Nos. 12-10492, 12-10493, 12-10500, 12-10514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

———————————————

UNITED STATES OF AMERICA,
Appellee,

v.

AU OPTRONICS CORPORATION, AU OPTRONICS CORPORATION AMERICA, HUI HSIUNG, and HSUAN BIN CHEN,
Appellants.

———————————————

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(JUDGE SUSAN ILLSTON)

———————————————

RESPONSE TO THE PETITIONS FOR REHEARING AND REHEARING EN BANC

———————————————

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INTRODUCTION

From 2001 to 2006, AU Optronics, led by its President and Executive Vice President, Hsuan Bin Chen and Hui Hsiung, conspired with five other major manufacturers to raise the price of TFT-LCD panels—setting up operations in the United States to sell those price-fixed panels to major U.S. companies. After an eight-week trial, a jury convicted the defendants of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and found that the conspirators had gained at least $500 million from the offense.

On appeal, defendants argued that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) renders the Sherman Act inapplicable here, that Supreme Court precedent holding the Sherman Act applies extraterritorially has been impliedly overruled, and that foreign price fixing cannot be *per se* unlawful. The panel rightly rejected all of these arguments: It found the FTAIA does not apply because defendants' conspiracy involved import commerce. It found defendants had waived any argument that the Sherman Act does not apply extraterritorially. And it declined defendants' invitation to read this Court's precedent to preclude application of the *per se* rule to foreign price fixing carried out in and substantially affecting the United States—a reading that would conflict with Supreme Court authority.

In their petitions for rehearing and rehearing en banc, defendants reiterate many arguments considered and rejected by the panel. They also advance the argument—not presented to the district court or the panel—that the jury's gain finding for purpose of the Alternative Fine Statute, 18 U.S.C. § 3571(d), is invalid. This argument is waived. And, like defendants' other assertions of error, it is incorrect. The panel decision does not conflict with any decision of this Court or the Supreme Court, and the Court should deny the petitions.

ARGUMENT

I. The Panel Did Not Err in Holding the Government Pleaded and Proved a Conspiracy Within the Sherman Act's Reach

A. The FTAIA Does Not Apply Because Defendants Fixed the Prices of Panels Sold in U.S. Import Commerce

Defendants' rehearing petitions rely heavily on the FTAIA, but the panel correctly concluded that the statute did not apply to this prosecution. The FTAIA amended the Sherman Act to include Section 6a, which provides:

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

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

15 U.S.C. § 6a.

Congress added Section 6a to make clear to U.S. exporters and U.S. firms doing business abroad that the Sherman Act does not apply to their business arrangements if they adversely affect only foreign markets. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004). But Congress also sought to ensure that purchasers in the United States remained protected by the federal antitrust laws. It accomplished this in two ways. First, Section 6a does not apply to conduct involving import commerce. 15 U.S.C. § 6a. Second, even when Section 6a applies and excludes non-import foreign commerce from the Sherman Act's reach, it contains an exception for conduct that affects U.S. import or domestic commerce. 15 U.S.C. § 6a(1).

It is well established that anticompetitive conduct involving import trade or import commerce is "excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded," and thus remains within the reach of Section 1 of the Sherman Act. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc);

Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, Inc., 227 F.3d 62, 71 (3d Cir. 2000) ("The [FTAIA] specifically excludes the importation of goods and domestic commerce from its antitrust exemption."), *overruled on other grounds in Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011). Accordingly, the jury was properly instructed it could convict if it found defendants joined a conspiracy to "fix[] the price of TFT-LCD panels targeted by the participants to be sold in the United States, or for delivery to the United States," ER1156—that is, conduct involving import commerce.

The panel affirmed defendants' convictions based on undisputed evidence that the conspirators sold $638 million in price-fixed panels manufactured abroad and shipped into the United States. *United States v. Hsiung*, 758 F.3d 1074, 1091 (9th Cir. 2014); *see also* ER617, 1443; SER2075-76. Defendants argue these sales do not constitute import commerce and do not include sales by AUO, but neither the law nor the facts support their argument.

As the panel explained, "not much imagination is required to say that this phrase ['import trade'] means precisely what it says." *Hsiung*, 758 F.3d at 1090. Import trade or commerce includes trade or commerce in "goods manufactured abroad and sold in the United States." *Id.* The panel's

understanding is supported by all other circuits to consider the issue. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012) (conspiracy to raise the price of copper tubing manufactured abroad and sold into the United States involved import commerce); *Animal Sci.*, 654 F.3d at 471 n.11 (evidence of conspirators' "sales of magnesite for delivery in the United States" is relevant to determining whether conduct involves import commerce); *see also Minn-Chem*, 683 F.3d at 855 (sales by conspirators located outside the United States to purchasers inside the United States are import commerce).

Defendants argue that the import commerce exclusion does not apply because "AUO is not an importer," AUO En Banc Pet. 10, but this argument "misses the point," *Hsiung*, 758 F.3d at 1091. "Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite." *Animal Sci.*, 654 F.3d at 470. Nothing in the language of the FTAIA indicates that the import commerce exclusion is limited to the conduct of importers, and such a limitation would leave U.S. commerce and consumers vulnerable to foreign cartels that simply employ unwitting third parties as import agents. This would contravene the purpose of the statute. The import commerce language was included so there would be "no misunderstanding that import restraints, which can be

damaging to American consumers, remain covered by the law." H.R. Rep. No. 97-686, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494. Here, 2.6 million of the conspirators' price-fixed panels, priced at more than $638 million, were sold in transactions with a "ship-to location" in the United States. SER2075; *see also* ER617. That is import commerce.

Defendants also argue the import commerce exclusion does not apply because the $638 million in panel imports does not include any panels sold by AUO. AUO En Banc Pet. 11. They falsely contend the government conceded as much, *id.* at 10 n.1. *See* ER439. But it is AUO that conceded, pre-trial, that it had sold nearly $200 million in panels for delivery in the United States during the conspiracy. ER1593-94.

At trial, the government proved $638 million in price-fixed panels were sold by five of the six members of the TFT-LCD price-fixing conspiracy (AUO, Chunghwa Picture Tubes, HannStar Display Corp., Samsung Electronics Corp., and LG Display Co.)[1] for import into the United States. ER617; SER2075-76. The evidence did not parse the sales by individual conspirator because such parsing was unnecessary.

The Sherman Act applies to "conduct involving" import trade or import commerce. 15 U.S.C. § 6a. The term "conduct" refers to activity that might

[1] The government did not present evidence on import sales by the sixth conspirator, Chi Mei Optoelectronics. SER2076.

violate the Sherman Act—in this case, a single conspiracy among AUO and other manufacturers to fix the price of TFT-LCD panels. Whether the charged conspiracy involved import commerce, therefore, turns not on the acts of any particular defendant, but on whether the price-fixing agreement and acts of any conspirator furthering that agreement involved import commerce. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) (A conspiracy to violate the federal antitrust laws is "a partnership in crime; and an overt act of one partner may be the act of all." (internal quotation marks omitted)).

The jury was instructed it could convict if it found defendants knowingly joined a conspiracy whose members fixed the price of panels sold in import commerce. ER1156. Defendants did not challenge this instruction on appeal. Nor could they since the district court sustained their only objection to the government's proposed instruction—that the instruction should require evidence the panels were "targeted by the participants" for sale in the United States. ER1158-60, 1217-18.

This instruction did not allow the jury to convict on a theory of vicarious liability. *See* AUO En Banc Pet. 13-15. Members of a conspiracy may be vicariously liable for "reasonably foreseeable substantive crimes committed by a co-conspirator in furtherance of the conspiracy." *United States v. Ruiz*,

462 F.3d 1082, 1088 (9th Cir. 2006). For example, the getaway driver for an armed bank robbery may be vicariously liable for the separate substantive offense of brandishing a firearm during a crime of violence, even if he did not personally hold the gun. *See, e.g.*, *United States v. Blackman*, 746 F.3d 137, 140-41 (4th Cir. 2014). But the driver is directly liable for conspiring to rob the bank. Here, sales of price-fixed panels in import commerce are not separate substantive crimes for which AUO or any other conspirator was convicted. They are overt acts in furtherance of an unlawful conspiracy. Defendants joined that unlawful conspiracy and were convicted for it. Defendants fault the panel for failing to discuss vicarious liability, AUO En Banc Pet. 14-15, but the panel decision does not rest on vicarious liability. It rests on basic principles of conspiracy law, and no en banc hearing is needed to reconsider it.

Finally, defendants contend that the panel decision is premised on two factual errors, but there is no error. First, defendants contend the panel mistakenly believed the $638 million in price-fixed panel imports included only sales by AUO. AUO Panel Pet. 4. But that contention is undermined by the panel's description of the more than $600 million in revenue from "sales of panels by Crystal Meeting participants." *Hsiung*, 758 F.3d at 1079; *see also id.* at 1091. As explained above, it is irrelevant whether the

imported panels were sold by AUO or instead by one of its co-conspirators, so long as the evidence was sufficient to prove defendants joined a conspiracy to fix the price of those panels. Defendants do not deny they joined the conspiracy. And the uncontested evidence that conspirators sold $638 million in price-fixed panels in U.S. import commerce is, by itself, sufficient to prove that conspiracy "involv[ed] import trade or import commerce," 15 U.S.C. § 6a.

Second, defendants take issue with the panel's reliance on evidence "that AUO imported over one million price-fixed panels per month into the United States." *Hsiung*, 758 F.3d at 1091. At trial, AUOA executive Michael Wong testified that between 2001 and 2006, major U.S. companies, including Dell, HP, Compac, Apple, and Motorola procured "more than a million" panels per month from AUO. ER1418. Wong did not distinguish between panels sold for delivery in the United States and panels delivered abroad and incorporated into finished products imported into the United States. Defendants wrongly imply that the Court erred by equating the AUO panels Wong describes with the $638 million in panels the five conspirators shipped to the United States, AUO Panel Pet. 5-6; the Court made no such error. The Court relied on Wong's testimony only in support of its conclusion that panel sales in import commerce bring the conspiracy

"squarely within the scope of the Sherman Act." *Hsiung*, 758 F.3d at 1091. Wong's testimony is evidence that the conspirators' price fixing targeted the United States and major U.S. companies. And, in any event, the $638 million in panel imports, which cannot be disputed, is sufficient to affirm the convictions. There is no error in the panel opinion, much less one that warrants rehearing.

B. Defendants' Conspiracy Also Had a Direct Effect on U.S. Import Commerce

Even setting aside Section 6a's import commerce exclusion, evidence that defendants' conspiracy had a direct, substantial, and reasonably foreseeable effect on import commerce would provide an independent basis to affirm their convictions, which this Court would then have to consider. *See* Gov't Opp. Br. 57-63. The jury was instructed that it could convict if it found defendants' conspiracy fixed the price of TFT-LCD panels that were incorporated into finished products and that "this conduct had a direct substantial and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States." ER1156. Defendants did not object to the language of this instruction. They argued only that the theory had not been alleged in the indictment, and therefore the jury should not be instructed on it. ER1218.

On appeal, defendants did not contest that the price-fixing conspiracy existed, that it had an effect on U.S. import commerce in computer monitors and laptops that incorporated price-fixed panels, or that the effect was substantial and reasonably foreseeable. AUO App. Br. 63. They argued only that the effect cannot be "direct," *id.*, but the evidence was sufficient to establish that direct connection.

Defendants' conspiracy enabled its participants to raise panel prices substantially, increasing their margins by a weighted average of $53 per panel. SER2065-68, 2071. Because the price-fixed panels were the single largest cost component in computer monitors and laptop computers, SER2160, 2414-16, representatives from Dell and HP testified that increased panel prices led to increased prices for monitors and laptops sold in import commerce, SER2165, 2423-24; *see also* ER763; SER2222-23. As one conspirator testified: "[I]f the panel price goes up, then it will directly impact the monitor set price." SER2223.

The panel concluded it was not necessary to resolve whether the defendants' conduct satisfied the effects exception because evidence that the conduct involved import commerce was "overwhelming." *Hsiung*, 758 F.3d at 1094. But the evidence that defendants' conspiracy had the requisite

effect on import commerce provides an independent basis to affirm the convictions.

C. No En Banc Rehearing Is Needed to Second-Guess the Panel's Assessment of the Indictment

Finally, defendants reiterate their argument rejected by the panel that the indictment was insufficient because it failed to plead Section 6a's import commerce exclusion or effects exception. Nothing in the panel's decision "fundamentally altered" pleading standards, AUO En Banc Pet. 15, and defendants' continued disagreement with the panel's reading of the indictment does not justify rehearing.

First, defendants fault the panel for holding that conduct involving import commerce "falls within the Sherman Act without further clarification or pleading," *Hsiung*, 758 F.3d at 1089. AUO En Banc Pet. 15-16. But the panel's approach is supported by the statutory language, which limits the Sherman Act's application only when the conduct involves foreign trade and commerce "other than import trade or import commerce." 15 U.S.C. § 6a. It is also supported by precedent from other circuits. *See Minn-Chem*, 683 F.3d at 854; *Carpet Group*, 227 F.3d at 71. As the panel recognized, the indictment is "replete with allegations that . . . defendants engaged in import trade," *Hsiung*, 758 F.3d at 1091. *See* ER1723 ¶ 2, 1724 ¶¶ 4-5, 1730-31 ¶ 17(j)-(k).

Second, defendants fault the panel for finding the indictment adequately alleged Section 6a's effects exception, *Hsiung*, 758 F.3d at 1092. AUO En Banc Pet. 16-17. Defendants do not attack the panel's conclusion that "the facts in the indictment necessarily supported the domestic effects claim, namely by allegations that AUO and AUOA sold price-fixed panels in the United States and abroad for use in finished consumer goods sold in or delivered to the United States." *Hsiung*, 758 F.3d at 1093. Instead, they claim that, by allowing the government to plead Section 6a's effects exception without citing Section 6a, the panel fundamentally altered pleading standards. AUO En Banc Pet. 16-17.

But "neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction" absent proof the defendant was misled and thereby prejudiced. Fed. R. Crim. P. 7(c)(2); *see also United States v. Vroman*, 975 F.2d 669, 671 (9th Cir. 1992). *United States v. Omer*, on which defendants rely, AUO En Banc Pet. 17, merely reaffirms that an indictment must plead the essential elements of an offense. 395 F.3d 1087, 1089 (9th Cir. 2005). *Omer* says nothing about statutory citation.

The panel did not relieve the government of its burden to plead the elements of an offense. *See Hsiung*, 758 F.3d at 1092. Instead, it found the

indictment adequately stated the elements, including the requirements of Section 6a's effects exception. *Id.* at 1092-93.

Nor did the panel contravene the Fifth Amendment's grand jury clause by finding deficiencies in the indictment harmless. AUO En Banc Pet. 17. Rather, the panel noted that the omission of a statutory citation or "magic words" from the indictment was not fatal because the allegations made clear a "key focus of the indictment" was "the effects of foreign sales on domestic commerce" and, thus, "[t]he scope of the charges was not a mystery." *Hsiung*, 758 F.3d at 1093; *see also id.* at 1089. Accordingly, defendants were not "misled and thereby prejudiced" by the indictments' failure to parrot the language of Section 6a(1). *See* Fed. R. Crim. P. 7(c)(2). Defendants provide no sound reason for the en banc Court to second-guess the panel's assessment of the indictment.

Third, defendants argue for the first time that they were denied due process because they only learned at the jury instruction conference whether and how the jury would be instructed on Section 6a's import commerce exclusion. AUO En Banc Pet. 18. This Court has refused to consider arguments raised for the first time in a petition for rehearing. *See, e.g.*, *Squaw Valley Dev. Co. v. Goldberg*, 395 F.3d 1062, 1064 (9th Cir. 2005). In any event, there is no due process violation. Defendants

themselves asked the court, before trial and again at the instruction conference, to instruct on the import commerce exclusion, and the district court agreed. ER1217-18, 1492. While defendants now complain the district court "shifted course and added the mental state element of 'targeting,'" AUO En Banc Pet. 18, the court made this addition at defendants' request and before closing arguments, ER1159-60, 1217-18. *See* Fed. R. Crim. P. 30(b) ("The court must inform the parties before closing argument how it intends to rule on the requested instructions.").

II. The Panel Did Not Err in Rejecting Defendants' Extraterritoriality Defense

It is "well established" that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 & n.24, 814 (1993). Relying on *Hartford Fire*, the district court instructed the jury it could convict if it found:

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

ER1155. On appeal, defendants objected to both parts of this instruction, but the panel correctly concluded that defendants had waived any objection

to Part B and that Part A, when read with the other instructions, was not improper. *Hsiung*, 758 F.3d at 1081-84.

A. Defendants' Argument that the Sherman Act Does Not Apply Extraterritorially Is Waived and Meritless

Defendants urge this Court to grant rehearing and hold that *Hartford Fire* has been overruled *sub silentio* by *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and that the Sherman Act no longer applies to foreign conduct. Hsiung Pet. 14-17. Rehearing may be appropriate when a "proceeding involves one or more questions of exceptional importance," Fed. R. App. P. 35(b)(1)(B). But the question of whether the Sherman Act applies to foreign conduct is not involved in this proceeding at all because defendants waived any argument that it does not apply. And while rehearing may be granted when a panel decision "conflicts with a decision of the United States Supreme Court," Fed. R. App. P. 35(b)(1)(A), the holding defendants urge would not resolve conflict with Supreme Court precedent, but rather create it.

Defendants did not merely fail to object to Part B of the above instruction. They told the district court it was "a correct statement of the *Hartford Fire* requirements for establishing extraterritorial jurisdiction over foreign anticompetitive conduct." ER1216; *see also* ER1241-46. And they never claimed that this Supreme Court precedent had been overruled.

In fact, they never cited *Morrison* until after the instruction was given and the verdict returned. Because defendants "intentionally relinquished the right to argue that the Sherman Act does not apply extraterritorially," no appellate review is appropriate. *Hsiung*, 758 F.3d at 1082 (citing *United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir. 1993)). While a party is not obligated to renew an objection "clearly and unequivocally" stated and equally clearly denied by the district court, *United States v. Arlt*, 41 F.3d 516, 523-24 (9th Cir. 1994) (cited at Hsiung Pet. 16), defendants here never objected to the jury instruction. Instead, they stated clearly and unequivocally that the instruction correctly stated unchallenged Supreme Court precedent and "should be given." ER1216. Any claim that an objection would have been futile is unfounded.

Defendants contend that this Court should ignore their waiver because "[c]onfining U.S. law to its proper geographic scope 'helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign consequences not clearly intended by the political branches.'" Hsiung Pet. 16 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)). But the panel did not "adopt an interpretation of U.S. law," *id.* It merely rejected defendants' argument based on waiver.

Nor does the panel decision carry "foreign consequences not clearly intended by the political branches," *id.* The legislative branch reaffirmed the extraterritorial application of the Sherman Act in 1982 when it enacted Section 6a. *See Gushi Bros. v. Bank of Guam*, 28 F.3d 1535, 1543 (9th Cir. 1994) (Prior to the passage of the FTAIA, "which explicitly created limited extraterritorial jurisdiction under the Sherman Act, we had 'firmly concluded that there is some extraterritorial jurisdiction under the Sherman Act.'"). And, as this Court has recognized, "when construing a statute with potential foreign policy implications" in a case brought by the Executive Branch, a court "must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *United States v. Corey*, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000).

At most, the Part B instruction could be reviewed only for plain error. Here there is no error at all because the instruction is entirely consistent with the Supreme Court's decision in *Hartford Fire*, and *Morrison* did not impliedly overrule or abrogate *Hartford Fire*. *See* Gov't Opp. Br. 67-80. *Morrison* reiterated the presumption against applying federal statues to foreign conduct absent a clear indication that Congress intended the statute to apply extraterritorially. 561 U.S. at 255. The Court was well aware of this

presumption when it decided *Hartford Fire*, in which all nine justices agreed that the Sherman Act applies extraterritorially. 509 U.S. at 796-97 & n.24; *see also id.* at 814 (Scalia, J., dissenting) (The Court has "found the presumption to be overcome with respect to our antitrust laws.").

Moreover, *Hartford Fire* is fully supported by the Sherman Act's language. Section 1 outlaws conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1; *see also* 15 U.S.C. § 6a. This language was purposefully chosen to occupy the fullest extent of Congress's constitutional power over commerce. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328-29 & nn.7, 10 (1991). This Court relied on similar language in the Lanham Act to conclude that statute applied extraterritorially, *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 612 n.6 (9th Cir. 2010), and saw "no need to revisit [that] case law" based on *Morrison* because the Lanham Act's "sweeping language contrasts so readily with the language in the Securities Exchange Act" at issue in *Morrison*. *Id.*

In any event, because "neither the Supreme Court nor this court has determined that *Morrison* overruled *Hartford Fire*," there can be no plain error in the instruction. *Hsiung*, 758 F.3d at 1083 n.4.

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

Defendants also contends that Part A of the instruction reflects a "breathtaking one-overt-act theory of jurisdiction" that is "wrong." Hsiung Pet. 17. According to defendants, the panel only approved Part A because it mistakenly believed the Section 6a instruction guaranteed a finding of the substantial and intended effects required by *Hartford Fire*. *Id.* at 18. Defendants misunderstand *Hartford Fire*, the panel opinion, and the district court's instructions.

Hartford Fire set forth requirements for the extraterritorial application of the Sherman Act.[2] That case involved "wholly foreign actors and conduct," and the issue raised was the application of U.S. law to "the conduct of business subject to the regulatory authority of a foreign sovereign taking place in a foreign market, and undertaken by foreign actors." Pet. For Writ of Certiorari at 19, *Hartford Fire*, 509 U.S. 764 (No.

[2] This Court has indicated that Section 6a supplanted prior precedent on the extraterritorial application of the Sherman Act, on which *Hartford Fire* relied for its substantial and intended effects test. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 n.8 (9th Cir. 1988) ("In an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act, Congress enacted section 6a."); *see also O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana*, 830 F.2d 449, 451 (2d Cir. 1987). In that event, the jury's findings with regard to Section 6a alone would be sufficient to defeat defendants' arguments about the *Hartford Fire* instruction. But that was not the basis of the panel's decision.

91-1128); *see also Carpet Group*, 227 F.3d at 75 (*Hartford Fire* "dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct."). But when, as here, conspirators act in the United States to further a price-fixing conspiracy that involves or adversely affects U.S. commerce, the prosecution of that conspiracy reflects a territorial application of the Sherman Act.

Thus, the jury was properly instructed in Part A that it could convict if it found the conspirators took at least one overt act in the United States to further the conspiracy, not because the Section 6a instruction somehow incorporated *Hartford Fire*'s "substantial and intended effect" test, but because, together, the instructions stated conditions under which *Hartford Fire* does not apply. The Section 6a instruction required the jury to find defendants conspired to fix the price of panels "targeted by the participants to be sold in the United States" or incorporated into products "sold in the United States," ER1156. The jury could not convict "on the basis of one, unintentional domestic act," *Hsiung*, 758 F.3d at 1083, but had to find an overt act in the United States in furtherance of a conspiracy that involved or affected U.S. commerce. Read together, these instructions allowed the jury to convict on a theory that did not entail the extraterritorial application of the Sherman Act.

Lastly, rehearing is not warranted here because, even if Part A were given in error, that error was harmless. It is clear beyond a reasonable doubt that defendants' conspiracy had a substantial and intended effect in the United States, which the defendants conceded at trial was a proper basis for conviction. *See* Gov't Opp. Br. 87-91.

III. The Panel Did Not Overrule *Metro Industries*

Defendants argue that en banc rehearing is necessary because the panel decision overruled *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), and only the en banc Court can overrule circuit precedent. But the panel did not overrule *Metro Industries*. Instead, the panel declined defendants' invitation to read that decision in a manner that conflicted with Supreme Court precedent. The panel also concluded that, even if defendants' reading of *Metro Industries* were correct, the case does not control because the facts here—a price-fixing conspiracy carried out in part in the United States—do not implicate *Metro Industries*' rule.

Metro Industries concerned allegations that a Korean design registration system conferring on defendants limited exclusive rights "constituted a market division that is a *per se* violation of Section 1 of the Sherman Antitrust Act." 82 F.3d at 841. The Court held first that the design registration system was not "a classic horizontal market division

agreement" normally subject to the *per se* rule, *id.* at 844, but even if it were, "application of the *per se* rule is not appropriate where the conduct in question occurred in another country," *id.* at 844-45.

On appeal here, defendants relied on this language from *Metro Industries* to argue that this Court has held all foreign anticompetitive conduct is subject only to the rule of reason. But the *Metro Industries* Court went on to explain what it meant. A market division formed and carried out in the United States would be deemed *per se* unlawful even if it had no effect. But determining whether such conduct occurring abroad violates the Sherman Act requires "an examination of the impact of the [conduct] on commerce in the United States." 82 F.3d at 845. This is nothing more than a restatement of the *Hartford Fire* Court's declaration that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," 509 U.S. at 796. *See Metro Indus.*, 82 F.3d at 845 (citing *Hartford Fire*); *id.* at 843 (requiring an inquiry into whether the conduct has "a sufficient negative impact on commerce in the United States"); *see also* Gov't Opp. Br. 94-98.

In their rehearing petition, defendants reiterate their argument that *Metro Industries* holds "Sherman Act cases premised on foreign conduct must be analyzed under the rule of reason," Hsiung Pet. 7, and fault the

panel for finding *Metro Industries* overruled by Supreme Court authority, *id.* at 9-10. But defendants misunderstand the panel.

As the panel explained, the language of *Metro Industries* "may have created some ambiguity," and defendants invited the Court to read the case in a manner "out of sync with the well established tradition of analyzing price-fixing under the *per se* rule and recent Supreme Court precedent emphasizing that price-fixing ought to be analyzed under the *per se* rule." *Hsiung*, 758 F.3d at 1084. The panel did not hold that *Metro Industries* was somehow overruled by *Socony-Vacuum*, *Leegin*, or *Actavis*. *Id.* Rather, those cases and others demonstrated the flaw in defendants' reading of *Metro Industries*. Cartels like the defendants' are "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Defendants would have this Court read *Metro Industries* to hold that foreign price fixing that harms U.S. commerce can somehow be justified under the rule of reason, contrary to the Supreme Court and other circuits. *See, e.g.*, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997). The panel was rightly skeptical of such a reading and declined defendants' invitation.

Even if defendants' reading of *Metro Industries* were correct, the case does not control here because, unlike *Metro Industries*, this case involved a

conspiracy carried out, in part, in the United States. Gov't Opp. Br. 17-21, 132-40. Defendants claim that *Metro Industries* also involved domestic conduct and point to allegations of predatory pricing by a U.S. subsidiary. Hsiung Pet. 13. But the predatory pricing allegations in *Metro Industries* had dropped out of the case years before, and the only allegations at issue on appeal were that defendant had restrained trade by establishing the design registration system "in Korea." 82 F.3d at 842-43; *see also* Gov't Opp. Br. 99-100. And while the *Metro Industries* plaintiff failed to present any evidence of "actual injury to competition in the United States," 82 F.3d at 848, here the government proved defendants fixed the price of goods sold in U.S. import commerce. *Metro Industries* does not apply here.

IV. Defendants' New Sentencing Arguments Are Waived and Meritless

Finally, AUO argues that panel rehearing is necessary because "[i]f, as the panel held, the convictions can only be based on direct import sales, then AUO's sentence of a $500 million fine is invalid." AUO Panel Pet. 8. This argument is waived because it was made for the first time in this rehearing petition, and, in any event, it is meritless.

A. The Jury Was Properly Instructed on the Alternative Fine Statute

When the ordinary statutory maximum fine for an offense does not adequately reflect the seriousness of the offense in light of the pecuniary gain or loss it caused, Congress has authorized an alternative maximum fine of "not more than the greater of twice the gross gain or twice the gross loss" from the offense. 18 U.S.C. § 3571(d). The ordinary statutory maximum corporate fine for violations of Section 1 of the Sherman Act is $100 million, 15 U.S.C. § 1, but here, the indictment alleged the conspirators derived gross gains of at least $500 million from their price-fixing conspiracy, ER1734 ¶ 23. The jury was instructed that, if it found the conspirators derived gain from the conspiracy, it must make a finding about that gross gain. ER605.

> In determining the gross gain from the conspiracy, you should total the gross gains to the defendants and other participants in the conspiracy from affected sales of (1) TFT-LCD panels that were manufactured abroad and sold in the United States or for delivery to the United States; or (2) TFT-LCD panels incorporated into finished products such as notebook computers and desktop computer monitors that were sold in the United States or for delivery to the United States.

Id. On appeal, defendants argued that the jury should have been instructed to consider only gains to AUO, but the panel held that the "unambiguous

language of the statute" permitted consideration of the gains to all co-conspirators. *Hsiung*, 758 F.3d at 1095-96.

AUO now argues that, because the panel affirmed its conviction based upon evidence that the conspiracy involved import commerce without deciding whether the evidence also satisfied Section 6a's effects exception, the jury's gain finding must be limited to gains from panels sold in import commerce. But defendants waived this argument when they failed to raise it in the district court.

The Section 6a instruction allowed the jury to convict if "members of the conspiracy engaged in one or both of the following activities": (1) fixing the price of panels sold in import commerce, or (2) fixing the price of panels incorporated into finished products sold in import commerce where that conduct had direct, substantial, and reasonably foreseeable effect on that import commerce. ER 1156. Despite the availability of two bases in the Section 6a instruction, defendants never asked for an additional instruction requiring the jurors to tie their gain determination for Section 3571(d) to the activities they found proven for purposes of Section 6a. Nor did defendants object to the gain instruction for not including that requirement. ER1231-32.

Defendants confirmed their waiver by again failing to make the argument to this Court on appeal. *See Squaw Valley Dev.*, 395 F.3d at 1064. AUO contends that this argument was only raised by the panel's "somewhat unexpected approach to this case," AUO Panel Pet. 2, but the possibility of that approach was obvious from the Section 6a instruction's disjunctive structure. And months before defendants filed their opening briefs, the government explained in its opposition to defendants Hsiung and Chen's motions for bail pending appeal that "the evidence need only be sufficient as to one of the [Section 6a] exceptions for the guilty verdict to be affirmed." Gov't Bail Opp. (Dkt. 14) at 20 (citing *Griffin v. United States*, 502 U.S. 46, 56 (1991)); *see also* Gov't Opp. Br. 55.

In any event, AUO's argument is meritless. Section 3571(d) provides for a maximum fine based on gain derived "from the offense." Here, the offense is a conspiracy to fix prices in violation of Section 1 of the Sherman Act. Under the plain language of Section 3571(d), the statutory maximum is twice the gain from that conspiracy—that is, gains from all sales of price-fixed panels. The district court took a conservative approach, limiting the jury's gain calculation to gains from affected sales of panels imported into the United States or panels incorporated into finished products imported

into the United States. But nothing in the statute supports AUO's contention that Section 6a limits the gain for purposes of Section 3571(d).

Section 6a does not divide a price-fixing conspiracy into separate offenses based upon the different types of commerce involved. Instead, it delineates when Section 1 of the Sherman Act applies, or does not apply, to conduct involving non-import foreign commerce. Here, defendants' conspiracy involved import commerce and thus, Section 6a has no impact at all. Section 1 applies and defines the relevant offense: a "conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1.

Similarly, the Sherman Act reaches conspiracies to fix the price of goods sold entirely in intrastate commerce, provided the conspiracy has some effect on interstate commerce, because the "jurisdictional element of a Sherman Act violation" may be satisfied if the conspirators' activities are "in" interstate commerce or "affect" interstate commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980). It is not necessary to quantify the effect on interstate commerce or even to establish that the effect is caused by those aspects of defendants' activity that are unlawful. *Id.* at 242-43; *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1143-44 (9th Cir. 2003) (nexus between defendants' business and

interstate commerce need not relate to alleged price fixing). Yet, under AUO's interpretation of Section 3571(d), despite satisfaction of the jurisdictional element, conspiracies to fix the price of goods sold entirely in intrastate commerce would yield no cognizable gain because all the conspirators' gains would be derived from intrastate transactions.

Many criminal statutes contain a jurisdictional element that brings the crime within the reach of federal law. But this does not mean that cognizable pecuniary gain or loss from those offenses is limited by that jurisdictional nexus. For example, 18 U.S.C. § 666 outlaws bribery intended to influence an organization that received $10,000 in federal funds in that year. The receipt of federal funds makes such a bribery scheme a federal offense. But it is not an offense only to the extent that federal funds are impacted. *Salinas v. United States*, 522 U.S. 52, 56-57 (1997) (holding bribe need not affect federal funds to violate federal bribery statute). And the gross gain or loss from such a bribery scheme is not limited to the federal funds gained or lost. *See United States v. McNair*, 605 F.3d 1152, 1225 (11th Cir. 2010) (gross loss for Section 3571(d) included all benefit the bribing contractors received). Similarly, there is no reason to believe the gain from a mail or wire fraud scheme is limited to the gain that can be strictly tied to the jurisdictional use of the mails or interstate wires.

Section 3571(d) authorizes fines up to twice the pecuniary gain from the offense to "enable federal courts to impose fines that will prevent convicted offenders from profiting from their wrongdoing." *See* H.R. Rep. No. 98-906, at 17 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5433, 5449. Considering only part of the gain from the offense, as AUO suggests, would subvert the deterrent purpose of the statute and risk making price fixing profitable because the fine cannot exceed the gain.

B. There Is No Error in the District Court's Guidelines Calculations

AUO makes a similar argument with respect to the Sentencing Guidelines. Again, this argument was not presented to the panel and should not be considered for the first time on a petition for rehearing. It is also wrong.

At sentencing, the district court found "this was a serious and far-reaching conspiracy" that was "proved beyond peradventure at trial," and that "the financial consequences to the U.S. market were enormous." ER245. For antitrust offenses, the guidelines range calculation turns largely on the volume of commerce done by the defendant or the defendant's principal "in goods or services that were affected by the violation," that is, by the price-fixing conspiracy. U.S.S.G. §§ 2R1.1(b)(2), (c), (d)(1). The government and the district court took a conservative approach—excluding

sales of panels incorporated into finished products sold outside the United States, even if those products were sold by U.S. companies like Dell, HP, and Apple. Excluding that commerce, the court found AUO's volume of commerce "affected by the violation" was $2.34 billion. ER239-40. Nothing in Section 6a or the guidelines suggests the volume of commerce "affected by the violation" should be limited in the way AUO suggests.

Even if the government could charge a conspiracy only to the extent that it impacted certain types of commerce, the sentencing court may consider related conduct in determining the applicable guidelines range. This includes "[c]onduct that is not formally charged or is not an element of the offense of conviction," U.S.S.G. § 1B1.3, comment., backg'd; conduct of which the defendant has been acquitted, *United States v. Watts*, 519 U.S. 148 (1997); and even conduct that is beyond the reach of the applicable statute, *United States v. Dawn*, 129 F.3d 878, 881-83 & n.8 (7th Cir. 1997) (considering related conduct beyond the reach of the federal statute because there is "no reason why the rules governing extraterritorial application of laws—including the presumption against extraterritoriality—should also constrain the operation of the Sentencing Guidelines").

Finally, while the panel declined to decide whether the evidence was sufficient for the jury to find beyond a reasonable doubt that defendants'

conspiracy had a direct, substantial, and reasonably foreseeable effect on U.S. import commerce, sentencing facts need only be proven by a preponderance of the evidence. *United States v. Burnett*, 16 F.3d 358, 361 (9th Cir. 1994). And here, the district court, applying that standard, found the volume of affected commerce to be $2.34 billion. ER239-40. No rehearing is appropriate to consider defendants' newfound claim that the district court erred in this calculation.

CONCLUSION

For the reasons set forth above, the petitions for en banc and panel rehearing should be denied.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief is accompanied by a motion for leave to file an oversized brief pursuant to Ninth Circuit Rule 32-2. This brief is 33 pages and contains 7187 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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

October 10, 2014

/s/ Kristen C. Limarzi
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CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on October 10, 2014, I electronically filed the foregoing Response to the Petitions for Rehearing and Rehearing En Banc with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

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

October 10, 2014 /s/ Kristen C. Limarzi
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