No. 13-10242

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SHIU LUNG LEUNG, Steve Leung, Chao-Lung Liang,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Honorable Susan Illston
District Court No. 3:09-cr-00110-SI-6

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CONSTITUTIONS, FEDERAL STATUTES, AND RULES

MISCELLANEOUS

STATEMENT OF JURISDICTION

The government agrees with appellant's jurisdictional statement.

STATEMENT OF ISSUES PRESENTED

I.

1. Whether the indictment adequately alleged a price-fixing conspiracy with the nexus to U.S. commerce required by the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. §§ 1, 6a.
2. Whether the evidence at the initial trial sufficiently proved the required nexus to U.S. commerce.
3. Whether the district court properly instructed the juries that the Sherman Act reaches conspiracies carried out, in part, in the United States, as well as conspiracies carried out entirely outside the United States with substantial and intended effects in the United States.
4. Whether the indictment adequately alleged a price-fixing conspiracy within the Sherman Act's reach.
5. Whether the district court correctly concluded that *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), neither required

the government to plead and prove specific intent to produce anticompetitive effects in the United States nor permitted justifications for price fixing under the rule of reason.

II.

6. Whether Rules 29 and 33 of the Federal Rules of Criminal Procedure and Rule 606 of the Federal Rules of Evidence bar consideration of a juror affidavit alleging juror bias and misconduct submitted four months after conviction.

STATEMENT OF THE CASE

In 2001, the major manufacturers of thin-film transistor, liquid crystal display (TFT-LCD) panels used in desktop computer monitors and notebook computers were two Korean companies, Samsung Electronics Corp. and LG Display Co., and four companies from Taiwan, Chunghwa Picture Tubes (CPT), Chi Mei Optoelectronics Corp. (CMO), HannStar Display Corp., and AU Optronics Corporation (AUO). Competition to sell TFT-LCD panels, particularly to major U.S. computer companies, was intense, and the panel manufacturers feared a price war would drive down profits. Their solution was to meet in secret to fix the prices of TFT-LCD panels contained in almost every

computer monitor and notebook computer sold in the United States. During more than five years of successful price fixing, the conspirators substantially increased their margins and secured billions in ill-gotten gains from U.S. purchasers alone.

On June 9, 2010, a federal grand jury sitting in the Northern District of California returned a single-count indictment charging AUO, its American subsidiary AU Optronics Corporation America (AUOA), AUO executives Hsuan Bin Chen, Hui Hsiung, and defendant Shiu Lung ("Steven") Leung, as well as six other individuals, with conspiring to fix prices for TFT-LCD panels in the United States and elsewhere. ER655-56 ¶¶ 1-2. At the initial trial, a jury found AUO, AUOA, Chen, and Hsiung guilty but failed to reach a verdict as to Leung.[1] On retrial, Leung was found guilty, fined $50,000, and sentenced to 24 months of imprisonment to be followed by three years of supervised release.

[1] The jury acquitted two other individuals, Lai-Juh "L.J." Chen and Tsannrong "Hubert" Lee. SER1088. The other four indicted individuals were fugitives at the time of the initial trial. One, Borlong "Richard" Bai, subsequently appeared and was acquitted. *See infra* p. 100.

ER206-09. He now appeals his conviction and is currently on release pending this appeal.[2]

A. Defendant's Role at AUO

Leung was a key sales executive at AUO from its inception in 2001. SER909. He was a sales manager before being promoted in 2003 to direct the sales division responsible for U.S. accounts. In both capacities, Leung sold panels for desktop computer monitors, which constituted a majority of AUO's overall sales. SER874. Leung's division accounted for more than $2 billion in annual sales, SER892, handling AUO's most significant U.S. customers, including Dell, Apple, and Hewlett-Packard (HP), SER893-94, 898-900. As sales division director, Leung was among a select group of AUO executives responsible for pricing AUO's TFT-LCD panels, SER889-91, 910, 929-30, 1043, and had broad authority to dictate the prices his sales representatives quoted to major U.S. customers like Dell, SER1008.

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[2] The factual summary provided here is drawn exclusively from evidence and testimony in defendant Leung's retrial. The government's response brief in *United States v. AU Optronics Corp.*, Nos. 12-10492, 12-10493, 12-10500, 12-10514 (9th Cir. argued Oct. 18, 2013), provides a corresponding account drawn from evidence and testimony in the initial trial.

Leung used AUOA, AUO's wholly owned subsidiary based in the United States, in exercising that authority in the United States. AUOA acted as a "tentacle" or "extension of AUO" for promoting and selling AUO's TFT-LCD panels to U.S. customers. SER1047, 1054-55. AUOA account managers received pricing approval from Leung before they offered those prices to U.S. customers. SER1051. Account representatives reported daily to Leung on their negotiations with U.S. customers. SER1050-51.

B. Defendant's Participation in the Conspiracy

Leung used his position and authority within AUO to help implement an industry-wide price-fixing conspiracy. Beginning in 2001, and lasting for five years, AUO and the other major TFT-LCD manufacturers held secret monthly meetings to set the prices of standard-sized panels sold worldwide. Leung joined the conspiracy in May 2002 when he attended his first of the so-called Crystal Meetings.

From the time he joined it, Leung played a central role in the conspiracy. Prior to the Crystal Meetings, he collected information from AUO's would-be competitors. SER925. He then attended the meetings on AUO's behalf and shared with fellow AUO executives his notes from

the meetings. SER938-84. Flagged "Extremely Confidential – Must NOT Distribute," Leung's notes from the meetings recorded pricing agreements among the conspiring companies. *E.g.*, SER951 ("Must fix 17 [inch panel] pricing even if faced with customer volume reduction."), 956 ("General MAY-JUNE . . . Panel Pricing Adjustment Consensus"); *see* SER1002-06 (summarizing Crystal Meeting reports that Leung wrote or received). Leung was the only AUO representative at some Crystal Meetings and had authority to set prices for the company. SER1018, 1021, 1027, 1058. He hosted some of the meetings, SER945, 972, and made PowerPoint presentations to lead the group's discussion, SER926-28. After Crystal Meetings, he directed his sales representatives to implement the pricing agreements. *E.g.*, SER922.

The March 20, 2003, Crystal Meeting exemplifies Leung's deep involvement in the conspiracy. Leung hosted that meeting, SER972, wrote its agenda, SER926, collected competitor prices in advance, SER925, invited other AUO executives to the meeting, SER971-72, reached pricing agreements at the meeting, SER966-70, circulated a report of the meeting to fellow AUO executives, SER966-70, then led a sales meeting where he gave his staff pricing directives for U.S.

customers based on the prices established at the meeting, SER911-21. Leung was proud of his work, boasting in his 2003 self-evaluation that he "[c]oordinated TFT[-LCD] industry communications and price stabilization." SER895; *see also* SER1015.

In addition to the monthly Crystal Meetings, Leung and his AUOA subordinates colluded directly with their counterparts at rival firms, as needed, to inflate the prices they charged their American customers. *E.g.*, SER933 (Leung directing his subordinates to "align with other TFT[-LCD] vendors to ensure we are not quoting too low or much too high"), 936 (recounting Leung's discussions with CPT "to align action for price increase to DELL/HP"). AUO's account managers in the United States met with their competitor counterparts to match the prices they charged to Dell, HP, and Apple, which they then reported to Leung. SER937 (notifying Leung of fixed prices to Dell), 888 (quoting those fixed prices to Dell with Leung's approval), 1046-47. These collusive meetings and discussions continued through November 2006, just before the FBI raided AUOA's offices. *See generally* SER986-1000 (summarizing the bilateral contacts by Leung and his subordinates).

Leung knew to keep his actions secret. The Crystal Meetings moved each month from hotel to hotel, with the location announced very shortly beforehand. *See* SER985 (Leung declining to specify a meeting location "before Monday AM" "for confidentiality reasons"). Attendees staggered their arrivals and departures to avoid being seen together. SER1024, 1030, 1061-62. Leung routinely instructed recipients of his meeting reports to keep them "Extremely Confidential" and not to disclose the pricing agreements reached at the meetings. *E.g.*, SER931. As one executive put it, when asked why no meeting signs were posted at the hotels where the Crystal Meetings were held, "a thief would not announce his activity when he was trying to steal something." SER1062-63.

In sum, Leung was at the heart of the conspiracy. He attended and arranged Crystal Meetings, he reached agreements on prices at those meetings, he directed his sales staff to implement the agreements, he aligned pricing with competitors one-on-one—often through American subordinates for American customers—and he tried hard to cover his tracks. Leung was a full, voluntary, and necessary participant in the conspiracy.

C. Procedural History

On June 9, 2010, a federal grand jury in San Francisco returned a single-count indictment charging defendant Leung and others with conspiring to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. ER655-56 ¶¶ 1-2. On November 12, 2010, defendant Chen, joined by Leung and his other co-defendants, moved to dismiss the indictment. SER1290-98. Relying on *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), Chen argued that price-fixing conspiracies involving foreign conduct must be evaluated under the rule of reason and, thus, the indictment must allege that defendants intended to produce anticompetitive effects. SER1295-98. On January 29, 2011, the district court denied the motion. ER191-201. The court rejected defendants' interpretation of *Metro Industries* and found the indictment's allegations sufficient. ER195-96.

On February 23, 2011, AUO and AUOA moved to dismiss the indictment for failure to allege that defendants' conduct was intended to produce a substantial effect in the United States and for failure to allege the requisite nexus to U.S. commerce under the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a. SER1265-89.

The district court denied the motion, finding that the indictment need not plead substantial and intended effects in the United States because it alleged some domestic conduct and that, in any event, the indictment did allege such an effect. ER186. The court further found the FTAIA "does not require dismissal" because the indictment was based "at least in part on conduct involving 'import trade or import commerce'" and "the FTAIA's exclusionary rule is inapplicable to such import activity conducted by defendants." ER188.

On March 13, 2012, after an eight-week trial, a jury convicted AUO, AUOA, Chen, and Hsiung but did not reach a verdict as to Leung. SER1087-89. After a three-week retrial of Leung, and less than three hours of deliberation, the second jury returned a guilty verdict on December 18, 2012. He was fined $50,000 and sentenced to 24 months of imprisonment to be followed by three years of supervised release. ER206-09.

Four months after his conviction, Leung sought acquittal or, in the alternative, a new trial, based on a claim of juror misconduct and a host of evidentiary and legal issues that he said the court had decided incorrectly. ER212-37. The district court denied the post-trial motion,

noting its belatedness. ER3. Leung filed a timely notice of appeal on May 2, 2013, ER202-04, and this Court granted him release pending appeal on October 23, 2013, Order, *United States v. Leung*, No. 13-10242 (9th Cir. Oct. 23, 2013) (ECF No. 22).

Meanwhile, Leung's former co-defendants AUO, AUOA, Chen, and Hsiung appealed their convictions and sentences to this Court (Nos. 12-10492, 12-10493, 12-10500, 12-10514), which held oral argument on October 18, 2013. A ruling has yet to issue. Their appeals raise some questions in common with Leung's.

SUMMARY OF ARGUMENT

In September 2001, AUO agreed with the five other major manufacturers of TFT-LCD panels to raise prices on panels sold around the world. From May 2002, defendant Leung took an active role in the conspiracy, hosting price-fixing meetings, takings steps to conceal them, and charging the agreed-upon prices to his major U.S. customers.

Defendant portrays his conduct as a benign exchange of information about wholly foreign sales with hardly any connection to the United States. But that portrayal is impossible to reconcile with the trial evidence. The government proved that the conspirators systematically

fixed prices on TFT-LCD panels, set up operations in the United States to sell price-fixed panels, and ultimately sold $23.5 billion worth of panels to U.S. purchasers, SER1118-26. Defendant's conspiracy harmed every family, school, business, and government agency in the United States that paid more for notebook computers and computer monitors incorporating the price-fixed panels. The conspirators, including Leung, understood that their conduct was criminal: they discussed their fears of prosecution under the U.S. antitrust laws during their conspiracy meetings and took great pains to conceal their conduct.

Having been caught and found guilty beyond a reasonable doubt, defendant hopes to escape punishment by claiming that, because the conspiracy meetings were held abroad, the Sherman Act has no application. But the conspirators acted in the United States to further their unlawful conspiracy, and they reaped billions of dollars in ill-gotten gains at the expense of their U.S. customers. That the conspiracy meetings were held abroad does not change the felonious nature of defendant's conspiracy or undo the enormous harm it caused in the United States.

1. The Foreign Trade Antitrust Improvements Act (FTAIA) provides defendant no valid defense here. That statute excepts anticompetitive conduct from the Sherman Act's application if that conduct involves export or wholly foreign commerce and does not involve or affect U.S. import commerce. 15 U.S.C. § 6a. Because the indictment adequately alleged a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, it need not have negated the exception laid out in the FTAIA. Regardless, the indictment alleged that defendant's price-fixing conspiracy involved import commerce—the conspirators fixed prices on panels imported into the United States—and that the conspiracy directly affected import commerce in the finished products incorporating price-fixed panels. The juries were properly instructed on the FTAIA defense—with instructions that defendant did not, in substance, dispute—and ultimately returned a guilty verdict.

The properly instructed juries likewise rejected defendant's extraterritoriality defense. The district court instructed that the Sherman Act reaches even wholly foreign conduct that has a substantial and intended effect in the United States. Defendant waived any challenge to this instruction when he told the district court it was a

"correct statement" of the law and "should be given." ER517. His belated attack is also meritless because it is well settled "that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796-97 & n.24, 814 (1993). *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010), on which defendant relies, did not abrogate *Hartford Fire*, and defendant's attempt to limit *Hartford Fire* to the civil context is unavailing. In any event, this case does not involve the extraterritorial application of the Sherman Act because, unlike the wholly foreign conduct at issue in *Hartford Fire*, defendant's conspiracy occurred, in part, in the United States.

Defendant's reliance on *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), is also unavailing. There, the Court held that determining whether conduct occurring abroad violates the Sherman Act requires "an examination of the impact of the [conduct] on commerce in the United States." *Id.* at 845. This is nothing more than a restatement of *Hartford Fire*. Defendant argues that, because his conspiracy involved some foreign conduct, *Metro Industries* imposes

additional burdens on the prosecution and allows defendant to argue to the jury that his price-fixing agreement was reasonable. But he misreads the opinion, and his claims of deficiencies in the indictment, instructions, and proof lack merit.

2. Defendant contrived an issue of juror bias and misconduct by submitting a juror affidavit four months after he was found guilty. His motion introducing that affidavit was untimely, and regardless, Federal Rule of Evidence 606(b) barred the district court from considering it.

ARGUMENT

With one exception, Leung's brief in this appeal raises the same issues and makes the same arguments, often verbatim, that his co-defendants made in their earlier, related appeal from the initial trial, which is now under submission. *See infra* pp. 99-100. Leung's appeal explicitly focuses on the initial trial and forgoes any challenge to the sufficiency of the evidence at his retrial, Def. Br. 3-4, thereby waiving any such challenge. The indictment, jury instructions, and conclusions of law were, in all pertinent respects, the same in both trials. All but one of the issues in this appeal can therefore be resolved without scrutinizing the retrial. Accordingly, Part I of this brief's argument

focuses primarily on the initial trial and, where the sufficiency of the evidence is relevant, addresses only the evidentiary record in that trial.

The exception is defendant's argument that he is entitled to a hearing on his claim of juror bias and misconduct at his retrial, Def. Br. 81-93. That argument is addressed in Part II.

I. Defendant Was Properly Convicted of Conspiring To Fix Prices in Violation of U.S. Law

Defendant Leung was charged with, and convicted of, joining a price-fixing conspiracy that occurred in part in the United States, restrained U.S. commerce, and ultimately caused billions of dollars of harm to U.S. purchasers. On appeal, defendant does not contest that he and his co-conspirators fixed the price of TFT-LCD panels, Def. Br. 11, or that billions of dollars' worth of price-fixed panels were shipped to the United States either as raw panels and as panels incorporated into finished products, Def. Br. 73 n. 18, 74. Instead, he claims that, because the price-fixing meetings took place abroad, the entire conspiracy is beyond the Sherman Act's reach. In defendant's view, by merely off-shoring their conspiracy meetings, the conspirators have effectively neutralized the Sherman Act, rendering U.S. prosecutors powerless to protect U.S. commerce and purchasers from the billions of

dollars of harm the conspirators caused. But the Sherman Act is not as feeble as defendant would have it.

A. The Sherman Act Protects U.S. Commerce from Conspiracies To Restrain Trade

Section 1 of the Sherman Act outlaws agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. In passing the Sherman Act, Congress "wanted to go to the utmost extent of its constitutional power" in an effort to preserve competition in or affecting U.S. commerce. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974) (internal citation omitted). Thus, its prohibition on agreements restraining trade among the states reaches not only conduct in the flow of interstate commerce but also wholly local conduct that nevertheless substantially affects interstate commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *see, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-38 (1948) (finding unlawful restraint in local commerce in sugar beets had the requisite effect on interstate commerce in sugar).

Similarly, the Sherman Act's prohibition on agreements restraining trade with foreign nations goes to the full extent of Congress's

constitutional power over foreign commerce. *See Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc.*, 404 F.2d 804, 815 (D.C. Cir. 1968). So broad was the Sherman Act's application to trade with foreign nations that Congress became concerned that U.S. exports would suffer as courts applied the statute to anticompetitive conduct involving only export commerce or wholly foreign commerce with no adverse impact in the United States. Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234; *see also* H.R. Rep. No. 97-686, at 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494. Congress's solution was to refine the required nexus to U.S. commerce for some "trade or commerce . . . with foreign nations" by enacting the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).

The FTAIA added a new section to the Sherman Act:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

The FTAIA "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004).

While Congress sought to give some comfort to U.S. exporters and firms operating in wholly foreign commerce, it also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. For that reason, the FTAIA provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," and thus it leaves the Sherman Act fully applicable to conduct involving import commerce. 15 U.S.C. § 6a. *See also Minn-Chem, Inc. v. Agrium,*

Inc., 683 F.3d 845, 854 (7th Cir. 2012) (en banc) (The limitations in the FTAIA were "inspired largely by international comity," but "there was no need for this self-restraint with respect to imports."); H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494 (The import commerce exclusion was included so there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law.").

Import commerce includes the sale of goods from outside the United States into the United States. Accordingly, a price-fixing conspiracy among foreign manufacturers "involv[es]" import commerce, 15 U.S.C. § 6a, if the conspirators fix the price of goods sold in or for delivery to the United States—i.e., goods in import commerce. *See Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 n.11 (3d Cir. 2011) (emphasizing the importance of defendants' "sales of magnesite for delivery in the United States" in determining whether the import commerce exclusion applies); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012) (holding that a conspiracy to raise the price of copper tubing manufactured abroad and sold into the United States involved import commerce).

In addition, the FTAIA includes an exception for conduct involving only non-import foreign commerce—that is, U.S. export commerce or wholly foreign commerce, *Empagran*, 542 U.S. at 162-63—that nevertheless affects certain U.S. commerce. The FTAIA leaves the Sherman Act applicable to such conduct if it has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or the export trade of a U.S. exporter. 15 U.S.C. § 6a(1).

The FTAIA makes application of the Sherman Act turn on the type of commerce involved or affected, and not on the location of the conduct. Delineating the application of the Sherman Act in this way makes sense because antitrust violations, by their nature, may be committed in one country but cause harm in another. Indeed, potentially anticompetitive activity by U.S. exporters in the United States is precisely the sort of conduct Congress sought to exclude from the Sherman Act so long as it affects only non-import foreign commerce. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814 (9th Cir. 1988) (noting that the FTAIA exempts from U.S. antitrust law certain conduct even though it originates in the United States). Conversely, the FTAIA leaves the

Sherman Act fully applicable to conduct that involves or affects U.S. import commerce, even if the conduct takes place entirely outside the United States.

The location of the conduct is not necessarily irrelevant, however, where an "extraterritoriality defense" is raised. A conspiracy to violate the federal antitrust laws is "a partnership in crime; and an overt act of one partner may be the act of all." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) (internal quotation marks omitted). Thus, once a participant acts in the United States to further a conspiracy in restraint of U.S. commerce—that is, with the necessary nexus to U.S. commerce—the entire conspiracy is within the Sherman Act's reach, regardless of where else conspiratorial acts may have occurred.

In addition, the Sherman Act applies extraterritorially—that is, to wholly foreign conduct. Again, the Sherman Act's broad language was purposefully chosen to occupy the fullest extent of Congress's constitutional power over commerce. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328-29 & nn.7, 10 (1991). And Congress's exercise of "the full sweep of its commerce power is not without significance in

determining whether the Sherman Act applies" to conduct that, while undertaken abroad, is a "restraint[] that operate[s], in the constitutional sense, against the 'foreign commerce' of the United States." *Pac. Seafarers*, 404 F.2d at 815.

Thus, by 1993, the Supreme Court considered it "well established" that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796-97 & n.24 (1993); *see id.* at 814 (Scalia, J., dissenting) ("We have . . . found the presumption [against extraterritoriality] overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.").[3] So even "wholly foreign conduct which has an intended and substantial effect in the United States" is within the Sherman Act's reach. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997); *see also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 845 (9th Cir. 1996) (The "potential illegality [under the

[3] The Court in *Hartford Fire* declined to consider whether the FTAIA supplanted prior precedent on the extraterritorial application of the Sherman Act. *See infra* p. 48 n.11. Thus, this brief addresses both the FTAIA's requirements, *see infra* pp. 25-47, and the *Hartford Fire* holding, *see infra* pp. 47-74.

Sherman Act] of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States.").

Together, the FTAIA and *Hartford Fire*'s effects requirement impose sensible but discrete limits on the reach of the Sherman Act to foreign conduct and foreign commerce. These limits preclude application of the Sherman Act to wholly foreign conspiracies that neither involve nor affect U.S. commerce, while ensuring that U.S. commerce and U.S. purchasers remain fully protected from anticompetitive conduct wherever it occurs.

Defendant Leung would turn this body of law on its head, using these limitations to shield himself from punishment for conduct that both took place here and substantially harmed U.S. commerce and U.S. purchasers. But the jury was properly instructed on the requirements of the FTAIA and *Hartford Fire*, *see* SER1100-01, and it found beyond a reasonable doubt that the government's evidence was sufficient to convict. Notwithstanding the jury's verdict, defendant now contends (1) that the government failed to plead and prove the FTAIA's import commerce exclusion and effects exception; (2) that the Sherman Act does not apply at all to a conspiracy involving foreign conduct, even if it

takes place in part in the United States and has effects in the United States; and (3) that, because the conspiracy involved some foreign conduct, defendant should have been allowed to argue to the jury that he was somehow justified in fixing prices to U.S. purchasers. These contentions are meritless.

B. The Government Pleaded and Proved the Required Nexus to U.S. Commerce

Defendant makes two arguments related to the FTAIA. First, he contends that the indictment failed to plead that the Sherman Act applies to the price-fixing conspiracy in light of the FTAIA. This claim is based on a misunderstanding of both the requirements for pleading a Sherman Act violation and the implications of the FTAIA. Second, defendant contends that the trial evidence was insufficient to prove that either the FTAIA's import commerce exclusion or effects exception applied. This claim, too, is based on a misunderstanding of the FTAIA. The jury in this case was properly instructed on the FTAIA, and the evidence amply supports its guilty verdict.[4]

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[4] This Court has treated the FTAIA as a limit on a court's subject-matter jurisdiction and thus as a question for the judge to decide. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 679-80 & n.5 (9th Cir. 2004); *McGlinchy*, 845 F.2d at 815. The district court below in a

1. The Indictment Charged a Violation of Section 1 of the Sherman Act

The sufficiency of an indictment is reviewed de novo. *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009). An indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c)(1), and it is sufficient if it states "the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy," *Awad*, 551 F.3d at 935 (internal quotation marks omitted).

An indictment "should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985);

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related civil case concluded, however, that the FTAIA implicates the merits, not subject-matter jurisdiction. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 957-59 (N.D. Cal. 2011) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006), and *Animal Sci.*, 654 F.3d at 468-69); *see also Minn-Chem*, 683 F.3d at 851-53. In recognition of that conclusion in the related case and out of an abundance of caution, the government agreed to submit the FTAIA question to the jury, which found beyond a reasonable doubt that its requirements were met. Therefore, this Court need not decide whether the FTAIA is a jurisdictional limit. *Cf. In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008) (declining to resolve whether FTAIA withdraws jurisdiction from the federal courts).

see also United States v. Inryco, Inc., 642 F.2d 290, 294 (9th Cir. 1981). And while an indictment need not "conform exactly to the language of the applicable statute," *Hockenberry v. United States*, 422 F.2d 171, 173-74 (9th Cir. 1970), one that "tracks the words of the statute charging the offense" is sufficient so long as it sets forth the elements necessary to constitute the offense, *United States v. Davis*, 336 F.3d 920, 922 (9th Cir. 2003) (internal quotation marks omitted).

Defendant was charged with violating Section 1 of the Sherman Act, which outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," 15 U.S.C. § 1, and the indictment tracked the language of that statute. Specifically, it alleged that defendant "entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the prices of thin-film transistor liquid crystal display panels ('TFT-LCD') in the United States and elsewhere," and that this conspiracy "was in unreasonable restraint of interstate and

foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)." ER656 ¶ 2.[5]

Defendant contends that the indictment was insufficient because it did not "mention, much less cite, the FTAIA." Def. Br. 65. That the indictment includes no citation to 15 U.S.C. § 6a is of no significance. "[N]either an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction" absent proof the defendant was misled and thereby prejudiced. Fed. R. Crim. P. 7(c)(2). Given that defendant's motion to dismiss the indictment relied heavily on the FTAIA, SER1280-88, he cannot claim to have been misled as to its potential relevance.

Defendant also contends that the indictment was deficient because it "did not track the language of the" FTAIA, Def. Br. 64, but defendant was not charged with violating the FTAIA. He was charged with violating Section 1 of the Sherman Act. An indictment "founded on a general provision defining the elements of an offense . . . need not

[5] The indictment provided numerous details, including specific information about the nature of the conspiratorial agreement, the TFT-LCD panel sizes at issue, the uses of those panels in notebook computers, desktop monitors, and televisions, and the approximate dates and location of conspiratorial meetings. ER660-65 ¶¶ 17-18.

negative the matter of an exception made by a proviso or other distinct clause." *McKelvey v. United States*, 260 U.S. 353, 357 (1922); *see also United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997) (applying this Court's "well-settled rule that a defendant bears the burden of proving he comes within an exception to an offense" in holding that exceptions do not create "additional elements of the offense"). This is true even if the government bears the ultimate burden of proving that the defendant's conduct falls within the reach of the statute. *See United States v. Bruce*, 394 F.3d 1215, 1222-23 (9th Cir. 2005) ("Government need not allege the non-Indian status of the defendant in an indictment" but "retains the ultimate burden of persuasion . . . that the exception [the defendant] claims is inapplicable.").

The FTAIA defines a narrow class of conduct—conduct involving only export or wholly foreign commerce without certain effects on U.S. commerce—to which the Sherman Act does not apply. 15 U.S.C. § 6a. Essentially, it provides U.S. exporters and firms operating in wholly foreign commerce a defense to liability under the Sherman Act. While defendant argued unsuccessfully at trial that this defense applied to his

price-fixing conspiracy, the indictment need not have anticipated defendant's argument. *See United States v. Sisson*, 399 U.S. 267, 288 (1970) ("It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses.").

Moreover, by charging a violation of Section 1 of the Sherman Act, the government alleged that the conduct was within the reach of that statute. The government "need not allege its theory of the case or supporting evidence, but only the essential facts necessary to apprise a defendant of the crime charged." *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982) (internal quotation marks omitted). Thus, there is no merit to defendant's claim that the indictment was deficient because it failed to "specify which theory of the FTAIA" the government would rely on to defeat defendant's claim that the Sherman Act was inapplicable, Def. Br. 65-66.

2. The Indictment Pleaded Both the FTAIA's Import Commerce Exclusion and Effects Exception

In any event, the indictment did plead the FTAIA's import commerce exclusion and the effects exception by alleging that defendant's price-fixing conspiracy both involved U.S. import commerce and had the requisite effect on U.S. import commerce.

a. The Indictment Alleged That Defendant Fixed the Price of TFT-LCD Panels Sold in U.S. Import Commerce

With respect to the FTAIA's import commerce exclusion, the indictment alleged that defendant fixed the price of TFT-LCD panels sold to customers in the United States. ER656 ¶ 2, 657 ¶¶ 4-5, 663-64 ¶ 17(j)-(k). Though defendant apparently reads these allegations to refer only to panels sold abroad and incorporated into finished products sold into the United States, the allegations in the indictment are not so limited. Fixing the price of panels made abroad and sold as raw panels in, or for delivery to, the United States is conduct involving import trade or import commerce. *See Animal Sci.*, 654 F.3d at 471 n.11. Thus, these allegations are sufficient to plead the FTAIA's import commerce exclusion.

Defendant faults the indictment for failing to allege that defendant was "engaged in importing," Def. Br. 68, but his argument that the import commerce exclusion applies only when defendants themselves import the price-fixed product finds no support in the statutory language or the case law. The FTAIA leaves the Sherman Act applicable, not just to the conduct of importers, but to any conduct that *involves* import commerce. Thus, "[f]unctioning as a physical importer

may satisfy the import trade or commerce exception, but it is not a necessary prerequisite." *Animal Sci.*, 654 F.3d at 470.[6]

Minn-Chem, on which defendant relies, Def. Br. 67-68, holds that allegations that plaintiffs "purchased potash directly from members of the alleged cartel" were sufficient to fall within the import commerce exclusion. *Minn-Chem*, 683 F.3d at 855. Contrary to defendant's assertion, Def. Br. 68, the decision says nothing about whether defendants themselves imported potash or what other allegations might be sufficient to meet the exclusion. Moreover, the narrow interpretation of the import commerce exclusion urged by defendant would be contrary to the FTAIA's broad purpose to ensure that purchasers in the United States remain fully protected by the federal antitrust laws. *See* H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494; *Minn-Chem*, 683 F.3d at 854.

Similarly, the indictment is not deficient for failing to allege that defendant's conduct was "'directed' or 'targeted' at United States

[6] The import commerce exclusion is commonly referred to as an "exception," but that is a misnomer. "Import trade and commerce are excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc).

imports," Def. Br. 69. The words "directed" and "targeted" do not appear in the Sherman Act, either in Section 1 or Section 6a, the proviso added by the FTAIA. Thus, those words cannot be said to constitute an element of the offense. And to the extent defendant contends that a price-fixing conspiracy must particularly or uniquely target U.S. import commerce in order to fall within the import commerce exclusion, he misstates the law.

Animal Science, on which defendant also relies, Def. Br. 69, does not support his argument. The *Animal Science* court distinguished *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002), where the import commerce exclusion was not applicable, from *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), where it was. *Animal Sci.*, 654 F.3d at 470. In *Turicentro*, the defendant airlines were alleged to have "only set the rates that foreign-based travel agents could charge for their services." 303 F.3d at 303. Because no import commerce was covered by the agreement, the conduct in *Turicentro* did not involve import commerce. In contrast, in *Carpet Group*, the complaint alleged a conspiracy to prevent the plaintiff from importing oriental rugs. 227 F.3d at 72. Defendants'

conduct allegedly restrained trade in rugs being sold into the United States and was, therefore, conduct involving import commerce.

The *Animal Science* court merely distinguished conduct that restrains import commerce from conduct that does not. It did not impose an additional requirement that the conduct uniquely or predominantly restrain import commerce. Nothing supports defendant's suggestion that *Animal Science* would require the TFT-LCD panels here to have been "specifically designed for the U.S. market," Def. Br. 74.

Moreover, under defendant's interpretation of the FTAIA, price-fixers outside the United States could immunize themselves from U.S. prosecution merely by extending the scope of their price fixing well beyond the United States. Nothing in the FTAIA provides a textual basis for such a loophole, which would greatly undermine the purposes of the FTAIA. "Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets." *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 393 (2d Cir. 2002), *abrogated on other grounds by Empagran*, 542 U.S. 155.

b. The Indictment Alleged the Required Effect on U.S. Import Commerce in Finished Products

The indictment also alleged the facts necessary to plead the FTAIA's effects exception. There is, therefore, no merit to defendant's claim of constructive amendment. Def. Br. 70-71. "[A] constructive amendment is simply a variance that has resulted in the denial of a defendant's right to the popular judgment of a grand jury." *United States v. Jingles*, 702 F.3d 494, 502 (9th Cir. 2012). But where, as here, "an indictment provided adequate notice and protection against double jeopardy," any "variance did not deny the defendant his right to the popular scrutiny of the grand jury." *Id.*[7]

The FTAIA's effects exception leaves the Sherman Act applicable to conduct involving wholly foreign commerce that nevertheless has a

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[7] Defendant claims that, prior to the initial trial, the government argued that the indictment pleaded the import commerce exclusion but that "no one then suggested that the government had pleaded the domestic effects exception." Def. Br. 70. In fact, in response to defendant's motion to dismiss, the government argued, as it does now, that the indictment adequately alleged the elements of Section 1 of the Sherman Act. SER1258-61. As set forth in that response, the government's consistent position has been that the FTAIA is no impediment to this prosecution because the indictment alleged that the conspiracy had substantial "domestic effects." SER1260. Moreover, months before the initial trial, the government proposed a jury instruction on the effects exception almost identical to the one given at both trials. SER1214-16; *see* ER275 (Leung retrial), 449 (initial trial).

direct, substantial, and reasonably foreseeable effect on import commerce. 15 U.S.C. § 6a. The indictment here alleged an agreement to fix the price of TFT-LCD panels sold to customers located in the United States. ER663-64 ¶¶ 17(j)-(k). While some of those panels were sold for delivery in the United States—and thus in import commerce—most were sold to U.S. companies for delivery to the purchasers' foreign affiliates, incorporated into finished products, and imported into the United States.

The indictment specifically alleged the "substantial terms" of defendant's conspiracy were "to agree to fix the prices of TFT-LCDs for use in notebook computers, desktop computer monitors, and televisions in the United States and elsewhere." ER656 ¶ 3; *see also* ER661 ¶ 17(e) ("[T]he participants in the Crystal Meetings reached price agreements on certain sized TFT-LCD used in computer notebooks and monitors."). And the indictment provided details about those finished products incorporating price-fixed panels. ER656 ¶ 3, 665 ¶ 18. There would have been no reason to include allegations about finished products other than to indicate that the conspiracy affected import commerce in those products.

Finally, the indictment alleged that defendant's conspiracy was "in unreasonable restraint of interstate and foreign trade and commerce," ER656 ¶ 2, and that the co-conspirators "derived gross gains of at least $500,000,000" from the conspiracy, ER667 ¶ 23. At a minimum, these allegations necessarily imply that the conspiracy successfully raised the prices of those panels. The indictment also alleged that those price-fixed panels were incorporated into many finished products imported into the United States. Read in its entirety and with common sense, *Givens*, 767 F.2d at 584, the indictment adequately alleged that defendant's panel price fixing had a direct, substantial, and reasonably foreseeable effect on import commerce in those finished products identified in the indictment.

3. Substantial Evidence at the Initial Trial Proved the FTAIA-Required Nexus to U.S. Commerce

Relying on the FTAIA, the district court instructed the initial jury that, in order to convict, it must find the government proved beyond a reasonable doubt that members of the conspiracy engaged in one or both of the following activities:

> (A) fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States; or

> (B) fixing the price of TFT-LCD panels that were incorporated into finished products, such as notebook computers, desktop computer monitors, and televisions, and that this conduct had a direct, substantial, and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States.

ER449.[8]

Defendant did not challenge these instructions below and does not do so on appeal. Rather, he argues that the evidence at the initial trial was insufficient to allow that jury to convict on either basis. He does not challenge the sufficiency of the evidence presented at his retrial.

"Claims of insufficient evidence are reviewed de novo." *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004). "There is

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[8] This instruction rendered unnecessary the conventional instruction on the required nexus to interstate or foreign commerce in criminal prosecutions under the Sherman Act. Ordinarily, courts instruct jurors that, to convict, they must find the conspiracy either affected interstate or foreign commerce in goods and services or it occurred within the flow of interstate or foreign commerce in goods and services. *See* ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 47, 82-83 (2009); *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1230 n.2 (8th Cir. 1992). In that context, proof of "indirect," "fortuitous," or unintended actual effects, as well as any "potential" effects had the conspiracy been successful, is sufficient. *Summit Health*, 500 U.S. at 329-30. This conventional instruction was unnecessary in light of the FTAIA instruction above, and thus, without objection, the court gave only the FTAIA commerce instruction.

sufficient evidence to support a conviction if, 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Moreover, a general verdict should not be set aside "because one of the possible bases of conviction was . . . merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 56 (1991). Thus, the evidence presented at the initial trial must be sufficient only as to one of the theories. Regardless, the government presented ample evidence on both.

a. The Evidence Proved the Conspiracy Involved U.S. Import Commerce in TFT-LCD Panels

In challenging the sufficiency of the evidence supporting the import commerce exclusion, defendant focuses primarily on evidence related to panels both sold and incorporated into finished products abroad. Def. Br. 72-75. But the government relied on evidence of price-fixed raw panels imported into the United States for the import commerce exclusion, not on evidence of panels incorporated into finished products.

Defendant concedes that the government presented evidence that 2.6 million of the conspirators' price-fixed raw panels—priced at more than $638 million—were shipped into the United States between October 2001 and June 2006. Def. Br. 73 n.18 (citing SER1090); *see also* SER1119-20. Nor does defendant contest HP procurement official Timothy Tierney's testimony that HP paid AUO for raw panels shipped to HP's facility in the United States. SER1173.

Instead, defendant claims that the volume of price-fixed imports at issue here is "small" as a proportion of the total volume of price-fixed panels, and that selling "panels directly to the U.S. . . . hardly makes AUO an importer." Def. Br. 73 n.18. As discussed above, *see supra* pp. 31-32, AUO need not be "an importer" to engage in anticompetitive conduct involving import commerce. It is sufficient that the conspirators sold price-fixed products for delivery to the United States, and the undisputed evidence shows that they did. Nor is there any basis for defendant's suggestion that the price-fixed imports must constitute a large portion of the total volume of price-fixed products.

To the extent that defendant suggests that only AUO's panel imports are relevant here, *see* Def. Br. 73-74 & n.18, he is wrong. The

FTAIA leaves the Sherman Act applicable to *conduct* involving import commerce. 15 U.S.C. § 6a. The term "conduct" refers to activity that might violate the Sherman Act, which in this case is a single conspiracy among AUO and the other panel makers to fix the price of panels. Thus, the conspiratorial agreement and any acts in furtherance of it by any conspirator are the "conduct" for purposes of the FTAIA. *See Socony-Vacuum*, 310 U.S. at 253-54. Whether the charged conspiracy involved import commerce, therefore, turns not on the acts of any particular defendant, but on whether the price-fixing agreement and the conspirators' acts in furtherance of it involved import commerce.

b. The Evidence Proved the Required Effect on U.S. Import Commerce in Finished Products

Defendant does not contest that the government proved the price-fixing conspiracy had a substantial and reasonably foreseeable effect on import commerce in finished products, but he argues that this effect cannot be "direct" under the FTAIA. Def. Br. 75. This argument ignores the record evidence and misreads the applicable case law.

The initial jury heard testimony that the price-fixing conspiracy enabled its participants to raise prices for their TFT-LCD panels sold to U.S. customers. SER1096, 1129-30, 1154-59. Indeed, the government's

expert estimated that the average price per panel from 2001 to 2006 was $205 and that, during the group Crystal Meetings, the conspirators' average per-panel margin was $53 higher than after the group Crystal Meetings ended. SER1109-12, 1115. The price-fixed panels are the single largest cost component of the finished products, accounting for 70 to 80 percent of the cost of finished monitors and 30 to 40 percent of the cost of finished notebook computers, SER1144, 1176-77, which were assembled abroad and imported into the United States, SER1176-78.

As Dell procurement official Piyush Bhargava testified, "there is definitely correlation between what we do in the procurement function, and in the way that we are able to then price the product in the marketplace, and offer the right deals to . . . our customers." SER1147; *see also* SER1185-86 (HP's Tierney testifying that when HP overpays for panels, it impacts the price of the finished product). The conspirators themselves understood well the impact of panel prices on sales of finished products. Indeed, co-defendant Hsiung suggested to his co-conspirators that they take into account demand for finished products when agreeing on how high to raise the price of panels. SER1092, 1150-51.

This evidence compels the conclusion that the conspirators' inflated panel prices resulted in inflated prices for finished products imported into the United States. As co-conspirator Stanley Park of LG explained, that effect on import commerce in the finished products was direct. SER1151 ("[I]f the panel price goes up, then it will directly impact the monitor set price").

United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004), on which defendant relies, Def. Br. 75-76, provides him no support. The civil complaint in *LSL* alleged that an agreement between U.S. and foreign biotech firms reduced the likelihood of innovations that could result in the development of long-shelf-life tomato seeds suitable for North American farmers. 379 F.3d at 681. This Court found the alleged effect—which depended upon the development of seeds that did not yet exist—too speculative and too dependent on uncertain intervening developments to be characterized as "direct." *Id.* at 681 & n.7.[9]

[9] In *LSL Biotechnologies*, the government argued, unsuccessfully, that a "direct" effect in the FTAIA context is one with a "proximate cause relationship." 379 F.3d at 692 (Aldisert, J., dissenting). In *Minn-Chem*, the government similarly proposed, and the en banc Seventh Circuit agreed, that "direct" means a "reasonably proximate causal

The actual effect of defendant's conspiracy on import commerce in finished products is nothing like the hypothetical effect found not to be direct in *LSL*. Unlike the not-yet-developed tomato seeds at issue in *LSL*, TFT-LCD panels do exist, and the conspirators sold them to U.S. firms at inflated prices to be incorporated into finished products imported into the United States. The evidence showed that the inflated panel prices led "directly" to increased prices for the finished products. SER1151. There are no intervening developments—let alone uncertain ones—breaking the causal relationship between defendant's conduct and the effect on import commerce in finished products. The initial jury need not have speculated to appreciate how a conspiracy to fix the price of the single largest cost component of monitors and notebook computers affected import commerce in those finished products.

Defendant contends that the effect here "depended entirely on intervening actors—namely, the [original equipment manufacturers]" that integrated the price-fixed panels into finished products—and that

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nexus." 683 F.3d at 856-57. Although the government believes that the Seventh Circuit's interpretation is correct, it is not necessary to revisit *LSL Biotechnologies* here, because defendant's conspiracy had a "direct" effect on import commerce in finished products under either interpretation.

there is no evidence the "higher prices were passed on, through the manufacturing chain, to consumers." Def. Br. 76. But panel prices were negotiated directly with the U.S. computer companies like Apple, HP, and Dell. SER1140-41, 1162-70, 1181-82, 1189. And the evidence is clear that increased panel prices had a direct effect on the prices of their notebook computers and computer monitors. SER1133, 1136-37, 1147, 1150-51, 1185-86.

Finally, defendant cites district court decisions that do not support his argument. In *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001), defendants allegedly prevented plaintiffs from manufacturing and selling a tuberculosis drug, but the court found no evidence that plaintiffs intended to sell the drug in the United States, and therefore, "no effect on any United States commerce" as required by the FTAIA. *Id.* at 1007, 1009.[10] In contrast, here, the

[10] To the extent that the district court in *United Phosphorus* concluded that the FTAIA "explicitly bars antitrust actions alleging restraints in foreign markets for inputs (such as [the chemical] AB) that are used abroad to manufacture downstream products (like ethambutol) that may later be imported into the United States," 131 F. Supp. 2d at 1014, that court was wrong. The direct-effects exception explicitly leaves the Sherman Act applicable to restraints in wholly foreign commerce that nevertheless affect U.S. import commerce. If that exception is read to exclude restraints of wholly foreign commerce in

finished products sold in the United States at higher prices because of defendant's conspiracy.

The plaintiff in *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F. Supp. 2d 555 (D. Del. 2006) (*Intel I*), argued that defendants' monopoly in non-import foreign commerce had a direct effect on U.S. commerce because lost foreign sales by plaintiff's foreign subsidiary reduced plaintiff's profitability, which in turn affected its ability to discount to U.S. customers, reduced revenues to its shareholders, and reduced its competitiveness in the United States. *Id.* at 560-61. The court rejected the plaintiff's argument because the alleged effect was premised on "a multitude of speculative and changing factors affecting business and investment decisions." *Id.* at 561; *see also In re Intel Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452 (D. Del. 2007) (rejecting claim of direct effect based on "same allegations" as in *Intel I*).

Unlike the speculative chain of events at issue in *Intel I*, the effect of defendant's price-fixing conspiracy proceeded without deviation or interruption from the panel manufacturers that fixed panel prices to the inflated prices on monitors and notebook computers imported into

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one product that affect U.S. import commerce in a closely related product, then the exception is largely superfluous.

the United States. As the district court below explained in a related civil case, "[w]here, as here, the nature of the effect does not change in any substantial way before it reaches the United States consumer, the effect is an 'immediate consequence' of the defendant's anticompetitive behavior." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d at 964. "[B]ecause the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for televisions, monitors, and notebook computers)," it is "direct" for purposes of the FTAIA. *Id.*

C. No "Extraterritoriality Defense" Bars the Convictions

Relying on *Hartford Fire*, the district court explained to both juries that the "Sherman Act applies to conspiracies that occur, at least in part, within the United States" and that it "also applies to conspiracies that occur entirely outside the United States, if they have a substantial and intended effect in the United States." ER274 (Leung retrial), 449 (initial trial). Thus, the district court instructed the juries that they must find beyond a reasonable doubt one or both of the following:

> (A) that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States, or
>
> (B) that the conspiracy had a substantial and intended effect in the United States.

Id.

Defendant does not dispute that the evidence was sufficient to allow the juries to convict under these instructions. Instead, he argues that his conviction must be vacated because the price-fixing conspiracy involved foreign conduct and the Sherman Act does not apply extraterritorially. Defendant asserts this belated extraterritoriality defense to challenge both the jury instructions and the indictment. But his argument is flawed in two fundamental respects. First, the Sherman Act does apply extraterritorially, "to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796-97 & n.24.[11] In fact, the

[11] The Supreme Court rested its "substantial and intended effects" requirement on cases that predate the FTAIA, and it expressly declined to consider whether the FTAIA "amends the existing law or merely codifies it" because "[a]ssuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements." 509 U.S. at 796 n.23. If the FTAIA supplanted prior precedent on the extraterritorial application of the Sherman Act, the jury's findings with regard to the FTAIA alone are sufficient to sustain the convictions. *See*

district court so-instructed the juries at defendant's urging. ER517. Second, this case does not require the extraterritorial application of the Sherman Act because defendant's conspiracy was conducted, in part, in the United States.

1. Defendant Waived Any Attack on the Instructions Regarding the Sherman Act's Extraterritorial Reach

While defendants in the initial trial, including Leung, objected to part A of the instruction, they all agreed that B "is a correct statement of the *Hartford Fire* requirements for establishing extraterritorial jurisdiction over foreign anticompetitive conduct, and should be given." ER517; *see also* ER40-45 (defense counsel repeatedly invoking *Hartford Fire*). Since urging it in the initial trial, defendant has never objected to it, retracted it, or offered an alternative, either in the initial trial or his retrial. *See* SER1072 ("[T]here [are] only two instructions that were given [at the initial trial] that the Defense is asking to kind of specifically modify for this case that have some substance to them," neither of which was part B.).

McGlinchy, 845 F.2d at 813 n.8 ("In an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act, Congress enacted section 6a."). This Court need not decide that question, however, because the juries were also instructed on *Hartford Fire*'s requirements.

Defendant apparently but mistakenly claims that he "preserved" a challenge to the instruction throughout the retrial, *see* Def. Br. 20-21, but there was never an objection to reassert. The portions of the record he cites show only that he intended to preserve previously made objections to evidentiary rulings and jury instructions. *Id.* at 21 (citing SER1075). To be sure, after the first jury completed its deliberations, Leung joined his co-defendant's post-trial motion for acquittal under Rule 29, which posited that *Hartford Fire* is no longer good law. SER1081-84, 1086 n.1. But that motion did not mention the instruction, and in any event, "a Rule 29 motion . . . cannot substitute as a timely objection to the jury instructions." *United States v. Moreland*, 622 F.3d 1147, 1166 (9th Cir. 2010). Leung did not object to the instruction either at the retrial's charge conference or after the charge was given to, but before deliberations by, the second jury. *Cf.* SER1011-12 (the defense requesting argument on three other instructions during the retrial). Thus, at no point prior to this appeal has defendant suitably challenged part B, an instruction he had advanced.

When a defendant "proposes allegedly flawed jury instructions," and thereby "relinquishes or abandons a known right," this Court denies review of the alleged error under the invited error doctrine. *United States v. Perez*, 116 F.3d 840, 844-45 (9th Cir. 1997) (en banc); *see also United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir. 1993).

There can be no doubt that defendant "considered the controlling law" before urging the court to give what he now claims is a flawed instruction. *Perez*, 116 F.3d at 845. The applicability of the Sherman Act to foreign conduct and foreign commerce was the subject of numerous motions before the initial trial, in which the defendants repeatedly invoked *Hartford Fire*. *See, e.g.*, SER1221-33, 1265-89; *see also* SER1234-55. Because defendant requested the instruction he now claims is erroneous and thereby relinquished his right to challenge its legal foundation, the claimed error is waived and unreviewable. *United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997) ("When an attorney signs a jury instruction proposal, he certifies to the court, as an officer of that court, that the instructions are legally correct.")

Even if defendant's claim of error was not waived and unreviewable, the instruction can be reviewed only for plain error because defendant

"did not raise a timely objection to the jury instructions." *Moreland*, 622 F.3d at 1165-66. To satisfy the plain error standard, defendant must show that there has been an error that was plain, affected substantial rights, and seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *Id.* at 1166. For the reasons explained below, defendant cannot carry his burden with respect to the court's instructions.

2. The Jury Was Properly Instructed on the Sherman Act's Extraterritorial Reach

Part B of the jury instruction is, as defendant told the district court, a "correct statement" of the Sherman Act's extraterritorial reach. And defendant's new-found argument that *Hartford Fire* is wrong and that the Sherman Act does not apply to foreign conduct regardless of its impact on the United States is without merit. It is also directed at the wrong court, for "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Hartford Fire's holding is fully supported by the Sherman Act's language. Section 1 outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations." 15 U.S.C. § 1. Congress formulated Section 1 in this way because it "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." *Gulf Oil*, 419 U.S. at 194 (quoting *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 558 (1944)); *cf.* U.S. Const. art. II, § 8 ("Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States."); *see also Summit Health*, 500 U.S. at 329 & n.10 ("It is firmly settled that when Congress passed the Sherman Act, it left no area of its constitutional power unoccupied." (internal quotation marks omitted)).

As a result, all nine Justices concluded in *Hartford Fire* that the presumption against "extraterritoriality" does not bar the Sherman Act's application to conduct affecting the United States. 509 U.S. at 796-97 & n.24, 814; *cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 252 (1991) (*Aramco*) (explaining that the Lanham Act's "broad jurisdictional grant" and "sweeping reach into all commerce which may lawfully be regulated by Congress" supported applying the statute to foreign conduct that had "some effects within the United States" (internal quotation marks omitted)).

a. *Morrison* Did Not Overrule or Abrogate *Hartford Fire*

Notwithstanding the breadth of the Sherman Act's language and the binding Supreme Court precedent establishing its extraterritorial reach, defendant urges this Court to conclude that the Sherman Act does not apply to foreign conduct, regardless of its effects in the United States. He relies on *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010). In *Morrison*, the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 does not allow foreign plaintiffs to sue in connection with securities traded on foreign exchanges because that section does not apply extraterritorially. 130 S. Ct. at 2875, 2883. Defendant claims that *Morrison* articulates a weightier presumption against the extraterritorial application of federal statutes and that the reach of the Sherman Act must be reconsidered in light of this new test. Def. Br. 49. But defendant misunderstands the reasoning of both *Morrison* and *Hartford Fire*.

As an initial matter, the application of *Morrison*, a civil case, to this criminal case is doubtful in light of *United States v. Bowman*, 260 U.S. 94 (1922). *Cf. Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring) (noting that nothing in the Court's opinion forecloses

government enforcement actions, which "differ from private . . . actions in numerous" ways and "pose a lesser threat to international comity"). In *Bowman*, the Supreme Court held that the presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction." *Id.* at 98. Instead, extraterritoriality may be "inferred from the nature of the offense" for criminal statutes when the effect of limiting "their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." *Id.*; *see also United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 n.3 (9th Cir. 1991) (observing that *Bowman* states an "exception to the presumption against extraterritoriality" for certain criminal statutes). The Sherman Act is such a criminal statute.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). As Section 1 makes clear, its protections extend not only to the nation's

interstate trade, but also to its trade with foreign nations. 15 U.S.C. § 1. The nature of an antitrust crime does not depend upon the locality of the defendant's acts, but rather on their connection to and impact on U.S. commerce. And as this prosecution demonstrates, foreign companies can and do conspire outside our borders to restrain U.S. trade with foreign nations.

Whether or not the *Bowman* exception applies, the Supreme Court has long construed the Sherman Act to apply extraterritorially. *Hartford Fire*, 509 U.S. at 796-97. And *Morrison* did not overrule *Hartford Fire*. *Morrison* did not mention *Hartford Fire*, and there is no reason to believe that the *Morrison* Court intended to abrogate *Hartford Fire sub silentio*. The Supreme Court has cautioned against drawing such conclusions from its silence. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Contrary to defendant's claim, *Morrison* did not render *Hartford Fire* "no longer good law," Def. Br. 49. Rather, it reiterated the presumption against applying federal civil statutes to foreign conduct absent a clear indication that Congress intended the statute to apply extraterritorially. 130 S. Ct. at 2877. The *Morrison* Court criticized the Second Circuit because it had ignored the previously articulated presumption—not because the Supreme Court had decided to alter the presumption. *See id.* at 2878 ("Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to 'discern' whether Congress would have wanted the statute to apply.").

As defendant acknowledges, that presumption has long been a part of Supreme Court jurisprudence. Def. Br. 47-48. It was, for example, rearticulated in *Aramco*. 499 U.S. at 248. In his *Aramco* concurrence, Justice Scalia agreed that the majority "accurately describe[d]" the presumption against extraterritoriality, *Aramco*, 499 U.S. at 260, and in his majority opinion in *Morrison*, Justice Scalia quotes *Aramco* for the presumption, *Morrison*, 130 S. Ct. at 2877. But *Aramco* was decided

just two years before *Hartford Fire*, in which all nine justices agreed that the Sherman Act applies extraterritorially.

Indeed, Justice Scalia, in his *Hartford Fire* dissent, recognized that the Court has "found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially." 509 U.S. at 814 (citing *Aramco*, 499 U.S. at 248). The *Hartford Fire* Court was undoubtedly aware of the presumption when it held that the Sherman Act applies extraterritorially. And Justice Scalia observed quite recently that "stare decisis suffices to preserve" the extraterritorial application of the Sherman Act after *Morrison*. Antonin Scalia & Bryan A. Garner, *Reading Law* 271-72 (2012). Thus, *Morrison* provides no basis for ignoring *Hartford Fire*.

Nor does *Morrison* broadly "repudiate[] [every] 'effects test,'" Def. Br. 49. *Morrison* holds that Section 10(b) of the Exchange Act has no extraterritorial application. 130 S. Ct. at 2881. Therefore, the effects test the Second Circuit developed to govern that section's application to foreign conduct was unnecessary. *Id.* But *Morrison* says nothing about the propriety of effects tests for statutes, like the Sherman Act, that do

apply to foreign conduct. Extraterritorial jurisdiction based upon "detrimental effects within the United States" is not only consistent with international law, *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002), it is a principle "recognized in the criminal jurisprudence of all countries," *Ford v. United States*, 273 U.S. 593, 623 (1927), and "[i]ts logical soundness and necessity received early recognition in the common law," *id.* *See generally* Jordan J. Paust, *International Law as Law of the United States* 417-19 (2d ed. 2003) (detailing recognition by U.S. courts of "objective territorial jurisdiction" based on effects in the United States).

Moreover, in the FTAIA, Congress expressed its understanding that the Sherman Act reaches foreign conduct and reaffirmed its intent to do so. *See Empagran*, 542 U.S. at 166 (With the FTAIA, "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm" except "of course . . . where that conduct also causes domestic harm."). Because the Sherman Act goes "to the utmost extent of [Congress's] Constitutional power," *Se. Underwriters Ass'n*, 322 U.S. at 558, Congress was concerned that the Sherman Act might be applied to

anticompetitive conduct with no impact on the United States to the detriment of U.S. exporters. This undesirable result, the FTAIA's drafters explained, was exemplified by *Pacific Seafarers*, 404 F.2d 804, which applied the Sherman Act to an alleged conspiracy among U.S. shipping companies to destroy plaintiffs' business of carrying cement and fertilizer between Taiwan and South Vietnam. H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494. The FTAIA is premised on the view that such anticompetitive conduct "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." *Id.*

To remedy this problem, Congress enacted the FTAIA, which provides that, absent proof of certain effects, the Sherman Act does not apply to "conduct involving trade or commerce (other than import trade or commerce) with foreign nations." 15 U.S.C. § 6a. This phrase was deliberately chosen to include conduct involving "commerce that did not involve American exports but which was wholly foreign." *Empagran*, 542 U.S. at 162-63. Through the FTAIA, Congress sought "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as it applied to foreign commerce." *Id.* at 169. But if the

Sherman Act had no extraterritorial reach, no such clarification or limitation would have been necessary. And the language of the FTAIA that Congress deliberately chose to cover wholly foreign commerce would be rendered largely "superfluous, void, or insignificant" in contravention of the "cardinal" principles of statutory interpretation. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Defendant claims that *Morrison* "squarely held that a statutory provision similar to the FTAIA does not provide a clear statement of extraterritorial effect," Def. Br. 51, but that is not correct. The extraterritoriality-providing language at issue in *Morrison* was directed at only one part of the Exchange Act concerning the concealment of domestic violations (§ 30(b)) and not the whole act. 130 S. Ct. at 2882-83. In contrast, the FTAIA relates to the entire Sherman Act and declares its application to conduct, wherever it occurs and even if it involves wholly foreign commerce, so long as it has the requisite effect on U.S. commerce. 15 U.S.C. § 6a.

b. The Extraterritorial Reach of the Sherman Act Is Not More Limited in Criminal Cases

Alternatively, defendant argues that *Hartford Fire* should be read narrowly to address only the extraterritorial application of the Sherman

Act in civil cases. Def. Br. 52. But defendant cites nothing in *Hartford Fire* itself that supports such a reading. And such a reading would override the principle of statutory construction that interpreting a criminal statute in a civil setting establishes its "authoritative meaning." *United States v. Thomson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion).

Section 1 of the Sherman Act is a criminal statute containing a single operative phrase outlawing conspiracies in restraint of trade or commerce among the states or with foreign nations. "Under settled principles of statutory construction, [courts] are bound to apply [*Hartford Fire*'s holding] by interpreting Section One the same way in a criminal case." *Nippon Paper*, 109 F.3d at 9. The Sherman Act's "words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort." *N. Secs. Co. v. United States*, 193 U.S. 197, 401-02 (1904) (Holmes, J., dissenting).

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978), on which defendant relies, Def. Br. 54, provides no support for the claim that the

Sherman Act's extraterritorial reach should be different in civil and criminal cases. *Gypsum* holds that "criminal offenses defined by the Sherman Act should be construed as including intent as an element" based on the centuries-old Anglo-American legal tradition that criminal liability—unlike civil liability—must ordinarily be premised on malevolent intent. 438 U.S. at 436-37, 443. But there is "simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality." *Nippon Paper*, 109 F.3d at 7.

Lacking any sound basis in the Sherman Act itself to draw this criminal/civil distinction, defendant claims that "the presumption against extraterritoriality assumes even greater force with criminal laws." Def. Br. 52. But the authorities he cites merely articulate the general presumption against extraterritoriality and provide no support for this claimed "super-presumption." *See id.* at 52-53 (citing *United States v. Flores*, 289 U.S. 137, 155 (1933); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984)). To the contrary, as this Court recently made clear in *United States v. Chao Fan Xu*, the presumption against extraterritoriality articulated in *Morrison* must be

applied statute by statute and should not vary from the civil to the criminal context. 706 F.3d 965, 974 (9th Cir. 2013) (applying cases addressing the extraterritorial reach of RICO in civil cases to a criminal RICO case).

Likewise, the Restatement (Third) of Foreign Relations Law does nothing more than state the ordinary presumption, which the Supreme Court found to be no bar to extraterritoriality in *Hartford Fire*. *Compare* 1 *Restatement (Third) of Foreign Relations Law* § 403 cmt. f, 247-48 (1987) ("[L]egislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication."), *with Aramco*, 499 U.S. at 248 (explaining that the presumption ordinarily is overcome by an "affirmative intention of the Congress clearly expressed" to apply a statute to foreign conduct). The Reporters' Notes to the Restatement also suggest that potential conflicts with foreign sovereigns might lead "enforcement agencies of the United States government" to exercise "criminal jurisdiction over activity with substantial foreign elements . . . more sparingly." *Restatement* § 403, Reporters' Note 8. This admonition to enforcement agencies, however, says nothing about the

substantive reach of the antitrust laws, and the Department of Justice's decision to criminally prosecute this price-fixing conspiracy resolved such concerns.

Defendant also asserts that applying U.S. criminal law to his conduct would run contrary to the principle that "'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" Def. Br. 53 (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). But the application of the *Charming Betsy* principle to a case brought by the United States is doubtful. "[T]he Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party," at least in part because courts "must presume that the President has evaluated [its] foreign policy consequences . . . and determined that it serves the interests of the United States." *United States v. Corey*, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000). And, even if *Charming Betsy* were to apply, there is no conflict with the law of nations here. "The law of nations permits the exercise of criminal jurisdiction" over "not only acts occurring within the United States, but acts occurring outside the United States' borders that have effects within the national

territory." *Felix-Gutierrez*, 940 F.2d at 1205-06. In this case, the government pleaded and proved both. *See infra* pp. 66-74.

3. The Jury Was Properly Instructed That the Sherman Act Applies to Conspiracies Carried Out, in Part, in the United States

Regarding part A of the instruction, defendant contends that the district court erred by allowing the juries to convict based upon "at least one action in furtherance of the conspiracy within the United States." Def. Br. 79-81; *see* ER274 (Leung retrial), 449 (initial trial). Defendant's fear that part A of the instruction could premise Sherman Act liability merely on "the making of a single phone call to or from the United States," Def. Br. 80, is unfounded. He overlooks the other jury instruction that required the juries also to find that the conspiracy had the requisite nexus to U.S. commerce under the FTAIA. *See supra* pp. 37-38.

The Sherman Act reaches only conduct that involves or affects commerce within the United States, U.S. import commerce, or certain U.S. export commerce. *See* 15 U.S.C. § 6a. Thus, a conspiracy to fix the price of goods sold entirely in foreign commerce that has no effects on U.S. commerce is not outlawed by the Sherman Act, regardless of a phone call to the United States. *See Empagran*, 542 U.S. at 166. But,

when a co-conspirator acts within the territory of the United States to further a conspiracy to fix the price of goods sold into the United States, no extraterritorial application of the statute is necessary to prosecute that conspiracy. *Cf. United States v. Moncini*, 882 F.2d 401, 403 (9th Cir. 1989) (finding analysis of the extraterritorial scope of the child pornography laws unnecessary where defendant mailed pornography from Italy to the United States because "part of the offense was committed in the United States as [defendant's] letters traveled through the mail").[12]

Moreover, part A of the court's instruction is fully supported by bedrock principles of conspiracy law, as well as *Hartford Fire*. A conspiracy to violate the antitrust laws is "a partnership in crime; and

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[12] *Morrison* observed that an overt act in the United States did not justify application of Section 10(b) of the Exchange Act. 130 S. Ct. at 2883-84. The Court reasoned that, because the "focus of congressional concern" is preventing deceptive conduct in connection with the purchase and sale of securities in the United States, the Act did not apply to deceptive conduct related to foreign securities transactions, even if some of that conduct took place in the United States. *Id.* at 2884. Likewise, price fixing with no nexus to U.S. commerce is not prohibited by the Sherman Act, even if an overt act in furtherance occurred here. But that portion of *Morrison* gives no help to this defendant, whose price-fixing conspiracy is plainly within the "focus of congressional concern" in protecting U.S. commerce from anticompetitive harm.

an overt act of one partner may be the act of all." *Socony-Vacuum*, 310 U.S. at 253-54 (internal quotation marks omitted). Like all criminal conspiracies, defendant's price-fixing conspiracy occurs where any overt act in furtherance of the conspiracy by any co-conspirator occurs. "Any conspiratorial act occurring outside the United States is within United States jurisdiction if an overt act in furtherance of the conspiracy occurs in this country." *United States v. Endicott*, 803 F.2d 506, 514 (9th Cir. 1986);[13] *United States v. Angotti*, 105 F.3d 539, 545 (9th Cir. 1997) ("[A] conspiracy charge is appropriate in any district where an overt act committed in the course of the conspiracy occurred."); *Woitte v. United States*, 19 F.2d 506, 508 (9th Cir. 1927) ("[T]he place of the conspiracy was immaterial, provided the overt acts were committed within the jurisdiction of the court."). And the United States' antitrust laws "certainly may control [foreign] citizens and corporations operating in our territory." *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 105-06 (1913) (rejecting the claim that a case involving some

[13] Defendant construes *Endicott* to hold "that extraterritorial jurisdiction can only be obtained by satisfying the requirements of *Alcoa*." Def. Br. 80 n.19. Regardless, acts in the United States, coupled with the jury's finding that the defendant either targeted U.S. import commerce or directly, substantially, and reasonably foreseeably affected U.S. import commerce (or both), are certainly sufficient.

domestic conduct required extraterritorial application of the Sherman Act); *see also United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (finding an antitrust conspiracy involving "deliberate acts, here and elsewhere, [was] within the jurisdiction of our courts and may be punished for offenses against our laws").

For this reason, *Hartford Fire*'s substantial and intended effects test for extraterritorial application of the Sherman Act does not apply to conspiracies carried out, in part, in the United States. *Hartford Fire* "dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Carpet Group*, 227 F.3d at 75 (rejecting defendants' reliance on *Hartford Fire* in a case involving some domestic conduct); *see also Nippon Paper*, 109 F.3d at 4 (The *Hartford Fire* Court allowed Sherman Act claims "to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil.").

4. Any Claimed Error in the Instruction Was Harmless

Even if part A of the extraterritoriality instruction were incorrect, any error was harmless. Where the instructions allow a jury to convict on two theories, one of which is invalid, the error is harmless if it is

"clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Anchrum*, 590 F.3d 795, 801 (9th Cir. 2009); *see also Hedgpeth v. Pulido*, 555 U.S. 57, 58-61 (2008) (holding instructional error is subject to harmless error review); *United States v. Green*, 592 F.3d 1057, 1071 (9th Cir. 2010). Because the evidence at defendant's retrial overwhelmingly supported a jury finding of substantial and intended effects in the United States—which defendant had conceded was a proper basis for conviction—any claimed error in part A of the instruction was harmless.[14]

Indeed, defendant does not argue on appeal that the evidence at his retrial was insufficient to allow the jury to find an effect in the United States. Nor could he, because the evidence was not merely sufficient—it was overwhelming. During the conspiracy, AUO and four of the other conspiring companies shipped 2.6 million raw panels—sold for more than $638 million—to customers in the United States. SER1040; *see also supra* p. 40. Apple alone purchased more than $152 million worth

[14] If it was wrong to give part A of the instruction at the initial trial, that error would also be harmless. At most, it would entitle defendant to a new trial, which he received. It would not entitle him to acquittal, because there was no dispute that the evidence in the initial trial was sufficient for conviction under part B.

of AUO's panels in the United States during that time. SER875, 1033-37.

In addition, AUO and its co-conspiring panel manufacturers established subsidiaries in the United States to sell panels to large U.S. companies like Apple, Dell, and HP, which were among the conspirators' largest customers. *See supra* pp. 4-5. AUO and its co-conspirators discussed the U.S. market and these large customers at their price-fixing meetings, and employees of the conspiring firms met one-on-one to discuss pricing to major U.S. customers. *See supra* pp. 5-7. Those customers then had little choice but to raise prices for their own consumers in turn, SER1069, for the price of a panel constitutes more than 80 percent of the price of a complete computer monitor, SER1066.

Moreover, the jury concluded that the price-fixing conspiracy had the requisite nexus to U.S. commerce under the FTAIA.[15] That finding,

[15] Although the FTAIA instruction allowed the jury to convict defendant on two distinct bases, both are consistent with a substantial and intended effect in the United States. The first required the jury to find beyond a reasonable doubt that the conspirators "fix[ed] the price of TFT-LCD panels targeted by the participants to be sold in the United States or for delivery to the United States." ER275. The second required the jury to find beyond a reasonable doubt that the

combined with overwhelming trial evidence, makes clear beyond a reasonable doubt that a rational jury would have found that the conspiracy had a substantial and intended effect in the United States. Thus, even if part A of the instruction was given in error, that error was harmless.

5. The Indictment Alleged Both Conduct and Effects in the United States

Finally, defendant claims that, even if the Sherman Act did apply to foreign conduct with a substantial and intended effect in the United States, the indictment failed to charge such an effect. Def. Br. 78-79. As an initial matter, the indictment did not have to allege a substantial and intended effect in the United States because it charged a conspiracy that took place in part in the United States. The indictment alleged that defendant AUOA has its principal place of business in Houston, Texas, ER657 ¶ 5, and that AUOA employees "located in the United States had regular contact through in-person meetings and phone calls with employees of other TFT-LCD manufacturers in the United States to . . . agree on pricing, to certain TFT-LCD customers located in the

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conspirators' conduct "had a direct substantial and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States." *Id.*

United States," ER663 ¶ 17(k). The indictment further alleged that AUOA employees negotiated sales of panels at fixed prices with "certain TFT-LCD customers located [in] the United States." ER664 ¶ 17(k); *see also* ER665 ¶ 21 (alleging that "the combination and conspiracy charged in this Indictment was carried out, in part, in the Northern District of California").

As explained above, the substantial-and-intended-effects requirement applies only in cases of wholly foreign conduct. *See supra* pp. 66-69. Because the indictment here alleged that the conspiracy was carried out, in part, in the United States, it need not have charged that defendant's conspiracy had a substantial and intended effect in the United States. *See Sisson*, 399 U.S. at 288.

In any event, the indictment did allege such an effect. The indictment charged defendant with agreeing to fix prices of TFT-LCDs sold to customers located in the United States. ER656 ¶¶ 2-3, 663-64 ¶¶ 17(j)-(k). And the indictment made clear that this was not an aborted or ineffective conspiracy. It specifically alleged that reports of the co-conspirators' meetings and price agreements "were used by certain employees of [AUOA] in their price negotiations with certain

TFT-LCD customers located [in] the United States," ER664 ¶ 17(k), and that the co-conspirators "derived gross gains of at least $500,000,000" from the conspiracy, ER667 ¶ 23; *see also* ER665 ¶ 20 (charging that activities alleged in the indictment "substantially affected[] interstate and foreign trade and commerce").

These allegations pleaded a substantial effect in the United States, and one can reasonably infer from the allegations that the effect was intended. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919) (An "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it."). A common-sense reading of the indictment's allegations provided defendant ample notice of the charges against him, including that the charged conspiracy had a substantial and intended effect in the United States.

D. *Metro Industries* Does Not Require Application of the Rule of Reason Here, Nor Would Applying It Have Mattered

Defendant relies on *Metro Industries*, 82 F.3d 839, to argue that, because his conspiracy involved some foreign conduct, the government was required to plead and prove specific intent and that he should have been allowed to argue to the jury that the agreement to fix the price of TFT-LCD panels was reasonable. Def. Br. 26-47. But defendant

misunderstands both the facts and reasoning of *Metro Industries*. Correctly interpreted, *Metro Industries* is merely a restatement of the familiar requirements for extraterritorial application of the Sherman Act to wholly foreign conduct.

1. *Metro Industries* Holds That the Sherman Act Applies to Wholly Foreign Conduct with Effects in the United States

The Sherman Act does not prohibit all agreements in restraint of trade, but only those that are unreasonable. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Certain practices, including "agreements among competitors to fix prices," are deemed unreasonable *per se*, and thus unlawful, without regard to their rationale or justification and without inquiry into their actual effects. *Id.* at 886; *see also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) ("In [*per se*] cases, we do not require evidence of any actual effects on competition because we consider the potential for harm to be so clear and so great."). Other restraints demand a fuller inquiry, dubbed the rule of reason, which requires the factfinder to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin*, 551 U.S. at 885.

In *Metro Industries*, this Court considered plaintiff's allegations that a Korean design registration system conferring limited exclusive rights to the defendants "constituted a market division that is a *per se* violation of section 1 of the Sherman Antitrust Act." 82 F.3d at 841. This Court held first that the challenged registration system was not "a classic horizontal market division agreement" normally subject to the *per se* rule. *Id.* at 844. But even if Metro could prove that the registration system constituted a market division, the Court found "application of the *per se* rule is not appropriate where the conduct in question occurred in another country." *Id.* at 844-45. A market division formed and carried out in the United States would be deemed *per se* unlawful even if it had no effect. But determining whether such conduct occurring abroad violates the Sherman Act requires "an examination of the impact of the [conduct] on commerce in the United States." *Id.* at 845.

This is nothing more than a restatement of the *Hartford Fire* Court's declaration that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. In fact, *Metro Industries* supports its

holding with citations to *Hartford Fire* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."). While the decision uses the term "rule of reason," it does not suggest that the contemplated analysis includes consideration of possible justifications for price fixing; there are none.[16] *See Leegin*, 551 U.S. at 886 ("horizontal agreements among competitors to fix prices . . . have manifestly anticompetitive effects and lack any redeeming virtue" (internal quotation marks and citation omitted)). The Court merely required an inquiry into whether the conduct had "a sufficient negative impact on commerce in the United States." *Metro Indus.*, 82 F.3d at 843.

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[16] Defendant claims that the rule of reason can sometimes apply to horizontal price-fixing cases, Def. Br. 32, but neither he nor the Supreme Court has identified such a case. To be sure, courts continue to search for reasonableness where "horizontal restraints on competition are essential if the product is to be available at all." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984). That is so even if the restraint can be said to constitute "'price fixing' in the literal sense." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979). But no Supreme Court decision analyzes under the rule of reason conspiracies that can "be wholly equated with a simple horizontal agreement among competitors." *Id.* at 23.

Defendant tries to support his erroneous interpretation of *Metro Industries* by asserting that "*per se* treatment is inappropriate for pricing agreements between foreign businesses in the context of a dynamic and rapidly changing market for a technological product." Def. Br. 39. But price-fixing conspiracies cannot become procompetitive just because they are hatched outside the United States by people not speaking English. And the fact that TFT-LCD panels are a "technological product" sold in a "dynamic market" has nothing to do with whether the conduct is foreign or domestic. There is no "technological product exception" to the *per se* rule, and defendant cites no case suggesting that there is.

Defendant makes much of *Metro Industries*' one reference to "price fixing." Def. Br. 34, 43. It occurs in a quotation from a treatise stating that "price fixing in a foreign country might have some but very little impact on United States commerce." *Metro Indus.*, 82 F.3d at 845 (quoting 1 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 237, at 269 (1978)). But neither the treatise nor *Metro Industries* suggests that price fixing abroad can be lawful when it does significantly affect United States commerce. And the current edition of the treatise

advises that a court need not "hesitate very long before condemning restraints" affecting U.S. commerce and lacking "any plausible purpose other than the suppression of competition." 1B Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b, at 354-55 (4th ed. 2013). Defendant cannot cite a single case in which a court refused to apply the *per se* rule to price fixing because the conduct was foreign.[17]

As with *Hartford Fire*, *Metro Industries*' requirement of actual effects in the United States does not apply here because defendant's price-fixing conspiracy involved domestic conduct. *See supra* pp. 66-69. Defendant's erroneous contention that *Metro Industries* also involved domestic conduct, Def. Br. 43-44, ignores the history of the case and the opinion's statement of the conduct under review.

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[17] To the contrary, district courts have consistently rejected defendant's reading of *Metro Industries*. *See eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1055 (N.D. Cal. 2006); Order Den. Mot. to Dismiss Indictment or, in the Alternative, for Ruling as a Matter of Law Re: Rule of Reason, *United States v. Eagle Eyes Traffic Indus. Co.*, No. 3:11-cr-00488 (N.D. Cal. Sept. 11, 2012). If, as defendant contends, *Metro Industries* did radically alter the substantive analysis of price fixing in cases involving wholly foreign conduct, then it conflicts with Supreme Court precedent holding price fixing *per se* unlawful, *Socony-Vacuum*, 310 U.S. at 222-23, and treating allegations of wholly foreign conduct as raising questions of the Sherman Act's reach and not the substantive analysis of the conduct, *Hartford Fire*, 509 U.S. at 796-97. *See Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 286 n.2 (4th Cir. 2002).

Metro Industries, Inc. imported kitchenware made in Korea by Sammi Corp. and sued Sammi in 1983 when it was unable to obtain "stainless steel steamers from any of Sammi's competitors in Korea." *Metro Indus.*, 82 F.3d at 841-42. Initially, Metro raised several antitrust theories, including the predatory pricing allegations defendant highlights, Def. Br. 44, which involved conduct in the United States by a Sammi subsidiary. But the predatory pricing allegations dropped out of the case in 1993, and Metro began advancing "a new theory—that the Korean design registration system under which Sammi had the exclusive rights to manufacture a particular steamer design constituted a market division that was illegal *per se* under § 1 of the Sherman Act," *Metro Indus.*, 82 F.3d at 842-43.

This new theory was the only theory at issue on appeal. *See id.* at 843 ("Metro appeals only the district court's grant of summary judgment in favor of Sammi on Metro's Sherman Act § 1 market division claim and the court's denial of Metro's cross-motion for summary judgment."). And it involved wholly foreign conduct. As the Court explained, Metro's new theory was "the same theory" that the Court had declined to consider in a parallel case because it had not been

presented to the district court.[18] *Id.* at 843 n.2. That theory was that Sammi and other exporters had restrained trade by establishing the design registration system "in Korea." *Id.* at 842.

This case, unlike *Metro Industries*, does not involve wholly foreign conduct that had no impact on U.S. commerce. Accordingly, the decision has no application here.

2. Defendant's Claims That the Indictment, Instructions, and Proof Were Insufficient Under the Rule of Reason Are Meritless

Defendant's claims of error with regard to the *per se* rule are based on his misreading of *Metro Industries* and his misunderstanding of the rule of reason and are, therefore, without merit.

a. Defendant Waived Any Attack on the Price-Fixing Instruction

Any error in failing to instruct the juries on the rule of reason is without merit and, in any event, was invited by defendant in proposing and adhering to a price-fixing instruction that made no mention of

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[18] Metro adopted this new theory precisely because it was the only theory not considered, and thus not foreclosed, by this Court's decision in the parallel case, *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993). *Metro Indus.*, 82 F.3d at 843 & n.2. In *Vollrath*, this Court had affirmed judgment for the defendant notwithstanding the verdict but declined to consider a theory, not presented at trial, that Sammi had participated in a *per se* unlawful market division. *Vollrath*, 9 F.3d at 1462 n.4.

defenses, exceptions, or justifications for price fixing. Counsel for the government and all defendants in the initial trial jointly submitted to the district court a single document containing 24 stipulated jury instructions and additional disputed instructions. ER485-541. The court gave stipulated instruction number 15, which defined price fixing and instructed the jury that it is illegal.[19] ER445-46, 504-05. The court delivered the same instruction at the retrial. ER270-72. Just as for the *Hartford Fire* instruction B, *see supra* pp. 49-50, the defense did not object to this instruction at either the trial or the retrial, so no challenge to it has been preserved.

Because defense counsel proposed the "allegedly flawed jury instructions," and thereby "relinquished or abandoned a known right," any error was invited and is not subject to review by this Court. *Perez*, 116 F.3d at 844-45. Defendant, who sought dismissal of the indictment based on *Metro Industries*, was undoubtedly aware of any rights it

[19] During the initial trial, at defendants' request, the district court struck a sentence from stipulated instruction 15. *See* SER1104, and *compare* ER445 *with* ER504. Based on *United States v. Alston*, 974 F.2d at 1210, the government also proposed to instruct the jury that price fixing is "conclusively presumed to be an unreasonable restraint on trade" and that "whether the agreement was reasonable or unreasonable" was not at issue. ER516. The defense objected to this instruction, *id.*, and the court declined to give it. ER32.

potentially bestowed when he joined the government in proposing the price-fixing instruction. Any objection to the instruction was thereby waived. *Cain*, 130 F.3d at 383-84.

Defendant contends that he jointly proposed the stipulated price-fixing instruction, despite disagreeing with it, because the district court had rejected his earlier reading of *Metro Industries*. Def. Br. 45-46. But defendant affirmatively sponsored an instruction contrary to a position he previously had taken, and defendant cites no cases excusing a defendant who invited error rather than merely remaining silent.[20]

b. The Rule of Reason Has No Effect on the Pleading and Proof Requirements on Intent

Defendant claims that the government failed to plead the requisite intent or mens rea, and that the jury instructions did not require the jury to find the requisite intent. Def. Br. 26. But the indictment alleged that defendant joined a conspiracy "to fix the prices of TFT-LCDs," which constituted an "unreasonable restraint" of trade. ER656

[20] Even if defendant did not intentionally abandon a known right, he still acquiesced in the instructions under which he was convicted. Consequently, any infirmity is reviewable only for plain error under Fed. R. Crim. Proc. 52(b). *Moreland*, 622 F.3d at 1165-66. Here, defendant has not demonstrated that there is an error at all, much less one that was plain, affected substantial rights, or seriously affected the integrity of the proceedings. *Id.* at 1166.

¶¶ 2, 3. And it further charged that AUO secretly met with co-conspirators many times and exchanged information with them "for the purpose of" fixing prices. ER661 ¶ 17(e). The indictment plainly alleged both the object of the conspiracy and the intention to achieve it. The failure to use the word "intent" is of no consequence. *United States v. Metro. Enters., Inc.*, 728 F.2d 444, 453 (10th Cir. 1984); *see also Frohwerk*, 249 U.S. at 209.[21]

Defendant's claim that "the district court's instructions at trial also did not require the jury to find the requisite *mens rea*," Def. Br. 26, ignores entirely the court's instruction requiring the jury to find beyond a reasonable doubt that "the defendant knowingly—that is, voluntarily and intentionally—became a member of the conspiracy charged in the Indictment, knowing of its goal, and intending to help accomplish it." ER274-75.

Defendant's claim of error is based on the holding in *Gypsum*, 438 U.S. at 443, that "criminal offenses defined by the Sherman Act should

[21] Defendant also contends that the government was required to allege "every element of a rule of reason offense," Def. Br. 36, but he does not identify any omitted element. As explained above, *see supra* pp. 26-28, the indictment in this case tracks the language of the statute and states all the elements of a Section 1 offense, including that the conspiracy was in "unreasonable" restraint of trade. ER656 ¶ 2.

be construed as including intent as an element." Def. Br. 27, 33. But defendant misunderstands the import of *Gypsum*, which unlike this case, involved the mere exchange of price information. 438 U.S. at 428, 435, 441.

In *Gypsum*, the Supreme Court concluded that criminal liability should not be imposed "for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken." *Id.* at 441. The Court contrasted the exchange of price information at issue in *Gypsum* with conduct, like price fixing, with "unquestionably anticompetitive effects." *Id.* at 440. "The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.'" *United States v. Soc'y of Indep. Gasoline Marketers*, 624 F.2d 461, 465 (4th Cir. 1980) (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)). The *Gypsum* intent requirement is always satisfied when the "defendants knowingly engaged in a conspiracy to fix prices." *United States v. Therm-All, Inc.*, 373 F.3d 625, 639 (5th Cir. 2004). That is so

because "the intent to fix prices is equivalent to the intent to unreasonably restrain trade." *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. Unit B Sept. 1981), *cited with approval in United States v. Brown*, 936 F.2d 1042, 1046 n.2 (9th Cir. 1991).

c. The Rule of Reason Permits No Justifications for Price Fixing

Finally, defendant argues that *Metro Industries* requires the government to plead and prove that defendant's price fixing "was unreasonable in light of all the surrounding circumstances." Def. Br. 37. But the indictment satisfies that standard because it set out "the elements of the offense charged with sufficient clarity to apprise" defendant of the offense charged, *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000), including that the charged conspiracy was in "unreasonable restraint" of trade. ER656 ¶ 2.

Nor was defendant denied the opportunity to introduce evidence on the nature of the conspirators' conduct and the circumstances in which it was undertaken. In the initial trial, the trial that defendant focuses on, the district court denied the government's motion to exclude five categories of evidence and argument relevant to reasonableness. ER151; SER1195; Def. Br. 29. Defendant nevertheless says that the

court "agreed with the government," Def. Br. 10, because the court said defendant could not argue that "there's a price-fixing conspiracy, but it was a reasonable one," ER151. Defendant cites much evidence that was introduced nonetheless, Def. Br. 38-39, yet he claims that he was not "allowed to present a full defense," including "additional and powerful evidence that [his] conduct was reasonable" and "actually *benefitted* American consumers . . . by stabilizing an industry that would otherwise have collapsed in a time of rapid change." Def. Br. 39.

Contending that similar additional evidence could have been material, defendant cites the district court's statement at the initial sentencing (which he was not subject to) that his co-defendants were motivated to fix prices by their desire to assist their "fledgling industry." *Id.* at 40 (quoting ER436). But the district court also said "it was proved beyond peradventure at trial that this conspiracy existed and was affected and caused exactly the damages set out." SER1078. And the court found that the co-defendants' proffered justifications for price fixing "don't make it not a crime," that "they don't excuse it," and that the defendants "did know it was illegal." ER436-37. The district court's decision to take the co-defendants' motivations into account

when determining an appropriate punishment for their felonious conduct does not undermine their convictions for that conduct.

Moreover, defendant's argument lacks merit because the rule of reason does not countenance any justifications for price fixing and certainly rejects defendant's proffered justification of "stabilizing an industry that would otherwise have collapsed," Def. Br. 39. This Court "reject[s] some justifications as a matter of antitrust policy, even though they might show that a particular restraint benefits consumers." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003). "If there is any argument the Sherman Act indisputably forecloses, it is that price fixing is necessary to save companies from losses they would suffer in a competitive market." *Id.* at 1152 n.24.

Freeman relied on the explication of the rule of reason in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In that case, the Society banned members from offering services through competitive bidding, and it contended that the ban was reasonable because it "ultimately inures to the public benefit" by preventing "deceptively low bids" and eliminating the "tempt[ation of] individual engineers to do inferior work with consequent risk to public

safety and health." *Id.* at 693. The Supreme Court viewed this justification as "nothing less than a frontal assault on the basic policy of the Sherman Act" and rejected it on the basis that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 695-96.

The evidence defendant contends "could well have convinced a properly instructed jury of the defendants' innocence under the rule of reason standard," Def. Br. 38, is, in fact, not relevant under the rule of reason because a price-fixing conspiracy cannot be reasonable or justified by a need to eliminate competition and thereby save competitors from losses. "Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Prof. Eng'rs*, 435 U.S. at 688. Defendant points to evidence, for example, that AUO invested in new manufacturing facilities and increased its production during the conspiracy period. Def. Br. 38. But he does not claim that the price-fixing conspiracy was connected in any way to those investments, other than by making

operations more profitable because reduced competition allowed them to charge higher prices. Thus, this evidence provides no basis to acquit defendant even under the rule of reason.

And to the extent that defendant sought to rely on this evidence to argue that he did not enter a price-fixing agreement, he could (and did) make that argument under the *per se* instructions. That argument was not, however, persuasive to the jury, which found that defendant had entered an agreement to fix prices—a finding that defendant does not contest on appeal. *See* Def. Br. 11.

II. Defendant's Claim of Juror Bias and Misconduct Is Untimely and Unsound

Finally, defendant challenges the district court's refusal to consider a juror's declaration that some other jurors discussed evidence, and expressed views on guilt, prior to the close of evidence. This Court reviews such a ruling—and the consequent denial of defendant's requests for an evidentiary hearing, acquittal, or a new trial—for abuse of discretion. Def. Br. at 81; *United States v. Smith*, 424 F.3d 992, 1011 (9th Cir. 2005).[22] This Court should affirm because defendant's

[22] This Court examines the timeliness of defendant's post-trial motion de novo. *See United States v. Matta-Ballestros*, 27 F. App'x 762,

allegation was untimely and because Federal Rule of Evidence 606(b) and *Tanner v. United States*, 483 U.S. 107 (1987), plainly direct the district court to disregard it.

A. Defendant's Motion for Acquittal or a New Trial Was Untimely

The district court found that "allegations of potential juror misconduct . . . were brought to [defense] counsel's attention immediately after the verdict." ER3. Nonetheless, defendant did not complain of juror bias and misconduct for four months after his conviction, when he sought acquittal or a new trial under the Federal Rules of Criminal Procedure 29 and 33. Both rules impose fourteen-day time limits on motions following guilty verdicts. Fed. R. Crim. P. 29(c)(1), 33(b)(2). Accordingly, the district court found the motion overdue, even as it denied the motion on its merits. ER3-5.

When defendant resurrected the juror bias and misconduct issue at a subsequent bail hearing, the district court characterized its prior denial as "leav[ing it] to the Court of Appeals to figure out if I was barred from making those decisions on account of untimeliness, because [the motion] was, as I noted then and will note again, late." SER836-37.

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763 (9th Cir. 2001) (unpublished memorandum opinion) (citing *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983)).

This Court, of course, is free to affirm on untimeliness. *See United States v. Allen*, 153 F.3d 1037, 1045 (9th Cir. 1998) ("[W]e are free to affirm the district court's [denial of defendant's Rule 33 motion] on any grounds supported by the record.").

As the Supreme Court has emphasized, "because of [the] insistent demand for a definite end to proceedings," a district court must "observe the clear limits of the Rules of Criminal Procedure" when—as here, SER847-51—the government invokes them. *Eberhart v. United States*, 546 U.S. 12, 19, 17 (2005); *see also id.* at 17 (describing a court's duty to enforce deadlines as "mandatory"). Defendant did not observe the clear limits on timeliness, as the district court said, and that failure is dispositive of his claims.

B. The District Court Correctly Ruled That Federal Rule of Evidence 606(b) Bars the Juror's Declaration

Even if this Court looks to defendant's position on the merits, it will locate no basis for reversal. Defendant primarily argues that Federal Rule of Evidence 606(b) does not bar a juror's testimony about pre-deliberation discussion. But no court has adopted defendant's narrow reading of the rule, which in any event is foreclosed both by *Tanner* and circuit precedent.

When a verdict's validity is questioned, Rule 606(b) prohibits a juror from testifying about (1) "any statement made or incident that occurred during the jury's deliberations," (2) "the effect of anything on that juror's or another juror's vote," or (3) "any juror's mental processes concerning the verdict." Fed. R. Evid. 606(b)(1). Defendant claims that the Rule does not preclude juror evidence relating to pre-deliberation conduct. As the district court observed, however, only the first of these circumstances includes reference to the jury's deliberations. ER3. The rule also lists three exceptions, not applicable here, which are not limited to, nor even directed at, the deliberation context. Fed. R. Evid. 606(b)(2). The rule is simply not as targeted as defendant would prefer.

Given the rule's plain language, it is no surprise that courts have consistently interpreted Rule 606(b) to prohibit consideration of juror testimony about jury influences, regardless of their timing. In *Tanner*, for example, the Supreme Court held that Rule 606(b) prohibited juror testimony alleging pre-deliberation alcohol and drug consumption by other jurors. 483 U.S. at 121. The Court observed that "there appears to be virtually no support" for the proposition that "Rule 606(b) is inapplicable to the juror affidavits." *Id.* Nor were the defendants

entitled to an evidentiary hearing, because "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Id.* at 127.

Defendant tries to distinguish *Tanner* by pointing out that the jurors' drug and alcohol use in *Tanner* did not "violate[] the trial court's express and repeated instructions." Def. Br. at 89. Juror use of cocaine and alcohol while on duty, however, is improper irrespective of any jury instruction.

Likewise, this Court has repeatedly prohibited consideration of post-verdict juror testimony offered to impeach the jury's verdict. For instance, in *United States v. Davis*, the Court refused to consider allegations of juror misconduct stemming from a juror's statement that "[f]rom the first day I knew [the defendant] was guilty." 960 F.2d 820, 828 (9th Cir. 1992) (citing, among other authorities, Rule 606(b)); *see also Anderson v. Terhune*, 409 F. App'x 175, 178 (9th Cir. 2011) (unpublished memorandum decision) (relying on *Tanner* to conclude that post-verdict juror testimony about one juror's sleeping *during trial* is inadmissible under Rule 606(b)); *United States v. Pimentel*, 654 F.2d 538, 542 (9th Cir. 1981) (holding that the district court properly refused

to consider post-trial evidence that some jurors had prematurely decided on the defendant's guilt).

Other courts agree. *See United States v. Williams-Davis*, 90 F.3d 490, 504-05 (D.C. Cir. 1996) (collecting cases); *United States v. Tierney*, 947 F.2d 854, 869 (8th Cir. 1991) (affirming the district court's refusal to grant a mistrial for pre-deliberation juror discussion); *United States v. Shalhout*, 280 F.R.D. 223, 230-31 (D.V.I.) (holding that Rule 606(b) barred an alternate juror's allegation that other jurors commented midtrial on the defendants' guilt and ethnicity), *aff'd*, 507 F. App'x 201, 206 (3d Cir. 2012) (unpublished) ("Evaluating jurors' pre-deliberation statements necessarily requires inquiring into their thought process to determine whether or not the premature statements affected their verdict, an inquiry that is prohibited under Rule 606(b)." (internal quotation marks and brackets omitted)); *United States v. Oshatz*, 715 F. Supp. 74, 76 (S.D.N.Y. 1989) (holding that Rule 606(b) rendered inadmissible a juror's post-verdict revelation that other jurors "had made up their minds" midtrial).

Defendant points to *United States v. Jadlowe*, 628 F.3d 1, 17-18 (1st Cir. 2010), but the district court in that case had erroneously instructed

jurors that they could discuss the evidence midtrial, and the First Circuit deemed that error harmless. It is no succor for defendant. Courts have consistently found Rule 606(b) to prohibit consideration of post-verdict juror testimony regarding juror conduct, including pre-deliberation conduct.

Defendant also argues that the jurors who allegedly engaged in pre-deliberation discussions must have been dishonest and biased during voir dire because they did not admit that they would later disobey the district court's instruction not to discuss the case prior to deliberations. That argument is unsound and finds no support in the pair of cases he cites. The allegation of pre-deliberation discussion casts no light on whether, during voir dire, any jurors intended to subsequently violate the court's instruction or harbored any bias against defendant. By contrast, the juror's use of racial slurs in *United States v. Henley* showed that his disclaimer of racial bias on the jury questionnaire was untruthful. 238 F.3d 1111, 1121 (9th Cir. 2001). Likewise, in *Hard v. Burlington Northern Railroad*, the plaintiff submitted evidence that, during deliberation, one juror, who had failed to disclose that he was formerly the defendant's employee, told the other jurors about the

defendant's settlement practice. 812 F.2d 482, 484-85 (9th Cir. 1987). The nature of the dishonesty in both cases revealed actual bias for or against one of the parties. No similar proof of dishonesty or actual bias during voir dire exists here.

"A district court is not required to hold an evidentiary hearing upon every allegation of juror misconduct." *United States v. Decoud*, 456 F.3d 996, 1018 (9th Cir. 2006). If that is so, then declining to hold one under these last-ditch circumstances cannot be an abuse of discretion.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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February 12, 2014

STATEMENT OF RELATED CASES

1. In December 2009, the grand jury, which was investigating price fixing among the TFT-LCD panel makers and subsequently returned the indictment in this case, subpoenaed AUO's and AUOA's law firm requesting certain non-privileged AUO and AUOA documents in the firm's custody in the United States. The firm, AUO, and AUOA moved to quash the subpoena, and the district court granted their motion. The government appealed, and this Court reversed, holding that the subpoena was enforceable. *In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010). The firm, AUO, and AUOA petitioned the Supreme Court for a writ of certiorari. The government opposed the petition, and the Supreme Court denied it. *Nossaman LLP, AU Optronics Corp., & AU Optronics Corp. Am. v. United States*, 131 S. Ct. 3062 (2011).

2. The initial jury in this case failed to reach a verdict as to defendant Leung, but it convicted two of Leung's corporate co-defendants, AUO and AUOA, and two individual co-defendants, Hui Hsiung and Hsuan Bin Chen. Those co-defendants appealed their convictions and sentences to this Court (Nos. 12-10492, 12-10493, 12-10500, 12-10514) on several bases that overlap with Leung's appeal. A

panel of this Court held a consolidated oral argument in the co-defendants' appeals on October 18, 2013. A ruling has yet to issue. The individual co-defendants Hsiung and Chen have been released on bail pending resolution of their appeal.

3. Another individual charged in the indictment, Borlong "Richard" Bai, was a fugitive at the time of the initial trial in this case. Bai subsequently appeared in the district court and pleaded not guilty. A jury acquitted Bai on October 10, 2013, in a trial that proceeded under the same docket number in the district court, No. 09-cr-110-SI.

CERTIFICATE OF COMPLIANCE

1. This brief is accompanied by a motion for leave to file an oversized brief pursuant to Ninth Circuit Rule 32-2. This brief contains 20,049 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

February 12, 2014

/s/ Adam D. Chandler
Attorney

CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on February 12, 2014, I electronically filed the foregoing Brief for the United States of America and the accompanying Supplemental Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

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

February 12, 2014 /s/ Adam D. Chandler
Attorney

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Signature of Attorney or Unrepresented Litigant: /s/ Adam D. Chandler

("s/" plus typed name is acceptable for electronically-filed documents)

Date: 02/12/2014

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.