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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG, Defendant.	Case No. CR-09-0110 SI UNITED STATES' TRIAL MEMORANDUM Pretrial Conference: Oct. 30, 2012 Time: 10:00 a.m. Judge: Hon. Susan Illston Place: Courtroom 10, 19th Floor Trial Date: November 26, 2012

I. INTRODUCTION

Defendant Steven Leung was previously tried, along with his employer, AU Optronics Corporation ("AUO"), its U.S. subsidiary, AU Optronics Corporation America ("AUOA"), and colleagues H.B. Chen, Hui Hsiung, L.J. Chen, and Hubert Lee, for conspiracy to fix the prices of standard-sized thin-film transistor liquid crystal display ("TFT-LCD") panels in violation of Section 1 of the Sherman Act. AUO, AUOA, Hsiung, and H.B. Chen were convicted. L.J. Chen and Hubert Lee were acquitted. The jury was unable to reach a unanimous verdict on Leung, leading to this retrial.

Because the Court has already presided over the first trial and the government does not intend to ask the Court to revisit its prior evidentiary rulings and jury instructions, this trial memorandum discusses only the legal and evidentiary issues specific to this retrial.

II. DEFENDANT'S PARTICIPATION IN THE CHARGED CONSPIRACY

Leung is a United States citizen who was educated here in San Francisco and who is fluent in written and verbal English. Leung joined AUO in June of 2001 and participated in the conspiracy from at least as early May 15, 2002. He was the Director of the Desktop Display Business Unit at AUO, the division responsible for monitor panel sales. He held that position from November 2003 to April 2007. Prior to that, he was a Senior Manager of that business unit (from September 2001 to July 2002, and again from February 2003 to October 2003). He had pricing authority for monitor panels and had responsibility for the Dell and Hewlett-Packard accounts, among others. He also served for a time as Senior Manager of the AUO Information Technology Display Business Unit Sales Division (from July 2002 to February 2003).

The evidence will show that Leung was an integral part of the conspiracy. He attended numerous crystal meetings on behalf of AUO starting as early as May 2002. He was an active participant at the crystal meetings. He reached pricing agreements at the meetings and memorialized those meetings and agreements in reports, written in English, for his superiors. He repeatedly describes the "consensus" reached by the co-conspirators at the meetings. Leung was an AUO "contact window" for the co-conspirators. He also fixed prices during bilateral contacts with competitors. The evidence will also show that Leung was a hands-on manager of his team

and that he was effective at implementing the conspiracy, instructing his subordinates to charge the crystal meeting target prices, and directing them to coordinate and align pricing with competitors.

Leung's participation is presumed to have continued throughout the conspiracy's entire period unless he produces affirmative evidence of withdrawal through some act to defeat or disavow the object of the conspiracy, communicated in a manner reasonably calculated to reach his co-conspirators. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65 (1978); *Hyde v. United States*, 225 U.S. 347, 369 (1912) (holding that participation in conspiracy continues until affirmative withdrawal or conspiracy's conclusion). The burden is on Leung to introduce sufficient evidence to make a *prima facie* case of withdrawal. *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992); *see also United States v. Basey*, 613 F.2d 198, 202 (9th Cir. 1979) ("[A defendant's] participation in the conspiracy is presumed to continue until the last overt act of the conspirators unless [the defendant] produces affirmative evidence of withdrawal."). Absent proof that a conspirator has withdrawn from the conspiracy, he is liable for all acts performed in furtherance of the conspiracy by the other conspirators. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946); *United States v. Long*, 301 F.3d 1095, 1103 (9th Cir. 2002).

III. EVIDENTIARY ISSUES

A. The Law of the Case Doctrine Applies

A number of evidentiary issues have been settled in connection with the first trial and need not be revisited. The law of the case doctrine generally bars a court from "reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). The doctrine applies to a judge's reconsideration of issues on retrial after a mistrial. *Id.* at 877. *United States v. Tham*, 948 F.2d 1107, 1113, *opinion amended and superseded*, 960 F.2d 1391 (9th Cir. 1991); *see also Hoffman v. Tonnemacher*, 362 Fed. App'x. 839, 841 (9th Cir. 2010) (citing *Tham* approvingly). And it applies regardless of whether the court made its original ruling before or during trial. *United States v. Phillips*, 367 F.3d 846, 856 (9th Cir. 2004) ("Issues that a district court determines

during pretrial motions become law of the case."). Listed below are evidentiary issues settled by court order or stipulation:

- Plea agreements can be referred to in the government's direct examination of witnesses subject to such agreements, except for the portions of the agreements that might boost the witnesses' credibility. (Dkt. 628);
- Defendant is precluded from presenting evidence or arguments regarding (1) the possible punishment or the consequences of conviction; (2) the fact that certain individuals and corporate co-conspirators were not charged; and (3) evidence regarding defendant's personal characteristics or circumstances. (Dkt. 628) (granting the government's motion *in limine* (Dkt. 489));
- AUO product and sales data, expense reports, and organizational charts are authentic business records meeting the requirements of Federal Rule of Evidence 803(6). (Dkt. 652, Attachment A);
- The Federal Reserve exchange rate compilations previously provided are authentic public records meeting the requirements of Federal Rules of Evidence 902(4) and 803(8). (Dkt. 652, Attachment B);
- The AUO SEC filings and AUOA California Secretary of State filings are authentic and meet the requirements of Federal Rule of Evidence 803(6). (Dkt. 652, Attachment C);
- Documents bearing "AU-MDL," "AUO-MDL," and "AUOA" bates prefixes, the various AUO transactional data spreadsheets and documents produced by AUO employees to the grand jury are authentic and admissible corporate records pursuant to Federal Rule of Evidence 901 and do not require the testimony of a sponsoring witness. (Dkt. 690);
- The translations of the Chinese and Korean language exhibits used during the first trial are accurate, correct, and complete. (Dkt. 719);

- Various business records of the co-conspirators, as well as Dell and Hewlett-Packard, are authentic and admissible business records pursuant to Federal Rules of Evidence 902(11) and 803(6). (Dkt. 741);
- The commercial reports created by Display Search are authentic and admissible business publications pursuant to Federal Rule of Evidence 803(17). (Dkt. 741);
- Certain biographical information regarding defendant Leung has been stipulated to. (Dkt 777);
- Trial exhibits admitted into evidence during the first case (many of which are on the government's exhibit list for the retrial[1]) are admissible. (Dkt. 875).
- Leung and other employees of AUO and AUOA are co-conspirators for purposes of the co-conspirator exception to the hearsay rule. *See* U.S.' Motion re: Co-conspirator Statements (Filed Under Seal); U.S.' Request for Pre-Appearance Admission of Documents – Michael Wong (Dkt. 672); U.S.' Request for Pre-Appearance Admission of Documents – Summary Witness (Dkt. 760); Order Denying Motions for Judgment of Acquittal and for a New Trial (Dkt. 920).

Below are brief outlines of evidentiary issues, in addition to those addressed in the government motion *in limine* of which the government believes the Court should be aware, but for which a particular ruling is not requested at this time.

B. Admissibility of Evidence of Convictions and Acquittals

As more fully discussed in the government's motion *in limine* (Dkt. 996), evidence regarding the first trial convictions and acquittals are not admissible to prove either the existence or non-existence of the charged conspiracy. *See, e.g., Ward v. Herbert*, 509 F. Supp. 2d 253, 268 (W.D. N.Y. 2007) ("co-defendant Lott's acquittal was not relevant and would not be admissible"). If, however, defendant attempts to mislead the jury by suggesting either through argument or the presentation of evidence that defendants AUO, AUOA, H.B. Chen, or Hui Hsiung did not participate in a conspiracy, the government should be permitted to use the

[1] The parties are using same trial exhibit numbers for those exhibits that were marked for the first trial.

convictions of those defendants for purposes of impeachment. *See, e.g., United States v. Antonaekas*, 255 F.3d 714, 724-25 (9th Cir. 2001) (holding that the defendant's disavowal of involvement with drugs opened the door to evidence that he sold drugs on two prior occasions); *United States v. David*, 337 Fed. App'x. 639, 640 (9th Cir. 2009) (holding that the defendant's testimony that he "would have never told anyone to falsify a document" opened the door to evidence of the defendant's prior conviction for theft involving the falsification of receipts). Likewise, any suggestion by defendant that this is a selective prosecution will open the door to evidence that many others – from AUO and other companies – have been charged and convicted in connection with this investigation.

It would be both improper and highly prejudicial to permit the jury to be misled into thinking either that the convicted AUO defendants did not participate in a conspiracy for which they were convicted or that Leung has, in some way, been singled out by the government for prosecution. Leung is certainly permitted to introduce evidence and argument that he did not participate in any conspiracy, but he cannot argue or present evidence that others did not participate in a conspiracy for which they either pled guilty or were convicted without opening the door to those pleas and convictions.

C. Use of Leading Questions

1. Government May Ask Leading Questions of Hostile Witnesses and Witnesses Identified with a Defendant

Federal Rule of Evidence 611(c) states that "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." With respect to witnesses identified with an adverse party, the government is not required to establish that the witness is hostile; such persons are "automatically regarded and treated as hostile." Notes of Advisory Committee on Proposed Rule 611, Subdivision (c). Accordingly, the government is permitted to ask leading questions of witnesses in criminal antitrust cases such as this where the witnesses are favorably disposed toward the defendant's industry or identified with the defendant. Although certain witnesses will be testifying pursuant to individual plea agreements or plea agreements that their employers have with the United

States, they may nonetheless be hostile because of outstanding civil damage cases brought by customers and close, ongoing business and personal ties with defendant or his employer.

In *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965), the court considered the propriety of the government asking leading questions of witnesses employed by the defendant's corporate co-conspirator in a price-fixing case. The trial court had permitted the government to ask leading questions because it had found those witnesses to be favorably disposed toward the defendant's industry. The Ninth Circuit affirmed, finding that witnesses "were in truth not favorable to the party calling them (the government), and hence could properly be considered hostile witnesses. As such they were properly and lawfully subjected to leading questions." *Id.* at 1005. Based on *Esco Corp.*, the United States should be given latitude to lead co-conspirators and hostile witnesses whose testimony is instrumental to constructing its case and to attempt to impeach them about those aspects of their testimony that conflict with the United States' account of the same events.

Courts also have permitted the use of leading questions in cases in which the witness was inarticulate and evasive, *United States v. Stelivan*, 125 F.3d 603, 608 (8th Cir. 1997), and where the witness is openly hostile, *United States v. Shursen*, 649 F.2d 1250, 1254 (8th Cir. 1981). In addition, courts have permitted the use of leading questions with a witness who has suffered a lapse of memory, in order to attempt to revive a witness's failing memory or to clarify "remarkably hazy" testimony. *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979); *Dege v. United States*, 308 F.2d 534, 537 (9th Cir. 1962). As noted above, given the long duration of this conspiracy, some of the earliest acts of the charged conspiracy go back more than ten years. In light of this passage of time, witnesses may have difficulty recalling details about certain events or conversations, and in these circumstances, the government should be permitted to use leading questions to develop the testimony of witnesses with failing or hazy recollections.

2. Government May Use Leading Questions with Foreign Witnesses

Leading questions are also permissible when the witness does not speak English well or where English is not the witness's first language, in order to avoid the danger that the witness

will misunderstand the questions and therefore answer incorrectly. Federal Rule of Evidence 611(c) specifically provides that leading questions are allowed "to develop" the testimony of the witness. When a witness "does not appreciate the tenor of the desired details," it is a permissible exercise of the court's discretion to allow leading questions. *United States v. Amjal*, 67 F.3d 12, 16 (2d Cir. 1995) (quoting III Wigmore, on Evidence, § 778 (1970 ed.)) (internal marks omitted).

In *United States v. Rodriguez-Garcia*, the court found that it was not an abuse of discretion for the trial court to allow the government to ask leading questions of its chief witness who did not speak English and was testifying through an interpreter. 983 F.2d 1563, 1570 (10th Cir. 1993). The court reasoned that, although the witness was not hostile or aligned with an adverse party, leading questions were permissible to develop the witness's testimony. *Id.* The court also noted that the Advisory Committee Notes provide for the use of leading questions where an adult has communication problems. *Id.*

3. Defendant May Not Use Leading Questions When Cross-Examining Witnesses Identified with Him or His Employer

Although Federal Rule of Evidence 611(c) provides that leading questions should "ordinarily" be permitted on cross-examination, courts have precluded defendants from using leading questions during their cross-examination of prosecution witnesses who are identified with defendants' interests. For instance, in *Mitchell v. United States*, a tax evasion prosecution of a husband and wife, the court affirmed the trial court in precluding leading questions during the cross-examination of a government witness who was employed by the husband and a close friend of the wife. 213 F.2d 951, 954-56 (9th Cir. 1954); *see also United States v. Bensinger Co.*, 430 F.2d 584, 591-92 (8th Cir. 1970), *superseded on other grounds as stated in DCS Sanitation Mgmt., Inc. v. Occupational Safety & Health Review Comm'n*, 82 F.3d 812 (8th Cir. 1996) (in antitrust prosecution of manufacturer and one of its dealers, the manufacturer was precluded from using leading questions to cross-examine a dealer's representative).

Thus, the Court should preclude defendant from asking leading questions on cross-examination of witnesses who are or were employed by AUO or AUOA, such as Michael Wong. It should also appropriately limit leading questions on the cross-examination of witnesses, such

as Stanley Park, who are employed by defendant's corporate co-conspirators on the ground that their status as co-defendants in the ongoing MDL civil litigation gives those witnesses a unity of interest with defendant regarding the nature and effect of their conspiratorial conduct.

D. Limitations on Character Evidence

As a general rule, "[e]vidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion." Fed. R. Evid. 404(a). Defendant may, however, seek to introduce evidence of his good character under Rule 404(a)(1)'s exception for criminal defendants seeking to introduce evidence of "a pertinent trait of character." Fed. R. Evid. 404(a)(1). The general trait of "law-abidingness" is pertinent to almost all criminal offenses. *United States v. Barry*, 814 F.2d 1400, 1402-03 (9th Cir. 1987) ("appellant could have offered the testimony of character witnesses on the subject of his general reputation as a law-abiding citizen"); *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981). Other traits, however, including the defendant's tendency toward truth and veracity, are admissible only when those characteristics have been specifically placed in dispute – when, for example, fraud or falsehood is one of the statutory elements of the crime charged, or when the defendant testifies and his credibility is attacked by the prosecution. *Id*. In this case, defendant is charged with knowingly participating in a conspiracy to suppress and eliminate competition by fixing prices for sales of TFT-LCD panels. Because character traits such as truthfulness and veracity, community involvement, or dedication to a job are not pertinent to this charge, evidence concerning those traits should be excluded.

To the extent defendant is permitted to introduce character evidence, the witnesses who testify regarding defendant's character should not be allowed to relate evidence of specific instances of defendant's conduct. *See United States v. Redlightning*, 624 F.3d 1090, 1120 (9th Cir. 2010) (Rule 404(b) prohibition "includes evidence used to show that a defendant has the character for honesty or for truthfully confessing"); *United States v. Hedgcorth*, 873 F.2d 1307, 1313 (9th Cir. 1989) (discussing defendant's "character for truthfulness"). Federal Rule of Evidence 405 limits the permissible methods of proving character. The Rule provides that, where admissible, proof of a pertinent character trait "may be made by testimony as to reputation

or by testimony in the form of an opinion." Fed. R. Evid. 405(a). Inquiry into specific instances of conduct relevant to the trait in question is permitted only on cross-examination. *See id*. Therefore, defendant's character witnesses should be limited to providing testimony as to general reputation or testimony in the form of opinions, and should not be allowed to testify to specific instances of defendant's conduct. *See, e.g., Michelson v. United* States, 335 U.S. 469, 476-77 (1948); *Barry*, 814 F.2d at 1403; *United States v. Giese*, 597 F.2d 1170, 1190 (9th Cir. 1979).

E. Translation of Foreign Language Documents

As in the first trial, the government intends to offer into evidence foreign language documents and English translations thereof. Specifically, the government intends to introduce documents that are in Mandarin, Korean, and a mixture of English and Mandarin or Korean. The parties have agreed that translations that were agreed upon and admitted during the first trial remain admissible during the retrial. The government will offer additional translated documents into evidence during the second trial. Certified translations of those documents have been provided to defendant, and the government and defendant are in the process of trying to reach agreement on the accuracy of these translations and to stipulate to them. In the event of a dispute between the parties as to the correct English translation of a Mandarin or Korean document, it is permissible to present the jury with two translations containing both sides' versions and let the jury determine which is more accurate. *See United States v. Salvador Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *see also United States v. Abonce-Barrera*, 257 F.3d 959, 963-64 (9th Cir. 2001) (upholding the admissibility of foreign language tapes, their transcriptions, and translations); *United States v. Salvador Franco*, 136 F.3d at 626; *United States v. Armijo*, 5 F.3d 1229, 1234-35 (9th Cir. 1993).

Dated: October 26, 2011

Respectfully submitted,

/s/ Heather S. Tewksbury
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