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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA; HSUAN BIN CHEN, aka H.B. CHEN; HUI HSIUNG, aka KUMA; LAI-JUH CHEN, aka L.J. CHEN; SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG; BORLONG BAI, aka RICHARD BAI; TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE; CHENG YUAN LIN, aka C.Y. LIN; WEN JUN CHENG, aka TONY CHENG; and DUK MO KOO, Defendants.	No. CR-09-0110 SI UNITED STATES' MEMORANDUM REGARDING FINAL JURY INSTRUCTIONS Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

INTRODUCTION

The United States writes to address four issues that are pending or have arisen with respect the final instructions to be given to the jury on Monday morning.

ARGUMENT

I. Price Fixing Instruction (p. 6)

Following the charging conference on Friday evening, counsel for AUO contacted the Court via email requesting that the Court remove language from Stipulated Instruction No. 15, an instruction that defendants had previously agreed to. *See* Dkt. No. 807, Stipulated and Party-Proposed Jury Instructions ("Stipulated Instructions") at 15; Dkt. No. 808, Jury Instructions Draft – As of 2/24/12 ("2/24/12 Jury Instructions") at 6. The Court should reject this request. The sentence the defendants now wish to strike – "The agreement is the crime, even if it is never carried out" – has been black letter law for a century. *See 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."). Nothing defense counsel propounds justifies rewriting the Sherman Act. Counsel's claim that this is only so for "domestic" cases misunderstands the facts of this case and the law. Since there was conduct in the United States, this is a "domestic" case. In any event, even domestic price-fixing prosecutions require a nexus to commerce among the states or with foreign nations. *See* 15 USC § 1. No court has ever held that this nexus to interstate or foreign commerce somehow contradicts the bedrock principle of antitrust law that the agreement is the crime. Likewise, the nexus here to import commerce does not mean the agreement is not the crime.

Properly instructing the jury – in the one instruction that explains price fixing – that the essence of the crime of price fixing is the agreement takes nothing away from the other instructions defense counsel cites. Nor does it contradict those instructions, just as the explanation that "the agreement is the crime" in run-of-the mill domestic cases does not contradict the interstate commerce element, venue requirement, nor the statute of limitations requirement in those cases.

Here the jurors will still consider whether the Sherman Act applies to the agreement made in Taiwan by finding an overt act inside the United States or, assuming every act was foreign, under *Hartford Fire*, an intended and substantial effect in the United States (Gov't Proposed Instruction No. 4; 2/24/12 Jury Instructions at 10). They will still consider venue (Stipulated Instruction No. 18; 2/24/12 Jury Instructions at 8). They will still consider the third element of the offense, which is based on the FTAIA and subsumes the ordinary commerce element – specifically whether the conspirators fixed the price of TFT-LCDs in import commerce, in which case no proof of effect is necessary, or fixed the price of TFT-LCDs incorporated into finished products in import commerce and that conduct had a direct, substantial, and reasonably foreseeable effect on import commerce in those finished products (Gov't Proposed Instruction No. 5; 2/24/12 Jury Instructions at 10-11). Lastly, the jury will still consider whether the conspiracy existed within the limitations period (Gov't Proposed Instruction No. 9; 2/24/12 Jury Instructions at 12-13). To be sure, one way the government can prove that the conspiracy existed after June 9, 2005 is to prove an overt act after that date. But this one way the government can prove a continuing conspiracy does not add an overt act requirement to a criminal statute, like the Sherman Act, that conditions liability on no more than the agreement. *See Nash*, 229 U.S. at 378.

II. Gross Pecuniary Gain and Expert Witness Instructions (pp. 4 & 14-15)

During the charging conference, it was suggested that the first paragraph of the "Gross Pecuniary Gain" instruction (Gov't Proposed Instruction No. 14; 2/24/12 Jury Instructions at 14) should be deleted. In addition, two paragraphs included in the "Opinion Evidence, Expert Witness" instruction (Stipulated Instruction No. 11; 2/24/12 Jury Instructions at 4) were deleted which were previously part of the limiting instruction the Court gave twice following the expert testimony of Dr. Leffler, at the defendants' request. *See* Trial Tr. at 3382-3383, 3452.

A. Gross Pecuniary Gain Instruction (pp. 14-15)

The first paragraph of the "Gross Pecuniary Gain" instruction is accurate, appropriate, and should be given as drafted. The Court has now instructed the jury on three separate occasions that "[t]he 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." *See* Trial Tr. at 298:8-11, 3382:18-22, 3452:1-5. Given the potential for jury confusion on the gain issue in light of the extensive expert testimony during this trial, it is appropriate that the jury receive the same instruction on this point at the close of evidence and before they deliberate, so that the jury understands the government does not need to prove any particular gain (or gain at all) in order to convict.

In addition, defense counsel's repeated suggestions that the first paragraph of the "Gross Pecuniary Gain" instruction should be removed due to some conflict with the "Application of the Sherman Act" instruction and *Hartford Fire* are incorrect. Even if the jury does not find domestic conduct, and therefore, finds that the government has the burden to prove an effect, that is different than the specific evidence of gain as to the corporate defendants. The first paragraph of the "Gross Pecuniary Gain" instruction draws that distinction, and, in short, that paragraph is not in conflict with *Hartford Fire* or the "Application of the Sherman Act" instruction because these two instructions are addressing different things – one is about effect, the other about amount of gain.

B. Opinion Evidence, Expert Witness Instruction (p. 4)

Both the "Gross Pecuniary Gain" and the "Opinion Evidence, Expert Witness" instructions have been revised following discussion at the charging conference on Friday. Upon reviewing those two instructions together as they currently appear in the Court's 2/24/12 Jury Instructions, the government is concerned that, as written, they may cause the jury to misunderstand that the expert testimony presented in this case relates *only* to the gain issue, and thus is only admissible as to the corporate defendants. The government has no objection to making it clear in the jury instructions that the issue of determining gain for purposes of 3571(d) is limited to the corporate defendants, and this clarification has been made explicit in the "Gross Pecuniary Gain" instruction. But the defendants have made clear they believe the government must prove that the conspiracy had an effect in order to convict any defendant, including the individual defendants. Without the modifications proposed below, the instructions as a whole

could incorrectly suggest that the jury is not permitted to consider expert testimony about the *effect* of the conspiracy when determining the guilt or innocence of each of the defendants, including the individual defendants. The risk of confusion is great because the expert testimony relates to both the effect of the conspiracy as well as the gain to the corporate defendants. Thus, the jury should be told explicitly that, while they may consider gain only as to the corporate defendants, evidence of the effect of the conspiracy may be considered against all defendants. The government's proposed modifications make that clear.

Thus, the government proposes that the "Opinion Evidence, Expert Witness" instruction be revised to insert limited additional language (appearing in bold, below) to cure this potential for jury confusion, as follows:

OPINION EVIDENCE, EXPERT WITNESS

You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions.

Such opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

You have heard economic evidence, which includes expert testimony about the effect of the alleged conspiracy on United States commerce. This testimony regarding the effect of the conspiracy is admissible as to all defendants. While you may consider expert testimony in making your determination of whether a conspiracy existed **and/or whether it had any effect**, no expert witness can offer an opinion on the ultimate issue of whether the charged conspiracy existed. That is an issue for the jury to decide.

See 2/24/12 Jury Instructions at 14.

III. Elements of the Offense Instruction (p. 10)

Finally, the Court stated during the charging conference that it would give Government's Proposed Instruction No. 5 on "Elements of the Offense" as drafted, noting that the defendants "[w]anted to add in Part A . . . the language, 'targeted by the participants to be.' And I don't

think that is helpful. I don't think it's clear. I don't think it's required. So I was proposing to read it just the way it is." *See* Trial Tr. at 4610:13-18. However, in the instructions filed by the Court, this additional language appears in the "Elements of the Offense" instruction. *See* 2/24/12 Jury Instructions at 10. The government wanted to bring this to the Court's attention in the event that this additional language was included in error.

Dated: February 26, 2012

Respectfully submitted,

/s/ Peter K. Huston
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Antitrust Division
U.S. Department of Justice