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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUI HSIUNG, et al.

Defendants.

Case No. 09-cr-00110-SI

DEFENDANT HUI HSIUNG'S:

1. **MOTIONS FOR A JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL**
2. **NOTICE OF MOTIONS**
3. **MEMORANDUM OF POINTS AND AUTHORITIES**

Date: May 25, 2012
Time: 11:00 a.m.
Judge: Hon. Susan Illston
Courtroom: 10, 19th Floor

NOTICE OF MOTIONS AND MOTIONS FOR A JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

PLEASE TAKE NOTICE that on May 25, 2012, at 11:00 a.m., in the courtroom of the Honorable Susan Illston, defendant Hui Hsiung will move the Court for a judgment of acquittal or, alternatively, for an order granting him a new trial as to his conviction in this matter.

These motions are based upon this notice of motions and motions, the accompanying memorandum of points and authorities, the files and records of the case, and such other evidence and authorities as may be presented in the course of these proceedings.

Respectfully submitted,

Dated: April 20, 2012

HOGAN LOVELLS US LLP
By:

/s/ Michael J. Shepard
Michael J. Shepard
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUI HSIUNG, et al.

Defendants.

Case No. 09-cr-00110-SI

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT HUI HSIUNG'S MOTIONS FOR A JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

Date: May 25, 2012
Time: 11:00 a.m.
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MEMORANDUM OF POINTS AND AUTHORITIES

From its inception, this case has raised novel and challenging questions regarding how the Sherman Act applies to conduct beyond the borders of the United States. It is now clear in light of the evidence introduced at trial that the foreign aspects of this criminal proceeding far overwhelmed any domestic activity. Put simply, the jury convicted foreign residents of a conspiracy consummated on foreign soil involving foreign-made components sold to foreign entities and shipped to foreign nations.

Because this controversy was foreign in all essential respects, the criminal prosecution suffered fundamental flaws that necessitate post-trial relief under Federal Rules of Criminal Procedure 29 and 33.[1] First, this case had no reason to be proceeding in a U.S. court: The Sherman Act's criminal prohibitions do not apply extraterritorially. Second, even if the Sherman Act could be stretched to cover this case, principles of comity would nonetheless extinguish this Court's jurisdiction. Third, binding Ninth Circuit precedent establishes that foreign conduct like that at issue here must be assessed pursuant to the rule of reason; because jurors were permitted to convict on a *per se* theory of liability, a new trial is warranted. Fourth, because the government's proof centered on foreign individuals and events, the government failed to carry its burden under the Constitution to demonstrate that venue was proper in the Northern District of California.[2]

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[1] Dr. Hsiung embraces and hereby incorporates all arguments made by the other defendants in their accompanying Rule 29 and 33 Motion. *See* Defendants' Joint Memorandum In Support Of Motion For Judgment Of Acquittal, Or In The Alternative, For New Trial (Apr. 20, 2012) (hereinafter AUO Post-Trial Motion). In addition to those arguments, this brief raises fundamental questions concerning the Court's exercise of jurisdiction under the Sherman Act.

[2] Dr. Hsiung also renews and preserves his request for a judgment of acquittal on all conceivable grounds. RT 4109 (moving "for acquittal under Rule 29 on each and every conceivable ground[]"); RT 4110-11 ("preserv[ing] on all grounds a motion for judgment on acquittal"); RT 4513; RT 4596; RT 4695-96; RT 4705; RT 5410. In addition, Dr. Hsiung renews and preserves all objections made on his behalf before and during the trial.

In short, this criminal case was flawed in its inception and flawed in its prosecution. Post-trial relief must be granted.

FACTUAL AND PROCEDURAL BACKGROUND

On June 10, 2010, defendants Dr. Hui Hsiung, Hsuan Bin Chen, Steven Leung, AU Optronics Corporation (AUO), AU Optronics Corporation America (AUOA), and others were indicted on one count of violating Section One of the Sherman Act, 15 U.S.C. § 1. From the get-go, the indictment signaled that the criminal charges were based primarily on foreign conduct: According to it, the individual defendants—all of whom were residents of Taiwan—allegedly agreed to fix the prices of TFT-LCD panels in a series of so-called "Crystal Meetings" held exclusively in Taiwan. Dkt. 8, ¶¶ 6-9, 11, 17 (Superseding Indictment).

Because the charges were premised on foreign conduct, defendants moved to dismiss the indictment for failure to allege the necessary elements of a Sherman Act violation as applied to overseas conduct. Dkt. 177 (Defendant Hsuan Bin Chen's Motion to Dismiss); Dkt. 181 (Joinder in Motion by Hui Hsiung). Defendants argued that the Ninth Circuit's decision in *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), established that their conduct must be evaluated pursuant to the rule of reason, yet the indictment alleged only a *per se* offense. Dkt. 177, pp. 5-9. This Court denied the motion to dismiss, holding that *Metro Industries* did not apply and that the case was instead governed by the First Circuit's decision in *United States* v. *Nippon Paper Industries Company*, 109 F.3d 1 (1st Cir. 1997), which suggested that *per se* analysis could apply to charges involving foreign conduct. Dkt. 250, pp. 4-6 (Order on Motion to Dismiss).

Accepting that the Court had concluded that *Nippon Paper* governed the case, defendants later moved to dismiss on the ground that the indictment did not allege that the conspiracy had a substantial and intended effect on U.S. commerce, as required by *Nippon Paper*. Dkt. 258, p. 3

(Motion of Defendants AUO and AUOA to Dismiss); Dkt. 260 (Joinder in Motion by Hui Hsiung). The Court denied this second motion to dismiss, holding that various allegations in the indictment concerning conduct within the United States sufficed to "alleg[e] a domestic conspiracy." Dkt. 287, p. 8 (Order Denying Defendants' Motion to Dismiss).

Consistent with these pre-trial rulings, the Court permitted the government to proceed on a theory that defendants had committed a *per se* violation of the Sherman Act. Before trial, the Court warned defendants that they "[would not] be allowed" to argue "that reasonableness would get [them] out from under the Sherman Act." Dkt. 607, pp. 43-44 (Reporter's Tr., Pre-Trial Proceeding, Dec. 13, 2011). And at the end of the case, the Court instructed the jury on a *per se* theory of liability, stating that mere agreement, without more, violated the Sherman Act. Dkt. 829, pp. 6-7 (Jury Instructions). Defendants accordingly had no opportunity to argue that their conduct was not unlawful under the rule of reason because the procompetitive benefits of their behavior outweighed any anticompetitive effects.

As defendants had anticipated in their motions to dismiss, the evidence at trial confirmed that the alleged conspiracy was foreign in all of its important aspects. Each individual defendant charged with participating in the conspiracy was at all times a resident of Taiwan. *E.g.*, Def. Ex. 1297T; Dkt. 8, ¶¶ 6-9, 11 (Superseding Indictment). The government's proof centered on the agreements allegedly reached at dozens of Crystal Meetings held over a five-year period—yet each and every Crystal Meeting occurred in Taiwan. RT 664; RT 2072; RT 2220-21; Gov't Ex. 6-75. The government also focused on agreements allegedly negotiated during one-on-one meetings between co-conspirators in the later period of the charged conspiracy—yet all of those meetings were also held in Taiwan. *E.g.*, RT 3794. The six companies that attended the Crystal Meetings were all incorporated and headquartered overseas. Gov't Ex. 804. The government called witnesses who described the Crystal Meetings and notes generated after the meetings in

painstaking detail—yet there was no question that the notes had been prepared abroad and detailed events occurring solely in Taiwan. Gov't Ex. 6-75. The TFT-LCD panels for which prices were allegedly fixed were all manufactured abroad. *E.g.*, RT 1095-96. Those panels were then sold to foreign companies. *E.g.*, RT 610-12; RT 2570; RT 3313. In line with these sales, the panels were shipped to foreign locations to be integrated into monitors, notebooks, and televisions. *E.g.*, RT 522; RT 617-18; RT 1095-96; RT 2425-26. The prices allegedly fixed at the Crystal Meetings in Taiwan applied globally, with no differentiation for various geographic markets. *E.g.*, RT 1370; RT 3037. And the panels, too, were not specifically designed for the U.S. market, but rather were placed in products sold throughout the world. *E.g.*, RT 612; RT 2073; RT 2504; RT 2520.

By the end of the trial, this Court recognized that the prosecution concerned predominantly foreign conduct; for that reason, the Court instructed the jurors regarding the extraterritorial application of the Sherman Act and the operation of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a. Dkt. 829, pp. 10-11 (Final Jury Instructions); *see* Dkt. 631, pp. 1-2 (Order Re: Preliminary Jury Instructions) (declining to give preliminary jury instructions on the Sherman Act's extraterritorial reach and the FTAIA, but reserving the right to do so in the final instructions "[a]fter hearing the evidence of the conspiracy's domestic component"). In all, the testimony and exhibits admitted at trial overwhelmingly concerned the actions of foreign defendants and foreign corporations meeting in a foreign country to allegedly fix prices all over the world for a foreign-made product sold to foreign-based entities and shipped from one foreign country to another.

ARGUMENT

Based on the evidence introduced at trial, it is now clear that this criminal antitrust prosecution centered on foreign individuals and events and so is properly classified as a foreign-

conduct case. Significant legal ramifications regarding the application of the Sherman Act follow from that classification. First, the strong presumption against extraterritorial application of U.S. laws establishes that the Sherman Act cannot be extended to criminalize defendants' foreign conduct. Second, principles of comity compel dismissal of a suit like this one with predominantly foreign elements. Third, to the extent that foreign Sherman Act cases can be prosecuted in the United States, courts must take care in defining the scope of that extraterritorial application; for this reason, the Ninth Circuit has correctly held that cases involving foreign conduct must be assessed pursuant to the rule of reason rather than under a *per se* theory of illegality, as was wrongly permitted in this case. Fourth, when a foreign conspiracy is consummated on foreign soil without a sufficient connection to the judicial district, the government may be unable to establish venue, as occurred here. Because defendants' trial did not account for these aspects of the Sherman Act's application to foreign conduct, post-trial relief is warranted.

I. The Trial Evidence Demonstrated That This Case Centered On Foreign Conduct

Although the characterization of conduct as foreign or domestic triggers important legal consequences under the Sherman Act, the statute does not define "foreign conduct" and the Supreme Court has never clarified that term. In the Ninth Circuit, it is clear that a dispute need not be foreign in every respect in order to qualify as "foreign conduct": In *Metro Industries*, 82 F.3d at 841-42, the Court of Appeals labeled conduct as "foreign" even though the plaintiff had sued both a foreign exporter and its U.S. subsidiaries and had alleged that the foreign market allocation system permitted predatory pricing through direct sales in the United States. The question thus arises how to classify cases that, like *Metro Industries*, present a mix of foreign and domestic elements.[3]

[3] Notably, an antitrust suit brought by the U.S. government or a U.S. plaintiff can never be "wholly" foreign, as the plaintiff must allege some domestic injury. Thus, even cases using the

Only one Court of Appeals has considered this classification question in any depth, and its analysis is instructive here. In *Dee-K Enterprises, Inc.* v. *Heveafil SDN. BHD.*, 299 F.3d 281, 294 (4th Cir. 2002), the Fourth Circuit held that in choosing the appropriate label, "courts should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic." Applying that test, the Fourth Circuit concluded that a conspiracy counted as "foreign conduct" when it "included many *participants* with foreign affiliations but a few who also had United States affiliations; *acts* that range from a series of conspiratorial meetings, all held abroad, to routine communications, a few with the United States; and a *target market* embracing dozens of nations including the United States." *Id.* at 287, 295-96.

In this case, all four factors—acts, participants, targets, and effects—demonstrate that the conspiracy counted as foreign conduct. Critically, of the more than sixty Crystal Meetings at which TFT-LCD prices were allegedly fixed, not one occurred in the United States. *See id.* at 295 (finding it "significant that not one of the conspirators' many meetings took place in the United States"). The "essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself," *Summit Health, Ltd* v. *Pinhas*, 500 U.S. 322, 330 (1991); an overt act is not an element of the offense at all, *United States* v. *Shabani*, 513 U.S. 10, 15 (1994). And there is no dispute that every last one of the pricing agreements at issue here—the "essence" of this prosecution—was formed on foreign soil.

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term "wholly foreign" have involved domestic elements. *See, e.g.*, *United States* v. *Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 2 (1st Cir. 1997) (labeling an alleged antitrust violation as "wholly foreign" even though the Japanese defendants had targeted North America in a price-fixing conspiracy and had required unaffiliated trading houses to sell the paper at the inflated price in the United States).

Similarly, the participants in the conspiracy were predominantly foreign. Each individual defendant was a resident of Taiwan, and the six companies charged with price fixing at the Crystal Meetings were all incorporated and headquartered in Taiwan or South Korea. Although the government charged AUO's small U.S. subsidiary with conspiracy, it presented no evidence that AUOA directly participated in the Crystal Meetings or took any action independent of AUO in furtherance of the conspiracy.[4] And no court has held that the participation of a single U.S. subsidiary prevents a finding that a conspiracy constituted foreign conduct; to the contrary, the Supreme Court and the Ninth Circuit have classified alleged Sherman Act violations as "foreign" even when U.S. companies were joined as defendants. *See Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 775-77, 779 (1993) (characterizing a conspiracy in the insurance market as "foreign conduct" even though it involved both international and U.S. participants); *Metro Industries*, 82 F.3d at 841 (finding conduct to be "foreign" even though U.S. subsidiaries were joined as defendants and allegedly helped carry out an unlawful market allocation); *Dee-K Enters.*, 299 F.3d at 284 (holding that action taken by five Malaysian producers and one U.S. subsidiary was "foreign conduct"). This reasoning applies with particular force here, where AUOA functioned as a small branch office with only a handful of employees, and so was far overshadowed by AUO's presence in Taiwan and other foreign countries; indeed, during the

[4] Dr. Hsiung was the nominal president of AUOA during part of the conspiracy period, but the government presented no evidence that he attended the Crystal Meetings in that role, as opposed to in his capacity as Executive Vice President of AUO. Indeed, Dr. Hsiung's role at AUOA was nothing more than a "CEO on paper"; the government offered no proof that he drew a salary from AUOA or ever issued a single directive as an AUOA officer. *See* Dkt. 8, ¶ 7 (Superseding Indictment) (identifying Dr. Hsiung only as an officer of AUO, and neglecting to mention any affiliation with AUOA); AUO Post-Trial Motion at 55-57; *see also Dee-K Enters., Inc.* v. *Heveafil SDN. BHD.*, 299 F.3d 281, 295 (4th Cir. 2003) (emphasizing that "[a]lthough dozens of people participated in [a conspiracy] over the years, Dee-K can only point to two who held office in United States companies, and both of them also had important and in fact primary roles in Southeast Asian companies").

years of the alleged conspiracy AUO employed *tens of thousands* of individuals in Taiwan and China, while AUOA never had more than a dozen or so employees on hand. *See* Gov't Ex. 808; Gov't Ex. 759-65.[5]

Consideration of the target of the conspiracy also weighs in favor of classifying this as a foreign-conduct case. The government's theory at trial was that the conspirators fixed prices for TFT-LCD panels all over the world. No effort was made to single out the United States; instead, the participants targeted a global market. *See, e.g.*, RT 1370 (testimony of Brian Lee) (stating that Crystal Meeting prices applied to customers worldwide); RT 3314-15 (testimony of government expert Dr. Keith Leffler) (noting that less than one-third of the defendants' TFT-LCD panels incorporated into personal computers ended up in the United States); *Hartford Fire*, 509 U.S. at 770, 779 (characterizing a conspiracy as "foreign conduct" *even though* the conspirators directly targeted the U.S. insurance market).

Finally, an examination of the anticompetitive effects further confirms that the conspiracy involved foreign conduct. As AUO has demonstrated, the evidence at trial did not prove that defendants' conduct had a significant overall anticompetitive effect in the U.S. market. *See* AUO Post-Trial Motion at 36-52. Any U.S. effects, moreover, did not result from direct sales by defendants into the United States; it was undisputed at trial that essentially all of defendants' TFT-LCD panels were sold to foreign companies and shipped to facilities outside the United States, where the panels were incorporated into finished products and only then imported into countries around the world, including the United States. *Cf. United States* v. *LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (holding that anticompetitive conduct has a "direct effect" on U.S. commerce only when the effect of the conduct "proceed[s] from one point

[5] And in any event, AUOA has demonstrated that there was insufficient evidence to convict it of conspiracy. *See* AUO Post-Trial Motion at 54-57.

to another in time or space without deviation or interruption"); *Dee-K Enters.*, 299 F.3d at 285 (finding that a global conspiracy constituted "foreign conduct" *even though* the conspirators sold the price-fixed product directly to customers in the United States). Finally, any effects from the conspiracy were not confined to the United States alone; the government offered no evidence that prices rose only in the United States as opposed to all over the world. *See, e.g.*, RT 612 (testimony of Timothy Tierney) (stating that the panels purchased by Hewlett Packard (HP) were later "sold . . . throughout the world, in products that went throughout the world").

In sum, while the Court concluded prior to trial that the indictment had "adequately allege[d] a domestic conspiracy," Dkt 287, p. 8 (Order Denying Defendants' Motion to Dismiss), the evidence at trial concerning the acts, actors, targets, and effects demonstrated precisely the opposite: This is a foreign-conduct case.

II. The Sherman Act Does Not Apply Extraterritorially To Defendants' Foreign Conduct

Just as it is now clear that defendants' conduct was foreign in every essential respect, it is also clear that this criminal prosecution never belonged in a U.S. court. Defendants must be acquitted because the Sherman Act does not apply extraterritorially to criminalize their conduct.

A. The Sherman Act Does Not Apply Extraterritorially To Foreign Conduct

For nearly two centuries, the Supreme Court has emphasized that there is a strong presumption against extraterritorial application of U.S. laws. *See, e.g.*, *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824). To effectuate this presumption, the Court has adopted a clear-statement rule: "[U]nless . . . the affirmative intention of the Congress [is] clearly expressed, we must presume [a statute] is primarily concerned with domestic conditions." *Aramco*, 499 U.S. at 248 (internal quotation marks and citation omitted).

Despite the clarity of the presumption against extraterritoriality, the Court veered away from it in *Hartford Fire*, 509 U.S. at 796. In a deeply fragmented decision regarding comity, the Court declared in passing—with no analysis of the statutory text—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." But the law has changed since the time of *Hartford Fire*. *See Dee-K Enters.*, 299 F.3d at 294 (noting that the extraterritorial application of the Sherman Act "has historically been marked by change, and remains a subject of serious debate"). Recent precedents concerning the extraterritorial reach of U.S. law have superseded *Hartford Fire* and compel the conclusion that the Sherman Act does not apply to foreign conduct.

First, the Court's declaration of extraterritorial application in *Hartford Fire* rested on the faulty premise that it was "well established" that the Sherman Act reached foreign conduct. 509 U.S. at 796. But examination of the authorities cited in *Hartford Fire* reveals that "none of the citations actually supports the Court's assertion; there were, in fact, no Supreme Court cases applying the Sherman Act on facts like those in *Hartford*," which involved a conspiracy among foreign and domestic defendants aimed at restricting the terms of insurance coverage available in the United States. Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case*, 89 Am. J. Int'l L. 750, 751 (1995). Indeed, there was a striking *absence* of precedent, for although the Sherman Act had been in existence for more than a century, no case had previously applied the statute to conduct that was foreign in all essential aspects.

Second, even assuming *Hartford Fire* had accurately surveyed applications of the Sherman Act to foreign conduct, recent precedents, including the Supreme Court's seminal decision in *Morrison*, demonstrate that *Hartford Fire*'s extraterritoriality ruling is no longer good law. In language that could not be more precise, *Morrison* declared that "[w]hen a statute gives

no clear indication of an extraterritorial application, it has none." 130 S. Ct. at 2878; *see also id.* at 2877 (reaffirming the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States" (citing *Aramco*, 499 U.S. at 248)); *Norex Petroleum Ltd.* v. *Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010) (*Morrison* "wholeheartedly embrace[d] application of the presumption against extraterritoriality"). Relying heavily on *Aramco*'s clear-statement rule and on the observation that the rule applies without exception, the *Morrison* Court held that Section 10(b) of the Securities Exchange Act of 1934 does not apply extraterritorially. *Id.* at 2883; *see also id.* at 2881 ("[W]e apply the presumption in *all* cases, preserving a stable background against which Congress can legislate with predictable effects." (emphasis added)).

In light of *Morrison*, this Court should hold that the Sherman Act does not apply extraterritorially. That would faithfully follow the approach that other federal courts have taken to heed *Morrison* by revisiting, and in some cases limiting, the extraterritorial reach of other federal statutes. *See, e.g.*, *Norex*, 631 F.3d at 32-33 (RICO); *United States* v. *Belfast*, 611 F.3d 783, 810-11 (11th Cir. 2010) (Torture Act); *Love* v. *Associated Newspapers, Ltd.*, 611 F.3d 601, 612 n.6 (9th Cir. 2010) (Lanham Act); *United States* v. *Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 27-29 (D.D.C. 2011) (RICO); *Cedeno* v. *Intech Group, Inc.*, 733 F. Supp. 2d 471, 472-473 (S.D.N.Y. 2010) (RICO).

The Supreme Court, too, has begun revisiting seemingly "well established" extraterritorial applications of U.S. law in the wake of *Morrison*: Just last month, the Court ordered briefing on the extraterritorial application of the Alien Tort Statute, even though the statute is specifically directed at non-U.S. persons and entities and even though courts have uniformly held that the law reaches foreign conduct. *See Kiobel* v. *Royal Dutch Petroleum*, No. 10-1491 (U.S.); *see also Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 809-10 (9th Cir. 2011) (Kleinfeld, J., dissenting) (stating

that the Alien Tort Statue should not apply to conduct that occurred on foreign soil); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 74-81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (same).

The Sherman Act's extraterritorial reach is similarly ripe for reconsideration. *Morrison* and cases following its lead make clear that courts may no longer rely on *Hartford Fire* to ignore the presumption against extraterritoriality and stretch U.S. antitrust laws to cover foreign conduct. Because the Sherman Act does not reach the foreign conduct in this case, defendants' convictions must be reversed.

B. The Sherman Act's Criminal Prohibitions Do Not Apply Extraterritorially To Foreign Conduct

This Court, however, can avoid deciding the ultimate question of whether *Hartford Fire* retains force in the wake of more recent precedent; after all, assuming *Hartford Fire* is still good law, the defendants nonetheless would be entitled to acquittal because *Hartford Fire* cannot be extended to the criminal sphere. *Hartford Fire*, a civil insurance case, cannot answer the question posed by this *criminal* case, with Dr. Hsiung's freedom on the line.

The Supreme Court has held in no uncertain terms that criminal laws do not apply extraterritorially absent an express statement from Congress: "If [criminal] punishment is to be extended [extraterritorially], it is natural for Congress to say so in the statute, and *failure to do so will negative the purpose of Congress in this regard*." *United States* v. *Bowman*, 260 U.S. 94, 98 (1922) (emphasis added). This clear-statement rule parallels the analysis in civil cases, but the presumption against extraterritoriality has particular force as applied to criminal laws. This is so because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.), and the "law of nations" singles out and specifically disapproves extraterritorial enforcement of criminal prohibitions. "[T]he exercise of criminal (as distinguished from civil)

jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive," justifying the "generally accepted" view that "criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity." Restatement (Third) of Foreign Relations Law § 403, Reporters' Note 8 (1986). Moreover, the risk of intrusion is heightened when a state seeks to regulate private economic conduct through criminal sanctions. As summarized by the Restatement:

> The principles governing [extraterritoriality] apply to criminal as well as civil litigation. *However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities law, the presence of substantial foreign elements will ordinarily weigh against application of criminal law.* In such cases, legislative 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.

Id. § 403, cmt. f (emphasis added); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 372j, p. 322 (2006) (acknowledging that "one might perhaps conclude that only acts committed within United States territory should constitute criminal violations" of the Sherman Act).[6]

Section 1 of the Sherman Act lacks any express statement regarding extraterritorial application, providing only that "[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,

[6] The intrusion on state sovereignty through application of criminal sanctions for purely economic conduct is particularly pronounced in this case. Although Taiwan prohibits price fixing, the Taiwan Fair Trade Commission has declared that "[c]riminal punishment . . . should be a measure of last resort," and has announced a policy of generally pursuing administrative sanctions before referring anticompetitive conduct for possible criminal prosecution. Taiwan Fair Trade Comm'n, *Explanatory Material Relevant to the Revised Articles of the Fair Trade Act*, § 3.1 (1999), *available at* http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=647&docid=1565 (last visited Apr. 20, 2012). Rather than heed this approach by bringing civil charges, the U.S. government here threatens Dr. Hsiung and the other individual defendants with substantial terms of imprisonment.

is declared to be illegal." 15 U.S.C. § 1. The text is the beginning and end of the question of extraterritorial application: Congress provided no clear statement extending the Sherman Act's criminal prohibition to foreign conduct, and so the statute cannot be stretched beyond the domestic sphere. *Morrison*, 130 S. Ct. at 2878 ("When a statute gives no clear indication of an extraterritorial application, it has none.").[7]

Nor does the FTAIA constitute a clear statement that the Sherman Act applies extraterritorially in criminal cases. *See* 15 U.S.C. § 6a(1)(A) (providing that the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce). Notably, even those courts that have held that the Sherman Act applies extraterritorially have declined to rest that conclusion on the FTAIA. *See Hartford Fire*, 509 U.S. at 796 & n.23 (finding it "unclear how [the FTAIA] might apply to the conduct alleged here"); *Nippon Paper*, 109 F.3d at 4 ("The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA." (citation omitted)).

Furthermore, in *Morrison*, the Supreme Court rejected the argument that a statutory provision similar to the FTAIA, which imposes a condition precedent to any application of the statute premised on foreign commerce, suffices as a clear statement of extraterritorial effect. 130

[7] In this regard, the Sherman Act stands in stark contrast to other criminal statutes where Congress has been careful to address the issue of extraterritoriality. For example, the Money Laundering Control Act of 1986 declares that "[t]here is extraterritorial jurisdiction over the conduct prohibited by this section if . . . the conduct is by a United States citizen or . . . the conduct occurs in part in the United States." 18 U.S.C. § 1956(f) (2009). Similarly, the Maritime Drug Law Enforcement Act specifies that "[t]his section is intended to reach acts of manufacture or distribution [with intent to import] committed outside the territorial jurisdiction of the United States." 21 U.S.C. § 959(c) (1996).

S. Ct. at 2882. "[I]t would be odd," the Court observed, "for Congress to indicate the extraterritorial application of the whole Exchange Act by means of a provision imposing a condition precedent to its application abroad. . . . At most, [this] proposed inference is possible; but possible interpretations of statutory language do not override the presumption against extraterritoriality." *Id.*; *see also Beattie* v. *United States*, 756 F.2d 91, 113 (D.C. Cir. 1984) (Scalia, J., dissenting) ("It is perverse to give the explicit exclusion of [certain] foreign claims the consequence of expanding the Act."), *overruled by Smith* v. *United States*, 507 U.S. 197 (1993).

Only one Court of Appeals has *ever* analyzed and approved an extraterritorial Sherman Act criminal prosecution. That Court relied exclusively on the claim that "in 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." *Nippon Paper*, 109 F.3d at 4. That argument is woefully deficient and ignores unique aspects of the Sherman Act that justify different rules in the civil and criminal contexts, as the Supreme Court itself has recognized. *See* Areeda & Hovenkamp, *supra*, at ¶ 303f, p. 59 (explaining that "[t]here are important practical differences between criminal and civil suits" under the Sherman Act that "may warrant the application of different substantive rules").

Critically, the Sherman Act is no ordinary statute—and so traditional canons of statutory construction do little to illuminate its meaning. As the Supreme Court has emphasized, "the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'" *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438-39 (1978) (quoting *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359-60 (1933)). Thus, "[t]he task of construing Section One in this context is not the usual one of determining congressional intent by parsing the language or legislative history of the statute. The broad, general language of the

federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the judiciary." *Nippon Paper*, 109 F.3d at 9 (Lynch, J., concurring). Because the Sherman Act invites "courts to give shape to the statute's broad mandate by drawing on common-law tradition," *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 688 (1978), nothing in the statutory text prohibits courts from restricting the extraterritorial application of the Act's criminal prohibitions, even if the civil provisions have a more expansive reach. Indeed, the use of differing canons of interpretation in the civil and criminal contexts is a hallmark of a judicial case-by-case system of adjudication.

This Court need go no further than to look to the Supreme Court's interpretation of the Sherman Act itself to see how *Nippon Paper* erred by claiming that the civil and criminal components of the statute must be parallel. After all, the Supreme Court specifically adopted completely *different* interpretations of Section One in civil and criminal cases with respect to *mens rea*. In *United States Gypsum Co.*, 438 U.S. at 438-39, the Court acknowledged that "[b]oth civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of conduct proscribed . . . without reference to or mention of intent or state of mind." Nevertheless, the Court interpreted the statute's criminal prohibition, but not its civil sanction, as incorporating a *mens rea* requirement. *Id.*; *see also id.* at 443 n.19 (Congress enacted Section One of the Sherman Act "fully aware of the traditional distinction between the elements of civil and criminal offenses and apparently did not intend to do away with them."); Areeda & Hovenkamp, *supra*, at ¶ 303c, p. 42 ("The courts should and do vary definitions of an antitrust offense" depending on whether the case is criminal or civil). *Gypsum* demonstrates that interpretations of the Sherman Act in civil suits cannot automatically be imported to criminal cases—and so a court is not free to ignore the strong presumption against extraterritorial application of criminal laws based simply on the rule that has prevailed in civil proceedings.

This point has particular salience in light of the rule of lenity. When courts identify ambiguity in a criminal statute, the rule of lenity instructs them to "resolve any doubt in favor of the defendant." *Ratzlaf* v. *United States*, 510 U.S. 135, 148 (1994). Any ambiguity regarding whether the Sherman Act covers defendants' foreign conduct, therefore, must be resolved against extending the statute's criminal prohibition extraterritorially in this case.

Because the Sherman Act cannot be read to criminalize the foreign conduct at issue here, defendants are entitled to a judgment of acquittal under Rule 29.

III. Principles Of Comity Require Dismissal Of This Suit

Even if the presumption against extraterritoriality could be ignored and the Sherman Act's criminal prohibitions could be stretched to reach foreign conduct, the evidence at trial demonstrated yet another fundamental flaw in prosecuting defendants in a U.S. court: This case should have been dismissed on grounds of comity.

Even when Congress has authorized the extension of U.S. law to foreign conduct, principles of comity require a court to consider whether a case's link to the United States is "sufficiently strong, vis-a-vis [links to] other nations, to justify an assertion of extraterritorial authority." *Timberlane Lumber Co.* v. *Bank of Am. N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (*Timberlane I*); *see also In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255 (7th Cir. 1980) ("[W]hile an effect on American commerce is the necessary ingredient for extraterritorial jurisdiction, considerations of comity and fairness require a further determination as to whether American authority should be asserted in a given case." (internal quotation marks omitted)).[8] To

[8] The Ninth Circuit has held that comity can require dismissal of a suit even when the suit satisfies the FTAIA's requirement of a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, 15 U.S.C. § 6a. *See McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 813 n.8 (9th Cir. 1988) ("[I]n passing the Foreign Trade Antitrust Improvements Act, Congress did not change the ability of the courts to exercise principles of international comity.").

effectuate comity principles, the Ninth Circuit applies a "jurisdictional rule of reason," which balances several elements, including:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane I, 549 F.2d at 614. No one element is dispositive, and courts must "examine each relevant factor, assign its relative importance, and come to a conclusion by comparing the relative importance of the elements involved." *In re Ins. Antitrust Litig.*, 938 F.2d 919, 932 (9th Cir. 1991), *overruled on other grounds by Hartford Fire*, 509 U.S. 764 (1993).[9] *See also Star-Kist Foods, Inc.* v. *P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th Cir. 1985) ("these seven factors should be balanced in each case"); *Timberlane Lumber Co.* v. *Bank of Am. N.T. & S.A.*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*) (balancing the factors before declining jurisdiction).

Applying the *Timberlane I* factors here, it is clear that comity necessitates dismissal of this suit. First, the individual defendants in this case were all residents of Taiwan, and the six corporations charged with attending Crystal Meetings were headquartered in Taiwan and Korea. The nationality of the parties thus counts strongly against an exercise of jurisdiction. *See Rivendell Forest Prods., Ltd.* v. *Canadian Forest Prods., Ltd.*, 810 F. Supp. 1116, 1119 (D. Colo.

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[9] Although the Supreme Court defined the type of conflict that matters for purposes of comity analysis in *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993), the Court "did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I*." *Metro Industries, Inc.* v. *Sammi Corp.*, 82 F.3d 839, 846 n.5 (9th Cir. 1996). Instead, the Court was careful to emphasize that it had "no need in this litigation to address other considerations [beyond a conflict of laws] that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Hartford Fire*, 509 U.S. at 799.

1993) (declining jurisdiction in part because "[a]ll of the defendants are Canadian corporations with Canadian operations"); *In re Bank of Credit & Commerce Int'l Depositors Litig.*, No. MDL-908, 1992 WL 696398, at *11 (C.D. Cal. Apr. 30, 1992) (similar).

Second, Taiwan and Korea both prohibit price-fixing, and so those nations can be expected to enforce restrictions on anticompetitive behavior in accordance with the goals of the Sherman Act. *See* Taiwan Fair Trade Act of 2011, Art. 19, *available at* http://www.ftc.gov.tw/ (last visited Apr. 20, 2012); South Korean Monopoly Regulation and Fair Trade Act, Art. 19 (2009), *available at* http://www.moleg.go.kr.english/korLawEng (last visited Apr. 20, 2012). Because "the majority of the allegedly infringing conduct" occurred in Taiwan, a tribunal there "is better-positioned than this Court to provide effective relief." *Love* v. *The Mail on Sunday*, 473 F. Supp. 2d 1052, 1057 (C.D. Cal. 2007).

Third, effects from the conspiracy were felt throughout the world and were not principally centered in the United States. *See, e.g.*, RT 3314-15 (testimony of Dr. Leffler) (stating that only 33% of computers featuring defendants' LCD-TFT panels ended up in the United States). Moreover, the conspiracy aimed at the global market and featured no explicit purpose to harm or affect U.S. commerce in particular. *See Timberlane II*, 749 F.2d at 1385 (declining jurisdiction in part because the defendant's "acts were directed primarily towards securing a greater return on its investment" and the defendant had no "particular interest in affecting United States commerce"); *cf. J. McIntyre Machinery Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality) (holding, in the context of personal jurisdiction, that targeting of the United States market as a whole did not suffice to demonstrate targeting of New Jersey). Of course, a showing of some effect in the United States cannot defeat the propriety of a dismissal based on comity, since it is possible to establish that effect in *every* case in light of the globalization of the economy; were the rule otherwise, the fact that some number of products eventually ended up in the United States—the

biggest market in the world—would permit an exercise of jurisdiction even if a case was foreign in all essential respects. To avoid this result, the *Timberlane I* test properly focuses on the relative significance of effects in the United States and on whether the United States was specifically targeted—and those factors cut against jurisdiction here. *See Timberlane I*, 549 F.2d at 614.

Finally, any conduct in furtherance of the conspiracy in the United States was far overshadowed by foreign conduct—most notably that each and every Crystal Meeting at which prices were allegedly fixed was held in Taiwan. *See Timberlane II*, 749 F.2d at 1385-86 (explaining that when "virtually all of the illegal activity occurred" abroad, that fact "clearly weighs against the exercise of jurisdiction"); *Rivendell Forest Prods.*, 810 F. Supp. at 1119 (declining jurisdiction on grounds of comity in part because the alleged anticompetitive activities occurred in Canada).

On balance, nearly all of the comity factors weigh against an exercise of jurisdiction here, demonstrating yet again that this case does not belong in a U.S. court. *See Timberlane II*, 749 F.2d at 1386 (dismissing a case on comity grounds when "all but two of the factors in *Timberlane I*'s comity analysis indicate that we should refuse to exercise jurisdiction over this antitrust case"). Defendants accordingly are entitled to acquittal under Rule 29.

IV. Defendants Are Entitled To A New Trial Because Their Foreign Conduct Should Have Been Evaluated Pursuant To The Rule Of Reason

Even if it could be established that this criminal prosecution properly proceeded in a U.S. court, the conduct of the trial itself suffered from a fundamental flaw: The Ninth Circuit has rightfully taken care to circumscribe the scope of the Sherman Act as applied to foreign conduct, and under that binding precedent defendants were entitled to defend their actions pursuant to the

rule of reason. Because the jury instead convicted them on a *per se* theory of liability, the convictions cannot stand and relief under Rule 33 is warranted.

A. *Metro Industries* Applies Rule-of-Reason Analysis To All Cases Involving Foreign Conduct

Whatever difficulties exist in determining whether and how the Sherman Act applies to foreign conduct, the Ninth Circuit has made one aspect of the analysis altogether easy by adopting a bright-line rule: "[W]here a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Metro Industries*, 82 F.3d at 845. Lest there be any doubt about the scope of this unqualified declaration, the Ninth Circuit repeated it several times over in varying formulations. At the outset: "Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, *per se* analysis is not appropriate." *Id.* at 843. And again: "Foreign Conduct Cannot Be Examined Under the Per Se Rule." *Id.* at 844. And still again: "Even if Metro could prove that the registration system constituted a 'market division' that would require application of the *per se* rule if the division occurred in a domestic context, application of the *per se* rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-45. And once more: "[T]he potential illegality of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States, regardless of the inherently suspect appearance of the foreign activities." *Id.* at 845.[10]

[10] Courts and commentators have acknowledged that *Metro Industries* sets forth a bright-line rule that foreign conduct must always be analyzed pursuant to the rule of reason, even if the conduct is anticompetitive *per se* in the domestic context. *See, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 273b, p. 331 (2006) ("[I]n *Metro Industries*, the Ninth Circuit concluded that a rule of reason inquiry is necessary in all cases involving restraints abroad"); *United States* v. *Nippon Paper Industries Co., Ltd.*, 62 F. Supp. 2d 173, 193 (D. Mass. 1999)

In articulating this bright-line rule applying rule-of-reason analysis to foreign conduct, the Ninth Circuit was careful not to distinguish between different types of *per se* offenses. As just noted, the court instructed that rule-of-reason analysis must apply "regardless of the inherently suspect appearance of the foreign activities." *Id.* at 845. And it went so far as to single out "price fixing in a foreign country" as an example of the type of conduct that requires a different analysis as compared to its domestic counterpart. *Id.* Under the Ninth Circuit's bright-line rule, the relevant question is not *what kind* of agreement was formed, but rather *where* that agreement occurred: In every instance "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Id.*[11]

B. This Case Falls Within *Metro Industries*' Bright-Line Rule

Just as *Metro Industries* clearly held that foreign conduct must be assessed pursuant to the rule of reason, it is equally clear that the foreign elements of this case place it squarely within the *Metro Industries* rule; indeed, this case involves as much, indeed more, foreign conduct than the conduct at issue in *Metro Industries* itself.

The dispute in *Metro Industries* centered on a Korean design registration system that allegedly permitted a South Korean exporting company and two of its U.S. subsidiaries to engage

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(understanding *Metro Industries* to require that "an international price-fixing, unlike a domestic price-fixing, is subject to different rules in all cases—i.e., a rule of reason test").

[11] In an alternative holding, the Ninth Circuit also ruled that the particular type of trade restraint at issue in *Metro Industries* necessitated rule-of-reason analysis because "the conduct at issue [wa]s not a garden-variety horizontal division of a market." 82 F.3d at 844. This ruling does nothing to undermine the force of the court's unequivocal other holding that all foreign conduct is subject to rule-of-reason analysis. *See English* v. *United States*, 42 F.3d 473, 485 (9th Cir. 1994); *see also United States* v. *Wright*, 496 F.3d 371, 375 n.10 (5th Cir. 2007) (explaining that it is "well-settled that alternative holdings are binding"); *Mariana* v. *Fisher*, 338 F.3d 189, 201 (3d Cir. 2003) ("[A]n alternative holding has the same force as a single holding; it is binding precedent.").

in predatory pricing in the United States. 82 F.3d at 841. The U.S.-importer plaintiff contended that it had provided the Korean exporter with models of a stainless steel steamer design, which the exporter then registered under the Korean system, vesting it with a three-year exclusive right to export the design. *Id.* When the U.S. importer later attempted to order the steamers from another company, the Korean exporter blocked the sales by invoking the design right it had obtained. *Id.* at 841-42. The case featured many domestic elements: a U.S. plaintiff alleged injury to U.S. commerce; that injury stemmed from cooperation between the U.S. plaintiff and the foreign defendant in designing a particular steamer model intended for the U.S. market; U.S. subsidiaries of the foreign exporter were joined as defendants and allegedly helped to implement the predatory pricing scheme; the foreign defendant had "a great deal of business in the United States," *id.* at 847; and "[t]he impact of the registration [wa]s felt more in the United States than in Korea because the registration system only limit[ed] the *export* of particular designs," *id.* Despite these domestic aspects of the controversy, the Ninth Circuit classified the dispute as "foreign conduct," triggering the rule that "where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." *Id.* at 845. Comparing these facts to those at issue here, it is clear that whatever acts or effects occurred in the United States, the predominantly foreign conduct in this case suffices to bring it within the *Metro Industries* rule.

C. The *Metro Industries* Rule Accords With Precedent And Common Sense

Because *Metro Industries* clearly states that foreign conduct must be assessed under the rule of reason and because this case clearly involves foreign conduct, defendants are entitled to a new trial. But it bears emphasis that the *Metro Industries* rule is grounded in precedent and sensible in light of the need for caution when extending U.S. laws abroad—a need the Supreme Court emphasized in *Morrison*. In this regard, even if this Court were to find that *Hartford Fire*

both (1) survives *Morrison* and (2) applies to this foreign *criminal* case, that would not resolve the question of *how* the Sherman Act functions here. *Morrison*, echoing the reasoning of *Metro Industries*, helps answer that question: Because any extraterritorial application of U.S. law must be carefully circumscribed, foreign conduct should always be assessed pursuant to the rule of reason.

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of [Section One of the Sherman Act]." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 882 (2007). In other words, *per se* illegality is the exception to the rule-of-reason norm. *Cont'l T.V.* v. *GTE Sylvania*, 433 U.S. 36, 49 (1977) (emphasizing that the rule of reason supplies the "prevailing standard of analysis").[12] Accordingly, courts permit *per se* liability "only after considerable experience with certain business relationships" in order to properly confine the class of *per se* offenses. *Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (quoting *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963)); *see also Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 349 n.19 (1982).

Under a straightforward application of these precedents, and as *Metro Industries* recognized, *per se* analysis is inappropriate when foreign conduct is at issue because courts lack "considerable experience" with foreign conspiracies that target commerce throughout the world and implicate market dynamics radiating far beyond U.S. borders. *See also* Areeda &

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[12] Even as to price fixing, the Supreme Court has not invariably applied a *per se* rule. *See, e.g.*, *NCAA* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (concluding that a *per se* rule did not apply to horizontal price fixing because "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"); *Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (indicating that the question is not simply "whether two or more potential competitors have literally 'fixed' a 'price,'" but instead whether the "particular practice . . . is plainly anticompetitive and very likely without redeeming virtue" (some internal quotation marks omitted)).

Hovenkamp, *supra*, at ¶ 273b, p. 328 (observing that analysis of foreign trade restraints must take account of "the international context" because "[r]isks, the need for combining complementary resources, or scale economies might be greater in some international combinations" and because "the customary terms of dealing in foreign markets might be different such that the less restrictive alternatives available at home would not be available abroad").[13]

As the Ninth Circuit observed, "[d]omestic antitrust policy uses per se rules for conduct that, in most of its manifestations, is potentially very dangerous with little or no redeeming virtue," but "[t]hat rationale would be inapplicable to foreign restraints that, in many instances, either pose very little danger to American commerce or have more persuasive justifications than are likely in similar restraints at home." *Metro Industries*, 82 F.3d at 845 (quoting 1 Phillip Areeda & Donald F. Turner, *Antitrust Law*, ¶ 237 (1978)). Moreover, the Court of Appeals noted that there is good reason to think that ordinary assumptions about anticompetitive effect break down when applied to conduct occurring outside U.S. borders:

> [T]he conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets. A foreign joint venture among competitors, for example, might be more "reasonable" than a comparable domestic

[13] The Supreme Court's general trend away from the *per se* rule further demonstrates the need for caution when applying criminal sanctions to foreign conduct. *See, e.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 882 (2007) (overruling prior precedent that applied *per se* analysis to certain vertical restraints); Randal C. Picker, Twombly, Leegin, *and the Reshaping of Antitrust*, 2007 Sup. Ct. Rev. 161, 163 (stating that "the [*Leegin*] Court continued its trend of killing off old Supreme Court precedents treating a variety of practices as *per se* illegal"). If the *per se*/rule-of-reason divide is not well settled in the domestic sphere, it certainly should not be extended to the international context, with all the additional market complexities existing there. *Cf. California Dental Ass'n* v. *FTC*, 526 U.S. 756, 779 (1999) ("We have recognized . . . that there is often no bright line separating *per se* from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called '*per se*' condemnation is justified." (some internal quotation marks omitted)).

> transaction in several respects: the actual or potential harms touching American commerce may be more remote; the parties' necessities may be greater in view of foreign market circumstances; and the alternatives may be fewer, more burdensome, or less helpful.

Metro Industries, 82 F.3d at 845 (quoting Areeda & Turner, *supra*, ¶ 237).[14]

And even putting to one side difficulties in making assumptions about the market effects of foreign conduct, *per se* antitrust analysis is at odds with Supreme Court precedent concerning the extraterritorial application of the Sherman Act. By definition, conduct that is *per se* unlawful is prohibited without reference to whether the conduct actually produced an anticompetitive effect in a given case. *See, e.g.*, *Nw. Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (agreements in the *per se* category "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused" (internal quotation marks and citation omitted)). Consider the example of price fixing. It does not matter under the *per se* rule whether competitors fixed prices at the same level (or even below) the price that would prevail in a perfectly competitive market; the mere *act* of price fixing is illegal even if that act does not harm consumers.

This feature of *per se* analysis contravenes precedent concerning foreign conduct because, to the extent the Sherman Act applies extraterritorially at all, it can only apply when there are substantial and intended effects in the United States. *See Hartford Fire*, 509 U.S. at 796; *see also*

[14] This insight from *Metro Industries* should not seem foreign to the government, which itself adopted the position for many years that different substantive antitrust rules should apply to foreign and domestic conduct. The Department of Justice's 1977 *Antitrust Guide for International Operations* stated that "[t]he rule of reason may have a somewhat broader application to international transactions where it is found that (1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications not normally found in the domestic market." U.S. Dep't of Justice, *Antitrust Guide for International Operations* 1 (1977 superseded) (citing Kingman Brewster, *Antitrust and American Business Abroad* 79-84 (1958)); *see also* Areeda & Hovenkamp, *supra*, at ¶ 273b, p. 333 (describing the Department of Justice's prior view that "the rule of reason should have somewhat broader application with respect to restraints abroad than over domestic restraints").

Dee-K Enters., 299 F.3d at 292 (observing that "the rationale for *per se* rules in cases addressing domestic conduct seems plainly inapplicable to foreign restraints that pose very little danger to American commerce" (internal quotation marks and ellipses omitted)); *MM Global Services, Inc.* v. *The Dow Chem. Co.*, No. 3:02CV1107, 2004 WL 556577, at *5 (D. Conn. Mar. 18, 2004) (noting that when a Sherman Act case involves foreign conduct, "effects may not be *presumed*" even "in cases where a *per se* violation . . . is alleged"). Because *per se* analysis is intended to foreclose case-by-case inquiry into the nature and depth of a restraint's effect on the market, it has no role to play when assessing foreign conduct, which must be shown to have the requisite U.S. effects in order to be subject to the Sherman Act.

D. Denial Of A New Trial Pursuant To *Metro Industries* Would Constitute A Due Process Violation

Because the evidence during the criminal prosecution confirmed that this case involves foreign conduct triggering application of rule-of-reason analysis under *Metro Industries*, defendants must have an opportunity to defend their conduct under the rule of reason in a new trial; indeed, the failure to order a new trial would constitute a striking departure from binding precedent in violation of the Due Process Clause.

It is long settled that retroactive judicial expansion of criminal statutes may contravene the Due Process Clause's fair notice principle. *See Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). A judicial construction is impermissible when it constitutes "a marked and unpredictable departure from prior precedent." *Rogers* v. *Tennessee*, 532 U.S. 451, 467 (2001); *see also Webster* v. *Woodford*, 369 F.3d 1062, 1069 (9th Cir. 2004). If this Court disregards *Metro Industries* and permits defendants' convictions to stand on a *per se* theory of liability, that ruling would expand and apply the Sherman Act in a new and unforeseen way. *See Poland* v. *Stewart*,

117 F.3d 1094, 1099 (9th Cir. 1997) (emphasizing that the Due Process Clause prohibits unforeseeable judicial enlargements of criminal statutes).

To determine whether a judicial opinion infringes "the right to fair warning that certain conduct will give rise to criminal penalties," the Ninth Circuit examines "the statutory language at issue, its legislative history, and judicial constructions of the statute." *Webster*, 369 F.3d at 1069. Any fair notice argument based on applications of the Sherman Act must of necessity focus on judicial constructions, because the Act, "unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *United States Gypsum Co.* 438 U.S. at 438; *see also Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688 (observing that the Sherman Act invites "courts to give shape to the statute's broad mandate by drawing on common-law tradition"). Without clear statutory text to work from, judicial standards—like the bright-line rule in *Metro Industries* prohibiting *per se* analysis of foreign conduct—serve a particularly critical notice function. Indeed, the difference between rule-of-reason analysis and *per se* illegality affects whether a criminal prosecution will be possible at all, in light of the federal government's longstanding policy of only bringing criminal charges for *per se* offenses. *See, e.g.*, U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* (Apr. 1995) ("Conduct that the Department prosecutes criminally is limited to traditional *per se* offenses of the law.").

Permitting the government to proceed on a *per se* theory at trial substantively impacted the scope of defendants' criminal liability. Under the *per se* theory, the government was not required to prove that defendants acted with knowledge that their conduct would likely cause anticompetitive effects in the United States, and the defendants' foreign conduct was conclusively presumed to have that effect. Had rule-of-reason analysis applied, as *Metro Industries* requires, defendants would have been able to argue that they did not possess the *mens rea* necessary to

support criminal liability and that the procompetitive benefits of their conduct outweighed any anticompetitive effect. The difference in the choice of standard affected the core elements of the alleged crime and the government's evidentiary burden. Because it is now beyond dispute that defendants' conduct falls within *Metro Industries*' bright-line rule, defendants must have the opportunity to mount a rule-of-reason defense in a new trial to avoid a violation of their due process rights.

V. The Government Failed To Prove Venue In Violation Of The U.S. Constitution And Bedrock Criminal Procedural Protections

The foreign nature of this prosecution reveals yet another foundational flaw in the government's case: By focusing on the foreign actions of foreign defendants, the government failed to carry its burden under the Constitution to prove that venue was proper in the Northern District of California.

The Constitution demands that venue lie in the state and district where a crime occurred: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const. amend. VI; *see also* U.S. Const. Art. III, § 2, cl. 3; Fed. R. Crim. P. 18. The constitutional stature of the venue requirement underscores that "'[q]uestions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy.'" *United States* v. *Barnard*, 490 F.2d 907, 910 (9th Cir. 1973) (quoting *United States* v. *Johnson*, 323 U.S. 273, 276 (1944)); *see also United States* v. *Baxter*, 884 F.2d 734, 736 (3d Cir. 1989) ("Proper venue in criminal trials is more than just a procedural requirement; it is a safeguard guaranteed twice in the United States Constitution itself."). These constitutional provisions give rise to the government's burden to prove proper venue. *United States* v. *Corona*, 34 F.3d 876, 879 (9th Cir. 1994).

Venue has particular salience in the context of this suit, which is foreign in all important respects. The Framers of the Constitution required crimes to be tried where they were committed in order to "protect the rights of the accused" and to check "federal government power against the individual." Todd Lloyd, *Stretching Venue Beyond Constitutional Recognition*, 90 J. Crim. L. & Criminology 951, 955 (2000). Shortly before the American Revolution, Parliament in Great Britain revived an ancient statute that permitted colonists accused of treason to be taken to England for trial; as then-Judge Alito has chronicled, this despised practice was "one of the precipitating factors of the American Revolution," *United States* v. *Palma Ruedas*, 121 F.3d 841, 862 (3d Cir. 1997) (Alito, J., dissenting), *rev'd by United States* v. *Rodriquez-Moreno*, 526 U.S. 275 (1999). Indeed, Thomas Jefferson specifically condemned the practice in the Declaration of Independence, criticizing King George III "for transporting us beyond Seas to be tried for pretended offenses." The Declaration of Independence, ¶ 20 (U.S. 1776). Against this backdrop, Justice Story described the justifications for the Constitution's venue requirement:

> The object . . . is to secure the party accused from being dragged to a trial in some distant state, away from his friends, witnesses, and neighborhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject a party to the most oppressive expenses, or perhaps even to the inability of procuring proper witnesses to establish his innocence.

Joseph Story, *Commentaries on the Constitution* § 925 (Carolina Academic Press reprint 1987); *see also Palma Ruedas*, 121 F.3d at 861 (Alito, J., dissenting) ("[T]he origin of [the Constitution's venue provisions] shows that they were adopted to achieve important substantive ends—primarily to deter governmental abuses of power."). The trial record in this case well illustrates the importance of the venue requirement, as all the individual defendants lived, worked, and reached the alleged conspiratorial agreements in Taiwan, thousands of miles and an ocean away from the United States. *See United States* v. *Angotti*, 105 F.3d 539, 541-42 (9th Cir.

1997) ("The Supreme Court has, at various times, expounded on the importance of prosecuting cases near the criminal defendant's home." (citing *United States* v. *Cores*, 356 U.S. 405 (1958), and *Hyde* v. *Shine*, 199 U.S. 62 (1905)). In short, defendants have been "transport[ed] . . . beyond Seas" to a judicial district with which they have little if any relevant connection.

The government failed to meet its constitutional obligation to establish venue in this case. For venue to lie in the Northern District, the government had to prove by a preponderance of the evidence that the conspiracy was formed in this judicial district or that a co-conspirator committed an overt act in furtherance of the conspiracy here. *Corona*, 34 F.3d at 879. The government made neither showing: All price agreements were formed at Crystal Meetings in Taiwan, and no direct evidence at trial established an overt act furthering the conspiracy in the Northern District.

Nor does circumstantial evidence adequately support the chain of inferences necessary to establish venue. The government's sole theory of venue at trial was that co-conspirators negotiated the sale of price-fixed panels to HP in the Northern District before HP moved its procurement office to Texas in May 2002. RT 5325-26. That slender reed cannot bear the necessary weight. To carry the burden of proof on this theory, the government needed to demonstrate three independent things: (1) that price negotiations occurred in this district; (2) that a co-conspirator present in the venue participated in those negotiations; and (3) that the negotiations were based on prices fixed in Taiwan and so were undertaken in furtherance of the conspiracy. But the government's proof at trial was insufficient not just as to one, but to each of these steps. Because the government may not "pil[e] inference upon inference" to establish venue, *United States* v. *Gomez*, 889 F.2d 1096, 1989 WL 143113, at *1 (9th Cir. 1989) (quoting *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943)), defendants are entitled to a

judgment of acquittal. *See United States* v. *Nevils*, 598 F.3d 1158, 1164-67 (9th Cir. 2010) (en banc).

A. The Government Failed To Establish That Price Negotiations Occurred In The Northern District of California

The trial record lacks sufficient evidence to show that *any* price negotiations occurred in the Northern District of California. The record establishes only that AOUA maintained a small office with a few employees in Cupertino, California beginning in September 2001, RT 838, and that HP's TFT-LCD procurement division was based in Cupertino until May 2002, RT 496. But having an office in a particular location does not establish that overt acts in furtherance of a conspiracy occurred there, even as a circumstantial matter. *United States* v. *Pace*, 314 F.3d 344, 350-51 (9th Cir. 2002). And that is especially true in this case because the record shows that AUOA did not attempt to sell TFT-LCD panels to U.S. customers during the nine-month period on which the government relies. RT 834 (testimony of Michael Wong) (emphasizing that AUOA did not sell panels, but rather merely promoted them, during these months).[15]

[15] Moreover, the government's attempt to establish venue based on supposed price negotiations in Cupertino between 2001 and 2002 does not square with the Superseding Indictment's representation that venue was proper because the conspiracy "was carried out . . . in the Northern District of California *within the five years preceding the filing of this indictment*"—that is, between June 2005 and June 2010. Dkt. 8, ¶ 21 (Superseding Indictment). Defendants prepared and executed their defense based on the Indictment's 2005 to 2010 venue timeframe, but the government now seeks to rely on a wholly different time period. Because the government's venue argument constructively amends the Indictment, relief under Rule 29 is appropriate. *United States* v. *Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984). At the very least, the argument depends on a timeframe that is "materially different from [that] alleged in the indictment"—indeed, fatally so. *E.g.*, *United States v. King*, 200 F.3d 1207, 1217 n.3 (9th Cir. 1999); *United States* v. *Durades*, 607 F.2d 818, 820 (9th Cir. 1979) (reversing a conviction where "variance between the indictment and the proof infringed one of [defendant's] substantial rights, Viz. his interest in being tried only in a district where venue properly lay"). The government's decision to wait until its rebuttal closing argument to announce that its venue proof hinged on pre-2005 conduct cemented the prejudicial effect. As the other defendants' post-trial motion explains, defendants were left with no opportunity to explain to the jury why the government's venue contention lacked any evidentiary basis. *See* AUO Post-Trial Motion at 13-15.

The leading case on this issue is *United States* v. *Pace*. In *Pace*, the Ninth Circuit concluded that maintaining business headquarters and employing a secretary in Tucson, Arizona did not establish that acts in furtherance of wire fraud occurred there. 314 F.3d at 350-51. The record in *Pace* included evidence that a third party sent the defendant a letter at his Tucson address requesting instructions regarding a fraudulent wire transfer and that the defendant authorized his secretary in Tucson to provide those instructions. *Id.* at 350. Missing entirely from the government's proof, though, was "sufficient evidence that [the defendant] gave this authorization *from Arizona*." *Id.* at 350-51 (emphasis added). The Ninth Circuit refused to infer that the location of the defendant's office and the direction he provided to his secretary there made it more likely than not that fraudulent use of the wires had occurred in Tucson. *See also United States* v. *Goodwin*, 433 F. App'x 636, 642 (10th Cir. 2011) (in wire fraud case premised on drug-distribution-related phone call, court did not rely solely on the fact that defendant lived in the venue as evidence that the call occurred there, but also highlighted (1) that the parties planned for the call to take place when a co-conspirator "got in town" and (2) the lack of evidence that defendant ever "left [the venue] to transact business").

The lack of evidence establishing venue in this case is even starker than it was in *Pace*. After all, the record here shows that AUOA and HP did not engage in price negotiations during the nine-month period that both companies had offices in Cupertino; Michael Wong explained that during AUOA's early years—which include the months at issue here—AUOA merely promoted AUO products and did not attempt to sell TFT-LCD panels to U.S. customers. RT 834-35. But even if the proximity of AUOA's and HP's offices for a limited number of months could give rise to the speculative possibility that AUOA took some action that could qualify as an overt act in furtherance of the conspiracy, that speculation would not suffice. It was equally possible that the defendant in *Pace* authorized use of the wires from his Tucson office. But speculation of

this sort, the Ninth Circuit has held, is not enough. Accordingly, the government has not established that price negotiations occurred in the Northern District.

B. The Government Failed To Prove That A Co-Conspirator Present In The Northern District Of California Participated In Price Negotiations

Even if one were to assume that the government introduced sufficient evidence to infer that price negotiations occurred in the Northern District, its proof of venue would still fall short because it did not establish that *a co-conspirator* present in the venue participated in those negotiations. *See, e.g.*, *United States* v. *Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003) (stating that venue is proper "in any district in which an overt act in furtherance of the conspiracy *was committed by any of the conconspirators*" (internal quotation marks omitted and emphasis added)).

If price negotiations occurred in the Northern District, they would be relevant to the question of venue only if the government had established that a co-conspirator was involved in them—and it has not done so. The government never maintained that any of the individual defendants negotiated prices with customers in the Northern District. Nor did the government establish that a co-conspirator otherwise took an overt act in furtherance of the conspiracy here. *See Pace*, 314 F.3d at 350-51 (holding that the government failed to meet its venue burden where the evidence did not establish that the defendant was in the venue when he authorized his secretary to provide information triggering a fraudulent wire transfer). Indeed, the record does not even clearly establish that defendants ever set foot in the Northern District during the life of the conspiracy. Moreover, the government offered no proof that any AUOA employee unnamed in the indictment attended Crystal Meetings or otherwise joined the conspiracy. Because the government cannot establish a co-conspirator's participation, any price negotiations that did occur would not suffice to establish venue.

C. The Government Failed To Prove That Any Price Negotiations In The Northern District Of California Occurred In Furtherance Of The Conspiracy

Even assuming the government could establish that a co-conspirator engaged in price negotiations in the Northern District of California, venue still would not lie in this district because the evidence is insufficient to demonstrate that those negotiations involved the prices fixed in Taiwan; accordingly, the government has not carried its burden to prove that an overt act was committed in the district *in furtherance* of the conspiracy. *See Angotti*, 105 F.3d at 545.

The evidence at trial showed that AUO charged its customers prices consistently below those agreed to at the Crystal Meetings. *E.g.*, RT 4264 (Oct. 2001); RT 4274 (Nov. 2001); RT 4276 (Jan. 2002). Michael Wong testified about the mechanisms that AUO employed to hide its low prices from its competitors, including the use of rebates and price masking to give the appearance that customers had paid a much higher price. RT 1086-87 (rebates); RT 1089 (price masking). "No one ever told [Wong that he] had to follow the price that was talked about at the Crystal Meeting" or "that AUO was bound by a price at a Crystal Meeting." RT 1094. Mr. Wong explained—and the government never challenged—that instead "AUO was trying to take business away from its competitors" and that "AUO's competitors were trying to take business away from AUO." RT 1061-62. In sum, the government failed to introduce evidence establishing that AUO employees more likely than not attempted to negotiate prices with their customers that matched Crystal Meeting prices. And so for this third reason, too, the government's venue evidence falls short.

D. The Government's Venue Evidence Is Too Speculative And Involves Too Many Inferential Leaps To Establish That Co-Conspirators Engaged In Overt Acts In Furtherance Of The Conspiracy In The Northern District

As the preceding discussion demonstrates, the government must stack inference upon inference to prove venue. First, the government must contend that the mere presence of a customer's office in the venue for a nine-month period makes it more likely than not that price

negotiations occurred there—even though the Ninth Circuit's decision in *Pace* forecloses this sort of speculation. Then the government must maintain that a co-conspirator participated in the price negotiations in the Northern District of California—even though the record lacks sufficient evidence to support that contention. Finally, the government must argue that when the co-conspirators in the Northern District (if they existed) participated in the negotiations in the venue (if those negotiations occurred), they used the prices fixed in Taiwan—even though the record shows that AUO consistently charged its customers lower prices than those agreed to at the Crystal Meetings.

Because the government's theory of venue requires "piling inference on inference" with "no clear preponderance in favor of . . . the existence of each of the links in the chain," *Smith* v. *Gen. Motors Corp.*, 227 F.2d 210, 216 (5th Cir. 1955), the evidence is insufficient to establish that defendants were tried in the "district wherein the crime shall have been committed." U.S. Const. amend. VI; *see United States* v. *Spinney*, 65 F.3d 231, 234 (1st Cir. 1995) (emphasizing that a reviewing court must "take a hard look at the record and . . . reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative"). Because the government failed to carry its burden under the Constitution and the Federal Rules of Criminal Procedure to prove venue, defendants must be acquitted.

CONCLUSION

For the foregoing reasons, Dr. Hsiung requests that the Court enter a judgment of acquittal under Federal Rule of Criminal Procedure 29. Alternatively, Dr. Hsiung requests that the Court order a new trial pursuant to Federal Rule of Criminal Procedure 33.

Dated: April 20, 2012

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