Nos. 12-10500, 12-10514, 12-10558
(consolidated with Nos. 12-10492, 12-10493, 12-10559, 12-10560)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee-Cross-Appellant,

v.

AU Optronics Corporation,

Defendant-Appellant-Cross-Appellee.

United States of America,

v.

AU Optronics Corporation America,

Defendant-Appellant.

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

OPENING BRIEF FOR DEFENDANTS-APPELLANTS
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INTRODUCTION

This appeal raises issues of law that profoundly affect economic and political relations between the United States and other nations.

This prosecution arose out of a financial crisis that plagued the nascent TFT-LCD (thin-film transistor liquid crystal display) flat screen panel industry at the beginning of this century. Struggling to survive in a market dominated by the cathode ray tube technology then prevalent in the manufacture of televisions and computers, Korean and Taiwanese manufacturers of TFT-LCDs began meeting in 2001 in Taipei to discuss their mutual concerns. Over the five-year life span of what became known as the "Crystal Meetings," representatives of a half dozen TFT-LCD manufacturers, including defendant AU Optronics Corporation (AUO), exchanged price information and discussed proposals for price stabilization.

During the same period of time, TFT-LCD technology became ubiquitous in the manufacture of televisions, computers, and cell phones, as the quality of liquid crystal displays constantly improved and their price to the American consumer dramatically dropped. To quote the district court, AUO and its executives "produced an extremely useful product, and it really has changed the world . . . how we function, and how we process information, and how we live our lives, and how we conduct our government." (ER 246-47.)

Subsequently, the United States Department of Justice charged the Crystal Meeting participants with conspiring to fix prices in violation of the Sherman Act. Most of the charged companies and executives entered into plea agreements with the government. AUO, its American subsidiary AU Optronics Corporation America (AUOA), and their executives did not. In the district court proceedings, the defendants vigorously contested the legal standards under which their foreign conduct was to be judged.

The government contended that a foreign agreement to set prices, no matter how reasonable, is a *per se* violation of the Sherman Act, requiring proof of neither an intent to curb competition nor an anti-competitive effect. The defense forcefully disagreed, contending that several sources of law imposed a far greater burden of proof on the prosecution than did its *per se* theory.

First, this Court has squarely held that because foreign conduct cannot be presumed to have the same anticompetitive impact as domestic conduct, the rule of reason always applies in foreign conduct cases. *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996). Under the rule of reason, the government would have had to prove that the defendants intended to harm United States commerce, that their conduct actually had a substantial anticompetitive effect, and, ultimately, that their conduct was unreasonable in light of all of the circumstances of the relevant market.

Second, the Foreign Trade Antitrust Improvement Act (FTAIA) states that the Sherman Act does not apply to foreign conduct unless that conduct is proven to come within one of two statutory exclusions: (1) the import trade exclusion, or (2) the domestic effects exclusion.

Third, under Learned Hand's opinion in *Alcoa*,[1] later cited by with approval by the Supreme Court, the Sherman Act reaches only foreign conduct that was intended to substantially affect American commerce and did so affect it.[2]

In its pretrial rulings, the district court embraced the government's position, rejecting the defendants' claims that the indictment failed to allege the elements required by *Metro Industries*, the FTAIA, and/or *Alcoa*. The court erroneously permitted the government to try its case on a *per se* theory. In addition, the instructions finally given were fatally flawed, and the government's evidence was insufficient as a matter of law to prove a Sherman Act violation under the FTAIA.

For these reasons, the convictions of all defendants must be reversed.

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[1] *United States v. Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945).

[2] In their opening brief, codefendants Chen and Hsiung contend that *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) effectively overrules *Alcoa* and bars extraterritorial application of the Sherman Act. Pursuant to Fed. R. App. P. 28(i), AUO and AUOA join that and all other claims raised by their codefendants.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from a final judgment of conviction, entered by the district court orally on September 20, 2012, and formalized in written orders filed on October 2, 2012. (ER 216, 221.) The notices of appeal were timely filed. (ER 201, 228.)

ISSUES PRESENTED FOR REVIEW

I. Whether the convictions must be reversed because the district court refused to follow this Court's holding in *Metro Industries*, which requires application of rule of reason analysis in foreign antitrust cases.

II. Whether the indictment was deficient because it alleged none of the elements required by the FTAIA to trigger application of the Sherman Act in foreign antitrust cases.

III. Whether the evidence at trial was insufficient to prove the required FTAIA elements.

IV. Whether the indictment was deficient for failing to allege the "intent and effects" elements of *Alcoa*, and whether reversal is also required because the jury instructions at trial failed to require a finding of those elements.

V. Whether the district court erred when, relying on a finding of collective gain by coconspirators, it applied the alternative fine statute and imposed a fine in excess of the statutory maximum for Sherman Act violations.

STATEMENT OF THE CASE

The defendants were charged by a superseding indictment filed on June 10, 2010. (ER 1692.) The charged defendants included AU Optronics Corporation, AU Optronics Corporation of America, and several AUO employees and executives, including defendant-appellants Hsuan Bin Chen and Hui Hsiung. The government alleged in one criminal count that the defendants had agreed to fix prices in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

Jury trial commenced before the Honorable Susan Illston on January 10, 2012. The jury returned its verdict on March 13, 2012. (ER 587.) The jury found both corporate defendants, AUO and AUOA, guilty. It found two AUO executives, H.B. Chen and Hui Hsiung, guilty. It acquitted two other AUO executives, and as to one other, it was unable to reach a unanimous verdict.

After denying the convicted defendants' post-trial motions, Judge Illston sentenced the defendants on September 20, 2012. AUO and AUOA were placed on probation, and AUO was ordered to pay a fine of $500 million. (ER 216-20.) The individual defendants, Hsiung and Chen, were each sentenced to a term of

imprisonment of 36 months, in addition to monetary sanctions and other conditions. The defendants timely appealed.

STATEMENT OF FACTS

A. The Government's Allegations

The superseding indictment alleged "the defendants and other coconspirators 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 ("TFT-LCD") in the United States and elsewhere." (ER 1723.)

The indictment focused on a series of "Crystal Meetings" that took place in Taiwan between 2001 and 2006. The government alleged that the defendants met secretly in hotel rooms and other locations in Taipei with representatives of other TFT-LCD manufacturers. (ER 1727-31.) It alleged that at these meetings, the participants agreed to fix the prices of TFT-LCD panels. It further alleged that the various manufacturers regularly exchanged pricing information in order to enforce the price-fixing agreement.

Finally, the indictment alleged that the defendants sold panels "in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in [other] states and countries." (ER 1732.) Furthermore, the defendants' activities "were within the flow of, and substantially affected, interstate and foreign trade and commerce." (*Id.*)

B. Pretrial Proceedings

Most of the claims raised in this appeal were initially raised by the defense and rejected by the district court prior to trial. The defendants filed two motions to dismiss the indictment. In the first, the defendants argued that the indictment was deficient because it pleaded the case as a *per se* antitrust case rather than a "rule of reason" antitrust case. (ER 1688-90.) They argued that the indictment therefore, among other things, failed to allege the element of intent required for a rule of reason case. The government argued that this case should be subject to the *per se* rule and thus not subject to the rule of reason. (ER 1674.) The district court agreed with the government and denied the motion to dismiss. (ER 189-91.)

In the second motion to dismiss, the defendants argued that regardless of the application of the *per se* rule, the indictment was deficient because it failed to allege other elements required for cases involving foreign conduct. (ER 1663-71.) In particular, the indictment failed to allege the statutory elements of the Foreign Trade Antitrust Improvement Act and other elements required by case law. In opposition, the government argued that it was not required to plead any such elements because this was not truly a "foreign" case. (ER 1643.) The district court again sided with the government and denied the motion to dismiss. (ER 177-85.)

Prior to trial, in advance of the pretrial motions hearing, the defendants submitted proposed jury instructions that would have required the government to

prove the elements of a rule of reason case. (ER 1524-34.) For the same hearing, the government filed a motion *in limine* aimed at barring the defense from arguing a rule of reason defense. The government argued that the defendants should not be allowed to present any evidence or argument that their actions were reasonable, necessary, or beneficial to the overall market. (ER 1557.) The district court again agreed with the government. It stated that because this was a price-fixing case and thus a *per se* case, arguments about reasonableness "won't be allowed." (ER 146-47.)

C. The Evidence at Trial

Given the district court's pretrial rulings barring a defense under the rule of reason, the trial focused primarily on the limited issue remaining under a *per se* theory of Sherman Act illegality—whether there was an agreement to set prices. The government argued to the jury that the defendants and their coconspirators had so agreed. The defendants argued that while they had met with competitors and exchanged some pricing information, they had not in fact agreed to fix prices. Rather, they had engaged in a strategic (and often deceptive) plan to obtain market intelligence from competitors. The defendants introduced evidence that they had competed vigorously in the market, had not abided by any price-fixing agreement, and did not charge higher prices or earn higher profits as a result of the meetings.

The defendants disagree with the jury's conclusion that they agreed to fix prices with their competitors, but given the demanding standard under which such claims are decided on appeal, the defendants do not now contest the legal sufficiency of the government's evidence showing an agreement. Thus, the trial evidence is substantially irrelevant to the legal claims raised herein and therefore can be summarized briefly.[3]

1. Defendants' Business Operations

Defendant-appellant AU Optronics, a Taiwanese corporation, is one of the world's largest manufacturers of TFT-LCD panels. TFT-LCD panels are used in a wide variety of consumer electronics, including desktop computer monitors, laptop computers, televisions, and cell phones. TFT-LCD is currently the most widely used flat screen technology.

AUO manufactures its panels at fabrication facilities, known as "fabs," in Asia. Its panels are then sold to foreign original equipment manufacturers (OEMs), also known as systems integrators, who in turn assemble them with other components into end products such as computer monitors and laptops. The OEMs then sell end-user products to branded companies in the United States (such as Dell and Hewlett-Packard) and abroad (such as Asus and Proview). The OEMs operate

[3] The major focus of the trial evidence other than the alleged price-fixing agreement was the issue of whether the alleged conspiracy, if it existed, resulted in an overcharge of at least five hundred million dollars, as charged in the indictment. That issue and the evidence relevant to it are discussed below in Argument V.

production facilities located primarily in Asia, including Taiwan and China, and the vast majority of AUO's panel sales are to customers located in Asia. In short, AUO manufactures panels in Asia, then ships them to its customers' facilities, also primarily in Asia, and its customers' products are then resold and shipped for sale around the world, in the United States and elsewhere.

AUO has subsidiaries around the world, including AUOA. AUOA's operations are primarily sales support—it operates sales offices in the United States. AUO and AUOA have no manufacturing facilities in the United States.

AUO's chief competitors in the TFT-LCD manufacturing business are also located in Asia. These competitors include LG and Samsung in Korea; Hannstar, CMO, and CPT in Taiwan; and other companies located in Japan and China.

2. Pricing Agreements at the "Crystal Meetings"

The government's core allegation in this case was that AUO met with its competitors at a series of meetings between 2001 and 2006 and agreed to fix the prices of TFT-LCD panels.

The price of TFT-LCD panels is volatile due to changing input prices and changing supply and demand dynamics. In 2001, prices of panels were falling due in part to over-supply. According to Dr. Keith Leffler, the government's economic expert, the industry was in a "desperate" situation with "very, very depressed profits." (ER 1253-55.) Beginning in September of 2001, executives from the six

primary TFT-LCD manufacturers—Samsung, LG, CMO, CPT, Hannstar, and AUO—began meeting in hotels in Taipei to discuss industry issues, market conditions, and pricing. The government alleged that at these "Crystal Meetings," the defendants conspired to fix prices.

At trial, the government called as witnesses several Crystal Meeting participants who testified pursuant to plea agreements. For example, it called J.Y. Ho, the former president of CMO. (ER 1437.)[4] Ho testified that beginning in September of 2001, he and his top sales executives began attending the Crystal Meetings, where he would discuss "target prices" of panels with competitors in order to "stabilize" prices. (ER 1427, 1435.) According to Ho, the participants would place a certain product (i.e., a certain panel size) on a whiteboard, and then would agree to a price for that product for sales in the coming months. (ER 1424-36.) Ho attended the first three meetings and later directed his subordinates to attend.

The government also called Brian Lee, a sales manager at CPT. (ER 1354.) Lee testified that in early 2001, panel prices were falling due to over-supply. (ER 1353.) He had some initial discussions with Samsung about setting prices, and Samsung encouraged CPT to meet with other Taiwanese manufacturers to stabilize

[4] Like many of the government's witnesses at trial, Ho was a Taiwanese citizen and a native Mandarin speaker. Several witnesses testified through interpreters.

prices. (ER 1350.) The companies then began meeting regularly in hotel rooms to share market intelligence, discuss production utilization, and fix prices. (ER 1346-48, 1351.) According to Lee, the meeting participants would have detailed discussions of market conditions and then reach a "consensus" on what pricing should be for various products. (ER 1341-42.) At subsequent meetings, the participants would discuss how prices had moved to see if the agreement had been implemented. (ER 1338-40.) Lee testified that the participants agreed to keep their meetings confidential. (ER 1343.)

Aside from Ho and Lee, the government called two other executives who also attended the meetings. (*See* RT 2138 (Stanley Park of LG); 2917 (C.C. Liu of CPT).) In addition to the witness testimony, the government also presented meeting notes taken by various participants. One such report for the first meeting, authored by Brian Lee, stated:

> Through this exchange session, all makers are hoping that an orderly pricing can be maintained for the short term, and production capacity and demand balance can be achieved for the mid and long term, thus prices can be stabilized in order to ensure profitability in the *TFT* industry.

(ER 795.) The government also introduced meeting notes prepared by AUO attendees. (*E.g.*, ER 769-94, 1028.)

The TFT-LCD manufacturers met approximately monthly for five years. Certain meetings were attended by top executives, while others were attended only

by lower-level sales executives. Especially in later years, after concerns were raised that customers might be aware of the meetings, the attendees took steps to preserve the confidentiality of the meetings by meeting in different discrete locations and by sending only lower-level employees.

3. Implementing the Agreements

Although most of the government's evidence at trial focused on the Crystal Meetings themselves, the government also presented some evidence about how the participants implemented pricing agreements.

The government called Michael Wong, who worked in sales for AUOA between 2001 and 2008. (ER 1415-20.) Wong negotiated panel sales with companies such as Dell, Apple, and Hewlett-Packard. Wong testified that AUOA employees communicated regularly with their superiors in Taiwan regarding pricing, and that his superiors in Taiwan had ultimate authority to decide what prices to quote customers. (ER 1405-10.) Wong's superiors in Taiwan occasionally sent him reports from the Crystal Meetings and instructed him to align prices with competitors'.

Wong also testified that while he was working for AUOA, he began to contact sales employees of other TFT-LCD manufacturers. (ER 1400-04.) They would discuss pricing information, including what prices the customers were requesting and what prices the manufacturers were quoting. (ER 1391-99.) Wong

would then convey that information back to his superiors in Taiwan. Many of Wong's communications with Taiwan were labeled "confidential," and at times, his superiors instructed him to erase emails after he had received them. (ER 1392.) Later, when Wong learned the FBI was investigating, he called a subordinate and instructed him to erase contact information for competitors from his cell phone and computer. (ER 1384.)

Wong also testified, however, that he did not believe he had done anything wrong. In his view, his contacts with competitors were simply an effort to gather as much market intelligence as possible. (ER 1380-82.) He testified that while he did exchange pricing information with competitors, he never agreed to fix prices with anyone.[5]

D. Defense Evidence

The defense primarily argued at trial that although individual defendants and other AUO representatives attended the Crystal Meetings and had pricing discussions with competitors, they did not intend to join any conspiracy to fix prices. In support of this argument, the defense presented evidence that AUO did

[5] At one point, one of Wong's employees, Evan Huang, sent Wong an email stating that Apple was suspicious that suppliers were exchanging pricing information, concluding: "This is illegal, especially in the states. We need to be watchful!" (ER 801.) The legal opinion of Huang, who has never been accused of price fixing, was simply wrong: as the district court instructed the jury, in itself it is not illegal "for a person to obtain information about a competitor's prices or even to exchange information about prices." (ER 598.)

not, in fact, fix prices and that it competed aggressively during the period of the alleged conspiracy.

The defense called an expert witness, Bruce Deal, to testify about AUO's actual pricing during the alleged conspiracy. Deal testified that AUO regularly and repeatedly sold panels at prices below the prices that had supposedly been agreed to at the Crystal Meetings. For example, Deal testified that in October 2001, during the first month of the alleged conspiracy, 76 percent of the panels that AUO sold were sold below the Crystal Meeting price, averaging 5 percent below. (ER 1289.) The next month, AUO sold 79 percent of its panels below the Crystal Meeting price, averaging 6 percent below. (ER 1287-88.) Deal found similar results throughout the period of the alleged conspiracy. (*E.g.*, ER 1277-85.) Deal opined that AUO's actual selling prices were inconsistent with any price-flooring or price-targeting agreement.[6]

In arguing against the charge that agreements had been reached to fix prices, the defense also presented more general evidence that the industry remained competitive despite the alleged conspiracy. The jury heard some evidence, for

[6] In response to Deal's testimony, the government called Dr. Leffler as a rebuttal witness. Leffler testified that although it was not a "perfect" conspiracy, the Crystal Meeting attendees succeeded in raising prices, resulting in a significant overcharge. (ER 1256-58.) Leffler testified, however, that while he disagreed with Deal's *interpretation* of the data, he did not disagree with the actual pricing data Deal had used. (ER 1252.) It was thus undisputed at trial that AUO had priced below the supposedly agreed-to prices.

example: (a) that manufacturers still competed for market share and that AUO gained market share (ER 1307, 1317); (b) that manufacturers regularly used discounts, rebates, free shipping, and other tools to offer lower effective prices to customers (ER 1293-99); (c) that manufacturers made efforts to keep actual prices hidden from competitors and regularly deceived competitors (ER 1357-60, 1460); (d) that purchasers retained substantial bargaining power and often negotiated favorable terms, including one-way price protection and below-contract ultimate pricing (ER 1324, 1451-59); (e) that purchasers deceived manufacturers about pricing terms they received from other manufacturers (ER 1373-79); and (f) that profits earned by AUO—the ultimate measure of competitiveness—were not measurably higher during the periods when prices were discussed compared to other benchmarks (ER 1259-62). Perhaps most importantly, prices of TFT-LCD panels fell considerably during the period of the Crystal Meetings. In fact, prices fell just as fast during the period of the alleged conspiracy as they did after the Crystal Meetings ended. (ER 1272-76.)

E. Post-trial Motions

While acquitting two AUO executives and failing to reach a verdict on a third, the jury found the corporate defendants and individual defendants Chen and Hsiung guilty. Following the jury verdict, the convicted defendants filed motions for acquittal under Rule 29 and, in the alternative, for a new trial under Rule 33.

(ER 518.) They reiterated claims raised prior to trial and also raised new claims based on issues that had arisen during trial. The district court denied their motion.

F. Sentencing

The district court imposed a fine of $500 million on defendant AUO and a sentence of 36 months imprisonment and a fine of $200,000 on the individual defendants. Those sentences, while severe, were less than what the government sought. The district court found that the government had clearly proved its *per se* theory of liability, but said this:

> I want to say something else both about the corporations and about the individuals . . . . [V]ery often when one comes to the time of sentencing and defendants are asked if there's anything they would like to say, they very often say: oh, I recognize that I made poor choices in this case, and that my judgment was poor, and I apologize for my poor judgment and my bad choices. My response to that is very often that you made far more than bad choices in this case, you committed felonies, and let's get on with it. In this case, though, I think that those explanations actually are quite apt.

(ER 247-48.)

The Court found that

> the business logic of assisting a fledgling industry in another country and in another culture and acting in and for the benefit of [AUO] and others in the industry are offsetting features of this crime . . . . [T]hey go a long way to explain it. [F]or a considerable period of time the defendants thought they were doing the right thing vis-a-vis their industry and their companies. . . . [T]here were a lot of business pressures that they were responding to, and that's what they did. These were poor choices. It was bad

> judgment. But there was no – there was relatively little personal motivation.

(ER 248-49.) It then reiterated the same point: "I find that there were reasons for committing these acts." (ER 250.)

SUMMARY OF ARGUMENT

The defendants present the following claims on appeal.

First, the convictions must be reversed because the district court erred when it allowed the government to treat this as a *per se* antitrust violation rather than a rule of reason case. This Court's ruling in *Metro Industries* created a bright-line rule that foreign antitrust cases must be analyzed under the rule of reason, yet in this case, the government neither pleaded nor proved the elements of a rule of reason case.

Second, the government also failed to plead the elements required by the FTAIA. The government claimed that the requirements of the FTAIA were merely "jurisdictional," and thus not subject to the requirements of *Apprendi*. That is false, and the indictment should have been dismissed.

Third, pleading failures aside, the government's evidence at trial was insufficient to prove the elements of the FTAIA.

Fourth, the government also failed to plead the requisite mens rea of the offense. Because this was a case based on foreign conduct, the government was required to plead and prove that the defendants intended to affect domestic

commerce and did so. The indictment contained no allegation of intent, and the district court's instructions at trial also did not require the jury to find the requisite mens rea and impact on United States commerce.

Fifth, the district court erred when it imposed a fine in excess of the statutory maximum for Sherman Act violations. The district court wrongly decided that it could employ the alternative fine statute, 18 U.S.C. § 3571(d), based on a finding of collective gains by all coconspirators.

ARGUMENT

I. THE DEFENDANTS' CONVICTIONS MUST BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PLEAD AND PROVE THE ELEMENTS OF A RULE OF REASON CASE AS REQUIRED BY THIS COURT'S RULING IN *METRO INDUSTRIES*

There are two types of cases in antitrust law: rule of reason cases and *per se* cases. *Per se* cases are limited to certain types of conduct that are so obviously anticompetitive that the mere act of engaging in the conduct is illegal. Rule of reason cases require more. *Metro Industries* states that when the government prosecutes a case based on foreign conduct, it must demonstrate that the defendants violated the rule of reason.

The conduct with which the defendants were charged took place almost entirely during a series of "Crystal Meetings" between September 2001 and December 2006 in Taipei. There, the named coconspirators allegedly met and conferred about fixing the prices of TFT-LCD panels. (ER 1727-31, Indictment ¶

17.) But the government did not plead or prove the elements of a rule of reason case—indeed, it did not even attempt to do so. Instead, it proceeded on a *per se* theory. Because this case was based on allegations of a foreign restraint of trade, the government's *per se* theory was legally invalid.

The defendants' argument in this case is simple: *Metro Industries* means what it says, and because *Metro Industries* means what it says, the defendants' convictions must be reversed.[7]

A. The District Court's Rulings Below

1. Motion to Dismiss Indictment

At the outset of this litigation, the defendants filed a motion to dismiss the indictment. (ER 1688-90.) The defendants argued, under *Metro Industries* and *United States v. United States Gypsum Co*., 438 U.S. 422, 443-44 (1978), that the indictment failed to allege essential elements of a rule of reason offense and should thus be dismissed under Fed. R. Crim. P. 12(b)(3). The indictment contained no allegation that the defendants' conduct adversely impacted American consumers—it did not allege actual injury. Even more obviously, the indictment contained no allegation that the defendants intended to harm commerce or knew that their

[7] The sufficiency of an indictment is reviewed de novo. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). When an argument for acquittal rests on a question of statutory interpretation, review is de novo. *United States v. Havelock*, 664 F.3d 1284, 1289 (9th Cir. 2012) (en banc).

actions would have anticompetitive effects in the United States—it did not allege mens rea.

In response, the government conceded that it had not alleged the elements of a rule of reason case, including the mens rea element. It argued, however, that *Metro Industries* and *Gypsum* were "inapposite" and "inapplicable" to this case. (ER 1676-77.) The government thus argued that it was not required to allege any rule of reason elements because it was proceeding on a *per se* theory. It similarly argued that it would be "unduly complicated and confusing" for a jury to determine the rule of reason elements. (ER 1680.)

The district court agreed with the government. It declined to apply *Metro Industries.* Instead, it applied the First Circuit's holding in *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). (ER 190-91.)[8] It therefore found that the indictment was "sufficient as pleaded" and denied the motion to dismiss.

2. *Pretrial Jury Instruction Requests and Motion* in Limine

Prior to trial, the defendants submitted proposed jury instructions based on the rule of reason. They proposed to tell the jury: "Because the conduct at issue in this case occurred primarily overseas, it is judged according to what is called the

[8] As antitrust authorities have recognized, however, the two cases are in conflict. *See* 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 273b, at 333 (3d ed. 2006) ("*Metro Industries*, requiring rule of reason treatment for all restraints abroad, stands in conflict with the First Circuit's *Nippon* decision . . . .").

rule of reason." (ER 1524.) Relying on the district's court's earlier order, however, the government moved *in limine* for

> an order prohibiting defendants from presenting any evidence or argument that: (1) the agreements to fix or stabilize prices were "reasonable" or justifiable; (2) there were economic, benevolent, or other justifications for the agreements to fix or stabilize prices; (3) the agreements to fix or stabilize prices created real or imagined economic efficiencies for the defendants and their coconspirators; (4) agreements to fix or stabilize prices were necessary to avoid ruinous competition; (5) prices set for TFT-LCDs set by an agreement to fix or stabilize prices were reasonable; or (6) any variations on the foregoing.

(ER 1557.)

Opposing the motion, the defendants once again asserted that "under controlling Ninth Circuit law, this prosecution based on foreign conduct must be decided under a rule of reason analysis." (ER 1551.)

While in part reserving its ruling on the government's motion, the district court ruled that the defendants would not be allowed to present a rule of reason defense:

> And certainly you can't say "Well, there's a price-fixing conspiracy, but it was a reasonable one, and therefore, we're okay." . . . And if there were ever an argument to be made that reasonableness would get you out from under the Sherman Act in this price-fixing case, [the government] can certainly object to that, because that won't be allowed.

(ER 146-47.)

3. Trial Evidence and Final Jury Instructions

Consistent with its pretrial ruling rejecting the applicability of *Metro Industries*, the district court stated during the instructional conference that the jury would not "even be told about rule of reason." (ER 1249.) It instructed the jury that any agreement to fix prices was *per se* illegal regardless of the reason or pro-competitive effects.

> [A]ny agreement to raise or lower a price, to set a maximum price, to stabilize prices, to set a price or price range, to set target prices, or to maintain a price is illegal. If you should find that the defendants entered into an agreement to fix prices, the fact that the defendants or their coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense.

(ER 1053.)

4. Post-trial Motions

After trial, the defendants moved for acquittal under Rule 29 or a new trial under Rule 33. They again argued that *Metro Industries* requires rule of reason treatment for this case. (ER 555-59.) The defendants further pointed to substantial additional evidence demonstrating the reasonableness of their actions—evidence that was excluded at trial but would have been admitted if the case had been tried as a rule of reason case. (ER 566-78.)

The government again argued that *Metro Industries* was inapplicable to this case, and the district court again agreed with the government. (ER 7-8.)

B. The Rule of Reason in Antitrust Law

The Sherman Act prohibits "[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 the statute is written in categorical terms, the Supreme Court has long held that not every combination or agreement that restrains trade is illegal.

As Justice Brandeis explained a century ago: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). More recently, building on the work of modern antitrust economists, the Court has recognized that "[s]ome activities can only be carried out jointly." *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) (quoting Robert Bork, *The Antitrust Paradox* 278 (1978)). Put differently, sometimes "a certain degree of cooperation is necessary" for businesses to operate effectively. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (quoting *NCAA*, 468 U.S. at 117).

In short, agreements that have pro-competitive and pro-consumer effects are not proscribed by the Sherman Act even though they may technically "restrain trade." Only *unreasonable* restraints of trade are illegal.

In order to determine which restraints of trade are unreasonable and therefore illegal, the Supreme Court has divided antitrust cases into two types: rule of reason cases and *per se* cases.

> Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," this Court has long recognized that Congress intended to outlaw only unreasonable restraints. As a consequence, most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.
>
> Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*.

State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citations omitted); *accord NFL*, 130 S. Ct. at 2216-17; *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (en banc). Most antitrust cases are rule of reason cases—it is the "default or presumptive" standard. *Safeway*, 651 F.3d at 1133. Only a few narrow classes of cases that are obviously and manifestly anticompetitive are subject to *per se* treatment.

Horizontal price fixing agreements are "ordinarily" subject to *per se* treatment. *NCAA*, 468 U.S. at 100. But even in horizontal price fixing cases, the Supreme Court has held that the rule of reason is sometimes the appropriate mode of analysis. *See id*. ("Nevertheless, we have decided that it would be inappropriate

to apply a *per se* rule to this case."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc*., 441 U.S. 1, 18-23 (1979).

Relative to *per se* cases, rule of reason cases have additional requirements of pleading and proof. This Court has set forth several elements that must be pleaded and proven in rule of reason cases. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012). Among other things, a plaintiff in a rule of reason case must show that the defendants "*intended* to harm or restrain trade or commerce" and also that the defendants' conduct "actually injure[d] competition." *Id.* (emphasis added); *see also Gypsum*, 438 U.S. at 443-44 (holding that "intent is a necessary element of a criminal antitrust violation").

C. Rule of Reason in Foreign Cases: The Holding of *Metro Industries*

In *Metro Industries*, this Court created a bright-line rule that foreign antitrust cases must be subjected to rule of reason analysis. The holding of *Metro Industries* was plain: "[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." 82 F.3d at 845.

Metro Industries was an American importer of kitchenware. Sammi Corp. was a Korean exporting company. Metro sued Sammi and two of its American subsidiaries alleging that the defendants had engaged in a naked horizontal market allocation in violation of the Sherman Act. *Id.* at 841-42. Market allocation

agreements between competitors are "classic per se antitrust violation[s]." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972)). The plaintiff thus sought *per se* treatment.

This Court rejected the plaintiff's argument and instead applied the rule of reason.

> 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.

Metro Industries, 82 F.3d at 844-45.

Leaving no doubt about its holding, this Court repeated the same point several times. *See, e.g.*, *id*. at 843 ("Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, *per se* analysis is not appropriate."); *id*. at 844 ("Foreign Conduct Cannot Be Examined Under the Per Se Rule."); *id*. at 845 ("Consequently, where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation."). *Metro Industries* specifically mentioned price-fixing as a practice that should not be viewed as a *per se* antitrust violation in a foreign

context. *Id.* at 845 ("[P]rice fixing in a foreign country might have some but very little impact on United States commerce.").

The holding of *Metro Industries* is plain. It has never been disavowed by this Court. It has been recognized by the leading antitrust treatise. *See* 1B Areeda & Hovenkamp, *supra*, ¶ 273b, at 331 ("[I]n *Metro Industries*, the Ninth Circuit concluded that a rule of reason inquiry is necessary in all cases involving restraints abroad."). It has been echoed by the Fourth Circuit. *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 291-92 (4th Cir. 2002) (stating that *per se* analysis is "inapplicable to foreign restraints that . . . pose very little danger to American commerce" (quoting Areeda & Hovenkamp, *supra*)). Even when judges of this Court have expressed discomfort with the holding of *Metro Industries*, they have nonetheless recognized that it remains binding law. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 697 (9th Cir. 2004) (Aldisert, J., dissenting) ("Given the binding precedent of [*Metro Industries*] . . . the United States may not rely on a *per se* theory of a Sherman Act violation in this case.").

Furthermore, the argument for application of the rule of reason rather than the draconian *per se* standard is even stronger in this criminal prosecution than it was in *Metro Industries*, a civil action. Absent application of the rule of reason, foreign businesses that enter into price stabilization arrangements which (1) are entirely legal in their home countries; (2) are reasonable in the context of their

relevant markets; (3) are not intended to affect United States commerce; and (4) have no substantial anticompetitive impact on United States commerce nonetheless could be subjected to devastating prosecution in American courts, and their executives to years of incarceration in American prisons. Such a result would be perceived by foreign states as "particularly intrusive." ALI, *Restatement (Third) of the Foreign Relations Law of the United States* § 403 (1987); *see also id*. cmt. f. ("[T]he presence of substantial foreign elements will ordinarily weigh against application of criminal [antitrust liability].").

Under *Metro Industries*, this prosecution should have been subject to the rule of reason.

D. The Government's Failure to Plead and Prove Rule of Reason Elements

Rule of reason cases require proof of additional elements. In a rule of reason case, a defendant is not guilty unless the factfinder determines that the defendant's conduct "impose[d] an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10.

Because these factual findings are necessary to a determination of guilt in a criminal rule of reason case, they are elements of the offense subject to the rule of *Apprendi*. Every fact necessary for a criminal conviction "must be charged in an

indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (internal quotation marks omitted); *see also United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005). In short, where rule of reason analysis is appropriate, a criminal conviction cannot be obtained unless the government pleads and proves the rule of reason elements.

1. The Government's Failure to Plead Rule of Reason Elements

The government below conceded that it did not plead this case as a rule of reason case. To the contrary, it insisted that it was not required to do so—it argued that it was entitled to plead only the facts necessary to demonstrate a *per se* violation. But under *Metro Industries*, the indictment was required to allege every element of a rule of reason offense. Its failure to do so "is a fatal flaw requiring dismissal of the indictment." *Omer*, 395 F.3d at 1089; *see United States v. Du Bo*, 186 F.3d 1177, 1179-80 (9th Cir. 1999) (failure to plead an element cannot be held harmless). On that basis alone, the convictions must be reversed.

2. The Government's Failure to Prove Rule of Reason Elements

As noted, under *Du Bo*, the deficiencies in the indictment could not be deemed harmless error even had the district court embraced the *Metro Industries* rule at trial and required the government to try the case under the rule of reason standard. In any event, the district court took no such ameliorative measures. Rather than changing fields, the court sustained the government's objection to any

defense evidence or argument that might support a rule of reason defense. As a result of the district court's refusal to accept that *Metro Industries* means what it says, the government was not required to prove essential elements of the offense, nor were the defendants permitted to introduce all relevant evidence rebutting the existence of those elements.

Thus, even absent the pleading deficiencies, the district court's trial errors would require reversal because it cannot possibly be said that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). Rather than being required to find proven the elements of a Sherman Act violation under the rule of reason standard, jurors were told that *any* price fixing agreement was a crime. (ER 1053.) Consequently, the government was not required to prove that (1) the defendants had intended to harm commerce; (2) the defendants' conduct actually harmed American consumers; or (3) the defendants' agreement was *unreasonable* in light of all the surrounding circumstances, including the condition of the industry, the pricing pressure from purchasers, the prices of LCD panels both before and after the agreement, and so on.

The defendants were barred by the court's pretrial ruling from introducing relevant evidence to support the claim that the reasonableness of their conduct. Even so, the evidence they succeeded in introducing in defending against the

government's *per se* theory could well have convinced a properly instructed jury of the defendants' innocence under the rule of reason standard. That evidence included:

- AUO invested tens of billions of dollars in new manufacturing facilities, which substantially lowered costs and contributed to downward pricing pressure (ER 1270-71);
- AUO ran its expensive fabs at high rates of utilization, thus lowering costs (ER 1268-69);
- Per-unit costs in the industry decreased dramatically and production increased dramatically during the period of the alleged conspiracy (ER 1305);
- Per-unit prices fell dramatically during the period of the alleged conspiracy at an even greater rate than after the alleged conspiracy ended (ER 1275-76);
- New competitors entered the market during the period of the alleged conspiracy (ER 1266-67);
- AUO's profits were greater in the one year *after* the alleged conspiracy ended than in all of the years of the conspiracy combined (ER 1306).

Furthermore, had it been permitted, the defendants would have presented a wealth of additional and powerful evidence that their conduct was reasonable under the circumstances and that it actually *benefitted* American consumers. And

if this had been tried as a rule of reason case, the defendants would have presented additional evidence demonstrating that during the period of the alleged conspiracy, competition in the industry remained ferocious.

Such evidence, argued and expanded on in a rule of reason context, would have substantially undermined any prosecution allegation that the defendants' conduct had an actual anticompetitive effect. In fact, to the contrary, such evidence could have demonstrated that the defendants' pricing discussions with competitors actually served to enhance competition by stabilizing an industry that would otherwise have collapsed in a time of rapid change. But because the district court ruled that *Metro Industries* was inapplicable, evidence of reasonableness and pro-competitive effects was excluded.

Moreover, if the defendants had been allowed to present a full defense, they could have illustrated precisely why the holding of *Metro Industries* makes so much sense in foreign cases. The defendants could have demonstrated 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. The assumption in domestic cases is that price fixing "is potentially very dangerous with little or no redeeming virtue." *Metro Industries*, 82 F.3d at 845. But here, the defendants could have presented a strong case that their conduct "pose[d] very little danger to American commerce or ha[d] more persuasive

justifications than are likely in similar restraints at home." *Id.* Indeed, the district court acknowledged as much at sentencing

> the business logic of assisting a fledgling industry in another country and in another culture and acting in and for the benefit of [AUO] and others in the industry are offsetting features of this crime . . . . [T]hey go a long way to explain it. [F]or a considerable period of time the defendants thought they were doing the right thing vis-a-vis their industry and their companies. [T]here were a lot of business pressures that they were responding to, and that's what they did.

(ER 248-49.) That was, after all, the very rationale of *Metro Industries*: Even if domestic price fixing agreements are ordinarily appropriate for *per se* treatment, the same does not hold true for cases like this.

Guided in part by principles of international comity, *Metro Industries* reaffirmed the bedrock principle that only unreasonable restraints of trade are illegal. In antitrust cases based on foreign conduct, the government should be required to prove rule of reason elements, and defendants should be allowed to prove that their conduct actually served consumer welfare "regardless of the inherently suspect appearance." *Id.* at 845. That is precisely what the defendants sought to do but were prevented from doing by the district court's rulings.

E. The Government's Attempt to Evade *Metro Industries*

In this appeal, the government will not argue that it pleaded and proved the elements of a rule of reason case under the rule of *Metro Industries*. It will not argue that the defendants were able to present all relevant evidence showing that

their actions, even if suspicious in appearance, were actually reasonable. Instead, the government will repeat the veritable blizzard of arguments it advanced in the district court aimed at evading the plain holding of *Metro Industries*.

1. Dicta

The government argued that *Metro Industries* does not mean what it says because the relevant portions of the opinion are mere dicta. It applied that epithet with little elaboration or explanation. But in this Circuit, "a prior decision has binding effect to the extent that 'it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue.'" *United States v. Cassel*, 408 F.3d 622, 633 n.9 (9th Cir. 2005) (quoting *United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (en banc) (Kozinski, J., plurality opinion)). The statements in *Metro Industries* were not stray remarks. The *Metro Industries* panel focused on the legal issue presented, and it stated—repeatedly—that *per se* analysis is not appropriate in cases based on foreign conduct.

It is true that the opinion in *Metro Industries* at least arguably rested on alternate grounds. First, the Court held that the plaintiffs had not alleged a classic horizontal market allocation. 82 F.3d at 844. Second, in the alternative, the Court held that even if the plaintiffs had alleged such an agreement, *per se* treatment would not be appropriate for a foreign case. *Id.* at 844-45. But the government

may not simply rely on one ground and ignore the other—alternative holdings cannot be dismissed as dicta. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 346 n.4 (1986); *United States v. Bagdasarian*, 652 F.3d 1113, 1118 n.16 (9th Cir. 2011) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." (internal quotation marks omitted)).

As courts and commentators have recognized, the "dicta" label is often used as a cheap tactic for avoiding unfavorable precedent. That was precisely the government's strategy below.

2. *Domestic Price Fixing*

The government argued that *Metro Industries* does not mean what it says because domestic cases make clear that horizontal price fixing is always subject to *per se* treatment. That argument is faulty partly because the Supreme Court has said that while horizontal market control agreements are *ordinarily* subject to *per se* treatment, they are not *necessarily* subject to *per se* treatment in every circumstance. *NCAA*, 468 U.S. at 100.

Even more obviously, the government's argument simply misses the point of *Metro Industries*. It is concededly true that horizontal price fixing, like horizontal market division, would ordinarily be subject to *per se* treatment—*where the conduct in question is domestic*. But, quite obviously, *Metro Industries* held the same conduct is analyzed under the rule of reason where the conduct in question is

foreign. "Even if Metro could prove that the [challenged conduct] 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." 82 F.3d at 844-45.

In a related vein, the government argues that *Metro Industries* does not apply because it involved allegations of horizontal market division rather than horizontal price fixing. That irrelevant factual distinction has no salience to this Court's clear holding. This Court did not hold that only foreign horizontal market allocations are subject to the rule of reason. Rather, it held 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.

Nothing in the opinion suggests any basis for distinguishing price fixing from market allocation. In fact, to the contrary, the opinion explicitly mentions foreign price fixing as an example of conduct that should be subject to the rule of reason because "price fixing in a foreign country might have some but very little impact on United States commerce." *Id.*

3. Wholly Foreign

The government argued that *Metro Industries* does not mean what it says because that case involved "wholly foreign" conduct. That is false. Nothing in the opinion indicates that the rule of *Metro Industries* is limited to "wholly foreign"

cases, and in any event, *Metro Industries* itself did not involve "wholly foreign" conduct. The plaintiff was a United States corporation, and it sued both a Korean distributor and also its two America subsidiaries. The plaintiff alleged that both the parent company and its domestic subsidiaries had "engaged in predatory pricing" in the United States. *Id*. at 842. The *Metro* Court also noted that defendant Sammi did "a great deal of business in the United States," that it had substantial assets in the United States, and that the impact of Sammi's conduct was "felt more in the United States than in Korea." *Id*. at 847. The claim that *Metro Industries* involved "wholly foreign conduct" is disingenuous.

The core anticompetitive conduct in this case was foreign, much more so then even in *Metro Industries*: the government's core allegation was that AUO (a foreign company) and other manufacturers (all foreign companies) met overseas and agreed to set prices of TFT-LCD panels for worldwide sale. While it is true that AUO had a domestic subsidiary and some domestic employees, that is no different from *Metro Industries*.

4. Forfeiture

After trial, the government argued that even if *Metro Industries* means what it says, the defendants waived any reliance on *Metro Industries* when they stipulated to the content of the final jury instructions defining the government's *per se* theory. That argument borders on silliness. The defendants clearly and fully

preserved their claim that they were entitled to rule of reason rather than *per se* treatment. After the district court definitively had ruled against them on multiple occasions, they were required to settle on the language to be given on the government's *per se* theory, but in doing so never surrendered their rule of reason claim.

It is hornbook law in this Circuit that once a district court has ruled on an issue, a party is not required to make an additional "futile formal objection." *United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010) (internal quotation marks omitted).[9] A party need not object to a particular instruction when the party has already litigated and lost the same issue. *Hangarter v. Provident Life & Accident Ins. Co*., 373 F.3d 998, 1012 n.10 (9th Cir. 2004). After all, the purpose of the contemporaneous objection rule is to make sure that trial courts have an opportunity to consider issues and correct errors, thereby avoiding the need for appellate review of those errors. Parties are not required to endlessly renew the same objection in order to preserve a claim. This Court does not require objections that would be a "pointless formality." *Norwood v. Vance*, 572 F.3d 626, 629 (9th Cir. 2009).

[9] S*ee also Dorn v. Burlington N. Santa Fe R.R. Co*., 397 F.3d 1183, 1189 (9th Cir. 2005) (holding that where a district court was "fully informed" of a party's position on an issue, "any further objection would have been superfluous and futile"); *Mukhtar v. Cal. State Univ*., 299 F.3d 1053, 1062 (9th Cir. 2002) ("Contemporaneous objection is not required where, as here, the trial court definitively ruled on a motion in limine . . . .").

At the outset of this case, the defendants filed a motion to dismiss the indictment based on *Metro Industries*. In so doing, they clearly and unambiguously presented their claim—and in denying their motion, the district court clearly and unambiguously rejected that claim.[10] Prior to trial, the defendants submitted proposed jury instructions based on the rule of reason. In other pretrial filings, the defendants made clear that they still maintained their *Metro* argument,[11] and the court repeated its refusal to permit evidence, argument, or instruction on a rule of reason theory. In denying the defendants' post-trial motions, the district court stated that it had "already fully considered and rejected" the defendants' *Metro* argument. (ER 7.)

The defendants' claim based on *Metro Industries* was fully and repeatedly preserved. The government's argument to the contrary is yet another desperate attempt to avoid this Court's binding precedent.

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[10] Moreover, even if the defendants had forfeited their trial claim—which they obviously did not—they nonetheless fully preserved their pretrial challenge to the indictment by filing a valid pretrial motion to dismiss. *See United States v. Fuentes*, 252 F.3d 1030, 1031 (9th Cir. 2001); *Du Bo*, 186 F.3d at 1179-80 & n.3. There is no case suggesting that once a defendant challenges the sufficiency of indictment with a pretrial motion, he must repeatedly renew the same claim during trial.

[11] *See, e.g.*, ER 1656 ("The defendant corporations continue to believe that *Metro Industries* . . . is controlling, but accept that the Court has decided that issue . . . ."); ER 1551 ("Defendants continue to maintain that under controlling Ninth Circuit law, this prosecution based on foreign conduct must be decided under a rule of reason analysis, and that the jury should be so instructed at the close of the evidence." (citing *Metro*)).

F. Conclusion

The defendants' appeal in this case rests on the simple premise that *Metro Industries* means what it says. All of the government's arguments cannot obscure the brute fact that in *Metro Industries*, this Court held that "application of the *per se* rule is not appropriate where the conduct in question occurred in another country." 82 F.3d at 844-45. *Metro* requires reversal of the convictions of all defendants.

II. THE INDICTMENT WAS DEFICIENT BECAUSE IT FAILED TO PLEAD THE REQUIREMENTS OF THE FTAIA, AND THE DISTRICT COURT CONSTRUCTIVELY AMENDED THE INDICTMENT BY ALLOWING THE GOVERNMENT TO PROCEED BASED ON THEORIES NOT PLEADED

As codefendants Hsiung and Chen have argued, the Sherman Act cannot be applied extraterritorially. But even assuming arguendo that the Sherman Act has some extraterritorial application, the scope of that application is limited by the Foreign Trade Antitrust Improvement Act (FTAIA). It states:

> [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 this Act, other than this section.

15 U.S.C. § 6a; *see generally F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161-63 (2004) (discussing the legislative history of the FTAIA).

The FTAIA states that the Sherman Act does not apply to foreign conduct unless that conduct comes within one of two statutory exceptions: (1) the import trade exception, or (2) the domestic effects exception. *Animal Science Prod. Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011).[12] If neither exception is satisfied, an antitrust action cannot proceed. *See LSL Biotechnologies*, 379 F.3d 672 (affirming dismissal of a civil antitrust action because the pleading failed to allege sufficient domestic effects). In this case, neither exclusion was pleaded in the indictment. The indictment was therefore deficient, and it should have been dismissed.[13]

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[12] Arguably, it is incorrect to label these as "exceptions." *See Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc). Labels aside, the point is that to avoid the limitations of the FTAIA, the government must show either that the defendant engaged in import trade or that the defendant's conduct had the sort of domestic effects required by the statute.

[13] The sufficiency of an indictment is reviewed de novo. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). Claims of constructive amendment are also reviewed de novo. *United States v. Hartz*, 458 F.3d 1011, 1019 (9th Cir. 2006)

A. The District Court's Rulings Below

1. Pretrial Challenge to the Indictment

The superseding indictment in this case did not mention or cite the FTAIA. Under the header "Trade and Commerce," the indictment contained the following allegations:

> 19. During the period covered by this Indictment, the defendants and their coconspirators sold and distributed substantial quantities of TFT-LCDs in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in states or countries other than the states or countries in which the defendants and their coconspirators produced TFT-LCDs. In addition, payments for TFT-LCDs traveled in interstate and foreign trade and commerce.
>
> 20. The business activities of the defendants and their coconspirators that are the subject of this Indictment were within the flow of, and substantially affected, interstate and foreign trade and commerce.

(ER 1732.)

The indictment clearly alleged conduct involving trade or commerce with foreign nations, thus putting the conduct presumptively within the purview of the FTAIA. But it did not allege that the defendants were involved in import trade or import commerce, pursuant to the import trade exception. It did not allege that the defendants had fixed the prices of TFT-LCDs which were "targeted" to be sold or delivered in the United States. It did not allege that the defendants' conduct had a direct, substantial, and reasonably foreseeable effect on domestic commerce.

Prior to trial, the defendants filed a motion to dismiss the superseding indictment for failure to plead essential elements of the offense. (ER 1663-71.) The defendants argued that because application of at least one exception would be legally necessary to the imposition of any punishment, the FTAIA exceptions constituted elements of the offense for the purposes of the *Apprendi* doctrine. The defendants argued that that the indictment did not plead either the domestic effects exception or the import trade exception. They therefore requested dismissal.

In its opposition to the motion to dismiss, the government did not contend that it had alleged either FTAIA exception. Rather, the government argued that it was not required to plead any FTAIA facts because the FTAIA only concerns a court's jurisdiction and does not create any additional elements of an offense. (ER 1643-45.) At a pretrial hearing, however, the government argued in the alternative that it had sufficiently pleaded the import trade exception. The government never once argued that it had pleaded the domestic effects exception.

The district court denied the defendants' motion to dismiss. The court suggested that the FTAIA might not apply at all to this case. (ER 183-84.) But regardless, the court ruled that the import trade exception had been sufficiently pleaded.

> Thus, it appears that the criminal charges alleged in the indictment are based at least in part on conduct involving "import trade or import commerce" (specifically, the importation of TFT-LCD products into the United States). By

> its express terms, the FTAIA's exclusionary rule is inapplicable to such import activity conducted by defendants.

(ER 183.) The court never suggested that the government had also pleaded the domestic effects exception.

2. Jury Instructions

Prior to trial, the defendants requested that the jury be instructed as to the elements of the offense at the outset of the case. Based on the district court's prior ruling, the defendants proposed an instruction for the import trade exception. (ER 1635-36.) Because neither the government nor the district court had ever indicated that the case could proceed on a domestic effects theory, the defendants proposed no instruction for that exception.

The government opposed the defendants' proposed import trade instruction. The government argued that the FTAIA did not apply at all, or in the alternative, that the FTAIA is merely "jurisdictional" and thus that any findings required by the FTAIA could be made by the judge rather than the jury. (ER 1605-07 & n.2.) The district court denied the defendants' motion. It determined that after hearing the evidence presented at trial, it would decide whether any FTAIA instruction was appropriate. (ER 101-02.)

At the close of trial, the government conceded that the FTAIA applied and thus that some instruction must be given. In the government's proposed instructions on the elements of the offense, it sought to instruct the jury that it

could find the defendants guilty based on either the import trade exception or the domestic effects exception. (ER 1217.)

The defense objected to the government's proposed domestic effects instruction because it had not been alleged in the indictment. (ER 1218.) It also objected to the government's proposed instruction on the import trade exception because it lacked the concept of "targeting" United States commerce established by the *Animal Science* case. (RT 4623-25.)

Over the government's objection, the district court incorporated the defense's "targeting" language into its FTAIA instructions (ER 1158-60), but overruled the defense objection to instruction on the domestic effects exception. (ER 1250.) Its instruction on the conspiracy charge described the FTAIA element as follows:

> And, 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, 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.

(ER 1057, 1156.) The jury was thus allowed to convict on either the import trade or the domestic effects theory.

/ /

B. The Essential Elements Required by the FTAIA

Throughout the pretrial proceedings, the defense argued under *Apprendi* that the government was required to plead and prove facts necessary for guilt under the FTAIA. The government argued that it was not required to plead or prove any facts under the FTAIA because the FTAIA is merely a "jurisdiction" statute. That is false for two reasons. First, under the Supreme Court's decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the FTAIA is not merely "jurisdictional." Second, even if the FTAIA is a jurisdictional statute, Ninth Circuit precedent makes clear that jurisdictional elements are subject to the rule of *Apprendi*.

1. Arbaugh's Bright-Line Rule

The distinction between "jurisdictional" facts and "substantive" facts has always been hard to draw. As the Supreme Court has said, "jurisdiction" is "a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). In *Arbaugh*, the Supreme Court sought to clarify the confusion with a "readily administrable bright line" rule. 546 U.S. at 516.

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16 (citations omitted); *see also Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) ("Under *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'").

When Congress enacted the FTAIA, it did not clearly state that the limitation on the Sherman Act's scope was jurisdictional. Therefore, under *Arbaugh's* bright-line rule, the FTAIA must be treated as nonjurisdictional.

It is true that, prior to *Arbaugh*, this Court had at least assumed that the FTAIA was jurisdictional. In *LSL Biotechnologies*, decided in 2004, this Court faced a motion to dismiss for lack of subject-matter jurisdiction under the FTAIA. 379 F.3d at 674. Both parties apparently assumed that the FTAIA should be treated as going to the court's jurisdiction rather than the merits, and this Court followed suit in its analysis. *See id*. at 683 ("The FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade."). But any holding to that effect has been fatally undermined by the intervening decisions in *Arbaugh* and its progeny. It is therefore no longer binding. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

Other circuits have recognized the impact of *Arbaugh* on the FTAIA, and they have concluded that the FTAIA cannot be deemed jurisdictional. The Seventh Circuit, for example, recently reversed its own prior precedent and ruled that the FTAIA creates additional elements of a claim.

> [T]he interpretation we adopt today—that the FTAIA spells out an element of a claim—is the one that is both more consistent with the language of the statute and sounder from a procedural standpoint. When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The FTAIA, however, never comes close to using the word "jurisdiction" or any commonly accepted synonym. Instead, it speaks of the "conduct" to which the Sherman Act . . . applies. This is the language of elements, not jurisdiction.

Minn-Chem, 683 F.3d at 852; *see also Animal Science*, 654 F.3d at 468-69 (overruling prior precedent that the FTAIA was merely jurisdictional). Those courts are correct: the FTAIA spells out elements of the claim or offense.

2. Jurisdictional Elements under **Apprendi**

But even assuming arguendo that the FTAIA is a jurisdictional statute, it would not matter for this *criminal* case. In civil cases, facts going to a court's subject-matter jurisdiction may be decided by the court rather than a jury. But in criminal cases like this one, jurisdictional elements must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.

Even before *Apprendi*, this Court held that "the government must prove the jurisdictional element in a federal criminal statute beyond a reasonable doubt, like any other element of the offense." *United States v. Gomez*, 87 F.3d 1093, 1096-97 (9th Cir. 1996). Some other circuits disagreed, but after *Apprendi*, it is now clear that regardless of label, any fact necessary for punishment must be treated as an

element of the offense. *See* 530 U.S. at 494 ("[L]abels do not afford an acceptable answer.").

Other circuits now agree that a "'jurisdictional element' is simply an element of a federal crime." *United States v. Kincaid*, 571 F.3d 648, 653 (7th Cir. 2009); *see United States v. Pickett*, 353 F.3d 62, 68-69 (D.C. Cir. 2004); *United States v. Vasquez*, 267 F.3d 79, 89 (2d Cir. 2001). And in this Circuit, it is beyond dispute that "a jurisdictional element must be charged in the indictment and proved beyond a reasonable doubt." *United States v. Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002); *see also United States v. Arnt*, 474 F.3d 1159, 1162 (9th Cir. 2007) ("[A]n indictment challenged before trial may be held insufficient for failure to assert an essential jurisdictional element.").

In short, even if it were true that the requisite FTAIA facts could be treated as merely jurisdictional in civil cases, it would still be true that they are essential elements in criminal cases. As such, they must be pleaded in the indictment.

C. The Indictment's Deficiency

The government took a litigation risk in this case when it decided not to plead the FTAIA in the indictment. No doubt it made that decision hoping that it could avoid the burden of establishing the FTAIA elements at trial. The government's decision not to plead the FTAIA was based on an assumption that it could prevail on an argument that FTAIA elements are jurisdictional, and thus

need not be pleaded. The flaws in those arguments were thoroughly exposed over the course of this litigation, to the point that the government stopped pressing them by the end of the trial.

But the government is now stuck with its initial litigation position—because it is stuck with its indictment. And the indictment was deficient in a variety of respects.

First, and foremost, the indictment failed to plead the elements of the offense. It is hornbook law in this Circuit that an indictment must "track[] the words of the statute" and "set forth all elements necessary to constitute the offense." *United States v. Milovanovic*, 678 F.3d 713, 727 (9th Cir. 2012) (internal quotation marks omitted). The indictment in this case did not track the language of the statute, and it did not allege the elements necessary to constitute a Sherman Act offense subject to the FTAIA.

Nowhere in the indictment, for example, is there any allegation that the defendants' conduct had "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a(1). Those are the elements necessary to establish the domestic effects exception, and yet they are not mentioned in the indictment. Nor is there any allegation that the defendants "targeted" domestic commerce. As the district court eventually recognized in formulating its jury instruction on the FTAIA , "targeting" is, at an absolute minimum, required for the

import trade exception. The government's failure to plead these essential elements deprived the defendants of their right to grand jury screening of the charges. *See United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997) ("A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the basis of facts which satisfied a grand jury that he should be charged.").

Second, the indictment does not mention, much less cite, the FTAIA. An indictment must "must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." Fed. R. Crim. P. 7(c)(1); *see United States v. Gonzalez*, 686 F.3d 122, 128-29 (2d Cir. 2012). Because this case was based on conduct involving foreign commerce, the FTAIA forms a necessary part of the offense. The government's failure to cite the very statute under which it was required to proceed was yet another way in which the indictment was deficient and illegally obtained.

Third, the indictment failed to provide fair notice of the charges. In addition to a bare recital of the statute and the alleged elements, the indictment must include a reasonably specific "statement of the facts and circumstances" so that the accused will be "fairly inform[ed]" of the charges against him. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Nothing in the indictment fairly informed the defendants of the facts and circumstances on which the government would rely to establish the elements of the FTAIA.

Among other things, the indictment did not specify which theory of the FTAIA the government alleged. The indictment did not state whether the government would attempt to prove the import trade exception, or the domestic effects exception, or both. One of the purposes of the Grand Jury Clause is to "ensure that criminal defendants have fair notice of . . . the theories that the government will present at trial." *United States v. Hartz*, 458 F.3d 1011, 1022 (9th Cir. 2006). The indictment in this case gave no notice of which FTAIA theory the government would attempt to prove at trial. The defendants thus had no way of knowing, prior to trial, whether they would be forced to defend against an import trade theory, a domestic effects theory, or both.

Prior to trial, the defendants pointed out the deficiencies in the indictment and moved to have it dismissed. At that point, the government could have returned to the grand jury and attempted to establish probable cause of the FTAIA elements (on whichever FTAIA theory it chose to pursue). Had it succeeded in that effort, the government could have returned to trial with valid charging document. Instead, the government marshaled a variety of shaky legal arguments aimed at justifying its earlier decision not to plead the FTAIA. Those arguments do not withstand scrutiny. The indictment did not validly allege an offense under the FTAIA, and it therefore should have been dismissed.

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D. The Requirements of the Import Trade Exception

In denying the defendant's motion to dismiss, the district court ruled that the government had sufficiently pleaded the import trade exception. That ruling was erroneous for all of the formal reasons mentioned above—the indictment did not cite the FTAIA, it did not track the language of the statute (or the import trade exception), and so on.

It was also erroneous because it was based on a mistaken view of what the import trade exception requires. The district court held that because the indictment was based on conduct involving "the importation of TFT-LCD products into the United States," it sufficiently alleged the import trade exception. (ER 183.) But the import trade exception does not apply any time there is a case involving some eventual importation of products into the United States. If that were true, the import trade exception would swallow the rule of the FTAIA.

This Circuit has not yet ruled on the meaning of the import trade exception. Other circuits have reached slightly varying formulations, but the government's indictment was deficient under any reasonable interpretation of the statute.

1. The **Minn-Chem** *"Importer" Formulation*

In its recent en banc decision in *Minn-Chem*, the Seventh Circuit held that the import trade exclusion applies to transactions between domestic buyers and foreign sellers. Thus, it defined "import trade" as "trade involving only foreign

sellers and domestic buyers." 683 F.3d at 855; *see also id*. at 857 (stating that the import trade exclusion applies to foreign corporations who engage in "direct import sales"). Therefore, the civil suit was allowed to proceed because it was based on allegations that domestic plaintiffs had purchased products "*directly* from members of the alleged [foreign] cartel." *Id*. at 855 (emphasis added).

Minn-Chem is a sensibly narrow interpretation of the import trade exception. It is consistent with the most ordinary reading of the statutory text—that "import trade" refers to corporations engaging in import transactions. And while it is certainly true that the import exception is hardly a model of clarity,[14] because its interpretation affects the scope of criminal liability under the Sherman Act, any ambiguity must be resolved in favor of lenity. *See United States v. Nosal*, 676 F.3d 854, 862-63 (9th Cir. 2012) (en banc). It is also precisely the interpretation that defendants proposed in their motion to dismiss the indictment. (ER 1670.)

In this case, the government did not allege that the defendants were engaged in importing—indeed, the indictment never even used the word "import." The government did not allege that any United States purchasers bought TFT-LCD panels "directly" from the defendants. *Minn-Chem*, 683 F.3d at 855. Rather, the indictment merely alleged that the defendants sold their products into a

[14] Both courts and commentators have complained that the FTAIA is "cumbersome, ambiguous, and inelegant." 1B Areeda & Hovenkamp, *supra*, ¶ 272i, at 288.

"continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in states or countries other than the states or countries in which the defendants and their coconspirators produced TFT-LCDs." But placing goods into a worldwide stream of commerce, with some of those goods eventually reaching the United States, is precisely what *Minn-Chem* says is insufficient. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002).

2. The **Animal Science** *"Targeting" Formulation*

The Third Circuit has treated the import trade exception slightly differently. It has agreed with all other courts that in order to give the entire statute meaning, the import trade exception "must be given a relatively strict construction." *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 72 (3d Cir. 2000). But its interpretation appears to be at least slightly broader than the *Minn-Chem* interpretation. The Third Circuit has held that the exception only applies when the defendant's conduct was "directed at an import market"—put differently, "the import trade or commerce exception requires that the defendants' conduct target import goods or services." *Animal Science*, 654 F.3d at 470 (internal quotation marks omitted); *see also Kruman*, 284 F.3d at 395-96.

Even if this Court adopts the *Animal Science* interpretation rather than the *Minn-Chem* interpretation, the allegations were still deficient. The indictment makes no claim that the defendants' conduct was "directed" or "targeted" at United

States imports. *Animal Science*, 654 F.3d at 470. Rather, the indictment merely alleges that the defendants sought to fix the price of panels sold worldwide, and that some of the panels were incorporated into products eventually sold in the United States. That is insufficient to constitute "targeting" under the "relatively strict construction" that term has been given by the Third Circuit. *Carpet Group Int'l.*, 227 F.3d at 72.

In upholding the indictment prior to trial, the district court in this case essentially adopted a general "stream of commerce" theory of the import trade exception. That theory is precisely what other circuits have rejected when they have interpreted the FTAIA. The district court later recognized the error of its ways when it incorporated the "targeting" language into its final jury instruction on the FTAIA, but that remedial measure could not cure the fatal deficiency in pleading. Because the indictment only alleged placement of products into the worldwide stream of commerce, it did not validly state an offense under the import trade exception. Because that was the only FTAIA exception even arguably contained in the indictment, the indictment was fatally defective, requiring reversal.

E. The Constructive Amendment Regarding the Domestic Effects Exception

Prior to trial, the government contended that the indictment had sufficiently (albeit only implicitly) pleaded the import trade exception. But no one then

suggested that the government had pleaded the domestic effects exception. Indeed, in none of the proceedings below did the government ever argue that it had pleaded domestic effects as well as import trade. And the district court's ruling denying the defendants' motion to dismiss rested solely on the import trade exception—it never mentioned domestic effects.

Nor could the indictment have been upheld on such grounds. After all, the indictment never used the critical statutory phrase: "direct, substantial, and reasonably foreseeable effect." The indictment never alleged that the domestic anticompetitive harm "follow[ed] as an immediate consequence of the defendant's activity," which is the legal meaning of the term "direct" under the FTAIA. *LSL Biotechnologies*, 379 F.3d at 680. And while the indictment may have alleged a substantial effect on domestic commerce, it never alleged that that effect was reasonably foreseeable to the defendants. It is thus not surprising that the government never sought to defend the indictment on the grounds that it pleaded the domestic effects exception.

And yet—notwithstanding the admitted failure to plead that theory—the district court allowed the government to obtain a conviction on that theory at trial. Over the defense's objection, the district court's instructions to the jury allowed the jury to convict on *either* the import trade theory *or* the domestic effects theory.

Those instructions worked a constructive amendment of the indictment. The prosecution may not present one theory of guilt to the grand jury and another to the petit jury. *Stirone v. United States*, 361 U.S. 212, 217 (1960); *see also Russell v. United States*, 369 U.S. 749, 768 (1962) (stating that the government is not permitted to "shift its theory of criminality" at various stages of the proceedings). Even setting to one side all arguments about the import trade theory, the domestic effects theory was simply not pleaded. "Nowhere in the indictment is there a statement of facts and circumstances that would support [the] other possible . . . theor[y]" that was ultimately allowed as a basis for conviction at trial. *United States v. Shipsey*, 190 F.3d 1081, 1087 (9th Cir. 1999).

Even had the district court correctly ruled that the import trade exception was sufficiently pleaded, it was still error to instruct the petit jury that it could convict on the domestic effects exception, which was concededly never pleaded. Those instructions worked an impermissible constructive amendment of the indictment, requiring reversal.

III. THE GOVERNMENT FAILED TO PROVE THE ELEMENTS OF THE FTAIA

Even aside from all of the problems discussed above relating to the indictment, the evidence at trial was insufficient. The government failed to prove beyond a reasonable doubt either that the defendants were involved in import trade or that their conduct had a direct effect on United States commerce. For that

reason, the defendants are further entitled to a dismissal of the indictment with prejudice.[15]

A. Import Trade Exception

The government did not present evidence that AUO was an importer or that AUO's alleged price fixing agreement targeted the United States. Rather, what the evidence at trial showed was that AUO shipped its products to overseas systems integrators, who then combined panels with other components to make end-user products, some of which were eventually imported into the United States by companies other than the defendants. Regardless of whether this Circuit adopts the *Minn-Chem* formulation or the *Animal Science* formulation, such conduct does not qualify as "import trade" for the purposes of the FTAIA.

It was uncontested at trial that during the period of the alleged conspiracy, AUO manufactured absolutely no consumer end-user products. Rather, AUO manufactured TFT-LCD panels that were eventually incorporated—by other foreign manufacturers—into consumer end-user products. Government witness Timothy Tierney of HP described the supply chain in some detail. According to Tierney, panel suppliers such as AUO would ship panels into an overseas warehouse called a "BAX hub." (ER 1447-50, 1461-64.) Panels would be delivered to independent OEMs, located in Taiwan or China. Those OEMs would

[15] Insufficiency claims are reviewed de novo. *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

then use the panel along with other components to manufacture the end-user product. (*Id.*) None of the OEMs was located in the United States. (ER 1367.) Tierney testified that HP had no manufacturing facilities in the United States that purchased AUO products. (ER 1441.) He testified that he was only aware of "a few" of AUO's panels that were ever shipped directly to the United States—and only then for marketing and qualification purposes. (ER 1442-46.) In short, AUO was not a importer of TFT-LCD panels.[16] Rather, AUO sold its products to other companies overseas, who then resold their end-user products globally, including to the United States.

If this Circuit adopts the *Minn-Chem* formulation of the import trade exception, AUO is clearly entitled to acquittal. AUO was not engaged in "direct import sales." 683 F.3d at 857. Rather, it shipped its products abroad to OEMs located in other countries. The transactions described in this case were not "trade involving only foreign sellers and domestic buyers." *Id*. at 855. Rather, the transactions involved foreign sellers, foreign intermediary purchasers, and multinational branded companies as importers. Consequently, under the *Minn-*

[16] In post-trial briefing on this issue, the government relied heavily on Govt. Exh. 775 to support its argument. But that exhibit only shows that panel manufacturers collectively sold a small number—less than 1%—of their panels directly to the U.S. The fact that other manufacturers imported a relatively few panels hardly makes AUO an importer.

Chem formulation, the government failed to prove that AUO was engaged in import trade.

But even if this Court adopts the *Animal Science* formulation, the government still failed to carry its burden. As the government's own witnesses testified, none of AUO's panels were specifically designed for the U.S. market. (ER 1442.) Rather, they were designed to be incorporated into consumer end-user products for sale around the world. Even accepting all of the government's evidence of pricing agreements, those agreements did not "target" the United States. *Animal Science*, 654 F.3d at 470.

AUO placed its panels into the worldwide stream of commerce, and its panels were built into computers and other products which were imported—by other companies—into the United States. If the district court's initial "stream of commerce" interpretation of the import trade exception is the correct one, then the government might well have presented sufficient evidence to prove the exception. But that interpretation has no support in the case law, and it would thoroughly undermine the limitations that Congress sought to enact with the FTAIA. Indeed, under the district court's interpretation, there would be no limitations at all. Under any reasonable interpretation of the statute, AUO was not involved in import trade.

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B. Domestic Effects Exception

The government also failed to prove the elements of the domestic effects exception because the government failed to prove that AUO's conduct had a "direct" effect on domestic commerce. Unlike the import trade exception, the domestic effects exception has already been defined by this Circuit. In fact, in *LSL Biotechnologies*, this Circuit focused in particular on the meaning of the term "direct" under the FTAIA. If that definition is applied to this case, acquittal is required.

The domestic defendant in *LSL* held the patent to a genetically-modified tomato seed, and, through a settlement provision obtained after litigation, it prevented a foreign competitor from developing any rival products. 379 F.3d at 675-76. According to the government's complaint, the foreign competitor was one of the "few firms" in the world "with the experience, track record and know-how" to develop a competing product. *Id*. at 676. And as a result of the defendant's imposed restriction on trade, the defendant came to dominate the market. It held over 70 percent market share. *Id*. at 675.

This Court, however, held that the government's allegations failed to state a claim under the FTAIA because it had not alleged a "direct" effect on United States commerce. It held that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Id*. at 680. Put differently, an "effect

cannot be 'direct' where it depends on . . . uncertain intervening developments." *Id*. at 681. Because the government could not allege with certainty that the defendants' conduct had limited domestic competition and adversely affected domestic consumers, the government's complaint was dismissed.

Those principles mandate acquittal in this case as well. Because AUO did not import any products or manufacture any consumer end-user products, the effects of its actions depended entirely on intervening actors—namely, the OEMs who integrated and imported the end-user products. Even assuming that AUO's conduct resulted in higher prices for OEMs, there was no evidence presented that those higher prices were passed on, through the manufacturing chain, to consumers. Moreover, any effects on American consumers were merely the "secondary and indirect effects that are also the by-product of numerous factors relevant to market conditions and the like." *In re Intel Corp. Microprocessor Antitrust Litig*., 452 F. Supp. 2d 555, 561 (D. Del. 2006); *see also In re Intel Corp. Microprocessor Antitrust Litig*., 476 F. Supp. 2d 452, 456 (D. Del. 2007) ("[T]his speculative chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce required by the FTAIA . . . .").

Simply put, under this Court's interpretation of "direct" for the FTAIA, the Sherman Act does not cover "antitrust actions alleging restraints in foreign markets for inputs . . . that are used abroad to manufacture downstream products . . . that

may later be imported into the United States." *United Phosphorus, Ltd. v. Angus Chem. Co*., 131 F. Supp. 2d 1003, 1014 (N.D. Ill. 2001). And yet that is all the government proved in this case. At most, it alleged and proved a restraint in a foreign market for inputs that were used in downstream consumer end-user products and then eventually imported into the United States. Any effects on domestic commerce depended on "intervening developments" and therefore were not direct. *LSL Biotechnologies*, 379 F.3d at 675-76. As with the import trade exception, the government failed to prove the elements of the domestic effects exception. Dismissal of the indictment with prejudice is in order.

IV. THE INDICTMENT DID NOT ALLEGE, AND THE JURY WAS NOT REQUIRED TO FIND PROVEN, THE ELEMENTS OF AN INTENT TO NEGATIVELY AFFECT, AND A SUBSTANTIAL EFFECT ON, UNITED STATES COMMERCE

The Sherman Act protects competition in United States commerce, not worldwide commerce. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). This principle was crystallized in Judge Learned Hand's opinion in *Alcoa*, 148 F.2d 416, 444 (2nd Cir. 1945), which held that the Sherman Act could be extended extraterritorially to reach foreign conduct only when that conduct was intended to detrimentally affect American commerce, and did so affect it. *Alcoa* was later cited with approval by the Supreme Court. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[I]t 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.").

The brief of codefendants Chen and Hsiung argues, in the wake of *Morrison*, that the Sherman Act cannot be applied extraterritorially. But if the Sherman Act still has extraterritorial application, that application must still be limited by *Alcoa's* intent and effects test. That test controls in any case where the alleged conduct is "primarily foreign." *Dee-K*, 299 F.3d at 294-95; *see also Hartford Fire*, 509 U.S. at 775-76, 796 (applying the *Alcoa* rule in case where several participants in alleged conspiracy were United States-based entities, all London-based defendants were subsidiaries of American corporations, and at least one key meeting attended by London-based defendants occurred in New York); *Nippon Paper*, 109 F.3d 1, 2, 4 (holding that a Sherman Act prosecution could proceed because the government had specifically alleged that price-fixing activities in Japan "were intended to have, and did in fact have, substantial effects in this country").

The subjective intent element identified in *Alcoa* and *Hartford* is more demanding than the objective "reasonably foreseeable" element found in the domestic effects exception in the FTAIA. While *Hartford Fire* found the relationship between existing case law and the FTAIA unclear, 509 U.S. at 796 n.23, the opinion suggested no retreat from the *Alcoa* test.

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A. The Pleading Error Requires Reversal

Prior to trial, the defendants moved to dismiss the indictment for its failure to allege the required intent element; indeed, the superseding indictment did not even contain the term "intent." (ER 1656.) The government responded that because the indictment alleged "domestic conduct and domestic victims," the case was "out of the realm of the FTAIA and *Nippon,* which concern 'wholly foreign conduct.'" (ER 1638.) In denying the motion to dismiss, the Court ruled that the *Alcoa* intent element was inapplicable because "the conspiracy alleged in the indictment is not based on 'wholly foreign conduct,'" and that, in any case, intent was adequately alleged. (ER 180-81.) But under *Hartfor*d, the elements of an intent to substantially affect, and a resulting substantial effect on, United States commerce had to be alleged in the indictment, and they plainly were not. Reversal is required due to this deficiency in pleading. *Omer*, 395 F.3d at 1089.

B. The Instructional Error Requires Reversal

By the time of final instructions, the government had decided to hedge its bets, and proposed an instruction that included the *Alcoa* element as an alternative theory under which the jury could find the Sherman Act applicable to the defendants' foreign contact. The proposed instruction read:

> The Sherman Act applies to conspiracies that occur, at least in part, within the United States. The Sherman Act also applies to conspiracies that occur entirely outside the United States, if they have a substantial and intended effect in the United States. Thus,

> to convict the defendants, you 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.

(ER 1216.)

Defense counsel objected to the alternative phrasing, noting that the inclusion of the *Alcoa-Hartford Fire-Nippon* language in alternative B was a concession that the anticompetitive intent element was applicable to the case at bar. (ER 1243.) Alternative A, however, could be satisfied by the making of a single phone call to or from the United States, relieving the jury of any need to find the required legal factual bases for the extraterritorial application of the Sherman Act.[17] Defense counsel objected: "We're given an instruction here which recognizes that *Hartford* applies. And then we've added to it an appendix which makes *Hartford* meaningless." (ER 1244.) Having proffered the *Hartford* language, the government then reiterated its argument that *Hartford* did not apply here at all, because it addressed only "wholly foreign conduct. That is not the

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[17] The government's argument that, even absent an intended and actual impact within the United States, extraterritorial jurisdiction could be conferred on the district court in this antitrust case by a single conspiratorial act committed within the borders of this country was based solely on *United States* v. *Endicott*, 803 F.2d 506, 514 (9th Cir. 1986). *Endicott* preceded *Hartford Fire* by seven years and was not an antitrust case, but in any event the opinion made clear that extraterritorial jurisdiction can only be obtained by satisfying the requirements of *Alcoa*. *Id.* (United States jurisdiction "extends to acts occurring outside its territory *if* those acts are intended to produce detrimental effects in the United States." (emphasis added)).

situation we face here." (*Id.*) The Court overruled the defense objection and gave the instruction in the alternative requested by the government.

If the Sherman Act can be applied at all to foreign conduct, then the requirements of *Hartford* and *Alcoa* must be met. By relying on alternative A rather than alternative B, however, the jury could have convicted without finding that the charged conduct of the defendants on foreign soil had any substantial effect on United States commerce, or that it was intended to have any such effect. Where, as here, the jury could have convicted either on a legally defective theory or a legally correct one, and it is impossible to determine upon which theory the guilty verdict rests, reversal is required.

When "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). In this case, the jury surely convicted on the defective "one act" theory rather than the "substantial intent and effect" standard, because the government never presented that latter theory to the jury. It argued to the district court at the instructional conference that it was not required to offer "proof of a subjective intent to direct or target" United States commerce. (ER 1159.) And while it argued to the jury that the defendants had the intent to fix prices, the government never once suggested in closing argument, much less cited to evidence in the record, that the defendants

intended to affect United States commerce. The instructional error cannot be found harmless; reversal is required.

V. AUO'S SENTENCE MUST BE VACATED BECAUSE THE DISTRICT COURT IMPOSED A FINE IN EXCESS OF THE MAXIMUM FINE AUTHORIZED BY LAW

In addition to the claims related to the underlying convictions, this case also presents a question of first impression regarding the alternative fine statute, 18 U.S.C. § 3571(d), which was the basis of the fine imposed on AUO at sentencing. While the statutory maximum for a fine under the Sherman Act is $100 million, the alternative fine statute, by authorizing a fine of twice the gains resulting from the charged offense, could permit a much higher fine in an antitrust case. The statute does not specify, however, how it applies to multi-defendant cases. This Court must resolve whether the § 3571(d) gain is calculated based on the defendant's *individual* gains or the *collective* gains of all defendants and co-conspirators.

A. The District Court's Rulings Below

Application of § 3571(d) requires a jury finding as to the relevant gain figure. *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012). Before trial, AUO argued that any fine under §3571(d) must be based on a jury finding of AUO's *individual* gains in the alleged conspiracy, and argued that any jury instruction must require an individual gain finding. (ER 1542, 1595-97.) The government argued that AUO's fine could be based on the *collective* gains from all

conspirators, including those of the much larger corporations Samsung and LG. (ER 1570-71.) The district court agreed with the government. (ER 103.)

At trial, the government offered no evidence as to what gain AUO obtained during the alleged conspiracy. Rather, it presented evidence of the overall gains by all conspirators combined. (RT 3282-87.) Consistent with the district court's pretrial ruling, and over the defense's objection, the government requested and received an instruction asking the jury to find collective gains in excess of $500 million. (ER 604-05, 1231.) The jury found a collective gain of at least $500 million. (ER 589.)

At sentencing, AUO again argued that that the jury's verdict was inadequate to trigger application of § 3571(d) because it had not found any individual gain. (ER 387.) It also argued in the alternative that if the alternative fines statute was applied collectively, then the total fine must be subject to ordinary principles of joint and several liability. (ER 395.) Application of those principles would have limited AUO's fine to a more proportional share of the collective fine. Prior to AUO's sentencing, the government had already recovered fines totaling $715 million from the other Crystal Meeting participants. Therefore, under the alternative fine provision of §3571(d), the government could recover only a maximum of $285 million from AUO.

The government reiterated its arguments that the statute should apply collectively. (ER 356.) But it simultaneously opposed any effort to apply ordinary rules of joint and several liability. The government argued that even though the alternative fine statute applied collectively, AUO was individually liable for the entire amount of the collective fine, and should thus be fined one billion dollars. Once again, the district court agreed with the government that AUO could be fined up to twice the amount of the collective overcharge, although in its discretion the court imposed a fine of $500 million, still five times the statutory maximum under the Sherman Act. (ER 219.)

The government cannot have it both ways, and the district court's rulings make no sense as a matter of statutory interpretation.[18] In cases involving multiple defendants, fines under § 3571(d) should be based on a defendant's individual gains, and if fines are to be imposed collectively, then they must be subject to principles of joint and several liability.

B. Individual Liability Under the Alternative Fine Statute

As noted above, the maximum fine that may be imposed on a corporation under the Sherman Act is $100 million. 15 U.S.C. § 1. Because the government sought to impose a fine on AUO above the $100 million Sherman Act threshold, it relied on the alternative fine statute. It states:

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[18] Questions of statutory interpretation are reviewed de novo. *United States v. Begay*, 622 F.3d 1187, 1193 (9th Cir. 2010).

> Alternative fine based on gain or loss. 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).

The text of the statute does not address group criminality. Nothing in the statute specifies how it should be applied to cases involving multiple defendants or multiple conspirators who collectively procure illegal gains. The statute could specify that in cases involving multiple defendants, each individual defendant may be fined twice the amount that he gained. That is, after all, the usual rule for criminal fines. *See McKinnon v. Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984) (Posner, J.) ("[P]unitive damages, like criminal fines, which they resemble, are always assessed individually."). Or the statute could specify that in cases involving multiple defendants, each individual defendant may be fined twice the amount that all defendants gained collectively. But the statute specifies neither.

1. Legislative History

The legislative history of § 3571, however, supports the former interpretation. The statute was originally passed as part of the Criminal Fine Enforcement Act of 1984. Pub. L. No. 98-596, 98 Stat. 3134 (1984). Congress enacted the statute to create a general provision in the federal criminal code that

would allow courts to impose a fine of twice the gross gain or loss, notwithstanding other limits. *See United States v. Condon*, 816 F.2d 434, 435 (8th Cir. 1987).

As originally enacted in 1984, the alternative fine statute stated that that "If the defendant derives pecuniary gain from the offense," a fine of twice the gain could be imposed.[19] Like the current statute, the text of the original statute did not specify whether, in multi-defendant cases, "gain from the offense" should be calculated based on the defendant's individual gain or the collective gain. The legislative history, however, made clear that Congress intended the former. Congress explained that the provision "is derived from the Model Penal Code, see Model Penal Code Sec. 6.03(5)." *See* H.R. Rep. 98-906 at 17, 1984 U.S.C.C.A.N. at 5449. That provision allows a fine "equal to double the pecuniary gain derived from the offense by the offender." ALI, *Model Penal Code* § 6.03(5) (1985). That is what Congress sought to enact in federal law.

> This provision is intended to enable federal courts to impose fines that will prevent convicted offenders from profiting from their wrongdoing. The most effective way to ensure that the wrongdoer does not profit is to base the fine *upon the pecuniary gain of the defendant*.

H.R. Rep. 98-906 at 17 (emphasis added).

[19] The statute was originally codified at 18 U.S.C. § 3623(c).

The statute was amended as part of the Criminal Fines Improvement Act of 1987. Pub. L. No. 100-185, 101 Stat. 1279. The amendment replaced the words "the defendant" in the opening clause with the words "any person." The House Judiciary Committee explained the reason for the amendment:

> Current law authorizes such a fine . . . 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. 100-390, 1987 U.S.C.C.A.N. at 2142.

Under the original version of the statute, if an employee committed a crime on behalf of his employer corporation, he could not be held accountable under the alternative fine provision. The amendment was intended to close that apparent loophole so that defendants could be held liable when they committed crimes for the benefit of others. *See, e.g.*, *United States v. Andreas*, 1999 WL 116218, at *2 (N.D. Ill. Feb. 24, 1999) ("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 [their employer].").

In its arguments below, the government seized on the "any person" language and argued that the statute, following the 1987 amendment, now "plainly"

contemplates collective fines. (ER 357.) That argument is bizarre for several reasons. First, nothing in the statutory text refers to collective fines or multi-defendant cases. Second, nothing in the legislative history gives any indication that Congress meant its amendment to expand fines in multi-defendant cases. Third, the government's argument utterly fails to account for the actual reason given by Congress for enacting the amendment: to cover cases where an individual defendant "intends that his conduct will benefit another person."

Even following the amendment, the statute still contemplates fines based on an individual defendant's conduct—the gross gain or loss that he caused. The government argued below that an individual interpretation would "nullify" the 1987 amendment, but that is simply not so. Prior to the amendment, if a defendant committed a crime that resulted in a gain to a third party, but did not himself receive any gain, he could not be fined under the alternative fine statute. Following the amendment, such a defendant can be fined under § 3571(d). That is the most natural reading of the amendment—and that is precisely what Congress said it intended to do. Under that reading, a defendant's fine is still based on his individual conduct and the individual gain or loss that he produced.

2. *Other Authority Regarding Section 3571(d)*

As the government itself conceded in proceedings below, there is no case in this Circuit or any other circuit addressing this precise question under § 3571(d).

The weight of authority nonetheless supports AUO's interpretation of the statute and rejects the government's interpretation.

The Sentencing Guidelines Commission has unequivocally stated that fines imposed under § 3571(d) should be calculated based on the additional profit to the individual defendant. *See* U.S.S.G. § 8A1.2, App. Note 3(h) ("'Pecuniary 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."); *see also* U.S.S.G. § 2R1.1(d)(1) & App. Note 3; United States Sentencing Commission, *Supplementary Report on Sentencing Guidelines for Organizations* at 10-11 (1991). In short, the Sentencing Commission has interpreted the statute to mean exactly what AUO says it means. While the Commission's interpretation is neither binding on this Court nor entitled to full *Chevron* deference, it is nonetheless true that Commission's interpretations of criminal statutes "have persuasive value . . . because of its experience and familiarity with the federal criminal laws." *United States v. Schiffbauer*, 956 F.2d 201, 203 n.3 (9th Cir. 1992).

Like the Commission, courts interpreting the statute have similarly assumed that, even after the 1987 amendment, § 3571(d) still ties fines to a defendant's individual conduct. Describing the alternative fine statute, the Second Circuit stated that it "authorizes a district court to impose a fine of not more than twice the gross pecuniary loss caused by, or gain derived from, *the defendant's* offenses."

United States v. Pfaff, 619 F.3d 172, 173 (2d Cir. 2010) (emphasis added). Other cases, including cases with multiple defendants, contain similar language stating that each defendant's fine is based on his own individual conduct. *See, e.g.*, *United States v. Chusid*, 372 F.3d 113, 117 (2nd Cir. 2004); *United States v. Sanford Ltd.*, 878 F. Supp. 2d 137, 150 (D.D.C. 2012).

In its arguments below, the government dismissed these cases because they did not squarely address the precise question presented here. That may be true—but the government itself has not cited any contrary cases squarely on point either. And what cases such as *Pfaff* show is that the most natural, most intuitive reading of § 3571(d) is that fines are imposed based on a defendant's individual conduct.

3. Rule of Lenity

The text of § 3571 itself does not specifically address how fines are to be imposed in multi-defendant cases. As a result, neither the government's interpretation nor the defendant's interpretation is squarely foreclosed by the plain meaning of the statute. The legislative history of the critical 1987 amendment supports the defendant's interpretation, as do the Sentencing Commission's interpretations and the routine descriptions of the statute by other courts. Those sources of authority are sufficient to settle the question. But even if they were not, the rule of lenity would be.

As Justice Scalia has explained, when no legal authority clearly supports the government's interpretation of a criminal statute, "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008).

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.

Id. (citations omitted).

The government's argument that § 3571, which does not even mention multi-party cases, somehow "plainly" imposes collective fines in such cases lacks credibility. The government's interpretation would also have grotesquely draconian consequences, where minor individual defendants could be subject to massive fines based on the gains received by central players or corporate defendants. There is no evidence whatsoever that Congress intended such a result. The most natural reading of the statute contemplates individual fines, and to the extent that the statute is unclear on this point, the rule of lenity mandates that the defendant's interpretation be adopted until Congress speaks more clearly.

4. *Prejudice and Remedy*

The statute requires a finding of the individual gain caused or realized by the defendant, but in this case, the district court's instruction failed to require such a finding. That error cannot be deemed harmless. The government did not present

any evidence whatsoever regarding AUO's individual gain from the alleged conspiracy. The government's expert Dr. Leffler performed a global overcharge analysis for all six charged companies—LG, Samsung, CPT, CMO, Hannstar, and AUO—to show that the total overcharge exceeded $500 million. (RT 3282-87.) Although Dr. Leffler had pricing data from AUO available, he did not perform any individual overcharge analysis. (RT 4405.) Defense expert Bruce Deal did analyze AUO's individual pricing data and concluded that AUO received no individual gains. (RT 4375, 4407-12.) In short, this is not a situation where the requisite jury finding—AUO's individual gain—was "uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 16.

Because there has been no jury finding in this case that AUO itself received any amount of gain, there is no basis for imposing any fine under § 3571(d). As a result, the maximum fine that may be imposed is the statutory maximum of the Sherman Act itself. AUO's sentence should therefore be vacated and this case should be remanded for resentencing under the Sherman Act.

C. Joint and Several Liability Under the Alternative Fine Statute

In the alternative, even if were the government correct that § 3571(d) imposes fines based on collective gains, then the fine must still be governed—and limited—by principles of collective responsibility. In particular, under hornbook

law regarding joint and several liability, the total recovery from all parties cannot exceed the maximum authorized by law.

Joint and several liability is limited by the "one recovery" rule. "The plaintiff may not, pursuant to the judgment for that claim, obtain more than the total of the recoverable damages." ALI, *Restatement (Third) of Torts*, § 10, cmt b; *see also McKinnon*, 750 F.2d at 1387 ("This means that each defendant is liable to the plaintiff for the whole of the plaintiff's damages, except that the plaintiff may not collect, from all the defendants together, more than those damages.").

In other contexts, federal courts have imposed joint and several fines for criminal violations. *See, e.g.*, *United States v. Pruett*, 681 F.3d 232, 237-38 (5th Cir. 2012); *United States v. Radtke*, 415 F.3d 826, 836 (8th Cir. 2005). In fact, other circuits have held that RICO and forfeiture laws allow for joint and several liability. *See United States v. White*, 116 F.3d 948, 951 (1st Cir. 1997); *United States v. Masters*, 924 F.2d 1362, 1370 (7th Cir. 1991). Those decisions are somewhat controversial because they run against the usual grain of individual liability for criminal conduct. *See United States v. Garcia-Guizar*, 160 F.3d 511, 527-28 (9th Cir. 1998) (Beezer, J., dissenting).

Regardless, where joint and several liability applies in the criminal law, the "one recovery" limitation must also apply. When the First Circuit adopted joint and several liability for the RICO statute, it clarified that the government could

recover the total fine only once: "The government can collect its $136 million only once but, subject to that cap, it can collect from any appellant so much of that amount as was foreseeable to that appellant." *United States v. Hurley*, 63 F.3d 1, 23 (1st Cir. 1995); *see also United States v. Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999) ("[T]he government can collect [the amount subject to forfeiture] only once."); *Masters*, 924 F.2d at 1370 ("Each is fully liable for the receipts of the other members of the enterprise, subject to the overall ceiling . . . .").

The government seeks joint and several liability for multi-defendant cases under § 3571, but it seeks to impose that liability without the usual "one recovery" limitation. It seeks full *individual* liability for all *collective* gains. That interpretation has no basis in the statute, and it would be anomalous in the law.

It would also produce absurd results that would run afoul of the Excessive Fines Clause. Imagine a drug conspiracy with a kingpin who earned $50 million and 100 employees who each earned $100,000. The total collective gain from the conspiracy would be $60 million. Under the government's interpretation of § 3571, each employee could be fined $120 million, over 1000 times his individual gain. The total fine imposed by a court could exceed $12 billion. Such fines would be absurd and unconstitutional, and there is no chance that Congress intended such a result when, in 1987, it made a minor change to § 3571(d), replacing the words "the defendant" with "any person."

Section 3571(d) does not authorize collective fines, and therefore joint and several liability should not be imposed at all. But if this Court adopts the broad collective approach, it must also adopt the *limitations* that always apply to joint and several liability. The jury below found that the collective gain exceeded $500 million. Based on that finding, the "one recovery" rule means that a collective fine could not exceed $1 billion. Other defendants having paid fines totaling $715 million, the $500 million dollar fine imposed by the district court in this case resulted in a total collective fine well over $1 billion. To the extent the fine imposed on AUO exceeded $285 million, it was therefore illegal—it must be reduced based on the amounts already paid by other alleged co-conspirators.

The government cannot have it both ways. Even if collective fines are appropriate under § 3571(d), this case must be remanded for resentencing consistent with ordinary principles of joint and several liability.

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CONCLUSION

For the reasons stated, the convictions of all defendants must be reversed and the charges against them dismissed or, in the alternative, a new trial ordered. Even if the convictions are upheld, the fine imposed on AUO must be vacated because the fine imposed was in excess of the statutory maximum.

Dated: February 4, 2013

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for AU Optronics Corporation and AU Optronics Corporation America identify the following related cases:

-*United States v. Hui Hsiung*, Ninth Cir. Nos. 12-10492, 10559. This appeal and cross-appeal, which have been consolidated with this case, arise out of the same case in the district court, raise the same or closely related issues, and involve the same events.

-*United States v. Hsuan Bin Chen*, Ninth Cir. Nos. 12-10493, 10560. This appeal and cross-appeal, which likewise have been consolidated with this case, arise out of the same case in the district court, raise the same or closely related issues, and involve the same events.

In addition, a related case is currently pending in the Northern District of California. That case, *United States v. Leung*, No. 09-cr-110-SI, involves the retrial of co-defendant Steven Leung. It arises out of the same case in the district court, raises the same or closely related issues, and involves the same events. Mr. Leung is currently awaiting sentencing in the case.

CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing opening brief is proportionately spaced, has a typeface of 14 points, and contains 19,832 words.

Dated: February 4, 2013

/s/ Donald M. Horgan
Donald M. Horgan

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When All Case Participants are Registered for the
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I hereby certify that on February 4, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /s/ Jocilene Yue
Jocilene Yue

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