JACKLIN CHOU LEM (Cal. Bar No. 255293)
MAY LEE HEYE (Cal. Bar No. 209366)
HOWARD J. PARKER (Wash. Bar No. 07233)
KELSEY C. LINNETT (Cal. Bar No. 274547)
ANNA TRYON PLETCHER (Cal. Bar No. 239730)
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102-3478
Tel: (415) 436-6660; Fax: (415) 436-6687
jacklin.lem@usdoj.gov

Attorneys for the United States

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 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. Place: Rm. 3, 17th Floor Trial Date: June 18, 2012 Hon. Richard Seeborg, United States District Judge

I. INTRODUCTION

Defendants contend that the Superseding Indictment ("Indictment") fails to allege the requisite intent for a Sherman Act violation. Defendants' argument is based on a fundamental misunderstanding of the caselaw and the Sherman Act. The Indictment here easily meets the

requirements of the Constitution and Rule 7 of the Federal Rules of Criminal Procedure and should not be dismissed.

II. LEGAL FRAMEWORK

An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim P. 7(c)(1). In general, "an indictment is sufficient if it sets forth the elements of the charged offense so as to ensure the right of the defendant not to be placed in double jeopardy and to be informed of the offense charged." *United States v. Forrester*, 616 F.3d 929, 940 (9th Cir. 2010) (internal quotation marks omitted). The test of sufficiency of the indictment is not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards. *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000). In making this determination, "an indictment should be read in its entirety, construed according to common sense and interpreted to include facts which are necessarily implied." *United States v. Drew*, 722 F.2d 551, 552 (9th Cir. 1983).

In order to establish the offense of conspiracy to fix prices, the government must prove the following elements beyond a reasonable doubt:

> *One*, that the conspiracy described in the indictment existed at or about the time alleged;
>
> *Two*, that the defendant knowingly became a member of the conspiracy; and
>
> *Three*, that the conspiracy described in the indictment either affected interstate commerce in goods or services or occurred within the flow of interstate commerce in goods and services.

American Bar Association Section on Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* (2009) at 47-48. Price fixing is a general intent crime; the government need not prove that defendants entered into an agreement with the specific intent to violate the Sherman Act. *United States v. Alston*, 974 F.2d 1206, 1213 (9th Cir. 1992).

III. ARGUMENT

Defendants argue that the Indictment is deficient because it does not allege that defendants "(1) *knowingly* participated in the alleged conspiracy and (2) *intended* to help accomplish it." Defendants' Motion (Dkt. No. 64) at 5 (emphasis in original). They are wrong.

Neither the statute nor caselaw requires an indictment for a Sherman Act violation to explicitly allege intent, let alone use the magic words "knowingly" and "intentionally."

A. The Language of the Sherman Act Implies Intent.

When an indictment includes words that have "an historical meaning either in statutory history or in the common law which might signal an allegation of mens rea," general criminal intent is implied. *United States v. Morrison*, 536 F.2d 286, 288-89 (9th Cir. 1976). The essence of a Sherman Act violation is a "combination" or "conspiracy in restraint of trade." 15 U.S.C. § 1. Those words, as used in the statute, have long been understood to imply the requisite intent.

In general, an allegation of "conspiracy" includes an allegation of mens rea. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919) ("intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it"); *Caywood v. United States*, 232 F.2d 220, 225 (9th Cir. 1956) ("Ordinarily, intent will be inferred from the nature of the combination").

Early in the history of the Sherman Act, courts inferred a state-of-mind component from the language "in restraint of trade." In response to the argument that the Sherman Act could be interpreted to reach legitimate business deals, the Supreme Court found that it only prohibited contracts that

> were of such a character as to give rise to the inference or presumption that they had been entered into or done *with the intent to do wrong* to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 51, 58 (1911) (emphasis added). In *United States v. United States Gypsum Company*, 438 U.S. 422, 438-443 (1978), the Court held, based on common-law, the history of the Sherman Act, and public policy, that per se violations of the Sherman Act required the government to prove general criminal intent.

Against this historical backdrop, it is not surprising that courts have read intent into the terms "conspiracy" and "combination" in Sherman Act cases. *See e.g., United States v. Brown*, 936 F.2d 1042, 1046 n.3 (9th Cir. 1991) (approving of jury instruction that "a conspiracy is a

kind of partnership in criminal purpose" and that "[t]he gist of the offense is a combination or agreement to disobey or disregard the law"). Indeed, the inference of mens rea is so well-accepted that courts analyzing the sufficiency of Sherman Act indictments do not even mention an explicit allegation of intent as a requirement. *See, e.g., United States v. Miller*, 771 F.2d 1219, 1226 (9th Cir. 1985) (holding that a Sherman Act indictment was sufficient because it alleged a time frame and described with particularity the actions the conspirators took to form and carry out the conspiracy); (*United States v. Mobile Materials, Inc.*, 871 F.2d 902 (10th Cir. 1989) ("For purposes of testing the sufficiency of the indictment, the essential elements of a conspiracy under §§ 1 & 2 of the Sherman Act are time, place, manner, means and effect") (internal quotation marks omitted).

B. The Indictment In This Case Follows *Alston* and *Miller*.

The underlying indictments in *Alston*, 974 F.2d 1206, and *Miller*, 771 F.2d 1219 – the two cases upon which defendants rely – prove the point. *See* Indictment, *United States v. Alston, et. al.*, CR 90-042-TUC (D. Ariz, Feb. 7, 1990) ("Alston Indictment") (Exhibit A); Indictment, *United States v. Continental Fuel Company, et. al.*, CR 83-40019 (D. Idaho, July 15, 2983) ("Miller Indictment") (Exhibit B). Neither indictment explicitly alleged any mens rea. Neither indictment contained the words "knowingly" or "intentionally." Nevertheless, the *Alston* Court found that "[t]he indictment charges, and the district court correctly instructed the jury to find, that the defendants *knowingly conspired* to fix and raise co-payment fees." *Alston*, 974 F.2d at 1213 (emphasis in original). The *Miller* Court rejected a broad challenge to the sufficiency of the indictment and approved of jury instructions describing the intent element of a Sherman Act violation. *Miller*, 771 F.2d at 1225-27, 1239-40.

The operative language in the Indictment here is nearly identical to the *Alston* and *Miller* indictments. All three indictments charge defendants with engaging or participating in a "combination and conspiracy" that was "in unreasonable restraint of […] trade and commerce in violation of Section 1 of the Sherman Act." *See* Indictment at ¶ 2; Alston Indictment at ¶ 15; Miller Indictment at ¶ 9. All three state that the "charged combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-

conspirators, the substantial term[s] of which" were to fix prices in the particular means alleged. *See* Indictment at ¶ 3; Alston Indictment at ¶ 16; Miller Indictment at ¶ 10. All three then recite specific, detailed means and methods defendants used to effectuate their schemes. *See* Indictment at ¶ 4; Alston Indictment at ¶ 17; Miller Indictment at ¶11. The *Alston* and *Miller* indictments were sufficient, and so is the Indictment in this case.

None of the cases defendants cite require that a Sherman Act charge explicitly allege intent. *Alston* and *Miller* clearly do not stand for that proposition. *Williams v. United States*, 265 F.2d 214 (9th Cir. 1959), held that an indictment for witness tampering was deficient where it failed to allege the victim was or was intended to be a witness. In *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999), the Court dismissed the indictment because it alleged the wrong mens rea for a Hobbs Act violation. *United States v. Sunia*, 643 F. Supp. 2d 51 (D.D.C. 2009), was a fact-specific case in which the Court found that the knowledge element of the charged obstruction count was not necessarily implied from the facts alleged in the indictment.

IV. CONCLUSION

It is well-established that a Sherman Act charge that alleges a "combination" or "conspiracy in restraint of trade," as the does Indictment here, also alleges the requisite intent. Defendants' claim that an indictment must include the words "knowingly" or "intentionally" to properly state a Sherman Act offense is meritless.

DATED: February 21, 2012

Respectfully submitted,

/s/ Anna Tryon Pletcher

JACKLIN CHOU LEM
MAY LEE HEYE
HOWARD J. PARKER
KELSEY C. LINNETT
ANNA TRYON PLETCHER
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102
Telephone: (415) 436-6660
Fax: (415) 436-6687
Email: jacklin.lem@usdoj.gov
Attorneys for the United States