IN THE UNITED STATES DISTRICT COURT

FOR THE 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, a/k/a DAVID LIN,

Defendants.
_______________________________________/

No. CR 11-00488 RS

ORDER ON MISCELLANEOUS PRETRIAL MOTIONS

I. INTRODUCTION

This order addresses several pretrial motions in the above-captioned antitrust price-fixing prosecution. Defendants move (1) to dismiss the Superseding Indictment, (2) for a bill of particulars, and (3) to compel production. The government moves to schedule disclosure of defendants' anticipated economic expert, or in the alternative, to exclude such expert testimony. In consideration of the briefs and the arguments raised at the hearing, the parties' motions are resolved as follows.

II. BACKGROUND

Defendant Eagle Eyes Traffic Industrial Co., Ltd. ("Eagle Eyes"), is a Taiwanese corporation that manufactured aftermarket auto lights sold in the United States, among other places; individual defendants Yu-Chu Lin and Homy Hong-Ming Hsu were chairman and vice chairman of Eagle Eyes, respectively, during the relevant period. E-Lite Automotive, Inc. ("E-Lite"), an entity affiliated with Eagle Eyes, is a California corporation that distributed aftermarket auto lights to customers in the U.S. On November 30, 2011, the Grand Jury returned a Superseding Indictment charging each defendant with one count of conspiracy to fix prices for aftermarket automobile lights under § 1 of the Sherman Act. According to that charging document, Eagles Eyes, Lin, and Hsu

United States District Court
For the Northern District of California

participated in the charged conspiracy at all relevant times, beginning as early as July of 2001, and continuing until at least September of 2008. E-Lite supposedly joined the conspiracy from March of 2006 to September of 2008. The government contends the conspiracy consisted of meetings and other communications between competitors in Taiwan and the United States that resulted in an agreement to fix prices according to set formulas, the issuance of a price list to customers, the monitoring and enforcement of the agreed-upon price structure, and efforts to conceal the conspiracy and its activities.

III. DISCUSSION

1. Motion to dismiss

Defendants move to dismiss the Superseding Indictment on the grounds that it does not adequately allege that they *knowingly* participated in the alleged conspiracy, and *intended* to help accomplish its objectives. Under the Federal Rules of Criminal Procedure, an indictment "must be a plain, concise and definite written statement of essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "Generally, 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. Rodriguez*, 360 F.3d 949, 958 (9th Cir. 2004). It must be read "in its entirety construed in accord with common sense and practicality." *United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir. 1995) (citing *United States v. Drew*, 722 F.2d 551, 552 (9th Cir. 1983)).

The government maintains that to prove defendants conspired to fix prices in violation of § 1, it must prove three elements: (1) that the charged conspiracy existed at or about the time alleged, (2) that each defendant knowingly became a member of the conspiracy, and (3) that the conspiracy had the requisite effect on interstate commerce. American Bar Association Section on Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* (2009), at 47-48. It argues that the allegation of a "conspiracy" necessarily implies the requisite intent because such an agreement entails knowing and intentional commitment. *See, e.g., Caywood v. United States*, 232 F.2d 220, 225 (9th Cir. 1956) ("Ordinarily, intent will be inferred from the nature of the combination"); Ninth Circuit Manual of Model Criminal Jury Instructions 8.20 (defining ordinary conspiracy as to require

proof that "defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it"). The only federal case to address this particular question in the context of the Sherman Act squarely supports the government's position. *United States v. Metropolitan Enters., Inc.*, 728 F.2d 444, 453 (10th Cir. 1984) ("[w]hile requisite intent must be pled and proved in any criminal prosecution arising out of the Sherman Act, the charge of conspiracy to violate a criminal law has implicit in it the elements of knowledge and intent" (internal citations and quotation marks omitted)). That case, while certainly persuasive, is not binding authority, and therefore does not end the discussion.

Defendants reply that "implied, necessary elements, not present in the statutory language, must be included in an indictment." *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (citing *United States v. Jackson*, 72 F.3d 1370, 1380 (9th Cir. 1995)). That general principle, however, does not necessarily apply to general intent crimes, such as price-fixing, where the inference of the requisite *mens rea* is "justified by the long history of prosecuting such crimes only where the requisite criminal intent is present." *United States v. Morrison*, 536 F.2d 286, 288 (9th Cir. 1976) (collecting cases where "allegations of common-law crimes [e.g., murder, assault] necessarily implied an allegation of a general criminal intent"). Price-fixing under § 1, which, as defendants candidly acknowledge, is a per se offense, fits this rubric.[1] The allegation of "conspiracy" to commit price-fixing implies the requisite general intent, and the history of the Sherman Act supports this inference, as the government has persuasively shown.

Defendants, relying on jury instructions given in *United States v. Alston*, nonetheless insist that the Superseding Indictment must specifically allege that each "defendant *knowingly* – that is, *voluntarily* and *intentionally* – became a member of the conspiracy charged in the indictment,

[1] Defendants rely on *United States v. Miller*, which required the prosecution to show specific intent, defined as "voluntarily and intentionally doing an act which the law forbids, intending to disobey the law." 771 F.2d 1219, 1239 (9th Cir. 1985). To the extent *Miller* appears to require a showing that defendants intended anticompetitive effects by their actions, however, it is no longer current. *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991). Specific intent is not an element, as conspiracy to commit price-fixing is deemed a per se offense. *Alston*, 974 F.2d at 1213 (government need not prove "specific intent to produce anticompetitive effects where a per se violation is alleged," only "that defendants had the requisite mental state to commit the crime"). *Miller* is therefore of limited assistance to defendants.

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

knowing of its goal and *intending* to help accomplish it." *See Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992) (emphasis in original). Defendants believe *Alston* supports their position insofar as it affirms that the jury must find "the defendants *knowingly conspired* to fix and raise co-payment fees," and clarifies that, "mere acquiescence in a fee schedule proposed or approved by" others is insufficient to complete the charged crime. *Id.* at 1213 (emphasis in original). While this is an accurate statement of the law, significantly, the issue only arose in *Alston* in connection with jury instructions. Jury instructions, of course, do not serve the same purpose as do indictments, and accordingly, are evaluated under a different standard. The former explain the law to the fact finder, in detailed but understandable terms. The latter put defendants on sufficient notice to enable a defense, protect against double jeopardy, ensure the prosecution rests on facts presented to the grand jury, and permit the court to gauge the sufficiency of the charge. *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979). As the Superseding Indictment in this case demonstrates, even relatively minimal allegations may so function.

The Ninth Circuit apparently felt the indictment in *Alston* also did so without the particularized intent allegations defendants believe are required. To be clear, the indictment in *Alston* did not contain the words "knowingly" or "intentionally," or variations thereof.[2] Exactly like the Superseding Indictment in this case, it stated only that the "charged combination and conspiracy consisted of a continuing agreement, understanding and concert of action…." (Exh. B to Govt.'s Opp'n to Defs.' Mot to Dismiss ¶ 16). Yet the Ninth Circuit stated, "[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," and declined to dismiss the indictment. *Alston*, 974 F.2d at 1213 (emphasis in original). *Alston* therefore supports the viability of the Superseding Indictment, not dismissal of it.

In their reply brief and at the hearing, defendants particularly emphasized their uncertainty as to whether or not the grand jury was presented with evidence of, and ultimately found, the requisite intent. For the reasons stated above, the allegation of a price-fixing conspiracy is not so broad or

[2] The indictments in *Alston* and *Miller* are attached to the government's brief as exhibits. (*See* Exhs. A & B to Govt.'s Opp'n to Defs.' Mot. to Dismiss).

imprecise as to create a risk of variance. As for the alternative notion that the grand jury may have misunderstood the required intent, there is no basis to assume, as defendants suggest, that the grand jury operated under such a misconception.

Although the government may ultimately need to prove that defendants knowingly joined the conspiracy with the intent to assist in the accomplishment of its objectives, the government's allegation of "conspiracy" implies as much, at least for present purposes. *Metropolitan Enters.*, 728 F.2d at 453. The Superseding Indictment must only clear a relatively low threshold, and because it does so here, the motion to dismiss must be denied.

2. Motion for bill of particulars

In the event their motion to dismiss is denied, defendants move for a bill of particulars specifying (1) the particular conduct the government alleges violated § 1, (2) the substance of the alleged agreement and/or pricing formula, (3) the identities of the alleged coconspirators, (4) the time during which the charged conspiracy existed,[3] (5) the prices allegedly fixed, and (6) the specific legal theories the government intends to advance at trial. Defendants generally maintain that given the Superseding Indictment's brief allegations, and the voluminous amount of document production, the government ought to be required to disclose the foregoing pieces of information with specificity.

The decision to grant or deny a bill of particulars rests within the trial court's discretion. Fed. R. Crim. P. 7(f). Particulars may be required, if necessary, "to apprise the defendant of the specific charges being presented to minimize danger of surprise at trial, to aid in preparation and to protect against double jeopardy." *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983) (citations omitted). In other words, the purpose of a bill of particulars is to clarify ambiguities in an indictment, not to serve as a replacement for discovery requests. *Id. See also*, *United States v. Ryland*, 806 F.2d 941, 942 (9th Cir. 1986) ("[a] defendant is not entitled to know all the evidence the government intends to produce but only the theory of the government's case"); *United States v. Giese*, 597 F.2d 1170, 1180-1181 (9th Cir. 1979) ("full discovery obviates the need for a bill of

[3] As noted above, the relevant dates for each defendant appear on the face of the Indictment with sufficient specificity, and defendants have subsequently withdrawn this particular request. (Defs.' Reply to Opp'n, 8 n.8).

particulars").

In prior price-fixing cases, courts have denied requests for particulars as to conduct, in the face of arguments closely resembling those advanced by defendants here. In *United States v. Chen*, for instance, the government indicted two corporate defendants and nine Taiwanese individuals for price-fixing in violation of § 1. *United States v. Hsuan Bin Chen*, No. 09-0110, 2011 WL 332713, at *2 (N.D. Cal. Jan. 29, 2011). In contrast to the Superseding Indictment in this case, there the charges alleged, with some detail, a series of monthly meetings held by senior executives and later junior employees of competitors for the purpose of setting prices on liquid crystal display screens in Taipei hotels and restaurants.[4] *Id.* In that case, the government produced 42 million documents. *Id.* at *5. Defendants argued they "should not and cannot be required to dig through this discovery to discover the 'missing details' of the government's allegations," and moved for particulars including the identities of alleged coconspirators, the locations of meetings, statements made by coconspirators, alleged "overt" acts, identification of products and customers, and the prices that were allegedly fixed, among other things. *Id.* The Court denied the motion.

Here, as in *Chen*, the government has provided defendants with memoranda memorializing interviews of numerous witnesses,[5] leniency and plea agreements for coconspirators, all Federal Bureau of Investigation 302 Reports, notes from the alleged price-fixing meetings, and discovery in the related civil action. The interview memoranda, to the extent they are exemplary, are extensive and detailed and include Bates references to each document reviewed.[6] Rolling production of all these materials began almost immediately after defendants entered into a protective agreement,

[4] Defendants move for judicial notice of the Indictment in *Chen*, which is attached as an exhibit to their motion, however, because it is a public case record available on the docket, there is no need to take judicial notice of it. The motion is denied as moot.

[5] The government has filed an administrative order requesting that the memorandum be sealed pursuant to the Local Rules and Federal Rule of Criminal Procedure 6(e), which preserves the confidentiality of grand jury proceedings. The government states that the memo was designated confidential under the protective agreement in this case, and also constitutes attorney work product. It fails, however, to identify any particular information contained therein that must be withheld from the public record. Bare assertions that materials are confidential are insufficient to justify sealing. Moreover, the government waived any privilege when it disclosed the memo to the defense. Accordingly, the motion is denied.

[6] Although defendants apparently disagree with this characterization, because the government was not required to produce any reports summarizing the results of their investigation, the fact that they may be of poor quality or confusing, as defendants contend, does not necessitate disclosure of particulars.

United States District Court
For the Northern District of California

approximately two months after the indictment was unsealed. Although defendants maintain that the 2.5 million documents produced to date are not sufficiently organized, the government insists that "virtually all" documents it has collected in electronic and hard-copy form are now available to defendants, searchable by electronic discovery software, and accompanied by indices. Defendants reply that the files are disorganized and have required extensive hand-editing to allow review. That may be, but if full discovery has been provided to defendants, the conclusion that particulars must be provided does not follow. As defendants concede, full discovery obviates the need for a bill of particulars. *Giese*, 597 F.2d at 1180-1181.

That said, defendants are correct that the government overstates the specificity of the Superseding Indictment. The parties agree that comparison with *Chen* is instructive, however, the charges in this case do not, as the charges in *Chen* did, identify with any meaningful specificity the means and manner in which the alleged price-fixing took place. The Superseding Indictment in *Chen* described the development of the conspiracy, from senior level executives meeting in hotel rooms to junior employees conducting "round robin" style meetings in restaurants, and included exact dates when particular events occurred. *Compare* 2011 WL 332713, at *1-2, *with* (Super. Indict., ¶ 4.) Here, by contrast, the government alleges defendants participated in a conspiracy generally consisting of "meetings, conversations, and other communications" in both Taiwan and the United States over a number of years, wherein the participants, among other things, "took steps to conceal the conspiracy and conspiratorial contacts, conversations, and communications through various means." (Super. Indict., ¶ 4.) It is a stretch to characterize that presentation, in the words of the government, as a "clear" and "specific" description of the charges; the Superseding Indictment is, rather, generic and open-ended at best. The question, however, is whether more specificity is required.

In *United States v. Miller*, defendants challenged the sufficiency of the indictment on the grounds that it contained "few facts other than the situs of the conspiracy and the names of the co-conspirators, does not give notice of any overt acts, and fails to place the conspiracies within a specific time frame." *United States v. Miller*, 771 F.2d 1219, 1226 (9th Cir. 1985). The Ninth Circuit agreed with the defendants that the indictment provided only an "open-ended time frame."

Id. Yet it distinguished an earlier case, *United States v. Cecil*, 608 F.2d 1294, 1297 (9th Cir. 1979), in which it dismissed charges of conspiracy too indefinite, on the grounds that the indictment in that case contained no allegation as to conduct. *Id.* at 1227 ("We have distinguished *Cecil* where an open-ended indictment nevertheless contains sufficient factual detail"). By contrast, the *Miller* indictment, the Court found, sufficiently identified "the actions which the co-conspirators took to form and carry out the conspiracy." *Id.* at 1226-27. As compared to the Superseding Indictment in this case, the charges in *Miller* provided an equally generic description of the challenged conduct, albeit with greater specificity as to the time and places of those actions. *Id.* at 1227 (alleged conspiracy was carried out by means of "discussions by telephone or at meetings at defendants' business premises, bars, restaurants, and gasoline stations which they owned, operated or at which they controlled the retail prices of gasoline").

On balance, the Superseding Indictment in this case is somewhat less detailed than the indictment in *Miller*, and a great deal less specific than the indictment returned in *Chen*.[7] Although the prosecution rightly maintains that it need not identify the "'when, where, and how' of every act in furtherance of the conspiracy," *Giese*, 597 F.2d at 1181, or even particular words or conduct by defendants, *Chen*, 2011 WL 332713, at *8, there is no question that the Superseding Indictment falls far short of that, and in any case, defendants here are not asking for as much. In sum, if defendants were forced to infer the charged conduct based on the allegations of the Superseding Indictment alone, they might be entitled to particulars. The government ultimately escapes an unfavorable ruling as to conduct, however, because of the discovery already provided to defendants. As noted, the materials produced to the defense apparently include notes taken at specific meetings, as well as memoranda including the exact dates of those meetings as well as the participants and the matters discussed. As a consequence, there can be little practical doubt about what conduct forms the bases of the charges. There is no need for particulars on that score.

Defendants also have not produced any authority to suggest they are entitled to identification of the substantive terms of the alleged price-fixing agreements, or the prices fixed. The government,

[7] The *Miller* indictment is attached as Exhibit 2 to the government's Opp'n to defendants' motion to dismiss.

United States District Court
For the Northern District of California

again, maintains such information is available within the materials already produced, including the memoranda it has disclosed. Given that defendants do not suggest otherwise, and that the government need not identify particular statements made by defendants, *Chen*, 2011 WL 332713, at *8, they also cannot prevail on the government to identify specifically any alleged agreements. As for defendants' third request, the government explains it has already produced a list of the alleged corporate coconspirators to defendants in a letter to counsel. Defendants request identification of the individuals involved. They do not deny, however, that such information is available within the documents already produced. Consequently, there is no need for further disclosure. Finally, defendants are, of course, aware of the government's basic theory that defendants conspired to fix prices of aftermarket auto lights, in violation of § 1, which is the extent of what is required. *Giese*, 597 F.2d at 1181 (citing *Yeargain v. United States*, 314 F.2d 881, 882 (9th Cir. 1963)). The motion for a bill of particulars is therefore denied in its entirety.

3. Motion to compel

Defendants advance two discovery-related requests. First, they move to compel production of any English translations of Chinese-language documents in the government's possession, pursuant to Federal Rule of Criminal Procedure 16. *See* Fed. Rule Crim. P. 16(a)(1)(E) ("government must permit the defendant to inspect and to copy" materials within the government's control if "the item is material to preparing a defense"). Specifically, defendants request an order imposing an ongoing duty on the government to produce translations in its possession of any "source" documents disclosed to defendants, including all those documents it has already turned over. Defendants also ask that the government identify any translations it has already produced. Finally, defendants request references or citations linking all translations to their original sources.

The government, in its pleadings and at the hearing, indicated a willingness to produce only translations of foreign-language documents offered as exhibits in its case-in-chief, in phases, and sometime sufficiently before trial for counsel to review them for accuracy. It believes the defense ought to be afforded two weeks after each phased disclosure to raise objections and suggests a deadline of May 15, 2012 (three weeks prior to the June 4 pretrial conference) for all translation-related objections and stipulations. Responding to defendants' motion for broader disclosure, the

government argues that it has no obligation to turn over translations, but musters no authority for that proposition. Instead, it maintains that defendants already have some translations available via their access to discovery in the parallel civil litigation. If need be, the government suggests, defendants can create their own translations.

The government's reading of Rule 16 is selective. While part (a)(1)(E)(ii) of the Rule requires the government to disclose all materials it intends to use in its case-in-chief, as it has agreed to do, part (a)(1)(E)(i) additionally requires disclosure of items within the government's control that are "material to preparing a defense." As defendants point out, the materiality standard is not high. *United States v. Bergonzi*, 216 F.R.D. 487, 501 (N.D. Cal. 2003) (evidence is material if there is a "strong indication" it will uncover admissible evidence, aid in witness preparation, corroborating testimony, or assist impeachment or rebuttal). Defendants justifiably maintain that translations of documents already produced (and those to be produced) are material, and self-evidently so, since the government has already deemed the "source" documents to be relevant under Rule 16 and accordingly produced them. Production of all translations to defendants will expedite agreement between the parties as to any stipulated translations and resolution of any disputes, an objective the government ostensibly supports according to its motion.

Consequently, defendants' request for compulsory production of any translations in the government's possession will be granted. To the extent the government possesses verbatim translations of documents already produced to defendants, and accompanying references identifying the underlying sources, it must produce them to defendants **by March 15, 2012**. This obligation is ongoing: if the government discloses more foreign language documents in the future, it must simultaneously turn over any translations in its possession, as well as any existing identifying references. To be clear, however, the government need not create new translations or references linking translated documents to their source, in order to satisfy this Order.

As for the government's request to impose rolling deadlines by which defendants must stipulate to translations, or else submit objections, Rule 16 does not provide a basis for requiring as much from defendants. All parties agree, however, that stipulations will greatly facilitate the proceedings, and at the hearing, defendants agreed to meet and confer with the government for that

purpose once they have received and reviewed all translations within the government's possession. Accordingly, the parties will attempt to file any translation-related stipulations, if any, or else lodge objections, **by April 30, 2012**.

Second, defendants also request more extensive indexing of the materials already produced by the government. Specifically, defendants demand an index identifying (1) the contents of each document or file, (2) the language of its contents, (3) the Bates number range for each, (4) the "phase" of discovery in which it was produced, and (5) the file name or file path. Defendants argue that such an index is "material," apparently again invoking Rule 16(a)(1)(E). At the hearing, the government represented that it has produced all organizing indices in its possession. Accepting that representation, the government is not required to disclose anything further. Consistent with the foregoing, however, to the extent the government possesses any indices cataloging the materials produced to defendants, it must disclose them **by March 15, 2012**. As with translations, this obligation is ongoing. Rule 16 does not, however, provide a basis to require the government to construct indices purely for defendants' use.

4. Motion to require disclosure of experts

Finally, the United States moves to set deadlines by which defendants must disclose anticipated expert witnesses and proposed expert testimony.[8] Defendants Eagle Eyes and E-Lite correctly assert that they are not required to disclose their experts, if any, unless they request expert disclosures from the government first. Federal Rule of Criminal Procedure 16(b)(1)(C). Because they have elected not to make such a request, they are under no duty to disclose. Defendant Hsu, on the other hand, has requested disclosure from the government, and acknowledges his resulting obligation to disclose any experts he intends to call. At the hearing, the parties agreed to hold a *Daubert* hearing, if necessary, on the date of the pretrial conference, June 5, 2012.[9] Hsu must, of course, disclose his expert and proposed testimony sufficiently far in advance of that date to permit the government to prepare its motion, and in any case, **by May 8, 2012** at the latest. The parties are

[8] While the government also appears to argue that no such testimony is appropriate, that question need not be resolved until there is a live dispute between the parties as to a specific expert.
[9] The government also consented to this arrangement. This agreement therefore supersedes the parties' prior stipulation to hold a hearing on any experts on May 8, 2012. (*See* Dkt. No. 50).

United States District Court
For the Northern District of California

hereby instructed to meet and confer for the purpose of setting a briefing schedule on that motion, and to present a stipulation concerning the same to the Court no later than that date.

III. CONCLUSION

Defendants' motions to dismiss and for a bill of particulars are denied. Defendants' motion to compel production is granted in part and denied in part, as detailed above. The government's motion requesting expert disclosure is granted in part as to defendant Hsu, and denied as to the remaining defendants, as set forth above.

IT IS SO ORDERED

Dated: 3/8/12

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE