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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD.; E-LITE AUTOMOTIVE, INC.; HOMY HONG-MING HSU; and YU-CHU LIN, aka David Lin, Defendants.	No. CR 11-0488 RS **UNITED STATES' OPPOSITION TO (1) EAGLE EYES AND E-LITE'S MOTION FOR BILL OF PARTICULARS AND (2) HOMY HSU'S JOINDER** Date: March 6, 2012 Time: 2:30 p.m. Place: Rm. 3, 17th Floor Trial Date: June 18, 2012 Hon. Richard Seeborg, United States District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Defendants are charged with a single count of price fixing in violation of Section one of the Sherman Act. The motions of defendants Eagle Eyes Traffic Industrial Co., Ltd. ("Eagle Eyes"), E-Lite Automotive Inc. ("E-Lite"), and Homy Hong-Ming Hsu ("Homy Hsu") for a bill of particulars are unnecessary and should be denied. A bill of particulars is inappropriate if the defendants have been adequately advised of the charges through the indictment and all other government disclosures. The Indictment here is detailed and clear, and it provides more than enough information to allow defendants to adequately conduct their own investigation, prepare their defense, and avoid prejudicial surprise.

Even if the Indictment were deficient in some way, the deficiency would be cured by the prompt and full discovery provided by the government. The discovery here goes above and beyond what is legally required. The discovery includes extensive write-ups of interviews conducted by Antitrust Division attorneys for all individuals interviewed in the government's investigation, plea agreements of all of defendants' coconspirators who have pled guilty, audio tape recordings of price-fixing meetings, all FBI 302s, and subpoenaed and voluntarily produced documents, including notes of price-fixing meetings. While the discovery is extensive, it is also accessible and manageable. The government has organized and indexed the materials, and the electronic document databases are configured for both of the most popular computerized litigation support platforms. In addition to the discovery produced by the government, Eagle Eyes and E-Lite have had access to extensive discovery in the parallel civil litigation, *Aftermarket Automotive Lighting Products Antitrust Litigation*, Case No. 2:09-ml-02007-GW-PJW (C.D. Cal). To the extent the government has received copies of depositions and exhibits from those depositions from cooperating companies and witnesses, it produced such materials to defendants in this case.

Against this backdrop, defendants' motion should be seen for what it is: (1) an inappropriate tactic to try to freeze and bind the government and lay the groundwork for later motions alleging a variance between the allegations and the proof, and (2) an attempt to contravene the Rules of Criminal Procedure and obtain an unfair advance look at the

government's evidence, witnesses, and trial strategy to which defendants are not entitled. The law in this Circuit does not condone these ploys.

II. BACKGROUND

A bill of particulars is unnecessary if the "indictment itself provides sufficient details of the charges and if the government provides full discovery to the defense." *United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984); *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). Both criteria are present here.

A. The Indictment.

On November 30, 2011, a grand jury returned a single-count Superseding Indictment ("Indictment") charging Eagle Eyes, its wholly owned subsidiary E-Lite, its Chairman Yu-Chu Lin ("Chairman Lin"), and its Vice Chairman Homy Hong-Ming Hsu ("Homy Hsu") (who was charged in the original indictment), with price fixing in violation of the Sherman Act, 15 U.S.C. § 1. *See* Superseding Indictment, Dkt. No. 30 ("Indict."). Chairman Lin has not appeared; a warrant has been issued for his arrest, and he is an international fugitive. As required by Rule 7(c) of the Federal Rules of Criminal Procedure, the Indictment sets forth the "essential facts constituting the offense charged." The government summarizes the indictment here. The Indictment includes the names and positions of the defendants charged. Indict., at ¶¶ 5-8. It identifies the time-period of the conspiracy: "at least as early as July 2001 . . .until at least as late as September 2008." Indict., at ¶ 2. It also specifically identifies the periods of time that the named defendants joined and participated in the conspiracy. Indict., at ¶¶ 5-8.

The Indictment describes the type of antitrust conspiracy charged and the products affected: specifically, "a continuing agreement, understanding, and concert of action among defendants and other coconspirators, the substantial terms of which were to agree to fix the prices of aftermarket auto lights in the United States and elsewhere." Indict., at ¶ 3.

Finally, the Indictment contains a description of the specific means and methods defendants and their coconspirators used to carry out the conspiracy. It alleges "meetings . . . among competitors in Taiwan and the United States." Indict., at ¶ 4(a). It states that agreements to set prices in accordance with pricing formulas were reached at those meetings. Indict., at ¶

4(b). It describes how defendants and the coconspirators implemented and enforced the agreement. Indict., at ¶ 4(c)-(f).

B. Discovery and Other Information Provided by the Government.

While the Indictment is detailed, the government has provided much more information to allow defendants to prepare their defense. The government has provided defendants with early and extensive discovery.[1] Defendants complain in the motions about the total number of pages of documents that the government has produced. This is a red herring. While it is true that the government has gathered and turned over a large volume of documents, defendants do not have to look at each of these documents to understand the charges against them or prepare their defense. Virtually all of the documents produced are in electronic form and were produced in word searchable tiff/text or native format. This enables defendants to conduct narrowly tailored searches once the documents have been loaded into Summation, Concordance, or other litigation support programs. For example, defendant can type in his names or email addresses, or the name of any witness, and the database will identify documents with that name in it. For the documents produced to the government in hard copy, the government electronically scanned them and produced them in searchable tiff/text format with accompanying "load files." For both electronic and hard-copy documents, the government provided indices containing the names of custodians, a description of the documents, type of document, and corresponding Bates ranges. Heye Decl. ¶ 4.

More importantly, in addition to the documents produced, the discovery has included a much smaller set of documents made up of (1) approximately 23 write-ups of witness interviews, including interviews of coconspirators who have pled guilty in this case and other employees of companies who have pled guilty or are cooperating with the government; (2) FBI 302s; (3) immunity letters and cooperation agreements; (4) plea agreements for all of the companies and

[1] Shortly after each of the defendants was indicted, the government sent counsel for defendants a draft protective order to allow for the production of confidential and grand jury material. Counsel for Homy Hsu entered into the Stipulated Protective Order on August 19, 2011, and the government began rolling production to her on August 23, 2011. Counsel for Eagle Eyes and E-Lite entered into the Stipulated Protective Order on December 28, 2011, and the government began its rolling production to him on that same day. Declaration of May Lee Heye ("Heye Decl.") ¶ 2.

individuals that have pled guilty; (5) the agreement between the government and the company that was granted leniency, and (6) transcripts of witness depositions in the government's possession taken in the class action litigation.[2] *Id.* at ¶ 3.

The interview write-ups generally provide detailed information on the following topics: employment history of the witness; the witness' contacts with competitors; a description of the witness' communications with competitors, including discussions on market pricing and pricing formulas; the time and place of meetings with competitors; their knowledge of the antitrust laws and their state of mind while they were engaged in the conspiratorial conduct; and their knowledge of the DOJ investigation. The interview write-ups also identify by Bates number all documents shown to the witness. Where the identifying numbers in the interview write-ups do not correspond to Bates numbers that defendants have, the government has provided defendants with charts showing the corresponding numbers. Heye Decl. ¶ 5. An example of one of these interview write-ups is attached to the declaration of May Lee Heye and filed under seal. *Id.* ¶ 5, Ex. 1.

III. A BILL OF PARTICULARS IS NOT WARRANTED BECAUSE DEFENDANTS HAVE BEEN PROVIDED A DETAILED INDICTMENT AND FULL DISCOVERY

The denial of a motion for a bill of particulars is within the discretion of the district court; its decision will not be disturbed absent an abuse of this discretion." *Giese*, 597 F.2d at 1180. Because defendants have adequate information to investigate the allegations, prepare their defense, avoid surprise, and avoid double jeopardy, the Court should deny their motions. While defendants claim to be seeking nothing more than information sufficient to prepare a defense, they are in fact attempting to secure evidentiary detail to which they are not entitled.

[2] The government provided an index of the CD containing these deposition transcripts including the name of the witness, the witness' title and organization, the type of document, and the date the deposition was taken. Heye Decl. ¶ 4.

A. Defendants Have Enough Information to Prepare Their Defense and Avoid Prejudicial Surprise.

"In determining if a bill of particulars should be ordered in a specific case, a court should consider whether the defendant has been advised adequately of the charges through the indictment and all other disclosures made by the government." *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983); *see also United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir. 1985)). The Indictment here advises the defendants of the charges against them in detail. The defendants, however, seek even more detailed evidence to which they are not entitled. *Giese*, 597 F.2d at 1180-81. As the Ninth Circuit has recognized, "[i]t is not the function of a bill of particulars to force [the] [g]overnment to spread its entire case before the accused." *Cooper v. United States*, 282 F.2d 527, 532 (9th Cir. 1960) (citing *United States v. Bryson*, 16 F.R.D. 431 (N.D. Cal. 1954)); *see also United States v. Hajecate*, 683 F.2d 894, 898 (5th Cir. 1982) (a bill of particulars is not intended as a device to force the government to disgorge the full theory of the case or all of the details of the evidence that it plans to introduce at trial.) "Acquisition of evidentiary detail is not the function of the bill of particulars." *Hemphill v. United States*, 392 F.2d 45, 49 (8th Cir. 1968).

A bill of particulars is not to be used as a general discovery tool. *Cooper*, 282 F.2d at 532. Nor should the government be required "to synthesize and correlate the information in a comprehensible format." *United States v. Deerfield Specialty Papers, Inc.*, 501 F.Supp. 796, 810 (E.D. Pa. 1980). As one court noted, "[a] bill of particulars, unlike discovery, is not intended to provide the defendant with the fruits of the government's investigation. . . . Rather, it is intended to give the defendant only that minimum amount of information necessary to permit the defendant to conduct his *own* investigation." *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (citing *United States v. Hill,* 589 F.2d 1344, 1352 (8th Cir.)), *cert. denied*, 442 U.S. 919 (1979); 8 MOORE'S FEDERAL PRACTICE ¶ 7.06[1] (2nd Ed. 1985 Rev.). The test "is not whether the information sought would be useful to the defendant but rather whether it is necessary to a defense." *United States v. Sierra-Garcia*, 760 F. Supp. 252, 268 (E.D.N.Y. 1991).

Because a bill of particulars restricts the government's proof to the particulars furnished, a request for a bill of particulars should not be granted where the consequence of granting the request would be to unduly restrict the government's ability to present its case. *See United States v. Glaze*, 313 F.2d 757, 759 (2d Cir. 1963); *United States v. Perez*, 940 F. Supp. 540, 550 (S.D.N.Y. 1996); *Deerfield*, 501 F.Supp. at 809 ("[T]he Government should not be forced into prematurely disclosing evidentiary matter to such an extent that they will be unduly confined in presenting their evidence at trial.").

1. The Indictment Is Clear and Specific.

"To the extent that the indictment or information itself provides details of the alleged offense, a bill of particulars is, of course, unnecessary." *Giese*, 597 F.2d at 1180; *see also DiCesare,* 765 F.2d at 897. Thus, the starting point for determining whether an indictment needs supplementation is the indictment itself. As detailed in Section II.A, above, the Indictment here is specific and sets forth information sufficient for the defendants to prepare their defense and avoid surprise. Specifically, the Indictment charges a single, continuing conspiracy. (Indict., at ¶¶ 2-3. The Indictment sets forth the dates of the conspiracy (Indict., at ¶ 2) and the specific time periods each defendant is alleged to have participated in it (Indict., at ¶¶ 5-8), a description of the type of antitrust conspiracy charged and the products covered by the Indictment (Indict., at ¶¶ 2, 11), a description of the goals of the conspiracy (Indict., at ¶ 3), as well as a description of the means and methods by which those goals were to be accomplished. (Indict., at ¶ 4(a)-(f)). The Indictment further explains that those activities affected interstate commerce (Indict., at ¶ 12) and why jurisdiction and venue are appropriate in this Court (Indict., at ¶¶ 12-14). In sum, the Indictment is a "plain, concise, and definite statement of the essential facts constituting the offense charged" (Fed. R. Crim. P. 7(c)(1), thereby apprising the defendants of the charges against them and satisfying the Ninth Circuit's standards. *See United States v. Martin*, 783 F.2d 1449, 1452 (9th Cir. 1986); *United States v. Miller*, 771 F.2d 1219, 1226-27 (9th Cir. 1985).

Two recent cases in this Circuit are particularly useful and similar to the context of this case. In *United States v. Hsuan Bin Chen*, 2011 WL 332713 (N.D. Cal. 2011), Judge Illston found that the defendants were not entitled to a bill of particulars. *Chen* also involved a price-

fixing conspiracy with foreign defendants who attended price-fixing meetings. Discovery productions totaled approximately 42 million pages of material. *Id.* at *5. The court found that the indictment that set forth the dates of the conspiracy, the specific time periods each of the defendants were alleged to have participated in it, a description of the type of antitrust conspiracy charged, the specific product covered by the indictment, a description of the goals of the conspiracy, and a detailed description of the means and methods by which these goals were accomplished – all of which are in the Indictment in this case – "adequately advise[d] defendants of the charges against them." *Id.* at *7. In addition, the court found that although the discovery was "voluminous," the timely fashion in which the government provided it, the production of highly detailed interview write-ups, the searchable format of the electronic discovery, and the existence of indices "obviate[d] the need for a bill of particulars." *Id.* In *United States v. Salyer*, 2011 WL 6026119 at *7 (E.D. Cal. 2011), another case with antitrust charges, the court similarly denied the requests for a bill of particulars about the antitrust allegations, finding that "[a]s was the case in *Chen*, the government in this case has produced the witness interviews that stand as support for the price fixing allegations" and finding that the volume of discovery did not require a bill of particulars.

Eagle Eyes and E-Lite cite primarily out-of-circuit cases and cases decided prior to the 1966 Amendment to Rule 7(f) for the proposition that a bill of particulars is particularly appropriate in a complex antitrust case. Even these cases do not require a bill of particulars in all complex cases. In *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 824-25 (N.D. Cal. 1957), the court denied requests that "would require too great a disclosure of evidence on the government's part" and which "relate[d] too heavily to the government's evidence." In *United States v. Greater Syracuse Board of Realtors*, 438 F. Supp. 376 (N.D.N.Y. 1977), the court noted that "the Government should not be forced into prematurely disclosing evidentiary matters to such an extent that they will be unduly confined in presenting their evidence at trial." *Id.* at 379-80. That would be the case here if the government were required to file a bill of particulars responding to defendants' requests. The court in *Greater Syracuse* stated that the government need only supply enough "information to enable a defendant to investigate the allegations against

him, and adequately prepare a defense to them." *Id.* at 379. Moreover, the court denied the defendants' requests similar to those made by defendants here for more detail on the "statements made, and acts performed by the various defendants in furtherance of the conspiracy." *Id.* at 381. The court held that such requests "call[] for matters of evidence, and should accordingly be denied." *Id.*

2. Discovery Is Both Full and Manageable.

The protests of defendants notwithstanding, the Ninth Circuit rule has long been clear: "Full discovery . . .obviates the need for a bill of particulars." *Giese*, 597 F.2d at 1180 (citing *United States v. Clay*, 476 F.2d 1211, 1215 (9th Cir. 1973)); *see also, Long*, 706 F.2d at 1054 (denying bill of particulars where government had made full discovery to defendant).

Not only has the government produced extensive discovery, but it has done so in a fashion calculated to help defendants prepare their defense. As set forth in Section II.B., above, the government began its production of discovery as soon as the defendants entered into protective orders. Heye Decl. ¶ 2. Also, the production has included interview write-ups, 23 in total, memorializing interviews of every witness the government has interviewed, including the two individuals who have already pled guilty to participating in this conspiracy. These interviews are extensive, conducted by government attorneys focusing on specific conspiratorial conduct and key conspiracy documents. *Id.* at ¶¶ 3, 5. The write-ups of these interviews are much more detailed than a typical FBI 302. The write-ups of initial interviews are typically between 10- to 25-pages long and contain substantial detail including extensive information on witness contacts with competitors, discussions about pricing, exchange of pricing information, and a review of meeting minutes. Moreover, most of the interview write-ups identify by Bates number every document shown to a witness during the interview. Where the identifying numbers in the interview write-ups differ from the Bates numbers that defendants have, the government has provided charts with corresponding numbers. *Id.* at ¶ 5. Accordingly, defendants may quickly and efficiently identify, retrieve, and scrutinize every document the government has discussed with each witness it has interviewed to date in its investigation.

In the event defendants wish to focus on documents other than those discussed in witness interviews (and thus memorialized in the government's interview write-ups and retrievable directly by Bates number), all documents collected in the investigation have been provided. The government has indexed electronic and hard copy documents, enabling defendants to identify the productions of individuals or corporations they wish to study in greater detail. The government has produced them in formats compatible with the commonly used Summation and Concordance litigation support programs. Heye Decl. ¶ 4. For example, defendant Hsu can readily generate a list of documents in which he or a coconspirator is mentioned, emails he wrote or received, and documents exchanged in a particular time period – or any combination thereof.

Defendants contend that the production consists of thousands of files, often with each individual page of a document saved as a separate file and no indication of where a particular document begins or ends. *See* Motion of Defendants for Bill of Particulars ("Motion") at 6. Defendants ignore the fact that load files have been produced along with the underlying documents. The load files contain document unitization information so that if the documents are loaded into a document review software program with the underlying data, the documents will appear unitized, and it will be clear where each document begins and ends. Heye Decl. ¶ 4. Defendants' suggestion that this information is an insurmountable and unorganized mountain of material ignores contemporary tools of electronic discovery.

B. Defendants' Requests Are Without Merit.

Defendants set out six specific requests in its Notice of Motion: "(1) what conduct the government intends to rely upon in support of its contention that Defendants, individually or collectively, violated 15 U.S.C. § 1; (2) the substance of the alleged agreement and/or allegedly unlawful pricing formula; (3) the identity of the main coconspirators; (4) when the defendants allegedly participated in the conspiracy; (5) what prices the government claims were fixed; and (6) what specific legal theories the government intends to advance at trial in support of the one-count Indictment." Notice of Motion at 2. These requests, along with defendants' complaints in its motion about the government's failure to identify overt acts and which defendants engaged in what conduct (Motion at 1, 5) show defendants misconstrue the fundamental purpose of a bill of

particulars. Tellingly, defendants do not make any argument as to why any specific information they identify is necessary for them to understand the allegations or prepare a defense.

As a preliminary matter, the answer to defendants' fourth request – when defendants participated in the conspiracy – appears on the face of the Indictment. The Indictment states that Eagle Eyes joined and participated in the conspiracy from at least as early as July 2001 until in or about September 2008 (Indict., at ¶ 5), E-Lite from in or about March 2006 until in or about September 2008 (Indict., at ¶ 6), and Homy Hsu from at least as early as November 2001 until in or about September 2008 (Indict., at ¶ 7).

Defendants are plainly not entitled to a bill of particulars to obtain names of unknown coconspirators (their third request). *See DiCesare*, 765 F.2d at 897; *United States v. Dreitzler*, 577 F.2d 539, 553 (9th Cir. 1978) (defendants not entitled to a list of the government's witnesses). Nevertheless, the government provided that information in a January 18, 2012 letter to Ken Julian (Heye Decl., Ex. 2 at 2). It states that "the coconspirators included TYC Brother Industrial Co., Ltd, Genera Corp. ("TYC"), Depo Auto Parts Industrial Co., Ltd. ("Depo"), Maxzone Vehicle Lighting Corp. ("Maxzone"), Eagle Eyes Traffic Industrial Co., Ltd. ("Eagle Eyes"), E-Lite Automotive, Inc. ("E-Lite"), Sabry Lee (U.S.A.), Inc. ("Sabry Lee") and various individual officers, employees, and agents of those entities . . . ." In addition, the interview write-ups reflect discussions with witnesses about who attended meetings and engaged in pricing discussions.

Defendants' remaining requests are vague and overbroad, but appear to seek evidentiary details inappropriate for a bill of particulars. *See United States v. Leonelli*, 428 F. Supp. 880, 882 (S.D.N.Y. 1977) (rejecting request for bill of particulars regarding the names, dates and places for the entire case as "an attempt to discover the minutia of the Government's case"). Defendants are not entitled to such detailed information in a bill of particulars. The defendants' requests "for the 'when, where, and how'" of acts in furtherance of a conspiracy are inappropriate. *Giese*, 597 F.2d at 1181 (quoting *United States v. Armocida*, 515 F.2d 49, 54 (3d Cir.), *cert denied*, 423 U.S. 858 (1975)); *United States v. Jimenez*, 824 F. Supp. 351, 363 (S.D.N.Y. 1993) (requests for "the 'whens' 'wheres' and 'with whoms' of acts and participation

in the charged conspiracy" are inappropriate and are routinely denied). "[I]t is unreasonable to require the government to 'state the circumstances under which, and the words or conduct by means of which' defendants and every alleged co-conspirator entered into the alleged conspiracies." *United States v. Chen*, 2006 U.S. Dist. LEXIS 84786 at *10 (quoting *DiCesare*, 765 F.2d at 897); *Deerfield*, 501 F.Supp. at 810 ("particularization is (not) required in respect of statements made, and acts performed, by the various defendants in furtherance of the conspiracy.") (quoting *Greater Syracuse*, 438 F.Supp. at 381). Furthermore, price-fixing conspiracies do not require the government to prove any overt acts in furtherance of the conspiracy or that the agreement was implemented or had an unlawful effect. The conspiracy itself constitutes the crime. *See Nash v. United States*, 229 U.S. 373, 378 (1913); *United States v. Miller*, 771 F.2d 1219 at 1226. Accordingly, the Indictment never uses the phrase "overt acts." Even if proof of overt acts were required in a Sherman Act case, defendants would not be entitled to such information. *See DiCesare*, 768 F.2d at 897 (defendants not entitled to bill of particulars in order to obtain statement of all overt acts); *Cook v. United States*, 354 F.2d 529, 531 (9th Cir. 1965) (defendants not entitled to bill of particulars in order to obtain statement of further overt acts); *Deerfield*, 501 F. Supp. at 810 ("the defendants are not entitled [to] . . . a list of overt acts which the government intends to prove at trial.")

In addition, defendants have information about what conduct is at issue, the substance of the agreement and price formulas, the identity of the coconspirators, the time period of the conspiracy, and what prices were fixed. The discovery provided to defendants includes meeting minutes (identified by Bates number in many of the interview write-ups) where the pricing agreement is discussed, calendar entries, and interview write-ups which specify the dates of meetings, attendees of the meetings, and what was discussed at particular meetings. Heye Decl. ¶¶ 3, 5. Finally, the defendants themselves are fully aware of the participants in the meetings they themselves attended, the topics discussed, and the agreements reached.

Defendants' sixth request for "what specific legal theories the government intends to advance at trial" is plainly beyond the bounds of what is necessary for defendants to be adequately advised of the charges and to conduct their own investigation. "The purpose of a bill

of particulars is to secure facts, not legal theories." *Rose v. United States*, 149 F.2d 755, 758 (9th Cir. 1945). It is not designed to compel the government to "explain the legal theories upon which it intends to rely at trial." *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980), *cert. denied,* 449 U.S. 1015 (1980); *see also United States v. Gabriel*, 715 F.2d 1447, 1449 (10th Cir. 1983), quoting *Burgin*, 621 F.2d at 1359.

IV. CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny the defendants' motions for a bill of particulars.

DATED: February 21, 2012.

Respectfully submitted,

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