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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA; HSUAN BIN CHEN, aka H.B. CHEN; HUI HSIUNG, aka KUMA; LAI-JUH CHEN, aka L.J. CHEN; SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG; BORLONG BAI, aka RICHARD BAI; TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE; CHENG YUAN LIN, aka C.Y. LIN; WEN JUN CHENG, aka TONY CHENG; and DUK MO KOO, Defendants.	No. CR-09-0110 SI UNITED STATES' REPLY TO DEFENDANTS' SENTENCING MEMORANDA Date: September 20, 2012 Time: 10:00 a.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

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I. INTRODUCTION

The $1 billion fine against AUO and the ten-year terms of imprisonment and $1 million fines against its top executives recommended by the government are necessary, appropriate, and equitable sentences in this case. They are the maximum sentences for the offense. The defendants were central figures in a massive, five-year global price-fixing conspiracy that caused enormous and widespread harm affecting virtually every purchaser of products containing LCD panels. H.B. Chen and Hui Hsiung were top executives at AUO and AUOA and created a culture of criminal collusion at their companies. In its first month of existence, AUO began fixing prices and only stopped when the FBI raided AUOA's office. And the defendants, unlike their coconspirators, are remorseless, having refused to accept responsibility or to provide any assistance that would justify a reduction in their sentences.

At all times before trial, defendants faced a choice. They could have accepted responsibility and assisted the government in its ongoing investigation of their industry, a choice that would have entitled them to reduced sentences. Defendants' coconspirators did so. These defendants, however, chose to exercise their right to contest their guilt and go to trial. This choice, they knew, carried with it both the possibility of acquittal and the risk of a jury convicting them and a court sentencing them without the benefit of reductions for acceptance of responsibility, cooperation, and substantial assistance. Having made their choice, defendants cannot now complain that the sentences they face are "draconian."

Moreover, fundamental fairness demands that defendants' recalcitrance in accepting responsibility cannot be rewarded. Defendants cannot credibly ask this Court to treat them more favorably than their coconspirators who accepted responsibility and provided substantial assistance to the investigation. Defendants cannot ask this Court to disregard the Alternative Fine Statute, 18 U.S.C. § 3571(d), when coconspirators LG Display and CMO were subject to Section 3571(d). Nor can they ask this Court to calculate their corporate fine on something other than 20 percent of affected commerce, as prescribed by U.S.S.G. § 2R1.1, when all of their coconspirators were subject to that provision. Nor can they ask this Court to take into account foreign fines and civil settlements when the fines imposed on its pleading coconspirators were

not reduced because of foreign fines and civil settlements. And defendants cannot now ask this Court to disregard volumes of commerce after January 2006 when pleading coconspirators CPT and CMO, which accepted responsibility and started cooperating years ago, were required to pay fines based on commerce until December 2006.

The government's recommended sentences result not from vindictiveness, as defendants suggest. They are the product of the Sentencing Guidelines ("Guidelines")—which were applied to every other pleading coconspirator in this case and to every other case. The $2.34 billion of affected commerce attributable to defendants is well supported, the application of the 20 percent figure of Section 2R1.1 is required and wholly appropriate, and the recommended fines and prison sentences are supported by the Guidelines. Precisely because defendants chose not to accept responsibility and provide substantial assistance, there are no factors available to them now that warrant a departure from the recommended fines and jail sentences. Indeed, while Samsung and LG reported their price fixing to the government and began assisting the government's investigation *months before that investigation became public*, AUOA responded to learning of the investigation by obstructing justice. Even after self-reporting and providing substantial assistance that helped the government gather evidence, understand the case, obtain guilty pleas from other coconspirators, and prosecute these defendants, LG still was required to pay a $400 million criminal fine and some of its senior executives served time in prison. These defendants are in no position to seek more favorable treatment than LG received when it came in to cooperate over six years ago. Instead, it is fitting that the AUO defendants pay a higher price.

The government agrees with the Probation Office's recommendation that H.B. Chen and Hui Hsiung should receive the maximum sentence of ten years in prison. They were ringleaders of a massive conspiracy that caused extraordinary harm. They should be punished accordingly. Even these recommended sentences at the statutory maximum are below the bottom of the Guidelines sentencing range.

The government also agrees with the Probation Office's recommendation that AUO and its subsidiary, AUOA, need a corporate compliance program as suggested by the government and attached along with its Sentencing Memorandum.

The government, however, respectfully disagrees with the Probation Office's recommended fine for AUO. Despite recognizing that no factors warrant a departure from AUO's Guidelines fine range of $936 million to $1.872 billion, it recommends a fine of only $500 million on the grounds that a fine within that range would be more than necessary to satisfy the goals of sentencing. But a $500 million fine would simply not be sufficient to reflect the seriousness of this offense, promote respect for the law, or, most importantly, adequately deter future price fixing. A $500 million fine would represent a nearly 50 percent discount off of AUO's minimum Guidelines fine. That would be nearly the same discount as what LG earned for self-reporting and providing substantial cooperation over six years ago. And it would not only be a perverse result for AUO to receive a nearly 50 percent discount when it has failed to accept responsibility and cooperate with the investigation, it would also harm the Division's ability to properly incentivize self-reporting and timely cooperation in future cases. Without the proper incentives, massive global cartels like this one will go undetected and unpunished.

Moreover, a $500 million fine would be a cost-of-doing-business fine for a large scale, highly successful cartel like the one proven in this case. While $500 million is a big number, experience teaches that Probation's recommended fine in this instance is not an adequate deterrent. When Judge Ruben Castillo of the Northern District of Illinois sentenced Archer Daniels Midland Company ("ADM") to a then-record fine of $100 million for its role in the lysine and citric acid conspiracies in 1996, he said: "I believe that the [$100 million] fine certainly serves as a deterrent to any company that might still be out there thinking that this type of behavior is acceptable. It simply is not acceptable. For any company to engage in price fixing is a sad day for corporate America because ultimately the consuming public are the victims of these type of conspiracies. I'm hopeful that the fine, and I know in my heart that the fine will deter other companies." Transcript of Sentencing Proceedings at 26, *United States v. Archer Daniels Midland Co.*, No. 96CR640 (N.D. Ill. Oct. 15, 1996). Judge Castillo was mistaken. Since he sentenced ADM to pay a $100 million fine—ten times the then-statutory maximum—19 other companies have been sentenced to fines of more than $100 million under Section 3571(d). In 1999, F. Hoffmann-La Roche, Ltd. was sentenced to pay a record $500 million fine

for participating in a criminal conspiracy in the vitamins industry. By 2000, the fines imposed on seven other vitamins cartel participants totaled nearly $400 million more. These large fines that received widespread publicity throughout the world had no effect on the behavior of AUO and its coconspirators. Undeterred, they came together *just two years* after the $500 million fine was imposed to form a cartel that was more pernicious than the vitamins cartel. Moreover, conspiracies in the DRAM, air cargo, and auto parts industries began after the $500 million fine and have themselves yielded fines approaching that of Hoffmann-La Roche.[1]

In the past dozen years, new cartels have continued to spring up in spite of the many fines of more than $100 million imposed in cartel cases. The continuing discovery of new cartels throughout the world is evidence that the fines imposed to date—as large as they are—have failed to provide adequate deterrence and that potential cartelists continue to see fines as an acceptable cost of doing business. Contrary to the Probation Office's justification, a $500 million fine is, in fact, demonstrably insufficient to deter others from engaging in similar conduct. It is possible that even a $1 billion fine will not deter the type of pernicious conduct before the Court, but it is the maximum deterrent message that can be sent in the most serious price-fixing cartel ever prosecuted by the government.

II. EVIDENTIARY STANDARD

A district court "typically uses a preponderance of the evidence standard when finding facts pertinent to sentencing." *United States v. Berger*, 587 F.3d 1038, 1047 (9th Cir. 2009). "[T]here may be an exception to th[is] general rule . . . when a sentencing factor has an *extremely disproportionate* effect on the sentence *relative to the offense of conviction*." *United States v. Restrepo*, 946 F.2d 654, 659-60 (9th Cir. 1991) (emphases added). In such cases, findings of fact at sentencing may have to be supported by clear and convincing evidence. *United States v. Felix*, 561 F.3d 1036, 1045 (9th Cir. 2009). This is not one of those cases. "The clear and

[1] For example, Yazaki Corporation was recently fined $470 million in the auto parts investigation, Société Air France-KLM was fined $350 million in the air cargo investigation, and Samsung Electronics Co., Ltd. was fined $300 million in the DRAM investigation. These are just a few of the fines approaching that of F. Hoffmann-La Roche in these other industries. *See* http://www.justice.gov/atr/public/criminal/sherman10.html.

convincing standard has been reserved for 'exceptional' enhancements of the defendant's offense level calculation." *United States v. Collins*, 684 F.3d 873, 889 (9th Cir. 2012).

While the Ninth Circuit has "not been a model of clarity" regarding this exception, *Berger*, 587 F.3d at 1048, it has "repeatedly held that sentencing determinations relating to the extent of a criminal conspiracy need not be established by clear and convincing evidence." *United States v. Treadwell*, 593 F.3d 990, 1001 (9th Cir. 2010) (citing *Berger*, 587 F.3d at 1047-49). Thus, for example, facts underlying loss enhancements in fraud cases are found by a preponderance of the evidence because the "sentencing enhancements for financial loss are based on the extent of the fraud conspiracy." *Id.* (affirming application of the preponderance of the evidence standard to a 22-level enhancement for losses caused by fraud) (citing *United States v. Riley*, 335 F.3d 919, 926-27 (9th Cir. 2003)).

Just as sentencing enhancements for financial loss are based on the extent of a fraud conspiracy, sentencing enhancements based on the volume of affected commerce are logically related to the extent of an antitrust conspiracy. *See* U.S.S.G. § 2R1.1(b)(2) background ("Tying the offense level of the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun."). The affected volume of commerce in antitrust cases serves as "an acceptable and more readily measurable substitute" for loss. U.S.S.G. § 2R1.1 background; *see also* U.S.S.G. § 2R1.1(d)(1). Accordingly, the government need only establish volume of commerce in an antitrust case by a preponderance of the evidence.

In addition, the Ninth Circuit has repeatedly held that the government need only prove a defendant's role in the offense under U.S.S.G. Section 3B1.1 by a preponderance of the evidence because that adjustment does not have "an extremely disproportionate effect" on sentences. *See, e.g.*, *United States v. Lopez-Arroyo*, 472 F. App'x 679, 679-80 (9th Cir. 2012); *United States v. Johansson*, 249 F.3d 848, 853-57 (9th Cir. 2001); *United States v. Valensia*, 222 F.3d 1173, 1181-82 (9th Cir. 2000), *judgment vacated on other grounds*, 532 U.S. 901 (2001). Indeed, the four-level enhancement for leader or organizer applicable to the individual defendants here is

"not an exceptional case that requires clear and convincing evidence." *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999); *see also Valensia*, 222 F.3d at 1181-82.[2]

Finally, an analysis of the "totality of the circumstances" supports the preponderance of the evidence standard for both the volume of commerce and role in the offense enhancements. *Treadwell*, 593 F.3d at 1001. Neither enhancement "negates the presumption of innocence" or "alters the burden of proof" on the underlying offense. *Id.* Nor does either enhancement hold defendants "responsible for any offenses for which they have not been convicted by a jury." *Id.* Indeed, "the only circumstance weighing in favor of a heightened standard of proof is the size of the [volume of commerce] enhancement." *Id.* But even if an enhancement is large, "that alone does not raise the due process concerns that urge 'clear and convincing' proof," *id.* at 1001-02, because the scope and extent of the conspiracy is defined by the volume of commerce it affected.

III. APPLICATION OF THE SENTENCING GUIDELINES UNDER SECTION 2R1.1

A. AUO's Volume of Affected Commerce Is at Least $2.34 Billion

AUO's volume of affected commerce is at least $2.34 billion. As the government explained in its Sentencing Memorandum, that figure is conservative for a variety of reasons. First, it excludes AUO's sales of television panels, which accounted for seven percent of its worldwide sales of indictment panels during the conspiracy. Dkt. 948 at 14. Second, it includes only those sales of panels that made their way into the United States in finished products, and does not include sales of panels invoiced to U.S. companies like Apple that were incorporated into computers sold in other countries.[3] And third, it conservatively estimates AUO's share of

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[2] The Section 3B1.1 enhancement does not, as defendant Chen argues, "meet[] *Jordan's* four-level threshold." Defendant H.B. Chen's Sentencing Memorandum and Motion for Departure at 8. In *United States v. Jordan*, the Ninth Circuit noted that the clear and convincing standard has been applied to enhancements "*greater* than four levels." 256 F.3d 922, 934 (9th Cir. 2001) (emphasis added).

[3] During the conspiracy, Apple sold between approximately 50 to 60 percent of its personal computers in the United States. Dkt. 984-1 at tbl. 2C: Apple Data. Thus, roughly 40 to 50 percent of its TFT-LCD panel purchases, although invoiced to the company here in the United States, are excluded from Dr. Leffler's estimate.

the United States' PC market as significantly less than its worldwide market share. *See* Dkt. 984 (Declaration of Dr. Keith Leffler Regarding AUO's U.S. Volume of Commerce for Sentencing Hearing ("Leffler Decl.") ¶ 26). Contrary to AUO's claims, the estimate is consistent with this Court's rulings, with the case law interpreting Section 2R1.1 of the Guidelines, and with the evidence presented at trial—including Dr. Leffler's testimony.

AUO halfheartedly requests an evidentiary hearing in a footnote at the end of its second brief. Dkt. 943 at 53 n.31. There is no need for an evidentiary hearing. Both sides' experts have provided thorough expert declarations addressing their positions on the affected volume of commerce—the principal disputed factual issue at sentencing. Yet, AUO's request for an evidentiary hearing is based on its desire to readdress overcharge issues, which were addressed by the experts at trial and in declarations attached to the sentencing memoranda. The parties exchanged draft expert declarations more than one month ago, the experts have responded to each other's opinions, the parties have provided those declarations to the Court along with the sentencing memoranda, and nothing more would be achieved by holding an evidentiary hearing.

AUO's arguments concerning its volume of affected commerce are addressed below.[4]

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[4] AUO incorporates a lengthy addendum apparently for the purpose of preserving two issues for appeal: (1) that the government failed to allege the FTAIA in the Superseding Indictment, and (2) that the evidence at trial was insufficient to prove the exclusions under the FTAIA. Dkt. 943 at 42. These arguments were previously refuted by the government and rejected by this Court. *See* Order Denying Defendants' Motion to Dismiss the Indictment (Dkt. 287 at 7) ("[T]he Court concludes that the FTAIA does not require dismissal of the superseding indictment."); Order Denying Motions for Judgment of Acquittal and For a New Trial (Dkt. 923 at 6) ("[T]he Court finds that, based on the evidence presented at trial a reasonable jury could have found that the price-fixing conspiracy involved import commerce and that the conspiracy, which extended to the United States, had a 'direct, substantial, and reasonably foreseeable effect' on that import commerce."). We incorporate by reference our previous responses. *See* Dkt. 281, 895. To the extent that AUO is attempting to argue that volume of affected commerce under Section 2R1.1 is limited by the FTAIA, this is incorrect. *See* Dkt. 948 at 14 & n.5. In any event, such a limitation would have no impact here because the government's conservative affected commerce calculation, consistent with the Court's FTAIA rulings, includes only panels that were incorporated into finished products that made their way to the United States.

1. AUO's Sales During the Final Ten Months of the Conspiracy Should Be Included

AUO asserts that the "government's entire case at trial—and Dr. Leffler's own testimony—focused on a cartel period ending January 31, 2006" (Dkt. 943 at 4) and that the government "used the January 2006 end-date to convict AUO." *Id.* at 20. In particular, AUO believes it knows why the jury found it guilty: because in one of Dr. Leffler's (many) empirical analyses he compared margins before and after the group meetings ended in January 2006. *Id.* at 31-33. For those reasons, AUO argues that the government is estopped from counting sales after January 2006 for purposes of sentencing. AUO's arguments about the final ten months of the conspiracy are wrong in every respect.

First, the government consistently argued at trial that the conspiracy continued until December 1, 2006 and presented evidence supporting that fact. The superseding indictment in this case alleged that the conspiracy continued until December 1, 2006. Dkt. 8 at 2. One of the government's first witnesses, J.Y. Ho, the former CMO president, testified that the conspiracy lasted until December 2006. Trial Tr. vol. 3 at 662-63. One of its last witnesses, Milton Kuan of CPT, testified that the conspirators provided the "same information" in the round-robin, one-on-one meetings that they had provided during the earlier group meetings, and that those round. robin meetings continued through November 2006. Trial Tr. vol. 21 at 3795-96. In closing arguments, the government summarized the evidence on those round-robin one-on-one meetings and argued that the conspiracy ended in December 2006, on the day that the FBI searched AUOA's offices in Houston, Texas. Trial Tr. vol. 27 at 4771-72 (closing argument); Trial Tr. vol. 30 at 5329 (rebuttal argument).

Second, the additional evidence presented at trial and in the United States' Sentencing Memorandum corroborates that AUO continued to have individual bilateral contacts with its competitors throughout 2006 in order to align its pricing to specific customers pursuant to their long-running agreement to fix prices, and that AUO's sales of indictment panels continued to be affected by the conspiracy through November 2006. Dkt. 948 at 15-18; Declaration of Dr. Keith Leffler ("Leffler Decl.") Ex. D. In fact, as late as November 23, 2006, just one week before the

FBI's raid, AUO's Steven Leung forwarded a message about the importance of "market info. sharing" on AUO's December pricing. Dkt. 984 Declaration of Heather S. Tewksbury ("Tewksbury Decl.") Exhibit D at Trial Ex. 189. That same email proposed pricing offers that aligned with AUO's competitors. *Id*.

Third, Dr. Leffler's testimony at trial is consistent with his testimony now—which eliminates an element that AUO concedes is necessary to its judicial estoppel and due process claims. *See* Dkt. 943 at 30, 33. In Dr. Leffler's recent declaration, he testifies that "the evidence is clear that the conspiracy impacted prices from October 2001 through December 1, 2006." Dkt. 948 (Leffler Decl. ¶ 30). That is consistent with his trial testimony because he never testified at trial that the conspiracy ended in January 2006—or at any other time. And the jury was instructed that Dr. Leffler was not offering testimony on the ultimate issue of whether a conspiracy existed. Dkt. 817 at 5. In his empirical analyses, he used the January 2006 date because that marked the end of the group crystal meetings, not the conspiracy. The Court made this distinction clear when defense counsel tried to turn Dr. Leffler into a conspiracy expert:

> Q. So at least, your opinion today is that the conspiracy period ended in January, 2006. Correct?
>
> MR. JACOBS: I'll object to mischaracterizing –
>
> THE COURT: He's testifying about the Crystal Meeting period. Is that what you're asking him about?
>
> MR. HEALY: Yes, Your Honor.
>
> THE COURT: That would probably be better, if you used those words.
>
> MR. HEALY: Sorry. Let me withdraw that.

Trial Tr. vol. 19 at 3473. Later, Dr. Leffler himself corrected defense counsel:

> Q All right. So, what I've done is -- one thing, there's been -- you agree with me that the indictment said the conspiracy ended in December of '06. Correct?
>
> A. Yes.

> Q. And, your initial disclosure talked about a conspiracy ending in July of '06. Correct?
> A. Talked about *Crystal Meetings* ending in June of '06.

Trial Tr. vol. 20 at 3631 (emphasis added). Contrary to AUO's claim that Dr. Leffler offered an opinion that the cartel period ended on January 31, 2006 (Dkt. 943 at 4), he consistently resisted these invitations to opine on when the conspiracy ended.

Dr. Leffler focused on the effect of the group crystal meetings because those were the meetings that occurred during the vast majority of the conspiracy and the ones from which he could most reliably quantify overcharges. He made that clear more than a year ago, in his initial expert report: "[e]xtensive notes were taken at these [group] meetings by the participants. . .. The notes indicate that specific prices of specific products were discussed. These are meetings at which it is most likely that supra-competitive prices will result." Dkt. 948 (Leffler Decl. Ex. B ¶ 25 (Sept. 13, 2011 disclosure)). That is consistent with his testimony now:

> In my trial testimony, I was concerned only with whether the impact on U.S. commerce was greater than $500 million. To do this, I focused my analysis on the effect of the group crystal meetings because that period is the most susceptible to quantification of the overcharges by virtue of the thorough records kept by some of the participating companies that memorialized the price discussions on a monthly basis.

Dkt. 948 (Leffler Decl. ¶ 30 n.20).

Contrary to AUO's argument, Dr. Leffler never testified that overcharges ended in January 2006. Dkt. 943 at 9. In Dr. Leffler's own words, "I did not testify that the overcharges ended on January 31, 2006. Rather, I *calculated* overcharges over that period." Dkt. 948, Leffler Decl. Ex. B ¶ 29 (emphasis in original).[5] Dr. Leffler knew that the indictment alleged a conspiracy through December 1, 2006 and that there were other meetings and communications apart from the group crystal meetings.[6] But his focus was on the group meetings, not the bilateral meetings.[7]

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[5] For that reason, his volume of commerce calculations at trial were similarly limited to a time period ending January 2006. Trial Tr. vol. 19 at 3313.

[6] *E.g.*, Trial Tr. vol. 19 at 3467-68 ("Q: All right. And you understand that in the indictment it indicated the conspiracy started in 2001, and ran all the way to December of 2006.

In short, Dr. Leffler never testified at trial about the effect of bilateral meetings in 2006, one way or the other. His use of a six-month period in 2006 as a control group in one of his many empirical analyses—where he compared margins just before and just after the group meetings ended—is not to the contrary. *See* Dkt. 943 at 25. That analysis, like all of his others, tested the effect of the group crystal meetings, not the bilateral meetings. Trial Tr. vol. 19 at 3373. Dr. Leffler did not conduct an analysis of the effect of the bilateral meetings because it was unnecessary for his task of measuring overcharges from the crystal meetings.

AUO also points to this particular analysis and claims it was the "central evidence" on which the jury likely relied to satisfy the statute of limitations in convicting AUO. Dkt. 943 at 31-33. But because Dr. Leffler was not opining on the existence of a conspiracy, it was very *unlikely* that the jury even considered this analysis when making its guilt determination.[8] It is also very unlikely that this analysis proved decisive to the jury's determination of AUO's guilt because Dr. Leffler was comparing margins of all six of the crystal meeting companies, not just AUO. Trial Tr. vol. 19 at 3371. Moreover, the discussion of this particular analysis takes up a mere four pages in the trial transcript (Trial Tr. vol. 19 at 3370-74), a transcript that spans 4,177 pages before the government rested and a total of 5,348 pages through the final jury instructions. There was ample evidence on which the jury could have based a finding that AUO participated in the conspiracy after June 9, 2005, including AUO's participation in the numerous group and one-on-one meetings occurring after that date.[9]

Correct? A: Yes. I mean, in substance, yes. That there were meetings of different names that they were alleging were conspiracies over that period.")

[7] That was clear from the outset of his trial testimony: "Q. Dr. Leffler, have you been asked by the Government in this case to study the effect of the Crystal Meetings on the revenues of the companies who went to those meetings? A. I have. Yes." Trial Tr. vol. 19 at 3274.

[8] Indeed, at defendants' insistence, the jury was instructed more than once that the experts were not opining on the existence of a conspiracy. Trial Tr. vol. 19 at 3383; Trial Tr. vol. 27 at 4713. Juries are presumed to follow such instructions. *United States v. Stinson*, 647 F.3d 1196, 1218 (9th Cir. 2011).

[9] *See, e.g*, Trial Exs. 108, 172, 189, 326, 328, 339, 440, 442, 443, 444, 445, 446, 447, 448, and 515.

The jury could have relied on the testimony of CPT's Milton Kuan, whose testimony was offered expressly on the period after June 2005, when he attended his first crystal meeting (Trial Tr. vol. 20 at 3726), and ending in December 2006, when the last meeting was called off by his coconspirators, including AUO. Trial Tr. vol. 21 at 3792-93. Or they could have relied on the testimony of Michael Wong, the head of AUOA, who testified about ongoing U.S. competitor pricing contacts and that he instructed his subordinate to delete competitor contact information in December 2006 during the FBI's search of AUOA's offices. Trial Tr. vol. 5 at 879, 1031-36, 1041-44. It is highly implausible that the jury relied on a few minutes of Dr. Leffler's testimony in deciding to convict AUO when it had abundant testimonial and documentary evidence on this issue. Thus, there is no basis for concluding that the jury was misled, as required for judicial estoppel (Dkt. 943 at 30-31), or that it found that the conspiracy ended at any time other than December 2006.

Finally, it does not matter that the jury's verdict did not specify an end date. *See* Dkt. 943 at 28. Even if the jury, for whatever reason, believed that the evidence at trial did not prove beyond a reasonable doubt that the conspiracy was effective throughout 2006, the Court is permitted to include AUO's sales through November 2006 in its volume of affected commerce if the Court finds by a preponderance that they were affected by the conspiracy. Indeed, a sentencing court may take into consideration uncharged and even *acquitted* conduct if the government can prove that conduct under a preponderance standard.[10] Here, the evidence presented at trial and in the United States' Sentencing Memorandum (Dkt. 948 at 15-18 and Leffler Decl. Ex. D) clearly demonstrates that AUO continued to participate in the conspiracy until December 1, 2006 and that its pricing continued to be affected by that conspiracy.[11]

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[10] *United States v. Watts*, 519 U.S. 148, 157 (1997); *United States v. Van Alstyne*, 584 F.3d 803, 816 (9th Cir. 2009); *United States v. Daychild*, 357 F.3d 1082, 1103 (9th Cir. 2004); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 92 (2d Cir. 1999).

[11] *See United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000) (holding that "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement"); *SKW Metals*, 195 F.3d at 90 (holding that "[w]hile a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy") (emphasis in original); *United*

2. Dr. Leffler's Methodology Is Consistent with the Court's Rulings and Sentences Imposed in this Case

Dr. Leffler's methodology is consistent with the methodology used in determining the volumes of commerce for companies that pled guilty and were sentenced by this Court earlier in the investigation. The plea methodology included three categories of commerce: panels that were (1) invoiced to, (2) shipped to, or (3) incorporated into finished products that made their way to the United States. Dr. Leffler's methodology focuses exclusively and rigorously on the third category by estimating only those panels that came to the United States in finished products. Accordingly, those panels in categories one and two that came into the United States in finished products are included in Dr. Leffler's estimate. Dr. Leffler excluded from his estimate panels that were invoiced to the United States but were not ultimately shipped to the U.S. in finished products. In that way, he was more conservative in his approach than the plea methodology. AUO strangely complains that Dr. Leffler's exclusion of these sales somehow inflates the estimated volume of commerce. But AUO's real complaint, at bottom, is that with the data now available, Dr. Leffler's estimate of the volume commerce is more accurate than when the pleas were taken. In any event, the vast majority of the commerce for the pleading companies fell into this third category. And the third category is the focus of Dr. Leffler's analysis. Accordingly, his methodology and the plea methodology—both of which are focused on finished products in the U.S.—are entirely consistent.

Dr. Leffler's estimate does more accurately measure the volume of panels incorporated into finished products that made their way to the United States than did the data used as the basis for earlier pleas. Since the time of those pleas, as the government prepared for trial and this sentencing, it has obtained additional data from AUO's coconspirators who had pled guilty and were cooperating and from victims of the conspiracy. It does not reflect a fundamental change in the methodology—the focus is, as it always has been, on counting price-fixed panels that made their way to the United States in finished products. The data available to the government now

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States v. Hayter Oil, 51 F.3d 1265, 1273 (6th Cir. 1995) (stating that "'affected' is very broad and would include all commerce that was influenced, directly or indirectly, by the price-fixing conspiracy").

includes (1) AUO's sales of monitor panels to HP, and (2) the remaining 38 percent of the U.S. market for finished computer monitors and notebooks that were sold into the U.S. market by major PC manufactures, such as Acer, Toshiba, and Lenovo.[12]

Nothing precludes the government from using all data available to it at the time of sentencing, or the Court from considering it. This is the case even if the data is different or results in a higher calculation than asserted against coconspirators involved in the same scheme. In the fraud context, for example, the Guidelines do not require the government to make loss determinations with precision. Rather, the government's figures "need only be a reasonable estimate given the information available to the government." *United States v. Cabrera*, 172 F.3d 1287, 1292 (11th Cir. 1999). Thus, even if the government stipulates to a loss figure in one case, it is not estopped from later attributing a different loss figure to a coconspirator in another case. *United States v. Pierce*, 409 F.3d 228, 233-34 (4th Cir. 2005). The government (and the Court) can attribute the volume of affected commerce, the central component of the loss surrogate, to different coconspirators on the basis of different data available at different times. *Id.* (holding that although the government stipulated to loss figures of less than $200,000 for the defendant's coconspirators, the government was not estopped from attributing to the defendant losses in excess of $200,000); *see also United States v. Montes*, 976 F.2d 235, 239 (5th Cir. 1992) (holding that a court is required to look at the evidence before it at the time of sentencing to determine the applicable sentencing guidelines range).

Moreover, "differences in evidence available at different sentencing hearings can mean there is no real inconsistency between findings" in different cases. *United States v. Valdez-Soto*, 31 F.3d 1467, 1476 n.21 (9th Cir. 1994). For instance, where one defendant is sentenced pursuant to a plea agreement and another after a lengthy trial in which more information is

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[12] AUO mischaracterizes the way in which Dr. Leffler estimated the remaining 38 percent of the market. He did not "simply scale up" using AUO's sales to Dell, HP, and IBM. Dkt. 943 at 15 n.24. Rather, Dr. Leffler included the sales to all five manufacturers for which he had data— including IBM and Gateway, both of which purchased nothing from AUO—and then used that *lower* percentage to estimate AUO's sales to the remainder of the U.S. market. Dkt. 948, Leffler Decl. ¶ 24.

developed, there may be no real inconsistency in the sentencing determinations in the two cases. *Id.*; *Montes*, 976 F.2d at 239; s*ee also United States v. Rodriguez*, 162 F.3d 135, 151-52 (1st Cir. 1998) (holding that the law allows the government to use a different methodology for sentencing after trial than used for defendants who pled, even where it led to "enormous sentencing disparities for the defendants who chose to put the government to its burden of proving its case.").

Finally, the fact that there is a disparity in the information used to sentence codefendants "is not, by itself, a sufficient ground for attacking an otherwise proper sentence under the guidelines. Rather, a defendant can only challenge his sentence by showing that it was the result of incorrect or inadmissible information or an incorrect application of the Sentencing Guidelines." *United States v. Taylor*, 991 F.2d 533, 536 (9th Cir. 1993) (internal quotations and citations omitted).

There is no basis to challenge the application of the Guidelines here where Dr. Leffler's methodology is entirely consistent with the Court's instruction on the offense's elements and its gain, which limited consideration to TFT-LCD panels either sold in or for delivery to the United States or incorporated into finished products sold in or for delivery to the United States. Dkt. 817 at 10, 15; Trial Tr. vol. 27 at 4721, 4728-29. While the volume of affected commerce for Guidelines purposes is not necessarily subject to those limitations, *see* Dkt. 948 at 14 & n.5, Dr. Leffler takes a conservative approach, including in his estimate only those price-fixed panels that were incorporated into finished PC products that were sold into the United States. There is nothing improper about presenting the Court with the most complete information available at the time of sentencing. And it is not unusual for a defendant that proceeds to trial to face a more accurate, but higher, volume of commerce as the government develops more information.

3. All AUO Sales of Indictment Panels Were "Affected" by the Conspiracy and Should Be Included

All of AUO's sales of indictment panels during the conspiracy should be included in its volume of affected commerce. The AUO panels subject to specific competitor discussions accounted for 98 percent of AUO's sales at the beginning of the conspiracy, and that percentage

remained very high throughout the conspiracy. Dkt. 948 (Leffler Decl. ¶ 40). Dr. Leffler's empirical analysis shows that all such panels were affected by the crystal meetings—even those not discussed every single month. *Id.* (showing "close fit" in price movements between panels discussed and those not discussed). The effect on non-discussed panels was due, in part, to the fact that the crystal meeting participants discussed the "general pricing relationships" among panels of different specifications. *Id.*

AUO has the burden of proving what courts have described as the "rare" or "odd" case where a sale is completely unaffected by the conspiracy. *Andreas*, 216 F.3d at 678-79. It has not done so. Instead, it has proposed a wholesale exclusion of all panel sales except in those months in which either AUO specified a price or a general industry price was listed. It also proposes excluding panels that were not discussed in a particular month even when they were discussed in both the month before and the month after. As Dr. Leffler explains in his declaration, these exclusions make no economic sense. Dkt. 948 (Leffler Decl. ¶ 35-41).[13]

4. AUO's Sales to Coconspirators LG and Samsung Should Be Included

AUO's sales of panels to the affiliated display companies of its coconspirators LG and Samsung should also be included in AUO's volume of affected commerce. AUO claims that LG and Samsung would not have paid overcharges because they could easily have supplied their

[13] Ignoring the jury's verdict, AUO continues to argue that target price conspiracies, such as this one, cannot work. In support of this conclusion, AUO cites the lysine cartel as an example of a target price conspiracy that was largely ineffective. Dkt. 943 at 40 ("[S]cholars have recognized that the lysine cartel . . . was largely ineffective during the period in which the members of the cartel agreed solely to target prices, without setting quantity allocations or providing for formal and coordinated monitoring.") The claim that the cartel was ineffective did not dissuade the sentencing court in its determination that all lysine sales during the scope of the conspiracy period constituted "affected" commerce under § 2R1.1. *Andreas*, 216 F.3d at 679 ("[T]he trial court correctly determined the volume of commerce based on *all* sales within the scope of the conspiracy.") (emphasis added) That same sentencing court imposed sentences at or approaching maximum prison terms for the executives who took the case to trial. *See Longer Sentences for Ex-Archer Officers*, N.Y. Times, Sept. 23, 2000, available at http://www.nytimes.com/2000/09/23/business/longer-sentences-for-ex-archer-officers.html?ref=michaeldandreas. Under the Guidelines, the fact that a cartel may have been "largely ineffective" at times does not affect the determination of the affected commerce. Dkt. 948 at 8-9.

own needs internally without incurring overcharges. Dkt. 943 at 41. AUO thus implies that LG and Samsung must have paid lower prices than did other customers. In fact, they paid the same prices as everyone else. Dkt. 948 (Leffler Decl. ¶ 43). Dr. Hall concedes this. Leffler Decl., citing to Hall August 10 Decl. ¶ 44 ("We found that both LG and Samsung purchased at essentially the same prices as other customers."). AUO's argument, then, rests entirely on its contention that it did not overcharge *anyone*, an argument clearly rejected by the jury. Dkt. 943 at 59-60. AUO overcharged everyone, including LG and Samsung, and its sales to those companies should be included as well.

5. AUO's Sales to Dell Should Be Included

AUO also contends that its sales to Dell after January 1, 2005 should be excluded, citing a multiple regression analysis by Dr. Mohan Rao, an expert retained by Dell in its related civil case. According to AUO, Dr. Rao failed to find "*any* persistent overcharges in AUO's sales to Dell after January 1, 2005." Dkt. 943 at 41-42 (emphasis in original).

But Dr. Rao did *not* analyze Dell's purchases from AUO alone, which is what is relevant here. The defendants in Dell's private action include many different TFT-LCD manufacturers, including Sharp, Hitachi, Epson, and Toshiba. M:07-1827 SI MDL 1827, Dkt. 3241. Dr. Rao analyzed Dell's purchases from all of the conspirators of products for which he could obtain DisplaySearch cost data. Tewksbury Decl. Ex. B. In his Reply Expert Report, which AUO does not cite, Dr. Rao attributes the absence of persistent overcharges not to AUO but instead to the actions of Samsung and LG—Dell's two largest panel suppliers. Tewksbury Decl. Ex. C.

Moreover, Dr. Rao did not find that the conspiracy—much less AUO's continued participation in it, which is the relevant focus here—had no effect whatsoever in 2005 and 2006. In fact, in his deposition, he implied that he did find overcharges during certain periods in those years.[14] At sentencing, the issue is whether the conspiracy had any effect at all on the defendant's sales. *See supra* note 10 and Dkt. 948 at 8-9. The fact that an economist hired by one of the defendant's customers cannot find quantifiable damages from all of its purchases does

[14] "I stop calculating overcharges in 2005 and '6; not that there aren't overcharges in certain periods, but as I said, there aren't systematic positive overcharges, and therefore I stop." Tewksbury Decl. Ex. D.

not mean that customer's purchases from the defendant should be excluded from its volume of affected commerce.

It is striking that AUO has not offered its own multiple regression analysis on this or any other issue. AUO hired Mr. Deal and paid him and his team $6 million. Trial Tr. vol. 24 at 4201. It now relies on the declaration from Dr. Hall, a highly qualified and capable $1,000 per hour economist. Trial Tr. vol. 24 at 4434. Yet for this point, AUO relies on snippets from the expert report of an economist hired by Dell.

Dr. Leffler is the only economist in this case who conducted a regression analysis. His regression focused on the only relevant issue here—the overcharge on AUO's sales alone. Including AUO's sales to Dell and its other customers, Dr. Leffler found a statistically significant estimate of the AUO overcharge on 12.1 to 30-inch panels of over 19 percent. Dkt. 948, Leffler Decl. ¶ 45.

AUO presents no viable arguments that necessitate a reduction in the volume of affected commerce estimated by Dr. Leffler. $2.34 billion is the appropriate and conservative estimate of AUO's affected volume of commerce.

B. The 20 Percent Surrogate Is Appropriate in This Case

1. The Guidelines Fine Range Must Be Based on 20 Percent of Affected Commerce

The Guidelines unequivocally direct courts to "use 20 percent of the volume of affected commerce," U.S.S.G. § 2R1.1(d)(1), and do not authorize substitutes on a case-by-case basis. *See* Dkt. 948 at 25. Application Note 3 does not authorize making substitutions, nor does it state, as AUO's claims, that proof of an overcharge substantially less than 10 percent justifies a downward variance. The Note unambiguously states that where "the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine *within* the guideline range." U.S.S.G. § 2R1.1 cmt. n. 3 (emphasis added). Thus, it suggests sentencing toward one end of the range or the other based on this factor, not varying from the range. In this case, the actual overcharge appears

to be substantially more than 10 percent, *see infra* Sec. III.B.2.(b)(1) If anything, it supports a Guidelines adjustment to the top of the range in this case.

Because the Guidelines ranges must be correctly calculated and carefully considered, *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc), the Court would commit procedural error if it fails to use the 20 percent surrogate for loss to calculate the Sentencing Guidelines range.

2. No Departure from a Fine Based on the 20 Percent Surrogate Can Be Justified

Although the Court is bound to use 20 percent of affected commerce to calculate the Guidelines range, it is not bound to sentence within that now-advisory range. To vary from that range, however, the Court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 991 (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)). And "a major departure should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50. AUO has provided no sound justification for this Court to depart from a fine range calculated using the 20 percent surrogate for loss specified in the Guidelines.[15]

a) There Is No Sound Policy Reason to Disagree with the Commission's 20 Percent of Affected Commerce in Lieu of Pecuniary Loss

To be sure, courts may deviate from the Sentencing Guidelines on the basis of a policy disagreement. *Kimbrough v. United States*, 552 U.S. 85 (2007). But the Ninth Circuit has not, as AUO claims, "particularly encouraged district courts to deviate downwards from the Guidelines when the Sentencing Commission has not exercised its 'characteristic institutional role.'" Dkt. 943 at 44-45 (citing *United States v. Carper*, 659 F.3d 923 (9th Cir. 2011)). To the contrary, the court of appeals emphasized in *Carper* that there is "no obligation for a district court to do so" and concluded that the district court had not "abused its discretion by not

[15] The Probation Office recommended a substantial downward departure to $500 million from the Guidelines fine range of $936 million to $1.872 million, but it, too, fails to provide sound justification. To the contrary, in the Probation Office's analysis of the application of the Guidelines, it concludes that there are no "factors that may warrant departure." Final AUO PSR at 15 (capitalization altered).

departing from the Guidelines on policy grounds." 659 F.3d at 925. In any event, Section 2R1.1(d)(1) exemplifies the Commission's institutional strengths because it is based on empirical research and national experience. *See Kimbrough*, 552 U.S. at 109 (explaining that Sentencing Commission in filling its "important institutional role" has "the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise'") (citation omitted); U.S.S.G. § 2R1.1 background ("The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well."); *cf. United States v. VandeBrake*, 679 F.3d 1030, 1046 (8th Cir. 2012) (Beam, J., dissenting) ("The history of and the amendments to § 2R1.1 exemplify the Commission's institutional strengths. Indeed, in order to craft the original version of § 2R1.1, the Commission used empirical research as its baseline and then increased antitrust sentences in the interests of 'greater rationality' and to avoid 'inconsistency' between white-collar crimes and other property crimes." (quoting *Rita v. United States*, 551 U.S. 338, 349 (2007))). Thus, the Commission's judgment cannot be lightly disregarded. *See Kimbrough*, 552 U.S. at 109 ("[W]hile the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines solely on the judge's view that the Guidelines range 'fails to properly reflect § 3553(a) considerations' even in a mine-run case." (quoting *Rita*, 551 U.S. at 351)).

(1) 20 Percent Is a Well-Founded and Sensible Policy Choice by the Commission

In the 1991 amendments to the Guidelines, the Sentencing Commission first introduced in Section 2R1.1 the use of 20 percent of affected commerce in lieu of pecuniary loss and observed in Application Note 3 that the estimated "average gain from price-fixing is 10 percent." U.S.S.G. § 2R1.1 cmt. n. 3. The Commission never disclosed the empirical basis for the 10 percent figure. A contemporaneous review, however, had found substantial success in cartel efforts to increase prices. James M. Griffin, *Previous Cartel Experience: Any Lessons for OPEC?*, in Economics in Theory and Practice: An Eclectic Approach 179 (Lawrence R. Klein & Jamie Marquez eds., 1989); *see also* Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers*

Should Go to Prison, 32 Antitrust Bull. 917, 925 n.24 (1987) (road-building conspiracies "increased prices at least 10 percent").

Attempting to undermine the Commission's 1991 decision to use a 10 percent estimate, AUO cites an article stating that two particular cases "appear to have been particularly important in producing the Commission's view that the markups arising from such conspiracies are large" and arguing that the latest research on those cases does not support that view. Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 Am. Crim. L. Rev. 331, 344-45 (1989); Dkt. 943 at 46-47. But the cited article was written while the Commission's research remained ongoing and two years before it first stated its belief that estimated "average gain from price-fixing is 10 percent." Likewise, AUO mistakenly suggests that these two cases were relied upon in the July 15, 1986 testimony before the Sentencing Commission by Assistant Attorney General Douglas H. Ginsburg (Dkt. 943 at 46). He did not cite either. Nor does the article itself provide any basis for its speculation that the Commission relied on those cases.

The Commission most recently revised Section 2R1.1 in 2005, deciding to retain 20 percent of affected commerce in lieu of pecuniary gain and the 10 percent estimated average gain from price fixing. That decision is fully supported by a wealth of evidence on the price effects of cartels available at the time. A 2003 review of recent, peer-reviewed studies of cartels prosecuted under the Sherman Act reported that most found price effects of more than 10 percent. Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook* 1-2, available at http://ssrn.com/abstract=384100. The 2005 law review article cited by AUO (Dkt. 943 at 45-47) reports that the median cartel overcharge is at least 25 percent, with international cartels associated with greater overcharges. John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513.

The most recent reviews of the evidence on overcharges cited by defendants (Dkt. 943 at 51) also strongly support using 20 percent of affected commerce as a surrogate for pecuniary loss in

Section 2R1.1.[16] The meta-analysis relied upon by Dr. Hall reported an average overcharge of 28.9 percent, with a median of 19 percent, and it found that international cartels result in overcharges that average 14 percentage points higher than domestic cartels. John M. Connor & Yuliya Bolotova, *Cartel Overcharges: Survey and Meta-Analysis*, 24 Int'l J. Indus. Org. 1109, 1128, 1134 (2006). The updated survey by Professor Connor found that most cartel overcharge estimates are 20 percent and the average overcharge estimate is 46.2 percent. John M. Connor, *Price-Fixing Overcharges: Revised 2nd Edition*, at 100 (Apr. 27, 2010), available at http://ssrn.com/abstract=1610262. And again, Professor Connor found that international cartels tended to produce much larger overcharges than domestic cartels. *Id.* at 42, 109. Professor Connor's own research on relatively recent international cartels in three industries found that all resulted in overcharges greater than 10 percent, and the average overcharge on vitamins was 30 percent. John M. Connor, *Global Price Fixing: Our Customers Are the Enemies* 165, 235, 339 (2d ed. 2008).

Because the 20 percent surrogate can be justified on the basis of the typical overcharge alone, the significance of additional components of pecuniary loss is not important, but they undoubtedly exist. One additional component is the loss on purchases not made as a result of higher prices. AUO argues that this component of loss is far less than that from the overcharge and could not possibly justify doubling the 10 percent overcharge figure to produce the 20 percent surrogate for loss. Dkt. 943 at 53-57. But AUO ignores the Sentencing Commission's use of the phrase "among other things" to signal that the loss on purchases not made is just one thing it considered. U.S.S.G. § 2R1.1 cmt. 3. AUO's simple diagram cannot reflect several other components of loss.

Cartels need not, and often do not, include all producers of the cartelized products, but non-members raise their prices as well. These non-members cannot be charged with a Sherman Act violation, and their affected commerce is not included in that of any defendant that can be prosecuted. But their price increases—the so-called "umbrella effects"—cause pecuniary losses

[16] As AUO argues, these surveys find some overcharge estimates that are quite low or even zero in a small percentage of the cases. It would be appropriate to take the ineffectiveness of a cartel into account at sentencing. But this is not such a case.

as well. And because purchasers usually cannot recover damages for these losses, *see generally In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 691 F.2d 1335, 1338-41 (9th Cir. 1982), considering these losses in criminal punishment is especially important. In addition, prices of close substitutes for the products of a cartel are apt to increase materially in response to the price increases from the cartel, which causes overcharges outside the cartelized market. Also relevant is the cost of detecting and prosecuting cartels, a cost society and consumers ultimately bear. Finally, the Commission's approach allows for the fact that fines typically are paid long after the loss is inflicted. The deterrent effect of fines can be significantly lessened merely by fact that they are paid well after the price-fixing conspiracy has profited its participants and harmed its victims.

(2) Use of the Specified 20 Percent Surrogate Saves Time and Expense

AUO attacks the Sentencing Commission's policy of using 20 percent of affected commerce rather than an individualized determination of overcharge in every case. Dkt. 943 at 47-50. But AUO cannot dispute that the Commission's approach avoids, as intended, the time and expense of a judicial determination of overcharge. Even in this case, where much work has been done, resolving the continuing dispute over the amount of the overcharge would consume substantial judicial resources. The Sentencing Commission filled "an important institutional role" (*Kimbrough*, 552 U.S. at 109) in eschewing a case-by-case determination of loss in antitrust cases, and its judgment cannot be lightly disregarded.

Moreover, a rule requiring the government to prove the overcharge in each case would be "an anomaly" because price fixing is "illegal per se" due to "its plainly anticompetitive effect." *Hayter Oil*, 51 F.3d at 1274; U.S.S.G. § 2R1.1 background ("The agreements among competitors covered by this section are almost invariably covert conspiracies that . . . are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual competitive effect."). "Such a rule would result in the government being relieved of the burden of ascertaining a conspiracy's effect and success for purposes of obtaining a conviction only to have to bear that very burden to establish the propriety

of any fine." *Hayter Oil*, 51 F.3d at 1274. The Commission's decision to use 20 percent of affected commerce in lieu of individualized pecuniary loss or overcharge determinations thus preserves the most basic of antitrust principles.

AUO extensively quotes antitrust defense bar self-serving arguments for abandoning the 20 percent surrogate in favor of an individualized determination of overcharge on the grounds that plea agreements have recommended fines above the Sherman Act's maximum fine based on the Alternative Fine Statute, 18 U.S.C. § 3571(d). Dkt. 943 at 47-50. But the occasional stipulation of gain or loss for purposes of Section 3571(d) does not undermine the Commission's policy. As this Court keenly knows, this is the first antitrust case in which gain under Section 3571(d) was subject to a jury determination, rather than a plea agreement stipulation. This case hardly demonstrates that cartel overcharge can be determined with ease and precision for Guidelines purposes. Section 3571(d) serves an important and different purpose by raising the statutory maximum fine to twice the gain from the price-fixing conspiracy to *all* the conspirators. This allows the government to allege and prove a certain amount of gain and thereby raise the maximum fine to an appropriate level, without having to precisely determine the overcharge. Here, for instance, the government alleged and proved beyond a reasonable doubt a gain of *at least* $500 million without the necessity of determining the gain with greater precision or parsing it out to the individual coconspirators. In fact, Dr. Leffler testified that the gain from the conspiracy was likely several billion dollars, but the government conservatively charged gain of only $500 million or more.

(3) Use of 20 Percent of Affected Commerce Does Not Violate the Constitution

AUO argues that the use of the 20 percent of affected commerce produces grossly disproportionate fines, in violation of the Excessive Fines Clause, and is arbitrary, in violation of the Due Process Clause. *See* Dkt. 943 at 57 & n.32. These constitutional arguments are meritless.

The Excessive Fines Clause applies to the actual fine imposed, not the fine range recommended by the Guidelines. *United States v. Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003).

A fine is only unconstitutional under this clause if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). A $1 billion fine—the maximum corporate fine available in this case—is not grossly disproportional for an offense that had at least $500 million in gains found by the jury. *See Mackby*, 339 F.3d at 1017-18 (holding that $729,454.92 judgment does not violate Excessive Fines Clause on assumption that Sentencing Guidelines loss was $58,151.46). Furthermore, the jury's gain finding is a lower-bound one. In reality, the offense affected tens of billions of dollars of commerce and likely caused billions of dollars in losses.

Moreover, the gravity of this cartel offense is not gauged only by the loss actually inflicted. Without regard to the loss inflicted, price-fixing conspiracies "are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-26 n.59 (1940). And the conspiracy itself is the offense. *Nash v. United States*, 229 U.S. 373, 378 (1913) ("the Sherman Act . . . does not make the doing of any act other than the act of conspiring a condition of liability"). Although a host of factors can be considered as part of the gravity of the offense, the scope of the conspiracy must be the prime factor. Volume of affected commerce itself is an important gauge of the gravity of any cartel offense, as that indicates the extent to which the central nervous system of the economy was threatened by the conspiracy.

Nor is the Due Process Clause violated by the Commission's choice of 20 percent. As explained above, *see supra* III.B.2.(a)(1), 20 percent of affected commerce is a well-founded and reasonable surrogate for loss, so it was not arbitrary or capricious. Instead of being arbitrary, it serves the purposes of the Sentencing Guidelines by making criminal punishment more predictable and less subject to unwarranted variation.

b) Nothing in This Case Puts It Outside the Guidelines' Heartland

"A district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply." *Kimbrough*, 552 U.S. at 109. This case

falls squarely within the heartland of the Sentencing Guidelines for corporate fines for antitrust offenses: Section 2R1.1 in conjunction with Sections 8C2.1-2.7. *See* Dkt. 948 at 23. Aspects of this conspiracy making it the most serious—its long duration, massive and pernicious effect on commerce, the participation of top executives, and these defendants' lack of acceptance of responsibility—are all appropriately accounted for by the Guidelines. The Sentencing Commission designed Section 2R1.1 so it could apply to all cartels, including large scale, highly successful, international cartels, like this one, and it geared its Guidelines to provide an appropriate fine that is sufficient to reflect the seriousness of these cartel offenses, promote respect for the law, and, most importantly, provide adequate deterrence.[17] Contrary to AUO's claims, no circumstance in this case removes it from Section 2R1.1's heartland. While this is an extraordinary case, nothing about it makes it so in determining an appropriate sentence. Rather, this is an "ordinary" or "mine-run" case under the Guidelines, and thus the Sentencing Commission's "recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 350). Accordingly, the Guidelines' advisory fine range should not be disregarded based on the specific facts of this case.

(1) AUO's Actual Overcharges Do Not Take Its Offense Outside the Heartland

Resurrecting arguments made by its economic expert at trial, AUO argues that its actual overcharges were far less than the average on which Section 2R1.1 was premised because its expert did "not find a measurable overcharge attributable to AUO." Dkt. 943 at 60; *see id. at* 58-61. AUO's expert Dr. Hall declares that he "worked extensively with [Bruce] Deal, who testified at trial, on the overcharge questions. . . .[and] agree[s] with his opinions as presented at trial." *Id.* at 59. Dr. Hall's opinions, which are nothing more than Mr. Deal's opinions, should be rejected.

[17] Prior to the 2005 amendments to Section 2R1.1, that section had a maximum volume of commerce enhancement of $100 million, which the United States Sentencing Commission increased to $1.5 billion so that ring-leaders whose volume of commerce was at that level would be subject to statutory maximum jail sentences.

Dr. Hall repeats several of Mr. Deal's opinions from trial here at sentencing: that there were no output effects (Dkt. 943 at 60-61 (Hall); Trial Tr. vol. 24 at 4324-34 (Deal)); that AUO did not earn a sufficient return on capital (Dkt. 943 at 58 (Hall); Trial Tr. vol. 24 at 4349-53 (Deal)); and that AUO earned no measurable overcharge (Dkt. 943 at 59-60 (Hall); Trial Tr. vol. 24 at 4412-14 (Deal)). Mr. Deal's opinions at trial were offered to show that AUO was not guilty of participating in a price-fixing conspiracy. Trial Tr. vol. 24 at 4406-07. The jury rejected those opinions because it convicted AUO. It also found that the AUO and its coconspirators gained $500 million or more from the price fixing. Dkt. 851 at 3.

In contrast to AUO's expert, the jury apparently found the government's economic expert persuasive. Dr. Leffler's economic analysis directly contradicts AUO's contentions that it enjoyed no measurable overcharge. His empirical work demonstrates that this cartel was, in fact, highly successful. His margin analysis, including AUO-specific margins, found margins consistent with overcharges well above 10 percent. And his regression analysis found a statistically significant mean estimate of the AUO overcharge on 12.1 to 30-inch panels of over 19 percent. Dkt. 948, Leffler Decl. ¶ 45. That 19 percent finding plainly refutes any argument that the actual overcharge in this case is so low that it takes this case outside the heartland of the Guidelines' surrogate for pecuniary loss.[18]

(2) Overseas Conduct Does Not Take This Case Outside the Heartland

AUO argues meritlessly that this case is outside Section 2R1.1's heartland because the conduct largely took place overseas. Dkt. 943 at 52. Where the conduct occurred is irrelevant. When the Commission adopted the 20 percent surrogate, it was clear that the Sherman Act applied to overseas conduct. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)

[18] Dr. Hall's opinion that the overcharge here is no more than 1.8%, based on his back-of-the-envelope estimate from the damages award in a tenuously related civil case against Toshiba, does not undercut Dr. Leffler's finding of a 19% overcharge. To calculate his overcharge estimate, Dr. Hall simply divided the Toshiba jury's damages award by the sales made to a limited class of plaintiffs. Dkt. 943 Hall Decl. ¶61. By contrast, Dr. Leffler conducted a rigorous multiple regression analysis.

("[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.") (citing, *inter alia*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.), and *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927)). In any event, experience shows that, if anything, Section 2R1.1 is overly lenient when applied to international cartels because they tend to produce greater than average overcharges. *See supra* Section III.B.2(a)(1).

Lastly, citing *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), AUO also argues that its price-fixing conspiracy, as "foreign conduct," is subject to the rule of reason, not the *per se* rule, and thus is outside the heartland of 2R1.1, which is limited to *per se* offenses. Dkt. 943 at 52. But this *Metro Industries* argument has been rejected by every judge that has heard it, including by this Court in this case. *See United States v. AU Optronics*, No. Cr. 09-0110 SI, 2012 WL 2120452 at *5 (N.D. Cal. June 11, 2012); *United States v. Chen*, No. CR 09-0110, 2011 WL 332713 at *3 (N.D. Cal. Jan. 29, 2011); *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1061 (N.D. Cal. 2012); *United States v. Eagle Eyes Traffic Industrial Co.*, No. Cr. 11-00488 RS (N.D. Cal. Sept. 11, 2012). *Metro Industries* provides no reason that a classic price-fixing conspiracy, like the one proven here, is outside Section 2R1.1's heartland.

(3) That the Product Is an Input Does Not Take This Case Outside the Heartland

AUO also argues meritlessly that this case is outside the Section 2R1.1 heartland because the products subject to the price-fixing conspiracy were "sold to consumers only after being incorporated into another product." Dkt. 943 at 53. AUO contends that Section 2R1.1 was designed for cartels involving final consumer products and does not make sense for other products. Both contentions are wrongheaded. The only sort of cartel to which AUO contends Section 2R1.1 reasonably can be applied is, in fact, unusual, and the suggestion that the Sentencing Commission designed a guideline only for unusual cases is a nonstarter. Many price-fixing cases prosecuted by the government, including most international cartels, involve inputs. Notably, DRAM is a component of numerous electronic devices, and lysine and vitamins are

both primarily used in animal feed. And this Court has taken pleas and imposed sentences in at least 13 criminal antitrust cases involving three different input products—monochloroacetic acid (chemical used with other chemicals to form intermediate chemical compounds, then used to make commercial and consumer products such as herbicides and pharmaceuticals);[19] organic peroxides (chemical inputs used in the manufacture of certain polystyrene products, including containers and packaging materials);[20] and sorbates (chemical preservatives used primarily as mold inhibitors in high-moisture and high-sugar food products).[21] Whether the overcharge was passed through for these products was irrelevant to their sentencings, and is equally irrelevant in sentencing AUO.

AUO has provided no principled approach for reducing its affected volume of commerce or using anything other than the 20 percent surrogate, which the Court has used in the sentencing of every corporate defendant to date.

IV. SECTIONS 3553 AND 3572 DO NOT SUPPORT A FINE BELOW $1 BILLION

A. Section 3553 Does Not Support a Departure Below AUO's Guidelines Fine Range

AUO advances a number of arguments under 18 U.S.C. §§ 3553 and 3572 that are little more than a reprise of the attacks in Parts I and II of its Sentencing Memorandum on 18 U.S.C. § 3571(d), U.S.S.G. Section 2R1.1's 20 percent figure, and the government's volume of commerce

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[19] *United States v. Hoechst*, CR 03-0035 SI (N.D. Cal. 2003); *United States v. Patrick Stainton*, CR 02-0078 SI (N.D. Cal. 2002); *United States v. Elf Atochem S.A.*, CR 02-0079 SI (N.D. Cal. 2002); and *United States v. Akzo Nobel Chemicals BV, et al.*, CR 01-0242 SI (N.D. Cal. 2001).

[20] *United States v. Elf Atochem S.A.*, CR 02-0079 SI (N.D. Cal. 2004); and *United States v. Degussa U.K. Holdings Ltd*, CR 04-0300 SI (N.D. Cal. 2004).

[21] *United States v. Hitoshi Hayashi*, CR 01-0019 SI (N.D. Cal. 2003); *United States v. Ueno Fine Chemicals Industry, Ltd.*, CR 01-0018 SI (N.D. Cal. 2001); *United States v. Yumi Komatsu, et al.*, CR 01-0019 SI (N.D. Cal. 2001); *United States v. Hirohisa Ikeda, et al.*, CR 00-0393 SI (N.D. Cal. 2000); *United States v. Daicel Chemical Indus.*, CR 00-0329 SI (N.D. Cal. 2000); *United States v. Nippon Gohsei, et al.*, CR 99-0261 SI (N.D. Cal. 1999); *United States v Hoechst, et al.*, CR 99-0144 SI (N.D. Cal. 1999); and *United States v. Eastman Chemical Co.*, CR 98-00302 SI (N.D. Cal. 1998).

calculation. Those arguments were largely disposed of by the United States' Sentencing Memorandum and above.[22] AUO's additional argument—that the application of 18 U.S.C. § 3571(d) in this case is inequitable—fundamentally misunderstands the function of that statute. *See* Dkt. 944 at 13. The Alternative Fine Statute merely provides an alternative maximum fine of twice the gain or loss from the offense. The recommended $1 billion fine is not compelled by Section 3571(d). The Court need only look to Section 3571(d) in the sentencing context to determine the ceiling for the maximum fine. The fine imposed, within that maximum, is based on the factors in Sections 3553 and 3572, including the Guidelines fine range.

In this case, the recommended fine of $1 billion is substantiated by the application of U.S.S.G. Section 2R1.1 to AUO's volume of affected commerce and reflects the statutory factors. A $1 billion fine is not "twice the amount of the conspiracy-wide gains,"[23] as defendants allege. *See* Dkt. 944 at 13. Instead, the recommended fine is near the bottom of the range resulting from application of the Sentencing Guidelines to AUO's own affected volume of commerce. There is nothing inequitable about the government substantiating the recommended

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[22] In addition to its substantive argument, AUO makes the unfounded accusation that the government leaked the Probation Office's sentencing recommendations for defendants Chen and Hsiung to the media. The Probation Office's sentencing recommendations were provided only in the final PSRs, which were sent to government counsel starting at 2:12 p.m. PDT, nearly four hours *after* the article referenced by AUO was published. The government did not leak this information and, unlike defendants—who liberally quote from the confidential PSRs throughout their sentencing memoranda—refrained from even referencing the sentencing recommendations in its opening brief.

[23] Defendants misrepresent the jury's verdict as a finding that the "conspiracy-wide gains" were limited to $500 million. The jury made no such finding. The jury concluded that the gains to all conspirators were "$500 million or more." The indictment alleged a gain to the conspirators of "at least $500,000,000." Dkt. 8 at 13. This allegation was supported by the government's preliminary economic analysis and would permit a $1 billion fine against AUO, which the government continues to believe represents a Guidelines range fine and the appropriate criminal punishment for AUO in this case. Had the government needed to allege the full gain to all conspirators from the conspiracy, the amount of gain alleged in the indictment would have been considerably larger than $500 million. Indeed, as the Court noted in denying defendants' post-trial motions, "Dr. Leffler's multiple regression analysis estimated total overcharges in excess of $2 billion, far more than $500 million." Dkt. 920 at 7.

fine under Section 2R1.1 and seeking a fine at the ceiling permitted by Section 3571(d) in this case in order to adequately punish AUO and deter future collusion.

Nor does the application of Section 3571(d) and Section 2R1.1's 20 percent figure create any unwarranted sentencing disparities. Those sections have been applied to AUO's pleading corporate coconspirators. Section 3571(d) was applied to coconspirators LG and CMO to permit criminal fines above the Sherman Act's $100 million statutory maximum corporate fine, and the 20 percent figure mandated by Section 2R1.1 was applied to each of AUO's pleading corporate coconspirators. AUO thus cannot claim it is being treated disparately by the application of those sections. The fines of AUO's corporate coconspirators are lower than the $1 billion recommended for AUO largely because the coconspirators accepted responsibility, cooperated with and substantially assisted the investigation, and pled guilty before the government had the benefit of the more thorough sales data upon which the current AUO volume of commerce calculation is based.[24] Sentencing disparities on those bases are not inequitable. *United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2009) ("[A] sentencing disparity based on cooperation is not unreasonable."). The only inequity in this case would be to permit AUO to free ride on acceptance of responsibility and substantial assistance by its corporate coconspirators by departing from the Sentencing Guidelines fine range. *United States v. Caperna*, 251 F.3d 827, 831-32 (9th Cir. 2001) ("In most cases, it will be inappropriate for a sentencing court to give a non-cooperating defendant the benefit of his co-defendant's cooperation.").

AUO also erroneously argues that it has already been punished by virtue of having been fined in other jurisdictions and having settled related civil litigation. Dkt. 944 at 3-4. Fines imposed by the European Commission ("EC") and the Korea Fair Trade Commission ("KFTC") likely reflect punishment for conduct directed at and affecting those jurisdictions, not the United

[24] Additionally, with the exception of LG, the pleading corporate coconspirators were smaller companies than AUO, had lower volumes of commerce than AUO even if their volumes of commerce were adjusted using the sales data currently available to the government, and would thus be subject to lower fines even at the present time.

States.[25] Moreover, AUO has appealed its EC fine and has publicly stated that it will appeal the KFTC fine, making the imposition and amount of those fines uncertain. Additionally, civil damages and settlements are not criminal punishment. They are a substitute for restitution, which would support a separate monetary exactment that the government could seek against AUO in this criminal proceeding but has not because of the parallel civil litigation. *United States v. Hayes*, 385 F.3d 1226, 1228 (9th Cir. 2004) (holding that fines are set by courts as punishment for a crime and restitution is a separate monetary penalty to compensate victims of a crime). Moreover, the fines imposed on AUO's coconspirators were not offset by the civil litigation or fines in other jurisdictions. True unfairness would result if AUO were credited with its civil settlements while its coconspirators—many of whom settled and cooperated early with the civil plaintiffs—received no such offset for their criminal fines. AUO erroneously believes that its recalcitrance should be rewarded, while those who came in early, cooperated with the government and the plaintiffs, and accepted responsibility years ago should be in a worse position. Departing from the Guidelines on this, or any other basis offered by AUO, would create perverse incentives for any future defendants facing similar choices.

Finally, AUO touts its otherwise spotless criminal history and good corporate citizenship to argue that the recommended fine is greater than necessary to fulfill the goals of Sections 3553 and 3572. Dkt. 944 at 12. AUO could not have had a criminal history prior to participating in the LCD conspiracy because *AUO did not exist before the LCD conspiracy*. AUO's participation in the LCD conspiracy began at AUO's inception[26] and collusion is woven into the fabric of the company. The fact that the company did not engage in other criminal conduct while simultaneously pursuing a pervasive course of criminal conduct that spanned its entire existence

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[25] *See* Guidelines [of the EC] on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 at ¶¶ 13, 18 (indicating that fine calculations will be based on a company's sales of relevant goods and services in Europe), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF.

[26] Indeed the record at trial demonstrated that one of AUO's predecessor companies, Acer Display Technology—through defendants Chen and Hsiung—had collusive contacts with some of its crystal meeting coconspirators even prior to merging with Unipac Optoelectronics to form AUO. *See, e.g.*, Trial Ex. 78, 471T.

is no saving grace. Likewise, a few modest examples of corporate largesse are not enough to atone for the hundreds of millions of dollars of harm that AUO inflicted on consumers through the conspiracy and for which it now must be adequately punished.

B. AUO Has No Cognizable or Supported Ability-to-Pay Argument

AUO also seeks a lower fine than that recommended by the Probation Office on the basis of inability to pay, suggesting that even that fine, half of what the government is recommending, "may cripple" AUO and make it an ineffective competitor against Samsung. Dkt. 944 at 10-12. The applicable Guidelines section—which AUO fails even to cite much less analyze—is U.S.S.G. Section 8C3.3, which requires the reduction of a corporate fine that either will unduly impair a company's ability to pay restitution or substantially jeopardize its continued viability. U.S.S.G. § 8C3.3; *see also United States v. Eureka Labs, Inc.*, 103 F.3d 908, 912 (9th Cir. 1996) (holding that Section 8C3.3(a) "requires a court to reduce a fine to the extent needed to avoid interfering with a defendant organization's ability to pay restitution to victims"). AUO bears the burden of establishing its inability to pay a Guidelines fine. *United States v. Bradley*, 644 F.3d 1213, 1304 (11th Cir. 2011) (holding that a corporate defendant "offered nothing to demonstrate that it lacks sufficient assets to pay the fine it owes, much less that it would be unable to pay restitution to its victims"). AUO makes no effort to, and cannot, meet its burden.

According to its SEC filings, AUO had net sales in 2011 of over $12.5 billion, total assets of over $19.6 billion, current assets of over $6.6 billion, and cash or cash equivalents of approximately $3 billion.[27] AUO's president, Paul Peng, confirmed the company's 2011 year-end cash and cash equivalents during a deposition. Deposition of Paul Peng at 99:24-100:3. Peng also testified that AUO has set aside cash reserves for its criminal fine, has been informed about the "possible highest amount for the fine," and has run financial simulations to confirm "how we should manage our cash flow so that [the criminal fine] would not affect our company's operation" if it exceeds AUO's cash reserve. Tewksbury Decl. Ex. E. There is thus little

[27] The TFT-LCD business is cyclical in nature so AUO's operating income, earnings, and net income vary year by year. While AUO was unprofitable in 2011, for the prior four years (2007 to 2010) it averaged net sales of over $13.75 billion per year, operating income of over $378 million per year, earnings before income tax of over $310 million per year, and net income of over $261 million per year.

question that AUO has the ability to pay the recommended fine, either in a lump sum or in installment payments. And if, in the interests of justice, the Court permits installment payments, it should also place AUO on probation, which would allow the Probation Office to monitor the company's financial condition relative to its fine and restitution obligations.

Nonetheless, AUO ignores the sworn testimony of its own President and relies solely on one of its expert economists, Dr. Hall, to argue that its fine should be reduced. Despite having served as AUO's expert for years and having been paid millions of dollars for his efforts, Dr. Hall turns to the internet to support his conclusion that AUO faces "serious financial challenges." Declaration of Dale Zuehls ("Zuehls Decl.") at ¶ 7 (stating that Dr. Hall's reliance "on 4 general items found on the internet . . . can be given little weight in determining a company's ability to pay a fine" without "any meaningful financial analysis"). Dr. Hall does not opine or even suggest that AUO's continued viability or ability to pay restitution would be jeopardized by the recommended fine, which is the relevant question under the Sentencing Guidelines. *Compare* U.S.S.G. § 8C3.3 *with* Hall August 27, 2012 Decl. at ¶¶ 79-85. His refusal to offer such an opinion is not surprising in light of AUO's President's sworn testimony that the company can manage its cash flow so that its operations would not be affected by a criminal fine.

Indeed, Dr. Hall apparently did not undertake even a cursory review of AUO's actual financial data, let alone the type of detailed financial analysis that would be required to offer an opinion regarding AUO's ability to pay the recommended criminal fine. Zuehls Decl. at ¶¶ 7-14. Dr. Dale Zuehls, a forensic accountant who has conducted ability-to-pay analyses on approximately 20 prior occasions, typically reviews detailed financial information and forecasts covering several years, conducts meetings with company financial officers and experts, gains an understanding of the past, current, and future financial performance, forecasts, and prospects of a company and its industry, and then processes the information through financial models to identify an appropriate payment range and options for the company. *Id.* Dr. Hall did no such analysis, and, based on the company's own admitted financial simulations, such an analysis would obviously confirm the company's ability to pay the recommended fine. AUO has billions of dollars in cash, which is available to pay the criminal fine that is imposed in this case.

V. THE ALTERNATIVE FINE STATUTE AUTHORIZES A $1 BILLION CORPORATE FINE IN THIS CASE

A. This Court Should Reject AUO's Constitutional Challenge to Section 3571(d)

AUO previously argued that the jury was required to find beyond a reasonable doubt the amount of pecuniary gain under the Alternative Fine Statute, 18 U.S.C § 3571(d). *See* Dkt. 339, at 10 ("Given the government's determination to seek a fine in excess of [the statutory maximum] pursuant to the alternative fine statute, 18 U.S.C § 3571(d), the government is required by *Apprendi* to prove the purported gain or loss arising from any offense to the jury and beyond a reasonable doubt."); *id.* at 15 ("If the government obtains a conviction at trial, the calculation of gain or loss must be made by the jury to a beyond a reasonable doubt standard."). The Court accepted this argument (over the government's objection), and the jury found that there was "$500 million or more" of "gross gains derived from the conspiracy." Dkt. 851 at 3.

Not getting the jury verdict it wanted, AUO now argues that Section 3571(d) is "facially unconstitutional" because (1) having the jury find the amount of gain is *constitutionally required*, but (2) that is not what Congress would have wanted had it known about this constitutional requirement. *See* Dkt. 942 at 3-7. The Court should reject this *post hoc* challenge to the procedure AUO itself urged on the Court.

1. AUO Is Estopped from Challenging Section 3571(d)'s Constitutionality Based on Jury Finding the Gain

AUO argues that "Section 3571(d) is facially unconstitutional under the remedial holding of *Booker*," "[b]ecause Congress intended courts and not juries to make such findings [on loss or gain]," and Section 3571(d) cannot reasonably be construed otherwise. Dkt. 942, at 7. This is, in essence, an argument that this Court erred in submitting the issue of gain to the jury. Having successfully urged the Court to submit gain to the jury, AUO is estopped from challenging that now.

As AUO acknowledges (*see* Dkt. 943 at 29), "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532

U.S. 742, 749 (2001). This rule "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* "It is an equitable doctrine invoked not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts." *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, __ F.3d __, 2012 WL 3743100, at *6 (9th Cir. Aug. 30, 2012) (internal quotations and citations omitted); *see also id.* at *13 ("Judicial estoppel is intended to protect the courts.").

The Supreme Court has "identified three factors that courts should consider in determining whether the doctrine is applicable in a given case." *Id.* at *7. "First, a party's later position must be clearly inconsistent with its earlier position." *New Hampshire*, 532 U.S. at 750. The second factor is, "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* The third factor is, "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.*

All three factors support estoppel here. First, AUO's current position is "clearly inconsistent" with its prior one, as it previously argued gain had to be submitted to the jury, which it is now claiming violates Section 3571(d).[28] Second, AUO succeeded in persuading this Court to accept its earlier position and submit gain to the jury. And third, AUO would receive an "unfair advantage" in reversing its position now, as its changed position reduces the maximum possible fine from $1 billion to $100 million—substantially less than the gain found by the jury here.

While the Supreme Court handed down *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), in the interim, that opinion—in AUO's own words—confirms that this Court's

[28] When previously arguing that gain had to be submitted to the jury, defendants never claimed this would contravene congressional intent.

prior order submitting gain to the jury was "correct." Dkt. 942 at 3. Thus, it does not provide a legitimate basis to allow AUO to switch its position on Section 3571(d) at sentencing.

2. Section 3571(d) Is Not Facially Unconstitutional

Even if AUO was not estopped from challenging the constitutionality of Section 3571(d), its challenge would fail because the statute is not facially unconstitutional. For Section 3571(d) to be "facially unconstitutional," it would have to be "unconstitutional in all its applications." *United States v. Cassel*, 408 F.3d 622, 626 n.1 (9th Cir. 2005); *see also Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).[29] That standard is not satisfied when there is a "'reasonable construction'" of the statute that would "'save [it] from unconstitutionality.'" *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (en banc) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). That is the case here, because it is reasonable to construe Section 3571(d) as permitting juries to determine the amount of gain—as AUO previously argued was required.

As AUO noted in its prior briefing (Dkt. 339 at 9-10), both the Second and Seventh Circuits have held that district courts must send Section 3571(d) loss or gain determinations that would increase the maximum fine to the jury. *See United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010); *United States v. LaGrou Distrib. Sys.*, 466 F.3d 585, 594 (7th Cir. 2006). And the procedures followed in this case show precisely how this can be implemented in practice. It might not be the only way of construing and applying the statute, but it certainly is a "fairly possible" way that defeats AUO's claim of facial unconstitutionality. *See Buckland*, 289 F.3d at 564 ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.") (internal quotation marks and citations omitted).

The "starting point for interpreting a statute is the language of the statute itself." *Id.* (citations and internal quotation marks omitted). Here, the text of Section 3571(d) does not

[29] A statute also can be facially unconstitutional if it "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad," *Foti*, 146 F.3d at 635, but AUO does not argue that here.

address who should determine the amount of gain or loss—judge or jury—and there is nothing in the statute inconsistent with having the jury do it (as the Court required here). That such a construction is permissible, is "dispositive". *Id.* at 565 ("Section 841 is most striking for what it does not say. The statute does not specify who shall determine drug quantity or identify the appropriate burden of proof for these determinations. . . . . [T]he text of the statute is dispositive.").

Although AUO (now) claims that Congress likely would have preferred to invalidate Section 3571(d) instead of submitting gain or loss to the jury, *see* Dkt. 942 at 3, AUO does not point to anything in the text of the statute supporting this conclusion. Instead, AUO cites a few snippets of legislative history and an amicus brief submitted in *Booker* that it claims clearly show that Congress wanted fines to be imposed by judges without any fact-finding regarding fines by juries. Dkt. 942 at 4-7. But the cited portions of the legislative history and the amicus brief do not, in fact, show what AUO says. None of the legislative history cited by AUO directly addresses—much less clearly speaks to—what Congress likely would have done had it known that juries must determine facts increasing the maximum fine.[30] Moreover, the cited portions of the amicus brief are about the Sentencing Act and the Sentencing Guidelines, not Section 3571(d). Given Congress's clear intention to increase the maximum fines to provide "a significant punishment[] for the offense involved," H.R. Rep. 98-906, at 16, and to prevent offenders from profiting from their crime, *id.* at 17, it is highly unlikely that Congress would have preferred to scrap Section 3571(d) instead of having juries determine the amount of loss or gain.

AUO's reliance on *Booker's* remedial holding is misplaced. In *Booker*, the Supreme Court concluded that "Congress, had it been faced with the constitutional jury trial requirement, likely would not have passed the same Sentencing Act," because it "likely would have found the requirement incompatible with the Act *as written.*" *United States v. Booker*, 543 U.S. 220, 258

[30] For instance, AUO claims that a passage in the House Committee Report shows that "Section 3623(c) 'authorizes a judge' – not a judge, working together with a jury – 'to impose a fine of up to twice the pecuniary gain derived by the defendant from the offense.'" Dkt. 942 at 5 (citing H.R. Rep. 98-906, 1984 U.S.C.C.A.N. at 5445, 5449). But the middle part is AUO's own addition. Whoever decides the amount of gain, the judge imposes the fine.

(2005) (emphasis added); *see also id.* at 249 (analyzing Congress's express use of "the court" in 18 U.S.C. § 3553(a)(1), and its removal of "typical 'jury trial' evidentiary limitations" in 18 U.S.C. § 3661). There is no such textual incompatibility here. Moreover, in the Supreme Court's view, "[t]o engraft the Court's constitutional requirement onto the sentencing statutes . . . would destroy the system." *Id.* at 252. That again is not the situation here, as this very case demonstrates how such a system could work.

AUO notes (Dkt. 942 at 7 n.2) that the dissent in *Southern Union* observed that juries could have difficulties determining the amount of loss, and having juries do so could create administrative problems. But that was not the view of the Supreme Court majority. More importantly, both the majority and the dissent in *Southern Union* clearly presuppose the survival of Section 3571(d). *See* 132 S. Ct. at 2351 & n.4 (citing Section 3571(d) as an example of a situation "requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount"); *id.* at 2370 (Breyer, J., dissenting) (discussing how juries will have to determine gain or loss under Section 3571(d) as a "consequence of the majority's holding").

The Ninth Circuit has repeatedly rejected similar arguments of facial unconstitutionality under *Apprendi*. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See, e.g.*, *United States v. Vela*, 624 F.3d 1148, 1156-59 (9th Cir. 2010) (rejecting argument that 18 U.S.C. § 111 is facially unconstitutional under *Apprendi*); *Buckland*, 289 F.3d at 563-67 (rejecting argument that 21 U.S.C. § 841 was facially unconstitutional under *Apprendi*); *United States v. Mendoza-Paz*, 286 F.3d 1104, 1109-10 (9th Cir. 2002) (rejecting argument that 21 U.S.C. § 841(a)(1) and § 960 are facially unconstitutional under *Apprendi*); *see also United States v. Hernandez*, 322 F.3d 592, 600-02 (9th Cir. 2002) (reaffirming *Buckland* and *Mendoza-Paz*). This Court should reject this one as well.

B. The Jury's $500 Million Gain Finding Properly Included Gain to All the Conspirators Derived from the Price-Fixing Conspiracy

AUO argues, as it did before trial (Dkt. 444 at 14-16), that Section 3571(d) only increases the maximum fine to twice the defendant's own gain. This Court has already rejected that argument and correctly held that gain from the offense "must include the gains flowing to all

conspirators jointly." Dkt. 631, at 3. The statutory language alone demands that result: "[I]f *any person* derives pecuniary gain from the offense . . . the defendant may be fined not more than . . . twice the gross gain." 18 U.S.C. § 3571(d) (emphasis added). "'Any person' means exactly that, and may not be interpreted restrictively to mean only" the defendant. *Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004). Thus, because the statute plainly contemplates persons besides the defendant deriving gain from the offense, the gain includes the gain derived by "any person" from the "offense."

AUO relies on unpersuasive legislative history. Where the language of the statute is clear, as here, there is no need to resort to legislative history. *Boyle v. United States*, 556 U.S. 938, 950 (2009). In any event, Section 3571(d)'s legislative history confirms this Court's interpretation. In 1987, Congress replaced the old Section 3623(c), which provided "[i]f *the defendant* derives pecuniary gain from the offense . . . the defendant may be fined not more than . . . twice the gross gain," 18 U.S.C. § 3623(c)(1) (Supp. III 1985) (emphasis supplied), with the current Section 3571(d) for the express purpose of authorizing a maximum fine that takes into account the gain that "any person" derives from the offense. *See* H.R. Rep. No. 100-390, at 4 (1987), reprinted in 1987 U.S.C.C.A.N. 2137, 2142 ("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.") (emphasis added); *United States v. Andreas*, 1999 WL 116218, at *2 (N.D. Ill. 1999). AUO's interpretation of Section 3571(d) would nullify Congress's 1987 change in statutory language. But this Court's interpretation makes perfect sense, particularly in the conspiracy context. After all, "a conspiracy is a partnership in crime; and an overt act of one partner may be the act of all." *Socony-Vacuum Oil Co.*, 310 U.S. at 253-54 (quotations omitted); *see also Salinas v. United States*, 522 U.S. 52, 64 (1997).

AUO also relies on references to state law and the Model Penal Code in the legislative history of Section 3571(d)'s predecessor, the old Section 3623(c)(1). Dkt. 942 at 9. Even if that history were relevant to interpreting the later statute, it simply illustrates that "had Congress

wished" to limit Section 3571(d) to defendant's own gain, "it clearly knew how to draft language to that effect." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 302 (2002).

AUO next resorts to the most tenuous evidence of Congressional intent, arguing that neither Congress nor the Congressional Budget Office announced that the new Section 3571(d) would result in a "huge increase in criminal fines." Dkt. 942 at 11-12. But if Section 3571(d) had deterred crime as intended, neither Congress nor its budget office would have expected a deluge of new fine revenue. In any event, even assuming that the new statute would have increased fine revenue, such "ambiguous legislative history"—the absence of a CBO announcement—should not be used "to muddy clear statutory language." *Hall v. United States*, 132 S. Ct. 1882, 1892 (2012).

AUO's reliance on the Guidelines definition of "pecuniary gain" and the Sentencing Commission's supplementary report is similarly unavailing. The Supreme Court has "never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines." *DePierre v. United States*, 131 S. Ct. 2225, 2236 (2011). Nor should the Court use the Commission's statements in a report "to manufacture ambiguity in the otherwise clear language of the statute." *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012).

Lastly, AUO points to dicta and out-of-context quotes from a few cases, claiming that "courts have consistently understood § 3571(d) as establishing a maximum fine equal to twice the defendant's own gain." Dkt. 942 at 12. But, as previously explained by the government, *see* Dkt. 465 at 9-10, and recognized by this Court, *see* Dkt. 631 at 3, none of these cases address the issue, let alone provide a persuasive analysis to support AUO's argument. The one additional case now cited by AUO, *United States v. Sanford*, also does not address whether "gross gain" includes coconspirators' gain, but rather "whether it includes only 'net' gains, i.e., profits, . . . all revenues derived from an offense without deducting costs and taxes, or . . . some other measure." 11-CR-352 BAH, 2012 WL 2930770 (D.D.C. July 19, 2012).

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C. Section 3571(d) Does Not Impose a Collective Maximum Fine

AUO also argues that Section 3571(d) requires that the "total fine received from the conspirators collectively" cannot exceed twice the gain from the conspiracy. Once again, its argument cannot be reconciled with the unambiguous statutory language. Section 3571(d) sets a maximum sentence for "the defendant"—in the singular—not a collective maximum sentence for all defendants who have or may be charged with an offense. If Congress had intended to set a collective maximum fine, it could have easily done so. But Congress did not make a single reference to apportionment of fines amongst criminal defendants in any of the relevant statutes. 18 U.S.C. §§ 3571-74. In contrast, the restitution statute provides that if "more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants." 18 U.S.C. § 3664(h)(1). And while a few district courts have apparently imposed joint and several liability for criminal fines, the government is aware of no case addressing whether such imposition is proper. *See United States v. Pruett*, 681 F.3d 232, 249-50 (5th Cir. 2012) (assessing criminal sentence without addressing whether fines were properly imposed jointly and severally); *United States v. Radtke*, 415 F.3d 826, 836 (8th Cir. 2005) (same).

AUO cannot cite to any case imposing a collective maximum criminal *fine*, relying instead on cases in which courts imposed a joint ceiling in other contexts, such as criminal forfeiture orders. However, a joint ceiling for restitution or forfeiture orders makes some sense. The purpose of the restitution statute is to make a victim whole. *See Hughey v. United States*, 495 U.S. 411, 416 (1990) ("[T]he ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event…"). Restitution does not seek to bestow a windfall on victims by recovering more than the loss cause by an offense. *See* 18 U.S.C. §§ 3664(j)(1) (if a third party has compensated a victim, restitution shall be paid to that person), (j)(2) (restitution amount shall be reduced by any amount later recovered as compensatory damages). Similarly, the purpose of forfeiture is to force criminals to disgorge their ill-gotten gains. *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991) (discussing forfeiture provisions of RICO statute). Thus, forfeiture does not seek to punish offenders by recovering

more than the total gain from an offense. *See United States v. Hurley*, 63 F.3d 1, 23 (1st Cir. 1999) (imposing collective cap for forfeiture order); *United States v. Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999) (same); *Masters*, 924 F.2d at 1370 (same).

But the purpose of a criminal fine is not just to make victims whole or to disgorge ill-gotten gains; the purpose is to punish offenders. *United States v. Mustafa*, 238 F.3d 485, 490 (3d Cir. 2001) ("A criminal fine is a form of punishment, whereas restitution is merely intended to compensate the victim."); *see also* U.S.S.G. § 8C2.8(a)(1) (in determining amount of criminal fine, courts should consider need to "provide just punishment"). Thus, unlike restitution and forfeiture, criminal fines can exceed the gain or loss from the offense. *See* 18 U.S.C. § 3571(d) (authorizing fines up to twice the gain or loss from the offense). And unlike restitution and forfeiture, criminal fines are not bound by a collective cap.

Finally, AUO's interpretation of section 3571(d) would lead to a bizarre result, setting a higher statutory maximum fine for those defendants who quickly accepted responsibility and assisted the government in its investigation than for a defendant that chooses not to accept responsibility and not to cooperate with the government. *Cf.* U.S.S.G. §§ 3E1.1 (authorizing downward departure for acceptance of responsibility); 5K1.1 (authorizing downward departure for substantial assistance to authorities). And even if several defendants go to trial, the order of the trials should not affect the maximum fine.

Section 3571(d) authorizes this Court to set a fine at the maximum amount of $1 billion. The Court properly instructed the jury to consider the gains to all participants in the conspiracy in reaching its determination that the gross gains derived from the conspiracy were $500 million or more. Section 3571(d) sets a maximum sentence for "the defendant," not for the conspiracy. AUO is solely responsible for the entirety of the fine imposed upon it.

VI. A CRIMINAL FINE AGAINST AUOA IS UNNECESSARY

AUOA argues it should not be subject to a substantial fine. The government, however, does not recommend a fine against it so long as AUO receives a substantial fine. Thus, the Court need not address AUOA's separate arguments, and the government only briefly addresses them.

AUOA advanced arguments based on an erroneous interpretation of the Supreme Court's ruling in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that a wholly owned subsidiary is incapable of conspiring with its parent for purposes of Section 1 of the Sherman Act. *Copperweld* does not limit the government's ability to prosecute a parent and its subsidiary where, as here, both engaged in an antitrust conspiracy with their *competitors*. Consistent with that, *Copperweld* likewise has no application and places no limitation on the Court's ability to impose criminal fines on a parent and its subsidiary where both conspired with their competitors. In such cases, the parent and subsidiary are separate entities for purposes of prosecution and punishment.

Moreover, because in this case AUOA was AUO's agent for purposes of conspiracy-affected LCD sales in the United States, the volume of commerce resulting from those sales is properly attributable to AUOA under Section 2R1.1(b)(2) and would support a significant criminal fine. There is nothing illogical or unfair about attributing to AUOA the volume of affected commerce from the sales it was instrumental in making. As discussed in the United States' Sentencing Memorandum, however, the government believes that AUOA could not on its own pay anything remotely approaching a Guidelines range fine. If the Court imposes the recommended $1 billion fine on AUO, places both companies on probation, and adopts the recommended corporate antitrust compliance program, the government does not recommend fining AUOA and the Court need not determine its Guidelines fine range. *See* U.S.S.G. § 8C2.2(b) ("Where it is readily ascertainable through a preliminary determination of the minimum of the guideline fine range . . . that the organization cannot and is not likely to become able (even on an installment schedule) to pay such a minimum guideline fine, a further determination of the guideline fine range is unnecessary.").

VII. CHEN AND HSIUNG SHOULD EACH BE SENTENCED TO 120 MONTHS INCARCERATION AND FINED $1 MILLION

Applying the Guidelines and the factors set forth in 18 U.S.C. §§ 3553(a) and 3572(a) to Chen and Hsiung leads to sentences of 120 months incarceration and fines of $1 million each. Their arguments for lesser sentences are without merit.

A. The Government and the Probation Office Have Correctly Calculated Chen and Hsiung's Guidelines Offense Level

Chen and Hsiung's Guidelines offense level is a function of the volume of affected commerce attributable to them and their role in the offense. Both Chen and Hsiung challenge the government and the Probation Office's volume of affected commerce figures. Those figures are accurate for the reasons set forth in the government's Sentencing Memorandum. The defendants' attacks on those figures are without merit for the reasons set forth in Section IV, above. Chen and Hsiung's other arguments against their Guidelines levels are also without merit.

1. Chen and Hsiung Should Receive a Four-Level Enhancement for Their Role in the Offense

Chen and Hsiung argue that their offense level should not be increased four levels, but at most three. (Dkt. 945 at 12; Dkt. 947 at 21-23). They are incorrect. Under the Guidelines, the offense level is to increase four levels "if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The increase is only three levels "if the defendant was a manager or supervisor (but not an organizer or leader)." U.S.S.G. § 3B1.1(b). The factors the Court should consider in determining if someone is an organizer or leader include "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices . . . and the degree of control and authority exercised over others." U.S.S.G. §3B1.1, cmt. 4. By any of these measures, Chen and Hsiung were leaders of the conspiracy, not managers or supervisors. Chen argues that "other conspirators organized and led the Crystal Meetings" (Dkt. 945 at 12), but, of course, "[t]here can . . . be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. §3B1.1, cmt. 4. Hsiung argues that he "merely *attend[ed]* meetings" which "is not evidence that [he] *organized* the crime." (Dkt. 947 at 21). These arguments simply do not square with the facts.

The group crystal meetings were divided between "top" or CEO meetings and "commercial" or "working" group meetings. Both Chen and Hsiung attended several top

meetings, the very function of which was to legitimize and provide leadership to the cartel. Chen and Hsiung also participated in many bilateral meetings with competitors as AUO's top decision makers.

a) Chen Was a Leader of the Conspiracy

Chen was a leader in the Taiwan TFT-LCD industry and a leader of the conspiracy. Even before the first crystal meeting, he was involved in high-level price-fixing meetings with LG and Samsung as the President of Acer, one of AUO's predecessor companies. *See, e.g.*,Trial Exs. 78, 471. While there was a brief period following Acer's merger with Unipac in which Chen was not ultimately in charge of the merged entity, as soon as he took the helm at AUO—just a month after AUO's formation—he started attending crystal meetings. He attended the critical October 19, 2001 crystal meeting at which the Presidents and CEOs of the conspirators stressed the importance of collaboration and agreed to pricing. Trial Ex. 405. He attended several other CEO-level meetings and reached pricing agreements. *See, e.g.,* Trial Exs. 306, 308, 310, 405, 411, 419. He authorized AUO's participation by his subordinates' attendance at the crystal meetings. *See, e.g.*, Trial Exs. 6, 12, 14, 16, 52, 124, 127. He received reports of crystal meeting pricing agreements from his subordinates. *See, e.g.*, Trial Exs. 16, 124, 127. Chen's role and participation in crystal meetings were culturally significant in conveying to subordinates that the meetings were important and blessing their participation. Trial Tr. vol. 17 at 2987. He also reached agreements with competitors at one-on-one meetings. *See, e.g.,* Trial Exs. 501, 505, 515. Lastly, he was warned about antitrust laws at the December 11, 2001 crystal meeting. Trial Ex. 308. When the TFT-LCD market was at a critical point in mid-2004, Chen even asked his subordinates via email whether AUO's competitors could reach a consensus to decrease production. Trial Ex. 52. Chen's email precipitated Hsiung's calling of an emergency crystal meeting in July 2004. At that meeting, the participants discussed the need to limit "Written Communication, which leave traces." Trial Ex. 431.

b) Hsiung Was a Leader of the Conspiracy

Like Chen, Hsiung was also a leader in the industry and leader of the conspiracy. He accompanied Chen in fixing prices with LG and Samsung before the first crystal meeting. *See,*

e.g., Trial Exs. 78, 471. He was also with Chen at the October 19, 2001 top crystal meeting. Trial Ex. 405. He attended several crystal meetings as the highest representative of AUO and reached price agreements. *See, e.g.*, Trial Exs. 309, 409, 410, 415, 417. He directed subordinates to attend crystal meetings. *See, e.g.*, Trial Exs. 15, 20. He received reports of crystal meeting pricing agreements from his subordinates. *See, e.g.*, Trial Exs. 16, 19, 21, 25, 27, 31, 37, 40, 43, 124. As the head sales officer, he directed staff to charge crystal meeting target prices. *See, e.g.*, Trial Exs. 115, 118, 179. He negotiated prices to key U.S. victims of the conspiracy, like Dell and HP. *See, e.g.*, Trial Ex. 89. He reached agreements with competitors at bilateral meetings. *See, e.g.*, Trial Exs. 476, 480, 501, 505, 515. He personally called the emergency July 2004 crystal meeting in order to keep the conspiracy on track. Trial Exs. 52, 431. Like Chen, Hsiung was warned about antitrust laws at the December 11, 2001 crystal meeting (Trial Ex. 308) and he took steps to conceal the conspiracy. *See, e.g.*, Trial Exs. 15, 80, 89, 118. He was also the President of AUOA, was aware of competitor contacts by AUOA's employees, and directed AUOA to implement agreed-upon prices in the United States. *See, e.g.*, Trial Ex. 89.

Chen and Hsiung argue that rather than a four-level enhancement, they are entitled to the three-level enhancement received by J.Y. Ho, C.C. Liu, C.S. Chung, Amigo Huang, C.L. Kuo, Bock Kwon, C.H. "Frank" Lin, and James Yang. (Dkt. 945 at 12; Dkt. 947 at 7-8 and 21-23). However, most of those individuals held positions below the President and Executive Vice President level of Chen and Hsiung, or they worked at companies that were much smaller than AUO. While J.Y. Ho was at the same level as Chen, he only attended the first three crystal meetings and was not personally involved after late 2001. C.H. Lin also held a high rank at CPT, but unlike Chen and Hsiung he did not attend *any* crystal meetings, bilateral meetings, or have any contacts with his competitors whatsoever. In addition, he worked for a much smaller player than Chen and Hsiung did. That is also true of C.C. Liu, who had a comparable title to Hsiung, but did not have comparable industry clout because of the size of CPT.

Even if Chen and Hsiung *were* similarly situated to other defendants who received enhancements of three levels, the Court would not need to reduce the enhancement for Chen and

Hsiung. *See Taylor*, 991 F.2d at 536 ("[A] disparity in sentencing among co-defendants is not, by itself, a sufficient ground for attacking an otherwise proper sentence under the guidelines. Rather, a defendant can only challenge his sentence by showing that it was the result of incorrect or inadmissible information, or an incorrect application of the Sentencing Guidelines.") (internal quotations omitted); *United States v. Hogan*, 54 F.3d 336, 340 (7th Cir. 1995) ("Neither is it material that one of Hogan's codefendants received a lesser enhancement than Hogan did. . . . A disparity in sentences does not . . . itself supply a rationale that warrants resentencing.").

2. The Guidelines Appropriately Reflect Defendants' Culpability

Chen argues that the Guidelines' focus on the loss from the crime overstates his personal culpability. To support that proposition, he cites *United States v. Milne*, 384 F. Supp. 2d 1309 (E.D. Wis. 2005). Yet the defendant in *Milne* was in a very different position than Chen. Milne was a high school graduate who had started his own car dealership. *Id.* at 1311. The cars on the lot secured a loan from his bank. As his business was failing, in desperation, he submitted statements to the bank that showed that he still owned cars that had already been sold. Milne voluntarily came forward and admitted his conduct and "he emptied his pockets, including turning over every cent of equity he had in his house (about $38,000) to try and make good on his obligation." *Id*. at 1310. Beyond just pleading guilty, the defendant showed acceptance, remorse, and atonement. "He did all this well before he was implicated in or charged with criminal activity." *Id*. at 1312. Based on these facts, the court found that the defendant was less culpable than the loss to the bank (the sole victim of the crime) suggested. Moreover, his family was "in difficult financial straits. [Milne's] wife had recently lost her job, making defendant the sole bread-winner. Thus, [Milne's] absence for an extended period of time would have been an extreme hardship." *Id.* at 1311. Milne stands in stark contrast with Chen and Hsiung—educated, multimillionaire executives, and captains of industry who have never owned up to their wrongdoing or willingly attempted to make restitution to their many victims.

Chen also cites *United States v. Costello*, 16 F. Supp. 2d 36 (D. Mass. 1998). In that case, the court noted that the value of stolen property in the Guideline for Theft serves as "an indicator of *both the harm to the victim and the gain to the defendant.*" *Id*. at 39 (quoting

U.S.S.G. § 2B1.1, comment (background)) (emphasis supplied by court). But the Court noted that "where the defendant is not the principal, where he or she is a functionary," the gain to the defendant is usually a lot less than the harm. *Id*. In *Costello*, the defendants in question were low-level employees who worked in the shipping and receiving departments of a company they were stealing from. They committed the crime at the behest of another defendant who took the lion's share of the proceeds from the theft. Chen, on the other hand, is no mere functionary or low-level employee. He and Hsiung were the leaders of AUO. It was their company, and it is entirely appropriate that the volume of AUO's commerce affected by the conspiracy be attributed to them.

3. The Court Should Not Depart Downward on Chen and Hsiung's Offense Level Because They Were Otherwise Law-Abiding

Chen argues that this case is outside the "heartland" and that the Court should depart downward because the price fixing that Chen was convicted of represented "aberrant behavior" for him and that he otherwise lived a law-abiding life. Dkt. 945 at 12-14; *see also* Dkt. 947 at 4 (noting that Hsiung had never before been charged with a crime). As support for this argument, Chen cites to Guidelines Section 5K2.20 and cases such as *United States v. Lam*, 20 F.3d 999 (9th Cir. 1994). Chen's argument is not supported by either the facts or the law.

Section 5K2.20 allows for a downward departure under the Guidelines "only if the defendant committed a single criminal occurrence or a single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20. In order for an offense to be entitled to Section 5K2.20 departure, it must have each of those characteristics. *United States v. Guerrero*, 333 F.3d 1078, 1081 (9th Cir. 2003). Chen's offense has none of them. Moreover, in applying this section of the Guidelines, "'the sentencing court must conduct two separate and independent inquiries, both of which the defendant must satisfy before a departure can be granted. That is, the court must determine whether the defendant's case is extraordinary and whether his or her conduct constituted aberrant behavior.'" *Id*. (quoting *United States v. Castano-Vasquez*, 266 F.3d 228, 235 (3d Cir. 2001)). Chen suggests that

Guerrero is somehow no longer good law following *Booker* (Dkt. 945 at 13), but *Guerrero* has never been overruled. To the contrary, the Ninth Circuit has quoted it approvingly following *Booker*. *See United States v. Leyva-Franco*, 162 Fed. Appx. 751, 752 (9th Cir. 2006) ("'[A] sentencing court must find both that the case is extraordinary and that the behavior was aberrant under the three-factor test.'") (quoting *Guerrero*, 333 F.3d at 1082). Guideline Section 5K2.20 simply does not apply. As to the first inquiry, Chen's case is extraordinary only in the sense that it is extraordinarily egregious, and that certainly does not warrant a *downward* departure under the Guidelines. Under the two step process, that is the end of the inquiry. But Chen fails the second part of the test as well, because the conduct was not aberrant. The crime was committed with significant planning; it was of an extended, rather than limited, duration; and Chen (and Hsiung) had engaged in price-fixing behavior even before they entered into the LCD conspiracy.

Nor is the general policy underlying section 5K2.20 applicable. Chen relies on *Lam*, 20 F.3d 999, but that case does not shed any light on this case. In *Lam*, a Vietnamese immigrant who opened a small business in this country with his family after arriving penniless, purchased a shotgun to protect himself and his family, after he and his pregnant sister were robbed at gunpoint and shot at by masked intruders. *Id.* at 1000. Unbeknownst to Lam, the barrel of the shotgun he purchased for self defense was an inch and a half shorter than the law allowed and he was prosecuted for possession of the gun in violation of the Gun Control Act of 1968. Under the circumstances of that case, the court held that the district court had discretion to depart from the Guidelines sentence of 18 to 24 months. *Id.* at 1005. The facts of *Lam* could not be further from the facts here. Chen knew what he was doing was illegal. The conspiracy was not a technical, victimless violation, and Chen did not commit the crime due to the strong pull of responsibility for the personal safety and physical protection of his family from violent crime. The Court should reject outright Chen's attempt to shoehorn himself into the *Lam* rubric with arguments that his crime should be considered a "benign event" perpetrated without knowledge of its wrongfulness "in order to help AUO, and its thousands of employees." Dkt. 945 at 14.

That Chen and Hsiung have good jobs, had clean criminal records, and give to charity are also not inappropriate reasons to depart from the Guidelines sentences. Their status as employed

first-time offenders does not differentiate them from most high-level price-fixing defendants. *See Carter*, 560 F.3d at 1121-22 (observing that a defendant's prior history and circumstances must be so "atypical as to put [the defendant] outside the 'minerun of roughly similar' cases considered by the Sentencing Commission in formulating the Guidelines"); *United States v. Goff*, 501 F.3d 250, 261 (3rd Cir. 2007) (explaining that the defendant's "criminal history, in Category I, is similar to the vast majority of those convicted" of the same offense, and therefore, the defendant "is no outlier; he is, on the contrary, plainly in the 'heartland' of offenders."); *see also United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998) (holding no downward departure for a high-profile businessman who advised local business, hired youth, served on his church's council, and raised money for charity); *United States v. Rybicki*, 96 F.3d 754, 758-59 (4th Cir. 1996) (holding no downward departure for a highly decorated Vietnam war veteran for saving an innocent civilian during the war and serving with the Secret Service); *United States v. McHan*, 920 F.2d 244, 247 (4th Cir. 1990) (holding no downward departure despite work history, family ties and responsibilities, plus sizable contributions to economic well-being of defendant's town); U.S.S.G. § 5H1.11 (Public service and good works are discouraged bases for departures.). Chen and Hsiung are squarely in the category of typical price fixers.

4. The Guideline Fine Is Not Excessive

Chen and Hsiung argue that the fine recommended by the Probation Office is excessive because they did not seek to enrich themselves from the offense. Dkt. 945 at 14-15; Dkt. 947 at 12. This argument ignores the fact that Chen and Hsiung's fortunes were inextricably intertwined with those of AUO, even apart from their performance bonuses. (According to AUO's SEC filings, it distributes five to ten percent of its distributable earnings to employees as bonuses.)

Chen also argues that in determining Chen's fine "the Court must . . . consider *AUO's* civil obligations through which it is making restitution to the victims of the Crystal Meeting Conspiracy." Dkt. 945 at 14-15 (citing U.S.S.G. § 5E1.2(d)(4)) (emphasis added). But this makes no sense. The section of the Guidelines that Chen cites concerns restitution required of *individual* defendants, not restitution that AUO is obligated to make. Beyond that, an argument

that Chen's fine should be reduced to allow AUO to meet its restitution obligation would only make logical sense if Chen anticipates that AUO will pay his fine for him. That may be what Chen expects, but it would be especially ironic since it was Chen's lawyer who was incensed by that concept at trial. *See* Trial Tr. vol. 11 at 1909 ("Mr. Attanasio: …Your Honor, I've never had a conversation with the Department of Justice or an Assistant U.S. Attorney where I was allowed to say, 'I have an idea. Do you want to fine my client? Let me have someone else pay it for him. Those are rejected, out of hand. So I apologize if the Court has a different view, but I've never had that experience. There's supposed to be personal responsibility for the guilty conduct, including going to jail, and including a fine."). In any event, whether or not Chen pays his own fine, it will have no impact on AUO's ability to make restitution to its victims.

Chen and Hsiung also suggest that they do not have the resources to pay a fine of even $500,000. But the financial disclosures made to the Probation Office sweep the legs out from under that argument. Both are wealthy men with substantial unencumbered assets.

B. The Section 3553(a) Factors Support the Sentences Requested by the Government

1. The Nature and Circumstance of the Offense and the History and Characteristics of Chen and Hsiung

The nature of the offense for which Chen and Hsiung were convicted calls for the maximum sentences allowable. Chen, incredibly, argues that "there is no proof that the Crystal Meeting conspiracy created the anti-competitive effects the Sherman Act is designed to combat." Dkt. 945 at 17. This statement flies in the face of the jury's finding of ill-gotten gains of at least $500 million. And Dr. Leffler has found the harm from the conspiracy was much higher than even that.

Almost as incredible is Hsiung's argument that he is entitled to a downward departure "because nearly all of the conduct that led to this conviction occurred abroad." Dkt. 947 at 13. He claims that it is "unfair to severely punish, by a long prison sentence in the United States, actions taken abroad in a country where there was little foreseeable prospect of being subject to U.S. criminal law." *Id.* It has long been clear that the Sherman Act applies to even wholly foreign conduct. *See infra* Section III.B.2.b.2. And AUO was a sophisticated multinational

company doing business throughout the world. It had several offices in the United States and sold huge amounts of its products to U.S. customers. Hsiung was the President of AUO's U.S. subsidiary. The conspiracy was carried out, in part, in the United States. Lastly, the argument is especially meritless coming from Hsiung, who was fully aware and conscious of his guilt and participated in crystal meetings in which antitrust concerns were discussed. *See, e.g.*, Trial Exs. 308, 431. Moreover, he was an American citizen, was educated in the United States, ran a U.S. company, and spent many years working here for a large U.S. corporation before returning to Taiwan to join AUO. His argument really boils down to the suggestion that it is unfair to hold him—a U.S. citizen—liable for conduct that victimized his fellow citizens because it was unforeseeable that if he went to Taiwan and engaged in illegal conduct, he and his coconspirators would be caught. This argument is particularly incredible given his and his coconspirators' extraordinary efforts to conceal their conduct.

Chen and Hsiung argue that their charitable giving merits a reduced sentence. Dkt. 945 at 7 and 16; Dkt. 947 at 17-18. However, "it is *usual* and *ordinary*, in the prosecution of similar white-collar crimes involving high-ranking corporate executives . . . . to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts." *United States v. Kohlbach*, 38 F.3d 832, 838 (6th Cir. 1994) (emphases in original). Charitable activities warrant a variance only if they are exceptional or extraordinary. The charitable giving of Chen and Hsiung is normal for business executives of their station and means. *United States v. Vrdolyak*, 593 F.3d 676, 682-83 (7th Cir. 2010) ("Wealthy people commonly make gifts to charity. They are to be commended for doing so but should not be allowed to treat charity as a get-out-of-jail card."); *United States v. Ali*, 508 F.3d 136, 149 (3d Cir. 2007) ("'Exceptional' works involve acts that are both 'substantial' and 'personal' in nature . . . . More is expected of [those] who enjoy sufficient income and community status[, as] . . . . they have the opportunities to engage in charitable and benevolent activities.'") (citations and quotation marks omitted); *United States v. Davis*, 182 F. App'x. 741, 744-45 (9th Cir. 2006) ("Davis's charitable activities were not so 'exceptional' or 'extraordinary,' . . . .Many of Davis's acts amounted to monetary contributions that were unremarkable for a person of his resources and station in life.").

Nor are Chen and Hsiung's education and professional accomplishments worthy of a variance from the recommended sentences. An admirable record of employment is a characteristic common to many white-collar criminals. *See United States v. Whitehead*, 559 F.3d 918, 921 (9th Cir. 2009) ("We can hardly be surprised if a white collar criminal has a good employment history-otherwise, he or she would likely not be in a position to commit the crime.") (Gould, J., dissenting); *United States v. McClatchey*, 316 F.3d 1122, 1134 (10th Cir. 2003) ("Unless we are simply to impose lesser penalties on the educated and business elite, there is nothing exceptional about [defendant's] education and enviable career to warrant consideration for downward departure."). Unlike many criminal defendants, whose crimes are born of need or addiction, Chen and Hsiung had advantages and financial resources available to few people. These characteristics make their conduct more reproachable than excusable. Moreover, their success at AUO is an especially inapt reason for any sort of sentence reduction because AUO itself was the vehicle through which they perpetrated the crime. And it was Chen and Hsiung's reputations in the industry that legitimized the conspiracy in the eyes of their subordinates and their coconspirators.

2. The Sentences Requested by the Government Are Just Punishment for the Crime

Only the sentences recommended for Chen and Hsiung meet the seriousness of their crime. Chen argues, however, that he has already been punished because he has been "confined to a foreign country." Dkt. 945 at 18. The Court should reject that notion. First, Chen was not "confined" following his indictment. He was free to move about the district and conduct AUO's business here as he pleased. Moreover, he was liberally allowed to travel both within the country and abroad. In fact, between the time of his indictment and today he has spent a total of 201 days in Taiwan and another 47 days in various parts of this country visiting his family. *See* Dkt. Nos. 109, 143, 184, 205, 255, 284, 304, 327, 343, 369, 382, 390,402, 925.

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3. The Recommended Sentences Are Necessary to Provide General Deterrence

Significant jail time is necessary to deter large-scale, highly successful antitrust conspiracies. Hsiung argues, however, that simply having been convicted he will be punished the rest of his life "through collateral effects, such as unemployment, financial hardship, and disqualification from participating in the economic affairs of the nation," and that these things, "along with the fact of conviction, will afford adequate deterrence to future violations of the antitrust laws for both Dr. Hsiung himself and other potential white-collar offenders." Dkt. 947 at 18 (internal quotation omitted); *see also* Dkt. 945 at 18-19. The notion that simply being convicted is sufficient punishment to deter others from perpetrating future crimes should be rejected out of hand. Only significant jail sentences will get the attention of would-be price fixers and counteract the powerful temptations to cheat.

4. The Requested Sentences Will Not Create Unwarranted Disparities

As expected, Chen and Hsiung point to the sentences handed down to other individuals in this case and argue that the sentences requested by the government will create unwarranted disparities. Dkt. 945 at 20-22; Dkt. 947 at 6-12. However, the government's Sentencing Memorandum anticipated all of their arguments. Those defendants are not similarly situated and those sentences are not adequate benchmarks for several reasons:

(1) they were based on different affected volumes of commerce;

(2) the avoidance of unwarranted disparities factor in 18 U.S.C. § 3553(a)(6) is designed to promote national uniformity in sentencing by treating similarly situated defendants similarly; it does not require uniformity of sentencing among co-defendants within the same case. *United States v. Green*, 592 F.3d 1057, 1072 (9th Cir. 2010); *United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007);

(3) all other defendants sentenced in this case pled guilty and received lesser sentences because they accepted responsibility for their conduct;

(4) all other defendants sentenced in this case, unlike Chen and Hsiung, cooperated with and substantially assisted the government's investigation and prosecution of the crime.

They received significant downward departures from their Guidelines sentences for their cooperation; and

(5) all other defendants sentenced in this case were sentenced while the investigation was still ongoing and before the government had an opportunity to completely analyze the effects of the conspiracy.

For all of these reasons, the sentences of the other individuals will not create unwarranted disparities if the Court sentences Chen and Hsiung to the maximum term of imprisonment and maximum fine as requested by the government.

5. The Requested Sentences Are Not a Punishment for Chen Exercising His Right to Go to Trial

Chen argues that the "disparity in the sentences of Mr. Chen and the pleading defendants will unconstitutionally punish Mr. Chen for exercising his right to trial." Dkt. 945 at 22 (capitalization altered). There is absolutely no basis for that argument. The sentences requested by the government are, in fact, below what the Guidelines suggest. And while those who pled guilty received lower sentences, the law is clear that "the government may encourage plea bargains by affording leniency to those who enter pleas" and that "failure to afford leniency to those who have not demonstrated those attributes on which leniency is based is unequivocally . . . . constitutionally prop[er]." *Carter*, 560 F.3d at 1121 (citations and internal quotations omitted); *United States v. Davis*, 960 F.2d 820, 829-30 (9th Cir. 1992) (holding that downward departures for acceptance of responsibility for those who plead guilty does not infringe on the constitutional right to trial or against self-incrimination); *United States v. LaPierre*, 998 F.2d 1460, 1468 (9th Cir. 1993) ("If there is insufficient evidence to establish acceptance of responsibility, denial of a reduction is appropriate. This is so even if the lack of evidence results from the exercise of constitutional rights."); *Rodriguez*, 162 F.3d at 152 ("The fact that those who plead generally receive more lenient treatment, or at least a government recommendation of more lenient treatment than co-defendants who go to trial, does not in and of itself constitute an unconstitutional burden on one's right to go to trial and prove its case.) (citations omitted); *see also United States v. Gonzales*, 897 F.2d 1018, 1021 (9th Cir. 1990).

To be sure, as noted in the cases cited by Chen, "courts must not use the sentencing power as a carrot and stick to clear congested calendars . . . . Accordingly, once it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty." *United States v. Stockwell*, 472 F.2d 1186, 1187-88 (9th Cir. 1973). But there is no factual support for a charge that either the Court or the government used the plea process to improperly infringe Chen's right to go to trial. Indeed, while the government invited Chen to discuss a possible disposition by plea, he, unlike others, never engaged the government in such discussions.

VIII. CONCLUSION

The government recommends that the Court sentence defendant AUO to pay a $1 billion fine, and defendants H.B. Chen and Hui Hsiung to serve ten years in prison and pay $1 million fines. The government further recommends that AUO and AUOA be placed on probation and, as a condition of probation, be required to implement an antitrust compliance program and hire an independent compliance monitor.

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Respectfully submitted,

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