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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' OPPOSITION TO GOVERNMENT'S PROPOSED INSTRUCTION ON IGNORANCE OF LAW** Date: TBA Time: TBA Courtroom: Hon. Susan Illston

INTRODUCTION

Late Last Wednesday night, the government filed a request that the court now instruct the jury as follows:

> It is not necessary for the prosecution to prove that the defendants knew that an agreement, combination, or conspiracy to fix prices,

> as charged in the indictment, is a violation of the law. Thus, if you find beyond a reasonable doubt from the evidence in the case that a defendant knowingly joined a conspiracy to fix prices, as charged, then the fact that the defendant believed in good faith that what was being done was not unlawful is not a defense.

The basis for the instructional request was the assertion that Brian Lee and J.Y. Ho have testified that they did not believe they were doing anything wrong in attending crystal meetings. See Govt. Motion, at 1.

The defense opposes the request on the grounds that: (1) the government has mischaracterized the record, as the testimony of Lee and Ho, taken in its entirety, requires no clarifying instruction at this time; (2) the government's proposed instruction, while correct in part, is erroneous in others; and (3) the proposed instruction would mislead the jury as to the relevancy of testimony concerning the witnesses' belief in the permissibility of their conduct.

DISCUSSION

1. The government has correctly represented that Lee and Ho in portions of their testimony stated that they did not believe they had done anything wrong in attending crystal meetings. What the government does not mention is that both these witnesses, at subsequent points in their testimony, stated that they had come to believe that their conduct was illegal, a realization that led them to plead guilty. Thus the present record raises no possibility of prejudice to the government that needs to be countered by an instruction at this time.

2. The defense does not dispute that the first sentence of the proposed instruction is a correct statement of law. As *Cheek v. United States*, 498 U.S. 192, 199 (1991) recognized, ignorance of the law is generally not a defense to criminal prosecution, although there are many exceptions to that rule in which "wilfulness," defined as an intentional violation of a known legal duty, is a required element of an offense. *Cheek* itself recognized that tax evasion is such an offense in which a good faith belief, however unreasonable, in the legality of the one's conduct is a complete defense.

The defendants in this case have never argued that an allegation of price fixing requires that the government prove "willfulness." That point aside, the second sentence of the proposed

instruction is an incomplete and misleading statement of the law. Even if "a defendant knowingly joined a conspiracy to fix prices," he would still not be guilty of the conspiracy charged in the indictment. Because the meetings at which prices were allegedly fixed occurred on foreign soil, a bare agreement to fix prices is not enough. Under the FTAIA, the government must also prove that the defendants intended to "direct" or "target" their price fixing agreement at the United States. *Animal Science Products, Inc. v. China Minmetals Corp*., 654 F.3d 462 (3d Cir. 2011) "[T]he relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market.'" *Animal Science*, 654 F.3d at 470 (quoting *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) (quoting *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002)*; see also Animal Science*, 654 F.3d at 470 ("[T]he import trade or commerce exception requires that the defendants' conduct target import goods or services."). The Court has previously ruled that it will defer its decision on the elements required by the FTAIA until the close of the evidence. It should not now prejudice its eventual decision by adopting a proposed instruction that it later will likely conclude is incomplete.

3. The government's instruction wrongly suggests to the jury that a witness's belief in the legality of his actions is irrelevant. That is untrue. It is certainly correct that a witness's opinion whether he has acted legally or illegally is not dispositive of that issue, which must be decided by the jury upon correct instructions by this Court at the close of the evidence. But a witness's belief in the legality of his actions may well be relevant to the jury's assessment of whether that witness pled guilty based on mistake or due to external pressure. A witness's belief that he did nothing wrong in attending the crystal meetings may prove relevant to the jury's determination of whether there was an agreement to fix prices at those meetings and, if so, whether that agreement

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was directed at, or targeted, the United States. The best course is simply to leave the subject of ignorance of the law to the Court's instructions at the close of the evidence.

Dated: January 29, 2012

Respectfully submitted,

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