that was proximately caused by those very same unlawfully inflated prices.

174. Motorola was also the entity forced to pay higher prices for panels delivered by defendants and their co-conspirators to Motorola's foreign affiliates for manufacture and sale in foreign markets. In fact, the injury caused to Motorola by defendants' price-fixing of such LCD

Panels is ultimately borne by Motorola, Inc. Thus, any injury suffered as a result of the delivery of price-fixed products to Motorola's foreign affiliates or subsidiaries at prices negotiated by Motorola, Inc. in the United States for incorporation into Motorola devices sold abroad results in an injury to Motorola, Inc. that was proximately caused by those very same unlawfully inflated prices.

175. Motorola has suffered a direct, substantial, and reasonably foreseeable injury as a result of defendants' and their co-conspirators' conspiracy to raise, fix, or maintain the price of LCD Panels at artificial levels.

176. During and after the Conspiracy Period, defendants' and their co-conspirators' conspiracy artificially inflated the price of LCD Panels shipped directly to Motorola in the United States, causing Motorola to pay higher prices for LCD Panels than it would have in the absence of the conspiracy.

177. Defendants' and their co-conspirators' conspiracy also artificially inflated the price that Motorola and defendants agreed upon in the United States for LCD Panels that defendants shipped to Motorola's foreign manufacturing facilities. Because Motorola, Inc. and its foreign manufacturing facilities functioned as a single enterprise for the purposes of purchasing LCD Panels, the injury resulting from all such deliveries is ultimately suffered by Motorola, Inc. Alternatively, defendants' and their co-conspirators' conspiracy artificially inflated the price that Motorola's foreign manufacturing facilities paid for the LCD Panels, and those claims have been or are in the process of being assigned by Motorola's foreign affiliates to Motorola, Inc.

178. Because defendants' and their co-conspirators' conspiracy artificially inflated the price of these LCD Panels purchased by Motorola, the conspiracy also artificially inflated Motorola's costs for manufacturing LCD Products and diminished Motorola's ability to compete in markets for LCD Products against suppliers, including defendants LG and Samsung. As a result, Motorola suffered losses of sales and profits.

179. The conspiracy artificially inflated the prices of LCD Panels using TFT, CSTN, and MSTN technology purchased by Motorola. The conspiracy also inflated the prices of LCD

Products purchased by Motorola for use in the ordinary course of its business, such as computer monitors, laptop computers, and television sets.

180. Moreover, defendants' and their co-conspirators' conspiracy caused artificially-inflated prices for LCD Panels to be offered to Motorola's single, global procurement process based at its headquarters in Illinois, which led Motorola to pay higher prices for LCD Panels around the world that were incorporated into Motorola devices intended for sale both in the United States and abroad. Thus, Motorola's claims based on deliveries of LCD Panels both in the United States and abroad arise from the same facts and illegal practices directed at Motorola, Inc. in the United States. As a result, these claims should be heard and adjudged by this Court because they rise from the same nucleus of intertwined facts.

VIII. MARKET CONDITIONS DEMONSTRATING THE CONSPIRACY

181. Beyond the guilty pleas and the extensive evidence of the defendants' wrongdoing produced by the defendants themselves, the market for LCD Panels provides further evidence of the defendants' collusive behavior.

A. Structure Of The LCD Panel Industry.

182. The LCD Panel industry has several characteristics that facilitated a conspiracy to fix prices, including high concentration, significant barriers to entry, homogeneity of products, consolidation, multiple interrelated business relationships and ease of information sharing.

183. The LCD Panel industry is highly concentrated and thus conducive to collusion. Throughout the Conspiracy Period, defendants and their co-conspirators collectively controlled a significant share of the market for LCD Panels, both globally and in the United States.

184. The LCD industry is characterized by high barriers to entry. New fabrication plants, or "fabs," can cost upwards of $2 to $3 billion, and rapidly evolving technology and intellectual property requirements require constant research and development and investment. Thus, firms cannot enter the market for the production and sale of LCD Panels without an enormous capital investment.

185. LCD Panels, whether incorporated into mobile wireless handsets or desktop monitors, notebook computers and televisions, are manufactured to a specific size, regardless of manufacturer. The manufacture of standard panel sizes for products containing LCD Panels across the LCD Panel industry facilitates price transparency in the market for LCD Panels and enables LCD Panel manufacturers to monitor and analyze LCD Panel prices and thus enables them to enforce their conspiracy.

186. The LCD Panel industry has experienced significant consolidation during the Conspiracy Period, as reflected by:

- the 2001 creation of AU Optronics itself through the merger of Acer Display and Unipac Electronics;
- the 2002 merger of the LCD operations of Toshiba and Matsushita into one entity, defendant Toshiba Mobile Display Co., Ltd.;
- the 2004 joint venture for the production of LCD Panels for televisions by Hitachi, Toshiba, and Matsushita;
- the 2005 transfer of Fujitsu Limited's LCD business to Sharp in 2005;
- the 2006 AU Optronics acquisition of Quanta Display.

187. Additional opportunities for collusive activity are presented by the many joint ventures, cross-licenses, and other cooperative arrangements in the LCD Panel industry. Using the otherwise legitimate cover of such arrangements, defendants implemented and policed their illegitimate agreements to fix prices and limit output for LCD Panels through the numerous meetings described hereinafter.

188. There were many opportunities for defendants to discuss and exchange competitively-sensitive information through their common membership in trade associations, interrelated business arrangements such as joint ventures, allegiances between companies in certain countries, and relationships between the executives of certain companies. Communication between the conspirators was facilitated by the use of meetings, telephone calls, e-mails, and instant messages. Defendants took advantage of these opportunities to discuss and

agree upon their pricing of LCD Panels and monitor each other's compliance with their agreement.

B. Pricing In The LCD Panel Market Indicates Collusion By The Defendants.

189. Since at least 1996, the LCD Panel market has not behaved as would be expected of a competitive market free of collusion. Rather, the behavior in this market strongly evidences that defendants engaged in a significant price-fixing conspiracy that had the purpose and effect of unnaturally stabilizing and raising prices for LCD Panels at supra-competitive levels.

190. After initially being introduced into a market, consumer electronics products and their component parts typically are characterized by steady downward pricing trends. However, since at least 1996, the LCD Panel market has been characterized by unnatural price stability and certain periods of substantial upward pricing trends.

191. Moreover, since at least 1996, the LCD Panel market has not followed the basic laws of supply and demand in a competitive market. In a competitive market, price increases normally occur during shortage periods. Since at least 1996, however, there have been significant price increases in the LCD Panel market during periods of both oversupply and shortage.

192. The demand for consumer electronic products and their component parts generally increases over time. As would be expected, demand for LCD Panels and LCD Products were steadily and substantially increasing throughout the Conspiracy Period. For example, a November 2005 forecast indicated that shipments of LCD Panels for mobile wireless handsets would grow 66% from 2004 through 2005, due to increased demand for mobile wireless handsets.

193. Rather than competing for this increased demand, however, since at least 1996, defendants worked together to stabilize prices by agreeing to fix prices at artificially high levels and to restrict the supply of LCD Panels through, among other things, decreasing their capacity utilization and refraining from expanding existing capacity. Those defendants not already

manufacturing LCD Panels in 1996 joined this conspiracy when they began manufacturing LCD Panels.

194. In 1996, the LCD Panel market was experiencing excess supply and drastic price cuts. Prices had already fallen 40 to 50 percent in 1995, and were projected to continue dropping due to lower manufacturing costs. However, LCD Panel prices began rising in 1996, allegedly due to insufficient production capacity. In fact, defendants were fixing the prices.

195. LCD Panel prices began to increase in early 1996. Defendants blamed the sudden increase in prices on an alleged inability to supply enough LCD Panels to meet demand. By May 1996, an industry magazine was reporting that, "[f]lat-panel-display purchasers are riding a roller coaster of pricing in the display market, with no clear predictability anytime soon . . . . Perplexed purchasers trying to keep up with the gyrating market can take solace that even vendors are constantly being surprised by the sudden twists and turns."

196. Soon thereafter, industry analysts began commenting on the unusual rise in LCD Panel prices, noting that this rise in prices was "quite rare in the electronics industry."

197. 1996 also brought the advent of third generation fabs. Since 1996, additional generations of fabs have been built, which has resulted in at least eight generations of LCD Panel fabs. LG Electronics was scheduled to have its third generation fab online by 1997, and Hyundai was scheduled to do so by early 1998. Each new LCD Panel generation was produced from ever larger pieces of glass, so as to reduce the cost of the screens used in televisions, computer monitors, and laptops. Ever-increasing production capacity threatened to outstrip demand for LCD Panels, with the result that prices of LCD Panels should have decreased rapidly. Instead, defendants falsely claimed to be operating at full capacity and unable to meet demand, despite the millions of units of over-capacity that had supposedly existed months earlier, and prices surged upwards. These price increases were also inconsistent with the fact that production had become more efficient and cost effective.

198. The supra-competitive level price of LCD Panels during the Conspiracy Period is demonstrated by, inter alia, the fact that costs were decreasing. One of the most significant costs in producing an LCD Panel is the cost of its component parts. Some of the major component

parts for an LCD Panel include the backlight, color filter, PCB polarizer, and glass. During the Conspiracy Period, the costs of these components collectively and individually had been generally declining, and in some periods at a substantial rate. Thus, the gap between LCD Panel manufacturers' prices and their costs was unusually high during the Conspiracy Period.

199. During the end of 2001 and 2002, LCD Panel prices increased substantially while the costs to produce these panels remained flat or decreased. Similarly, during the end of 2003 to 2004, LCD Panel prices again increased by a substantial amount, while costs remained flat or decreased. This economic aberration is the intended and necessary result of defendants' conspiracy to raise, fix, maintain, or stabilize the prices of LCD Panels.

200. LCD Panel prices increased by more than 5% in October 2001. These price increases continued until June of 2002.

201. At the time, defendants blamed these price increases on supply shortages. In fact, these price increases were a direct result of defendants' agreement to fix, maintain, and/or stabilize the prices of LCD Panels and defendants' false statements about supply shortages were designed to conceal their price-fixing agreement. When asked why prices had increased, defendants repeatedly asserted that increases in LCD prices were due to increased demand and a "supply shortage."

202. These price increases occurred as production costs declined due to lower prices for parts and components as well as improvements in manufacturing efficiency. These decreasing costs should have led to lower prices and competition among defendants. Instead, because defendants had entered into an agreement to fix, raise, and maintain the prices for LCD Panels at artificially high levels, it resulted in extremely high profits. For example, defendants AU Optronics Inc., Chi Mei Optoelectronics Corp., Chunghwa Picture Tubes Ltd., and HannStar Display Inc., posted higher pretax profits than expected in the first quarter of 2002. AU Optronics reported revenue of NT$19.7 billion in the first quarter, with pretax profit reaching about NT$2 billion. Chi Mei Optoelectronics reported pretax earnings of NT$800 million on revenue of about NT$8.8 billion at the same period.

203. This increase in prices and revenue was unprecedented. During the first six months of 2002, revenue for Taiwan's five major LCD Panel manufacturers (defendants AU Optronics, Chi Mei, Chunghwa Picture Tubes Ltd., HannStar Display Inc., and Quanta Display Inc., later purchased by AU Optronics) rose 184% from the same period in 2001.

204. The market structure of the LCD Panel market demonstrates collusion on TFT-LCD Panels and STN-LCD Panels. At certain points during and after the Conspiracy Period, for certain applications in LCD Panel Products, TFT-LCD Panels and STN-LCD Panels were substitutes for each other. For example, beginning in 2000, TFT-LCD Panels and CSTN panels were both purchased in significant quantities for similar uses—i.e., display purposes—in mobile wireless handsets and other LCD Products that included small displays. At other times during the Conspiracy Period, TFT-LCD Panels and CSTN panels were both purchased in significant quantities for use in notebook PCs.

205. Purchasers of LCD Panels often switched their purchases from TFT-LCD Panels to STN-LCD Panels in response to changes in the relative prices of TFT-LCD Panels and STN-LCD Panels. For example, in 2006, Motorola informed Toshiba that it was switching from a TFT-LCD panel to a CSTN-LCD Panel because the price of TFT-LCD panels was too high. Toshiba employees noted that other mobile wireless handset vendors had behaved similarly with respect to certain handset programs.

206. Because TFT-LCD Panels and STN-LCD Panels were substitutes, and purchasers of LCD panels switched purchases between the two technologies, from at least 2001 through 2006, the price per square inch of TFT-LCD Panels and CSTN-LCD panels tracked very closely, as seen in the chart below:

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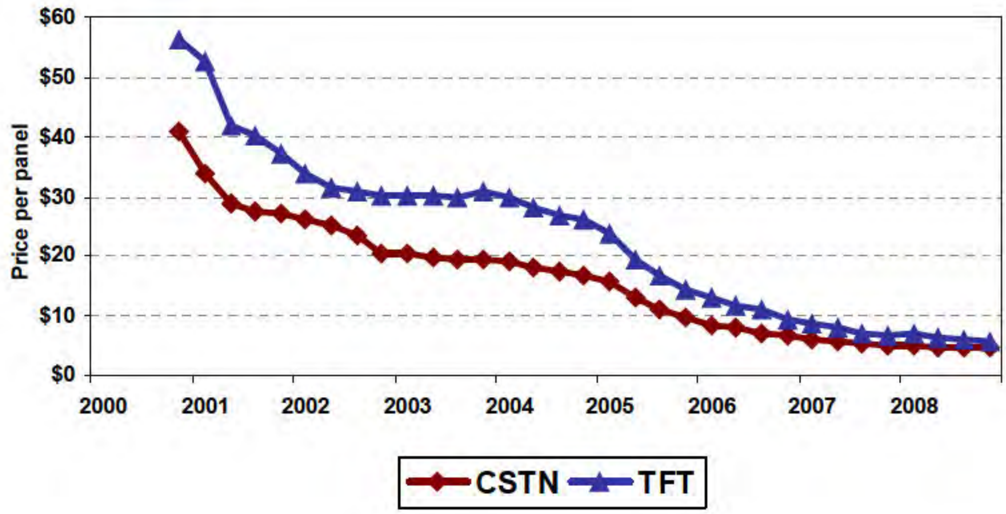

207. Defendants understood that they could profitably raise prices of STN-LCD Panels in response to increases in TFT-LCD Panel prices. For example, in a 1999 internal Sharp email, Sharp's Takeuchi Tomohito justified an increase in STN-LCD Panels sold to Apple because "LCD market price is going up as seen in TFT price" and "[Sharp] would like to improve the profit."

208. Because TFT-LCD Panels and STN-LCD Panels were close substitutes for certain LCD Products, and because defendants collectively controlled a significant share of the market for LCD panels, both globally and in the United States, defendants had the incentive and ability to inflate the prices STN-LCD Panels as well as TFT-LCD Panels. The conspiracy's success in inflating TFT-LCD Panel prices also inflated STN-LCD prices, and vice versa.

IX. <u>VIOLATIONS ALLEGED</u>

<u>FIRST CLAIM FOR RELIEF AGAINST ALL DEFENDANTS:</u>

<u>VIOLATION OF SHERMAN ACT</u>

209. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

210. Beginning at a time presently unknown to Motorola, but at least as early as January 1, 1996 and continuing through at least December 11, 2006, the exact dates being unknown to Motorola, defendants and their co-conspirators entered into a continuing agreement, understanding, and conspiracy in restraint of trade to artificially raise, fix, maintain, and/or

stabilize prices for LCD Panels in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

211. In formulating and carrying out the alleged agreement, understanding, and conspiracy, defendants and their co-conspirators did those things that they combined and conspired to do, including but not limited to the acts, practices, and course of conduct set forth above, and the following, among others:

A. To fix, raise, maintain and stabilize the price of LCD Panels;

B. To allocate markets for LCD Panels among themselves;

C. To submit rigged bids for the award and performance of certain LCD Panels contracts; and

D. To allocate among themselves the production of LCD Panels.

212. The combination and conspiracy alleged herein has had the following effects, among others:

A. Price competition in the sale of LCD Panels has been restrained, suppressed, and/or eliminated in the United States;

B. Prices for LCD Panels sold by defendants, their co-conspirators, and others have been fixed, raised, maintained and stabilized at artificially high, supra-competitive levels throughout the United States; and

C. Those who purchased LCD Panels produced by defendants, their co-conspirators, and others have been deprived of the benefits of free and open competition.

213. Motorola has been injured in its business and property by paying more for LCD Panels purchased from defendants, their co-conspirators, and others than it would have paid and will pay in the absence of the combination and conspiracy.

214. Defendants' and their co-conspirators' conduct involved U.S. import trade or commerce and/or had a direct, substantial, and reasonably foreseeable effect on U.S. domestic and import trade or commerce that resulted in the injuries suffered by Motorola and gave rise to Motorola's antitrust claims. As a result, Motorola has suffered injury as a direct, proximate and

reasonably foreseeable result of defendants' conspiracy to fix the price of LCD Panels. Motorola has been injured and will continue to be injured in its business and property by paying more for LCD Panels purchased from defendants, their co-conspirators, and others than it would have paid and will pay in the absence of the combination and conspiracy.

215. Because Motorola has suffered injury as a direct, proximate and foreseeable result of defendants' conspiracy to fix the price of LCD Panels, Motorola is entitled to damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for its purchases of LCD Panels produced by defendants, their co-conspirators, and others.

216. Because Motorola faces a serious risk of future injury, Motorola is entitled to an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, against all defendants, preventing and restraining the violations alleged herein. Defendants all continue to manufacture LCD Panels, and the market for production and sale of LCD Panels remains highly concentrated and susceptible to collusion. Defendants continue to have the incentive to collude to increase LCD Panel prices or stabilize LCD Panel price declines, and defendants' conspiracy to fix the price of LCD Panels could be easily repeated and concealed from Motorola.

SECOND CLAIM FOR RELIEF AGAINST ALL DEFENDANTS: VIOLATION OF ILLINOIS ANTITRUST ACT

217. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

218. Motorola believes and asserts that all of its purchases of LCD Panels and Products are actionable pursuant to the federal antitrust laws as alleged in the First and Second Claims For Relief. For its indirect purchases of LCD Products not actionable under the federal antitrust laws, Motorola alleges this Third Claim for Relief under the Illinois Antitrust Act.

219. During and after the Conspiracy Period, Motorola purchased LCD Panels and LCD Products from Illinois. During that same period, it conducted a substantial volume of business in Illinois, including selling in Illinois mobile wireless handsets and other LCD Products that contained LCD Panels manufactured and sold by defendants and others. Motorola also maintained inventories of LCD Products in Illinois and maintained offices in Illinois. As a

result of its presence in Illinois and the substantial business it conducts in Illinois, Motorola is entitled to the protection of the laws of Illinois.

220. Beginning at a time presently unknown to Motorola but at least as early as January 1, 1996, and continuing thereafter at least up to and including at least December 11, 2006, defendants and their co-conspirators entered into and engaged in a continuing conspiracy for the unreasonable restraint of trade or commerce, in violation of the Illinois Antitrust Law.

221. The aforesaid violations of the Illinois Antitrust Law consisted, without limitation, of a continuing unlawful conspiracy among defendants and their co-conspirators, the substantial terms of which were to fix, control and maintain the prices of, and to allocate markets for, LCD Panels.

222. For the purpose of forming and effectuating the unlawful conspiracy, the defendants and their co-conspirators have done those things which they combined and conspired to do, including but in no way limited to the acts, practices and course of conduct set forth above and the following:

A. to fix, raise, maintain and stabilize the price of LCD Panels;

B. to allocate markets for LCD Panels amongst themselves;

C. to submit rigged bids for the award and performance of certain LCD Panels contracts; and

D. to allocate among themselves the production of LCD Panels.

223. The combination and conspiracy alleged herein has had, *inter alia*, the following effects:

A. price competition in the sale of LCD Panels has been restrained, suppressed and/or eliminated in the State of Illinois and throughout the United States;

B. prices for LCD Panels have been fixed, raised, maintained and stabilized at artificially high, non-competitive levels in the State of Illinois and throughout the United States; and

C. those who purchased LCD Panels have been deprived of the benefit of free and open competition.

D. As a direct and proximate result of defendants' conduct, Motorola has been injured in its business and property by paying more for LCD Panels and LCD Products than they would have paid in the absence of defendants' combination and conspiracy. As a result of defendants' violation of the Illinois Antitrust Law, Motorola is entitled to damages and the costs of suit, including reasonable attorneys' fees.

THIRD CLAIM FOR RELIEF AGAINST SHARP:

BREACH OF CONTRACT

224. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

225. During and after the Conspiracy Period, Motorola and Sharp entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Sharp agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Sharp a price negotiated by Motorola and Sharp. These contracts between Motorola and Sharp include purchase orders issued by Motorola to Sharp.

226. Pursuant to these contracts, Sharp agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards.

227. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Sharp. Motorola paid Sharp for all LCD Panels and/or LCD Products delivered to Motorola by Sharp.

228. As set forth in the above allegations, Sharp did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Sharp repeatedly breached Sharp's contracts with Motorola.

229. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Sharp breached its covenant of good faith and fair dealing by depriving Motorola of

the benefits to which it was entitled under the contract, and Sharp did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

230. Due to the acts of Sharp, and as a direct result of Sharp's breaches of Sharp's contracts, Motorola suffered damages. Motorola is entitled to damages for Sharp's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Sharp over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

FOURTH CLAIM FOR RELIEF AGAINST SHARP:

UNJUST ENRICHMENT

231. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

232. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Sharp at what it believed were competitive prices. Motorola paid Sharp for all LCD Panels and/or LCD Products delivered to Motorola by Sharp.

233. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

234. Sharp was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Sharp's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Sharp should be required to disgorge the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

FIFTH CLAIM FOR RELIEF AGAINST EPSON:

BREACH OF CONTRACT

235. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

236. During and after the Conspiracy Period, Motorola and Epson entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Epson agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Epson a price negotiated by Motorola and Epson. These contracts between Motorola and Epson include purchase orders issued by Motorola to Epson.

237. Pursuant to these contracts, Epson agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

238. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Epson. Motorola paid Epson for all LCD Panels and/or LCD Products delivered to Motorola by Epson.

239. As set forth in the above allegations, Epson did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Epson repeatedly breached Epson's contracts with Motorola.

240. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Epson breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Epson did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

241. Due to the acts of Epson, and as a direct result of Epson's breaches of Epson's contracts, Motorola suffered damages. Motorola is entitled to damages for Epson's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from

Epson over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

SIXTH CLAIM FOR RELIEF AGAINST EPSON:

UNJUST ENRICHMENT

242. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

243. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Epson at what it believed were competitive prices. Motorola paid Epson for all LCD Panels and/or LCD Products delivered to Motorola by Epson.

244. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

245. Epson was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Epson's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Epson should be required to disgorge the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

SEVENTH CLAIM FOR RELIEF AGAINST TOSHIBA:

BREACH OF CONTRACT

246. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

247. During and after the Conspiracy Period, Motorola and Toshiba entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Toshiba agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Toshiba a

price negotiated by Motorola and Toshiba. These contracts between Motorola and Toshiba include purchase orders issued by Motorola to Toshiba.

248. Pursuant to each of these contracts, Toshiba agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

249. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Toshiba. Motorola paid Toshiba for all LCD Panels and/or LCD Products delivered to Motorola by Toshiba.

250. As set forth in the above allegations, Toshiba did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Toshiba repeatedly breached Toshiba's contracts with Motorola.

251. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Toshiba breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Toshiba did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

252. Due to the acts of Toshiba, and as a direct result of Toshiba's breaches of Toshiba's contracts, Motorola suffered damages. Motorola is entitled to damages for Toshiba's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Toshiba over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

EIGHTH CLAIM FOR RELIEF AGAINST TOSHIBA: UNJUST ENRICHMENT

253. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

254. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Toshiba at what it believed were competitive prices. Motorola paid Toshiba for all LCD Panels and/or LCD Products delivered to Motorola by Toshiba.

255. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

256. Toshiba was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Toshiba's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Toshiba should be required to disgorge the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

NINTH CLAIM FOR RELIEF AGAINST SAMSUNG: BREACH OF CONTRACT

257. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

258. During and after the Conspiracy Period, Motorola and Samsung entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Samsung agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Samsung a price negotiated by Motorola and Samsung. These contracts between Motorola and Samsung include purchase orders issued by Motorola to Samsung.

259. Pursuant to each of these contracts, Samsung agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all

applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

260. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Samsung. Motorola paid Samsung for all LCD Panels and/or LCD Products delivered to Motorola by Samsung.

261. As set forth in the above allegations, Samsung did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Samsung repeatedly breached Samsung's contracts with Motorola.

262. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Samsung breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Samsung did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

263. Due to the acts of Samsung, and as a direct result of Samsung's breaches of Samsung's contracts, Motorola suffered damages. Motorola is entitled to damages for Samsung's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Samsung over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

TENTH CLAIM FOR RELIEF AGAINST SAMSUNG:
UNJUST ENRICHMENT

264. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

265. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Samsung at what it believed were competitive prices. Motorola paid Samsung for all LCD Panels and/or LCD Products delivered to Motorola by Samsung.

266. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to

fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

267. Samsung was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Samsung's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Samsung should be required to disgorge the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

ELEVENTH CLAIM FOR RELIEF AGAINST AU OPTRONICS: BREACH OF CONTRACT

268. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

269. During and after the Conspiracy Period, Motorola and AU Optronics entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which AU Optronics agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay AU Optronics a price negotiated by Motorola and AU Optronics. These contracts between Motorola and AU Optronics include purchase orders issued by Motorola to AU Optronics.

270. Pursuant to each of these contracts, AU Optronics agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

271. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with AU Optronics. Motorola paid AU Optronics for all LCD Panels and/or LCD Products delivered to Motorola by AU Optronics.

272. As set forth in the above allegations, AU Optronics did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable

laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, AU Optronics repeatedly breached AU Optronics' contracts with Motorola.

273. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, AU Optronics breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and AU Optronics did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

274. Due to the acts of AU Optronics, and as a direct result of AU Optronics' breaches of AU Optronics' contracts, Motorola suffered damages. Motorola is entitled to damages for AU Optronics' breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from AU Optronics over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

TWELFTH CLAIM FOR RELIEF AGAINST AU OPTRONICS: UNJUST ENRICHMENT

275. Motorola incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

276. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from AU Optronics at what it believed were competitive prices. Motorola paid AU Optronics for all LCD Panels and/or LCD Products delivered to Motorola by AU Optronics.

277. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

278. AU Optronics was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. AU Optronics' retention of these monies violates the fundamental principles of justice, equity, and good conscience. AU Optronics should be required to disgorge the amount of that unjust enrichment at least in the

amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

X. PRAYER FOR RELIEF

WHEREFORE, Motorola requests:

A. That the unlawful agreement, conduct, contract, conspiracy or combination alleged herein be adjudged and decreed to be:

i. A restraint of trade or commerce in violation of Section 1 of the Sherman Act, as alleged in the First Claim for Relief; and

ii. An unreasonable restraint of trade or commerce in violation of the Illinois Antitrust Act, as alleged in the Second Claim for relief.

B. That Motorola recover damages, as provided by federal and state antitrust laws, and that a judgment be entered in favor of Motorola against defendants, jointly and severally, in an amount to be trebled in accordance with such laws;

C. That Motorola obtain any penalties, punitive or exemplary damages, and/or full consideration, where the laws of the respective states identified herein so permit;

D. That Motorola recover damages and/or all other available monetary and equitable remedies under the state unfair competition laws identified above;

E. That Motorola recover damages and/or all other available monetary and equitable remedies pursuant to its claims for breach of contract and unjust enrichment;

F. That defendants, their affiliates, successors, transferees, assignees, and the officers, directors, partners, agents, and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined and restrained from in any manner continuing, maintaining, or renewing the conduct, contract, conspiracy or combination alleged herein, or from entering into any other conspiracy or combination having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect;

G. That Motorola be awarded pre- and post-judgment interest, and that such interest be awarded at the highest legal rate from and after the date of service of the initial complaint in this action;

H. That Motorola recover its costs and disbursements of this suit, including reasonable attorneys' fees as provided by law; and,

I. That Motorola be awarded such other, further, and different relief as the case may require and the Court may deem just and proper under the circumstances.

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JURY TRIAL DEMAND

Pursuant to Federal Rules of Civil Procedure Rule 38(b), Motorola demands a trial by jury for all issues so triable.

Dated: July 23, 2010

Respectfully submitted,

/s/ Jason C. Murray

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EXHIBIT 4

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: *Motorola, Inc. v. AU Optronics Corporation, et al., C 3:09-05840 SI*	Case No. M 07-1827 SI MDL No. 1827 **PLAINTIFF MOTOROLA, INC.'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(b)(1) AND FED. R. CIV. P. 12(b)(6)** Date: November 3, 2010 Time: 9:00 a.m. Crtrm.: 10, 19th Floor Judge: Honorable Susan Illston

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Defendants seek to dismiss most of Plaintiff Motorola, Inc.'s ("Motorola") Second Amended Complaint ("SAC") on the theory that such claims are barred by the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA"). They also seek dismissal of Motorola's breach of contract claims. Their arguments are without merit.

INTRODUCTION

By order of June 28, 2010, the Court dismissed portions of Motorola's claims as pleaded in the First Amended Complaint, including those involving delivery of price-fixed LCD panels to Motorola subsidiaries abroad for incorporation into devices that Motorola imported into the United States. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, Case No. 07-1827, 2010 WL 2610641, at *7 (N.D. Cal. Jun. 28, 2010) (Docket No. 1822) (the "Order").

As the Court is undoubtedly aware, in pressing their theory that the FTAIA here limits Sherman Act jurisdiction with respect to consumer products imported into the United States, Defendants ask the Court to break new precedential ground, with significant implications for Motorola's claims and more broadly. For most consumer electronics sold in the United States, manufacturing takes place abroad. Therefore, the initial delivery of price-fixed components for importation to the United States takes place abroad as well.

Here, for example, during the conspiracy period, Motorola bought from Defendants approximately $61 million in LCD panels that were delivered directly to the United States. In contrast, it bought more than $1.75 billion in LCD panels for initial delivery to its subsidiaries abroad for incorporation in Motorola devices imported to the United States.[1] Defendants' proposed approach (and this Court's earlier Order addressed to the prior version of Motorola's complaint) would allow Sherman Act relief based on the $61 million of LCD panel purchases. But it would bar recovery with respect to the $1.75 billion in deliveries abroad for import to the United States as being beyond the jurisdictional reach of the Sherman Act. It would bar that recovery notwithstanding that the entire burden of Defendants' overpricing in connection with

[1] In addition, Motorola purchased approximately $4.37 billion in LCD panels for delivery to its subsidiaries abroad for incorporation in Motorola devices sold abroad. Whether those purchases are actionable in this Court is discussed in Section I.E. below.

those imports is ultimately borne in the United States. In the current global economy, where most manufacturing of electronic devices takes place outside the United States, such a ruling would cut a wide swath through private antitrust enforcement, leaving U.S. businesses and consumers without a remedy in many instances, and cartelists, who purposely caused injury in the United States, firmly in possession of their ill-gotten gains.

In light of the Court's Order, Motorola renewed its investigation of the facts and law and on July 23, 2010 filed the SAC, alleging, *inter alia*, that:

(1) Defendants and Motorola negotiated and agreed to prices for LCD panels in the United States;

(2) Defendants engaged in price discussions with their competitors in the United States and used U.S. affiliates and employees to direct their illegal conduct at Motorola in the United States, which led to Motorola unwittingly agreeing, in the United States, to pay artificially-inflated prices for LCD panels;

(3) the artificially-inflated prices Motorola agreed to in the United States applied to deliveries of LCD panels to Motorola manufacturing facilities around the world, both in the United States and abroad, including where such LCD panels were incorporated into finished products imported, and sold, in the United States;

(4) Motorola's foreign subsidiaries requested delivery of LCD panels at the direction of Motorola, at the artificially-inflated prices negotiated by Motorola, from specific vendors and at the quantity determined by Motorola, all in the United States;

(5) in requesting deliveries of LCD panels in such a manner, the foreign subsidiaries acted as Motorola's agents in procuring LCD panels and as part of a single enterprise with Motorola, and, as a result, Motorola bore the ultimate financial injury; and

(6) when Defendants delivered LCD panels requested by Motorola's foreign manufacturing facilities at the artificially-inflated prices set with Motorola in the United States, they did so knowing and intending that certain of those LCD panels would be incorporated into finished devices sold in the United States that were, in fact, imported into the United States.

As shown below, these allegations demonstrate that the conduct at issue had a "direct,

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substantial, and reasonably foreseeable effect" on both (a) "[domestic] trade or commerce" and (b) "import trade or import commerce," and those effects "give rise to" Motorola's claims. 15 U.S.C. § 6a. Motorola reached agreement to pay the artificially-inflated price and made all purchasing decisions, and deliveries were made to Motorola's subsidiaries abroad for importation into, and ultimate sale in, the United States. In such instances, no intervening actor or events broke the chain of proximate causation between the "effect" and the "claim."

Moreover, these facts establish that Motorola's foreign manufacturing facilities acted as a single enterprise with Motorola in the procurement of LCD panels. They also show why the reasons for rejecting that conclusion in the *Sun* cases are <u>not</u> present here.[2] In contrast to the *Sun* cases, Motorola determined not only the price at which its foreign manufacturing facilities would request deliveries of price-fixed LCD panels, but also directed the entire manufacturing schedule, including the quantity and timing of deliveries, as well as where those facilities would send finished Motorola devices after assembly was complete. Unlike the foreign facilities in the *Sun* cases, which could sell finished products abroad at their own discretion, Motorola itself directed the U.S. sale of Motorola devices assembled by its foreign subsidiaries. Thus, on any economic basis, and surely with respect to LCD panels imported into, and sold in, the United States, Motorola operated *vis a vis* its foreign manufacturing facilities as a single enterprise.

In detail below, Motorola addresses these facts in light of the legal analysis prescribed by the Supreme Court in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ("*Empagran*"). In *Empagran*, the Supreme Court addressed whether a wholly foreign plaintiff, with "only foreign injury," "independent" of *any* U.S. harm or impact, could bring a claim under the Sherman Act, as limited by the FTAIA. *See id*. at 158-59. The Supreme Court first looked to the language of the FTAIA. *See id*. at 161-63. Finding no clear answer there, it next looked to the purposes underlying the statute and principles of prescriptive comity that have long guided U.S. courts in applying U.S. antitrust law to claims with some foreign component. *See id*. at

[2] The "*Sun* cases" refer to: (1) *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007) ("*Sun II*"); and (2) *Sun Microsystems, Inc. v. Hynix Semicondutor, Inc.*, 608 F. Supp 2d 1166, 1189 (N.D. Cal. 2009) ("*Sun III*").

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163-70. The Supreme Court thus set forth the paradigm – language, purpose, prescriptive comity – to follow when answering questions about the scope of the FTAIA. Application of that analysis has significance in applying both: (a) the exceptions set forth in § 1(A) of the FTAIA for conduct producing "direct, substantial, and reasonably foreseeable effects" on either "[domestic] trade or commerce" <u>or</u> "import trade or import commerce," and (b) the exemption in the opening sentence of the FTAIA for "conduct involving . . . import trade or import commerce." It is useful to summarize these points at the outset:

<u>Language</u>. These three exclusions apply by the plain language of the FTAIA. For the exceptions set forth in § 1(A), the FTAIA asks whether there has been a direct effect on *either* "[domestic] trade or commerce" *or* "import trade or import commerce," and whether that effect "*gives rise to a claim*." 15 U.S.C. § 6a (emphasis added). Here, the sale of LCD panels for import to the United States clearly has a direct effect on "import trade or import commerce," namely that it was intended to and did affect the price of goods imported to the United States. It also had a direct effect on "[domestic] trade or commerce" because establishment of an artificially-inflated price with Motorola in the United States is a recognized domestic effect. And whichever effect is chosen, each "gives rise to a claim" because that effect is actionable and harmful in precisely the way the Sherman Act is designed to guard against. There are no independent, intervening actors or events that break the chain of proximate causation to somehow limit Defendants' responsibility for the injury – an injury Defendants knew and intended to occur in both import and domestic commerce. As for the FTAIA's exemption for "conduct involving . . . import trade or import commerce," the language used encompasses more than just the physical act of importing; it reaches sale for import as well.

<u>Purpose</u>. Applying each of these three exclusions to Motorola's claims is consistent with the FTAIA's basic purposes. With respect to the *purposes*, there is no dispute that Congress was primarily concerned with eliminating Sherman Act liability for U.S. firms that, through their anticompetitive conduct, injure *only* consumers and businesses abroad. Conduct that causes *only* foreign injury is, as a general matter, not subject to the Sherman Act. As the Supreme Court explained in *Empagran*, "[t]he FTAIA seeks to make clear to American exporters and to firms

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doing business abroad that the Sherman Act does not prevent them from entering into business arrangements . . . however anti-competitive as long as those arrangements adversely affect *only* foreign markets." *See id*. at 161 (emphasis added).[3]

The decisive point in this case, however, is the converse: In enacting the FTAIA, Congress did not, *in any way*, seek to limit the Sherman Act's historic protection of U.S. markets, businesses, and consumers. There is no hint or suggestion in the language or legislative history of the FTAIA that Congress intended – or even would have tolerated – such a result. The United States has a fundamental interest in applying its laws to transactions that are intended to, and do, injure U.S. markets, businesses, and consumers. This understanding is reflected in each of the exclusions set forth in the FTAIA.

With respect to products for import to the United States, *two* exclusions are facially applicable: (1) the exception for effects on "import trade or import commerce;" and (2) the exemption for "conduct involving . . . import trade or commerce." Both are based on a simple, self-evident proposition: Anti-competitive conduct involving imports "*invariably*" impacts U.S. markets, businesses, and consumers.[4] Congress sought to make certain that the FTAIA would not impinge on the Sherman Act's historic protection of U.S. markets, businesses, and consumers where such protection is most manifestly required, namely, where illegal conduct involves the sale of price-fixed goods for import into the United States. With these broad exclusions, Congress ensured that there would be ready remedies for, and a strong deterrent against, illegal conduct involving importation into the United States and, thus, harm in the United States. And, with these exclusions, it did so without undermining the FTAIA's main goal of limiting Sherman Act liability for injury solely to foreign markets.

The third exclusion, applicable to conduct with a "direct, substantial, and reasonably

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[3] *See also* 128 Cong. Rec. H4983 (daily ed. Aug. 3, 1982) (statement of Rep. McClory) ("We are trying in [the FTAIA] to set forth clearly and deliberately that we want to encourage exports by granting an exemption from the antitrust laws for those activities whose effects are felt *exclusively* abroad.") (emphasis added).

[4] *See* 128 Cong. Rec. H4981-82 (daily ed. Aug. 3, 1982) (statement of Rep. McClory) (emphasis added). (The FTAIA "does not address our domestic trade nor, for that matter, our import trade since imports *invariably* have an impact on our domestic trade.") (emphasis added).

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foreseeable effect" on "[domestic] trade or commerce," reflects similar Congressional objectives: Anti-competitive conduct that has a domestic effect is plainly a matter of U.S. concern.[5]

Comity. The continued application of the Sherman Act to anticompetitive conduct affecting goods destined for the United States is consistent with basic principles of prescriptive comity and the historic reach of the Sherman Act itself. The United States has a dominant interest in ensuring that those who sell price-fixed goods for import into the United States, with the intent to cheat U.S. businesses and consumers by depriving them of a competitive price, are subject to U.S. antitrust law. The Sherman Act has long been understood to cover conduct intended to cause harm in the United States, if it indeed caused such harm. Conversely, foreign governments have little interest in acting vigorously to protect U.S. businesses and U.S. consumers from such harm, particularly if much of the unlawful conduct also took place in the United States.

In fact, the FTAIA itself tells us that Congress could not plausibly have wanted to disavow U.S. antitrust jurisdiction over claims and conduct of the kind at issue here, thereby leaving such conduct to be regulated solely by foreign governments. With the passage of the FTAIA, Congress made clear that the United States itself has little interest in using its antitrust laws to protect *foreign* markets, businesses, and consumers from the anticompetitive practices of U.S. companies. *See Empagran*, 542 U.S. at 161. If *foreign* governments were to show a mirror-image lack of interest in using their laws to protect *U.S.* markets, businesses, and consumers from the anticompetitive practices of foreign companies, they too would be refraining from regulating or creating remedies for such conduct. Thus, if Defendants' theory on the scope of the FTAIA were accepted, there would be no remedy against foreign businesses that price-fix abroad with the specific intent of injuring U.S. markets, businesses, and consumers. So long as

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[5] The FTAIA's fourth exclusion – for "export trade or export commerce" (to the extent it involves injury to U.S. export business – is not relevant here. But the full collection of exclusions leaves no doubt that Congress intended to be *comprehensive* in ensuring that the FTAIA would not limit Sherman Act protection for U.S. markets, businesses, and consumers. Yet Defendants' motion argues the opposite – that they (and other cartelists) should be allowed to engage in price-fixing, with a dramatic and intended effect on U.S. commerce, with no fear that their victims will have recourse under the Sherman Act (or, as noted below, foreign law).

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those foreign businesses did not "directly" import their price-fixed goods into the United States, there would be a very real risk that *no law*, U.S. or foreign, would stand in their way. It is impossible to believe that Congress willingly disclaimed the United States' authority to regulate anticompetitive practices in such circumstances.

Consequences. In today's world, global supply chains leading to U.S. sales are the norm, not the exception. Thus, if this Court were to conclude that, under the circumstances of this case, it lacks subject matter jurisdiction over foreign deliveries of price-fixed products destined for the United States, the ability to successfully pursue antitrust claims impacting U.S. businesses and consumers in many industries would be significantly impacted. Indeed, it would also create needless tension with, and potentially undermine, well-accepted principles of antitrust enforcement in the United States, including criminal enforcement.

For example, in negotiating the volume of directly affected U.S. commerce in its plea agreements, the U.S. Department of Justice ("DOJ") takes the position that transactions like those at issue here are, in fact, subject to the Sherman Act. The fines that it levies on foreign cartelists includes: (1) sales to a U.S. company; (2) sales invoiced to a U.S. company (even where the products are delivered abroad); and (3) *sales billed or invoiced to the foreign affiliate of a U.S.-based company where finished products containing the price-fixed goods are imported into the United States*.[6] Under Defendants' proposed rule, U.S. courts would potentially have jurisdiction only over the first category of sales; the other two would fall outside the Sherman Act's reach. And even if the DOJ could preserve criminal Sherman Act jurisdiction over such sales (in the face of a ruling that such sales are beyond Sherman Act jurisdiction for civil liability), it will have lost a powerful incentive for pushing cartelists to turn to the amnesty program and report on anticompetitive activity: If foreign cartelists are not realistically subject to civil damages for deliveries of price-fixed products occurring initially abroad, then the fear of treble damages and a desire to minimize their impact through amnesty is significantly reduced.

[6] *See* Transcript of Hearing, *United States v. LG Display Company, et al.*, Case No. 08-cr-803 (N.D. Cal. Dec. 15, 2008) at 32-36 (Docket No. 1701).

Indeed, the powerful *deterrent* effect of treble damages is significantly reduced if foreign cartelists can evade private enforcement, even for conduct in the United States, so long as their initial deliveries will be to companies operating abroad.

Additionally, in agreeing on criminal pleas, it is the practice of the DOJ to disclaim its obligation to seek restitution from pleading defendants in light of the private remedies available to injured U.S. businesses and consumers under the Sherman Act. That happened here. But under Defendants' theory, those private remedies would now be all but eliminated, and the DOJ's rationale for disclaiming restitution would be rendered illusory.[7]

The way that Motorola structures and locates its manufacturing operations in today's global supply economy is typical of the consumer electronics industry (and itself the product of competitive pressure). Thus, this Court's ruling would have broad implications for the direct purchaser class action claims in this case (and in many other cases) as well. If accepted by this Court, the effect Defendants' argument would have on Motorola's claims illustrates how it would also undermine private antitrust enforcement in the United States, all to the benefit of international cartels that intentionally victimize U.S. markets, businesses, and consumers.

And so too, it would have equally broad implications for U.S. consumers. A consumer purchasing a Motorola device does not know if it is the one in twenty manufactured in the United States, or one of the 19 in 20 made abroad. Yet, under Defendants' theory, only the purchaser of the device made in the United States deserves Sherman Act protection. Indeed, if Defendants have their way, and the ruling they suggest under the FTAIA is extended to state antitrust laws, only those U.S. consumers that can identify their products as having been manufactured in the

[7] The plea agreements of Defendants Sharp and Epson specifically identify Motorola as a victim of the conspiracy, but provide:

> In light of the civil class action cases filed against the defendants, . . . in the United States District Court, Northern District of California, which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offenses charged in the Information.

See Plea Agreement, *United States v. Sharp Corporation*, Case No. 08-cr-802-SI (N.D. Cal. Dec. 8, 2008) (Docket No. 9) at ¶ 12; Plea Agreement, *United States v. Epson Imaging Devices Corporation*, Case No. 09-cr-854-SI (N.D. Cal. Oct. 9, 2009) (Docket No. 7) at ¶ 12.

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United States can maintain a claim against Defendants.[8] Such a rule would have broad implications for the consumer class this Court already certified.

Given that there is no reason to believe that Congress ever intended the FTAIA to limit the protections the Sherman Act affords to U.S. markets, businesses, and consumers, the interpretation of the FTAIA proposed by Defendants, which provides foreign cartelists with an astonishing windfall at the expense of their victims, should be rejected.

STATEMENT OF FACTS

A. Motorola's LCD Panel Purchases.

Motorola, Inc., a U.S. company based in Schaumburg, Illinois, manufactures products containing LCD panels, such as mobile wireless handsets and two-way radios ("Motorola devices"). SAC ¶¶ 1, 24. It brings this case on behalf of itself and its foreign manufacturing facilities that requested deliveries of LCD panels at prices negotiated and set with Defendants in the United States and at quantities determined in the United States. *Id.* ¶¶ 25-27.

1. Motorola's Global Manufacturing Operations.

During the Conspiracy Period, Motorola devices were manufactured at Motorola facilities in the United States, China, Singapore, Germany, Ireland, Brazil, Mexico, and the United Kingdom. *Id.* ¶¶ 25-26. With some exceptions, Motorola's facilities in Germany, Ireland, Brazil, Mexico, and the United Kingdom manufactured Motorola devices for sale outside the United States. *Id.* ¶ 26. Motorola's U.S. facilities and facilities in China and Singapore made Motorola mobile wireless devices destined for the U.S. market. *Id.* ¶ 26. And a substantial portion of that production was specifically for U.S. import and sale to Motorola, Inc.'s large U.S. customers, including AT&T, Sprint, Verizon, and T-Mobile. *Id.* Separate

[8] For example, two customers walk into a Best Buy store to purchase a Motorola Razr phone. Only two remain. The first, containing a price-fixed Samsung LCD panel, happened to have been manufactured at Motorola's facility in China before being shipped to the United States for resale. The second, with an identical price-fixed Samsung LCD panel, happened to have been manufactured at Motorola's facility in Illinois. Both are equally affected by the artificially inflated price imposed by the cartel. Under Defendants' rule, the individual who picked-up the box containing the first phone is not protected by U.S. law and not permitted to recover overcharges in a U.S. court, while the damages of the individual who picked-up the box containing the second phone would have an action under many state antitrust laws.

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corporate entities were created to run these facilities in major part because local laws in China and Singapore required Motorola, Inc. to create separate subsidiaries when doing business in those countries. *Id*. ¶ 25.

2. Motorola's U.S.-Based LCD Panel Procurement Operations.

Throughout the Conspiracy Period, Motorola, Inc. procurement teams based in Illinois negotiated the prices, conditions, and quantities governing *all* deliveries of LCD panels to Motorola manufacturing facilities around the world. *Id*. ¶¶ 12, 129-30. Those procurement teams had sole responsibility for: (1) evaluating, qualifying, and selecting LCD panel suppliers around the world; (2) preparing and issuing all requests for quotations for LCD panels used by Motorola; (3) analyzing all responses to such requests; and (4) determining the share of Motorola's global business to be awarded each LCD panel supplier. *Id*. ¶¶ 12, 129.

The prices that Motorola, Inc.'s U.S. procurement teams negotiated and agreed upon with LCD panel suppliers directly and immediately impacted Motorola's business plans, including its most basic business choices involving the production, pricing, and sales of its own products. *Id*. ¶ 132. Based in part on those LCD panel prices, Motorola, Inc. set its contracts with its own customers, made purchasing decisions for other components incorporated into Motorola devices, and planned product development and sales opportunities. *Id*.

After prices were set, a Motorola, Inc. supply chain organization based in Illinois directed a scheduling process that translated the demand for Motorola devices into specific quantities of LCD panels for each Motorola manufacturing facility. *Id*. ¶ 133-34. For example, for Motorola's U.S., Chinese, and Singapore facilities, when a U.S. customer placed an order for Motorola devices with one of Motorola, Inc.'s U.S. business operations teams, Motorola, Inc.'s Illinois supply chain organization directed those facilities to request a specific number of LCD panels, from the specific supplier chosen and at the price negotiated by Motorola Inc.'s U.S. procurement teams. *Id*. Those facilities then issued purchase orders according to the exact instructions, including the exact timing, provided by Motorola, Inc. from the United States. *Id*. The finished Motorola devices were imported to the United States by Motorola, Inc. for final assembly and packaging before being shipped to Motorola, Inc.'s U.S. customer. *Id*. ¶¶ 6, 135.

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Motorola's foreign manufacturing facilities were never authorized to negotiate the price of LCD panels, nor were they permitted to determine the total quantity of LCD panels they ordered from suppliers. *Id.* ¶ 133. In this respect, Motorola, Inc. in the United States controlled purchases of all LCD panels throughout the Conspiracy Period. *Id.* ¶¶ 133-34.

3. Motorola's LCD Panel Purchase Totals.

During the Conspiracy Period, Defendants shipped approximately $61 million of LCD panels directly to Motorola's manufacturing facilities in the United States for use in Motorola devices to be sold in the United States. *Id.* ¶ 166. In addition, Defendants shipped approximately $1.75 billion of LCD panels to Motorola's manufacturing facilities in China and Singapore for incorporation in Motorola devices to be sold in the U.S. market. *Id.* ¶ 167. And Defendants shipped approximately $4.37 billion worth of LCD panels to Motorola's foreign manufacturing facilities for incorporation in Motorola devices to be sold in foreign markets. *Id.* ¶ 168. The prices, vendors, and quantities for all these deliveries were negotiated and decided by Motorola, Inc. in the United States. *Id.*

B. Defendants' LCD Panel Sales.

Defendants are all foreign-based manufacturers of LCD panels, with substantial presences in the United States. *Id.* ¶¶ 29-60. Each ships LCD panels directly into the United States. *Id.* ¶ 154. In addition, Defendants spend large sums advertising their products in the United States and all maintain offices and marketing, sales, and account management teams in the United States to support and market to U.S. customers. *Id.* ¶¶ 4, 73, 154.

1. Defendants' Global Price-Fixing Conspiracy.

Defendants' price-fixing conspiracy began in Asia. *Id.* ¶¶ 78, 85-88. The cartel started with meetings among Japanese LCD panel manufacturers in the mid-1990s, but soon evolved into a systematic, well-organized, and long-running conspiracy encompassing all major LCD panel manufacturers in Japan, Korea, and Taiwan. *Id.* For over ten years, employees at every level of those companies – from the president down to sales representatives – engaged in frequent and continuous communications with competitors for the purpose of raising and/or stabilizing LCD panel prices. *Id.* ¶¶ 78, 89-91. Those meetings and communications occurred in

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the context of regularly scheduled cartel meetings in Taiwan, know as "Crystal Meetings," as well as through frequent bilateral interactions. *Id.*

Senior executives told subordinates around the world to engage in such illegal exchanges. *Id.* ¶ 78. Lower-level employees funneled competitive information to their superiors who used that information – along with pricing information they had collected through their own illegal competitor contacts – to artificially inflate prices for LCD panels. *Id.* To date, seven Defendants named in this action – LG Display (together with its U.S. subsidiary based in California, LG Display America, Inc.), Sharp, Chunghwa, Epson, Chi Mei, and HannStar – have pleaded guilty and paid a total of $861 million in criminal fines for their roles in that price-fixing conspiracy . *Id.* ¶¶ 7, 109-10, 114, 117, 119. Two Defendants – Sharp and Epson – have specifically admitted to fixing prices of LCD panels sold to Motorola. *Id.* ¶¶ 8, 171. In their pleas, each Defendant admits that its employees engaged in conspiratorial meetings and communications in the United States. *Id.* ¶ 163. DOJ's investigation of the cartel is ongoing. *Id.* ¶ 108.

2. Defendants' Illegal Conduct in the United States.

Since at least 1997, Defendants' sales representatives in the United States engaged in regular and continuous bilateral and multilateral communications with their competitors about pricing to U.S. customers, such as Motorola. *Id.* ¶¶ 2, 80. REDACTED

Thus, prices that seemed to be freely negotiated and agreed to between Defendants and Motorola, Inc. in the United States were actually the product of collusion. *Id.* Those prices directly and immediately impacted Motorola, Inc.'s business in the United States. *Id.* ¶¶ 112, 130, 164. In addition, the very same negotiations and agreements in the United States applied to delivery of LCD panels to Motorola manufacturing facilities around the world. *Id.* ¶¶ 128, 164.

Defendants focused their conspiracy on the United States because of the size of the U.S. LCD market, directing their illegal conduct at LCD panels intended for importation into and ultimate consumption in the United States. *Id.* ¶¶ 73. They knew that U.S. companies, such as Motorola, intended to, and did, incorporate the price-fixed LCD panels sold by Defendants into finished products specifically destined for U.S. sale and use. *Id.* ¶¶ 156-58. They also knew that because LCD panels are typically the most expensive and significant component of LCD-containing products, price increases for such panels necessarily resulted in increased prices for LCD-containing products in the United States. *Id.* ¶ 159. Defendants thus intentionally sent price-fixed LCD panels into a stream of commerce that led directly to the U.S. with the intent and full knowledge that it would impact U.S. businesses and customers by requiring them to pay inflated prices for LCD panels and LCD-containing products. *Id.* ¶ 155.

3. Defendants' Knowing Targeting of Imports into the United States.

At all times, Defendants knew the artificially-inflated prices for LCD panels they agreed upon with Motorola, Inc. in the United States would govern deliveries to Motorola's manufacturing facilities around the world and that a large percentage would be incorporated into Motorola devices for Motorola, Inc. to import for sale and ultimate consumption in this country. *Id*. In particular, they knew that Motorola's facilities in China and Singapore made Motorola devices specifically destined for the United States. *Id.* ¶ 157. They knew, intended, and expected that the price-fixed LCD panels would be incorporated into devices meant for U.S. import and sale. *Id*. They also knew that the United States was Motorola's primary market for Motorola devices and that well-known Motorola devices, such as the Razr phone, were being sold in large numbers in the United States. *Id.* ¶ 158. Thus, Defendants knew and intended that, when they sold LCD panels for inclusion in Razr phones, a large number of those phones would be imported to and sold in the U.S. *Id*. In fact, Epson and Sharp have both admitted to price-fixing in the United States specifically with respect to LCD panels sold to Motorola for incorporation into Razr phones. *Id.*

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<u>**ARGUMENT**</u>

I. This Court Has Subject Matter Jurisdiction Over Motorola's Antitrust Claims.

This Court is well-versed in the language of the FTAIA, so it is sufficient to start with the Supreme Court's concise summary in *Empagran* of how the statute operates: The FTAIA "lays down a general rule placing *all (non-import) activity involving* foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it *has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce*, and (2) *has an effect of a kind that antitrust law considers harmful, i.e., the 'effect' must 'giv[e] rise to' a [Sherman Act] claim.*" 542 U.S. at 162 (emphasis added).

Given that the exclusions identified above were built into the FTAIA in order to ensure that U.S. markets, businesses, and consumers were <u>not</u> negatively impacted by its passage, it is unsurprising that the illegal conduct at issue here falls within *several* exclusions.

In Part A below, Motorola explains that the § 1(A) exception for conduct affecting "import trade or import commerce" applies, and that the effect gives rise to Motorola's claims based on deliveries of price-fixed LCD panels to its foreign manufacturing facilities.

In Part B, Motorola explains that the § 1(A) exception for conduct affecting "[domestic] trade or commerce" equally applies to such deliveries.

In Part C, Motorola explains that any obstacles with respect to application of the § 1(A) exceptions are overcome here because, on these facts, Motorola and its foreign subsidiaries acted as a single enterprise for purposes of procuring LCD panels and importing them to U.S. markets.

In Part D, Motorola explains how and why the FTAIA's "conduct involving . . . import trade or import commerce" exemption reaches transactions in price-fixed goods abroad where those goods are known to be destined for import into the United States.

And in Part E, Motorola addresses special jurisdictional considerations associated with claims arising from the same transaction, i.e., the setting of a single, artificially-inflated price in the United States that governs all deliveries of LCD panels to Motorola around the world.

A. Defendants' Anticompetitive Conduct In Connection With LCD Panels Destined For Import To The United States Is Subject To The FTAIA's Explicit Exception For Conduct With A Direct, Substantial And Foreseeable Effect On Import Trade And Import Commerce.

In § 1(A), the FTAIA specifies that the Sherman Act does apply to conduct that "has a direct, substantial, and reasonably foreseeable effect . . . on import trade or import commerce with foreign nations [where] such effect gives rise to a claim." It is difficult to see how Defendants hope to maneuver around this language.

As described above, Motorola negotiated LCD panel prices with Defendants in the United States, ending up, in each instance, with a price it believed was competitive, but that turned out to be the product of collusion. Those prices governed Motorola's LCD panel purchases for delivery around the world. Motorola then determined the quantity of LCD panels to be sent to each of its manufacturing facilities. Defendants knew that products sent to certain Motorola facilities abroad – the subsidiaries in Singapore and China – were destined for U.S. import. And, in fact, Motorola imported devices with those LCD panels to the United States.

Motorola's importation though its subsidiaries of Motorola devices to the United States for sale in the United States is rather obviously "import trade or import commerce."

Motorola has alleged that Defendants knew that their conduct would affect devices being imported into the United States. That allegation easily qualifies under the more relaxed standard that the effect merely be "reasonably foreseeable."

Motorola purchased more than $1.75 billion in LCD panels for importation into the United States. That quantity of purchases undoubtedly counts as substantial.

So Motorola is left to speculate – because Defendants do not address the point – that if Defendants have a theory why their conduct does not fall within this exception, it must involve the notion that the "effect" was not a "direct" result of such conduct. If that is their contention, it must fail. Whether one construes "direct" by its plain meaning, or in light of principles of proximate cause, the conduct here directly affected Motorola's imports and import trade.

The conduct at issue here, of course, includes Defendants negotiation in the United States of the prices at which Motorola would purchase LCD panels. Those prices were inflated as a

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result of a conspiracy. Defendants knew and intended that Motorola would be using those prices in purchasing LCD panels around the world. And they knew and intended that some of the price-fixed LCD panels were destined for the United States. An effect is "direct" if it "follows as an immediate consequence of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). Does the fact that deliveries were made to Motorola's subsidiaries in Singapore and China and *then* imported into the United States mean that the effect on import trade was not sufficiently direct?

The answer is no. Under ordinary principles of proximate causation and "directness," the fact that Motorola bought the products for ultimate importation but had the purchase flow through its own subsidiary makes no difference in judging the effect of the conduct. There is nothing about the *length* of this causal chain to suggest that the connection is not proximate: Motorola agrees on the price, and LCD panels are delivered at that inflated price to its subsidiary, with the understanding that they will be (after they are incorporated in the devices abroad) imported into the United States. Whether the order is placed through a subsidiary or Motorola itself makes no difference to the directness analysis. Either way, they are purchased for importation to the United States and both Motorola Inc. and its subsidiaries are part of the "import trade." When prices are fixed on goods purchased *for import*, with defendants dealing with the importer, there is no escaping that the price fixing has a direct effect on "import trade or import commerce."

Moreover, Defendants' knowledge and purpose bears directly on "directnesss." Where a particular result is known, intended, and virtually certain to take place upon the occurrence of particular conduct – e.g., where Defendants knew that the inflated prices they were charging affected goods they were delivering in Singapore and China for incorporation in products for Motorola to import into the United States – both plain language and the language of proximate cause recognize that this result is "direct." *See* Restatement (Second) of Torts § 435A (1965) ("[a] person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable").

Nor can there be any argument against directness based on the notion that there is, within

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this causal chain, an independent, intervening actor whose exercise of independent judgment is in a position to break the causal chain. On this, the fact that the delivery is to a foreign *subsidiary* of Motorola resolves that question.[9] To be sure, courts tend to find an absence of proximate causation where (a) there are merely amorphous or attenuated connections between events and (b) the linkage between the cause and the alleged effect is potentially influenced by intervening events or actors. None of those concerns are present here.

Motorola's claims in connection with its importation of price-fixed LCD panels involve direct interactions between itself and Defendants, and its own decision to have its foreign subsidiaries, rather than itself, incorporate the panels into the devices it would import to the United States. Under such circumstances, the foreign subsidiary is under the control of Motorola: Motorola determines which LCD panels it will buy and then import into the United States. That is not a halt in the causal chain from the effect of Defendants' conduct; that is merely a stop along the way, little different from Defendants delivering their products dockside in China and Singapore for shipment to the United States. What Motorola chooses to do with the LCD panels as a prelude to importation no more changes the "directness" analysis than would a decision by Motorola to let them sit in a warehouse in China and Singapore for a lengthy period of time before bringing them to the United States. At all times, they remain destined for importation. The absence of intervening cause is decisive of the directness issue.

"Directness" (like proximate cause) is a phrase that may be interpreted and applied in light of a range of policy judgments.[10] Thus, the question arises whether there is any reason why

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[9] If Motorola arranged with an independent third party abroad to take delivery or perform manufacturing operations in connection with the fixed price products, for importation to the United States, the effect on importation would, in Motorola's view, still be direct. It ought not matter to whom the product is delivered so long as it is delivered for importation.

[10] In *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 991 (9th Cir. 2008) (Noonan, J., concurring), the concurrence described this point well:

> [I]t has been the judgment of Congress and the Supreme Court that the economic interests of consumers outside the United States are normally not something that American law is intended to protect. Hence it is difficult to persuade a court that injury to foreign consumers has been "caused" by price-fixing in the United States. It's so difficult that amendment of the complaint becomes futile and jurisdiction itself is found not to exist. We reach this vanishing point not from guidance in words like "proximate" or "direct"

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the phrase or concept should be given a restrictive interpretation or application here. In *Empagran*, the Supreme Court interpreted the FTAIA in light of its understanding of the statute's basic purpose: Congress was not trying to create remedies for foreign injury; to the contrary, Congress was trying to make clear that the United States is generally uninterested in applying its law to conduct that only causes foreign injury. The plaintiffs there were foreign companies that purchased abroad and then resold abroad. It was difficult to see why the United States should be concerned about their foreign injury. To the contrary, one would expect foreign governments to protect their consumers and take the lead in vindicating their claims.

Here, the controlling considerations push in exactly the opposite direction. In passing the FTAIA, Congress sought to preserve the historic protections that the Sherman Act affords U.S. markets, businesses, and consumers. Moreover, Congress was keenly aware that overpricing in connection with goods for import "*invariably*" has a deleterious effect on U.S. markets, businesses, consumers of the type the Sherman Act seeks to prevent. *See* 128 Cong. Rec. H4981-82 (daily ed. Aug. 3, 1982) (statement of Rep. McClory) (emphasis added). The United States has an interest in protecting those markets, businesses, and consumers. Foreign governments do not.

In short, there is no reason to adopt a narrow reading of the term "direct" in § 1(A) of the FTAIA. Significantly, application of the exception in these circumstances precisely parallels the DOJ's own understanding of the scope of the Sherman Act in insisting that Defendants' criminal fines reflect *sales billed or invoiced to the foreign affiliate of a U.S.-based company where finished products containing the price-fixed goods are imported into the United States.*

With the understanding that § 1(A) applies to Motorola's importation of price-fixed LCD panels, it is easy to see how this "effect" on import trade "gives rise to a claim" under § 2 of the FTAIA. Motorola and its subsidiaries paid inflated prices for goods purchased for import, and those payments gave rise to its claim. In sum, Motorola has plainly stated a claim arising from

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> but from a strong sense that the protection of consumers in another country is normally the business of that country. Location, not logic, keeps [plaintiff's] claim out of court.

its importation of LCD panels from Singapore and China.

B. Defendants' Foreign Sales for Import Into The United States Also Satisfy the FTAIA's "Domestic Effects" Test.

Under the facts of this case, Motorola's claims stemming from deliveries of LCD panels abroad for import are also covered by § 1(A)'s "*domestic* effects" exception.

1. Defendants' Conduct Had A "Direct, Substantial, And Reasonably Foreseeable Effect" On Domestic Commerce.

An effect on U.S. commerce is "substantial" if it involves a sufficient volume of U.S. commerce and not merely a "spillover effect." *See Sun II*, 534 F. Supp. 2d at 1110. It is "reasonably foreseeable" if it is a natural consequence of the conduct at issue. *See* H.R. Rep. No. 97-686, at 9 ("whether the effects would have been evident to a reasonable person making practical business judgments"). It is "direct" if it "follows as an immediate consequence of the defendant's activity." *LSL Technologies*, 379 F.3d at 680.

Here, Defendants intentionally targeted their illegal conduct at Motorola in the United States. Defendants Epson and Sharp specifically admitted as much in their plea agreements. Defendants negotiated prices, issued price quotations, and reached agreements on prices with Motorola in the United States in accordance with their illegal price-fixing agreements. They did this through sales, service, and design offices in the United States – sometimes even located at Motorola's own facilities – specifically run to effectuate their illegal scheme against Motorola.

That conduct – engaging in *faux* pricing negotiation that resulted in agreements under which Motorola would be charged an artificially-inflated price for deliveries of LCD panels around the world, including for incorporation into finished products bound for the United States – is at the heart of Motorola's antitrust claim. The setting of those prices had a U.S. effect in the most dramatic way: Based on the prices, Motorola made business plans and set objectives, negotiated contracts with its U.S. customers, made purchasing decisions for other components, and determined how to price Motorola devices sold in the United States.

In fact, this court has held that establishing an artificially-inflated price in the United States for products delivered abroad meets the FTAIA's "direct, substantial, and reasonably foreseeable effect . . . on [domestic] trade or commerce" test. In *Sun II*, the Court held that a

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"domestic effect is established . . . by virtue of . . . allegations that defendants' conduct led to higher prices . . . in the United States, which in turn formed the predicate for plaintiffs' domestic agreements to pay higher prices . . ." 534 F. Supp. 2d at 1113.[11] Contrary to Defendants theory, a relevant "effect" does not occur only where goods are delivered and money changes hands. Courts do not "draw a distinction between the setting of and the payment of higher prices and it would be inconsistent with prior decisions to find that the 'domestic effect' language of the FTAIA requires more – i.e., that it requires actual payment of those prices." *See id.* at 1112-13.

2. The Effect Defendants' Conduct Had On U.S. Domestic Commerce Gave Rise to Motorola's Antitrust Claims Based On Deliveries Of Price-fixed LCD Panels Abroad.

The next question is whether "such effect gives rise to a claim" under the Sherman Act. Although the "gives rise to" analysis surely requires a proximate link, it does not, as Defendants argue, always hinge on whether the domestic "effect" proximately caused a *separate* "injury." That argument ignores the Supreme Court's direction in *Empagran* to begin FTAIA analysis with the statutory language. The second part of the FTAIA's "domestic effects" test is not phrased in terms of "injury" or causal chain. Rather, it asks whether the "effect" gives rise to a "claim." In other words, it is not enough that the conduct had *effects* in the United States, those effects must also be, as the Court explained, of the "kind that antitrust law considers harmful." *Empagran*, 542 U.S. at 162. And that question answers itself because, as pointed out above, *Sun II* and other cases regard the establishment of a fixed price in the United States pursuant to an agreement with a U.S. customer, to be a domestic "effect" that the Sherman Act considers harmful. Under such circumstances, the "claim" arises directly from that harmful "effect" of setting an artificially-inflated price as the controlling price in an agreement in the United States, *particularly for goods to be imported into the United States for sale by the U.S. company.*

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[11] *See also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, Case No. 02-cv-1486, 2006 WL 515629, at *3 (N.D. Cal. Mar. 1, 2006) (finding a "direct, substantial, and reasonably foreseeable" effect was alleged where plaintiff averred that: (1) "defendants' conduct resulted in higher prices in the United States;" (2) "defendants have already pled guilty to charges in the United States that they participated in an international conspiracy to fix prices;" and (3) defendants were engaged in a "large volume . . . of commerce" in the relevant product).

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The legislative history of the FTAIA supports this reading of the statutory language. In relevant part, it provides:

> The intent of the [FTAIA] is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States – e.g., price fixing not limited to the export market – would affect all purchases of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad.

H.R. Rep. No. 97-686 at 9 (1982) (original emphasis included).

Where a plaintiff is an independent foreign company and the foreign harm does not arise in any immediate sense from the U.S. effect of the defendants' conduct, the only thing that connects the "effect" and the "claim" is the alleged "injury." But in a case like this, the question whether the U.S. effect gives rise to a claim can be answered directly. The effect of imposing an artificially-inflated price on a U.S. company is assuredly an essential and material part of any claim, and something that the Sherman Act deems harmful.

But even if one focuses on whether there is a proximate connection between the "effect" and the "*injury*," rather than the "effect" and the "*claim*," the result here is the same. Motorola has outlined principles of proximate causation above and will not repeat the discussion here. But as a practical matter, it is difficult to conceive of a closer connection between the effect and the injury than (1) establishing the fixed price by agreement with Motorola in the United States, and (2) invoicing at that price in connection with orders for Motorola devices abroad, *intended for incorporation into Motorola's own products in the United States*. Where there is an intimate connection between the domestic effect, the delivery abroad, and the harm to U.S. domestic markets, businesses, or consumers that the Sherman Act is meant to protect, there is necessarily a basis to pursue claims arising from such deliveries. *See Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483-4 (1982) (finding proximate cause where the claim of an intermediate party is "inextricably intertwined" with the injury of the party defendants intended to harm).

Where both sides knew and intended that the inflated prices to which Motorola agreed in the United States would apply to deliveries of LCD panels to Motorola manufacturing facilities sending finished products back to Motorola in the United States for U.S. sale, there can be no

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more proximate connection between domestic "effect" and "foreign injury" than that. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 990 (9th Cir. 2000) (holding that a plaintiff's injury is proximately caused by a conspiracy when the prices paid are affected by that conspiracy). Moreover, U.S. law has never found proximate cause to be an obstacle to liability for an intentional tort where a defendant intends the specific harm and that harm actually occurs. *See* Restatement (Second) of Torts § 435A (1965) ("[a] person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable").

That the initial shipment abroad was to a Motorola *subsidiary*, at prices and quantities set by Motorola, for LCD panels that Motorola decided to import and sell in the United States, is again of direct significance to the proximate cause analysis. That Motorola made these decisions and the delivery was to its subsidiary as a way station in aid of Motorola importing and selling in the United States eliminates the notion that the decision-making of an independent third party, whose actions might be deemed an intervening cause, is an obstacle to a finding of proximate cause. The subsidiary's injury, paying higher prices, flows directly from the U.S. effects.

Indeed, on these facts, any conclusion that no claim is viable would render a nullity Congress' clear understanding that the FTAIA's "domestic effects" requirement "does not exclude all persons injured abroad from recovering under the antitrust laws of the United States." *See* H.R. Rep. No. 97-686, at 9. If that were to be true in any case, it would be true here.

As is explained more fully below, acknowledging that the FTAIA reaches these transactions not only effectuates the purposes behind the FTAIA, but also is fully consistent with the historic understandings of principles of prescriptive comity identified by the Supreme Court in *Empagran*. With respect to the purposes behind the FTAIA, such an approach preserves the historic protection that the Sherman Act extends to U.S. markets, businesses, and consumers. *See infra* Part D. And with respect to principles of prescriptive comity, it reflects the United States' dominant interest in subjecting conduct with a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce to the authority of U.S. law and courts.[12] *See id.*

C. Motorola's Foreign Manufacturing Facilities Acted as Its Agents and as a Single Enterprise with Motorola in Connection with the Procurement of LCD Panels.

Of course, even under the *Sun* cases, there is no dispute that Motorola's claims arising from foreign deliveries of LCD panels must be sustained if the supposedly distinct "injury" to the foreign subsidiary really belongs to Motorola, Inc. Here Motorola itself agreed on the prices and decided how many panels should be delivered to each of its foreign manufacturing facilities, including those responsible for manufacturing finished Motorola devices for import into and sale by Motorola, Inc. in the United States. Because Motorola, Inc. in the United States controls all pricing, vendor, and quantity decisions in connection with such deliveries, and those foreign manufacturing facilities do nothing more than issue purchase orders for such LCD panels at the direction of Motorola, Inc. in the United States, all such entities acted as a single enterprise with Motorola, Inc., with the foreign subsidiaries acting as its "agent" in the procurement of LCD panels. Therefore, all injuries arising from deliveries of such price-fixed LCD panels were borne, and are now actionable, by Motorola, Inc.

The facts that caused rejection of the plaintiff's "agency" and "single enterprise" arguments in *Sun III* are not present here. In the *Sun* cases, the foreign subsidiaries themselves "controlled" and "took charge of their own DRAM purchases, for their own eventual use" to be "sold through [their] own European sales offices." *See Sun III*, 608 F. Supp. 2d at 1188.[13] They

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[12] In footnote 13 of their motion, Defendants assert standing as an alternative basis for dismissing a portion of Motorola's claims. They do so without even mentioning the seminal test for antitrust standing set forth by the Supreme Court in *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-546 (1983) ("*AGC*"). As *AGC* makes clear, a direct purchaser of price-fixed products, such as Motorola, who is the intended target of a supplier's anticompetitive activity, has standing to sue under the U.S. antitrust laws. *See id*. at 541. Moreover, because such an argument "implicates many of the same issues as the jurisdictional analysis under the Foreign Trade Antitrust Improvements Act," if this Court finds that Motorola's claims are cognizable under U.S. law, Motorola has standing to pursue those claims. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, Case No. 06-cv-1775, 2008 WL 5958061, at *15-16 (E.D.N.Y. Sept. 26, 2008) (citations omitted).

[13] The Court in *Sun III* also noted that the U.S. parent corporation was able to ask for and receive claim assignments from its foreign subsidiaries. Here, Motorola, Inc. has received such assignments from its foreign facilities that manufactured products to be sold by Motorola, Inc. in

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received the price-fixed goods *abroad* as arranged by the U.S. parent, but then incorporated those goods into finished products sold entirely through the foreign subsidiaries' own sales offices abroad and only to customers located *abroad*. To the contrary, Motorola's Singapore and Chinese manufacturing facilities not only requested deliveries of price-fixed LCD panels at prices negotiated by Motorola, Inc. in the United States, they also did so at quantities and times dictated by Motorola, Inc. from the United States. Then, after finalizing assembly of the finished Motorola devices, they were imported into the United States by Motorola, Inc. for sale to U.S. customers, as dictated by Motorola, Inc. sales teams based in the United States. Further, the injury from the purchase of those price-fixed LCD panels was ultimately borne by Motorola, Inc. in the United States. If the theories of agency and single enterprise focus in any respect on the economic realities of the transactions at issue – as they must – then these purchases must be regarded as those of Motorola, Inc.

D. The Sherman Act Reaches "Conduct Involving . . . Import Trade Or Import Commerce," Including The Initial Delivery Of Price-Fixed Goods Abroad For Ultimate Import Into The United States.

The first sentence of the FTAIA provides an exemption for "conduct involving . . . import trade or import commerce." Defendants urge an extraordinarily narrow view of the exemption. For Defendants, the use of the seemingly broad terms "involve," "import trade," and "import commerce" show an intention by Congress to cover only the circumstance where the defendant price-fixer imports price-fixed goods directly into the United States. In Defendants' view, once there is an initial delivery abroad, the exemption does not apply, even in cases where the price-fixers know and intend for their price-fixed goods to be imported into the United States. Motorola recognizes that, in its earlier decision in this case, the Court was concerned that any "intent" standard would be too broad and difficult to apply. On the facts alleged here, the Court should reexamine that concern. As shown below, neither the language of the FTAIA, its purposes, the historic scope of the U.S. antitrust laws that form the background for the FTAIA,

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(continued)
the United States. As the *Sun III* Court noted, "[t]his fact alone strongly suggests a plaintiff's entitlement to assert claims on behalf of its foreign affiliates." *See id.* at 1186.

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nor principles of prescriptive comity are consistent with Defendants' proposed approach.

First, the language of the FTAIA undermines Defendants' theory. The word "involve" and concepts of "import trade" and "import commerce" are broad. That language facially reaches a defendant's transactions in price-fixed goods abroad intended for import. Indeed:

> [E]ven a 'relatively strict' construction of [the phrase] 'involves import commerce,' . . . is broad enough to encompass anticompetitive conduct by entities other than import merchants . . . " and that "the [language of the FTAIA] makes clear that *not only import commerce*, *but conduct involving import commerce*, is never removed from the reach of the Sherman Act.

See In re Air Cargo, 2008 WL 5958061, at *12-14 (emphasis added). Reading these words to encompass sale for import is consistent with statutes defining U.S. jurisdiction over illegal conduct in terms of "import trade." For example, the Tariff Act of 1930 defines "import trade" as including "*sale for importation* [into the United States], or the sale within the United States after importation [of infringing goods]." *See* 19 U.S.C. § 1337(a)(1)(B)-(E) (emphasis added).

The FTAIA itself requires that these words be given a broad reading. For the FTAIA to achieve its primary purpose – that of immunizing *U.S. companies* from U.S. antitrust suits where their conduct causes only *foreign* harm – the words "involving," "trade," and "commerce" must include a wide range of conduct impacting foreign and export activity.[14] Otherwise, the FTAIA's affirmative limitations on application of the Sherman Act would have to be treated narrowly. As the identical terms are used in the first sentence of the FTAIA to define both the conduct that is excluded from Sherman Act jurisdiction and the conduct that is exempted from the FTAIA's reach (i.e., that conduct that is affirmatively governed by the Sherman Act), those terms cannot be read narrowly in one context and broadly in the other. If read narrowly, Congress' express purpose for the FTAIA would be undermined. Thus, if "conduct involving [foreign and export] trade and [foreign and export] commerce" referenced in the first line of the FTAIA is given the broad meaning Congress intended, the same correspondingly broad meaning

[14] *See Empagran*, 542 U.S. at 161; *see also Carpet Group Inter'l v. Oriental Rug Importers Ass'n Inc.*, 227 F.3d 62, 71 (3rd Cir. 2000) ("Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods by exempting export transactions that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade.").

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must be given to "conduct . . involving import trade and import commerce" in the same sentence.

Of course, in this case, it is not necessary to give this phrase the *broadest* reading possible. The Court need not hold that mere knowledge that the goods at issue would ultimately be imported to the United States is determinative. One can imagine that if the number of steps preceding the import were sufficiently numerous or economically significant the connection between any individual transaction and the importation could become attenuated, so much so that the conduct could no longer be described as "involving . . . import trade or import commerce."

Here, Defendants did not sell merely to some independent foreign firm hoping to export to the United States, but rather negotiated with the importer, making it easy to see that their conduct "involves" import trade. To suggest, in this setting, that the inquiry whether conduct "involves" import trade turns on who serves as the first purchaser, the exporter, or the importer is untenable. Where prices are set in the United States with a U.S. parent company and products are bound for the United States, there is no room for a distinction based on whether the U.S. parent, its subsidiary, or defendant does the importing. The sale for import is enough.

Second, if the language of the FTAIA does not answer the exact question posed, a court must look to the statute's underlying purposes, as well as principles of prescriptive comity, to determine how the Sherman Act applies to conduct with a foreign element.

The natural understanding of the rationale for this FTAIA exemption is that by including it in the FTAIA, Congress was able to continue, with one phrase, the Sherman Act's protection of U.S. markets, businesses, and consumers from a broad swath of anticompetitive conduct from abroad. And it could do so without impinging on the FTAIA's main objective of immunizing U.S. conduct that caused only foreign harm. That straightforward rationale for the exemption is clear from the FTAIA's legislative history: "[The FTAIA] does not address our domestic trade nor, for that matter, our import trade since imports *invariably* have an impact on our domestic trade." *See* 128 Cong. Rec. H4981-82 (daily ed. Aug. 3, 1982) (statement of Rep. McClory) (emphasis added). And the underlying desire to fully preserve the protection of U.S. markets, businesses, and consumers is reflected in the Committee Report discussing the FTAIA:

> Some observers raised questions about the status of import transactions under [the FTAIA] and urged the Subcommittee to make clear that the legislation had no effect on

> the application of antitrust laws to imports. As Mr. Atwood stated, "*it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law*" . . . To remove any possible doubt, the Subcommittee amendment modified the legislation to make clear [that] . . . wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not.

H.R. Rep. No. 97-686 at 8-10 (emphasis added). Thus, the exemption for "conduct involving . . . import trade or import commerce," neatly preserved a large portion of the protection for U.S. markets, businesses, and consumers that was a hallmark of the Sherman Act since its enactment.

Third, a broad reading of the exemption is consistent with the historic scope of U.S. jurisdiction, both in applying the Sherman Act, and as a matter of ordinary principles of comity.

The rule had long been 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." *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d. Cir. 1945) (L. Hand, J.) ("*Alcoa*")); *see also eMAG Solutions, LCC v. Toda Kogyo Corp.*, 2005 WL 1712084, *8 (N.D. Cal. July 20, 2005) ("By its terms, the FTAIA does not apply to cases alleging antitrust conduct in foreign import commerce . . . Thus, the rule articulated by the U.S. Supreme Court in *Hartford Fire* . . . applies - that is, 'the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.'").[15] There is nothing novel in applying a jurisdictional test for the "conduct involving . . . import trade or import commerce" exemption that turns on whether the defendants intended that their price-fixed goods would be imported into the United States. That is a conventional means of determining U.S. jurisdiction under the antitrust laws.

Defendants offer nothing based in logic or history to suggest that Congress would ever want to allow foreign companies to fix the prices of goods destined for the United States, with the intent of cheating and victimizing U.S. businesses and consumers, and escape remedy. Such

[15] The understanding that application of the Sherman Act may turn on *intent* has long been part of the antitrust framework. In *Alcoa*, Judge Hand distinguished between "agreements made beyond our borders *not* intended to affect imports," even if they "do affect them" – which are beyond the scope of the antitrust laws – and agreements intended to affect imports, which fall squarely within the antitrust laws. *See* 148 F.2d at 443-44.

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conduct was historically barred by U.S. antitrust law. If Congress had intended to allow it for the first time under the FTAIA, it surely would have been discussed in the statute's legislative history or clearly stated in the language of the FTAIA. It is not.

Equally important, interpreting "conduct involving . . . import trade and import commerce" to include claims against defendants who deliver price-fixed goods abroad for import into the United States is consistent with the basic principles of comity and prescriptive authority. It is well-settled that "[a country] has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has *or is intended to have* substantial effect within its territory." *See* Restatement (Third) of the Foreign Relations Law of the United States § 402(1)(c) (1986) (emphasis added). This principle "is generally accepted with respect to liability for injury in the [country] from products made outside the [country] and *introduced into its stream of commerce*." *See id*. § 402 cmt. d (emphasis added); *see also Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (Holmes, J.) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm . . .").

The FTAIA ultimately guides a choice of law inquiry through legislation: Where, as here, price-fixed goods are known to be destined for the *United States* at inflated prices actually contracted for *in the United States* with a *U.S. company*, does U.S. law apply or did Congress chose to leave the matter in the hands of a foreign government? The FTAIA itself provides the answer: It makes clear that U.S. antitrust law does not protect *foreign businesses and consumers* in the mirror image situation, so why should a foreign government be expected to punish and regulate anticompetitive conduct directed at U.S. businesses and consumers, particularly when the underlying conduct at the heart of the violation happened in the United States.

And there certainly is no reason to construe the "conduct involving . . . import trade or import commerce" exemption narrowly here. If a company participates in a price-fixing transaction with the intent, knowledge, and expectation that the goods in question are destined for U.S. businesses or consumers, that company should not be surprised if it is subjected to U.S. law in connection with those sales. In numerous contexts, U.S. courts recognize that knowingly and intentionally causing harm to someone in the United States through one's actions will subject that person to U.S. law. As discussed above, the inquiry into intent has always been part of the application of the Sherman Act to conduct and transactions with a foreign component.

A rule based on sale for import and intent to injure U.S. markets, businesses, and consumers places responsibility and liability where it should be. A rule based on who happens to do the actual importing would lead to a wide range of economically absurd results inconsistent with the Sherman Act's basic objective of protecting U.S. markets, businesses, and consumers. For instance, under Defendants' proposed rule, two foreign (or even American) LCD panel manufacturers could meet in this very courthouse and agree to fix the prices they intend to charge a U.S. customer for products destined for the United States, walk down the street and enter into contracts with that customer setting that price, but then escape all liability by simply assuring that their products are first sent through an unrelated intermediary, third-party distributor, assembler, or manufacturer located abroad –and then brought into the U.S. by the customer. Such an interpretation could leave the U.S. antitrust laws toothless in today's modern business environment where most, if not all, consumer electronics are manufactured outside of the United States, including those made by U.S. companies for U.S. sale.

Motorola is well aware that, in *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. and Exp. Corp.*, Case No. 05-cv-4376, 2010 WL 1324918 (D.N.J. Apr. 1, 2010) ("*Animal Science II*"), the District of New Jersey held that the FTAIA exemption applies only to an importer and, thus, application of the U.S. antirust laws turns on who holds title at the moment of importation, thereby requiring a close examination of shipping documents and bills of lading.[16] But that technical inquiry into the identity of the importer, rather than a simpler inquiry into whether the price-fixer knew and intended that its price-fixed goods would be sent to the United

[16] Other cases Defendants cite as support for their theory actually run contrary. For example, in *Turicentro v. American Airlines Inc.*, 303 F.3d 293 (3d Cir. 2002), the Third Circuit rejected the idea that conduct involving "import trade or import commerce" is restricted to the act of importing. The court said that the term must include "conduct by the defendants that was directed at an import market." *See id*. at 303. Of course, in *Turicentro*, there could be no showing that defendants directed their activity at an import market, because they were involved "*only* in unlawfully setting extra-territorial commission rates" that *foreign-based* travel agents could charge. *See id*. at 303 (emphasis added). Thus, their conduct was "only tangentially, if at all, related to import commerce." *See In re Air Cargo Shipping*, 2008 WL 5958061 at *15.

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States to harm U.S. businesses and consumers, reveals just how far from the basic purpose of the Sherman Act Defendants' theory would lead, and has no relationship whatsoever to the substantive inquiry that the Supreme Court requires in *Empagran*.

E. Because All of Motorola's Overcharges Arise From The Same Artificially-Inflated Price, They Are Part Of The Same Claim.

There is an even shorter route to the conclusion that deliveries of price-fixed LCD panels to Motorola's foreign manufacturing facilities – and certainly to its Chinese and Singapore factories for products imported into the United States – are properly subject to the jurisdiction of this Court.[17] As always, the basic question is whether, in light of the purposes behind the FTAIA and principles of prescriptive comity, it is appropriate to maintain claims in U.S. courts. Here, Defendants concede, as they must, that claims based on deliveries of price-fixed LCD panels in the United States are subject to the Sherman Act. But they would also have to concede the general rule that all of the remaining deliveries arising out of the same pricing agreements entered into in the United States with Motorola, would ordinarily be pursued in the same action. Indeed, joining all claims arising out of the same occurrence or transaction would be mandatory under the Federal Rules of Civil Procedure, or else deemed abandoned. Parties are not supposed to split their cause of action. And it is inconsistent with our basic understandings of jurisdiction and the orderly application of law to suggest that a single illegal act – i.e., imposing on Motorola in the United States a fixed price that governs its worldwide purchases of LCD panels – would require the victim to pursue claims arising from that act in different jurisdictions, depending on where deliveries are made. The question then arises whether Congress would have – or, more precisely, did – prescribe a different result with the FTAIA.

Once a plaintiff has shown that it has a proper "claim" (the question addressed by the Supreme Court in *Empagran*), nothing in the FTAIA suggests that a U.S. manufacturer, with a *bona fide* antitrust claim arising from a price fixed in the United States, which is clearly subject to U.S. law, is required to split its claim and pursue piecemeal remedies around the world.

[17] Under this principle, all deliveries of LCD panels to all Motorola manufacturing facilities around the world at the same artificially-inflated price could be actionable in this Court.

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In *Sun III*, the Court considered this issue under the rubric of "severability," but it is much more substantive than that. 608 F. Supp 2d at 1183-84. Where the same party is bringing essentially the same claim involving the same unlawful conspiracy and deliveries of price-fixed goods under the same pricing agreement, the law of the place where the unlawful price was set would govern. Where the U.S. contacts are so great, one would expect that it would also apply to all subsequent deliveries arising from that agreement. *Cf. Empagran*, 417 F.3d at 1271 ("proximate cause" test is met if foreign antitrust injury is "inextricably bound up with the [defendants'] domestic restraints on trade") (citing *Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Eng'g Co.*, No. 75-5828 CSH, 1977 WL 1353, at *11 (S.D.N.Y. Jan. 18, 1977) (finding simultaneous anticompetitive effects on a U.S. company and a foreign company to be "inextricably bound up")).

It may be possible to argue that comity requires severability where the products at issue are delivered abroad and remain abroad. But where faux negotiations take place in the United States, price is set in the United States, and products are to be sent to the United States to be sold along side those shipped directly to the United States, there is no reason that a claim based on a single price should be artificially divided, depending on where the initial deliveries takes place.

II. Motorola's Illinois Antitrust Act Claims Are Not Barred By The FTAIA.

Motorola's claims may also proceed under the Illinois Antitrust Act (the "IAA"). Like the FTAIA, the IAA exempts "conduct involving . . . import trade or import commerce" from its reach and authorizes its application to conduct that has "a direct, substantial, and reasonably foreseeable effect" on import commerce and commerce within Illinois when such "effect gives rise to a claim" under the statute. *See* 740 Ill. Comp. Stat. 10/5(14).

But the IAA differs from federal antitrust law in one key respect: It allows indirect purchasers to bring suit, meaning that an entity that purchases a finished product containing a price-fixed component may recover its overcharges. *See* 740 Ill. Comp. Stat. 10/7(2) ("No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages."). They can do so regardless of where they fall in the chain of commerce, whether they are a manufacturer of finished products, a retailer, or the ultimate consumer.

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The fact that the IAA allows indirect purchasers to bring suit means that none of the complexities of the "direct, substantial, and reasonably foreseeable effect" test raised by Defendants under the federal FTAIA are present under Illinois law. The relevant "conduct" includes Defendants' *faux* negotiation and establishment of artificially-inflated prices with Motorola *in Illinois*. That "conduct" had a "direct, substantial, and reasonably foreseeable effect" *in Illinois*. And "such effect" gave "rise to a claim" *in Illinois* – indeed, to actionable "injury" *in Illinois* – when Motorola accepted the price, directed its foreign subsidiaries to order LCD panels at the price, and ultimately *bore the injury caused by the price in Illinois*. Motorola experienced precisely the form of injury the IAA makes actionable in Illinois. And Illinois has a compelling interest in applying its law to illegal conduct taking place in Illinois and directed at, and intending to cause harm to, companies and consumers located in Illinois.

Defendants' arguments that allowing the IAA to apply to Motorola's claims will violate various constitutional provisions – the Supremacy Clause, the Commerce Clause, and Due Process – are all makeweights. For example, their assertion that the FTAIA somehow impliedly preempts the IAA lacks a legal foundation. To prevail on an implied preemption claim, Defendants would have to show: (1) that Congress intends for federal law to occupy a given field, or (2) that state law actually conflicts with federal law or stands as an obstacle to the accomplishment of the objectives of Congress. *See Cal. v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Under either theory, there is a strong presumption against implied preemption of state law in areas traditionally regulated by states, including state antitrust laws. *See id*. at 100-01.

There is no "conflict" between federal law and state law here. The IAA does not purport to legalize any conduct that federal law prohibits or forbid any conduct that federal law seeks to protect. When it passed the FTAIA, Congress did not seek to immunize price-fixers or protect price-fixing from sanction with respect to goods intended for sale in the United States. It created no immunity for price-fixers who knowingly and intentionally send their goods into a stream of commerce starting abroad that leads into the United States. Thus, there is no identifiable congressional objective that would be thwarted if the IAA is applied to the circumstances of this case. It is difficult to imagine that Congress would want to divest States of their traditional

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jurisdiction to regulate anticompetitive practices within their own boundaries, especially where such practices are intended, and do, cause harm to companies and citizens within the State.

And, with a statute, the FTAIA, that only limits the Sherman Act,[18] Congress gave no indication of an intention to occupy the "sub-field" of antitrust law involving imported or exported goods. Federal and state antitrust laws coexist and share a complementary purpose. *See ARC Am. Corp.*, 490 U.S. at 101. Equally clearly, state and federal antitrust law may vary in particular applications; States may prohibit activity permitted under federal antitrust law. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 131 (1978) (state statute may proscribe conduct legal under the federal antitrust laws). The fact that price-fixed goods are foreign-sourced or foreign-destined does not shift the balance. *See Amarel v. Connell*, 202 Cal. App. 3d 137, 148-49 (1988) (state law causes of action involving export commerce are not preempted by the Sherman Act). Congress has not assigned to foreign governments the exclusive authority to regulate foreign goods, barring States from applying their own law where relevant misconduct and demonstrable harm take place within that State. In fact, States routinely regulate and apply their law to goods entering their borders from abroad and contracts and conduct in their jurisdiction.

Finally, Defendants' assertion that applying the IAA to their conduct would violate the Commerce Clause and principles of prescriptive comity further misses the mark. The IAA is not, as they claim, a state regulation of foreign commerce; it addresses harm in Illinois. And unlike the state "anti-Burma" law at issue in *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68-69 (1st Cir. 1999), the IAA does not involve a state foray into foreign policy to protest the actions of a foreign government. Illinois is free to apply its law to commercial transactions involving goods sold to its domiciliaries, even if those goods come from abroad, particularly when it involves conduct and companies within its borders.[19]

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[18] At the outset, the FTAIA states only that "Section 1 to 7 of [*the Sherman Act*] shall not apply . . ." 15 U.S. § 6a (emphasis added).

[19] This applies even more directly to Motorola's breach of contract claims under Illinois law.

III. Motorola Has Properly Pleaded Its Claims For Breach Of Contract.

Defendants AU Optronics, Epson, Samsung, Sharp, and Toshiba (the "Contract Defendants") argue that Motorola's breach of contract claims are vague because Motorola has not identified particular contracts and contract provisions that it is relying upon. The argument is not credible. Their motion shows that they know exactly which contract terms they violated.

Motorola entered into agreements with each of the Contract Defendants for the supply of a certain percentage of Motorola's total LCD panel needs. Pursuant to those agreements, Motorola issued purchase orders containing agreed upon terms.[20] A key provision in those agreements was that the Contract Defendants warrant that they are in full compliance with applicable laws. *See* SAC ¶¶ 5, 131, 138-41. The Contract Defendants were not. To the contrary, they continuously and routinely participated in a cartel that undermined the agreements they entered into with Motorola. REDACTED

REDACTED

REDACTED

REDACTED The Contract Defendants note that some of the purchase orders state that the seller must comply with "all applicable laws, orders, rules and regulations" of China while others require compliance with the laws of Singapore. They argue that because the purchase orders they attached to their motion

[20] Because the contracts at issue are for the sale of goods, the Illinois-enacted Uniform Commercial Code governs the agreements. 810 ILCS 5/2-201, *et. seq*. If the Contract Defendants contend that the law of some other jurisdiction should apply, the Court can resolve any such conflicts using standard conflict of law analysis, but the result will be the same since Defendants' price-fixing activities were illegal and, therefore, in breach of the contracts and the implied covenant of good faith and fair dealing.

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call for compliance with the laws of different jurisdictions, they cannot determine which laws Motorola alleges they violated. But given that horizontal price fixing is illegal in all the jurisdictions referenced in the purchase orders,[21] it does not matter which jurisdiction was cited. Moreover, the Contract Defendants' illegal price-fixing agreements certainly violate the implied covenant of good faith and fair dealing that was a part of the agreements they entered into with Motorola. *See Martindell v. Lake Shore Nat'l Bank,* 154 N.E.2d 683, 690 (Ill. 1958).

The Contract Defendants insist that until Motorola catalogues specific contracts and shipments, "it is impossible to assess which transactions are the subject of the alleged breach of contract claims or what laws [were] supposedly violated." *See* Def. Mem. at 22. But not only did Motorola offer examples of the purchase orders, *see* SAC ¶ 139, and provide examples of contracts on which it is basing its claims, *see* Decl. of Colin West ¶ 31, Exhs. 1-14, 16-21, the Contract Defendants themselves attach additional purchase orders from their own document productions to their motion and describe the terms of their agreements with Motorola in their brief. *See* Def. Mem. at 21-22; *see also* Decl. of Colin West, Exhs. 1-29.

At this stage, and given the number of purchase orders and purchases involved, Motorola has pleaded "definite and certain terms" and how the Contract Defendants breached those terms. The level of additional contract-by-contract particularity that the Contract Defendants seek is properly obtained in discovery. Defendants cannot credibly suggest that they do not understand what is claimed, or that as pleaded, Motorola does not state a valid breach of contract claim.[22]

CONCLUSION

The Court should deny Defendants' motion to dismiss in its entirety.

---

[21] For example, Singapore's Competition Act of 2004 prohibits price-fixing. *See* Competition Act (Cap. 50B) § 34. Similarly, China made collusion to fix prices illegal in laws passed in 1998 and 2003. *See* 2003 Interim Provisions on Preventing the Acts of Price Monopoly, Article 4 (superseded by corresponding provisions in the China Anti-Monopoly Law in 2008); 1998 Price Law, Article 14. For reference, these statutory provisions are attached as Exhibits A, B, C.

[22] Contract Defendants argue that Motorola's unjust enrichment claims should be dismissed because Motorola has pleaded that the parties' relationship is governed by contract. But Motorola pleaded those claims in the alternative should the Court finds the contracts invalid or unenforceable. *See* Fed. R. Civ. Proc. 8(d)(2).

DATED: September 27, 2010

Respectfully submitted,

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EXHIBIT 5

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

IN RE: TFT-LCD FLAT PANEL ANTITRUST LITIGATION.
) NO. M-07-1827-SI
) C-09-4997 SI
) C-09-5840 SI
) SAN FRANCISCO, CALIFORNIA
) WEDNESDAY
) NOVEMBER 3, 2010
) 10:00 A.M.

TRANSCRIPT OF PROCEEDINGS

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WEDNESDAY, NOVEMBER 3, 2010 **10:00 O'CLOCK A.M.**

P R O C E E D I N G S

THE CLERK: CALLING CIVIL 07-1827, IN RE: TFT FLAT PANEL ANTITRUST LITIGATION.

THE COURT: HAVE YOU ALREADY MADE YOUR APPEARANCES KNOWN BY RECORDING OR OTHERWISE?

MR. TAFFET: WE HAVE, YOUR HONOR. THE COURT CLERK REPORTER ASKED US TO GIVE OUR NAMES AGAIN BEFORE WE APPEAR.

THE COURT: FIRST, I WOULD LIKE TO SAY THANK YOU FOR BEING HERE. IT WAS A LITTLE BIT OF A CHALLENGE TO GET HERE, I'M SURE, BECAUSE OF THE TRAFFIC OUTSIDE ON ACCOUNT OF THE CELEBRATION WHICH WILL OCCUR FORTHWITH ON CIVIC CENTER PLAZA.

I WOULD ALSO LIKE TO NOTE FOR THE RECORD THAT THE GIANTS WON THE SERIES, AND IT'S A DAY TO CELEBRATE THAT.

AND SO THANK YOU FOR BEING HERE, AND GO GIANTS.

MR. TAFFET: WELL, YOUR HONOR, RICHARD TAFFET FROM BINGHAM MCCUTCHEN FROM THE NEW YORK OFFICE. AND I DO CONGRATULATE THE CITY. AND I CAN SAY I'M A FAN, A PROGENY OF THE NEW YORK GIANTS, THE METS WHO MY FATHER BROUGHT ME TO THE POLO GROUNDS IN 1962 TO OBTAIN BASEBALL CONSCIOUSNESS.

SO CONGRATULATIONS TO THE CITY AND --

THE COURT: NOW, MR. TAFFET, YOU REPRESENT?

MR. TAFFET: THE SHARP DEFENDANTS.

THE COURT: THE SHARP DEFENDANTS. SO WE ARE NOW

TALKING ABOUT THE MOTOROLA MOTION.

MR. TAFFET: MOTOROLA. WE HAVE TWO MOTIONS ON TODAY.

THE COURT: YOU HAVE BOTH THEM. ALL RIGHT.

MR. TAFFET: WE HAVE THE AT&T AND THE MOTOROLA, YOUR HONOR. AND I THOUGHT WITH THE COURT'S PERMISSION TO JUST QUICKLY ADDRESS THE AT&T MOTION.

THE COURT: OKAY.

MR. TAFFET: BECAUSE I THINK -- AND I TALKED TO PLAINTIFFS' COUNSEL THIS MORNING -- WE SEEM TO BE IN AGREEMENT.

THE COURT: THAT'S WHAT IT LOOKED LIKE.

MR. TAFFET: A HEATED AGREEMENT. AND WE HAVE PREPARED A REVISED PROPOSED ORDER, WHICH I'M HAPPY TO HAND UP, WHICH MIGHT ASSIST THE COURT TO ADDRESS THAT. BUT I THINK WE'RE ALL IN LINE ON WHO BOUGHT WHAT, WHERE AND WHO DIDN'T. SO IF THE COURT --

THE COURT: YOU CAN HAND IT TO THE DEPUTY.

THANK YOU. WELL, WE'VE COME TO THE SAME CONCLUSION, BUT, OF COURSE, ONLY AFTER READING ALL YOUR MATERIALS AND WADING THROUGH IT.

SO IF YOU ARE GOING TO REACH CONCLUSIONS AND AGREEMENTS LIKE THIS, IT WOULD BE GOOD TO DO IT SOONER RATHER THAN LATER.

BUT THE MATTER CAN BE SUBMITTED ON THAT BASIS.

MR. TAFFET: YES. YES, YOUR HONOR.

SO TURNING TO THE MOTOROLA MOTION, IF WE MAY.

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THE COURT: YES.

MR. TAFFET: THERE ARE, BY MY COUNT, FIVE ISSUES THAT ARE RAISED BY THIS MOTION. THE FIRST IS THE ANTITRUST ISSUES DEALING WITH THE FOREIGN INJURY CLAIMS, BOTH UNDER FEDERAL AND STATE LAWS.

THEN, PERHAPS FOLLOWING ONTO THAT IS THE OTHER STATE LAWS FOR WHICH WE HAVE ARGUED THAT THEY SHOULD BE -- THAT THEY ARE PREEMPTED, AND THEY SHOULD BE DISMISSED, AND THAT WAS NOT OPPOSED.

THE FOREIGN AFFILIATE CLAIMS UNDER THE STATE LAWS AS NOT MEETING THE REQUIREMENTS OF DUE PROCESS WAS ALSO NOT OPPOSED.

AND THEN, WE HAVE THE ARGUMENTS, THE PLEADING ARGUMENTS FOR A BREACH OF CONTRACT CLAIM AND ALSO THE ARGUMENTS RELATING TO THE UNJUST ENRICHMENT CLAIMS.

THE COURT: SO JUST SAY AGAIN THE SECOND AND THIRD CLAIMS AS TO WHICH YOU --

MR. TAFFET: SURE. THERE WERE TWO ARGUMENTS THAT WE RAISED ON THIS MOTION RELATING TO THE STATE LAW CLAIMS OF THE PLAINTIFFS. ONE IS THAT IN ADDITION TO THE OTHER REASONS WE'VE RAISED IN RELATION TO THE ANTITRUST CLAIMS, THE NONANTITRUST STATE LAW CLAIMS ARE ALSO PREEMPTED UNDER THE INTEL II CASE. AND THAT WAS NOT OPPOSED IN PLAINTIFFS' OPPOSITION PAPERS.

THE COURT: WELL, STOP RIGHT THERE.

IS THAT -- PLAINTIFFS; IS THAT CORRECT?

MR. HOWARD: IT'S NOT CORRECT, YOUR HONOR.

JEFFREY HOWARD FOR THE PLAINTIFFS AT&T AND MOTOROLA.

THE COURT: ALL RIGHT. NOW, WHAT WAS THE THIRD ONE?

MR. TAFFET: THE THIRD ONE WAS THAT THE DUE PROCESS CLAIMS RELATED TO THE MOTOROLA FOREIGN AFFILIATES, THAT IT WAS NOT ALLEGED THAT THEY HAD PURCHASED IN ILLINOIS, FOR EXAMPLE, AND, THEREFORE, THE COURT'S PRIOR HOLDING UNDER DUE PROCESS WOULD ELIMINATE THOSE OR REQUIRE THE DISMISSAL OF ANY CLAIMS, THE STATE LAW CLAIMS AS TO THOSE PARTICULAR PLAINTIFFS.

AND I WOULD ASSERT, AGAIN, YOUR HONOR, THE OPPOSITION PAPERS THEMSELVES DO NOT OPPOSE THAT.

THE COURT: IS THAT CORRECT?

MR. HOWARD: NO, NOT CORRECT.

THE COURT: ALL RIGHT.

MR. TAFFET: WE COULDN'T FIND IT, IN ANY EVENT. WHICH BRINGS US BACK TO THE ANTITRUST CLAIMS.

THE COURT: WHICH IS THE ONES THAT I FIND MOST DIFFICULT.

MR. TAFFET: YES. AND PERHAPS TO START, I WOULD JUST NOTE, YOUR HONOR, THAT THIS IS THE THIRD COMPLAINT THAT WE'RE ADDRESSING RIGHT NOW, SEEKING TO ALLEGE THE CLAIMS, THE FOREIGN INJURY CLAIMS.

AND WE WOULD NOTE THAT ON THIS MOTION THAT THERE REALLY ARE NO NEW FACTS THAT HAVE BEEN ALLEGED IN THE PLEADING. THERE'S NO NEW LAW THAT'S BEING CITED OR RELIED UPON.

SO WHAT WE'RE REALLY FACING RIGHT NOW IS A REPACKAGING OF SOME OF THE ARGUMENTS THAT ARE PLAINTIFFS' ATTEMPT TO BRING BACK INTO THE SHERMAN ACT'S COVERAGE THE CONDUCT AND THE EFFECTS THAT THE FTI REQUIRES TO BE TREATED AS NOT SUBJECT TO THIS COURT'S JURISDICTION.

AND WHAT THEY TRY TO DO AND TO REPACKAGE THIS IS REALLY RAISING TWO REPACKAGED ARGUMENTS. ONE IS BASED UPON THE ARGUMENT THAT THERE WAS THIS SINGLE POINT OF NEGOTIATION IN THE UNITED STATES FOR THE GLOBAL PROCUREMENT SYSTEM, WHICH THEY OPERATED. AND THAT THE SINGLE PRICE THAT WAS ADOPTED FOR ALL OF MOTOROLA'S WORLDWIDE NETWORKS.

AND THE SECOND ARGUMENT IS ONE THAT THERE WAS AN IMPACT NOT DIRECT, SUBSTANTIAL AND FORESEEABLE IMPACT NOT SO MUCH ON U.S. COMMERCE, AS THEY UNDERSTAND THEIR ARGUMENT, BUT ON IMPORT COMMERCE INTO THE UNITED STATES.

THE COURT: YES. I'M LESS PERSUADED BY THAT ONE, BUT I'M REALLY STUCK ON THE FIRST ONE.

MR. TAFFET: OKAY. LET ME FOCUS ON THE FIRST ONE, BECAUSE I THINK TO PROVIDE SOME CONTEXT THAT THE REAL ISSUE HERE IS WHETHER THAT CENTRALIZED PROCUREMENT STRUCTURE WILL SATISFY THE DOMESTIC INJURY EXCEPTION UNDER THE STATUTE.

IT IS OUR POSITION THAT IT DOESN'T FOR SEVERAL REASONS. MOST IMPORTANTLY, THE STATUTE ITSELF IS CLEAR. AND EMPAGRAN AND THE SUPREME COURT MADE IT CLEAR AND CASES FOLLOWING THAT MADE IT CLEAR THAT TO MEET THE SECOND PRONG -- AND THAT'S

WHAT WE'RE REALLY TALKING ABOUT HERE -- TO MEET THE SECOND PRONG OF THE EXCEPTION IT MUST BE THE DEFENDANT'S CONDUCT THAT CAUSES THE EFFECT, THE DIRECT, SUBSTANTIAL, REASONABLY FORESEEABLE EFFECT UNDER U.S. COMMERCE. THAT'S PRONG ONE.

AND THE EFFECT ON U.S. COMMERCE MUST CAUSE THE FOREIGN INJURY. IT'S NOT THE CONDUCT ITSELF THAT MUST CAUSE THE FOREIGN INJURY.

SO RIGHT HERE EVEN IF WE WOULD LOOK TO THE CONDUCT THAT OCCURRED IN THE UNITED STATES -- AND LET'S ASSUME THAT THERE WAS THIS NEGOTIATIONS BETWEEN THE PLAINTIFF AND A DEFENDANT. AND LET'S EVEN ASSUME, AS JUDGE HAMILTON DID IN SUN, THAT THAT WOULD MEET THE FIRST PRONG, WHICH IS QUESTIONABLE BECAUSE IT'S PLAINTIFFS' CONDUCT AND NOT JUST DEFENDANTS' CONDUCT. BUT LET'S ASSUME THAT MEETS THE FIRST PRONG.

IT CAN'T -- IT STILL DOES NOT MEET THE SECOND PRONG BECAUSE THIS IS EXACTLY THE ARGUMENT MADE BY COUNSEL TO JUDGE HAMILTON IN SUN IN WHICH SHE DECIDED IN THE SUN II CASE.

SO EVEN IF WE HAVE THE REQUISITE EFFECT ON U.S. COMMERCE HERE, AS SHE POINTED OUT, THAT EFFECT IS STILL SO ATTENUATED FROM THE FOREIGN INJURY THAT IT CAN'T MEET THE PROXIMATE CAUSE REQUIREMENT.

THE COURT: AND WHY IS THAT?

MR. TAFFET: WELL, SHE POINTED OUT THAT, FOR EXAMPLE, THAT EVEN ASSUMING THAT YOU HAVE THAT EFFECT, THE PLAINTIFFS MUST STILL DIRECT THEIR AFFILIATE OVERSEAS TO BUY PRODUCTS.

THEY MUST -- THE AFFILIATE MUST ISSUE A PO. THE PO -- THE PURCHASE ORDERS, I MEAN -- THE PURCHASE ORDERS MUST BE ISSUED TO ONE OR MORE -- BY ONE OR MORE OF THE AFFILIATES TO ONE OR MORE OF THE DEFENDANTS.

THE INVOICE MUST THEN BE ISSUED FROM THE -- TO THE FOREIGN AFFILIATE, AND THE FOREIGN AFFILIATE MUST PAY THE PRICE.

THE COURT: NOW, LET'S SAY THAT SOME UNIFORM PRICE IS NEGOTIATED IN THE UNITED STATES, AS ALLEGED IN THE COMPLAINT. AND LET'S SAY THE THINGS THAT YOU JUST DESCRIBED HAPPENED AT THE PRICE THAT WAS NEGOTIATED IN THE U.S., AND THEN THE MONEY CHANGES HANDS. WHY IS THAT SO ATTENUATED?

MR. TAFFET: OKAY. BECAUSE -- WELL, TWO THINGS. ONE IS -- AND THIS RELATES SPECIFICALLY TO WHAT IS IN THE RECORD IN THIS CASE -- THE NEGOTIATION IN THE UNITED STATES, THAT CONDUCT, DOESN'T CREATE ANY EFFECT.

YOU NEGOTIATE A PRICE, BUT IT DOESN'T IMPOSE ANY REQUIREMENT UPON MOTOROLA IN THIS INSTANCE, OR ITS AFFILIATES, TO BUY ANYTHING. AND THEY ARE NOT PAYING ANY MONEY. THEY ARE NOT TAKING IN ANY PRODUCTS.

AND THE REQUISITE EFFECT ARISES FROM THE PURCHASE OF SUPERCOMPETITIVELY PRICED PRODUCT, ALLEGEDLY SUPERCOMPETITIVELY PRICED PRODUCT.

AND IT HAS TO FLOW FROM THAT EFFECT TO -- THAT MUST PROXIMATELY CAUSE THE FOREIGN INJURY. HERE WE --

THE COURT: SO YOU'RE SAYING THEY NEGOTIATE THE PRICE

IN THE UNITED STATES, BUT THEY COULD JUST CHOOSE NOT TO BUY ANYTHING.

MR. TAFFET: AND THAT'S REFLECTED IN THE PLEADING.

THE COURT: IN WHICH CASE THEY WOULDN'T BE ABLE TO PRODUCE THE GOODS THAT THEY --

MR. TAFFET: BUT THERE'S NO EFFECT. THERE'S NO EFFECT. AND THE EFFECT THAT ARISES WITH THE FOREIGN AFFILIATES IS WHEN THEY ISSUE THE PO. AND AS WE SUBMITTED AS PART OF THESE PAPERS, THE PO'S ARE SUBMITTED NOT BY MOTOROLA OUT SCHAUMBURG, ILLINOIS, BUT THEY ARE ISSUED OUT OF CHINA, MALAYSIA, SINGAPORE, DESIGNATING CHINESE LAW, SINGAPOREIAN LAW, MALAYSIAN LAW, SOMETIMES DESIGNATING NO LAW WHATSOEVER.

THE COURT: BUT YOU'RE SAYING THERE'S NO EFFECT CAUSED IN THE UNITED STATES. THAT'S CONTRARY TO WHAT JUDGE HAMILTON SAID. SHE SAID:

"I'M GOING TO GIVE YOU THAT MAYBE THAT HAPPENS," RIGHT?

MR. TAFFET: ON U.S. COMMERCE, RIGHT.

THE COURT: U.S. COMMERCE.

MR. TAFFET: WHAT SHE SAID, SHE SAID IF SHE ACCEPTED -- SHE SAID THE DEFENDANTS' ARGUMENT, WHICH SHE ACCEPTED, SAID IF THAT CONDUCT DOES CAUSE -- MEETS THE FIRST PRONG -- SO LET'S ASSUME THAT, OKAY? EVEN SO, THAT EFFECT DOESN'T CAUSE -- ISN'T THE PROXIMATE CAUSE OF THE FOREIGN INJURY BECAUSE OF THE ATTENUATED NATURE OF THE TRANSACTIONS.

THE COURT: RIGHT. AND THAT'S WHAT I WANTED TO UNDERSTAND IS WHY DO YOU SAY THAT THAT'S ALSO ATTENUATED?

MR. TAFFET: BECAUSE -- WELL, SHE RAISED SIX POINTS IN HER DECISION AND INDICATED WHY. IT'S EVEN MORE SHOULD IN THIS CASE.

SO WE HAVE IN THIS CASE FOREIGN AFFILIATES WHO THEMSELVES HAVE TO ISSUE THE PO. AND LET'S REMEMBER WE'RE NOT ARGUING ABOUT THE CLAIMS AND THE INJURY THAT'S ARISING IN THE UNITED STATES. THOSE CLAIMS ARE SURVIVING. WE'RE JUST TALKING ABOUT THESE FOREIGN INJURY CLAIMS.

SO THE FOREIGN AFFILIATES HAVE TO ISSUE THEIR OWN PO, HAVE TO BUY THE PRODUCT. AND IT'S NOT THE QUESTION OF -- THE ABSOLUTE LEVEL IN EACH OF THE PO'S PRICE IS GOING TO BE NEGOTIATED, ALSO. MAY BE A WORLDWIDE PRICE FOR WHATEVER TRANSACTIONS THAT MAY OCCUR.

BUT, THEN, THEY SUFFER THAT INJURY OUTSIDE THE UNITED STATES, SO IT'S NOT FLOWING -- AND I THINK JUDGE HAMILTON WAS CORRECT -- DIRECTLY FROM THE EFFECT WHICH SHE ASSUMED FOR PURPOSES OF THE SUN II DECISION.

THE OTHER POSITION IS IS THAT SHE RELIED UPON IN SUN II, SHE LOOKED AT THE RUBBER CHEMICALS DECISION BY THIS COURT.

AND THE RUBBER CHEMICALS DECISION MADE CLEAR THAT EVEN IF THERE ARE -- THE SAME CONDUCT IS GIVING AN EFFECT IN THE U.S. AND AN EFFECT IN THE FOREIGN JURISDICTION ABROAD, THAT'S

NOT ENOUGH. THAT, AT BEST, AS LATER THE NINTH CIRCUIT SAID IN DRAM SAID THAT IS, AT BEST, BUT-FOR CAUSATION.

AND THERE'S -- IT MAKES GOOD SENSE HERE, BECAUSE YOU HAVE INJURY THAT IS ARISING IN THE FOREIGN JURISDICTION BECAUSE THE PAYMENT OF THE SUPERCOMPETITIVE PRICE OCCURS IN THE FOREIGN JURISDICTION. THAT'S ENTIRELY CONSISTENT WITH THE UNDERLYING PRINCIPLES THAT THE SUPREME COURT ADDRESSED IN EMPAGRAN, THE COMITY PRINCIPLES.

AND, INDEED, WHAT WE'RE SAYING HERE, I WOULD SUBMIT, THAT THE ARGUMENTS THAT ARE BEING PUT FORWARD NOW BY MOTOROLA WOULD TURN THOSE POLICY CONSIDERATIONS ON THEIR HEAD.

THE COURT: WELL, IN EMPAGRAN WHAT THEY SAID WAS:

> "THE PRICE-FIXING CONDUCT SIGNIFICANTLY AND ADVERSELY EFFECTS BOTH CUSTOMERS OUTSIDE THE UNITED STATES AND CUSTOMERS WITHIN THE UNITED STATES. BUT THE ADVERSE FOREIGN EFFECT IS INDEPENDENT OF ANY ADVERSE DOMESTIC EFFECT. IN THESE CIRCUMSTANCES, IT DOESN'T APPLY."

MR. TAFFET: RIGHT.

THE COURT: WELL, THAT'S NOT SO HERE.

MR. TAFFET: WELL, IT IS SO, BECAUSE THE EFFECT IS THE PAYMENT OF THE HIGHER PRICES. SO --

THE COURT: WELL, THAT'S CERTAINLY NOT INDEPENDENT OF ANY ADVERSE DOMESTIC EFFECT.

MR. TAFFET: SURE IT IS, BECAUSE IN THE U.S. YOU'RE

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HAVING A DOMESTIC EFFECT, WHICH IS THE PAYMENT OF THE HIGHER PRICES. THAT'S DIFFERENT IF THE AGREEMENT -- THIS IS WHY IT'S IMPORTANT TO DIFFERENTIATE BETWEEN THE CONDUCT AND THE EFFECTS.

AND I THINK THE LAW IS ABSOLUTELY HERE THAT THAT IS A REQUIRED STEP TO TAKE. BECAUSE HERE THE EFFECT THAT'S BEING CAUSED IN THE UNITED STATES WILL ARISE FROM THE CONDUCT, LET'S ASSUME BETWEEN THE NEGOTIATIONS BETWEEN EACH DEFENDANT AND THE PLAINTIFF.

AND LET'S ASSUME -- I WOULD JUST NOTE THAT IT'S FOR THE FIRST TIME IN OPPOSITION THAT NOW PLAINTIFFS CALL THAT THE "FAUX NEGOTIATIONS," BUT THERE'S NO CONNECTION PLED BETWEEN THE BILATERAL NEGOTIATIONS AND THE CONSPIRACY.

BUT LET'S ASSUME THAT'S THE CONDUCT THAT GIVES RISE TO SOME EFFECT. SO THEN THAT GIVES RISE TO PURCHASES BEING MADE IN THE UNITED STATES AND THE INJURIES BEING SUFFERED HERE.

THAT'S THAT EFFECT. WHAT'S GIVING RISE TO THE INJURY THAT IS BEING OCCURRED OR BEING ALLEGED TO OCCUR IN THE FOREIGN JURISDICTION, IT'S NOT THE PAYMENT OF THE HIGHER PRICES IN THE U.S. IT'S THAT NEGOTIATION OF THE PRICE.

AND THAT'S WHERE DRAM AND RUBBER CHEMICALS MAKE IT CLEAR THAT IT HAS TO FLOW NOT FROM THAT CONDUCT THAT GIVES RISE TO THE U.S. EFFECT AND GIVES RISE TO THE EFFECT ABROAD, BUT HAS TO ARISE THAT I PAID MORE IN THE UNITED STATES. IT'S THE TWO-STEP.

THE COURT: WELL, THAT'S WHAT YOU'RE SAYING. ALL I AM

SAYING IS IF YOU GO BACK TO THE SUPREME COURT THEY DIDN'T HAVE A CASE LIKE THAT --

MR. TAFFET: I AGREE WITH THAT.

THE COURT: -- THAT WAY --

MR. TAFFET: I --

THE COURT: -- IN THE EMPAGRAN CASE, AND THEY DIDN'T SAY THAT. THE ONLY PLACE THAT THAT GETS SAID AS CLEARLY AS YOU'RE SAYING IT SO FAR AS I CAN TELL IS IN SUN.

MR. TAFFET: BUT SUN WAS THEN -- AND THEN, IN DRAM -- WELL, LET ME BACK UP.

THE COURT: DRAM DIDN'T HAVE THAT --

MR. TAFFET: NO. NO. WHAT I'M SAYING IS, WELL, IN DRAM WHAT THE COURT SAID, WHAT THE NINTH CIRCUIT SAID, IT SAID, QUOTE:

"THAT THE CONSPIRACY HAD EFFECTS IN THE UNITED STATES AND ABROAD DOES NOT SHOW THAT THE EFFECTS IN THE U.S. -- OTHER THAN -- THAT THE EFFECTS IN THE U.S. CAUSED THE EFFECTS ABROAD, AND THAT THE PRICE FIXING CONSPIRACY WAS NOT -- WAS NOT PROXIMATELY CAUSED BY THE OVERALL CONSPIRACY."

THE COURT: RIGHT. BUT, I MEAN, IN DRAM, THE PLAINTIFF, CENTERPRISE, WAS BRITISH.

MR. TAFFET: YES.

THE COURT: IT BOUGHT PRODUCT IN BRITAIN AND IT SOLD PRODUCT IN BRITAIN. AND IT WAS SAYING:

"BUT, NEVERTHELESS, THE GLOBAL CONSPIRACY" --

MR. TAFFET: RIGHT.

THE COURT: -- "WITH" --

MR. TAFFET: RIGHT.

THE COURT: -- "RISING AND THE U.S. BEING SUCH A BIG PLAYER AFFECTED US."

MR. TAFFET: RIGHT.

THE COURT: SO I'M SAYING DRAM DIDN'T HAVE THE FACT I'M STRUGGLING WITH HERE, WHICH IS THAT THEY SAT DOWN IN THE UNITED STATES AND IN SOME FASHION NEGOTIATE A PRICE THAT THEY ARE CONTENDING WAS THE PRICE-FIXED PRICE.

MR. TAFFET: I AGREE WITH YOU, BUT EXCEPT FOR THE FACT THAT THE PRINCIPLE THAT DRAM WAS TALKING ABOUT, IT WASN'T THE EXACT SAME FACT PATTERN. BUT IT WAS EXACTLY THE SAME TO DIFFERENTIATE BETWEEN CONDUCT AND EFFECT.

AND IF WE LOOK AT THE CONDUCT, WHETHER IT'S THE CONDUCTS OCCURRING IN BRITAIN, WHETHER THE CONDUCT HERE IS OCCURRING IN ASIA, OR THE CONDUCT HERE THAT WE ASSUME GIVES RISE TO THE U.S. DOMESTIC EFFECT OCCURS IN THE U.S., THAT CONDUCT IS GIVING RISE TO TWO SEPARATE EFFECTS.

ONE IS YOU HAVE TO BUY THE STUFF, THE PRODUCT, THE PRICE-FIXED PRODUCT IN THE U.S. TO SUFFER THE INJURY.

THAT'S AN EFFECT. YOU HAVE TO BUY THE PRICE-FIXED PRODUCT OUTSIDE THE UNITED STATES. THAT'S ANOTHER EFFECT.

AND THE PRICE, THE EFFECT IN THE UNITED STATES IS NOT

WHAT CAUSED THE INJURY. IT WAS THE CONDUCT IN THE UNITED STATES. AND THE QUESTION IS WHETHER IT IS SUFFICIENT FOR U.S.-BASED CONDUCT, OR MIXED CONDUCTED HERE, BECAUSE THE PRICE-FIXING ALLEGATIONS HERE OF THE CARTEL, SOME CONDUCT OCCURRED IN THE U.S. SOME CONDUCT OCCURRED OUTSIDE THE U.S. WHERE DO YOU DRAW THAT LINE?

THE FACT OF THE MATTER IS IT'S A GLOBAL CONSPIRACY, AND THAT'S WHAT IS ALLEGED. BUT IT DOESN'T MATTER UNDER THE THEORY OF ALL OF THESE CASES WHETHER IT WAS, AS YOU SAY IN DRAM, A DIFFERENT FACT PATTERN; RUBBER, SAME THING.

IF IT'S THE SAME EXACT CONDUCT THAT GIVES RISE TO THESE TWO EFFECTS, IT'S STILL THE CAUSATION RELATIONSHIP. IF WE DREW IT AS A TRIANGLE IT HAS TO BE ON THE EFFECT LEVEL, NOT ON THE CONDUCT LEVEL.

AND THAT CAN'T BE SHOWN. AND THAT'S, AS JUDGE HAMILTON SAID IN RUBBER, WAS BECAUSE IT WAS TOO ATTENUATED, AND IT MAKES SENSE.

THE COURT: THAT WAS JUDGE JENKINS, I THINK, IN THE RUBBER CASE.

MR. TAFFET: I MEAN, NOT RUBBER. I MEANT IN SUN, BUT YOU ARE CORRECT.

I STAND CORRECTED.

AND, AGAIN, WHAT I WAS -- WHAT I WAS REFERRING TO EMPAGRAN ON IS THE COMITY PRINCIPLES.

THE COURT: WELL, I JUST -- YOU KNOW, I SUSPECT THAT

CONGRESS WOULD BE SO SURPRISED TO HEAR YOUR ARGUMENT.

MR. TAFFET: WELL --

THE COURT: I DON'T THINK THAT'S WHAT THEY HAD IN MIND AT ALL WHEN THEY DRAFTED THE STATUTE.

MR. TAFFET: WELL, THAT'S WHAT THE LEGISLATIVE HISTORY TALKS ABOUT: THE DIFFERENTIATION BETWEEN, OR THE NEED TO ADDRESS EFFECTS THAT IMPACT U.S. COMMERCE.

INDEED, THERE'S A NICE QUOTE FROM AREEDA AND TURNER THAT WE PUT IN OUR PAPERS WHICH TALK ABOUT THE FACT THAT IT IS THE FOCUS ON THE GEOGRAPHICAL EFFECTS AS OPPOSED TO THE CONDUCT, QUOTE:

> "COMPORTS WITH BASIC AMERICAN ANTITRUST PRINCIPLES AS OUR INTEREST -- OUR ANTITRUST LAWS STRIVE TO MAINTAIN COMPETITION IN DOMESTIC MARKETS."

SO THE POINT BEING IS THAT AT LEAST AREEDA AND TURNER HAS SEEN IT THAT WAY. THE SUPREME COURT EVEN BEFORE EMPAGRAN SHOWS THAT -- SAID THAT -- IN HARTFORD FIRE SAID THAT THE SHERMAN ACT ONLY APPLIES TO FOREIGN CONDUCT THAT WAS MEANT TO PRODUCE AND DID, IN FACT, PRODUCE A SUBSTANTIAL EFFECT IN THE U.S.

AND I WOULD JUST NOTE, ALSO, THAT WITHIN THIS YEAR CHRISTINE VARNEY, ASSISTANT ATTORNEY GENERAL VARNEY TWICE HAS ADDRESSED THIS ISSUE OF THE SCOPE OF WHAT THE U.S. ANTITRUST LAWS SHOULD COVER.

IN HER GEORGETOWN SPEECH IN SEPTEMBER SHE SAID:

"WE NEED TO BE SENSITIVE TO THE REALITY THAT SOLUTIONS THAT WORK FOR SOME JURISDICTIONS MAY NOT ALWAYS WORK FOR OTHERS. NOR SHOULD OUR EFFORTS BE INFUSED WITH ASSUMPTIONS THAT THE MOST DEVELOPED JURISDICTIONS HAVE ALL THE RIGHT ANSWERS OR THAT THE UNITED STATES HAS LITTLE TO LEARN FROM THE EXPERIENCE OF OTHERS."

AND PREVIOUSLY IN PARIS, SHE SAID:

"IT IS NOT A MATTER OF PASSING THE BUCK. IT IS AN EFFORT TO RESPECT EACH OTHER'S SOVEREIGNTY AND TO ACKNOWLEDGE EACH OTHER'S GOOD FAITH EFFORTS TO SECURE OUTCOMES THAT ARE BEST FOR THE CONSUMERS WORLDWIDE."

AND I WOULD ADD TO THAT PRINCIPLE WE ARE NOT HERE TALKING ABOUT A RESULT THAT OCCURS FOR ANY REASON OTHER THAN THE FACT, AS WE'VE DISCUSSED PREVIOUSLY, THAT MOTOROLA SET UP ITS OPERATIONS WORLDWIDE.

AND WHAT WE'RE TALKING ABOUT HERE IS HOW MUCH -- HOW BIG IS THE REMEDY THAT PLAINTIFFS ARE ENTITLED TO SEEK IN THE UNITED STATES AS DISTINCT FROM IN JURISDICTIONS OVERSEAS. AND IT WAS BASED UPON THEIR DOING THAT THEY HAVE DECIDED TO TAKE ADVANTAGE OF THE LAWS, THE ENVIRONMENTS, THE CONDITIONS IN FOREIGN COUNTRIES TO SET UP THEIR WORLDWIDE OPERATIONS.

AND IT IS -- NOW WHAT THEY ARE TRYING TO DO IS SAY, NEVERTHELESS, THAT WE SHOULD EXTEND THE EACH OF U.S. ANTITRUST

LAWS, BECAUSE THE REMEDIES HERE ARE MORE AGGRESSIVE.

WELL, THAT'S EXACTLY WHAT GENERAL VARNEY WAS ADDRESSING. THAT'S EXACTLY WHAT THE PRINCIPLES OF COMITY SAY WE SHOULDN'T BE DOING AT THIS POINT IN TIME. THAT, INDEED, THAT'S WHY WE ARE NOT SEEKING TO DISMISS THIS ENTIRE CASE. WE'RE SEEKING TO DRAW THE LINE.

AND THE EXCEPTION, AS WE KNOW, THE DOMESTIC INJURY EXCEPTION HAS BEEN NARROWLY DEFINED. AND IF WE CONTINUE TO HAVE THIS EXPANSION, TO BE QUITE HONEST, I COULDN'T PREDICT WHAT THE SENATE WOULD DO OR THE CONGRESS WOULD DO BEFORE YESTERDAY, AND I CERTAINLY CAN'T PREDICT WHAT THEY WILL DO NOW.

SO I DON'T KNOW THE ANSWER TO YOUR QUESTION, BUT WHAT I CAN SAY IS UNDER THE PRINCIPLES OF COMITY, WHERE AT LEAST GENERAL VARNEY IS SPEAKING SHE IS ESPOUSING THE POSITION THAT THERE ARE LIMITS TO THE U.S. ANTITRUST LAWS. AND THAT IS WHAT WE'RE TALKING ABOUT NOW.

AND TO THE EXTENT THAT THEY ARE MORE EXPANSIVE, AS PLAINTIFFS ARE SEEKING RIGHT NOW, WELL, THAT'S ONLY BECAUSE THEY WANT THEM TO APPLY TO THEIR OPERATIONS, WHICH THEY VOLUNTARILY, FOR WHATEVER REASONS THEY HAD, PUT OVERSEAS AND TOOK OUTSIDE AND MADE THEMSELVES SUBJECT TO THE FOREIGN JURISDICTIONS LAWS BECAUSE THEY MAY BE FAVORABLE.

AND THAT'S NOT SOMETHING TO PLAY AGAINST BOTH SIDES. THEY ARE NOT REMEDILESS. THEY CAN GO TO THESE OTHER JURISDICTIONS AND DO WHAT THEY WISH. BUT THIS COURT NEEDS TO

ADDRESS ONLY THE EFFECTS THAT OCCUR HERE. AND THAT'S WHAT THE CASES -- THAT'S WHAT THE SCHOLARS SAY IS THE FOCUS THAT WE SHOULD HAVE.

THE COURT: THANK YOU.

YOU CAN COME ON UP. IS ANYBODY HERE FROM THE U.S. ON THE CRIMINAL MATTERS?

(NO RESPONSE.)

THE COURT: WOULD THAT BE A NO?

OKAY. YES.

MR. HOWARD: YOUR HONOR --

THE COURT: STATE YOUR NAME, PLEASE.

MR. HOWARD: JEFFREY H. HOWARD FOR THE PLAINTIFFS AT&T AND MOTOROLA.

YOUR HONOR HIT THE NAIL ON THE HEAD WITH QUOTING THE SUPREME COURT: "INDEPENDENT FOREIGN EFFECT."

THAT IS NOT WHAT WE HAVE HERE. THERE'S NOTHING INDEPENDENT ABOUT IT. THE FACTS THAT WE'VE ALLEGED IN OUR COMPLAINT SHOW THAT ALL OF THE PURCHASING DECISIONS WERE CONTROLLED IN THE U.S.

ALL OF THE PRODUCTS WERE DESIGNED IN THE U.S. FOR SALE IN THE U.S.

ALL OF THE PURCHASE CONTRACTS WERE ENTERED INTO IN THE U.S. THEY CAME TO CHICAGO TO NEGOTIATE CARTELIZED PRICES.

ALL OF THE PRICES WERE AGREED TO IN THE U.S.

ALL THE PANELS WERE INCORPORATED INTO FINISHED GOODS

THAT WERE IMPORTED INTO THE U.S. BY A U.S. COMPANY FOR SALE TO U.S. CUSTOMERS.

THAT'S NOT AN INDEPENDENT FOREIGN EFFECT. WE HAD A CONTRACT AT A CARTELIZED PRICE, AND OUR WHOLLY-OWNED OR CONTROLLED SUBSIDIARY PLACED AN ORDER. I DON'T UNDERSTAND WHY MR. TAFFET CAN'T SEE THE LINK BETWEEN THE CONTRACT SETS PRICE AT TEN, AND THE ORDER DEMANDS A HUNDRED OF THEM AT TEN.

THAT'S A CAUSE AND EFFECT RELATIONSHIP.

HE'S TRYING TO --

THE COURT: WELL, DO I HAVE TO DISAGREE WITH JUDGE HAMILTON FOR YOU TO WIN THIS MOTION?

MR. HOWARD: NO, YOU DON'T. JUDGE HAMILTON -- I WAS COUNSEL FOR SUN IN THE SUN CASE. WE DIDN'T LOSE THAT CASE UNTIL SUMMARY JUDGMENT.

WHAT I'M ASKING HERE IS FOR THE COURT TO FIND WE'VE MADE ADEQUATE ALLEGATIONS? AND THEN, IF WE CAN'T PROVE SOME OF THE FACTS WE'VE ALLEGED WE CAN TAKE IT UP AGAIN AT SUMMARY JUDGMENT.

BUT WE'VE ADEQUATELY ALLEGED THE SINGLE ENTERPRISE. WE'VE ADEQUATELY ALLEGED THE AGENCY. WE'VE ADEQUATELY ALLEGED THE CONTRACTS. WE'VE ADEQUATELY ALLEGED THE PRICING WAS SET OUT OF CHICAGO. ALL OF THAT IS IN OUR AMENDED COMPLAINT.

IN TERMS OF THE PUBLIC POLICY ISSUE, YOUR HONOR ASKED IF ANYONE WAS HERE FROM THE DEPARTMENT OF JUSTICE. YOUR HONOR HAS APPROVED CRIMINAL FINES BASED ON THE THREE-PART FINE

CALCULATION THE JUSTICE DEPARTMENT USES: SALES TO A U.S. COMPANY; SALES INVOICED TO A U.S. COMPANY, EVEN IF THE FINISHED GOODS GO OVERSEAS; AND SALES BILLED TO A FOREIGN AFFILIATE OF A U.S. COMPANY WHERE THE FINISHED GOODS ARE IMPORTED INTO THE UNITED STATES.

YOUR HONOR HAS APPROVED SOME $900 MILLION IN CRIMINAL FINES BASED ON THOSE THREE LEGS THAT THE UNITED STATES USES.

THE THIRD LEG IS EXACTLY WHERE MOTOROLA IS.

THE COURT: WELL, UP UNTIL NOW, OF COURSE, THAT'S ALL BEEN AGREED UPON BY THE PARTIES AND PRESENTED AS --

MR. HOWARD: IT HAS BEEN, YOUR HONOR. IT HAS BEEN AGREED UPON BY THE PARTIES, BUT I PRESUME THAT BOTH THE UNITED STATES AND THIS COURT LOOKED AT THOSE FACTORS AND WAS COMFORTABLE THAT THEY ADEQUATELY REFLECTED PUBLIC POLICY AND THE LAW THAT GOVERNS.

THE COURT: DO YOU THINK THAT THE STATUTE SHOULD BE CONSTRUED THE SAME FOR CRIMINAL AS FOR CIVIL PROCEEDINGS?

MR. HOWARD: I KNOW THE UNITED STATES HAS A DIFFERENT VIEW ON THAT, AND I'M NOT REQUIRED TO TAKE A POSITION HERE UNLESS THE COURT'S GOING TO FORCE ME TO.

BUT I THINK THE STATUTE WOULD APPLY TO BOTH CRIMINAL AND CIVIL IN THE SAME WAY. IT SHOULD REFLECT THE OUTER REACH OF THE SHERMAN ACT. THERE'S NO REASON IN THE STATUTE, NOTHING IN THE LANGUAGE OR LEGISLATIVE HISTORY THAT WOULD CAUSE THAT TO BE INTERPRETED DIFFERENTLY.

SO IT'S NOT AN INDEPENDENT FOREIGN INJURY. AND OUR PRIME ARGUMENT IS THE DOMESTIC EFFECTS.

NOW, LET ME GO BACK TO TALK A LITTLE BIT ABOUT AT THE LAST HEARING IN THE DELL CASE, YOUR HONOR SAID THAT A COURT SHOULD LOOK TO THE CONSEQUENCES.

THAT'S THE SAME WORD THAT JUDGE HAND USED 65 YEARS AGO IN ALCOA: CONSEQUENCES WITHIN OUR BORDERS.

HERE WE HAVE ALLEGED THAT THE CONSEQUENCES IN THE U.S. ARE THAT MOTOROLA OBLIGATED ITSELF TO PAY A CARTELIZED PRICE, PLACED THE ORDERS AND PAID FOR GOODS THAT WERE THEN SHIPPED BACK TO THE U.S. ALL THE CONSEQUENCE WAS IN THE U.S.

WE'VE ALLEGED IN OUR COMPLAINT THAT ALL OF THE INJURY, ALL OF THE INJURY WAS SUFFERED BY MOTOROLA IN THE U.S., PARAGRAPH 173.

THIS IS A DOMESTIC EFFECT, CLEAR AND SIMPLE. THE DEFENDANTS ARE, I SUBMIT, TRYING TO MIX THE LANGUAGE UP TO TURN IT AROUND SO THAT THE EFFECT IN THE UNITED STATES, WHICH IS THE CARTELIZED PRICE, CAN'T BE SEEN AS CAUSING AN OVERCHARGE TO THE FOREIGN SUB.

THAT DOESN'T MAKE ANY SENSE. DOESN'T MAKE ANY SENSE AT ALL. AND AFTER YOUR HONOR'S JUNE 28TH RULING, WE WENT BACK TO OUR CLIENT, MOTOROLA, DELVED INTO THE FACTS MORE AND PUT THOSE FACTS IN THE COMPLAINT.

NOW, I WANT TO SAY WE HAVE THREE BUCKETS OF ALLEGED PURCHASES. I THINK MR. TAFFET SAID HE DIDN'T OBJECT TO THE

FIRST, 61 MILLION BOUGHT IN THE U.S., DELIVERED IN THE U.S.

THE COURT: WELL, HIS MOTION ISN'T DIRECTED TOWARD THEM.

MR. HOWARD: THE OTHER TWO BUCKETS ARE 1.75 BILLION THAT MOTOROLA'S CHINESE AND SINGAPOREIAN SUBS PLACED THE ORDERS FOR ON OUR U.S. PRICES, AND THEN SHIPPED THE FINISHED GOODS BACK TO THE U.S.

THE THIRD BUCKET, I'M GOING TO DEFER TO MY BRIEF ABOUT, IS EVEN BIGGER. IT'S OVER $4 BILLION. AND THOSE ARE PANELS PURCHASED UNDER THE SAME PRICE REGIMEN BY OTHER ENTITIES OUTSIDE THE U.S. FOR FINISHED GOODS TO BE SOLD ABROAD.

I'M GOING TO DEFER -- I'M NOT GIVING THOSE UP, BUT I'M GOING TO DEFER TO MY BRIEF ON THAT.

MOTOROLA, SO IT'S FIGHTING HERE TODAY FOR THE RIGHT TO LITIGATE A CLAIM ON $1,750,000,000 IN PURCHASES OF LCD PANELS. THAT'S WHAT IS AT STAKE. IT'S A BIG NUMBER. AND WE CLAIM THAT IT FITS SQUARELY WITHIN THE DOMESTIC EFFECTS.

WE'VE ALLEGED WE DESIGNED THE PHONES HERE. WE NEGOTIATED THE PRICE HERE. WE CONTROLLED THE PRICE. THE HANDSETS CAME BACK TO THE U.S. FOR SALE TO PEOPLE IN THE U.S.

IN EFFECT, THIS IS JUST LIKE DELL, BUT WE'VE GOT MORE. WE'VE GOT ALL THOSE FINISHED GOODS, 1.75 BILLION WORTH. ALL THOSE FINISHED GOODS COMING BACK HERE INTO THIS COUNTRY FOR SALE TO AMERICANS.

WHY DO YOU SUPPOSE THE UNITED STATES HAS THAT THIRD

PRONG IN ITS FINE CALCULATION? SALES BILLED TO A FOREIGN AFFILIATE WHERE THE FINISHED GOODS COME BACK TO THE U.S.?

I HOPE MR. TAFFET WILL ANSWER THAT QUESTION. WHY DO THEY HAVE THAT THERE?

OBVIOUSLY THEY THINK THAT IT'S OF CONCERN TO THE UNITED STATES THAT ALL OF THE ELECTRONICS THAT ARE MADE OUTSIDE THIS COUNTRY AND IMPORTED BACK HERE COULD BE SOLD AT CARTELIZED PRICES WITH ABSOLUTELY NO RECOURSE IN THIS COUNTRY.

THAT DOESN'T MAKE ANY SENSE AT ALL.

I SEE MR. SCARPULLA IN THE BACK OF THE COURTROOM. WHAT ABOUT THE CONSUMER CLASS ACTION? THE CONSUMERS BOUGHT TV SETS. ALL THOSE TV SETS WERE MADE ABROAD AND IMPORTED INTO THIS COUNTRY.

UNDER MR. TAFFET'S RULE, THERE WILL BE NO CONSUMER CLASS ACTIONS IN THE FUTURE BECAUSE THOSE TV'S WERE MADE OUTSIDE THE COUNTRY.

WE'VE ARGUED IN OUR BRIEF AND ASSERTED IN OUR COMPLAINT THAT WE MEET THE GIVE-RISE-TO-A-CLAIM PRONG IN TWO RESPECTS. YOUR HONOR SAID IN YOUR JUNE 28TH RULING THAT MOTOROLA SHOULD SHOW FACTS ON, QUOTE:

"HOW MOTOROLA'S FOREIGN INJURIES WERE PROXIMATELY CAUSED BY ANY DOMESTIC EFFECT."

THIS IS WHAT WE CALL THE "TWO-STEP DANCE."

AND WE DID THAT.

IT'S A VERY SIMPLE TEST. WE HAVE NO DISPUTE WITH

JUDGE HAMILTON IN SUN II THAT IT IS A COGNIZABLE EFFECT THAT WE NEGOTIATED FOR CARTELIZED PRICES IN THE U.S.

THAT'S THE EFFECT. AS YOUR HONOR SAID, THAT'S WHAT SHE SAID IN SUN II. WE AGREE WITH THAT.

AND IF THE FOREIGN SUB PLACES AN ORDER, IT'S ONLY PERMITTED TO PLACE AN ORDER UNDER THAT CONTRACT AT THAT CARTELIZED PRICE. AND THAT'S A CAUSE AND EFFECT RELATIONSHIP.

SO THEY THEN PAID MORE FOR THE PANEL THAN THEY WOULD HAVE OTHERWISE.

WE ALSO ARGUED IN OUR BRIEF THAT AS A GENERAL PROPOSITION IT'S LONG BEEN KNOWN THAT THE SHERMAN ACT, QUOTE:

"IS AIMED AT SUBSTANCE RATHER THAN FORM," CLOSE QUOTE.

I DON'T CITE IT IN MY BRIEF, BUT THE SUPREME COURT JUST A COUPLE OF WEEKS AGO IN AMERICAN NEEDLE V. NFL REPEATED THE SAME INJUNCTION AND ADVICE.

HOW DOES THAT THEME APPLY HERE? THE SUBSTANCE OF ALL OF THE TRANSACTIONS WE'RE TALKING ABOUT WAS RUN BY MOTOROLA. EVERYTHING. THE FINISHED GOODS WERE IMPORTED INTO THE U.S. FOR SALE TO U.S. CUSTOMERS, AND MOTOROLA SUSTAINED THE ENTIRE INJURY IN THE U.S. PARAGRAPH 173.

HOW COULD THAT NOT BE A DOMESTIC EFFECT? MR. TAFFET, I THINK, IS TRYING TO CREATE A SHIBBOLETH. IF YOU REMEMBER IN THE OLD TESTAMENT THE ISRAELITES BEAT ANOTHER TRIBE, AND THEY HAD A RIVER SEPARATING THEIR CAMPS. THEY KNEW THE OTHER TRIBE

COULDN'T PRONOUNCE "S-H," SO THEY HAD AS THE CODE THE WORD "SHIBBOLETH." THAT'S WHAT I WAS THINKING AS I HEARD HIS ARGUMENT, A WORD THAT THE EPHRAIMITES COULD NOT PRONOUNCE, SO THE ISRAELITES KILLED EVERY SINGLE ONE OF THEM.

AND THAT'S WHAT HIS RULE WOULD DO TO ALL THESE IMPORTS INTO THE UNITED STATES, KILL EVERY SINGLE ONE OF THOSE CLAIMS.

WE ALSO BELIEVE AND HAVE ARGUED IN OUR BRIEF THAT IT MEETS THE IMPORT EFFECT TEST. EVERYONE KNEW THAT THESE PRODUCTS WERE BEING IMPORTED INTO THE UNITED STATES. TWO COMPANIES HAVE PLED GUILTY TO FIXING THE PRICE OF THE PANEL FOR THE RAZR, DESTINED TO THE U.S.

SO WE THINK WE MEET THAT TEST, AS WELL.

AND, FINALLY, WE HAVE A SINGLE ENTERPRISE THEORY. I DID LOSE THIS IN SUN III, BUT I LOST IT ON THE FACTS, NOT ON THE PLEADING.

AND I'VE ADEQUATELY PLED THE SINGLE ENTERPRISE OF THE AGENCY THEORY, AND I JUST ASK YOUR HONOR TO HOLD OFF UNTIL THE END OF DISCOVERY, AND WE WILL SEE WHETHER WE CAN PROVE IT. I THINK WE CAN.

THE COURT: DO YOU THINK AMERICAN NEEDLE AFFECTS THAT?

MR. TAFFET: DO I THINK AMERICAN NEEDLE?

THE COURT: AFFECTS YOUR SINGLE ENTERPRISE THEORY?

MR. HOWARD: WELL, YOU COULD PLAY THAT -- YOU COULD

INTERPRET THAT IN MY FAVOR, I THINK.

WE DON'T FOLLOW THE FORM.

THE COURT: I DON'T THINK SO.

MR. HOWARD: WE LOOK TO THE SUBSTANCE OF THE TRANSACTION.

THE COURT: YES.

MR. HOWARD: THE SUBSTANCE IS ONE ENTITY IN THE U.S. CONTROLLED EVERYTHING.

NOW, BEFORE I CLOSE, WE DID NOT -- ON THE WAIVER POINT WE DID ADDRESS THE QUESTION OF PREEMPTION ON PAGE 32 AND 33 OF OUR BRIEF.

ON THE AT&T --

THE COURT: WAIT. WAIT. SAY THAT AGAIN.

MR. HOWARD: SURE.

THE COURT: ON THE PREEMPTION YOU ADDRESS IT AT PAGES 33 --

MR. HOWARD: THIRTY-TWO TO THREE.

THE COURT: THIRTY-TWO, 33.

MR. HOWARD: ON THE AT&T PROPOSED ORDER, I HAVEN'T SEEN THIS BEFORE, SO I CAN'T AGREE TO IT. IT WAS JUST HANDED TO ME IN THE COURTROOM.

THE COURT: OH, ON THE OTHER MOTION?

MR. HOWARD: AND SO WE'D NEED A CHANCE TO RESPOND TO THAT.

THE COURT: WELL, IF YOU WANT, I'LL JUST DECIDE THE

MOTION.

MR. HOWARD: VERY WELL, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

MR. TAFFET: I'M NOT SURE I CAN PRONOUNCE "SHIBBOLETH," EITHER. BUT I WOULD JUST SAY, THOUGH, JUST A FEW POINTS, YOUR HONOR. THAT FIRST I KNOW MR. HOWARD SAID HE'S GOING TO STAND ON HIS BRIEF ABOUT THE SCOPE AND THE CONSEQUENCES AND EVERYTHING ELSE, WHICH IS SOMEWHAT ASTOUNDING, BECAUSE EVEN IN YOUR HONOR'S OPINION THE PANELS THAT WERE SOLD ABROAD AND THAT NEVER CAME INTO THE U.S., AS YOU NOTED THAT MOTOROLA CONCEDES TAKE IT CANNOT ASSERT ANY CLAIMS BASED ON THE SALE OF LCD PANELS TO MOTOROLA SUBSIDIARIES ABROAD IF THE PANELS NEVER ENTERED INTO THE UNITED STATES.

THE COURT: WELL, I JUST MADE A NOTE THAT HE DID IT AGAIN.

MR. TAFFET: OH, OKAY. OKAY.

THE COURT: I COULD HEAR WHAT HE SAID SO --

MR. TAFFET: I JUST WANTED TO POINT THAT OUT.

THE OTHER POINTS I WANTED TO MAKE, I THINK MR. HOWARD'S EXPLANATIONS REALLY ESTABLISH SOME OF THE POINTS THAT I WAS TRYING TO MAKE. THAT THERE IS A GOOD USE OF WORDS THAT THERE IS A CAUSAL -- A CAUSE AND EFFECT RELATIONSHIP, HE SAID; THAT THERE WERE NOT INDEPENDENT EFFECTS. THAT THERE WAS CAUSE AND EFFECT. THERE'S CAUSALITY.

THAT'S NOT THE QUESTION. THERE IS -- NO ONE CAN SAY

THAT THERE'S SOME ATTENUATED OR BUT-FOR -- OR EVEN BUT-FOR CAUSATION THAT MAY OCCUR FROM THE SAME CONDUCT GIVING RISE TO THE U.S. EFFECT AND THE FOREIGN EFFECT.

THAT'S NOT ENOUGH. THAT WAS THE SAME ARGUMENT THAT HE'S LOST ALREADY IN THE SUN CASE. THAT'S THE SAME ARGUMENT THAT THEY LOST IN ALL OF THESE CASES POST-EMPAGRAN II, OR STARTING WITH EMPAGRAN II, I SHOULD SAY. THAT THIS IS BUT-FOR CAUSATION. AND IF WE JUST DRAW THE PICTURE OF IT, THE FOREIGN AFFILIATE PURCHASES A PRODUCT, WHICH IS THE PANEL. THAT'S WHAT IS BEING ALLEGED TO HAVE BEEN PRICE-FIXED.

IT'S NOT THE END PRODUCT. IT PUTS IT INTO A FINISHED PRODUCT. THERE IS A WHOLE -- AND THIS THEN GETS SHIPPED TO THE UNITED STATES.

UNITED PHOSPHOROUS THAT WAS AFFIRMED IN THE SEVENTH CIRCUIT SAYS:

> "THAT DOESN'T EVEN MEET THE FIRST PRONG BECAUSE THE COMPONENT THAT'S INCLUDED IN THE FINISHED PRODUCT IS NOT SUFFICIENTLY DIRECT, SUBSTANTIAL AND REASONABLY FORESEEABLE."

BUT THEN IT COMES IN AND IT'S SOLD TO A CONSUMER HERE. AND WE'RE NOT TALKING ABOUT A CONSUMER HERE. WE'RE TALKING ABOUT MOTOROLA. SO IT IS GOOD TO SEE MR. SCARPULLA IN THE -- BEHIND THE BAR IN THE COURTROOM TODAY, BUT I DON'T THINK THE CLAIMS THAT HE'S ASSERTED HAS ANYTHING TO DO WITH MOTOROLA'S DECISION -- MOTOROLA'S ISSUES RIGHT NOW.

SO THE POINT BEING THAT AS MR. HOWARD EXPLAINED THE SCENARIO, THAT IS INDIRECT. THAT CANNOT BE PROXIMATE CAUSALITY.

AGAIN, IF THE PRICE-FIXING CONSPIRACY CAUSED THIS -- IT TRULY WAS A FAUX NEGOTIATION WITH MOTOROLA IN THE UNITED STATES. SO THE FOREIGN ENTITY BUYS THE PANEL, ASSEMBLES IT OVERSEAS. MOTOROLA DECIDES THROUGH ITS OWN SUPPLY CHAIN TO BRING THAT INTO THE UNITED STATES AND DELIVER IT TO SOME CUSTOMER.

MOTOROLA IS NOT BUYING THE NEXT -- IS NOT BUYING THE FINISHED PRODUCT. IT'S DELIVERING IT TO SOMEBODY INDIRECTLY.

SO THERE'S A LOT OF HOLES IN THIS RELATIONSHIP, IN THE STRUCTURE. IT MAY BE BUT-FOR CAUSALITY. I'M NOT EVEN SURE IT'S THAT. BUT IT'S NOT PROXIMATE CAUSALITY.

THE OTHER POINT THAT I JUST WANT TO MAKE IS THAT I WOULD DISAGREE WITH MR. HOWARD THAT, INDEED, YOU WOULD HAVE TO RULE CONTRARY TO JUDGE HAMILTON IN SUN.

SHE DECIDED THE GLOBAL PROCUREMENT ISSUE IN HER SECOND, THE SUN II. THE SINGLE ENTERPRISE THEORY WAS NOT DECIDED UNTIL SUMMARY JUDGMENT IN SUN III.

WE WOULD -- SO THAT, THE GLOBAL PROCUREMENT SYSTEM ISSUE, IS RIPE FOR DETERMINATION. WE WOULD ASSERT THAT THE SINGLE ENTERPRISE ISSUE IS RIPE, ALSO, BECAUSE THERE'S NOTHING ALLEGED HERE THAT WAS DIFFERENT THAN EXISTED IN SUN -- IN THE SUN CASE.

MOREOVER, WHAT WE HAVE HERE, AGAIN, IS MOTOROLA SETTING UP ITS CORPORATE OPERATIONS, IT'S GLOBAL OPERATIONS.

WHAT IT ESSENTIALLY WANTS TO DO IS MAINTAIN THE SANCTITY OF ITS CORPORATE STRUCTURE FOR ITS OWN PURPOSES.

I WOULD BE WILLING TO HAZARD A GUESS THAT IF THERE'S LIABILITY IN MALAYSIA WITH THEIR MALAYSIAN OR CHINESE OR ANY OTHER FOREIGN ENTERPRISE THAT THE PARENT IN SCHAUMBURG, ILLINOIS IS NOT GOING TO AGREE THAT IT IS LIABLE FOR THAT, FOR THAT VIOLATION OF FOREIGN LAW.

WHAT THEY ARE TRYING TO DO NOW IS AFFIRMATIVELY PIERCE THE VAIL. THAT'S NOT PERMITTED AS A MATTER OF LAW. AND WE CITED OUR CASES IN THAT.

AND YOU ASKED, JUST TO CONCLUDE, THAT IT'S NOT JUST LOOKING AT CONSEQUENCES. WE TALKED ABOUT CONSEQUENCES IS OF THEIR OWN DOING. IT'S NOT JUST SOME SOCIAL RELATIONSHIP RIGHT NOW AND THOUGHTS. THE ANTITRUST LAWS HAVE EVOLVED PAST THAT.

IT'S THE EFFECTS-BASED TEST THAT THE ANTITRUST LAWS NOW ADDRESS. BUT EVEN IN THE LEGISLATIVE HISTORY OF THE FTAIA, MR. HOWARD RAISED JUDGE LEARNED HAND IN ALCOA.

WHAT THE LEGISLATIVE HISTORY SAYS IS:

> "SINCE JUDGE LEARNED HAND'S OPINION IN THE UNITED STATES VERSUS ALCOA AMERICA, IT HAS BEEN RELATIVELY CLEAR THAT IT IS THE SITUS OF THE EFFECTS AS OPPOSED TO THE CONDUCT THAT DETERMINES WHETHER UNITED STATES LAW APPLIES."

AND HERE, BY HIS OWN CONCESSION, THE EFFECT OCCURS WHEN THAT FOREIGN SUBSIDIARY OR AFFILIATE MAKES THAT PURCHASE.

WHETHER IT'S AT THE DIRECTION OF THE PARENT OR NOT, IT HAS TO MAKE THE PURCHASE.

THAT'S THE INJURY SUFFERED AND IT IS STILL DERIVATIVE. IF ANY INJURY THAT FLOWS UP TO THE PARENT, THAT'S STILL DERIVATIVE. THAT'S NOT DIRECT.

SO THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

LET ME ASK YOU BOTH THIS QUESTION. WHATEVER I DO IN THIS CASE -- AND THE ISSUE IS OPEN IN THIS CASE. IT'S ALSO OPEN IN A SLIGHTLY DIFFERENT FORMAT IN THE DELL CASE. WHATEVER I DO, IT SEEMS TO ME THESE ARE TOUGH, TOUGH QUESTIONS. WHAT IS YOUR VIEW ON CERTIFICATION FOR INTERLOCUTORY APPEAL ON HOWEVER I GO ON THIS?

BECAUSE IT WOULD SEEM TO ME THAT WE WOULDN'T HAVE TO STAY THE CASE IN ORDER TO ALLOW AN INTERLOCUTORY APPEAL TO GO FORWARD.

MR. TAFFET: I THINK WE THOUGHT ABOUT THIS QUESTION VERY, VERY BRIEFLY, THOUGH, YOUR HONOR, WE HAVE NOT HAD THE OPPORTUNITY TO DISCUSS IT WITH OUR CLIENT. I THINK THE INITIAL REACTION IS THAT THESE ARE HARD QUESTIONS. AND WE CERTAINLY WOULD LOOK TO THAT POSSIBILITY.

BUT, AGAIN, I JUST HAVE TO BE CAUTIOUS BECAUSE I HAVEN'T HAD THE CHANCE TO TALK WITH, A, MY OWN CLIENT; AND, B, THE OTHER DEFENSE GROUP.

MR. HOWARD: COULD I ANSWER THE COURT'S QUESTION?

MAKE TWO OTHER POINTS?

THE COURT: SURE.

MR. HOWARD: THIS IS AN ISSUE OF GREAT DIGNITY AND IMPORTANCE THROUGHOUT THE UNITED STATES. WE'VE ARGUED THIS SIX TIMES IN DIFFERENT CASES, AND WE NEED SOME CLARITY. I HAVEN'T HAD A CHANCE TO TALK TO MY CLIENTS ABOUT THE ISSUE, BUT IF WE WERE TO LOSE, WE WOULD LOVE TO BE ABLE TO GO UP AND TRY TO GET SOME RESOLUTION, OBVIOUSLY.

THE COURT: WHAT IF YOU WON?

MR. HOWARD: IF WE WON, I THINK IT MIGHT -- YOU KNOW, THERE COULD BE JUSTIFIABLE REASONS FOR AN ISSUE OF THIS DIGNITY TO LET IT BE RESOLVED BY A HIGHER COURT.

COULD I MAKE MY FINANCIAL TWO POINTS?

THE COURT: SURE.

MR. HOWARD: FOR MY 1.75 BILLION?

THE COURT: YES, A BILLION HERE, A BILLION THERE.

MR. HOWARD: THERE'S NO INTERVENING THIRD PARTY. NO INTERVENING THIRD PARTY. IT'S NOT TOO ATTENUATED.

THERE IS NO HALT IN THE CAUSAL CHAIN. THE SUB PLACES THE ORDER, GETS THE PANEL. MOTOROLA GETS THE HANDSET.

IT'S COMPLETELY DIFFERENT FROM SUN FOR THREE REASONS THAT WE'VE ALLEGED IN THIS NEW COMPLAINT. HERE WE HAVE TOTAL CONTROL. IN SUN WE DIDN'T. INDEED, JUDGE HAMILTON POINTED OUT THAT SUN SCOTLAND AND SUN NETHERLANDS PURCHASED THEIR OWN DRAM AT THEIR OWN PRICES. SO THIS IS COMPLETELY DIFFERENT.

SECOND, HERE WE HAVE U.S. SALES IN THE 1.75 BILLION. AND IN SUN THE CLAIM WAS TO GET U.S. SALES AND FOREIGN SALES. COMPLETELY DIFFERENT FROM SUN.

THIRD, HERE WE HAVE WHOLLY-OWNED OR CONTROLLED SUBSIDIARIES, NOT THIRD-PARTY MANUFACTURERS UNRELATED TO MOTOROLA. AND IN SUN WE SOUGHT TO INCLUDE CLAIMS FOR PURCHASES BY THIRD-PARTY MANUFACTURERS. HERE WE DON'T HAVE THAT PARAGRAPH 128 TO 137.

SO SUN'S COMPLETELY DIFFERENT. IF WE PREVAIL AT THIS PLEADING STAGE ON THE SINGLE ENTERPRISE AND AGENCY THEORY, THEN WE SHOULD WIN ALL OF THIS, BECAUSE IT'S ONE ENTITY.

THE COURT: ALL RIGHT. THANK YOU.

ANYBODY ELSE NEED TO BE HEARD?

ALL RIGHT. WELL, THE MATTER WILL BE SUBMITTED. THANK YOU.

MR. TAFFET: THANK YOU, YOUR HONOR.

MR. HOWARD: THANK YOU, YOUR HONOR.

(THEREUPON, THIS HEARING WAS CONCLUDED.)

CERTIFICATE OF REPORTER

I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 12TH DAY OF NOVEMBER, 2010.

____

/S/ KATHERINE WYATT

EXHIBIT 6

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION
____________________________________/

No. M 07-1827 SI

MDL No. 1827

This Order Relates To:

MOTOROLA, INC.,

Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.
____________________________________/

No. C 09-5840 SI

ORDER DENYING DEFENDANTS' JOINT MOTION TO DISMISS THE SECOND AMENDED MOTOROLA COMPLAINT

On November 3, 2010, the Court held a hearing on defendants' motion to dismiss Motorola's second amended complaint. For the reasons set forth below, the motion is DENIED.

BACKGROUND

Plaintiff Motorola, Inc. ("Motorola") is a technology company that is incorporated in Delaware with its principal place of business in Schaumburg, Illinois. Second Amended Complaint ("SAC") ¶ 24. Motorola is a leading manufacturer of mobile wireless devices. *Id.* From January 1, 1996 until December 11, 2006 (the "Relevant Period"), Motorola manufactured products that incorporated liquid crystal display panels ("LCD Panels") for sale in the United States market and abroad. *Id.* ¶¶ 2, 26.

On October 20, 2009, Motorola filed a complaint in the Northern District of Illinois against numerous domestic and foreign defendants alleging a global price-fixing conspiracy by suppliers of LCD Panels. On December 8, 2009, the case was transferred to this district by order of the Judicial

Panel on Multidistrict Litigation and, pursuant to this Court's July 3, 2007 Pretrial Order #1, was deemed related to MDL No. 1827 (M 07-1827). Motorola filed an amended complaint on January 29, 2010.

On February 23, 2010, defendants filed a joint motion to dismiss the amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Among other things, defendants argued that the Court lacked subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act ("FTAIA") to the extent that Motorola's antitrust claims were based on injury suffered outside of the United States. On June 28, 2010, the Court granted defendants' motion to dismiss under the FTAIA. June 28, 2010 Order at 10.

On July 23, 2010, Motorola filed a second amended complaint ("SAC"), which included a number of new allegations. The SAC alleges that defendants and their co-conspirators "conspired with the purpose and effect of fixing, raising, stabilizing, and maintaining prices for LCD Panels." *Id.* ¶ 2. Motorola alleges that senior executives of the defendants instructed subordinates in the United States to communicate with employees of their competitors to exchange pricing and other competitive information to be used in fixing prices for LCD Panels sold to U.S. companies. *Id.* Motorola alleges that "[a]t least seven LCD Panel manufacturers have admitted in criminal proceedings to participating in this conspiracy and conducting illegal price-fixing operations in the United States," including defendants LG Display Co. Ltd., Sharp Corporation, Chunghwa Picture Tubes, Ltd., Epson Imaging Devices Corporation, Chi Mei Optoelectronics Corporation and HannStar Display Corporation. *Id.* ¶ 7. Motorola further alleges that defendants Sharp and Epson specifically identified Motorola as a customer which was overcharged for LCD Panels. *Id.* ¶ 8.

Motorola alleges that it was an intended victim of the price-fixing conspiracy and that the conspiracy was carried out, in part, in the United States. Motorola alleges that "[d]efendants and their co-conspirators, using their U.S. affiliates, salespeople, and contacts entered into supply agreements with Motorola in Illinois to sell Motorola LCD Panels at unlawfully inflated prices." *Id.* ¶ 4. "During and after the [Relevant Period], procurement teams at Motorola based in the U.S. negotiated the prices, conditions, and quantities that governed all Motorola purchases of LCD Panels around the world for inclusion in Motorola devices." *Id.* ¶ 129. Motorola alleges that its U.S. procurement teams negotiated each LCD Panel purchase with defendants through a process that involved developing requests and preliminary specifications in collaboration with U.S. representatives for defendants and the final negotiation of the terms of purchase for LCD Panels. *Id.* ¶ 130. Motorola alleges that the prices set through this domestic negotiation process "directly and immediately impacted Motorola's business plans, including its most basic business choices involving the production, pricing, and sales of its own products." *Id.* ¶ 132. After the price for LCD Panels was set, Motorola's supply chain organization (also based in Illinois) used an automatic scheduling process to determine the quantity requirements for it and its subsidiaries. *Id.* ¶ 133. This process was entirely directed by Motorola from the U.S., and "[t]he foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States." *Id.*

Motorola seeks treble damages and injunctive relief under Section 1 of the Sherman Act. Motorola also seeks relief under the antitrust laws of Illinois, the state in which it maintains its principal place of business. Finally, Motorola asserts individual claims for breach of contract and unjust enrichment against Sharp, Epson, Toshiba, Samsung and AU Optronics.

LEGAL STANDARDS

I. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. As the party invoking the jurisdiction of the federal court, the plaintiff bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either "facially" or "factually." *Thornhill Publishing Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In evaluating a facial attack to jurisdiction, the court must accept the factual allegations in plaintiff's complaint as true. *See Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). In evaluating a factual attack, the court may consider extrinsic evidence. *See Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

II. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

If the court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

I. Foreign Trade Antitrust Improvements Act (15 U.S.C. § 6a)

Defendants argue that the Court lacks subject matter jurisdiction over certain of Motorola's federal antitrust claims under the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a ("FTAIA"), which amends the Sherman Act and "excludes from [its] reach much anti-competitive conduct that causes only foreign injury." *F. Hoffman-LaRoche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 158 (2004). The SAC alleges three types of purchases: (1) purchases that were delivered directly to

Motorola facilities in the United States and were sold to United States customers; (2) purchases that were delivered to Motorola's foreign manufacturing facilities for importation to the United States; and (3) purchases that were delivered to Motorola's foreign facilities for manufacture and sale in foreign markets. SAC ¶¶ 166-68. Defendants argue that the court lacks jurisdiction under the FTAIA over the latter two categories of purchases and that the SAC simply re-pleads allegations that the Court has already rejected. Motion at 15-17, 20.

The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." 15 U.S.C. § 6a. The FTAIA then "provides an exception to this general rule, making the Sherman Act applicable if foreign conduct '(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.''" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 (9th Cir. 2008) (quoting *Empagran I* and 15 U.S.C. § 6a). This is known as the "domestic injury exception" of the FTAIA. *Id*. The Supreme Court has stated:

> This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."

Empagran I, 542 U.S. at 162 (quoting 15 U.S.C. § 6a, emphasis in original). In order to establish that a domestic effect "gives rise to" a Sherman Act claim, the complaint must allege facts sufficient to show that the domestic effects proximately caused the plaintiff's foreign injury. *DRAM*, 546 F.3d at 987-88.

Defendants argue that — as to any purchase that occurred outside the United States — Motorola has not alleged sufficient facts to establish that its foreign injury and the injury of its foreign affiliates (paying higher prices abroad) was proximately caused by any domestic effect of the alleged conspiracy. Motion at 20-23. Defendants argue that it is insufficient to allege that Motorola "directed that purchases be made abroad by its foreign affiliates and third-party EMS providers." *Id.* at 21. As a result, defendants contend that Motorola has failed to allege sufficient facts to bring its foreign antitrust claims within the domestic injury exception to the FTAIA.

Empagran I is the leading case on the domestic injury exception. 542 U.S. 155 (2004). In *Empagran I*, the plaintiffs filed a class action on behalf of purchasers of vitamins and alleged that foreign and domestic vitamin manufacturers and distributors had conspired to fix the price of vitamin products in the United States and abroad. At issue were claims brought by foreign vitamin distributors who bought vitamins for delivery outside the United States. *Id.* at 159-60. The Court held that where "the adverse foreign effect is independent of any adverse domestic effect," the FTAIA domestic effect exception does not apply. *Id.* at 164, 175. The Court noted that it "assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury." *Id.* at 175.

On remand in *Empagran S.A.v. F. Hoffman-La Roche, Ltd. (Empagran II)*, 417 F.3d 1267 (D.C. Cir. 2005), the plaintiffs relied on an "arbitrage" theory to argue that there was a causal link between the domestic effects of the conspiracy and the plaintiffs' foreign injury. Plaintiffs argued that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." *Id.* at 1269. Rejecting this as a basis for the domestic injury exception, the D.C. Circuit held that such an arbitrage theory alleges, at best, a "but-for" relationship that fails to satisfy the proximate causation requirement of the FTAIA. *Id.* at 1270-71.

The Eighth Circuit addressed a similar argument in *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir. 2007). The plaintiffs alleged that the defendants engaged in a global conspiracy to fix the prices of MSG and that the plaintiffs were injured by higher prices charged outside the United States. *Id.* at 536. The plaintiffs argued that their allegations satisfied the domestic injury exception to the FTAIA because the "United States market was included within the scheme because the fungible nature and worldwide flow of these products made the domestic and foreign markets interconnected, such that super-competitive prices abroad could be sustained only by maintaining super-competitive prices in the United States." *Id.* at 536-37. Following *Empagran II*, the Eighth Circuit held that

> The domestic effects of the price fixing scheme (increased U.S. prices) were not the direct cause of the appellants' injuries. Rather, it was the foreign effects of the price fixing scheme (increased prices abroad). Although United States prices may have been

> a necessary part of the appellees' plan, they were not significant enough to constitute the direct cause of the appellants' injuries, as they constituted merely one link in the causal chain. The theory proffered by the appellants therefore establishes at best only an indirect connection between the domestic prices and the prices paid by the appellants.

Id. at 539-40.

The Ninth Circuit addressed similar allegations in *DRAM*, 546 F.3d 981 (9th Cir. 2008). In *DRAM*, a British computer manufacturer, Centerprise, alleged that the defendant domestic and foreign manufacturers and sellers of dynamic random access memory ("DRAM") "engaged in a global conspiracy to fix DRAM prices, raising the price of DRAM to customers in both the United States and foreign countries." *Id.* at 984. Centerprise claimed that it satisfied the domestic injury exception to the FTAIA because the defendants could not have maintained the artificially inflated foreign prices without also fixing DRAM prices in the United States. *Id*. The Ninth Circuit held that such allegations were insufficient to establish that the domestic effects "gave rise to" Centerprise's foreign injury.

> The defendants' conspiracy may have fixed prices in the United States and abroad, and maintaining higher U.S. prices might have been necessary to sustain higher prices globally, but Centerprise has not shown that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad. Other actors or forces may have affected the foreign prices. In particular, that the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad.

Id. at 988. The court also rejected allegations of "a direct correlation between the U.S. price and the prices abroad" and that "the Defendants' activities resulted in the U.S. prices directly setting the worldwide price." *Id.* at 989. The court ruled that "a direct correlation between prices does not establish a sufficient causal relationship" where the complaint does not "set forth a theory with any specificity of how this price-setting occurred or how it shows a direct causal relationship." *See id.* at 989-90.

Various district courts have similarly rejected the arbitrage theory of causation on the ground that it does not establish a proximate link between the domestic effects of the anticompetitive conduct and the foreign injury incurred. *See In re Rubber Chemicals Antitrust Litigation,* 504 F. Supp. 2d 777, 786 (N.D. Cal. 2007) (Jenkins, J.) (ruling that the domestic injury exception did not apply where plaintiffs alleged that defendants "conspired to bring about a 'single worldwide price increase'" and "expressly allege[d] an arbitrage theory"); *Emerson Electric Co. v. Le Carbone Lorraine, S.A.*, 500 F.

Supp. 2d 437, 447 (D.N.J. 2007) (holding that "[b]ecause Plaintiffs in this case merely allege that tenuous connection, the arbitrage theory, the Court does not have jurisdiction over claims arising out of Plaintiffs' foreign purchases").

This case is significantly different from the cases described above. Motorola is not a foreign company alleging injury based on wholly foreign transactions and conduct, unlike the plaintiffs in *Empagran I*. Motorola is a Delaware corporation with its principal place of business in Illinois and alleges a conspiracy between defendants that involved both domestic and foreign conduct. SAC ¶¶ 1-8, 24. Many of the comity concerns regarding interference with the sovereign authority of other nations identified in *Empagran I* are therefore less applicable. Perhaps more importantly, Motorola does not rely on an arbitrage theory to establish the domestic injury exception. Motorola instead alleges that an important domestic effect of the anticompetitive conspiracy was the setting of a global price for all LCD Panel purchases around the world. *Id.* ¶ 129. As the Court views these new allegations, the SAC alleges that the price and other terms of purchase were negotiated exclusively by Motorola's procurement teams within the United States and applied worldwide, without regard to where the product was ultimately delivered. *Id.* ¶¶ 129-33. Moreover, Motorola's foreign affiliates were bound by these negotiations and were not permitted to negotiate the price of LCD Panels nor alter the total quantity ordered. *Id.* ¶ 133. These allegations establish a concrete link between defendants' price-setting conduct (the collusion between the defendants to establish an artificially high price for LCD Panels), its domestic effect (the negotiations between Motorola and defendants that resulted in the setting of a global, anticompetitive price for all LCD Panels sold to Motorola) and the foreign injury suffered by Motorola and its affiliates (payment of higher prices abroad). These allegations are far stronger than the arbitrage theory rejected in the cases above and cure the problem identified by the Ninth Circuit in *DRAM* by setting forth with specificity a direct causal relationship between the anticompetitive conduct, the domestic negotiations and Motorola's foreign injury.

Defendants point to *Sun Microsystems Inc. v. Hynix Semiconductor Inc. (Sun III)*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009) (Hamilton, J.) for the proposition that "a 'single enterprise theory [based] in part on a global procurement strategy' has 'already been discredited' and is 'not a viable legal theory.'" Motion at 21. The statements in *Sun III* are not controlling here. The court in *Sun III* faced a subtly different question: whether proof that a domestic company and its foreign subsidiaries form a "single entity," by itself, can satisfy the domestic injury exception where the plaintiff cannot otherwise establish a proximate link between any domestic effect of the anticompetitive conduct and the foreign injury. *Sun III*, 608 F. Supp. 2d at 1185-86. The court had previously ruled that the plaintiff failed to demonstrate that the higher prices set and established in the United States proximately caused the foreign entities associated with the plaintiffs to pay higher prices abroad. *Sun Microsystems Inc. v. Hynix Semiconductor Inc. (Sun II)*, 534 F. Supp. 2d 1101, 1115 (N.D. Cal. 2007) (Hamilton, J.). The question presented here, however, is not whether the mere existence of a "single entity" relationship is sufficient, but whether Motorola's allegations establish proximate causation between the domestically determined global price and Motorola's foreign injury — in other words, the question presented in *Sun II*. As discussed above, the Court finds that Motorola has done so.[1]

The Court also disagrees with the *Sun III* court's reading of the Ninth Circuit's opinion in *DRAM*, 546 F.3d at 989-90. Citing *DRAM*, the *Sun III* court stated that "[b]oth this court and the Ninth Circuit have held that, to the extent plaintiff's proximate causation theory rests on proof of a global procurement strategy, this is not a viable legal theory." *Sun III*, 608 F. Supp. 2d at 1186. In this Court's view, however, the holding in *DRAM* did not go so far. It is true that, in *DRAM*, the Ninth Circuit held that allegations of "a direct correlation between the U.S. price and the prices abroad" and that "the Defendants' activities resulted in the U.S. prices directly setting the worldwide price" were not sufficient for purposes of the domestic injury exception. *DRAM*, 546 F.3d at 989. However, the court based its holding on a determination that the plaintiff failed to "set forth a theory with any specificity of how this price-setting occurred or how it shows a direct causal relationship." *Id.* The court focused on particular allegations in the complaint that it found to be insufficient; the Ninth Circuit in *DRAM* stated:

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[1] In making this determination, the Court departs from the ruling in *Sun II* that, although the act of negotiating an inflated global price might be a "domestic effect" of the conspiracy, such effect cannot proximately cause the payment of higher prices abroad. *Sun II*, 534 F. Supp. 2d at 1115. Based on the allegations in the SAC, Motorola has alleged facts that would establish that the domestically negotiated price was identical for purchases both inside and outside the United States. This is sufficient to establish the necessary proximate link between the domestic effects of the conspiracy and Motorola's foreign injury.

Most notably, paragraph 75 of its complaint alleges:

> Memory purchases are a 24 hour global business, dependent in large part on United States events. For example, Plaintiff and many Class members start their days with communications to Defendants in Taiwan and Korea to understand what pricing is available for DRAM, and as the day goes on follow sales in the United States. Plaintiff and Class members were required to track the DRAM prices in dollars, which was the only available measure due to Defendants' sales and distribution practices, then work on dollar exchange rates in order to buy the DRAM at the best available price worldwide. The United States prices were the source of, and substantially affected the worldwide DRAM prices.

Id. at 990 n.10. The court found that "[t]he significance of these assertions . . . is not self-evident and Centerprise has not elaborated on how any of its asserted facts show that the higher U.S. DRAM prices proximately caused the excessive DRAM prices that Centerprise paid." *Id.* The allegations in this case offer far more detail than the allegations in *DRAM*. As discussed above, the SAC describes the method by which global prices were negotiated and set by Motorola's procurement team in Illinois and the connection to Motorola's foreign injury. According to the SAC, a single global price was effective worldwide, no matter where delivery of the product occurred. SAC ¶¶ 129-33. The U.S. prices therefore were not simply "the source of" the foreign prices; both the domestic and foreign prices were one and the same. These allegations address the problem identified in *DRAM* by alleging with specificity how the prices paid abroad were caused by the contractual terms negotiated inside the United States. Of course, whether this Court ultimately has jurisdiction over Motorola's foreign injury claims will turn on whether Motorola can, in fact, prove such allegations. At this stage, however, Motorola has met its burden to allege facts that bring its claims within the domestic injury exception to the FTAIA. Accordingly, defendants' motion to dismiss the Sherman Act claim under the FTAIA is DENIED.[2]

II. Illinois Antitrust Act

Defendants also move to dismiss Motorola's claim under the Illinois Antitrust Act, which has explicitly adopted the territorial limitations of the FTAIA. 740 Ill. Comp. Stat. 10/5(14). Section 10/5(14) of the Illinois Antitrust Act uses language that is essentially identical to the FTAIA and does

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[2] Because the Court finds that it has jurisdiction over Motorola's antitrust causes of action under the FTAIA, it need not reach defendants' argument based on the Supremacy Clause that the Court does not have jurisdiction over Motorola's state law causes of action.

not permit claims based on foreign injury unless the challenged conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce and such effect "gives rise to a claim" under the Illinois Antitrust Act. *Id.* Section 10/11 of the Illinois Antitrust Act states that "[w]hen the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." 740 Ill. Comp. Stat. 10/11.

Because the Court finds that the allegations in the Second Amended Complaint satisfy the domestic injury exception of the FTAIA, the Court also concludes that Motorola's allegations satisfy the analogous provision of the Illinois Antitrust Act. Accordingly, defendants' motion to dismiss Motorola's claims under the Illinois Antitrust Act is DENIED.

III. Due Process

Defendants move to dismiss Motorola's claims under the Illinois Antitrust Act and for breach of contract and unjust enrichment because they do not comport with due process. Motion at 26-27. Defendants specifically argue that the SAC asserts state law claims on behalf of foreign affiliates of Motorola and other foreign manufacturers who do not allege that they purchased any relevant product in Illinois.

To determine whether the application of a particular state's law comports with the Due Process Clause, the Court must examine "the contacts of the State, whose law [is to be] applied, with the parties and with the occurrence or transaction giving rise to the litigation." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). Courts have invalidated the application of a state's law where the state "had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Id.* Such is not the case here. Each of the claims targeted by defendants is asserted under Illinois state law, the state in which Motorola alleges that it maintains its corporate headquarters and runs substantial operations. SAC ¶ 12. Motorola also alleges that "during and after the Conspiracy Period, Motorola purchased LCD Panels and LCD Products in Illinois" and that its procurement team "negotiated all prices, specifications, and quantities for all purchases of LCD Panels and LCD Products from Motorola offices in Illinois." *Id.* Motorola alleges that the negotiations by its

Illinois-based procurement team "governed all Motorola purchases of LCD Panels around the world for inclusion in Motorola devices." *Id.* ¶ 129. These contacts establish significant ties between Illinois and the parties and claims in this litigation, and the application of Illinois law does not, therefore, violate due process.

Defendants' argument appears to turn on the way in which the SAC defines the term "Motorola," which includes certain foreign manufacturers and affiliates of Motorola that defendants maintain did not purchase any products in Illinois. Motion at 27; SAC ¶ 25. Contrary to defendants' argument, however, the SAC alleges clearly that "Motorola" (including the foreign manufacturers and affiliates) purchased LCD Panels and LCD Products in Illinois. SAC ¶ 12. Reading the SAC as a whole, therefore, Motorola does allege that it and each the foreign entities on whose behalf it brings this action purchased product in Illinois. Moreover, even if certain of the foreign entities or manufacturers did not make such purchases, Motorola alleges that the terms of every purchase — including price and quantity — were negotiated by its procurement team in Motorola's Illinois offices. By virtue of this Illinois-based negotiation process, even purchases that were consummated outside the United States by Motorola's foreign affiliates have a clear and substantial tie to Illinois.

For the reasons stated above, defendants' motion to dismiss Motorola's state law claims under the due process clause is DENIED.

IV. Breach of contract

Defendants assert that Motorola's state breach of contract claims are impermissibly vague because the SAC does not allege which contracts were supposedly breached or the terms of those contracts. Motion at 27-29. Defendants argue that "because the SAC does not specifically aver which contracts were allegedly breached, it is impossible to assess which transactions are the subject of the alleged breach of contract claims or what laws Defendants supposedly violated." *Id.* at 29. Motorola responds that its allegations identify Motorola's general supply agreements with each of the defendants as well as individual purchase orders as the contracts at issue. Opposition at 40. Motorola argues that these allegations are sufficient to put defendants on notice of its claims and that any further specificity is properly gained through discovery. *Id.* at 40-41.

Defendants contend — and Motorola does not dispute — that Illinois law applies to Motorola's breach of contract claims. In Illinois, the elements of a claim for breach of contract are "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages." *Village of South Elgin v. Waste Management of Illinois, Inc.*, 810 N.E. 2d 658, 669 (Ill. App. Ct. 2004).

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The pleading must state a claim that is "plausible on its face" and that contains factual allegations that are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570. Federal courts "must rely on summary judgment and control of discovery to weed out unmeritorious claims." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

Motorola's breach of contract claims against Sharp, Epson, Toshiba, Samsung and AU Optronics are set forth in claims Three, Five, Seven, Nine and Eleven of the SAC. These claims allege that Motorola and each defendant "entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which [defendant] agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay [defendant] a price negotiated by Motorola and [defendant]." SAC ¶¶ 225, 236, 247, 258, 269. Motorola alleges that "[t]hese contracts between Motorola and [defendant] include purchase orders issued by Motorola to [defendant]." *Id.* Motorola further alleges that "[p]ursuant to each of these contracts, [defendant] agreed on behalf of it and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards." *Id.* ¶¶ 226, 237, 248, 259, 270. Motorola alleges that each defendant violated this provision and the covenant of good faith and fair dealing by agreeing to fix the price of LCD Panels sold to Motorola. *Id.* ¶¶ 228-29, 239-40, 250-51, 261-62, 272-73. Motorola further alleges that it performed all of its obligations under the contracts and that, as a result of defendants' breach of the contracts, Motorola suffered damages. *Id.* ¶¶ 230, 241, 252, 263, 274.

The SAC alleges sufficient facts to establish a claim for breach of contract under Illinois law. A plain reading of the SAC sets forth Motorola's theory of relief in clear terms; that is, that each of the contracting defendants breached its contractual obligation to comply with the "applicable laws, rules, regulations, and standards" — along with the implied covenant of good faith and fair dealing — by engaging in a widespread price-fixing conspiracy. Motorola also alleges facts sufficient to establish each of the other elements of its claims, including offer and acceptance, consideration, Motorola's performance and damages. For purposes of the pleading stage, these allegations are sufficient. Defendants correctly identify a number of ambiguities in Motorola's claims, including the precise terms of the contracts at issue, which purchase orders are alleged to have been violated, and which "laws, rules, regulations, and standards" govern each of the contracts that Motorola is asserting. Motion at 28-29. Ambiguities of this type are properly explored in discovery.

Accordingly, defendants' motion to dismiss Motorola's breach of contract claims is DENIED.

V. Unjust Enrichment Claims

Defendants argue that Motorola's unjust enrichment claims must be dismissed because no unjust enrichment claim lies under Illinois law where, as here, there is a contract that allegedly governs the subject matter of the dispute. Motion at 30. Motorola argues that it is permitted to plead claims in the alternative. Opposition at 41 n.22.

The Court agrees with Motorola. Federal Rule of Civil Procedure 8(d)(2) states that "[a] party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones." Rule 8(d)(3) provides that "[a] party may state as many separate claims or defenses as it has, regardless of consistency." Rule 8(a) does not require a plaintiff explicitly to designate alternative claims "as long as it can be reasonably inferred that this is what [the plaintiff was] doing." *Coleman v. Standard Life Ins. Co.*, 288 F. Supp. 2d 1116, 1120 (E.D. Cal. 2003). At this early stage of the litigation, and given the "general purpose of the [Federal Rules of Civil Procedure] to minimize technical obstacles to a determination of the controversy on its merits," *United States ex rel. Atkins v. Reiten*, 313 F.2d 673, 675 (9th Cir. 1963), it would be imprudent to force Motorola to choose between the alternative theories currently expressed in the SAC. Accordingly, defendants' motion to dismiss the unjust enrichment claim is DENIED.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the second amended complaint is DENIED. (No. M 07-1827 SI, Dkt. 1989; No. C 09-5840 SI, Dkt. 54, 57).

IT IS SO ORDERED.

Dated: March 28, 2010

Susan Illston

SUSAN ILLSTON
United States District Judge

EXHIBIT 7

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

This Document Relates to
Case No. 09-cv-5840-SI

MOTOROLA MOBILITY, INC.,
Plaintiff,

v.

AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA, INC.; CHI MEI CORPORATION; CHIMEI INNOLUX CORPORATION; CHI MEI OPTOELECTRONICS USA, INC.; CMO JAPAN CO. LTD.; NEXGEN MEDIATECH, INC.; NEXGEN MEDIATECH USA, INC.; CHUNGHWA PICTURE TUBES LTD.; TATUNG COMPANY OF AMERICA, INC.; HANNSTAR DISPLAY CORPORATION; LG DISPLAY CO. LTD.; LG DISPLAY AMERICA, INC.; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA, INC.; SAMSUNG SDI CO. LTD.; SAMSUNG SDI AMERICA, INC.; SANYO CONSUMER ELECTRONICS CO. LTD.; SHARP CORPORATION; SHARP ELECTRONICS CORPORATION; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONICS COMPONENTS, INC.; TOSHIBA MOBILE DISPLAY CO., LTD.; TOSHIBA AMERICA INFORMATION SYSTEMS, INC.; EPSON IMAGING DEVICES CORPORATION; EPSON

MASTER FILE NO. 07-m-1827 SI
CASE NO. 09-cv-5840 SI
MDL NO. 1827

THIRD AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

(1) VIOLATION OF THE SHERMAN ACT PURSUANT TO 15 U.S.C. § 1

(2) VIOLATION OF THE ILLINOIS ANTITRUST ACT, 740 ILLINOIS CODE 10/3

(3) BREACH OF CONTRACT

(4) UNJUST ENRICHMENT

DEMAND FOR JURY TRIAL

ELECTRONICS AMERICA, INC.,

Defendants.

Plaintiff Motorola Mobility, Inc., for its complaint against defendants AU Optronics Corporation, AU Optronics Corporation America, Inc, Chi Mei Corporation, Chimei Innolux Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co. Ltd., Nexgen Mediatech, Inc., Nexgen Mediatech USA, Inc., Chunghwa Picture Tubes Ltd., Tatung Company of America, Inc., HannStar Display Corporation, LG Display Co. Ltd., LG Display America, Inc., Philips Electronics North America Corporation, Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Sharp Corporation, Samsung SDI Co., Ltd, Samsung SDI America, Inc., Sanyo Consumer Electronics Co., Ltd., Sharp Electronics Corporation, Toshiba Corporation, Toshiba America Electronics Components, Inc., Toshiba Mobile Display Co., Ltd., Toshiba America Information Systems, Inc., Epson Imaging Devices Corporation, and Epson Electronics America, Inc. hereby alleges as follows:

I. <u>INTRODUCTION</u>

1. Motorola Mobility, Inc. ("Motorola Mobility"), the transferee of claims from Motorola, Inc., brings this action to recover damages incurred as a result of a long-running conspiracy by suppliers of liquid crystal display panels ("LCD Panels") which occurred through bilateral and multilateral meetings held in the United States and abroad to fix the prices of LCD Panels sold to U.S. customers, including Motorola, Inc. ("Motorola"). As set forth in detail below, the conspirators utilized their U.S. affiliates, they targeted U.S. companies and consumers, and their conduct directly involved U.S. import trade and commerce. In addition, the conspiracy had a direct, substantial and reasonably foreseeable effect on U.S. domestic and import commerce through a consistent pattern of conspiratorial conduct in the United States to sell Motorola LCD panels at illegally inflated prices. That effect on U.S. domestic commerce, and U.S. import trade and commerce, proximately caused injury to Motorola in the form of supra-competitive prices for LCD panels delivered to Motorola in the U.S. and abroad and it

resulted in billions of dollars of damages to Motorola, damages Motorola now seeks to recover by this action.

2. From at least January 1, 1996 through at least December 11, 2006 ("the Conspiracy Period"), through hundreds of in-person meetings, telephone calls, emails, and other communications in the United States and abroad, defendants and their co-conspirators conspired with the purpose and effect of fixing, raising, stabilizing, and maintaining prices for LCD Panels. Senior executives of the defendants instructed their subordinates in the United States to communicate with employees of their competitors to exchange pricing and other competitive information to be used in fixing prices for LCD Panels sold to U.S. companies. The defendants' employees engaged in these illegal communications in the United States and utilized that information to increase the prices U.S. customers paid for LCD Panels.

3. The U.S. market for LCD Panels and products containing those panels has always been one of the largest and most-profitable markets for defendants and their co-conspirators, so they purposely set about fixing prices to unlawfully maintain and increase their profits from sales to U.S. manufacturers and consumers. Defendants and their co-conspirators delivered LCD Panels to U.S. manufacturers in the United States to be incorporated into consumer products made in the United States. Defendants and their co-conspirators also delivered LCD Panels to U.S. companies that the defendants knew would incorporate those LCD Panels into consumer products manufactured by U.S. companies through their subsidiaries abroad to be imported and sold into the United States. Defendants knew and intended for these sales to have an effect on U.S. domestic and import commerce.

4. Defendants and their co-conspirators, using their U.S. affiliates, salespeople, and contacts entered into supply agreements with Motorola in Illinois to sell Motorola LCD Panels at unlawfully inflated prices. They maintained sales, service, and design offices in the United States (sometimes working in Motorola's own U.S. offices) to effectuate their scheme and they monitored U.S. sales of LCD Products, such as Motorola's wireless handsets, to make sure the cartel was effectively exploiting the U.S. market through its sales to Motorola, and to monitor compliance with the cartel's unlawful pricing and bid-rigging.

5. The purchase orders issued to the defendants based on these pricing agreements contained provisions requiring the defendants to comply with all applicable laws and regulations in the performance of the contract. The defendants, by their agreements to fix prices to Motorola, violated those terms.

6. As described more fully below, for some portion of the LCD panels it purchased from defendants and their co-conspirators, Motorola, Inc., the U.S. parent corporation, directed one or more of its foreign affiliates and facilities, through an automated scheduling system, controlled entirely by Motorola, Inc. in the United States, to take delivery of panels outside the United States, place them into mobile wireless handset and other products, then deliver them to the United States for further manufacturing, and then deliver them for sale to Motorola, Inc.'s U.S. customers. For these purposes, those foreign affiliates and facilities acted as the representatives and agents of Motorola, Inc., and indeed as a single enterprise with Motorola, Inc., and had no discretion or power over what price, quantity, or specification of LCD Panel to purchase, or what LCD supplier to choose. These entities manufactured and sold phones at the direction of Motorola, Inc. Any injury suffered as a result of any delivery of LCD Panels to Motorola's foreign affiliates and facilities was ultimately an injury to Motorola, Inc., and was proximately caused by defendants' and their co-conspirators' unlawfully inflated prices for LCD Panels sold to Motorola, Inc. and other conspiratorial conduct in the United States.

7. At least seven LCD Panel manufacturers have admitted in criminal proceedings to participating in this conspiracy and conducting illegal price-fixing operations in the United States: defendants LG Display Co. Ltd. (and its wholly-owned subsidiary, LG Display America, Inc.), Sharp Corporation, Chunghwa Picture Tubes, Ltd., Epson Imaging Devices Corporation, Chimei Innolux Corporation's predecessor, Chi Mei Optoelectronics Corporation, and HannStar Display Corporation. On or about November 12, 2008, LG Display Co. Ltd., LG Display America, Inc., Sharp Corporation and Chunghwa Picture Tubes, Ltd. agreed to plead guilty and pay a total of $565 million in criminal fines for their roles in the conspiracy to fix the price of LCD Panels. On or about August 25, 2009, Epson Imaging Devices Corporation agreed to plead guilty and pay a $26 million criminal fine for its role in the conspiracy to fix the price of LCD

Panels. On or about December 9, 2009, Chi Mei Optoelectronics Corporation agreed to plead guilty and pay a $220 million criminal fine for its role in the conspiracy. And on or about June 29, 2010, HannStar Display Corporation agreed to plead guilty and pay a $30 million criminal fine for its role in the conspiracy.

8. In their respective pleas, Sharp and Epson specifically identified Motorola as a customer that was overcharged for LCD Panels. Sharp admitted to targeting Motorola (and other U.S. companies) and overcharging Motorola for LCD Panels it purchased. Epson also admitted to targeting Motorola and overcharging Motorola for LCD Panels it purchased. Both Sharp and Epson further admitted that acts committed in furtherance of its conspiracy were carried out in the United States.

9. Motorola Mobility brings this action to recover damages resulting from defendants' and their co-conspirators' price-fixing conspiracy, which during and after the Conspiracy Period artificially raised the price of LCD Panels above the price that would have prevailed in a competitive market. During and after the Conspiracy Period, hundreds of millions of Motorola's products, including mobile wireless handsets, two-way radios, and other products, contained LCD Panels. Motorola thus suffered damages as a result of defendants' and their co-conspirators' conspiracy, and is entitled to treble damages and injunctive relief to remedy these injuries.

10. Motorola Mobility brings this action seeking federal injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Motorola Mobility also seeks to recover damages under Section 4 of the Clayton Act, and under state antitrust, consumer protection, unfair trade, deceptive trade practices and contract laws. Motorola Mobility also seeks to recover the costs of suit, including reasonable attorneys' fees. These damages, costs, and fees are for the injuries that Motorola suffered as a result of the defendants' and their co-conspirators' conspiracy to fix, raise, maintain and stabilize the prices of LCD Panels.

II. JURISDICTION AND VENUE

11. Motorola Mobility brings this action under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to obtain treble damages and injunctive relief against all defendants.

12. Motorola Mobility also brings this action pursuant to the Illinois Antitrust Act, 740 Illinois Code 10/1 et seq, for injunctive relief and damages that Motorola sustained due to defendants’ and their co-conspirators’ violation of Section 3 of the Illinois Antitrust Act (the “Illinois Antitrust Law”). With its headquarters and substantial operations in Illinois, both Motorola and Motorola Mobility have a significant presence in Illinois. In addition, during and after the Conspiracy Period, Motorola purchased LCD Panels and LCD Products in Illinois. Motorola procurement teams based in Illinois, evaluated, qualified, and selected all of Motorola’s LCD Panel and LCD Product suppliers. U.S. procurement teams also negotiated all prices, specifications, and quantities for all purchases of LCD Panels and LCD Products from Motorola offices in Illinois. Moreover, representatives from defendants’ U.S. subsidiaries and affiliates negotiated and supported sales to Motorola from their sales offices in Illinois and other parts of the United States. For these reasons, Motorola and Motorola Mobility are entitled to the protections of the Illinois Antitrust Law.

13. Motorola Mobility also brings its claims for breach of contract and unjust enrichment under the law of the State of Illinois.

14. Pursuant to 28 U.S.C. §§ 1331 and 1337, the Court has jurisdiction over Motorola Mobility’s claims under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act.

15. Pursuant to 28 U.S.C. §1367, the Court has supplemental jurisdiction over Motorola Mobility’s claims under the Illinois Antitrust Law, as well as its claims for breach of contract and unjust enrichment. These state law claims are so related to Motorola Mobility’s claims under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act that they form part of the same case or controversy.

16. The activities of defendants and their co-conspirators, as described herein, directly involved U.S. import trade or commerce. In addition, the activities of the defendants and their

co-conspirators were within the flow of, were intended to, and did have a direct, substantial, and reasonably foreseeable effect on U.S. domestic and import trade or commerce. In particular, defendants' and their co-conspirators' conspiracy directly and substantially affected the price of LCD Panels and products which contained LCD Panels ("LCD Products") purchased in the United States. These effects give rise to Motorola's antitrust claims, which have been transferred to Motorola Mobility.

17. The activities of defendants and their co-conspirators, as described herein, were within the flow of, were intended to, and did have a direct and substantial effect on commerce in Illinois. In particular, defendants' and their co-conspirators' conspiracy directly and substantially affected the price of LCD Panels and LCD Products purchased in Illinois. These effects also give rise to Motorola's antitrust claims. Motorola maintained its headquarters, including its global procurement team, in Illinois during and after the Conspiracy Period.

18. This court has jurisdiction over each defendant named in this action under both Section 12 of the Clayton Act, 15 U.S.C. § 22, and section 2-209 of the Illinois Code of Civil Procedure, 735 Illinois Code 5/2-209. Each defendant conducts substantial business in Illinois. In addition, defendants and their co-conspirators purposely availed themselves of the laws of the United States and Illinois insofar as they manufactured LCD Panels for sale in the United States, including Illinois, or which were incorporated into LCD Products defendants and their co-conspirators knew would be sold to customers in the United States and Illinois. Defendants' and their co-conspirators' conspiracy affected this commerce in LCD Panels and LCD Products in the United States and in Illinois.

19. Venue is proper in the Northern District of Illinois under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391, because each defendant is either an alien corporation, transacts business in this District, or is otherwise found within this District. In addition, venue is proper in this District under 28 U.S. §1391 because a substantial part of the events or omissions giving rise to this claim occurred in this district. Defendants and their co-conspirators knew that price-fixed LCD Panels and LCD Products containing price-fixed LCD Panels would be sold and shipped into this District.

III. DEFINITIONS

20. "LCD Panel" means liquid crystal display panel. Liquid crystal display panels use glass plates and a liquid crystal compound to electronically display an image. The technology involves sandwiching a liquid crystal compound between two glass plates called "substrates." The resulting screen contains hundreds or thousands of electrically charged dots, or pixels, that form an image. As used herein, "LCD Panel" refers to both liquid crystal display panels and modules consisting of liquid crystal display panels combined with a backlight unit, a driver, and other equipment that allow the panel to operate and be integrated into a mobile wireless handset, television, computer monitor, or other product. During and after the Conspiracy Period, LCD Panels used in handheld devices included three different technologies: thin film transistor panels ("TFT panels"), color super-twist nematic panels ("CSTN panels"), and monochrome super-twist nematic panels ("MSTN panels"). The defendants' and their co-conspirators' price fixing conspiracy alleged herein had the effect of raising, fixing, maintaining, and/or stabilizing the prices of LCD Panels using TFT, CSTN, and MSTN technology in LCD Products, including mobile wireless handsets and two-way radios.

21. As used herein, the term "OEM" means any original equipment manufacturer of an LCD Product.

22. As used herein, the term "ODM" means any original design manufacturer of an LCD Product.

23. As used herein, the term "EMS provider" means any electronics manufacturing services provider of an LCD Product.

IV. THE PARTIES

A. Motorola Mobility

24. Motorola Mobility, Inc. ("Motorola Mobility") is a Delaware corporation with its principal place of business in Libertyville, Illinois. Motorola Mobility is a leading manufacturer of mobile wireless devices.

25. Motorola Mobility, Inc. brings this action on behalf of itself and its affiliates, including the former Motorola, Inc. and all former affiliates of the former Motorola, Inc. Motorola Mobility, Inc. substitutes for Motorola as the plaintiff in this action. In 2010, Motorola reorganized its corporate structure, pursuant to which a new entity called Motorola Mobility Holdings, Inc. was formed. Motorola Mobility is the operating entity and wholly owned subsidiary of Motorola Mobility Holdings, Inc. As part of the reorganization, Motorola contributed the U.S. assets and liabilities of its Mobile Devices and Home businesses to Motorola Mobility and transferred to Motorola Mobility all of Motorola's rights, title, and interest in and to all claims demands and causes of action arising out of or relating to the conduct of and transactions that are the subject of this action. Although Motorola, Inc. continues to exist, it has changed its name to Motorola Solutions, Inc. and now focuses primarily on the design, manufacture and sale of police radios, bar code scanners and other products for government and business clients. As of January 4, 2011, Motorola Mobility Holdings, Inc., and its subsidiary Motorola Mobility, separated from Motorola Solutions, Inc., and is an independent public company.

26. During and after the Conspiracy Period, Motorola, Inc. manufactured LCD Products for the U.S. market at its own facilities in Illinois, Florida, New York, as well as its foreign facilities located in Tianjin, China; Hangzhou, China; and Singapore. A substantial portion of the LCD Products manufactured at the Tianjin, Hangzhou, and Singapore facilities were for Motorola's largest U.S. customers, including U.S. mobile carriers such as Sprint, AT&T, Verizon, and T-Mobile. Motorola, Inc. also manufactured LCD Products for other markets in China, Singapore, Brazil, Germany, Ireland, Mexico, and the United Kingdom.

27. At the time this action was initiated, Motorola, Inc. had the following ownership interests in each of the above affiliate entities and related manufacturing facilities:

- Motorola's manufacturing facility in Tianjin, China was operated by Motorola Asia Limited, Motorola (China) Investment Limited, and Motorola (China) Electronics Limited. Motorola, Inc. owned 99.99% of Motorola Asia Limited. The only reason Motorola, Inc. does not own 100% of Motorola Asia Limited is because Chinese law requires at least some portion of a Chinese corporation to be Chinese owned. In turn, Motorola Asia Limited owns 100% of Motorola (China) Investment Limited, and Motorola (China) Investment Limited owns 100% of Motorola (China) Electronics Limited.

- Until it closed in December 2008, Motorola's manufacturing facility in Singapore was operated by Motorola Electronics Pte. Ltd. Motorola, Inc. owns 100% of Motorola Electronics Pte. Ltd.
- Motorola's manufacturing facility in Hangzhou, China was operated as a joint venture with a Chinese company, Eastern Communications, Co. Motorola owns 50% of the facility through its ownership interests in two joint ventures that together own the Hangzhou facility. Motorola's interests in those joint ventures are owned by Motorola (China) Investment Limited, which is in turn wholly owned by Motorola Asia Limited.
- In November 2003, Motorola, Inc. began purchasing LCD Panels for use by its EMS providers in building products on behalf of Motorola through its wholly-owned Singapore subsidiary, Motorola Trading Center Pte. Ltd.

28. Motorola Asia Limited, Motorola (China) Investment Limited, Hangzhou Motorola Cellular Equipment Co. Ltd., Motorola (China) Electronics Limited, Motorola Electronics Pte. Ltd., Motorola Trading Center Pte. Ltd., Motorola Asia Pacific Limited, Motorola Technology Sdn. Bhd., Motorola Limited, General Instrument of Taiwan, Ltd., Motorola GmbH, Motorola India Private Limited, Hangzhou Eastcom Cellular Phone Co., Ltd., Motorola Industrial Ltda., Motorola de Mexico, S.A., Motorola Korea, Inc. and Motorola de Nogales, S.A. de C.V. each assigned to Motorola, Inc. all of their rights, title, and interest in and to all claims, demands, and causes of action arising out of or relating to the conduct and transactions that are the subject of this action. Motorola, Inc.'s claims – including the claims assigned to it by Motorola Asia Limited, Motorola (China) Investment Limited, Hangzhou Motorola Cellular Equipment Co. Ltd., Motorola (China) Electronics Limited, Motorola Electronics Pte. Ltd., Motorola Trading Center Pte. Ltd., Motorola Asia Pacific Limited,

Motorola Technology Sdn. Bhd., Motorola Limited, General Instrument of Taiwan, Ltd., Motorola GmbH, Motorola India Private Limited, Hangzhou Eastcom Cellular Phone Co., Ltd., Motorola Industrial Ltda., Motorola de Mexico, S.A., Motorola Korea, Inc. and Motorola de Nogales, S.A. de C.V. – have been transferred to Motorola Mobility.

29. As is described in more detail below, during and after the Conspiracy Period Motorola paid artificially-inflated prices for the LCD Panels that it purchased. Those inflated prices were the direct result of defendants' and their co-conspirators' illegal price-fixing conspiracy.

B. Defendants

1. AU Optronics

30. Defendant AU Optronics Corporation is one of the largest manufacturers of LCD Panels. Its corporate headquarters are at No. 1, Li-Hsin Rd. 2, Hsinchu Science Park, Hsinchu 30078, Taiwan. During the Conspiracy Period, AU Optronics Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

31. Defendant AU Optronics Corporation America, Inc., is a wholly-owned and controlled subsidiary of defendant AU Optronics Corporation. Its corporate headquarters are at 9720 Cypresswood Drive, Suite 241, Houston, Texas. It also has facilities located in San Diego and Cupertino, California. During the Conspiracy Period, AU Optronics Corporation America, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

32. Defendants AU Optronics Corporation and AU Optronics Corporation America, Inc., are referred to collectively herein as "AU Optronics." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant AU Optronics Corporation America, Inc., was a member of the conspiracy because, among other reasons, of its status during the Conspiracy Period as the alter ego or agent of AU Optronics Corporation. AU Optronics Corporation

dominated or controlled AU Optronics Corporation America, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

2. Chi Mei

33. Defendant Chi Mei Corporation is one of the world's largest manufacturers of LCD Panels. Its corporate headquarters are at No. 11-2, Jen Te 4th St., Jen Te Village, Jen Te, Tainan 717, Taiwan. During the Conspiracy Period, Chi Mei Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

34. Defendant Chimei Innolux Corporation is one of the world's largest manufacturers of LCD Panels, with its principal place of business located at No. 160 Kesyue Rd., Chu-Nan Site, Hsinchu Science Park Chu-Nan, Miao-Li, Taiwan.. Chimei Innolux Corporation is the survivor of a three-way merger of Chi Mei Optoelectronics Corporation, Innolux Display Corporation, and TPO Displays Corporation, through exchanges of shares. TPO Display Corp. and Chi Mei Optoelectronics Corporation were dissolved after the merger. Prior to the merger, Chi Mei Optoelectronics Corporation was a wholly-owned subsidiary of Chi Mei Corporation, with its global headquarters at No. 3, Sec. 1, Huanshi Rd., Southern Taiwan Science Park, Sinshih Township, Tainan County, 74147 Taiwan. Innolux Display Corporation was a former LCD panel manufacturer, with its principal place of business located at No. 160 Kesyue Rd., Chu-Nan Site, Hsinchu Science Park, Chu-Nan, Miao-Li, Taiwan. During the Conspiracy Period, ChiMei Innolux Corporation's predecessor corporations, Chi Mei Optoelectronics Corporation, Innolux Display Corporation, and TPO Displays Corporation marketed, sold, and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

35. Defendant Chi Mei Optoelectronics USA, Inc., formerly known as International Display Technology USA, Inc., is a wholly-owned and controlled subsidiary of Chi Mei Corporation. Its corporate headquarters are at 101 Metro Drive Suite 510, San Jose, California. During the Conspiracy Period, Chi Mei Optoelectronics USA, Inc., manufactured, marketed,

sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

36. Defendant CMO Japan Co., Ltd., formerly known as International Display Technology, Ltd., is a subsidiary of Chi Mei Corporation. Its principal place of business is at Nansei Yaesu Bldg. 3F, 2-2-10 Yaesu, Chuo-Ku, Tokyo 104-0028, Japan. During the Conspiracy Period, CMO Japan Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

37. Defendant Nexgen Mediatech, Inc., is a wholly-owned and controlled subsidiary of Chi Mei Corporation. Its principal place of business is at No. 11-2, Jen Te 4th St., Jen Te Village Jen Te, Tainan 717 Taiwan. During the Conspiracy Period, Nexgen Mediatech, Inc., marketed, sold and/or distributed LCD Products manufactured by Chi Mei Optoelectronics Corporation throughout the United States and elsewhere.

38. Defendant Nexgen Mediatech USA, Inc., is a wholly-owned and controlled subsidiary of Chi Mei Corporation. Its principal place of business is at 16712 East Johnson Drive, City of Industry. During the Conspiracy Period, Nexgen Mediatech USA, Inc., marketed, sold and/or distributed LCD Products manufactured by Chi Mei Optoelectronics Corporation throughout the world.

39. Defendants Chi Mei Corporation, Chimei Innolux Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co., Ltd., Nexgen Mediatech, Inc., and Nexgen Mediatech USA, Inc., are referred to collectively herein as “Chi Mei.” They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendants Chimei Innolux Corporation (through its predecessor Chi Mei Optoelectronics Corporation), Chi Mei Optoelectronics USA, Inc., CMO Japan Co., Ltd., Nexgen Mediatech, Inc., and Nexgen Mediatech USA, Inc., were members of the conspiracy by virtue of their status during the Conspiracy Period as the alter egos or agents of Chi Mei Corporation. Chi Mei Corporation dominated or controlled Chi Mei Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co., Ltd., Nexgen

Mediatech, Inc., and Nexgen Mediatech USA, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

3. Chunghwa

40. Defendant Chunghwa Picture Tubes Ltd. is a leading manufacturer of LCD Products. Its global headquarters are at 1127 Hopin Rd., Padeh City, Taoyuan, Taiwan. During the Conspiracy Period, Chunghwa Picture Tubes Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

41. Defendant Tatung Company of America, Inc. ("Tatung America") is a California corporation with its principal place of business at 2850 El Presidio Street, Long Beach, California. During the Conspiracy Period, Tatung America manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

42. Defendants Chunghwa Picture Tubes Ltd. and Tatung America are referred to collectively herein as "Chunghwa." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. During the Conspiracy Period, Chunghwa Picture Tubes Ltd. and Tatung America were closely affiliated, commonly owned, controlled and dominated by Tatung Corporation, and functioned as a single enterprise and/or alter egos. Chunghwa is a subsidiary of Tatung Company, a consolidated consumer electronics and information technology company based in Taiwan. Chunghwa's Board of Directors includes representatives from Tatung Company. The Chairman of Chunghwa, Weishan Lin, is also the Chairman and General Manager of the Tatung Company. Tatung America is also a subsidiary of Tatung Company. At least as recently as 2010, Tatung Company owned approximately half of Tatung America, with the other half owned by Lun Kuan Lin, the daughter of Tatung Company's former Chairman, T.S. Lin.

4. HannStar

43. Defendant HannStar Display Corporation ("HannStar") has its headquarters at No. 480, Rueiguang Road, 12th Floor, Neihu Chiu, Taipei 114, Taiwan. During the Conspiracy

Period, HannStar manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

5. LG Display

44. Defendant LG Display Co., Ltd., formerly known as LG Philips LCD Co., Ltd., is a leading manufacturer of LCD Panels and/or LCD Products. It was created in 1999 as a joint venture by Royal Philips Electronics NV and LG Electronics, Inc. LG Display Co., Ltd. has its principal place of business at 20 Yoido-dong, Youngdungpo-gu, Seoul, 150-72 1, Republic of Korea. LG Display Co., Ltd. also maintains offices in San Jose, California. During the Conspiracy Period, LG Display Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

45. Defendant LG Display America, Inc., formerly known as LG Philips LCD America, Inc., is located at 150 East Brokaw Rd., San Jose, California. During the Conspiracy Period, LG Display America, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

46. Defendants LG Display Co., Ltd. and LG Display America, Inc., are referred to collectively herein as "LG Display." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant LG Display America, Inc., was a member of the conspiracy by virtue of its status during the Conspiracy Period as the alter ego or agent of LG Display Co., Ltd. LG Display Co., Ltd. dominated or controlled LG Display America, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

6. Philips

47. Defendant Philips Electronics North America Corporation is a wholly-owned subsidiary of Philips Holdings USA, Inc., which itself is a wholly-owned subsidiary of co-conspirator Koninklijke Philips Electronics N.V. ("Royal Philips"). Its principal place of business is at 3000 Minuteman Road, Andover, Massachusetts 01810. During the Conspiracy

Period, Philips Electronics North America Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

48. In 1999, Philips Electronics North America Corporation's ultimate parent company, co-conspirator Royal Philips, created a joint venture with its competitor, LG Electronics, Inc., to form defendant LG Philips LCD Co., Ltd., which is now known as LG Display Co., Ltd. LG Display Co., Ltd. is a leading manufacturer of LCD Panels and/or LCD Products. LG Display Co., Ltd. pleaded guilty to participating in a global conspiracy to fix LCD prices. Royal Philips, as one of the joint-venture owners of LG Display Co., Ltd., participated in the conspiracy through LG Display Co., Ltd. and through other actions alleged in this complaint. Philips Electronics North America Corporation was the agent and sales and marketing representative for Royal Philips and its subsidiaries in the United States.

49. Philips Electronics North America Corporation participated in the conspiracy through the actions of its respective affiliates (including Royal Philips), officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant Philips Electronics North America Corporation was a member of the conspiracy by virtue of its status during the Conspiracy Period as an alter ego or agent of co-conspirator Royal Philips. Royal Philips dominated or controlled Philips Electronics North America Corporation regarding conspiracy activities and used that dominion or control to charge artificially high prices for LCD Panels and/or LCD Products. Philips Electronics North America Corporation, Royal Philips, and their affiliates, parents, subsidiaries, agents and representatives are collectively referred to herein as "Philips."

7. Samsung

50. Defendant Samsung Electronics Co., Ltd. has its principal place of business at Samsung Main Building, 250-2 ga, Taepyung-ro Chung-gu, Seoul, Republic of Korea. During the Conspiracy Period, Samsung Electronics Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

51. Defendant Samsung Electronics America, Inc., is a wholly-owned and controlled subsidiary of Samsung Electronics Co., Ltd. Its principal place of business is at 105 Challenger

Road, Ridgefield Park, New Jersey. During the Conspiracy Period, Samsung Electronics America, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

52. Defendant Samsung Semiconductor, Inc., is a wholly-owned and controlled subsidiary of Samsung Electronics Co., Ltd. Its principal place of business is at 3655 North First Street, San Jose, California. During the Conspiracy Period, Samsung Semiconductor, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

53. Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Semiconductor, Inc., are referred to collectively herein as “Samsung.” They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendants Samsung Electronics America, Inc., and Samsung Semiconductor, Inc., were members of the conspiracy by virtue of their status during the Conspiracy Period as the alter egos or agents of Samsung Electronics Co., Ltd. Samsung Electronics Co., Ltd. dominated or controlled Samsung Electronics America, Inc., and Samsung Semiconductor, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

8. Samsung SDI

54. Defendant Samsung SDI Co., Ltd. has its principal place of business at 673-7 Maetan-dong, Youngton-gu, Suwon, Republic of Korea. Defendant Samsung Electronics Co., Ltd. holds a controlling interest in Samsung SDI Co., Ltd. During the Conspiracy Period, Samsung SDI Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

55. Defendant Samsung SDI America, Inc. (“Samsung SDI America”) is a wholly-owned and controlled subsidiary of Samsung SDI Co., Ltd. Its principal place of business is 333 Michelin Drive, Suite 700, Irvine, California 92618. During the Conspiracy Period, Samsung

SDI America manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

56. Defendants Samsung SDI Co., Ltd., and Samsung SDI America, Inc. are referred to collectively herein as "Samsung SDI." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant Samsung SDI America, Inc. was a member of the conspiracy as the alter ego or agent of Samsung SDI Co., Ltd. Samsung SDI Co., Ltd. dominated or controlled Samsung SDI America, Inc. regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

9. Sanyo

57. Defendant Sanyo Consumer Electronics Co., Ltd, formerly known as Tottori Sanyo Electric Co. (also known as "Torisan") is a Japanese company with its principal place of business at 101, 7-Chome, Tachikawa-Cho, Tottori-City, Tottori, 680-0061, Japan. Prior to 2004, co-conspirator Sanyo Electric Co., Ltd., owned and operated Sanyo Consumer Electronics Co., Ltd. In October 2004, Seiko Epson Corporation and Sanyo Electric Co., Ltd. (including its subsidiary Sanyo Consumer Electronics Co., Ltd.) formed a joint venture company, Sanyo Epson Imaging Devices Corporation. This joint venture was formed from a combination of Seiko Epson's D-TFD LCD and STN LCD businesses and Sanyo's LTPS TFT LCD and amorphous silicon TFT LCD businesses. After the Conspiracy Period, Sanyo Epson Imaging Devices Corporation became Epson Imaging Devices Corporation, also a defendant. During the Conspiracy Period, Sanyo Consumer Electronics Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

58. Defendant Sanyo Consumer Electronics Co., Ltd. participated in the conspiracy through the actions of its affiliates, officers, employees, and representatives acting with actual or apparent authority. During the Conspiracy Period, Sanyo Consumer Electronics Co., Ltd. was closely affiliated, commonly owned, controlled and dominated by co-conspirator Sanyo Electric Co., Ltd., and functioned as a single enterprise and/or alter egos. Sanyo Consumer Electronics Co., Ltd. is a wholly-owned subsidiary of Sanyo Electric Co., Ltd., a consolidated consumer

electronics and information technology company based in Japan. Sanyo Consumer Electronics Co., Ltd. and its affiliates, parents, subsidiaries, agents and representatives are referred to collectively herein as "Sanyo."

10. Sharp

59. Defendant Sharp Corporation has its principal place of business at 22-22 Nagaike-cho, Abeno-ku, Osaka 545-8522, Japan. During the Conspiracy Period, Sharp Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

60. Defendant Sharp Electronics Corporation is a wholly-owned and controlled subsidiary of Sharp Corporation. Its principal place of business is at Sharp Plaza, Mahwah, New Jersey. During the Conspiracy Period, Sharp Electronics Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

61. Defendants Sharp Corporation and Sharp Electronics Corporation are referred to collectively herein as "Sharp." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant Sharp Electronics Corporation was a member of the conspiracy by virtue of its status during the Conspiracy Period as the alter ego or agent of Sharp Corporation. Sharp Corporation dominated or controlled Sharp Electronics Corporation regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

11. Toshiba

62. Defendant Toshiba Corporation has its principal place of business at 1-1, Shibaura 1-chome, Minato-ku, Tokyo, 105-8001, Japan. During the Conspiracy Period, Toshiba Corporation manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

63. Defendant Toshiba Mobile Display Co., Ltd., formerly known as Matsushita Display Technology Co., Ltd., has its principal place of business at Rivage Shinagawa, 1-8, Konan 4-chome, Minato-ku, Tokyo, 108-0075, Japan. During the Conspiracy Period, Toshiba Mobile Display Co., Ltd. manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

64. Defendant Toshiba America Electronic Components, Inc., is a wholly-owned and controlled subsidiary of defendant Toshiba Corporation. Its corporate headquarters are at 19900 MacArthur Blvd., Ste. 400, Irvine, California. During the Conspiracy Period, Toshiba America Electronic Components, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

65. Defendant Toshiba America Information Systems, Inc., is a wholly-owned and controlled subsidiary of Toshiba America, Inc. Its principal place of business is at 9470 Irvine Boulevard, Irvine, California. During the Conspiracy Period, Toshiba America Information Systems, Inc., manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

66. Defendants Toshiba Corporation, Toshiba Mobile Display Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc., are referred to collectively herein as "Toshiba." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendants Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc., were members of the conspiracy by virtue of their status during the Conspiracy Period as the alter egos or agents of Toshiba Corporation. Toshiba Corporation dominated or controlled Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc., regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

12. Epson

67. Defendant Epson Imaging Devices Corporation ("Epson Japan") has its principal place of business at 4F Annex, World Trade Center Building, 2-4-1 Hamamatsu-cho, Minato-ku, Tokyo 105-6104 Japan. The company was originally formed as a joint venture between Seiko Epson Corporation and Sanyo Electric Co., Ltd. but is now a wholly-owned subsidiary of Seiko Epson Corporation. Up until December 28, 2006, Epson Japan was known as Sanyo Epson Imaging Devices Corporation. During the Conspiracy Period, Epson Japan manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

68. Defendant Epson Electronics America, Inc., ("Epson America") is a wholly-owned and controlled subsidiary of Seiko Epson Corporation. Its principal place of business is at 2580 Orchard Parkway, San Jose, California. During the Conspiracy Period, Epson America manufactured, marketed, sold and/or distributed LCD Panels and/or LCD Products throughout the United States and elsewhere.

69. Defendants Epson Japan and Epson America are referred to collectively herein as "Epson." They participated in the conspiracy through the actions of their respective officers, employees, and representatives acting with actual or apparent authority. Alternatively, defendant Epson America was a member of the conspiracy by virtue of its status during the Conspiracy Period as the alter ego or agent of Epson Japan. Epson Japan dominated or controlled Epson America regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels and/or LCD Products.

C. Agents and Co-Conspirators

70. The actions in this Complaint were authorized, ordered, or done by the defendants' respective officers, agents, employees, or representatives while actively engaged in the management of each defendant's business or affairs.

71. Each defendant acted as the agent or joint venturer of or for the other defendants with respect to the acts, violations and common course of conduct alleged herein. Each

defendant that is a subsidiary of a foreign parent acts as the United States agent for LCD Panels and/or LCD Products made by its parent company.

72. Various persons and entities, some identified and some not yet identified, participated as co-conspirators in the violations alleged herein and performed acts and made statements in furtherance thereof. When Motorola Mobility establishes the identities of such co-conspirators, Motorola Mobility will seek leave to amend this complaint to add such co-conspirators as defendants. These co-conspirators are believed to include, without limitation, LG Electronics, Inc., LG Electronics USA, Inc., Hydis Technologies Co., Ltd., NEC LCD Technologies, Ltd. ("NEC"), Royal Philips Electronics N.V., IPS Alpha Technology, Ltd., Mitsui & Co., Ltd., Mitsubishi Electric Corporation, Panasonic Corporation, and Panasonic Corporation of North America.

V. THE MARKET FOR LCD PANELS AND LCD PRODUCTS

73. During and after the Conspiracy Period, defendants, or one or more of their subsidiaries, sold LCD Panels in the United States through and into interstate and foreign commerce, including through the Northern District of Illinois.

74. During the Conspiracy Period, defendants collectively controlled the market for LCD Panels, both globally and in the United States.

75. Defendants' business activities substantially affected interstate trade and commerce in the United States and caused antitrust injury in the United States.

76. LCD Panels are utilized in televisions, computer monitors, notebook computers, mobile wireless handsets, digital cameras, and numerous other electronic products. LCD Panels were the principal form of display screen used in mobile wireless handsets and two-way radios manufactured during and after the Conspiracy Period.

77. LCD Panels use liquid crystal to control the passage of light. More specifically, an LCD Panel is made of two glass sheets sandwiching a layer of liquid crystal. When voltage is applied, the liquid crystal is bent, allowing light to pass through to form a pixel. The combination of these pixels forms an image on the panel.

78. LCD Panels have no independent utility, and have value only as components of other products, such as mobile wireless handsets, desktop computer monitors, notebook computer displays, laptop displays, and televisions. The demand for LCD Panels thus derives directly from the demand for such products. In the case of LCD Panels used in mobile wireless handsets, the demand for LCD Panels derives directly from the demand for mobile wireless handsets.

79. The market for LCD Panels is enormous, in part because of the extraordinarily high demand for mobile wireless handsets and other LCD Products. For example, demand for mobile wireless handsets grew exponentially during the Conspiracy Period. In 1997, worldwide shipments of mobile wireless handsets totaled approximately 100 million units. This number ballooned to over one billion units by 2006. This increased demand for mobile wireless handsets drove a similar increase in the demand for LCD Panels during the Conspiracy period. Shipments of LCD Panels for mobile wireless handsets grew from approximately 400 million panels in 2001 to over a billion panels in 2006.

80. The market for LCD Panels and the market for LCD Products, such as mobile wireless handsets, desktop computer monitors, notebook computers and televisions, are inextricably linked and intertwined because the LCD Panel market exists to serve the markets for LCD Products, such as mobile wireless handsets. The market for LCD Panels and the markets for LCD Products such as mobile wireless handsets, desktop computer monitors, notebook computers and televisions are, for all intents and purposes, inseparable in that one would not exist without the other.

81. Motorola participated in the market for LCD Panels during and after the Conspiracy Period through its purchases of LCD Panels and LCD Products. Motorola paid a higher price for LCD Panels and LCD Products purchased from defendants, their co-conspirators, and others than it would have absent the conspiracy.

VI. DEFENDANTS ENGAGED IN PRICE FIXING OF LCD PANELS IN THE UNITED STATES AND THEY PARTICIPATED IN PRICE FIXING MEETINGS OVERSEAS TO INCREASE THE PRICE OF LCD PANELS SOLD IN THE UNITED STATES

82. During the Conspiracy Period, the defendants were aware that the U.S. market for LCD Products was one of the largest in the world. Defendants regularly solicited updated information from potential purchasers of LCD Panels, including Motorola, about the type and quantity of LCD Panels needed for the manufacture of LCD Products for sale in the United States. Defendants maintained sales offices and sales agents in the United States to market their LCD Panel manufacturing capabilities to U.S. companies, including Motorola, and to support Motorola and other U.S. customers throughout the duration of the purchasing relationship.

A. Defendants Were Well Aware That LCD Panels Sold To Motorola Would Be Imported And Sold In The United States.

83. During the Conspiracy Period, defendants helped Motorola design, plan, and execute development programs for Motorola devices containing LCD Panels for the U.S. market and, therefore, knew that such devices would be imported into the United States. For example, Samsung employees worked in Illinois and throughout the U.S.—often in Motorola facilities—on the design and engineering of Motorola devices sold in the U.S. market. Samsung's offices in Illinois provided design and engineering support to Motorola, including weekly phone calls between Samsung engineers in the U.S. and Motorola engineers in the U.S., and regular Samsung visits to Motorola offices in Illinois. In addition, Samsung engineers collaborated with Motorola engineers on quality issues relating to Motorola devices sold in the U.S. market.

REDACTED

84. REDACTED

85. REDACTED

86. As a result of these and other activities, defendants knew that when they sold LCD Panels to Motorola, they were likely to be imported into the U.S., and the prices would have an effect on U.S. commerce.

B. Defendants Engaged In Bilateral And Multilateral Meetings And Communications With Competitors To Inflate Prices Of LCD Panels And LCD Products.

87. The defendants conspired to raise the prices of LCD Panels sold into the United States. The LCD Panel conspiracy alleged herein was effectuated through a combination of group and bilateral discussions at all levels of defendants that took place in the United States, as well as in Japan, South Korea, Taiwan, and elsewhere. Defendants' conspiracy included agreements to fix, raise, maintain and/or stabilize the prices of both TFT-LCD Panels and STN-LCD Panels. Defendants fostered a culture of corruption within their companies whereby employees at every level—from the very top executives all the way to lower-level sales representatives—engaged in frequent and continuous communications with employees at every level of their competitors. Senior executives at defendants made it clear to their subordinates that they were required to engage in these illegal exchanges of supply, production, and pricing information as a part of their employment. The lower-level employees funneled the competitive information up to their superiors who utilized that information—along with the pricing information they, themselves, were able to collect through their own illegal competitor contacts—to set prices for LCD Panels at artificially-inflated levels. The constant communications between defendants at all levels allowed defendants to conspire to set average prices across the entire industry, as well as conspiring to fix the prices of the particular LCD

Panels sold to specific U.S. customers, such as Motorola, Dell, Hewlett-Packard, Apple, and others.

1. Defendants Engaged In Illegal Communications About Pricing In The United States.

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91. REDACTED

92. For OEMs in the United States, such as Motorola, defendants' U.S. affiliates led the LCD Panel price negotiations, with pricing directions coming from Asia where the defendants were also engaging in conspiratorial acts to affect the price of LCD Panels and LCD Products. Many of the defendants' conspiracy meetings and conspiracy communications took place in the U.S., involved the U.S. affiliates of the defendants, and directly targeted U.S. import commerce and U.S. OEMs. But in addition to these conspiratorial acts committed in the U.S., defendants' conspiratorial conduct included discussions in Japan, South Korea, and Taiwan in which they agreed to illegally increase the prices of LCD Panels sold in the United States and around the world. And, defendants' conspiracy included discussions regarding the retail prices for LCD Products sold by their own corporate subsidiaries and affiliates that manufactured LCD Products, such as mobile wireless handsets. Defendants' conspiratorial acts in Asia were a necessary and integral part of the conspiracy to increase the price of LCD Panels and LCD Products in the U.S. market.

2. Defendants Engaged In Illegal Communications About Pricing With Regard To Small LCD Panels.

93. As part of the larger conspiracy to raise the price of LCD Panels, defendants engaged in bilateral communications specifically regarding prices for small LCD Panels used in mobile devices and two-way radios. These discussions usually took place between sales and marketing employees in the form of telephone calls, emails and instant messages. The

information gained in these communications was then shared with supervisors and used to determine the price to be offered the defendants' customers.

94. These bilateral communications between defendants routinely involved LCD Panels used in mobile wireless devices and other handheld products. Examples include:

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3. Defendants Engaged In Illegal Bilateral And Multilateral Communications About The Pricing Of TFT-LCD Panels.

95. In the early years of the conspiracy, beginning in at least 1996, representatives of the Japanese-based defendants, such as Sharp and Toshiba, met and agreed to fix the prices for LCD Panels generally, as well as to specific OEMs; they also agreed to limit the amount of LCD Panels each would produce.

96. REDACTED

97. Later in 1998, high level representatives at various LCD manufacturers, including Sharp, Toshiba, Samsung, NEC, LG, and Mitsubishi, met to discuss projected sales volumes. REDACTED The companies agreed that they needed additional meetings to head off the projected higher level of competition between the companies.

REDACTED

98. Representatives from Samsung, NEC, Sharp, Hitachi, Mitsubishi, and LG met again later in 1998 to discuss their projected sales plans to limit competition between them.

REDACTED

99. Beginning in 1999, high level representatives of Samsung met with counterparts at LG and other companies to discuss pricing trends and other aspects of the LCD Panel market.

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101. REDACTED

102. REDACTED

103. From early 2001 through at least 2006, officials from defendants Samsung, AU Optronics, Chunghwa, Chi Mei, HannStar, LG Display, and Sharp met periodically in Taiwan to discuss and reach agreements on LCD Panel prices, price increases, production, and production

capacity, and did in fact reach agreements increasing, maintaining, and/or fixing LCD Panel prices and limiting their production. The group meetings these defendants participated in were called "Crystal Meetings." Each defendant attended multiple meetings with one or more of the other defendants during this period. The Crystal Meetings occurred in Taiwan; other similar meetings took place in South Korea, Japan, and the United States on a regular basis throughout this period.

104. The Crystal Meetings were highly organized and reflected the culture of corruption at the defendant companies, with meetings among multiple levels of company representatives. Meetings among defendants' high-level executives were called "CEO" or "Top" meetings; those among defendants' vice presidents and senior sales executives were called "Commercial" or "Operational" meetings; and those among lower level sales representatives were call "Working Level" meetings.

105. The CEO meetings occurred quarterly from approximately 2001 to 2006. The Commercial meetings occurred monthly during that same period, and the Working Level meetings occurred frequently over the same time period. The purpose and effect of these meetings was to stabilize or raise prices. Each meeting followed the same general pattern, with a rotating designated "chairman" who would use a projector or whiteboard to put up figures relating to the supply, demand, production, and prices of LCD Panels for the group to review. Those attending the meetings would take turns sharing information concerning prices, monthly and quarterly LCD fab output, production, and supply, until a consensus was reached concerning the participants' prices and production levels of LCD Panels in the coming months or quarter.

106. During all of these meetings, defendants exchanged information about current and anticipated prices for their LCD Panels, and supply, demand, and production levels of LCD Panels. The participants reached agreement concerning the specific prices to be charged in the coming weeks and months for LCD Panels. Defendants set these prices in various ways, including, but not limited to, setting "target" prices, "floor" prices, and the price range or differential between different sizes and types of LCD Panels. Defendants limited the production

of LCD Panels in various ways, including, but not limited to, line slowdowns, delaying capacity expansion, shifting their production to different-sized panels, and setting target production levels.

107. During the Crystal Meetings, defendants also agreed to engage in bilateral communications with those defendants not attending these meetings. Certain defendants were "assigned" other defendants not in attendance and agreed to and did in fact communicate with non-attending defendants to synchronize the price and production limitations agreed to at the Crystal Meetings. Participants at the Crystal Meetings contacted Japanese defendants (such as Sharp and Toshiba) to relay the agreed-upon pricing and production limitations. Some of these meetings and communications took place in the U.S., and specifically targeted U.S. commerce and U.S. OEMs.

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4. Defendants Engaged In Illegal Bilateral And Multilateral Communications About The Pricing Of STN-LCD Panels.

111. During the Conspiracy Period, LCD Panels used in certain applications, including notebook PCs and mobile wireless handsets, included both TFT-LCD Panels and STN-LCD Panels. STN-LCD Panels included CSTN-LCD Panels and MSTN-LCD Panels. Certain defendants, their corporate affiliates, and other members of the conspiracy manufactured both TFT-LCD Panels and STN-LCD Panels, including defendants Samsung, Sharp and Epson. The same individuals at the defendants who were engaged in bilateral communications and group meetings regarding TFT-LCD Panel prices also had pricing responsibilities for STN-LCD Panels.

112. Defendants' conspiracy included agreements to raise fix, raise, maintain and/or stabilize the prices of both TFT-LCD Panels and STN-LCD Panels. Specifically, defendants engaged in bilateral discussions in which they exchanged information about STN-LCD Panel pricing, shipments, and production. These discussions usually took place between sales and marketing employees in the form of telephone calls, emails and instant messages. The information gained in these communications was then shared with supervisors and taken into account in determining the price to be offered defendants' customers for STN-LCD Panels.

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121. REDACTED

122. REDACTED

123. Thus, because a number of mobile wireless handsets, including the Motorola Razr phone, included both TFT-LCD Panels and STN-LCD Panels, and because mobile wireless handset manufacturers often requested a single price for LCD modules that included both types of panels, defendants' bilateral discussions and agreements with respect to TFT-LCD panel prices inevitably included and/or affected the prices of STN-LCD panels in those modules.

C. Defendants Have Been Charged With And Have Pled Guilty To Participating in Price-Fixing Meetings In The U.S. And For Fixing The Price Of LCD Panels And LCD Products Sold In The U.S.

124. In December 2006, authorities in Japan, South Korea, the European Union, and the United States revealed the existence of a comprehensive investigation into anti-competitive activity among LCD Panel manufacturers. In a December 11, 2006, filing with the Securities and Exchange Commission, defendant LG Display disclosed that officials from the South Korea Fair Trade Commission and Japanese Fair Trade Commission had visited the company's Seoul and Tokyo offices and that the United States Department of Justice ("DOJ") had issued a subpoena to its San Jose office.

125. On December 12, 2006, news reports indicated that in addition to LG Display, defendants Samsung, Sharp and AU Optronics were also under investigation.

126. At least one of the defendants has approached the Antitrust Division of the DOJ to enter into a leniency agreement with respect to defendants' conspiracy to fix prices of LCD Panels. In order to enter into a leniency agreement under the Corporate Leniency Policy of the DOJ, this defendant has reported defendants' price-fixing conspiracy to the DOJ and has confessed its own participation in defendants' price-fixing conspiracy. The DOJ Antitrust Division's investigation of the remaining defendants is ongoing and is expected to result in additional guilty pleas and criminal fines from the other defendants to this action. However, a number of defendants and their executives have pled guilty to price-fixing, as alleged more fully herein.

127. Defendant Chimei Innolux Corporation's predecessor, Chi Mei Optoelectronics, has admitted and pleaded guilty to participating in the conspiracy from September 2001 to December 2006 to fix the price of LCD Panels sold worldwide, including the United States and California in particular, and to participating in meetings, conversations and communications in Taiwan to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to agreed-upon prices. In connection with its guilty plea, Chi Mei Optoelectronics has agreed to pay a criminal fine of $220 million.

128. LG Display has admitted and pleaded guilty to participating in the conspiracy from September 2001 through June 2006 to fix the prices of LCD Panels sold worldwide, and to participating in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices. In connection with its guilty plea, LG Display has agreed to pay a fine of $400 million, the second-highest criminal fine ever imposed by the DOJ's Antitrust Division, for its participation in the conspiracy.

129. Chung Suk "C.S." Chung, an executive from LG Display also pleaded guilty to participating in the conspiracy to fix the prices of LCD Panels sold worldwide from September 2001 through June 2006. Specifically, Mr. Chung admitted that he participated in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreed to fix the prices of LCD Panels at certain predetermined levels, issued price quotations in accordance with the agreements reached, exchanged pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, and authorized, ordered, and consented to the participation of subordinate employees in the conspiracy. In connection with his guilty plea, Mr. Chung has agreed to serve a 7-month prison term and pay a criminal fine of $25,000.

130. Bock Kwon, an executive from LG Display, also pleaded guilty to participating in the conspiracy to fix the prices of LCD Panels sold worldwide, including the United States and

California in particular, from September 2001 through June 2006. Specifically, Mr. Kwon admitted that he participated in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreed to fix the prices of LCD Panels at certain predetermined levels, issued price quotations in accordance with the agreements reached, exchanged pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, and authorized, ordered, and consented to the participation of subordinate employees in the conspiracy. In connection with his guilty plea, Mr. Kwon has agreed to serve a 12-month prison term and pay a criminal fine of $30,000.

131. In addition, Duk Mo Koo, former Executive Vice President and Chief Sales Officer from LG Display, has been indicted for participating in the conspiracy to fix the prices of LCD Panels sold worldwide, including the United States and California in particular, from December 2001 through December 2005. Specifically, Mr. Koo has been charged with participating in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, including the Crystal Meetings that took place in Taiwan. Mr. Koo has also been charged with agreeing to fix the prices of LCD Panels at certain predetermined levels, issuing price quotations in accordance with the agreements reached, exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, authorizing, ordering, and consenting to the participation of subordinate employees in the conspiracy, accepting payment for the supply of LCD Panels sold at collusive, noncompetitive prices to customers in the United States, and taking steps to conceal the conspiracy and his conspiratorial contacts.

132. Chunghwa has admitted and pleaded guilty to participating in the conspiracy from September 2001 to December 2006 to fix the price of LCD Panels sold worldwide and to participating in meetings, conversations and communications in Taiwan to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to agreed-upon prices. In connection with its guilty plea, Chunghwa has agreed to pay a criminal fine of $65 million.

133. In addition, two current executives from Chunghwa, Chih-Chun "C.C." Liu and Hsueh-Lung "Brian" Lee, and one former executive from Chunghwa, Chieng-Hon "Frank" Lin pleaded guilty to participating in the conspiracy from September 2001 through December 2006. Specifically, Mr. Liu, Mr. Lee and Mr. Lin admitted that they participated in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, agreed to fix the prices of LCD Panels at certain predetermined levels, issued price quotations in accordance with the agreements reached, exchanged pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, and authorized, ordered, and consented to the participation of subordinate employees in the conspiracy. In connection with their guilty pleas, Mr. Lin has agreed to serve a 9-month prison term and pay a criminal fine of $50,000; Mr. Liu has agreed to serve a 7-month prison term and pay a criminal fine of $30,000; and Mr. Lee has agreed to serve a 6-month prison term and pay a criminal fine of $20,000.

134. In addition, two former Chunghwa executives, Cheng Yuan Lin and Wen Jun Cheng, have been indicted for participating in the conspiracy to fix the price of LCD Panels sold worldwide from December 2001 through December 2005. Specifically, Mr. Lin and Mr. Cheng have been charged with participating in meetings, conversations and communications in Taiwan, South Korea and the United States to discuss the prices of LCD Panels, including the Crystal Meetings that took place in Taiwan. Mr. Lin and Mr. Cheng have also been charged with agreeing to fix the prices of LCD Panels at certain predetermined levels, issuing price quotations in accordance with the agreements reached, exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices, authorizing, ordering, and consenting to the participation of subordinate employees in the conspiracy, accepting payment for the supply of LCD Panels sold at collusive, noncompetitive prices to customers in the United States, and taking steps to conceal the conspiracy and their conspiratorial contacts.

135. Defendant Sharp has admitted and pleaded guilty to participating in the conspiracy with unnamed co-conspirators to fix the price of LCD Panels sold to Dell from April 2001 to December 2006, to Apple Computer from September 2005 to December 2006, and to

Motorola from the fall of 2005 to the middle of 2006, and to participating in bilateral meetings, conversations and communications in Japan and in the United States with unnamed co-conspirators to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices. Defendant Sharp participated in multiple Working Level meetings, as well as bilateral discussions with other defendants, during which it discussed and reached agreements with other defendants on prices for LCD Panels during the Conspiracy Period.

136. Defendant Sharp also participated in multiple bilateral discussions with other defendants, including Samsung, Toshiba, and Epson, during the Conspiracy Period. Through these discussions, Sharp agreed on prices, price increases, production quotas, and production limits for LCD Panels. Because Samsung, Toshiba, and Epson were Sharp's primary competitors in the sale of LCD Panels used in mobile wireless handsets, Sharp knew that it could not have fixed the prices of LCD Panels incorporated into such handsets—as Sharp admitted it did in its guilty plea—unless it reached agreements with Samsung, Toshiba, and Epson to do the same.

137. Defendant Epson Japan has admitted and pleaded guilty to participating in the conspiracy with unnamed conspirators to fix the price of LCD Panels sold to Motorola. Epson Japan has admitted and pleaded guilty to participating in the conspiracy from 2005 through 2006 to fix the prices of LCD Panels, and to participating in meetings, conversations and communications in Japan and the United States to discuss the prices of LCD Panels, agreeing to fix the prices of LCD Panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices. In connection with its guilty plea, Epson Japan has agreed to pay a fine of $26 million.

138. Defendant Epson America is a wholly-owned and controlled subsidiary of defendant Epson Japan and Epson Japan was represented by co-conspirator Mitsui & Co., Ltd. ("Mitsui") at one of the bilateral meetings. Mitsui served as an agent of, and under the direction of, Epson Japan and Epson America. Epson Japan and Epson America, through their agent, were parties to the agreements made at those meetings and acted as co-conspirators. In addition, to the

extent Epson America distributed LCD Panels or LCD Products to direct purchasers, it played a significant role in the conspiracy because defendants wished to ensure that the prices for such products paid by direct purchasers did not undercut the pricing agreements reached at these various meetings. Epson America was an active, knowing participant in the alleged conspiracy, and acted as Epson Japan's agent for selling LCD Products in the United States.

139. In addition to the participation in the conspiracy outlined through the guilty pleas, other as yet uncharged conspirators also participated in the conspiracy. Defendant Toshiba also participated in the conspiracy by entering into joint ventures and other arrangements to manufacture or source LCD Panels with one or more of the defendants that attended the Crystal Meetings. The purpose and effect of these joint ventures by Toshiba and others was to limit the supply of LCD Panels and fix prices of such panels at unreasonably high levels and to aid, abet, notify and facilitate the implementation of the price-fixing and production-limitation agreements reached at the meetings. During the Conspiracy Period, Toshiba sought and formed strategic partnerships with other LCD manufacturers which allowed it to easily communicate and coordinate prices and production levels with other manufacturers as part of the overall conspiracy alleged herein. For instance, Toshiba formed HannStar in January 1998 as a manufacturing joint venture. In 2001, Toshiba and Matsushita formed a joint venture, Advanced Flat Panel Displays, which merged their LCD operations. In April 2002, Toshiba and Matsushita formed a joint venture, Toshiba Mobile Display, formerly known as Toshiba Matsushita Display Technology Co., Ltd., which combined the two companies' LCD development, manufacturing, and sales operations. In 2006, Toshiba purchased a 20% stake in LG Display's LCD Panel manufacturing facility in Poland. The operation and management of these many different joint ventures afforded Toshiba and the other defendant joint-venture partners regular opportunities to communicate with each other to agree on prices, price increases and production limits and quotas for LCD Panels that each defendant manufactured and sold.

140. Co-conspirator Hydis Technologies Co. Ltd. ("Hydis") participated in multiple lower level meetings between at least 2002 and 2005. In addition, Hydis had a bilateral meeting

with a Taiwanese defendant at least as recently as 2005. Through these discussions, Hydis agreed on prices and supply levels for LCD Panels.

141. Co-conspirator Mitsubishi Electric Corporation ("Mitsubishi") participated in multiple lower level meetings in 2001 with Chi Mei, Chunghwa, Samsung, and Unipac Electronics (later AU Optronics). Through these meetings, Mitsubishi agreed on prices and supply levels for LCD Panels.

142. Co-conspirator Mitsui had at least one bilateral meeting, which included a discussion about customers and future pricing, with a Taiwanese defendant in 2001. Mitsui was acting as an agent for co-conspirator Epson Japan in this discussion. Mitsui and Epson Japan agreed on prices and supply levels for LCD Panels.

143. Co-conspirator NEC LCD Technologies, Ltd. ("NEC") participated in meetings or discussions during the Conspiracy Period with at least one other defendant or co-conspirator, which included discussions about prices for LCD Panels.

144. Co-conspirator IPS Alpha Technology, Ltd. ("IPS Alpha") is a joint venture among Hitachi Displays, Ltd., Toshiba Corporation, and Panasonic Corporation ("Panasonic"), and one or more of the partners in this joint venture participated in the meetings described above. As a result, IPS Alpha was represented at those meetings and was a party to the agreements entered into by its joint venture partners at these meetings. As explained above, the agreements at these meetings included agreements on price ranges and output restrictions. The joint venture partners had substantial control over IPS Alpha's production levels and the prices of LCD Panels the joint ventures sold both to the joint venture partners and other non-affiliated companies. Thus, IPS Alpha and Panasonic were active, knowing participants in the alleged conspiracy.

145. When Motorola Mobility refers to a corporate family or companies by a single name in its allegations of participation in the conspiracy, it is to be understood that Motorola Mobility is alleging that one or more employees or agents of entities within the corporate family engaged in conspiratorial meetings on behalf of every company in that family. In fact, the individual participants in the conspiratorial meetings and discussions did not always know the corporate affiliation of their counterparts, nor did they distinguish between the entities within a

corporate family. The individual participants entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families. As a result, each entire corporate family was represented in meetings and discussions by their agents and each was a party to the agreements reached in them.

D. Defendants Negotiated With Motorola In The United States And Entered Into Agreements With Motorola To Sell LCD Panels At Prices Illegally Raised Through Their Conspiracy.

146. During and after the Conspiracy Period, Motorola purchased LCD Panels directly from the defendants. Motorola used those LCD Panels to manufacture a number of different types of LCD Products, including mobile wireless handsets, two-way radios, and other products ("Motorola devices"). Defendants' illegal conspiracy increased the prices of LCD Panels that the defendants shipped directly to Motorola in the United States as well as the prices for LCD Panels Motorola purchased through its manufacturing subsidiaries. The illegally-inflated prices the defendants charged Motorola for these LCD Panels affected the costs of each LCD Product Motorola manufactured. As described more fully herein, those inflated LCD Panel costs affected both the price at which Motorola sold its products and the number of products it could sell, which drove down Motorola's profits.

147. During and after the Conspiracy Period, procurement teams at Motorola based in the U.S. negotiated the prices, conditions, and quantities that governed all Motorola purchases of LCD Panels around the world for inclusion in Motorola devices. Motorola's U.S. procurement teams evaluated, qualified, and selected the LCD Panel suppliers that serviced Motorola around the world; drafted all requests for quotes for LCD Panels that would be purchased by Motorola facilities worldwide; reviewed the responses to the requests for quotes; selected which LCD Panel suppliers would supply each part to Motorola; and awarded each LCD Panel supplier a specific share of Motorola's overall business.

148. Motorola's U.S. procurement teams negotiated the terms of each such purchase with U.S.-based and foreign-based employees of LCD Panel suppliers. It did so as follows:

- At the initiation of a potential order, Motorola's U.S. procurement teams contacted the U.S.-based employee of the LCD Panel suppliers regarding the new opportunity. The teams provided the potential supplier's U.S. representative with preliminary specifications, such as the display size, volumes, and expected dates.
- Motorola's U.S. procurement teams developed the requests and preliminary specifications for LCD Panels in collaboration with U.S. representatives of the LCD Panel suppliers.
- Managers on Motorola's U.S. procurement teams, through face-to-face meetings and by correspondence, negotiated the terms of purchases for LCD Panels with the U.S. representatives of the LCD Panel suppliers and awarded the share amounts to the selected LCD Panel suppliers.

149. The purchase order contracts between Motorola and the LCD Panel suppliers in for the purchase of LCD Panels contain provisions required the defendants to comply with all laws and regulations in the performance of the contract.

150. The prices Motorola's U.S. procurement teams agreed upon with employees of the LCD Panel suppliers directly and immediately impacted Motorola's business plans, including its most basic business choices involving the production, pricing, and sales of its own products. Based in part on those LCD Panel prices, Motorola set its contracts with its own customers, made purchasing decisions for other components incorporated into Motorola devices, and planned product development and sales opportunities.

151. After the prices for LCD Panels were negotiated and agreed upon between Motorola's U.S. procurement teams and the U.S.-based employees of LCD Panel suppliers, a supply chain organization at Motorola based in Illinois directed an automatic scheduling process that translated the product demand for Motorola devices in the United States into the quantity requirements for the LCD Panels that would be incorporated into such devices. The quantity requirements were based on orders made to Motorola's U.S. business operations teams in the United States by Motorola's U.S. customers. This schedule-sharing process was entirely

directed by Motorola, Inc. from the U.S. In addition to price, Motorola, Inc. also controlled the amount and timing of LCD Panel orders by its foreign affiliates and subsidiaries.

152. Motorola's foreign affiliates and facilities were not authorized to negotiate the price of LCD Panels, nor did they determine the total quantity of LCD Panels ordered. The foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States.

153. In this respect, during and after the Conspiracy Period, Motorola, Inc. and its foreign affiliates and facilities operated as a single enterprise for the purpose of procuring LCD Panels. Motorola, Inc. directed all aspects of the purchase of LCD Panels for inclusion in Motorola devices by its foreign affiliates and facilities. The foreign affiliates and facilities acted as Motorola, Inc.'s agents for the purpose of transmitting purchase orders for LCD Panels to the LCD Panel suppliers at prices and for quantities that were determined by Motorola in the United States and in manufacturing Motorola devices on behalf of Motorola, Inc. These are actions that Motorola Inc. could have and would have otherwise conducted itself. At all relevant times, Motorola, Inc. controlled the price, quantity, and specifications at which its foreign affiliates purchased LCD panels, and Motorola, Inc. also controlled the timing of the purchases and the purposes for which they were used. The Motorola U.S. pricing teams and the U.S. procurement managers were responsible for final approval on pricing, conditions, and projected quantities for purchase of LCD Panels. The purchasing process at Motorola for the components of LCD Products for the U.S. market was managed and overseen by the supply chain organization and the procurement teams based in Motorola's U.S. operations.

154. After Motorola, Inc.'s foreign affiliates and facilities completed the manufacture of Motorola devices at the request of Motorola, Inc. for sale in the United States, those devices were imported into the United States by Motorola, Inc.

155. As part of the manufacturing process, Motorola's mobile devices were shipped to Fort Worth, Texas for final assembly and packaging.

156. Motorola suffered the entire injury resulting from these artificially-inflated prices, and the injury from the purchase of these price-fixed panels was ultimately borne by Motorola, Inc. in the United States.

E. Defendants Agreed To Provide Motorola LCD Panels In Compliance With Applicable Laws And Regulations.

157. During and after the Conspiracy Period, Motorola and its LCD suppliers, including Epson, Philips, Samsung, Samsung SDI, Sanyo, Sharp, and Toshiba, entered into contracts for the sale of LCD Panels and/or LCD Products by which the LCD suppliers agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay the LCD suppliers a price negotiated by Motorola and each LCD supplier. These contracts between Motorola and its LCD suppliers included purchase orders issued by Motorola to its LCD suppliers.

158. Pursuant to each of these contracts, Motorola's LCD suppliers agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders, for example:

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159. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under its contracts with its LCD suppliers. Motorola paid its LCD suppliers, including Epson, Philips, Samsung, Samsung SDI, Sanyo, Sharp, and Toshiba, for all LCD Panels and/or LCD Products delivered to Motorola.

160. As set forth in the above allegations, Epson, Philips, Samsung, Samsung SDI, Sanyo, Sharp, and Toshiba did not comply with the terms of their contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola.

F. Defendants Concealed That The Prices Motorola Negotiated For LCD Panels And LCD Products Were Illegally Increased By The Defendants' Conspiracy.

161. Motorola did not discover and could not have discovered, through the exercise of reasonable diligence, the existence of the conspiracy alleged herein until November 2006, when Motorola first learned of the DOJ and other antitrust regulators' investigation, because defendants and their co-conspirators actively and fraudulently concealed the existence of their contract, combination or conspiracy. Because defendants' agreement, understanding and conspiracy were kept secret, Motorola was unaware of defendants' unlawful conduct alleged herein and did not know that it was paying artificially high prices for LCD Panels and the products in which they were used. Motorola could not have learned of its claims against some of the defendants until it began participating in discovery in this litigation after its original complaint was filed.

162. REDACTED

163. REDACTED

164. As alleged above, defendants had secret discussions about price and output. Defendants agreed not to publicly discuss the existence or the nature of their agreement. In fact, the top executives who attended the CEO and Commercial Crystal Meetings agreed to stagger their arrivals and departures at such meetings to avoid being seen in public with each other and with the express purpose and effect of keeping them secret. Moreover, when the participants in those meetings became fearful that they might be subject to antitrust scrutiny, they agreed to meet one-on-one for the so-called Round Robin meetings.

165. Moreover, defendants repeatedly gave pretextual justifications for the inflated prices of LCD Panels in furtherance of the conspiracy.

166. There have been a variety of other purportedly market-based explanations for price increases. The first was supply and demand. In early 1999, Omid Milani, a marketing manager for NEC, stated that "demand by far is outstripping our supply capability" and predicted that "prices will continue to increase until a reasonable balance is achieved." Bock Kwon, Vice President of LG Philips' Sales Division, and Yoon-Woo Lee, President and CEO of Samsung's Semiconductor Division, also falsely reported in 1999 that price increases were due to "acute" shortages.

167. Another false rationale provided by defendants was undercapitalization. In 1999, Joel Pollack, a marketing manager for Sharp, stated: “Prices have dropped at a steady rate over the past couple of years to the point where it was difficult to continue the necessary level of capitalization. The [low prices] have starved the industry.”

168. A third rationale for the steep price hikes of 1999 was offered by Yoon-Woo Lee, CEO of Samsung. He claimed that the demand for larger panels was reducing the industry’s capacity because each display used more square inches of motherglass substrate.

169. Increased demand was repeatedly cited by defendants throughout the Conspiracy Period. On February 4, 2001, Bruce Berkoff, Executive Vice-President at LG Philips was quoted in News.com as saying that price increases were due to shortages. He claimed, “demand grew so fast that the supply can’t keep up.” Koo Duk-Mo, an executive at LG Philips, similarly predicted in 1999 that prices would rise 10 to 15 percent due to increased demand for the holiday season. In 2005, Koo Duk-Mo of LG Philips stated “[w]e are seeing much stronger demand for large-size LCD televisions than expected, so LCD TV supply is likely to remain tight throughout the year.”

170. Hsu Jen-Ting, a Vice-President at Chi Mei, and Chen Shuen-Bin, president of AU Optronics, offered another rationale for the 2001 price hike in an interview for the Taiwan Economic News in October 2001. They blamed “component shortages due to the late expansion of 5th generation production lines and new demand from the replacement of traditional cathode ray tubes with LCD monitors.”

171. These explanations were all pretextual and each served to cover up the conspiracy. As a result of defendants’ fraudulent concealment of their conspiracy, the running of any statute of limitations has been tolled with respect to Plaintiff’s claims.

Unbeknownst to Motorola, the prices Motorola’s U.S. procurement teams agreed to with U.S.-based employees at the U.S. affiliates at LCD Panel suppliers were artificially inflated as a result of the defendants’ and their co-conspirators’ illegal agreements to sell price-fixed LCD Panels. Defendants fixed those prices despite the fact that Motorola specified in its purchase orders for

LCD Panels that LCD Panel suppliers were required to comply with all laws and regulations in providing the LCD Panels to Motorola.

VII. EFFECT ON U.S. COMMERCE AND INJURY TO MOTOROLA

A. Defendants' Conduct Involved Import Trade Or Import Commerce

172. Defendants' illegal conduct involved U.S. import trade or import commerce. Defendants intentionally sent price-fixed LCD Panels to Motorola's foreign facilities knowing that they would subsequently be imported into the United States, one of their most important markets and a major source of their revenues. In this respect, they directed their anticompetitive conduct at imports into the United States with the intent of causing price-fixed LCD Panels to enter the United States market and inflating the prices of Motorola devices destined for the United States. Such conduct was meant to produce and did in fact produce a substantial effect in the United States in the form of higher prices being paid for such products by U.S. companies, U.S. consumers, and Motorola, Inc. itself.

173. The U.S. LCD market is enormous and was a major focus of and very important to the conspiracy. Defendants and others shipped more than 400 million LCD Panels, including those incorporated into LCD Products, into the United States during the Conspiracy Period for ultimate sale to U.S. consumers. During the Conspiracy Period, the value of LCD Panels imported into the United States was in excess of $50 billion. Defendants shipped millions of LCD Products worth billions of dollars into the United States each year during the Conspiracy Period. As a result, a substantial portion of defendants' revenues was derived from the U.S. market. Defendants spent hundreds of millions of dollars on advertising their products in the United States. Most, if not all, defendants had marketing, sales, and account management teams specifically designated to handle U.S. customer accounts and the U.S. market for LCD Panels and LCD Products. During the Conspiracy Period, every defendant shipped LCD Panels directly into the United States.

174. Because of the importance of the U.S. market to defendants and their co-conspirators, LCD Panels and LCD Products intended for importation into and ultimate

consumption in the United States were a focus of defendants' illegal conduct. The defendants knowingly and intentionally sent price-fixed LCD Panels and LCD Products into a stream of commerce that lead immediately and directly into the United States. Many LCD Panels were intended for incorporation into finished products specifically destined for sale and use in the United States. Furthermore, this conduct by defendants was meant to produce and did in fact produce a substantial effect in the United States in the form of artificially-inflated prices for LCD Panels and LCD Products.

175. When high-level executives based at defendants' Asian headquarters agreed on prices, they knew that their price-fixed LCD Panels would be incorporated into LCD Products sold in the United States. The defendants knew and intended that a significant portion of the products they sold to Motorola would be imported directly into the United States and thus would cause harm to Motorola and, ultimately, U.S. consumers. At all times, defendants were fully aware that the artificially-inflated prices they set would govern the deliveries of LCD Panels to Motorola's manufacturing facilities abroad and that a large percentage of those LCD Panels would be incorporated into Motorola devices and immediately shipped into the United States for sale and ultimate consumption in the United States.

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176. Specifically, defendants were aware that Motorola's facilities in Tianjin, China; Hangzhou, China; and Singapore manufactured LCD Products for the U.S. market. Therefore, when defendants delivered LCD Panels to those facilities, they knew, intended, and expected that the LCD Panels would be incorporated into Motorola devices intended to be sold in the United States.

177. Further, defendants knew that the U.S. market was Motorola's primary market for Motorola devices. Defendants also knew that Razr phones were one of Motorola's most successful products and, therefore, a large number of Razr phones manufactured by Motorola would be sold in the United States. In fact, Motorola sold 40% of its Razr phones during the Conspiracy Period in the United States. Thus, defendants knew and intended that, when they sold LCD Panels for inclusion in Razr phones, a large number of those phones would be sold in the U.S. market. In fact, defendants Epson and Sharp have both admitted to price-fixing in the United States specifically with respect to LCD Panels sold to Motorola for incorporation into Motorola Razr phones.

178. Moreover, because LCD Panels are—and were throughout the Conspiracy Period—the most expensive and significant component of LCD Products, defendants knew that price increases for LCD Panels would necessarily result in increased prices for LCD Products sold in the United States. Many defendants manufactured LCD Products and sold them in the United States. In fact, defendants routinely monitored the effect their price-fixing had on the prices of such LCD Products sold in the United States.

179. Defendants also monitored the prices for LCD Products sold in the United States, which they often referred to as "street prices," because defendants were aware that the conspiracy would elevate those prices in addition to the prices of LCD Panels. In addition, defendants used LCD Product pricing in the United States as a benchmark for establishing, organizing, and tracking their price-fixing of LCD Panels.

180. Defendants have acknowledged that their commercial activities involving intentionally sending LCD Panels and LCD Products into the United States involved American import trade and import commerce. In a series of complaints filed with the U.S. International Trade Commission over the past few years, defendants Samsung and Sharp have both alleged infringing conduct based on "[t]he importation into the United States, sale for importation into the United States, and/or sale after importation in the United States of . . . LCD devices" by the other (and by other entities on its behalf). *See In the Matter of Certain Liquid Crystal Display Devices and Products Containing the Same*, Investigation No. 337-TA-631, Complaint of Samsung Electronics Co., Ltd. (December 21, 2007) (Docket No. 2586); *In the Matter of Certain Liquid Crystal Display Modules, Products Containing Same, and Methods for Using the Same*, Investigation No. 337-TA-634, Complaint of Sharp Corporation (January 30, 2008) (Docket No. 2594); *In the Matter of Certain Liquid Crystal Display Devices and Products Containing the Same*, Investigation No. 337-TA-699, Complaint of Samsung Electronics Co., Ltd. (December 1, 2009) (Docket No. 2698).

181. Likewise, in a civil patent lawsuit brought in federal court, one Defendant acknowledged that other defendants' commercial activities involving intentionally sending LCD Panels and LCD Products into the United States involved American import trade and import commerce. In the case, defendant alleged infringing conduct on the part of the other defendants stemming from their sending infringing products into "the United States . . . through established distribution channels involving various third parties, knowing that these third parties will use their respective nationwide contacts and distribution channels to import into, sell, offer for sale, and/or use these products in . . . the United States." *See LG Philips LCD Co., Ltd. v. Chi Mei Optoelectronics Corporation, et al.*, Civil Action No. 06-726-JJF (D. Del.) (Docket No. 54) ¶¶ 6,

8. According to defendant, those distribution channels/networks are "designed to exploit the U.S. market" and are "comprised of the largest original equipment manufacturers . . . and the largest chain retail outlets in the United States." *LG Philips*, Civil Action No. 06-726-JJF (Docket No. 57) at 2.

182. Defendants who have entered guilty pleas in connection with the LCD conspiracy have acknowledged that their illegal activities impacted imports into the United States and had a substantial effect on American import trade and import commerce. Those defendants have expressly admitted that "[LCD Panels] affected by [their] conspiracy [were] sold by one or more of the conspirators to customers in [the Northern District of California]."

B. Defendants' Conduct Had A Direct, Substantial, And Reasonably Foreseeable Effect On U.S. Domestic And Import Trade Or Commerce That Gave Rise To Motorola's Antitrust Claim.

183. Defendants' illegal conduct had a direct, substantial, and reasonably foreseeable effect on U.S. domestic and import trade or commerce in the form of higher prices for LCD Panels (prices that were the product of collusion) being negotiated and agreed to between defendants and Motorola, Inc. in the United States. The prices reached, which were tainted by collusion, directly and immediately impacted Motorola's business in the United States. These same negotiations and agreements in the United States resulted in the delivery of LCD Panels to Motorola's foreign affiliates and facilities at the higher prices determined in the United States, thereby causing overcharges to be incurred and directly giving rise to antitrust claims.

184. Defendants and their co-conspirators delivered the LCD Panels and LCD Products to Motorola at prices and to locations specified in the agreements negotiated between the parties. Motorola's purchases of LCD Panels at issue in this case fall into three categories: (1) LCD Panels delivered by the Defendants to Motorola in the United States; (2) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices imported into the U.S. by Motorola and later sold by Motorola to customers in the United States; and (3) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices sold to Motorola customers abroad. Motorola Mobility is entitled to recover the overcharges

incurred on all these purchases of LCD Panels in U.S. courts, as well as on purchases made after the Conspiracy Period to the extent that defendants' and their co-conspirators' conspiracy caused a lingering artificial inflation of prices.

185. First, the defendants and their co-conspirators delivered LCD Panels directly to Motorola facilities in the United States. Motorola then incorporated those LCD Panels into LCD Products in the United States that were then sold to U.S. customers. The approximate total volume of those purchases during the conspiracy period is $61 million.

186. Second, Motorola also directed the defendants and their co-conspirators to deliver LCD Panels to Motorola's manufacturing facilities in Tianjin, China; Hangzhou, China; and Singapore for incorporation into LCD Products that were manufactured for importation and sale in the United States. The approximate total volume of those purchases during the conspiracy period is $ 1.75 billion.

187. Third, Motorola also directed the defendants and their co-conspirators to deliver LCD Panels and LCD Products to Motorola's facilities abroad for manufacture and sale in foreign markets. As alleged above, Motorola's U.S. procurement teams negotiated the prices, chose the vendors, and determined the quantities for all these purchases of LCD Panels. The approximate total volume of those purchases during the conspiracy period is $4.37 billion.

188. The purchases falling into the first two categories above are what the guilty pleas entered by defendants are premised upon. As the DOJ and defendant LG Display's counsel explained at the plea allocution of LG Display, and as this Court accepted, for purposes of determining the volume of commerce affected in assessing the criminal fine against LG Display, the DOJ considered three categories of conduct: (1) LCD sales that were directly shipped into the United States; (2) LCD sales that were directly billed to a company located in the United States; and (3) LCD sales to a company based in the United States through its foreign affiliates that ended up in finished products that were sold into the United States.

189. In fact, these are the same categories of purchases for which defendants have promised—both in their guilty pleas and during sworn allocutions before this Court at their sentencing hearings—to compensate U.S. victims of their illegal activities in related civil

actions. That promise was the reason why the U.S. government did not seek restitution for such purchases and why this Court accepted defendants' guilty pleas without requiring restitution to be paid.

190. In addition, the affected commerce at issue in defendant Epson's guilty plea appears to have been calculated using the first two categories listed above. Epson pleaded guilty specifically to fixing the prices of LCD Panels incorporated into Motorola Razr phones between the fall of 2005 and the middle of 2006. During that time period, Motorola purchased approximately $100-130 million worth of LCD Panels from Epson for delivery in the United States or for delivery abroad for inclusion in Razr phones that were then sold in the United States. The volume of affected commerce covered by Epson's plea is $110 million. Similar purchases appear to have been considered when determining the affected commerce at issue in defendant Sharp's guilty plea. Like Epson, Sharp also admitted to fixing the price of LCD Panels incorporated into Motorola Razr phones.

191. Motorola Mobility is entitled to recover all Motorola purchases falling in all three categories because the artificially inflated prices of these purchases were set in negotiations between Motorola and the defendants at Motorola's headquarters in the United States, and other locations, and were ordered by Motorola's subsidiaries at Motorola's direction.

192. Moreover, Motorola, Inc. was injured by the increased price paid for price-fixed LCD Panels that were included in Motorola devices brought into the United States for sale to U.S. companies and consumers. In fact, the entire injury caused to Motorola by defendants' price-fixing of such LCD Panels was ultimately borne in the United States by Motorola, Inc. Thus, any injury suffered as a result of the delivery of price-fixed products to Motorola's foreign affiliates or subsidiaries at prices negotiated by Motorola, Inc. in the United States for incorporation into Motorola devices sent to the United States resulted in an injury to Motorola, Inc. that was proximately caused by those very same unlawfully inflated prices. Motorola has transferred its right to recover for those injuries to Motorola Mobility.

193. Motorola was also the entity forced to pay higher prices for panels delivered by defendants and their co-conspirators to Motorola's foreign affiliates for manufacture and sale in

foreign markets. In fact, the injury caused to Motorola by defendants' price-fixing of such LCD Panels is ultimately borne by Motorola, Inc. Thus, any injury suffered as a result of the delivery of price-fixed products to Motorola's foreign affiliates or subsidiaries at prices negotiated by Motorola, Inc. in the United States for incorporation into Motorola devices sold abroad results in an injury to Motorola, Inc. that was proximately caused by those very same unlawfully inflated prices.

194. Motorola has suffered a direct, substantial, and reasonably foreseeable injury as a result of defendants' and their co-conspirators' conspiracy to raise, fix, or maintain the price of LCD Panels at artificial levels.

195. During and after the Conspiracy Period, defendants' and their co-conspirators' conspiracy artificially inflated the price of LCD Panels shipped directly to Motorola in the United States, causing Motorola to pay higher prices for LCD Panels than it would have in the absence of the conspiracy.

196. Defendants' and their co-conspirators' conspiracy also artificially inflated the price that Motorola and defendants agreed upon in the United States for LCD Panels that defendants shipped to Motorola's foreign manufacturing facilities. Because Motorola, Inc. and its foreign manufacturing facilities functioned as a single enterprise for the purposes of purchasing LCD Panels, the injury resulting from all such deliveries is ultimately suffered by Motorola, Inc. Alternatively, defendants' and their co-conspirators' conspiracy artificially inflated the price that Motorola's foreign manufacturing facilities paid for the LCD Panels, and those claims have been transferred to Motorola Mobility.

197. Because defendants' and their co-conspirators' conspiracy artificially inflated the price of these LCD Panels purchased by Motorola, the conspiracy also artificially inflated Motorola's costs for manufacturing LCD Products and diminished Motorola's ability to compete in markets for LCD Products against suppliers, including defendants LG and Samsung. As a result, Motorola suffered losses of sales and profits.

198. The conspiracy artificially inflated the prices of LCD Panels using TFT, CSTN, and MSTN technology purchased by Motorola. The conspiracy also inflated the prices of LCD

Products purchased by Motorola for use in the ordinary course of its business, such as computer monitors, laptop computers, and television sets.

199. Moreover, defendants' and their co-conspirators' conspiracy caused artificially-inflated prices for LCD Panels to be offered to Motorola's single, global procurement process based at its headquarters in Illinois, which led Motorola to pay higher prices for LCD Panels around the world that were incorporated into Motorola devices intended for sale both in the United States and abroad. Thus, Motorola's claims (which have now been transferred to Motorola Mobility) based on deliveries of LCD Panels both in the United States and abroad arise from the same facts and illegal practices directed at Motorola, Inc. in the United States. As a result, these claims should be heard and adjudged by this Court because they rise from the same nucleus of intertwined facts.

VIII. MARKET CONDITIONS DEMONSTRATING THE CONSPIRACY

200. Beyond the guilty pleas and the extensive evidence of the defendants' wrongdoing produced by the defendants themselves, the market for LCD Panels provides further evidence of the defendants' collusive behavior.

A. Structure Of The LCD Panel Industry.

201. The LCD Panel industry has several characteristics that facilitated a conspiracy to fix prices, including high concentration, significant barriers to entry, homogeneity of products, consolidation, multiple interrelated business relationships and ease of information sharing.

202. The LCD Panel industry is highly concentrated and thus conducive to collusion. Throughout the Conspiracy Period, defendants and their co-conspirators collectively controlled a significant share of the market for LCD Panels, both globally and in the United States.

203. The LCD industry is characterized by high barriers to entry. New fabrication plants, or "fabs," can cost upwards of $2 to $3 billion, and rapidly evolving technology and intellectual property requirements require constant research and development and investment. Thus, firms cannot enter the market for the production and sale of LCD Panels without an enormous capital investment.

204. LCD Panels, whether incorporated into mobile wireless handsets or desktop monitors, notebook computers and televisions, are manufactured to a specific size, regardless of manufacturer. The manufacture of standard panel sizes for products containing LCD Panels across the LCD Panel industry facilitates price transparency in the market for LCD Panels and enables LCD Panel manufacturers to monitor and analyze LCD Panel prices and thus enables them to enforce their conspiracy.

205. The LCD Panel industry has experienced significant consolidation during the Conspiracy Period, as reflected by:

- the 2001 creation of AU Optronics itself through the merger of Acer Display and Unipac Electronics;
- the 2002 merger of the LCD operations of Toshiba and Matsushita into one entity, defendant Toshiba Mobile Display Co., Ltd.;
- the 2004 joint venture for the production of LCD Panels for televisions by Hitachi, Toshiba, and Matsushita;
- the 2005 transfer of Fujitsu Limited's LCD business to Sharp in 2005;
- the 2006 AU Optronics acquisition of Quanta Display.

206. Additional opportunities for collusive activity are presented by the many joint ventures, cross-licenses, and other cooperative arrangements in the LCD Panel industry. Using the otherwise legitimate cover of such arrangements, defendants implemented and policed their illegitimate agreements to fix prices and limit output for LCD Panels through the numerous meetings described hereinafter.

207. There were many opportunities for defendants to discuss and exchange competitively-sensitive information through their common membership in trade associations, interrelated business arrangements such as joint ventures, allegiances between companies in certain countries, and relationships between the executives of certain companies. Communication between the conspirators was facilitated by the use of meetings, telephone calls, e-mails, and instant messages. Defendants took advantage of these opportunities to discuss and

agree upon their pricing of LCD Panels and monitor each other's compliance with their agreement.

B. Pricing In The LCD Panel Market Indicates Collusion By The Defendants.

208. Since at least 1996, the LCD Panel market has not behaved as would be expected of a competitive market free of collusion. Rather, the behavior in this market strongly evidences that defendants engaged in a significant price-fixing conspiracy that had the purpose and effect of unnaturally stabilizing and raising prices for LCD Panels at supra-competitive levels.

209. After initially being introduced into a market, consumer electronics products and their component parts typically are characterized by steady downward pricing trends. However, since at least 1996, the LCD Panel market has been characterized by unnatural price stability and certain periods of substantial upward pricing trends.

210. Moreover, since at least 1996, the LCD Panel market has not followed the basic laws of supply and demand in a competitive market. In a competitive market, price increases normally occur during shortage periods. Since at least 1996, however, there have been significant price increases in the LCD Panel market during periods of both oversupply and shortage.

211. The demand for consumer electronic products and their component parts generally increases over time. As would be expected, demand for LCD Panels and LCD Products were steadily and substantially increasing throughout the Conspiracy Period. For example, a November 2005 forecast indicated that shipments of LCD Panels for mobile wireless handsets would grow 66% from 2004 through 2005, due to increased demand for mobile wireless handsets.

212. Rather than competing for this increased demand, however, since at least 1996, defendants worked together to stabilize prices by agreeing to fix prices at artificially high levels and to restrict the supply of LCD Panels through, among other things, decreasing their capacity utilization and refraining from expanding existing capacity. Those defendants not already

manufacturing LCD Panels in 1996 joined this conspiracy when they began manufacturing LCD Panels.

213. In 1996, the LCD Panel market was experiencing excess supply and drastic price cuts. Prices had already fallen 40 to 50 percent in 1995, and were projected to continue dropping due to lower manufacturing costs. However, LCD Panel prices began rising in 1996, allegedly due to insufficient production capacity. In fact, defendants were fixing the prices.

214. LCD Panel prices began to increase in early 1996. Defendants blamed the sudden increase in prices on an alleged inability to supply enough LCD Panels to meet demand. By May 1996, an industry magazine was reporting that, "[f]lat-panel-display purchasers are riding a roller coaster of pricing in the display market, with no clear predictability anytime soon . . . . Perplexed purchasers trying to keep up with the gyrating market can take solace that even vendors are constantly being surprised by the sudden twists and turns."

215. Soon thereafter, industry analysts began commenting on the unusual rise in LCD Panel prices, noting that this rise in prices was "quite rare in the electronics industry."

216. 1996 also brought the advent of third generation fabs. Since 1996, additional generations of fabs have been built, which has resulted in at least eight generations of LCD Panel fabs. LG Electronics was scheduled to have its third generation fab online by 1997, and Hyundai was scheduled to do so by early 1998. Each new LCD Panel generation was produced from ever larger pieces of glass, so as to reduce the cost of the screens used in televisions, computer monitors, and laptops. Ever-increasing production capacity threatened to outstrip demand for LCD Panels, with the result that prices of LCD Panels should have decreased rapidly. Instead, defendants falsely claimed to be operating at full capacity and unable to meet demand, despite the millions of units of over-capacity that had supposedly existed months earlier, and prices surged upwards. These price increases were also inconsistent with the fact that production had become more efficient and cost effective.

217. The supra-competitive level price of LCD Panels during the Conspiracy Period is demonstrated by, inter alia, the fact that costs were decreasing. One of the most significant costs in producing an LCD Panel is the cost of its component parts. Some of the major component

parts for an LCD Panel include the backlight, color filter, PCB polarizer, and glass. During the Conspiracy Period, the costs of these components collectively and individually had been generally declining, and in some periods at a substantial rate. Thus, the gap between LCD Panel manufacturers' prices and their costs was unusually high during the Conspiracy Period.

218. During the end of 2001 and 2002, LCD Panel prices increased substantially while the costs to produce these panels remained flat or decreased. Similarly, during the end of 2003 to 2004, LCD Panel prices again increased by a substantial amount, while costs remained flat or decreased. This economic aberration is the intended and necessary result of defendants' conspiracy to raise, fix, maintain, or stabilize the prices of LCD Panels.

219. LCD Panel prices increased by more than 5% in October 2001. These price increases continued until June of 2002.

220. At the time, defendants blamed these price increases on supply shortages. In fact, these price increases were a direct result of defendants' agreement to fix, maintain, and/or stabilize the prices of LCD Panels and defendants' false statements about supply shortages were designed to conceal their price-fixing agreement. When asked why prices had increased, defendants repeatedly asserted that increases in LCD prices were due to increased demand and a "supply shortage."

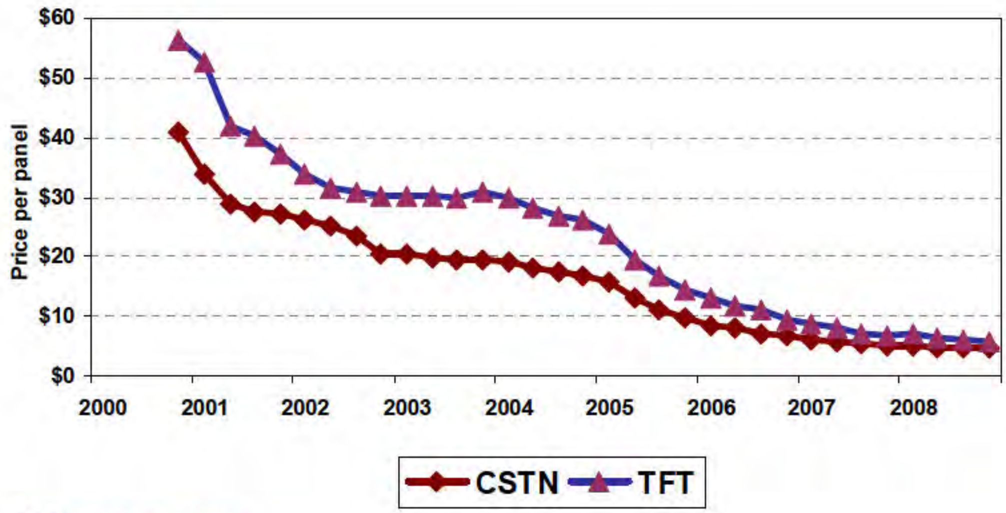
221. These price increases occurred as production costs declined due to lower prices for parts and components as well as improvements in manufacturing efficiency. These decreasing costs should have led to lower prices and competition among defendants. Instead, because defendants had entered into an agreement to fix, raise, and maintain the prices for LCD Panels at artificially high levels, it resulted in extremely high profits. For example, defendants AU Optronics Inc., Chimei Innolux Corporation's predecessor, Chi Mei Optoelectronics Corporation, Chunghwa Picture Tubes Ltd., and HannStar Display Inc., posted higher pretax profits than expected in the first quarter of 2002. AU Optronics reported revenue of NT$19.7 billion in the first quarter, with pretax profit reaching about NT$2 billion. Chi Mei Optoelectronics reported pretax earnings of NT$800 million on revenue of about NT$8.8 billion at the same period.

222. This increase in prices and revenue was unprecedented. During the first six months of 2002, revenue for Taiwan's five major LCD Panel manufacturers (defendants AU Optronics, Chi Mei, Chunghwa Picture Tubes Ltd., HannStar Display Inc., and Quanta Display Inc., later purchased by AU Optronics) rose 184% from the same period in 2001.

223. The market structure of the LCD Panel market demonstrates collusion on TFT-LCD Panels and STN-LCD Panels. At certain points during and after the Conspiracy Period, for certain applications in LCD Panel Products, TFT-LCD Panels and STN-LCD Panels were substitutes for each other. For example, beginning in 2000, TFT-LCD Panels and CSTN panels were both purchased in significant quantities for similar uses—i.e., display purposes—in mobile wireless handsets and other LCD Products that included small displays. At other times during the Conspiracy Period, TFT-LCD Panels and CSTN panels were both purchased in significant quantities for use in notebook PCs.

224. REDACTED

225. Because TFT-LCD Panels and STN-LCD Panels were substitutes, and purchasers of LCD panels switched purchases between the two technologies, from at least 2001 through 2006, the price per square inch of TFT-LCD Panels and CSTN-LCD panels tracked very closely, as seen in the chart below:



226. REDACTED

227. Because TFT-LCD Panels and STN-LCD Panels were close substitutes for certain LCD Products, and because defendants collectively controlled a significant share of the market for LCD panels, both globally and in the United States, defendants had the incentive and ability to inflate the prices STN-LCD Panels as well as TFT-LCD Panels. The conspiracy's success in inflating TFT-LCD Panel prices also inflated STN-LCD prices, and vice versa.

IX. VIOLATIONS ALLEGED

FIRST CLAIM FOR RELIEF AGAINST ALL DEFENDANTS:
VIOLATION OF SHERMAN ACT

228. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

229. Beginning at a time presently unknown to Motorola Mobility, but at least as early as January 1, 1996 and continuing through at least December 11, 2006, the exact dates being unknown to Motorola Mobility, defendants and their co-conspirators entered into a continuing agreement, understanding, and conspiracy in restraint of trade to artificially raise, fix, maintain,

and/or stabilize prices for LCD Panels in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

230. In formulating and carrying out the alleged agreement, understanding, and conspiracy, defendants and their co-conspirators did those things that they combined and conspired to do, including but not limited to the acts, practices, and course of conduct set forth above, and the following, among others:

A. To fix, raise, maintain and stabilize the price of LCD Panels;

B. To allocate markets for LCD Panels among themselves;

C. To submit rigged bids for the award and performance of certain LCD Panels contracts; and

D. To allocate among themselves the production of LCD Panels.

231. The combination and conspiracy alleged herein has had the following effects, among others:

A. Price competition in the sale of LCD Panels has been restrained, suppressed, and/or eliminated in the United States;

B. Prices for LCD Panels sold by defendants, their co-conspirators, and others have been fixed, raised, maintained and stabilized at artificially high, supra-competitive levels throughout the United States; and

C. Those who purchased LCD Panels produced by defendants, their co-conspirators, and others have been deprived of the benefits of free and open competition.

232. Motorola was injured in its business and property by paying more for LCD Panels purchased from defendants, their co-conspirators, and others than it would have paid and will pay in the absence of the combination and conspiracy.

233. Defendants' and their co-conspirators' conduct involved U.S. import trade or commerce and/or had a direct, substantial, and reasonably foreseeable effect on U.S. domestic and import trade or commerce that resulted in the injuries suffered by Motorola and gave rise to Motorola's antitrust claims. As a result, Motorola suffered injury as a direct, proximate and

reasonably foreseeable result of defendants' conspiracy to fix the price of LCD Panels. Motorola was injured, and Motorola Mobility will continue to be injured, in its business and property by paying more for LCD Panels purchased from defendants, their co-conspirators, and others than it would have paid and will pay in the absence of the combination and conspiracy.

234. Because Motorola suffered injury as a direct, proximate and foreseeable result of defendants' conspiracy to fix the price of LCD Panels, Motorola Mobility is entitled to damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for Motorola's purchases of LCD Panels produced by defendants, their co-conspirators, and others.

235. Because Motorola Mobility, which has continued Motorola's mobile devices business, faces a serious risk of future injury, Motorola Mobility is entitled to an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, against all defendants, preventing and restraining the violations alleged herein. Defendants all continue to manufacture LCD Panels, and the market for production and sale of LCD Panels remains highly concentrated and susceptible to collusion. Defendants continue to have the incentive to collude to increase LCD Panel prices or stabilize LCD Panel price declines, and defendants' conspiracy to fix the price of LCD Panels could be easily repeated and concealed from Motorola Mobility.

SECOND CLAIM FOR RELIEF AGAINST ALL DEFENDANTS:
VIOLATION OF ILLINOIS ANTITRUST ACT

236. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

237. Motorola Mobility believes and asserts that all of Motorola's purchases of LCD Panels and Products are actionable pursuant to the federal antitrust laws as alleged in the First and Second Claims For Relief. For its indirect purchases of LCD Products not actionable under the federal antitrust laws, Motorola Mobility alleges this Second Claim for Relief under the Illinois Antitrust Act.

238. During and after the Conspiracy Period, Motorola purchased LCD Panels and LCD Products from Illinois. During that same period, it conducted a substantial volume of business in Illinois, including selling in Illinois mobile wireless handsets and other LCD

Products that contained LCD Panels manufactured and sold by defendants and others. Motorola also maintained inventories of LCD Products in Illinois and maintained offices in Illinois. As a result of its presence in Illinois and the substantial business it conducted, and continues to conduct, in Illinois, Motorola and Motorola Mobility are entitled to the protection of the laws of Illinois.

239. Beginning at a time presently unknown to Motorola Mobility but at least as early as January 1, 1996, and continuing thereafter at least up to and including at least December 11, 2006, defendants and their co-conspirators entered into and engaged in a continuing conspiracy for the unreasonable restraint of trade or commerce, in violation of the Illinois Antitrust Law.

240. The aforesaid violations of the Illinois Antitrust Law consisted, without limitation, of a continuing unlawful conspiracy among defendants and their co-conspirators, the substantial terms of which were to fix, control and maintain the prices of, and to allocate markets for, LCD Panels.

241. For the purpose of forming and effectuating the unlawful conspiracy, the defendants and their co-conspirators have done those things which they combined and conspired to do, including but in no way limited to the acts, practices and course of conduct set forth above and the following:

A. to fix, raise, maintain and stabilize the price of LCD Panels;

B. to allocate markets for LCD Panels amongst themselves;

C. to submit rigged bids for the award and performance of certain LCD Panels contracts; and

D. to allocate among themselves the production of LCD Panels.

242. The combination and conspiracy alleged herein has had, *inter alia*, the following effects:

A. price competition in the sale of LCD Panels has been restrained, suppressed and/or eliminated in the State of Illinois and throughout the United States;

B. prices for LCD Panels have been fixed, raised, maintained and stabilized at artificially high, non-competitive levels in the State of Illinois and throughout the United States; and

C. those who purchased LCD Panels have been deprived of the benefit of free and open competition.

D. As a direct and proximate result of defendants' conduct, Motorola was injured in its business and property by paying more for LCD Panels and LCD Products than they would have paid in the absence of defendants' combination and conspiracy. As a result of defendants' violation of the Illinois Antitrust Law, Motorola Mobility is entitled to damages and the costs of suit, including reasonable attorneys' fees.

THIRD CLAIM FOR RELIEF AGAINST SHARP:

BREACH OF CONTRACT

243. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

244. During and after the Conspiracy Period, Motorola and Sharp entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Sharp agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Sharp a price negotiated by Motorola and Sharp. These contracts between Motorola and Sharp include purchase orders issued by Motorola to Sharp.

245. Pursuant to these contracts, Sharp agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards.

246. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Sharp. Motorola paid Sharp for all LCD Panels and/or LCD Products delivered to Motorola by Sharp.

247. As set forth in the above allegations, Sharp did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Sharp repeatedly breached Sharp's contracts with Motorola.

248. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Sharp breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Sharp did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

249. Due to the acts of Sharp, and as a direct result of Sharp's breaches of Sharp's contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for Sharp's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Sharp over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

FOURTH CLAIM FOR RELIEF AGAINST SHARP:
UNJUST ENRICHMENT

250. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

251. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Sharp at what it believed were competitive prices. Motorola paid Sharp for all LCD Panels and/or LCD Products delivered to Motorola by Sharp.

252. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

253. Sharp was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Sharp's retention of these monies

violates the fundamental principles of justice, equity, and good conscience. Sharp should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

FIFTH CLAIM FOR RELIEF AGAINST EPSON:

BREACH OF CONTRACT

254. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

255. During and after the Conspiracy Period, Motorola and Epson entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Epson agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Epson a price negotiated by Motorola and Epson. These contracts between Motorola and Epson include purchase orders issued by Motorola to Epson.

256. Pursuant to these contracts, Epson agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

257. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Epson. Motorola paid Epson for all LCD Panels and/or LCD Products delivered to Motorola by Epson.

258. As set forth in the above allegations, Epson did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Epson repeatedly breached Epson's contracts with Motorola.

259. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Epson breached its covenant of good faith and fair dealing by depriving Motorola of

the benefits to which it was entitled under the contract, and Epson did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

260. Due to the acts of Epson, and as a direct result of Epson's breaches of Epson's contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for Epson's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Epson over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

SIXTH CLAIM FOR RELIEF AGAINST EPSON:

UNJUST ENRICHMENT

261. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

262. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Epson at what it believed were competitive prices. Motorola paid Epson for all LCD Panels and/or LCD Products delivered to Motorola by Epson.

263. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

264. Epson was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Epson's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Epson should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

SEVENTH CLAIM FOR RELIEF AGAINST TOSHIBA:

BREACH OF CONTRACT

265. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

266. During and after the Conspiracy Period, Motorola and Toshiba entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Toshiba agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Toshiba a price negotiated by Motorola and Toshiba. These contracts between Motorola and Toshiba include purchase orders issued by Motorola to Toshiba.

267. Pursuant to each of these contracts, Toshiba agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

268. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Toshiba. Motorola paid Toshiba for all LCD Panels and/or LCD Products delivered to Motorola by Toshiba.

269. As set forth in the above allegations, Toshiba did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Toshiba repeatedly breached Toshiba's contracts with Motorola.

270. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Toshiba breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Toshiba did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

271. Due to the acts of Toshiba, and as a direct result of Toshiba's breaches of Toshiba's contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for Toshiba's breaches, including the amount that Motorola paid for LCD Panels and/or LCD

Products purchased from Toshiba over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

EIGHTH CLAIM FOR RELIEF AGAINST TOSHIBA:

UNJUST ENRICHMENT

272. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

273. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Toshiba at what it believed were competitive prices. Motorola paid Toshiba for all LCD Panels and/or LCD Products delivered to Motorola by Toshiba.

274. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

275. Toshiba was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Toshiba's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Toshiba should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

NINTH CLAIM FOR RELIEF AGAINST SAMSUNG:

BREACH OF CONTRACT

276. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

277. During and after the Conspiracy Period, Motorola and Samsung entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Samsung agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Samsung a

price negotiated by Motorola and Samsung. These contracts between Motorola and Samsung include purchase orders issued by Motorola to Samsung.

278. Pursuant to each of these contracts, Samsung agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

279. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Samsung. Motorola paid Samsung for all LCD Panels and/or LCD Products delivered to Motorola by Samsung.

280. As set forth in the above allegations, Samsung did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Samsung repeatedly breached Samsung's contracts with Motorola.

281. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Samsung breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Samsung did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

282. Due to the acts of Samsung, and as a direct result of Samsung's breaches of Samsung's contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for Samsung's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Samsung over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

TENTH CLAIM FOR RELIEF AGAINST SAMSUNG:

UNJUST ENRICHMENT

283. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

284. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Samsung at what it believed were competitive prices. Motorola paid Samsung for all LCD Panels and/or LCD Products delivered to Motorola by Samsung.

285. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

286. Samsung was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Samsung's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Samsung should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

ELEVENTH CLAIM FOR RELIEF AGAINST AU OPTRONICS:

BREACH OF CONTRACT

287. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

288. During and after the Conspiracy Period, Motorola and AU Optronics entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which AU Optronics agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay AU Optronics a price negotiated by Motorola and AU Optronics. These contracts between Motorola and AU Optronics include purchase orders issued by Motorola to AU Optronics.

289. Pursuant to each of these contracts, AU Optronics agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all

applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

290. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with AU Optronics. Motorola paid AU Optronics for all LCD Panels and/or LCD Products delivered to Motorola by AU Optronics.

291. As set forth in the above allegations, AU Optronics did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, AU Optronics repeatedly breached AU Optronics' contracts with Motorola.

292. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, AU Optronics breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and AU Optronics did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

293. Due to the acts of AU Optronics, and as a direct result of AU Optronics' breaches of AU Optronics' contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for AU Optronics' breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from AU Optronics over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

TWELFTH CLAIM FOR RELIEF AGAINST AU OPTRONICS:

UNJUST ENRICHMENT

294. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

295. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from AU Optronics at what it believed were competitive prices. Motorola paid AU Optronics for all LCD Panels and/or LCD Products delivered to Motorola by AU Optronics.

296. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to

fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

297. AU Optronics was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. AU Optronics' retention of these monies violates the fundamental principles of justice, equity, and good conscience. AU Optronics should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

THIRTEENTH CLAIM FOR RELIEF AGAINST PHILIPS: BREACH OF CONTRACT

298. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

299. During and after the Conspiracy Period, Motorola and Philips entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Philips agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Philips a price negotiated by Motorola and Philips. These contracts between Motorola and Philips include purchase orders issued by Motorola to Philips.

300. Pursuant to each of these contracts, Philips agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

301. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Philips. Motorola paid Philips for all LCD Panels and/or LCD Products delivered to Motorola by Philips.

302. As set forth in the above allegations, Philips did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in

providing LCD Panels and/or LCD Products to Motorola. Accordingly, Philips repeatedly breached Philips' contracts with Motorola.

303. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Philips breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Philips did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

304. Due to the acts of Philips, and as a direct result of Philips' breaches of Philips' contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for Philips' breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Philips over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

FOURTEENTH CLAIM FOR RELIEF AGAINST PHILIPS:

UNJUST ENRICHMENT

305. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

306. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Philips at what it believed were competitive prices. Motorola paid Philips for all LCD Panels and/or LCD Products delivered to Motorola by Philips.

307. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

308. Philips was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Philips' retention of these monies violates the fundamental principles of justice, equity, and good conscience. Philips should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the

amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

FIFTEENTH CLAIM FOR RELIEF AGAINST SANYO:

BREACH OF CONTRACT

309. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

310. During and after the Conspiracy Period, Motorola and Sanyo entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Sanyo agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Sanyo a price negotiated by Motorola and Sanyo. These contracts between Motorola and Sanyo include purchase orders issued by Motorola to Sanyo.

311. Pursuant to each of these contracts, Sanyo agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

312. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Sanyo. Motorola paid Sanyo for all LCD Panels and/or LCD Products delivered to Motorola by Sanyo.

313. As set forth in the above allegations, Sanyo did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Sanyo repeatedly breached Sanyo's contracts with Motorola.

314. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Sanyo breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Sanyo did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

315. Due to the acts of Sanyo, and as a direct result of Sanyo's breaches of Sanyo's contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for Sanyo's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Sanyo over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

SIXTEENTH CLAIM FOR RELIEF AGAINST SANYO:

UNJUST ENRICHMENT

316. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

317. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Sanyo at what it believed were competitive prices. Motorola paid Sanyo for all LCD Panels and/or LCD Products delivered to Motorola by Sanyo.

318. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

319. Sanyo was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Sanyo's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Sanyo should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

SEVENTEENTH CLAIM FOR RELIEF AGAINST SAMSUNG SDI:

BREACH OF CONTRACT

320. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

321. During and after the Conspiracy Period, Motorola and Samsung SDI entered into multiple contracts for the sale of LCD Panels and/or LCD Products by which Samsung SDI agreed to deliver LCD Panels and/or LCD Products to Motorola and Motorola agreed to pay Samsung SDI a price negotiated by Motorola and Samsung SDI. These contracts between Motorola and Samsung SDI include purchase orders issued by Motorola to Samsung SDI.

322. Pursuant to each of these contracts, Samsung SDI agreed on behalf of itself and its suppliers and subcontractors that all LCD Panels and/or LCD Products provided to Motorola would be produced, manufactured and supplied, and services rendered, in compliance with all applicable laws, rules, regulations, and standards. A specific provision confirming this term was included in many of the individual purchase orders.

323. Motorola has performed all of the obligations, conditions, and agreements required of Motorola under the contracts with Samsung SDI. Motorola paid Samsung SDI for all LCD Panels and/or LCD Products delivered to Motorola by Samsung SDI.

324. As set forth in the above allegations, Samsung SDI did not comply with the terms of its contracts with Motorola, including the provision assuring compliance with all applicable laws in providing LCD Panels and/or LCD Products to Motorola. Accordingly, Samsung SDI repeatedly breached Samsung SDI's contracts with Motorola.

325. Furthermore, in agreeing with the defendants to fix the prices of LCD Panels sold to Motorola, Samsung SDI breached its covenant of good faith and fair dealing by depriving Motorola of the benefits to which it was entitled under the contract, and Samsung SDI did so arbitrarily, capriciously, and in a manner inconsistent with Motorola's reasonable expectations.

326. Due to the acts of Samsung SDI, and as a direct result of Samsung SDI's breaches of Samsung SDI's contracts, Motorola suffered damages. Motorola Mobility is entitled to damages for Samsung SDI's breaches, including the amount that Motorola paid for LCD Panels and/or LCD Products purchased from Samsung SDI over and above what it would have paid in the absence of the combination and conspiracy in an amount to be proved at trial.

EIGHTEENTH CLAIM FOR RELIEF AGAINST SAMSUNG SDI:

UNJUST ENRICHMENT

327. Motorola Mobility incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

328. During and after the Conspiracy Period, Motorola purchased LCD Panels and/or LCD Products from Samsung SDI at what it believed were competitive prices. Motorola paid Samsung SDI for all LCD Panels and/or LCD Products delivered to Motorola by Samsung SDI.

329. As set forth in the above allegations, as a direct result of the defendants' illegal agreements to increase the prices of LCD Panels, Motorola paid more for LCD Panels and LCD Products than it would have paid in the absence of defendants' combination and conspiracy to fix, control and maintain the prices of, and to allocate markets for, LCD Panels. For each of Motorola's purchases, the reasonable value of these LCD Panels and/or LCD Products was inflated by the amount of overcharge caused by the defendants' combination and conspiracy.

330. Samsung SDI was unjustly enriched by the amount Motorola paid in excess of what the price would have been but for the defendants' illegal actions. Samsung SDI's retention of these monies violates the fundamental principles of justice, equity, and good conscience. Samsung SDI should be required to disgorge to Motorola Mobility the amount of that unjust enrichment at least in the amount in excess of the reasonable value Motorola would have paid in the absence of defendants' combination and conspiracy.

X. PRAYER FOR RELIEF

WHEREFORE, Motorola Mobility requests:

A. That the unlawful agreement, conduct, contract, conspiracy or combination alleged herein be adjudged and decreed to be:

i. A restraint of trade or commerce in violation of Section 1 of the Sherman Act, as alleged in the First Claim for Relief; and

ii. An unreasonable restraint of trade or commerce in violation of the Illinois Antitrust Act, as alleged in the Second Claim for relief.

B. That Motorola Mobility recover damages, as provided by federal and state antitrust laws, and that a judgment be entered in favor of Motorola Mobility against defendants, jointly and severally, in an amount to be trebled in accordance with such laws;

C. That Motorola Mobility obtain any penalties, punitive or exemplary damages, and/or full consideration, where the laws of the respective states identified herein so permit;

D. That Motorola Mobility recover damages and/or all other available monetary and equitable remedies under the state unfair competition laws identified above;

E. That Motorola Mobility recover damages and/or all other available monetary and equitable remedies pursuant to its claims for breach of contract and unjust enrichment;

F. That defendants, their affiliates, successors, transferees, assignees, and the officers, directors, partners, agents, and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined and restrained from in any manner continuing, maintaining, or renewing the conduct, contract, conspiracy or combination alleged herein, or from entering into any other conspiracy or combination having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect;

G. That Motorola Mobility be awarded pre- and post-judgment interest, and that such interest be awarded at the highest legal rate from and after the date of service of the initial complaint in this action;

H. That Motorola Mobility recover its costs and disbursements of this suit, including reasonable attorneys' fees as provided by law; and,

I. That Motorola Mobility be awarded such other, further, and different relief as the case may require and the Court may deem just and proper under the circumstances.

JURY TRIAL DEMAND

Pursuant to Federal Rules of Civil Procedure Rule 38(b), Motorola Mobility demands a trial by jury for all issues so triable.

Dated: July 22, 2011

Respectfully submitted,

/s/ Jason C. Murray

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EXHIBIT 8

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(Additional Parties and Counsel Listed on Signature Pages)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Master File No.: 3:07-MD-1827-SI Case No. 09-cv-5840-SI MDL No. 1827
This Document Relates to: *Motorola Mobility, Inc. v. AU Optronics Corporation, et al., C 09-5840 SI*	**DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ADDRESSING PLAINTIFF'S SHERMAN ACT CLAIM FOR INJURIES IN FOREIGN MARKETS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: July 13, 2012 Time: 9:00 a.m. Judge: Honorable Susan Y. Illston Courtroom: 10

DOCUMENTS SUBMITTED UNDER SEAL AND CHAMBERS COPY

NOTICE OF MOTION

PLEASE TAKE NOTICE that on July 13, 2012, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 10 of the above-referenced Court, located at 450 Golden Gate Avenue, San Francisco, California, undersigned Defendants will and hereby do move pursuant to Federal Rule of Civil Procedure 56 for entry of partial summary judgment in their favor as to Plaintiff's Sherman Act claim. Specifically, Plaintiff's Sherman Act claim is based on three categories of purchases:

Category	Type of Purchase
1.	LCDs purchased by Motorola, Inc. in the United States.
2.	LCDs purchased by Motorola, Inc. or a foreign affiliate outside the United States, which were incorporated into handheld devices sold in the United States.
3.	LCDs purchased by Motorola, Inc. or a foreign affiliate outside the United States, which were incorporated into handheld devices Motorola sold outside the United States.

TAC ¶¶ 184-87. This motion seeks summary judgment as to Plaintiff's Sherman Act claim that is based on the second and third categories of purchases of LCD Panels, because these categories of purchases constitute foreign injury claims and are barred by the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a ("FTAIA"). This motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the concurrently filed declaration of Stephen P. Freccero and attachments thereto, the concurrently filed Proposed Order, the pleadings and records on file in this action, and upon any additional evidence and argument that may be presented before or at the hearing of this motion.

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Defs' Jt. Mtn. to Dismiss FAC	Defendants' Joint Notice of Motion and Motion to Dismiss Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).	MDL ECF No. 1559	Feb. 19, 2010
Pltf's Opp'n to Defs' Mtn. to Dismiss FAC	Plaintiff Motorola, Inc.'s Brief in Opposition to Defendants' Motion to Dismiss Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).	MDL ECF No. 1701	April 16, 2010
Reply ISO Defs' Jt. Mtn. to Dismiss FAC	Reply Memorandum in Support of Defendants' Joint Motion to Dismiss.	MDL ECF No. 1740	May 14, 2010
SAC	Second Amended Complaint for Damages and Injunctive Relief.	MDL ECF No. 1913	July 23, 2010
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TAC	Third Amended Complaint for Damages and Injunctive Relief.	MDL ECF No. 3173	July 22, 2011

LIST OF MOTOROLA DEPONENTS CITED IN BRIEF

Global Commodity Team Members

Angela Ford	*Global Commodity Manager*	Motorola, Inc.
C.F. Cheng	*Commodity Manager*	Motorola Electronics Pte. Ltd. (Singapore)
C.M. Lai	*Commodity Manager*	Motorola Electronics Pte. Ltd. (Singapore)
Alex Lima	*Commodity Manager*	Motorola, Inc.
Jeffrey Rogero	*Commodity Manager*	Motorola, Inc.
Carrie Bodak	*Commodity Manager*	Motorola, Inc.

Motorola, Inc. Executives

Theresa Metty	*Chief Procurement Officer*	Motorola, Inc.
Bruce Brda	*Senior VP of Sales*	Motorola, Inc.
Janet Robinson	*VP of Procurement*	Motorola, Inc.
D.K. Singh	*VP of Procurement*	Motorola, Inc.
Tim Cawley	*Corporate VP for Mobile Devices*	Motorola, Inc.

Foreign Assignor Witnesses

E.L. Tay	*V.P. of Global Operations*	Motorola Electronics Pte. Ltd. (Singapore)
K.L. Khoo	*Global Purchasing Manager*	Motorola Electronics Pte. Ltd. (Singapore)
Tracy Guo	*LCD Purchasing Manager*	Motorola China Electronics Ltd.
John Kozlowski	*Director of Operations*	Motorola China Electronics Ltd.

Other

Robert Akins	*Display Engineering Manager*	Motorola, Inc.
Stephen Milligan	*Display Engineer*	Motorola, Inc.
Sharon Storm	*Director of Tax Planning*	Motorola, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE TO BE DECIDED

Whether summary judgment should be granted as to Plaintiff's Sherman Act Claim based on purchases of LCD panels by its foreign affiliates in foreign commerce on the ground that Plaintiff is unable to prove that an effect on U.S. commerce gave rise to these claims.

INTRODUCTION

This motion seeks summary judgment on Plaintiff's claims for injuries allegedly incurred by Plaintiff's foreign affiliates, based on foreign purchases of products shipped, billed, and invoiced outside the U.S., pursuant to purchase contracts entered into outside the U.S. These claims are barred under the FTAIA unless Plaintiff can plead and prove the two prerequisites for the domestic injury exception to the FTAIA: (1) that the Defendants' conduct had a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce; and (2) that such effect gave rise to Plaintiff's claims.

In *Motorola I* the Court dismissed these foreign injury claims, holding that Plaintiff's allegations of a "global conspiracy" that impacted "global prices" fell "far short of alleging that the domestic effect of defendants' conduct gave rise to Motorola's foreign injuries." *Motorola Inc. v. AU Optronics Corp.*, 2010 U.S. Dist. LEXIS 65037, at *25 (N.D. Cal. June 28, 2010) ("*Motorola I*"). Following *Motorola I*, Plaintiff added new allegations to its complaint that it had negotiated "all prices" for "all purchases" of LCDs "in Illinois." SAC ¶ 12. The "effect on U.S. domestic and import trade or commerce," Plaintiff now claimed, was that the prices paid by its foreign affiliates were "negotiated and agreed to between defendants and Motorola, Inc. in the United States." SAC ¶ 164. According to Plaintiff, these domestically-negotiated contracts "g[ave] rise" to the overcharges paid by its foreign affiliates in foreign commerce. *Id.*

In *Motorola II* the Court held that these new allegations could, if proven, show how a domestic effect on U.S. commerce gave rise to the foreign injury claims. *See Motorola, Inc. v. AU Optronics Corp.*, 785 F. Supp. 2d 835, 842-44 (N.D. Cal. 2011) ("*Motorola II*"). The Court explained that Plaintiff now alleged "that the price and other terms of purchase were negotiated exclusively by Motorola's procurement teams within the United States and applied worldwide, without regard to where the product was ultimately delivered." *Id.* at 842. The Court held that Plaintiff's allegations of "domestically negotiated price" alleged "with specificity how the prices paid abroad were caused by the contractual terms negotiated inside the United States." *Id.* at 843 n.1, 844. The Court noted that whether the foreign injury claims were properly before the Court would "turn on whether Motorola can, in fact, prove such allegations." *Id.* at 844.

It is now clear that Plaintiff cannot prove the allegations it presented to this Court in *Motorola II*, and had no factual basis to make them in the first place. In discovery Plaintiff has admitted that it cannot trace a single foreign LCD purchase to price negotiations that took place in the U.S. Plaintiff's *own business records*, and the testimony of its *own witnesses*, demonstrate that its foreign affiliates paid prices for LCDs that were negotiated all over the world, by a "Global Commodity Team," key members of which were based in Hong Kong, Singapore, Japan, and the United Kingdom. These global negotiations did not result in contracts "with Motorola in Illinois." Instead, Plaintiff's foreign affiliates purchased LCDs from Defendants by issuing Purchase Orders to Defendants from locations outside the U.S. These foreign Purchase Orders contained terms and conditions which (1) stated that they were the sole and exclusive agreement between the parties, (2) required shipping, billing, and invoicing to take place outside the U.S., (3) became binding and effective only upon the delivery of products outside the U.S., and (4) were expressly governed by foreign law.

Accordingly, this motion seeks summary judgment in Defendants' favor on Plaintiff's claims based on LCD purchases in foreign markets. Plaintiff's Third Amended Complaint alleges claims based on "three categories" of purchases: (1) <u>Category One:</u> LCDs purchased by Motorola, Inc. in the U.S.; (2) <u>Category Two:</u> LCDs purchased by Motorola, Inc. or a foreign affiliate outside the U.S. which were incorporated into devices sold in the U.S.; and (3) <u>Category Three:</u> LCDs purchased by Motorola, Inc. or a foreign affiliate outside the U.S. which were incorporated into devices sold outside the U.S. *See* TAC ¶¶ 184-87. This motion seeks summary adjudication on the second and third categories of claims (the "foreign injury claims").

The domestic injury exception to the FTAIA's general rule does not save these foreign injury claims. To meet the domestic injury exception's requirements under this Court's decision in *Motorola II*, Plaintiff bears the burden of proving at trial that "prices paid abroad were caused by the contractual terms negotiated inside the United States." 785 F. Supp. 2d at 844.[1] Plaintiff cannot meet this burden. Discovery has shown that its allegations concerning supposed global price agreements negotiated and entered into in Illinois are untrue. In fact, no sooner than the Court issued its ruling in *Motorola II*, Plaintiff discarded its "domestic negotiations" theory in favor of a theory based upon the authority of executives "officed" in the U.S. to "approve" prices negotiated abroad and paid abroad, pursuant to foreign purchase contracts. Plaintiff's new "approval" theory ignores the standard this Court established in *Motorola II*, and would constitute an unprecedented expansion of the Sherman Act's application to claims based on foreign injuries.

Separately and independently, even if a rational trier of fact could find, based on the record taken as a whole, that "prices paid abroad were caused by the contractual terms negotiated inside the United States," *id.* at 844, summary judgment is nevertheless warranted on Plaintiff's Category Three claims. These claims are based on LCDs purchased by foreign companies in foreign commerce that were incorporated into handsets sold outside the U.S. These claims involve alleged restraints that exclusively occurred overseas, both with respect to the initial component and the subsequent finished goods transactions. These claims do not implicate a restraint of trade on U.S. markets, at any time, and Plaintiff has conceded as much. The FTAIA bars such claims a matter of law.

PROCEDURAL HISTORY

The Court has twice addressed Plaintiff's foreign injury claims under the FTAIA.

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[1] Defendants' motion is brought without prejudice to their previously-stated position that the Court's decision in *Motorola II* constitutes legal error. Under the FTAIA it is not the Defendants' domestic conduct, but the effect on U.S. commerce of that conduct, which must proximately cause the foreign injuries. *See Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 305 n.13 (3d Cir. 2002) (the domestic injury exception focuses "exclusively on the geographical effect of defendants' conduct"), *overruled on other grounds by Animal Sci. Prods. Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011). Negotiating a price in the U.S. is conduct, not an "effect on" U.S. commerce of that conduct, nor do negotiations constitute "commerce" under the Sherman Act. *See, e.g.*, *Dedication & Everlasting Love to Animals v. Humane Soc'y*, 50 F.3d 710, 712 (9th Cir. 1995) ("Interpreting the Sherman Act, the Supreme Court has spoken of 'commerce' in terms of 'the purchase, sale and exchange of commodities.'") (citation omitted). Defendants' disagreement with *Motorola II* is irrelevant to the instant motion, however. For the reasons explained herein, Plaintiff cannot meet the standard the Court adopted in *Motorola II*.

1. ***<u>Motorola I</u>*****:** Defendants moved to dismiss the foreign injury claims asserted in the First Amended Complaint on the ground that these claims are barred as a matter of law under the FTAIA. Defs' Jt. Mtn. to Dismiss FAC at 1-3. Defendants argued that the complaint failed to allege facts showing how the alleged conspiracy's effects on U.S. domestic commerce "gave rise to" (or proximately caused), the foreign injuries for which Plaintiff sought relief. *Id.* at 9-15.

The Court agreed with Defendants. Pointing to the Ninth Circuit's decision in *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989-90 (9th Cir. 2008) ("*DRAM*"), the Court held that "where a global price-fixing conspiracy is alleged to have affected prices both in the United States and abroad, courts have held that 'the gives rise to language of [the FTAIA] requires a plaintiff to establish a direct or proximate causal relationship' between the alleged anticompetitive effects in the United States and the plaintiff's alleged foreign injury." *Motorola I*, 2010 U.S. Dist. LEXIS 65037, at *20 (quoting *DRAM*, 546 F.3d at 987-88). This Court held that "the amended complaint does not allege any facts showing how Motorola's foreign injuries were proximately caused by any domestic effects of defendants' conduct." *Motorola I*, 2010 U.S. Dist. LEXIS 65037, at *23-24. "Similar to the complaint in *DRAM*, Motorola's complaint generally alleges that defendants engaged in a 'global conspiracy' that impacted 'global prices' and that Motorola's foreign affiliates 'suffered injury as a result of defendants' antitrust violations.'" *Id.* at *24-25 (quoting FAC). "Under *DRAM*," the Court explained, "these allegations fall far short of alleging that the domestic effect of defendants' conduct gave rise to Motorola's foreign injuries." *Id.* The Court allowed Plaintiff an opportunity to re-plead.

2. ***<u>Motorola II</u>*****:** In its Second Amended Complaint, Plaintiff added new allegations that "U.S. procurement teams . . . negotiated *all prices*, specifications, and quantities for *all purchases* of LCD Panels . . . from Motorola offices *in Illinois*." SAC ¶ 12.[2] The SAC alleged that "prices for LCD Panels were *negotiated and agreed upon between Motorola's U.S. procurement teams and the U.S.-based employees of LCD Panel suppliers*." *Id.* ¶ 133. Plaintiff further alleged that

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[2] Except as noted, all emphasis added.

"Defendants and their co-conspirators, using their U.S. affiliates, salespeople, and contacts *entered into supply agreements with Motorola in Illinois to sell Motorola LCD Panels at unlawfully inflated prices*." *Id.* ¶ 4. Plaintiff alleged that the "higher prices for LCD Panels (prices that were the product of collusion) being negotiated and agreed to between defendants and Motorola, Inc. in the United States" constituted a "direct, substantial, and reasonably foreseeable effect on U.S. domestic and import trade or commerce," giving rise to Plaintiff's foreign injury claims. *Id.* ¶ 164. Hence, Plaintiff contended, it was entitled to recover for foreign purchases of LCDs "because the artificially inflated prices of these purchases were set in negotiations between Motorola and the defendants at Motorola's headquarters in the United States . . . ." *Id.* ¶ 172. Defendants again moved to dismiss Plaintiff's foreign injury claims, because the amended complaint still failed to allege facts showing that the conspiracy's effects on U.S. domestic commerce "gave rise to" these claims. *See* Defs' Jt. Mtn. to Dismiss SAC at 1-2.

In opposing that motion, Plaintiff pointed repeatedly to its new allegations concerning "domestic negotiations," which Plaintiff represented were based on its "renewed [] investigation of the facts." Pltf's Opp'n to Defs' Jt. Mtn. to Dismiss SAC at 2. These new allegations, Plaintiff claimed, showed how "Defendants and Motorola negotiated and agreed to prices for LCD Panels in the United States." *Id.*[3] At the hearing on the motion, Plaintiff claimed it had now alleged that "[*a*]*ll of the purchase contracts were entered into in the U.S. They came to Chicago to negotiate cartelized prices. All of the prices were agreed to in the U.S.*" *Motorola II* Hr'g Tr. at 22:22-24. Plaintiff's counsel asked the Court to "find we've made adequate allegations. And then, if we

[3] *See also id.* at 9 ("prices [were] negotiated and set with Defendants in the United States"); *id.* at 11 ("prices, vendors, and quantities . . . were negotiated and decided by Motorola, Inc. in the United States"); *id.* at 12 ("prices [were] negotiated and agreed to between Defendants and Motorola, Inc. in the United States"); *id.* at 15 ("Motorola negotiated LCD panel prices with Defendants in the United States"); *id.* at 21 (defendants "establish[ed] the fixed price by agreement with Motorola in the United States"); *id.* at 28 (defendants "contracted for" LCD prices "*in the United States with* a *U.S. company*") (original emphases); *id.* at 30 ("pricing agreements [were] entered into in the United States with Motorola"); *id.* at 32 ("relevant 'conduct' includes Defendants' *faux* negotiation and establishment of artificially-inflated prices with Motorola *in Illinois*") (original emphasis).

can't prove some of the facts we've alleged we can take it up again at summary judgment." *Id.* at 23:15-18; *see also id.* at 29:17-20.

On the basis of Plaintiff's allegations concerning a "domestic negotiation process," the Court denied Defendants' motion. The Court explained that Plaintiff had now alleged "that the price and other terms of purchase were negotiated *exclusively* by Motorola's procurement teams within the United States and applied worldwide, without regard to where the product was ultimately delivered," and that "[d]efendants and their co-conspirators . . . entered into supply agreements with Motorola in Illinois." *Motorola II*, 785 F. Supp. 2d at 838, 842. The Court held that Plaintiff's allegations established a "concrete link" between defendants' conduct (the alleged cartel activity), its domestic effect (i.e., "contractual terms negotiated inside the United States"), and the payment of higher prices that occurred in foreign commerce. *Id.* at 842-44. The Court held that Plaintiff's new allegations of a "domestically negotiated price" addressed "the problem identified in *DRAM* by alleging with specificity how the prices paid abroad were caused by the contractual terms negotiated inside the United States." *Id.* at 838, 843 n.1, 844.

As the Court noted subsequently, Plaintiff's theory that negotiating a global price contract in the U.S. constitutes an effect on U.S. domestic commerce which "gives rise to" foreign injury claims is "novel." Order Granting Defs' Mtn. to Certify at 2. Prior to *Motorola II* it was settled that a plaintiff could not bring foreign injury claims under the Sherman Act based on this theory. As Judge Hamilton explained in *Sun III*, an alleged "global procurement strategy . . . is not a viable legal theory" under the FTAIA's domestic injury exception. *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166, 1186 (N.D. Cal. 2009) ("*Sun III*") (Hamilton, J.); *see also In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 787 (N.D. Cal. 2007) (Jenkins, J.) (allegations that defendants treated U.S. plaintiff "as a global customer, setting a collusively-established price as the product of a single pricing relationship" insufficient under FTAIA); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437, 446 (D. N.J. 2007) (allegations that plaintiffs were "multinational corporations" with "headquarters and/or significant operations in the U.S." and who utilized "a single purchasing unit" at a "global level" insufficient under FTAIA). In ruling for Plaintiff in *Motorola II*, the Court acknowledged that it was departing from prior precedent. *See* 785 F. Supp. 2d at 843.

Because Defendants were challenging the sufficiency of a pleading, the Court properly assumed the truth of Plaintiff's claim that prices paid by its foreign affiliates "were caused by the contractual terms negotiated inside the United States." *Id.* at 844. The Court cautioned, however, that whether Plaintiff's foreign injury claims were cognizable under the Sherman Act "will turn on whether Motorola can, in fact, prove such allegations." *Id.*

FACT DISCOVERY SINCE *MOTOROLA II*

In discovery Plaintiff has acknowledged that it cannot trace any foreign LCD purchase to a purchase contract negotiated in the U.S. Plaintiff's own business records, moreover, confirm that Motorola's foreign affiliates (1) purchased LCDs at prices negotiated globally, (2) pursuant to purchase contracts entered into outside the U.S.

A. Over 99% of the LCD Purchases at Issue Were Purchases by Foreign Companies Outside the United States.

The Plaintiff in this action is Motorola Mobility, Inc., formerly Motorola, Inc. It brings this action on behalf of itself and seventeen foreign affiliates. TAC ¶¶ 25-28. The foreign affiliates on whose behalf Plaintiff is asserting claims either manufactured handsets containing LCDs or had ownership interests in such companies. TAC ¶¶ 26-28; *see also* Ex. 408.[4] They are referred to collectively as the "Foreign Assignors."

The Foreign Assignors are based in China, Singapore, Hong Kong, Malaysia, the United Kingdom, Taiwan, Germany, India, Brazil, Korea, and Mexico. Exs. 408, 415; TAC ¶ 28. The Foreign Assignors are duly organized under the laws of the foreign countries in which they do business. *See* Exs. 520-22, 524-26, 524A, Ex. A. Each Foreign Assignor asserts that it "suffered injury to its business and/or property as a result of Defendants' antitrust violations." *E.g.*, Ex. 520 at 1. The injuries the Foreign Assignors claim to have suffered "were incurred as a result of

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[4] All exhibits cited in this Memorandum are attached to the concurrently filed Declaration of Stephen P. Freccero. Deposition exhibits are referred to by their deposition exhibit numbers. Non-deposition exhibits are referred to by alphabetical exhibit designations. Deposition testimony is referred to by deponent name.

paying what [they] contend[] were artificially inflated prices for the LCD Panels that [they] purchased from Defendants." Ex. F at 5. Each has assigned its claims against Defendants to Plaintiff, pursuant to written Litigation Assignment Agreements. *See* Exs. 520-22, 524-26, 524A, Ex. A; TAC ¶ 28. In consideration for these assignments, Plaintiff is bound to "distribute the damages or settlement proceeds (if any)" to the Foreign Assignors, in amounts to be decided later. *E.g.*, Ex. 520 at 2; Ex. F at 10.

Plaintiff seeks damages based upon approximately $5.4 billion in LCD purchases from 1998 to 2006 (the "Relevant Time Period"). Ex. 4601, Fig. 1 at 5. Less than 1% of this amount constitutes LCD purchases by Motorola, Inc. in the U.S. Ex. C at 2, Table A; TAC ¶ 185. The remainder of the commerce at issue in this case is made up of purchases by the Foreign Assignors. Ex. C at 2, Table A. The assigned claims of the Foreign Assignors constitute *all* of the foreign injury claims Plaintiff seeks to pursue in this action (Categories Two and Three combined). *Id.* at 2, Table A; *id.* at 4, Table B. The Foreign Assignors, not Motorola, Inc., purchased LCDs by issuing Purchase Orders to Defendants.[5] The Foreign Assignors, not Motorola, Inc., paid for the LCDs they purchased from Defendants.[6] The Foreign Assignors, not Motorola, Inc., manufactured handsets for global markets.[7] Plaintiff established the Foreign Assignors to have manufacturing operations closer to emerging consumer markets, to reduce manufacturing costs, and because it was offered tax and financial incentives by foreign governments to do so.[8]

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[5] *See* Khoo Dep. at 263:20-264:17, 297:25-298:25.

[6] *See* Guo Dep. at 227:14-228:8, 180:10-181:2; Tay Dep. at 187:2-16 (bill-to entity in Purchase Order is entity to be invoiced); Khoo Dep. at 376:10-23 (same); *see also* Storm Dep. at 46:15-47:9 (explaining Foreign Assignors maintained funds outside U.S. to purchase components for use in manufacturing handsets).

[7] Brda Dep. at 32:24-33:15, 195:7-15; Ex. 424 at 3; *see also* Tay Dep. at 94:18-25, 96:4-21, 118:4-9, 129:22-130:15, 250:7-252:23; Tay 30(b)(6) Dep. at 53:5-54:22; Ex. 187 at 4.

[8] Brda Dep. at 33:16-34:1; Tay Dep. at 261:22-262:6; Tay 30(b)(6) Dep. at 49:16-53:13, 58:21-59:10, 78:17-79:8, 79:20-81:8, 83:9-84:20, 85:7-88:3, 101:14-104:13, 111:5-13; Metty Dep. at 66:1-68:22, 113:24-114:18, 119:9-121:12; Storm Dep. at 76:9-77:13, 84:18-85:18, 86:4-14, 88:13-89:5, 89:21-90:18, 94:3-15; *see also* Exs. 425 at 1, 187 at 5, 424 at 4-5.

Every Foreign Assignor Purchase Order that Plaintiff identified in discovery was issued outside the U.S.[9] Every Foreign Assignor Purchase Order that Plaintiff identified in discovery that identifies a shipping address called for shipment to occur outside the U.S. Freccero Decl. ¶ 207; Khoo Dep. at 378:11-379:24.[10] Every Foreign Assignor Purchase Order that Plaintiff identified in discovery called for billing outside the U.S. Freccero Decl. ¶ 208. Every Foreign Assignor Purchase Order that Plaintiff identified in discovery that includes Terms & Conditions contained a provision requiring compliance with foreign law. *Id.* ¶ 213.[11] Foreign Assignor Purchase Orders contained provisions requiring compliance with foreign law because Plaintiff wanted "to have the suppliers comply with the laws" of the countries "in which they were doing business." Robinson Dep. at 51:21-25; *see also id.* at 51:1-11 ("[T]he expectation was that our suppliers would comply with laws in the countries that we were conducting business in . . . .").

B. Prices Paid by the Foreign Assignors Were Negotiated Globally.

1. <u>Motorola's Global Commodity Team:</u> Throughout the Relevant Time Period, the Foreign Assignors bought LCDs from Defendants at prices negotiated by a team known as the Global Commodity Team or Category Team. As explained by E.L. Tay, V.P. of Foreign Assignor Motorola Electronics Pte. Ltd. and Director of Global Operations, the "pricing for the module[s] [purchased by the Foreign Assignors] has to be decided and agreed upon by the display commodity team." Tay Dep. at 67:20-68:19; *see also id*. at 66:6-22. The Global Commodity Team was formed around 1998. Cheng Dep. at 24:4-10, 65:14-66:11, 94:13-16. The team was made up of a "Global Commodity Manager" and several subordinate "Commodity Managers." Sometime in 2004 a new position of "Director" was created. Appendix A lists members of the Global Commodity Team, and their respective positions.

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[9] Freccero Dec. ¶¶ 205-06 & Ex. I; *see also* Khoo Dep. at 270:17-272:3, 287:17-289:21, 291:14-293:3, 378:11-379:24.

[10] *See also* Exs. 171, 274-76, 516 (Foreign "Hub" Agreements between Foreign Assignors and Suppliers designating foreign warehouses for shipments).

[11] With the exception of some Purchase Orders issued by Motorola GmbH (Germany). *See* Freccero Decl. ¶ 213.

The Global Commodity Team was "responsible for all agreement negotiations with suppliers." Ex. 263 at 20; *id.* at 13 (Commodity Team "responsible for . . . [n]egotiating contracts and agreements with suppliers"); *see also* Ex. 304 at 1, 11 ("official description of roles and responsibilities" of Commodity Team, "blessed . . . by senior management," is "Supplier Selection and Award, Cost & Capacity Negotiation"). Team members testified that the team's function was to "select LCD suppliers to do business with Motorola" and "to negotiate pricing with those suppliers." Global Commodity Mgr. Ford Dep. at 22:9-23:1; Commodity Mgr. Lima Dep. at 16:9-16 ("the commodity team was primarily responsible for selecting LCD module suppliers" and "negotiating costs with those LCD module suppliers").[12]

The Global Commodity Team was itself part of a larger procurement organization that was "global" and "literally located throughout the world in dozens of countries." Ex. 185 at 22; Metty Dep. at 55:6-60:19. According to Motorola, Inc.'s Chief Procurement Officer Theresa Metty, most employees in Plaintiff's procurement organization were outside the U.S. because "[m]ost of the suppliers from which Motorola purchased were located outside of the U.S., with over 80% of Motorola's critical suppliers in Asia." Ex. 185 at 22; Metty Dep. at 55:24-56:6. Motorola, Inc.'s V.P. of Procurement D.K. Singh testified that Plaintiff's foreign procurement employees "were essential to Motorola's procurement process," "as important as the U.S. employees," and "their activities affected the price at which Motorola [was] able to procure components." Singh Dep. at 250:2-251:22.

Accordingly, the Global Commodity Team was "decentralized." Commodity Mgr. Cheng at 200:12-201:17. Members of the team "were spread out in different countries around the world." Commodity Mgr. Bodak at 129:9-25. During the Relevant Time Period, its members were based in Scotland, Japan, Hong Kong, Singapore, and the U.S. *See* Appendix A. Global Commodity Team members were physically based in Asia in order to "facilitate communication with" LCD suppliers who "were all based in Asia." *See* Commodity Mgr. Lima Dep. at 25:17-

[12] *See also* Commodity Mgr. Lai Dep. at 50:11-23; Commodity Mgr. Rogero Dep. at 31:19-32:23; Commodity Mgr. Cheng Dep. at 26:23-29:14; Commodity Mgr. Bodak Dep. at 40:15-41:3, 84:1-85:9.

26:1, 62:21-63:2, 65:11-25; *see also* Commodity Mgr. Cheng Dep. at 197:2-25. Throughout the Relevant Time Period some team members were employed by Motorola, Inc., and some by the Foreign Assignors. App. A. During certain periods none of its members were in the U.S. *Id.* at A-3, A-4. Save for one brief period (October 2004–May 2005), throughout the Relevant Time Period the Global Commodity Manager (or later, the Director) was based outside the U.S. *Id.*

Every Motorola witness deposed in this action has testified that the Global Commodity Team negotiated prices outside the U.S. Commodity Team member Jeff Rogero explained:

> Q. Did you participate in face-to-face price negotiations in Japan?
>
> A. *Yes.*
>
> Q. Did you participate in face-to-face price negotiations in Hong Kong?
>
> A. *Yes.*
>
> Q. Did you participate in face-to-face price negotiations in Taiwan?
>
> A. *Yes.*
>
> Q. Did you participate in face-to-face price negotiations in Korea?
>
> A. *Yes.*
>
> ******
>
> Q. Were understandings reached with the LCD suppliers that you were negotiating with at these Asia meetings with respect to the price that Motorola would pay for LCDs? . . . .
>
> A. *Yes.*

Commodity Mgr. Rogero Dep. at 320:6-17, 323:10-16.[13]

The Global Commodity Team negotiated LCD prices in Asia because that is where the Defendants were located. A 2003/04 Global Commodity Team Negotiation Planner states that the “most ideal location” for price negotiations is “Japan” because the “[m]ajority spend is with Japan/Asia suppliers,” and “[k]ey senior management & decision makers attendance” is more likely. Ex. 265 at 10. Commodity Manager Cheng (Singapore) acknowledged that it was “easier

[13] *See also* Commodity Mgr. Lima Dep. at 66:23-68:17, 69:22-70:6; Global Commodity Mgr. Ford Dep. at 381:2-382:16; Commodity Mgr. Lai Dep. at 50:11-23, 58:2-59:4; Commodity Mgr. Cheng Dep. at 199:8-201:17, 202:5-22, 207:6-13, 208:4-11; V.P. of Procurement Robinson Dep. at 109:17-111:3.

to get participation of the relevant individuals on the supplier side if you hold the negotiations in Asia." Cheng Dep. at 197:10-25. Commodity Manager Rogero explained that it "was more efficient from a time standpoint . . . for our team to travel to Asia or to their headquarters rather than have all of them travel to the U.S." Rogero Dep. at 320:18-321:7.[14]

Plaintiff has admitted that, due to the global nature of the Commodity Team and its price negotiations with Defendants, it cannot identify any LCD modules purchased by the Foreign Assignors for which the prices were negotiated in the U.S. Motorola, Inc.'s Rule 30(b)(6) witness on price negotiations so testified:

> Q. Can you identify any specific LCD module that Motorola purchased during the relevant time period for which negotiations on price, conditions, and quantities occurred exclusively in the United States?
> . . . .
>
> A. And define the relevant time period, please.
>
> Q. . . . 1996-2006.
>
> A. I assume there were devices that we negotiated exclusively in the U.S. during that time frame.
>
> Q. Okay. My question is can you identify any? . . . .
>
> A. *I can't identify them specifically, no, nor can I identify the devices that were not negotiated in the U.S. specifically.*

Robinson Dep. at 106:7-107:14; *id.* at 271:6-23, 279:6-21. In addition, in response to an interrogatory seeking to identify negotiations relating to LCD price agreements that "were conducted exclusively in the United States," Plaintiff did not identify any such negotiations, and responded that "*negotiations related to agreements on LCD pricing occurred both inside and outside of the United States*." Ex. H at 36-37.

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[14] In addition to the Commodity Team's foreign negotiations, senior executives in Plaintiff's procurement organization frequently traveled to Asia to "[d]evelop and strengthen Motorola's business relationship[s]" with Defendants. Ex. 19 at 1. According to Motorola, Inc.'s Chief Procurement Officer Theresa Metty, these foreign meetings with suppliers were "[a] critical component" of Motorola's procurement strategy, because "Asian suppliers . . . are particularly focused on personal relationships, and the key to reaching agreements with them is often based on the quality and strength of personal relationships with them." Ex. 185 at 4 ¶ 6; *see also* Metty Dep. at 55:6-60:19; Cawley Dep. at 80:18-81:3, 81:14-82:7; Singh Dep.at 253:2-21, 254:14-255:19. For examples of foreign executive meetings see Ex. 4 at 1; Ex. 78 at 1; Ex. 89 at 5; Ex. 108 at 1; Ex. 128 at 6, 27, 39; Ex. 193 at 1; Ex. 200 at 1; Ex. 204 at 1; Ex. 205 at 3; Ex. 226 at 13-14; Ex. 364 at 1; Ex. 386 at 1; Ex. 389 at 1; Ex. 390 at 1; Ex. 694 at 1.

2. Chronology of Price Negotiations: We present below a chronological review of the Global Commodity Team's price negotiations with Defendants:

(a) The Duffy/Healy Era (1998–Oct. 2004): From around 1998 to 2004 the Global Commodity Manager was Michael Duffy. App. A at A-1 to A-5. Mr. Duffy was based in Scotland, and employed by Foreign Assignor Motorola Ltd. (U.K.). *Id.* As Global Commodity Manager, Mr. Duffy was "responsible for [LCD] supplier selection, cost negotiations, award allocations, and supplier relationship issues." Commodity Mgr. Rogero Dep. at 312:8-21; *see also* Ex. 472 at 3 (no LCD suppliers "shall be engaged at any stage without the approval" of the Global Commodity Mgr.); Ex. 393 at 31 (function of the Global Commodity Mgr. to "[s]elect … suppliers," and to "[l]ead negotiations, strategy, and critical supplier negotiations").

During Mr. Duffy's tenure, the Global Commodity Team conducted "annual negotiations," the purpose of which was to negotiate LCD pricing to be implemented in the following calendar year.[15] The Global Commodity Manager selected the location for the annual negotiations. Commodity Mgr. Cheng Dep. at 179:6-8. Annual negotiations were preceded by a Commodity Manager requesting and receiving price quotes via email or through Plaintiff's on-line system, MINT (or "Motorola Internet Negotiation Tool"). Commodity Mgr. Lima Dep. at 90:19-92:22, 135:1-136:24. Any Commodity Manager, wherever located, could ask for and receive price quotes from any supplier, "wherever they may be located." Commodity Mgr. Lai Dep. at 273:1-11, 273:23-274:8.

Hong Kong 2000: On October 23-28, 2000, the annual negotiations for Calendar Year 2001 were held in Hong Kong.[16] Suppliers invited included Epson, Philips, and Samsung.

[15] *See* Ex. 263 at 20 (Motorola Procurement Handbook: "Component cost contracts are typically negotiated on an annual basis."); *see also* Commodity Mgr. Cheng Dep. at 169:2-25, 171:21-172:16, 180:15-181:22 (describing annual negotiations); Commodity Mgr. Lai Dep. at 296:1-14 (same).

[16] *See* Ex. 656 at 1 ("Next negotiations—October 2000, Venue: *Asia*"); Ex. 482 at 1 ("Negotiation meeting—23 to 28 Oct. in *Hong Kong*"); Ex. 506 at 1 ("We look forward to reviewing . . . cost profiles before we meet in *Hong Kong*."); Ex. 509 at 2 ("Final Negotiation meeting . . . in our Corporate office in *Hong Kong*"); Ex. 511 at 39 ("Motorola/Epson Y2001 Annual Negotiation Meeting . . . October 24, 2000 @ *Hong Kong*"); Ex. 483 at 1 ("Negotiation meeting . . . in *Hong Kong*—DONE"); Ex. 657 at 2 (Negotiated Savings Report following *Hong Kong* negotiations).

Ex. 657 at 1. Following the negotiations the Global Commodity Team prepared an "awards file" reflecting "how much we will spend" and "who we will spend it with." Ex. 395 at 1. Global Commodity Manager Duffy estimated "negotiated savings" from the Hong Kong negotiations at $45-46 million. Ex. 391 at 3. On November 15, Commodity Manager Kimura (Japan) reported that the "negotiated pricing information" from Hong Kong had been provided to the Foreign Assignors "for pricing up-load." Ex. 484 at 1.

Scotland 2001: On October 22-26, 2001, the Global Commodity Team conducted its annual negotiations for Calendar Year 2002 in Easter Inch, Scotland, where Mr. Duffy was based. Ex. 674 at 1 ("Philips are visiting Scotland today as part of their negotiations."); Ex. 490 at 2 ("Display Contract Negotiation Meetings (Oct. 22-26, Easter Inch)"); Ex. 3454 at 22 ("Negotiation Location—Scotland"). Philips, Samsung SDI and Toshiba were invited. Ex. 490 at 2.

Asia 2002: In October, 2002 annual negotiations with Motorola's "key display suppliers" for Calendar Year 2003 occurred at various locations in Asia. Ex. 399 at 1 ("Annual Contract Negotiation Meetings (Asia, October 14-17)"); Ex. 680 at 1 ("negotiation meeting with Samsung SDI . . . in Hong Kong"); Ex. 701 at 1 (same); Ex. 679 at 3 ("LCD negotiations Epson [at] Motorola Japan"); Ex. 681 at 1 ("negotiation meeting held at Motorola Japan on October 18"); Ex. 400 at 1 ("Negotiation Meetings (Hong Kong, October 21-22)"). Following the Asia negotiations, Commodity Manager Lai (Singapore) scheduled a meeting with representatives of the Foreign Assignors "to go through the negotiation result[s]." Ex. 401 at 1.

Illinois/Japan 2003: In July 2003, the annual negotiations were initially held in Schaumburg, Illinois. Ex. 394 at 1. However, these negotiations did not result in business awards. Global Commodity Manager Duffy informed suppliers following these negotiations that "the offered pricing . . . did not meet our price expectations." *Id.* Since suppliers were "[u]nable to meet target pricing," the Commodity Team was "unable to make 12 month awards." Ex. 71 at 10. The Global Commodity Team therefore arranged for re-negotiations to occur in Japan in

December 2003.[17] The purpose of the Japan negotiations was to "[e]stablish competitive pricing" and "finalise award of business for Q2 and Q3 2004." *Id.* Meetings were conducted with Samsung, Samsung SDI, Sharp, and Toshiba. *See id*. The Commodity Team informed suppliers that "the commodity team will decide the % awards of business for each display module" for Q2 2004 and Q3 2004. Ex. 394 at 1. Afterwards, the Global Commodity Team prepared a "pricing summary" to "summarize the savings by product and supplier achieved following the Japan meetings with suppliers." Ex. 72 at 1.

<u>Japan/Illinois 2004:</u> In March, 2004, Mr. Duffy departed, and Michael Healy was appointed to the new position of Director of the Global Commodity Team. App. A at A-5. Like Mr. Duffy, Mr. Healy was based in Scotland and employed by Foreign Assignor Motorola Ltd. (U.K.). *Id.* In June and July 2004, the Global Commodity Team, now led by Mr. Healy, held negotiations with suppliers in Tokyo and Chicago. Ex. 542 at 2 ("Meet at supplier location for Japan based suppliers. Meet Taiwanese based suppliers in Japan."). Mr. Healy resigned later that year, and it is not clear whether these negotiations resulted in business awards.

Separate and apart from the annual negotiations described above, during this time period the Global Commodity Team frequently conducted negotiations on an ad hoc basis with suppliers outside the U.S.[18]

(b) <u>The Ford Era (Oct. 2004–May 2005):</u> Global Commodity Manager Angela Ford joined the team in October 2004. App. A at A-5-7. Angela Ford was based in Illinois. *Id.* Ms. Ford testified that she too, like her predecessors Mr. Duffy and Mr. Healy, negotiated LCD prices with Defendants in Asia. *See* Ford Dep. at 54:16-55:10, 261:13-262:21,

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[17] Ex. 394 at 1 ("[W]e will soon be meeting again *in Japan*."); Ex. 70 at 1 ("Negotiations (Dec 2003) *Japan*"); Ex. 670 at 4 ("Display Commodity Team *finished face-to-face cost management meetings . . . in Tokyo*."); Ex. 402 at 4 ("Display Re-Negotiation in *Tokyo*"); Ex. 403 at 4 (same); Ex. 539 at 1 ("Cost management & Negotiation Meeting was held at *Motorola Japan*" with Toshiba); Ex. 71 at 1 ("Attached are the meeting notes in *Tokyo* on December 2003."); Ex. 72 at 1 (summary of savings "following *the Japan meetings* with suppliers").

[18] *See, e.g.*, Ex. 326 at 1 (August 2004 Tokyo meeting with supplier who "agreed to reduce Razr module price by additional 5%"); Ex. 159 at 3 ("Q4 price will be reviewed in Tokyo next week."); Ex. 543 at 1 (August 2004 negotiations "with Sharp in Japan" to discuss V500 pricing); Ex. 545 at 1 (October 2004 meeting at "Sharp Osaka head office" re pricing on three separate projects); Ex. 566 at 1 (July 2004 meeting with Toshiba in Tokyo re Triplets pricing).

381:2-382:16. She testified that because the LCD suppliers "were all headquartered in Asia" and "all the key decision makers were . . . headquartered in Asia," she would "go and negotiate and talk directly to the people in the home country." *Id.* at 54:16-55:5, 381:2-382:16 ("final pricing decisions were made in Japan" by LCD suppliers based there); *see, e.g.*, Ex. 4863 at 43-44 (Ford meeting with Epson in Tokyo in December 2004 where Epson "agreed to . . . price" reduction for Razr modules for February, March 2005).

(c) <u>The Zaun Era (June 2005–Dec. 2006):</u> In June 2005 Pat Zaun was hired as Director of LCD Procurement. App. A at A-6. Thereafter Ms. Ford reported to Mr. Zaun. *Id.*; *see also* Ford Dep. at 33:16-34:4. Mr. Zaun was based in Hong Kong and then Japan. *Id.* at A-6, A-7. Mr. Zaun's boss, Motorola Inc.'s V.P. of Procurement D.K. Singh, testified that Mr. Zaun was based in Asia because "most of the display vendors were in Asia, so it made sense to have [our] procurement officer there." Singh Dep. at 244:16-20. Mr. Zaun's role, as explained by Mr. Singh, was LCD "source selection, contract negotiation, [and] managing the relationship with the suppliers." Singh Dep. at 245:4-9; Tay Dep. at 199:3-200:5 (Zaun was "the one responsible for the pricing and the negotiation of the pricing, yes").[19]

Mr. Zaun and his subordinates regularly conducted negotiations with Defendants in Asia. *See, e.g.*, Ex. 549 at 1 (Dec. 2005 Zaun email re "meeting with top Sharp guys in Hong Kong" to discuss "how much [volume] we need in Q4 . . . on key programs"); Ex. 537 at 1 (Zaun meeting with Sharp at Osaka, Japan, to negotiate "further price reduction" on Razr for Q1 and Q2 06); Ex. 538 at 1 (Nov. 2006 meeting at Motorola Japan with Toshiba "for a-Si and LTPS pricing and

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[19] The only time during the Relevant Time Period in which the Commodity Team's negotiations were interrupted was early in Mr. Zaun's tenure as Director of LCD Procurement (August 2005), when Motorola, Inc. held its "Rapid Source Initiative" or "RSI." The RSI was a one-time initiative, the purpose of which was to reduce the number of LCD suppliers from twelve to five for 2006 and 2007. *See* Ex. 139 at 1, 2, 6 (describing RSI process). Suppliers in the RSI were evaluated based on a number of criteria, including proposed pricing for certain projects for Q4 2005 and Q1 2006. *See id.* at 6. Awards made in this process were "contingent on" the execution of several proposed agreements, including "RSI award contract[s] detailing the mutual terms, performance measures and commitments required of the RSI partnership." Ex. 554 at 2; *see also* Exs. 556-58. So far as Defendants are aware, these proposed "RSI award contract[s]" were never executed.

award discussion"); Ex. 552 at 1 and Ex. 551 at 1 (emails re Motorola Japan Commodity Mgr. Takayama "discussing cost opportunities with Sharp, SEC, and SEID" for Q4 2006 Razr pricing).

Pat Zaun's quarterly negotiations on Razr LCD pricing in 2006 illustrate the foreign nature of price negotiations generally during his tenure. In November 2005, Epson representatives in Japan submitted Q1 2006 Razr pricing of $26.75 to Mr. Zaun, who was based in Hong Kong. Ex. 229 at 2. Foreign Assignor Motorola Electronics Pte. Ltd. (Singapore) subsequently issued Purchase Orders at this price. Ex. 518 at 1. In March 2006, Mr. Zaun met with Epson representatives in Hong Kong to discuss his "expectation[s]" for Q2 2006 pricing. Ex. 51 at 1; Matsuura Dep. at 286:23-287:8; *see also* Ex. 250 at 3 (Zaun email to Epson discussing "very good meetings in Japan as well as Hong Kong" re Q2 pricing). Days later, Epson submitted a quote from Japan to a Japan-based member of the Commodity Team, of $25.90. *See* Ex. 75 at 1. Foreign Assignor Motorola Electronics Pte. Ltd. (Singapore) subsequently issued Purchase Orders at that price. *See* Ex. B at 1. For Q3 2006, Epson representatives in Japan submitted Q3 pricing to a Japan-based member of the Commodity Team. *See* Ex. 278 at 1. Foreign Assignor Motorola Electronics Pte. Ltd. (Singapore) subsequently issued Purchase Orders at that price. *See* Ex. 279 at 1. For Q4 2006, Epson representatives in Japan submitted a quote of $24.48 in August to a Japan-based Commodity Manager. *See* Ex. 4883 at 2. In September a dinner meeting was held in Tokyo between members of the Commodity Team and Epson representatives. *See* Ex. 4865. At that meeting, Epson's Q4 2006 price proposal was discussed, and the Commodity Team "agreed to this" price. *Id.* at 4. For each quarter the prices the Foreign Assignors paid for Razr modules purchased from Epson were set pursuant to email exchanges and meetings that took place *in Asia.*

We emphasize that the foregoing examples of the Commodity Team's foreign negotiations are exactly that, examples. There are dozens of other examples of foreign price negotiations in Plaintiff's business records.[20]

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[20] *See, e.g.*, Ex. 69 at 5 ("Negotiations—Suppliers—*Japan*"); Ex. 73 at 1-2 (Zaun email: re "price discussion" with LCD supplier "several days ago in *Hong Kong*"); Ex. 166 at 1 (Healy: I will travel "to *Tokyo* to complete . . . negotiation" for Razr Q1 05 pricing); Ex. 264 at 1 (Sharp to

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C. Purchase Orders Issued by the Foreign Assignors in Foreign Countries Constitute the Exclusive Purchase Agreements with Defendants.

After the Commodity Team agreed on a new LCD price with a Defendant, a Commodity Manager supplied that information to buyers for the Foreign Assignors, either via email, a system signal, or a face-to-face briefing with Purchasing Managers for the Foreign Assignors.[21] The Foreign Assignors issued a Purchase Order to a Defendant reflecting the price negotiated by the Global Commodity Team *only* when a buyer for the Foreign Assignor had received (1) written confirmation from a member of the Commodity Team of the new price, (2) an official supplier quote reflecting the new price, and (3) written approval from a manager of the Foreign Assignor. Ex. 603 at 4 (describing price change workflow); Guo Dep. at 240:18-241:3, 242:23-244:4, 250:7-254:10, 254:24-255:7, 263:2-271:8, 280:14-281:23; Ex. D at 2 ¶ 2. Tracy Guo, Purchasing Manager for Foreign Assignor Motorola China Electronics Ltd., explained:

> Q. It was a *necessary precondition*, wasn't it, under the policy that was in place from '02 to '06, for you *to have an official quote in hand from the supplier* plus confirmation from the category team *before* you could revise a price term in a PO? . . . .
>
> A. It should be put this way, this is a piece of record that we *must have before releasing POs*.

Guo Dep. at 253:3-11. Buyers for the Foreign Assignors could, and did, solicit and receive price quotes directly from suppliers reflecting the newly negotiated price.[22]

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Motorola's K.J. Lim: "we are ready to fly to *Singapore* and we would like to discuss this opportunity with you in person"); Ex. 486 at 1 (email to Duffy: "Please see attached response to your request for price reductions based on our previous meeting in *Easter Inch*," Scotland); Ex. 502 at 1 (Duffy: "Samsung are very keen to hold a meeting as soon as possible . . . in *Easter Inch*," Scotland); Ex. 705 at 1 (email to Commodity Mgr. Lai: "According to your request in meeting on Nov. 9 at *Tianjin*, the attached is new pricing . . . ."); *see also* Exs. 74, 76, 97, 180, 214, 244, 284, 291, 292, 325, 328, 330, 347, 352, 362, 385, 479, 487, 489, 504, 540, 541, 544, 567, 574, 575, 578, 579, 645, 671, 675, 682, 693, 695, 697.

[21] *See* Foreign Assignor Purchasing Mgr. Khoo Dep. at 133:12-136:5 (explaining manner in which Commodity Team provided updated pricing to Foreign Assignors); *see also* Ex. 603 at 1; Ex. 605 at 1; Ex. 623 at 1; Ex. 626 at 2; Ex. 630 at 1; Ex. 633 at 3; Ex. 641 at 2; Ex. 643 at 1 (emails between members of Commodity Team and buyers for Foreign Assignors confirming new LCD pricing from suppliers for upcoming quarter).

[22] Guo Dep. at 251:10-19; *see also* Ex. 605 at 1, 5; Ex. 606 at 1, 5; Ex. 607 at 1, 6, 7; Ex. 608 at 1; Ex. 615 at 1, 2; Ex. 628 at 1, 2; Ex. 632 at 6; Ex. 636 at 1; Ex. 637 at 1; Ex. 638 at 1; Ex. 639 at 1, 5; Ex. 640 at 1; Ex. 642 at 1; Ex. 648 at 1; Ex. 649 at 1; Ex. 650 at 1 (examples of

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Throughout the Relevant Time Period, the issuance of Purchase Orders was the exclusive method by which the Foreign Assignors purchased LCDs from Defendants. *See e.g.*, Ex. 263 at 27 (Motorola Procurement Policy stating that Motorola may purchase goods *either* by executing "a written contract that is binding when the parties sign it" *or* "by submitting a purchase order form to suppliers").[23] Other than Purchase Orders, Motorola is unable to identify "any written supply agreements that were entered into between any of the[] entities that purchased LCD modules during the relevant time period and the suppliers from whom they purchased." Khoo Dep. at 263:5-15. Plaintiff's Rule 30(b)(6) witness on agreements with Defendants, V.P. of Procurement Janet Robinson, testified that "negotiations occurred absent corporate supply agreements," and that the "[p]urchase order is the document that validates the price that was agreed to during the negotiation process." Robinson Dep. at 80:5-81:19 ("[P]urchase orders were entered into based on negotiations of our category teams and our leadership."); *see also id.* at 76:3-77:23, 227:4-23, 282:21-283:1. Foreign Assignor Purchasing Manager K.L. Khoo testified that the Purchase Order constituted the "legally binding document that we send out to the suppliers . . . in terms of what we are requiring, the quantity we want the suppliers to build and ship to us." Khoo Dep. at 258:1-11; *id.* at 340:9-341:1 ("[T]he PO is a legally binding document that needs to be placed to the supplier."). "Motorola had no obligation to purchase LCD modules . . . absent a purchase order," and a supplier "had no obligation to sell LCD modules to Motorola without there being a Purchase Order in place." Robinson Dep. at 228:24-230:16. Every Motorola employee deposed in this action has so testified.[24]

These facts are confirmed by the plain terms of Motorola's Standard Terms & Conditions. The Standard Terms & Conditions contains an integration clause, stating that a Purchase Order

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price quotes submitted via email directly to buyers for Foreign Assignors, reflecting price negotiated with Global Commodity Team).

[23] *See also* Khoo Dep. at 225:17-23, 229:7-20, 236:14-237:18, 263:16-264:17; Tay Dep. at 62:24-63:22; Ford Dep. at 31:17-32:6.

[24] *See* Khoo Dep. at 258:1-11, 260:10-261:13, 263:2-15, 263:20-264:17; Ford Dep. at 255:17-24; Rogero Dep. at 207:13-208:7, 208:20-210:2, 442:25-444:1; Bodak Dep. at 105:12-106:6; Robinson Dep. at 36:10-22, 41:21-42:4; Cheng Dep. at 117:17-118:2; Ex. 320 at 1.

issued by a Foreign Assignor "*constitutes the entire agreement between Motorola and Seller and it specifically supersedes all prior or contemporaneous agreements, arrangements, representations and communications whether oral or written*." *E.g.*, Ex. 258 at 3, ¶ 1; Freccero Decl. ¶ 212 (other examples). Motorola's Standard Terms & Conditions also state that "Seller's commencement of services or *shipment of the goods*, whichever occurs first, *constitutes acceptance of this purchase order ('order'), and all of its terms and conditions*." *E.g.*, Ex. 258 at 3, ¶ 1; Freccero Decl. ¶ 211. Plaintiff's Rule 30(b)(6) witness on the terms and conditions applicable to LCD purchases testified that "shipment of the goods in accordance with [a] purchase order constitutes acceptance of its terms." Robinson Dep. at 275:10-277:13.

ARGUMENT

I. SUMMARY JUDGMENT MUST BE GRANTED WHEN PLAINTIFF FAILS TO PROVE ITS ALLEGATIONS CONCERNING THE FTAIA'S DOMESTIC INJURY EXCEPTION

Enacted in 1982 as an amendment to the Sherman Act, the FTAIA "excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury." *F-Hoffman LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004) ("*Empagran I*"); 15 U.S.C. § 6a. It does so by first laying down "a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *Empagran I*, 542 U.S. at 162 (original emphasis). The statute then "brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce,' *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must giv[e] rise to a [Sherman Act] claim." *Id.* (original emphases) (quoting 15 U.S.C. § 6a). This is known as the "domestic injury exception." *Motorola I*, 2010 U.S. Dist. LEXIS 65037, at *13.

In this case the burden is squarely on Plaintiff to prove that the assigned foreign injury claims it seeks to assert are subject to the Sherman Act, as amended by the FTAIA. If, as this Court has held in the indirect purchaser class action, the FTAIA is not jurisdictional, then it imposes "an additional element of a Sherman Act claim." *See In re TFT-LCD Antitrust Litig.*, 2011 U.S. Dist. LEXIS 115212, at *13 (N.D. Cal. Oct. 5, 2011) ("*IPP Order*"); *Animal Sci.*, 654

F.3d at 466 ("the FTAIA imposes a substantive merits limitation" on a plaintiff's Sherman Act claim).

The FTAIA's general rule obviously applies here. Over 99% of the commerce at issue in this case, and 100% of the commerce at issue in this motion, is foreign. *See DRAM*, 546 F.3d at 984, 986 n.6 (where "defendants engaged in a global conspiracy to fix DRAM prices" and plaintiff "purchased DRAM outside of the United States from the defendants" it was "undisputed" that the general rule applied). That the Foreign Assignors assigned their claims to the U.S. parent company is irrelevant. As a purported assignee of the Foreign Assignors' claims, Plaintiff "does not sue in its own right, but rather stands in the shoes of its assignor[s]." *Bassidji v. Goe*, 413 F.3d 928, 939 (9th Cir. 2005). Thus, Plaintiff has no greater basis on which to assert foreign injury claims under the Sherman Act than the Foreign Assignors. *Id.*

The only argument Plaintiff has ever made that the general rule does not apply is that Defendants' conduct "involved" U.S. import commerce. The Court correctly rejected this argument in *Motorola I*. *See* 2010 U.S. Dist. LEXIS 65037, at *19. The FTAIA excludes from its general rule "conduct involving . . . import trade or import commerce." 15 U.S.C. § 6a. Because the FTAIA separately excepts conduct which has an "effect" on U.S. import commerce, *id.* at § 6a(1)(A), courts have held that the exclusion for conduct "involving" import trade "must be given a relatively strict construction." *Animal Sci.*, 654 F.3d at 470 (quotation omitted). The relevant inquiry "is whether the defendants' alleged anticompetitive behavior 'was directed at an import market'" as such. *Id.* (quotation omitted). Here, since 99% of the transactions at issue are foreign, Defendants' conduct targeted a foreign market, not an import market. "Any subsequent 'importing'" of these products "into the United States occurred as a result of the plaintiffs' own activities," not the Defendants. *Id.* Plaintiff's allegations that Defendants "knew and intended" that Motorola would at a later point in time import some finished goods into the U.S. are irrelevant: "[D]efining 'imports' as goods that foreign companies 'intended' to ultimately make their way into the United States for resale would potentially sweep in much conduct excluded by the FTAIA." *Motorola I*, 2010 U.S. Dist. LEXIS 65037, at *19.

Accordingly, for its foreign injury claims to be cognizable under the Sherman Act, Plaintiff bears the burden of proving that (1) Defendants' conduct had "a direct, substantial, and reasonably foreseeable effect on domestic commerce," and (2) "such effect gives rise to a Sherman Act claim." *Id.* at *20 (quoting *Empagran I*, 542 U.S. at 159). The only effect on U.S. domestic commerce giving rise to the foreign injury claims that Plaintiff has pointed to (and that the Court has accepted as valid) is its allegation "that the price and other terms of purchase were negotiated exclusively by Motorola's procurement teams within the United States" and that "Defendants and their co-conspirators . . . entered into supply agreements with Motorola in Illinois." *Motorola II*, 785 F. Supp. 2d at 838, 842.

The question under *Motorola II*, therefore, and the key question presented in this motion, is whether Plaintiff can prove that the Foreign Assignors paid prices for LCDs pursuant to purchase contracts that were negotiated and entered into in the U.S., i.e., whether "the prices paid abroad were caused by . . . contractual terms negotiated inside the United States." *Id.* at 843-44. Because Plaintiff bears the burden of proof on this essential element of its Sherman Act claim, Defendants may carry their initial burden of production under Rule 56 "by either of two methods." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000). First, Defendants may affirmatively produce evidence in support of this motion "negating" Plaintiff's claim that prices paid by Foreign Assignors were caused by contracts negotiated and entered into in the U.S. *See id.* Second, and alternatively, Defendants can meet their initial burden by "showing—that is, pointing out to the district court—that there is an absence of evidence to support" Plaintiff's claim that prices paid by Foreign Assignors were caused by contracts negotiated and entered into in the U.S. *See id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once Defendants carry their initial burden of production, Plaintiff must then come forward with admissible evidence establishing that a reasonable jury could find, by a preponderance of the evidence, that prices paid abroad were caused by contract terms negotiated in the U.S. *See Celotex*, 477 U.S. at 322-23. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and

Defendants are entitled to judgment as a matter of law. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (quotation omitted).

II. PLAINTIFF CANNOT PROVE THAT THE FOREIGN ASSIGNORS PAID PRICES PURSUANT TO CONTRACTS NEGOTIATED AND ENTERED INTO IN THE UNITED STATES

Here, Defendants carry their initial burden of production on this motion for two separate and independent reasons. First, Defendants have presented affirmative evidence, from Plaintiff's own business records, which disproves its claim that prices paid abroad were caused by contract terms negotiated and entered into in the U.S. *See Nissan Fire & Marine Ins.*, 210 F.3d at 1106. Second, despite being given every opportunity to do so, Plaintiff has failed to identify facts in discovery in support of its allegations. *See id.*

A. The Record Taken as a Whole Demonstrates That the Foreign Assignors Purchased LCDs Pursuant to Globally-Negotiated Foreign Contracts.

Plaintiff's own records show that the prices paid by the Foreign Assignors were not "caused by . . . contractual terms negotiated inside the United States." *Motorola II*, 785 F. Supp. 2d at 844. Negotiations were conducted by a Global Commodity Team, members of which were based in foreign countries and employed by Foreign Assignors. The Global Commodity Team frequently conducted its negotiations with Defendants outside the U.S. Every member of the Global Commodity Team deposed in this action has testified that price negotiations took place outside the U.S. *See supra* pp. 11-17. As Commodity Manager Rogero explained, it was simply "more efficient from a time standpoint . . . for our team to travel to Asia or to their headquarters rather than have all of them travel to the U.S." *Supra* pp. 11-12. Motorola has admitted in its discovery responses that price negotiations took place globally. *See supra* p. 11.

Even more important, *no matter where the negotiations took place*, the Foreign Assignors did not pay inflated prices for LCDs pursuant to "'supply agreements [entered into] with Motorola in Illinois,'" as Plaintiff alleged. *Motorola II*, 785 F. Supp. 2d at 838 (quoting SAC ¶ 4). There were no such supply agreements. Instead, the Foreign Assignors purchased LCDs by issuing Purchase Orders outside the U.S., which state on their face that they constitute "the entire agreement" with the supplier, and that they "specifically supersede[] all prior or contemporaneous agreements, arrangements, representations and communications whether oral or written" between the parties. *Supra* p. 19. As a matter of law, this clause "supersedes any prior oral or written agreements" between the parties. *Bhari Info. Tech. Sys. Pvt., Ltd. v. Allied Boston Bank Inc.*, 2005 U.S. Dist. LEXIS 40094, at *6-7 (N.D. Cal. Dec. 19, 2005) (Illston, J.); *Rui One Corp. v. Hotel Emps. & Rest. Emps. Union Local 2850*, 371 F.3d 1137, 1148 (9th Cir. 2004) ("An integration clause is an express statement that all prior discussions are superseded by . . . the written agreement.") (quotation omitted). The integration clause in the Foreign Assignors' Purchase Orders "makes clear that the negotiations leading to the written contract *are not* the agreement." *Air Safety v. Teachers Realty Corp.*, 706 N.E.2d 882, 885 (Ill. 1999) (original emphasis).

Motorola's Standard Terms & Conditions, moreover, state plainly that shipment of the goods by the supplier "constitutes acceptance of this purchase order ('order'), and all of its terms and conditions." *Supra* pp. 19-20. Here, every Purchase Order issued by a Foreign Assignor that identifies a shipping address called for shipment (defined as "acceptance") to occur outside the U.S. *See supra* p. 8; Freccero Decl. ¶ 207. As a matter of law, therefore, the agreements utilized by the Foreign Assignors to purchase LCDs from Defendants were entered into *outside the U.S.*, not in Illinois. *See* 2 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 6:62 at 895 (4th ed. 1993 & Supp. 2011) ("[T]he place of contracting is the place where the last act necessary to the completion of the contract was done, that is, where the contract first creates a legal obligation."); *Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc.*, 446 F. Supp. 2d 551, 566 (E.D. Va. 2006) (under a Purchase Order stating that shipment constitutes acceptance, the contract is made where the goods are delivered, i.e., "when the last act to complete it is performed"); *W.A. Taylor & Co. v. Griswold & Bateman Warehouse Co.*, 719 F. Supp. 697, 702 (N.D. Ill. 1989) (under quotation stating that shipment constitutes acceptance "the act of shipping the goods constitutes acceptance of the terms"). There is no issue of fact for a jury to determine on this point. The Foreign Assignors' Purchase Orders are plain on their face.

We note further that, just as the evidence shows the Foreign Assignors purchased LCDs from Defendants pursuant to globally negotiated foreign contracts, the evidence also demonstrates that the prices Motorola, Inc. paid in the U.S. (for Category One purchases) did *not* determine the prices that were paid abroad (for Categories Two and Three combined). *Compare DRAM*, 546 F.3d at 990 & n.10. Plaintiff has never advanced such an argument, and could not do so now, for good reason. Less than 1% of the LCD purchases covered by the negotiations at issue occurred in the U.S. *See supra* p. 8; TAC ¶ 185. No reasonable finder of fact could plausibly conclude that Motorola, Inc.'s *de minimis* U.S. purchases were the primary driver (i.e., the proximate cause) of the prices paid outside the U.S. by the Foreign Assignors. *See In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 540 (8th Cir. 2007) ("[a]lthough United States prices may have been a necessary part of the [defendants'] plan, they were not significant enough to constitute the direct cause" of plaintiff's foreign injuries). The only reasonable conclusion is that the Foreign Assignors' foreign LCD purchases were the predominant factor in the Global Commodity Team's global negotiations and that, if anything, the Foreign Assignors' foreign prices determined Motorola's Inc.'s U.S. price—not vice versa.

Very simply, the effect on U.S. domestic commerce that "gave rise to" the foreign injury claims that Plaintiff identified in *Motorola II* is non-existent. Foreign Assignors purchased LCDs from Defendants pursuant to globally-negotiated foreign contracts, *not* pursuant to U.S.-negotiated, U.S. contracts.

B. Plaintiff Has Failed to Identify Facts Showing That the Foreign Assignors Paid Prices Pursuant to Contracts Negotiated and Entered Into in the U.S.

Defendants may also discharge their initial burden on this motion by simply pointing to the absence of evidence to support Plaintiff's allegations concerning exclusive U.S. negotiations and U.S. price agreements, having "made reasonable efforts, using the normal tools of discovery, to discover whether the nonmoving party has enough evidence to carry its burden of persuasion at trial." *Nissan Fire & Marine Ins.,* 210 F.3d at 1105. This is so because the moving party "has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial." *F.T.C. v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1075 (N.D. Cal. 2009) (Illston, J.). Here, Plaintiff has been given every opportunity to identify facts in discovery in support of its claim that "prices [were] set through [a] domestic negotiation process." *Motorola II*, 785 F. Supp. 2d at 838. It has failed to do so.

Following *Motorola II*, Epson, on behalf of all Defendants, served Plaintiff with a Notice of Deposition under Rule 30(b)(6), requesting that Plaintiff designate a corporate representative to testify on certain topics. *See* Ex. 255. Plaintiff agreed to provide a corporate representative, V.P. of Procurement Janet Robinson, to testify on the following topics: "The negotiation of any agreement relating to [Motorola's] purchases of LCD Modules" (No. 27), and "The terms and conditions contained in the purchase orders issued to defendants, including any negotiations with LCD Module suppliers over the terms and conditions" (No. 28). Ex. 255 at 9; Ex. 256 at 1. At the deposition, Plaintiff's corporate representative was asked to identify LCDs purchased by Foreign Assignors during the Relevant Time Period for which the price negotiations occurred solely in the U.S. *See supra* p. 12. In response, Plaintiff's corporate representative stated that Plaintiff was unable to identify any LCDs for which price negotiations occurred solely in the U.S., responding "*I can't identify them specifically, no*, nor can I identify the devices that were not negotiated in the U.S. specifically." *Id.* Plaintiff is bound by this testimony. *See Mitchell Eng'g v. City & Cnty. of San Francisco*, 2010 U.S. Dist. LEXIS 20782, at *4 (N.D. Cal. Feb. 2, 2010) (Illston, J.) ("A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity and he is responsible for providing all the relevant information known or reasonably available to the entity.") (quotation omitted).

Subsequently, Samsung, on behalf of all Defendants, served Plaintiff with interrogatories which asked Plaintiff, for "each agreement [it] entered into in the State of Illinois," to "state whether the negotiations that Related to that agreement were conducted exclusively in the United States." Ex. G at 10. In response to this request, Plaintiff again failed to identify any such negotiations, and again admitted that "negotiations related to agreements on LCD pricing occurred both inside and outside of the United States." Ex. H at 37. Federal courts routinely grant summary judgment where, as here, the non-moving party has the burden of proof and yet fails to identify facts essential to its claim in interrogatory responses. *See School Dist. No. 1J, Multnomah Cnty., Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263-64 (9th Cir. 1993) (affirming summary judgment because of plaintiff's failure to identify key facts in interrogatory response); *Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 325 (C.D. Cal. 2004) (granting summary judgment to defendant where plaintiff failed to identify in interrogatory responses key facts essential to element of plaintiff's claim); *see also Celotex*, 477 U.S. at 320 (non-moving plaintiff's failure to identify essential facts in interrogatories that "specifically request[] such information" sufficient for defendant to satisfy summary judgment burden when plaintiff bears the burden of proof).

The burden now shifts to Plaintiff to present evidence establishing that a reasonable jury could find, by a preponderance of the evidence, that the Foreign Assignors' foreign injuries were "caused by . . . contractual terms negotiated inside the United States." *Motorola II*, 785 F. Supp. 2d at 844. Having failed to do so during discovery, it cannot do so now.

C. Plaintiff's New "Approval" Theory Is Contrary to *Motorola II* and Invalid as a Matter of Law.

That Plaintiff will be unable to meet this burden is obvious from the evidence in its own records, from the paucity of its discovery responses, and from the fact that immediately following this Court's decision in *Motorola II*, Plaintiff jettisoned its "domestic negotiations" theory. Plaintiff's new theory is that there was an effect on U.S. commerce which gave rise to foreign injuries because "all Motorola negotiations were ultimately reported to and subject to approval by the procurement teams and management based in the United States." Ex. H at 37.[25]

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[25] While the facts underlying Plaintiff's new theory are irrelevant, we note the following. *First*, Plaintiff does not claim that the prices the Global Commodity Team negotiated with Defendants were *in fact* approved in Illinois, only that the Commodity Team's price negotiations were "*subject to*" approval by executives who were "*officed*" in Illinois. Ex. H. at 36. *Second*, "[n]o formal documentation procedure" needed to be followed for the Global Commodity Manager to obtain this "approval." Robinson Dep. at 122:1-13, 123:8-15. *Third*, Plaintiff admitted in discovery that it cannot identify a *single instance* in which a price negotiated by the Commodity Team was *not* approved by an executive "officed" in Illinois. Ex. H at 41-42; Robinson Dep. at 120:11-21; *see also* Metty Dep. at 83:3-7, 83:20-84:1 (same). Indeed, members of the Global Commodity Team either were unaware of any internal "approval" requirement over and above the Global Commodity Manager's head, or if they were generally aware of such a requirement, had no idea how it worked or who was involved. *See* Bodak Dep. at 249:7-17; Cheng Dep. at 107:9-15; Lai Dep. at 216:6-19; Rogero Dep. at 438:23-441:9; Lima Dep. at 148:23-151:7; Tay Dep. at 265:17-267:9; *see also* Guo Dep. at 280:14-281:12, 282:4-17, 283:4-24, 284:2-14.

Plaintiff's new "approval" theory is irrelevant as a matter of law, for several reasons. Most importantly, it is contrary to the standard this Court set out in *Motorola II*. In *Motorola I* the Court dismissed Plaintiff's foreign injury claims based on the Ninth Circuit's decision in *DRAM*. *Motorola I*, 2010 U.S. Dist. LEXIS 65037, at *24-25. The Court only reversed itself in *Motorola II* because Plaintiff had then alleged "with specificity how the prices paid abroad were caused by the contractual terms negotiated inside the United States." *Motorola II*, 785 F. Supp. 2d at 844. Plaintiff's allegations that "the price and other terms of purchase were negotiated exclusively by Motorola's procurement teams within the United States," established "a *concrete link* between defendants' price-setting conduct . . .[,] its domestic effect (the negotiations between Motorola and defendants . . .), and the foreign injury" suffered by the Foreign Assignors. *Id.* at 842-43. If the Court were to accept Plaintiff's new theory, it would mean that all negotiations could be conducted outside the U.S., all purchase contracts could be entered into outside the U.S., and all transactions could occur outside the U.S., and yet claims based on those transactions could be brought under the Sherman Act, simply because the prices paid abroad were "subject to" approval by an executive "officed" in the U.S.

If Plaintiff means to suggest, as it did in its interrogatory responses, that internal "approval" in the U.S. of prices negotiated by the Commodity Team means that price "agreements with the defendants were entered into in the *state of Illinois*," (Ex. H at 36), it is flat wrong as a matter of basic contract law. The purchase contracts used by the Foreign Assignors were (1) final, and (2) entered into ("accepted") where the goods were shipped, i.e., outside the U.S. *Supra* p. 24; Ex. 258 at 3, ¶ 1 ("Seller's commencement of services or *shipment of the goods*, whichever occurs first, *constitutes acceptance of this purchase order ('order'), and all of its terms and conditions*."). Motorola's new internal "approval" theory cannot be reconciled with *Motorola II*, with basic principles of contract law, or with the express terms and conditions applicable to the Foreign Assignors' LCD purchases.

Motorola II aside, Plaintiff's new "approval" theory cannot under any plausible reading of the FTAIA meet the requirements of the domestic injury exception. Nothing in the text or history of the statute suggests such a result, and no precedent even remotely supports it. "Approval" in the U.S. of prices implemented abroad by foreign companies pursuant to foreign purchase contracts is not an effect on U.S. domestic commerce, because the "economic consequences" of that action "are not felt in United States economy." *Turicentro,* 303 F.3d at 305. Any effect on commerce occurred in foreign markets, where the Foreign Assignors purchased LCDs. *See Sony Elecs., Inc. v. LG Display Co., Ltd.*, 2012 U.S. Dist. LEXIS 19955, at *14 (N.D. Cal. Feb. 15, 2012) (Under the FTAIA "it is the location of the purchase . . . that determines where the injury occurred.") (Illston, J.). Even if internal "approval" in the U.S. of globally negotiated prices that were implemented pursuant to foreign purchase contracts could possibly constitute an effect on U.S. commerce—and we are aware of no precedent to suggest that it can—internal "approval" did not proximately cause the Foreign Assignors' foreign injuries. Under the FTAIA, "[p]roximate cause requires more than establishing the conditions to make something possible." *In re Hydrogen Peroxide Antitrust Litig.*, 702 F. Supp. 2d 548, 554 (E.D. Pa. 2010). Proximate cause defines a causal relationship "so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain." *United States v. LSL Biotechnologies*, 379 F.3d 672, 693 (9th Cir. 2004) (quotation omitted). Here, a combination of a global negotiation process and the issuance of foreign purchase contracts determined the prices that the Foreign Assignors paid for LCDs. No credible reading of the statute supports the proposition put forth by Plaintiff that "approval" by an executive "officed" in Illinois can meet the domestic injury exception's requirements.

Finally, if the locus of ultimate pricing "approval," and not the place of contracting, is the relevant inquiry for purposes of determining application of the Sherman Act to foreign injury claims, then Plaintiff's new theory ignores the obvious: ultimate pricing approval resided *outside the U.S.* for its LCD suppliers, as members of the Global Commodity Team well understood. *See* Ford Dep. at 55:2-5, 381:2-6 (acknowledging that "all the key decision makers were . . . headquartered in Asia" and that "final pricing decisions were made in Japan" by LCD suppliers based there).[26] If *American* commerce was "affected" each time an executive "officed" in the U.S. "approved" prices negotiated globally, then necessarily the same must be true of *Korean* commerce (Samsung, LG), *Japanese* commerce (Sharp, Epson), *Taiwanese* commerce (AUO, Chi Mei), and so on. Under Plaintiff's "approval" theory, claims could proceed in a foreign court based upon transactions between U.S. companies in the U.S., and pursuant to U.S. negotiations and U.S. price contracts, simply because one of the parties to the transaction had a Korean parent company that at some point "approved" the prices. The theory makes no sense whatsoever, and cannot be reconciled with the announced goal of Congress in enacting the FTAIA to establish a "single, objective test" and a "clear benchmark" for application of U.S. antitrust law to foreign conduct. H.R. Rep. No. 97-686, at 2 (1982).

Motorola's newly-minted approval theory, cobbled together after *Motorola II*, is a non-starter as a matter of law.

III. CLAIMS BASED ON LCDS THAT NEVER ENTERED THE UNITED STATES IN ANY FORM ARE BARRED AS A MATTER OF LAW.

For the reasons explained above, summary judgment is warranted on *all* of Plaintiff's foreign injury claims (Categories Two and Three combined). Shorn of Plaintiff's made-for-litigation allegations concerning exclusive U.S. negotiations and U.S. purchase agreements, Plaintiff in effect alleges nothing more than a "global conspiracy" that impacted "global prices" and that "Motorola's foreign affiliates 'suffered injury as a result of defendants' antitrust violations.'" *Motorola I*, 2010 U.S. Dist. LEXIS 65037, at *25. A long line of precedent holds that these allegations "fall far short of alleging that the domestic effect of defendants' conduct gave rise to [plaintiff's] foreign injuries." *Id.*; *DRAM*, 546 F.3d at 988 ("[T]hat the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad.").

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[26] *See, e.g.*, Waldron Dep. at 82:25-84:12 (ultimate price approval for Epson resided in Japan); Sharif Dep. at 47:9-12, 95:8-9, 280:6-7 (same for Sharp); J.Y. Ho Dep. at 25:13-19 (ultimate price approval for Chi Mei resided in Taiwan); J.W. Kim Dep. at 46:5-47:3 (ultimate price authority for Samsung in Korea); M.S. Eom Dep. at 36:3-5 (ultimate price authority for Samsung SDI in Korea); Ex. L ¶ 3 (AUO pricing decisions made at corporate headquarters in Taiwan); Freccero Decl. Exs. J ¶ 11 & K ¶ 3 (ultimate price authority for LG Display in Korea).

Regardless of the evidence, however, summary judgment is warranted on Plaintiff's Category Three claims as a matter of law, for separate and independent reasons. Category Three claims stand on a very different legal footing under the FTAIA than Categories One and Two. Category One purchases (purchases by Motorola, Inc. in the U.S.) clearly implicate potential effects on U.S. commerce and are not the subject of this motion. Under this Court's *IPP Order* Plaintiff's Category Two purchases (purchases by Foreign Assignors in foreign countries of LCDs incorporated into phones sold in the U.S.) may also implicate effects on U.S. commerce, the finished handset market. *See* 2011 U.S. Dist. LEXIS 115212, at *34-36. Under the FTAIA, however, this potential effect is no help to Plaintiff, since its Category Two claims are based on alleged foreign injuries, not domestic injuries. *See id.* at *86 (FTAIA distinguishes between claims where "the primary injury to the plaintiff[] was foreign" and claims for "domestic injury" occurring in the U.S.). In addition, under the domestic injury exception's proximate cause requirement, Plaintiff cannot show that an effect on the prices of U.S. finished goods "gave rise to" the injuries of the Foreign Assignors. *See Motorola I*, 2010 U.S. Dist. LEXIS 65037, at *24 ("'[U]nder the FTAIA the domestic effects must occur *first* and *then* proximately cause the foreign antitrust claim.'" (quoting *In re Hydrogen Peroxide*, 702 F. Supp. 2d at 551)).[27]

Unlike Categories One and Two, however, *Category Three consists exclusively of panels that never entered the U.S.* Plaintiff has defined Category Three to consist solely of panels purchased by the Foreign Assignors abroad, and then used to manufacture mobile phones abroad, and then sold to customers abroad. *See* TAC ¶ 187. As a matter of law, no effect on U.S.

[27] Besides, since the Court's decision in *Motorola I*, discovery has shown that Plaintiff *profited* from any effects on the finished handset market in the U.S. Plaintiff's own expert has demonstrated that it passed on any overcharges from LCD purchases at a rate of more than 100%. *See* Ex. 4603 at 74, Figure 29 (calculating that Motorola passed through between 130% and 150% of any overcharge); Bernheim Dep. at 729:19-730:17 (Plaintiff "recouped the overcharge"). That Plaintiff and the Foreign Assignors affirmatively benefitted from any effect on the handset market in the U.S. forecloses any argument that any effect in the U.S. finished goods market "gave rise" to the claims of the Foreign Assignors for Category Two purchases. *See* H.R. Rep. No. 97-686 at 11 ("The domestic 'effect' that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws *prohibit*. For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial effect* within the United States . . . .").

commerce actionable under the Sherman Act occurred with respect to these foreign transactions, and Plaintiff has conceded as much throughout this litigation. Several lines of reasoning confirm this conclusion.

First, to our knowledge no plaintiff has ever successfully invoked the domestic injury exception without basing its claim upon some restraint of trade in the U.S. In the indirect purchaser class cases the Court observed that "Congress passed the FTAIA in an effort to limit the application of American antitrust laws to foreign anticompetitive conduct *when that conduct caused no injury to consumers in the United States*." *IPP Order*, 2011 U.S. Dist. LEXIS 115212, at *11. Similarly, in the AUO criminal proceeding, the Court distinguished between harm to foreign economies versus harm to the U.S. economy. *See United States v. AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 148036, at *5 (N.D. Cal. Dec. 23, 2011) ("The Court agrees with defendants that the 'pecuniary gain from the offense' . . . must be limited to those gains that derive from the conspiracy's effect on the United States."). Courts including the Supreme Court and the Ninth Circuit have consistently drawn this same distinction. *See Empagran I*, 542 U.S. at 161 ("The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . ., however anticompetitive, *as long as those arrangements adversely affect only foreign markets*."); *DRAM*, 546 F.3d at 986 ("The FTAIA thus clarifies that U.S. antitrust laws concern the protection of '*American* consumers and *American* exporters, not foreign consumers or producers.'" (original emphases)); *Turicentro*, 303 F.3d at 305 ("That certain activities might have taken place in the United States is irrelevant if the economic consequences are not felt in the United States economy.").

By definition, Plaintiff's Category Three claims do not arise from any restraint on U.S. trade, and implicate arrangements that "adversely affect only foreign markets." *Empagran I*, 542 U.S. at 161. Any initial restraint of trade as a result of Defendants' conduct would have been felt in foreign commerce to the extent the Foreign Assignors purchased LCDs from Defendants at artificially inflated prices. Any subsequent restraint of trade would have occurred exclusively in foreign commerce, when cell phones were sold in foreign countries containing LCDs bought from

Defendants. American antitrust law cannot reach such transactions, because Defendants' conduct with respect to them "caused no injury to consumers in the United States." *IPP Order*, 2011 U.S. Dist. LEXIS 115212, at *11.

Second, the FTAIA should be construed to promote international comity—"'the respect sovereign nations afford each other by limiting the reach of their laws'"— and to avoid "interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders." *DRAM*, 546 F.3d at 987; *Empagran S.A. v. F. Hoffmann-Laroche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) ("*Empagran II*"). Applying the Sherman Act to LCD transactions that never touch the U.S. at any time would undermine those purposes. For example, a Category Three panel might have been sold by a Japanese Defendant to a Foreign Assignor in China, which incorporated the panel into a mobile phone that was later sold to a consumer in Australia. Japan, China, and Australia each would have a stronger interest than the U.S. in regulating some or all of these transactions. *See Empagran I*, 542 U.S. at 165 ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

That the Foreign Assignors in this case happen to be subsidiaries of a U.S. parent company does not alter these comity principles. The FTAIA was specifically *not* intended to protect U.S. companies when, as here, they choose to set up subsidiaries in foreign markets to conduct business. *See* H.R. Rep. No. 97-686, at 9 ("A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws."); *Turicentro*, 303 F.3d at 300-01 n.5 ("Whether plaintiffs are United States citizens is irrelevant" under the FTAIA).

Third, putting the FTAIA aside, "the Sherman Act itself applies only to conduct in 'trade or commerce *with* foreign nations,'" as distinct from "commerce *between* or *among* foreign nations." *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 426 (5th Cir. 2001) (original emphases) (quoting 15 U.S.C. §§ 1 and 2). "Therefore, we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act." *Id.* The FTAIA confirmed this limitation: "'wholly foreign transactions as well as export transactions are covered by the [FTAIA].'" *See Empagran I*, 542 U.S. at 162-63 (quoting H.R. Rep. No. 97-686 at 9-10). Plaintiff's Category Three purchases are, by definition, "wholly foreign" in this sense. More generally, "Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Empagran I*, 542 U.S. at 169 (original emphasis). Before the FTAIA, the extraterritorial application of the Sherman Act was determined under the judge-made "*Alcoa* test." *See United States v. Aluminum Corp. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945). The *Alcoa* test was simply whether foreign conduct "was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993). Such an effect was conceived as a reduction in supply or an increase in price in a U.S. market. *See, e.g., Alcoa*, 148 F.2d at 444-45. If Plaintiff could not have recovered for its Category Three purchases under the *Alcoa* test—and we know of no authority that it could—then plainly it cannot do so under the FTAIA. *See LSL Biotechnologies*, 379 F.3d at 677-79 (explaining how the FTAIA made the *Alcoa* test more stringent).

It is precisely for these reasons that Plaintiff has repeatedly disclaimed any contention that the Sherman Act applied to its Category Three claims. In *Motorola I* this Court noted Plaintiff's express concession "that it cannot assert any claims based on the sale of LCD panels to Motorola subsidiaries abroad if the panels never entered the United States." 2010 U.S. Dist. LEXIS 65037, at *11-12. And in *Motorola II* Plaintiff once again sought to distinguish Category Two (foreign LCD purchases "intended for incorporation into Motorola's own products in the United States") from Category Three (i.e., claims brought by "foreign companies that purchased abroad and then resold abroad"). Pltf's Opp'n to Defs' Jt. Mtn. to Dismiss SAC at 18. As to the latter, Plaintiff stated that it "was difficult to see why the United States should be concerned about their foreign injury. To the contrary, one would expect foreign governments to protect their consumers and take the lead in vindicating their claims." *Id.*

At the oral argument in *Motorola II*, this Court noted its impression that Plaintiff had conceded away any claims based on panels that never entered the U.S.:

> Counsel for Defendants: [Y]ou noted that Motorola concedes [that] it cannot assert any claims based on the sale of LCD panels to Motorola subsidiaries abroad if the panels never entered into the United States.
>
> The Court: Well, I just made a note that he did it again.

Motorola II Hr'g Tr. at 31:10-15. The Court should take this opportunity to clarify that Plaintiff's Category Three claims are not actionable under the Sherman Act. This is true *even if* Plaintiff could prove "that the price and other terms of purchase were negotiated exclusively by Motorola's procurement teams within the United States." *Motorola II*, 785 F. Supp. 2d at 842. For reasons that are abundantly clear from its own records, it cannot.

CONCLUSION

For all the foregoing reasons, Defendants' respectfully submit that the Court should grant their motion for summary judgment on Plaintiff's claims for overcharges paid by foreign companies, in foreign markets.

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ECF ATTESTATION

I, Derek F. Foran, am the ECF User whose ID and Password are being used to file:

DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ADDRESSING PLAINTIFF'S SHERMAN ACT CLAIM FOR INJURIES IN FOREIGN MARKETS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

In compliance with General Order 45, X.B., I hereby attest that the above listed signatories have concurred in this filing.

Dated: April 3, 2012

MORRISON & FOERSTER LLP

By: /s/ Derek F. Foran
Derek F. Foran

APPENDIX A

GLOBAL COMMODITY TEAM

2000			
Name	**Title**	**Location**	**Employed by**
Michael Duffy	**Global Commodity Manager**	**Scotland**	**Motorola Ltd. (U.K.)**
Michael Healy*	**Regional Commodity Manager—Europe**	**Scotland**	**Motorola Ltd. (U.K.)**
C.F. Cheng	**Regional Commodity Manager—Asia**	**Singapore**	**Motorola Electronics Pte. Ltd. (Singapore)**
Nobuyuki Kimura	**Regional Commodity Manager—Japan**	**Japan**	**Motorola Japan Ltd.**
Carrie Bodak	**Regional Commodity Manager—Americas North**	**Illinois**	**Motorola, Inc.**
Alex Lima	**Regional Commodity Manager—Americas South**	**Florida**	**Motorola, Inc.**

Sources: Ex. 653 at 1 (Commodity Team as of July 20, 1999); Ex. 268 at 3 (Commodity Team as of April 2000); Ex. 471 at 2, 6 (Commodity Team as of Sep. 2000); *see also* Freccero Decl. Ex. H at 27-35 (interrogatory response identifying employer and office locations of Commodity Managers); Ex. 415 (Facilities list identifying location of Foreign Assignors).

* Joined May 2000. *See* Freccero Decl. Ex. H at 34.

APPENDIX A

GLOBAL COMMODITY TEAM

2001			
Name	**Title**	**Location**	**Employed by**
Michael Duffy	**Global Commodity Manager**	**Scotland**	**Motorola Ltd. (U.K.)**
Michael Healy	**Europe Commodity Manager**	**Scotland**	**Motorola Ltd. (U.K.)**
C.M. Lai	**Asia Commodity Manager**	**Singapore**	**Motorola Electronics Pte. Ltd. (Singapore)**
Noboyuki Kimura	**Japan Commodity Manager**	**Japan**	**Motorola Japan Ltd.**
Srikant Inampudi	**Americas Commodity Manager**	**U.S.**	**Motorola, Inc.**
Simon Leach	**Americas Commodity Manager (CGISS/IDEN)**	**U.S.**	**Motorola, Inc.**

Source: Ex. 3454 at 3 (Commodity Team as of Oct. 2001).

APPENDIX A

GLOBAL COMMODITY TEAM

2002			
Name	**Title**	**Location**	**Employed by**
Michael Duffy	**Global Commodity Manager**	**Scotland**	**Motorola Ltd. (U.K.)**
Michael Healy	**Strategic Commodity Manager—Europe, Middle East, Africa**	**Scotland**	**Motorola Ltd. (U.K.)**
C.M. Lai	**Strategic Commodity Manager—Asia**	**Singapore**	**Motorola Electronics Pte. Ltd. (Singapore)**
Nobuyuki Kimura	**Strategic Commodity Manager—Japan**	**Japan**	**Motorola Japan Ltd.**

Sources: Ex. 392 at 9 (Commodity Team as of Mar. 2002); Ex. 393 at 38 (Dec. 2002).

APPENDIX A

GLOBAL COMMODITY TEAM

2003			
Name	**Title**	**Location**	**Employed by**
Michael Duffy	**Global Commodity Manager**	**Scotland**	**Motorola Ltd. (U.K.)**
Michael Healy	**Commodity Manager**	**Scotland**	**Motorola Ltd. (U.K.)**
Nobuyuki Kimura	**Commodity Manager**	**Japan**	**Motorola Japan Ltd.**
C.M. Lai*	**Commodity Manager**	**Singapore**	**Motorola Electronics Pte. Ltd. (Singapore)**
K.J. Lim**	**Commodity Manager**	**Singapore**	**Motorola Electronics Pte. Ltd. (Singapore)**
Alex Lima***	**Commodity Manager**	**Illinois**	**Motorola, Inc.**

Source: Ex. 672 at 1 (Commodity Team as of Feb. 2003).

* Left in July 2003. *See* Lai Dep. at 62:19-25.

** Joined in November 2003. *See* Freccero Decl. Ex. H at 31.

*** Documents suggest Mr. Lima rejoined the team sometime in late 2003. *See, e.g.*, Ex. 71 (listing Lima as attendee at Japan negotiations in December 2003).

APPENDIX A

GLOBAL COMMODITY TEAM

2004			
Name	**Title**	**Location**	**Employed by**
Michael Healy	Sourcing Director	Scotland	Motorola Ltd. (U.K.)
Michael Duffy*	Global Commodity Manager	Scotland	Motorola Ltd. (U.K.)
Angela Ford**	Global Commodity Manager	Illinois	Motorola, Inc.
Nobuyuki Kimura	Commodity Manager—Japan	Japan	Motorola Japan Ltd.
Alex Lima	Commodity Manager—Americas	Illinois	Motorola, Inc.
K.J. Lim	Commodity Manager—Singapore	Singapore	Motorola Electronics Pte. Ltd. (Singapore)
Jim Murray	Commodity Manager—IDEN	Illinois	Motorola, Inc.
GN Low	Commodity Manager—CGISS	Malaysia	Motorola Technology Sdn. Bhd.
Alan Chen	Commodity Manager—IESS/ACES	Illinois	Motorola, Inc.

Sources: Ex. 69 at 3 (Commodity Team as of Feb. 2004); Lima Dep. at 17:9-14 (Joined in 2004).

* Left in Mar. 2004. *See* Freccero Decl. Ex. H at 34.

** Joined in Sep. 2004. *See* Freccero Decl. Ex. H at 34.

APPENDIX A

GLOBAL COMMODITY TEAM

2005			
Name	**Title**	**Location**	**Employed by**
Pat Zaun*	Director of Procurement, Displays & Imagers	Hong Kong	Motorola, Inc.
Angela Ford	Global Commodity Manager	Illinois	Motorola, Inc.
Nobuyuki Kimura	Strategic Commodity Manager	Japan	Motorola Japan Ltd.
K.J. Lim	Strategic Commodity Manager	Singapore	Motorola Electronics Pte. Ltd. (Singapore)
Alex Lima	Strategic Commodity Manager	Illinois	Motorola, Inc.
Jeff Rogero**	Strategic Commodity Manager	Illinois	Motorola, Inc.
Jim Murray	Commodity Manager—IDEN	Illinois	Motorola, Inc.
J.S. Palani	Commodity Manager—GEMS	Malaysia	Not Known
Michael Bonnet	Commodity Manager—GEMS	Illinois	Not Known

Sources: Ex. 65 at 4 (Commodity Team as of Jan. 2005); Ex. 267 at 4 (Commodity Team as of March 2005).

* Joined in June 2005. *See* Ford Dep. 20:21-24, 33:23-34:18; *see also* Freccero Decl. Ex. H at 33.

** Became a Strategic Commodity Manager sometime in late 2005. *See* Rogero Dep. at 29:18-22.

APPENDIX A

GLOBAL COMMODITY TEAM

2006			
Name	**Title**	**Location**	**Employed by**
Pat Zaun	Director of Procurement, Displays & Imagers	Hong Kong/ Japan	Motorola, Inc.
Toshinari Takayama*	Global Commodity Manager	Japan	Motorola Japan Ltd.
Angela Ford	Global Commodity Manager	Illinois	Motorola, Inc.
K.J. Lim	Senior Commodity Manager	Singapore	Motorola Electronics Pte. Ltd. (Singapore)
Nobuyuki Kimura	Strategic Commodity Manager	Japan	Motorola Japan Ltd.
Alex Lima	Strategic Commodity Manager	Illinois	Motorola, Inc.
Jeff Rogero	Strategic Commodity Manager	Illinois	Motorola, Inc.

Sources: Ex. 269 at 1 (Commodity Team as of January 2006); *id.* at 3 (Commodity Team as of May 2006); Ex. 208 at 5 (Commodity Team as of May 2006); Ex. 67 at 3 (Commodity Team as of May 2006); Ex. 66 at 8 (Commodity Team as of Sep. 2006).

* Joined in May, 2006. *See* Ford Dep. 35:13-39:2 (discussing re-organization that occurred in 2006); *see also* Freccero Decl. Ex. H at 32.

EXHIBIT 9

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

This Document Relates To:

Motorola Mobility, Inc. v. AU Optronics Corporation, et al., C 09-5840 SI

Master Docket No. 07-m-1827 SI
Case No. C 09-5840 SI

PLAINTIFF MOTOROLA MOBILITY, INC.'S OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

Date: July 13, 2012
Time: 9:00 a.m.
Judge: Hon. Susan Y. Illston
Courtroom: 10

DOCUMENTS SUBMITTED UNDER SEAL AND CHAMBERS COPY

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PRIOR RELEVANT ORDERS

Pursuant to the Court's April 9, 2012 Order, below is a list of the prior orders of the Court that address substantially similar arguments as those raised in this brief:

Date	Case No.	Doc. No.	Argument Raised
6/28/10	*Motorola v. AU Optronics*, 09-5840-SI ("*Motorola I*")	41	Granting motion to dismiss based on FTAIA, with leave to amend.
6/29/10	*Nokia v. AU Optronics*, 09-5609-SI	37	Granting motion to dismiss based on FTAIA, with leave to amend.
3/16/11	*Dell v. Sharp*, 10-1064-SI	40	Denying Defendants' motion to dismiss, because the "domestic injury" exception to the FTAIA applies to Defendants' anticompetitive conduct.
3/28/11	*Motorola v. AU Optronics*, 09-5840-SI ("*Motorola II*")	77	Denying Defendants' motion to dismiss, because the "domestic injury" exception to the FTAIA applies to Defendants' anticompetitive conduct.
8/29/11	*Electrograph v. Epson*, 10-0117-SI	89	Denying Defendant Mitsui Taiwan's motion to dismiss, because the "domestic injury" exception to the FTAIA applies to Defendants' anticompetitive conduct.
10/5/11	*In re TFT-LCD Antitrust Litig.*, 07-1827-SI	3833	Denying Defendants' motion for summary judgment, because the "domestic injury" exception to the FTAIA applies to Defendants' anticompetitive conduct.
11/9/11	*MetroPCS v. AU Optronics*, 11-0829-SI	76	Denying Defendant Mitsui Taiwan's motion to dismiss, because the "domestic injury" exception to the FTAIA applies to Defendants' anticompetitive conduct.
2/15/12	*Sony v. LG Display*, 10-5616-SI	50	Denying Defendants' motion to dismiss, because the "domestic injury" exception to the FTAIA applies to Defendants' anticompetitive conduct.

Plaintiff Motorola Mobility, Inc. ("Motorola") files this opposition to Defendants' April 3, 2012 Joint Motion for Summary Judgment Addressing Plaintiff's Sherman Act Claim for Injuries in Foreign Markets (the "Motion"). For the reasons set forth below, Defendants' Motion should be denied.

INTRODUCTION

By Order entered March 28, 2011, this Court denied a similar motion to dismiss brought by Defendants based on the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA"), on the grounds that "[t]his case is significantly different from the cases" where courts dismissed antitrust claims under the FTAIA. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 785 F. Supp. 2d 835, 842 (N.D. Cal. 2011) ("*Motorola II*"). The Court reasoned that "Motorola is not a foreign company alleging injury based on wholly foreign transactions and conduct," as was the case in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ("*Empagran I*"). *Id*. Rather, as the Court acknowledged, Motorola is a U.S. company based in Illinois that alleges "a conspiracy between defendants that involved both domestic and foreign conduct" and that it "negotiated and set" a "single global price" for LCD panels in the United States that "was effective worldwide," resulting in the "domestic and foreign prices" paid by Motorola being "one and the same." *Id*. at 842, 844. In turn, the Court found that "[t]hese allegations establish a concrete link between defendants' price-setting conduct . . . its domestic effect . . . and the foreign injury suffered by Motorola and its affiliates." *Id*. at 842-43.

With discovery now complete, the core of these allegations remains true: Motorola's key decisions regarding the procurement of LCD panels, including all decisions about which LCD panel vendors it would use, how its LCD panel business would be distributed, and how much it would pay for LCD panels were made by Motorola employees in the United States. Robinson Decl. at ¶¶ 3-6, 9. This resulted in the determination in the United States of a single price that applied globally to all Motorola facilities around the world. *Id*. at ¶ 7. The fact that some negotiations and administrative steps in Motorola's procurement process may have taken place outside the United States does not defeat the "concrete link" recognized by the Court. The most that Defendants' incomplete and misleading version of the facts can accomplish is to raise genuine issues of fact for trial.

This is especially true in light of the undisputed fact that Defendants themselves targeted Motorola in the United States, not only in their sales and marketing of LCD panels, but also in their admitted efforts to fix the prices of panels sold to Motorola. Defendants created subsidiaries in the United States to interact with Motorola, they sent personnel to the United States to meet with Motorola, they knew that large numbers of Motorola mobile devices containing price-fixed LCD panels would be imported into the United States, and they engaged in conduct in the United States that advanced the objectives of their cartel. These illegal activities artificially-inflated the single, global price for LCD panels that Motorola determined in the United States.

For these reasons, and as this Court decided previously, all of Motorola's damages claims fall within the "domestic effects" exception to the FTAIA. Moreover, a substantial portion of those claims also fall within the "import trade and commerce" exception to the FTAIA. Application of either exception provides a basis to deny Defendants' Motion.

STATEMENT OF FACTS

In an effort to bolster their argument at summary judgment, Defendants have painted a skewed picture of Motorola's LCD panel procurement process as being disaggregated and decentralized, as if Motorola's foreign subsidiaries acted independently in choosing LCD panel vendors and setting LCD panel prices. Nothing could be further from the truth. Motorola's LCD panel procurement is and always has been centered in Illinois. The overarching strategy for and all decisions relating to the prices Motorola pays for LCD panels, the LCD panel vendors it uses, and how it allocates its LCD panel business are all made in the United States. As a global corporation, that strategy and those decisions are then effectuated by Motorola employees located both in the United States and at Motorola manufacturing facilities abroad. Moreover, conspicuously absent from the picture Defendants attempt to paint is any mention whatsoever of the fact that, because Motorola's procurement organization was centered in Illinois, Defendants not only targeted their marketing activities at Motorola in the United States, but also directed their illegal conduct at Motorola in the United States. The sharp contrast between the story presented by Defendants and the facts set forth below show the degree to which a question of fact exists, and that alone warrants denial of Defendants' Motion.

A. Motorola's LCD Panel Procurement Was Centered In The United States.

Motorola is a U.S. company based in Libertyville, Illinois.[1] Originally founded in 1928 as the Galvin Manufacturing Corporation headquartered in Chicago, Motorola has grown into a large, multinational corporation engaged in the manufacture of a wide array of electronic products, including mobile devices. However, even as Motorola expanded, one thing remained the same: leadership and key decision making responsibilities have remained centered in Illinois. This includes the procurement of LCD panels, a key component of the mobile devices Motorola manufacturers. As one Motorola employee based in Singapore testified, "[i]t was made clear to all of us that the chief procurement officer" in the United States "needed to approve all [LCD panel] pricing . . . with the supplier." Ex. 372, Tay Dep. at 264:15-19.[2]

During the Relevant Period, there were two groups within Motorola's supply chain organization that had some hand in the acquisition of LCD panels: (1) the Display Commodity Team, which provided Motorola procurement executives based in the United States with the information they needed to make strategic decisions about LCD panel vendors and pricing; and (2) the Purchasing Department, which implemented the administrative and logistical side of ordering LCD panels from vendors at prices approved by Motorola procurement executives based in the United States.

1. Motorola's Procurement Policies.

Motorola's procurement practices and policies required that all final LCD panel pricing be determined by supply chain executives based in the United States before the pricing could be put

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[1] Motorola was formed in 2011 when Motorola, Inc. separated into two distinct companies: (1) Motorola Mobility, Inc.; and (2) Motorola Solutions, Inc. Motorola is the successor to Motorola, Inc.'s mobile handset business. Since its founding in 1928, Motorola, Inc. was headquartered in Illinois.

[2] All exhibits referenced herein are attached to the concurrently filed Declaration of Joshua Stokes ("Stokes Decl.") unless otherwise specified. References to the "Freccero Decl." are to the declaration submitted concurrently with Defendants' Motion.

into effect. Robinson Decl. at ¶ 4; *see also* Ex. 372, Tay Dep. at 263:25-267:25.[3] As Janet Robinson, Motorola's Vice President, Procurement, testified:

> The category managers don't have authority to finalize and enter into that contract or agreement [for LCD panels] without approval from their leadership . . . the head of supply chain or the head of -- Procurement for Motorola.

Ex. 363, Robinson Dep. at 118:23-120:10. Ms. Robinson further testified that these employees "were all based in the U.S." Ex. 363, Robinson Depo. at 119:20-120:10. Similarly, Theresa Metty, Motorola's Chief Procurement Officer during the Relevant Period, testified:

> The commodity managers resided -- I mean, again, their physical location, as I said earlier, to me wasn't highly relevant. The people that made the decision about sourcing resided in Illinois. So headquarters made the final decision about who we were going to buy from, what price we would pay. The commodity managers would have gathered information, developed potential suppliers for consideration, brought those recommendations to this group in Illinois for approval.

Ex. 359, Metty Dep. at 259:3-16. It was the job of members of Motorola's Display Commodity Team to gather and organize relevant pricing and supply information across Motorola's global LCD panel supply base and then present that information to executives in the United States for final decisions on which LCD panel suppliers Motorola would use, what portion of Motorola's LCD panel business each supplier would receive, and what prices Motorola would pay for LCD panels. Ex. 363, Robinson Dep. at 118:23-120:10, 121:06-122:18.

Motorola's LCD panel procurement was so highly centralized in the United States because LCD panels were one of the most expensive and essential components Motorola purchased for use in its mobile devices. Robinson Decl. at ¶ 8; *see also* Ex. 359, Metty Dep. at 19:11-17, 22:12-23:01, 32:20-33:20, 28:25-33:20, 35:25-37:22, and 261:14-262:09. This centralized procurement structure enabled Motorola to maximize its leverage when procuring LCD panels. Robinson Decl. at ¶ 8; Ex. 359, Metty Dep. at 35:25-37:22, 261:14-262:09.

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[3] The following are examples of these policies: Exs. 1-4 (2003 Contract Signing Authority Policy); Ex. 5; Ex. 6 at 425, 433; Ex. 7; Ex. 8 at 241; Ex. 9 at 378; Ex. 10 at 341-42, 344, 354; Ex. 11 at 501.

2. Motorola's Display Commodity Team.

Once a mobile device was designed by Motorola, it was the responsibility of the Display Commodity Team centered in Illinois to determine the strategy for procuring the LCD panels used in that device. Ex. 359, Metty Dep. at 31:14-32:02; Ex. 367, Singh Dep. at 252:19-253:1; Ex. 336, Ford Dep. at 44:5-20; Ex. 363, Robinson Dep. at 82:22-84:12. Because of the importance of LCD panels in Motorola devices, the Display Commodity Team controlled LCD panel procurement across all of Motorola's business divisions. Ex. 359, Metty Dep. 28:25-33:20.

The Display Commodity Team included a number of Commodity Managers and was headed by a Global Commodity Manager, who in turn reported to a Director of Sourcing. The Director of Sourcing reported to a Vice President, who oversaw procurement of mobile displays.[4] At all times during the Relevant Period, the Vice President responsible for overseeing display procurement was located in the United States. Ex. 363, Robinson Dep. at 118:7-120:10 (testifying that Vice Presidents and more senior procurement executives at Motorola were all based in the United States). Although the Motorola employees who held the positions of Director of Sourcing, Global Commodity Manager, and Commodity Manager were sometimes located outside the United States, they always reported into the procurement executives based in the United States, who had final decision making authority.[5] Motorola's procurement organization was structured as follows:

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[4] Freccero Decl., Ex. 48 (Motorola organizational chart showing commodity team members and directors of sourcing reporting to VP Peter Viohl); Ex. 359, Metty Dep. at 31:13-32:2 (Motorola's global commodity team presented their recommendations to the VP and higher executives in the United States); Ex. 12 at 859 (as of 2003, Theresa Metty was Senior VP and John Miller was Procurement VP at Motorola in the U.S.); Ex. 14 at 293 (as of 2005, D.K. Singh was Procurement VP at Motorola in the U.S.).

[5] Ex. 359, Metty Dep. at 259:9-16 ("The people that made the decision about sourcing resided in Illinois. So headquarters made the final decision about who we were going to buy from, what price we would pay. The commodity managers would have gathered information, developed potential suppliers for consideration, brought those recommendations to this group in Illinois for approval.").

Location	Organizational Structure	Responsibilities
UNITED STATES	• Sr. VP Supply Chain/Chief Procurement Officer • VP of Procurement	• Developed and set LCD panel procurement strategy • Approved selection of LCD panel suppliers • Approved final LCD panel pricing • Approved final LCD supplier share allocation • Instituted and enacted Rapid Sourcing Initiative
U.S. and/or ABROAD	• Director of Sourcing • Global Commodity Manager • Commodity Managers	• Engaged in localized pricing negotiations subject to final approval by senior management in United States • Recommended share awards, pricing, and LCD suppliers to management.

The Display Commodity Team's first responsibility with respect to procuring LCD panels for Motorola was to identify and select LCD panel suppliers with the appropriate level of technical ability and production capacity necessary to meet Motorola's needs.[6] The Display Commodity Team issued Requests For Quotations ("RFQs") to LCD panel suppliers detailing the technical specifications and other requirements for the displays.[7] Procurement leadership based in Illinois had ultimate responsibility for approving the vendors that supplied LCD panels to Motorola pursuant to these RFQs.[8] Beginning in the summer of 2005, Motorola shifted the manner in which it selected its LCD panel suppliers to what was called the Rapid Sourcing Initiative ("RSI"). RSI was a strategic sourcing process geared toward reducing the total number of LCD panel suppliers used by Motorola and awarding those suppliers a percentage of Motorola's total LCD panel spend.[9] The RSI supplier selection and negotiation process was

[6] Ex. 367, Singh Dep. at 233:9-235:19 (For a source selection process, Motorola would "invite the suppliers for an RFP process," and then the team would "look at those responses and say which suppliers are truly qualified to provide the products.").

[7] RFQs were often issued through a system called the Motorola Internet Negotiation Tool, which was run out of the United States. *See, e.g.*, Ex. 15 at 665; Ex. 16 at 213.

[8] Ex. 363, Robinson Dep. at 122:1-11 (Motorola's practice and policy was that approval authority resided only with the senior procurement officers in the U.S.), 131:21-137:15 (referencing Freccero Ex. 48, VP Pete Viohl had to approve pricing); Ex. 359, Metty Dep. at 31:13-32:2 (the global commodity team for displays was responsible for "developing the strategy for the corporation for the purchase of that particular category of spend" and then presenting their recommendations to procurement officers located in "Schaumburg and Libertyville" Illinois).

[9] Ex. 364, Robinson Dep. at 343:12-16 (Motorola held an RSI in 2005 where certain suppliers were selected for an award of a share of Motorola's business); Ex. 367, Singh Dep. at 153:8-154:17 (an RSI steering committee makes decisions on the successful bidders); Ex. 333, Cawley Dep. at 42:16-43:11 (for RSI, Motorola "made it clear" that it was "going to award certain chunks of business to a fewer number of suppliers and the awards would be based on a basket of quotes (Continued…)

controlled entirely by employees located in Illinois. Ex. 327, Akins Dep. at 38:20-39:15, 51:04-24, 314:21-316:23; Ex. 17 at 202 (Motorola email to Samsung stating that "[o]fficial Motorola award notification" in connection with the RSI "will come from Motorola Libertyville"); Ex. 18.[10]

The Display Commodity Team's second responsibility in procuring LCD panels for Motorola was to engage potential LCD panel suppliers in pricing negotiations in order to establish a single LCD panel price that would apply to Motorola's operations around the world. Ex. 359, Metty Dep. at 90:10-24; Ex. 373, Waldron Dep. at 234:17-236:18; Ex. 330, Bond Dep. at 214:04-215:02. The team typically negotiated with LCD panel suppliers on an annual basis in connection with supplier selection and price negotiations for the following year. Ex. 8 at 249.[11] During the year, there also were additional negotiations relating to existing products and new product introductions. *See, e.g.*, Exs. 26-68, 219-325. The price quotations made during these negotiations were in U.S. dollars at Motorola's request. Robinson Decl. ¶ 9; Ex. 330, Bond Dep. at 214:04-215:02; Ex. 345, Imaya Dep. at 122:01-11; Ex. 358, Matsuura Dep. at 328:05-09; Ex. 373, Waldron Dep. at 234:17-236:18.

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for various LCD displays as well as our sense that there was good quality and supply reliability from that supplier").

[10] In connection with the RSI process, LCD panel vendors first submitted bids to the "RSI Team," which consisted entirely of Motorola employees based in Libertyville, Illinois, including Motorola's Global Commodity Manager. The RSI Team would then report its recommendations to an "RSI Steering Committee," which also consisted entirely of Motorola executives based in Libertyville, Illinois, including the Senior Vice President of Supply Chain, the Chief Procurement Officer, and Vice President of Procurement for Mobile Devices. Ex. 327, Akins Dep. at 14:22-15:24; 39:01-15; Ex. 333, Cawley Dep. at 23:16-19; Ex. 18 at 913. Upon approval by the RSI Steering Committee, LCD panel vendors were notified of the results by the Global Commodity Manager from Motorola's headquarters in Libertyville, Illinois. Exs. 19-25. The RSI award letters set the terms for the future supply of LCD panels by the winning vendors. Defendants argue that the proposed "RSI award contract[s] were never executed," but they are confusing two points. As they well know, the percentage awards, pricing, and other conditions were put into effect after the RSI selection process was completed, even though the Corporate Supply Agreements were not signed until a later date. All other aspects of the awards, including price, were in force.

[11] On pages 13 through 17 of their Motion, Defendants focus on a single negotiation meeting each year, but ignore the pre- and post-negotiation meetings, emails, and conference calls with Motorola's U.S. employees and involving Defendants' U.S. employees that made up the negotiation process prior to an award. *See, e.g.*, Ex. 16 at 210, 215; Ex. 15 at 665, 668; Exs. 26-32; Ex. 33 at 207, 210-12; Ex. 34 at 543, 547; Ex. 35 at 610; Ex. 36 at 651-52; Ex. 37 at 461-64; Exs. 38-39.

For logistical reasons, these negotiations took place in person both in the United States and abroad, as well as through email exchanges with Motorola employees based in the United States.[12] In fact, documents cited in Defendants' own Motion refer to numerous meetings and communications with Motorola in the United States.[13] Because Motorola's LCD panel supply base was global in reach, the negotiations were often initiated by Commodity Managers who were located in proximity to and/or were the main points of contact for a specific vendor. Ex. 355, Lima Dep. at 27:03-27:20; Ex. 359, Metty Dep. at 38:12-39:24. Although these employees were "authorized to have meetings and gather information," they were "not [authorized] to make final approvals and decisions on pricing and selection." Ex. 363, Robinson Dep. at 94:21-95:12. Instead, they synthesized the information they gathered and "presented and shared [that

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[12] *See, e.g.*, Ex. 27 (Motorola presentation showing October 2000 annual pre-negotiations in Plantation, FL); Ex. 40 (Motorola schedule showing same); Ex. 41 (July 2003 Sharp document indicating "[p]lanning meeting in Libertyville [IL] on July 18th to discuss pricing for [various Motorola] programs"); Ex. 42 (July 2003 Sharp document indicating Motorola would have three days of negotiations in Chicago, IL with Sharp, Toshiba, and Samsung); Ex. 43 (Motorola document noting July 2003 Schaumburg, IL contract negotiations); Ex. 44 at 667 (February 2004 Motorola presentation indicating pre-negotiations for 2004-05 contract cycle with all suppliers in Libertyville, IL); Ex. 45 (Motorola presentation showing that final display negotiations for 2004 would be held in July 2004 in Chicago, IL); Ex. 46 (November 2004 Epson email from Jesse Waldron in Illinois thanking Angela Ford and Alex Lima of Motorola in Illinois for meeting to discuss Razr pricing); Ex. 47 (January 2005 Epson email from Patty Smith in Illinois to Angela Ford of Motorola in Illinois sending 2005 quotes for Motorola Razr and Siliqua); Ex. 48 (May 2005 Sharp email regarding meeting with Motorola in U.S.); Ex. 49 (August 2005 Sharp email noting that Motorola had its RSI meeting with Sharp in Libertyville, IL); Ex. 50 (Sharp email noting that Yasuhisa "Happy Jack" Iida and others discussed pricing with Motorola at meeting in Illinois on May 22, 2006); Ex. 51 (April 2005 Sharp email from Happy Jack Iida to Sharp employees based in the U.S. requesting that they arrange a meeting between Motorola and Sharp's Mr. Kitayama in Libertyville, IL); Ex. 52 (March 2003 Sharp email from John Capp regarding a proposed meeting with Motorola in Chicago, IL to review pricing); Ex. 53 (July 2003 Sharp email from Qais Sharif referring to Sharp meeting with Motorola in Chicago, IL); Ex. 28 (Motorola document reflecting pre-negotiation with Philips in Schaumburg, IL in September 2002); Ex. 29 (same with respect to Sanyo); Ex. 30 (same with respect to Toshiba); Ex. 16 (same with respect to Samsung in July 2003); Ex. 39; Ex. 54 (Motorola RSI pre-negotiation meeting in Illinois); Ex. 55 (same); Ex. 56 (February 2006 price negotiation in Libertyville, IL); Ex. 57 at 22-23, 26 (Nov. 2004 price negotiation in Libertyville, IL); Ex. 58 (Sept. 12, 2005 RSI price negotiation at Motorola's Winchester, IL office); Ex. 60 at 110-11, 114, 117; Ex. 61 at 81, 84; Ex. 62; Ex. 63 at 4058; and Ex. 64 at 089. There are far more instances where Motorola met or communicated with Defendants in the United States. Additional examples of such meetings and communications have been attached to the Stokes Declaration as Exs. 219 to 325.

[13] *See, e.g.*, Freccero Decl., Exs. 9 at 488 ("Negotiations held in July 03 @ Schaumburg"); 16 at 899; 19 at 944; 66 at 140; 75 at 396; 78 at 525; 97; 98; 107; 172 at 396; 176 at 849; and 191 at 649-50.

information] with the leadership" based in Illinois "for final approval and decisions." Ex. 359, Metty Dep. at 73:10-73:25, 76:10-77:20, 81:3-83:02, 90:10-93:16; Ex. 363, Robinson Dep. at 94:21-95:12. As Jeff Rogero, a Motorola Commodity Manager explained, "Motorola's [Display Commodity Team] would negotiate the best possible price with the supplier," and once those negotiations were complete, the "[Display Commodity Team] would meet and discuss the possible share, award allocation, and make recommendations to our management as far as the share and award allocation for approval." Ex. 365, Rogero Dep. at 437:10-438:02. Notably, Defendants do not cite this portion of Mr. Rogero's testimony when they imply that he testified that final agreements on pricing were approved by Motorola outside of the United States.

In fact, Defendants themselves knew that the Motorola employees they were interacting with on a daily basis did not have final pricing authority and that the pricing information those employees collected would be sent to Motorola executives in the United States for final approval. For example, one competitor communication between Defendants Epson and Toshiba specifically targeting Motorola refers to a Motorola Commodity Manager based in Singapore (often called a "sponsor" by Motorola or an LCD panel supplier) and states that the individual "possesses no powers of decision therefore negotiation would be with the US." Ex. 66 at 899. And in 2003, Toshiba wrote that it considered its "verbal" commitment from Motorola on the Triplet phones to be "weak" and "[p]recisely because of that . . . getting an official award from John Miller/Janet Robinson [in the United States] is important." Ex. 67; *see also* Ex. 65. Defendants knew that, as a U.S. company, Motorola centered its decision making in the United States.

Similarly, Defendants have asserted that their employees, who engaged in these pricing negotiations with Motorola, did not have final pricing authority and, therefore, needed approval from corporate headquarters before they could enter into binding agreements with Motorola on price. Freccero Decl. Exs. 204-205; Ex. 373, Waldron Dep. at 81:20-84:6; Ex. 369, P. Smith Dep. at 70:3-17; Ex. 330, Bond Dep. at 143:20-144:15; Ex. 366, Sharif Dep. at 95:3-9, 280:3-12; Ex. 342, Iida Dep. at 28:23-30:19; Ex. 375, Yun Dep. at 295:13-296:7.

Motorola's procurement policies required that all price quotes from the Display Commodity Team be reviewed and final decisions be made by the appropriate Vice President or higher ranking executive in the Supply Chain, all of whom were based in the United States during the Relevant Period. Robinson Decl. at ¶ 4; Ex. 372, Tay Dep. at 263:25-267:25; Ex. 363, Robinson Dep. at 118:7-120:10; Exs. 1-8. These decisions were generally made during the regular calls and meetings held among the members of the Display Commodity Team and management. Robinson Decl. at ¶ 6; Ex. 359, Metty Dep. at 91:21-93:16; Ex. 363, Robinson Dep. at 121:06-122:18. The price determined in the United States then applied globally to all Motorola manufacturing facilities ordering LCD panels for incorporation into Motorola mobile devices. Robinson Decl. at ¶ 7; Ex. 359, Metty Dep. at 90:10-24; Ex. 329, Bodak Dep. at 166:25-167:07. As Epson's own U.S.-based employee, Jesse Waldron, testified: "there was one global price. In other words, wherever Motorola would purchase [LCD panels] – in different facilities Motorola would purchase the product, they would all purchase at the, quote-unquote, Motorola price." Ex. 373, Waldron Dep. at 235:6-24; *see also* Ex. 330, Bond Dep. at 214:4-16.

Theresa Metty, Motorola's Chief Procurement Officer during the Relevant Period, summarized the LCD panel vendor selection and pricing process in which executives at the top of the supply chain organization

> set the strategy for procurement, decided who we were going to do business with, had commodity teams that reported in to the global procurement organization that . . . were responsible for negotiating prices, for finding, developing sources of supply around the world and bringing those back saying, you know, to the global procurement team to present them for consideration for a procurement agreement with Motorola overall.

Ex. 359, Metty Dep. at 30:03-32:17; *see also* Ex. 363, Robinson Dep. at 82:22-88:17; Ex. 336, Ford Dep. at 46:4-14; Ex. 355, Lima Dep. at 130:13-131:25; Ex. 68. This same approval process was in place throughout the Relevant Period and applied to all LCD panels purchased by Motorola, regardless of whether those panels were delivered to a Motorola facility in the United States or abroad, and regardless of whether the panels were ultimately incorporated into mobile devices sold in the United States or abroad. Robinson Decl. at ¶ 7.

3. <u>**Motorola's Purchasing Department.**</u>

In an attempt to convince the Court that Motorola's procurement process was based outside the United States, Defendants wrongly conflate Motorola's Purchasing Department with the Display Commodity Team discussed above. However, the two departments were entirely separate and had distinct responsibilities. Unlike the Display Commodity Team, the Purchasing Department had no responsibility for or role in selecting LCD panel suppliers, negotiating LCD panel pricing, or awarding percentages of Motorola's total LCD panel spend. Robinson Decl. at ¶ 11. As E.L. Tay, Motorola's Vice President of Global Operations, testified:

> Q. Are you saying that members of the purchasing team will not be asked to discuss or negotiate price with a supplier?
>
> A. As I said, the price negotiation, the responsibility of price negotiation resides with the procurement team.
>
> Q. Yeah. But who actually does it, don't members of the purchasing team actually conduct the negotiations?
>
> A. The price negotiation with the supplier is always done by the commodity team.

Ex. 372, Tay Dep. at 66:6-22.

Instead, as every Motorola employee has testified at deposition, the Purchasing Department served solely in an administrative capacity as the execution arm of the Motorola supply chain, issuing "purchase orders based on the pricing and award share negotiated and awarded by the [Display Commodity Team] in the U.S." Ex. 363, Robinson Dep. at 130:13-131:20, 175:06-176:01; Ex. 359, Metty Dep. at 225:09-227:06, 257:02-259:19; Ex. 372, Tay Dep. at 54:06-61:05; Ex. 347, Khoo Dep. at 133:23-135:24; Ex. 348, Khoo Dep. at 326:01-327:10; Ex. 339, Guo Dep. at 47:5-25, 63:16-64:09; Ex. 340, Guo Dep. at 233:07-235:02; Ex. 336, Ford Dep. at 283:17-284:4.

Further, the quantities requested in the purchase orders sent by the Purchasing Department were based on planning decisions made at and sent from Motorola's headquarters in Illinois. Ex. 372, Tay Dep. at 54:06-61:05, 150:5-10; Ex. 347, Khoo Dep. at 294:06-296:09; Ex. 367, Singh Dep. at 250:24-252:18, 351:17-352:06; Ex. 331, Brda Dep. at 235:22-236:21; Ex. 363, Robinson Dep. at 43:25-44:13, 130:16-131:09, 175:06-176:01. As a result, the Purchasing Department had zero discretion to negotiate LCD panel pricing with suppliers and had no authority to determine the volume of the LCD panels it requested. Ex. 372, Tay Dep. at 66:03-22; Ex. 363, Robinson

Dep. at 87:2-89:14. The Purchasing Department ultimately reported to Motorola executives located in the United States. *See*, *e.g.*, Ex. 69.

In their Motion, Defendants ask the Court to conclude that members of the Purchasing Department based in China were somehow involved in negotiating Motorola LCD panel prices by pointing to instances where those members may have received price quotations. Motion at 18. However, as Tracy Guo, a Motorola employee based in China during the Relevant Period, testified, the Purchasing Department did not receive price quotes as part of the pricing negotiation process; rather, it received "official" price quotes for "documentation purposes" only after the Display Commodity Team concluded its negotiations with LCD panel vendors. Ex. 340, Guo Dep. at 252:09-253:11, 353:23-355:04; Freccero Decl. Ex. 197. Indeed, a document cited in Defendants' own Motion illustrates this process: in December 2005, Sanyo Epson Imaging Devices ("SEID") emailed Ms. Guo to inform her of a possible price change that "our US members and commodity team is discussing." Ex. 70 at 453. SEID later emailed Ms. Guo again to tell her that the pricing discussions had concluded and that SEID had received "approval . . . from Angela [Ford]," a U.S.-based Motorola Global Commodity Manager, to charge a new price. *Id*. at 452. In response, Ms. Guo asked SEID to provide her with the "official quotation," which SEID then sent to Mr. Kimura of the Motorola Commodity Team. *Id.* The SEID employee then asked Mr. Kimura to confirm the price and forward to the Motorola buyers in China so they could issue the purchase order, and Mr. Kimura did so. *Id*.

Likewise, Defendants' effort to convince the Court that members of Motorola's Purchasing Department based at foreign manufacturing facilities somehow "approved" the prices negotiated by the Display Commodity Team is simply not true. Ms. Guo specifically testified that the Purchasing Department did not approve such prices, but rather that a purchasing manager simply reviewed purchase orders and supporting documentation to confirm that a buyer had correctly entered the price approved by the Display Commodity Team. Ex. 340, Guo Dep. at 353:23-355:04; *see also* Freccero Decl. Ex. 197. Indeed, documents cited by Defendants illustrate that Ms. Guo checked with the Display Commodity Team, not the Purchasing

Department, when she needed to confirm that the price quotes submitted by Defendants had been approved. *See*, *e.g.*, Exs. 71- 74; Freccero Decl. Exs. 146-148, 154-167, and 169.

Moreover, the Motorola subsidiary that issued purchase orders for approximately half the dollar value of all LCD panel purchases at issue in this case – the Motorola Trading Center ("MTC") located in Singapore – was considered a branch of the Motorola corporate parent in Illinois under U.S. tax law, and all of the profits and losses for MTC were treated as profits and losses for the U.S. parent company. Ex. 371, Storm Dep. at 23:09-26:25. As Sharon Storm, Motorola's Senior Director of International Tax, testified: "the tax department believed that there was no economic argument for keeping the profits off shore, [because] the parent company is responsible for the overall handling of its supply chain . . . and . . . the overall purchasing power of the company belonged to the parent company." Ex. 371, Storm Dep. at 26:10-16.

4. <u>Motorola's Supply Agreements.</u>

In their Motion, Defendants repeatedly assert that they are entitled to summary judgment because the purchase orders issued by Motorola constitute the exclusive purchase agreement between Motorola and its LCD panel suppliers. Motion at 18. That is not true. During the Relevant Period, Motorola's supply agreements were evidenced by multiple writings governing multiple aspects of the supply relationship. As support for their assertion, Defendants selectively cite to only part of the testimony given by Motorola's Janet Robinson, but ignore the rest of her testimony that Motorola's supply agreements included myriad writings, not just purchase orders. Ex. 363, Robinson Dep. at 47:04-49:25, 76:03-81:19.

First, as Defendants are well aware, many of the purchase orders issued by Motorola were "blanket" purchase orders setting an estimated quantity of LCD panels for a particular time period, after which Motorola would provide a weekly schedule to its suppliers with the requirements for the various items being purchased. Ex. 363, Robinson Dep. at 43:25-45:4. Those weekly forecasts dictated the quantity that Motorola intended to purchase within a particular time period. Ex. 363, Robinson Dep. at 43:25-45:4. They would tell a supplier "precisely when to deliver, what to deliver, and where to deliver." Ex. 372, Tay Dep. at 150:5-10. Notably, the forecasts were directed by Motorola's Materials Requirement Planning ("MRP") system, which generated specific requirements for product components at the direction of senior management located at Motorola headquarters in Illinois. Ex. 363, Robinson Dep. at 87:17-88:17 (adjustments to quantity needed by the Motorola manufacturing facilities are directed through the MRP); Ex. 367, Singh Dep. at 351:17-352:06 (a planning team in Illinois forecasts the amount of modules that Motorola would decide to order); Ex. 75 at 22. Defendants' version of the facts makes no mention of the schedule sharing forecasts directed from Motorola in Illinois.

Second, Motorola signed a number of "hubbing agreements" with Defendants that specified delivery and payment terms. *See, e.g.*, Freccero Decl. Exs. 51-53. The hubbing agreements specifically indicate that, if there are conflicting terms with any other purchase order or supply contract, the hubbing agreement controls. *Id.* Additionally, during the course of a year, Motorola's Display Commodity Team often negotiated rebate agreements and retroactive price discounts with Defendants based on volume purchases that were payable to Motorola in the United States and were accounted for on Motorola Inc.'s books and records. Ex. 368, Smith Dep. at 13:21-21:25; *see, e.g.*, Exs. 76-79. As a result, Motorola's purchases of LCD panels were not only governed by purchase orders, but were also governed by the terms and conditions of the rebate agreements and other agreements between the parties.

Furthermore, Defendants knew that the LCD panel prices approved by Motorola in the United States were part of the overall supply agreement between the parties and acted consistent with that understanding. For example, when a Motorola purchase order was inadvertently issued with a price other than what had been approved by Motorola in the United States (i.e., the price was either too high or too low), Motorola or the LCD panel supplier issued an adjustment rebate to the other party to bring the price in the purchase order into conformity with the agreed upon price. Ex. 368, Smith Dep. at 47:17-49:14.

Defendants simply ignore these other aspects of their overall supply agreement with Motorola. Therefore, their attempt to reduce the contractual relationship to a single purchase order is not supported by the record.

B. Defendants Directed Their Illegal Conduct At Motorola In The United States.

Defendants devote their entire Motion to focusing on certain administrative aspects of Motorola's LCD panel procurement that sometimes took place abroad. However, in doing so, they fail to mention that they targeted Motorola in the United States, not only in their sales and marketing of LCD panels, but also in their efforts to fix the prices of the panels sold to Motorola.[14]

1. Defendants Established U.S. Subsidiaries And Travelled To The United States To Sell Panels To Motorola.

Because Motorola's LCD panel procurement organization was centralized in the United States, Defendants established operations in the United States and also traveled to the United States to facilitate sales of LCD panels to Motorola.[15] In fact, many Defendants opened offices in the Chicago area specifically to service Motorola and other core U.S. customers. As Defendant AU Optronics stated in late 2003, its "regional strategy" for the U.S. was "direct access to Moto/Chicago and its global network." Ex. 80 at 537. Likewise, J.Y. Kim of Samsung SDI

[14] This brief focuses on the illegal conduct Motorola's LCD panel vendors directed at Motorola in the United States. However, the record shows that all Defendants targeted their illegal conspiracy at the U.S. market. Indeed, the Indirect Purchaser Class submitted dozens of documents demonstrating that Defendants' conspiracy was specifically intended to affect the United States. Motorola hereby incorporates by reference the evidence submitted by the IPPs on this issue. *See* Declaration of Patrick Clayton (Doc. No. 3066).

[15] The following is a list of Defendants' relevant U.S. subsidiaries/affiliates: (1) AU Optronics Corporation America ("AUOA") (Ex. 81 at 916, 924); (2) Epson Electronics America, Inc. ("EEA") (Ex. 82 at 880, 882) (identifying members of Epson's "Motorola Support Team (USA)"); (3) Philips Electronics North America Corporation ("PENAC") (Ex. 83 at 11); (4) Samsung Semiconductor, Inc. ("SSI") (Ex. 84 at 265, 271) (August 14, 2003, Regional Accounts Business Plan presentation listing Samsung SSI's TFT sales team for Motorola); Ex. 353, J.Y. Kim Dep. at 212:18-23; (5) Samsung SDI America, Inc. ("SDIA") (Ex. 85 at 341-42) (February 2001 presentation showing SDIA "Motorola Support Team"); (6) Sanyo Semiconductor Corp. ("SSC") (Ex. 86) (notice that Sanyo Semiconductor was the U.S. "sales window" for Motorola); (7) Sharp Microelectronics of the Americas ("SMA") (Ex. 366, Sharif Dep. at 33:02-35:06; Ex. 342, Iida Dep. at 130:19-132:23; Ex. 87 3875 at 125, 127, 134); and (8) Toshiba America Electronic Components, Inc. ("TAEC") (Ex. 88 (October 1, 2002, organizational chart listing TAEC offices in the United States, shows a location in Deerfield, IL); Ex. 330, Bond Dep. at 28:06-31:05). These acronyms for the Defendant U.S. subsidiaries are used throughout the brief.

testified: "[w]e had an office in Chicago because Motorola was in Chicago." Ex. 352, J.Y. Kim Dep. at 35:21-25.[16]

For instance, Defendants' U.S. subsidiaries were actively involved in negotiating LCD panel pricing with Motorola.[17] As part of that process, they served as the mouthpiece to Motorola for their parent companies that were located in Asia and Europe,[18] relaying pricing information to

[16] *See also* Ex. 345, Imaya Dep. at 65:8-13 (Sharp had an office in the Chicago suburb of Arlington Heights to be "close to our customers . . . . [f]irst of all, Motorola"); Ex. 89 at 104 (July 2004 presentation stating that AUOA had an account manager for "Motorola Libertyville"); Ex. 90 at 828-840 (EEA presentation from August 30, 2002 showing a sales office in Chicago to support "core customers" such as Motorola); Ex. 91 at 255 (document stating that Adam Miller, Philips' Global Account Director for Motorola, is based in the Chicago area); Ex. 92 at 203 (July 2003 presentation listing Keith Mizerek, who was based in Chicago, IL, as Philips' regional account manager for Motorola); Ex. 93 at 395 (April 17, 2003, presentation showing that members of Samsung's Motorola team were based in Illinois); Ex. 94 at 057 (Sanyo presentation for Motorola listing semiconductor sales offices in New Jersey, California, Illinois, and South Dakota); Ex. 88 (October 1, 2002, organizational chart listing TAEC offices in the United States, including a location in Deerfield, IL); Ex. 330, Bond Dep. at 108:01-109:14 (Toshiba's "components group came to the U.S. to support Zenith and Motorola in Chicago"); Ex. 356, Matsumura Dep. at 22:2-8 (Sanyo office in Chicago); Ex. 95 (Sharp office in Chicago); Ex. 87 at 125.

[17] Ex. 375, Yun Dep. at 72:11-73:8 (Samsung's Mr. Yun had several conversations per year in Chicago, IL with Motorola's John Miller regarding LCD panel pricing); Ex. 96 (TAEC report indicating face-to-face pricing negotiations with Motorola in Schaumburg, IL); Ex. 97 (August 2, 2004 email from Dave McCarthy of TAEC indicating "LCD negotiations" with Motorola took place in Libertyville, IL); Ex. 330, Bond Dep. at 115:9-116:17 (TAEC's role was primarily to secure business for overseas entities by negotiating on prices and terms and contributing to engineering and design work), 132:14-134:6 (TAEC's Clayton Bond met in the U.S. with Motorola "once every week or two" from 1996 to 2000), 140:12-141:2 (TAEC's Clayton Bond most frequently met with Motorola in Libertyville, IL); Ex. 352, J.Y. Kim Dep. at 19:9-20:4, 76:10-15 (SDI employees dispatched to the U.S. helped negotiate prices with Motorola); Ex. 366, Sharif Dep. at 70:2-70:19 (SMA served as an intermediary between Motorola in the U.S. and Sharp in Japan in connection with RFQs); Ex. 373, Waldron Dep. at 84:7-85:14 (EEA was responsible for communicating prices to Motorola and informing Epson headquarters in Japan of the status of those negotiations); Ex. 98 (Sanyo Japan and SSC submitted joint response to Motorola RFQ); Ex. 99 (July 9, 2004 email arranging a July 21, 2004, "Final Negotiations Meeting" with Motorola in Chicago to be attended by AUO and AUOA employees); Ex. 100 (AUO report on January 19, 2005 pricing meeting between AUOA and Motorola's Alex Lima in Illinois); Ex. 101 at 203-04 (EEA email dated January 12, 2005 reflecting Epson Japan's instructions to EEA to quote $37.90 for the Motorola Razr); Ex. 102 (Keith Mizerek email providing Philips and LCD quote to Motorola employees in U.S.); Ex. 103 at 117-18 (December 2004 email from EEA's Jesse Waldron reflecting notes of a negotiation with Motorola in Illinois).

[18] Ex. 373, Waldron Dep. at 84:7-85:14 (EEA was responsible for communicating prices to Motorola, and informing Epson Japan of the status of the negotiations); Ex. 354, Kiribuchi Dep. at 64:13-64:23 (part of EEA's job was to collect target prices from customers and communicate that information to Epson Japan); Ex. 366, Sharif Dep. at 70:2-70:19 (SMA served as an intermediary between Motorola in the U.S. and Sharp in Japan in connection with RFQs); Ex. 102 (Keith Mizerek email providing Philips quote to Steve Milligan, Michael Duffy and Jeff Rogero); Ex. 104 (Keith Mizerek email providing Philips quote to Motorola employees in U.S.); Ex. 375, (Continued…)

Motorola[19] and, in turn, providing pricing advice to their foreign corporate parents.[20] Some of those U.S.-based employees even had pricing responsibility with respect to Motorola.[21] The U.S.-based employees also assisted their corporate parents in responding to the RFQs and RSI requests that originated from Motorola headquarters in Illinois.[22] Additionally, Defendants' U.S.-based

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Yun Dep. at 64:3-64:24, 72:11-73:8, 122:8-122:16 (Samsung's U.S. employee Jason Yun involved in pricing discussions with Motorola); Ex. 330, Bond Dep. at 101:15-103:9 (TAEC's primary responsibility was to act as a go-between for U.S. customers and Japan, by performing sales, marketing, and engineering support functions); Ex. 105 (January 26, 2005, email from AUOA submitting a price quote to Motorola's Alex Lima, a U.S.-based Motorola employee); Ex. 353, J.Y. Kim Dep. at 163:18-164:11 (SDI dispatched a salesperson to Chicago to facilitate communications with Motorola); and Ex. 106 (Sept. 2006 email string between Motorola and SSI regarding LCD panels).

[19] Ex. 343, Iida Dep. at 228:12-229:1 (U.S.-based Greg Taylor of Sharp was responsible for providing quotes to Motorola); Ex. 105 (January 26, 2005, email from AUOA to Motorola's Alex Lima in the U.S. submitting price quotes); Ex. 107 (October 13, 2005, email from AUOA to Motorola employees in U.S. submitting AUO's final RSI quote); Ex. 98 (joint RFQ submission by Sanyo Japan and SSC); Ex. 108 (Philips price quote transmittal email sent to Motorola's Jeff Rogero in the U.S.); Ex. 350, I.S. Kim Dep. at 36:19-37:5 (after Samsung finalized its price quotes for Motorola, I.S. Kim relayed this information to Samsung's Jason Yun in the U.S. so that Mr. Yun could meet with Motorola); Ex. 109 (Toshiba price quote to Motorola issued by Dave McCarthy of TAEC); Freccero Decl., Ex. 180 (Sanyo's U.S. subsidiary responded to a Motorola RFQ); Ex. 110 (Sanyo U.S. subsidiary submitted a quote to Motorola); Ex. 373, Waldron Dep. at 84:7-85:14 (EEA was responsible for communicating prices to Motorola and informing Epson Japan of the status of negotiations); Ex. 366, Sharif Dep. at 70:2-19 (SMA served as an intermediary between Motorola in the U.S. and Sharp in Japan in connection with RFQs); Ex. 26; Exs. 31-34; Exs. 36-38; Exs. 111-114.

[20] Ex. 373, Waldron Dep. at 166:2-166:21 (Jesse Waldron of EEA would make recommendations to Epson Japan about the prices needed to win Motorola's business); Ex. 342, Iida Dep. at 28:23-29:14 (SMA in the United States had discretion to modify prices set by Sharp Japan); Ex. 375, Yun Dep. at 81:13-23; 115:1-115:19 (SSI's Jason Yun's responsibilities included pricing discussions with Samsung headquarters in Korea); Ex. 352, J.Y. Kim Dep. at 19:9-20:4 (J.Y. Kim of SDIA was involved in setting SDI's prices for Motorola); Ex. 115 (May 12, 2005 email from TAEC's Clayton Bond making recommendation to Toshiba Japan on rebates for Motorola); Ex. 116 (October 3, 2005 email from AUOA's Evan Huang to AUO recommending a new pricing proposal within two days to preserve their chance of becoming a Motorola RSI supplier).

[21] Ex. 83 at 11.

[22] Ex. 117 (June 1, 2005 email from Motorola's Alex Lima in Illinois to AUO and AUOA soliciting new price quotes); Ex. 118 (August 9, 2005 email from AUOA to Motorola's Alex Lima containing questions regarding RFQ process); Ex. 119 (December 19, 2004 email from Motorola's Alex Lima sending RFQ to AUOA); Ex. 120 at 028 (November 13, 2006 email from Motorola's Jeffrey Rogero to EEA requesting a pricing quote); Exs. 121-22 (August 4, 2005 email and letter from Motorola's Rob Akins to Jason Yun at SSI explaining Motorola's request for quote); Ex. 123 (February 23, 2005 email from Motorola's Alex Lima to Jerry McGaha of SMA regarding resubmission of quote in connection with RFQ, which was circulated at Sharp in Japan); Ex. 124 (January 19, 2005 email from Motorola's Alex Lima to David McCarthy of TAEC and Naoto Oki of TMD regarding a RFQ, which was circulated at TMD in Japan); Ex. 125 (Continued…)

employees gathered information on the U.S. market and relayed that information back to Asia and Europe.[23] Defendant Toshiba's U.S. subsidiary even prepared contracts governing aspects of Toshiba's relationship with Motorola. *See, e.g.,* Ex. 130 at 169. Furthermore, the compensation of Defendants Epson's and Toshiba's U.S. sales staff depended, in part, on their success in increasing global sales of LCD panels to Motorola and other U.S. customers. Ex. 330, Bond Dep. at 124:25-126:25; Ex. 373, Waldron Dep. at 60:16-61:05.

Defendants also assigned engineers to their U.S. subsidiaries to help develop products to sell to Motorola, as well as to address technical and supply chain issues relating to the LCD panels used by Motorola.[24] For example, in 2003, Defendant Sharp wrote that it would send its "division deputy general manager" of its "mobile LCD design center" to Chicago "for 3 weeks every month" for "better communication between Sharp and Motorola engineers." Ex. 138 at 12. Some Defendants even stationed employees at Motorola's headquarters in Illinois to serve as

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(October 2005 email from Motorola's Alex Lima to Tom Kim of SDIA regarding a pricing quote); Ex. 126 (June 2005 email from Motorola's Alex Lima to Joseph Kim and Tom Kim of SDIA regarding prices of LCD panels); Ex. 127 (April 2005 email from SMA's Jerry McGaha to Sharp Japan regarding RAZR quote).

[23] Ex. 128 (December 2, 2006 email from Naoto Oki of TAEC reporting prices of small-screen LCD products sold at U.S. retailer); Ex. 362, Pan Dep. at 71:2-9, 117:19-22, 112-113, 116-118 (AUO monitored U.S. street prices); Ex. 353, J.Y. Kim Dep. at 177:3-11, 178:11-17 (Mr. Kim monitored the prices and specifications of PDAs and mobile phones in U.S. retail stores for SDI's headquarters); Ex. 129 (PENAC presentation analyzing financial performance of U.S. retailers).

[24] Ex. 131 (June 13, 2006 email arranging a technology meeting between Jim Zhuang and Robert Polak of Motorola and AUOA and AUO); Ex. 90 at 837 (EEA presentation from August 30, 2002 stating that strong engineering support from EEA is needed to grow the Motorola business); Ex. 373, Waldron Dep. at 45:6-46:2 (duty of engineers at Epson's Crystal Lake, IL offices was to work with Motorola on LCD module design from 1996 to 2004), *id* at 68:17-69:24 (in order to facilitate the design process EEA's engineering staff met with Motorola engineers in Motorola's facilities in Illinois); Ex. 132 (Summary of action plan agreed upon during December 5, 2003 business meeting between Sanyo and Motorola, which states that "Design and Logistics cross-functional meeting [to take place] in Libertyville, IL USA"); Ex. 330, Bond Dep. at 115:9-116:17 (TAEC's role was primarily to secure business for overseas Toshiba entities by negotiating prices and terms and contributing to engineering and design work); Ex. 133 (summary of June 8, 2005 supplier/operations meeting between AUOA and Motorola's Jeff Rogero); Ex. 134 (PMDS email directing that an engineer be hired in the U.S.); Ex. 353, J.Y. Kim Dep. at 169:18-170:10 (SDI opened its Chicago office to provide engineering support to Motorola); Ex. 135 at 283, 285, 296; Ex. 136 at 683-84; Ex. 137 at 530 (Toshiba presentation noting that it had assigned two engineers "dedicated to Motorola only" to Toshiba's Illinois office).

integral parts of Motorola's design and manufacturing process.[25] As a result, technical meetings between Defendants and Motorola commonly took place in the United States.[26]

Moreover, Defendant employees from the foreign corporate parent companies frequently traveled to the United States to negotiate pricing for and volumes of LCD panels with Motorola.[27] Defendants' foreign engineering staffs also routinely traveled to meet with Motorola in the United States.[28]

2. Defendants Knew That LCD Panels They Sold to Motorola Would Be Incorporated Into Mobile Devices Sold In The United States.

Defendants sold LCD panels to Motorola with full knowledge that they would be incorporated into mobile devices sold in the United States. Given that Motorola was

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25 Ex. 353, J.Y. Kim Dep. at 170:16-171:6 (a number of LCD panel suppliers had offices inside of Motorola's buildings to facilitate communications regarding specification changes).

26 Ex. 344, Iida Dep. at 404:12-406:2 (the majority of the technical engineering meetings between Sharp and Motorola were held in Chicago and the U.S.); Ex. 375, Yun Dep. at 121:18-122:7 (negotiations regarding product specification occurred between Motorola and SSI's local engineering staff in Chicago, IL); Ex. 373, Waldron Dep. at 68:17-69:24 (to facilitate the design process, EEA's engineering staff met with Motorola engineers in Illinois); Ex. 330, Bond Dep. at 140:12-141:2 (TAEC's Clayton Bond most frequently met with Motorola in Libertyville, IL).

27 Ex. 375, Yun Dep. at 24:19-25:18; 27:5-27:15 (Samsung's Jason Yun visited Motorola at its facilities in Libertyville, IL, approximately 6 to 12 times per year, and in Florida approximately twice a year); Ex. 353, J.Y. Kim Dep. at 251:15-252:3 (about two-thirds of SDI's quarterly price negotiations occurred in the U.S.); Ex. 344, Iida Dep. at 404:12-406:2 (Sharp's Happy Jack Iida estimated that 40% of Sharp's price negotiation meetings with Motorola were held in the US); Ex. 139 at 047-48 (email from Kimura Nobuyoshi of Motorola notifying PMDS' Grant Rounding, Global Account Manager for Motorola, and Burkhardt Frick, Global Account Director for Motorola, that a face-to-face meeting will take place in Schaumburg, Illinois); Ex. 140 (May 30, 2006 Sharp email describing Motorola meeting held in U.S. where Sharp negotiated prices for a number of Motorola products); Ex. 141(presentation for SDI-Motorola management meeting in Libertyville); Ex. 356, Matsumura Dep. at 53:16-54:17; Ex. 357, Matsuura Dep. at 326:25-327:17; Ex. 142 at 561, 564, 566, 569 (calendar showing trips to U.S. for meetings with Motorola); Ex. 358, Matsuura Dep. at 326:25-327:17.

28 Ex. 375, Yun Dep. at 61:18-62:7 (Samsung's headquarters in Korea dispatched an engineer to Illinois to visit Motorola's factories); Ex. 353, J.Y. Kim Dep. at 163:18-164:4 (SDI dispatched a sales person and engineer to the U.S. in 2001 to work on new Motorola RFQs and programs); Ex. 344, Iida Dep. at 404:12-406:2 (Sharp's Happy Jack Iida testified that the majority of technical engineering meetings were held in Chicago, IL); Ex. 143 (email from Yukihiro Yamada of Sanyo to Nobuyuki Kimura noting that Sanyo had a "good meeting" with Motorola's Ken Foo in Illinois); Ex. 144 (May 7, 2005 email indicating that key Epson engineers were to visit Motorola in Illinois); Ex. 146 (September 11, 2003 Sharp meeting minutes indicating that Sharp engineers from Japan visited Motorola in Libertyville, IL on September 11, 2003, to discuss technical issues in relation to new Razr phone); Ex. 147 at 219-22 (September 25, 2006 Sharp email from Jerry McGaha indicating that Sharp engineers from Japan visited Motorola in Libertyville to discuss strengthening modules); Exs. 148-149.

headquartered in the United States, that Motorola sold mobile devices in the United States,[29] that Motorola was often the leading mobile phone vendor in North America during the Relevant Period,[30] that many of Motorola's major customers were U.S.-based wireless service providers,[31] and that the United States was one of the largest markets for mobile devices in the world,[32] Defendants were aware that their price-fixed LCD panels would enter the United States. The evidence, including documents and deposition testimony provided by Defendants, reflects this understanding.[33] As Defendant Epson's 30(b)(6) witness testified:

> Q. And what was [Sanyo Epson's] understanding of where Motorola sold its products containing LCD panels purchased from [Sanyo Epson]?
>
> * * *
>
> A. Our understanding is that they were sold throughout the world.
>
> Q. Including in the United States?
>
> A. Yes.

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[29] Ex. 150 at 58 (SEID presentation from 2005 noting that Motorola had the #1 market share in North America); Ex. 93 at 379, 383 (April 17, 2003 presentation authored by Samsung's Jason Yun stating that Motorola has the biggest market share in North America and listing Motorola's major customers as ALLTEL, AT&T, Cingular, Sprint, Verizon, T-Mobile and Cricket).

[30] Ex. 93 at 379 (April 2003 Samsung presentation noting that Motorola had the #1 market share in the U.S.); Ex. 151 at 792.

[31] Ex. 93 at 383 (April 2003 Samsung presentation listing Motorola's "major customers" as Alltel, AT&T Wireless, Cingular, Sprint, Verizon, T-Mobile, Quest and Cricket); Ex. 152 at 304 (January 2004 Toshiba email noting that T-Mobile and Cingular are Motorola customers).

[32] Ex. 153 at 593; Ex. 154 at 811-12; Ex. 155 (Toshiba sales plan based on strong demand from U.S. and Europe).

[33] Ex. 156 (Sharp analysis of U.S. cell phone market referring to the "status of models with our LCD installed" and pointing to various Motorola models); Ex. 157 at 209, 221, 224; Ex. 158 at 678, 681 (AUO presentation from June 2003 showing that North America is a top 3 mobile phone market and that Motorola had the second highest global market share); Ex. 159 at 86-87 (June 11, 2004 AUO presentation showing the number of end users in North America, noting that Motorola's geographic location is the U.S., and setting a goal to become one of Motorola's top 3 suppliers); Ex. 80 at 537; Ex. 90 at 824, 828, 830-31 (EEA presentation on August 30, 2002 noting the market potential for "US Originated" cellular phones generally, and Motorola specifically); Ex. 353, J.Y. Kim Dep. at 190:20-191:11 (SDI sold LCD modules to Motorola and understood that Motorola sold phones in the U.S.); Ex. 160 at 370 (document showing that SDI analyzed mobile phone market trends in the U.S.); Ex. 161 at 375 (presentation dated December 5, 2003 for business meeting between Sanyo and Motorola about Razr development schedule, including "[r]eception in U.S."); Ex. 330, Bond Dep. at 149:4-150:3 (TAEC's Clayton Bond understood that a portion of the LCD modules Toshiba sold to Motorola would be used in phones sold in the United States); Ex. 162 at 829.

Ex. 354, Kiribuchi Dep. at 67:9-18.

3. Defendants Engaged In Acts In Furtherance Of Their Illegal Conspiracy In The United States.

Defendants' own illegal conduct had an impact on U.S. commerce. That alone establishes an issue of fact as to whether the FTAIA's "domestic effects" exception applies. Defendants used their extensive operations in the United States to further their illegal conspiracy. In fact, Defendants specifically directed employees at their U.S. subsidiaries to exchange information with their counterparts at competitors regarding sales of LCD panels to Motorola and other U.S.-based customers.[34] A few examples include:

- Samsung's H.S. Kim gave Y.R. Sohn of Samsung, who was "dispatched" to the U.S. from approximately 1999 to 2004, "instructions about how to gather competitive information about [Samsung's] competitors." Ex. 349, H.S. Kim Dep. at 197:10-198:2, 199:02-20.
- Epson's Minoru Fujimori emailed John Capp and other Epson U.S.-based employees a "request to research competitor's situation" about a particular Motorola phone model. Ex. 167.
- Toshiba's Masatoshi Tanaka informed Toshiba's U.S.-based employees that he had gathered competitive information from Sanyo on Motorola's projected share awards for Razr mobile phone panels and instructed the U.S. employees to "get information as much as possible." Ex. 168.
- Samsung's Tae Woo Kim directed Samsung's U.S.-based employees Jason Yun and Jerry McGaha to "check LG status and 4Q Commitment of [Motorola phone display] TMR within this week" because he needed "to report to Top management early . . . next week." Ex. 166.

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[34] Ex. 349, H.S. Kim Dep. at 372:7-19 (H.S. Kim of Samsung directed employees that reported to him at Samsung's branch offices to meet with Samsung's competitors to discuss and report on pricing information); Ex. 342, Iida Dep. at 59:21-60:7 (after being assigned to the Motorola account in 2002, Sharp's Happy Jack Iida received a request from his superiors to gather information on competitors); Ex. 163 (July 25, 2005 email from John Capp to EEA summarizing a communication with Sharp regarding Motorola in response to SEID's request for Mr. Capp to collect information); Ex. 164 at 992 (February 23, 2006 email from Sharp Japan to SMA with information about pricing for Motorola "directly from TMD," and asking SMA to confirm the pricing); Ex. 165 (June 12, 2003 email from TMD's Naoto Oki instructing TAEC's Clayton Bond to continue to chase Sharp's VP regarding Motorola's status); Ex. 166 (Samsung's T.W. Kim asked SSI's Jason Yun and Jerry McGaha to collect information on LG Philips' status for a Motorola program).

As part of the conspiracy, Defendants' employees, such as Messrs. Sohn, Capp, and Yun, did as they were told, routinely exchanging a wide variety of competitive information about Motorola, including: (1) the prices charged to Motorola;[35] (2) the volume of LCD panels sold to Motorola;[36] (3) rebates Defendants were considering offering Motorola;[37] and (4) numerous other

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[35] Ex. 375, Yun Dep. at 146:25-149:14 (SSI's Jason Yun met with LG Display's H.S. Kim 3 to 4 times per year from 2002-2006, and they discussed Samsung's negotiations with Motorola, in addition to prices LG Display was offering); Ex. 169 (August 15, 2005 email from AUO's F.M. Chang to AUOA's Evan Huang regarding updated prices for Motorola based on information Huang acquired from "S"); Ex. 170 (September 6, 2005 email from AUOA's Evan Huang to AUO regarding information he obtained from Samsung regarding their prices for a Motorola RFQ); Ex. 330, Bond Dep. at 162:2-4; Ex. 171 (July 18, 2003 email from Clayton Bond describing the price that Sharp will offer in an upcoming meeting with Motorola; Bond subsequently testified that it is most likely that this information came from Qais Sharif of SMA); Ex. 366, Sharif Dep. at 27:9-28:13 (SMA's Qais Sharif had conversations with TAEC's Clayton Bond about Motorola's business and sometimes exchanged pricing information); Ex. 103 at 816 (December 2, 2004 email from EEA's John Capp with Sharp pricing information on Razor); Ex. 172 (June 2004 emails where SMA's Qais Sharif provides information on TMD's future prices for Motorola and Sharp Japan responds that this is consistent with information from Joe Kitayama's source); Ex. 173 (April 19, 2004 emails between Sharp Japan and SMA updating each other on TMD's prices for Motorola Triplets); Ex. 52 (March 25, 2003 email where John Capp of Sharp states "I'm still digging for Samsung pricing and capacity of each supplier..." for Motorola account); Ex. 53 (July 27, 2003 email from SMA's Qais Sharif to Sharp Japan providing TMD's quotes to Motorola; previously, Sharp Japan had emailed SMA the prices TMD and Samsung quoted to Motorola); Ex. 174 (August 20, 2004 Sharp and Toshiba emails indicating that Qais Sharif of Sharp and Clayton Bond of Toshiba communicated about pricing on a Motorola product); Ex. 175 (October 22, 2004 Sharp email indicating that Ryuhtaroh Tanaka of Sharp met with Mr. Yun (possibly Jason Yun of Samsung) on October 22, 2004 and discussed Samsung's capacity and pricing information for Motorola); Ex. 176 (February 6, 2004 email from Sharp Japan thanking SMA's Qais Sharif for confidential information regarding a Motorola purchase order from TMD, and providing additional information about TMD's future prices to Motorola); Ex. 177 (July 18, 2003, email where TAEC's Clayton Bond asks TMD if his information regarding a Sharp quote for a future Motorola project matches their information); Ex. 178 (August 20, 2004 email where TAEC's Clayton Bond describes conversation where he exchanged general pricing and volume information with a Sharp VP).

[36] Ex. 375, Yun Dep. at 278:1-278:11 (Samsung's Jerry McGaha obtained volume projections from competitors and provided this information to Samsung's Jason Yun when he worked on the Motorola account); Ex. 179 (June 30, 2006 email from John Capp to EEA relaying information regarding Sharp's and Samsung's production status on a Motorola project); Ex. 166 (June 14, 2004 email where SEC provides SSI's Jason Yun with information regarding Sharp's prices to Motorola, and requests that Jason Yun check with LG Display regarding their commitment status); Ex. 180 (August 6, 2003 email where SSI's Jason Yun provides "market intelligence" regarding Philips' sales volume to Motorola and ability to meet Motorola's cost target); Ex. 181 (July 21, 2005 email from SSI's Jason Yun to SEC regarding information SDI gave him about Motorola's forecast); Ex. 52 (March 25, 2003 email where John Capp of Sharp states "I'm still digging for Samsung pricing and capacity of each supplier . . ." for Motorola account); Ex. 153 (April 17, 2004 Sharp email indicating that Shu Akiyama of Sharp communicated with Dave McCarthy of Toshiba America regarding TMD's production lines for the Motorola business); Ex. 182 (August 20, 2004 email where Sharp's Qais Sharif confirms TMD's price and volume for a (Continued…)

aspects of their business relationship with Motorola.[38] Defendants' U.S.-based employees then transmitted that competitive information to their superiors in Asia and Europe.[39] In the examples

Motorola project); Ex. 175 (October 22, 2004 Sharp email indicating that Ryuhtaroh Tanaka of Sharp met with Mr. Yun on October 22, 2004 and discussed Samsung's capacity and pricing information for Motorola); Ex. 178 (August 20, 2004 email where TAEC's Clayton Bond describes a conversation where he exchanged general pricing and volume information with a Sharp VP); Ex. 67 (April 28, 2003 TMD email stating that Clayton Bond interacts with Sharp people locally and discussing Motorola's award of volume and scheduling to Sharp); Ex. 183 (August 3, 2004 email where TAEC's Clayton Bond instructs TAEC's Sean Collins to contact Sharp to see if Sharp has information on Motorola's forecast and if Sharp submitted a later offer to Motorola); Ex. 184 (March 10, 2005 email indicating that John Capp of EEA received information regarding Motorola volumes and delivery schedules from Sharp); Ex. 185 (AUOA employees emailing regarding a conversation with Samsung and another suppliers); and Ex. 186 (March 23, 2005 email showing EEA and SEID contacts with Sharp regarding production status for Motorola modules).

37 Ex. 375, Yun Dep. at 159:23-161:22 (SSI's Jason Yun communicated with Sharp's Jerry McGaha several times in the 2004-2006 time period, and at least one of those communications pertained to Motorola's rebate program), 173:7-178:16 (SSI's Jason Yun communicated with SDI's Tom Kim approximately 5 times per year in the 2002-2006 timeframe, and remembered talking to Mr. Kim about the Motorola RSI program and a Motorola request for a rebate); Ex. 187 (May 24, 2005 email from EEA's John Capp to Jesse Waldron relaying conversation with Sharp and TMD regarding Motorola's rebate program); Ex. 188 (October 11, 2005 email from SSI's Jason Yun to Samsung's J.W. Kim regarding Motorola rebate deal information received from Sharp, Sanyo, AU Optronics, and Samsung SDI).

38 Ex. 375, Yun Dep. at 155:13-156:13 (SSI's Jason Yun communicated with Philips MDS's Marcel Bogart once or twice between 2002 and 2006, and Mr. Bogart provided a rough idea of Philips MDS's activities with Motorola), 236:2-237:1 (SSI's Jason Yun testified that he was motivated to talk to LG Display's H.S. Kim by the concern that Motorola would use LG Display's panels to complete a module at a much lower cost than purchasing a completed module from Samsung); Ex. 113 (March 22, 2006 email from John Capp to EEA indicating that he communicated with Sharp regarding their participation in an RFQ for the Motorola Razr); Ex. 189 (March 25, 2005 email from John Capp at EEA informing Jesse Waldron of conversation with David Stubbs at Sharp about Motorola tooling orders); Ex. 190 (March 18, 2005 email demonstrating that EEA's John Capp communicated with Sharp and received product information regarding Sharp's modules for a Motorola project); Ex. 191 (August 22, 2005 Epson email describing communications between EEA and TMD USA regarding Samsung's work on a Motorola LCD module); Ex. 179 (June 30, 2006 email from John Capp to EEA indicating that he spoke with Sharp and received information regarding Sharp's and Samsung's status on a Motorola Razr project); Ex. 193, Ex. 194 at 100, Ex. 195 at 302, Ex. 196 at 462, Ex. 197 at 510, Ex. 198 at 530, Ex. 199 at 557 (expense reports for Samsung's Jason Yun showing meetings with competitors Philips and SDI in the United States regarding Motorola); Ex. 116 (email from AUOA's Evan Huang to AUO mentioning that he "confirmed Samsung AMLCD, TMD and Wintek have received [a Motorola] RFQ"); Ex. 200 at 146-47 (emails between SEID and EEA employees regarding conversations with Sharp employees in the U.S. and Japan about Motorola Razr module production); Ex. 179 (June 30, 2006 email where Epson's Kimiyoshi Nakamura asked EEA's John Capp to "sound out [Razr] with Sharp US?").

39 Ex. 375, Yun Dep. at 272:24-274:12 (SSI's Jason Yun forwarded competitive information to Samsung Korea so that headquarters could make final decisions for mobile application RFQ responses); Ex. 373, Waldron Dep. at 168:18-169:8 (Epson's Jesse Waldron was aware that EEA (Continued…)

above, Samsung's Mr. Sohn provided his superiors with competitive information "once or twice a month," Ex. 349, H.S. Kim Dep. at 197:10-16, 199:14-17; Epson's Mr. Capp relayed what he learned about Motorola's panel qualification plans from the "Sharp persons" he contacted to his superior in Japan, who, in turn, responded "Thank you. And please get more information later," Ex. 167; and Samsung's Mr. Yun provided "the latest on [LG Philips]" to Samsung management in Korea, and after learning from Defendant LG that Motorola might be looking to purchase panels from Innolux, in turn asked a colleague to "share some intelligence on Innolux," Ex. 166. Defendants' employees located abroad also transmitted similar information learned from competitors to the U.S.-based employees to help further the goals of the conspiracy.[40]

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employee John Capp was meeting with competitors, and some of the information Mr. Capp received from competitors may have been communicated to SEID in Japan); Ex. 366, Sharif Dep. at 254:9-22 (SMA's Qais Sharif passed on information about TMD's prices provided by TAEC's Clayton Bond to Sharp Japan); Ex. 166 (June 14, 2004 email where SEC provides SSI's Jason Yun with information regarding Sharp's prices to Motorola, and requests that Mr. Yun check with LG Display regarding their commitment status); Ex. 172 (June 2004 emails where SMA's Qais Sharif provides information on TMD's future prices for Motorola to Sharp Japan, and Sharp Japan responds that this is consistent with information from Sharp's Joe Kitayama's source); Ex. 173 (April 19, 2004 emails between Sharp Japan and SMA updating each other on TMD's prices for Motorola Triplets); Ex. 53 (July 27, 2003 email from SMA's Qais Sharif to Sharp Japan providing TMD's quotes to Motorola); Ex. 176 (February 6, 2004 email from Sharp Japan thanking SMA's Qais Sharif for confidential information regarding a Motorola purchase order from TMD and providing additional information about TMD's future prices to Motorola); Ex. 177 (July 18, 2003 email where TAEC's Clayton Bond emails Sharp's prices to its parent company TMD); Ex. 169 (August 15, 2005 email from AUO's F.M. Chang to AUOA's Evan Huang regarding updated prices for Motorola based on information Mr. Huang acquired from "S"); Ex. 170 (September 6, 2005 email from AUOA's Evan Huang to AUO regarding information he obtained from "different channels" regarding Samsung's prices for a Motorola RFQ).

[40] Ex. 366, Sharif Dep. at 59:2-59:9 (SMA's Qais Sharif received emails from Sharp Japan with information about the prices that Toshiba was planning to charge Motorola); Ex. 201 (April 5, 2006 email from SEID to EEA employees John Capp and Jesse Waldron reporting on meeting where TMD shared its price quotes for Motorola); Ex. 202; Ex. 203 (June 12, 2006 email reporting on SEID and TMD "information exchange" regarding supply of Motorola devices); Ex. 204 (January 7, 2005 Epson email to Jesse Waldron at EEA reporting on meeting where TMD shared Razr prices with SEID); Ex. 205 (August 31, 2006 email from SEID to EEA indicating that SEID communicated with TMD and received competitive pricing information regarding TMD's price quotes to Motorola); Ex. 206 (November 2005 email from SEID to Jesse Waldron of EEA stating that SEID had obtained information on Samsung's and Sharp's pricing for Motorola's Razr phone and that SEID had decided to "stay at the same level as Sharp"); Ex. 207 (November 22, 2006 email to EEA indicating communications between TMD and Epson regarding the Motorola RSI selection); Ex. 208 (December 21, 2004 email where Jesse Waldron of EEA requests the results of SEID's meeting with TMD regarding Motorola Razr pricing); Ex. 166 (June 14, 2004 email where SEC provides SSI's Jason Yun with information regarding (Continued…)

Defendants admit that the Motorola pricing information they received from their competitors was used in setting the final LCD panel prices offered to Motorola.[41] As a former sales executive for Defendant Sanyo, and later Defendant Epson admitted, he used "information . . . learned in. . . discussions with [Defendant Toshiba] in formulating pricing proposals to Motorola for LCD panels." Ex. 356, Matsumura Dep. at 83:15-21.

Sharp's prices to Motorola); Ex. 209 (February 17, 2005 email where SEC forwards competitive information about Sharp's and SEID's Razr bids to SSI's Jason Yun); Ex. 210 (May 27, 2005 email from Sharp Japan to SMA's Qais Sharif summarizing a meeting where Samsung shared its volume and inventory for Motorola); Ex. 172 (June 2004 emails where SMA's Qais Sharif provides information on TMD's future prices for Motorola, and Sharp Japan responds that this is consistent with information from Sharp's Joe Kitayama's source); Ex. 211 (January 8, 2004 Sharp email from Happy Jack Iida to SMA's Qais Sharif and John Capp indicating that Sharp Japan discussed Motorola production numbers with Samsung); Ex. 212 (April 5, 2004 Sharp email from Happy Jack Iida to SMA's John Capp indicating that Sharp's Yoshihiko Kitayama discussed pricing for Motorola with Epson); Ex. 208 (April 19, 2004 emails between Sharp Japan and SMA updating each other on TMD's prices for Motorola Triplets); Ex. 51 (April 26, 2005 email from Sharp Japan to SMA indicating that Sanyo Epson approached Sharp regarding whether or not Sharp was a participant in Motorola's rebate program); Ex. 164 (February 23, 2006 email from Sharp Japan to SMA with information about pricing for Motorola pricing "directly from TMD," and asking SMA to confirm this pricing); Ex. 53 (July 2003 email where Sharp Japan sends SMA the prices that TMD and Samsung quoted to Motorola); Ex. 213 (April 23, 2004 email where Sharp Japan informs SMA about TMD and Samsung capacity decisions and how this will affect future pricing for Motorola); Ex. 214 (April 15, 2004 email where Sharp Japan provides SMA's Qais Sharif with TMD's future price quotes for Motorola); Ex. 215 (July 11, 2003 email relaying information on TMD and Samsung pricing for Motorola from SEC's overseas sources to SSI); Ex. 176 (February 6, 2004 email from Sharp Japan thanking SMA's Qais Sharif for confidential information regarding a Motorola purchase order from TMD, and providing additional information about TMD's future prices to Motorola); Ex. 216 (June 6, 2004 email from Yoshihiko Kitayama of Sharp to Qais Sharif of SMA reflecting communication between Sharp and TMD regarding TMD supplying Motorola with panels); Ex. 217 (November 13, 2003 SMA email relaying information from Sharp Japan about Samsung's present and future prices and production for Motorola); Ex. 168 (January 8, 2005 email from TMD's Masatoshi Tanaka informing TAEC that he met with SEID sales people to exchange information about Motorola Razr prices and supply, and asking TAEC to get as much information as possible).

[41] Ex. 351, J.W. Kim Dep. at 69:13-70:25 (Samsung's J.W. Kim considered the information Samsung's Seishu Arai obtained from Sharp about their prices when he set prices for Motorola); Ex. 374, Yamazawa Dep. at 34:4-35:17, 74:20-75:10 (invoking fifth amendment when asked whether competitor information was used to set prices for "Sharp's customers in the United States," "including Motorola"); Ex. 356, Matsumura Dep. at 34:16-23, 79:18-83:21 (market information gathered from competitors was used to set Sanyo's prices, and SEID collected information from competitors used to set prices to Motorola); Ex. 354, Kiribuchi Dep. at 61:24-62:5 (information learned from competitors about the prices they were offering to customers was a factor used when SEID set its own prices); Ex. 334, Chiba Dep. at 262:2-265:18; Ex. 335, Chiba Dep. at 345:12-346:7 (Toshiba used information about competitors' prices when deciding what to charge customers, including Motorola); Ex. 169 (August 15, 2005 email from AUO's F.M. Chang to AUOA's Evan Huang regarding updated prices for Motorola based on information obtained from "S").

An example of this occurred when Rob Akins, a U.S.-based employee of Motorola, requested that Jason Yun, a U.S.-based Samsung account manager for Motorola, provide a revised RFQ response to Motorola. Ex. 188 at 817. Mr. Yun immediately asked for an extension of time to provide Samsung's response, representing that Samsung's "factory advised [Mr. Yun] that they need more time to review the new spec and also to prepare our complete response." *Id.* at 816. Mr. Akins granted Samsung the extension, despite Motorola's desire to complete the RFQ process as quickly as possible. *Id.*

Mr. Yun's representation to Motorola about the Samsung factory response was an utter and complete falsehood. Acting under cover of his lie, Mr. Yun communicated with his co-conspirators at Defendants Sharp, Sanyo, AUO, and Samsung SDI to learn about what they were doing in response to Motorola's request for a rebate as part of the RFQ. *Id.* at 815. After illegally obtaining this information from his co-conspirators, Mr. Yun communicated to his Samsung superiors in Korea that "[b]ased on all information that we've gathered so far, I have to conclude that we still have the best proposal on the table for Motorola." He then recommended to Samsung management that Samsung not agree to further price reductions for Motorola, instead suggesting that they "stay with our course." *Id.*

Moreover, as this Court is well aware, many of the Defendants have pled guilty to criminal violations of the Sherman Act for their price-fixing activities and have admitted that their conduct affected U.S. commerce totaling more than $4 billion.[42] Two of those Defendants,

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[42] *See* Plea Agreement, *United States v. LG Display Co.*, Case No. 08-cr-803-SI (N.D. Cal. Dec. 8, 2008) (Docket No. 10) (LG Display pled guilty and agreed to pay a criminal fine of $400,000,000, based upon an admitted volume of affected domestic commerce of $2,500,000,000); Plea Agreement, *United States v. Sharp Corp.*, Case No. 08-cr-802-SI (N.D. Cal. Dec. 8, 2008) (Docket No. 9) (Sharp pled guilty and agreed to pay a criminal fine of $120,000,000, based upon an admitted volume of affected domestic commerce of $511,000,000) ("Sharp Plea"); Plea Agreement, *United States v. Chunghwa Picture Tubes, Ltd.*, Case No. 08-cr-804-SI (N.D. Cal. Jan. 16, 2009) (Docket No. 18) (Chunghwa pled guilty and agreed to pay a criminal fine of $65,000,000 based upon an admitted volume of affected domestic commerce of $357,677,000); Plea Agreement, *United States v. Hitachi Displays Ltd.*, Case No. 09-cr-247-SI (N.D. Cal. May 26, 2009) (Docket No. 10) (Hitachi pled guilty and agreed to pay a criminal fine of $31,000,000, based upon an admitted volume of affected domestic commerce of $130,000,000); Plea Agreement, *United States v. Epson Imaging Devices Corp.*, Case No. 09-cr-854-SI (N.D. Cal. Oct. 23, 2009) (Docket No. 15) (Epson pled guilty and agreed to pay a criminal fine of $26,000,000 based upon an admitted volume of affected domestic commerce of $110,000,000) ("Epson Plea"); Plea Agreement, *United States v. Chi Mei Optoelectronics*, Case (Continued…)

Epson and Sharp, have specifically pled guilty to fixing the prices of panels sold to Motorola both in the United States and abroad. *See* Sharp Plea (Sharp pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones from fall 2005 through mid-2006); Ex. 338, Goto Dep. at 27:25-30:1, 33:8-34:6 (testifying that the statements in Sharp's plea agreement that Sharp engaged in bilateral telephone conversations and meetings with competitors to fix the prices sold to Motorola were true); and Epson Plea (Epson pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones from fall 2005 through mid-2006). In doing so, Epson and Sharp admitted that acts in furtherance of the conspiracy occurred in the United States. *See* Sharp Plea at ¶ 4; Epson Plea at ¶ 4.

C. <u>The Injury Resulting From Defendants' Conspiracy Was Felt By Motorola In The United States.</u>

Motorola suffered the impact of Defendants' illegal price-fixing conspiracy in the United States. Contrary to what Defendants imply, Motorola did not just serve as a holding company in the United States with autonomous subsidiaries around the world acting on their own behalf and for their own profit. During the Relevant Period, Motorola's financial statements reflected ongoing repatriation by Motorola to the United States of all profits generated by Motorola's foreign subsidiaries through the sale of mobile devices containing LCD panels beyond what was necessary to maintain the capital to operate those subsidiaries. Ex. 371, Storm Dep. at 18:14-24:02; Freccero Decl. Ex. 85. Motorola instructed its foreign subsidiaries to repatriate those profits because the costs associated with intellectual property, the research and development expenses, and the corporate debt were borne by the parent company in the United States. Ex.

No. 09-cr-1166-SI (N.D. Cal. Feb. 2, 2010) (Docket No. 9) (Chi Mei pled guilty and agreed to pay a criminal fine of $220,000,000, based upon an admitted volume of affected domestic commerce of $985,000,000); Plea Agreement, *United States v. HannStar Display Corp.*, Case No. 10-cr-498-SI (N.D. Cal. August 5, 2010) (Docket No. 11) (HannStar plead guilty and agreed to pay a criminal fine of $30,000,000, based upon an admitted volume of affected domestic commerce of $107,000,000). In addition, as amnesty applicant, Samsung has admitted its involvement in the illegal cartel and assisted in the Department of Justice's investigation. Further, AUO was convicted in March 2012 for participating in a conspiracy to fix prices of LCD panels sold in the United States during the time September 2001 to December 2006. *See* Special Verdict Form, *United States v. AU Optronics Corp.*, Case No. 09-cr-0110 SI (N.D. Cal. Mar. 2012) (Doc. No. 851).

371, Storm Dep. at 20:03-16, 28:15-30:20, 50:12-51:6. As Sharon Storm, Motorola's Senior Director of International Tax, testified, Motorola repatriated those profits because it "was in the U.S. that [Motorola] paid for research and development expenses and also . . . had all of [its] debt." Ex. 371, Storm Dep. at 20:03-09, *see also, id* at 28:15-30:20, 50:12-51:6. Furthermore, as discussed above, over half of Motorola's so-called "foreign" LCD panel purchases were invoiced from the Motorola Trading Center, an entity treated as a branch of the U.S. parent company under U.S. tax law. Ex. 371, Storm Dep. at 23:09-26:25.

ARGUMENT

A. Summary Judgment Is Not Appropriate Where, As Here, There Is A Genuine Issue Of Material Fact.

Defendants are entitled to summary judgment only if they "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is "material" if it could affect the outcome of the lawsuit under the applicable substantive law, while an issue is "genuine" if the relevant evidence as to that issue could permit a jury reasonably to return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As the party seeking summary judgment, Defendants bear the burden to support their motion with evidence that potentially could be admissible at trial. Only if this requirement is satisfied, does the burden then shift to Motorola to "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). In considering Defendants' Motion, the Court may not weigh the evidence or make credibility determinations. *Anderson*, 477 U.S. at 255. The Court is tasked only with determining whether the evidence is such that a reasonable jury could return a verdict for Motorola. *Id*. at 248; *Datagate, Inc. v. Hewlett-Packard Co.*, 672 F. Supp. 1288, 1290 (N.D. Cal. 1987).

Summary judgment is not appropriate here, because the evidence is such that a jury reasonably could return a verdict for Motorola. *Id*. At most, Defendants' Motion merely alleges factual inferences about Motorola's procurement process that are directly contradicted by the facts presented by Motorola. Summary judgment is not appropriate where "contradictory inferences, one of which supports the non-moving party's position, can be drawn from the facts." *Alioto v. United States*, 593 F. Supp. 1402, 1405 (N.D. Cal. 1984). Moreover, the evidence presented by Motorola is to be believed, and all justifiable inferences are to be drawn in Motorola's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A summary of the material differences in the core facts presented by the parties is set forth below:

Issue	Motorola	Defendants
Motorola's Procurement Structure	Motorola is a global corporation with a global supply chain that makes all final decisions about LCD panel vendors and prices in the United States.	Motorola is a shell company with foreign subsidiaries that act independently in determining the vendors they will use and prices they will pay for LCD panels.
Motorola Display Commodity Team	For logistical reasons, the Display Commodity Team engaged in pricing negotiations both in the United States and abroad and then presented the information gathered up to Motorola supply chain executives in the United States for final U.S. approval.	The Display Commodity Team had key employees located abroad and engaged in a large percentage of its LCD panel pricing negotiations overseas.
Motorola Purchasing Department	The Purchasing Department served a purely administrative function in the Motorola supply chain, issuing purchase orders at prices and to vendors determined by Motorola in the United States.	The Purchasing Department was involved in pricing negotiations and had a say in the final prices paid by Motorola.
Final Motorola Price	Motorola agrees to a single price for LCD panels that applies globally to all Motorola facilities around the world.	Defendants do not offer any evidence to the contrary.
Supply Agreements	The supply relationship between Motorola and its vendors is governed by myriad documents.	Purchase orders are the only relevant agreements between the parties.
Defendants' Conduct	Defendants targeted their illegal conduct at Motorola in the United States.	Defendants do not offer any evidence to the contrary.

Applying this standard to the evidence presented here, Defendants' Motion should be denied.

B. <u>There Is A Genuine Issue Of Material Fact As To Whether Defendant's Conduct Falls Under The Statutory Exceptions To The FTAIA.</u>

Motorola is a U.S. company that agreed to a single price for LCD panels in the United States, which applied globally to all of its purchases. That single price determined in the United States was artificially-inflated by Defendants' illegal cartel conduct targeted expressly at Motorola. Yet, Defendants would have this Court hold that the U.S. antitrust laws do not apply to 99% of Motorola's LCD panel purchases.[43] That is not what the FTAIA requires. Indeed, it is antithetical to the entire aim of the U.S. antitrust laws.[44]

Defendants selectively quote language from this Court's prior FTAIA decision at the motion to dismiss stage and then claim that it creates a new legal test that Motorola must satisfy at summary judgment. In doing so, they ignore the actual requirements of the FTAIA and the summary judgment standard. Specifically, Defendants claim that the applicable legal standard here is whether "the price and other terms of purchase were negotiated exclusively by Motorola's procurement teams within the United States and applied worldwide, without regard to where the product was ultimately delivered." Motion at 1-2 (citing *Motorola II* at 842). But as the introductory clause of that sentence ("[a]s the Court views these new allegations") in *Motorola II* shows, the Court was interpreting the allegations set forth in Motorola's Complaint and not creating a new legal standard that governs application of the FTAIA.

Defendants' singular focus on where some initial pricing negotiations took place is especially surprising in light of the evidence showing that Defendants knew that the Motorola employees who engaged in such negotiations did not have authority to bind Motorola without approval from executives in the United States, and that Defendants' own employees who engaged

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43 Interestingly, Defendants concede that Motorola is entitled to seek damages under the Sherman Act based on the artificially-inflated price set in the United States, as long as the LCD panels that are subject to that transaction are shipped directly to Motorola in the United States. Motion at 2.

44 As the recent Supreme Court decision in *American Needle, Inc. v. National Football League*, 130 S.Ct. 2201, 2210 (2010), reminds us, the Sherman Act "is aimed at substance rather than form." The substance of the transactions at issue here is that pricing and other key decisions regarding Motorola's procurement of LCD panels were made in the United States and Defendants targeted their illegal activities at Motorola in the United States.

in those same negotiations were also required to seek final approval from their corporate headquarters. *See, supra*, Stmt. of Facts at Section A.2.

Moreover, it is unclear whether any U.S. company that operates on a global scale could ever satisfy the standard Defendants promote. Under that standard, international price-fixing cartels that openly target U.S. companies would avoid all liability simply because the *victims of their illegal conduct* permitted some negotiations and administrative functions to take place abroad. In fact, under Defendants' theory, the minute an employee of a U.S. company sets foot outside the United States to discuss pricing, that purchase is exempt from the Sherman Act. Basing the legal analysis here entirely on where non-binding negotiations took place makes little sense.[45]

The operable legal test remains whether Motorola has established a genuine issue of material fact as to whether there is a sufficient nexus between Defendants' conduct and U.S. commerce to apply the Sherman Act to the claims Motorola asserts in this case. Therefore, the question presented simply is whether a reasonable jury could look at the facts and determine that Defendants' anticompetitive conduct falls within one of the two exceptions enumerated in the FTAIA. If there is a genuine issue of material fact as to whether this "additional element" of the Sherman Act applies, then Motorola prevails at summary judgment. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 967 (N.D. Cal. 2011) ("*IPP Order*"); *see also Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 468-69 (3d Cir. 2011)

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[45] Throughout their Motion, Defendants claim that Motorola's "theory" has changed over the course of this case. That is not true. Motorola's core allegations remain the same and have proven true: (1) "The Motorola U.S. pricing teams and the U.S. procurement managers were responsible for final approval on pricing, conditions, and projected quantities for purchase of LCD Panels. The purchasing process at Motorola for the components of LCD Products for the U.S. market was managed and overseen by the supply chain organization and the procurement teams based in Motorola's U.S. operations," Third Amended Complaint (Docket Entry 3173) ¶153; and (2) "Moreover, defendants' and their co-conspirators' conspiracy caused artificially-inflated prices for LCD Panels to be offered to Motorola's single, global procurement process based at its headquarters in Illinois, which led Motorola to pay higher prices for LCD Panels around the world that were incorporated into Motorola devices intended for sale both in the United States and abroad," *id.* at ¶ 199.

("*Animal Science*") (the FTAIA imposes "a substantive merits limitation" on a Sherman Act claim).

As the Court is well aware, the FTAIA "creates *two distinct exceptions* that restore the authority of the Sherman Act." *Animal Science*, 654 F.3d at 466 (citations omitted) (emphasis added). The FTAIA provides that the Sherman applies where "the defendants' 'conduct has a direct, substantial, and reasonably foreseeable effect' on domestic commerce, import commerce, or certain export commerce and that conduct 'gives rise' to a Sherman Act claim." *Id*. This is referred to as the "domestic effects" exception. The FTAIA further makes clear that the Sherman Act continues to apply where "the defendants were involved in 'import trade or import commerce.'" *Id*. This is referred to as the "import trade or commerce" exception.

For the reasons set forth below, a reasonable jury could – and should – conclude that all of Motorola's damages claims fall within the "domestic effects" exception to the FTAIA, and that a substantial portion of those same claims also fall within the "import trade and commerce" exception to the FTAIA.[46]

1. <u>A Reasonable Jury Could – And Should – Conclude That Defendants' Conduct Had A Direct Effect On U.S. Commerce That Gave Rise To Motorola's Damages.</u>

The "domestic effects" exception to the FTAIA provides that foreign anticompetitive conduct is still subject to the Sherman Act if it "(1) has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (2) such effect gives rise to a Sherman Act claim." *IPP Order* at 956 (citations omitted). A reasonable jury could – and should – conclude that Defendants' illegal conduct targeting Motorola in the United States, which led Motorola to unknowingly agree to a single, artificially-inflated LCD panel price in the United States that applied to all of its LCD panel purchases, had a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce that "gave rise" to all of Motorola's damages.[47]

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[46] As the Court recognized in its final jury instructions in the AU Optronics criminal trial, application of the FTAIA exceptions is an issue for the jury to decide. *See United States v. AU Optronics Corp.*, Case No. 09-cr-0110 SI (N.D. Cal. Mar. 1, 2012) (Doc. No. 829) at 10.

[47] Defendants' assertion that Motorola somehow waived its right to seek recovery of all its damages is patently false. Nowhere in the record is there any evidence that Motorola limited its (Continued…)

An effect on U.S. commerce is "direct" if it "proceed[s] from one point to another in time or space without deviation or interruption." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). It is "substantial" if it involves a sufficient volume of U.S. commerce and not merely a "spillover effect." *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007). And it is "reasonably foreseeable" if it "would have been evident to a reasonable person making practical business judgments." *Animal Science*, 654 F.3d at 471. Such an effect "gives rise to a Sherman Act claim" if it was the "proximate" cause of that claim. *See Empagran S.A. v. F. Hoffmann–LaRoche, Ltd.*, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005) ("*Empagran II*").

At the motion to dismiss stage, this Court concluded that all of the requirements of the "domestic effects" exception were met with respect to Motorola's entire damages claim, because the facts alleged established a "direct causal relationship" between the anticompetitive conduct at issue (i.e., Defendants' global price-fixing activities), the effect on U.S. commerce (i.e., the setting of a single, artificially-inflated global price in the United States), and Motorola's "injury" (i.e., the payment of a single, artificially-inflated price for LCD panels). *See Motorola II* at 843.[48] The full factual record now before the Court demonstrates this "direct causal relationship."

Defendants intentionally targeted their illegal conduct at Motorola in the United States. *See supra*, Stmt. of Facts at Section B. They established sales, service, and design offices in the United States – some even located at Motorola's own facilities – that were used to more effectively implement their conspiracy with respect to Motorola. *Id*. Defendants ordered

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claim for damages. In fact, Motorola specifically stated in its briefing in *Motorola II* that it was not waiving its right to seek recovery on all its purchases. *See* Brief in Opposition to Motion to Dismiss Second Amended Complaint, Case No. 09-cv-5840 SI (N.D. Cal. Sept. 27, 2010) (Doc. No. 64) at 1 n.1. And during oral argument at the *Motorola II* hearing, Motorola's counsel rebutted Defendants' counsel and specifically disavowed any such waiver: "I'm not giving those up, but I'm going to defer to my brief on that." *Motorola II* Hr'g Tr. at 26:8-13. Moreover, since that hearing, both Defendants and Motorola have actively sought and engaged in extensive discovery relating to *all* of Motorola's damages, including voluminous document productions from foreign Motorola facilities and depositions of Motorola employees located abroad. Such behavior is not consistent with the waiver Defendants now claim.

[48] The Court reached the same conclusion in connection with claims asserted by Dell Inc., a similarly-situated American OEM, in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 781 F. Supp. 2d 955 (N.D. Cal. 2011).

employees at those facilities to exchange pricing, supply, and other sensitive information about their sales of LCD panels to Motorola with their competitors in the United States, which they readily did. *Id*. Defendant employees located abroad also exchanged similar information and sent it to the U.S.-based employees. *Id*. All this information was used to establish the LCD panel pricing for Motorola. *Id*. Defendants then sent those artificially-inflated price quotes to members of Motorola's Display Commodity Team, knowing that the information would be gathered, organized, and sent to executives in the United States for final determination. *Id*.

Defendants' anticompetitive "conduct" directly resulted in Motorola executives in the United States unknowingly agreeing to pay a single, artificially-inflated LCD panel price around the world. *See supra*, Stmt. of Facts at Section A. That is because all final decisions about which LCD panel vendors Motorola would use, how much Motorola would pay for LCD panels, and how Motorola would divide its LCD panel spend were made by those procurement executives based in the United States. *Id*. This same approval process applied regardless of where pricing negotiations took place, regardless of where a Motorola purchase order originated from, and regardless of where an LCD panel was to be delivered to Motorola. *Id*. It resulted in a single price being determined in the United States (in U.S. dollars) that applied to all LCD panel orders made by Motorola manufacturing facilities around the world. *Id*. This is indisputably a "direct effect" on domestic commerce. *See Sun Microsystems*, 534 F. Supp. 2d at 1112-13 (rejecting argument that "domestic effect" had to be the actual payment of higher prices in the United States and holding that "a domestic effect is established here by virtue of plaintiffs' allegations that defendants' conduct led to higher prices for DRAM in the United States, which in turn formed the predicate for plaintiffs' domestic agreements to pay higher prices for DRAM").[49]

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[49] No case law holds that payment of higher prices, rather than the existence of such prices, is the required domestic effect of foreign price-fixing conduct. Indeed, in *Empagran I*, the Supreme Court referred to "higher prices in the United States," not payment of those higher prices, as an example of an adverse domestic effect. *See Empagran I*, 542 U.S. at 175. And in *Empagran II*, the Circuit Court noted that "maintaining super-competitive prices in the United States," not payment of those higher prices, was the domestic effect at issue. *See Empagran II*, 417 F.3d at 1269-70.

Moreover, this "effect" – the approval of a single, artificially-inflated LCD panel price in the United States – proximately caused all of Motorola's damages, because that same artificially-inflated price applied wherever and whenever a Motorola facility placed a purchase order and paid for a panel. *Id*.[50] Those facilities were not permitted to deviate from the prices approved by Motorola in the United States. *Id*. For these reasons, a reasonable jury could – and should – conclude, as this Court did previously, that there is enough of a "direct causal relationship" between the relevant anticompetitive conduct, effect on U.S. domestic commerce, and "foreign injury" for the "domestic effects" exception to the FTAIA to apply and for Motorola's entire damages claim to be brought under the Sherman Act.[51]

Such a result is squarely supported by the Court's recent FTAIA decision in the LCD indirect purchaser class case. There, the Court denied Defendants' summary judgment motion, and held that a material question of fact exists as to whether the FTAIA's "domestic effects" exception applies where Defendants directed their "collusive activity" at the United States market

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[50] Defendants claim that this Court must ignore the fact that all LCD panel pricing was approved by Motorola executives based in the United States on account of "integration clauses" contained in the purchase orders issued by Motorola's foreign subsidiaries (based on pricing directions they received from the United States). Their claim should be rejected for several reasons. First, the crux of this case is that, in response to pricing requests from Motorola, Defendants targeted their illegal price-fixing conduct at Motorola and submitted artificially-inflated price quotes that Motorola unknowingly accepted in the United States. The purchase orders Defendants point to were issued only after that pricing process had ended, and they served as logistical mechanisms by which Motorola requested shipments of LCD panels at prices that were approved in the United States and unknowingly tainted by the cartel. A focus on those purchase orders draws attention away from the illegal conduct and pricing decisions that are at the core of the FTAIA analysis. Second, even if given any merit, Defendants' argument relies on inapplicable case law. Defendants cite to cases that do not involve the sale of goods and, therefore, do not address application of the Illinois UCC. *See* Motion at 24. The Illinois UCC makes clear that, in connection with the sale of goods, written agreements can be supplemented by such things as course of performance and course of dealing. *See* 810 ILCS 5/2-202. Third, Defendants' argument also ignores that Motorola's supply agreements with its LCD panel vendors were based on myriad documents. *See supra*, Stmt. of Facts at Section A.4.

[51] This standard applies to all LCD panels purchased by Motorola. Defendants argue for a different outcome for panels that were incorporated into finished goods that were ultimately sent to locations other than the United States. But the ultimate disposition of the finished goods is irrelevant to the question of whether Motorola has a Sherman Act claim for the purchase of panels. Once it has been established that there was anticompetitive conduct, an effect on domestic commerce, and an injury in the purchase of panels, the FTAIA analysis is complete; there is no need to prove in addition that finished goods incorporating the panels were then imported into the United States.

and their illegal acts resulted in a concrete and quantifiable harm to purchasers located in the United States. *See IPP Order* at 967. A similar situation is present here with respect to Motorola, a U.S. company that was targeted by Defendants in the United States, paid a higher price as a result of Defendants' illegal conduct, and felt the consequences of the illegal conduct in the United States.

In rejecting Defendants' argument, the Court noted that "modern manufacturing takes place on a global scale" and that the relationship between defendants and "the largest U.S. OEMs" takes place "in large part within the United States," *id*. at 963, 64, and held that the "domestic effects" exception was not undermined "simply because . . . American OEMs use a complex manufacturing process." *Id*. at 964. The Court should similarly reject Defendants' argument here that Motorola's use of a global supply chain to conduct certain administrative aspects of procuring LCD panels for its global manufacturing operations somehow prohibits application of the "domestic effects" exception to the entirety of Motorola's damages claim, especially when Motorola set a single, global price for LCD panels in the United States. Defendants' attempt to portray Motorola's foreign subsidiaries as autonomous entities that acted independently of Motorola in the United States should be rejected. The uncontradicted record shows that: (1) Motorola's foreign subsidiaries had no discretion on what mobile devices to manufacture, what LCD panel suppliers to use, what quantities to order, or what prices to pay for LCD panels, because those decisions were made by the U.S. parent company; (2) negotiated rebates were received and accounted for at the U.S. parent company level because of the centralized procurement organization used by Motorola; (3) Motorola repatriated profits beyond what were needed to operate its foreign subsidiaries to the United States; and (4) over half of the purchases at issue in this case were made by a Motorola subsidiary that was treated as a branch of the U.S. parent company under U.S. tax law.

Indeed, accepting Defendants' argument at this stage of the case would require the Court to effectively vitiate its prior *IPP Order*. The Court has already concluded that a reasonable jury could determine that the "domestic effects" exception applies where a price-fixed LCD panel is sold abroad and then incorporated into finished products bound for sale in the United States. *See*

IPP Order at 966.[52] As the Court explained, where "defendants colluded to increase the prices of LCD panels, a major component in electronic products that are imported into the United States" and the "increased price of the components caused the prices of the finished products in the United States to increase," there is a sufficiently direct effect on U.S. commerce. *Id.* (stating that "[i]f this effect is not 'direct,' it is difficult to imagine what would be"). This is because "the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for [finished LCD-containing products])." *See id.* at 964. It would be impossible to have, as the *IPP Order* references, a "direct" effect that "proceeded without deviation or interruption from the LCD manufacturers to the American retail store" with respect to American consumers, that is not also "direct" with respect to American OEMs, such as Motorola, that manufactured abroad and sold in the United States the LCD-containing products purchased by the American consumer. *See id.* (internal quotations omitted). Thus, at a minimum, a material question of fact exists as to whether the "domestic effects" exception applies to Motorola's damages arising from LCD panels that were incorporated into mobile devices imported into the United States.

Permitting Motorola to recover under the Sherman Act all of the damages it suffered as a result of paying a single, artificially-inflated LCD panel price that was determined in the United State raises no comity concerns. Congress passed the FTAIA in an effort to limit the application of American antitrust laws to foreign anticompetitive conduct when that conduct causes no injury to consumers in the United States. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993) ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy.") (citing H.R. Rep. No. 97-686, ¶¶ 2-3, 9-10 (1982)); *see also IPP Order* at 956. That is not the case here.

The United States has a significant interest in policing the illegal activities at issue here and applying its antitrust laws to the claims asserted by Motorola. First, the United States has a

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[52] Defendants concede as much in their Motion, admitting that such sales "may . . . implicate effects on U.S. commerce." Motion at 31.

strong interest in protecting a U.S. company, such as Motorola, from unknowingly approving artificially-inflated prices in the United States that apply to its worldwide operations. Second, the United States has a strong interest in preventing and subsequently punishing foreign conspirators, such as Defendants, that establish cartel enforcement mechanisms in the United States (in the form of subsidiaries and employees based in the United States that furthered the cartel's aims) for the specific purpose of targeting a U.S. company. Either of these interests is enough to warrant application of the U.S. antitrust laws to all claims stemming from such activities; here there is both.

This Court recognized the first of these interests (protecting U.S. companies from agreeing to prices tainted by a cartel) in *Motorola II*. In that decision, the Court noted that "Motorola is not a foreign company" that attempts to recover damages "based on wholly foreign transactions and conduct," but is rather a "Delaware corporation with its principal place of business in Illinois" that requests damages caused by "a conspiracy between defendants that involved both domestic and foreign conduct." *Id*. at 842. The Court explained that, as a result, "many of the comity concerns regarding interference with the sovereign authority of other nations . . . are therefore less applicable." *Id*. at 842. As the Court correctly noted, applying U.S. antitrust law to the circumstances here – i.e., an international price-fixing cartel targeting a U.S. company in the United States that results in the U.S. company sustaining injury on account of that illegal activity in the United States – is a far cry from the situation that raised comity concerns in *Empagran* and its progeny, where wholly foreign plaintiffs, with no U.S. ties and wholly foreign injuries, sought to take advantage of the protections afforded by the U.S. antitrust laws.[53]

[53] In their Motion, Defendants imply that the Litigation Assignment Agreements between Motorola, Inc. and its foreign subsidiaries somehow advance their argument. That is not the case. The Litigation Assignment Agreements "strongly suggest" Motorola, Inc.'s "entitlement to assert claims on behalf of its foreign affiliates." *See Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1186 (N.D. Cal. 2009). Where, as here, there is such a complete unity of interest between a parent company and its subsidiaries, it is proper for the parent company to bring claims on behalf of its affiliates. *See Farmland Dairies, Inc. v. New York Farm Bureau, Inc.*, 1996 WL 191971, at *3-4 (N.D.N.Y. Apr. 15, 1996) (holding that it is proper for a parent company to bring an antitrust claim on behalf of its wholly owned subsidiary, because "any injury to [the wholly owned subsidiary] directly injures [the parent] as well"). Moreover, the Litigation Assignment Agreements provide a benefit to Defendants, as they eliminate the threat of double recovery created by suits being brought in multiple countries.

This Court recognized the second of these interests (stopping foreign cartelists from establishing cartel enforcement mechanisms in the United States), in its recent *IPP Order*. In that decision, the Court pointed to Defendants' guilty plea "admissions that the conspiracy was targeted at the United States" and the fact that Defendants used "American subsidiaries and U.S.-based employees . . . to market and sell their products specifically to American companies," "used their American employees in furtherance of the conspiracy," targeted their "actions . . . at the United States," and centered their "relationships" with large U.S. OEMs "in large part within the United States," and, based on these facts, concluded that it "is skeptical that Congress intended to remove from the Sherman Act's reach anticompetitive conduct that has such a quantifiable effect on the U.S. economy." *IPP Order* at 962-64.

Similarly, it is hard to imagine that Congress would affirmatively relinquish the United States' right to protect a U.S. company from an international cartel that set up subsidiaries and stationed employees in the United States for the purpose of targeting their illegal activities at that U.S. company, as is the case here. *See Turicentro, S.A. v. American Airlines Inc.*, 303 F.3d 293, 305 (3d Cir. 2002) (explaining the distinction between anticompetitive conduct directed at foreign markets that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets, and explaining that antitrust laws apply to the latter sort of conduct).

For the reasons set forth above, a reasonable jury could – and should – conclude that the "domestic effects" exception applies and Motorola is entitled to bring its entire damages claim under the Sherman Act.

2. <u>A Reasonable Jury Could – And Should – Conclude That Defendants' Conduct With Respect To Motorola Involves U.S. Import Trade And Commerce.</u>

The "import trade or commerce" exception to the FTAIA specifically excludes from the statute's reach foreign anticompetitive conduct that "involves" U.S. import trade or commerce, meaning that such conduct is subject to application of the Sherman Act. Because Defendants' illegal price-fixing conduct was targeted at LCD panels sold to Motorola that Defendants knew would be incorporated into mobile devices sold in the United States, a reasonable jury could –

and should – conclude that the "import trade or commerce" exception applies and that Motorola is entitled, at a minimum, to seek damages in this case based on purchases of such panels.

As recent case law makes clear, a defendant "[f]unctioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite." *Animal Science*, 654 F.3d at 470. Rather, the relevant inquiry is whether the defendant's anticompetitive behavior "was directed at an import market," i.e. whether "the defendants' conduct target[ed] import goods or services." *Id*. (citing *Turicentro*, 303 F.3d at 313); *see also Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650, 661 (7th Cir. 2011), *reh'g granted* (Dec. 1, 2012). Illegal conduct abroad "involves" U.S. import commerce if the conspirators fix the prices of goods sold in or for delivery to the United States. *See Animal Science*, 654 F.3d at 471 n.11 (emphasizing the importance of "defendants' sales of [price-fixed products] for delivery in the United States").

The Court agreed with this application of the "import trade or commerce" exception in its final jury instructions issued in the AU Optronics criminal case. *See United States v. AU Optronics Corp*., Case No. 09-cr-0110 SI (N.D. Cal. Mar. 1, 2012) (Doc. No. 829) at 10 ("In order to establish the offense of conspiracy to fix prices charged in the indictment, the government must prove each of the following elements beyond a reasonable doubt: . . .Third, that the members of the conspiracy engaged in one or both of the following activities: (A) fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States *or for delivery to* the United States . . .") (emphasis added). Additionally, the U.S. government supported this application in an amicus brief recently submitted in connection with the Seventh Circuit's rehearing en banc of *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650 (7th Cir. 2011) ("*Potash*"). *See* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party on Rehearing En Banc, Case No. 10-1712 (7th Cir. Jan. 12, 2012) (Doc. No. 62) ("a price-fixing conspiracy among foreign manufacturers 'involv[es]' import commerce if the conspirators fix the price of goods sold in *or for delivery to* the United States – i.e., goods in import commerce") (emphasis added) ("U.S. Amicus Brief") (attached to the Stokes Decl. as Ex. 326).

The evidence in this case shows that Defendants sold price-fixed LCD panels to Motorola manufacturing facilities abroad with full knowledge that those panels would be incorporated into Motorola mobile devices sold in the United States. *See supra*, Stmt. of Facts at Section B.2. As Motorola is a U.S. company and the U.S. market for cell phones is one of the largest in the world, Defendants are hard pressed to claim otherwise. *Id*. Moreover, Defendants are unable to claim that they sold the price-fixed LCD panels to some independent foreign firm that later dumped them into the U.S. market, as Defendants negotiated directly with Motorola and delivered price-fixed products directly to Motorola facilities. In this respect, Defendants targeted their illegal conduct at goods bound for import into the United States. A reasonable jury could – and should – conclude that this illegal conduct sufficiently "involved" U.S. imports such that the "import trade or commerce" exception to the FTAIA applies.

This result is proper in light of Congress' rationale for including the "import trade and commerce" exception in the FTAIA: "[The FTAIA] does not address . . . our import trade since imports *invariably* have an impact on our domestic trade." *See* 128 Cong. Rec. H4981-82 (daily ed. Aug. 3, 1982) (statement of Rep. McClory) (emphasis added). This desire to fully preserve the protection of U.S. markets, businesses, and consumers from illegal conduct aimed at imports into the United States is further reflected in the Committee Report discussing the FTAIA:

> Some observers raised questions about the status of import transactions under [the FTAIA] and urged the Subcommittee to make clear that the legislation had no effect on the application of antitrust laws to imports. As Mr. Atwood stated, "*it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law*" . . . To remove any possible doubt, the Subcommittee amendment modified the legislation to make clear that . . . wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not.

H.R. Rep. No. 97-686 at 8-10 (emphasis added).

Moreover, such a result is consistent with the historic scope given to the U.S. antitrust laws: "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *See Hartford Fire*, 509 U.S. at 795-96 (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.)); *see also eMAG Solutions, LCC v. Toda Kogyo Corp.*, 2005 WL 1712084, *8 (N.D. Cal. July

20, 2005) ("By its terms, the FTAIA does not apply to cases alleging antitrust conduct in foreign import commerce . . . Thus, the rule articulated by the U.S. Supreme Court in *Hartford Fire* . . . applies - that is, 'the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect' in the United States.'"). The Sherman Act has always authorized antitrust actions "predicated on wholly foreign conduct which has an intended and substantial effect in the United States," *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997), and that should not change here.

Further, interpreting the "import trade or commerce" exception to include damages claims against conspirators, such as Defendants, that deliver price-fixed goods abroad for import into the United States is consistent with basic principles of comity. It is well-settled that "[a country] has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has *or is intended to have* substantial effect within its territory." *See* Restatement (Third) of the Foreign Relations Law of the United States § 402(1)(c) (1986) (emphasis added). This principle "is generally accepted with respect to liability for injury in the [country] from products made outside the [country] and *introduced into its stream of commerce*." *See id*. § 402 cmt. d (emphasis added); *see also Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (Holmes, J.) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm . . .").

The U.S. government recently set forth an even broader interpretation of the "import trade or commerce" exception in its amicus brief submitted in connection with the Seventh Circuit's rehearing in the *Potash* case. In that brief, the U.S. government argued that, if the defendants' illegal conduct "involves" even a small bit of U.S. import commerce, then all of the defendants' conduct falls under the exception and is subject to the Sherman Act. Specifically, the government asserted:

> "Directed at" and "targeting" also might be misunderstood to suggest that the import commerce exception turns on the proportion or dollar value of products sold in or for delivery to the United States. A price-fixing conspiracy "involv[es]" U.S. import commerce even if the conspirators set prices for products sold around the world (so long as the agreement includes products sold into the United States) and even if only a relatively small proportion or dollar amount of the price-fixed goods were sold into the United States.

U.S. Amicus Brief at 18 (attached as Ex. 376). In the U.S. government's view, Motorola's entire damages claim qualifies under the "import trade or commerce" exception and, therefore, is actionable under the Sherman Act.

For the reasons set forth above, the "import trade or commerce" exception to the FTAIA applies and requires denial of Defendants' Motion.

CONCLUSION

Based on the foregoing, Motorola respectfully requests that the Court deny Defendants' Motion.

Dated: May 18, 2012

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EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION
_______________________________________/

This Order Relates to:

Motorola Mobility, Inc. v. AU Optronics Corporation, et al., C 09-5840 SI
_______________________________________/

No. M 07-1827 SI
MDL. No. 1827

Case No. C 09-5840 SI

ORDER DENYING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON MOTOROLA'S FOREIGN INJURY CLAIMS

On August 3, 2012, the Court heard argument on defendants' joint motion for summary judgment on Motorola Mobility, Inc.'s Sherman Act claim for injuries in foreign markets. Defendants' motion asserts that Motorola's claims based on TFT-LCD purchases in foreign markets are barred by the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a ("FTAIA").

Defendants argue that Motorola has failed to prove that its foreign injury claims were caused by any domestic effect of defendants' anticompetitive conduct. Defendants contend that although Motorola alleged that "[d]efendants and their co-conspirators . . . entered into supply agreements with Motorola in Illinois to sell Motorola LCD panels at unlawfully inflated prices," Third Amended Complaint ("TAC") ¶ 4, in fact "[d]iscovery has shown that [Motorola's] allegations concerning supposed global price agreements negotiated and entered into in Illinois are untrue." Motion at 3. Pointing to a lack of evidence demonstrating the requisite "domestic effect" proximately causing Motorola's foreign injury claims, defendants argue that two of the three categories of claims against it[1] should not be allowed to go to trial.

The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." 15 U.S.C. § 6a. The FTAIA then "provides an exception to this general rule, making the Sherman Act applicable if foreign conduct '(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.''" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 (9th Cir. 2008) (quoting *Hoffmann-La Roche Ltd. v. Empagran S.A.*, 541 U.S. 155 (2004)(*Empagran I*) and 15 U.S.C. § 6a). This is known as the "domestic injury exception" of the FTAIA. *Id*. The Supreme Court has stated:

> This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."

Empagran I, 542 U.S. at 162 (quoting 15 U.S.C. § 6a) (emphasis original). The FTAIA "sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts." *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012); *Animal Sci. Prods., Inc v. China Minmetals Corp.*, 654 F.3d 462, 469 (3d Cir. 2011); *see also* October 5, 2011 Order Denying Defendants' Joint Dispositive Motion Regarding Indirect Purchaser Claims Based on Foreign Sales ("IPP Order") at 7, Master Docket No. 3833 (adopting *Animal Science* view that "the FTAIA does not implicate the subject matter jurisdiction of the federal courts").

The Court concludes that whether the price fixing activities alleged by Motorola in this case gave rise to direct, substantial, and reasonably foreseeable effects on domestic commerce, and whether such

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[1]Motorola's TAC alleges antitrust claims based on three categories of purchases: "(1) LCD Panels delivered by the Defendants to Motorola in the United States; (2) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices imported into the U.S. by Motorola and later sold by Motorola to customers in the United States; and (3) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices sold to Motorola customers abroad." TAC ¶ 184. Defendants seek summary adjudication on the second and third categories of claims (the "foreign injury claims").

effects gave rise to a Sherman Act claim present issues of fact which must be resolved by the jury in this case.

Motorola contends, and this Court agrees, that its domestic roots and the locale of the transactions at issue distinguish this case from *Empagran I*. As this Court has previously observed, "Motorola is not a foreign company alleging injury based on wholly foreign transactions and conduct, unlike plaintiffs in *Empagran I*." March 28, 2011 Order Denying Defendants' Joint Motion to Dismiss the Second Amended Motorola Complaint (*Motorola II* Order) at 8, Master Docket No. 2602.

Motorola points to substantial evidence that defendants targeted Motorola in the United States for defendants' sales and marketing of LCD panels. *See Animal Science*, 654 F.3d at 470 (the relevant inquiry is whether the defendants' anticompetitive behavior "target[ed] import goods or services") (citing *Turicentro, S.A. v. American Airlines Inc.*, 303 F.3d 293, 313 (3d Cir. 2002)). Defendants knew that Motorola sold mobile devices in the United States and that the United States was one of the largest markets for mobile devices in the world. *See, e.g.*, Declaration of Joshua Stokes ("Stokes Decl."), Ex. 379 (Samsung presentation noting that Motorola had the number one market share in the U.S.); Ex. 150 (Sharp presentation noting same); Ex. 155 (indicating Toshiba's sales plan was based on strong demand from U.S. and Europe); Exs. 156, 157-160 (defendants' presentations and analyses regarding Motorola's U.S. market share). Defendants established U.S. subsidiaries to facilitate sales of LCD panels to Motorola in the United States. *See, e.g.*, Opposition at 15, n. 15 (listing defendants' relevant U.S. subsidiaries and affiliates); Stokes Decl., Ex. 80 (AUO email stating that its "regional strategy" for the U.S. was "direct access to Moto/Chicago and its global network"); Ex. 352 (deposition testimony of Samsung SDI employee that "[Samsung] had an office in Chicago because Motorola was in Chicago"); Ex. 345 (deposition testimony that Sharp had an office in a Chicago suburb in order to be "close to our customer . . . [f]irst of all, Motorola").

Defendants also met with Motorola on several occasions in the United States to discuss, and, at times, negotiate prices for LCD panels. *See, e.g.*, Exs. 251, 254, 255, 266, 314 (defendants' PowerPoint presentations to Motorola in the United States); Ex. 375 (document indicating that Samsung had several conversations in Chicago with Motorola regarding LCD panel pricing); Ex. 96 (Toshiba America Electronic Corporation ("TAEC") report indicating in-person price negotiations with Motorola in

Schaumburg, IL); Ex. 99 (email setting "Final Negotiations Meeting" in Chicago with Motorola and representatives of AUO and AUOA); Ex. 140 (Sharp email describing Motorola meeting held in U.S., where price negotiations took place). Defendants also used their employees — both U.S.-based and those stationed abroad — in furtherance of the price-fixing conspiracy. *See*, *e.g.*, Ex. 349 (deposition testimony identifying Samsung employee who was "dispatched" to the U.S. from 1999 to 2004 and given instructions "about how to gather competitive information about [Samsung's] competitors"); Ex. 167 (email requesting that Epson's U.S.-based employees "research competitor's situation" regarding a particular Motorola phone model); Ex. 168 (Toshiba informing its U.S.-based employees that competitive information had been gathered from Sanyo about projected share awards for Razr mobile phones and instructing them to "get information as much as possible").

Motorola also points to the admissions in the guilty pleas of many companies and executives involved in the LCD price-fixing conspiracy as further evidence that the conspiracy was targeted at the United States. Opposition at 26, n. 42 (listing plea agreements of LG, Sharp, Chunghwa, Hitachi, Epson, Chi Mei, and HannStar); *see also* Special Verdict Form, *United States v. AU Optronics Corp.*, Case No. 09-cr-0110 SI (N.D. Cal. Mar. 2012) (AUO convicted of participating in a conspiracy to fix prices of LCD panels sold in the United States from September 2001 to December 2006), Docket No. 85. Some defendants admitted to specifically targeting Motorola in the United States. *See* Plea Agreement, *United States v. Sharp Corp.*, Case No. 08-cr-802 SI (N.D. Cal. Dec. 8, 2008) (Sharp pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones); *United States v. Epson Imagining Devices Corp.*, Case No. 09-cr-854 SI (N.D. Cal. Oct. 23, 2009) (Epson pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones).

The parties dispute whether defendants' conduct gave rise to its Sherman Act claims. *See DRAM*, 546 F.3d at 989-90 ("[W]here a global price-fixing conspiracy is alleged to have affected prices both in the United States and abroad, courts have held that 'the give rise to language of [the FTAIA] requires a plaintiff to establish a direct or proximate causal relationship' between the alleged anticompetitive effects in the United States and the plaintiff's alleged foreign injury."). Defendants argue that, because Motorola's foreign affiliates purchased LCD panels pursuant to globally-negotiated foreign contracts (*i.e.*, purchase orders), the "domestic injury exception" is inapplicable to Motorola's foreign injury claims. *See* Motion at 23-24. Defendants claim that the prices used in purchase orders Motorola used with its LCD panel suppliers were based on negotiations abroad, not in the United States. *Id*. On this basis, defendants conclude that "the effect on U.S. domestic commerce that 'gave rise to' the foreign injury claims . . . is non-existent." *Id*. at 25. The Court is not persuaded by defendants' argument. Motorola has presented admissible evidence from which a jury could infer that final decisions regarding pricing of LCD panels took place in the United States. *See, e.g.*, Stokes Decl., Ex. 363 (deposition testimony of Motorola's Vice President of Procurement, Janet Robinson, that it was Motorola's "practice" that senior procurement officers in the United States gave "approval to enter into an agreement on price with a display module supplier during the relevant time period . . . ."). Motorola also points to the deposition testimony of its employees to support its claim that foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States. *See*, *e.g.*, Ex. 359 (deposition testimony of Motorola's Chief Procurement Officer, Theresa Metty, that the "decision making" regarding contract negotiations, "which would include prices," happened in Illinois); Ex. 372 (deposition testimony of Motorola's Vice President of Global Operations, E.L. Tay, that the purchasing team "basically execute[d] what was done and planned [in the United States]").

Whether, as defendants argue, Motorola's "rubber stamp approval process falls far short of what the FTAIA requires," Motion at 6, will be left up to a jury to decide, not the Court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on motions for summary judgment."). The Court finds that a reasonable jury could find a "concrete link between defendants' price setting-conduct . . . its domestic effect, and the foreign injury suffered by Motorola and its affiliates." *See Motorola II* Order at 8.

Accordingly, the Court DENIES dependants' joint motion for summary judgment. Master Docket No. 5415; Docket No. 312 in 09-5840.

IT IS SO ORDERED.

Dated: August 9, 2012

Susan Illston

SUSAN ILLSTON
United States District Judge

EXHIBIT 11

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

Master Docket No. 07-m-1827 SI
Case No. C 09-5840 SI

This Document Relates To:

Motorola Mobility, Inc. v. AU Optronics Corporation, et al., C 09-5840 SI

PLAINTIFF MOTOROLA MOBILITY LLC'S OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY UNDER 28 U.S.C. § 1292(b)

Date:	October 5, 2012
Time:	9:00 a.m.
Judge:	The Hon. Susan Illston
Courtroom:	10

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FEDERAL STATUTES

I. <u>INTRODUCTION</u>

Defendants have asked this Court to certify for immediate appellate review its August 9, 2012 Order Denying Defendants' Joint Motion for Summary Judgment on Motorola's Foreign Injury Claims (Dkt. No. 6422) ("August 9 Order"). Specifically, Defendants request interlocutory appeal of this Court's finding that in this case – under its specific facts – application of the "domestic injury" exception to the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA") presents an issue of fact that must be resolved by a jury.

This is the second time that Defendants have now challenged an order from this Court rejecting their contention that the FTAIA bars Motorola's antitrust claims stemming from deliveries of price-fixed LCD panels to Motorola facilities located abroad. *See* Defs' Motion to Certify Under 28 U.S.C. § 1292(b) (Dkt. No. 2649) ("First Motion for Certification"). Although, at the motion to dismiss stage, the Court did certify Defendants' previous request, the Ninth Circuit made clear that this is not an issue warranting interlocutory review, rejecting Defendants' petition and refusing to allow appeal. *See* Order, Case No. 11-80128 (Aug. 11, 2011) (Dkt. No. 5) ("Appeal Denial"). There is no reason to believe that the Ninth Circuit would see things any differently now.

In fact, since the Court was confronted with this issue at the motion to dismiss stage, both the posture of this case and case law surrounding application of the FTAIA have changed dramatically. Procedurally, fact and expert discovery is now complete, summary judgment briefing is now complete, and this case is heading to trial shortly. When the Court decided the August 9 Order, it was the first time it had a full factual record before it. That factual record was the entire basis for the Court's decision. There is no dispute that the Court applied the correct legal standard: whether there was a "direct, substantial, and reasonably foreseeable" effect on U.S. domestic commerce. Indeed, this Court has applied that standard in two recent LCD trials, the AUO criminal trial and the Toshiba class trial. Substantively, this Court and two circuits have now confirmed that the FTAIA is a substantive element of a Sherman Act claim, rather than a jurisdictional requirement and, therefore, the FTAIA must be applied in a different manner.

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Under these circumstances, Defendants' current motion fails because:

First, Defendants fail to demonstrate that the August 9 Order presents a "controlling question of law." In fact, the question on which Defendants seek interlocutory appeal is not a "question of law" at all. Instead, Defendants seek review of whether this Court was correct in determining that, after the completion of discovery, there are genuine issues of material fact as to whether the "domestic injury" exception to the FTAIA could apply to the circumstances here. As the Court recognized in its August 9 Order, "whether the price fixing activities alleged by Motorola in this case gave rise to direct, substantial, and reasonably foreseeable effects on domestic commerce, and whether such effects gave rise to a Sherman Act claim *present issues of fact which must be resolved by the jury in this case*." August 9 Order at 3 (emphasis added). Indeed, an adverse decision at summary judgment necessarily means that questions of fact, rather than questions of law, govern. Nor is this question "controlling," as appeal will not definitively resolve Motorola's claims, or alter the underlying issues in this case.

Second, Defendants fail to demonstrate that there are "substantial grounds for a difference of opinion on a question of law." Based on recent Supreme Court guidance regarding statutory interpretation, courts addressing the FTAIA in the last year have held that the statute sets forth a substantive element of a Sherman Act claim, rather than a jurisdictional bar. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 958-59 (N.D. Cal. 2011) (holding that the FTAIA establishes a substantive element of a Sherman Act claim); *Minn-Chem, Inc.* v. Agrium, Inc., 683 F.3d 845, 852 (7th Cir. 2012) (same); *Animal Sci. Prods., Inc. v. China Minmentals Corp.*, 654 F.3d 462, 469 (3rd Cir. 2011) (same). As a result, and as this Court correctly recognized in its August 9 Order, application of the FTAIA depends on the facts of a particular case. Indeed, the August 9 Order is based on a review of the unique facts presented after the close of fact discovery in this case; it is not a difference of opinion on a pure question of law.

Third, Defendants cannot show that "an immediate appeal may materially advance the ultimate termination" of this litigation. Unlike the Court's FTAIA ruling at the motion to dismiss stage, this ruling comes at the end of discovery, as the case is about to proceed to trial. Defendants cannot show that an appeal now would likely be resolved before trial or in any way advance the ultimate resolution of this case. If the pending appeal in the Ninth Circuit on Due Process issues is any guide, an appeal here could take several years to be resolved. Moreover, because Motorola's Sherman Act claims based on deliveries of price-fixed LCD panels to the United States and breach of contract and unjust enrichment claims based on global deliveries of price-fixed LCD panels will remain no matter what, reversal of the August 9 Order would have little, if any, effect on the parameters of this case.

Additionally, and equally important to the Section 1292(b) factors described above, the Court will soon transfer the Motorola case back to the Northern District of Illinois (in all likelihood by year's end), and case law and common sense strongly suggest that it is unwise for a court to certify for appeal a case that is being imminently transferred to an entirely different circuit, especially where there are issues involved that will be litigated under the law of that circuit, and where that circuit has recently spoken to the issues.[1]

II. <u>BACKGROUND</u>

On July 23, 2010, Motorola filed its Second Amended Complaint (the "SAC") describing its procurement process and the interrelationship between Motorola's procurement organization based in Illinois and its facilities abroad. Specifically, the SAC set forth the precise mechanics by which Motorola's Illinois-based procurement organization approved the pricing that applied to all LCD panels delivered to Motorola around the world. In addition to a Sherman Act claim, the SAC also asserted claims for breach of contract and unjust enrichment based on Motorola's global purchases of price-fixed LCD panels.

On August 27, 2010, Defendants moved (for a second time) to dismiss Motorola's claims based on deliveries of price-fixed LCD panels abroad, asserting that the Court lacks subject

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[1] *See, e.g., In re Enron Corp. Securities, Derivative & ERISA Litig.*, Case No. 01-cv-3624, 2003 WL 22025050, at *3 (S.D. Tex. Jan. 23, 2003) (Dkt. No. 1238) (denying motion for certification under Section 1292(b), in part, for the following reason: "Moreover, because this is a multidistrict litigation, many of the consolidated member suits arose in other Circuit Courts of Appeals, which have different standards for pleading securities violations and to which the individual suits will be returned for trial, if they are to be so resolved. Thus the Fifth Circuit's determination of the questions may not be controlling.").

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matter jurisdiction over those purchases under the FTAIA.[2] The Court denied defendants' motion on March 28, 2011, ruling that the specific allegations contained in the SAC established a "concrete link" between Defendants' price-fixing of LCD panels, the domestic effect of that unlawful conduct, and the injury that Motorola suffered in connection with deliveries of LCD panels abroad. *See* Order Denying Defs' Motion To Dismiss the Second Amended Motorola Compl. (Dkt. No. 2602) (the "March 28 Order"). The Court also denied Defendants' motion to dismiss with respect to Motorola's breach of contract and unjust enrichment claims. *Id*. at 12-14.

On April 13, 2011, Defendants moved for certification for interlocutory review of the March 28 Order, and, on May 25, 2011, this Court granted Defendants' motion. *See* Order Granting Defendants' Motion to Certify Under 28 U.S.C. § 1292(b) at 2 (Dkt No. 2810). However, shortly thereafter, on August 11, 2011, the Ninth Circuit denied Defendants' petition and refused to hear their appeal. *See* Appeal Denial (Dkt No. 5). This case proceeded, and discovery closed on December 8, 2011.

In a motion for partial summary judgment, Defendants again challenged whether Motorola's claims based on deliveries of price-fixed LCD panels abroad are barred by the FTAIA. *See* Defs' Joint Motion for Summary Judgment Addressing Pls' Sherman Act Claims for Injuries in Foreign Markets (Dkt No. 5417). In their briefing, the parties did not dispute the correct legal standard to be employed by the Court – whether there was a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce. The only dispute was about the facts.

On August 9, 2012, the Court denied Defendants' motion, ruling that "whether the price fixing activities alleged by Motorola in this case gave rise to direct, substantial, and reasonably foreseeable effects on domestic commerce, and whether such effects gave rise to a Sherman Act claim *present issues of fact which must be resolved by the jury in this case*." August 9 Order at 2-3 (emphasis added). Specifically, the Court pointed to detailed evidence showing that Defendants targeted their illegal activities at Motorola in the United States, that "final decisions [at Motorola]

[2] Defendants did not challenge Motorola's claims based on purchases of price-fixed LCD panels delivered to its U.S. facilities.

regarding pricing of LCD panels took place in the United States," and that Motorola's "foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States." *Id*. at 5. Based on this evidence, the Court concluded that "a reasonable jury could find 'a concrete link between defendants' price setting conduct…its domestic effect, and the foreign injury suffered by Motorola and its affiliates.'" *Id*. at 5 (citation omitted).

Shortly before its summary judgment ruling, the Court indicated that the Motorola case would be transferred back to the Northern District of Illinois for trial. *See* August 3, 2012 Civil Pretrial Minutes (Dkt. No. 6416) (the Motorola case was "filed out of district and will be transferred back to the originating district so that a court there may establish pretrial/trial dates in accordance with its calendar/procedures").

III. ARGUMENT

Certification for appeal under 28 U.S.C. § 1292(b) is reserved for "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). The tool of interlocutory appeal should be "applied sparingly." *In re Cement Antitrust Litig*., 673 F.2d 1020, 1027 (9th Cir. 1982). Thus, a party seeking appellate review under Section 1292(b) bears a substantial burden in establishing that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

A party seeking interlocutory appeal under Section 1292(b) must demonstrate that: (1) the order at issue involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; *and* (3) interlocutory appeal will "materially advance" the litigation. *See In re Cement Antitrust Litig.*, 673 F.2d at 1026; *see also Northstar Fin. Advisors Inc. v. Schwab Inv.*, No. C 08-4119 SI, 2009 WL 1126854 at *1 (N.D. Cal. Apr. 27, 2009), *rev'd*, 615 F.3d 1106 (9th Cir. 2010). Defendants have failed to make a sufficient showing for certification under Section 1292(b). As a result, their Motion should be denied.

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A. Defendants Have Failed to Establish a Controlling Question of Law.

Defendants have failed to establish that this Court's August 9 Order involves a controlling question of law.

Indeed, the August 9 Order does not even present at "question of law," let alone one that is "controlling." In the context of Section 1292(b), a "question of law" means a pure question of law – that is, "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine" that presents an "abstract legal issue." *Ahrenholz v. Bd. of Tr. of the Univ. of Ill.*, 219 F.3d 674, 676-77 (7th Cir. 2000). When a question of law is "inextricably intertwined with the . . . court's factual findings, an interlocutory appeal is not appropriate." *Oliner v. Kontrabecki*, 305 B.R. 510, 529 (N.D. Cal 2004); *see also Powers v. Eichen*, 977 F. Supp. 1031, 1046 (S.D. Cal. 1997) (Section 1292(b) does not apply to a "challenge [to] the manner in which the [district court] applied the facts in the instant case to the law."); *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (emphasizing that "[Section] 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts."). Yet that is precisely what Defendants challenge in their Motion.

In its August 9 Order, the Court considered, as is required at summary judgment, whether Motorola had presented sufficient evidence to raise a genuine issue of material fact as to whether there was a "direct, substantial, and reasonably foreseeable" effect on U.S. domestic commerce in this case. *See* August Order at 2-3, 4, 5. The Court's analysis focused on the facts. Those facts show that: (1) Motorola was targeted by Defendants' illegal cartel; (2) Defendants engaged in conduct in the United States in furtherance of their illegal cartel targeting Motorola; and (3) final pricing decisions at Motorola took place in the United States and applied to all Motorola purchases of LCD panels around the world. *See* August 9 Order at 3-5. Based on this evidence, the Court determined that "a reasonable jury could find a 'concrete link between defendants' price setting-conduct . . . its domestic effect, and the foreign injury suffered by Motorola and its affiliates.'" August 9 Order at 5 (citation omitted).

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Unable to escape the patently factual nature of the analysis in the August 9 Order, Defendants attempt to recast this Court's order as something it is not: one of statutory interpretation.[3] However, their own words betray that effort. The heart of Defendants' challenge, as the moving papers show, is whether "the Court's interpretation and application of the FTAIA" to what they inaccurately call "undisputed facts" was correct. Motion at 5. Defendants just do not like that the Court actually looked at all the facts presented (not just the limited set of facts Defendants reference). They disagree with how the Court viewed those facts and how the Court applied those facts in the context of the FTAIA. But, this is not proper grounds for interlocutory appeal under Section 1292(b). *See In re Text Messaging Antitrust Litig*., 630 F.3d 622, 626 (7th Cir. 2010) (noting that "routine applications of well-settled legal standards to facts" are not appropriate for interlocutory appeal); *see also Powers*, 977 F. Supp. at 1046 ("challenge[s] [to] the manner in which the [district court] applied the facts in the instant case to the law" are beyond the scope of Section 1292(b)). In fact, an adverse decision at summary judgment, such as the August 9 Order, shows that questions of fact, rather than questions of law govern.

Moreover, even if the question raised by Defendants is somehow deemed to be a "question of law," it is not "controlling" under Section 1292(b). A question of law is "controlling" only where it disposes of the case, or at a minimum, "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig*., 673 F.2d at 1026. That is not the situation here, as reversal of the August 9 Order would not change the outcome of this case.

Defendants' Motion ignores that even if the August 9 Order is reversed, Motorola will still have a substantial Sherman Act claim based on deliveries of price-fixed LCD panels to its facilities in the United States. Moreover, Defendants' contention that "a decision by the Ninth Circuit here would determine whether Motorola can pursue the foreign injury claims that

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[3] Defendants request interlocutory appeal of the following question: "Whether, as a matter of law, under the [FTAIA's] 'domestic injury' exception, Motorola has identified an effect on domestic commerce that proximately caused its purported foreign injuries where the undisputed facts show that all the alleged illegal prices of foreign purchases were contractually agreed upon and paid outside of the United States by foreign corporations." Motion at v.

constitute 99% of the commerce at issue in this litigation," Motion at 5, ignores that Motorola has also asserted breach of contract and unjust enrichment claims that cover the exact purchases at issue here. Those claims will remain regardless of appellate review of the August 9 Order.

In sum, Defendants have failed to identify a question of law and have additionally failed to present a question of law that is controlling within the meaning of Section 1292(b). Accordingly, Defendants' Motion must be denied.

B. Defendants Have Not Shown a Substantial Ground for Difference of Opinion on a Question of Law.

The second requirement for certification under Section 1292(b) is a showing that there be a "substantial grounds for difference of opinion." 28 U.S.C. § 1292(b). Defendants have not – and cannot – make that showing here.

As described above, the August 9 Order is based on application of the FTAIA's "domestic injury" exception to the specific facts of this case. The Court concluded that those facts were sufficient for a "reasonable jury [to] . . . find a 'concrete link between defendants' price setting-conduct . . . its domestic effect, and the foreign injury suffered by Motorola and its affiliates.'" August 9 Order at 5. Where, as here, a decision hinges on the unique facts presented, there can be no "substantial ground for difference of opinion on a question of law." *See Couch v. Telescope Inc*., 611 F.3d 629, 633 (9th Cir. 2010) ("[t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion"); *see also Powers*, 977 F. Supp. at 1046-47) (a "challenge [to] the manner in which [a court] applied the facts . . . to the law, does not provide a sufficient basis for granting a motion for certification for interlocutory appeal").

As support for their contention that a "substantial ground for difference of opinion" exists, Defendants cite to a number of *earlier* cases, with very different facts, that apply the FTAIA. *See* Motion at 7-8, 9. In doing so, Defendants ignore that there has been a fundamental shift in how courts view and apply the FTAIA since those earlier decisions. Based on recent Supreme Court guidance that limitations on the extraterritorial reach of a statute describe what conduct the law purports to regulate, rather than strip courts of subject matter jurisdiction, courts recently addressing application of the FTAIA have held that the FTAIA sets forth a substantive element of a Sherman Act claim, rather than a jurisdiction bar. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d at 959; *Minn-Chem*, 683 F.3d at 852; *Animal Sci. Prods.*, 654 F.3d at 469. As a result, and as this Court recognized in the August 9 Order, application of the FTAIA centers on a review of the facts of a particular case.

Defendants also attempt to rely on a straw man argument in support of their position, asserting that "[t]he Court's reliance here, if any, on the parent company's domestic status therefore provides a substantial difference for opinion." Motion at 9. However, there is no indication whatsoever that the Court's August 9 Order is based simply on the fact that Motorola is headquartered in the United States. The Court based its decision on numerous facts. Indeed, and not surprisingly, Defendants never cite to a specific portion of the August 9 Order as support of this baseless assertion.

Lastly, in an attempt to present a "substantial difference of opinion," Defendants actually resort to criticizing this Court's application of the facts. *See* Motion at 9-10. Not only does this argument ignore that the "substantial difference of opinion" must be on a "question of law," not a question of fact, but it also inherently undermines Defendants' position.

In turn, Defendants have failed to meet their burden for showing a substantial ground for a difference in opinion on a question of law.

C. <u>Defendants Have Not Demonstrated That Immediate Appellate Review Will Materially Advance Termination of the Litigation</u>.

A court considering whether immediate appellate review may materially advance the ultimate termination of the litigation, "should consider the effect of a reversal by the Ninth Circuit on the management of the case." *See Mateo v. M/S Kiso*, 805 F. Supp. 792, 800 (N.D. Cal. 1992). Interlocutory review of the August 9 Order would have little, if any, effect on the management of this litigation.

First, any decision on appeal would likely come after the conclusion of the trial in this matter, so absolutely nothing would be saved or altered by an interlocutory appeal at this time. By way of example, in the case of the interlocutory appeal granted in the AT&T litigation, 1 year and 8 months passed between the time when this Court granted the Section 1292(b) petition and the Ninth Circuit scheduled oral argument on the issue (which was just set for November 5, 2012).

This case is set to be transferred to the Northern District of Illinois shortly – in all likelihood after *Daubert* motions and common in limine motions are resolved later this year. It will be trial ready and, according to Senior Judge Gottschall's Deputy Courtroom Clerk, will likely be set for trial in the Northern District of Illinois within 60 to 90 days of remand. *See* August 3, 2012 Civil Pretrial Minutes (Dkt. No. 6419) (the Motorola case was "filed out of district and will be transferred back to the originating district so that a court there may establish pretrial/trial dates in accordance with its calendar/procedures"). Given the approaching trial and the significant claims at issue in this case, an interlocutory appeal would not advance termination of this case. As the this District Court noted in *Mateo*:

> If the Court certified the interlocutory appeal and stayed the proceedings, the trial would be delayed for months while the Court waited for a ruling . . . If the Court certified the interlocutory appeal and did not stay the proceedings, there is a possibility that the Ninth Circuit would not decide the appeal until after the trial is set to begin, which would also delay the termination of the case. Neither of these options would be practical.

Mateo, 805 F. Supp. at 801; *see also* Order Denying Defendants' Joint Motion to Certify (Dkt. No. 4346) ("Given the late stage of these proceedings, the Court finds that immediate appeal would not 'materially advance' the termination of th[e] litigation.").

Second, as noted above, Motorola's Sherman Act claims based on deliveries of price-fixed LCD panels in the United States will remain regardless of appeal, as will Motorola's breach of contract and unjust enrichment claims based on all purchases of price-fixed LCD panels worldwide (including Motorola's purchases resulting in so-called "foreign injury"). As a result, this case, and those claims, are slated to proceed to trial regardless.

Third, the trial preparation required to support or defend against Motorola's so-called "foreign injury" claims would also be unaffected by a reversal. As the facts show, and as the Defendants do not dispute, a single price governed all purchases of LCD panels by Motorola around the globe. As a result, in presenting its claims based on deliveries of price-fixed LCD panels in the United States (claims that are undoubtedly in this case), Motorola will rely on evidence and damages estimates that have equal application to all of its purchases. The same will be true for Defendants' efforts in defending this case.

As a result, Defendants have failed to demonstrate that immediate appellate review will materially advance termination of this case.

IV. CONCLUSION

For the reasons set forth above, Motorola respectfully requests that Defendants' Motion to Certify Under 28 U.S.C. § 1292(b) be denied.

Dated: September 13, 2012

Respectfully submitted,

/s/ Jerome A. Murphy

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EXHIBIT 12

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(Additional Parties and Counsel Listed on Signature Pages)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Master File No.: 3:07-MD-1827-SI Case No. 09-cv-5840-SI MDL No. 1827
This Document Relates to: *Motorola Mobility, Inc. v. AU Optronics Corporation, et al.*, C 09-5840 SI	**DECLARATION OF STEPHEN P. FRECCERO IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ADDRESSING PLAINTIFF'S SHERMAN ACT CLAIM FOR INJURIES IN FOREIGN MARKETS** Date: July 13, 2012 Time: 9:00 a.m. Judge: Honorable Susan Y. Illston Courtroom: 10

DOCUMENTS SUBMITTED UNDER SEAL AND CHAMBERS COPY

I, STEPHEN P. FRECCERO, hereby declare as follows:

1. I am a partner with the law firm of Morrison & Foerster LLP, located at 425 Market Street, San Francisco, CA, 94105, and counsel of record for Epson Imaging Devices Corporation ("EID") and Epson Electronics America, Inc. ("EEA"). I am licensed to practice law in the State of California and before this Court. I have personal knowledge of the matters stated herein, and if called as a witness, could and would testify competently thereto. I make this Declaration in support of Defendants' Motion for Summary Judgment Addressing Plaintiff's Sherman Act Claim for Injuries in Foreign Markets.

2. For the convenience of the Court, Defendants have organized the evidentiary submission in support of their Motion into 9 volumes. Volumes 1 - 4 contain documents marked as deposition exhibits in this proceeding. Volume 5 contains other documents not previously marked as deposition exhibits. Volumes 6 - 9 contain excerpts of deposition testimony.

3. Documents marked as deposition exhibits are referred to in this Declaration (and accompanying Motion) by their deposition exhibit numbers. Discovery and other materials not marked as deposition exhibits are referred to by letter designations (*e.g.*, "Ex. A," "Ex. B"). Deposition testimony is referred to by the name of the deponent.

<u>Volume 1</u>

A. Deposition Exhibits.

4. Attached is a true and correct copy of Motorola Deposition Exhibit 4, which was marked at the April 12, 2011 deposition of Motorola witness Jeffrey Rogero.

5. Attached is a true and correct copy of Motorola Deposition Exhibit 19, which was marked at the April 12, 2011 deposition of Motorola witness Jeffrey Rogero.

6. Attached is a true and correct copy of Motorola Deposition Exhibit 51, which was marked at the April 12, 2011 deposition of Motorola witness Jeffrey Rogero.

7. Attached is a true and correct copy of Motorola Deposition Exhibit 65, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

8. Attached is a true and correct copy of Motorola Deposition Exhibit 66, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

9. Attached is a true and correct copy of Motorola Deposition Exhibit 67, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

10. Attached is a true and correct copy of Motorola Deposition Exhibit 69, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

11. Attached is a true and correct copy of Motorola Deposition Exhibit 70, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

12. Attached is a true and correct copy of Motorola Deposition Exhibit 71, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

13. Attached is a true and correct copy of Motorola Deposition Exhibit 72, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

14. Attached is a true and correct copy of Motorola Deposition Exhibit 73, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

15. Attached is a true and correct copy of Motorola Deposition Exhibit 74, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

16. Attached is a true and correct copy of Motorola Deposition Exhibit 75, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

17. Attached is a true and correct copy of Motorola Deposition Exhibit 76, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

18. Attached is a true and correct copy of Motorola Deposition Exhibit 78, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

19. Attached is a true and correct copy of Motorola Deposition Exhibit 89, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

20. Attached is a true and correct copy of Motorola Deposition Exhibit 97, which was marked at the April 21, 2011 deposition of Motorola witness Alex Lima.

21. Attached is a true and correct copy of Motorola Deposition Exhibit 108, which was marked at the May 10, 2011 deposition of Motorola witness Timothy Cawley.

22. Attached is a true and correct copy of Motorola Deposition Exhibit 128, which was marked at the May 10, 2011 deposition of Motorola witness Timothy Cawley.

23. Attached is a true and correct copy of Motorola Deposition Exhibit 139, which was marked at the May 17, 2011 deposition of Motorola witness Robert Akins.

24. Attached is a true and correct copy of Motorola Deposition Exhibit 159, which was marked at the May 17, 2011 deposition of Motorola witness Robert Akins.

25. Attached is a true and correct copy of Motorola Deposition Exhibit 166, which was marked at the June 8, 2011 deposition of Motorola witness Durgesh ("D.K.") Singh.

26. Attached is a true and correct copy of Motorola Deposition Exhibit 171, which was marked at the June 8, 2011 deposition of Motorola witness D.K. Singh.

27. Attached is a true and correct copy of Motorola Deposition Exhibit 180, which was marked at the June 8, 2011 deposition of Motorola witness D.K. Singh.

28. Attached is a true and correct copy of Motorola Deposition Exhibit 185, which was marked at the July 15, 2011 deposition of Motorola witness Theresa Metty.

29. Attached is a true and correct copy of excerpts from Motorola Deposition Exhibit 187, which was marked at the July 15, 2011 deposition of Motorola witness Theresa Metty.

30. Attached is a true and correct copy of Motorola Deposition Exhibit 193, which was marked at the July 15, 2011 deposition of Motorola witness Theresa Metty.

31. Attached is a true and correct copy of Motorola Deposition Exhibit 200, which was marked at the July 15, 2011 deposition of Motorola witness Theresa Metty.

32. Attached is a true and correct copy of Motorola Deposition Exhibit 204, which was marked at the July 15, 2011 deposition of Motorola witness Theresa Metty.

33. Attached is a true and correct copy of Motorola Deposition Exhibit 205, which was marked at the July 15, 2011 deposition of Motorola witness Theresa Metty.

34. Attached is a true and correct copy of Motorola Deposition Exhibit 208, which was marked at the July 26, 2011 deposition of Motorola witness Angela Ford.

35. Attached is a true and correct copy of Motorola Deposition Exhibit 214, which was marked at the July 26, 2011 deposition of Motorola witness Angela Ford.

36. Attached is a true and correct copy of Motorola Deposition Exhibit 226, which was marked at the July 26, 2011 deposition of Motorola witness Angela Ford.

37. Attached is a true and correct copy of Motorola Deposition Exhibit 229, which was marked at the July 26, 2011 deposition of Motorola witness Angela Ford.

38. Attached is a true and correct copy of Motorola Deposition Exhibit 244, which was marked at the July 26, 2011 deposition of Motorola witness Angela Ford.

39. Attached is a true and correct copy of Motorola Deposition Exhibit 250, which was marked at the July 26, 2011 deposition of Motorola witness Angela Ford.

40. Attached is a true and correct copy of Motorola Deposition Exhibit 255, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

41. Attached is a true and correct copy of Motorola Deposition Exhibit 256, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

42. Attached is a true and correct copy of Motorola Deposition Exhibit 258, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

43. Attached is a true and correct copy of Motorola Deposition Exhibit 259, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

44. Attached is a true and correct copy of Motorola Deposition Exhibit 260, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

45. Attached is a true and correct copy of Motorola Deposition Exhibit 261, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

46. Attached is a true and correct copy of Motorola Deposition Exhibit 262, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

47. Attached is a true and correct copy of Motorola Deposition Exhibit 263, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

48. Attached is a true and correct copy of Motorola Deposition Exhibit 264, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

Volume 2

49. Attached is a true and correct copy of Motorola Deposition Exhibit 265, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

50. Attached is a true and correct copy of Motorola Deposition Exhibit 267, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

51. Attached is a true and correct copy of Motorola Deposition Exhibit 268, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

52. Attached is a true and correct copy of Motorola Deposition Exhibit 269, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

53. Attached is a true and correct copy of Motorola Deposition Exhibit 272, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

54. Attached is a true and correct copy of Motorola Deposition Exhibit 274, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

55. Attached is a true and correct copy of Motorola Deposition Exhibit 275, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

56. Attached is a true and correct copy of Motorola Deposition Exhibit 276, which was marked at the August 3, 2011 Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

57. Attached is a true and correct copy of Motorola Deposition Exhibit 278, which was marked at the August 4, 2011 personal and Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

58. Attached is a true and correct copy of Motorola Deposition Exhibit 279, which was marked at the August 4, 2011 personal and Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

59. Attached is a true and correct copy of Motorola Deposition Exhibit 280, which was marked at the August 4, 2011 Rule 30(b)(6) and personal deposition of Motorola witness Janet Robinson.

60. Attached is a true and correct copy of Motorola Deposition Exhibit 281, which was marked at the August 4, 2011 Rule 30(b)(6) and personal deposition of Motorola witness Janet Robinson.

61. Attached is a true and correct copy of Motorola Deposition Exhibit 284, which was marked at the August 4, 2011 personal and Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

62. Attached is a true and correct copy of Motorola Deposition Exhibit 291, which was marked at the August 4, 2011 personal and Rule 30(b)(6) deposition of Motorola witness Janet Robinson.

63. Attached is a true and correct copy of Motorola Deposition Exhibit 292, which was marked at the August 4, 2011 Rule 30(b)(6) and personal deposition of Motorola witness Janet Robinson.

64. Attached is a true and correct copy of Motorola Deposition Exhibit 304, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

65. Attached is a true and correct copy of Motorola Deposition Exhibit 320, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

66. Attached is a true and correct copy of Motorola Deposition Exhibit 325, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

67. Attached is a true and correct copy of Motorola Deposition Exhibit 326, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

68. Attached is a true and correct copy of Motorola Deposition Exhibit 328, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

69. Attached is a true and correct copy of Motorola Deposition Exhibit 330, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

70. Attached is a true and correct copy of Motorola Deposition Exhibit 347, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

71. Attached is a true and correct copy of Motorola Deposition Exhibit 352, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

72. Attached is a true and correct copy of Motorola Deposition Exhibit 362, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

73. Attached is a true and correct copy of Motorola Deposition Exhibit 364, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

74. Attached is a true and correct copy of Motorola Deposition Exhibit 385, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

75. Attached is a true and correct copy of Motorola Deposition Exhibit 386, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

76. Attached is a true and correct copy of Motorola Deposition Exhibit 389, which was marked at the September 13, 2011 deposition of Motorola witness Stephen Milligan.

77. Attached is a true and correct copy of Motorola Deposition Exhibit 390, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness Kah Leng (K.L.) Khoo.

78. Attached is a true and correct copy of Motorola Deposition Exhibit 391, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

79. Attached is a true and correct copy of Motorola Deposition Exhibit 392, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

80. Attached is a true and correct copy of Motorola Deposition Exhibit 393, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

81. Attached is a true and correct copy of Motorola Deposition Exhibit 394, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

82. Attached is a true and correct copy of Motorola Deposition Exhibit 395, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

83. Attached is a true and correct copy of Motorola Deposition Exhibit 399, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

84. Attached is a true and correct copy of Motorola Deposition Exhibit 400, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

85. Attached is a true and correct copy of Motorola Deposition Exhibit 401, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

86. Attached is a true and correct copy of Motorola Deposition Exhibit 402, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

87. Attached is a true and correct copy of Motorola Deposition Exhibit 403, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

Volume 3

88. Attached is a true and correct copy of Motorola Deposition Exhibit 408, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

89. Attached is a true and correct copy of Motorola Deposition Exhibit 415, which was marked at the November 10, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

90. Attached is a true and correct copy of Motorola Deposition Exhibit 417, which was marked at the November 11, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

91. Attached is a true and correct copy of Motorola Deposition Exhibit 418, which was marked at the November 11, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

92. Attached is a true and correct copy of Motorola Deposition Exhibit 419, which was marked at the November 11, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

93. Attached is a true and correct copy of Motorola Deposition Exhibit 420, which was marked at the November 11, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

94. Attached is a true and correct copy of Motorola Deposition Exhibit 421, which was marked at the November 11, 2011 Rule 30(b)(6) and personal deposition of Motorola witness K.L. Khoo.

95. Attached is a true and correct copy of excerpts from Motorola Deposition Exhibit 424, which was marked at the November 11, 2011 deposition of Motorola Rule 30(b)(6) witness Sharon Storm.

96. Attached is a true and correct copy of Motorola Deposition Exhibit 425, which was marked at the November 11, 2011 deposition of Motorola Rule 30(b)(6) witness Sharon Storm.

97. Attached is a true and correct copy of Motorola Deposition Exhibit 471, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

98. Attached is a true and correct copy of Motorola Deposition Exhibit 472, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

99. Attached is a true and correct copy of Motorola Deposition Exhibit 479, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

100. Attached is a true and correct copy of Motorola Deposition Exhibit 482, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

101. Attached is a true and correct copy of Motorola Deposition Exhibit 483, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

102. Attached is a true and correct copy of Motorola Deposition Exhibit 484, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

103. Attached is a true and correct copy of Motorola Deposition Exhibit 486, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

104. Attached is a true and correct copy of Motorola Deposition Exhibit 487, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

105. Attached is a true and correct copy of Motorola Deposition Exhibit 489, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

106. Attached is a true and correct copy of Motorola Deposition Exhibit 490, which was marked at the November 8, 2011 deposition of Motorola witness Carrie Bodak.

107. Attached is a true and correct copy of Motorola Deposition Exhibit 502, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

108. Attached is a true and correct copy of Motorola Deposition Exhibit 504, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

109. Attached is a true and correct copy of Motorola Deposition Exhibit 506, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

110. Attached is a true and correct copy of Motorola Deposition Exhibit 509, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

111. Attached is a true and correct copy of Motorola Deposition Exhibit 511, which was marked at the November 18, 2011 deposition of Motorola witness Carrie Bodak.

112. Attached is a true and correct copy of Motorola Deposition Exhibit 516, which was marked at the November 22, 2011 deposition of Motorola witness Ewee Liang(“E.L.”) Tay.

113. Attached is a true and correct copy of Motorola Deposition Exhibit 517, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

114. Attached is a true and correct copy of Motorola Deposition Exhibit 518, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

115. Attached is a true and correct copy of Motorola Deposition Exhibit 519, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

116. Attached is a true and correct copy of Motorola Deposition Exhibit 520, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

117. Attached is a true and correct copy of Motorola Deposition Exhibit 521, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

118. Attached is a true and correct copy of Motorola Deposition Exhibit 522, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

119. Attached is a true and correct copy of Motorola Deposition Exhibit 524, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

120. Attached is a true and correct copy of Motorola Deposition Exhibit 525, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

121. Attached is a true and correct copy of Motorola Deposition Exhibit 526, which was marked at the November 22, 2011 deposition of Motorola witness E.L. Tay.

122. Attached is a true and correct copy of Motorola Deposition Exhibit 524A, which was marked at the December 1, 2011 deposition of Motorola witness John Kozlowski.

123. Attached is a true and correct copy of Motorola Deposition Exhibit 537, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

124. Attached is a true and correct copy of Motorola Deposition Exhibit 538, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

125. Attached is a true and correct copy of Motorola Deposition Exhibit 539, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

126. Attached is a true and correct copy of Motorola Deposition Exhibit 540, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

127. Attached is a true and correct copy of Motorola Deposition Exhibit 541, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

128. Attached is a true and correct copy of Motorola Deposition Exhibit 542, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

129. Attached is a true and correct copy of Motorola Deposition Exhibit 543, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

130. Attached is a true and correct copy of Motorola Deposition Exhibit 544, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

131. Attached is a true and correct copy of Motorola Deposition Exhibit 545, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

132. Attached is a true and correct copy of Motorola Deposition Exhibit 549, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

133. Attached is a true and correct copy of Motorola Deposition Exhibit 551, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

134. Attached is a true and correct copy of Motorola Deposition Exhibit 552, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

135. Attached is a true and correct copy of Motorola Deposition Exhibit 554, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

136. Attached is a true and correct copy of Motorola Deposition Exhibit 556, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

137. Attached is a true and correct copy of Motorola Deposition Exhibit 557, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

138. Attached is a true and correct copy of Motorola Deposition Exhibit 558, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

139. Attached is a true and correct copy of Motorola Deposition Exhibit 566, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

140. Attached is a true and correct copy of Motorola Deposition Exhibit 567, which was marked at the December 2, 2011 deposition of Motorola witness Jeffrey Rogero.

141. Attached is a true and correct copy of Motorola Deposition Exhibit 574, which was marked at the December 5, 2011 deposition of Motorola consultant James Anklesaria.

142. Attached is a true and correct copy of Motorola Deposition Exhibit 575, which was marked at the December 5, 2011 deposition of Motorola consultant James Anklesaria.

143. Attached is a true and correct copy of Motorola Deposition Exhibit 578, which was marked at the December 5, 2011 deposition of Motorola consultant James Anklesaria.

144. Attached is a true and correct copy of Motorola Deposition Exhibit 579, which was marked at the December 5, 2011 deposition of Motorola consultant James Anklesaria.

145. Attached is a true and correct copy of Motorola Deposition Exhibit 600, which was marked at the December 14, 2011 deposition of Motorola witness Tracy Guo.

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146. Attached is a true and correct copy of Motorola Deposition Exhibit 601, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

147. Attached is a true and correct copy of Motorola Deposition Exhibit 602, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

148. Attached is a true and correct copy of Motorola Deposition Exhibit 603, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

149. Attached is a true and correct copy of Motorola Deposition Exhibit 605, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

150. Attached is a true and correct copy of Motorola Deposition Exhibit 606, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

151. Attached is a true and correct copy of Motorola Deposition Exhibit 607, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

152. Attached is a true and correct copy of Motorola Deposition Exhibit 608, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

153. Attached is a true and correct copy of Motorola Deposition Exhibit 613, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

154. Attached is a true and correct copy of Motorola Deposition Exhibit 615, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

155. Attached is a true and correct copy of Motorola Deposition Exhibit 623, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

156. Attached is a true and correct copy of Motorola Deposition Exhibit 626, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

157. Attached is a true and correct copy of Motorola Deposition Exhibit 628, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

158. Attached is a true and correct copy of Motorola Deposition Exhibit 630, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

159. Attached is a true and correct copy of Motorola Deposition Exhibit 632, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

160. Attached is a true and correct copy of Motorola Deposition Exhibit 633, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

161. Attached is a true and correct copy of Motorola Deposition Exhibit 636, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

162. Attached is a true and correct copy of Motorola Deposition Exhibit 637, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

163. Attached is a true and correct copy of Motorola Deposition Exhibit 638, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

164. Attached is a true and correct copy of Motorola Deposition Exhibit 639, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

165. Attached is a true and correct copy of Motorola Deposition Exhibit 640, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

166. Attached is a true and correct copy of Motorola Deposition Exhibit 641, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

167. Attached is a true and correct copy of Motorola Deposition Exhibit 642, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

168. Attached is a true and correct copy of Motorola Deposition Exhibit 643, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

169. Attached is a true and correct copy of Motorola Deposition Exhibit 645, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

170. Attached is a true and correct copy of Motorola Deposition Exhibit 648, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

171. Attached is a true and correct copy of Motorola Deposition Exhibit 649, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

172. Attached is a true and correct copy of Motorola Deposition Exhibit 650, which was marked at the December 15, 2011 deposition of Motorola witness Tracy Guo.

173. Attached is a true and correct copy of Motorola Deposition Exhibit 653, which was marked at the December 20, 2011 deposition of Motorola witness C.F. Cheng.

174. Attached is a true and correct copy of Motorola Deposition Exhibit 656, which was marked at the December 20, 2011 deposition of Motorola witness C.F. Cheng.

175. Attached is a true and correct copy of Motorola Deposition Exhibit 657, which was marked at the December 20, 2011 deposition of Motorola witness C.F. Cheng.

176. Attached is a true and correct copy of Motorola Deposition Exhibit 670, which was marked at the December 20, 2011 deposition of Motorola witness C.F. Cheng.

177. Attached is a true and correct copy of Motorola Deposition Exhibit 671, which was marked at the December 20, 2011 deposition of Motorola witness C.F. Cheng.

178. Attached is a true and correct copy of Motorola Deposition Exhibit 672, which was marked at the December 21, 2011 deposition of Motorola witness Chung Ming ("C.M.") C.M. Lai.

179. Attached is a true and correct copy of Motorola Deposition Exhibit 674, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

180. Attached is a true and correct copy of Motorola Deposition Exhibit 675, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

181. Attached is a true and correct copy of Motorola Deposition Exhibit 679, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

182. Attached is a true and correct copy of Motorola Deposition Exhibit 680, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

183. Attached is a true and correct copy of Motorola Deposition Exhibit 681, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

184. Attached is a true and correct copy of Motorola Deposition Exhibit 682, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

185. Attached is a true and correct copy of Motorola Deposition Exhibit 693, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

186. Attached is a true and correct copy of Motorola Deposition Exhibit 694, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

187. Attached is a true and correct copy of Motorola Deposition Exhibit 695, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

188. Attached is a true and correct copy of Motorola Deposition Exhibit 697, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

189. Attached is a true and correct copy of Motorola Deposition Exhibit 701, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

190. Attached is a true and correct copy of Motorola Deposition Exhibit 705, which was marked at the December 21, 2011 deposition of Motorola witness C.M. Lai.

191. Attached is a true and correct copy of Motorola Deposition Exhibit 3454, which was marked at the July 1, 2011 deposition of Sharp witness Yasuhisa ("Jack") Iida.

192. Attached is a true and correct copy of excerpts from MDL Deposition Exhibit 4601, which was marked at the January 30, 2012 deposition of Motorola expert witness B. Douglas Bernheim, Ph.D.

193. Attached is a true and correct copy of excerpts from Motorola Deposition Exhibit 4603, which was marked at the January 30, 2012 deposition of Motorola expert witness B. Douglas Bernheim, Ph.D.

194. Attached is a true and correct copy of excerpts from Motorola Deposition Exhibit 4863, which was marked at the March 16, 2012 deposition of Epson witness Hiroyuki Matsuura.

195. Attached is a true and correct copy of excerpts from Motorola Deposition Exhibit 4865, which was marked at the March 16, 2012 deposition of Epson witness Hiroyuki Matsuura.

196. Attached is a true and correct copy of excerpts from Motorola Deposition Exhibit 4883, which was marked at the March 16, 2012 deposition of Epson witness Hiroyuki Matsuura.

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B. Non-Deposition Exhibits.

197. Attached as Exhibit A is a true and correct copy of the Litigation Assignment Agreement between Hangzhou Motorola Cellular Equipment Co. Ltd. and Motorola, Inc.. Exhibit A was produced by Motorola in this action, and bears Bates numbers MOTOLCD001248303-304.

198. Attached as Exhibit B is a true and correct copy of Motorola Electronics Pte. Ltd's Purchase Order No. IO286651. Exhibit B was produced by Motorola in this action, and bears Bates numbers MOTOLCD-00004278-80.

199. Attached as Exhibit C is a true and correct copy of an errata to Appendix A to the Expert Report of Defendants' Expert, Professor Dennis W. Carlton, dated February 29, 2012.

200. Attached as Exhibit D is a true and correct copy of the Declaration of Tracy Guo, dated February 17, 2012.

201. Attached as Exhibit E is a true and correct copy of Motorola Mobility, Inc.'s Responses and Objections to Defendants' First Joint Set of Requests for Admissions, dated January 30, 2011.

202. Attached as Exhibit F is a true and correct copy of Motorola Mobility, Inc.'s Responses and Objections to Epson Electronics America, Inc.'s First Set of Requests for Admissions to Motorola Mobility, Inc., dated March 23, 2012.

203. Attached hereto as Exhibit G is a true and correct copy of Samsung Electronics Co., Ltd., Samsung America, Inc., and Samsung Semiconductor, Inc.'s First Set of Interrogatories, dated September 30, 2011 ("Samsung Interrogatories"). Samsung served these Interrogatories "on behalf of all Defendants." *See* Ex. G at 2. The Samsung Interrogatories asked

Motorola to identify "each and every contract" Motorola contended was breached, as set forth in Motorola's Third Claim for Relief in its Third Amended Complaint. *Id.* at 7-9.

204. Attached hereto as Exhibit H is a true and correct copy of Plaintiff Motorola Mobility, Inc.'s Supplemental Responses and Objections to Defendants Samsung Electronics Co., Ltd., Samsung America, Inc., and Samsung Semiconductor, Inc.'s First Set of Interrogatories, dated January 20, 2012 ("Supplemental Responses"). In its Supplement Responses, Motorola referred to an Attachment A which it stated was "a list of Bates numbers referring to documents produced by Motorola and the Defendants in this action that evidence the agreement between the parties, including purchase orders, share award notifications, hubbing agreements, and other documents." Ex. H at 9; *see also id.*, Attachment A.

205. In Attachment A to its Supplemental Responses, Motorola identified 1,465 Purchase Orders produced by either Motorola or a Defendant in this action. The Purchase Orders identified by Motorola in Attachment A to the Samsung Interrogatories are so voluminous that they cannot be conveniently examined by the Court. Staff working under my direction and subject to my supervision have reviewed the Purchase Orders Motorola identified in Attachment A. For the convenience of the Court, attached as Exhibit I is a true and accurate summary of the Purchase Orders identified by Motorola in Attachment A. Exhibit I was prepared at my direction.

206. Of the Purchase Orders identified by Motorola in Attachment A to its Supplemental Responses, every Purchase Order that was issued by a Foreign Assignor to a Defendant was issued from a location outside the U.S. *See* Ex. I.

207. Of the Purchase Orders identified by Motorola in Attachment A to its Supplemental Responses, every Purchase Order that was issued by a Foreign Assignor to a Defendant and that identifies a shipping address required the supplier to ship goods to a location outside the U.S. *See* Ex. I.

208. Of the Purchase Orders identified by Motorola in Attachment A to its Supplemental Responses, every Purchase Order issued by a Foreign Assignor to a Defendant called for the supplier to send the bill for payment to a location outside the U.S. *See* Ex. I.

209. Of the 1,465 Purchase Orders identified by Motorola in Attachment A to its Supplemental Responses, less than half (638) attach a copy of Motorola's Standard Terms & Conditions. *See* Ex. I.

210. Examples of Foreign Assignor Purchase Orders that were marked at deposition and that attach Motorola's Standard Terms & Conditions include the following attached to this declaration: Motorola Deposition Exhibits 519, 602 (Purchase Orders issued by Foreign Assignor Motorola China Electronics Ltd.); Motorola Deposition Exhibits 258, 279, 280, 281, 518 (Purchase Orders issued by Foreign Assignor Motorola Electronics Pte. Ltd. (Singapore)); Motorola Deposition Exhibits 517, 601 (Purchase Orders issued by Foreign Assignor Motorola Trading Center Pte. Ltd. (Singapore)); and Motorola Deposition Exhibits 259, 417, 418 (Purchase Orders issued by Foreign Assignor Motorola GmbH (Germany)).

211. Subject to minor word variations, every Purchase Order that was issued by a Foreign Assignor that attaches Terms & Conditions that Motorola identified in Attachment A to its Supplemental Responses contains a clause which states that "Seller's commencement of services or shipment of the goods, whichever occurs first, constitutes acceptance of this purchase order ('order') and all of its terms and conditions." *See, e.g.*, Motorola Deposition Exhibit No. 602 at 3 ¶ 1 (Motorola China Electronics Ltd.). For other examples see Motorola Deposition Exhibit No. 518 at 2 ¶ 1 (Motorola Electronics Pte. Ltd. (Singapore)); Motorola Deposition Exhibit No. 601 at 2 ¶ 1 (Motorola Trading Center Pte. Ltd. (Singapore)); Motorola Deposition Exhibit No. 259 at 2 ¶ 1 (Motorola GmbH (Germany)).

212. Every Purchase Order that was issued by a Foreign Assignor that attaches Terms & Conditions that Motorola identified in Attachment A to its Supplemental Responses contains an integration clause. A typical example is as follows: "1. ACCEPTANCE AGREEMENT. . . . This order constitutes the entire agreement between Motorola and Seller and it specifically supersedes all prior or contemporaneous agreements, arrangements, representations and communications whether oral or written." *See, e.g.*, Motorola Deposition Exhibit No. 602 at 3 ¶ 1 (Motorola China Electronics Ltd.). For other examples see Motorola Deposition Exhibit No. 518 at 2 ¶ 1 (Motorola Electronics Pte. Ltd. (Singapore)); Motorola Deposition Exhibit No. 601 at 2 ¶

1 (Motorola Trading Center Pte. Ltd. (Singapore)); Motorola Deposition Exhibit No. 259 at 3 ¶ 1 (Motorola GmbH (Germany)).

213. Every Purchase Order that was issued by a Foreign Assignor that attaches Terms & Conditions that Motorola identified on Attachment A to its Supplemental Responses contains a "compliance with laws" provision requiring compliance with foreign law. As an example see Motorola Deposition Exhibit No. 517 at 3 ¶ 14 ("Seller warrants that all goods and services supplied pursuant to this order will have been performed, produced, and supplied in compliance [with] all the laws of [the] People's Republic of China."). The only exception is Motorola GmbH Ltd. (Germany) whose Purchase Orders in certain instances contained a provision requiring compliance with Illinois law.

214. Examples of Foreign Assignor Purchase Orders that were marked at deposition and attached to this Declaration that do not attach Motorola's Standard Terms & Conditions include the following: Motorola Deposition Exhibit Nos. 260-62, 272, 419-21, 600.

215. Attached as Exhibit J is a true and correct copy of the Declaration of Davis Lee in Support of Defendants' Joint Dispositive Motion Regarding Indirect Purchaser Claims Based on Foreign Sales, executed on May 25, 2011.

216. Attached as Exhibit K is a true and correct copy of the Declaration of Davis Lee Regarding Pricing Authority at LG Display, executed on March 28, 2012.

217. Attached as Exhibit L is a true and correct copy of the Declaration of Claire Liu, executed March 29, 2012.

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C. Motorola Deposition Testimony.

218. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Robert Akins, dated May 17, 2011.

219. Attached hereto are true and correct excerpts from the deposition transcript of Motorola consultant James Anklesaria, dated December 5, 2011.

220. Attached hereto are true and correct excerpts from the deposition transcript of Motorola expert witness B. Douglas Bernheim, Ph.D., dated January 30, 2012.

221. Attached hereto are true and correct excerpts from the deposition transcript of Motorola expert witness B. Douglas Bernheim, Ph.D., dated February 1, 2012.

222. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Carrie Bodak, dated November 18, 2011.

223. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Bruce Brda, dated November 17, 2011.

224. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Timothy Cawley, dated May 10, 2011.

225. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness C.F. Cheng, dated December 20, 2011.

226. Attached hereto are true and correct excerpts from the deposition transcript of Samsung witness Mun Seop Eom, dated September 7, 2011.

227. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Angela Ford, dated July 26, 2011.

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228. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Tracy Guo, dated December 14, 2011.

229. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Tracy Guo, dated December 15, 2011.

230. Attached hereto are true and correct excerpts from the deposition transcript of Chi Mei Optoelectronics witness J.Y. Ho, dated June 16, 2010.

231. Attached hereto are true and correct excerpts from the deposition transcript of Sharp witness Yasushisa Iida, dated July 1, 2011.

232. Attached hereto are true and correct excerpts from the deposition transcript of Motorola 30(b)(6) witness K.L. Khoo, dated November 10, 2011.

233. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness K.L. Khoo, dated November 11, 2011.

234. Attached hereto are true and correct excerpts from the deposition transcript of Samsung witness Joo Wan Kim, dated July 19, 2011.

235. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness John Kozlowski, dated December 1, 2011.

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236. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness C. M. Lai, dated December 21, 2011.

237. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Alex Lima, dated April 21, 2011.

238. Attached hereto are true and correct excerpts from the deposition transcript of Epson witness Hiroyuki Matsuura, dated March 16, 2012.

239. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Theresa Metty, dated July 15, 2011.

240. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Stephen Milligan, dated September 13, 2011.

241. Attached hereto are true and correct excerpts from the deposition transcript of Motorola 30(b)(6) witness Janet Robinson, dated August 3, 2011.

242. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Janet Robinson, dated August 4, 2011.

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243. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Jeffrey Rogero, dated April 12, 2011.

244. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness Jeffrey Rogero, dated December 2, 2011.

245. Attached hereto are true and correct excerpts from the deposition transcript of Sharp witness Qais Sharif, dated January 25, 2012.

246. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness D.K. Singh, dated June 8, 2011.

247. Attached hereto are true and correct excerpts from the deposition transcript of Motorola 30(b)(6) witness Sharon Storm, dated November 11, 2011.

248. Attached hereto are true and correct excerpts from the deposition transcript of Motorola witness E.L. Tay, dated November 22, 2011.

249. Attached hereto are true and correct excerpts from the deposition transcript of Motorola 30(b)(6) witness E.L. Tay, dated November 22, 2011.

250. Attached hereto are true and correct excerpts from the deposition transcript of Epson witness Jesse Waldron, dated November 29, 2011.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3rd day of April, 2012, at San Francisco, California.

/s/ Stephen P. Freccero

STEPHEN P. FRECCERO

ECF ATTESTATION

I, Derek F. Foran, am the ECF User whose ID and Password are being used to file this:

DECLARATION OF STEPHEN P. FRECCERO IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ADDRESSING PLAINTIFF'S SHERMAN ACT CLAIM FOR INJURIES IN FOREIGN MARKETS

In compliance with General Order 45, X.B., I hereby attest that Stephen P. Freccero has concurred in this filing.

Dated: April 3, 2012

MORRISON & FOERSTER LLP

By: /s/ Derek F. Foran
Derek F. Foran

EXHIBIT 13

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	)	Master File No. C07-1827 SI
	)	MDL No. 1827
This Document Relates to:	)	
Motorola Mobility, Inc.	)	
Plaintiff,	)	
vs.	)	
AU OPTRONICS CORPORATION et al.,	)	
Defendants	)	

ERRATA TO EXPERT REPORT OF PROFESSOR DENNIS W. CARLTON

February 29, 2012

ERRATA SHEET – EXPERT REPORT OF PROFESSOR DENNIS W. CARLTON CONCERNING MOTOROLA MOBILITY, INC.

In paragraph 1 of Appendix I, replace "Category One: Purchases of TFT-LCD panels by that were delivered directly to Motorola facilities in the United States ("US Purchases");" with "Category One: Purchases of TFT-LCD panels by Motorola that were delivered directly to Motorola facilities in the United States ("US Purchases");".

In paragraph 4 of Appendix I, replace "The results are presented in **Error! Reference source not found**." with "The results are presented in Table A."

In footnote 2 of Appendix I, replace "page 5" with "page 6".

Appendix I

1. I have been asked by counsel for the Defendants to analyze Motorola's data regarding purchases of TFT-LCD panels from Defendants. Specifically, I have been asked to determine whether the TFT-LCD purchases reflected in the data Motorola has produced can be placed in the following three categories:

- Category One: Purchases of TFT-LCD panels by Motorola that were delivered directly to Motorola facilities in the United States ("US Purchases");
- Category Two: Purchases of TFT-LCD panels by Motorola's foreign affiliates that were delivered to facilities located outside the United States that were later incorporated into mobile phones sold in the United States ("ROW Purchases/US Sales"); and
- Category Three: Purchases of TFT-LCD panels by Motorola's foreign affiliates that were delivered to facilities located outside the United States that were later incorporated into mobile phones sold outside the United States ("ROW Purchases/ROW Sales").

2. To carry out this assignment, I reviewed Motorola's allegations in its Third Amended Complaint for Damages and Injunctive Relief, in which Motorola alleges amounts of purchases by Motorola, Inc. and its foreign affiliates that fit into each of these three categories. The Complaint alleges $61 million in US purchases of TFT-LCD panels (Category One), $1.75 billion in purchases of TFT-LCD panels outside the United States used in mobile phones later sold in the United States (Category Two), and $4.37 billion in purchases of TFT-LCD panels outside the United States used in mobile phones later sold outside the United States (Category Three).[1] The total of the alleged purchases in the Complaint is $6.181 billion.

[1] Motorola's Third Amended Complaint for Damages and Injunctive Relief ¶¶ 185-187.

3. I also reviewed Motorola's purchase data and "where used" files combined with Motorola's sales data[2] to classify Motorola's purchases by the location of Motorola's purchase of TFT-LCD panels and the location of Motorola's sales of mobile phones in which those TFT-LCD panels were used. Motorola's purchase data does not match the $6.181 billion alleged in the Complaint. Rather, it includes approximately $5.466 billion in purchases of TFT-LCD panels. The breakdowns of those purchases into the three categories, discussed above, is provided in Table A.

Table A: Estimated Location of Purchases and Sales of TFT-LCDs in Motorola Transactional Data
September 2001 – December 2006
Excluding Purchases from Non-Defendants

			ROW Purchases	
Source	**Total Purchases**	**US Purchases**	**US Sales**	**ROW Sales**
		[Category One]	**[Category Two]**	**[Category Three]**
Complaint	$6,181,000,000	$61,000,000	$1,750,000,000	$4,370,000,000
	100.0%	1.0%	28.3%	70.7%
Complaint Benchmarked to	$5,385,232,500	$53,146,608	$1,524,697,763	$3,807,388,129
Bernheim	100.00%	1.0%	28.3%	70.7%
Motorola Data	$5,465,954,341	$43,257,939	$2,308,482,125	$3,114,214,277
	100.00%	0.8%	42.2%	57.0%
Motorola Data Benchmarked to	$5,385,232,500	$42,619,101	$2,274,390,196	$3,068,223,204
Bernheim	100.0%	0.8%	42.2%	57.0%

4. I also reviewed Dr. Bernheim's expert report submitted on behalf of Motorola, which estimates damages on approximately $5.3billion in purchases of TFT-LCD panels by Motorola, Inc. and its foreign affiliates. I benchmarked the total purchases in Dr. Bernheim's report to the percentages of purchases that fall within each of the three categories discussed above. I performed this benchmarking using both the percentages

[2] All raw data files are listed on page 6 of this appendix.

derived from Motorola's allegations in its Complaint and the percentages derived from my analysis of Motorola's data. The results are presented in Table A.

5. As shown, no matter which purchase figures are used (the Complaint's, Motorola's purchase data, or Dr. Bernheim's figures), approximately 99 percent of the TFT-LCD panels purchased from Defendants were purchased outside the United States. Depending on which purchase figures are used, either 57 percent or 71 percent of the TFT-LCD panels purchased from Defendants were purchased outside the United States and used in mobile phones that were later sold outside the United States (Category Three). Depending on which purchase figures are used, either 28 percent or 42 percent of the TFT-LCD panels purchased from Defendants were purchased outside the United States and used in mobile phones that were later sold in the United States (Category Two).

6. The purchases outside the United States were primarily purchases by companies based in Singapore and China. In Table B, I list purchases made by Motorola, Inc. and its foreign affiliates by country and by entity. I matched the purchases to the entity who made them using facility codes in Motorola's purchase data and a Facilities List provided by Motorola that matches legal entities to facility codes in Motorola's purchase data.[3] Figure A shows these same purchases by country.

---

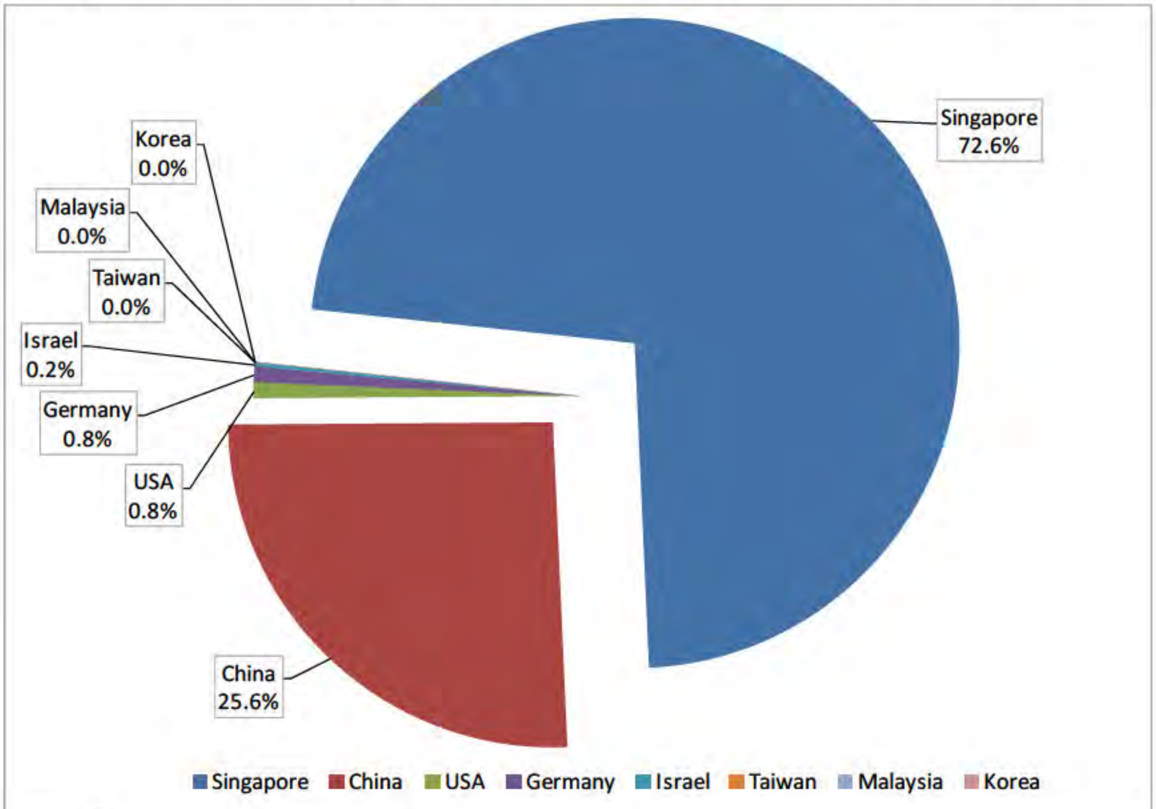
[3] Facilities List MOTOLCD01250122.pdf; Khoo Dep. 242:16-24 (statement from counsel for Motorola agreeing that the Facilities List matches legal entities purchasing TFT-LCD panels to facility codes). Note that for several of the facility codes in Singapore, the matching to a legal entity depends on whether the purchases are before or after 2004. For those facility codes, purchases before 2004 are associated with Motorola Electronics Pte. Ltd. and purchases on or after January 1, 2004 are associated with Motorola Trading Center Pte. Ltd. Both entities made purchases from Singapore for delivery in Singapore.

Table B: Purchases from Defendants, by Legal Entity
September 2001 – December 2006

Country	Entity	Purchases (USD)	Share
Singapore	Motorola Trading Center Pte. Ltd.	3,754,220,591	68.7%
Singapore	Motorola Electronics Pte. Ltd.	215,746,239	3.9%
	Total Singapore	**3,969,966,831**	**72.6%**
China	Motorola (China) Electronics Ltd.	1,398,626,881	25.6%
China	Hangzhou Motorola Cellular Equipment Co. Ltd.	187,452	0.0%
China	Motorola Asia Pacific Limited	69,823	0.0%
	Total China	**1,398,884,155**	**25.6%**
USA	Motorola Inc.	43,257,939	0.8%
Germany	Motorola GmbH	42,753,574	0.8%
Israel	Motorola South Isreal Limited	10,689,433	0.2%
Taiwan	Motorola Electronics Taiwan Limited	342,922	0.0%
Malaysia	Motorola Technology Sdn Bhd	56,542	0.0%
Korea	Motorola Korea, Inc.	2,946	0.0%
Total		5,465,954,341	100.0%

Source: "MOTO 00003984 xlsx", "Facilities List MOTOLCD01250122.pdf".

Figure A: Motorola Purchases by Receiving Country, September 2001 - December 2006



Source: "MOTO 00003984.xlsx", "Facilities List MOTOLCD01250122.pdf".

Purchase Data

MOTO 00003984 xlsx

"Where Used" Files

Iden Where Used report- MOTOLCD01247785- Highly Confidentia xlsx
Where Used with Market Names-MOTOLCD01247784- Highly Confid xlsx

Sales Data

1999-2000_asia_tcops__data-Moto00004041-Highly Confidential xls
Iden Sales Data 1998 - Moto000407827A-Highly Confidential xls
IDEN Sales Data 1998 - Moto00407827 - Highly Confidential xls
Iden Sales Data 1999 - Moto000407828A-Highly Confidential xls
IDEN Sales Data 1999 - Moto00407828 - Highly Confidential xls
Iden Sales Data 2000 - Moto000407829A-Highly Confidential xls
IDEN Sales Data 2000 - Moto00407829 - Highly Confidential xls
Iden Sales Data 2001 - Moto000407830A-Highly Confidential xls
IDEN Sales Data 2001 - Moto00407830 - Highly Confidential xls
Iden Sales Data 2008-Moto00004034-Highly Confidential xls
Iden Sales Data LA 2004-2008 yearly-Moto00004035-Highly Confidential xls
IDEN Sales data Q1 2002-Moto00004009A-Highly Confidential xlsx
IDEN Sales data Q1 2002-Moto00004009-Highly Confidential xlsx
IDEN Sales data Q1 2003-Moto00004013A-Highly Confidential xlsx
IDEN Sales data Q1 2003-Moto00004013-Highly Confidential xlsx
IDEN Sales data Q1 2004-Moto00004017 A-Highly Confidential xlsx
IDEN Sales data Q1 2004-Moto00004017A-Highly Confidential xlsx
IDEN Sales data Q1 2004-Moto00004017-Highly Confidential xlsx
Iden Sales Data Q1 2005-Moto00004022-Highly Confidential xls
Iden Sales Data Q1 2006-Moto00004026 A-HIghly Confidential xls
Iden Sales Data Q1 2006-Moto00004026-Highly Confidential xls
Iden Sales Data Q1 2007- Moto000004030-Highly Confidential xls
IDEN Sales data Q2 2002-Moto00004010A-Highly Confidential xlsx
IDEN Sales data Q2 2002-Moto00004010-Highly Confidential xlsx
IDEN Sales data Q2 2003-Moto00004014A-Highly Confidential xlsx
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IDEN Sales data Q2 2004-Moto00004018-Highly Confidential xlsx
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Iden Sales Data Q2 2005-Moto00004023-Highly Confidential xls
Iden Sales Data Q2 2006-Moto00004027 A-Highly Confidential xls
Iden Sales Data Q2 2006-Moto00004027-Highly Confidential xls
Iden Sales Data Q2 2007-Moto00004031-Highly Confidential xls
IDEN Sales data Q3 2002-Moto00004011A-Highly Confidential xlsx
IDEN Sales data Q3 2002-Moto00004011-Highly Confidential xlsx
IDEN Sales data Q3 2003-Moto00004015-Highly Confidential xlsx
IDEN Sales data Q3 2004-Moto00004019-Highly Confidential xlsx
Iden Sales Data Q3 2005-Moto00004024 A-Highly Confidential xls
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Iden Sales Data Q3 2006-Moto00004028 A-Highly Confidential xls
Iden Sales Data Q3 2006-Moto00004028-Highly Confidential xls
Iden Sales Data Q3 2007-Moto00004032-Highly Confidential xls
IDEN Sales data Q3 1 2004-Moto00004021-Highly Confidential xlsx
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IDEN Sales data Q4 2004-Moto00004020-Highly Confidential xlsx
Iden Sales Data Q4 2005-Moto00004025 A-Highly Confidential xls
Iden Sales Data Q4 2005-Moto00004025-Highly Confidential xls
Iden Sales Data Q4 2006-Moto00004029-Highly Confidential xls
Iden Sales Data Q4 2007-Moto00004033-Highly Confidential xls
LA_TCOPS_1999-2004-Moto00004042-Highly Confidential xls
NA TCOPS Data 1994 - Moto00407822 - Highly Confidential xls
NA TCOPS Data 1995 - Moto00407823 - Highly Confidential xls
NA TCOPS Data 1996 - Moto00407824 - Highly Confidential xls
NA TCOPS Data 1997 - Moto00407825 - Highly Confidential xls
NA TCOPS Data 1998 - Moto00407826 - Highly Confidential xls
NA_TCOPS data_1999-Moto00004036-Highly Confidential xls
NA_TCOPS data_2000aa_Moto00004037-Highly Confidential xls
NA_TCOPS data_2001aa_Moto00004038-Highly Confidential xls
NA_TCOPS data_2002aa_Moto00004039-Highly Confidential xls
NA_TCOPS data_2003aa-Moto00004040Highly Confidential xls
Sales data Q1 2003 xls
Sales data Q1 2003-Moto00003997A-Highly Confidential xls
Sales data Q1 2004- Moto00004001A- Highly Confidential xls
Sales data Q1 2005-Moto0004005A-Highly Confidential xls
Sales data Q1 2006-Moto00003985A-Highly Confidential xls
Sales data Q1 2007-Moto00003989A-Highly Confidential - Address Corrected xls
Sales data Q1 2007-Moto00003989A-Highly Confidential xls
Sales data Q1 2008- Moto00003993A- Highly Confidential xls
Sales data Q2 2003-Moto00003998A-Highly Confidential xls
Sales data Q2 2004- Moto00004002A- Highly Confidential xls
Sales data Q2 2005-Moto00004006A-Highly Confidential xls
Sales data Q2 2006-Moto00003986A-Highly Confidential xls
Sales data Q2 2007-Moto00003990A-Highly Confidential - Address Corrected xls
Sales data Q2 2007-Moto00003990A-Highly Confidential xls
Sales data Q2 2008- Moto00003994A-Highly Confidential - Address Corrected xls
Sales data Q2 2008- Moto00003994A-Highly Confidential xls
Sales data Q3 2003 -Moto00003999A-Highly Confidential xls
Sales data Q3 2003 -Moto00003999A-Highly Confidential xlsx
Sales data Q3 2004-Moto00004003A-Highly Confidential xls
Sales data Q3 2005 Moto00004007A-Highly Confidential xls
Sales data Q3 2006-Moto00003987A-Highly Confidential xls
Sales data Q3 2007-Moto00003991A-Highly Confidential - Address Corrected xls
Sales data Q3 2007-Moto00003991A-Highly Confidential xls
Sales data Q3 2008- Moto00003995A-Highly Confidential xls
Sales data Q3 2008-Moto00003995A-Highly Confidential xls
Sales data Q4 2003- Moto00004000A-Highly Confidential xls
Sales data Q4 2003- Moto00004000A-Highly Confidential xlsx
Sales data Q4 2004-Moto00004004A-Highly Confidential xls
Sales data Q4 2005-Moto00004008A-Highly Confidential xls
Sales data Q4 2006-Moto00003988A-Highly Confidential xls
Sales data Q4 2007-Moto00003992A-Highly Confidential xls

EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,	) Master File No.:
	) M:07-1827 SI
THIS DOCUMENT RELATES TO:	)
Motorola Mobility, Inc. v. AU Optronics Corporation, et al., No. 3:09-cv-5840 SI	) (Case No.: 3:09-cv-05840 SI)
AT&T Mobility LLC, et al., v. AU Optronics Corporation, et al, No. 3:09-cv-4997 SI	)
Target Corporation, et al., v. AU Optronics Corporation, et al, No. 3:10-cv-4945 SI	)

*** HIGHLY CONFIDENTIAL ***

VIDEOTAPED DEPOSITION OF

B. DOUGLAS BERNHEIM, PH.D., VOLUME III

Held at Bingham McCutchen

Three Embarcadero Center, 28th Floor

San Francisco, California

Wednesday, February 1, 2012

8:38 a.m. - 12:38 p.m.

REPORTED BY: JAMES BEASLEY, RPR, CA CSR No. 12807

the prices that were paid by the foreign affiliates, or did you use the cost to Motorola, Inc., that was recorded by Motorola, Inc., pursuant to its transfer pricing policies?

09:42 A. Well, I just want to refer to the appendix of my report to see whether -- oh, no, no, I'm sorry, that's the other data appendix, I don't have that in here. I -- as I sit here, I don't remember.

Q. Well, would it make sense to attribute the
09:43 prices paid by Motorola, Inc., pursuant to its internal transfer pricing policies, as the base upon which you would apply an overcharge?

A. So I -- conceivably the answer to that question could depend upon the relationships between
09:44 the identities -- between the entities, but as I sit here, it seems like in most cases the answer would be that the transfer price would not be the correct base.

Q. Okay. So for purchases that were made by
09:44 Motorola's foreign affiliates, the overcharge was occurred by the foreign affiliate, and you would apply your overcharge percentage to the prices paid by the foreign affiliate, right?

A. That sounds right to me.

09:44 Q. Now, you concluded that Motorola had a pass-through rate on the costs that it incurred in making mobile phones in excess of 100 percent; is that right?

A. My estimates indicated that it was in excess of 100 percent, yes.

Q. But doesn't that mean that Motorola itself did not sustain any economic injury by reason of any -- of any overcharge on the panels it bought?

A. Are you using that as a legal term or are you asking me just as an economist?

Q. Just as an economist.

A. If it passed through more than 100 percent, then it recouped the overcharge.

Q. So -- and it did not incur any economic injury by reason of that overcharge, correct?

A. Well, an economic damage, it passed the economic damage forward.

Q. So it did not incur it?

A. Well, it incurred it and then passed it forward.

Q. Okay. Now, when you calculated Motorola's breach of contract and unjust enrichment damages, did you take into account your conclusion that Motorola had a pass-on rate in excess of 100 percent?

deposition of B. Douglas Bernheim, Ph.D. The time is 12:38 p.m. on February 1st, 2012, and we're off the record.

(The deposition proceedings were concluded at 12:38 p.m.)

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated ___________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, JAMES BEASLEY , hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 12807 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated:

FEB 10 2012

James Bensley

EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,	)	
THIS DOCUMENT RELATES TO:	)	Case No. M-07-1827-SI
ALL ACTIONS	)	

*** HIGHLY CONFIDENTIAL TRANSCRIPT ***

*** ATTORNEYS' EYES ONLY ***

VOLUME I

VIDEOTAPED DEPOSITION OF

BRUCE BRDA

THURSDAY, NOVEMBER 17, 2011

REPORTED BY: RACHEL F. GARD, CSR, RPR, CLR
CSR No. 084-003324

America?

09:51 A. Yes.

Q. Were you still located in Chicago when running the Asia Pacific business?

A. Yes.

Q. How often did you travel to Asia for your work during that time period?

A. Typically about 10 to 14 days per month, I was in the region.

09:51 Q. And did you have team members who were located in Asia?

A. Yes.

Q. And team members who were located in the United States?

09:51 A. Yes.

Q. What was the rationale for having team members located in Asia during that time period?

A. The business was being executed in Asia, and we tended to put the staff, the team as close to the customers as possible.

09:52 Q. When you say the business was being executed in Asia, what do you mean by that?

A. Selling to customers in Asia, that transaction took place in Asia.

09:52 Q. Meaning that the product was delivered in

Asia and payment was received from Asia and the contracts were signed in Asia?

MR. MURRAY: Object to foundation.

BY THE WITNESS:

09:52 A. What I meant was customers -- I'll give an example of China. The customers were in China. Our sales team was in China. The negotiations were done in China. The agreements would have been signed in China.

09:52 Q. And the products would be delivered in China, right?

A. Correct.

Q. When you were running the Asia Pacific business, was the idea that the handsets would be

09:53 sold to China for consumption in China?

A. Yes.

Q. And I take it that the goal was not to sell handsets to companies that would then resell them into the United States or other regions around

09:53 the world?

A. If you're referring to in China, that's correct. Motorola did sell to distributors who had a global presence.

Q. Would that have included the United

09:53 States?

15:24
15:25
15:25
15:25
15:25

Q. For phones like the RAZR that were manufactured in China, when those phones were sold to customers outside of the United States, were they first shipped -- for transaction -- for a customer outside of the United States who was buying RAZR phones, where would the phones that they bought be shipped from?

A. The short answer is, I don't know. Manufactured in China, they typically would go through a distribution center. I don't know that I can name all of those. In the U.S. that distribution center was in Texas. That would be the port of entry. Phones were customized and then shipped to customers. There were similar setups in other countries.

Q. So for phones that were sold into the United States, they would be shipped to a distribution center in the United States?

A. Yes.

Q. And shipped to a customer location from there.

My question to you is: For phones that were shipped outside the United States, would they come into the United States first?

A. No.

Q. So they would go directly from the manufacturing facility to a distribution center near where the customer was located?

A. That's my belief, yes.

15:25 Q. What Motorola entity would receive the money for a RAZR that was sold to a customer outside the United States?

MR. MURRAY: Object to form. Foundation.

BY THE WITNESS:

15:26 A. I don't know. We have legal entities in many countries, so I don't know that I could answer -- I can't list all the legal entities, that's for sure. And depending on the country the sale was transacted in, it probably was paid to that

15:26 legal entity.

Q. So let's maybe start with Latin America where you have some experience. What countries bought the most RAZR phones in Latin America?

MR. MURRAY: Object to form.

15:26 BY THE WITNESS:

A. By the time I was involved in Latin America, the RAZR was pretty much past tense. But, again, as I said earlier, Brazil and Mexico were the volume drivers for Latin America.

15:26 Q. So for Brazil, when a Brazilian customer

4:42 p.m.

(Witness excused.)

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated_____________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, RACHEL F. GARD , hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 084-003324 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: DECEMBER 12, 2011

Rachel F Gard

EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL))
ANTITRUST LITIGATION,) Case No.
__________________________________)
) 3:07-md-1827 SI
MOTOROLA, INC. versus AU)
OPTRONICS CORPORATION, et al.,)
C 3:09-05840 SI) MDL No. 1827
__________________________________)

*** HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY ***

VIDEOTAPED DEPOSITION OF ANGELA M. FORD

Held at Crowell & Moring

515 South Flower Street, 40th Floor

Los Angeles, California

Tuesday, July 26, 2011

9:00 a.m. - 6:40 p.m.

REPORTED BY: JAMES BEASLEY, RPR, CA CSR No. 12807

Mr. Healy's performance?
(Clarification by the reporter.)
MR. STOKES: Object to form.
THE WITNESS: Only that he was hard to get ahold of.
BY MR. FORAN:
Q. Now, your suppliers told you that Mr. Healy was hard to get ahold of?
A. Yes.
Q. Among other reasons, that's because he was up in the wilds of Scotland?
MR. STOKES: Object to form.
THE WITNESS: I don't know if that was the reason why.
BY MR. FORAN:
Q. Well, most of your suppliers, weren't they, were in Asia, weren't they, the LCD suppliers?
A. Yes.
Q. In fact, they were all in Asia, weren't they?
MR. STOKES: Object to form.
THE WITNESS: But -- they were all headquartered in Asia, but they had people in the States.
///

BY MR. FORAN:
Q. But all the key decision-makers were -- they were headquartered in Asia; is that fair?
MR. STOKES: Object to form.
09:35 THE WITNESS: Yes.
BY MR. FORAN:
Q. And Mr. Healy was on the other side of the world there, up in Edinburgh, Scotland?
MR. STOKES: Object to form.
09:35 THE WITNESS: Yes.
BY MR. FORAN:
Q. You agreed with those notes in October 2004, didn't you?
MR. STOKES: Object to form.
09:36 THE WITNESS: That's what it says, yes.
BY MR. FORAN:
Q. I mean, Mr. Akins asked you, if you had any corrections or omissions, to please note them, isn't that what he said?
09:36 A. Yes.
Q. And you said:
"I agree with those notes"?
A. Yes.
Q. Your understanding was, as global commodity
09:36 manager at Motorola, your understanding, your

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated______________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA }
} ss.
COUNTY OF SAN FRANCISCO }

I, James Beasley, hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 12807 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record of the testimony given by the witness. (Fed. R. Civ. P. 30 (f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: AUGUST 4, 2011

James Beasley

JAMES BEASLEY, CSR No. 12807

EXHIBIT 17

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

- - - -

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,) Case No. 3:07-md-1827-SI) MDL No. 1827

THIS DOCUMENT RELATES TO:

Case No. 09-5840

MOTOROLA MOBILITY INC.,

Plaintiff,

vs.

AU OPTRONICS CORPORATION, et al.,

Defendants.

*** HIGHLY CONFIDENTIAL ***

VIDEOTAPED DEPOSITION OF TRACY GUO

(Through Interpreter.)

Held at Crowell & Moring

275 Battery Street, 23rd Floor

San Francisco, California

Wednesday, December 14, 2011

9:04 a.m. - 7:09 p.m.

REPORTED BY: JAMES BEASLEY, RPR, CA CSR No. 12807

06:27
06:27
06:28
06:28
06:29

Q. So at least under this purchase order, once the goods are received by Motorola Singapore, Motorola then has 45 days to pay for the LCDs; is that how it works?

MR. STOKES: Object to the form. Calls for a legal conclusion.

Go ahead.

THE WITNESS: That's my understanding.

BY MR. FORAN:

Q. Do you see that the bill-to address is AMK Singapore?

A. Yes.

Q. Does that mean that the supplier bills AMK Singapore for the goods that were shipped under this purchase order?

MR. STOKES: Object to the form.

THE WITNESS: Correct.

BY MR. FORAN:

Q. And so essentially what I'm getting at, Ms. Guo, if -- whatever entity is indicated under the bill-to address, that's the entity that pays for the -- for the goods that are called -- that are called for -- called for under the purchase order?

MR. STOKES: Object to the form. Calls for speculation.

Go ahead.
THE WITNESS: That's my understanding.
BY MR. FORAN:
Q. Ms. Guo, let me refer you to the second page of the document, do you see there's a section entitled: "Additional Information"?
A. Yes.
Q. And then it says this is a goods PO or a fixed PO?
A. I see that.
Q. Would this additional information be input by the buyer when preparing a purchase order?
MR. STOKES: Hold on a second, where does it say "fixed"?
MR. FORAN: This is a goods PO or fixed PO.
MR. STOKES: Ah, thank you. Thank you. Object to the form.
Go ahead.
THE WITNESS: Input by the buyer.
BY MR. FORAN:
Q. All right. What's a goods PO or fixed PO, what does that mean?
MR. STOKES: Object to the form.
I'm sorry, go ahead.
THE WITNESS: When a part is qualified and

original discs will be retained by Barkley. We are off the record at 7:09 p.m.

(The deposition proceedings were adjourned at 7:09 p.m.)

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated ___________________.

____
(Signature of Deponent)

STATE OF)
) ss.
COUNTY OF)

I, ______________________________, declare:

My address is _____________________________ ____;

I am a person who speaks the language of the deponent, namely, _________________________________;

On the _____ day of ________________, 20___, I did translate the within deposition from the English into the __________________________language, reading same to the deponent to the best of my ability;

All corrections and changes required by the deponent were made on the transcript by me and initialed by the deponent;

Upon completion of said reading the deponent did confirm to me that he/she understood the reading.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at ________________ on _________________.
(Place) (Date)

____
(Signature of Reader-Interpreter)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA }
} ss.
COUNTY OF SAN FRANCISCO}

I, James Beasley, hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 12807 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [X] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: DEC 29 2011,

James Beasley

EXHIBIT 18

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL))
ANTITRUST LITIGATION,)
_______________________________)
) Case No.
THIS DOCUMENT RELATES TO:) M-07-1827-SI
)
ALL ACTIONS)
_______________________________)

*** HIGHLY CONFIDENTIAL TRANSCRIPT ***

*** ATTORNEYS' EYES ONLY ***

VOLUME I

VIDEOTAPED 30(b)(6) AND PERSONAL DEPOSITION OF

MOTOROLA, INC., BY KAH LENG KHOO

THURSDAY, NOVEMBER 10, 2011

REPORTED BY: RACHEL F. GARD, CSR, RPR, CLR
CSR No. 084-003324

BY MR. ROELLKE:
Q. We've already made a distinction on the record, I think, between supply agreements, on the one hand, and purchase orders, on the other.
15:58 And my question to the witness is whether or not he can identify any written supply agreements that were entered into between any of these entities that purchased LCD modules during the relevant time period and the suppliers from whom they purchased
15:58 that?
MR. STOKES: Object to the form. Outside the scope.
Go ahead, if you can answer the question.
BY THE WITNESS:
15:58 A. No.
Q. Do you know whether or not the entities listed in Topic 36 bought LCD modules during the relevant time period pursuant to purchase orders?
A. I'm sorry. Can you repeat that question?
15:59 Q. Yeah. Do you know whether or not the entities listed in Topic 36 bought LCD modules during the relevant time period pursuant to purchase orders?
A. What do you mean pursuant to purchase
15:59 order? I mean --

Q. Were they purchased -- Did they purchase LCD modules based on the issuance of purchase orders?
A. Yes.
15:59 Q. And how do you know that?
A. How do I know that?
Q. Yes.
A. Because a supplier -- I mean, that is based, again, on the general process and procedures, 15:59 all right. The suppliers will have got to receive a PO before they deliver the goods to us.
Q. Has there ever been a circumstance where a Motorola entity purchased an LCD module without issuing a purchase order?
15:59 MR. STOKES: Object. Outside the scope.
BY THE WITNESS:
A. Not that I'm aware of.
MR. ROELLKE: I think that's a method of purchasing.
15:59 MR. STOKES: Look, I made my objection. Whether it is a good one or not is for a later time.
MR. FORAN: Your objection is overruled.
MR. STOKES: I withdraw it. I change it to objection to form. How about that? I know we're 16:00 getting late. We're getting late in the day, and I

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated_____________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, RACHEL F. GARD , hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 084-003324 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: NOVEMBER 23, 2011

Rachel F Gard

EXHIBIT 19

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL))
ANTITRUST LITIGATION,)
___________________________________)
) Case No.
THIS DOCUMENT RELATES TO:) M-07-1827-SI
)
ALL ACTIONS)
___________________________________)

*** HIGHLY CONFIDENTIAL TRANSCRIPT ***

*** ATTORNEYS' EYES ONLY ***

VOLUME II

VIDEOTAPED 30(b)(6) AND PERSONAL DEPOSITION OF

MOTOROLA, INC., BY KAH LENG KHOO

FRIDAY, NOVEMBER 11, 2011

REPORTED BY: RACHEL F. GARD, CSR, RPR, CLR
CSR No. 084-003324

purchase order, is the supplier -- should the supplier expect that Motorola will actually buy at that price and at that quantity?

MR. STOKES: Object to the form.

09:57 BY THE WITNESS:

A. It depends on the time frame where the parts was delivered, right, because the price would have changed, you know, every quarter when there's another new quarter or when there's a new price that becomes effective again. 09:57

Q. Now, sir, all of the purchase orders that were issued by Motorola's entities located outside the United States for display modules during the relevant time period were shipped to a location outside the United States, correct? 09:58

MR. STOKES: Object to the form.

BY THE WITNESS:

A. I'm not entirely sure. But I would say in general, yes, a purchase order that is issued outside of the Motorola entities gets shipped to generally whichever issued POs come from. 09:58

Q. So if a purchase -- So all purchase orders issued by a Motorola entity outside the United States called for the shipment of display modules to locations outside the United States, correct? 09:58

MR. STOKES: Object to the form.

BY THE WITNESS:

A. As far as I remember, yes.

Q. And as far as you know, sir, all of the display modules that were purchased by Motorola's subsidiaries located outside the United States were, in fact, delivered to locations outside the United States, correct?

MR. STOKES: Object to form. Asked and answered.

BY THE WITNESS:

A. Yes --

MR. STOKES: Outside the scope. Sorry.

BY THE WITNESS:

A. As far as I can recall, yes.

Q. And it's your understanding that display modules purchased by Motorola entities located outside the United States were used in finished handsets that were manufactured by Motorola entities located outside the United States, correct?

MR. STOKES: Object to the form. Outside the scope.

BY THE WITNESS:

A. Yeah. As far as I remember, yes.

Q. Now, if I understand your testimony from

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated_______________________.

____

(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, RACHEL F. GARD , hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 084-003324 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: NOVEMBER 30, 2011

Rachel F. Gould

EXHIBIT 20

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,	)	
THIS DOCUMENT RELATES TO:	)	Case No. M-07-1827-SI
ALL ACTIONS	)	

VOLUME I

*** HIGHLY CONFIDENTIAL TRANSCRIPT ***

*** ATTORNEYS' EYES ONLY ***

VIDEOTAPED DEPOSITION OF THERESA M. METTY

FRIDAY, JULY 15, 2011

REPORTED BY: RACHEL F. GARD, CSR, RPR, CLR,
CSR No. 084-003324

A. I do.
Q. You're familiar with 10-Ks, of course?
A. I am.
Q. Did you provide any feedback for the securities filings that Motorola made?
A. It's possible I may have, or my organization may have.
Q. Ms. Metty, let me refer you to Page 5 of the document. It says, Table of Contents. And then in italics, it says, Our Facility/Manufacturing. Do you see that?
A. I'm still looking for that. You said it's Page 5?
Q. Yeah. It has a Page Number 5 in the top right-hand corner.
A. Oh, okay.
Q. Pardon me.
A. There we go.
Q. You got it?
A. I have it.
Q. Great.
I want to refer you to the third paragraph in the document on Page 5. It starts: In 2003, nearly three-fourths of our handsets were manufactured in Asia. Do you see that?

A. I see that.
Q. Is that a true statement as far as you know?
A. I think that's true.
09:45 Q. And why did Motorola manufacture handsets in Asia?
MR. STOKES: Objection to form.
If you know, go ahead.
BY THE WITNESS:
09:45 A. It was lower cost. That's really -- I think that was the primary reason. It was important to diversify the manufacturing base, but also Asia was very low-cost.
Q. Lower labor costs?
09:46 A. Correct.
Q. Any other costs other than labor?
A. There could have been other costs. There could have been tax -- you know, tax benefits in particular countries. So yeah. I guess I would say 09:46 the overall cost of operating a manufacturing facility in Asia would have been lower than, for example, operating one in Illinois.
Q. Okay. And so that's why -- that's why Motorola manufactured handsets in Asia as opposed to 09:46 Illinois?

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated______________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF COOK)

I, RACHEL F. GARD , hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 084-003324 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: JULY 27, 2011

Rachel J Gard.

EXHIBIT 21

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL))
ANTITRUST LITIGATION,)
______________________________)
) Case No.
THIS DOCUMENT RELATES TO:) M-07-1827-SI
)
ALL ACTIONS)
______________________________)

VOLUME I

*** HIGHLY CONFIDENTIAL TRANSCRIPT ***

*** ATTORNEYS' EYES ONLY ***

VIDEOTAPED 30(b)(6) DEPOSITION OF MOTOROLA, INC.

BY JANET ROBINSON

WEDNESDAY, AUGUST 3, 2011

REPORTED BY: RACHEL F. GARD, CSR, RPR, CLR
CSR No. 084-003324

A. Chief procurement officers, which one of those was John Miller.

Q. Can you identify anybody else?

A. There were individuals on Theresa's staff that held positions like chief procurement officer -- for instance, D. K. Singh.

Q. Anyone else?

A. I'm certain there were. I can't think of the names and the specific time frames. They were all based in the U.S.

Q. Can you identify any circumstance under which any of the individuals who you just identified did not approve of a recommendation made by a category manager with respect to prices for display modules during the relevant time period?

MR. MURRAY: Object to form. Foundation.

BY THE WITNESS:

A. I'm not aware of any specific examples.

Q. So as you sit here today, you can't identify one?

A. No, I cannot.

Q. Is it generally correct that the individuals you identified approved of the recommendations made by category managers with respect to the prices at which display modules were

Q. Was there any formal documentation process that a category manager had to follow in order to get approval to enter into an agreement on price with a display module supplier during the relevant time period?

12:57

A. No formal documentation procedure, no.

Q. On what basis, then, do you assert that approval resided only with the senior procurement officers in the United States?

12:57

A. That was our practice, and that was our policy.

Q. Is that policy written anywhere?

A. Not that I'm aware of.

Q. You said that the approval would be done through meetings and presentations; is that correct?

12:57

A. Could be.

Q. That's one --

A. That could be one way, yes.

Q. Could it be the category manager simply picking up the phone?

12:57

A. That would be unusual.

Q. Why would that be unusual?

A. Because typically you would have to share data that would require more than just a verbal discussion.

12:57

Q. Is there any documentation within the company that you're aware of that establishes the requirement that a category manager must obtain approval from a senior procurement officer located in the United States before they enter into an agreement with a display module provider?

A. Repeat the question, please.

Q. Yes. Is there any documentation that you're aware of that establishes the requirement that a category manager must obtain approval from senior procurement officials located in the United States before the category managers can agree on the price with a display module supplier?

A. Not that I'm aware of, but all of those teams reported into and through that organization.

Q. Now, where were you from 2003 to 2006?

A. Horsham, Pennsylvania.

Q. And on what basis do you conclude that this requirement of authorization from senior procurement officers in the United States was required during that time period? Did somebody tell you that?

A. I was part of the leadership team that reported in to Theresa Metty. I did not have display responsibilities.

16:20 16:20

A. Yes, he was stating his opinion.

MR. FORAN: Okay. I'm about to move on to another topic.

MR. MURRAY: Okay.

MR. FORAN: So I suggest --

MR. MURRAY: Take a short break?

MR. FORAN: Yeah, yeah. Let's take a short break.

THE VIDEOGRAPHER: Now going off the record at 4:20 p.m. This ends Tape No. 6.

(Deposition adjourned until 9:00 a.m. on August 4, 2011.)

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated_____________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF COOK)

I, RACHEL F. GARD , hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 084-003324 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: AUGUST 15, 2011

Rachel F. Gard.

EXHIBIT 22

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

---o0o---

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,	)	
THIS DOCUMENT RELATES TO:	)	Case No. M-07-1827-SI
ALL ACTIONS	)	

HIGHLY CONFIDENTIAL TRANSCRIPT

ATTORNEYS' EYES ONLY

VIDEOTAPE DEPOSITION OF DURGESH SINGH

WEDNESDAY, JUNE 8, 2011

REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

Q. BY MR. DAVIDSON: So if a supplier wanted to be competitive for Motorola's business, it wasn't good enough to just provide a certain price, they had to perform on all of those dimensions that you just talked about?
03:21
A. That is correct.
Q. And to be clear, while you were at Motorola, were all of your display providers foreign companies?
03:21 MR. STOKES: Object to the form.
Go ahead.
THE WITNESS: I know most of the companies were, but I would not remember if they were 100 percent.
03:21 Q. BY MR. DAVIDSON: Do you remember any of those companies?
A. Yes, some of -- some of those we talked about, Sanyo-Epson, Samsung.
Q. But do you remember any suppliers that were inside the United States?
03:21
A. Oh, inside the United States, no, I don't.
Q. So to the best of your recollection --
A. Most of the suppliers were outside, yeah.
Q. Now, where did Motorola manufacture its handsets while you were working for Motorola?
03:21

MR. STOKES: Object to the form.
Go ahead.
THE WITNESS: We had manufacturing operation in Tianjin, China. We also manufacturing, using the contract manufacturers, they were also in Asia.
And I believe that we also had little bit operation in Singapore. I may not be 100 percent sure on that.

03:22

Q. BY MR. DAVIDSON: Motorola didn't manufacture any of its handsets in the United States, did it?
A. That's what I recollect.
Q. And because Motorola manufactured all of its handsets outside of the United States, all of the panels that Motorola purchased were delivered outside of the United States?
MR. STOKES: Object to the form.
THE WITNESS: That's fair to say.
Q. BY MR. DAVIDSON: Is it your recollection that all of the purchase orders were issued by Motorola's foreign subsidiaries?
A. There might have been little bit POs going from Libertyville, because I had a small group, and I don't remember now what we called them, but this

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated______________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, Balinda Dunlap, hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 10710 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: JUNE 22, 2011

EXHIBIT 23

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,	)	
THIS DOCUMENT RELATES TO:	)	Case No. M-07-1827-SI
ALL ACTIONS	)	

*** HIGHLY CONFIDENTIAL TRANSCRIPT ***

*** ATTORNEYS' EYES ONLY ***

VOLUME I

VIDEOTAPED 30(b)(6) DEPOSITION OF MOTOROLA, INC.

BY SHARON STORM

FRIDAY, NOVEMBER 11, 2011

REPORTED BY: RACHEL F. GARD, CSR, RPR, CLR
CSR No. 084-003324

profits Motorola Electronics Pte, Limited, might have realized during the relative time period lower in Singapore than they are in the United States?

MR. STOKES: Object to form.

BY THE WITNESS:

A. The tax rate --

Q. Yeah.

A. -- was lower, yes.

Q. What was the tax rate applicable to Motorola Electronics Pte, Limited's, profits?

MR. STOKES: Object to the form.

Go ahead.

BY THE WITNESS:

A. My recollection is it was dependent on the activity, that we had a zero percent rate for some activities and a higher rate for others. I don't -- whether it was 15 percent or -- I don't recall. For manufacturing, I believe that we had a zero rate.

Q. That's a zero rate applicable to Motorola Electronics Pte, Limited?

A. Correct.

Q. Okay. And what about Motorola Trading Center Pte, Limited? Does that also have a zero rate?

MR. STOKES: Object to the form.

BY THE WITNESS:

A. Yes, it had a zero rate in Singapore. But as I said, it was treated as a branch of the United States and all of its profits were included in current U.S. tax returns.

15:16

Q. Right. But it paid zero taxes in Singapore?

A. Correct.

Q. Had a zero tax rate applicable in Singapore itself?

15:16

A. In exchange for obligations to the economic development board in Singapore, they gave us zero rate.

Q. All right. And what were the nature of the obligations that were made to the economic development board in Singapore?

15:16

A. It had to do with particular percentage of our business activities for price masking taking place in Singapore, employing a certain number of people, employing -- providing training opportunities, things like that.

15:17

Q. And is that one of the reasons that Motorola decided to locate the Motorola Trading Center Pte, Limited, in Singapore?

MR. STOKES: Object to form. Outside the

15:17

BY MR. FORAN:

Q. The court reporter has handed you what's been marked as Deposition Exhibit No. 425. It's an email with Bates Numbers MOTOLCD 1250110 through 1250111. The first email, at least, is written by Mike Zafirovski to Jeff Tan.

Do you have that document in front of you, Ms. Storm?

A. I do.

Q. Take a moment to review it, and I'll ask you some questions.

A. Okay.

Q. Ms. Storm, does this email look like an email from Jeff Tan to Mike Zafirovski at Motorola regarding the tax benefits or tax incentive and cash grant package that was awarded to Motorola as a result of locating the ITC in Singapore; is that what it looks like to you, Ms. Storm?

A. That's what it appears to be.

Q. And the pioneer tax status tax incentive for the ITC that's referred to in this email, that's the tax holiday that you referred to earlier, the ten-year tax holiday?

MR. STOKES: Object to the form.

BY THE WITNESS:

A. Yes.
Q. And under that tax holiday, Motorola Singapore pays -- the trading center in Singapore pays zero percent corporate tax in Singapore, right?
15:28 A. That's correct.
Q. Okay. And Motorola was also granted a cash grant package to locate the ITC in Singapore?
A. That's what this says. I would not have had anything to do with that.
15:28 Q. Fair enough.
A. Yeah.
Q. The document says whatever it says, Ms. Storm. I'm just asking for your understanding.
Do you have any understanding that
15:28 Motorola was granted a cash package by the Economic Development Board in Singapore in order to locate the ITC there?
A. By looking at this, it rings a bell with me that there was a grant associated with it. But it's
15:29 nothing that I have any real knowledge about.
Q. All right. And, again, Motorola had to make certain commitments to the Economic Development Board in exchange for this package of tax incentive and cash grants, right?
15:29 A. Correct.

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated______________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, RACHEL F. GARD , hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 084-003324 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: NOVEMBER 30, 2011

Rachel F. Garel.

EXHIBIT 24

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,	)
THIS DOCUMENT RELATES TO:	) Case No. 3:07-md-1827-SI
Case No. 09-5840	) MDL No. 1827
MOTOROLA MOBILITY INC.,	)
Plaintiff,	)
vs.	)
AU OPTRONICS CORPORATION, et al.,	)
Defendants.	)

*** HIGHLY CONFIDENTIAL ***

VIDEOTAPED DEPOSITION OF E.L. TAY,

MOTOROLA MOBILITY, INC. 30(B)(6)

Held at Crowell & Moring

275 Battery Street, 23rd Floor

San Francisco, California

Tuesday, November 22, 2011

3:53 p.m. - 6:25 p.m.

REPORTED BY: JAMES BEASLEY, RPR, CA CSR No. 12807

Q. When you say the Chinese government wanted the manufacturing base to be in China, what is that you mean, what do you mean by that?

A. For example, if you want to sell a product in China, they wanted to make sure that the products are locally made instead of imported from somewhere else.

Q. That's important to the government of the People's Republic of China?

MR. STOKES: Object to the form.

THE WITNESS: I assume it's important to them, that's why they have the regulation.

BY MR. FORAN:

Q. And that's -- that desire on their part was made clear to Motorola?

MR. STOKES: Object to the form.

THE WITNESS: That was a requirement that we had to comply with, to have manufacturing in China in order to sell in China.

BY MR. FORAN:

Q. All right. Did Motorola negotiate any kind of a financial incentive package with the government of the People's Republic of China in order to set up MCEL in China?

A. Yes, we did.

Q. What was the nature of that financial incentive package?
A. It involved some preferential tax rates.
Q. Okay. What was the preferential tax rate that Motorola negotiated with the government of the People's Republic of China?
A. I don't have the specifics.
Q. But in any event, it was -- it was preferential to the company?
04:57 A. It was preferential to the company.
Q. Okay. And did it receive any other kind of financial benefits, other than getting a preferential tax rate from the government of the People's Republic of China, in order to source its manufacturing base there?
MR. STOKES: Object to the form.
THE WITNESS: They may -- they may have some other form of incentives, but I do not know for sure.
04:57 BY MR. FORAN:
Q. Mr. Tay, I'm going to go back and I'm going to do all this again for Motorola Electronics PTE Limited. How do you -- how would you like me to refer to that company, do you want to call it Motorola Singapore?

negotiate a favorable tax and cash incentive package with the government of Singapore in order to set up MCEL there?

MR. STOKES: Not MCEL.

05:19 BY MR. FORAN:

Q. Sorry, pardon me. Let me ask -- let me ask another question. I apologize, Mr. Tay. We'll have a fuzzy record otherwise.

Did Motorola, Inc., negotiate a favorable
05:20 tax incentive package with the government of Singapore prior to establishing MEPL in Singapore?

MR. STOKES: Object to the form.

Go ahead.

THE WITNESS: Okay. I don't know -- I do
05:20 not know which one come first, but when we set up the manufacturing operations in Singapore, we did receive the tax incentive from the Singapore government.

(Overlapping speakers.)

05:20 THE WITNESS: Whether that was prior to setting up -- setting up the legal entity or not, I do not know.

BY MR. FORAN:

Q. Was that a negotiated package?

05:20 MR. STOKES: Object to the form.

manufacturing plant in Singapore?
A. Yes.
Q. So if I understand correctly, there's the -- there's the pioneer tax status it received, correct?
A. Yes.
Q. Motorola wanted to be close to Asian emerging market, correct?
A. Yes.
Q. Were there any other business justifications for setting up a manufacturing plant in Singapore, to your knowledge, Mr. Tay?
A. Another important reason is the talented pool of resources that was available in Singapore.
Q. Versus the United States?
A. No, just that when we want to come to Asia to find the right location for investment, Singapore stands out.
Q. It is considered a -- a favorable place in which to do business; is that a fair statement?
A. It is.
Q. Favorable in the sense that it has, you know, a probusiness regulatory environment?
MR. STOKES: Object to the form.
THE WITNESS: Yes. It's a -- it's a

favorable location to do business.
BY MR. FORAN:
Q. Are costs of manufacturing in Singapore lower than they are in the United States during the relevant time period?
A. In the early years it was lower. The cost of manufacturing was lower than in -- in Singapore than it is in the United States.
Q. All right. And is that -- is that one of the justifications that led Motorola, Inc., to setting up a manufacturing plant in Singapore?
A. Being -- to be able to reduce the cost of manufacturing is always one objective.
Q. Okay. So it's pioneer status -- tax status, correct?
A. Yes.
Q. Wanting to be close to the emerging Asian handset market?
A. Yes.
Q. Lowering manufacturing costs?
A. Yes.
Q. And tapping into an available -- an available talent pool in Singapore?
A. Yes.
Q. Are there any other business justifications

getting at?

A. Okay. The buy-sell activities conducted by MEPL would have all the activities that transacted through MEPL's legal book. So MEPL is a sole manufacturing company.

So one of the consideration is to separate buy-sell activities from the normal manufacturing activities.

Q. But why, why do that?

A. I do not know why, but that was one of the reasons.

Q. All right. So let me go back to my original question.

What is your understanding, as Motorola's designated representative on this topic, as to the business justifications that drove Motorola, Inc., to establish MTC as a separate legal entity in Singapore in order to conduct buy-sell activities?

MR. STOKES: Object to the form.

THE WITNESS: First of all, the sole purpose of establishing the MTC is to do buy-sell with the third-party manufacturer.

We have a choice of putting the -- putting the MTC in Singapore or in other part of the world. Again, Singapore government offer tax incentives for us to set up MTC in Singapore.

BY MR. FORAN:

Q. So it was tax incentives?

A. Yes.

05:49 Q. Was there any other business justification that drove Motorola, Inc.'s decision to establish MTC as a separate legal entity in Singapore in order to conduct buy-sell activities?

A. The -- some of the team members who are

05:50 familiar with the buy-sell activities under MEPL, they are located in Singapore. So for us to set up MTC in Singapore, we already have a pool of resources there familiar with operations.

Q. Okay. So some on-the-ground knowledge of

05:50 how buy-sell operates?

A. Yes.

Q. All right. In order to get the tax incentives that it got from the government of Singapore in order to locate the MTC in that

05:50 country, did -- was the MTC required to be set up as a separate legal entity?

A. The incentives -- list of incentive given by the Singapore government is always given to a legal entity. They are tied to a legal entity.

05:50 Q. All right. So in order -- in order to get these tax incentives that drove Motorola to establish MTC as a buy-sell operation in Singapore, it was required -- it was a requirement that it be set up as a separate legal entity?

05:51 A. Yes.

Q. Now, what were the nature of the tax incentives that Motorola, Inc., secured from this Singaporean government?

MR. STOKES: Object to the form.

05:51 THE WITNESS: Again, it is a preferential tax rate.

BY MR. FORAN:

Q. What is that preferential tax rate?

A. I do not have the specific details. It was
05:51 a preferential tax rate over a period of time.

Q. Isn't it the case that MTC was given a 10-year tax holiday from the Singaporean government?

MR. STOKES: Object to the form.

THE WITNESS: I'm not sure exactly whether
05:51 it's 10 years or not.

BY MR. FORAN:

Q. All right. Well --

A. It is --

Q. Go ahead, Mr. Tay.

05:51 A. I thought it was like six years, but I'm not sure.

Q. All right. But you're aware it was given a tax holiday?

A. Yes.

05:51 Q. Where corporate taxes applicable to its business activities would be zero percent?

MR. STOKES: Object to the form.

THE WITNESS: I do not know exactly whether it's zero percent, but it was some preferential tax rate over a period of time, that part I know.

05:51

BY MR. FORAN:

Q. And was that an advantage to Motorola?

A. Yes.

Q. Are there any other business

05:52 justifications, other than the preferential tax treatment that you received from the Singaporean government and knowledge on the ground of how buy-sell activities operated, to setting up MTC as a separate legal entity in Singapore to conduct

05:52 buy-sell activities?

A. One of the main reason is to do buy-sell with third party, so that when we send the components to the third-party manufacturer, they do not know exactly the price that we are paying to the

05:52 supplier.

05:59 modules in the cell phone product line, so some of the models Tianjin has the lowest conversion cost, but for some other model Hangzhou has the lowest conversion cost.

05:59 Q. Okay. That's helpful, thank you, Mr. Tay. Was Motorola Tianjin, MCEL, and Hangzhou, were they considered the lowest-cost facilities for manufacturing handsets during the relevant time period?

05:59 A. Yes.

Q. Was that -- was that driven in large part by the lower labor rates prevailing in China?

A. Yes.

Q. Are you familiar with the phenomenon in

06:00 China of migrant labor?

MR. STOKES: Object to the form. Outside the scope.

THE WITNESS: I'm familiar with the term "migrant labor."

06:00 BY MR. FORAN:

Q. Does MCEL utilize migrant laborers in its factories?

MR. STOKES: Same objection.

THE WITNESS: We have contract laborers,

06:00 short-term contract laborers that we utilize to

Videotape No. 3, Volume I and concludes the deposition of E.L. Tay as a PMK for Motorola Mobility, Inc.

The time is 6:25 p.m. on November 22nd,

06:25 2011, and we are off the record.

(The deposition proceedings were concluded at 6:25 p.m.)

I have read the foregoing deposition transcript and by signing hereafter, approve same.

Dated ___________________.

____
(Signature of Deponent)

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA }
} ss.
COUNTY OF SAN FRANCISCO}

I, James Beasley, hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 12807 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a)).

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1)).

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28).

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [ ] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: DEC 08 2011,

James Beasley

515 South Flower Street, 40th Floor, Los Angeles, CA 90071-2258 ▪ p213 622-4750 ▪ f213 622-2690

crowell moring

Joshua C. Stokes
(213) 443-5573
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January 20, 2012

VIA EMAIL AND U.S. MAIL

Rachel Gard, C.S.R.
Barkley Court Reporters
1875 Century Park East, Suite 1300
Los Angeles, CA 90067

Re: *In re TFT-LCD (Flat Panel) Antitrust Litigation*
Northern District of California, Case No. M:07-1827 SI
Corrections to El Tay Deposition Transcript

Dear Rachel:

Enclosed please find the errata sheet for the deposition of El Tay, taken on November 22, 2011. Please contact me with any questions.

Sincerely,

Joshua C. Stokes

JCS/td
Enclosure

cc: Elizabeth C. Pritzker, Esq. (via email) (liaison)
Jack W. Lee, Esq. (via email) liaison)
Anne Schneider, Esq. (via email (liaison)
Jerome A. Murphy, Esq. (via email) liaison)
Katharine Chao, Esq. (via email) (liaison)

ERRATA SHEET FOR THE DEPOSITION OF EL TAY TAKEN ON NOVEMBER 22, 2011

In re TFT-LCD (Flat Panel) Antitrust Litigation

Court Reporter: Rachel Gard, C.S.R. No. 084-003324

The following corrections should be made to the transcript of my depositions taken on November 22, 2011.

Personal deposition:

- pg 35, line 14 Change "Integrative" to "Integrated"
- p. 56, line 1 Change "The procure agreements is done" to "The procurement was done"
- p. 208, line 13 Change "Electronics" to "Inc."

30(b)(6) depo:

- p. 18, line 25 Change "bought" to "board"
- p. 66, line 1 Change "cut" to "cuts"
- p. 67, line 14 Change "Ki" to "Kee"
- p. 70, line 20 Change "X" to "Acts"
- p. 95, line 4 Change "X" to "Acts"
- p. 101, line 4 Change "is a sole" to "is solely a"
- p. 101, line 25 Change "offer" to "offered"

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 1/20, 2012

EL TAY

EXHIBIT 25

No. 03-724

In the Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD., ET AL., PETITIONERS

v.

EMPAGRAN, S.A., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, the Sherman Act applies to claims of foreign plaintiffs whose injuries do not arise from the effects of antitrust violations on United States commerce.

2. Whether such foreign plaintiffs lack antitrust standing under Section 4 of the Clayton Act, 15 U.S.C. 15(a).

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In the Supreme Court of the United States

No. 03-724

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws, and thus they have a strong interest in the correct application of those laws and in the effect of judicial interpretations on antitrust enforcement programs. The United States is concerned that the court of appeals' holding will substantially harm its ability to uncover and break up international cartels and undermine law enforcement relationships between the United States and its trading partners.

STATEMENT

1. The Antitrust Division of the United States Department of Justice has a Corporate Leniency Policy that provides amnesty from criminal prosecution in certain circumstances. 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993); <*http://www.usdoj.gov/atr/public/guidelines/0091.htm*>. In 1999, one of the petitioners, Rhone-Poulenc SA, applied for admission to the government's amnesty program for Rhone-Poulenc's role in global price-fixing and market-allocation conspiracies among domestic and foreign manufacturers and

distributors of bulk vitamins. In exchange for amnesty, the company exposed the cartel, which had sold billions of dollars of vitamins in the United States and other countries around the world. The company cooperated with the United States' subsequent investigations into violations by the vitamin companies of Section 1 of the Sherman Act, 15 U.S.C. 1. Chemical Business NewsBase: Press Release, *Rhone-Poulenc issues statement regarding vitamin business*, available in 1999 WL 17728220 (May 26, 1999); U.S. Dep't Of Justice Press Release, *F. Hoffman-LaRoche and BASF Agree To Pay Record Criminal Fines For Participating In International Vitamin Cartel* (May 20, 1999) (Press Release).

To date, the investigation triggered by Rhone-Poulenc's application for amnesty has resulted in plea agreements with twelve corporate defendants and thirteen individual defendants and the imposition of fines exceeding $900 million—including the largest criminal fine ($500 million) ever obtained by the Department of Justice under any statute. Press Release, at 1-2. Eleven of the thirteen individuals have received sentences resulting in imprisonment, and an additional individual awaits a criminal trial. European Union, Canadian, Australian, and Korean authorities similarly have obtained record civil penalties exceeding ∈855 million against the vitamin companies. Pet. 5; Pet. App. 68a.

In the wake of the government's investigations, domestic private parties sued the vitamin companies seeking treble damages and attorney's fees, see 15 U.S.C. 1, 15, 26, for overcharges that the domestic companies paid in United States commerce as a result of the price-fixing conspiracy. In settlement of suits by some United States purchasers, the vitamin companies paid amounts "exceeding $2 billion." Pet. 5; *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867 (D.D.C. Mar. 31, 2000).

2. Respondents are foreign corporations domiciled in Ecuador, Panama, Australia, and Ukraine. Pet. App. 6a; Pet. ii, 5; Br. in Opp. ii. They brought this class action on behalf

of purchasers of "vitamins abroad from the vitamin companies or their alleged co-conspirators * * * for delivery outside the United States." Pet. App. 6a. The district court held (*id.* at 47a-53a) that it lacked subject matter jurisdiction over respondents' claims against petitioners under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, which provides that the Sherman Act shall not apply to non-import foreign conduct unless it has "a direct, substantial, and reasonably foreseeable effect" on United States commerce, 15 U.S.C. 6a(1), and that "such effect gives rise to a claim" under the Sherman Act, 15 U.S.C. 6a(2).[1] The district court explained that, although respondents had alleged that "the conduct causing their injuries resulted in a 'direct, substantial, and reasonably foreseeable effect on U.S. commerce,'" they had not alleged that the conduct's effect on United States commerce gave rise to respondents' claims. Pet. App. 48a-49a. Because the district court found subject

---

[1] The FTAIA, which was enacted in 1982 (Pub. L. No. 97-290, § 402, 96 Stat. 1248) and became Section 7 of the Sherman Act, 15 U.S.C. 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

matter jurisdiction lacking, the court did not reach petitioners' alternative contention that respondents lacked antitrust standing because they "fall outside the class of persons whom the Sherman Act is designed to protect." *Id.* at 53a, 54a.

3. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-42a. The court observed that the "Second and Fifth Circuits have split" on "the question whether FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct." *Id.* at 14a-15a. The court explained (*ibid.*) that the Fifth Circuit in *Den Norske Stats Oljeselskap As* v. *HeereMac Vof*, 241 F.3d 420, 427 (2001) (*Statoil*), cert. denied, 534 U.S. 1127 (2002), held that the plain text of the FTAIA bars claims that do not stem from the conspiracy's anticompetitive domestic effects. By contrast, the court explained (Pet. App. 16a-17a), the Second Circuit in *Kruman* v. *Christie's International PLC*, 284 F.3d 384, 400 (2002), cert. dismissed, 124 S. Ct. 27 (2003), held that the FTAIA permits suit, even when the plaintiff's injury does not arise from the domestic effect of the conspiracy, as long as the "domestic effect violate[s] the substantive provisions of the Sherman Act."

The majority adopted a "view of the statute [that] falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. 20a. The majority rejected respondents' argument —based on *Kruman*, 284 F.3d at 397-400—that the "FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. 20a. The majority nonetheless interpreted the phrase "gives rise to a claim" in 15 U.S.C. 6a(2) as requiring only that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. 4a. The majority also found its interpretation supported by the FTAIA's legislative history, *id.* at 24a-30a, and by its view that asserting jurisdiction over respondents' claims would maximize deterrence of international cartels by "forc[ing] the conspirator to internalize the full cost of his anticompetitive conduct," *id*. at 32a.

The majority further held that respondents have antitrust standing under Section 4 of the Clayton Act, 15 U.S.C. 15(a). Pet. App. 33a-37a. The court reasoned that "the arguments that have already persuaded [the court] that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here." *Id*. at 36a.

Judge Henderson dissented. Pet. App. 40a-42a. She disagreed with the majority's interpretation of the FTAIA, reasoning that the Fifth Circuit's reading was "unambiguously" supported by the Act's text and history. *Id*. at 40a.

SUMMARY OF ARGUMENT

A. The Foreign Trade Antitrust Improvements Act provides that the Sherman Act shall not apply to foreign conduct unless it has a requisite effect on United States commerce and "such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2). The most natural reading of that statutory language is that the required effect on United States commerce must give rise to a claim by the particular plaintiff before the court. In rejecting that interpretation, the court of appeals reached the implausible conclusion that Congress intended to permit suits in the United States that seek redress for injuries that were sustained entirely overseas and that arise out of purely foreign commerce. That conclusion finds no support in the Act's legislative history.

Such an expansive interpretation of the FTAIA would greatly expand the potential liability for treble damages in United States courts and would thereby deter members of international cartels from seeking amnesty from criminal prosecution by the United States Government. The interpretation adopted by the court of appeals thus would weaken the Department of Justice's criminal amnesty program, which has served as an effective means of cracking international cartels. That interpretation also likely would damage the cooperative law enforcement relationships that the United States has nurtured with foreign governments and would burden the federal courts with a wave of new international antitrust cases raising potentially complex satellite disputes that turn on hypothetical claims of persons not before the courts.

B. Antitrust standing principles independently support the conclusion that foreign plaintiffs whose claims arise solely from a conspiracy's effects on foreign commerce cannot bring antitrust lawsuits in United States courts. Section 4 of the Clayton Act, which defines the class of persons who may maintain a private damages action under the antitrust laws, does not provide a treble damages remedy for all injuries that result from an antitrust violation. *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983). This Court accordingly has limited the types of plaintiffs who are proper parties to bring a private antitrust action based on substantive antitrust and other policy considerations.

Foreign plaintiffs whose claims arise from a conspiracy's effects outside the United States are not proper plaintiffs to invoke our antitrust laws. The focus of the FTAIA, and the fundamental purpose of the Sherman Act, are the protection of American consumers and commerce. To provide antitrust relief to respondents, even though their injuries have no connection to a conspiracy's effects on United States commerce, would divorce antitrust recovery from the central purposes of the antitrust laws.

ARGUMENT

RESPONDENTS HAVE NO CLAIM UNDER THE ANTITRUST LAWS

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. Although this Court has articulated a general presumption in other contexts that Congress intends its laws to apply only within the territorial jurisdiction of the United States, *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), "it is well established by now 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." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993); *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582-583 n.6 (1986); see *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (1st Cir. 1997) (holding that Sherman Act's criminal provisions apply to wholly foreign conduct with intended and substantial domestic effects), cert. denied, 522 U.S. 1044 (1998).

Consistent with that judicial construction of the Sherman Act, Congress provided in the FTAIA that the Sherman Act applies to foreign conduct when "(1) such [foreign] conduct has a direct, substantial, and reasonably foreseeable effect * * * on [United States domestic commerce] * * * and (2) such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a. It is not disputed in this case that, under Section 6a, the Sherman Act applies to a plaintiff's claim that arises from an illegal conspiracy's anticompetitive effects on domestic commerce, whether the plaintiff is located here or abroad, or is a citizen of the United States or of another country. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978) (holding that a foreign government may sue under the Sherman Act); see *Statoil*, 241 F.3d at 427 n.22, 428 n.25.

The question presented in this case is whether the Sherman Act permits respondents to recover treble damages and attorney's fees under the United States' antitrust laws for injuries that they sustained entirely overseas and that arose out of purely foreign sales transactions that had no substantial effect on United States commerce. The court of appeals held that respondents were entitled to seek such relief on the theory that the foreign conduct by petitioners that injured respondents was part of a global price-fixing conspiracy that had anticompetitive effects in the United States, and that those effects give rise to a claim by some *other* person.

Such an expansive reach of the antitrust laws is not justified by either the text or history of the FTAIA. The result reached by the court of appeals is also highly likely to have the perverse effect of undermining the government's efforts to detect and deter international cartel activity.

A. THE FTAIA REQUIRES A PLAINTIFF'S CLAIM TO ARISE OUT OF A CONSPIRACY'S ANTICOMPETITIVE EFFECT IN THE UNITED STATES

1. *The Text Of The Statute Requires A Plaintiff To Allege That His Claim Arises From The Domestic Anticompetitive Effect Of A Sherman Act Violation*

a. The FTAIA governs whether a federal court may hear a plaintiff's complaint alleging violations of the Sherman Act involving foreign conduct. Section 6a(1) provides that the Sherman Act extends to foreign conduct only when it has a requisite effect on United States commerce. 15 U.S.C. 6a(1). That such effect was caused by the vitamin cartel has not been disputed. Pet. App. 9a. A requisite effect is not enough to establish that the Sherman Act applies to foreign conduct, however, for Section 6a(2) imposes the further condition that "such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2).[2]

It is a "fundamental principle of statutory construction" that the meaning of statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div., AVCO Corp.* v. *UAW*, 523 U.S. 653, 657 (1998) (internal quotation marks omitted). The FTAIA's focus is explicitly and only on the *domestic* effect of anticompetitive conduct. Its text contains no hint of a statutory purpose to permit recovery where the situs of the plaintiff's injury is entirely foreign and that injury arises exclusively from a price-fixing or market-allocation conspiracy's effect on foreign commerce. Accordingly, read in context, by far the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim" under the Sherman Act is that the requisite anticompetitive effect on domestic commerce must give rise to a Sherman Act claim brought by the *particular plaintiff* before the court.

The requirement that a plaintiff tie his own claim to a conspiracy's domestic anticompetitive effect does not conflict with a supposedly literal or "plain" meaning of Section 6a(2), based on its use of the indefinite article "a," as has been suggested. See *Kruman*, 284 F.3d at 400; *Statoil*, 241 F.3d at 432 (Higginbotham, J., dissenting). "The word 'a' has varying meanings and uses," and "the meaning depends on context." *Black's Law Dictionary* 1 (6th ed. 1990). And in particular, although "[*a*] (or *an*) is called the indefinite article,"

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[2] The court of appeals treated the FTAIA as setting forth a threshold requirement for subject matter jurisdiction rather than a substantive element of a Sherman Act claim. Pet. App. 8a; see generally *United Phosphorus, Ltd.* v. *Angus Chem. Co.*, 322 F.3d 942, 949-951 (7th Cir.) (en banc), cert. denied, 124 S. Ct. 533 (2003). That issue has no bearing on the question of statutory interpretation before the Court, *i.e.*, whether the Sherman Act applies to foreign conduct when a claim by the plaintiff does not arise from a conspiracy's effect on United States commerce.

"[a]ctually, it is used to indicate a definite but unspecified individual, as in *a man in our town*. * * * When we wish to refer indefinitely to a single person or thing we say *any*, as in *any man in our town*, *any library book*." Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 3 (1957). Thus, the article "a" is far too slender a reed on which to rest the conclusion that Congress intended to give Section 6a(2) an unprecedented world-wide scope whenever *any* person in the domestic commerce of the United States would have *any* claim under the Sherman Act based on the same conduct.

Moreover, the article "a" in Section 6a(2) is immediately followed by the specific term "claim." 15 U.S.C. 6a(2). Congress surely intended a federal court to examine not *any* hypothetical "claim," but a claim that is being asserted by the party seeking to invoke the jurisdiction of the court in the case actually pending before it. In other words, the reference to "a claim" *presupposes*, but leaves unstated, that the "claim" to which the conduct in question "gives rise" is one advanced by the plaintiff. In this respect, Section 6a(2) is just like Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides for dismissal of a complaint for "failure to state a claim on which relief can be granted." Surely Rule 12(b)(6) refers to "a claim" asserted by the plaintiff in the case, not by some other hypothetical person not before the court. Accordingly, to recognize jurisdiction in a federal district court under the United States' antitrust laws over a private action lacking the requisite "effect" on United States commerce—on the premise that the requirement of such "a claim" might be satisfied by some third party—"would not be consistent with the 'sense of the thing,' and would confer upon [the court] jurisdiction beyond what 'naturally and properly belongs to it.'" *Heckler* v. *Edwards*, 465 U.S. 870, 879 (1984) (citation omitted). Instead, the critical inquiry under Section 6a(2) "is, regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce?" *Statoil*, 241 F.3d at 427 n.22.[3]

For similar reasons, the Second Circuit in *Kruman*, 284 F.3d at 397-400, erred in concluding that the only relevant inquiry is whether the conduct that caused the anticompetitive domestic effect violated the substantive provisions of the antitrust laws, such that the *government* would have a valid claim for injunctive relief under Section 4 of the Sherman Act, 15 U.S.C. 4. Under that view, the phrase "gives rise to a claim" adds nothing, because the United States always has a claim under Section 4 of the Sherman Act whenever that Act is violated. Nor is there any suggestion in the FTAIA's text that Congress intended the availability of relief under the Sherman Act to turn on whether the government would have a claim—particularly since the FTAIA equally governs whether a private party may seek relief, and a price-fixing conspiracy that violates Section 1 of the Sherman Act, 15 U.S.C. 1, does not "give[] rise" to a private "claim" under the Sherman Act in the absence of injury to the particular plaintiff. See 15 U.S.C. 15(a) (providing for private right of action to "any person injured in his business or property"). In short, as the court of appeals in this case pointed out, "[t]he view that FTAIA must be taken to refer only to defendant's conduct tends to ignore the fact

[3] Contrary to respondents' contention, the government's reading of the statute does not mean that only injury that occurs *in the United States* comes within the terms of the FTAIA. Br. in Opp. 20-21. Rather, the text of the FTAIA requires that any anticompetitive injury, whether here or abroad, arise from the conspiracy's requisite effect on domestic commerce. See, *e.g.*, *Caribbean Broad. Sys., Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080, 1086-1087 (D.C. Cir. 1998) (while the situs of injury was overseas, plaintiff's claim arose from a conspiracy's effect on the United States advertising market). Moreover, the federal agencies charged with the responsibility of enforcing the antitrust laws "do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties." U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines For International Operations* § 2 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, at 20,589-20,592 (Apr. 5, 1995).

that FTAIA does refer on its face to the conduct's effect giving rise to a claim"—which even the court acknowledged "arguably refers to a plaintiff's injury. " Pet. App. 21a.

Thus, when the court of appeals recognized that "the usual meaning of 'a claim' is a private action," Pet. App. 22a, it should have further recognized that, in the context of a statute governing a private civil action, the words "a claim" are most naturally understood to refer to a claim that is actually being asserted in the civil action arising under that statute. Indeed, we are not aware of any statutory scheme that makes the determination of statutory coverage turn on whether a person not before the court, *i.e.*, a hypothetical plaintiff in some other civil action, has a claim. Ordinarily, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). "This is generally so even when the very same allegedly illegal act that affects the litigant also affects a third party." *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990).

b. The implausibility of the panel's expansive interpretation of Section 6a(2) is confirmed by the fact that it would produce results that Congress could not have intended. The panel's holding would open United States courts to suits that are strikingly localized to foreign countries. For example, under the panel's holding, a buyer in Nigeria could file suit in the United States against its own Nigerian supplier if that supplier was a member of an international cartel, simply by alleging (and being able to prove if contested, see, p. 22, *infra*) that some unnamed third person who was injured by the same cartel in United States commerce would have a claim under the Sherman Act.

In other words, under the panel's reading of Section 6a(2), once *any* person is determined to have a claim arising from an injury resulting from the domestic anticompetitive effects of a conspiracy, any foreign purchaser can piggyback on that claim and sue for treble damages in United States courts, even when that purchaser is "injured solely by that [conspiracy's] effect on foreign commerce." Pet. App. 4a. Consider, for example, an international price-fixing cartel with wholly foreign members that had annual foreign sales of $2 billion to 50 foreign customers, and annual sales in the United States of $1 million to one customer. Because the domestic customer could sue based on the conspiracy's domestic effects, all 50 foreign customers also could bring a claim under the Sherman Act, "even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." *Statoil*, 241 F.3d at 427-428.

No decision pre-dating the FTAIA has been cited that permitted such a suit. *Statoil*, 241 F.3d at 429 ("[W]e have found no case in which jurisdiction was found in a case like this—where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market."). Congress passed the FTAIA to "exempt from the Sherman Act export transactions that did not injure the United States economy," *Hartford Fire Ins. Co.*, 509 U.S. at 796 n.23, and to create a "single, objective test—the 'direct, substantial, and reasonably foreseeable effect' test"—to "serve as a simple and straightforward clarification of *existing* American law," H.R. Rep. No. 686, 97th Cong., 2d Sess. 2 (1982) (House Report) (emphasis added). It is highly doubtful that the same Congress that intended to codify *limits* on the extraterritorial reach of the antitrust laws intended at the same time to bring about the sweeping expansion that the court of appeals' decision would accomplish.

c. The statutory text should also be read in light of background principles concerning the extraterritorial reach of United States law. As noted above (see p. 7, *supra*), although this Court has adopted a general presumption that Congress intends for its laws to apply only within the territorial jurisdiction of the United States, it is well established—quite apart from the FTAIA—that the Sherman Act applies to foreign conduct that was meant to and did produce some substantial effect in the United States. And the FTAIA ratifies that fundamental proposition by providing that the Sherman Act applies to foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on the domestic commerce of the United States, if that effect in turn "gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a. The Sherman Act and the FTAIA have thus supplanted any general background presumption against extraterritoriality within those fields involving effects on domestic commerce. It does not follow, however, that general background principles are entirely irrelevant in considering the further question presented in this case.

Here, respondents' alleged injuries do not flow from any effect of petitioners' conduct on the domestic commerce of the United States (*e.g.*, from sales to customers in the United States), which would fall within the rubric of *Hartford Fire Insurance Co.* and the terms of the FTAIA. They instead flow from sales transactions that occurred outside the United States, either entirely within one foreign country or between a seller in one foreign country and a purchaser in another. To apply the Sherman Act to those transactions would extend the Act one significant step further than this Court's Sherman Act decisions culminating in *Hartford Fire Insurance Co.* and anything required by the terms of the FTAIA. Such an application would regulate not merely the defendants' conduct (their conspiracy to fix prices and allocate markets) and the remedies for persons injured by that conduct in United States commerce (persons who bought vitamins from those defendants at supracompetitive prices in domestic sales transactions). It also would subject wholly foreign sales transactions having no significant effect on United States commerce to regulation under our antitrust laws, by affording a Sherman Act claim to injured purchasers of vitamins in foreign countries against the defendants who charged them supracompetitive prices in those foreign transactions. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

In *Foley Brothers* v. *Filardo*, 336 U.S. 281 (1949), this Court held that a federal law requiring employers to pay overtime for work in excess of an eight-hour day did not apply in a foreign country. Because the statute and associated cause of action were motivated by "concern with domestic labor conditions," the Court saw no reason to apply them to conditions in foreign countries. *Id.* at 286. The Court concluded that "[a]n intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." *Ibid.* Similarly, in *EEOC* v. *Arabian American Oil Co.*, the Court declined to apply Title VII to employment in a foreign country in the absence of "clearer evidence of congressional intent." 499 U.S. at 255. In both cases, the Court's conclusion was reinforced by its determination that to subject such transactions or relationships in foreign countries to United States law would risk friction with the foreign governments concerned. So too here, in the absence of a clearer expression of congressional intent, the Court should not interpret Section 6a(2) to afford a private claim under the Sherman Act to foreign purchasers in wholly foreign sales transactions, which "are the primary concern of a foreign country" when such sales have no significant effect on our commerce. *Foley Bros.*, 336 U.S. at 286; see, *e.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19, 21 (1963); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383 (1959).

2. *The FTAIA's Legislative History Does Not Reveal An Intent To Open United States Courts To Claims Seeking Redress For Foreign Injuries Sustained As A Result Of Foreign Conduct*

The court of appeals' majority acknowledged that portions of the FTAIA's legislative history could be read to support the government's interpretation of the Act, Pet. App. 24a, 29a, but concluded that, on the whole, the legislative history favors an expansive interpretation because nothing in the history affirmatively "denigrate[s] or exclude[s]" an expansive interpretation, *ibid.* The majority thus assumed that, in the absence of express legislative history to the contrary, Congress must have intended the more expansive interpretation—a dubious analytical approach to begin with for a statute that was prompted in significant part by a perceived need to clarify the *limitations* of the Sherman Act's reach over international transactions. House Report 2.

More fundamentally, however, the majority looked for an answer to the wrong question in its review of the legislative history. Because application of the Sherman Act to wholly foreign sales transactions having no substantial effect on United States commerce would be contrary to the most natural reading of the text of the FTAIA and to the background presumption against application of United States laws to transactions in foreign countries, the proper question is whether the legislative history contains a clearly expressed intent to extend the reach of the Sherman Act in that manner. There is no suggestion, much less a clear expression, of such an intent. See *Statoil*, 241 F.3d at 429 n.28 ("Nothing is said about protecting foreign purchasers in foreign markets.") (quoting *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

The only explicit mention of suits by foreign purchasers, and the deterrent effect such suits might have, is a discussion in the House Report of this Court's decision in *Pfizer*, *supra*. House Report 10. *Pfizer*, however, addressed neither the extraterritorial reach of the antitrust laws nor the extent to which a plaintiff's claim must have some connection to United States commerce. Rather, *Pfizer* held that a foreign government that purchased goods from United States companies is a "person" "entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." 434 U.S. at 320. Although the Court in *Pfizer* observed that "suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers," *id.* at 314, the Court's decision in *Pfizer* involved foreign purchasers injured by anticompetitive *domestic* conduct and effects. *Id.* at 318 (observing that foreign governments "enter[ed] our commercial markets as a purchaser of goods or services"). The Court nowhere intimated that the purposes of the antitrust laws would support the availability of a private treble damages action when foreign injury is sustained exclusively as a result of *foreign* conduct, and the House Report's discussion of *Pfizer* therefore carries no such intimation either.

The remainder of the legislative history, in fact, cuts strongly against such an interpretation. For example, the House Report states that the Act "preserves antitrust protections in the *domestic* marketplace for all purchasers, regardless of nationality or the situs of the business." House Report 10 (emphasis added).[4] Such purchasers, however, are markedly different from foreign purchasers who "bought [goods] exclusively outside the United States" and whose injuries arise exclusively from a conspiracy's foreign anticompetitive effects. Pet. App. 8a. Other passages in the House Report uniformly tie the application of United States anti-

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[4] There was no Senate Report on the bill, and the brief discussion in the conference report, H.R. Conf. Rep. No. 924, 97th Cong., 2d Sess. 29-30 (1982), sheds no light on the issue.

trust laws to foreign transactions to a domestic anticompetitive effect.[5]

Finally, the explanation in the legislative history for the language of Section 6a(2) as ultimately enacted strongly undermines the court of appeals' interpretation. The House Judiciary Committee amended the relevant bill, as proposed by the Subcommittee, to add Section 6a(2) with language that provided that "(2) such effect is the basis of the violation alleged." House Report, 16; H.R. 5235, 97th Cong., 2d Sess. § 2 (Aug. 2, 1982). Absent that subsection, the House Report explained, a plaintiff might have been able to bring suit in federal court "merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment." House Report 11. The Report explained that the language the Committee added would "require that the 'effect' providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws*." *Id.* at 11-12 (emphasis added). That passage unambiguously contemplates that the plaintiff's claim must be based on injury resulting from the

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[5] See, *e.g.*, House Report 5 ("Since Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-444 (2d Cir. 1945), it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies."); *ibid.* (quoting Antitrust Div., DOJ, *Antitrust Guide to International Operations* 6-7 (1977) ("[I]t would be a miscarriage of Congressional intent to apply the Sherman Act to 'foreign activities which have no direct or intended effect on United States consumers or export opportunities."); *id.* at 7 (bill would "reinforc[e] the fundamental commitment of the United States to a competitive domestic marketplace"); *id.* at 9-10 ("A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign transactions should, for purposes of this legislation, be treated in the same manner as export transactions-–that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on a domestic consumer or a domestic competitor.").

domestic effect of the defendant's conduct in violation of the Sherman Act.

As contemplated in the separate statement by Chairman Rodino (see House Report 18), Section 6a(2), as added by the Committee, was subsequently amended to require that "such effect gives rise to a claim." The Chairman stated that "[t]he substituted language accomplishes the same result as the Committee version" but was preferable "because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation." *Ibid.* Thus, Section 6a(2) as finally enacted was intended to accomplish the same result as the language the House Report described as requiring that the "effect" of the defendant's conduct on United States commerce "must also be the basis for the injury alleged"—*i.e.*, by the plaintiff—"under the antitrust laws." *Id.* at 2. The decision of the court of appeals cannot be reconciled with that expression of congressional intent.

3. *Important Policy Considerations Grounded In The Antitrust Laws Significantly Undermine The Court Of Appeals' Interpretation*

a. The court of appeals' interpretation of the FTAIA would substantially interfere with the primary enforcement of the antitrust laws by the United States Government. Price-fixing conspiracies, including those operating globally, are inherently difficult to detect and prosecute. Cooperation by one of the conspirators, through provision of documents or testimony, is often vital to law enforcement.

In light of those practical realities, the Antitrust Division of the Department of Justice maintains a robust amnesty program that offers strong incentives to conspirators who voluntarily disclose their criminal conduct and cooperate with prosecutors. Cf. Germany Am. Br. Pet. Stage 14-16 (discussing EU and German amnesty policies). Since 1993, the program has offered: (1) automatic (*i.e.*, not discretionary) amnesty to corporations that come forward prior to an investigation and meet the program's requirements; (2) the possibility of amnesty even if cooperation begins after an investigation is underway; and (3) if a corporation qualifies for automatic amnesty, all directors, officers, and employees who come forward and agree to cooperate also receive automatic amnesty. 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993). Critically, amnesty is available only to the first conspirator to break ranks with the cartel and come forward. The incentives, transparency, and certainty of treatment established by the program set up a "winner take all" dynamic that sows tension and mistrust among cartel members and encourages defection from the cartel.

The amnesty program has been extremely valuable to enforcement of the antitrust laws. The majority of the Antitrust Division's major international investigations, including the investigation of the vitamin cartel, have been advanced through cooperation of an amnesty applicant. The program has been responsible for cracking more international cartels than all of the Division's search warrants, secret audio or videotapes, and FBI interrogations *combined*. Since 1997, cooperation from amnesty applications has resulted in scores of criminal convictions and more than $1.5 billion in criminal fines.

The court of appeals' interpretation of Section 6a would undermine the effectiveness of the government's amnesty program. Even those conspirators who come forward and receive amnesty from *criminal* prosecution still face exposure to private treble damage actions under 15 U.S.C. 15(a). Potential amnesty applicants therefore weigh their civil liability exposure when deciding whether to avail themselves of the government's amnesty program. The court of appeals' interpretation would tilt the scale for conspirators against seeking amnesty by expanding the scope of their potential civil liability. Faced with joint and several liability for coconspirators' illegal acts all over the world, a conspirator could not readily quantify its potential liability. The prospect of civil liability to all global victims would provide a significant disincentive to seek amnesty from the government.

From a practical standpoint, moreover, the court of appeals' analysis of deterrence is unsound because its focus is on private lawsuits that often follow the exposure of a cartel by the government. Such lawsuits are possible, of course, only if the cartel is discovered in the first place. A private action "supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws." *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954).

In the government's judgment, the amnesty program, by creating a high risk of defection and exposure, deters cartel behavior more effectively than an increase in private litigation after the cartel has been exposed. It follows that deterrence is best maximized, and United States consumers are best protected, not by maximizing the potential number of private lawsuits, but by encouraging conspirators to seek amnesty and thus expose cartels in the first place.

b. The court of appeals' holding would also present a risk of undermining the foreign relations of the United States. Germany, a major trading partner of the United States, expressed the view in its amicus brief at the petition stage (at 9) that, "[b]y applying the United States' antitrust laws in cases where neither the plaintiff nor the alleged harm has direct effects on United States commerce, the court of appeals' decision fails to respect the fundamental right of foreign sovereigns to regulate their own markets and industries." We understand that other countries share that view. A scheme in which United States courts would adjudicate treble damages actions arising out of transactions that occur wholly in foreign countries and that have no meaningful connection to the United States would be likely to result in tension with our trading partners and attempts by foreign countries to enact statutory counter-reactions to any judgments entered in such suits. See *id.* at 11-14 (describing foreign "blocking" and "claw back" statutes and refusals to enforce certain United States judgments). It is for reasons such as these that the Court declined to apply United States law to transactions in foreign countries in *Arabian American Oil Co.* and *Foley Brothers*. See p. 15, *supra*.

Extension of the Sherman Act to foreign transactions having no substantial relation to the United States might also undermine the cooperative relationships that this Nation's antitrust agencies have forged with their foreign counterparts in recent years. In the cartel area, conspiratorial meetings frequently take place in more than one country, witnesses may be scattered around the world, and documentary evidence may be located in multiple jurisdictions. Effective prosecution of an international cartel requires the ability to gather evidence in different countries and, frequently, coordination of investigative strategies among multi-national enforcement agencies. Because the United States and many of its foreign counterparts now have similar views on the seriousness of cartel behavior (see *infra*, p. 24), and effective mechanisms for coordinating investigations, the United States has become more effective in attacking conspiracies that straddle borders. But those cooperative relationships depend on mutual good will and reciprocity. If our foreign counterparts fear that the fruits of their cooperation ultimately will be used to support follow-on treble damage actions in the United States that they perceive as inappropriate, cooperation may be strained, to the overall detriment of international cartel enforcement.

c. The court of appeals' decision also would be likely to burden the federal courts with a wave of antitrust cases raising potentially complex satellite disputes. For cases in which defendants contest whether the Sherman Act applies to foreign conduct covered by the FTAIA, plaintiffs must prove both that the challenged foreign conduct had the requisite effects on United States commerce and that those effects give rise to a claim. 15 U.S.C. 6a(1) and (2).

For plaintiffs whose injuries are sustained in United States commerce, proof of the FTAIA's prerequisites will overlap substantially with the merits of the plaintiff's claim. But for plaintiffs entitled to sue under the court of appeals' holding, *i.e.*, plaintiffs whose injuries are sustained entirely abroad and arise from purely foreign transactions, the statutory inquiry would turn on claims and persons not before the court. Courts faced with such suits nonetheless would be forced to adjudicate whether the challenged foreign conduct was part of some global conspiracy, whether that global conspiracy had the requisite effects on domestic commerce, and whether some third person was injured in United States commerce in such a way that gave rise to a claim. Pet. App. 4a, 20a. Those questions might be intensely factual, hotly disputed, and difficult to resolve, particularly when the critical person and claim are not before the court. The court of appeals' decision thus would thrust upon federal courts the potential for burdensome and protracted satellite litigation that is far removed from the claim before the court.

d. The court of appeals failed to take into account any of the foregoing considerations. It rather believed that "forc[ing] the conspirator to internalize the full costs of his anticompetitive conduct" would provide maximum deterrence to cartels that injure American consumers. Pet. App. 32a. The theoretical possibility of additional deterrence contemplated by the court, however, would come only at the expense of weakening the ability of the United States government to discover the wrongdoing in the first place. The court of appeals similarly overlooked that the primary deterrent to cartel activity is the threat of imprisonment and other criminal penalties (especially when heightened through the fear of exposure created by the amnesty program). Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., *Detecting and Deterring Cartel Activity Through an*

Effective Leniency Program (Brighton, England, Nov. 21-22, 2000) ("Based on our experience, there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials.") (available at <*http://www.usdoj.gov/atr/public/speeches/9928.htm*>). Criminal fines also can be substantial, as the penalties imposed on the participants in the vitamin cartel demonstrate. P. 2, *supra*.[6]

The court of appeals likewise failed to consider the large number of antitrust statutes around the world that deter and punish cartel activity. It is our understanding that approximately 100 countries now have comprehensive antitrust laws, and at least one-third of those, including most of the major industrialized countries, allow private lawsuits to recover damages for antitrust violations or provide for damages in conjunction with administrative proceedings.[7] Private civil suits have been filed against the vitamin cartel in Canada, the United Kingdom, Germany, Belgium, and the Netherlands, and class actions have been filed in Canada, Australia, and New Zealand. Pet. 5. At least three of the four home countries of respondents have antitrust laws that

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[6] Persons who violate the Sherman Act are subject to a maximum statutory term of imprisonment of three years, a statutory maximum corporate fine of $10 million, and a statutory maximum individual fine of $350,000. 15 U.S.C. 1. Fines may exceed those amounts however, as defendants may be fined up to twice the gross gain from the offense or twice the gross loss to victims of the offense if those amounts exceed the Sherman Act's maximum fine. 18 U.S.C. 3571. Defendants may also be ordered to pay restitution in the full amount of the victim's loss. 18 U.S.C. 3663, 3663A; U.S.S.G. § 8B1.1.

[7] *E.g.*, ABA Section of Antitrust Law, *Competition Laws Outside the United States* 1:13, 2:13-14, 3:16-17, 9:11, 10:10 (2001); Global Competition Review, *Cartel Regulation, Getting the Fine Down in 25 Jurisdictions Worldwide* (2002); Global Competition Review, *Private Antitrust Litigation in 16 Jurisdictions Worldwide* (2004); World Trade Organization, Working Group on the Interaction Between Trade and Competition Policy, *Overview of Members' National Competition Legislation, Note by the Secretariat*, WT/WGTCP/W/128/Rev. 2 (July 4, 2000), available at <*http://www.wto.org/english/tratop_e/comp_e/comp_e.htm*>

prohibit price-fixing and laws that authorize private civil actions by persons who suffer damages from antitrust violations.[8] These countries have enacted the remedies that their governments consider appropriate, and United States law should not promote forum shopping that undermines those sovereign judgments.

B. PLAINTIFFS WHOSE INJURIES ARE NOT TIED TO A CONSPIRACY'S ANTICOMPETITIVE EFFECT ON UNITED STATES COMMERCE LACK ANTITRUST STANDING

Even if the Court were to conclude, contrary to our submission in Point A, that the FTAIA does not limit the application of the Sherman Act itself in a manner that excludes claims arising from wholly foreign sales transactions with no significant effect on United States commerce, respondents' suit must fail because the Clayton Act does not in any event offer a cause of action in these circumstances.

1. Section 4 of the Clayton Act, 15 U.S.C. 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue for treble damages and attorney's fees. Despite that broad language, Section 4 never was intended

[8] Australia Trade Practices Act § 45A (agreement is unlawful if it has purpose or effect of "fixing, controlling or maintaining * * * the price for * * * goods or services") and Federal Court of Australia Act § 33C, *et seq.*; Panama Const. art. 290 and Law No. 29 of 1996 arts. 5, 11(1) (per se violations include any agreement that involves "to fix, manipulate, arrange or impose the sale or purchase price of goods or services or to exchange information with the same purpose or effect"), 142 (allowing suit by "any affected party"); Law of Ukraine On Restriction of Monopolism and Prevention of Unfair Competition in Business Activities (1992) and Law of Ukraine On Protecting the Economic Competition art. 55 (2001). The situation in Ecuador is less clear, but it does appear that damages caused by cartel behavior (which appears to be illegal in Ecuador, Crim. Code arts. 67, 363) may be available under Ecuador's general consumer protection and contract laws. Ecuador Organic Law for Consumer Protection arts. 2, 51, 70, 87; Civ. Code arts. 2211, 2241, 2256.

"to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Associated General Contractors*, 459 U.S. at 529; accord *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 877 (2004) (concurring opinion of Stevens, J). Thus, even if an antitrust plaintiff has suffered harm sufficient to satisfy the constitutional standing requirement of "injury in fact," the court must make a further determination whether the plaintiff has "antitrust standing," *i.e.*, "whether the plaintiff is a proper party to bring a private antitrust action." *Associated General Contractors*, 459 U.S. at 535 n.31.

This Court accordingly has established several limitations on antitrust standing based on substantive antitrust and policy considerations. For instance, in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), the Court held that States could not sue in their *parens patriae* capacity for damages to their general economy. Similarly, in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the Court held that the antitrust laws do not provide relief to indirect purchasers who paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), the Court held that a plaintiff must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." And in *Associated General Contractors*, 459 U.S. at 545, the Court found that a union lacked antitrust standing to sue a multi-employer association for alleged antitrust violations, after considering "the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy."

Those decisions establish that antitrust standing should be denied to a plaintiff whose suit would "divorce[] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Brunswick*, 429 U.S. at 487; accord *Associated General Contractors*, 459 U.S. at 538 (observing that the plaintiff should be seeking to redress injuries that are tied to the central purposes of the antitrust laws). In analogous circumstances, this Court has interpreted the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and other statutes to deny standing when the plaintiff's interests do not fall within the "zone of interests" protected by the statute. *E.g.*, *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998); *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997); see *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975) (applying zone of interests analysis to the antitrust laws).

2. Foreign purchasers in transactions having no substantial connection to United States commerce are not proper plaintiffs under Section 4 of the Clayton Act. As explained above, there is a background presumption that Congress did not intend to regulate such transactions in foreign countries under United States law, and nothing in the Clayton Act itself suggests a congressional intent to afford a treble damages remedy. The FTAIA did not amend the Clayton Act, and nothing in the text or history of the FTAIA's amendment of the Sherman Act suggests a congressional intent, much less a "clear statutory command" (*Brunswick*, 429 U.S. at 487), to displace the background presumption and create a treble damages remedy under the Clayton Act for a wide class of global plaintiffs whose injuries have no connection to United States commerce. To the contrary, the House Report makes clear (at 11) that the FTAIA was "not intend[ed] to alter existing concepts of antitrust injury or antitrust standing." And to conclude, as did the court of appeals, that such a class of plaintiffs may sue based on the rights of third

parties who were injured in the United States conflicts with basic principles of standing generally. See p., 12, supra.

The court of appeals reasoned that "[t]he foreign plaintiffs' paying of inflated prices in foreign commerce" was a loss that the antitrust laws were designed to prevent. Pet. App. 35a. The fact that respondents were direct purchasers victimized by a price-fixing conspiracy, however, does not mean that respondents suffered the kind of injury contemplated by Section 4 of the Clayton Act when their particular injuries did not arise from anticompetitive effects on United States commerce. Under the FTAIA, the conduct of petitioners at issue in this case was unlawful under the Sherman Act only because of its anticompetitive effect on domestic United States commerce. Respondents' injury, which is not based on any such an effect, does not "flow[] from that which makes the defendants' acts unlawful," *Brunswick Corp.*, 429 U.S. at 489, and therefore is outside the zone of interests protected by the antitrust laws.

"American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Rather, the central purpose of the antitrust laws is to protect consumers, competition, and commerce *in the United States*. "Congress' foremost concern in passing the antitrust laws was the protection of Americans." *Pfizer*, 434 U.S. at 314; see 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272h, at 358 (2d ed. 2000) ("[The FTAIA] makes clear that the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers."); *Turicentro, S.A.* v. *American Airlines Inc.*, 303 F.3d 293, 307 (3d Cir. 2002) ("Plaintiffs' injuries occurred exclusively in foreign markets. They are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act."). Accordingly, to award treble damages and attorney's fees to a class of foreign plaintiffs whose injuries arise exclusively from a conspiracy's foreign anticompetitive effects would "divorce antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Brunswick Corp.*, 429 U.S. at 487; *Matsushita*, 475 U.S. at 582-284 & nn. 6 & 7 (antitrust damages unavailable except where foreign conduct caused plaintiffs' injury in American market).[9]

The conclusion that the Clayton Act does not afford respondents a cause of action is reinforced by the fact that private suits such as this would undermine enforcement of the Sherman Act by the United States Government, which is primarily responsible for protecting American consumers and markets. All of the lower court decisions interpreting Section 6a(2), *i.e.*, this case, *Kruman* and *Statoil*, have involved private actions by foreign plaintiffs that followed directly on the heels of criminal or civil enforcement actions initiated by United States and foreign antitrust authorities. As explained previously, the United States' experience is that the most effective method of enforcement features an amnesty program that offers strong incentives to conspirators to break ranks with and expose their cartels by seeking amnesty from criminal prosecution. Greatly expanding the scope of private follow-on litigation would weaken the incentives to seek amnesty, and ultimately weaken the protection of United States consumers by making international cartels difficult to detect. See pp. 19-21, *supra*. Opening our courts to suits with no connection to United States commerce also would risk undermining the relationships with foreign governments that are important to the

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[9] The court of appeals viewed respondents as proper plaintiffs because respondents' claimed injuries, in the court's view, suffered none of the defects mentioned in *Associated General Contractors*, *supra*. Pet. App. 36a-37a. The factors mentioned in that decision, however, simply persuaded the Court that the plaintiffs in that particular case lacked standing. The Court did not intimate that those factors were exclusive, and explicitly stated that "[a] number of other factors may be controlling" in determining whether a plaintiff has antitrust standing. 459 U.S. at 538.

United States' enforcement efforts and would impose on federal courts potentially burdensome and complex antitrust suits brought by plaintiffs around the globe based on transactions that took place overseas. See pp. 21-23, *supra*; cf. *Associated General Contractors*, 459 U.S. at 545 ("massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits"). Those considerations, and the fact that such suits are far removed from the core policy of the antitrust laws to protect commerce in the United States, establish that respondents lack standing to invoke the treble damages remedy of Section 4 of the Clayton Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is recused in this case.
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EXHIBIT 26

Nos. 12-10492, 12-10493, 12-10500, 12-10514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

AU OPTRONICS CORPORATION, AU OPTRONICS CORPORATION AMERICA, HUI HSIUNG, and HSUAN BIN CHEN,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(JUDGE SUSAN ILLSTON)

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

The government agrees with appellants' jurisdictional statements.

STATEMENT OF ISSUES PRESENTED

I.

1. Whether the indictment adequately alleged a price-fixing conspiracy with the nexus to U.S. commerce required by the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. §§ 1, 6a.
2. Whether the evidence sufficiently proved the required nexus to U.S. commerce.
3. Whether the district court properly instructed the jury that the Sherman Act reaches conspiracies carried out, in part, in the United States, as well as conspiracies carried out entirely outside the United States with substantial and intended effects in the United States.
4. Whether the indictment adequately alleged a price-fixing conspiracy within the Sherman Act's reach.
5. Whether the district court correctly concluded that *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), neither required

the government to plead and prove specific intent to produce anticompetitive effects in the United States nor permitted justifications for price fixing under the rule of reason.

II.

6. Whether the district court properly instructed the jury that to establish venue the government must prove by a preponderance of the evidence that a co-conspirator acted in the district to further the conspiracy during the conspiracy period.
7. Whether the evidence sufficiently proved venue in the Northern District of California.
8. Whether the prosecutor fairly characterized the venue evidence during rebuttal closing argument.

III.

9. Whether the fine imposed on AU Optronics Corporation was within the maximum authorized by 18 U.S.C. § 3571(d).

STATEMENT OF THE CASE

On June 9, 2010, a federal grand jury sitting in the Northern District of California returned a single-count indictment charging AU Optronics Corporation (AUO), AU Optronics Corporation America

(AUOA), Hsuan Bin Chen, and Hui Hsiung (collectively, the defendants), as well as seven other individuals, with conspiring to fix prices for thin-film transistor, liquid crystal display (TFT-LCD) panels in the United States and elsewhere. ER1722-23 ¶¶ 1-2. The indictment also alleged, "for purposes of determining the alternative maximum fine" pursuant to 18 U.S.C. § 3571(d), that defendants AUO and AUOA and their co-conspirators "derived gross gains of at least $500,000,000." ER1734 ¶ 23.

Defendants twice sought dismissal of the indictment. On November 12, 2010, defendant Chen, joined by his co-defendants, moved to dismiss the indictment. ER1683-91. Relying on *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), Chen argued that price-fixing conspiracies involving foreign conduct must be evaluated under the rule of reason and, thus, the indictment must allege that defendants intended to produce anticompetitive effects. ER1688-91. On January 29, 2011, the district court denied the motion. SER2479-89. The court rejected defendants' interpretation of *Metro Industries* and found the indictment's allegations sufficient. SER2483-84.

On February 23, 2011, AUO and AUOA moved to dismiss the indictment for failure to allege defendants' conduct was intended to produce a substantial effect in the United States and for failure to allege the requisite nexus to U.S. commerce under the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a. ER1648-72. The district court denied the motion, finding the indictment need not plead substantial and intended effects in the United States because it alleged some domestic conduct and, in any event, the indictment did allege such an effect. SER2474. The court further found the FTAIA "does not require dismissal" because the indictment was based "at least in part on conduct involving 'import trade or import commerce'" and "the FTAIA's exclusionary rule is inapplicable to such import activity conducted by defendants." SER2476.

On March 13, 2012, after an eight-week trial, the jury convicted AUO, AUOA, Chen, and Hsiung. ER587-89.[1] The jury further found that the participants in the conspiracy derived gain from it and that the

[1] The jury acquitted two other individuals, Lai-Juh "L.J." Chen and Tsannrong "Hubert" Lee, and failed to reach a verdict as to a third individual, Shiu Lung "Steven" Leung. ER588. Leung was later retried and convicted. *See infra* p. 160. The other four indicted individuals were fugitives at the time of trial.

amount of gross gain to all participants was $500 million or more. ER589. On June 11, 2012, after extensive briefing and oral argument, the district court denied defendants' motions for acquittal or, in the alternative, for a new trial. ER1-8.

On September 20, 2012, the district court sentenced AUO to a fine of $500 million. ER216-20. The court also sentenced both AUO and AUOA to three years of probation during which the companies are required to develop, adopt, and implement an effective compliance and ethics program, to retain an independent monitor to oversee that program, and to pay a $400 special assessment. ER216-25. The court sentenced Chen and Hsiung each to serve 36 months imprisonment and to pay a $200,000 fine and a $100 special assessment. ER206-15. The defendants each timely filed a notice of appeal. ER201-05, 226-31.

Before sentencing, defendants Chen and Hsiung sought bail pending appeal. The district court denied their request, finding that none of the requirements for bail pending appeal had been met, and ordered Chen and Hsiung to report to prison on November 30, 2012. ER289.

On November 26, 2012, Chen and Hsiung renewed their requests for bail pending appeal in this Court. ECF No. 11, No. 12-10492 (9th Cir.

Nov. 26, 2012); ECF No. 12, No. 12-10493 (9th Cir. Nov. 26, 2012). Before ruling on the motions, this Court directed the district court to provide further explanation of its reasons for denying bail. In response, the district court explained that "defendants did not meet their burden to show that their appeals raise 'a substantial question of law or fact' for purposes of title 18 U.S.C. section 3143(b)." ER198. In particular, the district court found that "the applicability of *Metro Industries* does not present a 'substantial' question," that "[d]efendants have not shown that [the applicability of the Sherman Act to foreign conduct] is a 'substantial question,'" and that "defendants have not shown a 'substantial' question as to the sufficiency of the evidence" on the FTAIA's exceptions. ER199-200.

On January 22, 2013, this Court denied Chen and Hsiung's motions for bail pending appeal, finding that they "have not shown that these appeals raise a 'substantial question' of law or fact that is likely to result in reversal, an order for a new trial," or a reduced sentence. ECF No. 23, No. 12-10492 (9th Cir. Jan. 22, 2013). Chen and Hsiung are currently incarcerated.

STATEMENT OF THE FACTS

In 2001, the major manufacturers of TFT-LCD panels used in desktop computer monitors and notebook computers were two Korean companies, Samsung Electronics Corp. and LG Display Co., and four companies from Taiwan, Chunghwa Picture Tubes (CPT), Chi Mei Optoelectronics Corp. (CMO), HannStar Display Corp., and defendant AUO. Competition to sell TFT-LCD panels, particularly to major U.S. computer companies, was intense, and the panel manufacturers feared a price war that would drive down profits. SER2125-26, 2255-56. Their solution was to meet in secret to fix the prices of TFT-LCD panels contained in almost every computer monitor and notebook computer sold in the United States. During more than five years of successful price fixing, the conspirators substantially increased their margins and secured billions in ill-gotten gains from U.S. purchasers alone.

A. Commerce in TFT-LCD Panels

TFT-LCD is a display technology used in flat-panel computer monitors, notebook computers, and other devices. SER2427-28. The panels used in computer products come in standard sizes, ranging from 12 to 20 inches. SER2302-03. The panels are manufactured in Asia and sold to computer and other electronics companies around the world for integration into finished products. SER2429, 2432. During the conspiracy, the United States was the single largest country market for finished computer products incorporating TFT-LCD panels, accounting for approximately one third of all panels produced by the six conspiring manufacturers. ER1312-13; SER2129-30, 2409. AUO's major U.S. customers, including Dell Computers, Hewlett-Packard Company (HP), and Apple Computers, purchased as many as a million panels from AUO per month. ER1418.

During the conspiracy, the participants' TFT-LCD panels reached the United States in two ways. First, 2.6 million raw panels—sold for more than $638 million—were shipped from the conspiring manufacturers to customers in the United States. ER617; SER2075-76; *see also* ER1443. Second, $23.5 billion in panels were imported into the United States as part of finished products, such as notebook computers and computer monitors. SER2078-79. The conspiring manufacturers negotiated the sale of these panels directly with U.S. computer companies. SER2149-50, 2161-62. The panels were then shipped either to the U.S. computer company's own factory or to contract

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manufacturers, known as system integrators, abroad, where they were incorporated into finished products bound for the United States. SER2144-48, 2412-16.

B. The Conspirators Meet to Fix Panel Prices

On September 14, 2001, senior executives of the four panel makers from Taiwan, including the President of AUO, met in a hotel room in Taipei. ER795-99, 1432-33. At that meeting, the executives agreed to "stabilize the price" of panels, ER1435-36, to "ensure profitability" of the meeting participants. ER795; *see also* SER2296-97. Specifically, the participants "decided to first maintain prices in October . . ., and in November, to try to raise the prices." ER795-98.

AUO's representative at the meeting suggested that the participants invite the two Korean panel manufacturers to ensure their success. ER795-99; SER2117-18, 2298-99. When the conspirators met again a week later, representatives of the two Korean manufacturers, LG and Samsung, were in attendance. SER1982-86, 2118, 2288. At this second meeting, AUO reported that it planned to increase its prices for 14.1-inch notebook panels and 15-inch monitor panels in the next two months. SER1982-86, 2284. All the manufacturers agreed "to adjust the pricing together." SER2285; *see also* ER1344-45, 1436. The participants also set out the agenda for their next meeting in October, which included discussing the "results of implementation" of the agreed prices. SER1986.

The participants called these meetings Crystal Meetings after the product that was the subject of their conspiracy. And they continued to meet as a group on a monthly basis for four and a half years. ER1028-37; SER2048-52, 2100, 2121-22, 2245-46. The structure of the meetings was determined by the senior executives at the outset of the conspiracy. ER798; SER2100. Responsibility for hosting the meeting rotated among the participants. SER2101. At each meeting, the host would ask the attendees, usually company vice presidents or others with pricing authority, to share their target prices for the standard-sized panels and then record each company's target prices on a whiteboard. SER2259 ("[T]he figures that we were discussing were written on the whiteboards. One is one, two is two, everything is very clear. It's not possible to miscomprehend."); *see also* SER2097, 2103-06, 2402-03. The attendees discussed the prices until an agreement on the target price per panel size was reached. ER1424-25; SER2097, 2104-07, 2274-76, 2291-93, 2402-03, 2406.

One participant described the usual procedure to the jury: For example, HannStar "would say, 'We raise $3 for 15-inch; or for 14-inch notebooks.'" SER2106. Next, AUO would "say. 'We raise—we intend to raise $5 for 15-inch.'" *Id.* After each company had made their proposal, "the chairman would say, 'Okay. So there were four votes for $5 increase; two votes for $3 increase. The market seems to be not too bad. Then why don't we raise it—why don't we raise $5?'" SER2106-07. And "if people have no objections, then the consensus was reached." SER2107.

The senior executives divided their meetings into two levels: CEO or "Top Management" meetings and "Commercial" or "Operational" meetings. The CEO meetings, attended by CEOs and presidents of the participating companies, initially were held quarterly. SER2101, 2276. If any problems arose in the Commercial meetings, they were raised during the CEO-level meetings. SER2276-77.

AUO's President and Chief Operating Officer, defendant Hsuan Bin Chen, as well as its Executive Vice President, defendant Hui Hsiung (also known as Kuma), participated in CEO-level meetings where price agreements were reached. *See, e.g.*, ER1433-34; SER2092-94, 2232-36, 2262, 2268. Chen and Hsiung then passed the day-to-day operation of the conspiracy to subordinates, directing them to attend the Commercial meetings, take notes, and report on the matters discussed and the price agreements reached. ER994-96, 976. Those subordinates dutifully sent Crystal Meeting reports to Chen, Hsiung, and other AUO executives detailing the price agreements reached at each meeting. *See* ER1028-37.

The Crystal Meetings also provided an opportunity for the conspirators to monitor compliance with their price-fixing agreement. ER1340. The October 2001 Crystal Meeting minutes show that "[a]lthough each maker had faced customers' resistance against the price increase, since all the makers unanimously upwardly adjusted the price, and the market supply cannot meet demand, the price level for October reached the original target at around $205." SER1980. Buoyed by their success, the conspirators agreed to increase the price again in November. *Id.* When some conspirators fell short of the agreed-upon target price, they were criticized by the other manufacturers. *Id.* ("We have contacted these two makers informing them 'partially effective on Oct 15' is extremely inappropriate; improvement has been generally implemented."). *See also* ER767-68; SER2088-90, 2232-38. The participants also established a "Hot Line" procedure whereby they would contact individual competitors to verify they were adhering to the target price and to "avoid being tricked by customers into cutting price." ER785; *see also* SER2271.

Throughout the Crystal Meetings, the participants focused particular attention on their major U.S. customers. For example, at the November 2004 meeting, the participants discussed panel prices to Dell. SER1956-57. Samsung announced its intention to respond to "Dell's demand of $165 for 17" . . . with No for anything below $170" and "[h]ope[d] others to participate." SER1957; *see also, e.g.*, ER775 (LG "[w]ill announce April prices to major factories such as Dell/Compaq after making agreement with Samsung"); SER1966 ("Attending companies agree to hold their proposed prices [to HP] unchanged in May and June."); SER1986 (AUO and CPT agree to "simultaneously adjust the price upwards for Compal/HP to $160 in Oct.").

The participants focused on their major U.S. customers because the United States was the single largest country market for their products, and because the conspirators considered these major U.S. computer companies to be "index companies" that were representative of the market as a whole. SER2265. The conspirators reasoned that "if these index companies can accept [the] price increase, then that means the entire market could also accept the price increase." *Id.*

During negotiations with customers, including Dell and HP, participants would contact their co-conspirators to align their prices to those customers. SER2241-42, 2340-42. And Chen, Hsiung, and other AUO employees reached price agreements with competitors in one-on-one meetings and phone calls. In July 2004, Chen and Hsiung set up a call with LG's Executive Vice President to establish a "cooperation plan for preventing the recent sharp drop in price, apparently [t]riggered by Dell's unreasonable demand vis-a-vis AUO of late." SER1924; *see also* SER2185. In June 2005, representatives from LG met with defendants Chen and Hsiung to discuss price increases on notebook panels. SER1920-22; *see also* SER2168-77. Notes from the meeting show that "based on the [notebook] shortage, a sharp price increase is being planned" and "it was agreed to increase by $10 in July and August, respectively." SER1920, 2176-77.

C. Fearing Detection, the Conspirators Attempt to Conceal Their Conspiracy

From their first meeting, the conspirators recognized the need to keep their conspiracy a secret. ER795-99, 1343, 1349; SER2110. To that end, they varied the location of their meetings; each meeting was in a different hotel only revealed to the attendees shortly beforehand. ER1020-27, 1432; SER1978. The attendees also staggered their entrances and exits so as not to be seen together. ER1332-33; SER2111-14, 2280-81.

The conspirators feared being seen together because they understood their conduct exposed them to antitrust liability. At the December 7, 2001, meeting, the participants discussed "security in connection with violating the Fair Trade Act [Taiwan's competition law]." SER1929; *see also* SER2226-29. A week later, LG "[r]emind[ed] executives in attendance to take notice of anti-trust laws." ER778. And at the July 21, 2004, meeting, LG sales manager Stanley Park "[p]ointed out the fact that two years ago there were cases filed [in the United States] against DRAM companies for antitrust law violations for colluding" and suggested that "more care be given to security both within and without, and that written communication, which leaves traces, be refrained from as much as possible." SER2210; *see also* SER1961-63.

The meeting attendees were regularly reminded not to disclose the fact of the meetings to anyone. *See, e.g.*, ER798 ("[D]o not disclose this meeting to outsiders, not even to colleagues; keep a low profile."). Information from the December 10, 2003, Crystal Meeting was emailed out with instructions to "delete the mail right after you retrieve the file." SER1930. And Crystal Meeting reports circulated within AUO were designated as "extremely confidential" and for limited distribution. *See, e.g.*, ER982-87, 990-93, 997-1001, 1004-09.

In 2005, rumors began circulating that HP and Dell were aware of the Crystal Meetings, and the participants endeavored to scale down—but not to stop—their conspiratorial meetings. SER1951-55, 2197-202. The participants started meeting in tea houses and karaoke bars. SER1939-50, 2192-94, 2203-04. While the location changed, the purpose of the meetings did not. The attendees—now lower-level employees within the conspiring companies, to better guard against detection—discussed price targets for various TFT-LCD panels. SER1946-50, 2048-51, 2205-07. Despite their efforts to scale down the meetings, the participants still worried about getting caught. SER1939 ("Currently, this Meeting has cut down its size and is run mainly by hands-on workers. By the nature of the Meeting, we will maintain security regarding its existence as usual.").

D. AUO Sells Price-Fixed Panels to U.S. Customers

AUO established a wholly owned subsidiary in the United States—defendant AUOA—to sell to AUO's major U.S. customers. ER1415-16, 1418. AUOA's practice was to follow its customers and "pitch a tent next to them." ER1419. AUOA strategically located offices and employees in Houston, Texas, near HP/Compaq, in Austin, Texas, near Dell, and in Cupertino, California, near HP and Apple. ER1419-20; SER2381. AUOA Branch Manager Michael Wong testified that his place of employment was in the Bay Area, although he regularly traveled to AUOA's offices in Houston and Austin. SER2391, 2397, 2399. AUO's co-conspirators also located branch offices near the major U.S. computer companies. SER2367-69 (Samsung's U.S. operations were in the Bay Area, Houston, and Austin; LG's U.S. operations were in San Jose, Houston, and Austin; CMO's U.S. operations were in the South Bay Area and Houston).

AUOA account managers based in the United States negotiated the price and volume of panel sales to AUOA's major U.S. customers on a monthly basis through in-person meetings, phone calls, and emails. SER2375-83, 2419-20. In person negotiations were primarily conducted at the customers' headquarters. HP negotiated panel procurement in the United States out of its Cupertino office until May 2002, when HP merged with Compaq and moved its procurement function to Houston. ER1467. Negotiations with Dell took place mostly at Dell's campus in Austin, Texas. SER2375. Wong was responsible for the Dell account and testified that he visited the Dell campus a few times each month to negotiate panel sales. *Id.* Wong also exchanged emails and phone calls with Dell's procurement team more than once a week. *Id.*; *see also, e.g.*, SER2379-80, 2419-20 (negotiations with HP in-person and by phone); SER1908-10 (email negotiation with Apple). While these negotiations were primarily conducted by AUOA employees located in the United States, including some in the Bay Area, AUO executives Steven Leung and defendant Hsiung also traveled to the United States several times a year to meet with U.S. customers, including Dell, Apple, and HP. SER2385-88.

AUOA acted as a "tentacle" or an "extension of AUO" in the United States and took its direction regarding sales from AUO. ER1416. Defendant Hsiung also served as President of AUOA. SER1916. Reports of the agreements made by Hsiung and other AUO executives at Crystal Meetings and in one-on-one contacts were distributed to AUOA employees in the United States for use in their price negotiations with U.S. customers. ER953-60, 1004-09; SER2005-09, 2012-14, 2018-19, 2336-37, 2345, 2391.

For example, in a phone call in November 2004, LG Vice President C.S. Chung and defendant Hsiung agreed on prices to offer Dell. SER2010-11. Hsiung related the agreement by email to Wong, with instructions to delete the email after reading it. *Id.* Hours later, Wong emailed his contact at Dell, offering the very prices discussed between Hsiung and Chung. SER1911.

In addition to implementing the price agreements reached by their supervisors at AUO, AUOA employees met one-on-one with counterparts in the United States to coordinate prices to major U.S.

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customers. SER2370-72. And they were directed by AUO executives to "align with other TFT vendors to ensure we are not quoting too low or much too high." SER2001; *see also* SER2002 ("All proposed AUO May pricing are decided with consideration of competitors' May quotation targets"; "Aligned toward GENERAL CONSENSUS among competitors for 15"/17"/19" PRICING INCREASES in MAY.").

Michael Wong met or spoke with LG's account manager for Dell, Stephen Yoon, about once a month and reported those communications to his supervisors in Taiwan. ER805; SER2015-17, 2351-54. In June 2004, Wong reported on a meeting with Yoon through which he learned that Dell was asking for a price reduction, but that LG and Samsung "will not yield to Dell's demand." ER805; *see also* SER2355-57. In November 2004, Wong reported to his supervisors that he "[c]onfirmed with [LG] sales here in Austin that their offer [to Dell] in Nov. is $145/15", $160/17" and $260/19"TN." ER804. Four days later, Wong quoted Dell prices identical to those discussed with LG. SER1912. *See also* SER1913-15, 2015-16. Wong testified that aligning prices with AUO's competitors allowed him to charge customers higher prices. SER2306-11.

As branch manager, Wong also received from AUOA account managers weekly reports that regularly contained pricing information gathered from AUOA's competitors. SER2326-29. For example, Evan Huang, an account manager responsible for Apple who was located in Cupertino, California, sent a weekly report to Wong regarding pricing to Apple and related competitor pricing information he obtained from his contact at CMO. SER1996-98, 2322-23, 2381; *see also* SER1999-2000.

AUOA employees were also attuned to the need for secrecy. Defendant Hsiung and other AUO executives regularly reminded them to keep this information confidential and even to delete emails referencing pricing agreements after reading them. SER1989 ("Do not forward and do not share."); *see also* SER2010-14, 2018-19. In August 2006, AUO's Apple account manager, Huang, sent an email titled "Watchful" to Wong and sales representatives in the AUO notebook business unit. ER801; SER2322-23. In the email, Huang warns that "NYer is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" ER801. Wong testified that "NYer" was code for Apple. SER2323.

E. The Conspiracy Succeeds and Causes Massive U.S. Harm

CPT Vice President C.C. Liu told the jury he believed the Crystal Meetings were beneficial because "through our sincerity and collaboration we did see increase in prices." SER2091-92. The evidence showed that the price-fixing conspiracy was indeed very successful. *See, e.g.*, SER1971 ("Remark: 15" history of price increase: $10 up/Oct.; $15 up/Nov.; $5 up/Dec; $10 up/Jan; $5/Feb; $5/Mar; $5/Apr; $5/May. Total increase is $60.").

The conspirators fixed the prices of at least $71.8 billion in panels sold worldwide, at least $23.5 billion of which came into the United States either as raw panels or incorporated in finished products. ER617; SER2074-82. The government's economic expert, Dr. Keith Leffler, estimated that the average price per panel from 2001 to 2006 was $205 and that, during the group Crystal Meetings, the conspirators' per panel margin was $53 higher than it was after the group Crystal Meetings ended. SER2065-68, 2071. Dr. Leffler testified based on his margin analysis that overcharges on the conspirators' panels that came into the United States were "substantially above $500 million."

SER2060-61. Dr. Leffler concluded based on regression analysis that the overcharges were "certainly in excess of $2 billion." SER2055.

TFT-LCD panels are the single biggest cost component in a notebook computer or desktop monitor, comprising 30 to 40 percent of the cost of a notebook computer and 70 to 80 percent of a desktop monitor. SER2160, 2414-15. Therefore, the panel price increases made possible by the conspiracy directly impacted prices for those finished products. As Dell procurement manager Piyush Bhargava testified, there is "definitely correlation between what we do in the procurement function, and in the way we are able to then price the product in the market place." SER2165; *see also* SER2153-54, 2157; SER2423-24 (HP's Tierney testifying that when HP overpays for panels, it impacts the price of the finished product).

The conspirators themselves were well aware of the link between panel pricing and finished-product pricing. At a Crystal Meeting on February 6, 2002, defendant Hsiung proposed raising monitor panel prices slowly. ER762-64. As Hsiung explained, "[t]he greatest demand is in [monitors]. But, given the fact that the panel constitutes a relatively large portion of the [monitor] set cost, and since price-demand elasticity and market impact are great, we must be prudent when raising [monitor] panel price." SER2222; *see also* ER763. Demand for the finished products was an important consideration for the conspirators because, as LG's Stanley Park explained to the jury, "if the panel price goes up, then it will directly impact the monitor set price." SER2223; *see also* SER2219.

F. The Conspiracy Is Ended by an FBI Raid

Relying on information provided by an informant, the FBI executed a search warrant at AUOA's offices in Houston, Texas, in late 2006. Only then did AUO and AUOA cease participation in the TFT-LCD panel price-fixing conspiracy. At the time of the search, Michael Wong and AUOA's HP account manager Roger Hu were attending a meeting at HP's offices in Houston. SER2319. When they learned that the FBI was searching AUOA's offices, Wong instructed Hu to begin deleting contact information for, and communications with, the conspiring companies from his cell phone and laptop computer. ER1384. Wong soon realized that any efforts to destroy evidence would be futile because the FBI had probably already seized his work computer. SER2315-16.

SUMMARY OF ARGUMENT

In September 2001, AUO, led by its President and Executive Vice President, defendants Hsuan Bin Chen and Hui Hsiung, agreed with the five other major manufacturers of TFT-LCD panels to raise prices on panels sold around the world. Defendants portray their conduct as a benign exchange of information about wholly foreign sales with hardly any connection to the United States. But that portrayal is impossible to reconcile with the trial evidence. The government proved that the conspirators systematically fixed prices on TFT-LCD panels, set up operations in the United States to sell price-fixed panels, and, ultimately sold $23.4 billion worth of these panels to U.S. purchasers. Defendants harmed every family, school, business, and government agency in the United States that paid more for notebook computers and computer monitors incorporating the price-fixed panels. The conspirators understood that their conduct was criminal: they discussed their fears of prosecution under the U.S. antitrust laws during their conspiracy meetings and took great pains to conceal their conduct.

Having been caught and found guilty beyond a reasonable doubt, defendants hope to escape punishment by claiming that, because they held conspiracy meetings abroad, the Sherman Act has no application and the district court no venue. But the conspirators acted in the United States—indeed, in the Northern District of California—to further their unlawful conspiracy, and they reaped billions of dollars in ill-gotten gains at the expense of their U.S. customers. That conspiracy meetings were held abroad does not change the felonious nature of defendants' conspiracy or undo the enormous harm it caused in the United States.

1. The Foreign Trade Antitrust Improvements Act (FTAIA) provides defendants no valid defense here. That statute limits the Sherman Act's application when the anticompetitive conduct involves export or wholly foreign commerce, but it leaves the Sherman Act fully applicable when the conduct either involves or affects U.S. import commerce. 15 U.S.C. § 6a. Because the indictment adequately alleged a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, it need not have negated the exception laid out in the FTAIA. Regardless, the indictment alleged that defendants' price-fixing conspiracy involved

import commerce—the conspirators fixed prices on panels imported into the United States—and that the conspiracy directly affected import commerce in the finished products incorporating price-fixed panels. The jury was properly instructed on the FTAIA defense—with instructions the defendants did not, in substance, dispute—and returned guilty verdicts.

The properly instructed jury also rejected defendants' extraterritoriality defense. The district court instructed that the Sherman Act reaches even wholly foreign conduct that has a substantial and intended effect in the United States. Defendants waived any challenge to this instruction when they told the district court it was a "correct statement" of the law and "should be given." ER1216. Their belated attack is also meritless because it is well settled "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." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796-97 & n.24, 814 (1993). *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010), on which defendants rely, did not abrogate *Hartford Fire*, and defendants' attempt to limit *Hartford Fire* to the civil context is unavailing. In any event, this case does not involve the extraterritorial application of the Sherman Act because, unlike the wholly foreign conduct at issue in *Hartford Fire*, defendants' conspiracy occurred, in part, in the United States.

Defendants' reliance on *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), is also unavailing. There, the Court held that determining whether conduct occurring abroad violates the Sherman Act requires "an examination of the impact of the [conduct] on commerce in the United States." *Id.* at 845. This is nothing more than a restatement of *Hartford Fire*—indeed, *Metro Industries* cites *Hartford Fire* for the point. Defendants argue that, because their conspiracy involved some foreign conduct, *Metro Industries* imposes additional burdens on the prosecution and allows defendants to argue to the jury that their price-fixing agreement was reasonable. But they misread the opinion, and their claims of deficiencies in the indictment, instructions, and proof lack merit.

2. The properly instructed jury also found venue in the Northern District of California. Defendants waived any attack on the venue instruction when they proposed it jointly with the government,

stipulated to it, and relied on it in closing argument. Defendants' belated challenges to this instruction are also meritless. The claim that venue must be proved beyond a reasonable doubt is foreclosed by precedent in every circuit. Similarly, there is no support for defendants' claim that a venue-establishing act must occur within the statute of limitations.

Because the indictment alleged overt acts in the district within the statute of limitations period, defendants claim that the jury instructions and the government's venue evidence constructively amended or fatally varied from the indictment. But venue allegations cannot be the basis of a constructive amendment because venue need not be presented to the grand jury. *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963). And any variance from the indictment is not fatal here because it did not affect defendants' substantial rights, *id.* at 733, or mislead defendants in preparing their defense.

Defendants' claim of insufficient evidence supporting venue is also meritless. Acts in furtherance of a price-fixing conspiracy include not only acts reaching or coordinating the price agreement, but also acts advancing or effecting the sale of price-fixed products. *United States v.*

Trenton Potteries, Co., 273 U.S. 392, 403-04 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940). In this case, AUO and its co-conspirators set up operations in the district to market to, negotiate with, and sell to major U.S. computer companies located in the Bay Area. The jury saw more than forty emails to and from AUOA employees based in the Bay Area that contained competitor pricing communications and negotiations for the sale of price-fixed panels to AUO's customers. The jury easily could have concluded it was more likely than not that an overt act furthering the conspiracy occurred in the Northern District of California.

Defendants' claim that the prosecutor misstated the venue evidence during his rebuttal closing argument and thereby deprived them of due process is unsupported by the record. The prosecutor fairly characterized the record evidence and remained comfortably within his "considerable leeway" to argue "all reasonable inferences from the evidence." *United States v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002).

3. Lastly, AUO's $500 million fine does not exceed the maximum authorized by law. Under 18 U.S.C. § 3571(d), "[i]f any person derives

pecuniary gain from the offense, . . . the defendant may be fined not more than . . . twice the gross gain." Here, the government pleaded and the jury found beyond a reasonable doubt that the conspirators derived gross gains of at least $500 million from the offense—the charged price-fixing conspiracy—thereby authorizing a fine of up to $1 billion. AUO argues that the relevant gain for purposes of Section 3571(d) is the defendant's own gain, but this argument is foreclosed by the statute itself. Its use of "any person" makes clear that gain from the offense is not limited to defendant's own gain. And though resorting to legislative history is unnecessary here because the statute's language is clear, that history also contradicts AUO's argument.

AUO contends that, if Section 3571(d) authorizes a maximum fine of twice the gain to all conspirators, then the total fines imposed on all conspirators cannot exceed that maximum. AUO relies on torts treatises and forfeiture cases for this creative argument. But once again, the argument is foreclosed by the statute itself, which sets a maximum fine for "the defendant," singular, and not a collective maximum for all culpable participants who may be charged with the same offense.

ARGUMENT

I. Defendants Were Properly Convicted of Conspiring to Fix Prices in Violation of U.S. Law

Defendants were charged with and convicted of joining a price-fixing conspiracy that occurred in part in the United States, restrained U.S. commerce, and ultimately caused billions of dollars of harm to U.S. purchasers. On appeal, defendants do not contest that they and their co-conspirators fixed the price of TFT-LCD panels, AUO Br. 9, that they carried out this conspiracy in part in the United States, Hsiung/Chen Br. 60, or that billions of dollars in price-fixed panels were shipped to the United States either as raw panels or incorporated into finished products, AUO Br. 61 n.16, 62. Instead, they claim that, because their price-fixing meetings took place abroad, the entire conspiracy is beyond the Sherman Act's reach. In defendants' view, by merely off-shoring their conspiracy meetings, they have effectively neutralized the Sherman Act, rendering U.S. prosecutors powerless to protect U.S. commerce and purchasers from the billions of dollars of harm the conspirators caused. But the Sherman Act is not as feeble as defendants contend.

A. The Sherman Act Protects U.S. Commerce from Restraints of Trade

Section 1 of the Sherman Act outlaws agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. In passing the Sherman Act, Congress "wanted to go to the utmost extent of its constitutional power" in an effort to preserve competition in or affecting U.S. commerce. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974) (internal citation omitted). Thus, its prohibition on agreements restraining trade among the states reaches not only conduct in the flow of interstate commerce but also wholly local conduct that nevertheless substantially affects interstate commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *see, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-38 (1948) (finding unlawful restraint in local commerce in sugar beets had the requisite effect on interstate commerce in sugar).

Similarly, the Sherman Act's prohibition on agreements restraining trade with foreign nations goes to the full extent of Congress's constitutional power over foreign commerce. *See Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc.*, 404 F.2d 804, 815 (D.C. Cir. 1968). So broad was the Sherman Act's application to trade with foreign nations, that Congress became concerned that U.S. exports would suffer as courts applied the statute to anticompetitive conduct involving only export commerce or wholly foreign commerce with no adverse impact in the United States. Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234; *see also* H.R. Rep. No. 97-686, at 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494. Congress's solution was to refine the required nexus to U.S. commerce for some "trade or commerce . . . with foreign nations" by enacting the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).

The FTAIA added a new section to the Sherman Act:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

The FTAIA "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004).

While Congress sought to give some comfort to U.S. exporters and firms operating in wholly foreign commerce, it also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. For that reason, the FTAIA provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," and thus it leaves the Sherman Act fully applicable to conduct involving import commerce. 15 U.S.C. § 6a.[2] *See also Minn-Chem, Inc. v.*

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[2] Although this is commonly referred to as the FTAIA's "import commerce exception," the term is a misnomer. "Import trade and commerce are excluded at the outset from the coverage of the FTAIA in

Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012) (en banc) (The limitations in the FTAIA were "inspired largely by international comity," but "there was no need for this self-restraint with respect to imports."); H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494 (The import commerce language was included so there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law.").

Import commerce includes the sale of goods from outside the United States into the United States. Accordingly, a price-fixing conspiracy among foreign manufacturers "involv[es]" import commerce, 15 U.S.C. § 6a, if the conspirators fix the price of goods sold in or for delivery to the United States—i.e., goods in import commerce. *See Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 n.11 (3d Cir. 2011) (emphasizing the importance of defendants' "sales of magnesite for delivery in the United States" in determining whether the import commerce exclusion applies); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012) (finding a conspiracy to raise the price

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the same way that domestic interstate commerce is excluded." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc).

of copper tubing manufactured abroad and sold into the United States involved import commerce).

In addition, the FTAIA includes an exception for conduct involving only non-import foreign commerce—that is, U.S. export commerce or wholly foreign commerce, *Empagran*, 542 U.S. at 162-63—that nevertheless affects certain U.S. commerce. The FTAIA leaves the Sherman Act applicable to such conduct if it has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or the export trade of a U.S. exporter. 15 U.S.C. § 6a(1).

The FTAIA makes application of the Sherman Act turn on the type of commerce involved or affected, and not on the location of the conduct. Delineating the application of the Sherman Act in this way makes sense because antitrust violations, by their nature, may be committed in one country but cause harm in another. Indeed, potentially anticompetitive activity by U.S. exporters in the United States is precisely the sort of conduct Congress sought to exclude from the Sherman Act so long as it affects only non-import foreign commerce. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814 (9th Cir. 1988) (noting the FTAIA exempts from U.S. antitrust law certain conduct even though it originates in the United States). Conversely, the FTAIA leaves the Sherman Act fully applicable to conduct that involves or affects U.S. import commerce, even if the conduct takes place entirely outside the United States.

The location of the conduct is not necessarily irrelevant, however, where an "extraterritoriality defense" is raised. A conspiracy to violate the federal antitrust laws is "a partnership in crime; and an overt act of one partner may be the act of all." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) (internal quotation marks omitted). Thus, once a participant acts in the United States to further a conspiracy in restraint of U.S. commerce—that is, with the necessary nexus to U.S. commerce—the entire conspiracy is within the Sherman Act's reach, regardless of where else conspiratorial acts may have occurred.

In addition, the Sherman Act applies extraterritorially—that is, to wholly foreign conduct. Again, the Sherman Act's broad language was purposefully chosen to occupy the fullest extent of Congress's constitutional power over commerce. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328-29 & nn.7, 10 (1991). And Congress's exercise of "the full sweep of its commerce power is not without significance in determining whether the Sherman Act applies" to conduct that, while undertaken abroad, is a "restraint[] that operate[s], in the constitutional sense, against the 'foreign commerce' of the United States." *Pac. Seafarers*, 404 F.2d at 815.

Thus, by 1993, the Supreme Court considered it "well established" 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." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796-97 & n.24 (1993); *see id.* at 814 (Scalia, J., dissenting) ("We have . . . found the presumption [against extraterritoriality] overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.").[3] So even "wholly foreign conduct which has an intended and substantial effect in the United States" is within the Sherman Act's reach. *United States v. Nippon Paper Indus. Co.*, 109

[3] The Court in *Hartford Fire* declined to consider whether the FTAIA supplanted prior precedent on the extraterritorial application of the Sherman Act. *See infra* p. 64 n.11. Thus, this brief addresses both the FTAIA's requirements, *see infra* pp. 41-63, and the *Hartford Fire* holding, *see infra* pp. 63-93.

F.3d 1, 4 (1st Cir. 1997); *see also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 845 (9th Cir. 1996) (The "potential illegality [under the Sherman Act] of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States.").

Together, the FTAIA and *Hartford Fire*'s effects requirement impose sensible but discrete limits on the reach of the Sherman Act to foreign conduct and foreign commerce. These limits preclude application of the Sherman Act to wholly foreign conspiracies that neither involve nor affect U.S. commerce, while ensuring that U.S. commerce and U.S. purchasers remain fully protected from anticompetitive conduct wherever it occurs.

Defendants would turn this body of law on its head, using these limitations to shield themselves from punishment for conduct that both took place here and substantially harmed U.S. commerce and U.S. purchasers. But the jury was properly instructed on the requirements of the FTAIA and *Hartford Fire*, *see* ER1155-56, and it found beyond a reasonable doubt that the government's evidence was sufficient to convict. Notwithstanding the jury's verdict, defendants now argue (1) that the government failed to plead and prove the FTAIA's exceptions;

(2) that the Sherman Act does not apply at all to a conspiracy involving foreign conduct, even if it takes place in part in the United States and has effects in the United States; and (3) that, because the conspiracy involved some foreign conduct, defendants should have been allowed to argue to the jury that they were somehow justified in fixing prices to U.S. purchasers. Many of these arguments were waived by the defendants, and all are meritless.

B. The Government Pleaded and Proved the Required Nexus to U.S. Commerce

Defendants make two arguments related to the FTAIA. First, they contend that the indictment failed to plead that the Sherman Act applies to their price-fixing conspiracy in light of the FTAIA. This claim is based on a misunderstanding of both the requirements for pleading a Sherman Act violation and the implications of the FTAIA. Second, defendants contend that the trial evidence was insufficient to prove that one of the FTAIA's exceptions applied. This claim, too, is based on a misunderstanding of the FTAIA. The jury in this case was properly

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instructed on the FTAIA, and the evidence amply supports its guilty verdict.[4]

1. The Indictment Charged a Violation of Section 1 of the Sherman Act

The sufficiency of an indictment is reviewed de novo. *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009). An indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c)(1), and it is sufficient if it states "the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead

[4] This Court has treated the FTAIA as a limit on a court's subject-matter jurisdiction and thus as a question for the judge to decide. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 679-80 & n.5 (9th Cir. 2004); *McGlinchy*, 845 F.2d at 815. The district court below in a related civil case concluded, however, that the FTAIA implicates the merits, not subject-matter jurisdiction. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 957-59 (N.D. Cal. 2011) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006), and *Animal Sci.*, 654 F.3d at 468-69); *see also Minn-Chem*, 683 F.3d at 851-53. In recognition of that conclusion in the related case and out of an abundance of caution, the government agreed to submit the FTAIA question to the jury, which found beyond a reasonable doubt that its requirements were met. Therefore, this Court need not decide whether the FTAIA is a jurisdictional limit. *Cf. In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008) (declining to resolve whether FTAIA withdraws jurisdiction from the federal courts).

double jeopardy," *Awad*, 551 F.3d at 935 (internal quotation marks omitted).

An indictment "should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985); *see also United States v. Inryco, Inc.*, 642 F.2d 290, 294 (9th Cir. 1981). And while an indictment need not "conform exactly to the language of the applicable statute," *Hockenberry v. United States*, 422 F.2d 171, 173-74 (9th Cir. 1970), one that "tracks the words of the statute charging the offense" is sufficient so long as it sets forth the elements necessary to constitute the offense, *United States v. Davis*, 336 F.3d 920, 922 (9th Cir. 2003) (internal quotation marks omitted).

Defendants were charged with violating Section 1 of the Sherman Act, which outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," 15 U.S.C. § 1, and the indictment tracked the language of that statute. Specifically, it alleged defendants "entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the prices of thin-film transistor liquid crystal display panels

('TFT-LCD') in the United States and elsewhere," and that this conspiracy "was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)." ER1723 ¶ 2.[5]

Defendants contend that the indictment was insufficient because it did not "mention, much less cite, the FTAIA." AUO Br. 52. That the indictment includes no citation to 15 U.S.C. § 6a is of no significance. "[N]either an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction" absent proof the defendant was misled and thereby prejudiced. Fed. R. Crim. P. 7(c)(2). 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.

Moreover, defendants were not charged with violating the FTAIA. They were charged with violating Section 1 of the Sherman Act. An indictment "founded on a general provision defining the elements of an

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[5] The indictment provided numerous details, including specific information about the nature of the conspiratorial agreement, the TFT-LCD panel sizes at issue, the uses of those panels in notebook computers, desktop monitors, and televisions, and the approximate dates and location of conspiratorial meetings. ER1727-32 ¶¶ 17-18.

offense . . . need not negative the matter of an exception made by a proviso or other distinct clause." *McKelvey v. United States*, 260 U.S. 353, 357 (1922); *see also United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997) (applying this Court's "well-settled rule that a defendant bears the burden of proving he comes within an exception to an offense" in holding that exceptions do not create "additional elements of the offense"). This is true even if the government bears the ultimate burden of proving that the defendant's conduct falls within the reach of the statute. *See United States v. Bruce*, 394 F.3d 1215, 1222-23 (9th Cir. 2005) ("Government need not allege the non-Indian status of the defendant in an indictment" but "retains the ultimate burden of persuasion . . . that the exception [the defendant] claims is inapplicable.").

The FTAIA defines a narrow class of conduct—conduct involving only export or wholly foreign commerce without certain effects on U.S. commerce—to which the Sherman Act does not apply. 15 U.S.C. § 6a. Essentially, it provides U.S. exporters and firms operating in wholly foreign commerce a defense to liability under the Sherman Act. While defendants argued unsuccessfully at trial that this defense applied to their price-fixing conspiracy, the indictment need not have anticipated defendants' argument. *See United States v. Sisson*, 399 U.S. 267, 288 (1970) ("It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses.").

Moreover, by charging a violation of Section 1 of the Sherman Act, the government alleged that the conduct was within the reach of that statute. The government "need not allege its theory of the case or supporting evidence, but only the essential facts necessary to apprise a defendant of the crime charged." *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982) (internal quotation marks omitted). Thus, there is no merit to defendants' claim that the indictment was deficient because it failed to "specify which theory of the FTAIA" the government would rely on to defeat defendants' claim that the Sherman Act was inapplicable, AUO Br. 53.

2. The Indictment Pleaded Both the FTAIA's Import Commerce and Effects Exceptions

In any event, the indictment did plead the FTAIA's import commerce exception and its effects exception by alleging that defendants' price-fixing conspiracy both involved U.S. import commerce and had the requisite effect on U.S. import commerce.

a. The Indictment Alleged that Defendants Fixed the Price of TFT-LCD Panels Sold in U.S. Import Commerce

With respect to the FTAIA's import commerce exception, the indictment alleged that defendants fixed the price of TFT-LCD panels sold to customers in the United States. ER1723 ¶ 2, ER1724 ¶¶ 4-5, ER1730-31 ¶ 17(j)-(k). While defendants apparently read these allegations to refer only to panels sold abroad and incorporated into finished products sold into the United States, the allegations in the indictment are not so limited. 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. *See Animal Sci.*, 654 F.3d at 471 n.11. Thus, these allegations are sufficient to plead the FTAIA's import commerce exception.

Defendants fault the indictment for failing to allege defendants "were engaged in importing," AUO Br. 55, but their argument that the import commerce exception applies only when defendants themselves import the price-fixed product finds no support in the statutory language or the case law. The FTAIA leaves the Sherman Act applicable, not just to the conduct of importers, but to any conduct that involves import commerce. Thus, "[f]unctioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite." *Animal Sci.*, 654 F.3d at 470.

Minn-Chem, on which defendants rely, AUO Br. 54-55, holds that allegations that plaintiffs "purchased potash directly from members of the alleged cartel" were sufficient to meet the import commerce exception. *Minn-Chem*, 683 F.3d at 855. The decision says nothing, however, about whether defendants themselves imported potash or what other allegations might be sufficient to meet the exception. Moreover, the narrow interpretation of the import commerce exception urged by defendants would be contrary to the FTAIA's broad purpose to ensure that purchasers in the United States remain fully protected by the federal antitrust laws. *See* H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494; *Minn-Chem*, 683 F.3d at 854.

Similarly, the indictment is not deficient for failing to allege defendants' conduct was "'directed' or 'targeted' at United States imports," AUO Br. 56-57. The words "directed" and "targeted" do not appear in the Sherman Act, either in Section 1 or Section 6a, the proviso added by the FTAIA. Thus, those words cannot be said to constitute an element of the offense. And to the extent defendants contend that a price-fixing conspiracy must particularly or uniquely target U.S. import commerce in order to fall within the import commerce exception, they misstate the law.

Animal Science, on which defendants rely, AUO Br. 56-57, does not support their argument. The *Animal Science* court distinguished *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002), where the import commerce exception was not applicable, from *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), where it was. *Animal Sci.*, 654 F.3d at 470. In *Turicentro*, the defendant airlines were alleged to have "only set the rates that foreign-based travel agents could charge for their services." 303 F.3d at 303. Because no import commerce was covered by the agreement, the conduct in *Turicentro* did not involve import commerce. In contrast, in *Carpet Group*, the complaint alleged a conspiracy to prevent the plaintiff from importing oriental rugs. 227 F.3d at 72. Defendants' conduct allegedly restrained trade in rugs being sold into the United States and was, therefore, conduct involving import commerce.

The *Animal Science* court merely distinguished conduct that restrains import commerce from conduct that does not. It did not impose an additional requirement that the conduct uniquely or predominantly restrain import commerce. Moreover, under defendants' interpretation of the FTAIA, price fixers outside the United States could immunize themselves from U.S. prosecution merely by extending the scope of their price fixing well beyond the United States. Nothing in the FTAIA provides a textual basis for such a loophole, which would greatly undermine the purposes of the FTAIA. "Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets." *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 393 (2d Cir. 2002), *abrogated on other grounds by Empagran*, 542 U.S. 155.

b. The Indictment Alleged the Required Effect on U.S. Import Commerce in Finished Products

The indictment also alleged the facts necessary to plead the FTAIA's effects exception. There is, therefore, no merit to defendants' claim of constructive amendment. AUO Br. 57-59. "[A] constructive amendment is simply a variance that has resulted in the denial of a defendant's right to the popular judgment of a grand jury." *United States v. Jingles*, 702 F.3d 494, 502 (9th Cir. 2012). But where, as here, "an indictment provided adequate notice and protection against double jeopardy," any "variance did not deny the defendant his right to the popular scrutiny of the grand jury." *Id.*[6]

The FTAIA's effects exception leaves the Sherman Act applicable to conduct involving wholly foreign commerce that nevertheless has a direct, substantial, and reasonably foreseeable effect on import commerce. 15 U.S.C. § 6a. The indictment here alleged an agreement to fix the price of TFT-LCD panels sold to customers located in the United States. ER1730-31 ¶¶ 17(j)-(k). While some of those panels were sold for delivery in the United States—and thus in import commerce—most were sold to U.S. companies for delivery to the purchasers' foreign affiliates, incorporated into finished products, and imported into the United States.

[6] Defendants claim that, prior to trial, the government argued that the indictment pleaded the import commerce exception but that "no one then suggested that the government had pleaded the domestic effects exception." AUO Br. 57-58. 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. ER1639-42. As set forth in that response, the government's consistent position has been that the FTAIA is not an impediment to this prosecution because the indictment alleged that defendants' conduct had substantial "domestic effects." ER1641.

The indictment specifically alleged the "substantial terms" of defendants' conspiracy were "to agree to fix the prices of TFT-LCDs for use in notebook computers, desktop computer monitors, and televisions in the United States and elsewhere." ER1723 ¶ 3; *see also* ER1728 ¶ 17(e) ("[T]he participants in the Crystal Meetings reached price agreements on certain sized TFT-LCD used in computer notebooks and monitors."). And the indictment provided details about those finished products incorporating price-fixed panels. ER1723 ¶ 3, 1732 ¶ 18. There would have been no reason to include allegations about finished products other than to indicate that the conspiracy affected import commerce in those products.

Finally, the indictment alleged that defendants' conspiracy was "in unreasonable restraint of interstate and foreign trade and commerce," ER1723 ¶ 2, and that the co-conspirators "derived gross gains of at least $500,000,000" from the conspiracy, ER1734 ¶ 23. Thus, the indictment alleged that defendants conspired to fix the price of TFT-LCD panels, and one can reasonably infer from the allegations of substantial gains that the conspiracy successfully raised the prices of those panels. The indictment also alleged that those price-fixed panels were incorporated into many finished products imported into the United States. Read in its entirety and with common sense, *Givens*, 767 F.2d at 584, the indictment adequately alleged that defendants' panel price fixing had a direct, substantial, and reasonably foreseeable effect on import commerce in those finished products identified in the indictment.

3. Substantial Evidence Proved the Nexus to U.S. Commerce Required by the FTAIA

Relying on the FTAIA, the district court instructed the jury that, in order to convict, it must find the government proved beyond a reasonable doubt that members of the conspiracy engaged in one or both of the following activities:

> A, fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States, or
>
> B, fixing the price of TFT-LCD panels that were incorporated into finished products, such as notebook computers, desktop computer monitors, and televisions; and that this conduct had a direct substantial and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States.

ER1156.[7]

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[7] This instruction rendered unnecessary the conventional instruction on the required nexus to interstate or foreign commerce in criminal

Defendants did not challenge the propriety of these instructions in the district court,[8] and they do not do so on appeal. Rather, they argue that the evidence was insufficient to allow the jury to convict on either basis.

"Claims of insufficient evidence are reviewed de novo." *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004). "There is sufficient evidence to support a conviction if, 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

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prosecutions under the Sherman Act. Ordinarily, courts instruct jurors that, to convict, they must find the conspiracy either affected interstate or foreign commerce in goods and services or it occurred within the flow of interstate or foreign commerce in goods and services. *See* ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 47, 82-83 (2009); *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1230 n.2 (8th Cir. 1992). In that context, proof of "indirect," "fortuitous," or unintended actual effects, as well as any "potential" effects had the conspiracy been successful, is sufficient. *Summit Health*, 500 U.S. at 329-30. This conventional instruction was unnecessary in light of the FTAIA instruction above, and thus, without objection, the court gave only the FTAIA commerce instruction.

[8] The district court sustained defendants' only objection to the government's proposed instruction on the import commerce exception—that it failed to include the word "targeted." ER1159-60, 1217-18. Defendants' only objection to the instruction on the effects exception was that the theory was not alleged in the indictment and that the jury should not be instructed on it. ER1218.

reasonable doubt.'" *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Moreover, a general verdict should not be set aside "because one of the possible bases of conviction was . . . merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 56 (1991). Thus, the jury's verdict must be upheld if the evidence is sufficient as to either of the alleged theories. The government presented ample evidence on both.

a. The Evidence Proved the Conspiracy Involved U.S. Import Commerce in TFT-LCD Panels

In challenging the sufficiency of the evidence supporting the import commerce exception, defendants focus primarily on evidence related to panels both sold and incorporated into finished products abroad. AUO Br. 60-62. This argument misses the point. 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.

Defendants concede that the government presented evidence that 2.6 million of the conspirators' price-fixed raw panels—priced at more than $638 million—were shipped into the United States between

October 2001 and June 2006. AUO Br. 61 n.16 (citing ER617); *see also* SER2075-76. Nor do defendants contest HP procurement official Timothy Tierney's testimony that HP paid AUO for raw panels shipped to HP's facility in the United States. ER1443.

Instead, defendants claim that the volume of price-fixed imports at issue here is "small," at least as a proportion of the total volume of price-fixed panels, and that selling "panels directly to the U.S. . . . hardly makes AUO an importer." AUO Br. 61 n.16. As discussed above, *see supra* pp. 47-48, AUO need not be "an importer" to engage in anticompetitive conduct involving import commerce. It is sufficient that the conspirators sold price-fixed products for delivery to the United States, and the undisputed evidence shows that they did. Nor is there any basis for defendants' suggestion that the price-fixed imports must constitute a large portion of the total volume of price-fixed products.

To the extent that defendants suggest that only AUO's panel imports are relevant here, *see* AUO Br. 61 n.16, they are wrong. The FTAIA leaves the Sherman Act applicable to *conduct* involving import commerce. 15 U.S.C. § 6a. The term "conduct" refers to activity that might violate the Sherman Act, which in this case is a single conspiracy

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among AUO and the other panel makers to fix the price of panels. Thus, the conspiratorial agreement and any acts in furtherance of it by any conspirator are the "conduct" for purposes of the FTAIA. *See Socony-Vacuum*, 310 U.S. at 253-54. Whether the charged conspiracy involved import commerce, therefore, turns not on the acts of any particular defendant, but on whether the price-fixing agreement and the conspirators' acts in furtherance of it involved import commerce.

b. The Evidence Proved the Required Effect on U.S. Import Commerce in Finished Products

Defendants do not contest that the government proved the price-fixing conspiracy had a substantial and reasonably foreseeable effect on import commerce in finished products, but they argue that this effect cannot be "direct" under the FTAIA. AUO Br. 63. This argument ignores the record evidence and misreads the applicable case law.

The jury heard testimony that the price-fixing conspiracy enabled its participants to raise prices for their TFT-LCD panels sold to U.S. customers. SER1971, 2091-92, 2306-11. Indeed, the government's expert estimated that the average price per panel from 2001 to 2006 was $205 and that, during the group Crystal Meetings, the conspirators' average per-panel margin was $53 higher than after the group Crystal

Meetings ended. SER2065-68, 2071. The price-fixed panels are the single largest cost component of the finished products, accounting for 70 to 80 percent of the cost of finished monitors and 30 to 40 percent of the cost of finished notebook computers, SER2160, 2414-15, which were assembled abroad and imported into the United States, SER2414-16.

As Dell procurement official Piyush Bhargava testified, "there is definitely correlation between what we do in the procurement function, and in the way that we are able to then price the product in the marketplace, and offer the right deals to . . . our customers." SER2165; *see also* SER2423-24 (HP's Tierney testifying that when HP overpays for panels, it impacts the price of the finished product). The conspirators themselves understood well the impact of panel prices on sales of finished products. Indeed, defendant Hsiung suggested to his co-conspirators that they take into account demand for finished products when agreeing on how high to raise the price of panels. ER763; SER2222-23.

The jury could have readily concluded from this evidence that the conspirators' inflated panel prices resulted in inflated prices for finished products imported into the United States. As co-conspirator Stanley

Park of LG explained, that effect on import commerce in the finished products was direct. SER2223 ("[I]f the panel price goes up, then it will directly impact the monitor set price").

United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004), on which defendants rely, AUO Br. 63-64, provides them no support. The civil complaint in *LSL* alleged that an agreement between U.S. and foreign biotech firms reduced the likelihood of innovations that could result in the development of long-shelf-life tomato seeds suitable for North American farmers. 379 F.3d at 681. This Court found the alleged effect—which depended upon the development of seeds that did not yet exist—too speculative and too dependent on uncertain intervening developments to be characterized as "direct." *Id.* at 681 & n.7.[9]

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[9] In *LSL Biotechnologies*, the government argued, unsuccessfully, that a "direct" effect in the FTAIA context is one with a "proximate cause relationship." 379 F.3d at 692 (Aldisert, J., dissenting). In *Minn-Chem*, the government similarly proposed, and the Seventh Circuit agreed, that "direct" means a "reasonably proximate causal nexus." 683 F.3d at 856-57. Although the government believes that the Seventh Circuit's interpretation is correct, it is not necessary to revisit *LSL Biotechnologies* here, because defendants' conspiracy had a "direct" effect on import commerce in finished products under either interpretation.

The actual effect of defendants' conspiracy on import commerce in finished products is nothing like the hypothetical effect found not to be direct in *LSL*. Unlike the not-yet-developed tomato seeds at issue in *LSL*, TFT-LCD panels do exist, and defendants and their co-conspirators sold them to U.S. firms at inflated prices to be incorporated into finished products imported into the United States. The evidence showed that the inflated panel prices led "directly" to increased prices for the finished products. SER2223. There are no intervening developments—let alone uncertain ones—breaking the causal relationship between defendants' conduct and the effect on import commerce in finished products. The jury need not have speculated to appreciate how a conspiracy to fix the price of the single largest cost component of monitors and notebook computers affected import commerce in those finished products.

Defendants contend that the effect here "depended entirely on intervening actors—namely, the [original equipment manufacturers]" that integrated the price-fixed panels into finished products—and that there is no evidence the "higher prices were passed on, through the manufacturing chain, to consumers." AUO Br. 64. But panel prices were negotiated directly with the U.S. computer companies like Apple, HP, and Dell. ER1467; SER2140-41, 2375-83, 2419-20. And the evidence is clear that increased panel prices had a direct effect on the prices of their notebook computers and computer monitors. SER 2133, 2136-37, 2165, 2222-23, 2423-24.

Finally, defendants cite three district court decisions, none of which supports their argument. In *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001), defendants allegedly prevented plaintiffs from manufacturing and selling a tuberculosis drug, but the court found no evidence that plaintiffs intended to sell the drug in the United States, and therefore, "no effect on any United States commerce" as required by the FTAIA. *Id.* at 1007, 1009.[10] In contrast, here, the finished products were sold in the United States at higher prices because of defendants' conspiracy.

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[10] To the extent that the district court in *United Phosphorus* concluded that the FTAIA "explicitly bars antitrust actions alleging restraints in foreign markets for inputs (such as [the chemical] AB) that are used abroad to manufacture downstream products (like ethambutol) that may later be imported into the United States," 131 F. Supp. 2d at 1014, that court was wrong. The direct effects exception explicitly leaves the Sherman Act applicable to restraints in wholly foreign commerce that nevertheless affect U.S. import commerce. If that exception is read to exclude restraints of wholly foreign commerce in

The plaintiff in *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F. Supp. 2d 555 (D. Del. 2006) (*Intel I*), argued that defendants' monopoly in non-import foreign commerce had a direct effect on U.S. commerce because lost foreign sales by plaintiff's foreign subsidiary reduced plaintiff's profitability, which in turn affected its ability to discount to U.S. customers, reduced revenues to its shareholders, and reduced its competitiveness in the United States. *Id.* at 560-61. The court rejected the plaintiff's argument because the alleged effect was premised on "a multitude of speculative and changing factors affecting business and investment decisions." *Id.* at 561; *see also In re Intel Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452 (D. Del. 2007) (rejecting claim of direct effect based on "same allegations" as in *Intel I*).

Unlike the speculative chain of events at issue in *Intel I*, the effect of defendants' price-fixing conspiracy proceeded without deviation or interruption from the panel manufacturers that fixed panel prices to the inflated prices on monitors and notebook computers imported into the United States. As the district court below explained in a related

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one product that affect U.S. import commerce in a closely related product, then the exception is largely superfluous.

civil case, "[w]here, as here, the nature of the effect does not change in any substantial way before it reaches the United States consumer, the effect is an 'immediate consequence' of the defendant's anticompetitive behavior." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011). "[B]ecause the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for televisions, monitors, and notebook computers)," it is "direct" for purposes of the FTAIA. *Id.*

C. No "Extraterritoriality Defense" Bars the Convictions

Relying on *Hartford Fire*, the district court explained to the jury that the "Sherman Act applies to conspiracies that occur, at least in part, within the United States" and that it "also applies to conspiracies that occur entirely outside the United States, if they have a substantial and intended effect in the United States." ER1155. Thus, the district court instructed the jury that it must find beyond a reasonable doubt one or both of the following:

> A, that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States, or,

> B, that the conspiracy had a substantial and intended effect in the United States.

Id.

Defendants do not dispute that the evidence was sufficient to allow the jury to convict under these instructions. Instead, they argue that their convictions must be vacated because their price-fixing conspiracy involved foreign conduct and the Sherman Act does not apply extraterritorially. Defendants assert this belated extraterritoriality defense to challenge both the jury instructions and the indictment. But their argument is flawed in two fundamental respects. First, the Sherman Act does apply extraterritorially, "to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796-97 & n.24.[11] Indeed, the

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[11] The Supreme Court rested its "substantial and intended effects" requirement on cases that predate the FTAIA, and it expressly declined to consider whether the FTAIA "amends the existing law or merely codifies it" because "[a]ssuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements." 509 U.S. at 796 n.23. If the FTAIA supplanted prior precedent on the extraterritorial application of the Sherman Act, the jury's findings with regard to the FTAIA alone are sufficient to sustain the convictions. *See McGlinchy*, 845 F.2d at 813 n.8 ("In an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act, Congress enacted section 6a."). This Court need not decide that

district court so-instructed the jury at defendants' urging. ER1218. Second, this case does not require the extraterritorial application of the Sherman Act because defendants' conspiracy was conducted, in part, in the United States.

1. Defendants Waived Any Attack on the Instructions Regarding the Sherman Act's Extraterritorial Reach

While defendants objected to part A of this instruction, they all agreed that B "is a correct statement of the *Hartford Fire* requirements for establishing extraterritorial jurisdiction over foreign anticompetitive conduct, and should be given." ER1216; *see also* ER1241-46 (defense counsel repeatedly invoking *Hartford Fire*). When the defendants themselves "propose[] allegedly flawed jury instructions," and thereby "relinquish[] or abandon[] a known right," this Court denies review of the alleged error under the invited error doctrine. *United States v. Perez*, 116 F.3d 840, 844-45 (9th Cir. 1997) (en banc); *see also United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir. 1993).

There can be no doubt that the defendants "considered the controlling law" before urging the court to give what they now claim is a

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question, however, because the jury was also instructed on *Hartford Fire*'s requirements.

flawed instruction. *Perez*, 116 F.3d at 845. The applicability of the Sherman Act to foreign conduct and foreign commerce was the subject of numerous pre-trial motions, in which defendants repeatedly invoked *Hartford Fire*. *See, e.g.*, ER1624-36, 1648-72; SER2448-69. Because defendants requested the instruction they now claim is erroneous and thereby relinquished their right to challenge its legal foundation, the claimed error is waived and unreviewable. *United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997) ("When an attorney signs a jury instruction proposal, he certifies to the court, as an officer of that court, that the instructions are legally correct.")

Even if defendants' claim of error was not waived and unreviewable, the instruction can be reviewed only for plain error because defendants did not object to the instruction in the district court. *United States v. Moreland*, 622 F.3d 1147, 1165-66 (9th Cir. 2010). To satisfy the plain error standard, defendants must show that there has been an error that was plain, affected substantial rights, and seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *Id.* at 1166. For the reasons explained below, defendants cannot carry their burden with respect to the court's instructions.

2. The Jury Was Properly Instructed on the Sherman Act's Extraterritorial Reach

Part B of the jury instruction is, as defendants told the district court, a "correct statement" of the Sherman Act's extraterritorial reach. And defendants' new-found argument that *Hartford Fire* is wrong and that the Sherman Act does not apply to foreign conduct regardless of its impact on the United States is without merit. It is also directed at the wrong court, for "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Hartford Fire's holding is fully supported by the Sherman Act's language. Section 1 outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Congress formulated Section 1 in this way because it "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." *Gulf Oil*, 419 U.S. at 194 (quoting *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 558 (1944)); *cf.* U.S. Const. art. II, § 8 ("Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States."); *see* *also Summit Health*, 500 U.S. at 329 & n.10 ("It is firmly settled that when Congress passed the Sherman Act, it left no area of its constitutional power unoccupied." (internal quotation marks omitted)).

As a result, all nine justices concluded in *Hartford Fire* that the presumption against "extraterritoriality" does not bar the Sherman Act's application to conduct affecting the United States. 509 U.S. at 796-97 & n.24, 814; *cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 252 (1991) (*Aramco*) (explaining that the Lanham Act's "broad jurisdictional grant" and "sweeping reach into all commerce which may lawfully be regulated by Congress" supported applying the statute to foreign conduct that had "some effects within the United States" (internal quotation marks omitted)).

a. *Morrison* Does Not Overrule or Abrogate *Hartford Fire*

Notwithstanding the breadth of the Sherman Act's language and the binding Supreme Court precedent establishing its extraterritorial reach, defendants urge this Court to conclude that the Sherman Act does not apply to foreign conduct, regardless of its effects in the United States. They rely for this argument on *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010). In *Morrison*, the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 does not allow foreign plaintiffs to sue in connection with securities traded on foreign exchanges because that section does not apply extraterritorially. 130 S. Ct. at 2875, 2883. Defendants claim that *Morrison* articulates a more "muscular" presumption against the extraterritorial application of federal statutes and that the reach of the Sherman Act must be reconsidered in light of this new test. Hsiung/Chen Br. 39-40. But defendants misunderstand the reasoning of both *Morrison* and *Hartford Fire*.

As an initial matter, the application of *Morrison*, a civil case, to this criminal case is doubtful in light of *United States v. Bowman*, 260 U.S. 94 (1922). *Cf. Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring) (noting nothing in the Court's opinion forecloses government enforcement actions, which "differ from private . . . actions in numerous" ways and "pose a lesser threat to international comity"). In *Bowman*, the Supreme Court held that the presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction." *Id.* at 98. Instead, extraterritoriality may be "inferred from the nature of the offense" for criminal statutes when the effect of limiting "their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." *Id.*; *see also United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 n.3 (9th Cir. 1991) (observing that *Bowman* states an "exception to the presumption against extraterritoriality" for certain criminal statutes). The Sherman Act is such a criminal statute.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). As Section 1 makes clear, its protections extend not only to the nation's interstate trade, but also to its trade with foreign nations. 15 U.S.C. § 1. The nature of an antitrust crime does not depend upon the locality of the defendants' acts, but rather on their connection to and impact on U.S. commerce. And as this prosecution demonstrates, foreign companies can and do easily conspire outside our borders to restrain U.S. trade with foreign nations.

Whether or not the *Bowman* exception applies to the Sherman Act, the Supreme Court has long construed the Sherman Act to apply extraterritorially. *Hartford Fire*, 509 U.S. at 796-97. And *Morrison* did not overrule *Hartford Fire*. Indeed, *Morrison* did not even mention *Hartford Fire*, and there is no reason to believe that the *Morrison* Court intended to abrogate *Hartford Fire sub silentio*. The Supreme Court has cautioned against drawing such conclusions from its silence. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Contrary to defendants' claim, *Morrison* did not "radically recalibrate[]" the law on extraterritoriality, Hsiung/Chen Br. 44. Rather, it reiterated the presumption against applying federal civil statutes to foreign conduct absent a clear indication that Congress intended the statute to apply extraterritorially. 130 S. Ct. at 2877. The *Morrison* Court criticized the Second Circuit because it had ignored the previously articulated presumption—not because the Supreme Court

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had decided to alter the presumption. *See id.* at 2878 ("Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to 'discern' whether Congress would have wanted the statute to apply.").

As defendants acknowledge, that presumption has long been a part of Supreme Court jurisprudence. Hsiung/Chen Br. 38. It was, for example, rearticulated in *Aramco*. 499 U.S. at 248. In his *Aramco* concurrence, Justice Scalia agreed that the majority "accurately describe[d]" the presumption against extraterritoriality, *Aramco*, 499 U.S. at 260, and in his majority opinion in *Morrison*, Justice Scalia quotes *Aramco* for the presumption, *Morrison*, 130 S. Ct. at 2877. But *Aramco* was decided just two years before *Hartford Fire*, in which all nine justices agreed that the Sherman Act applies extraterritorially. Indeed, Justice Scalia, in his *Hartford Fire* dissent, recognized that the Court has "found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially." 509 U.S. at 814 (citing *Aramco*, 499 U.S. at 248). The *Hartford Fire* Court was undoubtedly aware of the presumption when it held the Sherman Act applies extraterritorially. Thus, *Morrison* provides no basis for ignoring *Hartford Fire*.

Nor does *Morrison* "abrogate[] *Hartford Fire*'s 'effects test,'" Hsiung/Chen Br. 45. *Morrison* holds that Section 10(b) of the Exchange Act has no extraterritorial application. 130 S. Ct. at 2881. Therefore, the effects test the Second Circuit developed to govern that section's application to foreign conduct was unnecessary. *Id.* But *Morrison* says nothing about the propriety of effects tests for statutes, like the Sherman Act, that do apply to foreign conduct. Extraterritorial jurisdiction based upon "detrimental effects within the United States" is not only consistent with international law, *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002), it is a principle "recognized in the criminal jurisprudence of all countries," *Ford v. United States*, 273 U.S. 593, 623 (1927), and "[i]ts logical soundness and necessity received early recognition in the common law," *id*. *See generally* Jordan J. Paust, *International Law as Law of the United States* 417-19 (2d ed. 2003) (detailing recognition by U.S. courts of "objective territorial jurisdiction" based on effects in the United States).

Moreover, in the FTAIA, Congress expressed its understanding that the Sherman Act reaches foreign conduct and reaffirmed its intent to do so. *See Empagran*, 542 U.S. at 166 (With the FTAIA, "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm" except "of course . . . where that conduct also causes domestic harm."). Because the Sherman Act goes "to the utmost extent of [Congress's] Constitutional power," *Se. Underwriters Ass'n*, 322 U.S. at 558, Congress was concerned the Sherman Act might be applied to anticompetitive conduct with no impact on the United States to the detriment of U.S. exporters. This undesirable result, the FTAIA's drafters explained, was exemplified by *Pacific Seafarers*, 404 F.2d 804, which applied the Sherman Act to an alleged conspiracy among U.S. shipping companies to destroy plaintiffs' business of carrying cement and fertilizer between Taiwan and South Vietnam. H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494. The FTAIA is premised on the view that such anticompetitive conduct "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." *Id.*

To remedy this problem, Congress enacted the FTAIA, which provides that, absent proof of certain effects, the Sherman Act does not apply to "conduct involving trade or commerce (other than import trade or commerce) with foreign nations." 15 U.S.C. § 6a. This phrase was deliberately chosen to include conduct involving "commerce that did not involve American exports but which was wholly foreign." *Empagran*, 542 U.S. at 162-63. Through the FTAIA, Congress sought "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as it applied to foreign commerce." *Id.* at 169. But if the Sherman Act had no extraterritorial reach, no such clarification or limitation would have been necessary. And the language of the FTAIA that Congress deliberately chose to cover wholly foreign commerce would be rendered largely "superfluous, void, or insignificant" in contravention of the "cardinal" principles of statutory interpretation. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Defendants claim *Morrison* "squarely held that a statutory provision similar to the FTAIA does not provide a clear statement of extraterritorial effect," Hsiung/Chen Br. 48, but that is not correct. The extraterritoriality-providing language at issue in *Morrison* was directed at only one part of the Exchange Act concerning the concealment of domestic violations (§ 30(b)) and not the whole act. 130 S. Ct. at 2882-83. In contrast, the FTAIA relates to the entire Sherman Act and declares its application to conduct, wherever it occurs and even if it involves wholly foreign commerce, so long as it has the requisite effect on U.S. commerce. 15 U.S.C. § 6a.

b. The Extraterritorial Reach of the Sherman Act Is Not More Limited in Criminal Cases

Alternatively, defendants argue that *Hartford Fire* should be read narrowly to address only the extraterritorial application of the Sherman Act in civil cases. Hsiung/Chen Br. 48. But defendants cite nothing in *Hartford Fire* itself that supports such a reading. And such a reading would override the principle of statutory construction that interpreting a criminal statute in a civil setting establishes its "authoritative meaning." *United States v. Thomson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion).

Section 1 of the Sherman Act is a criminal statute containing a single operative phrase outlawing conspiracies in restraint of trade or commerce among the states or with foreign nations. "Under settled principles of statutory construction, [courts] are bound to apply

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[*Hartford Fire*'s holding] by interpreting Section One the same way in a criminal case." *Nippon Paper*, 109 F.3d at 9. The Sherman Act's "words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort." *N. Secs. Co. v. United States*, 193 U.S. 197, 401-02 (1904) (Holmes, J., dissenting).

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978), on which defendants rely, Hsiung/Chen Br. 53-55, provides no support for the claim that the Sherman Act's extraterritorial reach should be different in civil and criminal cases. *Gypsum* holds that "criminal offenses defined by the Sherman Act should be construed as including intent as an element" based on the centuries-old Anglo-American legal tradition that criminal liability—unlike civil liability—must ordinarily be premised on malevolent intent. *Id.* at 436-37, 443. But there is "simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality." *Nippon Paper*, 109 F.3d at 7.

Lacking any sound basis in the Sherman Act itself to draw this criminal/civil distinction, defendants claim that "the presumption against extraterritoriality assumes even greater force with criminal laws." Hsiung/Chen Br. 49. But the authorities they cite merely articulate the general presumption against extraterritoriality and provide no support for this claimed "super-presumption." *See id.* (citing *United States v. Flores*, 289 U.S. 137, 155 (1933); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984)). To the contrary, as this Court recently made clear in *United States v. Chao Fan Xu*, the presumption against extraterritoriality articulated in *Morrison* must be applied statute by statute and should not vary from the civil to the criminal context. 706 F.3d 965, 974 (9th Cir. 2013) (applying cases addressing the extraterritorial reach of RICO in civil cases to a criminal RICO case).

Amicus Professor Guzman contends that *Bowman* supports a stronger presumption in criminal cases, Guzman Br. 9-10, but his reliance is puzzling. *Bowman* holds the presumption against extraterritoriality does not apply to criminal statutes that are "not logically dependent on their locality for the government's jurisdiction."

260 U.S. at 98; *see United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000). For other criminal statutes, *Bowman* does nothing more than reiterate the presumption against extraterritoriality established in civil cases such as *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). 260 U.S. at 98. The *Bowman* Court regarded *American Banana*, a Sherman Act case, as the appropriate analogy because the antitrust statute "is criminal as well as civil." *Id.* As the First Circuit explained, "[t]his seems to support the notion that the presumption is the same in both instances and leaves little room to argue that the *Bowman* Court was attempting to craft a special, more rigorous rule for criminal proceedings." *Nippon Paper*, 109 F.3d at 6 n.4.

Similarly, the Restatement (Third) of Foreign Relations Law does nothing more than state the ordinary presumption, which the Supreme Court found to be no bar to extraterritoriality in *Hartford Fire*. *Compare* 1 *Restatement (Third) of Foreign Relations Law* § 403 cmt. f, 247-48 (1987) ("[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."), *with Aramco*, 499 U.S. at 248 (explaining the presumption ordinarily is overcome by an "affirmative

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intention of the Congress clearly expressed" to apply a statute to foreign conduct). The Reporters' Notes to the Restatement also suggest that potential conflicts with foreign sovereigns might lead "enforcement agencies of the United States government" to exercise "criminal jurisdiction over activity with substantial foreign elements . . . more sparingly." *Restatement* § 403, Reporters' Note 8. This admonition to enforcement agencies, however, says nothing about the substantive reach of the antitrust laws, and, as discussed more fully below, the Department of Justice's decision to criminally prosecute this price-fixing conspiracy resolved such concerns. *See infra* pp. 117-18.

3. The Jury Was Properly Instructed that the Sherman Act Applies to Conspiracies Carried Out, in Part, in the United States

Defendants do not contest that participants in their price-fixing conspiracy acted in the United States to further that conspiracy. Hsiung/Chen Br. at 60 ("[D]efendants never contested that *some* overt acts occurred in the United States."). Nor could they. The trial record is replete with evidence of conspirators, including AUO and AUOA employees, acting in furtherance of the conspiracy in the United States. *See supra* pp. 17-21, *infra* pp. 132-40. Rather, they contend that, because some of the conspiratorial conduct occurred abroad, the entire conspiracy is beyond the reach of the Sherman Act. Thus, they argue that the district court erred in giving part A of the instruction, which allowed the jury to convict based upon "at least one action in furtherance of the conspiracy within the United States," ER1155. AUO Br. 67-70; Hsiung/Chen Br. 55-60.

Defendants contend that this instruction created a "one-touch" rule, but they overlook the instruction on the elements of the offense that required the jury also to find that the conspiracy had the requisite nexus to U.S. commerce under the FTAIA. *See supra* p. 53. Their fear that part A of the instruction could premise Sherman Act liability merely on "one phone call in furtherance of the conspiracy made from a U.S. airport on a layover between foreign destinations," Hsiung/Chen Br. 56; *see also* AUO Br. 68, is unfounded.

The Sherman Act reaches only conduct that involves or affects commerce within the United States, U.S. import commerce, or certain U.S. export commerce. *See* 15 U.S.C. § 6a. Thus, a conspiracy to fix the price of goods sold entirely in foreign commerce that has no effects on U.S. commerce is not outlawed by the Sherman Act, regardless of an overt act in a U.S. airport. *See Empagran*, 542 U.S. at 166. But, when a co-conspirator acts within the territory of the United States to further a conspiracy to fix the price of goods sold into the United States, no extraterritorial application of the statute is necessary to prosecute that conspiracy. *Cf. United States v. Moncini*, 882 F.2d 401, 403 (9th Cir. 1989) (finding analysis of the extraterritorial scope of the child pornography laws unnecessary where defendant mailed pornography from Italy to the United States because "part of the offense was committed in the United States as [defendant's] letters traveled through the mail").[12]

Moreover, part A of the court's instruction is fully supported by bedrock principles of conspiracy law, as well as *Hartford Fire*. A

[12] *Morrison* observed that an overt act in the United States did not justify application of Section 10(b) of the Exchange Act. 130 S. Ct. at 2883-84. The Court reasoned that, because the "focus of congressional concern" is preventing deceptive conduct in connection with the purchase and sale of securities in the United States, the Act did not apply to deceptive conduct related to foreign securities transactions, even if some of that conduct took place in the United States. *Id.* at 2884. Likewise, price-fixing with no nexus to U.S. commerce is not prohibited by the Sherman Act, even if an overt act in furtherance occurred here. But that portion of *Morrison* gives no help to these defendants, *see* Hsiung/Chen Br. 58, whose price-fixing conspiracy is plainly within the "focus of congressional concern" in protecting U.S. commerce from anticompetitive harm.

conspiracy to violate the antitrust laws is "a partnership in crime; and an overt act of one partner may be the act of all." *Socony-Vacuum*, 310 U.S. at 253-54 (internal quotation marks omitted). Like all criminal conspiracies, defendants' price-fixing conspiracy occurs where any overt act in furtherance of the conspiracy by any co-conspirator occurs. "Any conspiratorial act occurring outside the United States is within United States jurisdiction if an overt act in furtherance of the conspiracy occurs in this country."[13] *United States v. Endicott*, 803 F.2d 506, 514 (9th Cir. 1986); *United States v. Angotti*, 105 F.3d 539, 545 (9th Cir. 1997) ("[A] conspiracy charge is appropriate in any district where an overt act committed in the course of the conspiracy occurred."); *Woitte v. United States*, 19 F.2d 506, 508 (9th Cir. 1927) ("[T]he place of the conspiracy was immaterial, provided the overt acts were committed within the jurisdiction of the court."). And the United States' antitrust laws

[13] Defendants argue that this principle is merely "a stray sentence" in *Endicott* and that the decision "did not approve jurisdiction without intended effects in the United States." Hsiung/Chen Br. 59; *see also* AUO Br. 68 n.17. A better reading, however, is that this principle was listed as one of several distinct bases for jurisdiction. In any case, acts in the United States, coupled with the jury's finding that the defendants either targeted U.S. import commerce or directly, substantially, and reasonably foreseeably affected U.S. import commerce (or both), are certainly sufficient.

"certainly may control [foreign] citizens and corporations operating in our territory." *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 105-06 (1913) (rejecting the claim that a case involving some domestic conduct required extraterritorial application of the Sherman Act); *see also United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (finding an antitrust conspiracy involving "deliberate acts, here and elsewhere, [was] within the jurisdiction of our courts and may be punished for offenses against our laws").

For this reason, *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. *Hartford Fire* "dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Carpet Group*, 227 F.3d at 75 (rejecting defendants' reliance on *Hartford Fire* in a case involving some domestic conduct); *see also Nippon Paper*, 109 F.3d at 4 (The *Hartford Fire* Court allowed Sherman Act claims "to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil.").

To the extent that defendants contend that *Hartford Fire*'s extraterritoriality holding is based on antitrust claims involving some domestic conduct, Hsiung/Chen Br. 57, they misread the opinion. *Hartford Fire* involved multiple suits by states and private parties alleging several distinct conspiracies among foreign and domestic reinsurers and insurance brokers. 509 U.S. at 770. The Supreme Court granted two separate petitions for certiorari. The first petition concerned the domestic insurers' claims of immunity under the McCarran-Ferguson Act. *Id.* at 780. The second petition raised the issue of "whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct." *Id.* at 794-95. As that second petition explained, "[t]he claims from which it arises involve wholly foreign actors and conduct." Petition for Writ of Certiorari at 9, *Hartford Fire*, 509 U.S. 764 (No. 91-1128). The issue raised was the application of U.S. law to "the conduct of business subject to the regulatory authority of a foreign sovereign taking place in a foreign market, and undertaken by foreign actors." *Id.* at 19. Thus, the Supreme Court's opinion in that case addressed the application of the Sherman Act to wholly foreign conduct. *See Carpet Group*, 227 F.3d at 75; *Nippon Paper*, 109 F.3d at 4.

Although defendants claim that part A of this instruction was erroneous, they suggest no alternative. To the extent they contend that the government must prove a price-fixing conspiracy had substantial and intended effects in the United States in every case under the Sherman Act, regardless of the allegations and evidence of domestic conduct, there is no legal support for such a requirement. And to the extent they contend there is some threshold of overt acts in the United States below which the substantial and intended effects requirement applies, there is no sound basis in law or logic for requiring either some arbitrary number of overt acts or a preponderance of domestic conduct.

Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281 (4th Cir. 2002), on which defendants rely, Hsiung Br. 57-58, underscores how unworkable such a standard would be. According to the Fourth Circuit's analysis in *Dee-K*, whether a price-fixing conspiracy is foreign conduct must be determined, not based on the conduct's location, but through a "flexible and subtle inquiry" that considers "whether the participants, acts, targets, and effects involved" are "primarily foreign or primarily domestic." 299 F.3d at 294. Because "this area of antitrust law has historically been marked by change" and courts, commentators, and other nations have "differing views," the Fourth Circuit concluded that courts must "remain able to consider the full range of factors that may appropriately affect the exercise of our antitrust jurisdiction in any given case" *Id.* at 294-95. It is difficult to imagine how a judge could instruct a jury on this "flexible and subtle inquiry" or how a jury so-instructed could reach a unanimous verdict. Moreover, this inquiry ignores the basic principle that under the Constitution's Commerce Clause, exercised to its utmost in the Sherman Act, the federal government has the authority to prosecute conduct occurring within the United States territory that restrains U.S. trade or commerce with foreign nations.

4. Any Claimed Error in the Instruction Was Harmless

Even if part A of the extraterritoriality instruction were incorrect, any error was harmless. Where the instructions allow a jury to convict on two theories, one of which is invalid, the error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Anchrum*, 590

F.3d 795, 801 (9th Cir. 2009); *see also Hedgpeth v. Pulido*, 555 U.S. 57, 58-61 (2008) (holding instructional error is subject to harmless error review); *United States v. Green*, 592 F.3d 1057, 1071 (9th Cir. 2010). Because the evidence overwhelmingly supported a jury finding of substantial and intended effects in the United States—which the defendants conceded at trial was a proper basis for conviction—any claimed error in part A of the instruction was harmless.

Indeed, the defendants do not argue on appeal that the evidence was insufficient to allow the jury to find an effect in the United States. Nor could they, because the evidence was not merely sufficient—it was overwhelming. Approximately $23.5 billion worth of TFT-LCD panels produced by the conspirators came into the United States. SER2074-82. AUO and its co-conspiring panel manufacturers established subsidiaries in the United States to sell panels to large U.S. companies like Apple, Dell, and HP, which were among the conspirators' largest customers. *See supra* pp. 17-18. AUO and its co-conspirators discussed the U.S. market and these large customers at their price-fixing meetings, and employees of the conspiring firms met one-on-one to discuss pricing to major U.S. customers. *See supra* pp. 14-15, 19-21.

The government's expert, Dr. Keith Leffler, testified that the conspirators increased their margins on the price-fixed panels an average of $53 per panel during the group Crystal Meetings, SER2064-65, and that they reaped more than $500 million in gains on those TFT-LCD panels that came into the United States in finished monitors and notebook computers, SER2057, 2085. Indeed, Dr. Leffler's best estimate based on his regression analysis was that the overcharges were "certainly in excess of $2 billion." SER2055.

Defendants suggest that the district court's preliminary instructions improperly told the jurors "that the government need not prove that the conspiracy had detrimental effects on competition" and that "they were forbidden from considering the economic effects of the conspiracy 'when deciding the guilt or innocence of the individual defendants.'" Hsiung/Chen Br. 12 (citing and quoting ER1471-72.). But the cited instruction, which was requested by defendant Hsiung, SER2434-35, merely explained that gain from the offense was a separate and distinct question from whether the offense was committed. ER1471-72. At the close of the evidence, the jurors were instructed regarding the required effects on U.S. commerce, *see supra* pp. 53, 63-64, and told that they could consider economic evidence, including expert testimony, about the effect of the conspiracy on U.S. commerce against all defendants, SER2040.

The record evidence enabled the jury to find the defendants' price-fixing conspiracy had the requisite nexus to U.S. commerce under the FTAIA,[14] and to find that AUO and its co-conspirators derived at least $500 million in gains from the conspiracy from affected sales of TFT-LCD panels either sold in the United States or incorporated into finished products that were sold in the United States. ER587-89, 604-05. These jury findings, combined with the trial evidence, make clear beyond a reasonable doubt that a rational jury would have found that the conspiracy had a substantial and intended effect in the United

[14] Although the FTAIA instruction allowed the jury to convict defendants on two distinct bases, both are consistent with a substantial and intended effect in the United States. The first required the jury to find beyond a reasonable doubt that the conspirators "fix[ed] the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States." ER1156. The second required the jury to find beyond a reasonable doubt that the conspirators' conduct "had a direct substantial and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States." *Id.*

States. Thus, even if part A of the instruction were given in error, that error was harmless.

5. The Indictment Alleged Both Conduct and Effects in the United States

Finally, defendants claim that, even if the Sherman Act did apply to foreign conduct with a substantial and intended effect in the United States, the indictment failed to charge such an effect. AUO Br. 67. As an initial matter, the indictment did not have to allege a substantial and intended effect in the United States because it charged a conspiracy that took place in part in the United States. The indictment alleged that defendant AUOA has its principal place of business in Houston, Texas, ER1724 ¶ 5, and that AUOA employees "located in the United States had regular contact through in-person meetings and phone calls with employees of other TFT-LCD manufacturers in the United States to . . . agree on pricing, to certain TFT-LCD customers located in the United States," ER1730 ¶ 17(k). The indictment further alleged that AUOA employees negotiated sales of panels at fixed prices with "certain TFT-LCD customers located [in] the United States." ER1731 ¶ 17(k); *see also* ER1732 ¶ 21 (alleging that "the combination and conspiracy charged in this Indictment was carried out, in part, in the Northern District of California").

As explained above, the substantial and intended effects requirement applies only in cases of wholly foreign conduct. *See supra* pp. 80-85. Because the indictment here alleged that the conspiracy was carried out, in part, in the United States, it need not have charged that defendants' conspiracy had a substantial and intended effect in the United States. *See Sisson*, 399 U.S. at 288.

In any event, the indictment did allege such an effect. The indictment charged defendants with agreeing to fix prices of TFT-LCDs sold to customers located in the United States. ER1723 ¶¶ 2-3, ER1730-31 ¶¶ 17(j)-(k). And the indictment made clear that this was not an aborted or ineffective conspiracy. It specifically alleged that reports of the co-conspirators' meetings and price agreements "were used by certain employees of [AUOA] in their price negotiations with certain TFT-LCD customers located in the United States," ER1730-31 ¶ 17(k), and that the co-conspirators "derived gross gains of at least $500,000,000" from the conspiracy, ER1734 ¶ 23; *see also* ER1732 ¶ 20 (charging that activities alleged in the indictment "substantially affected, interstate and foreign trade and commerce").

These allegations pleaded a substantial effect in the United States and one can reasonably infer from the allegations that the effect was intended. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919) (An "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it."). A common-sense reading of the indictment's allegations provided defendants ample notice of the charges against them, including that the charged conspiracy had a substantial and intended effect in the United States.

D. *Metro Industries* Does Not Require Application of the Rule of Reason Here, Nor Would Applying It Have Mattered

Defendants rely on *Metro Industries*, 82 F.3d 839, to argue that, because their conspiracy involved some foreign conduct, the government was required to plead and prove specific intent and the defendants should have been allowed to argue to the jury that their agreement to fix the price of TFT-LCD panels was reasonable. AUO Br. 19-41; Hsiung/Chen Br. 20-37. But defendants misunderstand both the facts and reasoning of *Metro Industries*. Correctly interpreted, *Metro Industries* is not the radical departure from ordinary principles of antitrust law that defendants claim, but merely a restatement of the familiar requirements for extraterritorial application of the Sherman Act to wholly foreign conduct.

1. *Metro Industries* Holds that the Sherman Act Applies to Wholly Foreign Conduct with Effects in the United States

The Sherman Act does not prohibit all agreements in restraint of trade, but only those that are unreasonable. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Certain 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. *Id.* at 886; *see also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) ("In [*per se*] cases, we do not require evidence of any actual effects on competition because we consider the potential for harm to be so clear and so great."). Other restraints demand a fuller inquiry, dubbed 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." *Leegin*, 551 U.S. at 885.

In *Metro Industries*, this Court considered plaintiff's allegations that a Korean design registration system conferring limited exclusive rights to the defendants "constituted a market division that is a *per se* violation of section 1 of the Sherman Antitrust Act." 82 F.3d at 841. This Court held first that the challenged registration system was not "a classic horizontal market division agreement" normally subject to the *per se* rule. *Id.* at 844. But even if Metro could prove that the registration system constituted a market division, the Court found "application of the *per se* rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-45. A market division formed and carried out in the United States would be deemed *per se* unlawful even if it had no effect. But determining whether such conduct occurring abroad violates the Sherman Act requires "an examination of the impact of the [conduct] on commerce in the United States." *Id.* at 845.

This is 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." 509 U.S. at 796. In fact, *Metro Industries* supports its holding with citations to *Hartford Fire* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."). While the decision uses the term "rule of reason," it does not suggest that the contemplated analysis includes consideration of possible justifications for price fixing; there are none. *See Leegin*, 551 U.S. at 886 ("horizontal agreements among competitors to fix prices . . . have manifestly anticompetitive effects and lack any redeeming virtue" (internal quotation marks and citation omitted)). The Court merely required an inquiry into whether the conduct had "a sufficient negative impact on commerce in the United States." *Metro Indus.*, 82 F.3d at 843.

Defendants try to support their erroneous interpretation of *Metro Industries* by asserting that "the usual assumptions about anticompetitive effects get lost in translation when applied to foreign conduct," Hsiung/Chen Br. 23, and that "*per se* treatment is inappropriate for pricing agreements between foreign businesses in the context of a dynamic and rapidly changing market for a technological product," AUO Br. 33. But price-fixing conspiracies cannot become procompetitive just because they are hatched outside the United States by people not speaking English. And the fact that TFT-LCD panels are a "technological product" sold in a "dynamic market" has nothing to do with whether the conduct is foreign or domestic. There is no "technological product exception" to the *per se* rule.

To be sure, circumstances can be important in assessing the legality of conduct under the Sherman Act, and relevant circumstances can differ materially between the United States and other countries. This explains the 1977 policy statement issued by the Justice Department indicating that the rule of reason might apply more broadly to international transactions than to domestic transactions. U.S. Dep't of Justice, Antitrust Guide for International Operations 3 (1977) (cited by Hsiung/Chen Br. 26). But no circumstances justify price fixing, which is why that statement "emphasize[d]" that the Department's policy was "that the normal per se rules will be applied fully to basic horizontal restraints designed to affect U.S. market prices or conditions." *Id.*[15]

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[15] The superseding 1988 statement set out the Department's policy of criminally prosecuting price-fixing conspiracies formed and carried out entirely outside the United States if they substantially affect U.S. import commerce. U.S. Dep't of Justice, Antitrust Enforcement Guidelines for International Operations § 3.1, case 14 (1988). The

Defendants make much of *Metro Industries*' one reference to "price fixing." AUO Br. 27-28, 37; Hsiung/Chen Br. 25, 31. It occurs in a quotation from a treatise stating that "price fixing in a foreign country might have some but very little impact on United States commerce." *Metro Indus.*, 82 F.3d at 845 (quoting 1 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 237, at 269 (1978)). But neither the treatise nor *Metro Industries* suggests that price fixing abroad can be lawful when it does significantly affect United States commerce. And the current edition of the treatise advises that a court need not "hesitate very long before condemning restraints" affecting U.S. commerce and lacking "any plausible purpose other than the suppression of competition." 1B Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b, at 330 (3d ed. 2006).[16]

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treatment of price fixing outside the United States in the current guidelines addresses only whether the conduct is subject to the Sherman Act. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 3.12 (1995), *available at* www.justice.gov/atr/public/guidelines/internat.htm.

[16] If, as defendants contend, *Metro Industries* did radically alter the substantive analysis of price fixing in cases involving wholly foreign conduct, then it conflicts with Supreme Court precedent holding price fixing *per se* unlawful, *Socony-Vacuum*, 310 U.S. at 222-23, and treating allegations of wholly foreign conduct as raising questions of the

As with *Hartford Fire*, *Metro Industries*' requirement of actual effects in the United States does not apply here, where defendants' price-fixing conspiracy involved domestic conduct. *See supra* pp. 80-85. To the extent that defendants contend that *Metro Industries* also involved domestic conduct, AUO Br. 37-38; Hsiung/Chen Br. 29-30, they misread the opinion, just as they misread *Hartford Fire*.

Metro Industries, Inc. imported kitchenware made in Korea by Sammi Corp. and sued Sammi in 1983 when it was unable to obtain "stainless steel steamers from any of Sammi's competitors in Korea." *Metro Indus.*, 82 F.3d at 841-42. Initially, Metro raised several antitrust theories, including the predatory pricing allegations defendants highlight, AUO Br. 38; Hsiung/Chen Br. 28-29, which involved conduct in the United States by a Sammi subsidiary. But the predatory pricing allegations dropped out of the case in 1993, and Metro began advancing "a new theory—that the Korean design registration system under which Sammi had the exclusive rights to manufacture a

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Sherman Act's reach and not the substantive analysis of the conduct, *Hartford Fire*, 509 U.S. at 796-97. *See Dee-K*, 299 F.3d at 286 n.2.

particular steamer design constituted a market division that was illegal *per se* under § 1 of the Sherman Act," *Metro Indus.*, 82 F.3d at 842-43.

This new theory was the only theory at issue on appeal. *See id.* at 843 ("Metro appeals only the district court's grant of summary judgment in favor of Sammi on Metro's Sherman Act § 1 market division claim and the court's denial of Metro's cross-motion for summary judgment."). And it involved wholly foreign conduct. As the Court explained, Metro's new theory was "the same theory" that the Court had declined to consider in a parallel case because it had not been presented to the district court.[17] *Id.* at 843 n.2. That theory was that Sammi and other exporters had restrained trade by establishing the design registration system "in Korea." *Id.* at 842.

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[17] Metro adopted this new theory precisely because it was the only theory not considered, and thus not foreclosed, by this Court's decision in the parallel case, *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993). *Metro Indus.*, 82 F.3d at 843 & n.2. In *Vollrath*, this Court had affirmed judgment for the defendant notwithstanding the verdict but declined to consider a theory, not presented at trial, that Sammi had participated in a *per se* unlawful market division. *Vollrath*, 9 F.3d at 1462 n.4.

This case, unlike *Metro Industries*, does not involve wholly foreign conduct that had no impact on U.S. commerce. Accordingly, the decision has no application here.

2. Defendants' Claims that the Indictment, Instructions, and Proof Were Insufficient Under the Rule of Reason Are Meritless

Defendants' claims of error with regard to the *per se* rule are based either on their misreading of *Metro Industries* or a misunderstanding of the rule of reason and are, therefore, without merit.

a. *Metro Industries* Did Not Change the Law on Price Fixing

Defendants contend that the district court's application of the *per se* rule was an "unexpected departure from the bright-line rule in *Metro Industries*" and therefore "violates due process." Hsiung/Chen Br. 37. But application of the *per se* rule to this price-fixing conspiracy is a judicial interpretation of the Sherman Act that is neither "unforeseeable, nor an enlargement of the usual and ordinary meaning of the statute." *Poland v. Stewart*, 117 F.3d 1094, 1100 (9th Cir. 1997). The Supreme Court declared price fixing *per se* unlawful more than eighty years ago, *United States v. Trenton Potteries*, 273 U.S. 392, 396-99 (1927), and criminal prosecutions under the Sherman Act have been common for a century, *see Nash v. United States*, 229 U.S. 373, 376-78 (1913).

Contrary to defendants' argument, *Metro Industries* did not sweep aside decades of Supreme Court precedent and hold that foreign price-fixing conspiracies, when subject to the Sherman Act, are judged under special substantive rules. Indeed, defendants cannot cite a single case in which a court refused to apply the *per se* rule to price fixing because the conduct was foreign.[18] Because *Metro Industries* has never been relied upon to bar a price-fixing prosecution, it cannot have negated defendants' ample warning that their conduct was *per se* unlawful. *See Rogers v. Tennessee*, 532 U.S. 451, 466-67 (2001) (rejecting due process argument that rested on common law rule that had "never been relied upon as a ground of decision").[19]

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[18] To the contrary, district courts have consistently rejected the reading of *Metro Industries* advanced by defendants here. *See* ER189-91 (Jan. 29, 2011, ruling denying motion to dismiss indictment); *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1055 (N.D. Cal. 2006); Order Den. Mot. to Dismiss Indictment or, in the Alternative, for Ruling as a Matter of Law Re: Rule of Reason, *United States v. Eagle Eyes Traffic Indus. Co.*, No. 3:11-cr-00488 (N.D. Cal. Sept. 11, 2012).

[19] Not only was this criminal prosecution foreseeable under the law, the conspirators actually foresaw it during their conspiracy. A similar

b. Defendants Waived Any Attack on the Price-Fixing Instruction

Any error in failing to instruct the jury on the rule of reason is without merit and, in any event, was invited by defendants in proposing a price-fixing instruction with no mention of defenses, exceptions, or justifications for price fixing. Counsel for the government and all defendants jointly submitted to the district court a single document containing 24 stipulated jury instructions and additional disputed instructions. ER1184-1240. The court gave stipulated instruction number 15, which defined price fixing and instructed the jury that it is illegal.[20] ER596-97, 1203-04.

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prosecution in another industry was discussed at a Crystal Meeting. SER1961-63, 2210-12, 2249, 2252. And in an email to the employees in the AUO notebook division, AUOA's Evan Huang warned that Apple "is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" ER801; SER2323.

[20] At the defendants' request, the district court struck a sentence from stipulated instruction 15. *See* SER2043, and *compare* ER596 *with* ER1203. Based on *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992), the government also proposed to instruct the jury that price fixing is "conclusively presumed to be an unreasonable restraint on trade" and that "whether the agreement was reasonable or unreasonable" was not at issue. ER1215. The defense objected to this instruction, *id.*, and the court declined to give it. ER1250.

Because defense counsel proposed the "allegedly flawed jury instructions," and thereby "relinquished or abandoned a known right," any error was invited and is not subject to review by this Court. *Perez*, 116 F.3d at 844-45. Defendants, who sought dismissal of the indictment based on *Metro Industries*, were undoubtedly aware of any rights it potentially bestowed when they joined the government in proposing the price-fixing instruction. Any objection to the instruction was thereby waived. *Cain*, 130 F.3d at 383-84.

Defendants contend that they jointly proposed the stipulated price-fixing instruction, despite disagreeing with it, because the district court had rejected their earlier reading of *Metro Industries*. AUO Br. 40; Hsiung/Chen Br. 33-34. Defendants analogize their action to the failure to renew a motion made *in limine* when the issue the motion addressed arose at trial. Hsiung/Chen Br. 34 (citing *United States v. Varela-Rivera*, 279 F.3d 1174, 1177-78 (9th Cir. 2002)). But defendants did not just fail to renew an objection. They affirmatively sponsored an instruction contrary to a position they previously had taken.

Defendants cite no cases excusing defendants who invite error rather than merely remain silent.[21]

c. The Rule of Reason Has No Effect on the Pleading and Proof Requirements on Intent

Defendants claim that the government failed to plead the requisite intent or mens rea, AUO Br. 19; Hsiung/Chen Br. 10, and that the jury instructions did not require the jury to find the requisite intent, AUO Br. 19; Hsiung/Chen Br. 36. But the indictment alleged that defendants joined a conspiracy "to fix the prices of TFT-LCDs," which constituted an "unreasonable restraint" of trade. ER1723 ¶¶ 2, 3. And it further charged that AUO secretly met with co-conspirators many times and exchanged information with them "for the purpose of" fixing prices. ER1727-28 ¶ 17(e). The indictment plainly alleged both the object of the conspiracy and the intention to achieve it. The failure to use the word "intent" is of no consequence. *United States v. Metro.*

[21] Even if defendants did not intentionally abandon a known right, they still acquiesced in the instructions under which they were convicted. Consequently, any infirmity is reviewable only for plain error under Fed. R. Crim. Proc. 52(b). *Moreland*, 622 F.3d at 1165-66. Here, defendants have not demonstrated that there is an error at all, much less one that was plain, affected substantial rights, or seriously affected the integrity of the proceedings. *Id.* at 1166.

Enters., Inc., 728 F.2d 444, 453 (10th Cir. 1984); *see also Frohwerk*, 249 U.S. at 209.[22]

Defendants' claim that "the district court's instructions at trial also did not require the jury to find the requisite mens rea," AUO Br. 19, ignores entirely the court's instruction requiring the jury to find beyond a reasonable doubt that "the defendants knowingly—that is, voluntarily and intentionally—became members of the conspiracy charged in the Indictment, knowing of its goal, and intending to help accomplish it." ER1156; *see also* ER603.

Defendants' claim of error is largely based on the holding of *Gypsum*, 438 U.S. at 443, that "criminal offenses defined by the Sherman Act should be construed as including intent as an element." AUO Br. 20-21, 26. But defendants misunderstand the import of *Gypsum*, which unlike this case, involved the mere exchange of price information. 438 U.S. at 428, 435, 441.

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[22] Defendants also contend that the government was required to allege "every element of a rule of reason offense," AUO Br. 30, but they do not specifically identify any other omitted element. As explained above, *see supra* pp. 42-44, the indictment in this case tracks the language of the statute and states all the elements of a Section 1 offense, including that the conspiracy was in "unreasonable" restraint of trade. ER1723 ¶ 2.

In *Gypsum*, the Supreme Court concluded that criminal liability should not be imposed "for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken." *Id.* at 441. The Court contrasted the exchange of price information at issue in *Gypsum* with conduct, like price fixing, "with unquestionably anticompetitive effects." *Id.* at 440. "The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.'" *United States v. Soc'y of Indep. Gasoline Marketers*, 624 F.2d 461, 465 (4th Cir. 1980) (quoting *Trenton Potteries*, 273 U.S. at 397). The *Gypsum* intent requirement is always satisfied when the "defendants knowingly engaged in a conspiracy to fix prices." *United States v. Therm-All, Inc.*, 373 F.3d 625, 639 (5th Cir. 2004). That is so because "the intent to fix prices is equivalent to the intent to unreasonably restrain trade." *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. Unit B Sept. 1981), *cited with approval in United States v. Brown*, 936 F.2d 1042, 1046 n.2 (9th Cir. 1991).

d. The Rule of Reason Permits No Justifications for Price Fixing

Finally, defendants argue that *Metro Industries* requires the government to plead and prove defendants' price fixing "was *unreasonable* in light of all the surrounding circumstances," AUO Br. 31, or that their price fixing did not "produce[] sufficient procompetitive benefits to avoid liability," Hsiung/Chen Br. 36. But the indictment set out "the elements of the offense charged with sufficient clarity to apprise" defendants of the offense charged, *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000), including that the charged conspiracy was in "unreasonable restraint" of trade. ER1723 ¶ 2. The indictment was not deficient.

Nor were defendants denied the opportunity to introduce evidence on the nature of their conduct and the circumstances in which it was undertaken. The district court denied the government's motion to exclude five categories of evidence and argument relevant to reasonableness. ER146, 1557; AUO Br. 22. Defendants nevertheless say that the court "agreed with the government," AUO Br. 8; Hsiung/Chen Br. 12, because the court said defendants could not argue that "there's a price-fixing conspiracy, but it was a reasonable one," ER146. Defendants claim they were not "allowed to present a full defense," including "additional and powerful evidence that their conduct was reasonable" and "actually *benefitted* American consumers . . . by stabilizing an industry that would otherwise have collapsed in a time of rapid change." AUO Br. 32-33.

Defendants cite, in support of this argument, the district court's statement at sentencing that defendants were motivated to fix prices by their desire to assist their "fledgling industry." *Id.* at 34 (quoting ER248-49). But the district court also said "it was proved beyond peradventure at trial that this conspiracy existed and was affected and caused exactly the damages set out." ER245. And the court found defendants' proffered justifications for price fixing "don't make it not a crime," that "they don't excuse it," and that defendants "did know it was illegal." ER248-49. The district court's decision to take defendants' motivations into account when determining an appropriate punishment for their felonious conduct does not undermine their convictions for that conduct.

Moreover, defendants' argument lacks merit because the rule of reason does not countenance justifications for price fixing. This Court "reject[s] some justifications as a matter of antitrust policy, even though they might show that a particular restraint benefits consumers." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003). "If there is any argument the Sherman Act indisputably forecloses, it is that price fixing is necessary to save companies from losses they would suffer in a competitive market." *Id.* at 1152 n.24.

Freeman relied on the explication of the rule of reason in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In that case, the Society banned members from offering services through competitive bidding, and it contended that the ban was reasonable because it "ultimately inures to the public benefit" by preventing "deceptively low bids" and eliminating the "tempt[ation of] individual engineers to do inferior work with consequent risk to public safety and health." *Id.* at 693. The Supreme Court viewed this justification as "nothing less than a frontal assault on the basic policy of the Sherman Act" and rejected it on the basis that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 695-96.

The evidence defendants contend "could well have convinced a properly instructed jury of the defendants' innocence under the rule of reason standard," AUO Br. 32, is, in fact, not relevant under the rule of reason because a price-fixing conspiracy is never reasonable. "Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Prof. Eng'rs*, 435 U.S. at 688. Defendants point to evidence, for example, that they invested in new manufacturing facilities and increased their production during the conspiracy period. AUO Br. 32. But they do not claim that their price-fixing conspiracy was connected in any way to those investments, other than by making their operations more profitable because reduced competition allowed them to charge higher prices. Thus, this evidence provides no basis to acquit defendants even under the rule of reason.

And to the extent that defendants sought to rely on this evidence to argue that they did not enter a price-fixing agreement, they could (and did) make that argument under the *per se* instructions. That argument was not, however, persuasive to the jury, which found that defendants had entered an agreement to fix prices—a finding that defendants do not contest on appeal. *See* AUO Br. 9.

E. Principles of International Law and International Comity Provide Defendants No Support

Defendants, Hsiung/Chen Br. 49-50, and amicus Professor Guzman, Guzman Br. 11-12, argue that application of U.S. criminal law to the conduct in this case would run contrary to the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). But the application of the *Charming Betsy* principle to a case brought by the United States is doubtful. And, even if it were to apply, there is no conflict with the law of nations here.

"[T]he purpose of the *Charming Betsy* canon is to avoid the negative 'foreign policy implications' of violating the law of nations . . . ." *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010). As this Court has explained, the *Charming Betsy* Court interpreted the relevant statute "so as to avoid embroiling the nation in a foreign policy dispute unforeseen by either the President or Congress." *Corey*, 232 F.3d at

1179 n.9. Yet "when construing a statute with potential foreign policy implications" in a case brought by the Executive Branch, a court "must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *Id.* Thus, as this Court has observed, "the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party." *Id.*

Moreover, this case presents no conflict with international law. "The law of nations permits the exercise of criminal jurisdiction by a nation under five general principles," including the "territorial" principle. *Felix-Gutierrez*, 940 F.2d at 1205. The territorial principle includes "not only acts occurring within the United States, but acts occurring outside the United States' borders that have effects within the national territory." *Id.* at 1205-06. In this case, the government pleaded and proved both. *See supra* pp. 80, 87-93.

Nor does this case run contrary to international norms regarding the treatment of price fixing. The view of international norms painted by defendants and the amicus is decades out of date. Price-fixing conspiracies fall into the category of hard-core cartels. "A truly global effort against hard core cartels has emerged," partly due to the work of the International Competition Network (ICN), a consensus-based organization made up of over 100 national competition agencies, including both the Taiwan Fair Trade Commission and the U.S. Department of Justice. ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes* 5 (2005). In 2005, the ICN working group devoted to cartels observed:

> This worldwide consensus is based on the recognition that hard core cartels harm consumers and damage economies. . . . Secret cartel agreements are a direct assault on the principles of competition and are universally recognised as the most harmful of all types of anticompetitive conduct. Any debate as to whether cartel conduct should be prohibited has been resolved, as the prohibition against cartels is now an almost universal component of competition laws.

Id.

Other jurisdictions' responses to defendants' TFT-LCD conspiracy are good examples of the current international consensus regarding price fixing. Participants in this conspiracy have been sanctioned in China, the European Union, and Korea based on the conspiracy's effects in each of those jurisdictions, with total fines exceeding a billion dollars. These three jurisdictions all apply their competition laws extraterritorially to protect their consumers from price fixing anywhere in the world.[23] Thus, for example, the EU exercised jurisdiction over the TFT-LCD cartel because "the prices discussed at the cartel meetings were global in scope and, therefore, intended to also cover customers in the EU market—the fact that the collusive conduct took place entirely in Asia, among Asian suppliers only and with limited to no involvement of their local EU subsidiaries was irrelevant." Yves Botteman & Agapi Patsa, *The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits*, 8 Eur. Competition J. 365, 377-78 (2012).

These three jurisdictions are not exceptional. "The extraterritorial application of antitrust laws on the basis of the effects doctrine is by now widely accepted. . . . Nor do comity concerns seriously limit the extraterritorial reach where there are domestic effects . . . ." Florian Wagner-von Papp, *Competition Law and Extraterritoriality*, *in Research*

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[23] *See* Yves Botteman & Agapi Patsa, *The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits*, 8 Eur. Competition J. 365, 377-78 (2012); Joseph Seon Hur, *Extraterritorial Application of Korean Competition Law*, 6 Regent J. Int'l L. 171 (2008); Philip F. Monaghan, *Cartel Enforcement Comes of Age in China—The National Development and Reform Commission's* LCD Panels *Decision*, CPI Antitrust Chron., Feb. 2013 (2), https://www.competitionpolicyinternational.com/file/view/6887.

Handbook on International Competition Law 21, 57-58 (Ariel Ezrachi ed. 2012); *see also* Einer Elhauge & Damien Geradin, *Global Competition Law and Economics* 1187-88 & n.43 (2d ed. 2011) (citing Argentina, Brazil, Canada, Egypt, India, Korea, New Zealand, Singapore, South Africa, Taiwan, and Turkey as additional countries that "apply their antitrust laws to extraterritorial conduct").

While defendants argued below that principles of international comity barred this prosecution, they have abandoned that argument here. The amicus, Professor Guzman, however, has taken up the cause. Guzman Br. 13-16. He maintains that he is relying on the sort of comity "exercised by legislatures when laws are enacted." *Id.* at 13. But such notions of comity do not preclude extraterritorial application of U.S. antitrust law. To the contrary, the Supreme Court has observed that "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Empagran*, 542 U.S. at 165. Professor Guzman simply ignores the Supreme Court's most recent teaching.

Professor Guzman also focuses on factors, like Taiwan's response to this price-fixing conspiracy and the U.S. prosecution, that have little to do with statutory construction. Such facts are considered by some courts in private cases in determining whether comity concerns counsel them to decline jurisdiction out of deference to the interests of other nations. *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-16 (9th Cir. 1976). But no such consideration is warranted in a case brought by the Executive Branch that is charged both with enforcing the criminal laws of the United States and with managing the relations between the United States and foreign nations. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (declining to second-guess the government's decision to prosecute a scheme to defraud a foreign government of tax revenue "based on the foreign policy concerns," which courts have "neither aptitude, facilities nor responsibility to evaluate" (internal quotation marks omitted)). By bringing these charges, the Executive Branch has stated its determination that international comity concerns do not warrant forbearance. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for

International Operations § 3.2 (1995) (outlining comity factors the agencies consider before bringing an antitrust action).

In any event, international comity does not counsel against this prosecution. In *Hartford Fire*, for example, the Court focused on the degree of conflict with foreign law or policy as the primary consideration for international comity. 509 U.S. at 798. The Court held that "[n]o conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* at 799 (quoting 1 *Restatement (Third) Foreign Relations Law* § 403, cmt. e). Defendants could have easily complied with both U.S. and foreign law because, as defendants and the amicus acknowledge, Taiwan also prohibits price fixing. Hsiung/Chen Br. 52 n.9; Guzman Br. 17.

Professor Guzman suggests that, even though there is no conflict with foreign law, additional comity analysis is still appropriate. Guzman Br. 14. Although he is unclear as to the factors he considers relevant and how they apply here, Guzman suggests that Taiwan has treated defendants' price-fixing conspiracy differently and that the imposition of criminal sanctions in the United States intrudes on "Taiwan's ability to regulate its economy." *Id.* at 16. But the modern international consensus does not find it unduly intrusive for a country harmed by a price-fixing conspiracy to sanction foreign conspirators, as was done here. *See supra* pp. 113-16.

The economic reality is that a conspiracy in one jurisdiction to fix the price of products predominantly exported "transfers wealth away from the territory containing the buyers and toward the territory containing the sellers." Areeda & Hovenkamp, *supra*, ¶ 272j, at 325. Here, the United States and other countries containing large numbers of buyers are "more appropriate criminal prosecutor[s]" than the jurisdiction containing the conspiring sellers. *Id.* at 326. Thus, it is perhaps not surprising that Taiwan "investigated the events in question but concluded that no action was appropriate," Guzman Br. 18, while the United States, the EU, and China—where many of the price-fixed products were ultimately sold—have enforced their competition laws.

Notwithstanding Professor Guzman's assessment that Taiwan "feel[s] that such aggressive intrusion into its regulatory sphere is unjustified," Guzman Br. 14, to date, neither Taiwan, nor any other foreign government, has voiced a concern to the United States about this prosecution. Nor did any government object to the United States' earlier sanctioning of five companies based in Taiwan, Japan, and Korea, and ten foreign nationals for participation in the TFT-LCD conspiracy with sentences totaling more than $715 million in fines and 89 months imprisonment.

Given that there is no conflict with foreign law or policy, that the conspiracy operated in the United States, that it had a reasonably foreseeable, direct, and substantial effect on U.S. commerce, and that it victimized U.S. companies and consumers, this criminal prosecution was appropriate.

II. The Jury Was Properly Instructed and Found Venue in the Northern District of California

Defendants attack the jury's finding of venue in the Northern District of California, arguing that the jury instructions were erroneous or constructively amended the indictment, that the proof was insufficient, and that the government's rebuttal closing tainted the jury's finding and denied defendants due process. Hsiung/Chen Br. 61-87. These arguments are legally and factually meritless.

A. The Jury Was Properly Instructed on the Preponderance Standard and Time Period Applicable to Finding Venue

The district court instructed the jury that, "[b]efore you can find a defendant guilty of committing a crime charged in the Indictment, you must find by a preponderance of the evidence that between September 14th, 2001, and December 1st, 2006, the conspiratorial agreement, or some act in furtherance of the conspiracy, occurred in the Northern District of California," which includes fifteen specified counties. SER2032-33; *see also* ER598. The court further instructed that "[t]o prove something by a preponderance of the evidence is to prove it is more likely true than not true," which "is a lesser standard than beyond a reasonable doubt." ER1155; *see also* ER598-99. Defendants argue that the standard should have been beyond a reasonable doubt and that the time period should have been limited to the limitations period, which extends back only to June 2005. Hsiung/Chen Br. 72-73, 79-82. Both arguments were waived and, in any event, are wrong.

1. Defendants Waived Any Attack on the Venue Instruction

The invited error doctrine bars appellate review of defendants' argument. The doctrine applies when a defendant induces what he subsequently claims to be an error, having been aware at the time that

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he was relinquishing some advantage or right. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997). Invited errors are unreviewable on appeal. *Id.*

Contrary to the defendants' suggestion that they merely "did not object to the jury instruction," Hsiung/Chen Br. 79 n.14, they actually proposed it jointly with the government and stipulated to it. ER1207. One defense counsel also emphasized in his closing argument that preponderance is the relevant burden of proof, "not reasonable doubt," and that the relevant time period was the conspiracy period, "between September 14th, 2001, and December 1, 2006." SER2022. Thus, the defendants bear responsibility for introducing what they now claim is an error, for binding themselves to it by stipulation, and for repeating it and disclaiming their current argument in front of the jury. Under these circumstances, the invited error doctrine applies.

Even if defendants had not invited what they now consider to be an error, they did not raise a timely objection to the venue instruction, and therefore their argument is subject to plain error review, as they concede, Hsiung/Chen Br. 79 n.14. *See United States v. Moreland*, 622 F.3d 1147, 1165-66 (9th Cir. 2010). That is, relief is not warranted unless there has been an error that was plain, affected substantial rights, and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 1166. Defendants cannot show that there was an error, let alone a plain one. Moreover, nothing about the supposed error affects the fairness, integrity, or public reputation of the proceedings. There is no dispute that the defendants' knowing participation in the charged price-fixing conspiracy was proved beyond a reasonable doubt in a fair trial before an impartial jury.[24]

2. The Preponderance Standard Applies to Venue

As defendants rightly acknowledge, this Court's precedents contravene their contention that "venue must be proved beyond a reasonable doubt," Hsiung/Chen Br. 79, 81 (citing *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002); *United States v. Powell*, 498 F.2d 890,

[24] To the extent defendants argue their trial was unfair because venue is proper nowhere—and they do not suggest an alternative venue, nor did they move to transfer—they ignore the catch-all venue provision, 18 U.S.C. § 3238. Under Section 3238, offenses begun or committed outside the United States "shall be" tried in any district in which an offender "is arrested or is first brought," and if there is no such district, then the government may indict in the district of the "last known residence" of any of the offenders. AUOA is incorporated in California, SER1916-19, with its office in the Northern District of California, SER2399, making it a resident of that district. Thus, trial in that district did not seriously affect the fairness of the proceedings.

891 (9th Cir. 1974)). This Court has never wavered from the rule that the government need establish venue only by a preponderance of the evidence. *See, e.g.*, *United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012) (describing the rule as "well settled"); *United States v. Angotti*, 105 F.3d 539, 541 (9th Cir. 1997); *United States v. Prueitt*, 540 F.2d 995, 1006 (9th Cir. 1976).[25]

Defendants' contention that this Court has failed to adequately justify the rule, *see* Hsiung/Chen Br. 81-82, is not only irrelevant given the binding precedent, but also wrong. This Court has explained that the burden for proving venue is lower than "beyond a reasonable doubt" because venue "is not an essential fact constituting the offense charged." *Powell*, 498 F.2d at 891; *see also United States v. Svoboda*, 347 F.3d 471, 485 (2d Cir. 2003) (rejecting argument that *United States*

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[25] Post-*Apprendi*, every other regional circuit has also continued to apply this rule. *See United States v. Cameron*, 699 F.3d 621, 636 (1st Cir. 2012); *United States v. Coplan*, 703 F.3d 46, 77 (2d Cir. 2012); *United States v. Root*, 585 F.3d 145, 155 (3d Cir. 2009); *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012); *United States v. Strain*, 396 F.3d 689, 692 n.3 (5th Cir. 2005); *United States v. Kuehne*, 547 F.3d 667, 677 (6th Cir. 2008); *United States v. Knox*, 540 F.3d 708, 714-15 (7th Cir. 2008); *United States v. Rivera-Mendoza*, 682 F.3d 730, 733 (8th Cir. 2012); *United States v. Cope*, 676 F.3d 1219, 1224 (10th Cir. 2012); *United States v. Stickle*, 454 F.3d 1265, 1271-72 (11th Cir. 2006); *United States v. Brodie*, 524 F.3d 259, 273 (D.C. Cir. 2008).

v. Gaudin, 515 U.S. 506 (1995), requires proof of venue beyond a reasonable doubt because "venue is *not* an essential element of the crime charged").

The Court's explanation is entirely consistent with venue's constitutional significance. Indeed, this Court extensively described venue's constitutional provenance in *Angotti* while simultaneously specifying preponderance as the relevant burden. 105 F.3d at 541-42. It saw no tension in that position, and there is none.

3. Acts Establishing Venue Can Occur Anytime During the Conspiracy's Existence

Defendants assert that a venue-establishing act must occur within the statute of limitations and make two arguments based on that assertion. First, they argue, by implication, that the jury instruction that they jointly proposed was erroneous. Hsiung/Chen Br. 72-73. But the instruction is correct because there is no such requirement. *See United States v. Tannenbaum*, 934 F.2d 8, 13 (2d Cir. 1991) (holding that the government need not prove "that the overt act establishing proper venue also must have been committed within the statute of limitations"); *cf. Forman v. United States*, 264 F.2d 955, 956 (9th Cir. 1959) (applying prior requirement of venue within a division of a district and holding that overt acts in the division are sufficient to establish venue "notwithstanding only the later acts [outside the division] satisfy the requirements of the statute of limitations").

The contrary rule suggested by defendants finds no support in the case law or the statutory or constitutional venue provisions, which focus on where the offense occurs, not when it occurs.[26] And defendants' rule makes no sense: it would deny venue in a district where numerous acts in furtherance took place simply because the final act, and the only one within the limitations period, occurred elsewhere.

Defendants focus on the indictment's allegation that the conspiracy "was carried out, in part, in the Northern District of California, within the five years preceding the filing of this Indictment," ER1732 ¶ 21. Hsiung/Chen Br. 72. But they cannot rely on the indictment as legal authority establishing a new rule for venue when the stipulated jury instruction correctly stated the law on venue.

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[26] Defendants' only purported authority is a single sentence in a discussion of the statute of limitations from an out-of-circuit district court decision a half-century ago. Hsiung/Chen Br. 72-73 (citing *United States v. Luros*, 243 F. Supp. 160, 168 (N.D. Iowa 1965)). To the extent the sentence pertains to venue, it is mere dicta supported by no analysis.

Second, defendants argue that the jury instruction and the government's evidence on venue constructively amended or fatally varied from the indictment, but this argument lacks merit. A constructive amendment occurs when "'the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them.'" *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)). But "[v]enue is not an element of the charged crime," *United States v. Casch*, 448 F.3d 1115, 1117 (9th Cir. 2006), and it need not be pleaded in the indictment or presented to the grand jury, *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963). Allegations regarding venue in an indictment are not "charging terms" and, therefore, cannot be the basis of a constructive amendment.

A fatal variance occurs only when "'the evidence offered at trial proves facts materially different from those alleged in the indictment,'" and the variance affects the defendants' "'substantial rights.'" *Von Stoll*, 726 F.2d at 586-87 (quoting *United States v. Cusmano*, 659 F.2d 714, 718 (6th Cir. 1981); *see also United States v. Kaiser*, 660 F.2d 724, 730 (9th Cir. 1981)). A variance is not fatal if it would not mislead a defendant in preparing his defense (or raise double jeopardy concerns, not pertinent here). *United States v. Tsinhnahijinnie*, 112 F.3d 988, 991 (9th Cir. 1997).

Here, the alleged variance does not touch the defendants' "substantial rights," for "[d]efendants have the right to be tried in the proper forum, [but] not the right to be charged with the proper venue." *Carbo*, 314 F.2d at 733. Moreover, defendants could not have been misled in preparing their defense. One month before trial, the government proposed a jury instruction on venue explaining that the relevant time period for venue evidence was the conspiracy period ("between September 14, 2001 and December 1, 2006") rather than the limitations period, giving defendants ample notice of the time period relevant to venue. SER2440.[27] During the trial, the parties jointly proposed and stipulated to a set of jury instructions that included a venue instruction identical to the one the government had proposed before trial. ER1207. In closing argument, defense counsel emphasized

[27] Defendants' corresponding proposed instructions lacked a venue instruction altogether. ER1474-1548.

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the conspiracy period as the relevant time period, SER2022, raising no doubts about it at any point. These circumstances undermine defendants' contention that the government's venue argument somehow caught them by surprise at the end of the trial. Thus, if there was a variance from the indictment, it is hardly a fatal one.

In any event, there is no variance at all because the government offered proof of several overt acts that a rational jury could have found occurred in the district during the limitations period. As explained below, defendants' co-conspirators committed numerous acts in the district, including acts within the limitations period. AUOA employees Michael Wong and Evan Huang, who were based in the district, routinely emailed other AUO employees about their communications with competitors and transmitted collusive prices to AUO's customers, and several such emails were sent within the limitations period. *See, e.g.*, SER1996-98 (August 11, 2006, email from Huang to Wong regarding pricing); ER801 (August 25, 2006, email from Huang to AUO employees warning them to be "watchful" because Huang's customer account, Apple, suspected that AUO was engaged in illegal activities). Thus, even assuming defendants were correct that venue evidence must be gleaned from within the limitations period, the evidence was sufficient to prove venue.

B. The Evidence Sufficiently Proved Acts in Furtherance of the Conspiracy in the Northern District of California

In reviewing the sufficiency of the evidence supporting venue, this Court views the evidence in the light most favorable to the government and then asks whether any rational trier of fact could have found by a preponderance of the evidence that venue was proper.[28] *United States v. Cruz*, 554 F.3d 840, 844 (9th Cir. 2009). Direct proof is not required; circumstantial evidence alone can establish venue. *United States v. Childs*, 5 F.3d 1328, 1332 (9th Cir. 1993).

1. Acts Coordinating the Price Agreements or Advancing the Sale of Price-Fixed Goods Establish Venue

To satisfy the statutory and constitutional venue requirements, the government "must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18. For conspiracies, venue is proper in any district where an overt act in furtherance of the conspiracy occurred. *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988); *see also* 18 U.S.C. § 3237(a) (permitting prosecution "in any district in

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[28] Defendants propose a special, higher standard for this case, but their argument is misguided. *See infra* pp. 141-43.

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which such offense was begun, continued, or completed"). It is "not necessary that [the defendant] himself have entered or otherwise committed an overt act within the district." *Meyers*, 847 F.2d at 1411. In fact, venue may lie in districts "with which the defendant had no personal connection, and which may occasionally be distant from where the defendant originated the actions constituting the offense." *Angotti*, 105 F.3d at 543.

The objective of the conspiracy here, like all price-fixing conspiracies, was selling products at artificially inflated prices. Acts in furtherance of that objective include not only communications among the conspiring competitors, but also acts by any of the conspirators to advance or effect sales of the price-fixed panels. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 403-04 (1927) (holding that venue-establishing acts in furtherance of a price-fixing conspiracy include the "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 inflated prices).

In sum, the question on appeal is whether, viewing the evidence in the light most favorable to the government, a reasonable jury could have found that it was more likely than not that some overt act furthering the conspiracy, which could be a co-conspirator communication or an effort to effect sales, occurred in the Northern District of California. Ample evidence answers that question in the affirmative.

2. AUOA Employees Furthered the Conspiracy in the Northern District of California

In a seminal decision on venue for price fixing, the Supreme Court found venue was proper in the Southern District of New York because, "[a]lthough the [manufacturers] were widely scattered, an important market for their manufactured product was within the Southern district of New York, which was therefore a theater for the operation of their conspiracy." *Trenton Potteries*, 273 U.S. at 403. Likewise, the conspiring panel manufacturers, while based in Asia, made the Northern District of California a "theater for the operation of their conspiracy" because major U.S. customers were there. And in that theater, they established offices, marketed price-fixed panels, and communicated with their co-conspirators, all in furtherance of their conspiracy.

Like Samsung, LG, and CMO, AUOA maintained an office in the Northern District of California because of the presence of major customers. ER1417-19; SER2367-70. Michael Wong was employed by AUOA from 2001 to 2008 and was based in AUOA's office in the district, although he travelled to AUOA's offices in Texas, as well. SER2391, 2397, 2399. Wong had responsibility for AUOA's customer accounts with HP, Apple, and Dell. ER1410; SER2394. He conducted negotiations with these customers in person, by email, and by telephone. SER2375-76, 2379-80, 2419-20; *see also e.g.*, SER1908-10 (price negotiation via email between Wong and Apple).

Wong personally discussed panel pricing with AUO's competitors in the United States and shared with his colleagues in Taiwan pricing information gathered by other AUOA employees through communications with competitors. ER1402; SER2312, 2326, 2332-33, 2342, 2352-53, 2358. Wong and his contact at LG coordinated the panel prices they charged to Dell and, in doing so, obtained higher prices. SER2306-11. Subordinates sent Wong weekly reports containing information from pricing communications with competitors, including communications about Bay Area customer accounts. SER1996-98 (Evan Huang report regarding Apple, which includes competitor pricing information).

More than forty trial exhibits contain emails that Wong sent or received, reflecting both competitor pricing communications and the implementation of agreed-upon prices.[29] *E.g.*, ER804; SER1912-15, 2015-16. Thus, a rational jury could rightly conclude that it was more likely than not that Wong participated in and supervised both collusive conduct and marketing of panels from his Bay Area office, sometimes involving Bay Area customers like HP and Apple. Indeed, it would be irrational for the jury to presume that, each time Wong sent or received any of these emails or otherwise marketed TFT-LCD panels, all of which furthered the conspiracy, he first exited the district.

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[29] Defendants suggest that the government cannot rely on emails involving Wong and Huang or their price negotiations because such a theory of venue was "not presented to the jury." Hsiung/Chen Br. 65-66. The claim is puzzling because the government's argument is based entirely on testimony and evidence presented to the jury at trial and on the stipulated jury instruction on venue. The government, having highlighted some evidence establishing venue during closing argument, is not somehow estopped on appeal from pointing to additional evidence that the jury was free to consider in reaching its verdict.

The numerous emails sent or received by Wong reflecting price communications with competitors and implementing agreed-upon prices also refute defendants' claim that "[n]o reasonable jury could have found that Wong was a co-conspirator," Hsiung/Chen Br. 70. When the district court ruled that many of Wong's emails were admissible under the co-conspirator hearsay exception, it explicitly observed that AUOA employees participated in the conspiracy, ER1422-23, and after hearing the trial testimony, the court did not waver from that conclusion when admitting the emails into evidence. To the extent that Wong claimed he was not engaged in price fixing, the jury was of course free to disregard such self-serving denials. *See United States v. Heredia*, 483 F.3d 913, 923 n.14 (9th Cir. 2007) ("We have long held that juries are not bound to believe or disbelieve all of a witness's testimony."). It would be unremarkable for the jury to have concluded, just as the district court did, that Wong participated in the conspiracy.

Similarly, the activities of AUOA's Evan Huang independently support the jury's venue finding. Huang was assigned to sell to Apple, one of AUO's major customers. ER1418; SER2381. While he was responsible for the Apple account, Huang was located in Cupertino, California. SER2322-23, 2381. And while stationed in Cupertino, he engaged in collusive conduct regarding the Apple account. His boss, Wong, testified that Huang had a contact at CMO who provided competitor pricing information regarding Apple. SER2327-28.[30] Huang submitted his report on Apple pricing with a cover email that included a local South Bay telephone number (area code 408) in the signature block. SER1996-98. He also emailed information about Apple pricing negotiations to AUO employees with the subject line "Pls call me….at" a South Bay phone number. SER1999-2000.

Again, the district court rightly concluded that Huang's emails were admissible as co-conspirator statements. ER1422-23. Huang's participation in these collusive price communications undermines the defendants' claim that there is "no evidence that Huang was aware of

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[30] Defendants contend that "efforts to gather competitor data relevant to informed pricing decisions . . . is not illegal," Hsiung/Chen Br. 70. But "[t]he overt act need not be unlawful" by itself. *United States v. Monroe*, 552 F.2d 860, 864 (9th Cir. 1977) (citing *Braverman v. United States*, 317 U.S. 49, 53 (1942)); *see also United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011) (explaining an act "need not be unlawful; it can be any act, innocent or illegal, as long as it is done in furtherance of the object or purpose of the conspiracy"). And the jury's conviction of AUO and AUOA belies the contention that Huang's acts were not in furtherance of the price-fixing conspiracy.

any price-fixing activities," Hsiung/Chen Br. 71. Indeed, the evidence shows Huang not only knew of and participated in the conspiracy, but fully appreciated its illegal nature. In August 2006, Huang sent an email to Wong and others while working for AUOA in Cupertino. ER801; SER2322-23. That email was titled "Watchful!" and read, "Dear All, NYer is suspecting suppliers are exchanging price information. This is illegal, especially in the states. We need to be watchful!" ER801. Wong testified that NYer was code for Apple. SER2323. This email also included Huang's South Bay telephone number.

Based on these exhibits and Wong's related testimony, the jury could reasonably conclude that Huang participated in and furthered the conspiracy not only by doing his job marketing the price-fixed panels, but also through his specific pricing communications with competitors and his attempt to safeguard it from discovery, all while stationed in Cupertino.

United States v. Pace, 314 F.3d 344 (9th Cir. 2002), on which defendants rely, Hsiung/Chen Br. 67-69, is not on point. The defendant in *Pace* was charged with wire fraud, and venue for a wire-fraud scheme lies "only where there is a direct or causal connection to the misuse of wires," that is "where the wire transmission at issue originated, passed through, or was received, or from which it was 'orchestrated.'" 314 F.3d at 349-50. But venue for a price-fixing conspiracy is not so limited, extending to the site of any act of any conspirator in furtherance of the conspiracy. Besides, the volume of documented communications advancing the conspiracy in this case, as well as testimony from multiple witnesses, dwarfs the two stray communications in evidence in *Pace*.

3. Conspirators Negotiated Sales of Price-Fixed Panels to HP and Apple in the Northern District of California

Evidence that major American customers negotiated the procurement of panels from offices in the Northern District of California independently establishes venue there. One of those customers was HP. Evidence at trial showed that HP negotiated the procurement of panels out of its Cupertino, California, office until May 2002, when its procurement operation moved to Houston following HP's merger with Compaq. ER1467. Four conspirator companies (AUO via AUOA, LG, Samsung, and CMO) maintained offices in the South Bay near HP, and they negotiated sales of panels to HP at collusive prices. SER2367-70. The Crystal Meeting reports from that time show the conspirators specifically discussed prices to charge HP. ER774-77, 785-94; SER1964-68, 1982-86. The jury could reasonably infer that representatives from the major panel manufacturers had regular contact with HP's procurement team in Cupertino to negotiate panel sales until May 2002.

Apple is another customer that procured panels in the district. In September 2002, Wong was working in the Bay Area and negotiated the sale of panels to Apple, which is also located there.[31] SER1908-10. During those negotiations, Wong emailed AUO's Steven Leung to confirm the prices he was authorized to offer Apple. *Id.* Accordingly, the jury could infer from the record evidence, viewed in the light most favorable to the prosecution, that it was more likely than not that pricing negotiations between AUOA and Apple occurred in the Northern District of California.

Even if the jury were somehow unpersuaded that participants in the conspiracy were ever physically present in the district when they acted

[31] It is common knowledge in the Northern District of California that Apple is located in the district, in Cupertino, California. In fact, defendants invoked that common knowledge in their closing argument, telling jurors that "Apple, as you know, is headquartered in Cupertino, 40 miles away from here." SER2029.

in furtherance of the conspiracy, despite the government's ample evidence, they were nevertheless entitled to credit telephone calls or emails between a conspirator outside the district and a nonconspirator in the district, provided the call or email furthered the conspiracy's objectives. *United States v. Rommy*, 506 F.3d 108, 119-22 (2d Cir. 2007); *see also United States v. Gonzalez*, No. CR 10-00834, 2011 WL 500502, at *3 (N.D. Cal. Feb. 9, 2011) (collecting cases).

Thus, even if the conspirators were absent from the district, however inexplicably, every time they endeavored to sell price-fixed products to customers like Apple and HP that were located there, their communications with those customers establish venue. And Wong testified that defendant Leung emailed American customers about pricing negotiations. SER2385-86. Likewise, emails from defendants Leung and Hsiung to AUOA employees located in the district that furthered the conspiracy, *see* SER1908-10, 1987-88, 2348, also establish venue, whether or not those employees were knowing participants in the conspiracy. In short, abundant evidence allowed the jury to conclude the government had proven venue.

C. The Prosecutor's Rebuttal Closing Did Not Alter the Standard of Review or Deny Defendants Due Process

Defendants claim the government mischaracterized the evidence proving venue during its rebuttal closing argument. The prosecutor argued that HP "was a major victim of this crime" and "had a procurement office in Cupertino from the beginning of the charged conspiracy time until HP and Compaq merged in May of 2002." ER1042. He further argued that "negotiations for LCD panels were carried out there" and that the "conspirators' negotiation of price-fixed panels with HP in Cupertino were acts in furtherance of this conspiracy." *Id.* Attempting to rebut this rebuttal, defense counsel objected, stating in open court that this "[m]isstates the evidence." *Id.* The court asked "[i]s that in evidence," received an affirmative response from the prosecutor, and summarily responded "[o]verruled." *Id.*

First, citing *Lukashov*, 694 F.3d 1107, defendants argue that, because the district court overruled their objection, a heightened standard of review for sufficiency of venue evidence applies on appeal. Hsiung/Chen Br. 63-64. In *Lukashov*, the district court had answered the factual venue inquiry for itself, as a matter of law. 694 F.3d at 1120. This Court noted that those circumstances were "unusual" and had "no prior precedent." *Id.* Because of the abnormal procedure, this Court reformulated its typical standard of review to ask whether "a rational jury could not fail to conclude that a preponderance of the evidence establishes venue." *Id.*

Nothing similar occurred here to take the venue question away from the jury. Overruling the objection did not somehow "signal agreement" with the prosecutor's characterization of the evidence, let alone the government's position on venue. Hsiung/Chen Br. 64. To the contrary, the district court had instructed the jurors that their recollection of the evidence controlled and that "what the lawyers have said . . . in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence." SER2037. The court had also instructed the jurors to "not read . . . into anything that I may have said or done as any suggestion as to what verdict you should return. That is a matter entirely up to you." SER2036. The jury must be assumed to have followed these instructions. *Heredia*, 483 F.3d at 923.

Defendants' reliance on *Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003), Hsiung/Chen Br. 64, is unavailing because there the district court had wrongly instructed the jury "that the only contested issue in

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the case should be decided against" the petitioner. *Id.* at 564. In contrast, here the court overruled an objection without commentary or direction. That opaque ruling did not command the jury to decide the issue against defendants, just as a ruling sustaining the objection would not have commanded the jury to decide the issue against the government. The jurors were properly instructed on venue and on how to treat all they heard. Defendants provide no sound reason to depart from the ordinary standard of review here.

Second, defendants argue that the prosecutor's statement "grossly misled the jury about the venue evidence," thereby denying defendants due process. Hsiung/Chen Br. 83. But the prosecutor did not misstate the venue evidence, much less "infect[]" this eight-week trial with "unfairness." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted).

Defendants contend that the prosecutor "saved any mention of venue for rebuttal closing argument" and then "sandbagg[ed] the defense." Hsiung/Chen Br. 83, 85. The government was under no obligation to address venue in its closing argument at all, and it was certainly free in rebuttal to respond to defense counsel's lengthy

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discussion of venue in its closing argument, SER2021-26. *See United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) ("It is fair advocacy for the prosecution to advance an argument in rebuttal to which the defendant has opened the door."). Moreover, prosecutors are "granted reasonable latitude to fashion closing arguments" and are "free to argue reasonable inferences from the evidence." *Id.* at 1417. They have "'considerable leeway to strike "hard blows" based on the evidence and all reasonable inferences from the evidence.'" *United States v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002) (quoting *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2002)).

The record shows that the prosecutor fairly characterized the evidence when he stated that HP maintained its procurement office in Cupertino until its May 2002 merger with Compaq and that pricing negotiations affected by the conspiracy were carried out there. Both AUOA's Wong and HP's Tierney testified that HP maintained its procurement office in Cupertino, California until mid-2002. ER1419, 1467. Wong testified that he was employed by AUOA from 2001 to 2008, was located in the Bay Area, and was responsible for selling TFT-LCD panels to HP before he became branch manager in early 2003.

ER1418; SER2377-78, 2399. LG, Samsung, and CMO also had U.S. headquarters in the Bay Area, near their major U.S. customers. SER2367-70. While HP's procurement office was in Cupertino, many of those suppliers reached agreements on the prices they would charge HP. ER762-64, 774-77, 785-94; SER1964-68, 1982-86. Sales, obviously, are the result of price negotiations, and those negotiations occurred during the conspiracy period. There was nothing exceptional or misleading about the prosecutors' characterization of this evidence in closing. He remained comfortably within his "considerable leeway," *Hermanek*, 289 F.3d at 1100, hewing closely to the evidence presented at trial. The defendants were not denied due process.

III. AUO's Fine Does Not Exceed the Maximum Authorized by Law

When the ordinary statutory maximum fine for an offense—$100 million for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1—does not adequately reflect the seriousness of the offense in light of the pecuniary gain or loss it caused, Congress has authorized an alternative maximum fine:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined

> not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3571(d). Here, the government alleged the conspirators derived gross gains of at least $500 million from their price-fixing conspiracy. ER1734 ¶ 23. Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court determined that the gross gain was a jury question and required the government to prove it beyond a reasonable doubt. SER2446.

Thus, the jurors were instructed that, if they found AUO guilty,[32] they "must then determine whether the Government has proven beyond a reasonable doubt that any of the defendants or other participants in the conspiracy derived monetary or economic gain from the conspiracy." ER1154. If the jurors found such a gain, they were directed to make findings "regarding the total gross gain from the conspiracy," including "the gross gains to the defendants and other participants in the conspiracy." *Id.* The jurors unanimously agreed the gross gain was at

[32] The government sought to rely on Section 3571(d) to set a statutory maximum fine only for AUO and AUOA. At sentencing, the government did not seek and the district court did not impose a fine on AUOA. Thus, AUO is the only defendant challenging its sentence.

least $500 million, ER589, and thus the maximum fine was $1 billion, twice the $500 million fine actually imposed on AUO.

AUO argues on appeal that the relevant pecuniary gain under Section 3571(d) is limited to the pecuniary gain to the individual defendant. But Section 3571(d) contains no such limitation, and none of the authority AUO marshals supports AUO's reading. Because the statute is not ambiguous, AUO's reliance on the rule of lenity is misplaced. Lastly, Section 3571(d) does not impose a collective maximum fine for a group of co-conspirators, and AUO's reliance on the civil law concept of joint and several liability, AUO Br. 80-83, is unavailing because criminal fines serve entirely different purposes from civil damages.

A. The Gross Gain from a Conspiracy Offense Includes All Conspirators' Gains

Despite the language of Section 3571(d), which authorizes a maximum fine of "twice the gross gain" if "any person derives pecuniary gain from the offense," AUO argues that the maximum fine is limited to twice the defendant's own gain. But where, as here, "the language of a statute is unambiguous, the plain meaning controls." *United States v. Robinson*, 94 F.3d 1325, 1328 (9th Cir. 1996). "'Any person' means exactly that, and may not be interpreted restrictively." *Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004); *see also Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) ("The term 'any person' is quite broad, and we give words their ordinary meaning."; "[A]ny means ALL-used to indicate a maximum or whole." (internal quotation marks omitted)). Because the statute plainly contemplates that persons other than the defendant may derive gain from the offense, the gain for Section 3571(d) includes the gain derived by "any person" from the "offense."

AUO cites in support of its argument *United States v. Pfaff*, in which the Second Circuit describes Section 3571(d) as authorizing a fine of "not more than twice the gross pecuniary loss caused by, or gain derived from, the defendant's offenses," 619 F.3d 172, 174 (2d Cir. 2010). AUO Br. 77. AUO reads this to require that the maximum fine be "based on [a defendant's] own individual conduct." *Id.* at 78. But *Pfaff* refers to the gains from the defendant's "offenses," not from its "conduct." AUO's offense is the price-fixing conspiracy charged and proved at trial. Like all antitrust conspiracies, it "is a partnership in crime; and an overt act of one partner may be the act of all." *United States v. Socony-Vacuum*

Oil Co., 310 U.S. 150, 253-54 (1940). Thus, *Pfaff* does not support AUO's reading of Section 3571(d) and instead is consistent with including all the gains or losses from the price-fixing conspiracy, not only those realized by AUO.[33]

AUO also cites the statute's legislative history, AUO Br. 74, but ordinary rules of statutory construction require the Court to "follow the plain meaning of those words" in the statute, and "not look to legislative history where their meaning is clear on their face." *Farr v. United States*, 990 F.2d 451, 455 (9th Cir. 1993). Moreover, AUO's reliance is puzzling because Congress rejected the limitation AUO presses here when it modified the language of a predecessor statute to create Section 3571(d).

That predecessor statute provided that "[i]f the *defendant* derives pecuniary gain from the offense . . . the defendant may be fined not more than . . . twice the gross gain." 18 U.S.C. § 3623(c)(1) (Supp. III

[33] AUO cites two additional cases, neither of which addresses the issue AUO raises, much less provides a persuasive analysis to support AUO's argument. *See United States v. Chusid*, 372 F.3d 113, 117 (2d Cir. 2004) (imposing a fine of $250,000 without resort to Section 3571(d)'s alternative maximum fine); *United States v. Sanford Ltd.*, 878 F. Supp. 2d 137, 150 (D.D.C. 2012) (interpreting the term "gross gain" to refer to before-tax profit).

1985) (emphasis added). But Congress changed “defendant” to “any person” so that the relevant gain from the offense would not be limited to the defendant’s gain. As the legislative history explains:

> New section 3571(d) carries forward, with a modification, the provision of current law authorizing an alternative fine of twice the gross gain or gross loss resulting from an offense. Current law authorizes such a fine, notwithstanding the otherwise applicable fine limit, if the defendant derives pecuniary gain from the offense or if the offense results in pecuniary loss to another person. New section 3571(d) amends this provision by authorizing the court to impose such an alternative fine *if a person other than the defendant* derives pecuniary gain from the offense. Thus, if the defendant knows or intends that his conduct will benefit *another person* financially, the court can measure the fine imposed based on twice that benefit.

H.R. Rep. No. 100-390, at 4 (1987) (emphasis added), *reprinted in* 1987 U.S.C.C.A.N. 2137, 2142; *see also United States v. Andreas*, No. 96 CR 762, 1999 WL 116218, at *2 (N.D. Ill. Feb. 24, 1999) (explaining in a price-fixing case that “Congress amended subsection (d) to ensure that criminal defendants like Andreas would be liable for their conduct even if they intended to enrich a third party like ADM”). Section 3571(d) was drafted to allow for an alternative maximum fine when there is no gain at all to the defendant, but AUO's interpretation would nullify Congress's change.

AUO contends that this language change was intended only to cover cases in which defendants "committed crimes for the benefit of others," such as when an employee commits a crime "on behalf of his employer corporation." AUO Br. 75. Although the statutory language certainly encompasses such a scenario, nothing in it suggests any such limitation.

In any event, AUO, like all participants in price-fixing conspiracies, did commit a crime for the benefit of others. Defendants' price-fixing conspiracy, by its nature, was intended to benefit all its participants. Only by conspiring to fix the price of TFT-LCD panels could the conspirators successfully raise prices to their customers, and thereby secure massive pecuniary gains. Each of the conspirators, including AUO, committed this crime to benefit both itself and its co-conspirators. Thus, even if AUO were correct that Section 3571(d) was altered to cover cases in which defendants commit crimes "for the benefit of others," this is such a case.

Finally, AUO relies on the definition of "pecuniary gain" in the U.S. Sentencing Guidelines to interpret Section 3571(d). AUO Br. 76-77. As an initial matter, the Supreme Court has "never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines." *DePierre v. United States*, 131 S. Ct. 2225, 2236 (2011).

AUO contends that the statement in a Guidelines Application Note that "'[p]ecuniary gain' is derived from 18 U.S.C. § 3571(d) and means the additional before-tax profit to the defendant resulting from the relevant conduct of the offense," U.S.S.G. § 8A1.2, App. Note 3(h), shows "the Sentencing Commission has interpreted the statute to mean exactly what AUO says it means." AUO Br. 77. But a better reading is that the Commission merely adopted Section 3571(d)'s concept of "pecuniary gain," and not any definition of whose pecuniary gain is relevant. And the focus on gain to an individual defendant in certain provisions of the Guidelines does not override Section 3571(d)'s plain language.

AUO claims that the government's interpretation of Section 3571(d) would have "grotesquely draconian consequences." AUO Br. 79. But AUO fails to distinguish between the maximum allowable fine and the actual fine imposed. While Section 3571(d) sets an alternative maximum fine, the actual fine imposed is determined by the district court based upon the factors in 18 U.S.C. §§ 3553(a) and 3572(a), including the advisory fine range provided by the Sentencing Guidelines. And while Section 3571(d) requires a court to calculate the maximum fine based upon the gain from the offense—here, a price-fixing conspiracy—the Sentencing Guidelines applicable to antitrust crimes direct that each conspirator's fine range be calculated based upon that conspirator's own volume of affected commerce. U.S.S.G. § 2R1.1.

Thus, a conspirator that sold only a small volume of price-fixed products has little reason to fear a "massive fine[] based on the gains received by central players," AUO Br. 79, even if Section 3571(d) would authorize such a fine, because the Guidelines fine range would be based on that conspirator's own "small volume" of commerce. In any event, AUO was no such minor player, as evidenced by its Guidelines fine range of $936 million to $1.872 billion, based on its own $2.34 billion in affected commerce. ER239-41.

B. The Rule of Lenity Does Not Apply Because There Is No "Grievous Ambiguity"

AUO argues that, because Section 3571 "does not specifically address how fines are to be imposed in multi-defendant cases," the rule of lenity requires this Court to adopt its interpretation of the statute. AUO Br. 78-79. But Section 3571 is a statute of general application. It applies to all federal offenses, even if the offense specifies a lower fine, unless the law setting forth an offense "by specific reference, exempts the offense" from the application of Section 3571. 18 U.S.C. § 3571(e). The Sherman Act contains no such exemption. Nor do numerous other federal statutes outlawing criminal conspiracies, all of which create the possibility of a multi-defendant case. *See, e.g.*, 18 U.S.C. §§ 371, 1349. Section 3571's failure to specifically address multi-defendant cases or any other scenario in which it could be applied does not implicate the rule of lenity.

The rule of lenity applies only where there is "a grievous ambiguity, that requires [the Court] to guess as to what Congress intended." *United States v. O'Donnell*, 608 F.3d 546, 555 (9th Cir. 2010) (internal quotation marks and citation omitted). AUO does not identify any ambiguous terms in Section 3571(d), and there are none. Section

3571(d)'s "pecuniary gain from the offense" is unambiguous and rightly includes all gain from the offense. And there is no need to guess whether the gain is limited to AUO's own gain because Congress used the term "any person," rather than "the defendant." AUO's advancement of a narrower interpretation with no basis in the statutory language does not create an ambiguity. *See Smith v. United States*, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable.").

C. Section 3571(d) Does Not Impose a Collective Maximum Fine

Lastly, AUO argues that, if Section 3571(d) authorizes a maximum fine of twice the gain to all conspirators, then the total fines imposed on all conspirators cannot exceed that maximum. AUO Br. 80-83. Thus, in its view, the maximum fine would be $285 million, the difference between the $715 million in fines imposed on AUO's co-conspirators and the $1 billion maximum based on the jury's gain finding.

But the unambiguous language of Section 3571(d) sets a maximum sentence for "the defendant," singular, and not a collective maximum sentence for all defendants who may have been charged with the same offense. Had Congress intended to set a collective maximum fine, it could have easily done so. Yet statutes governing the imposition of criminal fines make no mention of apportioning fines amongst criminal defendants. *See* 18 U.S.C. §§ 3571-74.

AUO is unable to support its argument with a single case directly on point.[34] Instead, it relies on torts treatises and forfeiture cases to argue this Court should adopt a "one recovery" rule. AUO Br. 81-82. But civil damages awards are intended to compensate the plaintiff for his injuries. *Felder v. United States*, 543 F.2d 657, 667 (9th Cir. 1976). And the purpose of criminal forfeiture is to disgorge ill-gotten gains. *United States v. Newman*, 659 F.3d 1235, 1243 (9th Cir. 2011). Neither seeks to punish offenders by recovering more than the total gain or loss from an offense.

Criminal fines are quite different. They are intended to punish offenders and deter offenses, and thus, they are not so limited. The difference is plain on the face of Section 3571(d), which sets the

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[34] While AUO cites two cases in which it asserts that courts have imposed "joint and several fines for criminal violations," neither decision addresses whether such fines are proper. *See* AUO Br. 81 (citing *United States v. Pruett*, 681 F.3d 232, 237-38 (5th Cir. 2012), and *United States v. Radtke*, 415 F.3d 826, 836 (8th Cir. 2005)). And AUO acknowledges that such fines "run against the usual grain" of individual accountability for criminal conduct. *Id.*

maximum fine, not equal to the gain or loss from the offense, but *twice* the gain or loss from the offense. Moreover, AUO's novel proposal would allow individuals contemplating crimes that may produce pecuniary gain to reduce the fines they face simply by enlisting co-conspirators.[35]

AUO also argues that, if Section 3571(d) does not impose a collective maximum fine, then it "would produce absurd results that would run afoul of the Excessive Fines Clause." AUO Br. 82. But the Excessive Fines Clause applies to the actual fine imposed, not the maximum fine permitted. *United States v. Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003). And AUO does not argue that the fine imposed on it violates the Excessive Fines Clause. Nor could it.

A fine is unconstitutional under the Excessive Fines Clause only if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). AUO's offense consisted of a conspiracy to fix the price of panels costing more than

[35] Here, had the jury only found a gross gain of $350 million, such a strategy would have paid off for AUO because its co-conspirators had already paid $715 million in fines. The court would have been unable to fine AUO at all—indeed, the co-conspirators might claim the government owes them a $15 million rebate.

$23.5 billion that were imported into the United States either as raw panels or in finished products, $2.34 billion of which were sold by AUO itself. SER1888-89, 2075-76, 2078-79. At sentencing, the government's expert estimated that AUO's overcharge on its panels was over 19 percent. SER1906. The district court concluded that "it was proved beyond peradventure at trial that this conspiracy existed and was affected and caused exactly the damages set out" and that "the financial consequences to the U.S. market were enormous." ER245. In light of this evidence, AUO's $500 million fine is not "grossly disproportional." Indeed, it is well below AUO's Guidelines fine range of $936 million to $1.872 billion.

CONCLUSION

For the reasons stated, the judgments of the district court should be affirmed.

Respectfully submitted.

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STATEMENT OF RELATED CASES

1. In December 2009, the grand jury, which was investigating price fixing among the TFT-LCD panel makers and subsequently returned the indictment in this case, subpoenaed AUO's and AUOA's law firm requesting certain non-privileged AUO and AUOA documents in the firm's custody in the United States. The firm, AUO, and AUOA moved to quash the subpoena, and the district court granted their motion. The government appealed, and this Court reversed, holding that the subpoena was enforceable. *In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010). The firm, AUO, and AUOA petitioned the Supreme Court for a writ of certiorari. The government opposed the petition, and the Supreme Court denied it. *Nossaman LLP, AU Optronics Corp., & AU Optronics Corp. Am. v. United States*, 131 S. Ct. 3062 (2011).

2. The jury in the present case failed to reach a verdict as to one of the individual defendants, Shiu Lung "Steven" Leung. Leung was subsequently found guilty on retrial. He is currently awaiting sentence. That case, *United States v. Leung*, is proceeding under the same docket number in the district court as the present case did, No. 09-cr-110-SI.

3. Another individual charged in the indictment, Borlong "Richard" Bai, had been a fugitive at the time of trial in this case. Bai has recently appeared in the district court and pleaded not guilty. Trial of the indictment against Bai is set for September 23, 2013. Again, that case, *United States v. Bai*, is proceeding under the same docket number in the district court, No. 09-cr-110-SI.

CERTIFICATE OF COMPLIANCE

1. This brief is accompanied by a motion for leave to file an oversized brief pursuant to Ninth Circuit Rule 32-2. This brief contains 31,555 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

April 5, 2013

/s/ Kristen C. Limarzi
Attorney

CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on April 5, 2013, I electronically filed the foregoing Brief for the United States and the accompanying Supplemental Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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