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AU OPTRONICS CORPORATION and
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.

Case No. CR-09-0110 (SI)

AUO DEFENDANTS' RESPONSE TO UNITED STATES' MEMORANDUM RE: FINAL JURY INSTRUCTIONS

Judge: Hon. Susan Illston
Place: Courtroom 10, 19th Floor

A. Introduction

The defendant AU Optronics Corporation is a global corporation which ships almost none of its TFT-LCD products directly to the United States. It is accused of agreeing to fix prices at meetings held in Taiwan. Yet, on the eve of closing arguments, the government maintains that this is a "domestic case." *See* Govt. Mem, at 1 ("Since there was conduct in the United States, this is a 'domestic' case.") (Doc. No. 810). The government therefore claims that the case is controlled by case law announced over a hundred years ago, directed solely at domestic trusts, holding that under the Sherman Act the crime of price-fixing consists of nothing more than an agreement to do so. *Id*. (citing *Nash v. United States*, 229 U.S. 373, 378 (1913) ("[T]he Sherman Act punishes the conspiracies at which it is aimed on the common-law footing,-that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.")).

One hundred years ago, when *Nash* was decided, the Foreign Trade Antitrust Improvement Act ("FTAIA"), which created a presumption that anti-competitive conduct abroad is *not* subject to United States jurisdiction, had not been enacted. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), which requires that to exercise extraterritorial jurisdiction over foreign anticompetitive conduct, that conduct must have a substantial and intended effect on United States commerce, had not been decided, nor had *United States v. Nippon Paper Industries Company*, 109 F.3d 1 (1st Cir. 1997), holding to the same effect. *Nash* came nearly a century before the Supreme Court, in interpreting the FTAIA, cautioned against applying United States antitrust principles to foreign conduct. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A*., 542 U.S. 155, 168 (2004) (applying American antitrust remedies to foreign conduct risks "undermin[ing] foreign nations' own antitrust enforcement").

The government's position is entirely inconsistent with the instructions it proposed, and the Court accepted. If this were a domestic case, the Court would not have decided to instruct on paragraphs (A) or (B) contained in the "Application of the Sherman Act" instruction, which describe facts that the government must prove beyond a reasonable doubt before this Court can exercise extraterritorial jurisdiction over the defendants' alleged conduct in Taiwan. And if this were a domestic case, the Court

would not have decided to instruct on paragraphs (A) or (B) in its instruction on "The Elements of The Offense," which concern the FTAIA exceptions that the government must prove to bring the defendants' foreign conduct within the scope of the Sherman Act.

The fact that some act occurred in the United States plainly does not render a case almost entirely based on foreign conduct a "domestic" case. *Kruman v. Christie's International PLC*, 284 F.3d 384, 395 (2d Cir. 2002) ("The application of the FTAIA hinges on whether the 'conduct' involves foreign trade or commerce. Clearly, when there is conduct directed at reducing the competitiveness of a foreign market, as there was in this case, such conduct involves foreign trade or commerce, regardless of whether some of the conduct occurred in the United States."). The government's contention that this is a domestic case requiring it to prove "the crime" by establishing no more than that there was an agreement to fix prices in a Taiwan hotel room by Chinese and Korean businessmen is, to use a legal term, loopy.

B. The Price-Fixing Instruction

Because the defendants' position taken in an email to the Court last Friday, February 24, 2012, has not yet been incorporated in a formal pleading, AUO repeats it here.

In Stipulated Instruction No. 15, concerning price-fixing, at lines 16-17, the instruction reads: "The agreement is the crime, even if it is never carried out." (Doc. No. 807) On Friday, this Court struck similar language twice from the Government's Proposed Instructions Nos. 6 and 7, and quite correctly so. Tr. at 4610:23-4611:8. While that language may be correct in a domestic antitrust matter, it is flatly erroneous in this case.

The government's theory is that the charged agreement was formed in Taiwan hotel rooms in 2001. The government has conceded in its own instructions that there are four reasons why the charged agreement does not, in itself, constitute the Count One offense.

First, both paragraphs (A) and (B) of the Government's Proposed Instruction No. 4 on the "Application of the Sherman Act," much discussed on Friday, require acts or effects within the United States. Second, both paragraphs (A) and (B) of Government's Proposed Instruction No. 5 on the "Elements of the Offense" require acts or effects within the United States. Government's Proposed

Instruction No. 9, "Statute of Limitations," requires an act in furtherance of the conspiracy after June 9, 2005. And Stipulated Instruction No. 18, "Venue," requires an act in furtherance of the conspiracy in the Northern District of California.

That being so, it would be error for the government to argue, or the jury to be instructed, that proof of a price-fixing agreement in Taiwan in 2001 "is the [charged] crime," for in this case much more must be proven to convict. We ask that the Court strike the quoted language from Stipulated Instruction No. 15 as it did on Friday with the same language in other instructions proposed by the government.

C. The Gross Gains Instruction

At Friday's instructional conference, the Court ruled over defense objection that the jury would be instructed in the guilt phase of the trial on the "gross gains" calculation related to the alternative fine issue, rather than in a separate, subsequent proceeding if and when the corporations are convicted of price-fixing. At that point in the conference, the defendants objected to the first paragraph of the government's Proposed Instruction No. 14 on gross gains, which reads as follows:

> The government does not have to prove that anyone derived monetary or economic gain from the alleged conspiracy or that the alleged conspiracy caused any monetary or economic harm in order for you to find a defendant guilty of the offense. To find a defendant guilty, all that you must find is that the government has proven the elements of the offense, which I previously described.

Because the government again has submitted an excerpt of a form instruction for domestic antitrust matters without considering the facts of this case, or even its other proposed instructions, the paragraph is patently erroneous.

We begin with the sentence: "To find a defendant guilty, all that you must find is that the government has proven the elements of the offense, which I previously described." The Court's draft jury instructions contain a previous instruction titled "Elements of the Offense." That "Elements" instruction contains three numbered elements, one with alternate paragraphs (A) and (B). But the aforementioned "Elements" instruction only contains half the factual components that the government must prove before the jury can find a defendant guilty. Specifically, the government must prove beyond a reasonable doubt one of the two alternative elements stated in paragraphs (A) and (B) in the separate

instruction titled "Application of the Sherman Act." It must also prove an overt act within the statute of limitations, as well as an act within the venue of the Northern District of California. The first paragraph of Government's Proposed Instruction No. 14, "Gross Gains," ignores these requirements, and obviously may not be given.

Of equal importance, the first sentence–"The government does not have to prove that anyone derived monetary or economic gain from the alleged conspiracy or that the alleged conspiracy caused any monetary or economic harm in order for you to find a defendant guilty of the offense."–is equally flawed. Paragraphs (A) and (B) in the "Application" and "Elements" instructions both require a showing of a detrimental impact on United States commerce. The gross gains paragraph now being challenged carries the same message as would an instruction in an interstate transportation of stolen property ("ITSP") case that informs the jury that the stolen property has to be proven to have traveled in interstate commerce but does not have to be proven to have done so. The instructional conflict must be eliminated.

Finally, the gross gains instruction properly comes into play only when and if the jury has convicted one or both of the corporations. It makes no sense to have incorporated in a penalty phase an instruction with directions as to what does and does not have to be proven in the guilt phase of the trial. The entire paragraph should be deleted from the gross gains instruction.

D. Expert Opinion Testimony

The defense does not object to the government's proposed amendment of the "Opinion Evidence, Expert Witness" instruction.

E. The "Targeted" Language in the "Elements of the Offense" Instruction

The Court correctly inserted the "targeted" language in the "Elements of the Offense" instruction.

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