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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AU OPTRONICS CORPORATION, *et al.*, Defendants.	Case No. CR-09-0110 (SI) **DEFENDANT AU OPTRONICS CORPORATION AMERICA'S MOTION FOR JUDGMENT OF ACQUITTAL (FED. R. CRIM. PROC. 29(A))** Date: February 21, 2012 Time: 8:30 a.m. Courtroom: Hon. Susan Illston

INTRODUCTION

Like juries, judges can acquit defendants. *United States v. Sisson*, 399 U.S. 267, 290 (1970). In this trial, the Government has failed to produce sufficient evidence that would enable a reasonable jury to convict Defendant AU Optronics Corporation America ("AUOA") of violating the Sherman Antitrust Act, 15 U.S.C. § 1. Therefore, AUOA respectfully requests this

Court to grant its motion for entry of judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29.

I. RULE 29 MOTION STANDARD

Following the Government's case-in-chief in a criminal trial, the Court may direct a verdict of acquittal for a defendant on any offense for which the evidence presented is insufficient to sustain a conviction. *See* FED.R.CRIM.P. 29(a). In ruling on a defendant's Rule 29 motion, trial courts must evaluate the evidence presented during trial and determine whether "a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Ching Tang Lo*, 447 F.3d 1212, 1221 (9th Cir. 2006). If no rational trier of fact could find the essential elements of the charged crime beyond a reasonable doubt, the trial court must grant the motion and enter a judgment of acquittal for the defendants. *See, e.g., United States v. Tisor*, 96 F.3d 370, 379 (9th Cir. 1996). Rule 29 motions must also be granted if the Government fails to present any evidence of illegal behavior. *See, e.g., United States v. Gen. Motors Corp.*, 216 F. Supp. 362 (S.D. Cal. 1963). Additionally, if the evidence provides "equal or nearly equal circumstantial support to a theory of guilty and a theory of innocence of the crime charged," the district court must grant a Rule 29 motion. *United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995). This is so because "where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence . . . a reasonable jury *must necessarily entertain* a reasonable doubt." *Id.* (emphasis in original) (internal quotations omitted).

The sufficiency of the evidence depends on "whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Willard*, 230 F.3d 1093, 1095 (9th Cir. 2000). To find the evidence sufficient, "it is not enough that the inferences in the government's favor are permissible." *United States v. Triumph Capital Group*, 544 F.3d 139, 159 (2d Cir. 2008). Rather, the court must be satisfied that "the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt." *Id.* Circumstantial evidence may support a conviction, but "mere

suspicion or speculation . . . does not rise to the level of sufficient evidence." *United States v. Hernandez-Orellana,* 539 F.3d 994, 1004 (9th Cir. 2008) (quotation omitted); *see, e.g., United States v. Andrews,* 75 F.3d 552, 556 (9th Cir. 1996); *United States v. Dinkane,* 17 F.3d 1192, 1196 (9th Cir. 1994).

In this trial, the Government has failed to present sufficient evidence that would enable a rational jury to find, beyond a reasonable doubt, each essential element of an alleged foreign price-fixing conspiracy against AUOA, under Section 1 of the Sherman Act. Therefore, AUOA respectfully requests this Court to grant the instant motion and enter a judgment of acquittal with respect to AUOA.

II. THE GOVERNMENT HAS FAILED TO PRESENT ANY EVIDENCE THAT ANY AUOA REPRESENTATIVE EVER ENTERED INTO AN AGREEMENT WITH A COMPETITOR TO FIX PRICES ON LCD PANELS.

The Superseding Indictment alleges that, at various times, employees of AUOA agreed with employees of other TFT-LCD manufacturers to fix prices on panels sold to customers in the United States. Accordingly, to sustain a verdict against AUOA, the Government must prove beyond a reasonable doubt that AUOA conspired to fix prices. *See* Superseding Indictment, 9:20–25. As AUOA is a separately named defendant, the Government's evidence against AUOA's parent company, AU Optronics Corporation ("AUO"), and the five current and former officers and/or employees of AUO has no bearing on AUOA's guilt or innocence.[1] To convict AUOA, the Government must present evidence demonstrating beyond a reasonable doubt that at least one AUOA employee intentionally agreed to join the alleged price-fixing conspiracy and took actions in furtherance of the conspiracy. *See, e.g., United States v. U.S. Gypsum Co.,* 438 U.S. 422, 444-46 (1978). With respect to AUOA's alleged involvement in the conspiracy, however, at trial the Government has presented *nothing*.

A. THE GOVERNMENT'S CASE-IN-CHIEF CONTRADICTS THE INDICTMENT'S PRICE-FIXING ALLEGATIONS AGAINST AUOA.

[1] It should be noted that while individual Defendant Hui Hsiung (aka "Kuma") was president of AUOA during part of the relevant period, the Government has produced no evidence whatsoever that Dr. Hsiung took any allegedly anticompetitive act in that capacity.

The only Government witness who testified regarding the actions of AUOA employees during the period of the alleged conspiracy unequivocally denied that any AUOA employee ever agreed to fix prices on LCD panels. Former AUOA branch manager Michael Wong testified as part of the Government's case-in-chief, yet nothing in his testimony corroborated the Government's price-fixing allegations.[2] Wong testified that he never agreed to fix prices with competitors; that he never agreed to fix prices with any AUO employees, including the individual Defendants; and that he never agreed to fix prices with other AUOA employees. *See* Testimony of Michael Wong ("Wong Testimony"), 1061:8–20. Further, Wong testified that neither he nor any other AUOA employee ever attended a Crystal Meeting, which is where the alleged unlawful agreements involving AUO employees supposedly occurred. *Id.* at 1093:8–19. Wong testified that throughout the time that he worked at AUOA, there was consistently fierce competition between AUO and its competitors, and panel manufacturers faced intense pressure from customers to drive prices down. *Id.* at 1186:16-25. Given such explicit disavowals of price-fixing activity by an AUOA employee who has testified on the prosecution's behalf, any rational jury "would *necessarily* have to have a reasonable doubt" as to AUOA's guilt. *United States v. Reynolds*, 511 F.2d 603, 606 (5th Cir. 1975) (emphasis added).

B. VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, MICHAEL WONG'S TESTIMONY SHOWS ONLY THAT AUOA EXCHANGED PRICING INFORMATION WITH COMPETITORS, WHICH IS NOT ILLEGAL CONDUCT UNDER THE SHERMAN ACT.

The Government elicited substantial testimony from Michael Wong regarding AUOA's practice of exchanging LCD-panel pricing information during the period of the alleged conspiracy,[3] but such testimony does not establish that AUOA violated the Sherman Act. It is a well-established tenet of antitrust law that the mere exchange of pricing information between competitors, without more, is not illegal. *See, e.g.*, *U.S. Gypsum Co.*, 438 U.S. at 441 n.16

[2] Since the Superseding Indictment never specifically names any AUOA employee who participated in the alleged conspiracy, the Government's case with respect to AUOA must rest entirely upon Wong's testimony. Any other theory of liability would necessarily fail for lack of fair notice.

[3] *See, e.g.*, Wong Testimony, 853:18–20, 879:14–18; 880:15–21; 884:10–22.

(explaining that the Supreme Court has held on multiple occasions that exchanges of price data and other information among competitors does not constitute a *per se* violation of the Sherman Act); *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (noting that possession of competitors' price information "does not, at least in itself, tend to exclude legitimate competitive behavior"). The Government presented no witness or other evidence who in any way contradicted Wong's testimony.

No jury can infer AUOA's involvement in a price-fixing conspiracy from the exchange of competitive information alone. *See Citric Acid*, 191 F.3d at 1103 ("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.") (internal quotations omitted). At no point during its case-in-chief did the Government present any evidence—direct or circumstantial—that would permit a reasonable jury to conclude that AUOA's exchange of pricing data with its competitors constituted anything more than just that—a simple exchange of information unaccompanied by any agreement to fix prices. To judge otherwise would not only be unfounded as an evidentiary matter—it would also undermine the very spirit of corporate competitiveness that the Sherman Act's proscriptions are designed to protect. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 455 (9th Cir. 1990) ("To allow an inference of agreement from [the exchange of price information], standing alone, would have the effect of deterring competitors from obtaining information about other companies' actual retail prices, even through legitimate means. *We can think of few inferences that would have a more undesirable distorting effect on market conduct*.") (emphasis added). If anything, AUOA's information exchange with competitors made it *more* competitive.

Indeed, the only rational inference to draw from Wong's testimony regarding price-information exchange is that such conduct was part and parcel of Wong's job duties as an employee who worked in the hyper-competitive TFT-LCD panel industry. Wong testified that AUOA did not sell directly to customers in the United States, but rather it only promoted AUO's products to accounts such as, *inter alia*, Hewlett-Packard, Compaq, ViewSonic, and Apple. *See* Wong Testimony, 834:11–15. Wong testified that it was part of his job "as a salesperson" to talk

with competitors. *Id.* at 888:6–18. He further testified that the only purpose of such information exchanges was "to get the perspective of the market." *Id.* at 895:3–10. Wong found it only natural—indeed *essential*—to share information with competitors to determine the outlook on the LCD market. *See id.* at 1020:19–22 ("[T]hat's your second nature: You try to get your competitors' information."). To infer illegality from such conduct would be utterly irrational.

The Government has failed to present any evidence that would be sufficient for a rational jury to find, beyond a reasonable doubt, that employees of AUOA formed any illegal agreement with a competitor to fix prices. As the next Part will demonstrate, the Government's argument that AUOA acted in concert with AUO to conspire with competitors is equally deficient.

III. AUOA CANNOT CONSPIRE WITH ITS PARENT CORPORATION UNDER SECTION 1 OF THE SHERMAN ACT.

The Government has presented evidence showing that AUO employees shared information gleaned from Crystal Meetings with employees at AUOA. *See, e.g.*, Wong Testimony, 954:2–955:14, 955:20–956:9; Exhibits 24T, 25T, 28, 133T, 134. The Government's apparent purpose in focusing on the sharing of such information between AUO and AUOA is to suggest that these two entities agreed to fix prices on products sold in the United States. As noted above, however, Wong flatly denied agreeing to fix prices with AUO personnel or with anyone else.

Wong's communications with AUO cannot support a conspiracy finding for a second reason: A parent corporation and its wholly owned subsidiary are not capable of conspiring with each other in violation of Section 1 of the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).[4] "[I]t is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 [of the

[4] Although *Copperweld Corp.* was a civil case, its holding that a corporation and its subsidiary are a single entity for purposes of Sherman Act Section One applies to criminal prosecutions as well. *See, e.g., United States v. Korean Air Lines Co.*, 505 F. Supp. 2d 91, 94 (D.D.C. 2007) ("[A] conspiracy consisting only of an employer and its employees does not violate Section 1 of the Sherman Act." (citing *Copperweld Corp.*)); *cf. United States v. Suntar Roofing, Inc.*, 709 F. Supp. 1526, 1530 (D. Kan. 1989) (holding president of corporation could not conspire with corporation and citing *Copperweld Corp*.).

Sherman Act] was designed to police." *Id*. at 769. Rather, "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act," due to their "complete unity of interest." *Id.* at 771. Therefore, "the coordinated activity of parties lacking independent sources of economic power and separate interests does not warrant judicial scrutiny." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005).

The Government's evidence clearly establishes that AUOA was a subsidiary of AUO. Wong Testimony, 834:16–19; *cf.* Superseding Indictment, 3:10–12 ("Within the period covered by this Indictment, defendant [AUOA] was a wholly owned subsidiary of defendant [AUO] . . . ."). Hence, as a matter of law AUO and AUOA cannot conspire to violate the Sherman Act. *Copperweld Corp.*, 467 U.S. 752.

Nor does Wong's testimony establish that AUOA conspired with anyone else. Wong testified that Crystal Meeting notes "summarize[d] information about AUO's competitors"; that the notes provided "very good information"; that the notes were thought of as "another source of market information"; and that he found "all of this information helpful." Wong Testimony, 955:4–8; 956:7; 958:20–22; 1094:5–6. What Wong did *not* testify to, however, was that he or anybody else at AUOA ever used Crystal Meeting notes to fix prices with a competitor. In fact, Wong flatly denied any such conduct. *Id.* at 1227:6–8 (**Q:** "What you did not do was agree with your competitors to fix prices. Correct?" **A:** "No, I did not.").

As a matter of law, AUO and AUOA cannot form a conspiracy under Section 1 of the Sherman Act. The Government has not presented any evidence that AUOA ever used Crystal Meeting notes distributed by AUO employees for the purpose of fixing prices with AUOA's competitors. The Government established *through its own redirect* that Michael Wong lacked the authority to agree to prices without approval from AUO in Taiwan and knew nothing about whether any agreements might – or might not – have been reached at Crystal Meetings:

Q. You didn't have authority to set prices on your own for your customers, right?

A. Yes, you're right.

> Q. And the people in Taiwan who set the prices for Dell – you don't know, one way or the other, whether they were meeting with their competitors in Taiwan to fix prices to these customers, do you?
>
> A. No, I don't.

Wong Testimony, 1227:19-1228:1

No rational jury may be allowed to conclude beyond a reasonable doubt that AUOA conspired to fix prices.

IV. CONCLUSION

For the reasons stated above, the government's case-in-chief is factually insufficient for any rational jury to find the essential elements of a criminal Sherman Act violation as to AUAO beyond a reasonable doubt. Therefore, AUOA respectfully requests this Court to grant this Rule 29 motion and enter judgment of acquittal for AUOA.

DATED: February 16, 2012

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