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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) **DEFENDANTS' PROPOSED INSTRUCTION RE: EXCHANGE OF PRICE INFORMATION**

On January 11, the first day of testimony, Mr.Tierney, the government's initial witness, testified that he believed that the exchange of price information among business competitors

might be illegal. As a result, the defendants requested an instruction on the legality of the exchange of information among business competitors. While the defendants maintained that Mr. Tierney's opinion or mental state on the legality of price information was irrelevant, they anticipated that there will be additional testimony on that subject from other witnesses whose mental state is indeed in issue in this case.

The defendants asserted that the question of the legality of the exchange of price data was ultimately an issue of law on which the jury must be correctly instructed by the Court. The defendants had previously submitted an extensive instruction on the matter with supporting case citations in the complete set of proposed instructions filed prior to trial on December 13, 2011, which they attached to their instructional request. As a result of Tierney's injecting the issue of the legality of such information exchanges into these proceedings, defendants asked that the Court provide the jury with a brief instruction on the subject, as follows: "The exchange of price data and other information among competitors or discussions among competitors or concerning the prices and quantities of a product which they have sold is not in itself illegal."

In a brief filed the following day, Thursday, January 12th, the government opposed the defendants' request on two grounds. One of these was that such an instruction was premature. The government stated:

> Any instruction on the substantive law applicable in a Sherman Act Section 1 case beyond the basic iteration of the elements of the offense already provided as a preliminary instruction is premature at this time. Such instructions are appropriately left for the end of trial, after the evidence in the case has been admitted and the Court can determine which instructions on the law are appropriate based on all the evidence.

Opp., at page 2.

The government also argued as a substantive matter that, even at the end of the case, the Court should decline to instruct that the exchange of price information among competitors is not in itself illegal. That position was not dictated by a disagreement with the defendants over the black letter law principle herein at issue. Indeed, the government agreed with the defendants'

assertion that the United States Supreme Court has expressly held that absent an agreement to fix prices, an exchange of price information is not illegal *per se*. Opp., at page 2, citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 429, 441 n.16 (1978); *see also In re Citric Acid Litigation*, 191 F.3d 1090, 1103 (9th Cir. 1999), quoting *In re baby Food Antitrust Litig*., 166 F.3d 112, 118 (3d Cir. 1999) ("Communications 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.")

Rather, the government maintained in its Opposition that because "a trial witness, J.Y. Ho, has already testified that the members of the conspiracy agreed to target prices for TFT-LCDs. *See* Transcript of Proceedings, January 12, 2012 ("Tr."), at 660-61, 669-70, 676, 680" then "the evidence has shown that this is a full-fledged *per se* price-fixing case to which *Gypsum* does not apply." (Opp., at 2). The government further maintained that the Court has already concluded that the defendants are guilty of price fixing,[1] and that finding dispenses with the need for jurors to decide whether the exchange of information among competitors was accompanied by an agreement to fix prices. Opp., at 2 ("Therefore, defendants' request for an instruction regarding the legality of the exchange of price data should be denied.")

Finally, the government submitted that if the Court did instruct the jury as the defendants requested, it should give a lengthy instruction on the definition of price fixing, which it attached to its Opposition as Appendix A.

At today's hearing, the defendants objected to the admission of Government's 172, an email from Evan Huang, on the ground that it contained (1) a legal opinion on the exchange of price information, a subject reserved for the Court (2) which was incorrect. The Court then stated that it would consider a limiting instruction on the matter. The government agreed that the

[1]Opp., at 1: "As the Court has found, the government has already established by a preponderance of the evidence "that the conspiracy set forth in the indictment existed and involved AUO, AUOA, LG, Chunghwa, Chi Mei, HannStar, and Samsung, as well as the individual defendants."

jury should be instructed that the legality of the exchange of price information was a matter for the Court to decide and one on which the jury would be instructed, but opposed an instruction at this time on whether such exchanges are legal.

Two points are in order. First, it can no longer be said that an instruction on the subject of the legality of the exchange of price information is premature. Indeed, the government now agrees that at a minimum, the jury must be told that it is the Court, not the witnesses, who will provide jurors with the controlling principle as to the legality of such exchanges. But the jury needs that information now. They have heard, and will continue to hear over the next few months, witnesses testify to their opinions on the subject. If those opinions are incomplete, misleading, or flat wrong, and they already have been, it will be difficult, if not impossible, for jurors to alter their views on the subject if they are only instructed on the correct principle many weeks from now.

Second, the government's argument that Mr. Ho has already proven the existence of a price-fixing conspiracy and that, in ruling on the admissibility of certain evidence, the Court made a finding that there was a price fixing agreement in this case that controls the jury's decision on that question is just silly. This is not a civil case. Courts in criminal cases cannot and will not take a single issue relevant to the determination of guilt or innocence from the jury. *See United States v. Gaudin*, 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged...." It is the jury that at the close of the evidence must decide the legality of the defendants' exchange of information with competitors: if that exchange led to, or was accompanied by, an agreement to fix prices; the exchange was an illegal component of the charged conspiracy; if there was no price fixing agreement, then the exchange was legal.

The simple and correct solution, fair to both sides, is to instruct the jury on the *Gypsum* principle in essentially the language contained in the government's Opposition at page two: "absent an agreement to fix prices, an exchange of price information is not illegal *per se*."

Leaving out the Latin and putting the principle in context, defendants request that the Court instruct as follows:

> "You have heard evidence of opinions concerning the issue of whether the exchange of price and product information among competitors is legal or illegal. There may be more such evidence. I now instruct you that absent an agreement to fix prices, an exchange of price information is not illegal in itself. It will be your duty at the close of the evidence to decide whether the government has met its burden of proving the agreement to fix prices charged in the indictment."

Dated: January 17, 2012

Respectfully submitted,
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