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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

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I. INTRODUCTION

The government recommends that the Court sentence AU Optronics Corporation ("AUO") to pay a $1 billion fine and its top executives, H.B. Chen and Hui Hsiung, to serve ten years in prison and pay $1 million fines. These defendants and AUO's subsidiary, AU Optronics Corporation America ("AUOA"), were central figures in the most serious price-fixing cartel ever prosecuted by the United States. Only these sentences could possibly reflect the seriousness of this offense or provide adequate deterrence. The correctly and conservatively calculated Sentencing Guidelines ("Guidelines") ranges—a corporate fine of $936 million to $1.872 billion and prison terms from 121 to 151 months—suggest that these sentences are lenient ones for the offense in this case.

Defendants' offense was no regulatory violation, nor a momentary lapse soon regretted. Rather, fully conscious of the wrongfulness of their actions, AUO and its executives conspired with the other major makers of TFT-LCD panels to systematically fix prices. The conspiracy lasted five years, ending only when the FBI raided their offices and a federal grand jury subpoenaed the conspirators' records. And unlike their coconspirators, defendants have refused to cooperate, assist the investigation, or accept responsibility after the government discovered the cartel or even after the jury convicted them.

The conspiracy's breadth and its pernicious effect can hardly be overstated. The conspirators sold $71.9 billion in price-fixed panels worldwide. Even conservatively estimated, the conspirators sold $23.5 billion—AUO alone sold $2.34 billion—in price-fixed panels destined for the United States. The conspiracy particularly targeted the United States and its hi-tech companies: Apple, HP, and Dell. But the harm extended beyond these pillars of America's hi-tech economy. The conspiracy affected every family, school, business, charity, and government agency that paid more to purchase notebook computers, computer monitors, and LCD televisions during the conspiracy.

Yet, even the overcharges they paid do not fully reflect the conspiracy's harm. Because of the increased prices, notebook computers, computer monitors, and LCD televisions were not purchased by American consumers, causing further personal and social loss. Moreover, the

price-fixing conspiracy not only distorted the markets for TFT-LCD panels and products incorporating those panels, but indubitably affected related markets.

While the large criminal fines and lengthy prison terms recommended here are essential to deterring large-scale, highly profitable price-fixing conspiracies, more is needed to stamp out AUO and AUOA's corporate culture of criminal collusion. The Court should also require as a condition of AUO and AUOA's probation that they hire a compliance monitor to develop and implement an effective antitrust compliance program.

II. THE OFFENSE CONDUCT

A. Defendants Conspired to Fix the Price of TFT-LCD Panels

Over a five-year period starting in September 2001—the very month AUO was formed—defendants conspired to fix the price of TFT-LCD panels contained in almost every laptop computer and computer monitor sold in the United States. With much of the world demanding the product that they produced, defendants and their coconspirators were able to and did carry out a conspiracy that was as harmful as it was egregious.

A conspiracy so lengthy and pernicious could only succeed by being systematic. The conspirators—all the major manufacturers of standard-sized panels—held over 60 multilateral meetings, which they termed "crystal meetings." The pricing discussions and agreements at these meetings were detailed, and the participants left a voluminous written record of those meetings. *See, e.g.*, Government's Trial Exhibits ("Trial Exs.") 12T, 302T, 404T. In addition to the multilateral crystal meetings, defendants and their coconspirators engaged in even greater numbers of collusive one-on-one meetings and telephone communications in Asia and in the United States to police and carry out their price-fixing conspiracy. *See, e.g.*, Trial Exs. 86, 90, 95, 168, 476T, 480T, 501T, 505T, 515. The participants believed that the fruits of this conspiracy were well worth the risk as well as the extraordinary investment of time and effort that they poured into it.

At trial, defendants' coconspirators explained how the CEOs and Presidents of the participating companies attended the early crystal meetings to initiate and ensure the success of the conspiracy. These witnesses also testified that the supposedly competing panel

manufacturers reached price agreements at these meetings. Trial Tr. vol. 3 at 660 (J.Y. Ho); Trial Tr. vol. 6 at 1243 (Brian Lee); Trial Tr. vol. 13 at 2138 (Stanley Park); Trial Tr. vol. 17 at 2954 (C.C. Liu). Defendant H.B. Chen, AUO's President and Chief Operating Officer during the conspiracy, attended several of these high-level crystal meetings. Trial Exs. 1, 762; Trial Tr. vol. 4 at 830, 833; Trial Tr. vol. 22 at 4031. Defendant Hui Hsiung, AUO's Executive Vice President and President of AUO America during most of the conspiracy, also attended these early crystal meetings. Trial Exs. 1, 190, 768; Trial Tr. vol. 4 at 831; Trial Tr. vol. 22 at 4024-25. The participation and approval of Chen and Hsiung were necessary for the success of the conspiracy because they were the two highest-ranking executives at AUO, a company that at the end of the conspiracy had more than 40,000 employees.

After Chen and Hsiung attended the early crystal meetings and set out the purpose of the conspiracy, they passed on the day-to-day operation of the conspiracy to their subordinates by directing them to attend the meetings, take notes, and report on the matters discussed and agreed upon. Trial Exs. 15T, 20T. Scores of crystal meeting reports sent by their subordinates to Chen, Hsiung, and other AUO executives detail the pricing agreements reached at the crystal meetings. Trial Exs. 4, 306T, 308T-310T, 312T-318T, 405T, 407T, 409T-411T, 415T, 417T, 419T. Although the monthly crystal meetings were generally attended by the "working level" employees who did the day-to-day work of the conspiracy, the CEOs and Presidents of the participating companies, when necessary, would attend meetings to show their continued support for the purpose and goals of the cartel. Trial Exs. 52T, 431T.

AUO's participation in the conspiracy was not limited to its representation at the crystal meetings. Chen and Hsiung, along with other AUO employees, also discussed and coordinated pricing with competitors through one-on-one or bilateral meetings and telephone calls**.** For example, Chen and Hsiung attended a June 27, 2005 meeting with LG executives where they "agreed to increase [notebook panels] by $10 in July and August, respectively" and acknowledged the "active information exchange and collaboration" for notebook and monitor panels. Trial Ex. 515T. The conspirators stopped meeting as a group in crystal meetings in early 2006 in an effort to minimize the risk of detection. But AUO continued to meet with its co-

conspirators in serial one-on-one meetings in cafes and karaoke bars around Taipei through November 2006. In these meetings and through other bilateral contacts, the conspirators continued to share pricing information and align their prices as part of their ongoing agreement to fix the prices of standard-sized TFT-LCDs.

Defendant AUOA's employees implemented the conspiracy in the United States. These employees all reported either directly or indirectly to Hsiung, AUOA's President at the time, and ultimately to Chen. Trial Ex. 768. According to Michael Wong, AUOA's branch manager, AUOA was a "tentacle" or "extension of AUO" for the purpose of promoting and selling AUO's TFT-LCDs to major U.S. customers Dell, HP, and Apple. Trial Tr. vol. 4 at 834-35. The defendants strategically located AUOA's facilities and employees near these major customers: Houston, Texas for HP; Austin, Texas for Dell; and Cupertino, California for HP and Apple. Trial Tr. Vol. 4 at 838-39. United States-based AUOA account managers negotiated the price and volume of TFT-LCD sales to these major U.S. customers on a monthly basis. Trial Tr. vol. 5 at 858-66.

AUOA played a critical implementation role in the cartel by selling AUO's TFT-LCDs to U.S. customers at anticompetitive, illegally fixed prices. Reports of discussions and agreements by AUOA's President Hsiung and others at crystal meetings and through other one-on-one contacts in Taiwan were distributed to AUOA employees in the United States for use in their price negotiations with U.S. customers. *See, e.g.*, Trial Tr. vol. 5 at 854, 955-56; Trial Exs. 12T, 25T, 80, 86, 90, 91. In addition, Wong and AUOA's account managers for Dell, HP, and Apple participated in the conspiracy by coordinating prices with AUO's conspirators in the United States. For example, in 2003, Wong first began meeting in the United States with his competitor counterparts on the Dell account; likewise, others at AUOA had contacts with their respective counterparts on the Dell, HP, and Apple accounts. Trial Tr. vol. 5 at 880. During these discussions, the conspirators would discuss and align their pricing to Dell, HP, and Apple, encourage one another to increase prices, and affirm their intent to increase or maintain prices to these major U.S. customers. *See, e.g.*, Trial Tr. vol. 5 at 886-89; Trial Exs. 81, 83, 85, 89, 108.

The prices discussed with competitors were then implemented to AUO's U.S. customers. *See, e.g.*, Trial Exs. 88, 822.

B. Defendants Sought to Conceal Their Felonious Conduct

Chen and Hsiung knew that the conspiracy was illegal. The crystal meeting participants were well aware of and discussed the antitrust laws. Trial Ex. 474T. In fact, in 2002, it became public knowledge that the U.S. Department of Justice was investigating price fixing in the DRAM industry. Shortly thereafter, private lawsuits were filed. In the end, several DRAM corporations and executives pled guilty and were sentenced. The antitrust problems in the DRAM industry did not escape the attention of the TFT-LCD conspirators. Stanley Park testified at trial that he raised the DRAM antitrust investigation during the July 21, 2004 crystal meeting, which was called and hosted by Hsiung. Trial Tr. vol. 13 at 2241-42, 2246-48; Trial Ex. 431. Knowing the illegal nature of their alliance, the crystal meeting participants rotated their secret meetings among hotels in Taipei. They also only identified the meeting locations shortly beforehand in order to limit knowledge of the fact and location of the meetings. Trial Exs. 6T, 305T. The attendees also staggered their arrivals and departures to avoid being seen together. Trial Tr. vol. 7 at 1332-33; Trial Tr. vol. 13 at 2220-21; Trial Tr. vol. 17 at 3007-10.

Hsiung and others at AUO instructed subordinates to keep the meetings confidential and not disclose the pricing agreements reached at the crystal meetings. *See, e.g.*, Trial Ex. 118. The crystal meeting reports circulated within AUO were designated as "extremely confidential" and for limited distribution. *See, e.g.*, Trial Exs. 12T, 14T, 16T, 18T. Eventually the participants stopped taking these detailed notes because of the risk that the conspiracy could be leaked. At the July 2004 meeting that was hosted by Hsiung, the conspirators were warned to limit "written communication[s], which leave traces." Trial Ex. 431T. Later, as concerns grew that two primary victims of the conspiracy, Dell and HP, had discovered the clandestine meetings, the conspirators moved the meetings to teahouses, cafes, and karaoke bars, and sent even lower-level employees to the meetings to exchange the pricing information essential to the price-fixing conspiracy's continued success.

Only when the FBI raided AUOA's offices in Houston in December 2006 did AUO and AUOA cease their participation in the TFT-LCD cartel. At the time of the search, Wong and an AUOA HP account manager, Roger Hu, were attending a meeting at HP's offices in Houston. Trial Tr. vol. 5 at 1034. When they learned that the FBI was searching AUOA's office, Wong instructed Hu to begin deleting the contact information for conspiring companies from his cell phone and from the e-mails on his laptop. Trial Tr. vol. 5 at 1042. After Hu began deleting the e-mails, Wong realized the document destruction was futile because the FBI had probably seized his computer, and he and Hu returned to AUOA's offices to meet the FBI. *Id.* at 1043-44.

C. The Conspiracy Had a Massive Impact on U.S. Commerce

This conspiracy affected tens of billions of dollars of commerce in products used in almost every household, business, school, and government office in the United States. It victimized millions of American consumers. The United States was by far the world's largest consumer of products containing price-fixed TFT-LCD panels during the conspiracy. The panels manufactured by AUO and its coconspirators in Asia were shipped into the United States both as raw panels and in finished products that were assembled overseas but destined for sale in the United States. As Dr. Keith Leffler, the government's expert economist, testified, of the $71.8 billion in standard-sized TFT-LCDs produced and sold worldwide by the conspirators during the conspiracy period, approximately $23.5 billion worth, nearly 33 percent, made its way into the United States. Trial Tr. vol. 19 at 3309-17. Dr. Leffler's testimony, along with the jury's finding, that coconspirators gained at least $500 million from the conspiracy, is uncontroverted. Trial Tr. vol. 19 at 3282, 3380; Dkt. 851 (Verdict) 3; Trial Tr. vol. 24 at 4415 (AUO's expert, Mr. Deal, conceding he was not offering an opinion on overcharge by the entire conspiracy); Trial Tr. vol. 28 at 4896 (AUOA closing argument: "we're not here to talk about overcharge").

This massive impact on U.S commerce is unsurprising, given that U.S. computer companies like Dell and HP were among the conspirators' largest customers for panels during the conspiracy. Trial Tr. vol. 3 at 547, 643; Trial Tr. vol. 4 at 837; Trial Tr. vol. 15 at 2525. Furthermore, the United States was the largest market for the notebooks and computer monitors containing TFT-LCDs that Dell, HP, and Apple produced. Evidence presented at trial showed

that approximately 40 percent of HP's notebooks and 30 to 40 percent of HP's monitors were sold in the United States. Trial Tr. vol. 3 at 533. Approximately 60 to 70 percent of all Dell computer monitors and notebook computers were sold in the United States. Trial Tr. vol. 16 at 2885-86.

AUO and its coconspirators were aware that these companies were their biggest customers, and they explicitly targeted the United States and these companies at the crystal meetings, including meetings that Chen and Hsiung attended. Trial Exs. 302T, 303T, 305T, 306T, 309T, 311T, 427T, 438T. They also participated in one-on-one pricing discussions with their coconspirators regarding price quotes to U.S. customers. Trial Exs. 89, 515T; Trial Tr. vol. 14 at 2319, 2326.

As discussed below, AUO alone sold at least $2.34 billion of price-fixed TFT-LCDs that made their way into the United States during the conspiracy. As a result of these panel sales, AUO reaped massive ill-gotten gains from its participation in the conspiracy.

III. STANDARD OF PROOF AT SENTENCING

The government bears the burden of proving, by a preponderance of the evidence, the facts necessary to enhance a defendant's offense level under the Guidelines. *United States v. Burnett*, 16 F.3d 358, 361 (9th Cir. 1994).

IV. GUIDELINES CALCULATIONS

A. Defendants' Volume of Affected Commerce is $2.34 Billion

For antitrust offenses, the calculation of Guidelines ranges turns largely on the volume of commerce affected by the price-fixing conspiracy. *See* U.S.S.G. § 2R1.1(b)(2) (amended 2005) (offense level adjusted by volume of commerce); 2R1.1(c)(1) (fine range for individual is one to five percent of the defendant's volume of commerce); 2R1.1(d)(1) (base fine for corporations is 20 percent of the defendant's volume of commerce). Because the volume of affected commerce reflects the magnitude of the harm caused by the offense, it is a fitting benchmark for the Guidelines and exemplifies the nature and seriousness of the offense and the need for just punishment that is adequate to deter the criminal conduct.

In this case, the affected commerce is the same for all four convicted defendants: $2.34 billion, the sales by AUO of the 12.1- to 30- inch TFT-LCD panels specified in the Indictment ("indictment panels") that were both affected by the price-fixing conspiracy and incorporated into computer monitors and laptops sold in or for delivery to the United States. This commerce applies not only to AUO, but also to its executives, Chen and Hsiung, because for Guidelines purposes "the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." U.S.S.G. § 2R1.1(b)(2). Similarly, AUO's sales of these panels can be attributed to AUOA because, as the Probation Office concluded, AUOA is AUO's subsidiary and because AUOA played a significant role in negotiating sales of price-fixed panels to major U.S. customers such as Dell, HP, and Apple during the conspiracy.

Determining the volume of affected commerce "does not require a sale-by-sale accounting, or an econometric analysis, or expert testimony." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999); *see also United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001). Rather, courts have uniformly held that all sales made by the defendant during the conspiracy period should be presumed affected. *Giordano*, 261 F.3d at 1146 (presuming all sales within conspiracy period were affected unless the conspiracy was wholly a "non-starter" or "ineffectual"); *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000) (holding that "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement, since few if any factors in the world of economics can be held in strict isolation"); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995) (concluding that "the volume of commerce attributable to a particular defendant . . . includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy.").

The term "affected" is "very broad and would include all commerce that was influenced, directly or indirectly, by the price-fixing conspiracy." *Hayter Oil*, 51 F.3d at 1273. Thus, a price-fixing conspiracy need not operate perfectly to affect sales. "Sales can be 'affected' . . . when the conspiracy merely acts upon or influences negotiations, sales prices, the volume of

goods sold, or other transactional terms." *SKW*, 195 F.3d at 91. And "[w]hile a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy." *Id.* at 90. Therefore, the volume of affected commerce should include all sales made by defendants during the conspiracy period "without regard to whether individual sales were made at the target price." *Hayter Oil*, 51 F.3d at 1273.[1]

This presumption is supported by the purpose of the Sherman Act and the *per se* rule against price fixing. As the Sixth Circuit reasoned, "[i]t would be an anomaly to declare price fixing illegal per se without regard to its success, merely because of its plainly anticompetitive effect, but to provide for a fine only if the price fixing were successful." *Id*. at 1274. Such a rule would relieve the government of its burden to ascertain a conspiracy's success "for purposes of obtaining a conviction only to have to bear that very burden to establish the propriety of any fine." *Id.* Requiring this "burdensome inquiry" into the volume of commerce for sentencing purposes would be inconsistent with the *per se* rule itself. *Giordano*, 261 F.3d at 1146 (quoting *Hayter Oil*, 51 F.3d at 1273). "[T]he Sentencing Commission intended that the government have the benefit of a per se rule both at trial and at sentencing to avoid the protracted inquiry into the day-to-day success of the conspiracy." *Hayter Oil*, 51 F.3d at 1274; *see also* U.S.S.G. § 2R1.1 cmt. n. 3 and background.

1. The Estimate of $2.34 Billion in Affected Commerce Is Supported by the Analysis of an Expert Economist

Dr. Keith Leffler, the economist who testified as an expert witness for the government at trial, estimated $2.34 billion in affected commerce. This estimate is supported by Dr. Leffler's declaration submitted with the government's Sentencing Memorandum. Dr. Leffler estimated AUO's sales of indictment panels from October 2001 through December 1, 2006 that were

[1] Some courts suggest that this presumption is rebuttable in "the 'rare circumstance' of a completely unaffected transaction." *E.g.*, *Andreas*, 216 F.3d at 679 (quoting *SKW*, 195 F.3d at 93). In such cases, "the defendant should bear the burden of proving that rare circumstance." *Id.* The Court need not determine whether the presumption is rebuttable or not in this case because the conspiracy affected all of AUO's sales of indictment panels during the conspiracy. *See infra* Section IV.A.

incorporated into notebook computers or computer monitors and that were sold in or delivered to the United States.[2] He did so using invoice data from AUO, invoice and/or purchase data from five large U.S. personal computer manufacturers—Dell, HP, Apple, IBM, and Gateway ("U.S. PC OEMs")—and data from Gartner Dataquest, the same data source he relied upon during his trial testimony in estimating the volume of U.S. commerce affected by all six of the crystal meeting companies. Leffler Decl. ¶ 3.

To estimate AUO's sales of indictment panels to Dell that were used in notebook computers in the United States, Dr. Leffler first determined AUO's sales of notebook indictment panels, by quarter, made to Malaysia Direct Ship ("MDS"), the entity within Dell responsible for purchasing TFT-LCD panels for notebooks destined for North America and South America. Leffler Decl. ¶ 6. Since 100 percent of the notebooks shipped from MDS came to the Americas, Dr. Leffler then estimated the percentage of those panels that went to the United States by using Gartner data showing Dell's personal computer sales by country within the Americas. Leffler Decl. ¶ 7. By multiplying that percentage, calculated for each quarter during the conspiracy, by AUO's sales to MDS, Dr. Leffler estimated AUO's sales of indictment panels to Dell during the conspiracy that were incorporated into notebook computers used in the United States. Leffler Decl. ¶ 7 and tbl.2A.

For Dell monitor panels, Dr. Leffler determined AUO's sales of monitor indictment panels, by quarter, made to Dell Global Procurement Malaysia ("DGPM"), which purchased all of Dell's monitor panels worldwide. DGPM then resold those panels to system integrators, which then sold finished computer monitors back to Dell through various regional purchasers. Leffler Decl. ¶ 8. To estimate the percentage of AUO's sales of monitor panels to Dell that ended up in the United States, Dr. Leffler used data from Dell and Gartner that showed the percentage of all Dell monitors that were destined for the United States. Leffler Decl. ¶¶ 9-10.

[2] Dr. Leffler also considered the raw panels that were sold by AUO and imported to the United States. Because it is possible that those panels are included in his finished product calculations, he did not include those sales in his estimate of AUO's volume of commerce. Leffler Decl. ¶ 4 n. 5.

For each quarter of the conspiracy, he then multiplied that percentage by AUO's sales to DGPM to estimate AUO's sales of indictment panels to Dell during the conspiracy that were sent to the United States. Leffler Decl. ¶¶ 9-10 and tbl. 2A.

Dr. Leffler made similar estimates for AUO's sales of indictment panels to both HP and Apple on a quarterly basis. Leffler Decl. ¶¶ 12-21. He also determined that AUO did not make any sales of indictment panels during the conspiracy to IBM or Gateway. Leffler Decl. ¶ 22.

From these calculations, Dr. Leffler estimated that these U.S. PC OEMs purchased a total of $1.51 billion of indictment panels from AUO from October 2001 through November 2006. Leffler Decl. ¶ 23 and tbl.1. The five U.S. PC OEMs, however, accounted for only 62 percent of PC sales in the United States during this time period. As a result, this $1.51 billion figure excludes the remaining 38 percent of the notebook computers and computer monitors, almost all of which contained a TFT-LCD panel. To account for that remaining 38 percent of indictment panels sold into the United States by computer manufacturers such as Acer, Toshiba, and Lenovo, Dr. Leffler used quarterly Gartner data to estimate AUO's sales to these other PC sellers by assuming that AUO sold indictment panels to these other sellers in the same proportion as it did to Dell, HP, Apple, IBM, and Gateway. Leffler Decl. ¶ 24. It is unlikely that AUO sold proportionally less to the remaining 38 percent of the market. Rather, in all likelihood, AUO actually sold proportionally *more* to those other customers. That is a reasonable and conservative assumption because (1) there were lengthy periods of time during the conspiracy when AUO did not sell *any* indictment panels to these five U.S. PC OEMs; (2) neither IBM nor Gateway purchased any indictment panels from AUO during the entire conspiracy; (3) Dell did not directly purchase any notebook panels from AUO before the second quarter of 2004 and did not directly purchase any monitor panels from AUO before the third quarter of 2005; (4) HP did not start directly purchasing AUO notebook panels until the third quarter of 2002; and (5) the data relating to HP's purchase of monitor panels does not reflect purchases from any supplier prior to July 2003, which strongly suggests that Dr. Leffler undercounted HP's purchases of such panels from AUO during the conspiracy. Leffler Decl. ¶ 24.

After accounting for the rest of the U.S. PC market, Dr. Leffler estimated that AUO's sales of indictment panels from October 2001 through December 1, 2006 that were incorporated into personal computers sold in the United States totaled $2.34 billion:

AUO's TOTAL VOLUME OF AFFECTED U.S. COMMERCE
(PCs ONLY; TV PANEL SALES EXCLUDED)

OEM	AUO SALES TO U.S.
Dell	$721,148,464
HP	$701,725,776
Apple	$85,660,835
IBM	$0
Gateway	$0
Remaining 38% of U.S. PC sellers	$831,973,582
TOTAL	**$2,340,508,657**

Leffler Decl. ¶25 and tbl.1. Again, this $2.34 billion estimate is conservative because it excludes AUO's sales of indictment TV panels, which account for about seven percent of AUO's worldwide sales of indictment panels during the conspiracy. Leffler Decl. ¶ 25.

Dr. Leffler's methodology is largely consistent with the government's approach in estimating the volume of commerce for companies that pled guilty and were sentenced by this Court earlier in the investigation. As with the methodology Dr. Leffler used in estimating AUO's volume of commerce, the government estimated the pleading defendants' volume of affected commerce by totaling those companies' sales to the five U.S. PC OEMs (Dell, HP, Apple, Gateway, and IBM) that made their way back to the United States in finished computer monitors and notebooks ("plea methodology"). The plea methodology also included all TFT-LCD panels that were invoiced in the United States regardless of whether they were integrated into finished products ultimately shipped to the United States.[3] Dr. Leffler's methodology is

[3] Raw panels that were imported directly into the United States were also counted under the plea methodology. Dr. Leffler did not include any additional volume of commerce from these directly imported panels because his volume of commerce estimate may have included those panels in his finished product calculations. Leffler Decl. ¶ 4 n. 5.

more conservative —he does not count all panels invoiced in the United States, only the ones that were actually shipped to the United States in finished products.

Dr. Leffler's methodology augments the plea methodology in two primary respects: (1) it includes AUO's sales of monitor panels to HP, and (2) it counts the remaining 38 percent of the U.S. market for finished computer monitors and notebooks that were sold to U.S. consumers by non-U.S. PC OEMs, such as Acer, Toshiba, and Lenovo.

The plea methodology did not include the pleading companies' sales of monitor panels to HP because the government did not have data for those sales at the time it negotiated those plea agreements. This accounts for a significant share of the panels sold to HP. Because HP only started tracking these prices in 2003, and thus no sales from 2001 through mid-2003 are included, the HP sales figures relied upon by Dr. Leffler substantially understate AUO's actual sales to HP during the conspiracy.

The plea methodology also omitted PC OEM sales to the remaining 38 percent of the U.S. market. At the time the government entered into plea agreements with crystal meeting companies—LG (2008), CPT (2008), CMO (2010), and HannStar (2010)—it had insufficient data from the TFT-LCD suppliers, OEMs, and relevant industry publications to allow it to identify all of each pleading company's volume of affected commerce. In continuing its investigation and preparing for trial, the government acquired additional data and other information that allowed it to do a more complete and accurate estimate of affected commerce.

It is not unusual for a defendant that proceeds to trial to face a more accurate, but higher, volume of commerce as the government develops more information. That does not reflect an inconsistent methodology. And in this case, the government's methodology is not only consistent, but accurately reflects the magnitude of the harm caused by the offense as prescribed by the Guidelines.

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2. $2.34 Billion in Affected Commerce Is a Conservative Estimate

Dr. Leffler's approach in estimating affected commerce is conservative.[4] The $2.34 billion estimate excludes sales of TFT-LCD panels that were incorporated into computer monitors and laptops that were sold outside of the United States—even if those products were sold by U.S. companies like Dell, HP, and Apple. Nothing in the Guidelines or the case law suggests that the volume of affected commerce needs to be limited in this way. Rather, the Guidelines direct the Court to consider all commerce affected by the violation. Here, the violation is a global price-fixing conspiracy, and it affected sales of panels both in the United States and around the world.[5] Nonetheless, the government takes the conservative approach by excluding sales of TFT-LCD panels that were not destined for the United States. This approach is aligned with the Court's instruction on the offense's elements and its gain, which limited consideration to TFT-LCD panels either sold in or for delivery to the United States or incorporated into finished products sold in or for delivery to the United States (Dkt. 817 at 10, 15; Trial Tr. vol. 27 at 4721, 4728-29.

The $2.34 billion commerce estimate further excludes categories of sales for which the government did not have adequate data to make a reliable estimate. For example, it excludes all of AUO's sales of television panels, which accounted for seven percent of its worldwide sales of indictment panels during the conspiracy. *See* Leffler Decl. ¶¶ 3, 25. If anything, the $2.34 billion estimate understates the commerce actually affected by the conspiracy.

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[4] The volume of commerce estimate for purposes of sentencing differs from the gain found by the jury for purposes of 18 U.S.C. § 3571(d). The jury's finding included gain to AUO and its coconspirators, while the government's estimate of the affected commerce excludes sales of price-fixed TFT-LCD panels by AUO's coconspirators.

[5] Even if the government could charge a conspiracy only to the extent that it impacted certain types of commerce, the Guidelines expressly state that sentences should be based on related, but uncharged conduct. *See* U.S.S.G. § 1B1.3; *see also United States v. Dawn*, 129 F.3d 878, 879 (7th Cir. 1997) (affirming sentence for possession of child pornography using the more severe Guidelines provision applicable to the production of child pornography, even though the production offense was not charged because the production took place abroad and the statute did not apply extraterritorially).

3. Defendants' Estimate Vastly Understates Affected Commerce

Defendants estimate that AUO's volume of affected commerce is only between $151.1 million and $223.7 million—just six to nine percent of the government's estimate.[6] This wide discrepancy is the result of defendants' expert, Dr. Robert Hall, improperly excluding several categories of AUO's sales, including (1) all of AUO's sales for the final ten months of the conspiracy, from February through December 1, 2006; (2) all of AUO's sales of panels to anyone other than 13 selected U.S. companies, regardless of whether those panels were incorporated into finished products that ended up in the United States; (3) all of AUO's sales of monitor panels that were incorporated into HP's desktop computer monitors; (4) all of AUO's sales during months when it attended crystal meetings and received specific prices from its conspirators, but did not provide price information to others; and (5) all of AUO's sales to coconspirators LG and Samsung. Each of these errors is discussed below.

a) Defendants Improperly Exclude All of AUO's Sales During the Last Ten Months of the Conspiracy

Dr. Hall excludes the last ten months of the conspiracy—a total of 41 percent of AUO's affected volume of commerce—based on a fundamental misunderstanding of Dr. Leffler's trial testimony and the purpose of that testimony. Leffler Decl. ¶ 29. Dr. Leffler was tasked with determining whether the participants in the crystal meeting conspiracy derived gross gains of at least $500 million (the overcharge set forth in the Indictment's sentencing allegation) for purposes of satisfying 18 U.S.C. § 3571(d). He did so by studying the effect of the group crystal meetings on the revenues of the participating companies. Leffler Decl. ¶¶ 29-30 nn.19, 20. These group crystal meetings occurred during a 52-month period from October 2001 through January 2006. *Id*. Dr. Leffler never testified that the conspiracy ended in January 2006. Indeed,

[6] The parties exchanged expert declarations more than one month ago. Through this process, the parties' experts provided their respective views on the affected volume of commerce. After the parties exchanged declarations in early August, the experts reviewed the opinions each side provided and responded to those opinions in the expert declarations attached to the parties' respective Sentencing Memoranda. References in Dr. Leffler's declaration to paragraphs in Dr. Hall's declaration refer to Dr. Hall's draft declaration of August 10, 2012, attached as Exhibit C to the Leffler Declaration.

defendants made sure that the jury was instructed that Dr. Leffler was not testifying as a conspiracy witness. Dkt. 817 at 5 (Final Jury Instructions) ("[N]o expert witness can offer an opinion on the ultimate issue of whether the charged conspiracy existed."). He could, however, testify about the "effect of the alleged conspiracy on U.S. commerce," (*id.*) which he did by focusing on the price discussions recorded in 52 months of detailed crystal meeting notes to determine that the conspiracy resulted in overcharges in excess of $500 million.

As Dr. Leffler notes in his declaration, his relevant inquiry at trial was to determine whether the gain from the conspiracy on U.S. commerce was greater than $500 million. To do this, he focused on the 52 months of group crystal meetings. The conspirators' gain during that period was the easiest to quantify because the crystal meeting participants kept such thorough records memorializing their pricing discussions on a monthly basis. The conspirators stopped keeping such detailed records in early 2006 because they feared detection. Based only on this narrower time frame, Dr. Leffler readily concluded the gain was more than the $500 million the government alleged in its Indictment and needed to prove at trial. But the price-fixing conspiracy continued through November 2006 as the coconspirators continued to meet one-on-one in furtherance of the conspiracy. Dr. Leffler simply had no need—for purposes of concluding the gain exceeded $500 million—to examine that period.

The task of calculating overcharges for purposes of 18 U.S.C. § 3571(d) is fundamentally different from the task of determining the "volume of affected commerce" under U.S.S.G. Section 2R1.1. For sentencing purposes, under Section 2R1.1, "[w]hile a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy." *SKW*, 195 F.3d at 90. In responding to this very different task of determining whether the prices charged by AUO were affected in any way during the entire conspiracy period, Dr. Leffler concluded that "[t]he evidence is clear that the conspiracy impacted prices from October 2001 through December 1, 2006." Leffler Decl. ¶ 30.

In reaching this conclusion, Dr. Leffler considered the evidence that the conspirators continued to meet one-on-one in cafes around Taiwan after they stopped meeting as a group by

February 2006. Leffler Decl. ¶ 30. He considered trial testimony where conspiracy witness Milton Kuan testified that the participants continued to share the same information that they provided in the group crystal meetings when they met one-on-one. *Id*. The evidence showed that the conspiracy only—and abruptly—ended in December 2006 when the Department of Justice issued grand jury subpoenas and the FBI executed a search warrant on AUO America's offices. Trial Tr. vol. 21 at 3797.

Dr. Leffler also considered the evidence of AUO's continued bilateral contacts with competitors throughout 2006. Leffler Decl. ¶31, Ex. D. As discussed in Section II.A. above, AUO's participation in the conspiracy was not limited to its representation at the crystal meetings and continued one-on-one meetings in cafes around Taiwan. AUO also participated in pervasive bilateral contacts with competitors where the companies coordinated and aligned their pricing to specific accounts. This pervasive bilateral conduct continued throughout 2006. For example, in an April 26, 2006 e-mail, Steven Leung, Director of U.S. accounts in AUO's Monitors Business Unit, directed his sales team to "align with other TFT vendors to ensure we are not quoting too low or much too high." Trial Ex. 108. When finalizing bottom-line prices and quotations to customers, AUO employees also sent out the following directives:

- "[P]rovide any input you may have for competitor market quotations…. I only need competitor pricing info." April 20, 2006, Trial Ex. 106;
- "Let's get other competitor's status for reference before we try to feed back our proposal to HP." April 26, 2006, Trial Ex. 105;
- Regarding AUO's quote to HP: "If CMO Taiwan's people try to double check with you, this is what I told them in Houston. We need to line up our information!" April 26, 2006, Trial Ex. 109;
- Yesterday I visited AMLCD [Samsung] to know the AMLCD NB policy…[AMLCD] hopes AUO also follow AMLCD's strategy." June 29, 2006, Trial Ex. 188;
- To the U.S. account representative for Apple regarding AUO's quote to Apple: "Our suggestion is to follow LPL --> 'Standard+$50.'" August 11, 2006, AU-MDL-06430178;

- CMO just phoned me for HP's Oct price discussion…AUO's status that I told CMO…." October 25, 2006, Trial Ex. 113.

In the context of an ongoing five-year price-fixing conspiracy, this evidence demonstrates the agreement to fix prices continued. Even as late as November 23, 2006, in an e-mail forwarded by Steven Leung, AUO employees noted the importance of "market info. sharing" on AUO December "pricing ideas" and noted that "some of major suppliers would like to keep flat for the first quotation, but prepare for $2-3 down for 17" and 19"." Trial Ex. 189. This same proposal was then suggested as AUO's pricing plan. *Id.* And in August 2006, AUO employees were just as concerned, if not more, about the legality of their collusive behavior: "NYer is suspecting suppliers are exchanging price information. This is illegal, especially in the [S]tates. We need to be watchful!" Trial Ex. 172. And, as noted above, when the FBI searched AUO America's offices in December 2006, the branch manager of AUO America instructed his subordinate to delete conspirator contact information from his cell phone and computer. Trial Tr. vol. 5 at 1042.

All this evidence demonstrates that the conspiracy lasted at least until the FBI executed search warrants in the United States and the DOJ issued subpoenas on the coconspirator companies in December 2006. The defendants participated in that conspiracy up until the last moment; up until their employees' last-ditch efforts to keep it secret. And AUO's prices were affected as a result. Moreover, the defendants have no response to this evidence of the conspirators' continued collusive behavior, the continued efforts to target U.S. customers by aligning prices and keeping them higher than they should have been through the price-fixing agreement, and their continued efforts to hide the existence of the conspiracy. Instead, the defendants claim that the Court should ignore ten months of the conspiracy because Dr. Leffler did not testify at trial to the conspiracy's existence or effect during that time. But Dr. Leffler was not asked that question and he did not answer it at trial, nor did he have to. But he does now: "The evidence is clear that the conspiracy impacted prices from October 2001 through December 1, 2006." Leffler Decl. ¶30. Accordingly, Dr. Hall has no basis to exclude AUO's sales during the last ten months of the conspiracy.

b) Defendants Improperly Exclude All of AUO's Sales to Major Sellers of PCs into the United States

Dr. Hall fails to count any AUO sales to non-U.S. companies, omitting sales to major household-name computer manufacturers, such as Toshiba, Lenovo, Acer, and eMachines, that undoubtedly sold large quantities of notebook computers and computer monitors in the United States that included AUO's price-fixed panels.[7] That failure cannot be reconciled with the Guidelines, which require counting all AUO sales affected by the "violation." U.S.S.G. § 2R1.1(b)(2). Nothing in the Guidelines or the case law suggests affected commerce is limited to sales to U.S. companies, especially when, as here, the foreign companies sold notebook computers and computer monitors in the United States that included AUO's price-fixed panels.

Moreover, Dr. Hall's methodology is inconsistent with the Court's approach to identifying the commerce relevant to the elements of the offense and the gross gain to the conspirators under 18 U.S.C. § 3571(d). For both, the Court ruled that the relevant commerce included TFT-LCD panels incorporated into finished products sold in or for delivery to the United States. Trial Tr. vol. 27 at 4721, 4728-29. The Court never suggested that only sales made to U.S. computer companies could be counted in assessing relevant commerce. Instead, the focus was on the effect on commerce in the United States. The Court's rulings in this case were consistent with its rulings in the related private civil damage actions. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011), this Court rejected the civil defendants' argument to "exclude from the Sherman Act's reach a significant amount of anticompetitive conduct that has real consequences for American consumers" under the FTAIA. As the TFT-LCD panel cartel illustrates, "modern manufacturing takes place on a global scale." *Id*. In the FTAIA context, this Court was properly "skeptical that Congress intended to remove

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[7] Dr. Hall excludes all AUO sales to companies other than 13 U.S. companies he selected. Hall Decl. ¶ 19 & App. C. As Dr. Leffler explains, although Dr. Hall includes eight purchasers in addition to the five U.S. PC OEMs (Dell, HP, Apple, Gateway, and IBM) in his calculations, these additional eight companies add very little. Leffler Decl. ¶34 n. 29. Indeed, the combined sales of Dell, HP, and Apple constitute 95% of the sales of the thirteen purchasers considered by Dr. Hall. *Id.* Accordingly, these additional companies included in Dr. Hall's analysis only negligibly increase his volume of commerce number.

from the Sherman Act's reach anticompetitive conduct that has such a quantifiable effect on the U.S. economy." *Id*. at 964. The Court should be similarly skeptical here of removing commerce with effects on the U.S. economy from the volume of affected commerce under the Sentencing Guidelines. Indeed, the affected commerce considered for purposes of the Guidelines is broader than commerce considered for purposes of the FTAIA. *See supra* Sec. IV.A.1. & n. 3.

c) Defendants Improperly Exclude All of AUO's Sales of Monitor Panels Incorporated into HP's Desktop Monitors

Dr. Hall also excludes all AUO sales of monitor panels used in HP's desktop computers that were sold in the United States. Leffler Decl. ¶ 33. This is a significant exclusion because HP is the second-leading seller of personal computers in the United States and was AUO's second-largest customer for monitor panels during the conspiracy. Leffler Decl. ¶ 33 and n. 28. Dr. Hall excludes these sales not because he disputes that a significant percentage of AUO's panels were used in computer monitors in the United States, but because HP was not invoiced directly for those sales. AUO first sold the monitor panels to a non-U.S. system integrator—at prices that AUO negotiated with HP in the United States—and then that system integrator invoiced HP for the negotiated price of the monitor panel when it sold the assembled product to HP. Leffler Decl. ¶ 33.

For the reasons explained in Section IV.A.1 above, Dr. Hall's exclusion of all of these monitor panel sales, based solely on the fact that AUO first sold these panels to a non-U.S. system integrator, cannot be reconciled with the Guidelines, the facts of this case, or even the limitations the Court included in its jury instructions for gain and the offense elements. Dr. Leffler followed the correct approach by including these sales in his estimate of AUO's volume of affected commerce. Leffler Decl. ¶ 33.

d) Defendants Improperly Exclude All of AUO's Sales During Months When It Attended Crystal Meetings and Collected, But Did Not Contribute, Specific Price Information

Dr. Hall next excludes a significant percentage of AUO sales—accounting for approximately 75 percent of the AUO sales included in Dr. Leffler's estimate—in order to limit sales to those "subject to cartel influence, in the sense that their prices were discussed at the

Crystal Meetings." Hall Decl. ¶ 29. Yet he does much more than just eliminate AUO's sales in those months in which prices were not discussed. Instead, he eliminates AUO's sales in every month except those in which either: (1) AUO itself specified a price at a crystal meeting; or (2) there was a general "industry" price listed in the crystal meeting notes. Leffler Decl. ¶¶ 33-37. So if, during a given crystal meeting, three of AUO's competitors provided their target prices for a 15-inch notebook panel, but AUO did not, Dr. Hall excludes AUO's sales of that panel for the following month. In essence, Dr. Hall assumes that AUO's panel prices were affected only when it was *giving* price information to its competitors and not when it was *getting* such information from them and commits the same error that has been uniformly rejected by the courts of appeals. *See Hayter Oil*, *SKW*, and *Giordano*; *see also supra* Sec. IV.A.

As Dr. Leffler notes, this makes no economic sense. Leffler Decl. ¶ 37. Economic theory (and common sense) teaches that the greatest impact on AUO's prices is expected when it learns about its conspirators' pricing plans in the context of an ongoing conspiracy to fix prices. *Id.* There were numerous months in which AUO attended crystal meetings and listened to its conspirators' pricing information, but did not provide its own. *Id.* For example, at the November 2005 meeting, CMO, CPT, HannStar, and Samsung provided target prices for the SXGA 17-inch monitor. AUO did not. Trial Exs. 73T, 445. Yet in that month, AUO had the second-highest average price for this monitor of any of the crystal meeting participants. Leffler Decl. ¶ 36. It makes no economic sense—let alone common sense—to conclude that AUO's prices were not affected by attending this meeting and hearing its conspirators' pricing plans. *Id.* Sales during these months should be included in AUO's volume of affected commerce.

Dr. Leffler's declaration explains a number of other problems with Dr. Hall's exclusion of these sales. *See* Leffler Decl. ¶¶ 37-39. For example, by following this approach, Dr. Hall includes AUO's sales of the 13.3-inch XGA notebook panel in January and March 2002, but not for the month in between—February 2002. Yet he does not present any data showing a significant change of the prices of this panel in February 2002 that would justify a conclusion that AUO's price in that month was not affected. Leffler Decl. ¶ 39.

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e) Defendants Improperly Exclude All of AUO's Sales to LG and Samsung

The final major defect in Dr. Hall's commerce estimate is that he excludes all of AUO's sales to coconspirators LG and Samsung, which had affiliated display companies that purchased TFT-LCD panels for the manufacture of finished products incorporating those panels. Hall Decl. ¶ 30. Because of Dr. Hall's assumption that these companies are able to supply their own panels internally if AUO attempted to sell panels to them at inflated prices, Dr. Hall erroneously concludes that all such AUO sales during the conspiracy "*must* have occurred at prices without any overcharge." Hall Decl. ¶ 31 (emphasis added).

Dr. Hall's theoretical assumption overlooks the evidence at trial showing that the conspirators took steps to limit any discounts on internal sales. In fact, this issue was addressed at the very first crystal meeting, on September 14, 2001, in which the conspirators agreed that the "internal sales price shall not be discounted more than 3 percent . . . in order to avoid disturbing the order of market prices." Trial Ex. 302. Similarly, at the November 15, 2001 meeting, it was agreed to try to limit price competition in certain cases, including those involving "strategic clients" and "internal relationship[s]." Trial Ex. 306.

These efforts apparently worked, because both Dr. Hall and Dr. Leffler agree that LG and Samsung purchased panels at essentially the same prices as did other customers. Hall Decl. ¶ 44; Leffler Decl. ¶ 43. Given that AUO's prices to LG and Samsung were approximately the same as its prices to other customers, AUO either overcharged everyone or, as Dr. Hall contends, did not overcharge anyone. Leffler Decl. ¶ 43. Dr. Hall's exclusion of AUO's sales to LG and Samsung therefore rests entirely on his untenable contention that there is no "measurable overcharge attributable to AUO." Hall Decl. ¶ 9.

But the jury heard this same argument from AUO's expert at trial, Mr. Deal. He testified repeatedly that AUO did not overcharge anyone, and that the lack of any overcharge was inconsistent with AUO participating in a price-fixing conspiracy.[8] Yet the jury convicted AUO

[8] *E.g.*, Trial Tr. vol. 24 at 4375 ("there's no evidence of AUO overcharging. . . . That's not consistent with AUO participating in a price-fixing agreement.").

of participating in such a conspiracy, and found beyond a reasonable doubt that AUO and its coconspirators overcharged their customers by at least $500 million. Dkt. 851. Similarly, Dr. Leffler's regression analysis found a statistically significant overcharge, by AUO alone, of over 19 percent. Leffler Decl. ¶ 45.

The evidence is consistent with AUO overcharging all of its customers, including LG and Samsung, by a substantial amount. Dr. Hall's exclusion of all of AUO's sales to LG and Samsung is not justified.

B. The Guidelines Ranges for Each Defendant

1. AUO's Guidelines Fine Range Is $936,000,000 to $1,872,000,000

For corporations, the Guidelines first determine a base fine and then calculate a fine range by applying minimum and maximum multipliers to that base fine. U.S.S.G. §§ 8C2.1-8C2.7. Those multipliers are based on a culpability score. *Id.*

Under Section 8C2.4(a)(1)-(3), a corporation's base fine is the greatest of (1) the amount from the table in Section 8C2.4(d), (2) the corporation's pecuniary gain from the offense, or (3) the pecuniary loss from the offense caused by the corporation. In this case, the greatest base fine is the pecuniary loss. For antitrust offenses, the Guidelines instruct sentencing courts, "[i]n lieu of the pecuniary loss under subsection (a)(3) of § 8C2.4," to "use 20 percent of the volume of affected commerce." U.S.S.G. § 2R1.1(d)(1); *see* U.S.S.G. § 8C2.4(b).

The 20 percent of affected commerce serves as a surrogate for loss. The Guidelines' 20 percent figure derives from the estimate "that the average gain from price-fixing is 10 percent of the selling price" and from the reasoning that the "loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices." U.S.S.G. § 2R1.1 cmt. n.3. Thus, "[b]ecause the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of volume of affected commerce is to be used." *Id.* In addition, the purpose of specifying a particular percentage—20 percent—is "to avoid the time and expense that would be required for the court to determine the actual gain or loss." *Id.*

Thus, AUO's base fine is 20 percent of the $2.34 billion in affected commerce: $468 million. AUO's culpability score under U.S.S.G. Section 8C2.5 is ten. AUO starts out with five points under Section 8C2.5(a) and receives an additional five points because it had more than 5,000 employees[9] and "individuals within high-level personnel" of AUO participated in the offense conduct. No factors support a reduction. Based on its culpability score, the base fine multipliers are 2.0 and 4.0. Therefore, AUO's Guidelines fine range is $936,000,000 to $1,872,000,000:

- Base Fine (20% of $2.34 billion) (§ 2R1.1(d)(1) & 8C2.4(b)) — $468 million
- Culpability Score

i.	Base (§ 8C2.5(a))	5
ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	5
iii.	Prior History (§ 8C2.5(c))	0
iv.	Violation of Order (§ 8C2.5(d))	
v.	Obstruction of Justice (§ 8C2.5(e))	0
vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0
vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g))	0
	Total Culpability Score:	10

- Minimum and Maximum Multipliers (§ 8C2.6) — 2 – 4
- Minimum and Maximum Fine Range — $936 million to $1.872 billion

Because the jury found $500 million in gain from the offense, the statutory maximum fine is $1 billion. *See* 18 U.S.C. § 3571(d). Thus, the Court can impose a sentence anywhere

[9] While AUO objects to the PSR's finding that it employed over 40,000 persons throughout the conspiracy because it employed fewer than 40,000 before 2006, AUO does not apparently contest the Probation Office's finding that AUO employed at least 5,000 employees and that high-level personnel—its President and COO, H.B. Chen, and its Executive Vice President of Sales, Hui Hsiung—were involved in and tolerated the criminal conduct.

within the Guidelines range "provided that the sentence is not greater than" $1 billion. U.S.S.G. § 5G1.1(c)(1).[10]

a) AUO's Guidelines Fine Range Must Be Based on 20 Percent of Affected Commerce

AUO has suggested that the Section 2R1.1's 20 percent figure cannot be used to calculate the base fine for AUO or AUOA. AUO Objections to Presentence Report ("PSR Objections") at 4. But "it would be procedural error for a district court to fail to calculate—or to calculate incorrectly—the Guidelines range." *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc); *see United States v. Rodriguez-Ocampo*, 664 F.3d 1275, 1278-79 (9th Cir. 2011) (vacating sentence for incorrectly calculating Guidelines range). The failure to use the 20 percent figure or the substitution of another factor to determine the base fine and, in turn, the Guidelines fine range, would be just such an error. Because "the Guidelines are the starting point and the initial benchmark" for all sentencing proceedings, such proceedings "are to begin by determining the applicable Guidelines range." *Carty*, 520 F.3d at 991 (internal quotation marks and citations omitted). The Guidelines "range must be calculated correctly." *Id.*

In correctly calculating the range, the 20 percent figure is not optional. Rather, the Guidelines direct the sentencing court to "use 20 percent of the volume of affected commerce" to determine a corporation's base fine for antitrust offenses. U.S.S.G. § 2R1.1(d)(1). Defendants' claim that the overcharge was no more than 1.8 percent is not only erroneous, but also irrelevant in calculating the Guidelines range. PSR Objections at 4. The Guidelines use a specific percentage—20 percent—"to avoid the time and expense that would be required for the court to determine the actual gain or loss." U.S.S.G. § 2R1.1 cmt. n.3. Even if the Court could quickly and easily determine the actual gain or loss, the Guidelines do not permit substituting the actual overcharge for the Guidelines' 10 percent overcharge estimate for price fixing, which is doubled

[10] Earlier in this case, for purposes of 18 U.S.C. § 3571(d), AUO and AUOA argued that "the government is required by *Apprendi* to prove the purported gain or loss arising from any offense to the jury and beyond a reasonable doubt." Opposition of Defendants AUO and AUOA to Government's Motion for Bifurcation and Order Regarding Fact Finding for Sentencing. Dkt. 33910. The government proved the gain to the jury beyond a reasonable doubt, as AUO and AUOA requested. Thus, AUO and AUOA are estopped from arguing that such proof is insufficient or unconstitutional.

to yield 20 percent. Rather "[i]n cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than ten percent, this factor should be considered in setting the fine *within* the guidelines fine range." *Id*. (emphasis added).

b) Use of the 20 Percent Figure Provides No Sound Basis to Depart from the Guidelines Fine Range

To be sure, the Guidelines are no longer binding, and thus the Court is not bound to sentence within the correctly calculated Guidelines range. *See United States v. Booker*, 543 U.S. 220, 259 (2005); *see also Carty*, 520 F.3d at 990. But the Guidelines remain advisory. The Court must "consider the Guidelines 'sentencing range'" and "the pertinent Sentencing Commission policy statements" along with the other 3553(a) factors.[11] *Booker*, 543 U.S. at 259-60 (citing 18 U.S.C. § 3553(a)(4)(A), (a)(5)); *Carty*, 520 F.3d at 991. Indeed, if a sentencing "judge 'decides that an outside-Guidelines sentence is warranted, [s]he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Carty*, 520 F.3d at 991 (*quoting Gall v. United States*, 552 U.S. 38, 50 (2007)). As the Supreme Court explained in *Gall*, "a major departure should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50.

Nothing about AUO's overcharge or the use of Section 2R1.1(d)(1)'s 20 percent figure justifies departing downward from the Guidelines range. Defendants argue the Court should disagree with the Guidelines' policy of using 20 percent to avoid the time and expense of a judicial determination of the actual gain or loss. PSR Objections at 4. They contend the proposition that such a gain/loss determination is time-consuming or expensive was unsupported when the Guidelines were adopted and is wrong here because defendants claim to have already determined the actual overcharge. *See id*.

The Guidelines' common sense reason for using 20 percent is as sound today as it was at the Guidelines' adoption. As a general matter, it is self-evident that use of a specified figure avoids the time and expense of a judicial determination of an overcharge. And in this case, a judicial determination of the actual gain or loss would require substantial time and expense. The

[11] When imposing a fine, the Court must also considered the factors set forth in 18 U.S.C. § 3572(a).

parties' positions on overcharge—ranging from 1.8 percent to 19 percent—are conflicting, and, as such, do not give the Court a head start. Indeed, as explained below, defendants' 1.8 percent figure is not even a determination of overcharge at all. Thus, a judicial determination would require more time and expense—precisely what the specified 20 percent figure is meant to avoid.

Defendants also apparently contend that the Court should disagree with the Guidelines on policy grounds because "20 percent of the volume of affected commerce" is never a reasonable surrogate for loss from a price-fixing conspiracy. As explained in Application Note 3, "it is estimated that the average gain from price-fixing [*i.e.*, the overcharge] is 10 percent of the selling price," but the Sentencing Commission observed that the loss from price fixing "exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices." U.S.S.G. § 2R1.1 cmt. n. 3. For this reason, the Guidelines direct that "20 percent of the affected commerce is to be used in lieu of the pecuniary loss under § 8C2.4(a)(3)." *Id.*

Defendants do not deny that the loss from price fixing exceeds the gain, but they question the Sentencing Commission's judgment in doubling the average overcharge estimate to account for this additional loss. Defendants apparently believe that this additional loss is limited to loss to final consumers resulting from not purchasing the price-fixed product at its elevated price, which defendants contend could not be as much as loss from paying the overcharge. But this was not the only type of additional loss the Sentencing Commission was considering. Application Note 3, in fact, refers to this type of loss "among other things," making clear that it was aware of other types of loss. *Id*. The Sentencing Commission's approach accounts for this additional loss and allows for the fact that fines tend to be paid well after the losses are inflicted.

Price-fixing conspiracies do cause other injury to consumers, including harm from increased prices on sales of non-conspirators' products and sales of substitute products or in other related markets. Moreover, defendants insist that pass-through must be evaluated at each stage of distribution to determine the harm to consumers. PSR Objections at 5. In fact, the Guidelines require no such evaluation, nor does the Sherman Act. While that statute outlaws anticompetitive conduct for the ultimate benefit of consumers, it "does not confine its protection

to consumers, or to purchasers, or to competitors, or to sellers." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). Thus, the offense's harm includes all the losses it caused, not just those passed on to consumers.[12]

When it prescribed 20 percent of the affected commerce as the base fine for price-fixing offenses in lieu of pecuniary loss, the Sentencing Commission filled an "important institutional role." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). AUO has not made the case that the Commission's judgment that the 20 percent figure used in the antitrust Guideline fails to properly reflect § 3553(a) considerations, even in ordinary cases. *Id*. And thus, that judgment cannot be lightly disregarded.

Moreover, this case is not outside the "heartland" to which the Commission intended the relevant Guidelines to apply. *Rita v. United States*, 551 U.S. 338, 351 (2007). Defendants argue that using 20 percent of the affected commerce does not fit the particular facts of this case and that Dr. Hall's 1.8 percent figure better represents the overcharge figure. But Dr. Hall did not conduct an overcharge analysis to reach this number. Rather, he simply divides $17 million (the jury damages award to a limited class of plaintiffs in the civil Toshiba trial) by $939 million (the estimated sales of TFT-LCD panels presented by a limited class of plaintiffs). Since $17 million is 1.8 percent of $939 million, Dr. Hall concludes, without any economic analysis, that the overcharge is 1.8 percent.

In contrast, Dr. Leffler did the empirical work to estimate the overcharge in this case. That work shows that the likely AUO-specific overcharge exceeded the Guidelines' 10 percent overcharge estimate for price fixing. His analyses comparing margins before and after the conspiracy period, including AUO-specific margins, found margins consistent with overcharges well above 10 percent. And his multiple regression analysis found a statistically significant mean estimate of the AUO overcharge on all indictment panels of over 19 percent. Leffler Decl. ¶ 45. Thus, in this case, actual analysis of the overcharge does not provide a reason to depart

[12] Indeed, in civil antitrust suits for damages, the overcharge paid by purchasers to cartel members is a compensable "injury" even if those purchasers passed on much of the overcharge to others. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487-94 (1968); *see also Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

from the Guidelines range. To the contrary, the congruence of the specified 20 percent figure with the actual overcharge and the additional losses demonstrates that the Guidelines fine range for AUO is a particularly apt measure of the nature and seriousness of its offense and the need for just punishment and adequate deterrence. If it errs at all, it advises a range that is too lenient under the facts of this case. The remedy for such an error, as the Guidelines explain, is to sentence at the high end of the range. *See* U.S.S.G. § 2R1.1 cmt. n. 3.

2. AUOA's Guidelines Fine Range Is $842,400,000 to $1,684,800,000

Like its parent, AUOA's base fine is 20 percent of the $ 2.34 billion in affected commerce: $468 million. AUOA's culpability score under Section 8C2.5 is nine. AUOA starts out with five points under Section 8C2.5(a) and receives an additional point under Section 8C2.5(b)(5) because it had more than ten employees and "individuals within high-level personnel"—AUOA's President Hsiung and U.S. Branch Manager Michael Wong—participated in the offense conduct. AUOA receives three more points under Section 8C2.5(e) because its employees engaged in acts of obstruction (and its branch manager instructed an employee to engage in destruction) by destroying documents after learning of a search of its offices by the FBI in December 2006. No factors support a reduction. Based on its culpability score, the base fine multipliers are 1.8 and 3.6. Therefore, AUO's Guidelines fine range is $842,400,000 to $1,684,800,000:

- Base Fine (20% of $2.34 billion) ($ 2R1.1(d)(1) & 8C2.4(b)) — $468 million
- Culpability Score

i.	Base (§ 8C2.5(a))	5
ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(5))	1
iii.	Prior History (§ 8C2.5(c))	0
iv.	Violation of Order (§ 8C2.5(d))	
v.	Obstruction of Justice (§ 8C2.5(e))	3
vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0
vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g))	0

Total Culpability Score:	9
• Minimum and Maximum Multipliers (§ 8C2.6)	1.8 – 3.6
Minimum and Maximum Fine Range	$842 million to $1.684 billion

Like AUO, AUOA's fine cannot exceed the statutory maximum of $1 billion. But as explained below, *see infra* Sec. VI.C., AUOA is unlikely to be able to pay a fine within the Guidelines range. So long as a $1 billion criminal fine is imposed on AUO and AUO and AUOA are placed on probation and required to adopt the antitrust compliance program proposed below, the government believes fining its subsidiary AUOA is unnecessary. *Id.*

3. H.B. Chen's Guidelines Incarceration Range Is 121 to 151 Months

Chen's Total Offense Level is 32 and his Criminal History Category is I:

i.	Base Offense Level (§ 2R1.1(a))	12
ii.	Volume of Affected Commerce (§ 2R1.1(b)(2)(H))	16
iii.	Total Adjusted Offense Level	28
iv.	Victim–Related Adjustments (§ 3A)	0
v.	Role in the Offense Adjustment (§ 3B1.1(a))	4
vi.	Obstruction Adjustments (§ 3C)	0
vii.	Acceptance of Responsibility (§ 3E1.1(a) and (b))	0
Total Offense Level		32

This results in a Guidelines prison range of 121 to 151 months. Because the statutory maximum term of incarceration for a violation of Section 1 of the Sherman Act (15 U.S.C. § 1)—120 months—falls below the Guidelines range, the statutory maximum becomes the Guidelines sentence for Chen. *See* U.S.S.G. § 5G1.1(a).

The Guidelines fine range for individuals is one to five percent of the affected commerce, but not less than $20,000. U.S.S.G. § 2R1.1(c)(1). Thus, based on the $2.34 billion in affected commerce done by his principal AUO and thus attributable to Chen, *see* U.S.S.G. § 2R1.1(b), his fine range is $23.4 million to $117 million. But because the Sherman Act maximum for individuals is $1 million, 15 U.S.C. § 1, and because the government has not sought to raise the

statutory maximum fine against the individuals under 18 U.S.C. § 3571(d), the maximum fine for Chen is $1 million. *See* U.S.S.G. § 5G1.1(a).

a) Chen Was an Organizer and Leader in the Conspiracy

Chen's adjusted offense level of 28 should be increased an additional four levels because he was "an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a) An application note to U.S.S.G. Section 3B1.1 provides:

> Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. . . .

U.S.S.G. § 3B1.1, cmt. 4. These factors support finding Chen was an organizer and leader.

Chen's approval of AUO's participation in the conspiracy was instrumental to the success of the conspiracy and its continuation over five years. At key meetings with other high-level executives at the start of the conspiracy, Chen approved of AUO's participation in the conspiracy and was involved in the planning and operation of the conspiracy. His stamp of approval as the top executive at AUO confirmed to the other companies that AUO was committed to the conspiracy and gave the green light to many below him at AUO to actively participate in the conspiracy to further its success. Witnesses at trial testified that in Taiwanese culture, attendance at meetings by a top executive sends the signal that the meetings are important. Trial Tr. vol. 3 at 672; Trial Tr. vol. 17 at 2987. Chen was the President of the largest of the Taiwan-based TFT-LCD manufacturers. According to trial testimony, all of the CEO meeting attendees were "quite famous in the industry." Trial Tr. vol. 7 at 1332. Had Chen disapproved and AUO not participated, the crystal conspiracy would have disintegrated.

Chen also directly participated in critical, high-level conspiracy meetings where key pricing agreements were reached. He attended at least five CEO-level crystal meetings during

the crucial early part of the conspiracy between October 2001 and December 2002. Trial Exs. 405T, 306T, 330, 449, 308T, 407T, 310T, 411T, 419T.[13]

Throughout the conspiracy, Chen communicated with AUO's conspirators one-on-one outside the crystal meetings and, as the top executive responsible for AUO's sales efforts, ensured that the illegally fixed prices were implemented and charged to AUO's customers. Trial Tr. vol. 17 at 3018, 3037. For example, in July 2004, a call was arranged between Chen and executives at LG on the subject of a "cooperation plan for preventing the recent sharp drop in price" at Dell. Trial Ex. 501T. In January 2005, Chen and Hsiung met with LG's head of TFT-LCD sales to discuss maintaining prices at Dell and HP for TFT-LCDs used in computer monitors. Trial Ex. 505T. And in June 2005, Chen and Hsiung met with him again and agreed to raise the price of TFT-LCDs used in notebook computers $10 per panel in July and August. Trial Ex. 515T ("As for NB Panel, it was agreed to increase by $10 in July and August, respectively"). A report of that meeting further states: "[m]utual collaboration on price is necessary during the period of rapid market change." *Id.*

As AUO's President and Chief Operating Officer, Chen could not have held any greater position of control or authority over other employees at AUO who participated in the conspiracy. Organizationally, all AUO employees, including defendant Hsiung and other AUO participants in the conspiracy reported either directly or indirectly to Chen. Chen blessed his subordinates' attendance at the crystal meetings, ensuring their continuing participation in the conspiracy. These subordinates dutifully provided Chen detailed written reports of the crystal meetings throughout the conspiracy. *See, e.g.*, Trial Exs. 12T, 14T, 16T.

The conspiracy also involved five or more participants. A "participant" is defined in the application notes to U.S.S.G. Section 3B1.1 as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, cmt 1. The

[13] Chen was the President and Chief Operating Officer of AUO from October of 2001 until 2007. Prior to that, he had been the President and Chief Operating Officer of Acer Display Technology, the company that merged with Unipac Optoelectronics to form AUO. For a brief period after the merger, the former Unipac executives were in charge of AUO. Thus, Chen and Hsiung did not attend the inaugural crystal meeting that took place on September 14, 2001. But as soon as Chen took over as President the very next month, he and Hsiung began attending crystal meetings.

fact that ten individuals have pled guilty to participating in the conspiracy is sufficient to show that the conspiracy in this case involved five or more participants. In addition, dozens of AUO and AUOA employees directly participated in the conspiracy by attending crystal meetings or engaging one-on-one with conspirators in Taiwan and the United States to discuss pricing. All of AUO and AUOA's participants were subordinates of Chen. He had control and authority over them and was ultimately responsible for their recruitment into the conspiracy. The four-level role-in-the-offense adjustment increases Chen's offense level from 28 to 32.

b) Chen Has Not Accepted Responsibility for Participating in the Conspiracy

Chen should receive no downward adjustment for acceptance of responsibility under U.S.S.G. Section 3E1.1 because it applies only where a defendant "clearly demonstrates acceptance of responsibility." Chen has not demonstrated any contrition or remorse for his conduct. *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) ("To receive the two-point downward adjustment, a defendant must at least show contrition or remorse."). To the contrary, Chen stated in a letter to AUO employees after conviction, "I still do not regret the decision I made at the beginning. Because it's not only for the company, but also for my personal reputation, I have chosen to fight to the end . . . My mind is full of the thought of 'Fight, keep fighting.'" Ruying Zeng, "Sentenced to Serve in Prison: Personal Letter Written in Tears by AUO Vice Chairman Exposed," Nikkei Tech on-line (April 17, 2012) available at http://www.pc.hc360.com. Declaration of Heather S. Tewksbury ("Tewksbury Decl."), Exhibit B. Any effort by Chen now, after his conviction, to claim any degree of responsibility would be untimely, given that his primary defense at trial was that he never entered into illegal agreements with his competitors to fix prices, an essential element of a Sherman Act violation. *See* U.S.S.G. § 3E1.1 cmt. n.2 ("This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."); *United States v. Schales*, 546 F.3d 965, 976 (9th Cir. 2008). Accordingly, a downward adjustment for acceptance of responsibility is not available to him.

4. Hui Hsiung's Guidelines Incarceration Range Is 121 to 151 Months

Hsiung's Total Offense Level is 32 and his Criminal History Category is I, resulting in a Guidelines prison range of 121 to 151 months:

i.	Base Offense Level (§ 2R1.1(a))	12
ii.	Volume of Affected Commerce (§ 2R1.1(b)(2)(H))	16
iii.	Total Adjusted Offense Level	28
iv.	Victim–Related Adjustments (§ 3A)	0
v.	Role in the Offense Adjustment (§ 3B1.1(a))	4
vi.	Obstruction Adjustments (§ 3C)	0
vii.	Acceptance of Responsibility (§ 3E1.1(a) and (b))	0
Total Offense Level		32

Because the statutory maximum term of incarceration for a violation of Section 1 of the Sherman Act (15 U.S.C.§ 1)—120 months—falls below the Guidelines range, the statutory maximum becomes the Guidelines sentence for Hsiung. *See* U.S.S.G. § 5G1.1(a).

Like Chen, Hsiung's Guideline fine range is one to five percent of the affected commerce done by his principal, AUO: $23.4 million to $117 million. But because the Sherman Act maximum for individuals is $1 million, 15 U.S.C. § 1, and because the government has not sought to raise the statutory maximum fine against the individuals under 18 U.S.C. § 3571(d), the maximum fine for Hsiung is $1 million. *See* U.S.S.G. § 5G1.1(a).

a) Hsiung Was an Organizer and Leader in the Conspiracy

Like Chen, Hsiung's adjusted offense level of 28 should be increased an additional four levels under U.S.S.G. Section 3B1.1(a) because he was "an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive."

Many of the same factors supporting this adjustment for Chen support the same four-level upward adjustment for Hsiung, including Hsiung's exercise of his decision-making authority to further the conspiracy, the nature of his participation in the conspiracy, his recruitment of his subordinates at AUO and AUOA to participate in the conspiracy, the significant degree of control and authority he exercised over other participants in the conspiracy, and the fact that the conspiracy involved five or more participants, including the five companies

and ten individuals who have already pled guilty. He was a senior executive at AUO and the president of AUOA. Nearly all of the dozens of AUO participants in the conspiracy, including all the participant employees of AUOA, reported either directly or indirectly to Hsiung. Like Chen, Hsiung had control and authority over these AUO and AUOA participants and was ultimately responsible for recruiting them into, and directing their participation in, the conspiracy. *See, e.g.*, Trial Exs. 15T, 34T. The four-level role-in-the-offense adjustment increases Hsiung's offense level from 28 to 32.

b) Hsiung Has Not Accepted Responsibility for Participating in the Conspiracy

Hsiung should receive no downward adjustment for acceptance of responsibility under U.S.S.G. Section 3E1.1 because that section applies only where a defendant "clearly demonstrates acceptance of responsibility." Like Chen, Hsiung has not demonstrated any contrition or remorse for his conduct. Also, like Chen, Hsiung's primary defense at trial was that he never entered into illegal agreements with his competitors to fix prices, an element of a Sherman Act violation. Therefore, any effort now, after his conviction, to claim any degree of responsibility is untimely. *See* U.S.S.G. § 3E1.1 cmt. n.2; *Schales*, 546 F.3d at 976.

V. RECOMMENDED FINE AND PRISON SENTENCES

The government requests that this Court impose the following sentences: AUO should pay a $1 billion fine; AUO and AUOA should serve a term of probation of five years and implement a comprehensive antitrust compliance program; Chen and Hsiung should each serve a sentence of 120 months incarceration and pay a $1 million fine.

Because Chen is a deportable alien who likely will be deported after imprisonment, the Guidelines recommend that no term of supervised release be imposed following any term of imprisonment. U.S.S.G. § 5D1.1(c). The government requests a term of supervised release of one to three years following any term of imprisonment for Hsiung, who has U.S. citizenship. U.S.S.G. § 5D1.2(a)(2).

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A. AUO Should Receive the Maximum Allowable Fine of $1 Billion

Because the jury found that the conspirators derived gains from the conspiracy of at least $500 million, the most the Court can fine AUO under 18 U.S.C. § 3571(d) is twice that, or $1 billion. AUO should be fined the full amount. The Court is required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant.'" *Booker*, 543 U.S. at 259 (2005) (quoting 18 U.S.C. § 3553(a)(4)(A)); *Carty*, 520 F.3d at 991 ("All sentencing proceedings are to begin by determining the applicable Guidelines range. . . . [T]he Guidelines . . . are to be kept in mind throughout the process."). Here, the Guidelines range is $936 million to $1.872 billion. Even that range is lenient because, as explained above, the volume of commerce figures are conservative and the "actual monopoly overcharge appears to be . . . substantially more" than the ten percent estimated overcharge on which the 20 percent loss figure is based, U.S.S.G. Section 2R1.1 cmt. n.3. *See supra* Sec. IV.A.2. This would normally counsel for a fine at the high end of the range, but in this case the Court is constrained by the $1 billion statutory maximum under 18 U.S.C. § 3571(d). Thus, a $1 billion fine is the maximum allowable fine.

Along with the Guidelines range, the Court must also consider the other factors set forth in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572(a). The Court need not address each factor explicitly as long as the record as a whole indicates that the Court considered the factors. *United States v. Eureka Laboratories, Inc.*, 103 F.3d 908, 913-14 (9th Cir. 1996). To the extent those factors apply here, they support the sentence recommended by the government. We address them in turn below.

1. The Nature and Circumstance of the Offense and the History and Characteristics of AUO Support the Recommended Fine

The "nature and circumstance of the offense and the history and characteristics of the defendant" support a $1 billion fine. *See* 18 U.S.C. § 3553(a)(1). Price-fixing cartels represent a frontal assault on our regime of competition, which the Supreme Court has called "the fundamental principle governing commerce in this country." *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978). Such conspiracies "have manifestly

anticompetitive effects and lack . . . any redeeming virtue." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotations and citations omitted). Price fixing is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Cartel activity is "properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition." Gregory Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 European Competition J. 19, 24 (2009). In recognition of this "profoundly harmful impact that antitrust violations have on consumers and the economy," Congress increased the criminal penalties for violation of the Sherman Act in 2004. 150 Cong. Rec. S3610-02, S3614 2004 WL 714783, *18 (statement of Sen. Hatch).

As for AUO's "history and characteristics," the company has been engaged in felonious conduct from its inception. The very month that AUO was formed, representatives of the company attended its first meeting with its competitors, where AUO's highest-level executives agreed with the other major TFT-LCD panel manufacturers to engage in a conspiracy to stabilize prices in the LCD market. AUO continued to participate in the conspiracy until its U.S. subsidiary was searched by the FBI in December 2006. Since that time, while every other conspiracy participant—Samsung, LG, CPT, CMO, and HannStar—has come forward and accepted responsibility, AUO has repeatedly and publicly refused to accept any responsibility for its participation in this scheme. From its inception to this day, AUO's corporate culture encouraged collusion, and it has not only refused to accept responsibility for its participation in this conspiracy, but it has continued to issue public statements denying its participation in this conspiracy.

2. The Recommended Sentence for AUO Would Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment for the Offense

The sentence imposed should also "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). As noted in the legislative history of the Sentencing Reform Act, this "is another way of saying

that the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense . . . ." S. Rep. No. 98-225, at 75-76 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3258-59. As noted above, this case represents the most harmful, egregious antitrust conspiracy ever prosecuted by the United States. This price-fixing conspiracy was especially reprehensible because of its nearly unprecedented scale, affecting tens of billions of dollars in U.S. commerce. The sentence recommended by the government for AUO reflects that harm and ensures that AUO is justly punished. Anything less raises the prospect that AUO will have managed to retain a portion of its ill-gotten gains.

3. The Recommended Sentence Is Necessary to Afford Adequate Deterrence

A $1 billion fine is also necessary "to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). General deterrence is "the primary goal of criminal antitrust enforcement." United States Sentencing Commission: Unpublished Public Hearings, 1986 volume, at 4 (July 15, 1986) (statement of Douglas H. Ginsburg, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice); U.S.S.G, § 2R1.1, cmt. background (1987) (stating that "general deterrence" is the "controlling consideration underlying [the Antitrust] Guideline."). The doctrine of general deterrence "boasts an impressive lineage, was long-recognized at common law, and continues to command near unanimity . . . among state and federal jurists." *United States v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985) (internal quotes omitted); *see also* S. Rep. No. 98-225, at 76 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3259 (One of the primary purposes of sentencing under the Sentencing Reform Act "is to deter others from committing the offense.").

Deterrence "is particularly important in the area of white collar crime." S. Rep. No. 98-225, at 76 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3259. "Because economic and fraud-based crimes are 'more rational, cool, and calculated than sudden crimes of passion or opportunity,' these crimes are 'prime candidate[s] for general deterrence.'" *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (quoting Stephanos Bibas, *White-Collar Plea*

Bargaining and Sentencing After Booker, 47 Wm. & Mary L. Rev. 721, 724 (2005)). And because defendants in white collar crimes "often calculate the financial gain and risk of loss," such crimes "therefore can be affected and reduced with serious punishment." *Id.* Moreover, there is no risk of over-deterrence, because antitrust cartels serve no legitimate purpose and are never efficient or otherwise socially desirable.[14] As Judge Richard Posner explained, criminal sanctions "are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it." Richard A. Posner, *An Economic Theory of Criminal Law*, 85 Colum. L. Rev. 1193, 1215 (1985).

The corporate fine in this case is capped at $1 billion by 18 U.S.C. § 3571(d), which allows for fines of twice the gain found by the jury (here, at least $500 million). The Guidelines fine range of $936 million to $1.872 billion for AUO is based on an assumed 10 percent overcharge, which is doubled and applied to the affected volume of commerce. The use of 20 percent is necessary from the standpoint of judicial efficiency, and, as explained above, there is no reason to suspect that it overstates the loss caused by AUO's conduct or the seriousness of the offense.

A fine of the magnitude recommended by the government is necessary in order to provide adequate deterrence. To have a deterrent effect, fines must be large enough that they are not merely considered a cost of doing business. *See* S. Rep. No. 98-225, at 107 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3289 ("[C]ertainly no correctional aims can be achieved where the maximum sentence imposable is set at such a low level that it can be regarded merely as a cost of doing business—a cost that may in fact be more than offset by the gain from the illegal method of doing business."). In the language of economics, "the sanctions imposed on cartel participants must produce sufficient disutility to outweigh what the participants expect to gain from the cartel activity." Werden, *Sanctioning Cartel Activity*, at 24. That many conspiracies will go

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[14] In fact, although fines of at least $100 million have been imposed on cartel participants 20 times—including a $500 million fine levied against F. Hoffman-LaRoche, Ltd. in 1999—these substantial penalties have not succeeded in deterring cartels like this one. All fines of $10 million or more for Sherman Act violations are listed on the Antitrust Division's website, http://www.justice.gov/atr/public/criminal/sherman10.pdf.

undetected must also factor into the fine calculation. To adequately deter cartel conduct, fines must be high enough to overcome the effect that the low probability of detection and successful prosecution have on predicted outcomes.[15]

4. The Recommended Sentence Does Not Result in Unwarranted Disparities

The government's recommended sentence does not create "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). To the contrary, any disparity here is fully justified by the differences between AUO and its corporate coconspirators. While this factor seeks to promote national uniformity in sentencing by treating similarly situated defendants similarly, it does not require uniformity of sentencing among co-defendants within the same case. *United States v. Green*, 592 F.3d 1057, 1072 (9th Cir. 2010); *United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007). Nor is it designed to eliminate all sentence disparities, only *unwarranted* sentence disparities. And even unwarranted disparities will "not render [defendants'] sentences unreasonable." *United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006) (stating that "the need to avoid unwarranted sentencing disparities is only one factor a district court is to consider in imposing a sentence.").

As an initial matter, the Guidelines, by linking sentences to the volume of affected commerce, capture the scope and duration of the crime and thus provide a built-in mechanism to ensure basic parity. Thus, a sentence within the Guidelines range satisfies § 3553(a)(6). As the Ninth Circuit stated in a case in which a defendant challenged his Guidelines sentence, "avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *United States v. Treadwell*, 593 F.3d 990, 1011 (9th Cir.

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[15] One recent report suggests that fines as high as $3 billion may yet be inadequate to offset the rewards of certain unlawful conduct. *See Fine and Punishment*, The Economist, July 21, 2012, at 64 (concluding, "the economics of crime suggest that fines imposed by regulators may need to rise still further if they are to offset the rewards from lawbreaking."). Tewksbury Decl., Ex. A.

2010) (internal quotations omitted); *see also United States v. Becerril-Lopez*, 541 F.3d 881, 895 (9th Cir. 2008) ("[W]e have trouble imagining why a sentence within the Guideline range would create a disparity."). Accordingly, "when a district court imposes a within-Guidelines sentence, the explanation of its decision-making process may be brief." *United States v. Carter*, 560 F.3d 1107, 1117 (9th Cir. 2009).

While other participants in the TFT-LCD conspiracy received lower sentences than those recommended here, those other sentences are inappropriate benchmarks because those other defendants are not similarly situated. *See United States v. Fernandez*, 443 F.3d 19, 32 (9th Cir. 2009) (holding that a disparity between non-similarly situated defendants is not a valid basis for a claim of error under 18 U.S.C. § 3553(a)(6)).

First, all other defendants who have been sentenced in this case pled guilty. Their sentences are inapt benchmarks for a defendant who proceeds to trial. It is axiomatic that defendants who plead guilty typically receive more lenient treatment. *Carter*, 560 F.3d at 1121 ("[T]he government may encourage plea bargains by affording leniency to those who enter pleas."); *United States v. Murphy*, 65 F.3d 758, 763 (9th Cir. 1995) ("The government may offer either reduced charges or its recommendation of a lenient sentence for the defendant to plead guilty."); *United States v. Winters*, 278 Fed. Appx. 781, 783, 2008 WL 2080732, 1 (9th Cir. 2008) (stating that a "necessary corollary of plea bargaining is that defendants who go to trial may receive greater sentences than similarly situated defendants who do not.").

The Ninth Circuit recognizes that if sentencing judges were to reduce the sentences of those found guilty at trial in an attempt to normalize them with the sentences of those who voluntarily pled guilty, it would tend to discourage the government from offering plea deals, an outcome which courts are to avoid on judicial efficiency grounds. *See United States v. Reina-Rodriguez*, 468 F.3d 1147, 1158 (9th Cir. 2006), *overruled in part on separate grounds* by *United States v. Grisel*, 488 F.3d 844, 851 (9th Cir. 2007); *United States v. Meija*, 953 F.2d 461, 468 (9th Cir. 1992); *United States v. Enrique-Munoz*, 906 F.2d 1356, 1359 (9th Cir. 1990).

Second, other corporate defendants who have pled in this case received lesser fines because they accepted responsibility for their conduct. AUO, on the other hand, is unrepentant.

A sentencing reduction based on acceptance of responsibility is not an "unwarranted disparity." *United States v. Corona-Verbera*, 509 F.3d 1105, 1120 (9th Cir. 2007) (disparity between defendant who accepted responsibility and defendant who went to trial did not render sentence unreasonable); *Winters*, 278 Fed. Appx. at 783, 2008 WL 2080732, 1 (9th Cir. 2008) (same). Downward departures for acceptance of responsibility for those who plead guilty does not infringe on the constitutional right to trial. *United States v. LaPierre*, 998 F.2d 1460, 1468 (9th Cir. 1993) ("If there is insufficient evidence to establish acceptance of responsibility, denial of a reduction is appropriate. This is so even if the lack of evidence results from the exercise of constitutional rights."); *United States v. Davis*, 960 F.2d 820, 829-30 (9th Cir. 1992); *United States v. Gonzales*, 897 F.2d 1018, 1021 (9th Cir. 1990).

Third, all other defendants sentenced in this case, unlike these defendants, cooperated with and substantially assisted the government's investigation and prosecution of the crime. They received significant downward departures from their Guidelines sentences for their cooperation. All of the others defendants sat for interviews or, in the case of corporate defendants, made employees available for interviews with the government. Those who were interviewed gave facts, provided leads, explained documents, and implicated coconspirators. Some of the cooperating defendants testified at trial. Such cooperation from cartel insiders is extraordinarily valuable in the investigation and prosecution of price-fixing conspiracies, which, by their nature, are secretive and operate in the shadows. The government relies heavily on this sort of cooperation to break up cartels, and it is worthy of the significant downward departures given by this Court. It would be inappropriate to use the sentences of the cooperating defendants as a benchmark for these defendants. Such benchmarking would be highly inequitable to the pleading defendants because it would allow these convicted defendants to derive a benefit from the timely acceptance of responsibility and valuable cooperation of the pleading defendants. "In most cases, it will be inappropriate for a sentencing court to give a non-cooperating defendant the benefit of his co-defendant's cooperation." *United States v. Caperna*, 251 F.3d 827, 831-32 (9th Cir. 2001); *Carter*, 560 F.3d at 1121 ("[A] sentencing disparity based on cooperation is not unreasonable.").

Fourth, all other defendants sentenced in this case were sentenced while the investigation was still ongoing and before the government had an opportunity to completely analyze the effect of the conspiracy. The prior sentences for both corporations and individuals were based on volume-of-affected-commerce figures estimated from the data available at the time. Since then, the government has collected additional data and retained and worked extensively with an outside economic expert. The sentences that the government now recommends for these defendants are the product of a much more complete, rigorous, and detailed calculation of the volume of affected commerce. This is an additional reason that those earlier sentences are not a valid benchmark for the defendants currently before the Court. In sum, other defendants who pled in this case are not similarly situated to AUO, and therefore their sentences cannot support any unwarranted disparity claim.

If the government is correctly reading the report of AUO's expert and the objections to the Probation Department's preliminary PSR, AUO proposes that its fine be calculated based on an overcharge of 1.89 percent rather than the 20 percent figure called for by the Guidelines and that was used for purposes of calculating the fines of those corporations that pled guilty. It then proposes that this figure be applied to a volume of commerce figure of $224 million for a fine of $4.2 million. Aside from the flaws in AUO's figures, which are dealt with elsewhere in this memorandum, the fine AUO proposes is dramatically less that that paid by the pleading companies—LG: $400 million; CMO: $220 million; CPT: $65 million; and HannStar $30 million—despite the fact that those other companies pled guilty, accepted responsibility, and cooperated with the government's investigation and prosecution. Considering AUO's circumstances, the government's recommended fine is proportionate to the fines already handed down in this case, while AUO's proposal would create a truly unwarranted disparity.

5. To Protect the Public from Further Crimes of AUO and to Provide AUO with Needed Training, AUO Should Be Placed on Five Years' Probation and Be Required to Implement an Effective Antitrust Compliance Program

The Court should consider the need for the sentence imposed "to protect the public from further crimes of the defendant" and "to provide the defendant with needed educational or . . .

other correctional treatment in the most effective manner." 18 U.S.C. §§ 3553(a)(2)(C) & (D). To satisfy these factors, the government further recommends that as part of its probation (which is mandatory in this case under U.S.S.G. Section 8D1.1(a)(3)(6)) AUO be required to hire a compliance monitor to develop and implement an effective antitrust compliance program. As set forth in more detail in section VI. below, this condition of probation is recommended under U.S.S.G. Sections 8D1.4(b)(1) & (2) and is critical for AUO, which, as noted above, has engaged in illegal conduct from its inception.

6. Restitution Is Not Necessary

The Court should consider "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). The government does not recommend restitution in this case because there are many victims and the process of determining the appropriate restitution for each would be very complex and would significantly lengthen and unduly complicate the sentencing process. U.S.S.G. § 8B1.1(b)(2). Moreover, the victims of this conspiracy are pursuing recovery for their harm through private civil actions before this Court; most have already reached settlements with AUO after conviction.

7. 18 U.S.C. § 3572(a) Factors Support the Recommended Fine for AUO

The Court should also consider in its fine determination: (1) the defendant's "income, earning capacity, and financial resources," (2) "the burden that the fine will impose on defendant" and any person financially dependent on the defendant, (3) the "pecuniary loss inflicted on others as a result of the offense," (4) "whether restitution is ordered," (5) "the need to deprive the defendant of illegally obtained gains from the offense," (6) "the costs to the government," (7) "whether defendant can pass on to the consumers" the expense of the fine, and (8) "the size of the organization and any measure taken by the organization to discipline" employees responsible for the offense "and prevent a recurrence of such offense." 18 U.S.C. § 3572(a)(1) - (8). These factors support the requested fine against AUO.

Public records show that AUO has the "income, earning capacity, and financial resources" to pay the fine recommended by the government. According to its SEC filings, AUO had net sales in 2011 of over $12.5 billion, total assets of over $19.6 billion, current assets of

over $6.6 billion, and cash or cash equivalents of approximately $3 billion. Thus, there is little question that AUO has the financial resources to pay the recommended fine, either in a lump sum or, if necessary, in installment payments. *See* U.S.S.G § 8C3.2 (b).

AUO cannot avoid a fine by claiming that the fine will impose a burden on it or persons financially dependent on it. 18 U.S.C. § 3572(a)(2). This factor does not even appear to apply to corporate fines. *Eureka Labs, Inc.*, 103 F.3d at 914 ("[T]he language of section 3572(a)(2) seems to refer to dependent family members of an *individual* defendant, not the employees of a *corporate* defendant.") (emphasis added). In any event, "[c]orporations always have employees who could be affected by the imposition of a corporate fine. This fact alone cannot allow a corporation that has engaged in illegal activity to escape paying a fine." *Id.*

AUO's offense inflicted widespread "pecuniary losses" upon others (18 U.S.C. § 3572(a)(3)) and resulted in huge "illegally obtained gains" for AUO (18 U.S.C. § 3572(a)(5)), which support the requested fine. This was a long-lasting conspiracy that victimized huge swaths of consumers and yielded significant ill-gotten gains for AUO.

If the Court imposes the term of probation requested by the government, including the compliance monitor, there will be some costs to the government (18 U.S.C. § 3553(a)(6)), which is another factor supporting the recommended fine.

AUO is unlikely to be able to "pass on to consumers" the expense of a fine (18 U.S.C. § 3572(7)). Presumably the government's prosecutions and private civil cases have resulted in a competitive market for TFT-LCD panels. In such a market, AUO would have limited ability to pass the expense of the fine on to consumers.

Lastly, AUO is a large organization which did not take any measures to discipline those responsible for the offense. 18 U.S.C. § 3572(a)(8). Indeed, it continues to employ convicted felons and indicted fugitives. H.B. Chen continues to serve as AUO's Vice-Chairman. AUO also employs indicted fugitives who continue to have a sales function within the company.

B. AUOA Should Be Put on Probation

As described at trial by AUOA's former branch manager, AUOA essentially functions as a "tentacle" of AUO in the United States. Thus, AUOA is as culpable as AUO and is deserving

of stiff punishment, and AUO could legally be held responsible for AUOA's criminal fine under an alter ego theory. But the government recognizes that AUOA has been left undercapitalized by AUO and lacks the financial ability to pay a significant criminal fine. Accordingly, the government believes that adequate deterrence, punishment, protection of the public, and education of defendant can be achieved if (1) a $1 billion criminal fine is imposed on AUO, and (2) AUO and AUOA are placed on probation and, as discussed below, required to adopt the antitrust compliance program the government proposes. Under those circumstances, the government would recommend that the Court not impose a criminal fine on AUOA. The government also recommends no restitution obligation for AUOA for the same reasons it is not necessary for AUO.

C. Chen and Hsiung Should Be Imprisoned for 120 Months and Fined $1 Million

Based on Chen and Hsiung's active leadership role in the conspiracy, their refusal to accept responsibility or show remorse, and the volume of commerce affected by this conspiracy, the Guidelines suggest a custodial sentence of between 121 and 151 months for each of them. *See* Section IV.B.3 and IV.B.4, above. Because the Sherman Act maximum falls below that range, the statutory maximum becomes the Guidelines sentence. *See* U.S.S.G. § 5G1.1(a). The Court is to give the Guidelines sentence of 120 months considerable weight. A Guidelines sentence "significantly increases the likelihood that the sentence is a reasonable one." *Rita*, 551 U.S. at 347. Any deviation outside that sentence must be "sufficiently compelling to support the degree of the variance." *Carty*, 520 F.3d at 991 (en banc) (quoting *Gall*, 552 U.S. at 50).

No departures below the Guidelines sentence of 120 months are warranted for either Chen or Hsiung. Nor do the factors under 18 U.S.C. § 3553(a) support any departure or variance below the Guidelines sentence. Rather, the sentencing factors enumerated in 18 U.S.C. § 3553(a) support a 120-month sentence.

1. The Nature and Circumstances of the Offense and History and Characteristics of Chen and Hsiung Support the Guidelines Sentences

Because violations of the antitrust laws are serious offenses, Congress increased the maximum prison terms for antitrust violators from three to ten years. Antitrust Criminal Penalty

Enhancement and Reform Act of 2004, Pub. L. 108-237 (2004). In response to the new statutory maximum, the Sentencing Commission amended the antitrust guidelines, effective November 1, 2005, by raising the base offense level for antitrust offenses from level 10 to level 12 (U.S.S.G. § 2R1.1(a)) and by increasing the volume of commerce table (U.S.S.G. § 2R1.1(b)(2)). Chen and Hsiung are the first individuals to be sentenced in a contested proceeding for participating in an international cartel under this increased penalty regime.[16]

The increased maximum sentences reflect both that criminal antitrust violations are serious, white-collar crimes like mail and wire fraud and that additional penalties are necessary to deter large-scale cartels, like this one, that affected tens of billions of dollars of commerce. Congress intended to send a message to antitrust offenders: "if they are caught they will spend much more time considering the consequences of their actions within the confinement of their prison cells." 150 Cong. Rec. H3657 (daily ed. June 2, 2004) (statement of Rep. Sensenbrenner). As Senator Kohl noted, "criminal antitrust violations, crimes such as price fixing and bid rigging, committed by business executives in a boardroom are serious offenses that steal from American consumers just as surely as does a street criminal with a gun." 150 Cong. Rec. S3610-02, S3615.

In some ways the white-collar price fixer is more blameworthy than the common criminal. White collar criminals, like Chen and Hsiung, are often in less desperate circumstances when they commit their crimes than a typical offender. When sentencing two price fixers, Judge Bennett of the Northern District of Iowa observed that a "crime of fraud by one who already has more than enough—and who cannot argue that he suffered a deprived or abusive childhood or the compulsion of an expensive addiction—is simply a crime of greed." *United States v. VandeBrake*, 771 F. Supp. 2d 961, 965, 1006 (N.D. Iowa 2011) (internal citations and quotations omitted), *aff'd*, 679 F.3d 1030 (8th Cir. 2012). And yet "[b]ecause of the nature of their crimes, white-collar offenders are uniquely positioned to elicit empathy from a sentencing court. District

[16] Because this conspiracy operated, in part, when the new Guidelines were in effect, it is governed by them. *See United States v. Portland*, 109 F.3d 534, 546 (9th Cir. 1997) ("We have also required that all continuing offenses be sentenced under one Guidelines manual: the later one."); *United States v. Bracy*, 67 F.3d 1421, 1434 (9th Cir. 1995) ("[C]ontinuing offenses, like conspiracy, which are initiated before, but not concluded until after the effective date of the Guidelines, are subject to sentencing under the Guidelines."); *accord United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1242 (D. Mont. 2006).

courts sentencing white collar criminals can more often identify with the criminal . . . . But, socioeconomic comfort with a criminal convict is not a sufficient reason to show leniency." *United States v. Edwards*, 622 F.3d 1215, 1216-17 (9th Cir. 2010) (dissent of Judges Gould, Bybee, Callahan, and Bea).

Letters attesting to Chen and Hsiung's integrity, character, and respect within the community have been submitted to the Court. But Chen and Hsiung were convicted for what they did, not who they are. They are high-level executives at a major corporation, which is ordinarily a prerequisite position to fix prices on a significant scale. As high-level executives with public profiles and significant wealth, they may have respect within the community and the means to engage in philanthropy, which is hardly unusual for persons in that position. And like the vast majority of price fixers, they have no prior criminal record. These characteristics and histories, however laudable, are shared by most price-fixing defendants. They provide no reason to depart downward from the Guideline sentences because the antitrust guideline accounts for such a typical offender. *See Carter*, 560 F.3d at 1121-22 (9th Cir. 2009) (observing that a defendant's prior history and circumstances must be so "atypical as to put [the defendant] outside the 'minerun of roughly similar' cases considered by the Sentencing Commission in formulating the Guidelines"); *see also* U.S.S.G. § 5H1.11 ("Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.").

More importantly, and ironically, their sterling reputations legitimized the conspiracy in the eyes of their subordinates and their coconspirators. Because of their positions, Chen and Hsiung had a special responsibility. They could have stood up in the group crystal meetings and said: "This is wrong. We should not be meeting in secret. We are competitors. We should be competing, not colluding." They could have rebuffed their competitor's bilateral price-fixing discussions rather than embracing them. They could have made clear that anticompetitive contacts with other panel manufacturers were not going to be tolerated at AUO. Had they chosen that path, the conspiracy would have failed. Instead, they consciously decided, over and over—from the very formation of their company until the conspiracy was detected—to cheat.

Rather than using the power of their high offices and their personal influence as well-respected industry leaders to stop the conspiracy, they used those characteristics to perpetuate and strengthen it.

2. 120-Month Sentences Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment

Chen and Hsiung were both organizers and leaders of the TFT-LCD conspiracy. Only a significant term of incarceration will constitute a just sentence for them and help engender respect for the antitrust laws and the United States criminal justice system. Indeed, if any case calls for the maximum term of imprisonment, it is this one.

In this case, Chen and Hsiung have shown no remorse for their leadership and active participation in conspiracy, nor for their approval and recruitment of subordinates into the illegal conspiracy. Also, both defendants have provided no reason to believe that they would not engage in the same illegal activity again if given the opportunity. In fact, their attempts at trial to justify their illegal activity and to claim that AUO's participation in the monthly crystal meetings actually promoted price competition show the risk that they might, in fact, commit the same crime again.

3. 120-Month Jail Terms Are Necessary to Provide Deterrence

The maximum term of incarceration for price fixing under the Guidelines was increased in 2005 to allow sentences that can deter large-scale, highly profitable cartels like this one. Evidence from this case shows the necessity of 120-month sentences here.

As noted above, the conspirators became aware of the DRAM conspiracy. Stanley Park of LG testified at trial that he even raised the DRAM investigation at a crystal meeting called by Hsiung in July 2004. Trial Tr. vol. 13 at 2241-42, 2246-48; Trial Ex. 431. And the conspirators were warned during that meeting not to "leave traces" of the conspiracy. *Id.* While the DRAM investigation was enough to make the TFT-LCD conspirators take notice and redouble their concealment efforts, it failed to deter them from their criminal conduct. The goal of deterrence is not simply to make perpetrators nervous about their criminal behavior, but to make them

abandon it. The Guidelines' combination of lengthy jail terms, fines, and probation now provide the Court with the tools necessary for real deterrence.

For wealthy corporate executives like Chen and Hsiung, significant prison sentences are an even more effective deterrent than significant fines. The legislative history of the Sentencing Reform Act notes that for white collar crimes, "the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance." S. Rep. No. 98-225, at 91-92 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3274-75. As a "very senior corporate executive" once told a top antitrust enforcer, "as long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me." Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging*, 69 Geo. Wash. L. Rev. 693, 705 (2001). Employees have been known to expose themselves and their employers to enormous risk in the pursuit of profit for the employer. The risk of incarceration will help deter such behavior.

Because of the size and scope of this conspiracy, the calculated Guidelines range is 121 to 151 months. In this case, though, the Sherman Act maximum prison term lowers the Guideline sentence to 120 months. If ever there were a case calling for the Sherman Act maximum prison term, this is it. The antitrust bar, criminal bar, and the business community have watched this case closely. A Guidelines sentence for each of these convicted felons would reverberate throughout the business world and would cause other business executives to think twice before they entered into a price-fixing conspiracy that victimized U.S. businesses and consumers.

In addition, the threat of a significant term of incarceration facilitates detection and prosecution of cartels by providing cartelists with a powerful incentive to self-report and cooperate with authorities in exchange for reduced sentences.

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4. Guideline Sentences for Chen and Hsiung Do Not Create Unwarranted Disparities

The recommended sentences would not create any unwarranted sentencing disparities. No other individual defendants have been sentenced in a contested proceeding for participating in an international cartel under the increased penalty regime. Accordingly, there are no other sentences that can be used as benchmarks.

The sentences of individuals who have pled guilty for participating in other Sherman Act conspiracies are not appropriate benchmarks. To the extent that those sentences were the result of negotiated plea agreements (representing the vast majority of Sherman Act sentences), the individuals accepted responsibility and provided assistance to the government and their situations are not comparable for all of the reasons set forth in Section V.A.(4) above.

Chen and Hsiung were leaders and organizers of the largest, most egregious antitrust conspiracy that the Department of Justice has ever prosecuted. This alone sets them apart from the defendants in other price-fixing and bid-rigging cases. The TFT-LCD conspiracy was a blatant and long-running cartel that affected products used in almost every household, business, school, and government office in the United States and ultimately victimized huge numbers of American consumers.

5. Chen and Hsiung Should Each Be Fined $1 Million

Chen and Hsiung each have a Guidelines fine range of $23.4 million to $117 million. The statutory maximum fine for individuals convicted of a Sherman Act offense, however, caps the fine at $1 million. Thus, even a fine at the statutory maximum represents a significant departure from the Guidelines fine range.

The § 3572(a) factors also support the requested fines. Both Chen and Hsiung have considerable financial resources that would allow them to pay a $1 million fine. 18 U.S.C. § 3572(a)(1). The PSRs indicate that Chen and Hsiung have cash and cash equivalents and additional unencumbered assets sufficient to pay the $1 million fine. Both Chen and Hsiung are clear examples of the Sentencing Commission's belief that "most antitrust defendants have the

resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis." U.S.S.G. § 2R1.1(c)(1) (background to application notes).

The other § 3572 factors also support the requested fines. Given their substantial wealth, and the fact that their children are adults, the fines will not impose a significant burden on them or their dependents. 18 U.S.C. § 3572(a)(2). As noted above, their offense inflicted huge pecuniary losses on others. 18 U.S.C. § 3572(a)(3). The government is not requesting restitution. 18 U.S.C. § 3572(a)(4).

VI. RECOMMENDATION FOR PROBATION AND THE APPOINTMENT OF A COMPLIANCE MONITOR

Probation is prescribed by Section 8D1.1 and is necessary "to protect the public from further crimes of the defendant" and "to provide the defendant with needed educational or . . . other correctional treatment in the most effective manner." 18 U.S.C. §§ 3553(a)(2)(C) & (D). In order to protect the public from further antitrust violations by AUO, the government urges the Court to require as a condition of probation that AUO and AUOA hire a compliance monitor to develop and implement an effective antitrust compliance program. This condition of probation is recommended by Section 8D1.4(b)(1) and (2) and is critical for AUO and AUOA.

A. The Guidelines Support Placing AUO on Probation

The Guidelines set forth the circumstances under which probation "shall" be ordered. U.S.S.G. § 8D1.1(a). Several of the circumstances mandating probation are present here. First, AUO has more than 50 employees and clearly does not have an effective antitrust compliance program, mandating probation under U.S.S.G. Section 8D1.1(a)(3). While AUO apparently claims to have adopted (or to be in the process of developing) such a program, it is not effective. The company refuses to recognize the illegality of its conduct even after being convicted. Thus, whatever its antitrust compliance program might include, it apparently does not condemn the very conduct at issue here. AUO joined the conspiracy from the very beginning of its existence, has no history of lawful conduct or antitrust compliance, continues to employ convicted price fixers and indicted fugitives, some of whom are still employed as leaders of the company, and has made public statements in defiance of the Court's jurisdiction and the jury's

verdict in this case. Probation is necessary to ensure that changes are made to the corporate culture and operations of AUO to reduce the likelihood of future criminal conduct. *See* U.S.S.G. § 8D1.1(a)(6). Absent such a change, there is a meaningful risk that AUO and its many affiliated companies, including those involved in burgeoning industries such as the solar industry, will continue AUO's normal (and illegal) course of conduct.

B. AUO Should Be Required to Retain a Compliance Monitor and Develop an Effective Antitrust Compliance Program

When a convicted company is placed on probation, one of the recommended conditions is to require it to develop an effective compliance and ethics program and then notify its employees and shareholders about that program. U.S.S.G. § 8D1.4(b)(1) and (2). Rarely has a company needed an effective antitrust compliance program as much as AUO.

AUO was founded by a merger in September 2001, and AUO and its coconspirators started the TFT-LCD conspiracy that very same month. So, from its very inception, AUO's standard operating procedure has been collusion. AUO has never known any other way of doing business and has never willingly operated lawfully. That being the case, one cannot expect AUO to reinvent itself and begin to operate legitimately for the first time in its existence on its own, especially when it maintains to this day that it has done nothing wrong. A new corporate culture must be created, and AUO has neither the will nor the experience to institute these new business practices on its own. More importantly, AUO's defiant public statements demonstrate that the company has no intention or motivation to do so. While all of the other corporate conspirators recognized the illegality of their conduct and accepted responsibility for their participation in the illegal scheme, AUO refuses even to acknowledge that its participation in that same scheme is, or should be, illegal. As a result, there is no reason to assume that its conviction and the imposition of a criminal fine, alone, will cause AUO to cease engaging in collusive practices.

For this reason, U.S.S.G Section 8D1.4(b)(1) and (2) recommends that convicted companies be required to adopt an effective corporate compliance and ethics program. The government has proposed the elements for a comprehensive antitrust compliance program

consistent with those described in U.S.S.G. Section 8B2.1 that it recommends be imposed on AUO. Tewksbury Decl., Ex. C.

AUO cannot be expected to develop and implement an effective compliance program. Nor should the Court or the Probation Office be expected to do so. Accordingly, the government recommends that AUO be required to hire (at its own expense) an experienced, independent antitrust attorney as a compliance monitor to review its current compliance program and to ensure that AUO develops a program containing the recommended elements. This is the most reasonable, efficient, and effective way to accomplish the vital task of creating a legitimate, non-criminal business culture at AUO for the first time and thereby create a foundation for good corporate citizenship and a necessary safeguard against future collusion.

Requiring a compliance program will require some involvement by the Probation Office in the appointment of a compliance monitor, but thereafter would require minimal oversight by the Probation Office and actually relieve the Probation Office of much of the burden of directly monitoring AUO during the probation period. The appointment of compliance monitors to develop and implement compliance programs for companies engaged in illegal conduct is commonly required by the Department of Justice in deferred prosecution agreements, and the same considerations support that process here. *See also* U.S.S.G. §§ 8B2.1, 8D1.4(b)(1),(2).

C. AUOA Should Also Be Placed on Probation and Required to Appoint a Compliance Monitor to Develop an Effective Antitrust Compliance Program

The government recommends that this Court sentence AUOA to five years of probation conditioned on the same requirement that it implement a comprehensive antitrust compliance program. The probation is prescribed by U.S.S.G. Section 8D1.1(a)(6),(7). AUOA was engaged in this conspiracy for much of its existence, had no antitrust compliance program whatsoever during the relevant period, has an inherent business culture of collusion, and needs the oversight of probation to ensure that changes are made within the organization to prevent future criminal conduct. Certainly, AUOA cannot look to its parent, AUO, for lessons in how to conduct its operations lawfully. Moreover, nothing in its post-conviction conduct or statements suggests

that AUOA recognizes the seriousness and unlawful nature of its conduct or that it plans to change the way it conducts business.

More importantly, because AUOA cannot pay a significant criminal fine due to the way in which AUO and AUOA have structured their business operations, the imposition of probation, the retention of a compliance monitor, and the development and implementation of an effective antitrust compliance program are important for changing AUOA's corporate culture and preventing future misconduct. The government believes that applying the same compliance program to AUOA as recommended for AUO is sufficient. It also believes that appointing the same monitor for AUOA would be the most efficient use of resources, and would further ease the burden on the Probation Office by having only one monitor responsible for reporting to the Probation Office.

D. Additional Conditions of Probation

In addition to being required to retain a compliance monitor to develop and implement an effective antitrust compliance program, AUO should be required to print advertisements of at least one full page in size in three major trade publications in the United States and three major trade publications in Taiwan containing the information required by U.S.S.G. Section 8D1.4(a). This public acknowledgment of its conviction and punishment and the remedial steps the company has taken as a result of its conviction is necessary because, to date, AUO's public statements have been recalcitrant and have displayed a complete refusal to take responsibility for its criminal conduct.

Also, if the Court permits AUO to pay its criminal fine in installments pursuant to U.S.S.G Section 8C3.2(b), the company should be required to comply with the financial reporting and examination requirements of U.S.S.G. Section 8D1.4(b)(3)-(5).

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VII. CONCLUSION

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

Dated: September 11, 2012

Respectfully submitted,

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