AUO IN THE DOCK: WATERSHED EVENT, BUSINESS AS USUAL, OR BOTH? *A ROUNDTABLE*

Views From Observers Jim McGinnis and Thomas Mueller
Moderated by Thomas Dahdouh★

I. Introduction

The year 2012 saw the DOJ Antitrust Division's San Francisco Field Office try a criminal complaint alleging price fixing of thin-film transistor liquid crystal display panels by multiple defendants participating in an international cartel. U.S. District Judge Susan Illston of the Northern District of California presided over the eight-week jury trial. The trial was a watershed matter that will have implications for criminal antitrust enforcement for years to come. In securing convictions against two companies and ultimately three individual defendants, the DOJ's prosecution raised important issues that will resonate through future criminal antitrust trials.

On March 13, 2012, the jury convicted Taiwan-based AU Optronics Corporation ("AUO"), its U.S. subsidiary, and two of its senior executives, former AUO President Hsuan Bin Chen and former Executive Vice President Hui Hsiung.[1] The jury hung as to a third individual defendant, Sui Lung Leung, AUO's former Senior Manager of its Desktop Display Business Group. He was retried and convicted in the Fall. The jury exonerated two other AUO executives—Lai-Juh Chen, former director of the Desktop Display Business Group, and Tsannrong Lee, former Senior Manager of the Notebooks Business Group.

The government's case, as set forth in the indictment, charged that AUO was involved in a world-wide price-fixing scheme for more than five years, from September 14, 2001 to December 1, 2006. Its subsidiary allegedly joined the conspiracy as early as 2003. The jury found that the corporations and the three individuals they convicted fixed the prices of LCD panels sold in the United States. The defendants collaborated in their scheme, the government alleged, during 60 or more secret monthly meetings held in hotel conference rooms, karaoke bars, and tea rooms in Taiwan.

The meetings, dubbed "Crystal Meetings," started in a hotel room in Taipei, Taiwan.[2] By May 2005, the defendants suspected that some of their customers might have found out about the meetings and took precautions to avoid detection. They decided that senior executives should no longer attend the Crystal Meetings and directed subordinates to attend in their stead. They also moved the meetings from hotel rooms to more discreet

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★ Assistant Regional Director, Western Region—San Francisco office, Federal Trade Commission. The moderator and panelists would like to thank Kenneth R. O'Rourke of O'Melveny & Myers LLP and Niall Lynch of Latham & Watkins LLP for their extensive help.

1 The jury verdict form is reprinted in its entirety at the end of this Roundtable.

2 Superseding Indictment, *United States. v. AU Optronics*, No. CR-09-0110, ¶ 17 (N.D. Cal. Mar. 13, 2012), 2010 WL 5641429.

locations such as restaurants and cafes.[3] As concern about detection grew in 2006, the defendants decided to no longer meet as a group and instead to operate in a "round robin" fashion.[4] Representatives would meet with one another one-on-one and take the exchanged information to the next meeting. Through these "round-robin" meetings, the shipping, production, and price information would be shared among the group.

In its defense, AUO argued that it was simply meeting to compete better and gain a competitive advantage, not to fix or set prices. AUO's counsel later argued there had been no gains for AUO largely because AUO had been bluffing its competitors at the Crystal Meetings, and, instead of aligning its prices with its competitors, AUO actually set its prices below the prices discussed. Thus, counsel argued, AUO had not conspired with its competitors but had used information from the Crystal Meetings to gain a competitive advantage over them. One defense counsel put it this way in his opening statement: AUO had "to meet to compete."

This trial was part of an extensive DOJ investigation into the TFT-LCD industry. LCD panels are used in computer monitors, laptops, televisions, and other electronic devices. The world market for LCD panels was $70 billion annually by the end of the conspiracy. The price-fixing scheme allegedly took advantage of some of the largest computer manufacturers in the world, including Hewlett-Packard, Dell, and Apple.

The Antitrust Division's investigation focused on many of the world's leading panel makers, including AUO, Samsung Electronics Co. Ltd, LG Display Co. Ltd, Sharp Corp, Chunghwa Picture Tubes Ltd., Chi Mei Optoelectronics, and HannStar Display Corp. Samsung apparently triggered the investigation in 2006 by informing the DOJ about the price-fixing conspiracy.[5] Samsung was granted conditional leniency, requiring it to cooperate with the prosecution of AUO.[6] Many of the defendants chose to settle, agreeing to pay large fines and serve prison sentences. In late 2008, LG Philips, Sharp, and Chunghwa all agreed to plead guilty and to pay a total of $585 million in fines. An LG executive and three Chunghwa executives later agreed to plead guilty, to serve prison sentences ranging from six to nine months, and to pay a total of $125,000 in fines. Similarly, in December 2009, Chi Mei agreed to plead guilty, pay $220 million in fines, and cooperate with the Antitrust Division's investigation. In April 2010, two Chi Mei executives agreed to plead guilty, serve eight and fourteen months in prison respectively, pay a total of $75,000 in fines, and assist the DOJ with its investigation. In June 2010, HannStar agreed to plead guilty and pay a $30 million fine.

As a result of the conviction, AUO and its U.S. subsidiary were ordered, on September 20, 2012, to pay a $500 million criminal fine—a sum that equals the largest fine imposed against a company for violations of the U.S. antitrust laws. Chen and Hsuing were each sentenced to serve three years in prison and to pay $200,000 each in

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3 *Id.* at ¶ 17(h) and (i).

4 *Id.* at ¶ 17 (i).

5 United States' Trial Memorandum, *AU Optronics Corp.*, No. CR-09-0110, *filed* December 9, 2011, at 1 n.2.

6 Motion in Limine #4, *AU Optronics*, No. CR-09-0110 (N.D. Cal. Mar. 13, 2012), 2011 WL 7400777

criminal fines. The ongoing investigation has resulted in guilty pleas or convictions for eight companies that have been sentenced to pay more than $1.39 billion in fines.

In a historic first, the Division successfully litigated its position that, even though the maximum statutory fine under the Sherman Act is $100 million, that ceiling could be raised in appropriate cases to up to twice the gross gain to the cartel or twice the gross loss suffered by the victims. The Division has used the alternative fine provisions, 18 U.S.C. § 3571(d), to justify negotiated fines in plea agreements above $100 million, but this is the first time the Division has litigated the matter since the Supreme Court's ruling in *Booker*.[7] Importantly, the Judge ruled that while the appropriate measure of gain (or loss) would look to the entirety of the conspiracy, rather than just the defendant's customers, the DOJ would need to prove the amount of gross gains or losses to the jury beyond a reasonable doubt—a daunting standard that some observers felt might doom the Division's efforts. But the Division met the challenge: it successfully proved to a jury beyond a reasonable doubt that the gross gain from the price-fixing conspiracy was at least $500 million.

The trial also offered an opportunity to test the contours of the Sherman Act's reach over foreign conduct as codified by Congress in the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA).[8] Hardly a model of statutory draftsmanship, the FTAIA has been the battleground for many antitrust cases for conduct that occurs in whole or in part outside the country. In this case, Judge Illston ruled against a defense effort to dismiss the indictment because of failure to meet the requirements of the FTAIA.[9] Judge Illston found that the indictment met the FTAIA test because it (1) sufficiently alleged that the unlawful conduct affected the importation of TFT-LCD products into the United States and (2) that the alleged conspiracy involved conduct that occurred, at least in part, in the United States.[10] AUO had allegedly instructed its United States subsidiary to contact competitors to exchange price information and also sent such information gleaned from competitors to its U.S. subsidiary. The issues around FTAIA continue to advance, however. A recent *en banc* opinion by Judge Wood in *Minn-Chem v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012), shows that FTAIA issues will continue to predominate where antitrust violations involve foreign conduct.

Our illustrious panel consists of:

- **James McGinnis** of Sheppard Mullin's San Francisco office. Mr. McGinnis is an accomplished trial lawyer and has extensive first chair jury trial experience in complex civil and criminal matters and major mass tort cases. In over 30 years of practice, Mr. McGinnis has tried 40 cases, 22 of which were trials in state or federal court. Formerly an Assistant United States Attorney, Mr. McGinnis's practice now focuses on the criminal and civil

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7 *See United States v. O'Hara*, 1991 U.S. Dist. LEXIS 21724 at *3 (rejecting alternative fine request); *United States v. Andreas*, 1999 U.S. Dist. LEXIS 9655, at *14 (N.D. Ill. June 2, 1999).

8 15 U.S.C. § 6a.

9 Order Denying Motion to Dismiss Indictment, *AU Optronics,* No. CR-09-0110 (N.D. Cal. Mar. 12, 2012), 2011 WL 1464858.

10 *Id.* at *5.

aspects of international cartel cases. He has been recognized by Chambers & Partners, Best Lawyers in America and other peer reviewed publications.

- **Thomas Mueller** of WilmerHale's Washington, D.C. office. Thomas Mueller is co-chair of WilmerHale's Antitrust and Competition Practice Group. Mr. Mueller's antitrust practice focuses on global cartel enforcement matters. Having practiced both in Brussels and Washington, Mr. Mueller has insight into antitrust issues on both sides of the Atlantic and has helped steer clients through the difficulties and opportunities created by the closer cooperation between the U.S. and EU authorities.

- **Thomas Dahdouh**, Assistant Regional Director of the FTC's San Francisco office, moderated this discussion. This discussion builds upon the recent panel discussion at the Antitrust Section's 2012 Golden State Institute in San Francisco at which Mr. Mueller was joined by the DOJ's Heather Steiner Tewksbury and Brian H. Getz, two of the lawyers who tried the AUO case (Ms. Tewksbury for the Government and Mr. Getz for Lai-Juh Chen, whom the jury acquitted).[11] The panel discussion can be accessed on-line by following the instructions for watching streaming audio and video at http://antitrust.calbar.ca.gov/Education.aspx.

II. Panel Discussion
Deciding to Fight Rather Than Settle

Moderator: *As a publicly-traded company, AU Optronics' decision to take the case to trial is highly unusual. Indeed, this appears to be the first time a corporation has fought the DOJ Antitrust Division through trial in an international cartel case since Nippon Paper did so back in the late 1990s. What factors go into a company's decision to take a criminal price-fixing case to trial? Why do you think AU Optronics was willing to roll the dice?*

Mueller: The decision whether to go to trial is fundamentally a risk analysis dependent mostly on a company's tolerance for risk. On the one hand—the AU Optronics case notwithstanding—it is difficult for the government to prove all of the elements of an antitrust case at trial, and so, if the case is a close one, the company may well win.

On the other hand, taking a case to trial is a multi-year commitment of the company's financial and human resources and can be a major distraction from its business, including producing unwelcome negative publicity. A loss at trial may result in the imposition of greater penalties for the company.

Not surprisingly, even when the case against them has clear weaknesses, many companies prefer to avoid the time, expense, and distraction of going to trial by choosing the certainty and quick resolution of a plea agreement.

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11 Kenneth R. O'Rourke of O'Melveny & Myers LLP moderated the panel discussion and assisted with the preparation of this article.

Beyond a pure risk analysis, another factor that may affect a company's decision whether to go to trial is the company's relationship with any employees who are being prosecuted. Some companies will choose to go to trial to support employees who face individual charges rather than enter a plea agreement that may require the company to cooperate with the government against an individual employee's interests.

McGinnis: I suspect that the DOJ, and possibly others, do not fully realize the extent to which some companies truly do not think they have done anything wrong, even when to others the evidence of price fixing is overwhelming. Deeply embedded in some executives' mindset is a famous quotation from the Chinese general, Sun Tzu, that says in essence "know your enemy and you have nothing to fear from a thousand battles." Therefore, meeting with competitors can be part of the battle, not collusion. In this case, AUO has made many strong public statements of innocence that are consistent with that belief.

Mueller: It is important to note that the risk calculus may change as time passes. As the government's investigation progresses and begins to focus on companies like AUO that have not pled, it may stiffen its financial demands for settlement and will increasingly focus on maximizing its chance of success (both in terms of getting a conviction and a high fine) against those hold-outs, including their executives.

Even then, the government will usually remain open to a plea deal for the company at a substantial discount to the amount it would seek at trial. But while the company may not have to pay much more for the delay, the longer the company waits to settle, the more attention the government will focus on individual employees and the more individual employees are likely to be prosecuted.

III. Willingness of Foreign Nationals to Appear in U.S. Courts

Moderator: *Since the U.S. does not have an extradition treaty with Taiwan, the individual defendants could have remained in Taiwan and escaped prosecution in the U.S., as several other Taiwanese executives did in the TFT-LCD investigation. Why do you think the executives were willing to come to the U.S. to face charges at trial?*

Mueller: Individual antitrust defendants who live abroad in countries that do not have well-established extradition for antitrust crimes have a difficult decision to make. If the individual remains in his home country and does not cooperate with authorities, he risks indictment. Because the indictment may be under seal, he may have no certainty when the statute of limitation lapses. He will become a fugitive and the risk of an Interpol red notice and accompanying border checks will significantly limit his ability to travel. Given that many individual antitrust defendants are business executives whose careers require significant amounts of international travel, deciding not to come to the U.S. to answer charges could be a career-limiting or career-ending decision. Consequently, for young executives and those with families, life as a fugitive is often not a reasonable option. Beyond these practical concerns, many individuals choose to come to the U.S. and stand trial simply because they want to clear their names or, if they choose to plead guilty or are convicted at trial, to serve their time and get on with their lives.

McGinnis: I agree with Thomas' assessment. Especially for a younger executive, the "carrot" is the ability to get on with their lives and careers after going to trial or

having to serve jail time. In the U.S., a felony conviction is a career killer. That is not necessarily so for some companies in Asia. Inability to travel, however, probably would be a career killer.

Moderator: *After filing the indictment, the executives from AUO traveled from Taiwan and voluntarily appeared in court to face the charges. The DOJ then filed a motion to require the executives to remain in the Northern District of California pending trial, which the court granted. Is this typical, or does this represent a more aggressive approach by the Antitrust Division? How would you advise your clients in the future to avoid this predicament, if possible?*

McGinnis: I expect this approach will be typical. The Division, however, does have an interest in having individuals appear for trial, rather than remain fugitives, so I think there will be room in some cases for individuals to negotiate conditions of release that allow international travel. Further, the Division stipulated to allow occasional travel in this case for reasons that appeared compelling, such as serious family health issues. These kinds of determinations of course are highly fact and individual specific.

Mueller: I agree that it is typical, but it is not good policy. The Division should make trials more accessible and pretrial "detention" in a foreign country is a huge impediment to foreign executives voluntarily coming to the United States to stand trial.

Indictments against executives who elect to remain undisturbed in their home countries are simply not as meaningful for deterrence as trials (even if they result in acquittals). The trials create publicity and send the message that executives are not beyond the reach of U.S. law. Foreign executives thinking about engaging in price fixing will likely recall a countryman who stood trial and faced possible jail time (even if he beat the charge). He will not know that a countryman is likely curtailing his foreign travel for fear of extradition.

As the number of indictments of foreign executives pile up, the Division and defense counsel would be well advised to follow the model allowed by one judge in an air cargo prosecution. In *United States v. Ogiermann*,[12] the executives petitioned the court, before appearing in the United States, to guarantee them the right to return during the pre-trial proceedings to Luxembourg, which does not extradite for antitrust crimes. The *Ogiermann* court rejected the Division's objections to the request, even though it recognized a legitimate flight risk, and allowed the executives to return to Luxembourg until a month before trial. The court concluded that the defendants' self-interest in having the matter resolved so they could continue their employment and travel without fear of being arrested and extradited outweighed the benefits of hiding in Luxembourg. Because of the court's ruling, the executives voluntarily appeared to answer the charges and then went back to their work in Luxembourg. Then, as ordered, a month before trial, the executives returned to the U.S. and chose at that time to plead guilty rather than go to trial. The process was fair and beneficial both to the accused and to the government.

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12 Order Setting Conditions of Pretrial Release, *United States v. Ulrich Ogiermann and Robert Van de Weg*, Case 0:10-cr-80157-KAM (S.D. Fla. January 26, 2011), ECF No. 25.

IV. Trying a Criminal Case with Multiple Defendants

Moderator: *The DOJ indicted AUO, AUO America, and five separate executives. With seven defendants, how did this affect the trial proceedings? Did it work to the defendants' or the DOJ's advantage?*

Mueller: There are benefits and challenges for both the Division and the defendants in a multi-defendant trial. Prosecuting the company and individual employees in the same trial allows the government to construct a more powerful "big picture" narrative by showing the jury how the alleged conspiracy was implemented by the company. However, more defendants complicate the trial and prosecutors must be careful that, in addition to sketching out the big picture, they provide sufficient evidence to prove their case against each defendant. At the same time, each defendant can exploit the added complexity of a multi-defendant trial by pointing out the gaps in the government's case against him individually.

There may also be some specific benefit to lower-ranking employee defendants who are tried along with their bosses, as juries seem less willing to convict employees who merely implemented a conspiracy hatched by their bosses.

McGinnis: As a former Assistant United States Attorney, I think charging decisions often are among the most difficult judgment that a prosecutor has to make. While all prosecutors love the possibilities for bad evidence against one defendant spilling over to another—though they will rarely say so—it can be a very sharp two-edged sword, especially when there are clear differences in culpability or the strength of the evidence. As Thomas says, juries may draw distinctions between more and less culpable defendants and between senior executives and subordinates. Further, if the trial begins to prove unexpectedly challenging for the prosecution, there is an almost irresistible hydraulic pressure to concentrate on the more serious defendants. As prosecutors begin to fear that there may be acquittals, the response may be to do everything possible to make sure that the most serious targets are convicted. That can result in a failure to put in enough evidence and make strong enough arguments against the lower-level defendants—with a resulting mix of convictions and acquittals. Here, I speak from personal experience!

V. Use of Plea Agreements in Criminal Trials

Moderator: *The TFT-LCD case was one of the most successful investigations and prosecutions by the Antitrust Division, with numerous companies and individuals pleading guilty prior to trial. However, most of the plea agreements did not come into evidence during the trial. Under what circumstances are company or individual plea agreements likely to be admitted in a criminal trial, and what impact did the few plea agreements that did come in have on the trial?*

Mueller: Guilty pleas, non-prosecution agreements, and leniency letters often come into evidence in antitrust prosecutions to impeach government witnesses. If the government is relying on witnesses from the leniency defendant, those witnesses may have avoided jail time by cooperating with the government and offering to testify against the defendant on trial. Juries tend to be suspicious of these witnesses' motivations and generally do not trust witnesses who have clear motives in their testimony. In the AUO Optronics case, however, the government did not rely on any witnesses from the leniency defendant, Samsung, and much of the most persuasive and moving testimony against

the AUO defendants came from executives who served substantial amounts of jail time. Because they had served time as part of their pleas, their plea agreements made weak impeachment evidence. Moreover, introduction of many guilty pleas as impeachment evidence could have backfired against the defendants by suggesting to the jury that there was something to the government's allegations of a wide-ranging conspiracy.

McGinnis: When guilty pleas are admitted to show witness bias, the prosecution typically will try very hard to mention pleas at their first opportunity. As early as their first trial training, prosecutors are taught to be the first to mention anything that is arguably damaging and will be trumpeted by the defense. So the jury will hear from the prosecution about pleas as early as the opening statement, if not in voir dire, and they will be mentioned on direct examination, too.

Here, as with much else in the trial, the pleas were a double-edged sword. Moving well beyond impeachment, the defense did an outstanding job of using the pleas to emphasize the extent of the punishment that their clients were likely to suffer if convicted of a crime they did not know they were committing. The latter point came in through testimony that competitor meetings are widely understood to be permissible in Taiwan. At the same time, it was clear that many different people from different companies had agreed that there was a conspiracy.

Finally, the effect on the judge cannot be discounted. A judge who has taken a dozen or more guilty pleas might well come to the trial with opinions about what the evidence shows.

VI. Upping Fines in Criminal Antitrust Matters

Moderator: *One of the most significant aspects of the AUO trial was the government's decision to plead and prove a $500 million overcharge, which allowed the court to fine the company up to $1 billion (although the Court ultimately settled on a $500 million fine). Can you please explain the significance of this, and why it was so important for the Antitrust Division?*

McGinnis: I think this is highly significant because the Division wants to maintain the threat of using the alternative fine statute rather than the Sherman Act's current maximum fine of $100 million. Given the size of many of the markets involved, there is the potential for fines far in excess of the statutory maximum. The Division wants that increased exposure to be front and center in the cost-benefit analyses of targets and their counsel as to whether pleas should be entered.

Mueller: It was critical for the Division to prove this element. At least in recent memory, I can think of only one case in which a defendant capped its negotiated fine to the statutory limit. If the Division had failed to prove gain or loss to obtain an enhanced penalty here, the Division would have had difficulty extracting lofty fines in plea negotiations. As a general matter, it was important that the Division show that it could use economic evidence to persuade a jury that the conspiracy caused such a significant amount of harm "beyond a reasonable doubt." Many people, defense counsel especially, were skeptical that economic analysis, so reliant on assumptions and competing models, could satisfy such a high burden of proof. While the huge market size made this a good case for the government to attempt to prove large damages, the market was also

characterized by declining prices throughout the conspiracy, with no clear spike in prices like those present in the Vitamins conspiracy.[13]

McGinnis: Let me add one more point. In this case, both the government and the defense had difficult decisions to make about the economic testimony. The government chose to offer testimony that the conspiracy resulted in prices above competitive levels, and that the gain was far above $500 million. The defense, by contrast, focused on trying to show that the actual prices were lower than the "target prices" discussed at meetings. In effect, the defense was trying to prove through economic evidence that the defendants had not come to an unlawful agreement on price. The defense may well have thought that this aggressive position was necessary because the crime of price fixing is complete once the agreement is made. Issues critical to civil cases—impact and damages—are not elements of the crime. In the end, the jury apparently found that the defendants at least agreed to stabilize or raise prices and that it was not necessary for the government to show that there were agreements for specific prices.

I expect that the use of economists will continue to be a challenging and important issue in these kinds of cases.

Moderator: *Since this was the first time the Antitrust Division charged and proved, beyond a reasonable doubt, an overcharge under 18 U.S.C. § 3571, Judge Illston had to resolve a number of issues of first impression, including which sales should be included in deciding the overcharge. In her pretrial rulings, she held that the sales of all of the conspirators, and not just AUO's, should be included. She also ruled that certain indirect sales including "finished products" should be included in the overcharge analysis. What is the significance of her rulings on this issue, and do you think they are susceptible to reversal on appeal?*

McGinnis: Judge Illston made three key pretrial rulings regarding the application of the alternative fine statute, which allows the Division to seek a maximum fine of twice the gross "pecuniary gain" (or loss) that resulted from the charged offense. First, she ruled that the relevant pecuniary gain is limited to that resulting from the conspiracy's "effects on the United States," rejecting the Division's argument that the gain calculation should include revenue from all affected sales worldwide. The Division's view was that the "offense" charged in an international price-fixing case is the entire global conspiracy, and therefore all of the gain resulting from the conspiracy should be considered when calculating the alternative maximum fine. Judge Illston disagreed, holding that the charged offense was "the conspiracy to fix prices of TFT-LCD panels within the United States."

Second, Judge Illston ruled that the gain should be measured as that flowing to all conspirators jointly, rather than the gain realized by AUO alone. Given the overall size of the LCD market and the number of alleged co-conspirators, this ruling significantly increased AUO's potential maximum fine under the alternative fine statute, which likely would have been in the billions. Nevertheless, the Division elected to charge and prove

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13 Over a number of years, the Antitrust Division prosecuted over 30 cases and gathered nearly a billion dollars in criminal fines relating to the international vitamin cartel. For a listing of corporate fines imposed against corporate vitamin cartel participants, *see* Antitrust Division Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, *available at* http://www.justice.gov/atr/public/criminal/sherman10.htm. *See also United States v. BASF Aktiengesellschaft*, Crim. No. 3:99-CR-200-R (N.D. Tex. May 20, 1999).

a pecuniary gain of "at least $500 million," for a total maximum fine of $1 billion. This choice probably stemmed at least in part from the previous plea agreements and fines—the largest of which was $400 million. The Division may have felt that seeking a larger fine would have given the appearance of punishing AUO for going to trial—an argument eventually pressed very hard by the defendants at the time of sentencing.

Finally, Judge Illston ruled that the gain could include not only revenue from allegedly price-fixed LCD panels but also revenue from finished products containing those panels. This appeared to mean that the "gain" calculation could include revenues from LCD panels (even if foreign-sold) that were later incorporated into finished products sold in the United States, as well as revenues from the co-conspirators' own sales of finished products to U.S. customers. This position probably reflects the Division's oft-repeated concern for U.S. consumers.

VII. FTAIA

Moderator: *The FTAIA played a significant role in the case. Can you please describe the significance of this issue and how it played out in the Court's pre-trial rulings and in the jury instructions?*

McGinnis: While this is not the first time the FTAIA has been at issue in a criminal context, the statute did feature very prominently in this case. AUO filed a pretrial motion to dismiss the indictment on FTAIA grounds, arguing that the indictment failed to adequately allege the Court's subject matter jurisdiction over AUO's foreign conduct. Judge Illston denied the motion, ruling that at least part of the alleged conspiracy involved "import commerce" as required by the FTAIA, and holding that "an indictment alleging a combination of domestic and foreign conduct . . . adequately states a criminal violation of the Sherman Act."

The parties also disagreed on how the FTAIA should be incorporated into the jury instructions, with the Court ultimately adopting the Division's proposed instruction. The instruction included the FTAIA's "import commerce" and "domestic effect" prongs as an additional element of a violation of Section 1 of the Sherman Act. Traditionally, such a violation has been understood as consisting of only three elements—that the alleged conspiracy existed, that the defendant was a member, and that the conspiracy involved interstate commerce. Here, for perhaps the first time, Judge Illston included the FTAIA's requirements as an additional element of the offense that the Division must charge and prove. Given that so many consumer products are manufactured offshore, this is yet another critical legal issue. Judge Illston and the Division may have believed that, to a degree, discretion was the better part of valor. Adding this element of proof might make the verdict more defensible on appeal.

Mueller: In my view, the most difficult question the FTAIA raises is, at what point do purely foreign conduct and indirect commerce have a substantial and reasonably foreseeable effect on U.S. commerce such that there is a violation of the Sherman Act? The answer to that question will define the extraterritorial reach of U.S. antitrust law. Ultimately, the result in the AUO trial did not turn on this difficult issue because the conspiracy involved domestic conduct—a point the judge gave significant weight to in

her initial FTAIA rulings—and because the jury found that there was direct import commerce.

One thing struck me from the trial and the jury instructions. We lawyers and our clients spend so much time and money arguing about the meaning of "directness" in the FTAIA—the briefing on these issues is enormous in motions to dismiss and for summary judgment. But if the issue ever gets to a jury, then we leave the question up to a lay jury to decide with very little guidance at all as to its meaning. The jury instructions did little more than quote from the opaque language of the FTAIA.

I think that there will continue to be significant litigation over the FTAIA in both the civil and criminal contexts and that the Supreme Court will have to give its view on what limits the FTAIA places on the extraterritorial application of the Sherman Act.

VIII. Representing a Corporate Defendant

Moderator: *The jury convicted both AUO and AUO America. What lessons can be learned from the AUO case regarding the challenges and opportunities of representing a company in a criminal antitrust trial?*

Mueller: It is harder to defend a corporation than an individual defendant in an antitrust prosecution. Both the Division and jurors think of price-fixing and other anticompetitive conduct as corporate crimes because the benefits of the crimes flow to the corporate entity rather than the individual. Because no one is going to jail, juries are also more willing to find a corporation guilty beyond a reasonable doubt.

The result in AUO shows that, when there is evidence of a series of meetings between competitors where price is discussed, juries are likely to conclude that the companies were reaching an agreement on price.

McGinnis: I agree that the company is probably the easiest target. At the same time, however, the DOJ is firmly of the view that deterrence comes from sending individuals—especially high-level individuals—to jail. I would be surprised if we ever found the Division trying a case solely against a corporation. To the contrary, their program is to send individuals to jail for longer and longer prison terms.

IX. Representing an Individual Defendant

Moderator: *The jury convicted the two most senior executives and acquitted two other individuals and hung on a third. What lessons can be gleaned from this case regarding the challenges and opportunities of representing an individual in a criminal antitrust case?*

Mueller: When prosecuting a multi-defendant trial, it is difficult for the government to make sure they have presented adequate testimony against each individual defendant and persuaded the jury of each defendant's culpability. A jury considering the guilt of several individual defendants may have a tendency to compromise and differentiate culpability based on each defendant's level of responsibility and involvement in the conspiracy. Jurors tend to sympathize with lower-level employees who did not show any initiative in the conspiracy, but instead just did what their bosses told them to do.

In the AUO case, jurors said in published interviews after the trial that they had looked through the emails introduced into evidence for active engagement in the conspiracy and use of information obtained from the meetings by each defendant. Ultimately, the jury convicted the two highest-ranking individuals, acquitted the two lowest-ranking, and hung 8 to 4 on the middle-ranked defendant.

McGinnis: A lawyer representing an individual in a long, multiple-defendant trial needs to decide whether an aggressive, full-throated defense is going to be necessary or something more akin to staying hidden in the weeds—or a combination of both. That strategy must be calibrated continually throughout the trial as the government's strategy evolves. In the AUO case, it is possible that lawyers for several of the defendants began aggressively but took lower and lower profiles as the trial progressed and the government aimed most of its fire at the other defendants.

As is well known, an individual's lawyer also has to decide whether the individual should testify. Conventional wisdom holds that most of the time a white-collar defendant who does not testify will not be acquitted, despite the instruction that tells the jury that the defendant has a right not to testify. Very likely, the calculus in this trial was driven by mock-trial exercises testing the likely result if the defendant did testify as well as an assessment that the government had failed to put forth sufficient evidence against their clients to force them to take the stand. In the case of the acquitted defendants, my guess is their lawyers felt they had strong arguments based on lack of evidence alone. Clearly, they were correct.

X. Representing a Foreign National

Moderator: *The five individuals charged were Taiwanese and were not native English speakers. What challenges are faced in representing a foreign national in a criminal trial in the U.S.?*

Mueller: Representing a foreign defendant is difficult. Those from non-Western backgrounds present particular challenges because they may not be familiar with U.S. judicial processes and may not understand the significance of events that occur at trial. During the panel discussion, Brian Getz, who represented a Taiwanese AUO employee at trial, explained that his client's "total unfamiliarity with the judicial system made him [of] questionable strength as a witness . . . . [H]e had never been in an American courtroom before, he had never seen it on TV, he didn't know anything about procedure . . . . [H]e never really understood exactly how it worked or the courtroom dynamics, so we were not all that comfortable about putting him on."

McGinnis: The language and cultural challenges cannot be overstated. It is virtually impossible for individuals to present their testimony clearly through an interpreter in a foreign court. In addition, there is a strong likelihood that a U.S. jury will misinterpret their demeanor. That said, the government faces a similar and sometimes even greater challenge when calling foreign nationals to the stand. An uncomfortable foreign witness may not appear credible to the jury. Miscommunication and misinterpretation of their demeanor can sink a case unless there is extensive contemporary written corroboration. Compounding the problem is the fact that the Division cannot spend too much time preparing the witness. The time of preparation will be explored extensively by the defense on cross-examination. In the worst case, the preparation may generate *Brady*

material if the witness recalls events differently, has serious loss of memory, or changes prior statements in any significant way.

Moderator: *Some government witnesses used translators and some did not, while others spoke English on direct, but switched to Chinese on cross. What did you think of the way the Antitrust Division dealt with the foreign language testimony and the use of translators? How would you have done it differently?*

Mueller: Obtaining testimony through a translator complicates the trial and creates significant delay. Using a translator makes it difficult for the jury to assess the witness's credibility, often leading to cultural misunderstandings or over reliance on a translator's precise words.

On balance, if a witness speaks decent English, having him testify in English on direct when he can anticipate the questions and know that they are friendly, may make sense. The problem is that many witnesses may not feel secure enough to handle an aggressive cross-examination in English and may want to use a translator. The translation lets the witness (assuming he speaks some English) hear the question twice, which can help him be sure what the question is asking.

But while speaking in English on direct and relying on a translator on cross-examination may be perfectly justified, it can be viewed as defensive or evasive—and it can in fact serve as a tactical advantage for the defense by interrupting the pace of cross-examination. Ultimately, the choice has to be based on the language ability of the witness.

McGinnis: In the future, I think the government will have to be consistent in the use of a translator on direct and cross-examination. Frankly, it looks bad if the witness testifies for the government in English on direct and then immediately uses a translator for cross-examination. Moreover, it can be very apparent to a jury when a witness insisting on a translator throughout cross-examination in fact does understand English and is using the translator strategically as a crutch. Of course, language capability is key, but I think use of a translator must be consistent.

XI. Retrial

Moderator: *The individual on whom the jury hung, Leung, was subsequently retried and convicted in December 2012. What lessons can be learned about retrial issues from this experience?*

Mueller: Leung's situation underscores the difficulty that the government faces in trying multiple defendants. As mentioned earlier, there may be some benefit to lower-ranking employee defendants who are tried along with their bosses because the jury may use it as an opportunity to compromise by finding the boss guilty while acquitting or hanging on the lower-ranked employee. If a hung jury is the result of a jury room compromise, the government's odds of convicting the single defendant on retrial should be good. In this case, Mr. Leung, who may have benefitted from being tried with his bosses in the first trial, was not as fortunate when tried individually.

McGinnis: In almost every case, the government's odds for conviction improve the second time around. That is for the reasons Thomas mentions and, perhaps even more

importantly, the defense has probably lost the element of surprise. While the prosecution can make very educated predictions about what the defense will be, there is nothing like having heard the entire case and then preparing again. Of course, the government will be much better prepared. They will determine what went wrong the first time around, what gaps there may have been in the evidence, which witnesses were or were not credible, and they will address all of their problems in the retrial. Retrials are viewed by prosecutors as very tedious exercises, but the government usually wins.

Moderator: *Any final thoughts on the implications of the AUO trials?*

McGinnis: In some respects, this trial was not too different from many federal criminal trials. Experienced and talented defense counsel confronted a large body of incriminating evidence. The government succeeded in admitting the evidence and made all of the right arguments. As is also typical, the government's rebuttal closing argument was extremely effective. What was not typical was the central issue. The concept of "agreement" is very slippery when examined through the lens of a trial, especially where all of the participants came from different cultures and were discussing matters in a third language. Here, meetings among Koreans and Taiwanese were largely conducted in English. What clearly turned the tide for the government were internal emails and contemporaneous meeting minutes. In that sense, the lesson is just what many experienced trial lawyers have learned: "it's the emails, stupid!"

If the trial has lasting significance, it will be in the appellate rulings on the application of the FTAIA and the government's alternative fine positions. A clean sweep for the government will mean that international defendants face very large, potentially catastrophic fines and may be very reluctant to take those risks. The Division's cartel program—its crown criminal enforcement jewel—will continue to build momentum. A reversal of course will mean that these critical issues remain very much in play. The government will need to recalibrate its expectations and probably go to the trial mat again with a defendant that believes the worst result at trial may not be too different from the government's plea offer.

Mueller: The AUO case was a big victory for the Division, but it had more to lose than to gain. It came into the trial having lost a number of high-profile cases against executives in international cartel cases. As one other observer at the trial remarked, with five or six other corporate co-conspirators admitting guilt and cooperating with the government, if it lost the case against AUO, the government might as well hang up its hat on prosecuting these types of cases. With the testimony of foreign executives who had served jail terms, supported by explicit contemporaneous emails, the Division met its burden. It also won the most important legal battle in setting liberal parameters for proving the gain or loss from the crime and meeting that burden of proof.

On the sentences, the Division was undoubtedly disappointed that the court had not imposed penalties and jail terms closer to the maximums that it had sought. And there have been rumors that the amount of the AUO fine did not diverge significantly from the last plea offer from the government—thus potentially justifying to the defense the decision to roll the dice and go to trial. But neither the disappointment nor the crowing is justified. For the government, it should see it as a clear victory that AUO was sentenced to a fine that met its previous record and exceeded the other LCD plea

agreements by a substantial amount, even though AUO was a much smaller producer than many of the others. However, the Division does need to recognize that many judges will also be more moderate in sentencing executives for whom the Division cannot show personal gain from their misconduct.

For the defense, the cost of going to trial is not the difference between a plea offer made to a recalcitrant defendant that the government had targeted for prosecution for years and the fine imposed by the court. Instead the cost is the lost opportunity to negotiate a plea at a time when its cooperation may have been helpful and the government may have negotiated a less expansive view of its commerce with the United States.

FILED
MAR 1 2012
RICHARD W. WIEK
CLERK, U.S. DISTRICT CO
NORTHERN DISTRICT OF CAL

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; TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE, Defendants.	No. CR-09-0110 SI **SPECIAL VERDICT FORM**

WE, THE JURY, in the above-entitled case, unanimously find the answer to the following questions:

PART A

AU OPTRONICS CORPORATION

1. Do you find that defendant, AU OPTRONICS CORPORATION, violated the Sherman Act as charged?

__✓__ Yes, guilty ______No, not guilty

AU OPTRONICS CORPORATION AMERICA

2. Do you find that defendant, AU OPTRONICS CORPORATION AMERICA, violated the Sherman Act as charged?

__✓__ Yes, guilty ______No, not guilty

(continued)

HSUAN BIN "H.B." CHEN

3. Do you find that the defendant, HSUAN BIN CHEN, also known as H.B. CHEN, violated the Sherman Act as charged?

✓ Yes, guilty ______No, not guilty

HUI HSIUNG ("KUMA")

4. Do you find that the defendant HUI HSIUNG, also known as KUMA, violated the Sherman Act as charged?

✓ Yes, guilty ______No, not guilty

LAI-JUH "L.J." CHEN

5. Do you find that the defendant LAI-JUH CHEN, also known as L.J. CHEN, violated the Sherman Act as charged?

______ Yes, guilty ✓ No, not guilty

SHIU LUNG "STEVEN" LEUNG

6. Do you find that the defendant, SHIU LUNG LEUNG, also known as CHAO-LUNG LIANG and STEVEN LEUNG, violated the Sherman Act as charged?

______ Yes, guilty ______No, not guilty

TSANNRONG "HUBERT" LEE

7. Do you find that the defendant, TSANNRONG LEE, also known as TSAN-JUNG LEE and HUBERT LEE, violated the Sherman Act as charged?

______ Yes, guilty ✓ No, not guilty

If the answer to either question 1 <u>or</u> question 2, above as to AUO or AUOA, is "Yes, guilty," proceed to Part B below. If the answer to both question 1 <u>and</u> question 2, above, is "No, not guilty," proceed directly to the conclusion and skip Part B.

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