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Eagle Eyes Traffic Industrial Co., Ltd; and E-Lite Automotive, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD; E-LITE AUTOMOTIVE, INC.; HOMY HONG-MING HSU; and YU-CHU LIN, AKA DAVID LIN,

Defendants.

Case No. CR-11-0488 RS

REPLY BY DEFENDANTS EAGLE EYES AND E-LITE TO GOVERNMENT'S OPPOSITION TO MOTION FOR BILL OF PARTICULARS; DECLARATION OF MATTHEW D. WILLIAMSON IN SUPPORT THEREOF

[Request For Judicial Notice In Support Of Same Filed Concurrently]

Date: March 6, 2012
Time: 2:30 p.m.
Place: Rm. 3, 17th Floor
Judge: Hon. Richard Seeborg

I. INTRODUCTION AND ARGUMENT

The Government's Opposition strategically attempts to re-frame both the Indictment and the discovery provided to Defendants in this case, keeping Defendants in the dark regarding the charges that have been brought against them. The Government's characterizations, however, ignore the reality of the struggle facing the Defendants in this matter. Defending against what the Government concedes is a complex charge of price-fixing, the Defendants are left to guess what the Government's theory of the case will be through a boiler-plate Indictment and voluminous and unmanageable discovery. Neither the Rules of Criminal Procedure, nor the applicable case law supports the Government's positions, warranting a bill of particulars in this instance.

A. The Government's Opposition Highlights Constitutional Deficiencies with the Indictment

As repeated throughout their Opposition, the Government's primary objection to Defendants' motion is that a bill of particulars would "freeze and bind the government" to a particular theory of the case and would force the Government to reveal its "evidence, witnesses, and trial strategy." See e.g. Opp. at 1-2 and 5-6. Defendants' motion attempts neither. Instead, through this motion, Defendants simply request disclosure of the "facts and circumstances as will inform the accused of the specific offense . . . with which he is charged." United States v. Chenaur, 552 F.2d 294, 301 (9th Cir. 1977) (quoting United States v. Hess, 124 U.S. 483, 487 (1888)).

In so arguing, the Government reveals that maximizing the number of theories it can present at trial is at least partially responsible for the brevity of the Indictment. This strategy is not permitted. In addition to not sufficiently informing Defendants of the specific charges against them (see Defendants' Motion at 3), this approach violates the 5th Amendment in that the Indictment is not "sufficiently specific to ensure that the subsequent prosecution is based upon facts presented to the grand jury." Russell v. United States, 369 U.S. 749, 760 (1962). As stated in Russell:

> to allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Id. at 769-70. Thus, in reviewing the sufficiency of an indictment the court:

> must focus upon whether the indictment provides 'the substantial safeguards' to criminal defendants that indictments are designed to guarantee. Pursuant to this purpose, an indictment must furnish the defendant with a sufficient description of the charges against him to enable him to prepare his defense, to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury, to enable him to plead jeopardy against a later prosecution, and to inform the court of the facts alleged so that it can determine the sufficiency of the charge. To perform these functions, the indictment must set forth the elements of the offense charged and contain a statement of the facts and circumstances that will inform the accused of the specific offense with which he is charged.

United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979). The broad and conclusory allegations contained in the Indictment do not come close to meeting this requirement and a bill of particulars is warranted in order to remedy this deficiency prior to trial.

B. The Complexity of this Case Bolsters Defendants' Request for a Bill of Particulars

The Government does not deny the complexity of this case, or that in such cases, the contents of the Indictment and the quality of the discovery is viewed more critically in deciding whether a bill of particulars is warranted. Instead, the Government merely points out that "a bill

of particulars [is not required] in all complex cases."[1] Opp. at 7-8. While Defendants do not refute this claim, it is telling that in both cases cited by the Government in support of this statement, a bill of particulars was ordered, in part due to lack of specificity in the indictment. See United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957) (bill of particulars ordered in light of "complexities of this case. . . and the generality of the allegations in the indictment); United States v. Greater Syracuse Bd. of Realtors, Inc., 438 F. Supp. 376, 380 (N.D.N.Y. 1977). In fact, a review of the cases cited in the Government's Opposition does not reveal a single instance where a court denied a bill of particulars request on the ground that a bare-bones indictment, such as what we see in this case, warranted the denial.

C. The Boiler-Plate Indictment Warrants a Bill of Particulars

The Government's investigation of this matter began at least three years prior to the return of the Superseding Indictment ("Indictment") on November 30, 2011. Declaration of Matthew D. Williamson ("Williamson Decl.") ¶2. During this investigation, the Government has interviewed at least 24 witnesses, subpoenaed, through the grand jury, millions of pages of relevant documents, and obtained extensive discovery (written, documentary and depositions) from parties to the related civil litigations. Id.

It is against this back-drop that the Government now claims that the Indictment, containing just over three pages (excluding the caption and signatures) of generic and vague allegations, is "detailed" "clear" "specific" and "a plain, concise, and definite statement of the essential facts constituting the offense charged." See Opp. at 1, 6. As described in Defendants' initial motion (see Motion pp. 1-2, 4-5), and as the Court can certainly ascertain by reading the brief Indictment, the Government's characterizations are without merit.

In support of its claim that the allegations contained in the Indictment do not warrant a bill of particulars, the Government cites to United States v. Hsuan Bin Chen, where the court recently refused to order a bill of particulars under circumstances the Government claims are "similar to

[1] The Government also criticizes Defendants' analysis on the ground that it relies on cases decided prior to the 1966 Amendment to Rule 7(f). Opp. at 7. This argument, in fact, bolsters Defendants' claim, as the Amendment to Rule 7(f) actually liberalized the rule in favor of granting requests for bill of particulars. See Motion at 3-4.

the context of this case." Opp. at 6-7. While both cases involve allegations of anti-trust violations by Taiwanese manufacturers and share a number of other factual similarities, these similarities do not extend to the content of the two indictments.[2]

The Chen indictment contains five pages of factually specific allegations detailing the "means and methods of the conspiracy," including: (1) specific dates of, attendees at, locations of, topics discussed and agreements reached during meetings the government claims were in furtherance of the conspiracy,[3] (2) details of the specific actions taken by defendants to enforce the alleged price fixing agreement,[4] (3) allegations specifying the exact involvement of subordinate employees in the alleged conspiracy,[5] and (4) detailed descriptions of the actions taken in order to conceal the conspiracy.[6]

In stark contrast, the Indictment in this case contains nothing but generic, boiler-plate allegations describing the "means and methods of the conspiracy." See Superseding Indictment ¶ 4. This contrast is fatal to the Government's reliance on Chen. In fact, by highlighting many of the deficiencies with the Indictment in this case, the Chen indictment actually does an excellent job of demonstrating why a bill of particulars is appropriate here.

Finally, the authority cited in support of the Government's claim that the Indictment is sufficient to warrant denial of Defendant's request for a bill of particulars are inapposite. Opp. at 6. Unlike the case at hand, the cases cited by the Government involve a small number of players, over a limited time period, participating in criminal conduct that is clearly defined by their indictments. See United States v. Giese, 597 F.2d 1170 (9th Cir. 1979) (approximately ten individuals, charged with conspiracy to bomb a U.S. Naval recruiting station, over the course of less than two years), United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985) (five individuals, charged with conspiracy to possess or distribute cocaine, over a limited time period), and United States v. Martin, 783 F.2d 1449 (9th Cir. 1986) (single defendant, charged with assault with a

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[2] A copy of the indictment in United States v. Hsuan Bin Chen is attached as Exhibit A to the Request for Judicial Notice, filed concurrently.
[3] Compare Eagle Eyes indictment at ¶ 4(a)-(c) with Chen indictment at ¶ 17(a)-(d), (f)-(g), (j).
[4] Compare Eagle Eyes indictment at ¶ 4 (d) with Chen indictment at ¶ 17(e).
[5] Compare Eagle Eyes indictment at ¶ 4(e) with Chen indictment at ¶ 17(k).
[6] Compare Eagle Eyes indictment at ¶ 4(f) with Chen indictment at ¶ 17(h)-(i), (l).

deadly weapon for a single event). Otherwise, these cases are inapplicable in that their rulings are not in the context of a motion for bill of particulars, or, even if in the context of a bill of particulars motion, do not contain any substantive discussion regarding the sufficiency of the indictment. See United States v. Miller, 771 F. 2d 1219 (9th Cir. 1985) (affirming conviction, noting indictment's "considerabl[e] . . . factual detail"), and DiCesare, 765 F.2d at 897 (no substantive discussion regarding sufficiency of indictment).

The Government's Opposition strains to characterize the Indictment as something that it is not. Unable to support its position with persuasive legal authority, the Government's argument falls flat. As such, a bill of particulars should be granted.

D. The Government Discovery Does Not Overcome the Deficiencies in the Indictment

The Government argues that its discovery negates the need for a bill of particulars because: (1) although the discovery is extremely voluminous, it has been produced in an organized and easily accessible manner; and (2) the content of the discovery, particularly the numerous witness interviews provided, are sufficient to notify the defendants of the charges brought against them. Opp. at 3-4. Neither argument is persuasive.

First, the Government attempts to downplay the significance of the volume of discovery, since "[t]he government has produced [the documents] in formats compatible with the commonly used Summation and Concordance litigation support programs." Opp. at 9. The Government goes on to argue that by producing documents in this format, they have "enable[d] defendants to conduct narrowly tailored searches" of these electronic documents. Opp at 3. But this argument is circular. Without a detailed indictment (or a bill of particulars), Defendants lack the foundational information about the Government's case necessary to run such "narrowly tailored searches" among the over 2.5 million pages the Government has produced to date.[7]

[7] The Government's Opposition actually confirms this point. As an example of the type of "narrowly tailored" search this production format allows Defendants to perform, they offer a search for all documents mentioning defendant Homy Hsu. Opp. at 9. Having performed such a search, the database returns nearly 50,000 individual documents totaling almost 750,000 pages. These are not narrow searches, and do not offer an adequate substitute to a sufficiently detailed indictment or bill or particulars. Williamson Decl. ¶3.

Further, the Government's claims regarding the steps they have taken to produce these materials in an easily searchable format are simply not true. Opp. at 1, 3 and 9. The most significant issues affecting Defendant's ability to review the Government's discovery include: (1) defective load files (approximately 80% of load files have required editing and manual verification), and (2) documents produced in formats not compatible with Concordance (approximately 10% of the files produced to date). Williamson Decl. ¶4. Defendants raise these issues not to drag a discovery dispute in front of the Court, but instead to simply refute the Government's contention that Defendants' issues reviewing the discovery "ignores the contemporary tools of electronic discovery." Opp. at 9. As anybody who has utilized Concordance or any similar litigation support program is aware, the software is only as good as the data you put into the program. In this case, the data has exhibited numerous and substantial issues which have prohibited Defendants from being able to efficiently use the vast amount of electronic discovery produced by the Government in this case.

Second, the Government points to the numerous "interview write-ups" it has produced as further proof that Defendants have been provided with the information sufficient to inform them of the specific charges they face. Opp. at 8. These write-ups fall well short of this purpose for a number of reasons. First, the Government has produced at least forty-two witness interview write-ups, totaling approximately four hundred pages of single-spaced text. Second, the witness statements are vague, contradictory, contain broad generalizations, often suffer from poor witness recollections and appear to suffer from poor translations in many instances. Williamson Decl. ¶5. While the Government's Opposition presents these interview write-ups as a clarifying tool for Defendants to rely on in deciphering the Government's case, in fact, the quantity and quality of these notes further muddy the waters as the Defendants seek to identify the specific charges against them.

The Government finally contends that because they have made "full discovery" in this case, the need for a bill of particulars is obviated. Opp. at 8 (citing United States v. Clay, 476 F.2d 1211, 1215 (9th Cir. 1973)). Defendants do not agree with the Government's claim that full discovery has occurred. While the Government has provided a response to Defendants'

December 30, 2011 discovery letter, this response is neither complete nor sufficient. Williamson Decl. ¶6. Further, as Defendants begin their review of the Government's vast production, additional discovery deficiencies have been identified. Williamson Decl. ¶7. While Defendants expect to continue an on-going discussion with the Government in an effort to remedy these perceived discovery shortcomings, Defendants do not agree that the Government has satisfied this "full discovery" requirement. The Government's reliance on this line of cases is, therefore, misplaced. See United States v. Mitchell, 744 F.2d 701, 705 (9th Cir. 1984) (defendant's objection to government's claim of "full discovery" relevant when deciding appropriateness of bill of particulars).

E. The Information Sought in the Bill of Particulars is Appropriate

The Government raises two general objections to the six specific categories of information Defendants have requested via a bill of particulars. First, the Government argues that because these requests seek the "names, dates, and places for the entire case," they are evidentiary, and therefore improper. Opp. at 10-11. Defendants object to this classification of their requests, which, rather than seeking broad swaths of evidentiary matter, instead seek specific information necessary to understand the case the Government is bringing against the Defendants. Requesting a description of the alleged illegal pricing agreement, or the specific prices the government alleges does not amount to the type of improper evidentiary requests denied in the cases cited by the Government. See e.g. United States v. Leonelli, 428 F. Supp. 880, 882 (S.D.N.Y. 1977) (bill of particulars requesting "a) the specific location, date and time of each act alleged in the indictment; [and] b) any similar act proof" was denied as "an attempt to discover the minutia of the Government's case"). The Government's Opposition on this ground is further undermined by the numerous cases holding that such requests are appropriate in cases such as this. See United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 810 (E.D. Pa. 1980) and United States v. Tedesco, 441 F. Supp. 1336 1341 (M.D. Pa. 1977) (both discussed in Defendants opening Motion at 5, fn 1).

Second, the Government claims that these requests are inappropriate because Defendants already posses this knowledge, via (1) the discovery in this case, and (2) because Defendants

participated in the conspiratorial meeting and are therefore aware of "the participants in the meetings . . . the topics discussed and the agreements reached." Opp. at 11. As discussed in Section D, above, the discovery in this matter does not provide Defendants with the tools necessary to ascertain the information requested via a bill of particulars. And the Government's claim that Defendants are already in possession of this knowledge via their participation in the conspiracy is absurd. If allegations against an individual are sufficient to impute knowledge of all facts surrounding such allegations, obviously there would never be a need for a bill of particulars. Unsurprisingly, the Government can cite to no case law in support of this position, as none exists.

In addition to these general objections, the Government raises a number of request-specific objections.[8] In response to Defendant's request number three (identity of the main coconspirators), the Government objects and cites to United States v. Dreitzler, 577 F.2d 539, 553 (9th Cir. 1978), where the court refused to grant a bill of particulars requesting the identification of all government witnesses. Opp. at 10. Defendants' request #3 is obviously significantly narrower than the request in Dreitzler, rendering the Government's argument unpersuasive.

The Government also objects to request number six (government's legal theories), citing a number of out-of-circuit and out-dated decisions holding that such requests are unwarranted. Opp. at 11-12. This ignores the plentiful legal authority from this Circuit holding that such requests are permitted via a bill of particulars. See United States v. Ryland, 806 F.2d 941, 942 (9th Cir. 1986) (purpose of a bill of particulars is to inform the defendant of "the *theory* of the government's case." (italics in original)); United States v. Giese, 597 F.2d 1170, 1181 (9th Cir. 1979).

The objections raised by the Government in response to the information Defendants have requested via a bill of particulars are, for the above reasons, without merit.

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[8] The Government correctly points out that the Indictment contains the information sought through request number four (when the defendants allegedly participated in the conspiracy). Opp. at 10. Defendants inadvertently included this request, and, as such, agree to withdraw this specific request.

II. CONCLUSION

For all of the foregoing reasons and the reasons stated in Defendants' opening Motion, Defendants respectfully request that this court grant their motion for a bill of particulars.

Dated: February 28, 2012

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Kenneth B. Julian
Kenneth B. Julian
Attorneys for Defendants
Eagle Eyes Traffic Industrial Co., Ltd; and
E-Lite Automotive, Inc.

DECLARATION OF MATTHEW D. WILLIAMSON

I, Matthew D. Williamson, hereby declare:

1. I am an associate at the law firm of Manatt, Phelps and Phillips LLP, counsel for defendants Eagle Eyes Traffic Industrial Co. and Ltd, E-Lite Automotive, Inc. I have knowledge of the matters set forth herein, and if called upon to do so, I could and would testify competently thereto.

2. Based on a review of our files in this case, including various correspondence with the Government, grand jury subpoenas, government discovery and other pertinent documents it is my belief that the Government's investigation of this matter began at least three years prior to the return of the Superseding Indictment on November 30, 2011. Based on this same review, it is my belief that during this investigation, the Government has interviewed at least 24 witnesses, subpoenaed, through the grand jury, millions of pages of relevant documents, and obtained extensive discovery (written, documentary and depositions) from parties to the related civil litigations.

3. With the assistance of paralegals and other staff at my firm familiar with the discovery received from the Government in this case, I oversaw a search of the electronic database for all documents mentioning Homy Hsu. This search included any document including Mr Hsu's first and/or last name in either English and Chinese. This search returned nearly 50,000 documents totaling almost 750,000 pages.

4. Our efforts to upload the Government's discovery into software which will enable us to efficiently review the large number of document provided have been hampered by a number of issues resulting from the way in which the Government has produced these documents. The most significant issues affecting Defendant's ability to review the Government's discovery include: (1) defective load files (approximately 80% of load files have required editing and manual verification), and (2) documents produced in formats not compatible with Concordance (approximately 10% of the files produced to date).

5. The Government has produced at least forty-two witness interview write-ups, totaling approximately four hundred pages of single-spaced text. The witness statements are

vague, contradictory, contain broad generalizations, often suffer from poor witness recollections and appear to suffer from poor translations in many instances.

6. In response to Defendants' December 30, 2011 discovery letter, we received a response from the Government on February 15, 2012. The Government's response does not address all of the discovery requests contained in Defendants' December 30, 2011 letter, and even where a response has been included, the response is often incomplete or otherwise insufficient.

7. As Defendants begin their review of the Government's vast production, additional discovery deficiencies have been identified.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on February 28, 2012, at Costa Mesa, California.

/s/ Matthew D. Williamson
Matthew D. Williamson