

Volume 22

Pages 3340 - 3515

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON, JUDGE

IN RE: TFT-LCD (FLAT-PANEL))
ANTITRUST LITIGATION.) NO. C 07-MDL-1827 SI

San Francisco, California
Thursday
August 29, 2013
8:43 a.m.

Individual Cases:
CASE NO. 10-CV-4572
CASE NO. 12-CV-4114

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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MARTIN TOTO, ESQ.
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Also Present:

Naomi Kusakabe
Alex Tsai
Paul Chiu
William Johnson
Julius Christensen
Jeff Gold

Reported by:

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Official Reporters, U.S. District Court

1 **THURSDAY, AUGUST 29, 2013**

8:43 A.M.

2 **PROCEEDINGS**

3 (The following proceedings were held outside of the
4 presence of the Jury)

5 **THE CLERK:** Come to order.

6 **THE COURT:** Good morning.

7 **MR. SILBERFELD:** Good morning, Your Honor.

8 **MR. FREITAS:** Good morning, Your Honor.

9 **THE COURT:** Are we ready?

10 **MR. SILBERFELD:** A few housekeeping things,
11 Your Honor.

12 **THE COURT:** All right. You may all be seated.

13 **MR. SILBERFELD:** We found a date typo in the verdict
14 form.

15 **THE COURT:** Okay. May I ask this question? What is
16 your name?

17 **MR. GOLD:** Jeff Gold, Your Honor.

18 **THE COURT:** Gold?

19 **MR. GOLD:** Yes.

20 **THE COURT:** All right. Okay, I would like to
21 designate Mr. Gold as the magic finger for the purposes of
22 these instructions, because you did such a nice job is the
23 other day at changing the heading on something right on the
24 fly. I was so impressed at that. So can we make you in
25 charge? We'll make any corrections we have to make this

1 morning, and then are you able do that?

2 **MR. GOLD:** Yes.

3 **THE COURT:** All right. Thank you, Mr. Gold.

4 Okay, so what was your --

5 **MR. SILBERFELD:** In the verdict form, Your Honor --

6 **THE COURT:** Okay.

7 **MR. SILBERFELD:** At Page 4 for Questions 6 and 7, in
8 order to track the instructions about this particular
9 question, we think that the parentheses for Toshiba ought to
10 be in here, because this is the date that relates to Toshiba.

11 **THE COURT:** Okay, on Question 6?

12 **MR. SILBERFELD:** 6. On Question 6.

13 **THE COURT:** Where's that in the instructions? I
14 don't disagree with you, I just want to see exactly what we
15 told them on the instructions.

16 **MR. SILBERFELD:** Sure. It -- well -- it's in the
17 instruction under State Law, Statute of Limitations.

18 **THE COURT:** Oh, here it is, Page 14.

19 **MR. SILBERFELD:** Yeah, Page 14.

20 **THE COURT:** So you would like Question No. 6 to say
21 what?

22 **MR. SILBERFELD:** After the date, paren, "for
23 Toshiba," close paren.

24 **MR. CURRAN:** That doesn't seem to make sense to me,
25 Your Honor. I don't know why the jury needs to know what 6

1 and 7 relate to.

2 **THE COURT:** I kind of agree. It's -- the question is
3 when did Best Buy figure this stuff out.

4 **MR. SILBERFELD:** (Nods head)

5 **THE COURT:** Now, I don't -- I am not exactly proud of
6 these two questions either, because -- "Did you find it was
7 before September 15, do you find it is before December 30" --
8 there's some overlap in there, but I don't know how to make it
9 clearer.

10 **MR. SILBERFELD:** To make matters worse, there's
11 actually a typo in Question 7, on the date.

12 **THE COURT:** Oh, December 31st.

13 **MR. SILBERFELD:** The date should be February 5.

14 **THE COURT:** Okay. Okay. Mr. Gold, are you listening
15 here?

16 **MR. GOLD:** Yes, Your Honor.

17 **THE COURT:** All right. So we're at the verdict form,
18 and we are at Page 4. This is only in the event somebody
19 wants to display it to the jury during the argument. I'll do
20 the final one myself, but you need pay attention to this.

21 Page 4 between Lines 12 and 13, that should be February 5,
22 2006. Right?

23 **MR. SILBERFELD:** Yes.

24 **THE COURT:** Okay, now, but let's go back to the two
25 questions, themselves.

1 **MR. CURRAN:** And Mr. Chung has a possible tweak on 6
2 and 7.

3 **MR. CHUNG:** Your Honor, what we could do is because
4 September 15th is the earlier day in Question 6, you could
5 say, after Question 6, "If you answer yes, fill in the month
6 and year as it requests. And if you answer yes, then skip the
7 next question, because you -- you have established an earlier
8 date. If your answer is no to Question 6, then move to
9 Question 7 and try and answer the question as to the later..."

10 **THE COURT:** I feel better about that. I think that
11 is better.

12 **MR. CHUNG:** Okay.

13 **THE COURT:** And Mr. Gold, I will do that, myself, and
14 bring it -- bring it back.

15 **MR. GOLD:** Okay.

16 **THE COURT:** But I -- I agree --

17 (Off-the-Record discussion between counsel)

18 **THE COURT:** Anyway, Mr. Silberfeld, I agree with them
19 that adding Toshiba and HannStar doesn't really assist this
20 particular thing. So, but I think we should say "If not, then
21 move on." That's a good one.

22 Okay, what else?

23 **MR. CURRAN:** Your Honor, I think this one may not be
24 disputed either, but Questions 3 and 4.

25 **THE COURT:** Yeah.

1 **MR. CURRAN:** If you see in Question 3, there's a
2 parenthetical there with the "e.g.," and it lists a bunch of
3 different types of products.

4 **THE COURT:** Yeah.

5 **MR. CURRAN:** Question 4 has a parenthetical, but it
6 does not list the same set of products. I don't know if that
7 was intentional or not.

8 **THE COURT:** Oh, not. How about "involving these
9 imported panels and/or finished products" and then no
10 parenthetical at all, because it's supposed to refer back to
11 the same thing as was discussed in 3, right?

12 **MR. CURRAN:** I think that solution makes sense.

13 **MR. SILBERFELD:** That's fine.

14 **THE COURT:** Is that okay?

15 **MR. SILBERFELD:** Yes.

16 **THE COURT:** Okay.

17 **MR. FREITAS:** What was that, Your Honor? I don't
18 think I understood.

19 **THE COURT:** All right. In Question 4 we'll just say,
20 "Did Best Buy prove by a preponderance of the evidence that
21 the conspiracy involving these imported TFT-LCD panels and/or
22 finished products..." because that's already been set out in
23 the prior question, and then just strike the parenthetical,
24 "produced substantial intended effects in the United
25 States..."

1 How's that?

2 **MR. FREITAS:** I understand, Your Honor.

3 **THE COURT:** Okay.

4 **MR. FREITAS:** I have a point about 6 and 7. It
5 looks, Your Honor, like throughout, the reference is
6 "Best Buy" rather than "the Plaintiffs." But in the question
7 that follows 7 (Indicating), it says, "the Plaintiffs."
8 There's two questions. 6 and 7 ask about "Best Buy," and then
9 7 refers to "the Plaintiffs."

10 I suggest that given that "Best Buy" is used everywhere
11 else, it should say "Best Buy" there instead of "the
12 Plaintiffs," if "the Plaintiffs" is not going to be used.

13 **THE COURT:** I didn't see where you were pointing to.

14 **MR. FREITAS:** It's the "If yes" question that follows
15 7, Your Honor (Indicating).

16 **THE COURT:** Oh, okay. I would be willing -- and I
17 will have to look at the context, but I would be willing to
18 stick "Best Buy" instead of "the Plaintiffs," because what
19 we've had is "HannStar," "Toshiba" and "Best Buy." And that's
20 kind of what I meant to do.

21 So if that's okay, that's what I'll do throughout the
22 questions.

23 **MR. FREITAS:** It looks like that's how it is,
24 Your Honor, everywhere except right there.

25 **THE COURT:** Okay, thank you. Okay, what else?

1 **MR. SILBERFELD:** Nothing else on the verdict form.

2 I have an objection to one of Mr. Freitas's slides.
3 Actually, a couple of his slides. And I think we handed this
4 up (Indicating).

5 **THE COURT:** You did. Which ones do you want to talk
6 to me about? Which ones are disputed at this time?

7 **MR. SILBERFELD:** The fifth page in, entitled "Assumed
8 Defendants and Co-Conspirators."

9 **THE COURT:** Okay, that's Page --

10 **MR. SILBERFELD:** It's numbered as Page 12 in the
11 PowerPoint.

12 **THE COURT:** You say this is outdated tables?

13 **MR. SILBERFELD:** Yeah. Actually, this is -- the
14 source of the note is not May 2nd. It's August, I think,
15 27th, when these figures were revised. And it's misleading.

16 We asked them to fix it; they declined.

17 **THE COURT:** Well, is that inaccurate, what it says?

18 **MR. FREITAS:** I have no idea, Your Honor.

19 **THE COURT:** The world's last honest man.

20 **MS. LEAL:** I actually can speak as to -- with that
21 date from the earlier one, is we don't have a revised table.
22 One was never admitted into evidence. This one was.

23 And the point of the slide is that the names are all
24 disappearing. So the names are not going to be -- so, we're
25 not saying that Dr. Frankel's relying on those today, but that

1 at one point during the trial he did admit that, saying that
2 those were the ones he's relying upon.

3 **MR. FREITAS:** I do understand what the slide is
4 supposed to depict. What we want to have up on the screen --

5 **THE COURT:** Well, is this an exhibit in evidence?

6 **MS. LEAL:** Yes, Your Honor.

7 **THE COURT:** Yes?

8 **MS. LEAL:** (Nods head)

9 **MR. SILBERFELD:** But they are removing names that
10 were removed subsequent to the exhibit. The exhibit in
11 evidence is not this page.

12 **THE COURT:** So this is not an exhibit in evidence.

13 **MS. LEAL:** It is an exhibit in evidence, Your Honor.

14 **THE COURT:** Just the way it appears?

15 **MS. LEAL:** The first slide is. It's a -- it's a --
16 it's one of the --

17 **MR. SILBERFELD:** Animation?

18 **MS. LEAL:** Thank you. It's the animation, Your
19 Honor. So it begins with the original exhibit and --

20 (Reporter interruption)

21 **MS. LEAL:** It begins with the exact exhibit that was
22 admitted into evidence. And all we do is remove from it, so
23 it becomes obsolete. Like, it disappears.

24 **THE COURT:** So, you start with a thing that is an
25 exhibit.

1 **MR. SILBERFELD:** Right.

2 **THE COURT:** And then the argument will go on, and
3 say, "However, in testimony, they took out X, Y and Z, so
4 look, they disappeared through the magic of animation, and
5 this is really what it's now all about."

6 **MS. LEAL:** That's correct, Your Honor.

7 **THE COURT:** "Even though it started somewhere
8 different." Is that what you're going to do?

9 **MR. FREITAS:** Your Honor, we're going to argue that
10 there is no evidence as to some, and that's why they're going
11 to disappear.

12 **THE COURT:** Okay. Well, then, if that's what you're
13 doing, as long as you don't represent something as an exhibit
14 which is not an exhibit, then I -- I'll overrule the
15 objection.

16 **MR. FREITAS:** Yes, Your Honor. What we want to do is
17 start with what they claimed, and then have the ones where
18 there is no proof disappear.

19 **THE COURT:** Okay. Do you like that? They worked so
20 hard on this, Mr. Silberfeld.

21 **MR. SILBERFELD:** Yeah. Slide 43, Your Honor, is a
22 problem. This is the one with Professor Carlton and Professor
23 Bernheim's figures side by side.

24 **THE COURT:** Yeah.

25 **MR. SILBERFELD:** No -- no problem at all with the

1 percentages. But there are dollar figures there which I don't
2 think are part of the evidence any more.

3 **THE COURT:** Well, this is a demonstrative, right?

4 **MS. LEAL:** Yes, it was used --

5 **THE COURT:** And you have put onto this demonstrative
6 pieces of information that was testified to at trial?

7 **MS. LEAL:** This exact slide was used during the
8 trial.

9 **MR. SILBERFELD:** With dollars?

10 **MS. LEAL:** Correct.

11 **THE COURT:** Okay, then that objection is overruled.

12 In general, I mean, it's okay to make up a demonstrative
13 that says, "So-and-so testified to this," and write it down,
14 "and somebody else testified to that," and write it down.
15 You can do that.

16 **MR. SILBERFELD:** If we could just get the reference
17 where those dollars are testified to -- they're not where we
18 were told they were -- that's fine.

19 **THE COURT:** All right. Well, would you let them
20 know?

21 **MS. LEAL:** (Nods head)

22 **THE COURT:** Is that it for these?

23 **MR. SILBERFELD:** Yes.

24 **THE COURT:** Okay.

25 **MR. FREITAS:** Your Honor, I have one more request on

1 the verdict form. On the -- on the verdict form there's only
2 two questions on amount of damages, 9 and 10.

3 And, it's possible that the evidence could come out
4 differently for HannStar and Toshiba. It's possible that both
5 could be held liable. But, in different amounts.

6 And we suggest that it's important to have separate damage
7 numbers, separate damage questions for HannStar and Toshiba.

8 **THE COURT:** All right. I overrule that request. I
9 disagree with you.

10 **MR. FREITAS:** All right. Well, I intend to argue,
11 Your Honor, for a number that I don't think will bear any
12 relationship to whatever number might be argued by Toshiba.

13 So, I don't know what the jury's opportunity to address
14 what I'm going to claim, based on the evidence involving
15 HannStar, will be.

16 **THE COURT:** All right. Thank you. You have made
17 your position clear.

18 **MR. CURRAN:** Your Honor, we have a few preliminary
19 issues. I think that make sense to address first, one
20 suggestion we have with respect to the final instructions.
21 And Mr. Chung will address this.

22 I'm mindful of the clock.

23 **MR. CHUNG:** Your Honor, the first issue is an
24 agreed-upon change between the parties. And that appears at
25 Page 8 of your draft last night, and it's the instruction on

1 the use of interpreters.

2 **THE COURT:** Yeah.

3 **MR. CHUNG:** The parties have agreed to omit the word
4 "solely" from the second sentence, "a party based solely..."

5 **THE COURT:** You've agreed to that?

6 **MR. CHUNG:** Yes. We have, Your Honor. It was with
7 the joint agreed instructions that were submitted on Wednesday
8 morning.

9 **THE COURT:** You have agreed to that?

10 **MR. SILBERFELD:** That's fine.

11 **THE COURT:** Okay.

12 **MR. CHUNG:** The second issue, Your Honor, appears at
13 Page 26 of your draft last night. And, this occurred to us as
14 we went back and reviewed your instructions more closely.
15 And, this is the instruction on damages, consumer damages, at
16 the bottom.

17 And the issue here is this instruction pertains to the IPP
18 settlement. But, two instructions later, on the very next
19 page, there is an instruction -- and I believe it is agreed
20 upon, the settlement agreements of the settling Defendants.
21 So it's, in one respect, redundant.

22 And in terms of the substance of the consumer damages
23 instruction, it's been the rules of trial all along that the
24 amounts of the settlements are not to be introduced. And
25 there hasn't been any testimony adduced about the amount of

1 the IPP class settlement. And therefore, it's unnecessary.

2 **THE COURT:** I think it's helpful to the jury.

3 Otherwise I think they would be confused, because they've

4 heard that there were consumer settlements. And if I were

5 they, I would wonder how that relates to this. And this tells

6 them it does not.

7 **MR. CHUNG:** Does the size or amount which was never

8 adduced -- I think it just might be confusing, because they

9 haven't heard anything about the size or amount.

10 **THE COURT:** But they know it happened.

11 **MR. SILBERFELD:** And they know that the class has

12 been compensated (Indicating quotation marks).

13 **THE COURT:** Yeah, no, I think this is an important

14 one.

15 **MR. CHUNG:** Thank you, Your Honor.

16 **THE COURT:** Okay.

17 **MR. CURRAN:** Next, Your Honor, we would like to make

18 a motion under Rule 50 of the Federal Rules of Civil

19 Procedure. And Mr. Gidley will address that briefly.

20 **THE COURT:** Okay, just say it. Really briefly.

21 **MR. GIDLEY:** Yes, Your Honor.

22 We filed a motion last night, it is Docket No. 8547. So

23 we are moving under Rule 50 of the Federal Rules of Civil

24 Procedure -- and I'll simply just note for the Record, again,

25 briefly, among the grounds which are listed in that motion,

1 Citric Acid, ATM Fees, Hartford Fire and so forth, we, in
2 addition, renew our earlier motion on pass-through that we had
3 filed earlier, actual damages sustained.

4 And we also renew our motions to strike Drs. Bernheim and
5 Frankel, not only for the grounds stated in the briefing
6 provided earlier, which I believe is Docket 8453, but also for
7 lack of evidentiary foundation as to actual purchase data,
8 actual purchase data by named Plaintiffs, the six, as well as
9 just a lack of foundation by Dr. Bernheim for knowledge of his
10 materials.

11 And there is a second, if you will, Your Honor, judgment
12 for motion as a matter of law under Rule 50 that was filed
13 last night by HannStar. Docket 8546. And Toshiba has joined
14 that second judgment-as-a-matter-of-law motion.

15 **THE COURT:** Thank you. They're denied.

16 **MR. FREITAS:** Your Honor, as Mr. Gidley noted,
17 HannStar has filed a motion under Rule 50, Docket 8546. We
18 have also joined the other motions that Mr. Gidley just made
19 reference to, the Toshiba Rule 50 motion and the other Toshiba
20 motions.

21 **THE COURT:** All right, thank you. Well, that's
22 denied, too.

23 **MR. CURRAN:** Lastly, I think, Your Honor, we have
24 some objections we would like to state on the Record as to the
25 instructions and the verdict form.

1 **THE COURT:** All right.

2 **MR. CURRAN:** Ms. Koprowski, who you met yesterday,
3 will do this. It will take a few minutes, but we will move it
4 along as quickly as we can.

5 **THE COURT:** Okay.

6 **MS. KOPROWSKI:** Thank you, Your Honor. I'll address
7 the verdict form first, please.

8 Toshiba objects to the verdict form for the following
9 reasons: The verdict form --

10 **THE COURT:** Speak right into the mic so the court
11 reporter can get you.

12 **MS. KOPROWSKI:** The verdict form does not require the
13 jury to identify the ownership or control relationships
14 between alleged conspirators and the entities which sold to
15 Best Buy, which is a requirement for standing under *ATM Fee*
16 for Plaintiffs' federal law claims.

17 The verdict form does not identify the members of the
18 alleged conspiracy, the beginning or end of the alleged
19 conspiracy, or require that any of the Best Buy Plaintiffs
20 prove injury due to the alleged conspiracy.

21 **THE COURT:** Incidentally, the verdict form doesn't
22 require that anybody prove anything. The instructions outline
23 what must be proved, and then the jury will say whether it was
24 or wasn't.

25 So the fact that the verdict form doesn't reflect that

1 doesn't mean that the jury wasn't required to find that it's
2 been demonstrated. But, anyway. Go ahead.

3 **MS. KOPROWSKI:** Toshiba also objects because it
4 provides no mechanism for the jury to identify which of the
5 four Toshiba Defendants, if any, individually joined the
6 conspiracy.

7 Toshiba objects to Questions 3 and 4 because they misstate
8 the application of -- pardon me -- misstate the application of
9 the Sherman Act to import commerce, are compound and
10 confusing, and misstate the Plaintiffs' allegations in this
11 case.

12 Toshiba objects to Question 4 because it misstates the
13 antitrust law regarding import commerce under *Hartford Fire*.

14 Toshiba objects to Question 5 because it is misleading
15 regarding the requirements of FTAIA.

16 Toshiba objects to Question 8 as compound as ambiguous.

17 And we have some objections to the jury instructions as
18 well.

19 **THE COURT:** Okay.

20 **MS. KOPROWSKI:** Toshiba objects to the instruction
21 entitled "Federal Claims/Direct Purchases" because this
22 instruction --

23 **THE COURT:** Can you give me a page reference?

24 **MS. KOPROWSKI:** Yes, Your Honor. Page 11.

25 **THE COURT:** Okay.

1 **MS. KOPROWSKI:** Toshiba objects to the instruction
2 titled "Federal Claims/Direct Purchases" because this
3 instruction does not instruct the jury on the requirements to
4 establish the exception to the indirect purchaser prohibition
5 under *Illinois Brick*. The Ninth Circuit decision in *ATM Fee*
6 confers standing only when a conspiring seller owns and
7 controls the direct purchaser.

8 First, the instruction incorrectly permits the jury to
9 find that Best Buy has standing under the Sherman Act to
10 recover damages as a direct purchaser if it purchased a
11 finished product containing a price-fixed panel, when the
12 price-fixed panel was sold to an intermediate entity,
13 unaffiliated with the conspirator, before being sold to
14 Best Buy. In such cases, Best Buy would be an indirect
15 purchaser.

16 Second, the instruction would allow Best Buy to recover
17 damages for purchases of finished products containing LCD
18 panels manufactured by non-conspiring entities.

19 Toshiba also objects to the instruction titled "Import
20 Commerce - Intent; Substantial Effect." And that's on
21 Page 15. The instruction does not define "substantial," and
22 is therefore vague and ambiguous.

23 The instruction does not instruct the jury that it must
24 find a "substantial, intended effect" on a product-by-product
25 and conspirator-by-conspirator basis.

1 The instruction incorrectly instructs the jury that
2 Minnesota antitrust law may apply to foreign conduct, that
3 produced "a substantial, intended effect" in the United
4 States, but not specifically in Minnesota.

5 The next objection is to "Horizontal Price Fixing -
6 Elements of the Federal Claims" and "Elements of the State Law
7 Claims," which are on Page 12 and 13.

8 Initially, Toshiba rejects -- objects to the Court's
9 rejection of Defendants' Instruction No. 33, Foreign Commerce,
10 because Defendants' Instruction No. 33 is an accurate
11 statement of the law and is necessary based on the record
12 evidence. Defendants' Instruction No. 33 correctly states the
13 requirements for showing direct, substantial, and reasonably
14 foreseeable effects as required under federal law.

15 For the same reasons, Toshiba objects to the two
16 instructions I just mentioned, Horizontal Price Fixing -
17 Elements of the Federal Claims and Horizontal Price Fixing -
18 Elements of the State Law Claims, because the terms "direct,
19 substantial, and reasonably foreseeable" are vague and
20 ambiguous.

21 Toshiba also objects to the instruction titled --

22 **THE COURT:** "Reasonably foreseeable" is vague and
23 ambiguous? Doesn't that go back to *Palsgraf*? Haven't we been
24 instructing juries about reasonably foreseeable things since
25 the dawn of time?

1 **MS. KOPROWSKI:** Yes, but "direct" is also not defined
2 at all. And, Your Honor, you do define "intent and
3 substantial effect" under Import Commerce, but there's -- and
4 you mention that the jury may find that the conspiracy
5 affected foreign commerce, but then don't define the terms
6 related to that, under --

7 **THE COURT:** Okay.

8 **MS. KOPROWSKI:** Toshiba objects to elements of the
9 state law claims because the instruction does not require the
10 finder of fact to find that in order to pursue damages under
11 Minnesota law, Plaintiffs must prove by a preponderance of the
12 evidence that the members of the conspiracy undertook a
13 conspiratorial act in Minnesota, or sold a significant
14 aggregation of price-fixed panels or goods containing
15 price-fixed panels within Minnesota as explained in
16 Defendants' Instruction No. 46, Scope of State Law.

17 In addition, the instruction incorrectly equates affected
18 commerce in Minnesota with affected commerce in the United
19 States.

20 Toshiba objects to the instruction entitled Guilty Pleas
21 and Convictions on Page 27 because it improperly implies that
22 the violations underlying the guilty pleas or convictions of
23 non-defendants are admissible as evidence against Defendants.

24 Toshiba objects to the instruction entitled "Good Intent
25 Is Not a Defense," and that is on Page 18, because it is

1 irrelevant and will lead to jury confusion.

2 Toshiba objects to the instruction entitled "Federal
3 Damages - No 'Pass-On' Consideration," also because it is
4 irrelevant and will lead to jury confusion. And that's
5 located on Page 24.

6 Additionally, the instruction would impermissibly permit
7 duplicative recovery.

8 Toshiba objects to the instruction State Law Damages -
9 Pass-On, also on Page 24, because it incorrectly instructs the
10 jury that Defendants have the burden of proving downstream
11 pass-on under Minnesota state law.

12 I'm going to go through a few lists. I'll try not to take
13 too long. Toshiba objects to the following nine instructions,
14 because they do not instruct the jury that each of the six
15 named Plaintiffs bear an individual burden on its claims:

16 Federal Claims/Direct Purchases;

17 Horizontal Price Fixing - Elements of the Federal Claims;

18 Horizontal Price Fixing - Elements of the State Law

19 Claims;

20 Statute of Limitations: State law claims Law Claims;

21 Antitrust Injury;

22 Damages - Joint Conspirator Liability;

23 Damages - No Need for Certainty; Speculation not

24 Permitted;

25 And Nominal Damages.

1 I'm sorry, that was eight, not nine.

2 Toshiba objects to the following instructions because they
3 do not instruct the jury that the Plaintiffs must establish
4 individual liability against each alleged co-conspirator
5 before Plaintiffs may recover damages caused by the conduct of
6 that conspirator:

7 Federal Claims - Direct Purchases;

8 Contract, Combination or Conspiracy;

9 Participation and Intent;

10 Damages - Joint Conspirator Liability;

11 State Law Damages - Pass-On.

12 Toshiba objects to the language throughout the
13 instructions referring to "a conspiracy," because it
14 inaccurately characterizes the single overarching conspiracy
15 alleged by Plaintiffs, and without a clear statements of the
16 alleged conspiracy, the jury cannot determine whether the
17 relevant conspiracy existed.

18 Toshiba objects to the rejection of Defendants'
19 Instruction No. 9, because it is an accurate statement of the
20 law and necessary based on the evidence on the record.

21 Defendants' Instruction No. 9 would instruct the jury of the
22 requirements under Ninth Circuit and Supreme Court precedent,
23 as described in *Citric Acid*, *Monsanto*, and *Matsushita*.

24 Finally, Toshiba objects to the rejection of each of the
25 following instructions because they are accurate statements of

1 the law and necessary based on the evidence on the record:

2 Defendants' Instruction No. 24: Single versus Multiple
3 Conspiracies.

4 Defendant's Instruction No. 30: Price Checking is Lawful.

5 Defendants' Instruction No. 30A like "Apple": Shop Talk
6 and Social Exchanges Among Competitors Are Not Price Fixing.

7 Defendants' Instruction No. 31: Possession of Information
8 Available From Sources Other Than Competitors.

9 Defendants' Instruction No. 32: Limited Use of HannStar's
10 Plea Evidence.

11 Defendants' Instruction No. 32A: Limited Use of Plea
12 Evidence of Non-Defendants.

13 Defendants' Instruction No. 34A: Multiple Plaintiffs.

14 Defendants Instruction No. 38: Damages - Time Period.

15 Defendants' Instruction No. 38A: Mitigation.

16 Defendants' Instruction No. 40: Damages - Causation and
17 Disaggregation.

18 Defendants' Instruction No. 43: No Duplicative Recovery.

19 And Defendants' Instruction No. 46: Scope of State Law.

20 Thank you, Your Honor.

21 **THE COURT:** Thank you.

22 **MR. CHUNG:** Thank you.

23 **MS. CONN:** Good morning, Your Honor. Bernice Conn
24 for Plaintiff.

25 We have one objection. And it's solely to the additional

1 language requested by Toshiba on Page 28, in the
2 lack-of-indictment instruction.

3 And specifically, we're objecting to the modifications
4 they requested and were made. So it would be the phrase "by
5 the Department of Justice and you may consider that fact in
6 your deliberations."

7 And also to the word "necessarily."

8 And the grounds for objection is we don't believe it's
9 proper for the jury to consider that fact in their
10 deliberations. So it would be an objection, under 403, as to
11 all of this language.

12 **THE COURT:** Okay, thank you. It's overruled.

13 **MR. FREITAS:** Your Honor, on the verdict form, we
14 join the comments and objections by Toshiba. And, I earlier
15 had requested a separate damage question this morning.

16 Also, we think the verdict form should explicitly make
17 reference to the possibility that the jury would find
18 different conspiracies, or separate conspiracies. We think
19 the verdict form assumes that it would just be one conspiracy.

20 On the jury instructions, Your Honor, we join Toshiba's
21 objections. And I would like to specifically mention again
22 the single- versus multiple-conspiracy issue that we discussed
23 yesterday. And we also renew our prior requests and
24 objections.

25 Thank you, Your Honor.

1 **THE COURT:** All right, thank you. With that, are we
2 ready to get going?

3 **MR. CURRAN:** Yes, Your Honor.

4 **MR. FREITAS:** Yes, Your Honor.

5 **THE COURT:** All right. So, Mr. Gold?

6 **MR. GOLD:** Yes, Your Honor.

7 **THE COURT:** With respect to the jury instructions,
8 which I would like to be flashed on the screen as we read
9 them, you can do that?

10 **MR. GOLD:** Yes.

11 **THE COURT:** And have you eliminated the word "solely"
12 from Page 8?

13 **MR. GOLD:** I did, Your Honor.

14 **THE COURT:** Okay. And then, the other thing you
15 should eliminate is on the front page of it, I don't know if
16 that will be flashed up there, but it says Draft - Post
17 Conference." You should just take that off.

18 **MR. GOLD:** Okay. I can redact it, or would you like
19 me to just wait until you start reading the instructions?

20 **THE COURT:** That will be fine, too.

21 **MR. GOLD:** Okay.

22 **THE COURT:** So, that's what we will do on the
23 instructions.

24 All the other things you just read out into the record are
25 -- are rejected, for all the reasons we have previously

1 discussed.

2 But I'm going to take five minutes and go fix the jury
3 form -- I mean, the verdict form.

4 **MR. CURRAN:** Your Honor, would you like Mr. Gold to
5 highlight as you read, or just show the text?

6 **THE COURT:** Oh, I don't think you need to highlight.
7 Just, as long as it's up there, they'll have something to do.
8 They can read it.

9 **MR. GOLD:** I can magnify it as you go to each one, so
10 it's a little bit larger for them to read.

11 **THE COURT:** All right, that might be good. All
12 right, thank you.

13 All right. Well, I'm going to go amend the verdict form
14 as you've requested. And, then, hopefully within about five
15 minutes, we will be ready to go.

16 So, Mr. Silberfeld.

17 **MR. SILBERFELD:** Yes, Your Honor.

18 **THE COURT:** You get to go first. What is your plan
19 in terms of your time? And do you want me to say anything to
20 you about time?

21 **MR. SILBERFELD:** I'm going to -- I have a clock
22 (Indicating), and I'll be guided by my own clock.

23 **THE COURT:** Okay.

24 **MR. SILBERFELD:** Thank you.

25 (Recess taken from 9:15 to 9:32 a.m.)

1 (The following proceedings were held outside of the
2 presence of the Jury)

3 **THE CLERK:** Come to order.

4 **THE COURT:** Ready?

5 **MR. SILBERFELD:** Just a logistical question in terms
6 of time, Your Honor. I imagine the Court is going to read
7 instructions for about an hour?

8 **THE COURT:** I'm going to read the instructions, as we
9 have settled on them.

10 **MR. SILBERFELD:** Right. And if that takes until
11 about 10:30, should I start then?

12 **THE COURT:** Oh. What I will tell the jury, and I'll
13 tell you folks as well, is what we will try to do is just take
14 breaks as it makes sense, for comfort. Probably everybody has
15 had a lot of coffee this morning. So, I think logically, we
16 would take maybe ten minutes.

17 I'll tell them we want to keep the breaks short, if we
18 can, so we can get this all done. But ten minutes, maybe,
19 between the restrictions and you starting.

20 **MR. SILBERFELD:** And then I'll reserve some time.

21 **THE COURT:** And then, depending on how long you go,
22 we'll either -- take a ten-minute break then.

23 Between you folks, who is going to go first between you
24 two?

25 **MR. FREITAS:** I am, Your Honor.

1 **THE COURT:** All right.

2 **MR. SILBERFELD:** Great.

3 (The following proceedings were held in the presence of
4 the Jury)

5 **THE COURT:** Welcome back, ladies and gentlemen. You
6 may all be seated.

7 So, what will happen now is the following: I have some
8 instructions that I will read to you, which tell you what the
9 law is that you are to apply when you deliberate on these
10 matters. They are lengthy. And I will read them, because
11 that's what I shall do. We also will show them on the screen
12 as I read them, so you may follow along.

13 When you go back in the jury room to deliberate, you will
14 each get a set of the instructions. So don't worry about
15 memorizing them, but just try to -- try to pay attention, if
16 you can, because it will give you a framework for listening to
17 what will happen next, which will be the closing arguments of
18 counsel.

19 Mr. Silberfeld will go first. Thereafter, Mr. Freitas is
20 going to argue for HannStar, and then Mr. Curran will argue
21 for Toshiba. Then if he has reserved some of his time,
22 Mr. Silberfeld will finish up, and then we will be done.

23 I have said this more rapidly than it will actually
24 happen. Therefore, what we will do is take rest stops at
25 various points during the morning. We've tentatively agreed

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1 that I will probably take, say, a ten-minute break after I
2 read the instructions and before counsel begin their
3 arguments. Then we will just kind of take breaks as it seems
4 logical in the proceedings.

5 What I anticipate is that we will get this all done before
6 we take any kind of a lunch recess. So you may have to
7 fortify yourselves on the brief breaks, but this way we will
8 get it to you as soon as we can today.

9 However, if -- in the meantime, if any of you feels that
10 your attention would be improved by taking a really short
11 break, just raise your hand, and we will take a five-minute
12 break at any point. Otherwise, we will just take them as the
13 proceedings kind of unfold. Okay?

14 All right. So, I'll begin by reading the instructions.

15 Mr. Gold?

16 (Document displayed)

17 **THE COURT:** All right.

18 **JURY INSTRUCTIONS**

19 **BY THE COURT:**

20 Ladies and gentlemen, it is my duty to instruct you on the
21 law.

22 During this trial, you have heard testimony from certain
23 witnesses, and reviewed certain documents in evidence, with
24 reference to what is and what is not lawful or what they
25 considered to be lawful or not lawful. You are to disregard

JURY INSTRUCTIONS

1 any such testimony and such documents in determining what the
2 law is, although that testimony may be relevant to issues you
3 immediate to decide, such as knowledge and intent. I alone
4 will instruct you as to what is lawful or unlawful conduct.

5 These instructions are to help you understand the
6 principles that apply to civil trials and to help you
7 understand the evidence as you have listened to it. You will
8 be allowed to keep this set throughout your deliberations.
9 You will also be provided with a set of the exhibits admitted
10 into evidence. This set of instructions and those exhibits
11 are not to be taken home and must remain in the jury room when
12 you leave in the evening.

13 You must not infer from these instructions or from
14 anything that I have said or done as indicating that I have an
15 opinion regarding the evidence or what your verdict should be.

16 It is your duty to find the facts from all the evidence in
17 the case. To those facts, you will apply the law as I give it
18 to you. You must follow the law as I give it to you whether
19 you agree with it or not. And you must not be influenced by
20 any personal likes or dislikes, opinions, prejudices, or
21 sympathy. That means that you must decide the case solely on
22 the evidence before you. You will recall that you took an
23 oath to do so.

24 In following my instructions, you must follow all of them
25 and not single out some and ignore others; they are all

JURY INSTRUCTIONS

1 important.

2 The Plaintiffs have the burden of proving their claims by
3 a preponderance of the evidence. The Defendants have the
4 burden of proving their affirmative defenses by a
5 preponderance of the evidence. When a party has the burden of
6 proof on any claim or affirmative defense by a preponderance
7 of the evidence, it means that you must be persuaded by the
8 evidence that the claim or affirmative defense is more
9 probably true than not true.

10 You should base your decision on all of the evidence,
11 regardless of which party presented it.

12 As you know, this trial involves products called
13 "thin-film transistor liquid crystal display panels." These
14 panels are sometimes called "TFT-LCD panels," or sometimes
15 just "LCD panels," or "panels" for short. TFT-LCD panels are
16 found in a number of finished products, including flat-screen
17 computer monitors, laptops, and flat-screen televisions. They
18 are the screens that display the images -- they are the
19 screens that display the images. This trial involves certain
20 manufacturers of these TFT-LCD panels.

21 The Plaintiffs in this case are Best Buy Co.; Best Buy
22 Purchasing, LLC; Best Buy Enterprise Services, Inc.; Best Buy
23 Stores LP; BestBuy.com, LLC; and Magnolia Hi-Fi, Inc. In
24 these instructions and in the verdict form, the Plaintiffs are
25 sometimes referred to collectively as the "Best Buy entities,"

JURY INSTRUCTIONS

1 or just "Best Buy." The Plaintiffs allege that they are
2 buyers and resellers of finished products containing TFT-LCD
3 panels. The Defendants in this trial are HannStar Display
4 Corporation; Toshiba Corporation; Toshiba Mobile Display Co.,
5 Ltd; Toshiba America Electronics Components, Inc.; and
6 Toshiba America Information Systems, Inc. HannStar is a
7 manufacturer of TFT-LCD panels. The Toshiba entities include
8 manufacturers of TFT-LCD panels, as well as related companies.
9 In these instructions and in the verdict form, the Toshiba
10 entities are sometimes referred to collectively as "Toshiba"
11 or "the Toshiba entities."

12 Plaintiffs allege that the Defendants engaged in a
13 conspiracy to fix the price of TFT-LCD panels in violation of
14 United States federal law, which is the Sherman Act, and
15 Minnesota state law with the following entities: Acer
16 Display; AU Optronics Corporations, sometimes called AUO;
17 Chi Mei Corporation, CMO; Chunghwa Picture Tubes, CPT; Epson
18 Imaging Devices Corporation; Hitachi Displays, Ltd.; Hydis
19 Technologies Co., Ltd., formerly known as BOE Hydis Technology
20 Co., Ltd.; Koninklijke Philips Electronics N.V., also known as
21 Royal Philips Electronics N.V.; LG Display Co., Ltd.;
22 Mitsubishi Electronics Corporation; NEC LCD Technologies,
23 Ltd.; Quanta Display, Inc.; Samsung SDI Co., Ltd.; Samsung
24 Electronics Co., Ltd.; Sanyo Consumer Electronics Co., Ltd.,
25 formerly known as Tottori Sanyo Electric Co.; Sharp

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1 Corporation; Toppoly Optoelectronics Corporation; and Unipac
2 Electronics. The Plaintiffs allege that the conspiracy lasted
3 from January 1, 1998 through December 1, 2006.

4 The Plaintiffs contend that they were injured because
5 manufacturers of the finished products containing TFT-LCD
6 panels had to pay more for TFT-LCD panels, and those
7 manufacturers and sometimes intermediate sellers then passed
8 on the higher costs of the TFT-LCD panels to the Plaintiffs.

9 Toshiba contends that it did not reach any agreements with
10 any competitors and therefore it was not part of any
11 conspiracy regarding TFT-LCD panels.

12 HannStar admits to participating in what you have heard
13 described as the Crystal Meetings between September 2001 and
14 January 2006, and admits that pricing agreements regarding
15 certain panels were sometimes reached during those meetings.
16 HannStar denies engaging in any other unlawful conduct or
17 participating in any other conspiracy. HannStar also disputes
18 how effective and broad any conspiracy was and contends that
19 the Plaintiffs claim more in damages than the evidence
20 supports. HannStar denies that it reached any agreements on
21 panel prices with any of the Toshiba entities.

22 The Defendants also contend, as to the Plaintiffs'
23 Minnesota state law claims only, that the Plaintiffs passed on
24 most of any higher costs to their own customers, and thus were
25 not harmed, themselves. That contention regarding passing on

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1 of costs to customers applies only to the state law claims.

2 The Plaintiffs and Defendants involved in this case are
3 corporations. A corporation is entitled to the same fair
4 trial as a private individual. All persons, corporations,
5 partnerships, and other organizations stand equal before the
6 law, and stand equal in this Court.

7 Therefore, in examining the issues in this case, it does
8 not matter that some of the parties are corporations. You
9 should consider and decide the case as a dispute between those
10 of equal standing.

11 You should decide the case as to each Defendant and as to
12 each Plaintiff separately, even though there are multiple
13 Defendants and Plaintiffs, and the parties may have presented
14 some common evidence.

15 Unless otherwise stated, the instructions apply to all
16 parties.

17 The evidence you are to consider in deciding what the
18 facts are consists of:

19 The sworn testimony of any witness, whether the witness
20 appeared live in the courtroom, by deposition, or through a
21 reading of prior sworn testimony;

22 The exhibits that are received into evidence;

23 Any facts to which the parties have agreed or stipulated;

24 And any facts of which I told you I have taken judicial
25 notice.

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1 As I instructed you in the preliminary instructions, in
2 reaching your verdict, you may consider only the testimony and
3 exhibits received into evidence. Certain things are not
4 evidence, and you may not consider them in deciding what the
5 facts are. I will list them for you:

6 Arguments and statements by lawyers are not evidence. The
7 lawyers are not witnesses. What they have said in their
8 opening statements, and will say in their closing arguments
9 and at other times is intended to help you interpret the
10 evidence, but it is not evidence. If the facts as you
11 remember them differ from the way the lawyers have stated
12 them, your memory of the facts controls.

13 Questions and objections by lawyers are not evidence.
14 Attorneys have a duty to their clients to object when they
15 believe a question is improper under the Rules of Evidence.
16 You should not be influenced by the objection or by the
17 Court's ruling on it.

18 Testimony that has been excluded or stricken, or that you
19 have been instructed to disregard, is not evidence and must
20 not be considered. In addition, sometimes testimony and
21 exhibits are received only for a limited purpose. When I've
22 given a limiting instruction, you must follow it.

23 Finally, anything that you may have seen or heard when the
24 Court is not in session is not evidence. You are to decide
25 the case solely on the evidence received at the trial.

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1 Evidence may be direct or circumstantial. Direct evidence
2 is direct proof of a fact, such as testimony by a witness
3 about what the witness personally saw or heard or did.
4 Circumstantial evidence is proof of one or more facts from
5 which you may find another fact. You should consider both
6 kinds of evidence. The law makes no distinction between the
7 weight to be given to either direct or circumstantial
8 evidence. It is for you to decide how much weight to give any
9 evidence.

10 There are rules of evidence that control what can be
11 received into evidence. When a lawyer asks a question --
12 asked a question or offered an exhibit into evidence, and a
13 lawyer on the other side thought that it was not permitted by
14 the rules of evidence, that lawyer may have objected. If I
15 overruled the objection, the question was answered or the
16 exhibit received. If I sustained the objection, the question
17 could not be answered, and the exhibit could not be received.
18 Whenever I sustained an objection to a question, you must
19 ignore the question and must not guess what the answer might
20 have been.

21 Sometimes I may have ordered that evidence be stricken
22 from the record and that you disregard or ignore the evidence.
23 That means that when you are deciding the case, you must not
24 consider the evidence that I told you to disregard.

25 In deciding the facts in this case, you may have to decide

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1 which testimony to believe and which testimony not to believe.
2 You may believe everything a witness said, or part of it, or
3 none of it.

4 In considering the testimony of any witness, you may take
5 into account:

6 The opportunity and ability of the witness to see or hear
7 or know the things testified to;

8 The witness's memory;

9 The witness's manner while testifying;

10 The witness's interest in the outcome of the case and any
11 bias or prejudice;

12 Whether other evidence contradicted the witness's
13 testimony;

14 The reasonableness of the witness's testimony in light of
15 all the evidence; and

16 Any other factors that bear on believability.

17 The weight of the evidence as to a fact does not
18 necessarily depend on the number of witnesses who testify
19 about it.

20 In deciding whether to believe a witness, you should
21 specifically note any evidence of hostility or affection which
22 the witness may have toward one of the parties. Likewise, you
23 should consider evidence of any other interest or motive that
24 the witness may have in cooperating with particular party,
25 including a cooperation agreement.

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1 If -- oh, for these reasons, in evaluating the testimony
2 of those witnesses, you should consider the extent to which or
3 whether that testimony may have been influenced by any of
4 these factors. In addition, you should examine the testimony
5 of those witnesses with greater caution than that of other
6 witnesses.

7 It is your duty to consider whether the witness has
8 permitted any such bias or interest to color his or her
9 testimony. In short, if you find that a witness is biased,
10 you should view his or her testimony with caution, weigh it
11 with care, and subject it to close and searching scrutiny.

12 You should also ask yourself whether there was evidence
13 tending to prove that the witness testified falsely concerning
14 some important fact; or, whether there was evidence that at
15 some other time the witness said or did something, or failed
16 to say or do something, which was different from the testimony
17 the witness gave before you during the trial.

18 You should keep in mind, of course, that a simple mistake
19 about a witness does not necessarily mean that the witness was
20 not telling the truth as he or she remembers it, because
21 people naturally tend to forget some things or remember other
22 things inaccurately. So, if a witness has made a
23 misstatement, you need to consider whether that misstatement
24 was simply an innocent lapse of memory or an intentional
25 falsehood; and the significance of that may depend on whether

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1 it has to do with an important fact or only an unimportant
2 detail.

3 Testimony of a witness may have been discredited or
4 "impeached" by showing that on some former occasion the
5 witness made a statement that is inconsistent with the
6 witness's testimony in this trial. Evidence of this kind may
7 be considered by you in connection with all the other facts
8 and circumstances in evidence in deciding the weight to be
9 given to the testimony of that witness.

10 Certain individuals called as witnesses in this case speak
11 English as their first language -- oh, pardon me. Let me
12 start over.

13 Certain individuals called as witnesses in this case do
14 not speak English as their first language. These witnesses
15 may have requested the assistance of an interpreter during
16 their testimony. You must not make any assumptions about a
17 witness or a party based upon the use of an interpreter to
18 assist that witness or party.

19 Some witnesses, because of education or experience, are
20 permitted to state opinions and the reasons for those
21 opinions. Opinion testimony should be judged just like any
22 other testimony. You may accept it or reject it, and give it
23 as much weight as you think it deserves, considering the
24 witness's education and experience, the reasons given for the
25 opinion, and all the other evidence in the case.

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1 You have heard testimony of witnesses the parties refer to
2 as experts who have been called by both side to give their
3 opinion about various issues. The witnesses who testified in
4 this case did so in order to assist you in reaching a decision
5 on certain issues. It is your obligation to determine the
6 expertise, if any, of such witnesses and the credibility of
7 such witnesses and the reliability of their opinions.

8 The testimony of these witnesses is in conflict. They
9 disagree. You must remember that you are the sole trier of
10 facts, and where -- and where the expert's testimony relates
11 to a question of fact, it is your job to resolve those
12 disagreements.

13 I'm going to read that whole paragraph over again.

14 The testimony of these witnesses -- this is the expert
15 witnesses -- is in conflict. They disagree. You must
16 remember that you are the sole trier of facts, and where their
17 testimony relates to a question of fact, it is your job to
18 resolve the disagreements.

19 The way you resolve the conflict between these witnesses
20 is the same way that you decide other fact questions, and the
21 same way that you decide whether to believe ordinary
22 witnesses. In addition, since they gave their opinions, you
23 should consider the soundness of each opinion, reasons for the
24 opinion, and the witness' motive, if any, for testifying.

25 You may give the testimony of each of these witnesses such

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1 weight, if any, that you think it deserves in light of all the
2 evidence. You should not permit a witness's opinion testimony
3 to be a substitute for your own reason, judgment and common
4 sense.

5 You may reject the testimony of any opinion witness in
6 whole or in part, if you conclude that the reasons given in
7 support of an opinion are unsound, or, if you, for other
8 reasons, do not believe the witness. The determination of the
9 facts in this case rests solely with you.

10 During the trial, you may have heard the attorneys use the
11 term "inference," and in their arguments they may ask you to
12 infer on the basis of your reason, experience and common sense
13 from one set -- one or more established facts, the existence
14 of some other fact.

15 An inference is not a suspicion or a guess. It is a
16 reasoned, logical conclusion that a disputed fact exists on
17 the basis of another fact which has been shown to exist.

18 There are times when different inferences may be drawn
19 from facts, whether proved by direct or circumstantial
20 evidence. The Plaintiffs may ask you to draw one set of
21 inferences while the Defendants may ask you to draw another.
22 It is for you, and you alone, to decide what inferences you
23 will draw.

24 The process of drawing inferences from facts in evidence
25 is not a matter of guesswork or speculation. An inference is

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1 a deduction or conclusion which you, the jury, are permitted
2 to draw -- but not required to draw -- from the facts which
3 have been established by either direct or circumstantial
4 evidence. In drawing inferences, you should exercise your
5 common sense.

6 So, while you are considering the evidence presented to
7 you, you are permitted to draw, from the facts which you find
8 to be proven, such reasonable inferences as would be justified
9 in light of your experience.

10 The law does not require any party to call as a witness
11 all persons who may have been present at any time or place
12 involved in the case, or who may appear to have some knowledge
13 of the matters at issue in this trial. Nor does the law
14 require any party to produce exhibits -- to produce as
15 exhibits all papers and things mentioned in the evidence in
16 this case.

17 A deposition is the sworn testimony of a witness taken
18 before trial. The witness is placed under oath to tell the
19 truth and lawyers for each party may ask questions. The
20 questions and answers are recorded. When a person is
21 unavailable to testify at trial, the deposition of that person
22 may be used at trial.

23 You should consider deposition testimony, presented to you
24 in court in lieu of live testimony, insofar as possible, in
25 the same way as if the witness had been present to testify.

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1 When a deposition was read to you, do not place any
2 significance on the behavior or tone of voice of any person
3 reading the questions and answers.

4 During the trial, the parties showed you various charts or
5 summaries. Some of those charts or summaries came into
6 evidence, while others did not.

7 Charts not received into evidence are not themselves
8 evidence or proof of any facts. If they do not correctly
9 reflect the facts or figures shown by the evidence in the
10 case, you should disregard these charts and summaries and
11 determine the facts from the underlying evidence.

12 By contrast, charts and summaries received into evidence
13 should be treated as any other evidence. You should therefore
14 give them only such weight as you think the underlying
15 evidence deserves.

16 The Plaintiffs and Toshiba have agreed to certain facts to
17 be placed in evidence in two stipulated statements, as
18 Exhibits 2859 and 2860. You should therefore treat those
19 facts as having been proved as to the Plaintiffs and Toshiba.

20 Virtually all documents used at this trial have previously
21 been used in prior investigations or litigation matters.
22 Accordingly, many of the documents have been marked with
23 legends stating "Highly confidential," "Highly Confidential -
24 Attorneys' Eyes Only," or "Confidential - Grand Jury
25 Material," or words that to that effect. These designations

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1 are not part of the original documents and have no relevance
2 to the substance of any of the documents provided to you as
3 evidence.

4 You have heard evidence and argument and -- and you will
5 hear argument about the Plaintiffs' purchases of finished
6 products containing LCD panels, and you have heard the
7 attorneys in the case refer to the federal Sherman Act claims
8 as "Direct purchases."

9 The Sherman Act applies to purchases of finished products
10 when a Plaintiff:

11 1, buys a product containing a panel made by a
12 conspirator, or that was made by an entity that is owned or
13 controlled by, or owns or controls, any one of the
14 conspirators; and

15 2, the finished product was sold to Plaintiff by a
16 conspirator or by an entity which is owned or controlled by,
17 or owns or controls, any one of the conspirators.

18 "Own" means to own greater than 50 percent --

19 (Alarm sounds)

20 **THE COURT:** Tracy will check if that's a genuine
21 emergency. I will let you know. But for now, we will
22 proceed.

23 "Own" means to own greater than 50 percent of the stock of
24 the company in question. "Control" means to exercise
25 restraint or direction over; dominate, regulate, command or to

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1 have the power or authority to guide or manage. Stock
2 ownership alone, when it amounts to less than a majority, is
3 not sufficient proof of domination or control. Mere input
4 into policies or pricing issues, on its own, is not control.

5 Under the Sherman Act, it is illegal for competitors,
6 regardless of their size or amount of sales, to agree on the
7 prices to be charged for their competing products.

8 An agreement between competing firms can violate this rule
9 even if there is not an agreement on the exact price to be
10 charged. For example, it is illegal for competing companies
11 to agree on maximum or minimum prices, a range within which
12 prices will fall, a formula to set prices, or a component of
13 prices, such as a shipping charge or an interest rate. It is
14 also illegal for competitors to agree on a plan or scheme that
15 will tend to stabilize prices.

16 To prevail against a Defendant on a price-fixing claim,
17 the Plaintiffs must prove as to that particular Defendant each
18 of the following elements by a preponderance of the evidence:

19 First, that an agreement to fix the price of LCD panels
20 existed;

21 Second, that such Defendant knowingly -- that is,
22 voluntarily and intentionally -- became a party to that
23 agreement;

24 Third, that such agreement occurred in or affected
25 interstate, import or foreign commerce. Any such conduct

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1 involving import commerce must have produced substantial
2 intended effects in the United States; any such foreign
3 commerce must have produced direct, substantial and reasonably
4 foreseeable effects in the United States; and

5 Fourth, that the settlement agreement caused Plaintiffs to
6 suffer an injury to their business or property.

7 If you find the evidence is insufficient to prove any one
8 or more of these elements as to a particular Defendant then
9 you must find for that Defendant and against the Plaintiffs on
10 Plaintiffs' price-fixing claim. If you find that the evidence
11 is sufficient to prove all four elements as to a particular
12 Defendant, and you find that the Plaintiffs have also made the
13 other required showings I discuss later in these instruction,
14 then you must find for the Plaintiffs and against the
15 particular Defendant on Plaintiffs' price-fixing claim.

16 I will now instruct you on the elements of the Plaintiffs'
17 Minnesota state law claims, as distinct from Plaintiffs'
18 federal law claims. For the TFT-LCD finished products at
19 issue with respect to the Plaintiffs' state law claims, the
20 Plaintiffs allege that they purchased those products from
21 entities such as finished-product makers and distributors who
22 were not the Defendants or alleged co-conspirators, and who
23 were not companies owned or controlled by a Defendant or a
24 co-conspirator. Rather, in these state law claims the
25 Plaintiffs are seeking damages based on purchases from other

JURY INSTRUCTIONS

1 entities of TFT-LCD finished products containing TFT-LCD
2 panels manufactured by the Defendants or their alleged
3 co-conspirators. The parties have sometimes referred to the
4 Plaintiffs' state law claims as "indirect" claims. The
5 Plaintiff may recover for "indirect" claims in different
6 circumstances than those under which the Plaintiffs may
7 recover for "direct" claims under federal law.

8 To prevail against a Defendant in a Minnesota state-law
9 price-fixing claim, the Plaintiffs must prove as to that
10 particular Defendant each of the following elements by a
11 preponderance of the evidence:

12 First, that an agreement to fix the prices of LCD panels
13 existed;

14 Second, that such Defendant knowingly -- that is,
15 voluntarily and intentionally -- became a party to that
16 agreement;

17 Third, that such agreement occurred in or affected
18 commerce in Minnesota. Any such conduct involving import
19 commerce must have produced substantial intended effects in
20 the United States; any foreign commerce must have produced
21 direct, substantial and reasonably foreseeable effects in the
22 United States; and

23 Fourth, that the agreement caused Plaintiffs to suffer an
24 injury to their business or property.

25 If you find the evidence is insufficient to prove any one

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1 or more of these elements as to a particular Defendant then
2 you must find for that Defendant and against the Plaintiffs on
3 the Plaintiffs' price-fixing claim. If you find that the
4 evidence is sufficient to prove all four elements as to a
5 particular Defendant, and you find that the Plaintiffs have
6 also made other required showings I will discuss later in
7 these instructions, then you must find for the Plaintiffs and
8 against that particular Defendant on Plaintiffs' price-fixing
9 claim.

10 Minnesota law generally does not permit a plaintiff to
11 recover damages for injuries that it suffered more than four
12 years before the plaintiff filed suit. An exception to this
13 time limitation is where A Defendant has actively concealed
14 its wrongful conduct; this is called fraudulent concealment.

15 In this case, Plaintiffs cannot recover for antitrust
16 injury that occurred prior to September 15, 2005 (for Toshiba)
17 and prior to February 5, 2006 (for HannStar), unless they can
18 show fraudulent concealment. To establish fraudulent
19 concealment, Plaintiffs must prove that:

20 The members of the conspiracy actively concealed the
21 alleged conduct that caused the Plaintiffs' injury;

22 The Plaintiffs failed to discover the conspiracy before
23 September 15, 2005 (for Toshiba) and before February 5, 2006
24 (for HannStar); and

25 The Plaintiffs exercised due diligence to try to -- to try

JURY INSTRUCTIONS

1 to discover the conspiracy if facts were available to them
2 that should have aroused their suspicion.

3 If the Plaintiffs prove each of the three elements as to a
4 particular Defendant, the statute of limitations would no
5 longer apply to the state law claims during that period as to
6 that Defendant. If Plaintiffs fail to show any one of the
7 three elements, you must apply the dates I have provided you
8 and you may not award the Plaintiffs any damages under state
9 law based on purchases before those dates.

10 Antitrust law applies to foreign conduct that was meant to
11 produce and did in fact produce some substantial effect in the
12 United States.

13 To show that foreign conduct was meant to produce some
14 substantial effect, the Plaintiffs must establish by a
15 preponderance of the evidence that each Defendant knowingly
16 entered into an express or tacit agreement intending to
17 produce a substantial effect in the United States.

18 The Plaintiffs must also meet their burden of proving that
19 the alleged agreement between the Defendants and the alleged
20 co-conspirators in fact produced a "substantial" effect on the
21 U.S. market. A substantial effect in the United States cannot
22 simply be assumed. Nor can a substantial effect in the United
23 States be assumed to continue because it once existed. The
24 Plaintiffs must prove that the substantial effect requirement
25 is met at the relevant time.

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1 The Plaintiffs allege that the Defendants and others
2 participated in a conspiracy to restrain trade by fixing the
3 prices of TFT-LCD panels. A conspiracy is an agreement by two
4 or more persons to accomplish some unlawful purpose or to
5 accomplish a lawful purpose by unlawful means.

6 The Plaintiffs must prove both of the following elements
7 by a preponderance of the evidence:

8 First, that the alleged conspiracy existed; and

9 Second, that the Defendants knowingly became a member of
10 that conspiracy. "Knowingly" means voluntarily and
11 intentionally, and not because of mistake or accident or other
12 innocent reason.

13 A conspiracy is a kind of "partnership" in which each
14 person found to be a member of the conspiracy is liability for
15 all acts and statements of the other members made during the
16 existence of and in furtherance of the conspiracy. To create
17 such a relationship, two or more persons must enter into an
18 agreement that they will act together for some unlawful
19 purpose or to achieve a lawful purpose by unlawful means.

20 To establish the existence of a conspiracy, the evidence
21 need not show that its members entered into any formal or
22 written agreement; that they met together; or that they
23 directly stated what their object or purpose was, or the
24 details of it, or the means by which they would accomplish
25 their purpose. The agreement itself may have been entirely

JURY INSTRUCTIONS

1 unspoken. What the evidence must show to prove that a
2 conspiracy existed is that the alleged members of the
3 conspiracy in some way came to an agreement to accomplish a
4 common purpose. It is the agreement to act together that
5 constitutes the conspiracy. Whether the agreement succeeds or
6 fails does not matter.

7 A conspiracy may vary in its membership from time to time.
8 It may be formed without all parties coming to an agreement at
9 the same time, such as where competitors, without previous
10 agreement, separately accept invitations to participate in a
11 plan to restrain trade. The agreement may be shown if the
12 proof establishes that the parties knowingly worked together
13 to accomplish a common purpose. It is not essential that all
14 persons acted exactly alike, nor is it necessary that they all
15 possessed the same motive for entering the agreement.

16 Direct proof of an agreement may not be available. A
17 conspiracy may be disclosed by the circumstances or by the
18 acts of the members. Therefore, you may infer the existence
19 of an agreement from what you find the alleged members
20 actually did, as well as from the words they used. Mere
21 similarity of conduct among various persons, however, or the
22 fact that they may have associated with one another and may
23 have met or assembled together and discussed common aims and
24 interests, does not establish the existence of a conspiracy
25 unless the evidence tends to exclude the possibility that the

JURY INSTRUCTIONS

1 persons were acting independently. If they acted similarly
2 but independently of one another, without any agreement among
3 them, then there would not be a conspiracy.

4 It is not necessary that the evidence show that all of the
5 means or methods claimed by the Plaintiffs were agreed upon to
6 carry out the alleged conspiracy; nor that all of the means or
7 methods that were agreed upon were actually used or put into
8 operation; nor that all the persons alleged to be members of
9 the conspiracy actually were members. What the evidence must
10 show is that the alleged conspiracy of two or more persons
11 existed, that one or more of the means or methods alleged was
12 used to carry out its purpose, and that a Defendant knowingly
13 became a member of the conspiracy.

14 In determining whether an agreement has been proved, you
15 must view the evidence as a whole and not piecemeal. In
16 considering the evidence, you should first determine whether
17 or not the alleged conspiracy existed. If you conclude that
18 the conspiracy did exist, you should next determine whether
19 the Defendants knowingly became members of that conspiracy
20 with the intent to further its purposes.

21 Before you can find that a Defendant was a member of the
22 conspiracy alleged by the Plaintiffs, the evidence must show
23 that the Defendant knowingly joined in the unlawful plan at
24 its inception or at some later time with the intent to advance
25 or further some object or purpose of the conspiracy.

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1 To act knowingly means to act voluntarily and
2 intentionally, and not because of a mistake or accident or
3 other innocent reason. A person may become a member of a
4 conspiracy without full knowledge of all the details of the
5 conspiracy, the identity of all its members, or the parts they
6 played. Knowledge of the essential nature of the plan is
7 enough. On the other hand, a person who has no knowledge of a
8 conspiracy, but happens to act in a way that furthers some
9 object or purpose of the conspiracy, does not thereby become a
10 conspirator.

11 A person who knowingly joins an existing conspiracy or who
12 participates only in part of a conspiracy with knowledge of
13 the overall conspiracy, is just as responsible as if he had
14 been one of those who formed or began the conspiracy and
15 participated in every part of it.

16 The membership of a Defendant in a conspiracy must be
17 based only on evidence of its own statements or conduct. In
18 determining whether the Defendants were members of the alleged
19 conspiracy, you should consider only the evidence of the
20 Defendant's statements and conduct, including any evidence of
21 the Defendant's knowledge or lack of knowledge, status, and
22 participation in the events involved, and any other evidence
23 of participation in the conspiracy alleged.

24 If you find that the alleged conspiracy existed, then the
25 acts and statements of the conspirators are binding on all of

JURY INSTRUCTIONS

1 those whom you find were members of the conspiracy. But
2 actions or statements of any conspirator that were not done or
3 made in furtherance of the conspiracy, or that were done or
4 made before its existence or after its termination, may be
5 considered as evidence only against the person who made them.

6 Once a person is found by you to be a member of a
7 conspiracy, he or she is presumed to remain a member and is
8 responsible for all actions taken by all conspirators during
9 and in furtherance of the conspiracy until it is shown that
10 the conspiracy has been completed or abandoned or that the
11 person has withdrawn from the conspiracy.

12 Although a Defendant who was a member of a conspiracy may
13 withdraw from and abandon the conspiracy, the Defendant is
14 still liable with all other co-conspirators for the illegal
15 acts, if any, committed by that Defendant or by any
16 co-conspirator while the Defendant was a member of the
17 conspiracy up until the time of the Defendant's withdrawal.

18 If you find that a Defendant engaged in a price-fixing
19 conspiracy, it is not a defense for that Defendant that it
20 acted with good motives or thought its conduct was legal, or
21 that the conduct may have had some good results.

22 Evidence has been introduced concerning the exchange of
23 information about prices for TFT-LCD panels among one or more
24 of the Defendants and/or other TFT-LCD manufacturers alleged
25 to be co-conspirators. Plaintiffs claim that such exchanges

JURY INSTRUCTIONS

1 are part of the evidence establishing an agreement to fix
2 prices.

3 The fact that a Defendant exchanged price information does
4 not necessarily establish an agreement to fix prices. There
5 may be other legitimate reasons that would lead competitors to
6 exchange price information, and the law recognizes that
7 exchanges of price information may enhance competition and
8 benefit consumers. On the other hand, if you find that price
9 information was exchanged and that a Defendant does not offer
10 a reasonable explanation as to why it was exchanging that
11 information, you may consider whether it was being exchanged
12 as part of an agreement to fix prices, along with all of the
13 other evidence bearing on whether there was an agreement to
14 fix prices.

15 You have also heard evidence in this case that certain
16 companies were invited to join a conspiracy or to initiate a
17 conspiracy. A mere invitation to join a price-fixing
18 conspiracy, without acceptance, is not proof of knowingly
19 joining a conspiracy.

20 Evidence that the Defendants may have charged identical
21 prices as their competitors for the same goods, or engaged in
22 identical or similar business practices, does not alone
23 establish an agreement to fix prices because such practices
24 may be consistent with lawful, ordinary and proper competitive
25 behavior in a free and open market.

JURY INSTRUCTIONS

1 Antitrust law prohibits agreements between two or more
2 competitors to fix prices. It does not prohibit independent
3 behavior, even if such behavior is similar or identical to
4 that of competitors. A Defendant may lawfully charge prices
5 identical to those charged by its competitors and not violate
6 the antitrust laws. A Defendant may even copy the prices of a
7 competitor or follow and conform exactly to the price policies
8 and price changes of its competitors. Likewise, a Defendant
9 does not violate antitrust law by taking some action in the
10 hope or expectation that its competitors will follow, so long
11 as it has not reached an agreement with its competitors.
12 Parallel conduct, without more, does not violate the law.

13 Nevertheless, you may consider such facts and
14 circumstances, along with all the other evidence, in
15 determining whether any similarity or identity of prices
16 resulted from the independent business judgment of a Defendant
17 freely competing in the open market, or whether it resulted
18 from an agreement between a Defendant and one or more of their
19 alleged co-conspirators.

20 It is lawful for buyers of goods or services to discuss
21 and decide on prices of those goods or services with the
22 sellers of the goods and services -- or services, even if the
23 buyers and sellers are otherwise competitors.

24 A corporation acts through its agents. A corporation's
25 agents include its directors, officers, employees, or others

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1 acting on its behalf. A corporation is not capable under the
2 law of conspiring with its own agents, employees, its
3 unincorporated divisions or its wholly-owned subsidiaries.
4 Through its agents, however, a corporation is capable of
5 conspiring with other persons or independent corporations.

6 A corporation is legally bound by the acts and the
7 statements of its agents or employees done or made within the
8 scope of the agent's employment or apparent authority.

9 Acts done within the scope of employment are acts
10 performed on behalf of a corporation and directly related to
11 the performance of the duties the agent has general authority
12 to perform. Apparent authority is the authority that
13 outsiders could reasonably believe the agent would have,
14 judging from his position with the company, the
15 responsibilities previously entrusted to him or his office,
16 and the circumstances surrounding his past conduct.

17 To summarize, for a corporation to be legally responsible
18 for the acts or statements of its agents, you must find that
19 the agent was acting within the scope of his employment with
20 apparent authority.

21 A corporation is entitled to the same fair trial as a
22 private individual. The acts of a corporation are to be
23 judged by the same standard as the acts of a private
24 individual, and you may hold a corporation liable only if such
25 liability is established by the preponderance of the evidence.

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1 All persons, including corporations, are equal before the law.

2 If you find that a Defendant has violated the antitrust
3 laws, then you must decide if the Plaintiffs are entitled to
4 recover damages from that Defendant.

5 Plaintiffs are entitled to recover damages for injuries to
6 their business or property if they can establish three
7 elements of injury and causation:

8 First, that the Plaintiffs were in fact injured as a
9 result of the Defendant's alleged violation of the antitrust
10 laws;

11 Second, that the Defendant's alleged illegal conduct was a
12 material cause of the Plaintiffs' injuries; and

13 Third, that the Plaintiffs' injuries are injuries of the
14 type that the antitrust laws were intended to prevent.

15 The first element is sometimes referred to as "injury in
16 fact," or "fact of damage." For the Plaintiffs to establish
17 that they are entitled to recover damages, they must prove
18 that the Plaintiffs were injured as a result of Defendants'
19 alleged violation of the antitrust laws. Proving the fact of
20 damage does not require the Plaintiffs to prove the dollar
21 value of the injury. It requires only that they provide --
22 that they prove that they were in fact injured by the
23 Defendants' alleged antitrust violation. If you find that the
24 Plaintiffs have established that they were in fact injured,
25 you may then consider the amount of their damages. It is

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1 important to understand, however, that injury and amount of
2 damage are different concepts and that you cannot consider the
3 amount of damage unless and until you have concluded that the
4 Plaintiffs have established that they were in fact injured.

5 As to the second element, the Plaintiffs must also offer
6 evidence that establishes as a matter of fact and with a fair
7 degree of certainty that the Defendants' alleged illegal
8 conduct was a material cause of their injuries. This means
9 that the Plaintiffs must prove that some damage occurred to
10 them as a result of the Defendants' alleged antitrust
11 violation, and not some other cause. The Plaintiffs are not
12 required to prove that the Defendants' alleged antitrust
13 violation was the sole cause of their injuries; nor do the
14 Plaintiffs need to eliminate all other possible causes of
15 injury. It is enough if the Plaintiffs have proved that the
16 alleged antitrust violation was a material cause of their
17 injuries. However, if you find that the Plaintiffs' injuries
18 were caused primarily by something other than the alleged
19 antitrust violation, then you must find that the Plaintiffs
20 have failed to prove that they are entitled to recover
21 damages.

22 To prove the final element, the Plaintiffs must establish
23 that their injuries are the type of injuries that the
24 antitrust laws were intended to prevent. This is sometimes
25 referred to as "antitrust injury." If the Plaintiffs'

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1 injuries were caused by a reduction in competition, acts that
2 would lead to a reduction in competition, or acts that would
3 otherwise harm consumers, then Plaintiffs' injuries are
4 antitrust injuries. On the other hand, if the Plaintiffs'
5 injuries were caused by heightened competition, the
6 competitive process itself, or by acts that would benefit
7 consumers, then the Plaintiffs' injuries are not antitrust
8 injuries, and the Plaintiffs may not recover damages for those
9 injuries under the antitrust laws.

10 If the Plaintiffs can establish that they were in fact
11 injured by the Defendants' conduct, that the Defendants'
12 allegedly illegal conduct was a material cause of the
13 Plaintiffs' injuries, and that their injuries were the type
14 that the antitrust laws were intended to prevent, then the
15 Plaintiffs are entitled to recover damages for their injuries
16 to their business or property.

17 I am now going to instruct you on the issue of damages.
18 The fact that I am giving you instructions concerning the
19 issue of the Plaintiffs' damages does not mean that I believe
20 the Plaintiffs should, or should not, prevail in the case.

21 If, for any reason, you reach a verdict for any Defendant
22 on the issue of liability, you should not consider the issue
23 of damages as to that Defendant, and you may disregard the
24 damages instructions that I am about to give you.

25 Instructions as to the measure of damages are given for your

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1 guidance in the event you should find in favor of Plaintiffs,
2 as to one or more of the Defendants, based on a preponderance
3 of the evidence in accordance with the other instructions I
4 have given you regarding the existence of conspiracy, whether
5 a Defendant knowingly joined that conspiracy, injury in fact,
6 and causation. You should only consider calculating damages
7 if you first find that a Defendant violated the antitrust laws
8 and that this violation caused injury to Plaintiffs.

9 If you find that any of the Defendants violated the
10 antitrust laws and that this violation caused injury to the
11 Plaintiffs, you must -- then you must determine the amount of
12 damages Plaintiffs are entitled to recover. The law provides
13 that Plaintiffs should be fairly compensated for all damages
14 to their business or property that were a direct result or
15 likely consequence of the conduct that you have found to be
16 unlawful.

17 For the purpose of awarding damages in an antitrust action
18 -- oh, let me start again.

19 The purpose of awarding damages in an antitrust action is
20 to put an injured Plaintiff as near as possible in the
21 position in which it would have been if the alleged antitrust
22 violation had not occurred. The law does not permit you to
23 award damages to punish a wrongdoer or to deter a Defendant
24 from particular conduct in the future, or to provide a
25 windfall to someone who has been the victim of an antitrust

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1 violation. Antitrust damages are compensatory only. In other
2 words, they are designed to compensate the Plaintiffs for the
3 particular injuries they suffered as a result of the alleged
4 violation of the law.

5 Each participant in a conspiracy which violates the
6 antitrust laws is "jointly and severally" liable for all the
7 damages resulting from the conspiracy. This means that each
8 conspirator is fully liable for all of the damages caused by
9 the acts of any other member of the conspiracy done pursuant
10 to, or in furtherance of the conspiracy during the time it was
11 a member of the conspiracy.

12 If you find a Defendant participated in the conspiracy
13 alleged by the Plaintiffs and that the Plaintiffs are entitled
14 to damages based on the other instructions in this case, then
15 that Defendant is liable for all damages caused by the
16 conspiracy during the time it was a member. Such damages
17 generally include all overcharges on purchases of TFT-LCD
18 finished products that are part of the claims here made by the
19 Plaintiffs from all conspirators, not just the overcharges on
20 TFT-LCD finished products purchased from the Defendant -- from
21 that Defendant.

22 To award damages on the Plaintiffs' federal claims, these
23 are the "direct" claims, you need not determine the overcharge
24 paid by the Plaintiffs with precision. It is sufficient for
25 you to determine the average overcharge paid by the Plaintiffs

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1 or estimate the overcharge paid by the Plaintiffs, as long as
2 the average or estimate is based on evidence and reasonable
3 inferences. You may not, however, engage in guesswork or
4 speculation. If damages can only be ascertained through
5 guesswork or speculation, you may not award damages.

6 The Plaintiffs claim that they were harmed because they
7 paid higher prices for TFT-LCD products than they would have
8 paid in the absence of the alleged price-fixing conspiracy. A
9 proper method of calculating such damages is to award the
10 difference between the prices actually paid for these products
11 and the prices which would have been paid in the absence of
12 the agreement to fix prices.

13 Whether or not the Plaintiffs passed on any overcharges to
14 their customers is irrelevant to your calculation of damages
15 under federal law.

16 The Plaintiffs may recover damages for the state
17 "indirect" claims in different circumstances than those under
18 which the Plaintiffs may recover for "direct" claims under
19 federal law.

20 As to these "indirect" claims, if you conclude that the
21 Plaintiffs have met their burden on liability and are entitled
22 to damages, the Plaintiffs are to recover only to the extent
23 that the alleged price-fixing conspiracy caused the prices
24 that they paid for TFT-LCD products to be higher than those
25 prices would have been in the absence of the price-fixing

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1 conspiracy, and only to the extent that the Plaintiffs
2 absorbed the overcharge, meaning that they did not pass
3 through the overcharge to their customers.

4 Because the Plaintiffs did not purchase panels at issue in
5 their indirect claims directly from the Defendants or other
6 companies that participated in a panel conspiracy, Plaintiffs
7 must initially show that the overcharges were passed through
8 to the Plaintiffs. This means that the Plaintiffs must show
9 that there was an initial overcharge on the price of the
10 TFT-LCD panel by a conspirator who was a TFT-LCD panel
11 manufacturer and that the companies above the Plaintiffs in
12 the distribution chain then passed on some or all of the
13 overcharge on the price of the TFT-LCD panel to the
14 Plaintiffs.

15 State law similarly recognizes that the Plaintiffs may, in
16 turn, pass on any overcharge it paid when it resells the
17 TFT-LCD products to its customers. State law provides that a
18 Plaintiff is not entitled to recover for any alleged
19 overcharge that it passed on to its own customers (in this
20 case customers of TFT-LCD finished products). The parties
21 have sometimes referred to this as "downstream pass-on" or
22 "pass-on to customers" -- "pass-on to consumers."

23 The Defendants have the burden -- the Defendants have the
24 burden to prove by a preponderance of the evidence that the
25 Plaintiffs passed-on some or all of an alleged overcharge to

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1 their customers. If the Defendants prove by a preponderance
2 of the evidence that the Plaintiffs passed-on all of an
3 alleged overcharge to their customers you should award zero
4 damages as to that overcharge. If the Defendants prove by a
5 preponderance of the evidence that the Plaintiffs passed-on
6 some of an overcharge to their customers, then you must deduct
7 that "downstream pass-on" from the Plaintiffs' total damages.

8 The Plaintiffs are not seeking damages for lost profits as
9 a result of the alleged conspiracy. In determining the amount
10 of damages to award Plaintiffs, if any, you should not
11 consider whether the Plaintiffs experienced a decrease in
12 sales or profits as a result of the alleged conspiracy.

13 Damages may not be based on guesswork or speculation. If
14 you find that a damages calculation cannot be based on
15 evidence and reasonable inferences, and instead can only be
16 reached through guesswork or speculation, then you may not
17 award damages. If the amount of damages attributable to an
18 antitrust violation cannot be separated from the amount of
19 harm caused by factors other than the antitrust violation
20 except through guesswork or speculation, then you may not
21 award damages.

22 You are permitted to make reasonable estimates in
23 calculating damages. It may be difficult for you to determine
24 the precise amount of damage suffered by the Plaintiffs. If
25 the Plaintiffs establish with reasonable probability the

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1 existence of an injury proximately caused by the Defendant's
2 antitrust violation, you are permitted to make a just and
3 reasonable estimate of the damages. So long as there is a
4 reasonable basis in the evidence for a damages award, the
5 Plaintiffs should not be denied a right to be fairly
6 compensated just because the damages cannot be determined with
7 absolute mathematical certainty. The amount of damages must,
8 however, be based on reasonable, non-speculative assumptions
9 and estimates. The Plaintiffs must prove the reasonableness
10 of each of the assumptions upon which the damages calculation
11 is based. If you find that the Plaintiffs have failed to
12 carry their burden of proving a reasonable basis for
13 determining damages, then your verdict must be for Defendants.
14 If you find that the Plaintiffs have provided a reasonable
15 basis for determining damages, then you may award damages
16 based on a just and reasonable estimate supported by the
17 evidence.

18 You have heard testimony about a settlement reached
19 between Defendants and a class of consumers. The size or
20 amount of the consumer recovery is irrelevant to your
21 consideration of damages in this case. The Court, after
22 trial, will make any adjustments in the verdict that may be
23 required by law.

24 The law which applies to this case authorizes an award of
25 nominal damages. If you find for the Plaintiffs but you find

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1 that the Plaintiffs have failed to prove damages as defined in
2 these instructions, you must award nominal damages. Nominal
3 damages may not exceed one dollar.

4 Certain LCD suppliers -- who were formerly Defendants in
5 this matter -- reached settlements with the Plaintiffs prior
6 to trial. Some of these settlement agreements generally
7 require the settling Defendants to cooperate with Plaintiffs
8 in pursuing Plaintiffs' claims as to the other Defendants.
9 The existence of these settlement agreements should not
10 influence your consideration of this case, but you may
11 consider the cooperation obligations in evaluating the bias
12 and credibility of witnesses associated with the settling
13 Defendants.

14 You have heard evidence of certain convictions for
15 violating the antitrust laws by fixing the prices of LCD
16 panels. These convictions are evidence, on their face, that
17 during the periods specified in the pleas or charged in the
18 indictment, AUO, Chunghwa, Chi Mei, HannStar, LG Display,
19 Sharp, Epson, and Hitachi engaged in the violations stated in
20 each of their plea agreements or in the indictment. You,
21 therefore, may use such convictions and findings of fact that
22 support them, without more, to resolve issues in this case
23 that are the same as the ones in the prior cases.

24 You are the sole judges of whether the Plaintiffs have
25 proved by a preponderance of the evidence that they are

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1 entitled to a verdict in their favor. You must determine from
2 all of the evidence in this case, including the convictions
3 and findings of fact, whether the Defendants engaged in the
4 conduct alleged by the Plaintiffs, and whether the Plaintiffs
5 have proved all of the required elements of their claim.

6 The Defendants have offered evidence in this case to
7 refute the Plaintiffs' charges. If, after considering all of
8 the evidence presented by both -- both sides, you conclude
9 that the Plaintiffs have not proved all of the required
10 elements of their claims, then you cannot find the Defendants
11 liable in this case.

12 Toshiba and certain alleged co-conspirators were not
13 indicted by the Department of Justice, and you may consider
14 that fact in your deliberations. But the fact that Toshiba or
15 certain alleged co-conspirators were not criminally indicted
16 does not necessarily mean that they did not engage in the
17 alleged illegal conduct.

18 That completes the substantive instructions. So, I think
19 what we will do is we will take a ten-minute break at this
20 time, ladies and gentlemen. You haven't got the case to
21 deliberate, so don't speak with each other or anyone else
22 about the case, or make up your minds.

23 If you would be ready to come back, please, at ten 'til,
24 and we'll start with closing arguments.

25 (Jury excused)

1 (The following proceedings were held outside of the
2 presence of the Jury)

3 **THE COURT:** All right, we'll be in recess.

4 (Recess taken from 10:40 to 10:55 a.m.)

5 **DEPUTY CLERK:** Come to order.

6 **THE COURT:** Are you ready?

7 **MR. SILBERFELD:** Yes, your Honor.

8 (The jury enters the courtroom)

9 **THE COURT:** Welcome back, ladies and gentlemen. You
10 may all be seated.

11 All right, Mr. Silberfeld, you may proceed.

12 **MR. SILBERFELD:** Thank you, your Honor.

13 **CLOSING ARGUMENT**

14 **BY MR. SILBERFELD:**

15 Your Honor, Counsel, and ladies and gentlemen of the jury,
16 good morning.

17 **JURORS:** Good morning.

18 **MR. SILBERFELD:** We've been together here for six
19 weeks, and in that time, the lawyers have had only a few
20 opportunities to talk directly with you. We talked to you
21 directly when you were chosen, we talked to you directly a
22 second time when we gave opening statements, and this is the
23 third and last time that we get to talk to you directly about
24 our views about the case.

25 But before getting into all of that, let me on, behalf of

1 myself and my colleagues, and I know I speak for all the
2 lawyers here, express our thanks to you for your service.
3 It's been a long case. We've been here every day. It's
4 sometimes been challenging to get here. We appreciate your
5 service. We couldn't try the case without you.

6 This case is more than just a dispute between some
7 companies. It's more than an isolated, private dispute. And
8 that's because the conspiracy that's involved here threatened
9 the health of the economy of the United States. The
10 conspirators here violated one of the key protections that our
11 economic system has, and that protection is the antitrust
12 laws. The antitrust laws have been described as just as
13 important to our economic freedom as the Bill of Rights is to
14 our personal freedoms. And why? Because the economy depends,
15 our country depends, on fair competition. Fair competition
16 makes innovation. Fair competition improves lives. Fair
17 competition gets us products that we want at prices that are
18 fair and hopefully low. That's what the antitrust laws are
19 designed to protect.

20 And so this case is about more than just Best Buy,
21 HannStar and Toshiba. There's a greater principle at stake
22 here. And when we gather you as jurors, we take you from your
23 home lives and your work and we ask you to come in here and
24 bring with you all of your life's experiences; we ask you to
25 bring your common sense, your wisdom and your good judgment.

1 And when you deliberate about this case, all of you will bring
2 all those individual qualities to the deliberations about the
3 verdict that you will reach.

4 And when you do, you will be expressing, in your own way,
5 the conscience of this community about the issues that are
6 going to be decided in this case. Because the jury has -- you
7 have -- the power, consistent with the Court's instructions,
8 to decide what's right and what's wrong; what's fair, what's
9 unfair; what's legal and what's illegal. And you are the sole
10 and exclusive judges of the facts in this case. You follow
11 the Court's instructions, but the Court has decided no facts.
12 That's all for you.

13 We're kind of at a solemn moment in this trial because
14 when we finish talking as lawyers, the case will be handed to
15 you. Judge Illston has said that a couple of times. And when
16 the case is handed to you, you will act as judges. And what I
17 always think about at this point in the trial is, I think
18 about the robe that the judge wears. Judge Illston wears one
19 as a symbol of the dignity and majesty of the office she
20 holds. And in a symbolic way, when we all finish talking,
21 each of you will wear robes too. You will be the judges to
22 decide this case, consistent with the Court's instructions.

23 The opening statement that I gave a long time ago was
24 intended to be a roadmap of where we were going. I think
25 we've proved where we said we were going. Now we get a chance

1 to look back at where we've been.

2 And I'm going to be brief this morning. I'm going to
3 reserve some time to talk with you later after Mr. Freitas and
4 Mr. Curran have talked to you, but I'm going to be relatively
5 brief this morning in reviewing the evidence. And what I'm
6 privileged to be able to do is to talk with you not only about
7 some of the instructions on the law that you've been given
8 that I think are important to think about and consider, but
9 how that law fits into and weaves with the facts of this case.

10 So with that, let me begin.

11 This is a part of the instruction that you've been given
12 on the burden of proof. And you've heard about criminal cases
13 in this case. Everybody knows about beyond a reasonable doubt
14 as a standard in a criminal case. You hear that on TV, you
15 hear that in the news. The civil burden of proof is
16 different. It's called a preponderance. It's what's more
17 likely than not true. Most courthouses have scales of justice
18 on the outside, and when you think about the scales of
19 justice, you can think about a preponderance. Because when
20 you put pieces of evidence up on the scales, if the scales are
21 evenly balanced when you're done, no one has preponderated.
22 But if the scales tip in someone's favor ever so slightly,
23 that's a preponderance and that's enough to prevail; that's
24 enough to carry a burden of proof.

25 Here's another instruction that the Court gave, and it's

1 an important one, about the meaning of conspiracy, and this
2 will become important later when we look at some of the
3 evidence in this case. The Court instructs you that to find a
4 conspiracy, the evidence need not show any formal or written
5 agreement. There does not have to be any evidence that the
6 parties even met or that they directly stated what their
7 object or purpose was, the details of it, or anything else.
8 The agreement could be entirely unspoken. That's the law of
9 conspiracy.

10 And the second part of this is of some importance, because
11 it says the direct proof of an agreement may not be available.
12 And we've heard a lot in the course of this trial about
13 document destruction policies and things that were told to be
14 destroyed that somehow survived. And so it's not a surprise
15 that the instruction says direct proof of a conspiracy of an
16 effort by people to keep secret their illegal activity, that
17 direct proof of that may not be available. Not a surprise.
18 Makes common sense. And that's what this instruction teaches.

19 But it also goes on to say that in finding the conspiracy,
20 you may consider the existence of an agreement based upon what
21 the members actually did as well as from the words they used.

22 And I want to show you some of the words that you will
23 find in the exhibits, in the documents that have been admitted
24 in this case. I'm going to let them scroll on the screen
25 while I put up a board about them. This is the language of

1 conspiracy.

2 Your Honor, may I put this here? Is that bothering the
3 Court (referring to easel)?

4 **THE COURT:** That's all right.

5 **MR. SILBERFELD:** Each and every one of these words
6 comes from the exhibit numbers across the bottom. There's way
7 too many to talk about in detail. But every one of those is a
8 word that helps prove the existence of a conspiracy. Words
9 like consensus, maintain, arrangement, agreement, plan. These
10 are the words the defendants used. These are the words that
11 Toshiba, HannStar and others used that proves the existence of
12 the conspiracy to fix prices.

13 Where did it all begin? It all began, as we told you in
14 opening statement, at a golf match in 1998. Toshiba was
15 there. And what happened after golf? What happened after
16 golf was that the parties exchanged confidential business
17 information, information that would not be shared by
18 competitors, ever. So they shared past supply information,
19 and they went on to share future supply information. All
20 conspiracies start somewhere in some way. This conspiracy
21 started right there, on that day.

22 How else do we know that there was a conspiracy in 1998
23 and thereafter?

24 Well, here's how we know. We have testimony. We have the
25 testimony of H.B. Suh, who said he reached understandings with

1 Toshiba between 1998 and 2005.

2 We have Mr. Hanson, who came here from Texas, I think, to
3 testify that in the course of 1998 to 2004, he had well over
4 100 competitor contacts. I think he said it could have been
5 as many as 500, but he wasn't sure.

6 We have LG, in 2000, having contacts with Sharp.

7 We have Stanley Park, who came here to testify, talking
8 about his contacts with competitors in 2001, before any of the
9 crystal meetings occurred.

10 And there's more. Mr. Nakayama, whose testimony was
11 presented here in court, had quarterly or semiannual meetings
12 with Toshiba.

13 Mr. Fujuro, whose testimony was played here in court,
14 exchanged panel prices with Philips, Sharp and Samsung, all
15 before the first of the crystal meetings.

16 Mr. Lee from Chunghwa Picture Tubes who came here to
17 testify talked about his contacts before 2001 with Mitsui, and
18 that Samsung had asked him to cooperate with them in early
19 2001.

20 How about Mr. Amano? Mr. Amano came here and testified
21 and talked about this email from August the 8th, 2001, about
22 five weeks before the very first of the crystal meetings. And
23 he said, I am frequently in contact with the senior man at
24 Sharp; the same was true of Hitachi.

25 And he says Mr. Chiba, his colleague, was in regular

1 contact with IBM and Sanyo. Two more competitors of Toshiba.

2 And what did Mr. Amano suggest that his American
3 colleagues do? That they create the same sort of channel,
4 that's the word he used, a channel in the United States so
5 that they could have -- what I thought was remarkable
6 testimony by him -- a competitive intelligence network in the
7 United States, in utter and frank violation of the antitrust
8 laws.

9 The very next day after this email, Mr. Amano is
10 exchanging information with Sharp about one of their
11 customers, Dell. And what happens? They knew Sharp's price.
12 Toshiba decided to offer the same as Sharp. And Sharp would
13 follow later on. Why? So that prices would stay stable.
14 That was the object of the plan.

15 And then we get up to the crystal meetings. You've seen
16 these documents before. They're hard to read, but there they
17 are. They're in evidence. The one on the left, the blue one,
18 is the summary of Stanley Park's crystal meeting notes. And
19 the one on the right is Mr. Lee's crystal meeting notes. All
20 of these are in evidence for you to see if you wish. But it
21 just shows the extent of what happened here. And we don't
22 have them all. This is only 20 or 30 meetings. There were 60
23 or 70, according to some testimony, over five years.

24 And what about HannStar's participation in all of this?
25 They were there at the first crystal meeting. They were there

1 in July of 2005 at one of the last ones that we have a record
2 of. And HannStar's participation, not much more to say about
3 it. They pled guilty. They paid \$30 million in fines. And
4 that money went into the United States Treasury. And that
5 money was accepted by the government of the United States
6 because one of the conditions to HannStar getting off its
7 criminal liability that way was that, there were private
8 lawsuits. And that's what this part of the plea agreement
9 says. There were private lawsuits that could still seek
10 compensation from HannStar. Because HannStar had not paid,
11 nor has it paid, any restitution to Best Buy. That's why
12 we're here with regard to HannStar.

13 And this is just a slide you've seen before of the rest of
14 the corporate guilty pleas or convictions, the fines they
15 paid. Nearly a billion dollars. There can simply be no doubt
16 but that that level of conspiratorial behavior had a dramatic
17 and profound effect on the economy of the United States.

18 Let's look at a couple of crystal meeting notes, and I
19 only want to focus on certain ones. Here's the first one:

20 You'll remember early on in the crystal meetings that were
21 between LG and Samsung in Korea, AUO, Chi Mei, HannStar and
22 CPT from Taiwan, there were no Japanese firms present. And so
23 early in the discussions, at crystal meetings, the question
24 was: Is it possible to cooperate with the Japanese firms?
25 The Japanese firms still had significant market share then.

1 The Taiwan firms were rising up, the Korean firms were
2 growing, but the Japanese firms still had significant shares
3 of the total LCD market. If this conspiracy was going to
4 work, the Japanese firms had to be involved somehow. Maybe
5 they didn't need to attend meetings, but they had to be
6 involved somehow if this plan was going to work. And this is
7 an excerpt about: Maybe we can cooperate with the Japanese,
8 on or off the record. And you may remember Mr. Park actually
9 corrected us about that and said, I didn't mean on or off the
10 record, I meant covertly or overtly. Translation is slightly
11 off.

12 Regarding attendance by the Japanese, notify them of the
13 results and encourage them to cooperate.

14 How to contact the Japanese is another note, in order to
15 synchronize the stabilization of price. That was the goal.
16 That was the plan. And it required the involvement and
17 participation of the Japanese firms.

18 And lastly, discuss participation. Actually, second to
19 last.

20 Here's the last one. Adopt a private notification system
21 method with the Japanese makers. Did that happen? It
22 happened. I'll show you how, I'll show you where, right now.

23 Here's a slide actually that I think is used by one of the
24 defendants in the opening statement. The Crystal Meeting Six
25 are sitting around the table and they're talking about this

1 adopting of a private notification system. How are they going
2 to do it? Well, they're going to appoint people, and Samsung
3 designated its representative, Mr. Suh, and HannStar was
4 designated to contact Hitachi. And Mr. Suh in his testimony
5 said, Sure, I had contact with Toshiba monthly between 1998
6 and 2006. And he also had friends at Hitachi. And people at
7 Hitachi had friends at Toshiba. And so that's how the private
8 notification system worked.

9 So what does all that tell us about Toshiba in the crystal
10 meetings? I think it's clear Toshiba didn't participate in
11 the crystal meetings directly, actively. Sit in the room.
12 They didn't do that. But here's what they did do.

13 The evidence is clear that Toshiba was at the golf course
14 meeting. Had monthly contacts with a competitor named Mr. Suh
15 from Samsung for eight years. Had regular quarterly
16 communications with Sharp. Had meetings with competitors.
17 Had correspondence with competitors. And they did one other
18 thing that's very, very important:

19 They violated their own code of conduct.

20 You may remember the testimony of Mr. Simons, the
21 president of Toshiba America Information Systems. Came here
22 and we talked with him about the code of conduct. The version
23 we talked to him about was from 1997. The dos and don'ts.
24 And this is Exhibit 2547 that is in evidence. The dos and
25 don'ts make clear that you don't have any communication, even

1 unsolicited, with any competitor about prices or terms or
2 conditions.

3 You don't talk about anything that affects prices. You
4 don't talk about bidding or not bidding. You don't talk about
5 dealing or not dealing with a particular customer.

6 That was in 1997.

7 Did the policy change at Toshiba over time? No.

8 Here's what Mr. Bond had to say in 2006 when he wrote to
9 Mr. Blashe, the engineer who came here to testify, and to
10 Mr. Colins, who we saw a video of. Mr. Bond writes: We are
11 not to talk to any competitor ever about anything related to
12 price or share of business.

13 I'm going to show you now some things that people at
14 Toshiba did and said and ask you to reflect back on whether
15 what they did and said kept their word, complied with the law,
16 their moral standards, or not.

17 We know from the evidence in this case that Mr. Chiba and
18 Mr. Amano, and at times some of their colleagues, some of whom
19 are their bosses, talked regularly with AUO, Chi Mei, Hitachi,
20 LG, Samsung and Sharp.

21 What did Mr. Amano testify to when he was here on July the
22 30th? He was asked:

23 With respect to Samsung, you'd not only exchange future
24 pricing information, but future supply and demand?

25 Yes.

1 Did you do the same thing with LG?

2 Yes.

3 Hitachi?

4 That's right.

5 CMO?

6 Yes.

7 Sharp?

8 Yes.

9 Epson?

10 Yes.

11 Here's Mr. Amano confirming the role that TMD had --
12 that's Toshiba -- as the intermediary between LG and Samsung.
13 One of the questions on your verdict form is: Did the
14 defendant knowingly participate in a conspiracy? This is
15 proof, among many other things, that they actually knew what
16 they were doing at the time they did it.

17 Here's Mr. Amano, conspiring to fix prices.

18 Sharp.

19 He got a figure from Sharp about a particular product and
20 was told that they planned to catch up with the TMD price.
21 And they agreed to support a certain supply, 25,000 units a
22 month through March.

23 And there was a plan with Samsung to increase prices.

24 Mr. Amano told us that for a particular month, consensus
25 was taken. This was consensus over a particular product with

1 Hitachi and Samsung. Consensus was taken for a different
2 product with Sharp. For a different product, consensus was
3 taken with Samsung again.

4 And there was going to be a meeting the next day,
5 according to this email, to reconfirm all that consensus.

6 What else did we learn from Mr. Amano? He was supposed to
7 go to a meeting at LG. Couldn't go. Had a personal
8 obligation. And he sends his boss, Mr. Ujihara. And what was
9 that meeting about? The price increase plan between the two
10 firms.

11 Here again, Mr. Amano talking to Samsung and LG about next
12 year's supply, and business plans. And that TMD, Toshiba,
13 agreed prices through June with the U.S. PC makers as a goal.

14 If you needed any more evidence about the intention to
15 impact the economy of the United States, that's an example of
16 it.

17 Here's one of Mr. Amano's destroy-after-reading emails,
18 which is kind of ironic. Talking about CMO. Agreement
19 reached on the 14-inch panel. Agreement reached on another
20 panel.

21 This is the language of conspiracy. This is the language
22 used by Toshiba in this case.

23 The instruction that you've been given about price-fixing
24 describes what is illegal and what is not. And this
25 instruction simply says: It is illegal for competing

1 companies to agree on maximum -- it's not necessary to agree
2 on specific prices, but they can agree on maximums or
3 minimums. Or a range. Or a formula. The key is to agree on
4 a plan that will tend to stabilize prices.

5 And that is what happened here. Those words "stabilize"
6 are actually used.

7 So, did the defendants think that what they were doing was
8 wrong? Did they think it was illegal?

9 Here's some more words. And these words are all found,
10 again, in the documents at the bottom there. These are all
11 words used by the defendants to describe their behavior. They
12 knew what they were doing was wrong, and that's why they
13 covered it up. That's why they sought to destroy documents.

14 Let's talk about Mr. Chiba. Mr. Chiba, again a remarkable
15 email, what Chiba is doing is essentially illegal -- and it
16 bothers me, he writes to his colleague, that you are not aware
17 of that.

18 This is in 2004.

19 Elsewhere, Mr. Chiba writes about the three-company
20 bid-rigging meeting that Mr. Amano and others were proposing.
21 He doesn't say, Don't do that; you can't do that; that's
22 illegal. He says instead, Well, all right, if you're going to
23 do it, make sure you go to a place you're not going to be
24 seen. Where the industry will possibly have people present.

25 Stop writing emails. It's risky.

1 And this one: Please do not send emails as much as
2 possible. This is because emails remain as evidence. Make do
3 with phone calls.

4 Mr. Amano. Destroy after reading. That is one of the
5 security levels within TMD.

6 If we don't have more documents to show you, and I think
7 we have plenty, but if we don't have more, ask yourselves:
8 For every document we have, how many were, in fact, destroyed?
9 How many are, in fact, no longer available, because of the
10 document destruction policy that was testified to here?

11 And what about some of the American employees of Toshiba
12 entities? You'll remember the testimony of Mr. Collins. Miss
13 Caperton had come to him and said, You know, I'm worried about
14 competitor contacts. I don't know whether we ought to be
15 doing this. And he said, If you have any concerns, talk to
16 legal.

17 And what did she do? She wrote him back and said, I
18 didn't contact legal regarding this. I do not believe it is
19 good to share that with them.

20 And this was at a time when the DRAM investigations were
21 going on.

22 She says, I must share things verbally.

23 Now, this language about producing effects in the United
24 States is from each and every plea agreement of the defendants
25 who pled guilty. And the language is of some importance when

1 you consider the verdict form that you're going to have in the
2 jury room. It says, Certain business activities of the
3 defendants and its coconspirators in connection with the
4 production of panels, let's say, affected by this conspiracy
5 were within the flow of and substantially affected interstate
6 and foreign commerce.

7 So we know that the activities may have been partially in
8 Asia. The plan may have been hatched in Asia. But it
9 involved not only the American employees of some of these
10 companies, but it involved causing direct effects on the
11 economy of the United States.

12 So let's talk about what those effects were for a couple
13 of minutes. Here is Dr. Bernheim's slide of the actual
14 prices, and he talked with you about the three price humps
15 that he found from his model. And he talked to you about his
16 careful and thoughtful calculation of the difference between
17 the actual prices, which were too high, and where the prices
18 should have been, had there not been a conspiracy to fix the
19 prices. And you'll remember this slide, the red areas are the
20 three price humps. The first one was at least partially
21 explained by the Asian financial crisis. But part of it was
22 due to the conspiracy. And then the other two.

23 And Dr. Bernheim calculated Best Buy's damages at about
24 \$280 million for the direct purchases. And Dr. Frankel came
25 and calculated the indirect damages, about \$480 million, for

1 the long period of time, the eight-year period.

2 And those do seem like big amounts of money, and they are.
3 But they aren't when you consider just how much product Best
4 Buy bought over those eight years. Something on the order of
5 \$30 billion worth of product was bought. And it's not a lot
6 of money when you consider the size of the LCD panel market,
7 which was something on the order of 160 or more billion
8 dollars during this same period of time.

9 The damages in this case were directly caused by the price
10 hikes, which are directly the product of this evidence and the
11 rest of the evidence that I don't have enough time to talk
12 about with you this morning.

13 Let me talk to you briefly about the two kinds of claims.
14 You've been instructed about direct and indirect purchases.
15 Here's a simple slide that I have prepared. I'm not trying to
16 paraphrase the instruction, but basically the direct claims
17 are under the federal Sherman Act. They involve purchases by
18 Best Buy of finished products, either from conspirators or
19 from companies owned and controlled by conspirators. And
20 there is no pass-on issue, no issue of pass-on or
21 consideration of deducting anything from the direct purchase
22 claims.

23 The indirect purchase claim is under Minnesota law.
24 Again, finished products that contain price-fixed panels. But
25 this time, they're bought by Best Buy from nonconspirators.

1 And pass-on may apply. It's a defense. It's not something
2 that the plaintiff has to prove. It's something the defense
3 has to prove. It may apply.

4 But the key point here is that there's no overlap between
5 these purchases. The direct purchases are from one group; the
6 indirect purchases are from another.

7 We showed you this slide in connection with the testimony
8 of Mr. Gill, and this is a bit more about the question of
9 ownership and control. It gets very technical. But you have
10 this particular exhibit in evidence. It's 2857. And there
11 are actually two more that reach the same sort of graphic
12 illustration of exactly what company owned which other
13 company. And those other two exhibits are 2858 and 2860.

14 I won't say more about that, in the interest of time.

15 Here's the instruction on pass-on that the Court just gave
16 you. It says if a defendant -- first of all, the defendant
17 has the burden of proof on this. If we said nothing about it,
18 we don't have a burden. They have the burden of proof on this
19 question.

20 But if a defendant proves by a preponderance that the
21 plaintiffs passed on all or part of an overcharge, then that
22 amount, whatever you find that amount to be, is deducted from
23 the indirect purchase claim. But if they don't prove that --
24 and there's ample evidence that a simple national average, for
25 eight years, for every Best Buy store, doesn't give the right

1 answer. Dr. Frankel talked about that in his testimony, and a
2 bit grudgingly, I think, Dr. Snyder even considered and
3 conceded that retailing is a pretty complicated business, and
4 things tend to change from store to store, from year to year,
5 and a store in Bangor, Maine isn't going to have the same
6 pricing policies or discount policies as a store in Anchorage,
7 Alaska, or in Honolulu.

8 The defendants haven't carried their burden on the
9 question of pass-on. So there ought not to be a deduction
10 from damages on the indirect side.

11 Here are the damage slides that were presented by both
12 Dr. Bernheim and by Dr. Frankel. The first upper part is the
13 shorter period of time that we presented from the beginning of
14 the crystal meetings till the end of 2006. And for that, the
15 indirect damages are \$408 million. And the direct damages are
16 \$238 million.

17 For the longer period of time, the damages are slightly
18 larger. They're \$489 million in indirect damages, and they
19 are \$280 million in direct purchase damages.

20 Two more instructions I'll talk about. Then I'll sit
21 down.

22 One is damages. You'll have this instruction in the jury
23 room with you. It essentially says that damages do not have
24 to be proven with mathematical certainty. And every expert in
25 this case has only given an estimate, because that's frankly

1 the best we can do with the information we have. And so there
2 is no mathematical certainty required. A reasonable estimate
3 that appeals to your good sense as to what really happened
4 here, that estimate is enough to award damages.

5 And lastly, I want to talk for a moment about joint and
6 several liability. The Court instructed you that someone who
7 participates in a conspiracy is responsible for all of it.
8 Because, as Dr. Bernheim pointed out when he was here, the
9 only way conspiracies hang together is if everybody hangs
10 together. When Samsung went in and confessed to the United
11 States, right on the heels of them going in, LG went in, and
12 what happened next? The conspiracy fell apart. So a
13 conspiracy depends on the loyalty of everybody in it. Even
14 though there may not be honor among these people, there is
15 loyalty, because they're there to protect each other. And
16 that's why the law imposes joint and several liability.

17 You've heard testimony about Toshiba's market share
18 declining over time. You've heard testimony that HannStar
19 was, you know, not that big a player from a market share
20 perspective. None of that matters at all. Because if they're
21 liable, they're liable for all of it. Not a part of it. All
22 of it.

23 I'm going to reserve the rest of my time, if I may, your
24 Honor.

25 And when I come back, I want to go over the verdict form

1 with you and talk about the questions in detail. But for now,
2 I'll pass to other counsel.

3 Thank you very much.

4 **THE COURT:** All right. Thank you.

5 So you're up next, Mr. Freitas.

6 **MR. FREITAS:** Yes, your Honor. Could we have a short
7 break?

8 **THE COURT:** We're going to kind of just power on
9 through. So we'll take a 10-minute break at this time, and
10 then if you'd be ready to come back, please, at 10 till 12:00,
11 then we'll resume at that time.

12 (The jurors exit the courtroom)

13 **THE COURT:** I planned on being -- to have your
14 argument and your argument, hopefully with no breaks, and then
15 at the end of your argument and before your final, then we'd
16 take another break. Okay?

17 **MR. CURRAN:** Thank you.

18 **THE COURT:** But raise your hand if that's completely
19 not going to work.

20 (Recess)

21 **DEPUTY CLERK:** Come to order.

22 **THE COURT:** Are you ready?

23 **MR. FREITAS:** Yes, your Honor.

24 **MR. MARTINEZ:** May I have a couple of minutes? Let
25 me get my colleague, Mr. Silberfeld.

1 in the crystal meetings. It did not engage in any other
2 illegal activity. It did not fix prices for small panels. It
3 did not participate in any conspiracy at any time with
4 Toshiba, or any of the other Japanese companies. None of
5 those things happened.

6 But between September 2001 and January 2006, HannStar did
7 participate in the crystal meetings, and it's responsible for
8 that. It's accepted that responsibility in the criminal
9 proceeding by pleading guilty, agreeing to cooperate and
10 acknowledging that it broke the law.

11 And I don't think, based on what Mr. Silberfeld said this
12 morning, that we have a lot of disagreement about what
13 HannStar did. I didn't hear him suggest that HannStar was on
14 the golf course, or even that it existed then. I didn't hear
15 him suggest that HannStar broke the law in any way before
16 September 2001 when the crystal meetings began. I didn't hear
17 him suggest that after the date, after the date set forth in
18 the guilty plea, that HannStar broke the law.

19 Best Buy has spent a lot of time working with the
20 documents from the criminal cases. And it looks like, at
21 least in this case, they're not trying to go beyond what the
22 plea agreement actually says. September 2001, January 2006.
23 And there's more that's in that agreement that Mr. Silberfeld
24 didn't challenge. The agreement between HannStar and the
25 United States makes reference to what HannStar was doing

1 during those years. It was making panels for notebooks and
2 monitors. And you heard from Mr. Liu that there were a few
3 other problems that were made. I believe he talked about
4 personal DVD players.

5 But what the government referred to is what happened at
6 the crystal meetings, notebooks and monitors. You've heard
7 the evidence. You know that eventually at the crystal
8 meetings there were discussion for panels of televisions as
9 well. You remember what Stanley Park said about that.
10 Remember, I called to his attention the document where it said
11 HannStar's a latecomer; they don't have a strong position;
12 they're not getting the price. And Mr. Park explained that he
13 said that because HannStar didn't even start making panels for
14 televisions till much later. The plea agreement makes
15 reference to notebooks and monitors and nothing more. And all
16 the evidence that you've heard makes it clear that never was
17 there a time during the crystal meetings where there was any
18 price-fixing involving small panels. Not at all.

19 I don't think there's a big disagreement between Best Buy
20 and HannStar on this point.

21 But there's one thing that came up this morning where
22 there is a disagreement between HannStar and Best Buy, and
23 that has to do with the claim that was made today about the
24 Japanese companies participating in the crystal meetings.
25 That didn't happen. All of the evidence from all of the

1 witnesses makes that clear. They were never there.
2 Mr. Silberfeld didn't deny that. But he did try to suggest
3 that outside the meetings that something happened. That there
4 was communication of some sort. But that's not what the
5 evidence shows.

6 Let's talk about one of the things on the slide that he
7 put up.

8 Can we see that slide, please?

9 You see the line between Hitachi and HannStar? Well,
10 there was actually evidence that was presented in the trial
11 about that subject. Remember, there was a document, a crystal
12 meeting minute, that said that HannStar was going to contact
13 Hitachi? Brian Lee testified about that. HannStar did
14 contact Hitachi and Hitachi said no. Hitachi declined to
15 participate in the crystal meetings.

16 Mr. Lee's testimony is unrefuted.

17 So that line between HannStar and Hitachi, unless it means
18 that HannStar asked Hitachi to participate and Hitachi said
19 no -- well, it's just not correct.

20 There's some other things on this slide. You see up in
21 the right, Mr. Suh. You've heard a lot about Mr. Suh. Do you
22 see the arrow from Mr. Suh down to the crystal meetings?
23 Mr. Suh never attended a crystal meeting. There's no evidence
24 that he did that. His company was there, sure. Starting
25 September 21st, 2001, the second meeting. But Mr. Suh never

1 participated. And if the suggestion there is a link to what
2 Mr. Suh was doing independent of the crystal meetings, if
3 there's a suggestion that somehow what Mr. Suh was doing is
4 connected to what HannStar participated in, it's just not
5 supported by the evidence.

6 And there's more. HannStar did not conspire with Toshiba
7 or Epson or Sharp or Hitachi. None of the Japanese companies.
8 There wasn't one witness from any of those companies who said
9 that he or she talked with HannStar about pricing at any time,
10 much less fixed prices with HannStar.

11 And, what about what the government found? Remember when
12 Mr. Gill testified? He was the summary witness, the former
13 FBI guy. And he talked about all the criminal case documents.
14 He just summarized them. But in his summary, you may remember
15 when Mr. Curran was questioning him in particular. Well, what
16 came out of Mr. Gill's summary is how different all of those
17 plays were. You didn't see in the charges the government
18 brought or in the charges acknowledged by the Japanese
19 companies anything about the crystal meetings. Price-fixing
20 at Motorola, price-fixing at Dell, price-fixing at Apple.
21 That's what they acknowledged. None of them -- none of
22 them -- was accused by the government of having been at the
23 crystal meetings, and none of them acknowledged it.

24 So that's the evidence that Best Buy presented about those
25 companies through those exhibits that Mr. Gill summarized.

1 And there's no testimony that goes beyond it or refutes
2 what I just told you about what it establishes.

3 Question two on your verdict form asks you to decide
4 whether Best Buy proved that HannStar participated in a
5 conspiracy. Well, sadly, the answer is yes. They did prove
6 that. They proved it largely because we acknowledged it. I
7 think that was the first thing that I said when we met for the
8 first time on July 22nd. I acknowledged the guilty plea.

9 So, it is the case that HannStar participated in a
10 conspiracy. But the conspiracy has the boundaries that I've
11 described. Crystal meetings only. September '01 to
12 January '06. No small panels. No Japanese companies. That's
13 what the evidence shows. And that's what HannStar's
14 acknowledged. And when you answer yes to that question,
15 that's what you should be finding.

16 I mentioned the evidence that's been presented about the
17 other activities of some of the companies. And it's mostly
18 Samsung. You know, Samsung really played a role here.
19 Samsung was the one that got the crystal meetings going.
20 Samsung was the ringleader. We heard a lot of testimony about
21 what Samsung people did. But remember what Samsung said about
22 HannStar:

23 Those Samsung witnesses, they didn't even take HannStar
24 seriously. They didn't think HannStar was a competitor. When
25 those Samsung folks were out there doing the other things that

1 they were doing, they didn't care about HannStar. They didn't
2 talk to HannStar. They didn't engage with HannStar. There's
3 no conspiracy between HannStar and Samsung that reaches any of
4 the activity outside of the crystal meetings, and no one said
5 there was.

6 One of our last witnesses was asked whether he thought --
7 the Samsung employee, whether he thought that HannStar was a
8 competitor. He shrugged his shoulders. He said no. So the
9 activities of Samsung have nothing to do with HannStar outside
10 of the crystal meetings. That's what we've acknowledged.
11 That's what the evidence shows.

12 Now, before I get to the damages issues, there's one thing
13 that I want to say about Toshiba. HannStar is in this trial
14 with Toshiba. But that's not because HannStar conspired with
15 Toshiba. We're here because that's the way cases work out
16 sometimes. That's just the way it happened.

17 But there isn't any evidence that HannStar ever conspired
18 with Toshiba, with any Toshiba company, in any way. You heard
19 that HannStar and Toshiba had a buyer/seller relationship.
20 That's all it was. It was lawful and aboveboard, at all
21 times.

22 And Mr. Curran will talk about the broader issues in the
23 case involving Toshiba. That's not my role. But there is one
24 place where Toshiba does fit into the case involving HannStar.
25 Because HannStar didn't conspire with Toshiba. When you think

1 about those direct sales and the allegations of direct sales
2 as to HannStar, sales by the Toshiba companies, those aren't
3 direct sales. They're not a conspirator. Toshiba is not a
4 conspirator, as far as HannStar is concerned, regardless of
5 how you might resolve the broader issues involving Toshiba.

6 Well, let's talk about the damages issues. Those are the
7 most important issues, from the HannStar perspective. Because
8 we've acknowledged that we did break the law. The issues have
9 to be placed in context. And I've tried to provide the
10 context that we think is appropriate. The scope of our
11 liability. Let's now talk about what you've heard from the
12 experts and what it all shows.

13 First, let's begin with, I think everyone agrees what
14 we're dealing with here. Not lost sales. Not lost profits.
15 Overcharges. Remember the ideas as they were explained by --
16 I think all of the experts -- Professor Carlton, Dr. Bernheim,
17 and Dean Snyder as well.

18 I don't mean to exclude Dr. Frankel.

19 The idea is that we know what the actual prices are. And,
20 as you heard, Dr. Bernheim actually created a price index.
21 But in any event, we know what the actual prices are. And the
22 task that the experts took on was to find the so-called
23 but-for price. Given the activity that took place, what's the
24 difference between what the price would have been and what it
25 was? And you heard about the models that were created by the

1 experts.

2 I want to talk first about the model that Professor
3 Carlton created. Can we see the Carlton variables, please?

4 The idea that these experts took on when they set out to
5 create their models and identify what that but-for price would
6 have been, their objective was to come up with the factors
7 that influenced supply and demand. The factors that drive the
8 price levels. And what they were supposed to do is to look at
9 all those factors and then create one of those regression
10 equations that they all talked about but didn't show us. And
11 it's not because they were hiding something. It's 'cause of
12 what those equations look like.

13 But anyway, their job was to pick the right variables to
14 measure supply and demand. You can't come up with the right
15 but-for price if you're not capturing supply and demand.

16 Now, take a look at what Professor Carlton did. He looked
17 at -- can we go back, please? -- he looked at real costs.
18 Unit cost of production. Unit cost of production from the
19 previous period. Shipping costs. He looked at real costs.
20 He didn't try to create a proxy for the cost. He had the
21 information and he used it.

22 And look at his other variables. He was trying to capture
23 supply and demand, and, we submit, he did.

24 Now, what Dr. Carlton produced as a result of his model
25 was a conclusion that the overcharge rate that applies to the

1 large panels was .4 percent. And for the small panels,
2 1.9 percent.

3 Remember when Mr. Silberfeld was cross-examining Professor
4 Carlton? He suggested that what Professor Carlton came up
5 with was almost zero. Well, that's not fair. It's not almost
6 zero when you take a look at all the things that should be
7 considered. Remember Dr. Bernheim's testimony that the volume
8 of commerce that was affected was about \$160 billion?

9 .4 percent of that would mean \$640 million in extra profit to
10 the LCD panel makers. That's not an extra zero. And if you
11 used that higher number, 1.9 percent, it's more than \$3
12 billion in extra profits. That's not almost zero, and it's
13 not right to criticize Professor Carlton because he doesn't
14 come up with a huge number like Dr. Bernheim did. The way to
15 attack Professor Carlton, if he's going to be attacked, is to
16 take on the work that he did. Criticize those variables that
17 he used, if you can. And I don't recall any criticism for the
18 variables that Professor Carlton used when he tried to model
19 supply and demand, when he tried to understand what drove
20 these prices outside the period of the alleged price-fixing.

21 And I'm calling it "alleged price-fixing". There was some
22 price-fixing, but not what the plaintiffs say.

23 Dr. Carlton's assessment of what the right variables are
24 was not attacked. It wasn't challenged.

25 But the flaws in Dr. Bernheim's model begin with his

1 variables. They don't end there, but they certainly begin
2 there.

3 Instead of looking at the factors that Professor Carlton
4 looked at, what did Dr. Bernheim do? Well, remember how he
5 only had four variables? You can see them on the screen now.
6 The first one, total industrial production for the G7
7 countries, only one of which by the way was ever an LCD
8 panel-making country.

9 Total industrial production for South Korea.

10 Capital investment in South Korea.

11 Those the three demand variables that he came up with.
12 None of them aims very well at LCD -- the LCD panel-making
13 process. They're all general. They're all high level. And
14 you know, when you're talking about total industrial
15 production, you're talking about a whole variety of things
16 that have nothing to do, clearly have nothing to do with
17 making LCD panels.

18 I think we have a slide illustrating some of those things.

19 Total industrial production. Shoes, fish, oil,
20 cigarettes. And there's a lot more. These things don't have
21 anything to do with making LCD panels.

22 Well, they do reflect at some level was going on in the
23 economy. And maybe they shed some sort of light on some other
24 factors. But what's better? Doing what Professor Carlton did
25 and looking at the real variables that tap into what's

1 actually going on? Or using these high level, economy-wide
2 issues that don't get down to what's really going on?

3 Well, those were the three demand variables that
4 Dr. Bernheim came up with when he turned in his report.

5 Now, let's get some perspective on this. You've heard a
6 lot about it. I want to make sure the context is clear.
7 Dr. Bernheim put together a model. He turned in a report.
8 That report contains the analysis that supports the claim for
9 almost \$800 million of damages. And when Dr. Bernheim turned
10 in that report, he had four variables: The three I've just
11 mentioned, and one more. And he had no cost variable other
12 than his fourth variable, and that's the one that you've heard
13 so much about.

14 Now, remember what Professor Carlton said when he
15 testified the second time, and I think I've already mentioned
16 it once this morning. Dr. Bernheim had the actual cost
17 information. You've heard about the discovery process and how
18 all the experts have access to data. Well, part of the data
19 that Professor Carlton talked about was the cost data that he
20 used. Remember how Professor Carlton described it?

21 Dr. Bernheim had the actual cost data, and he didn't use it.
22 He wouldn't use it.

23 And funny enough, the technical -- the economics term that
24 Professor Carlton used to describe that, it's the same as the
25 technical legal term: "Nuts". That's what he said. It was

1 nuts he wouldn't use the actual cost data.

2 But, in his original report, he did talk about a cost
3 variable. And what he talked about was the microprocessor
4 producer price index. MP-PPI. MPPI. It's easier for me to
5 drop one of the P's, so I'll probably do that when I'm talking
6 about it.

7 This, in the original report, the one where his analysis
8 was set forth, was a cost variable. That's all it was.
9 Didn't purport to address demand in any way, shape or form.
10 It was a cost variable. Well, what was that based on?
11 Dr. Bernheim's an economist. He doesn't know costs of making
12 LCD panels. So he had to rely on someone else. And he relied
13 on another expert whose name you've heard many times. Adam
14 Fontecchio. What happened with Dr. Fontecchio? How did it
15 come about that he was the sponsor for the MP-PPI? You heard
16 about it. You heard his own testimony about how it happened.
17 Remember what he said: He was directed to look at
18 microprocessors. He was directed. Not, "I'm a scientist, I
19 made a study." Not, "I investigated all of the PPI's."

20 I was directed to look at microprocessors.

21 That's not a scientific way to do things. Not the right
22 way to do things. Why did it happen that way? Sort of fishy,
23 isn't it? No cost variables except that one. And somebody
24 directed Dr. Fontecchio to look at microprocessors. What did
25 he say when he did that? He didn't say very much. He said

1 that there were similarities between the process of making LCD
2 panels and the process of making microprocessors.

3 Well, you heard what Dr. Souri has to say about that. And
4 what Dr. Fontecchio said in his general high level way just
5 wasn't convincing. Dr. Souri -- can we have Dr. Souri's slide
6 please? Dr. Souri explained what's really going on as far as
7 that comparison is concerned: It's no good. It's not a valid
8 comparison. And Dr. Souri reported his findings long ago.
9 Now, when he did that, did Professor Bernheim drop the MPPI?
10 No. He couldn't drop it. You know why he couldn't drop it?
11 Because there aren't any damages without the MP-PPI. It's
12 absolutely essential to proof of damages that that variable
13 still be used. Why?

14 Can we see Professor Carlton's slide, please, with the
15 indices?

16 We'll find it. You've seen it. You've seen it many
17 times. It's the slide that shows the various semiconductor
18 indices. And there's one that goes down like this, while the
19 other ones go kind of like this (indicating).

20 Well, that is the key to the damage model right there.
21 Without that purple line dropping down like it does, there
22 aren't any damages. And that's why Dr. Bernheim wouldn't give
23 up, that's why he kept the MP-PPI in his model. There's no
24 other reason.

25 The cost rationale was blown up by Dr. Souri and the other

1 experts. It was dead.

2 In his report, the one I talked about where the analysis
3 is set forth, it's on Pages 49 and 50 of the report, where the
4 MP-PPI is discussed. Dr. Bernheim didn't really say anything.
5 He's simply reporting the allegation that Dr. Fontecchio had
6 found similarities. That's it. Cited some marketing
7 materials from Applied Materials. There wasn't anything else.

8 When Dr. Bernheim was here last, he spoke as if he had
9 actually done some real study. But when he wrote his report,
10 all he mentioned was the superficial analysis by
11 Dr. Fontecchio that Dr. Souri and the other experts refuted.
12 There wasn't anything else.

13 But now he needed to keep it. So what did he do? He came
14 up with a new idea. He said, Well, it's a demand variable,
15 too. And that I think is what he tries to stand on now.
16 Although in the courtroom, he did say he still relies, in
17 part, on Dr. Fontecchio. Why would he do that?
18 Dr. Fontecchio's been discredited. Dr. Bernheim said he
19 relied on Dr. Fontecchio.

20 Best Buy doesn't rely on Dr. Fontecchio. If Best Buy
21 relied on Dr. Fontecchio, you would have heard from him. If
22 Best Buy believed that the rationale that was presented to
23 support this claim that is now \$800 million almost, if Best
24 Buy believed it was sound, you would have heard from
25 Dr. Fontecchio. But you didn't.

1 So now, Dr. Bernheim says that it's a demand variable.
2 Well, he's got a point in part. It does connect to demand in
3 some ways. The idea, he expressed, is that the demand for
4 processors is a proxy for something involving LCD panels,
5 because notebook computers have processors. That's what
6 Miss Fritz said.

7 She also said, by the way, that notebook computers had
8 memory, which of course they do. Why wouldn't you use a
9 memory index? Or a semiconductor index that included memory?
10 Why -- other than the fact that that line goes like
11 this (indicating), why would you stick with microprocessors?
12 Wendy Fritz's testimony about notebooks and processors is no
13 big deal. She mentioned memory right there with processors.

14 Dr. Bernheim made the point that monitors are used with
15 computers and computers have processors. Okay. It's true.
16 But there are other of the LCD products that aren't closely
17 associated with or don't use microprocessors. Televisions.
18 So what did Dr. Bernheim say there? Well, sometimes Xboxes
19 are hooked up to them. Okay. But what are we doing here? Is
20 this a game where you come up with an idea that says, Oh,
21 well, it's a demand proxy because there's this and there's
22 that? This is not the way to do something like what we're
23 doing in this trial. What about all the other products where
24 microprocessors aren't proxies? What about those? And why --
25 why, why, why -- pick that single index?

1 I've already said what the answer is. Because that's the
2 only way you make damages. You can't get the but-for price
3 you're looking for from the Best Buy perspective without that
4 line that goes like that (indicating).

5 Now there's other ways to do it.

6 I want to say something else about what Dr. Bernheim said
7 about the MP-PPI. And I want to tie that to something else
8 that happened.

9 Remember the first time that Dr. Bernheim was here?
10 Remember how he talked about how his model nailed it? He
11 pointed out how it connects up with the post-conspiracy, and
12 he made a big show about: I nailed it, he said again and
13 again.

14 Well, then Dr. Carlton testified and he said, You know
15 what, plenty of other models nail it. That's just not very
16 important.

17 Did we hear any response from Dr. Bernheim? No. Why did
18 he make a big show about his model nailing it when it's not
19 important? Why did he do that?

20 And then when he came back, remember that cost correlation
21 that he presented? So in the original report, MP-PPI is a
22 cost variable. Then the Fontecchio rationale is discredited.
23 It now becomes a demand variable.

24 And then in his second testimony, he tries to move back to
25 a cost rationale.

1 So what he does is he shows you a correlation table, and
2 he tries to suggest that MP-PPI is best correlated compared to
3 the other semiconductor indices with LCD panels.

4 How did he do that? Well, the way he built that
5 correlation had three steps. The first one, he took the raw
6 data.

7 The second one, he logarithmically transformed the data.
8 Remember, Dr. Carlton talked about that, and he explained, in
9 his mind, it was just a detail, that second step, the
10 logarithmic conversion.

11 And Professor Carlton explained, after the logarithmic
12 conversion, MP-PPI is least well-correlated.

13 But there was one more step in the analysis, and that's
14 the one that you saw on the table. Remember how Dr. Bernheim
15 talked all about it and he explained the plus one and minus
16 one? He said there was a strong correlation after he
17 detrended the data. He said a strong correlation -- and it
18 was about .36, I think it was. The other numbers were
19 negative.

20 Well, guess what? When Professor Carlton came back, he
21 explained to you Dr. Bernheim doesn't use the detrended data.
22 Why did he tell you about that? What's the point of
23 demonstrating a strong correlation involving something that
24 isn't a variable?

25 I think you know why he did that. It's the same reason he

1 talked about nailing it when it doesn't matter.

2 You know, there's one other thing that's sort of striking
3 about this whole MP-PPI thing. In the report where he
4 presented his analysis, Dr. Bernheim called it what it is:
5 Producer Price Index for Microprocessors. But by the time of
6 trial, it had a new name. The way you heard about it in the
7 courtroom, it was the Cost of Computing Power. He wanted to
8 get away from the discredited Fontecchio analysis, so he gave
9 it a new name to make it sound like it was more valuable.

10 So, here's their story:

11 When Dr. Bernheim put his analysis together, he came up
12 with MP-PPI as a cost variable. He presented the analysis
13 that survives to this day. It's what Best Buy's relying on.
14 But what you're hearing from Dr. Bernheim and Best Buy with
15 the idea that, Oh, no, it's a demand variable, too, is a story
16 that just doesn't add up. You saw Dr. Bernheim. You had a
17 chance to observe him. You heard him talk all about his
18 experience, his qualifications, his awards. The government
19 jobs he's been offered and turned down. He's an impressive
20 guy. The idea that's being presented to you is that when
21 Dr. Bernheim took on something as important as what we're
22 dealing with in this trial, he whiffed on MP-PPI as a demand
23 variable. Just didn't occur to him. Dr. Bernheim and his
24 team of 10 or 20 PhDs, however many there were, nobody thought
25 of it. Instead they turned in a report that says, Let's go

1 with MP-PPI, because Dr. Fontecchio says, Applied Materials
2 has marketing materials, suggesting some process somewhere.

3 That doesn't make sense, ladies and gentlemen. A guy like
4 Dr. Bernheim would not miss a critical -- and that's what he
5 called it in this trial -- a critical demand variable. Just
6 wouldn't happen. And it didn't happen here. What's going on
7 is his original rationale was discredited, and he's trying to
8 come up with a new one to save the day.

9 And one more thing -- I'm sorry, one more thing. Remember
10 what Professor Carlton said about the correlation? The
11 correlation that was presented with such drama. What was the
12 correlation? It was a correlation of the semiconductor
13 indices to Dr. Carlton's costs. Why do that? If you want to
14 address the cost structure, why not use the costs? It's like
15 if you want to know how tall I am, instead of measuring me,
16 you'd start a discussion about whether Ms. Leal or Mr. Angell
17 is a proxy for my height. There's no point in going through
18 things like that.

19 Measure it. Look at it. Use it. He didn't do that.

20 There's something else. There's a big difference between
21 Dr. Bernheim and our experts. Dr. Bernheim is, for all his
22 accomplishments and for all his skill, he doesn't have the
23 practical experience our experts do. Dean Snyder grew up in
24 the antitrust division, putting cases together. Dean Snyder
25 studied all of the price-fixing cases for a period of time,

1 for purposes of his PhD dissertation. Professor Carlton ran
2 the economics section of the Antitrust Division.

3 Our experts have been through this. They've put cases
4 together. They understand what matters.

5 Dr. Bernheim didn't even look at the industry when he made
6 his report. In his second testimony, he says, Yeah, I looked
7 at the industry. I just didn't see anything important.

8 Does that make sense? Nothing was important? An industry
9 like this, rapidly changing, massive entry and exit, rapid
10 innovation, short product cycles -- all the things you heard
11 about from Professor Carlton and Dean Snyder. It doesn't
12 matter? It wasn't important?

13 And then Dr. Bernheim had the nerve to criticize
14 Dr. Carlton. Remember, he put up a few industry factors on
15 the screen? He thought they weren't important enough to
16 mention. But he tried to take Professor Carlton to task
17 because he didn't mention them. That's not fair and it
18 doesn't make sense.

19 But Dr. Bernheim didn't do the industry analysis.

20 You know what else he didn't do? Make a credible
21 presentation for the idea that his model fits the evidence.
22 That's what he said.

23 Could we see that slide, please?

24 Remember those flags. Four of them. Dr. Bernheim
25 testified about 74 crystal meetings. If you could just do the

1 arithmetic from September '01 into '06, you can come up with a
2 number in the 50's yourself of the all of those meetings, four
3 data points, and one of them is before the crystal meetings.
4 Is that really true? That his model gets the evidence?

5 Well, look at what he says. Conspiracy begins. Okay. If
6 there really was a conspiracy at that time, I guess it makes
7 sense that something might happen. But he didn't point to
8 anything. No conduct happened. He didn't show that there
9 were meetings on these dates and these prices were discussed.
10 All he does is he points to the price hump. He points to the
11 price hump and rounds up the usual suspects. That's what's
12 going on. That does not determine a fit.

13 Let's look at the next one, okay. Another easy one,
14 right. The crystal meetings begin. You'd expect there was
15 some impact. And we agree with him. We don't deny that the
16 crystal meetings had some impact.

17 Let me put some context on it. Professor Carlton
18 explained that his overall overcharges rate, it doesn't mean
19 that there was never impact. It doesn't mean that there was
20 never impact above .4 percent. There could have been big
21 impact at times for some products. And we don't deny that.
22 We never have. I told you in opening statement we don't deny
23 that there was some impact. But just putting a flag and
24 saying "crystal meetings begin" without looking at the
25 minutes, without paying attention to what happened, that's not

1 proving a fit.

2 And remember what Dr. Bernheim said? You can't have big
3 overcharges, you can't have them, without supplier capacity
4 constraints.

5 There's no evidence to support the idea that there were
6 supply restrictions.

7 There's no evidence.

8 And you heard the cooperating witnesses that Best Buy
9 called: Stanley Park, Sonia Chen, Brian Lee. You saw the
10 videos. There's no fit. There's no evidence of supply
11 restrictions. Dr. Bernheim said you can't have it. Remember
12 how he fought with me? Trying to find some disagreement?
13 Remember, I told him, We're in violent agreement? I'm not
14 sure what was going on there. But we don't have a dispute.
15 He said it. We endorse it. And his fit is missing because he
16 didn't address it. And he didn't pay attention to what the
17 witnesses said.

18 Let's see the next flag, please.

19 This is the one where -- I think he changed what he's
20 saying when he was here on Tuesday. Here's what happened.
21 Remember, he said there was a lull in the fourth quarter of
22 2002 in crystal meeting activity. And the first time he's
23 here I asked him, Well, what's the lull? How many meetings
24 were there? Weren't there really three, just like in the
25 prior quarter?

1 Well, on Tuesday he said it doesn't matter whether there
2 were three. Well, if it doesn't matter whether there were two
3 or three, what in the world are we calling a lull?

4 But the actual impact of a lull in the fourth quarter.

5 Can we see the slide, please? The prices are dropping.
6 From the middle of the year. Excuse me, the overcharges shown
7 by Dr. Bernheim were dropping from about May. And he says
8 that there's a lull that explains the leveling off of prices?
9 Before his lull in the fourth quarter, the prices were
10 dropping. You can see it right there on the screen.

11 Let's look at the last slide, please. This is another one
12 I talked to Dr. Bernheim about when he was here the second
13 time. I thought he was saying, Samsung must have checked out
14 in January '06 when it went to the DOJ, and there were some
15 lingering effects for a few months. Now he's claiming a fit
16 here.

17 Well, the evidence is just about diametrically contrary to
18 his claim of fit. First of all, he puts the flag January '06,
19 but his small panel model shows overcharges the whole rest of
20 the year. Where's the fit there?

21 Moreover, on the large panel side, yes, his model shows
22 that the overcharges dwindle and peter out at the end of
23 March. But the evidence shows that Samsung and LG changed
24 theirs long before January. Remember what Sonia Chen said:
25 The crystal meetings became social events when Harry Cho and

1 Stanley Park went home to Korea. They became social events.
2 They had tea and there was no formal price discussions. She
3 said that happened around August of 2005.

4 Well, actually, Harry Cho testified his last crystal
5 meeting was in May 2005. Stanley Park testified that his last
6 crystal meeting was in July. But what's Dr. Bernheim's model
7 show? He's trying to attribute big significance to Samsung
8 checking out. Harry Cho from Samsung goes home to Korea in
9 May. Dr. Bernheim's model -- and this is why I asked him all
10 those details when he was here last -- Dr. Bernheim's model
11 shows steady, high overcharges the rest of 2005. Stanley Park
12 goes home to Korea in July. Same thing, steady high
13 overcharges.

14 There's no fit. The model doesn't fit common sense. It
15 doesn't fit the testimony of our experts, and it just doesn't
16 fit the evidence.

17 As I conclude, I want to talk briefly about three things.
18 First, the statute of limitations. You have instructions on
19 the statute of limitations. It's a four-year rule. They have
20 to sue within four years. They didn't. But they're relying
21 on what's called fraudulent concealment. You heard Judge
22 Illston read this instruction this morning. One of the
23 requirements for fraudulent concealment is that the plaintiff
24 exercise due diligence if facts are called to its attention
25 that should have aroused its suspicion. You'll see exactly

1 what the Court's instruction says about this.

2 Don't forget what happened in May 2003 when Best Buy was
3 told about the existence of a panel cartel. Did Best Buy hear
4 about the panel cartel? Well, of course it did. You've seen
5 the exhibits. You've seen how they were passed around. What
6 did Best Buy do? You heard from Miss Fritz what Best Buy did.
7 Nothing. No diligence. No effort to get to the bottom of
8 things.

9 We submit to you that their claims are barred, their
10 indirect claims are barred by the Minnesota statute of
11 limitations according to the date that's set forth in the
12 Court's instruction.

13 Two more points: Upstream pass-on; downstream pass-on.
14 You've heard from Dean Snyder about upstream pass-on. His
15 rate isn't very different from Dr. Frankel's or
16 Dr. Bernheim's. Everybody agrees there's a high rate of
17 upstream pass-on. Let me just highlight a couple of reasons,
18 apart from the econometrics, why we think Dean Snyder's rate
19 is the right one.

20 You heard a lot of testimony in this trial about Best
21 Buy's buying power. How Best Buy is able to force its vendors
22 to absorb cost. Doesn't happen every day; doesn't happen with
23 every product. But it happens. You heard it from a lot of
24 witnesses. It makes sense, doesn't it, in this, a powerful
25 company like Best Buy who has leverage over its vendors can

1 sometimes force them to absorb some of the costs. That's a
2 key fact.

3 Last point before I conclude with some reference to the
4 damage summary.

5 Downstream pass-on. I told you in opening statement, you
6 wouldn't hear a competing number from Best Buy. You didn't.
7 And Dr. Frankel, he said nothing more than that the downstream
8 pass-on is complex and variable. Okay, it is.

9 You know what he didn't say? He never said you can't
10 calculate it. He didn't say he lacked the data. He didn't
11 say the econometric techniques won't work. He never had the
12 punch line. He never said you can't do it. Dean Snyder did.
13 Dean Snyder's work was unrefuted. His average pass-on rate of
14 93 percent stands unrefuted.

15 And for all of the smokescreen about something being
16 complex and something being variable, no punch line from
17 Dr. Frankel.

18 Now, Dr. Frankel suggests Dean Snyder could have looked at
19 it state-by-state, region-by-region. Dean Snyder understands
20 these issues. And his judgment was: I'm calculating damages
21 to Best Buy. It doesn't matter whether pass-on is different
22 in Fort Wayne and Fort Worth or Seattle and Miami. Because I
23 want to find the central tendency, the central tendency, the
24 average downstream pass-on rate.

25 He's unrefuted. And when you consider indirect damages,

1 you should apply Dean Snyder's rate.

2 The last thing I want to do is summarize where we stand.

3 We have presented some exhibits with Dean Snyder that
4 summarize the damage. 8271, 8272 and 8273. And these
5 exhibits are revisions of what he did last time.

6 What you see on the screen is a modified version because
7 of what I told you in the beginning today. These small panel
8 products, we say they don't count because there was no
9 price-fixing by HannStar as to them.

10 We look over on the right column. Not the left column.
11 Because HannStar didn't become involved in any conspiracy
12 until September 2001.

13 And the three exhibits from Dean Snyder, 8271, 8272, 8273.

14 You'll have to work with those because he presented the
15 complete list based on what he calculated. But we submit to
16 you that when you do the arithmetic, you could deduct the
17 small panel numbers.

18 That's all I have to say, ladies and gentlemen, but for
19 one final thought:

20 This is the last time I get to speak to you.

21 Mr. Silberfeld will have another chance. I won't be able to
22 respond. What I ask is that when you hear what he says, think
23 about how I would have responded. Think about, based on what
24 you've heard from us and the evidence throughout the trial,
25 what we'd have to say.

1 That's the best I can do, because I don't get that final
2 chance. He has the burden of proof. He goes first and last.

3 But when you think about those things, think about whether
4 Mr. Silberfeld has an answer for these questions. Where is
5 Dr. Fontecchio? Where is Dr. Frankel's downstream pass-on
6 calculation? And also, what evidence do you have if you
7 decide that Toshiba is not a conspirator, or that Philips is
8 not a conspirator, what did they give you to enable to you
9 make adjustments? They called it bean-counting. But they
10 didn't give you the tools to make those adjustments.

11 Thank you very much, ladies and gentlemen. We appreciate
12 the effort that you have put in, and the effort that you'll
13 make from here on out to arrive at a just conclusion.

14 Thank you, your Honor.

15 **THE COURT:** Thank you, Mr. Freitas.

16 Mr. Curran -- ladies and gentlemen, we talked before, I
17 think we'll just keep going. Is that all right with you?

18 (Jurors nod heads)

19 **THE COURT:** If anybody needs a break, raise your
20 hand.

21 Mr. Curran?

22 **CLOSING ARGUMENT**

23 **BY MR. CURRAN:**

24 **Q.**

25 There was a conspiracy, and Toshiba wasn't in it. Those

1 were my first words to you last month immediately after you
2 were sworn in as jurors.

3 At that time, I predicted to you -- in fact, I committed
4 to you -- that the evidence would bear that out.

5 Now I'm back addressing you face-to-face for the first
6 time since then. And I'd like to outline exactly why I think
7 I have fulfilled my prediction and my commitment to you.

8 The conspiracy is pretty much self-evident. We've heard
9 witnesses and we've seen documents. The crystal meetings
10 occurred. We heard from the very first witness in the case,
11 Brian Lee from Chunghwa, about how the crystal meetings
12 started, about how some folks from Samsung came over to Taiwan
13 and encouraged the Taiwanese to have a meeting. And that lead
14 to the first meeting on September 14th, 2001.

15 We also heard from Mr. Lee, as well as from Stanley Park,
16 LG, that the very next meeting had the Korean manufacturer,
17 Samsung, itself and LG, participating. And then from there,
18 those six companies, the four Taiwanese and the two Korean
19 companies, were off to the races. They had a series of
20 meetings, regular, structured, with agendas, minutes,
21 discussion of prices, agreements on prices; agreements on
22 prices by people who had the authority to bind those
23 companies.

24 That's the conspiracy here. We've all heard as well that
25 Samsung later reported that conspiracy to the Department of

1 Justice, and that lead to a cascade of guilty pleas and
2 convictions. And we've heard all about those guilty pleas and
3 convictions from the summary witness who was here, Mr. Gill.

4 And when I was walking Mr. Gill through those guilty pleas
5 and the indictment and conviction of AUO, I tried to be
6 careful in setting forth, for your benefit, exactly what it
7 was that those companies admitted to and what the Department
8 of Justice was prosecuting them for. And I think it was clear
9 from those documents that the testimony of Brian Lee and
10 Stanley Park was accepted by DOJ. Because those prosecutions
11 all related to the crystal meetings and the crystal meeting
12 periods.

13 The Department of Justice investigation of that conspiracy
14 was so thorough, not only did the participants in the crystal
15 meetings get prosecuted, but DOJ unearthed some other
16 conspiracies by other companies that weren't even related to
17 the crystal meetings.

18 Yet Toshiba, which, as you know, was subject to that
19 investigation, was not charged or convicted of anything.

20 In this courtroom, I think we've seen why. While Best Buy
21 set out to prove a connection between the crystal meetings and
22 Toshiba, the evidence didn't support that. In fact, we saw
23 that at the outset of the case when Brian Lee testified. He
24 came here, talked about the crystal meetings and he stated,
25 under oath, that Toshiba wasn't involved in them at all.

1 Interestingly, Best Buy didn't ask Mr. Lee about Toshiba's
2 involvements in the crystal meetings. I did.

3 And the same with Stanley Park and Sonia Chen after that.
4 So we had three live witnesses come before you and testify.
5 Yet it was Toshiba lawyers not Best Buy lawyers who asked
6 whether Toshiba was involved.

7 Furthermore, it is true that some of the crystal meeting
8 minutes referred to the Japanese companies, and even reflect
9 some discussion about the possibility of roping them in. But
10 you heard these admitted conspirators testify here that they
11 didn't follow through on that. There is quite literally, I
12 think, no evidence at all that's been presented to you that
13 links Toshiba to the crystal meetings. Not one participant in
14 the crystal meetings says Toshiba was involved, either in
15 person or otherwise, either overtly or covertly. None.

16 So then a lot of the other evidence in the case as to
17 Toshiba related to not any alleged crystal meeting connection
18 but to bilateral discussions that Toshiba folks had with
19 competitors. And it is true, as I said in my opening, that
20 Toshiba folks did gather information, they did participate in
21 information exchange, they did do price verification, they did
22 meet with competitors and try to determine market conditions,
23 supply and demand, and so forth. No question about that.
24 We've admitted that from Day 1.

25 Just as Phillip Britton and Wendy Fritz admitted it as to

1 Best Buy. That, ladies and gentlemen, that evidence is not
2 evidence of conspiracy. It's evidence of vigorous
3 competition.

4 In fact, in my allotted time, this afternoon now, I intend
5 to not only show that any suggestion of complicity of Toshiba
6 in the conspiracy is unfounded. But I also intend to show to
7 you that the conduct that Best Buy is focusing on as to
8 Toshiba is not merely non-conspiratorial, but in fact is
9 closely parallel to what Best Buy itself does. And I do
10 that -- I draw that parallel not to condemn anything Best Buy
11 has done. Quite the contrary. I think Best Buy is a vigorous
12 competitor in the marketplace, and they succeeded quite well.
13 And I think Wendy Fritz personified that. She was an
14 impressive executive. I think Phillip Britton personifies
15 that as well. Best Buy has told you, their witnesses have
16 told you under oath, they've testified that they gather up
17 information all the time.

18 That is not different from what Toshiba did. Why do you
19 do that kind of thing? Why did Toshiba do it? Why did Best
20 Buy do it? The evidence is consistent. They did it to
21 compete better. They wanted to figure out market conditions,
22 where the competitors were, and undercut them to beat the
23 competitors and win business.

24 So I submit to you, it is hypocritical of Best Buy to
25 condemn Toshiba for the same conduct that the evidence

1 unequivocally establishes Best Buy engaged in itself.

2 That's a longer wind-up. And I, too, have slides like the
3 other lawyers do, and I'd like to walk you through those. My
4 intention here is -- Mr. Silberfeld referred to Judge Illston
5 and her robe, and so forth. I think of the courtroom in
6 somewhat similar terms. I mentioned already that you all are
7 under oath. You all remember taking the oath when you were
8 sworn in as jurors. Every witness that took the stand took
9 the oath. You all remember that.

10 You may or may not know Judge Illston takes an oath. She
11 took an oath when she was sworn in as a federal judge.

12 So it's kind of a funny thing: Everybody gets sworn in
13 except the lawyers, and we do most of the talking, it seems
14 like, most times.

15 So the slides I'm going to put up -- I'm not going to put
16 up demonstrative exhibits, I'm not going to put up anything in
17 fancy artwork. What I'm going to do is put up actual
18 testimony and actual documents that you've been presented
19 with. Because I don't want you to trust my credit. I want
20 you to rely on the evidence that you've seen in court.

21 So, to begin with, what I'd like to do is to show you --
22 highlight for you some of the instructions that Judge Illston
23 has already given.

24 First -- and I've got Noel and Heather helping me -- I'd
25 like to show Judge Illston's preliminary instruction. This is

1 Page 215 of our trial transcript. And ladies and gentlemen,
2 you may remember this, because I mentioned it in my opening:
3 It's been clear from the start of this case that the crucial
4 question under the antitrust laws is whether or not there was
5 an agreement.

6 So this is something Judge Illston said to you at the
7 outset of this case: Under both federal law and state law, it
8 is illegal for competitors to agree on the prices to be
9 charged for their competing products. Plaintiffs bear the
10 burden of proving the conspiracy they have alleged. To
11 prevail against a defendant on a price-fixing claim, under
12 either federal law or state law, a plaintiff must initially
13 prove that an agreement to fix the prices of LCD panels
14 existed, and that the defendant knowingly -- that is,
15 voluntarily and intentionally -- became a party to that
16 agreement.

17 I think it's been clear all along. Throughout this case,
18 I have myself and my colleagues asked witnesses, Did you reach
19 a price-fixing agreement with Toshiba? That's been kind of
20 our mantra throughout the case. Because we knew from the
21 start, based on what Judge Illston said, that that was the
22 touchstone of whether or not there was a violation by Toshiba
23 or participation in a conspiracy by Toshiba.

24 Now today we've heard in judge Illston's extended reading
25 of the instructions to you, reminders to the same effect.

1 Now, I'm not going to belabor this, but if we can put up
2 Page 12 of the instructions from today.

3 You'll see this section called horizontal price-fixing,
4 elements of the federal claims, and you all, as Judge Illston
5 said, will be getting copies of this, but you can see here
6 throughout this instruction as to what violates the law. We
7 see agreement. The very first sentence. Under the federal
8 Sherman Act, it is illegal for competitors, regardless of
9 their size or amount of sales, to agree on the prices to be
10 charged for their competing products.

11 We see skip down a couple of paragraphs to the elements
12 there. First, that an agreement to fix the prices of LCD
13 panels existed.

14 Second, that -- that the defendant knowingly -- that is,
15 voluntarily and intentionally -- became a party to that
16 agreement.

17 Third, that such agreement occurred in or affected
18 interstate commerce.

19 Fourth, that the agreement caused plaintiffs to suffer
20 injury in their business or property.

21 So the test that we are presented with is examining
22 whether or not Toshiba agreed with competitors. Agreed with
23 competitors. As to price or other terms of sale.

24 And I submit to you, and as I'll try to summarize in the
25 coming slides, the evidence has shown Toshiba did not agree

1 with competitors at all, as to price or other terms. They
2 certainly did not agree to join the crystal meeting conspiracy
3 of the six companies from Taiwan and Korea.

4 All right. So my much-awaited slides here. Let's begin
5 with Slide 2, which is right after the title page, and talk a
6 little bit about the evidence as to the crystal meetings.

7 Okay. This first slide shows a couple of the minutes.
8 This is just a reminder. You all have been presented with
9 evidence, literally contemporaneous minutes of the crystal
10 meetings. And I underscore that because there is an unusually
11 precious documentary trail from the crystal meetings. And
12 that trail, which has lead to the convictions of the actual
13 participants in the crystal meetings, is powerful evidence
14 that Toshiba was not a participant in that conspiracy.

15 Slide 3. This is the same one I showed in the opening,
16 just a reminder of the six companies. I think by now that's
17 probably pretty well-established.

18 Slide 4. Brian Lee. Who was there at the start of the
19 crystal meetings. Testifying.

20 Sir, did anyone from Toshiba's LCD panel manufacturing
21 business, either when it was called Toshiba or when it was
22 called TMD, attend any of the crystal meetings that you
23 attended?

24 No.

25 Sir, did you ever hear that anyone from Toshiba's LCD

1 panel manufacturing business, either when it was Toshiba or
2 when it was TMD, ever attended any meeting?

3 No.

4 I'm not going to belabor that point. Other witnesses said
5 the same thing. I think Mr. Silberfeld and Best Buy concede
6 that Toshiba wasn't present.

7 So, Slide 5 has Stanley Park from LG saying the same
8 thing.

9 Slide 6 has Sonia Chen, who was the Samsung attendee at
10 some of the crystal meetings, saying the same thing.

11 Slide 7. This was a video witness, J.Y. Ho. He said the
12 same thing. Again, Toshiba not there.

13 And Mr. Silberfeld in his closing today referred to some
14 of the passages I've referred to in the crystal meeting
15 minutes. I'd like to get to those.

16 So, Slide 8.

17 Remember, this is a passage that refers to Japanese
18 makers' production capacity plans are mainly based on the
19 estimate of CPT, which is Mr. Lee's company, because they are
20 no longer invited to attend.

21 When I saw they said "no longer invited to attend", I
22 asked Mr. Lee what that was all about, and he clarified, Well,
23 that was just that they weren't invited.

24 So not only was Toshiba and the other Japanese companies
25 not participating in these meetings, they weren't invited.

1 The next slide, Slide 9.

2 Mr. Lee, did you personally ever tell anyone at Toshiba's
3 LCD panel manufacturing business at anytime what happened at
4 the crystal meetings?

5 No.

6 Are you aware of whether anyone else did?

7 No.

8 Slide 10. Same thing. From Sonia Chen and J.Y. Ho.

9 Slide 11, back to Stanley Park. Here he's asked about the
10 openly or off the record, overtly or covertly. He was asked
11 if he knew if there were any follow-through as to the Japanese
12 companies. He didn't know. There's no evidence of such
13 follow-through.

14 Slide 12. Regarding attendance by the Japanese. Notify
15 them of the results and encourage them to cooperate rather
16 than attend the conference.

17 Then we asked Mr. Park about that.

18 After this meeting, did you make any attempt to notify
19 Toshiba about the results of the crystal meetings?

20 No.

21 Are you aware of whether anyone else -- of anyone else
22 being assigned to notify Toshiba of the results of the crystal
23 meetings.

24 I'm not aware.

25 Again, no evidence of that at all.

1 Slide 13 shows another crystal meeting minutes that has a
2 reference to this private notification method.

3 Again, Slide 14. Both Mr. Lee and Mr. -- and Harry Cho
4 testified about this and said that they -- there was no
5 follow-through, or they weren't aware of any follow-through.

6 So again, what we have here -- well, one more.

7 15. 15 is Brian Lee. You may remember he testified about
8 this. We had this chart up on the big screen behind me. And
9 I asked him where the production information came from.
10 Because it's got not only Korean and Taiwanese companies, but
11 Japanese companies. And he said he got that from public
12 sources.

13 So again, there were passages in the crystal meeting
14 minutes that refer to the Japanese and the idea, the
15 possibility of circling of the Japanese companies, but that
16 just never happened. There's no evidence at all of it
17 happening.

18 Then over to Slide 17. Kind of just flat-out questions to
19 these crystal meetings participants whether they conspired and
20 reached price-fixing agreements with Toshiba at all in the
21 crystal meetings or otherwise.

22 No.

23 So you see with Brian Lee:

24 Sir, at any time before or after September 14, 2001, did
25 you have any price-fixing agreements on LCD panels with any

1 Toshiba entity?

2 No.

3 Then the same from Stanley Park.

4 And then Slide 18, we see the same thing from Sonia Chen.

5 And J.Y. Ho again.

6 One last thing in this module, Slide 21. Brian Lee gives
7 an indication as to why it is that the participants in the
8 crystal meetings never saw fit to get the Japanese involved or
9 asked them to get involved. Here he said -- the testimony is:

10 And sir, at the crystal meetings, the companies that
11 attended discussed mainly standard size product, correct?

12 Yes.

13 And the sizes were the sizes for monitor and PC notebook
14 applications, right?

15 Yes.

16 These LCD panels were the focus of the Taiwanese and
17 Korean companies at this time, right?

18 Yes.

19 And, sir, the Japanese companies, like Toshiba, were
20 focusing on new innovative LCD panels, right?

21 Yes.

22 It goes on from there.

23 When Mr. Silberfeld was issuing his initial comments
24 before he talked about how antitrust violations stifle
25 innovation and stifle competition, well, I think Toshiba's

1 marketplace conduct shows that Toshiba's innovation and its
2 aggressive attempts to undercut competitors on price are
3 consistent with a lack of participation in such conspiracy.

4 Now, Mr. Silberfeld made a couple of allegations about
5 Toshiba being connected to the crystal meetings or otherwise
6 involved in this conspiracy. So I'd like to try to deal with
7 some of that head-on.

8 He spoke about this H.B. Suh from Samsung. And
9 Mr. Silberfeld referred to him having reached understandings
10 with Toshiba. And I do acknowledge that that is the closest
11 evidence Best Buy has to anyone in this case saying they
12 reached an agreement with Toshiba. I submit to you even if
13 H.B. Suh said he reached an agreement, that could not be
14 credited in light of the other evidence here.

15 But let's take a close look at exactly what H.B. Suh said,
16 and what he meant. So on this one, maybe we can put up
17 Slide 57 and for a moment. This is Mr. Suh in his video
18 deposition where he was explaining what he meant when he said
19 he reached understandings.

20 Now, rather than read this, in this one instance, I think
21 it's helpful to see Mr. Suh again and exactly what he said he
22 meant when he said he reached understandings.

23 Can we roll this?

24 (Videotaped excerpt played)

25 **MR. CURRAN:** If we can put that slide back up with

1 the testimony. It's 57. This is the transcript from that
2 same testimony. So we can see, and as we just saw and heard,
3 that when Mr. Suh said he reached understandings with Toshiba,
4 and I think he said that as to some other companies as well,
5 he did not mean that they reached a price-fixing agreement.
6 What he's testifying about here is information exchange. He
7 understood what the competitor was going to charge, and they
8 understood what he was going to charge. But he wasn't sure
9 whether it could be believed or not.

10 That's what his testimony was. And that's, I think, the
11 sole link or the sole evidence of agreement between Toshiba
12 and anybody in this case.

13 So, let's consider Mr. Suh a little bit more. So,
14 Slide 58.
15 You may recall that both Mr. Chiba and Mr. Amano were asked
16 about Mr. Suh. And they both testified flatly that they did
17 not reach any agreement with him.

18 So that's consistent with my interpretation of what
19 Mr. Suh was saying.

20 Let's go to Slide 59. Let's consider who Mr. Suh is a
21 little bit here. Mr. Suh was not part of senior management.

22 The next slide, 60. And Mr. Suh acknowledged that he did
23 not have pricing authority.

24 So he might be able to do information exchange, but if he
25 doesn't have pricing authority, he can't reach price-fixing

1 agreements.

2 Slide 61. Mr. Suh was from Samsung, which you'll remember
3 is the Korean company, but he was in their outpost in Japan.
4 The people who had pricing authority were back in Korea.

5 Mr. Suh acknowledged that here at Slide 61.

6 Pricing authority resided at Samsung headquarters back in
7 Seoul, correct?

8 Yes.

9 Specifically, two gentlemen, D.H. Lee H.S. Kim, had
10 pricing authority, correct?

11 Yes.

12 Slide 62, please.

13 Now, this is Mr. Kim, one of the guys with pricing
14 authority.

15 Tell me what your responsibilities were as senior manager?

16 I had the decision-making power.

17 And that included pricing authority for LCD screens?

18 Yes, that's right.

19 So Mr. Kim, the boss, acknowledges that he's the one who
20 had pricing authority.

21 The next slide, 63. Another boss. J.W. Kim. He's
22 acknowledging he had pricing authority at certain times.

23 64. Another boss back in Korea, D.H. Lee, the big boss.
24 He's -- here he's saying that he had pricing authority.

25 Let's see what these bosses with pricing authority said

1 about Mr. Suh. Let's go to Slide 65.

2 Okay. So this is one boss, H.S. Kim. Okay.

3 And did you also ask Mr. Suh to contact somebody at
4 Toshiba to get their pricing information?

5 I don't really have any recollection about that.

6 Tell me, to the best of your recollection, what
7 information Mr. Suh provided to you about either Hitachi or
8 Toshiba in terms have what prices they might be charging for
9 TFT-LCDs?

10 Mr. Suh hardly ever provided me with competitors'
11 information. Usually I collected competitors' information in
12 Japan myself.

13 Did he ever provide you with Japanese competitors'
14 information?

15 I can't remember exactly.

16 Which companies -- I guess the next question -- which
17 companies did you have contacts with in Japan by which you
18 gathered their competitive information?

19 Hitachi.

20 Anybody else?

21 No.

22 Okay. So Mr. Suh certainly didn't have a big impact on
23 H.S. Kim.

24 Slide 66. The same -- the same point.

25 Let's talk about Mr. Suh. During this time frame, were

1 you aware of which Samsung competitors Mr. Suh was
2 communicating with?

3 I'm not familiar with the fact that Mr. Suh making
4 contacts with competitors or having meetings with competitors.

5 You were not aware at that time?

6 Well, because I have not seen him doing it myself about
7 his activity, all I can do is guess as to whether he could
8 have had meetings. But I cannot clearly say that he did.

9 At this time, were you aware that Mr. Suh was
10 communicating with any other competitors besides Sharp?

11 I don't know.

12 Okay. So these are the decision-makers at Samsung.
13 They're not even aware of what Mr. Suh's doing in Japan.

14 Maybe one more to the same effect. One or two more.

15 Slide 67.

16 Mr. Lee, during your time as head of sales and marketing
17 at LCD, did you rely on any marketing report sent to you by
18 your subordinates?

19 I have seen such reports several times. However, based on
20 my sales strategy, those market prices were totally ignored.

21 And then 68. This is H.S. Kim again.

22 Similar to what you described when you had discussions
23 about the market with other competitors, would you talk about
24 price as well as production levels?

25 I don't believe it was -- the circumstances were, as such,

1 where I would discuss things like that. Because Toshiba was
2 such a small player.

3 Well then, why did you even bother meeting with Mr. Chiba?

4 That's why after one meeting I never had another contact
5 with him.

6 So these decision-makers were not interested in what
7 Toshiba was doing because Toshiba was operating in a different
8 market segment and it was too small.

9 Slide 69. A little bit more on Mr. Suh. To --
10 Mr. Silberfeld and Best Buy have been suggesting that H.B. Suh
11 was a conduit as to the crystal meetings.

12 Slide 69. His testimony.

13 You never went to a crystal meeting, did you?

14 Correct.

15 Slide 70. You all may remember that the very first
16 crystal meeting, there was a packet of secrecy among the
17 participants. That may help explain why Mr. Suh didn't know
18 much about the crystal meetings.

19 Slide 71. Mr. Suh testifying:

20 Well, did you receive any written reports about the
21 meetings?

22 I don't remember.

23 Slide 72.

24 Do you know whether or not agreements were reached about
25 prices that the companies who were involved in the meetings

1 would charge customers?

2 I don't know exactly.

3 He didn't even know if agreements were reached at the
4 crystal meetings. He couldn't have been a conduit for Toshiba
5 for that.

6 73.

7 How did you learn about the crystal meetings?

8 And Mr. Suh testifies:

9 To my recollection, I'm not actually sure if it was a
10 crystal meeting or not. However, I heard about a meeting that
11 people gathered.

12 This is the lynchpin connecting Toshiba to the crystal
13 meetings?

14 And then Slide 74. The crystal meeting attendees
15 testified here they didn't even know who H.B. Suh was.

16 Slide 75. You may remember Mr. Suh testifying that he
17 made a joke about a group meeting, and that Mr. Chiba
18 testified that he was against it because it was against the
19 law.

20 I think that's enough on Mr. Suh. But Mr. Suh's testimony
21 and the testimony of his bosses and the testimony of people at
22 Toshiba is fundamentally inconsistent with the notion that
23 either Mr. Suh reached agreements with Toshiba or that Mr. Suh
24 was some sort of conduit as to the crystal meetings.

25 Next, Mr. Silberfeld referred to that 1998 golf course

1 meeting. And let me put that in a little bit of context here.
2 As I said, it's clear there was a conspiracy. It was the
3 crystal meeting conspiracy. Six people. And it started on
4 September 14th, 2001, and it went for a number of years. It
5 petered out. It had highs and lows, but that's what it was.

6 In this case, Best Buy is trying to extend the crystal
7 meeting period backwards essentially to 1998. They're also
8 trying to include other participants like Toshiba. They're
9 also attempting to allege -- attempting to prove that it
10 included products other than the large panels that were
11 discussed at the crystal meetings. They're trying to say it
12 included small panels and everything else. And they, of
13 course, are alleging a big overcharge.

14 I submit to you that those are all overreaches. The
15 crystal meeting conspiracy has to be viewed for what it was
16 and for what the DOJ prosecuted it as. The 1998 meeting is, I
17 think, an important part of Best Buy's case, because -- that
18 they say that's when the conspiracy began, as though it's part
19 of the crystal meetings. So let's look at what the evidence
20 actually is as to this.

21 Let's go to Slide 32, please. This is this chart. And
22 again, the evidence in this case is clear, that there was some
23 sort of golf outing among the Taiwanese locals -- not top
24 executives or anything like that -- but some Taiwanese locals.
25 In March of '98 and afterwards, after a round of golf,

1 somebody wrote up this document. Someone from Toshiba,
2 according to the participant, was there -- we don't even know
3 who that was. But we have one person in this trial who has
4 testified that he was there and he testified about what
5 happened.

6 So, Slide 33.

7 This is H.S. Kim. One of those Samsung guys that was H.B.
8 Suh's boss. And here's what he had to say.

9 At the two meetings in 1998 -- and remember, there was a
10 second he testified about -- did you tell the other companies,
11 representatives of the other companies that were present, the
12 prices Samsung intended to charge for TFT-LCD panels in 1998?

13 No, I don't believe so, based on my recollection.

14 Did the other companies, representatives of the other
15 companies, at the two meetings in 1998 tell you the prices
16 they intended to charge for TFT-LCD panels in 1998?

17 I don't believe so.

18 Next slide.

19 It's true, therefore, there was no agreement reached among
20 the companies at these two meeting in 1998 about what prices
21 they would collectively charge for TFT-LCD panels in 1998;
22 isn't that correct?

23 I believe it was hard to have that kind of conversation at
24 the time.

25 Okay, but just to be clear, there were no such agreement

1 reached at the 1998 meetings, correct?

2 I agree.

3 Next, Slide 35. The two 1998 meetings.

4 Did you tell the other companies present that Samsung
5 would limit its production, its output, of TFT-LCD panels in
6 1998?

7 I don't believe I did.

8 Did the other companies at the two meetings tell you that
9 they would limit their output of TFT-LCD panels in an 1998?

10 I don't think that happened.

11 Next, Slide 36.

12 It's true, therefore, that there was no agreement reached,
13 to your knowledge, among the companies at the two 1998
14 meetings that they would limit their outfit of TFT-LCD panels
15 in 1998?

16 Because the people who attended those meetings were the
17 representatives from the Taiwan branches, so they were not --
18 I don't believe they were in the position to talk about how
19 much the headquarters were willing to put out as the entire
20 production.

21 And then, just to wrap this up, Slide 37. Still Mr. Kim.

22 Mr. Kim, is it not true that by the conclusion of the
23 meeting of March 26, 1998, at the Oriental Golf Country Club
24 in Taipei, that you reached consensus with your competitors on
25 certain matters?

1 I guess you could say so.

2 And you understand what the word "consensus" means?

3 I do.

4 And what does it mean?

5 My understanding is that different people understood it as
6 the same meaning.

7 And how did the people at the meeting signify that they
8 understood there was a consensus?

9 I don't know exactly who it was, who said this, but
10 somebody said something to the effect of, Wow, the competition
11 is going to be fierce.

12 So that's the conclusion of this meeting at which this
13 massive conspiracy was supposed to have begun. A bunch of
14 Taiwanese local representatives writing down some production
15 information after a golf match? No agreements being reached
16 on either a price or production?

17 And there's no evidence whatsoever that this meeting's
18 connected to any other activity. The crystal meetings or
19 anything else.

20 Furthermore -- Slide 38.

21 This evidence, contrary to what Mr. Silberfeld said in his
22 closing, the -- this type of production information is readily
23 available in multiple sources. There was not anything
24 particularly secretive about the information being shared.

25 So we heard witnesses here testify about information --

1 production information being in DisplaySearch reports. Sonia
2 Chen and Michael Hanson saying things like that.

3 And to the same effect, Slide 39. J.Y. Ho and Brian Lee.
4 And again, remember, Mr. Lee used Japanese production
5 information, including future information, at the crystal
6 meetings and -- that he got from public sources.

7 So we cannot allow the fact that some low level people met
8 and exchanged some aggregate numbers on production to permit
9 the crystal meetings to be extended backwards like that and to
10 rope in other participants. Particularly when we heard how
11 the crystal meetings started, from Samsung visiting the people
12 in Taiwan.

13 All right. So let me turn to a different topic.

14 I've acknowledged to you that Toshiba folks had contacts
15 with competitors over the years. I'd like to summarize the
16 evidence as to why they were doing that.

17 So I'd like to go to Slide 83, please.

18 You all will remember that there's been testimony in this
19 case about this Dell master purchase agreement. And it
20 seems -- may seem odd that I'm talking about Dell, because the
21 evidence has been clear in this case that Dell never sold
22 anything to Best Buy. But a lot of the competitor
23 communications that Toshiba's being attacked on in this case
24 have related to Dell products. And this helps put in context
25 why Toshiba was having contacts with competitors as to sales

1 to Dell. All right.

2 So, Slide 83 shows the document in question. This is the
3 contract, master purchase agreement which governs the sales of
4 the Toshiba companies to Dell.

5 Slide 84. This is a bit of legalese. You'll remember,
6 generally, we have had a number of witnesses testify about
7 this, because under this contract with Dell, Toshiba had to
8 sell the panels to Dell at a price that was determined in part
9 by what competitors were selling to Dell. So Toshiba had to
10 know what the competitor's price was in order to determine its
11 own price to Dell.

12 And Dell, of course, knew that.

13 Slide 85. You remember Lena Shuhart. One of the Toshiba
14 witnesses from San Jose testified she had to fill out a form
15 and provide it to Dell every month that identified not only
16 what Toshiba's prices were and would be in the future, but
17 what competitor prices were and would be in the future. This
18 is to comply with the Dell contract so the pricing could be
19 done according to the contract.

20 Slide 86. The -- Mr. Amano testified to the same extent.
21 That he, too, was mindful of the obligations to Dell and that
22 drove his competitor communications as to Dell products.

23 And then Slide 87. You'll remember Shutuan Lille. She's
24 the Dell person who was involved in the contract. She
25 acknowledged in her testimony that she expected the Toshiba

1 folks to know what the competitors were charging so that the
2 MPA could be complied with.

3 There were other contracts that are similar to that.

4 Slide 88. This one related to an HP contract where TMD,
5 the Toshiba unit, was required to price at the price that was
6 the average price between Korean and Japanese vendors. Now,
7 let's remember that one, because we're going to come back to
8 that when we talk about that consensus document that
9 Mr. Silberfeld referred to.

10 Okay. Slide 89. Dell. And you heard -- okay, I think
11 you've heard a number of witnesses, but Miss Shuhart was one,
12 and Mr. Collins testified by video was another -- the folks at
13 Dell were not always honest about what the competitors of
14 Toshiba were charging to Dell. So Dell, in other words, was
15 suggesting to Toshiba that the prices were lower so that when
16 Toshiba matched the competitor price, it, too, would be lower.

17 So the folks at Toshiba were essentially required to do
18 some competitive intelligence to figure out where the
19 competitors really were so they couldn't be taken advantage of
20 in the contract.

21 Slide 90, please.

22 Mr. Amano said information to the same extent.

23 And then Michael Hanson -- remember, he's this U.S.
24 Samsung guy who Best Buy brought to trial. He even -- he
25 acknowledged when he was testifying here that Dell misled

1 Samsung on price as well. So Dell was playing games with the
2 pricing and with these master purchase agreement terms such
3 that competitors had to communicate with one another to get
4 the real information to comply with their contracts.

5 91. Okay, so it's in this context that Mr. Amano talks
6 about the -- a competitive intelligence network. And how
7 competitors were one source of the information. There were a
8 lot of other sources. Customers, DisplaySearch. OEMs.
9 Various other market participants. But competitors were one
10 source of this kind of competitive intelligence.

11 Slide 92. To the same extent, here, to the same effect,
12 Mr. Collins and Miss Shuhart. That's why they were engaged in
13 competitive intelligence, to figure out what the competitors
14 were charging.

15 Slide 93, and the ensuing slides here. So 93 talks about
16 DisplaySearch was another thing that the Toshiba folks looked
17 at.

18 Slide 94. The OEMs were another source.

19 95. So this is a document I'm going to talk a little bit
20 about more in a moment. But this is one Mr. Silberfeld showed
21 you. He was criticizing Mr. Amano for having competitor
22 contacts. Well, the context of that document is that they did
23 not trust Emon, who, you may remember, was the procurement guy
24 at Dell, so they wanted to verify the price with Sharp because
25 Dell's playing games.

1 The evidence all holds together. It's unrebutted.
2 Everyone at Toshiba U.S., Japan, the folks at Dell, the folks
3 at other companies everyone acknowledges what was going on
4 here.

5 Slide 96. It's in that context that Mr. Amano talked
6 about, creating this kind of channel. He wanted to develop a
7 network that he could verify prices. And, as I'll get to in a
8 minute, that bears a lot of similarity to what the folks at
9 Best Buy did.

10 Slide 97.

11 Testimony by Mr. Collins and Mr. Amano to the effect of
12 what I was saying before. You want to find out what the
13 competitor is charging so you can undercut it and win the
14 business. Mr. Collins talked about that. Mr. Amano talked
15 about that.

16 And there are some examples. Slide 98. The -- here we
17 can see a situation where Sharp's price was learned. And
18 Toshiba went to the bottom of the range. Bottom of the range.
19 After learning that Sharp was negotiating with Dell in that
20 range, TMD decided to offer 285 for September/October
21 proactively. So this is a pro-competitive use of competitor
22 information.

23 So let's turn from there to the Best Buy module and --
24 Slide 100.

25 Now, here again I want to try to show that the evidence

1 indicates that Best Buy engaged in the same type of behavior
2 and intelligence gathering that the Toshiba did.

3 Remember this code of ethics. I questioned Miss Fritz
4 about it. Best Buy's own code of ethics has a section that
5 acknowledges competitive intelligence gathering is necessary
6 to compete effectively.

7 And you may remember the testimony from Miss Fritz, and
8 also from Mr. Britton: Best Buy engaged dozens and dozens of
9 employees in this effort. The most -- you know, an incredibly
10 elaborate effort to gather competitor information.

11 Now, Slide 101. There's Mr. Britton whose video played
12 here. Acknowledging that as of August 1999, there were 172
13 marketing coordinators making visits to competitor's stores to
14 collect information at Best Buy.

15 Slide 102. Here I'd like to draw a comparison. So we've
16 got Mr. Britton from Best Buy testifying, as we covered in
17 previous documents, maintaining a network or contacts at
18 competitors is generally acceptable practice in competitive
19 intelligence.

20 This is a Best Buy witness acknowledging our defense in
21 this case. This is one of the scores and scores of Best Buy
22 employees committed to competitive intelligence, and he's
23 explaining that within Best Buy, they develop a network and
24 contacts at competitors in order to compete better.

25 It's very similar to what Mr. Amano testified in the

1 bottom part here.

2 And the competitor intelligence network, you had in mind
3 was to have American-based employees of Toshiba gathering as
4 much competitor information as you could get. True?

5 That is correct.

6 That was a question Mr. Silberfeld asked Mr. Amano.

7 The next slide, 103, we've shown you in opening, we showed
8 you through Miss Fritz' testimony, we showed you through
9 Mr. Britton's testimony. A variety of documents from within
10 Best Buy that show Best Buy having competitor contacts in a
11 variety of contexts.

12 This is one Mr. Britton was just testifying about, where
13 one of the Best Buy operatives was having contact with my good
14 friend, who's an operations manager at a Circuit City.

15 Okay. My good friend. That sounds a lot like the e-mail
16 that Mr. Silberfeld was condemning Toshiba for in his closing
17 about Mr. Chiba and Mr. Amano having friends or acquaintances
18 at other companies like Sharp.

19 And here the Best Buy operative is talking about pricing
20 with the Circuit City counterpart.

21 Slide 104. Best Buy had a policy by which they had to
22 match -- they undertook to match a competitor's price and --
23 in order sometimes to verify the price of the competitor, they
24 would call up and have a direct communication to verify what
25 the price was.

1 That's equivalent to our Dell master purchase agreement
2 and our other arrangements with customers where our price is
3 based on the competitor's price and therefore sometimes
4 there's verification communications.

5 Slide 105, 106, are -- to the same extent, these are more
6 Best Buy documents that we've shown to you and are in evidence
7 that show that the competitive field operatives at Best Buy
8 are gathering up information from competitors and -- including
9 through direct communications with those competitors.

10 Slide 107, to the same extent. Pinging their contacts.
11 They have whole units pinging contacts to verify information
12 about Circuit City.

13 Slide 108. Remember, I questioned Miss Fritz extensively
14 about their Black Friday competitive intelligence. You'll
15 recall that Miss Fritz testified Black Friday is the biggest
16 shopping day of the year. They had everything they could to
17 gather up information about what competitors were doing. They
18 knew months ahead of time what sales promotions Wal-Mart was
19 going to do on Black Friday. They even knew the sales
20 projections of Wal-Mart for Black Friday.

21 Again, I'm not condemning that. That can be good
22 business. But Best Buy does it, why can't Toshiba do it?

23 Slide 109. You may remember this document which I showed
24 Miss Fritz. Asia Newsflash. This is the operatives in Asia
25 for Best Buy who are reporting back to all of the senior

1 executives in the company about competitive intelligence that
2 they gathered in Asia. You can also see that document
3 contains that scary sounding legend about: If you're not an
4 authorized recipient, you ought to destroy the document.

5 Slide 110. This is another internal Best Buy document
6 that's -- the status is listed as Top Secret, For Authorized
7 Personnel Only, No Distribution. Sometimes business people,
8 especially those in competitive intelligence, might take
9 themselves a little too seriously on the spy side and think
10 that they're dealing with state secrets or something. And
11 that's reflected in Toshiba.

12 No question about it. You've seen that there's a formal
13 policy in Toshiba that one of the appropriate legends for
14 sensitive information is "destroy after reading". Especially
15 maybe with something while it's in translation, that sounds
16 unusually stark and overdone, but we see the same type of
17 thing done in Best Buy documents.

18 **THE COURT:** You're just about out of time.

19 **MR. CURRAN:** Am I?

20 **THE COURT:** Just about.

21 **MR. CURRAN:** I'm sorry.

22 I would like to quickly jump then to Mr. Silberfeld's
23 slides.

24 Can we show Slide 22 from Mr. Silberfeld's slides, please?

25 Mr. Silberfeld walked you through a number of documents

1 that he said showed improper conduct or conduct in violation
2 of the antitrust laws by Toshiba.

3 This was one. I point out to you that the question
4 above -- You'd not only exchange future pricing information,
5 but also information having to do with future supply and
6 demand? -- this is information exchange. No agreement.

7 And the companies listed here, LG, Hitachi, Sharp, CMO,
8 Epson, they have all testified there were no agreements with
9 Toshiba.

10 The next document, Slide 23. This is one of the emails I
11 was talking to you about. This relates to Dell. And
12 Mr. Silberfeld was focused on TMD communications with Sharp
13 and the effort to develop a channel of communications. I
14 point out that this relates to Dell's crazy games. This is
15 consistent with our defense. Not with any violation of
16 antitrust law.

17 The next slide, 24. Here again, talking about Dell. And
18 this is the document where Toshiba undercuts Sharp's price
19 proactively.

20 Mr. Silberfeld focused on Sharp. Will follow that
21 later -- well, Sharp had an MPA with Dell as well. We heard
22 that from Shutuan Lille. Of course, Sharp would have to lower
23 its price after TMD did.

24 Slide 25. At which time TMD has a role of intermediary
25 between Samsung and LGP. You may remember Mr. Amano's

1 testimony about this. This is the -- you can see the date.
2 This is in the middle of 2003, in the middle of the crystal
3 meetings. There's no need for an intermediary between Samsung
4 and LGP. They're participants in the crystal meetings.
5 Mr. Amano was dealing with the marketing people in Japan at
6 LG. It was the young executive who had no contacts and didn't
7 know how to exchange competitive information. That's what
8 Mr. Amano testified there. That was Kim Chang Han.

9 Can we put up Slide 135, from our deck?

10 You may remember Mr. Park testifying about Mr. Kim Chang
11 Han. So let's look at -- let's go to the next one, too,
12 please.

13 This is about Kim Chang Han. Did he -- he did not have
14 sales responsibility and he didn't have pricing authority. He
15 wasn't even in the sales function.

16 So this is -- these are -- this passage is taken out of
17 context.

18 The next slide in Mr. Silberfeld's, 26. This document
19 doesn't even say where the information came from. It's
20 Mr. Amano talking about competitor information, and it's
21 information for October. We're in the middle of September.
22 So those prices would have long ago been set.

23 The next slide. 789. 789. This talks about consensus
24 being reached. Mr. Amano testified unequivocally that this
25 was an internal consensus within TMD and Toshiba to determine

1 what the average price was of the Korean and Japanese
2 manufacturers, because remember, this relates to HP, and the
3 contract there required Toshiba to price at the average price
4 of Korean and Japanese competitors.

5 So this shows an effort by Toshiba to comply with the
6 contractual obligation. Not an attempt to violate the
7 antitrust laws.

8 **THE COURT:** You're --

9 **MR. CURRAN:** How am I doing, your Honor?

10 **THE COURT:** You're over.

11 **MR. CURRAN:** Okay.

12 So I submit to you at that Toshiba has not agreed with any
13 competitor on anything. It certainly didn't agree to join in
14 the crystal meeting conspiracy, and the evidence that the
15 Department of Justice uncovered that's reflected in the guilty
16 pleas and the conviction of AUO, that helps prove that.

17 I also submit to you that Toshiba engaged in competitor
18 contacts for legitimate pro-competitive reasons, just like
19 Best Buy did.

20 Thank you for your attention today and throughout the
21 trial. I appreciate it.

22 Thank you, your Honor.

23 **THE COURT:** Thank you, Mr. Curran.

24 I think we'll take a brief recess, and then we'll come
25 back and conclude.

1 And at that point, Mr. Silberfeld will have a brief
2 response, I'll read you a couple of instructions, and then you
3 will have this case.

4 But you don't have it yet, so please don't speak with each
5 other or anyone else or make up your minds just yet.

6 **DEPUTY CLERK:** How long?

7 **THE COURT:** 10 minutes. So, 20 till.

8 (The jurors exit the courtroom)

9 **THE COURT:** Mr. Silberfeld, I show that you have 20
10 minutes left.

11 **MR. SILBERFELD:** That's my calculation as well.

12 Thank you, your Honor.

13 (Recess taken from 1:33 to 1:44 p.m.)

14 (The following proceedings were held outside of the
15 presence of the Jury)

16 **THE CLERK:** Okay, come to order.

17 **THE COURT:** Are you ready?

18 **MR. SILBERFELD:** Yes.

19 (The following proceedings were held in the presence of
20 the Jury)

21 **THE COURT:** Welcome back, ladies and gentlemen. You
22 may all be seated.

23 All right, Mr. Silberfeld, you may proceed.

24 **MR. SILBERFELD:** Thank you, Your Honor.

25

REBUTTAL ARGUMENT

1
2 **BY MR. SILBERFELD:**

3 Ladies and gentlemen, this is my opportunity to talk to
4 you for the last time for a few minutes, and respond to some
5 of the things that both Mr. Freitas and Mr. Curran had to say.
6 And, and you've seen throughout the course of this trial that
7 we disagree about most things.

8 I didn't think we would disagree, though, about whether
9 lawyers take an oath. We do. We are officers of the Court,
10 too. And so, we take an oath to defend and protect the
11 Constitution and abide by the local rules, and conduct
12 ourselves in an honorable way.

13 So I thought that would be worth saying.

14 Let's begin with Toshiba.

15 (Document displayed)

16 **MR. SILBERFELD:** Whoops. Jeff, am I -- we're good?

17 **MR. GOLD:** (Gives thumbs-up signal)

18 **MR. SILBERFELD:** Okay.

19 (Document displayed)

20 **MR. SILBERFELD:** This is a slide I showed you
21 earlier. And the suggestion was made by Mr. Curran -- to a
22 degree, also by Mr. Freitas -- that this conspiracy we're
23 talking about was a conspiracy of six companies who got
24 together and had crystal meetings.

25 Well, that would be fine, if the companies who pled guilty

1 were limited to those six.

2 (Document displayed)

3 **MR. SILBERFELD:** But here, what you see is AUO was
4 convicted. Hitachi pled guilty. Hitachi's a Japanese
5 company. Never attended a crystal meeting.

6 Sharp, Japanese company. Pled guilty. Never attended a
7 crystal meeting.

8 If this conspiracy was just about the six firms, why did
9 Hitachi plead guilty? Why did Sharp plead guilty
10 (Indicating)? There is an explanation. And the explanation
11 is that this was a much broader conspiracy than just the
12 Taiwan firms and the Korean firms talking about large panels.

13 The evidence in the case, the guilty pleas in this case,
14 establish that beyond any reasonable doubt, and certainly by a
15 preponderance.

16 The jury instructions you have been given, which you will
17 have, also address this in an important way. Because Toshiba
18 says, "We don't know anything about a conspiracy. We weren't
19 part of the crystal meetings. Never attended one."

20 I say, makes no difference whether you attended one, if
21 you were part of the plan. Because the instruction you have
22 is (As read):

23 "A person may become a member of a conspiracy without
24 full knowledge of all the details of the conspiracy,
25 without full knowledge of the identity of the members

1 or the parts they played. Knowledge of the essential
2 nature of the plan is enough."

3 And is there, as to Toshiba, evidence of a plan? You bet
4 there is.

5 There was a price plan that was agreed upon between LG and
6 Toshiba. There's a document here. Mr. Curran didn't address
7 it. Mr. Curran says, "Well, you know, Toshiba didn't really
8 agree with anybody on prices."

9 I showed you emails from Mr. Amano where they used the
10 word "Agreed on price." Maybe he just ran out of time to talk
11 about those.

12 Mr. Curran makes this really strained comparison between
13 Best Buy and Toshiba and the behavior of the two firms. The
14 argument goes something like this: Best Buy looks at its
15 competitors, and tries to learn what it can in a legitimate
16 way about what the competition is doing because there is a
17 need to give your customer what it wants and what she wants
18 and what he wants, by knowing what the competition is doing.
19 And he compares that to what Toshiba did.

20 There's no comparison at all. Why? Because of the
21 purpose of doing the very thing we're talking about. The
22 conduct may look similar -- by the way, one's illegal, one's
23 illegal. The conduct may look similar, but the purpose is
24 completely different.

25 Let me show you what I mean.

1 (Document displayed)

2 **MR. SILBERFELD:** I'm going to skip these for the
3 moment, and come back to them.

4 (Document displayed)

5 **MR. SILBERFELD:** This (Indicating) is the slide I was
6 talking about where Mr. Amano said an agreement was reached.
7 Never addressed.

8 (Document displayed)

9 **MR. SILBERFELD:** This is the slide I wanted to get
10 to. So what does Toshiba do? Toshiba enters into these sorts
11 of activities (Indicating), but for what purpose? For the
12 purpose of lowering its prices? No. For the purpose of
13 keeping its prices artificially high.

14 And what does Best Buy do? Best Buy does these things,
15 there's no question about it. But the object is to lower
16 prices, not to raise them.

17 To compare those two things, to try to make something that
18 is lawful and tries to serve the best interests of your
19 customer and compare that to participating for eight years in
20 an illegal cartel as being the same, I think that's a problem.

21 Now, Mr. Freitas mentioned the statute of limitations, and
22 there's a couple of questions on the verdict form that I want
23 to talk to you about in a moment. But the reference there was
24 to this one meeting in 2003 where --

25 (Document displayed)

1 **MR. SILBERFELD:** -- a discussion was had between
2 Toshiba and Best Buy about panel shortages. And there was a
3 statement made, denied by every single person who came here to
4 testify, including the president of the Toshiba entity that
5 was present at this meeting (Indicating). Everyone from
6 Toshiba says "We never used the word 'panel cartel.'"

7 Best Buy says, "We certainly didn't know anything about
8 it. We heard it from Toshiba."

9 But whoever said it, it's absolutely clear that Best Buy,
10 on a regular basis, including two weeks later, including three
11 months later, followed up that panel issue and learned, three
12 months later, what Mr. Kevin Winneroski testified to here.

13 (Document displayed)

14 **MR. SILBERFELD:** And that is as of that time, which
15 was August the 25th, 2003, having checked into it further,
16 there was no more issue with Toshiba and panels. There always
17 were issues with hard drives, getting supplies. But the
18 fundamental issue about this was simply this was an excuse on
19 the part of Toshiba.

20 Several references have been made to the Department of
21 Justice. And I mentioned at the outset that there is a
22 different burden of proof in a criminal case versus a civil
23 case. One is beyond a reasonable doubt, very, very high
24 (Indicating). And one is preponderance of the evidence,
25 what's more likely true than not (Indicating).

1 Whatever decisions the Department of Justice may have made
2 to choose to prosecute who they prosecuted, given the
3 resources that the government has available to do that, we
4 can't speculate as to why Toshiba wasn't indicted or whether
5 they should have been. What we're here about is a civil case
6 with a different legal standard. A different burden of proof.
7 And whatever the DOJ may have done or not done, as the case
8 may be, is really beside the point.

9 Mr. Freitas spent a fair amount of time talking about
10 experts. And in the few minutes that I have remaining I want
11 to talk about that. Dr. Fontecchio was attacked for I guess
12 not being here. When the real role that he played was simply
13 to suggest as a technical matter that the microprocessor index
14 could be useful as a cost proxy.

15 You heard Dr. Bernheim say he carefully studied whether or
16 not to use the microprocessor as a cost proxy or something
17 else. Cost proxies are something economists do. It's not
18 what technologists do. And by the way, it is not what
19 Dr. Sourì did.

20 So Dr. Bernheim, I think, put it best when he said, "Look,
21 I had two competing technologists. I had Dr. Sourì on the one
22 hand, Dr. Fontecchio on the other. I didn't quite know which
23 way to go on the technology point, but I tested whether or not
24 the microprocessor would be a good cost proxy. Concluded it
25 was, used it, and came to a very stable model to talk about."

1 What about Dr. Carlton? Dr. Carlton came here, and
2 testified to a model that assumed that the conspiracy operated
3 exactly the same way over eight years. And then, he zoomed in
4 on a period of time at the end of 2006, where there were no
5 more overcharges. And he compared that to the first quarter
6 of 2007. And surprise, surprise, found that there were no
7 overcharges, or very little. Point-four percent or
8 1.9 percent, you will remember his testimony, those are not
9 distinguishable from zero.

10 And does anybody really think -- forget econometrics.
11 Does anybody really think, using your common sense, that all
12 these companies got together and conspired for eight years, to
13 earn nothing?

14 If their overcharge was this indistinguishable from zero,
15 how did they know they weren't making any money? If
16 Dr. Carlton could figure it out, how did the business people
17 at these companies not know, "You know, this isn't working,
18 we've got to stop, there's criminal liability here. We could
19 go to jail." People did. It simply makes no sense to say
20 that the overcharge is zero.

21 Eighteen percent? Well, you know, we all go to
22 restaurants. We tip the waiter. We tip 15, 16, 17 percent,
23 sometimes 20 percent if the service is great. An 18 percent
24 overcharge over time to these companies, with the levels of
25 money they were both making and investing, is like a tip.

1 Mr. Freitas criticized Dr. Frankel. Criticized
2 Dr. Frankel for not doing an average downstream pass-on
3 analysis. And what I would ask you to look at, because words
4 matter, is the difference between the two instructions that
5 you will have about damages.

6 So, for the federal claim, which is called Federal Damages
7 - No Pass-On instruction, or No Pass-On Consideration, the
8 instruction says you can use an average to find an overcharge.

9 When you get to the state pass-on instruction that I read
10 to you earlier about the Defendants having the burden of
11 proof, you will not see the word "average" anywhere. And
12 there's a reason for that. Averages don't give you, in the
13 retail setting, a useable answer. And that's the essence of
14 Dr. Frankel's testimony, to which Dr. Snyder grudgingly
15 agreed.

16 I just want to --

17 (Document displayed)

18 **MR. SILBERFELD:** I'll pass by Dr. Carlton's slide
19 about cartels raising prices and keeping them high. That's
20 (Indicating) the only way you incentivize people to become
21 engaged in and participate in criminal behavior.

22 (Document displayed)

23 **MR. SILBERFELD:** But I want to talk about Dr. Snyder
24 for a minute. Dr. Snyder, as distinguished as he is, came
25 here and talked out of both sides of his mouth.

1 A year ago, when the consumer class case was ongoing in
2 this courtroom (Indicating), Dr. Snyder's opinion was, "Oh,
3 gee, you know, we're not going to be able to find any way to
4 see if there are damages suffered by the consumers.
5 Impossible." He said that at the class stage, and he said it
6 on the merits. No damages at the class, can't prove it; no
7 damages on the merits.

8 And one year later, he comes here and says, "Well,
9 Best Buy passed everything along." That's just not credible.
10 It's not believable. He has a not-insignificant bias. He
11 gave the same testimony all over this country (Indicating),
12 over the course of the last 18 years. He shouldn't be
13 believed. That idea, that testimony, simply ought to be
14 rejected.

15 All right. Let me turn to the verdict form.

16 (Document displayed)

17 **MR. SILBERFELD:** This is the form that you will have
18 that the Court will ask you to complete when the Court
19 finishes the final instructions to you. There are nine
20 questions for you.

21 Yes. Thanks, Jeff.

22 (Document displayed)

23 **MR. SILBERFELD:** The first question: Did Best Buy
24 prove, by a preponderance and in accordance with the
25 instructions, that Toshiba knowingly participated in a

1 conspiracy to fix, raise, maintain or stabilize prices?

2 I don't think there is any doubt that the answer to that
3 question is yes. They can explain some of it, no question
4 about it. But I would say to Mr. Curran what Mr. Chiba said
5 to his colleague. What Chiba is doing, Mr. Curran, is
6 essentially illegal, and it worries me or bothers me that you
7 don't know that.

8 That's the Toshiba liability story, right there.

9 Question No. 2. This one actually isn't in dispute. It's
10 whether HannStar participated in a conspiracy. Mr. Freitas
11 said yes, they did. Answer that question yes.

12 (Document displayed)

13 **MR. SILBERFELD:** And as to that, the only question is
14 how big a conspiracy. But, remember the "joint and several"
15 instruction I read to you earlier? If you're in, you're in
16 for all of it. And, to say that the conspiracy consisted only
17 of the crystal meetings and didn't involve the Japanese firms
18 at all, tells us nothing about why Hitachi and Sharp pled
19 guilty.

20 The third question, did Best Buy prove, by a
21 preponderance -- and so forth -- that the conspiracy involved
22 panels and/or finished products imported into the U.S.?

23 Ms. Fritz testified, everything was bought in Minnesota
24 and shipped from overseas to the United States. The answer to
25 that question is an easy yes.

1 The fourth question: Did Best Buy prove, by a
2 preponderance of the evidence, that the conspiracy involved
3 these imported panels, and whether they produced a substantial
4 effect in the United States. The intended effect is not a
5 good effect, it's a bad effect. It's the effect of a
6 conspiracy raising prices. And the various guilty pleas prove
7 that without any question. So the answer to that question is
8 yes.

9 Question No. 5, did Best Buy prove that the conspiracy
10 involved conduct which had a direct, substantial and
11 reasonably foreseeable effect on trade or commerce in the
12 U.S.? No question about that one. The guilty pleas, the
13 various references to effects in the United States from
14 Toshiba and others makes that question an easy yes.

15 No. 6, do you find, based on a preponderance...that
16 Best Buy discovered the conspiracy -- this is the
17 statute-of-limitations question -- discovered the conspiracy
18 to fix prices before September 15th, 2005?

19 There's no evidence of that. None, whatsoever. The
20 answer to that question is no.

21 You will remember, there was testimony in this case that
22 although Samsung and LG went to the government in early 2006,
23 they kept that information confidential. And the first break
24 of the big news was when the investigation was made public,
25 and that wasn't until December of 2006.

1 Next question, also a statute of limitations question: Do
2 you find that Best Buy discovered the conspiracy before
3 February 5th, 2006? Here again, this is a burden of proof
4 question for the Defendants. They haven't presented any
5 evidence to indicate that. The answer to that question is no.

6 Eighth question: Did Best Buy prove that it was injured
7 as a result of the conspiracy? Well, we know what Best Buy
8 bought over time. We know from the testimony of Dr. Bernheim
9 and Dr. Frankel, the extent to which it was injured. There's
10 no question but that Best Buy was injured as a result of the
11 conspiracy, caused by the conspiracy. The answer to that
12 question is yes.

13 And lastly, the numbers. The damage figures is Question
14 No. 9 for Best Buy's direct purchases, and then the tenth
15 question is -- there are ten questions, sorry. The ninth
16 question is direct, the tenth question is indirect. For
17 direct purchases, what is the amount of damages proved by --
18 by a preponderance of the evidence, that Best Buy suffered as
19 a result of the conspiracy?

20 And here, we gave you two choices. We gave you the
21 narrower conspiracy -- crystal meeting period, and the broader
22 eight-year period from '98 to 2006. I leave it to your good
23 judgment which number to pick here. The two choices are
24 \$280 million, for the longer period, and \$238 million. These
25 are both the estimates from Dr. Bernheim, and neither,

FINAL JURY INSTRUCTIONS

1 according to federal law, are reduced by any pass-on, if you
2 find any such thing.

3 And lastly, the indirect purchase question, No. 10. What
4 is the amount of the damages Best Buy proved that it suffered
5 as a result of the conspiracy?

6 Here, again, Dr. Frankel gave you two choices. For the
7 narrower period, the number is \$408 million. And for the
8 longer period, it is \$489 million.

9 That one has a pass-on possibility. Leave that to your
10 good judgment as to what, if anything, should be deducted from
11 that figure.

12 I'm going to close with this: I want to thank you for
13 your attention. I ask you to return a verdict in favor of
14 Best Buy, and hold HannStar and Toshiba accountable for the
15 wrong that they've committed that this lawsuit seeks to make
16 right.

17 Thank you very much.

18 **THE COURT:** Thank you, Mr. Silberfeld.

19 **FINAL JURY INSTRUCTIONS**

20 **BY THE COURT:**

21 All right, ladies and gentlemen, we are almost there.
22 When you begin your deliberations you should elect one member
23 of the jury as your presiding juror. That person will preside
24 over the deliberations, and speak for you here in court.

25 You will then discuss the case with your fellow jurors to

1 reach agreement, if you can do so. Your verdict must be
2 unanimous.

3 Each of you must decide the case for yourself, but you
4 should do so only after you have considered all of the
5 evidence, discussed it fully with the other jurors, and
6 listened to the views of your fellow jurors.

7 Do not hesitate to change your opinion if the discussion
8 persuades you that you should. But, do not come to a decision
9 simply because other jurors think it is right.

10 It is important that you attempt to reach a unanimous
11 verdict but, of course, only if each of you can do so after
12 having made your own conscientious decision. Do not change an
13 honest belief about the weight and effect of the evidence
14 simply to reach a verdict.

15 I will now say a few words about your conduct as jurors.

16 First, do not decide what the verdict should be until you
17 and your fellow jurors have completed your deliberations.

18 Second, because you must decide this case based only on
19 the evidence received in the case and on my instructions as to
20 the law that applies, you must not be exposed to any other
21 information about the case or to the issues it involves while
22 you deliberate. Thus, until the end of the case or until I
23 tell you otherwise:

24 Do not communicate with anyone in any way and do not let
25 anyone else communicate with you in any way about the merits

FINAL JURY INSTRUCTIONS

1 of the case or anything to do with it. This includes
2 discussing the case in person, in writing, by phone or
3 electronic means, via email, text messaging or any Internet
4 chat room, blog, website or other feature. You may not
5 "blog," "tweet," or use Facebook or any other social
6 networking site to communicate anything to do with this case
7 or your jury service. This applies to communicating with
8 everyone else including your family members, your employer,
9 the media or press, and the people involved in the trial. In
10 the jury room, you are not to use your cell phones at recesses
11 or lunch to call anyone to ask questions about the case. But,
12 if you are asked or approached in any way about your jury
13 service or anything about this case, you must respond that you
14 have been ordered not to discuss the matter and to report the
15 contact to the Court.

16 Because you have received all the evidence and legal
17 instruction you properly may consider to return a verdict: Do
18 not read, watch, or listen to any news or media accounts or
19 commentary about the case or anything to do with it; do not do
20 any research, such as consulting dictionaries, searching the
21 Internet, "Googling" any party or lawyer or court personnel or
22 using any other reference materials; and do not make any
23 investigation or in any other way try to learn about the case
24 on your own.

25 The law requires these restrictions to ensure that the

FINAL JURY INSTRUCTIONS

1 parties have a fair trial, based on the same evidence that
2 each party has had an opportunity to address. A juror who
3 violates these restrictions jeopardizes the fairness of these
4 proceedings, and a mistrial could result that would require
5 the entire trial process to start over. So, please, do not
6 let that happen.

7 If any juror is exposed to any outside information, please
8 notify the Court immediately.

9 You may have taken notes to help you remember the
10 evidence. Whether or not you have taken notes, you should
11 rely on your memory of the evidence. Notes are only to assist
12 your memory. You should not be overly influenced by your
13 notes or by those of your fellow jurors.

14 If it becomes necessary during your deliberations to
15 communicate with me, you may send a note through Tracy, signed
16 by your presiding juror or by one or more of the other members
17 of the jury. No member of the jury should ever attempt to
18 communicate with me except by a signed writing. I will
19 communicate with any member of the jury concerning the case
20 only in writing, or here in open court. If you send out a
21 question, I will consult with the parties before answering it,
22 which may take some time. You may continue your deliberations
23 while waiting for the answer to any question. Remember that
24 you -- this is really important -- you are not to tell me or
25 anyone else how the jury stands, numerically or otherwise,

1 until after you have reached a unanimous verdict or have been
2 discharged. So, do not disclose any vote count in any note to
3 the Court.

4 A verdict form has been prepared for you. After you have
5 reached unanimous agreement on a verdict, your presiding juror
6 will fill in the form that has been given to you, sign it,
7 date it, and advise the Court that you are ready to return to
8 the courtroom.

9 So with that, ladies and gentlemen, this matter is in your
10 hands. You may at this time, as I told you, set your own
11 schedule. That includes lunch. I know we have -- haven't had
12 lunch. If you want to have lunch, you are welcome to do that.
13 There is a deli that is a block away that has really good
14 things. I think the building is probably shut down now, but
15 the deli is available.

16 In any event, all I -- all we request is that you tell
17 Tracy what your schedule is going to be, what you're going to
18 be doing. And, if you should take a break, or take a lunch
19 break or any other kind of break, it's important that you not
20 deliberate or discuss the case except when all ten of you are
21 together in the room. So if you take a break, don't be taking
22 about the case in little clumps and little groups. Just wait
23 until everybody is in the room before you deliberate on the
24 case.

25 Thank you very much, ladies and gentlemen. You may retire

1 to the jury room.

2 (Jury excused)

3 (The following proceedings were held outside of the
4 presence of the Jury)

5 **THE COURT:** Well done.

6 **MR. FREITAS:** Your Honor, I would like to address one
7 point. I'm not sure I heard it right, but I thought
8 Mr. Silberfeld might have suggested that average downstream
9 pass-on rates are not appropriate under the law. And, I will
10 look at the transcript and see just what he said. But, it's
11 possible that he said something that is inconsistent with the
12 law. We want to look into that.

13 And we may take the matter up with the Court after we look
14 more carefully.

15 **THE COURT:** You may, after you look -- I think he was
16 reflecting on the words in the instruction, but --

17 **MR. FREITAS:** We'll take a look, Your Honor.

18 **THE COURT:** All right. Okay. You folks need to be
19 on 15-minute standby. So, give Tracy your phone numbers. The
20 jury at some point will tell us what their plans are, by way
21 of how late they will stay today, and whether they're coming
22 in tomorrow.

23 It's been a pleasure, as always, to see you all. And we
24 will be -- we will be adjourned until we hear more from the
25 jury.

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MR. CURRAN: Thank you.

MR. FREITAS: Thank you, Your Honor.

(Record completed at 2:14 p.m.)

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CERTIFICATE OF REPORTERS

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball 

Thursday, August 29, 2013

I, CONNIE KUHL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Connie Kuhl _____

Thursday, August 29, 2013