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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 PRELIMINARY JURY INSTRUCTIONS ON THE ELEMENTS OF THE OFFENSE, AND MEMORANDUM IN SUPPORT OF PROPOSED INSTRUCTIONS** Date: Tuesday, December 13, 2011 Time: 3:30 p.m. Courtroom: Hon. Susan Illston

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

On June 10, 2010, the United States filed a Superseding Indictment in this action. The indictment purports to state a single count for price-fixing under the Sherman Act. 15 U.S.C. § 1. The indictment names two corporate defendants, AU Optronics Corporation ("AUO") and AU Optronics Corporation America ("AUOA"), as well as six individual defendants who are either current or former employees of AUO: (1) Hsuan Bin Chen; (2) Dr. Hui Hsiung; (3) Dr. Lai-Juh Chen; (4) Shiu Lung Leung; (5) Borlong Bai; and (6) Tsannrong Lee.

The corporate defendants request that the jury be instructed on the elements of the charged offense at the outset of trial. The corporate defendants' proposed instructions, which are based on the points and authorities discussed below, are attached. In particular, the corporate defendants request that the jury be instructed that it must find the substantive elements of the offense required by both (a) *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), and its progeny; and (b) the Foreign Trade Antitrust Improvement Act (FTAIA). Important recent decisions from the Third Circuit and Seventh Circuit make clear that the jury must be instructed on these elements of the offense. *See Animal Science Products, Inc. v. China Minmetals Corp.*, -- F.3d --, 2011 WL 3606995 (3d Cir. Aug.17, 2011); *Minn-Chem, Incorporated v. Agrium Inco.*; -- F.3d --, 2011 WL 4424789 (7th Cir. Sept. 23, 2011).

The corporate defendants have consulted with the government and agreed that they will brief the defendants' preinstruction request in time for the Court to hear argument on the issue at the pretrial conference to be held on December 13th. The parties have also agreed that the government may place on for a hearing at the pretrial conference a motion for preinstruction on issues related to the alternative fine provision. 18 U.S.C. section 3571(d).

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II. MEMORANDUM IN SUPPORT OF PROPOSED INSTRUCTIONS

A. Procedural Background

This Court has previously discussed what the requisite elements of the offense are, but it has not conclusively resolved the issue. AUO and AUOA filed a motion to dismiss the Superseding Indictment on the grounds that it failed to allege every element of a criminal violation of the Sherman Act. The defendants contended that two elements had not been pleaded. *First*, the defendants pointed out that the Superseding Indictment failed to allege that any defendant intended by that defendant's conduct to produce a substantial anti-competitive effect in the United States, as required by the First Circuit's decision in *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997). *Second*, the defendants argued that although the Superseding Indictment plainly alleged "trade or commerce . . . with foreign nations" pursuant to the Foreign Trade Antitrust Improvement Act (FTAIA), the Indictment failed to allege either that defendants' alleged conduct "involved import trade or commerce" or that their conduct had a "direct, substantial and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a.

In its opposition, the government primarily contended that it was not required to plead or prove either fact, because neither is an essential element of the offense. (Dkt. 281.)

On April 18, 2011, the Court denied the defendants' motion. (Dkt. 287.) For each of the two claims made by the defendants, the Court issued rulings in the alternative. First, with respect to the *Nippon Paper* element, the Court questioned whether the holding in *Nippon Paper* was applicable, noting that while the conduct alleged there was "wholly foreign," the Government has alleged limited domestic conduct here. (Opn. at 4-5.) In the alternative, the Court held that to the extent that the *Nippon Paper* standard did apply, the allegations in the Superseding Indictment of a conspiracy to fix prices of TFT-LCD panels worldwide, including in the United States, was a sufficient allegation of intent to produce a substantial domestic effect. (Opn. at 5 ("Even if *Nippon* applies to this case, the superseding indictment contains sufficient allegations to establish an 'intended and substantial effect in the United States.'").)

Second, with respect to the FTAIA element, the Court held that even if the FTAIA applied to criminal cases, any allegation of a domestic overt act was sufficient to satisfy the statute. (Opn. at 7-8.) In the alternative, the Court held that the Government's allegation that price-fixed TFT-LCD panels had been sold in the United States was sufficient to constitute "import trade or commerce." (Opn. at 7: "Thus, it appears that the criminal charges alleged in the indictment are based at least in part on conduct involving 'import trade or import commerce' . . . .").

In sum, with respect to both questions, this Court essentially reserved ruling on whether either fact was a necessary element of the offense. The Third Circuit's ruling in *Animal Science* and the Seventh Circuit's ruling in *Minn-Chem* lend substantial new support to the defendants' position that both facts are indeed necessary elements of the offense, which must be submitted to the jury and proved beyond a reasonable doubt.

B. The FTAIA Element, and the Rulings in *Animal Science* and *Minn-Chem*

Like this case, both *Animal Science* and *Minn-Chem* involved allegations of global conspiracies to fix prices. The *Animal Science* plaintiffs alleged that the defendants, Chinese producers and exporters of magnesite, had engaged in a conspiracy to fix the price of magnesite imported to the United States. 2011 WL 3606995 at *1. The *Minn-Chem* plaintiffs alleged that the defendants, potash producers located in Canada, Russia, and Belarus, had engaged in a conspiracy to fix the price of potash sold worldwide, including that imported into the United States. 2011 WL 4424789 at *1-2.

In both cases, the defendants raised defenses based on the FTAIA. Both the Third Circuit and the Seventh Circuit largely accepted the arguments made by the defendants regarding the meaning and scope of the FTAIA. In so doing, those circuits clarified two critical points that are directly applicable to this case.

First, the Third Circuit explicitly held-contrary to what the government has argued in this case-that the exceptions to the FTAIA are substantive elements of the offense, not mere

"jurisdictional" limitations. The Third Circuit relied on the "bright line" rule for distinguishing jurisdictional from substantive elements that the Supreme Court adopted in *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006). It concluded:

> The FTAIA neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts.. Indeed, the statutory text is wholly silent in regard to the jurisdiction of the federal courts. The FTAIA reads only that the Sherman Act "shall not apply" if certain conditions are met. Assessed through the lens of *Arbaugh's* "clearly states" test, the FTAIA's language must be interpreted as imposing a substantive merits limitation rather than a jurisdictional bar. Or, in the terminology set forth above, in enacting the FTAIA, Congress exercised its Commerce Clause authority to delineate the elements of a successful antitrust claim rather than its Article III authority to limit the jurisdiction of the federal courts. We therefore overrule our earlier precedent that construed the FTAIA as imposing a jurisdictional limitation on the application of the Sherman Act.

2011 WL 3606995 at *4 (citations and footnotes omitted). In *Minn-Chem*, the Seventh Circuit indicated that it agreed with the Third Circuit's analysis on this point, but reserved the issue for another case since its outcome would have been the same regardless. See 2011 WL 4424789 at *6 & n.3.

Second, both courts emphasized that the "import trade or commerce" exception to the FTAIA-the same exception that the government apparently intends to prove in this case-must be construed narrowly. The Third Circuit emphasized, as it previously had in *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293 (3d Cir.2002), that selling goods or services that are eventually imported does not constitute "import trade or commerce." Rather, "the relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market.' Or, to phrase it slightly differently, the import trade or commerce exception requires that the defendants' conduct target import goods or services." *Animal Science*, 2011 WL 3606995 at *5 (quoting *Turicentro*, 303 F.3d at 303).

The Seventh Circuit agreed with this analysis, and it reasoned that the district court in *Minn-Chem* had interpreted the "import trade or commerce" exception far too broadly.

> If foreign anticompetitive conduct can "involve" U.S. import

> commerce even if it is directed entirely at markets overseas, then the "direct effects" exception is effectively rendered meaningless. Under the district court's reading of the statute, a foreign company that does *any* import business in the United States would violate the Sherman Act whenever it entered into a joint-selling arrangement overseas *regardless* of its impact on the American market. This would produce the very interference with foreign economic activity that the FTAIA seeks to prevent.

2011 WL 4424789 at *8 (emphasis in original). Relying on *Animal Science*, the Seventh Circuit concluded that the "import trade or commerce" exception must be interpreted more narrowly.

> Thus, the relevant inquiry under the import-commerce exception is "whether the defendants' alleged anticompetitive behavior 'was directed at an import market.'" Contrary to what the district court seemed to think, it is not enough that the defendants are engaged in the U.S. import market, though that may be relevant to the analysis. Rather, "the import trade or commerce exception requires that the defendants' [foreign anticompetitive] conduct target [U.S.] import goods or services."

Id. at *9 (quoting and citing *Animal Science*).

The *Minn-Chem* plaintiffs failed to "allege any specific facts to support a plausible inference that the offshore defendants agreed to an American price or production quota for potash." *Id*. They had merely alleged general coordination to fix prices worldwide, and had made only conclusory allegations that the conspiracy was directed particularly at the United States. As a result, the Seventh Circuit ordered the suit be dismissed for failure to state a claim.

In sum, *Animal Science* and *Minn-Chem* support two propositions regarding the application of the FTAIA to this case. First, the jury must be instructed that the government is required to prove beyond a reasonable doubt that the defendants conduct involved "import trade or commerce." Second, the jury instructions must clarify that the government can satisfy that burden only by proving a conspiracy that is particularly directed at the American import market.

C. The *Hartford Fire-Nippon Paper* Element

In addition to the FTAIA elements, the defendants also request that the jury be instructed that, in order to find defendants guilty, it must find a "substantial and intended effect" on United States commerce as required by *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), and

United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997).

In its April 18 Order, this Court suggested that *Nippon Paper* applies only to cases based on "wholly foreign conduct." While it is true that the First Circuit used that phrase, 109 F.3d 1, 9, the conspiracy in *Nippon Paper* involved both foreign and domestic conduct. Moreover, the holding in *Nippon Paper* was based on the Supreme Court's holding in *Hartford Fire*, which involved mostly domestic conduct. It is not true that the principles of *Hartford Fire* and *Nippon Paper* apply only to "wholly foreign" cases. Therefore, a substantial and intended effect on domestic commerce is a necessary element of the charged offense in this case, regardless of whether this case is characterized as "wholly foreign" or not.

Hartford Fire involved both domestic and foreign conduct; the suit named both domestic and foreign defendants. In fact, most of the conduct in *Hartford Fire* was domestic-the primary four defendants in the case were four large domestic insurance companies. *See* 509 U.S. at 774-81. But *Hartford Fire* also involved certain foreign defendants, namely several London-based reinsurers. *Id*. at 794-95. Those foreign reinsurers argued that the Sherman Act could not be applied to them. The Supreme Court rejected that argument because "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id*. at 796.

In short, though *Hartford Fire* was based primarily on domestic conduct, the Supreme Court held that the foreign aspect of the case could be reached only because it had a substantial and intended effect on domestic commerce.

The First Circuit subsequently applied and extended the principles of *Hartford Fire* when it decided *Nippon Paper*. The defendants in *Nippon Paper* actually sought to distinguish *Hartford Fire*. They argued that unlike *Hartford Fire*, their case was based on "wholly foreign conduct," and thus beyond the jurisdictional reach of the Sherman Act. The government, by contrast, argued that the case was not "wholly foreign" because it involved both intended domestic effects and also significant domestic acts. Indeed, in its arguments to the First Circuit,

the government relied heavily on the fact that the indictment "alleged a vertical conspiracy in restraint of trade that involved overt acts by certain coconspirators within the United States." 109 F.3d at 2.

The First Circuit rejected the defendant's arguments. It held that, even if the case was based on "wholly foreign conduct," it could still proceed in American court because the foreign conduct was intentionally aimed at the United States. It held that the indictment was sufficient because it alleged "that the defendant orchestrated a conspiracy with the object of rigging prices in the United States." *Id*. at 8. It held that even if the case had been based on "wholly foreign conduct" (which in fact it was not, according to the government), the foreign conduct could be reached because it had a substantial and intended effect on domestic commerce. In so holding, the First Circuit simply applied *Hartford Fire*. *See* 109 F.3d at 9 ("We need go no further. *Hartford Fire* definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States.").

Taken together, *Hartford Fire* and *Nippon Paper* stand for the proposition that antitrust cases based *partly or entirely* on foreign commerce may proceed in domestic court so long as the conduct at issue had a substantial and intended effect on domestic commerce. To say that *Hartford Fire only* applies when the case is based on "wholly foreign conduct" is to turn that case on its head. Neither the Supreme Court nor the First Circuit ever suggested anything of the sort. Both *Hartford Fire* and *Nippon Paper* stand for the same proposition: Foreign conduct is covered by the Sherman Act if and only if it has a substantial and intended effect on domestic commerce.

Regardless of whether this case is characterized as "wholly foreign," it is clear on the face of the indictment that this case is based to a large extent on foreign conduct. The Indictment alleges that defendant AUO and each of the executives are nationals of Taiwan. (Indictment, 4, 6-11.) Nearly all of the conduct alleged in the Indictment took place overseas. (Id., 17(a-b) (alleged "crystal meetings" in Taiwan); 17(h) (alleged meetings involving "lower-level marketing employees" in Taiwan); 17(i) (alleged "back-to-back, one-on-one meetings" in Taiwan).) In fact,

this case involves far more foreign conduct than *Hartford Fire* and as much foreign conduct as *Nippon Paper*. Applying *Hartford Fire* and *Nippon Paper*, the foreign conduct alleged in this case is covered by the Sherman Act if and only if it had a substantial and intended effect on domestic commerce. That is a fact necessary for conviction. It is thus an essential element of the offense which the government must prove beyond a reasonable doubt at trial.

III. PARTIAL PROPOSED JURY INSTRUCTIONS

Consistent with the principles set forth above, the defendants request the following jury instructions describing the elements of the offense, and describing the meaning of "import trade or commerce." The defendants will of course submit additional proposed jury instructions at the appropriate time.

INSTRUCTION NO. ** - ELEMENTS OF A SHERMAN ACT VIOLATION

Defendants AU Optronics and AUO America are charged in the Indictment with knowingly joining in a single ongoing conspiracy to suppress and eliminate competition by fixing prices in the market for TFT-LCD panels, in violation of Section 1 of Title 15 of the United States Code, commonly known as the Sherman Antitrust Act. In order for one or both of these defendants to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

One, that beginning on or about September 14, 2001 and ending on or about December 1, 2006, there was an agreement or mutual understanding between two or more persons to fix the prices of TFT-LCD panels as charged in the Indictment;

Two, that on or about the various dates set forth in the Indictment, one or both corporate Defendants voluntarily and intentionally became members of the conspiracy knowing that the object of the conspiracy was to suppress and eliminate competition by fixing prices of TFT-LCD panels and intending to help accomplish that goal;

Three, that the Defendants' conduct had a substantial and intended effect on United States commerce;

Four, that the conspiracy described in the Indictment involved import trade or commerce.

INSTRUCTION NO. ** - FTAIA - IMPORT TRADE OR COMMERCE

Because the alleged conspiracy predominantly involved conduct which occurred, if at all, in foreign countries, I instruct you as a matter of law that the conduct of AU Optronics Corporation and AU Optronics Corporation America alleged in the indictment was "conduct involving trade or commerce with foreign nations."

Section 6a of the Sherman Act, which is known as the Foreign Trade Antitrust Improvement Act, provides that the Act does not apply to "conduct involving trade or commerce with foreign nations" unless the conduct involved "import trade or commerce." Therefore, before you may find either defendant guilty, you must find beyond a reasonable doubt that the defendants' conduct involved "import trade or commerce." I will now instruct you on how to make this determination.

In order to conclude that the conduct of the defendant involved import trade or commerce, you must find beyond a reasonable doubt that defendants' anticompetitive conduct, if any, was directed at the United States import market.

It is not sufficient, without more, for the government to establish that the defendants were engaged in the United States import market. It is similarly not sufficient for the government to establish that the defendants were engaged in global anticompetitive behavior involving products that were eventually imported into the United States. Rather, the government must establish beyond a reasonable doubt that the defendants' anticompetitive conduct targeted United States import goods.

The transmission of payments for TFT-LCD panels, even if those payments traveled across the United States border, is irrelevant to the question of whether the defendant engaged in

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conduct involving import trade or commerce; nor does ancillary activity in support of the supposed conspiracy transform the conspiracy into "conduct involving import trade or commerce."

DATED: November 2, 2011

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