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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 **NOTICE OF MOTION AND MOTION BY DEFENDANTS EAGLE EYES AND E-LITE TO DISMISS INDICTMENT FOR FAILURE TO ALLEGE ESSENTIAL ELEMENT OF CHARGED CRIME** Date: March 6, 2012 Time: 2:30 p.m. Judge: Hon. Richard Seeborg

TO PLAINTIFF THE UNITED STATES OF AMERICA AND TO DEPARTMENT OF JUSTICE ATTORNEYS JACKLIN LEM AND HOWARD J. PARKER, ITS ATTORNEYS OF RECORD:

Please take notice that, on March 6, 2012, at 2:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 3 of the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, California, Defendants EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD and E-LITE AUTOMOTIVE INC. will move for an order dismissing the Indictment for failure to allege the essential elements of knowledge and intent.

This Motion is based upon this notice, the accompanying Memorandum of Points and Authorities, the pleadings filed and prior proceedings herein, and such additional evidence and argument as may be presented at the hearing on this Motion.

Dated: February 7, 2012

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Kenneth B. Julian
Kenneth B. Julian
Attorneys for Defendants

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I.

INTRODUCTION AND ARGUMENT

In this case, the indictment (the "Indictment") purports to charge defendants Eagle Eyes Traffic Industrial Company, Ltd. and E-Lite Automotive, Inc. (collectively "Eagle Eyes"), as well as defendant Homy Hsu, with conspiracy to commit price fixing in violation of 15 U.S.C. § 1. The Indictment, however, must be dismissed because it fails to allege the basic "two-tiered intent *element* of a Sherman Act violation"—that is, that defendants: (1) *knowingly* participated in the alleged conspiracy to suppress and eliminate competition for aftermarket auto lights through price-fixing, and (2) *intended* to help accomplish the object of that conspiracy. United States v. Miller, 771 F.2d 1219, 1239 (9th Cir. 1985) (emphasis added).

Accordingly, the Indictment must be dismissed because it fails to state an offense under 15 U.S.C. § 1, and because it violates the grand jury and notice requirements guaranteed under the Fifth and Sixth Amendments of the United States Constitution. See, e.g., United States v. Hamling, 418 U.S. 87, 117 (1974) (indictment must "'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'") (quoting United States v. Carll, 105 U.S. 611, 612 (1882)) (emphasis added).

A. The Operative Allegations of the Indictment

The Indictment alleges, in relevant part, as follows:

> 2. The defendants and other coconspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition for aftermarket auto lights, which began at least as early as July 2001 and continued until at least as late as September 2008, the exact dates being unknown to the Grand Jury ("the period covered by this Indictment"), by agreeing to fix the prices of aftermarket auto lights sold to customers in the United States and elsewhere. The combination and conspiracy engaged in by the defendants and other coconspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section I of the Sherman Act (15 U.S.C. § 1).

> 3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the 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.

Indictment, ¶¶ 2, 3 (emphasis added).

The Indictment further alleges that defendants "combined and conspired" to have meetings "to discuss … price structure for aftermarket auto lights" (¶ 4(a)); "agreed to … to set prices for aftermarket auto lights" (¶ 4(b)); issued price lists pursuant to a jointly determined price structure (¶ 4(c)); collected and exchanged information to monitor and enforce price structure (¶ 4(d)); authorized subordinate employees to participate in the conspiracy (¶ 4(e)); and took steps to conceal the conspiracy (¶ 4(f)). The Indictment does not contain any allegations: (1) that defendants knowingly—that is, voluntarily and intentionally—became members of the conspiracy charged in the Indictment, or (2) that they did so knowing of its goal and intending to help accomplish it.

B. Elements Of Conspiracy Under 15 U.S.C. § 1

To establish conspiracy to commit price fixing in violation of 15 U.S.C. § 1, the government must prove three elements, beyond a reasonable doubt, as follows:

> First, that the conspiracy charged existed at or about the time stated in the indictment; second, that the defendant knowingly—that is, voluntarily and intentionally—became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it; third, that interstate commerce was involved.

United States v. Alston, 974 F.2d 1206, 1210 (9th Cir. 1992) (emphasis added).

The knowledge and intent elements are referred to as the "two-tiered intent *element* of a Sherman Act violation …" Miller, 771 F.2d at 1239 (9th Cir. 1985), citing United States v. United States Gypsum Co., 438 U.S. 422, 443 n.20 (1978) (government must prove not only: (1) "the basic intent to agree" but also (2) the "intent to effectuate the object of the conspiracy")

(emphasis added); See also Ninth Circuit Manual of Model Criminal Jury Instructions 8.16 (Conspiracy—Elements) ("defendant became a member of the conspiracy knowing of at least one of its objects *and* intending to help accomplish it.") (emphasis added).

In Miller, the Ninth Circuit approved the following formulation of the two-tiered intent element of a Sherman Act violation:

> [I]n order to find that the defendants were members of a conspiracy, the jury must find that each defendant had a specific intent. Specific intent [means] . . . [1] voluntarily and intentionally doing an act which the law forbids, intending to disobey the law. Further, . . . [2] each defendant had to know of the general purpose and scope of the conspiracy and adopt this as his own.

Miller, 771 F.2d at 1239 (emphasis added).

In Alston, the Court explained that, although the government did not have to prove "specific intent to produce anticompetitive effects where a per se violation is alleged," it still "must prove that defendants had the requisite mental state to commit the crime." Alston, 974 F.2d at 1213. This is because "while they need not have entered the agreement with the specific intent to violate the Sherman Act, *mere acquiescence*" in an alleged plan to set prices "does not an anti-trust *conspiracy* violation make." Id. (emphasis added). Hence, the Court found no error where the "indictment charge[d], and the district court correctly instructed the jury to find, that the defendants *knowingly conspired* to fix and raise co-payment fees." Id. (emphasis in original).

The Alston Court emphasized that the term "price fixing" is a "term of art that is hardly self-defining," and may well involve non-criminal conduct. Alston, 974 F.2d at 1213-14. The Court provided a litany of examples and contexts in which competitors meeting, exchanging information, monitoring and enforcing price structures and plans may, or *may not*, be a criminal violation, depending upon the intent of the alleged participant in that activity. Id. at 1214. Indeed, the Court recognized that some "collective actions" among competitors with respect to pricing may be "constitutionally protected" and "legitimate." Id.

C. Dismissal Mandatory Where Indictment Fails to Allege An Essential Element

The Fifth Amendment provides in relevant part that: "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const., amend. V. Rule 7 of the Federal Rules of Criminal Procedure requires that an indictment include a "plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." Fed. R. Crim. P. 7(c)(1).

"An indictment must be specific in its charges and necessary allegations cannot be left to inference. . . ." Williams v. United States, 265 F.2d 214, 218 (9th Cir. 1959). Moreover, "an indictment must do more than simply repeat the language of the criminal statute." Russell v. United States, 369 U.S. 749, 764 (1962); accord United States v. O'Donnell, 608 F.3d 546, 555 (9th Cir. 2010); United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) ("'[a]n indictment must set forth each element of the crime that it charges'" (quoting Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998))) (emphasis added).

"[I]f properly challenged prior to trial,[1] an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999). This is true even if the elements of an offense may not be expressly set forth in the statute but are required by case law. See, e.g., United States v. Orner, 395 F.3d 1087, 1088-89 (9th Cir. 2005) (per curiam) (dismissal required where "indictment fails to recite an essential element of the charged offense--materiality of falsehood" as required by case law); United States v. Pernillo-Fuentes, 252 F.3d 1030, 1032 (9th Cir. 2001) (failure to allege that defendant had acted with specific intent rendered indictment deficient, and required its dismissal).

A conviction obtained on the basis of an indictment that fails to allege all elements of the charged offense "requires reversal because [the] indictment fails to ensure that [the defendant] was prosecuted only 'on the basis of facts presented to the grand jury. . . .'" Id. (quoting United States v. Rosi, 27 F.3d 409, 414 (9th Cir. 1994)). As the Ninth Circuit has explained, "[t]he Fifth

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[1] Federal Rule of Criminal Procedure 12(b) provides: "Any defense, objection, or request which is capable of determination without a trial of the general issue may be raised before trial by motion." Fed.R.Crim.P. 12(b).

1 Amendment thus requires that a defendant be convicted only on charges considered and found by
2 a grand jury," and a failure to enforce that requirement "'deprive[s] the defendant of a basic
3 protection that the grand jury was designed to secure,' by allowing a defendant to be convicted
4 'on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted
5 him.'" Id. (quoting United States v. Keith, 605 F.2d 462, 464 (9th Cir.1979)).

6 **D. The Present Indictment Must Be Dismissed**

7 In this case, the Indictment fails to allege any of the essential intent elements to charge
8 conspiracy, namely that defendants: (1) *knowingly* participated in the alleged conspiracy and (2)
9 *intended* to help accomplish it. Alston, 974 F.2d at 1213; Miller, 771 F.2d at 1239. As such, the
10 Indictment must be dismissed. Du Bo, 186 F.3d at 1179 (reversing conviction under the Hobbs
11 Act because the indictment failed to recite the "implied and necessary" intent "not present in the
12 statutory language"); United States v. Sunia, 643 F. Supp. 2d 51, 80-81 (D.D.C. 2009) (granting
13 motion to dismiss indictment under 18 U.S.C. § 1505 where indictment did not allege "defendant
14 knew about the agency proceeding" allegedly obstructed) (emphasis added)).

15 The Indictment's use of the term "price fixing," together with allegations that defendants
16 met, exchanged information, monitored and enforced an undefined alleged "price structure," do
17 not substitute for the required intent element allegations. Williams, 265 F.2d at 218 (critical
18 intent elements cannot be left to inference). Because the present indictment does not allege that
19 defendants *knowingly conspired* to fix and raise prices, and intended thereby to accomplish the
20 object of the conspiracy, nor does it allege any essential facts to support those elements, it must
21 be dismissed. Id. (emphasis in original). Without these essential allegations in the Indictment,
22 the defendants may well have been indicted by the grand jury—in violation of the grand jury
23 clause—for entering the alleged "agreement to fix prices" based upon a "mere acquiescence,"
24 rather than doing so knowingly and intentionally. Alston, 974 F.2d at 1213.

25 The government's failure to allege these basic intent elements is not "a minor or technical
26 flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." Du
27 Bo, 186 F.3d at 1179. And the "crushing consequences of a criminal conviction ... make[] it all
28

the more important" that the required intent elements be "spell[ed] out with specificity" in the Indictment. Id. at 1214.

II.

CONCLUSION

Because the Indictment fails to allege that defendants acted with the required knowledge and intent, the Indictment must be dismissed.

Dated: February 7, 2012

MANATT, PHELPS & PHILLIPS, LLP

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