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14 AMERICA

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

17)	Case No. CR-09-0110 (SI)
18	UNITED STATES OF AMERICA,)	
19	Plaintiff,)	DEFENDANTS' PROPOSED
20	v.)	INSTRUCTION RE: EXCHANGE OF
21	AU OPTRONICS CORPORATION, et al.,)	PRICE INFORMATION
22	Defendants.)	
23	_____)	

24 This morning, government witness Tierney gave testimony that he believed that the
25 exchange of price information among business competitors might be illegal. While the
26 defendants maintain that Mr. Tierney's opinion or mental state on the legality of price
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1 information was irrelevant, they anticipate that there will be additional testimony on that subject
2 from other witnesses whose mental state is indeed in issue in this case. The question of the
3 legality of the exchange of price data is, of course, ultimately an issue of law on which the jury
4 must be correctly instructed by the Court. The defendants submitted an extensive instruction on
5 the matter with supporting instructions in their proposed instruction filed on December 13, 2011,
6 a copy of which is attached to this motion. Since the issue has already been injected into these
7 proceedings, defendants request that the Court now provide the jury with a brief instruction on
8 the subject, as follows: “The exchange of price data and other information among competitors or
9 discussions among competitors or concerning the prices and quantities of a product which they
10 have sold is not in itself illegal.”

11 Dated: January 11, 2012

Respectfully submitted,

12 RIORDAN & HORGAN

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14 /s/ Dennis P. Riordan
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**INSTRUCTION NO. X – THE EXCHANGE OF PRICING INFORMATION
BETWEEN COMPETITORS**

As I have explained, it is unlawful for persons to reach agreements to fix prices. However, the publication or exchange of price data and other information among competitors can, in certain circumstances, increase economic efficiency and render markets more, rather than less, competitive. Therefore, evidence that competitors exchanged information or stated their intentions concerning the prices and quantities of a product which they have sold and produced or the prices and quantities of a product which they intended to sell and produce does not by itself prove that there was a conspiracy to fix prices, even if the exchange of information was done by agreement. For this reason, although you may consider whether there were meetings or telephone calls between competitors in deciding whether a conspiracy has been proven, proof of such meetings or calls alone, without more, is not a sufficient basis for inferring a conspiracy.

Moreover, in a competitive economy, business managers are permitted to take the pricing and other actions of their competitors into account in order to compete effectively. Therefore, the fact that one business manager bases pricing decisions on information learned about competitors is lawful so long as that manager does not agree with competitors to behave in some particular fashion when it comes to pricing his or her own products.

Similarly, the fact that a business manager knows and is able to take advantage of the fact that some or all the competitors have agreed to raise their prices, does not mean that that manager has joined a conspiracy so long as that manager does not agree with the competitors to join their conspiracy.

It is not illegal to benefit or take advantage of other persons' unlawful activity so long as the defendant does not become a participant in it. However, if a person does enter into such an agreement, then his or her conduct is unlawful.

Source:

United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16 (1978); *In re Citric Acid Litigation*, 191 F.3d 1090, 1102-03, 1105 (9th Cir. 1999); *Blomkest Fertilizer, Inc. v. Potash Crop. of Saskatchewan*, 203 F.3d 1028, 1032-33, 1037 (8th Cir. 2000); *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 118-19, 125-26, 133 (3rd Cir. 1999); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3rd Cir. 1994); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 51, 53 (7th Cir. 1992); Transcript of Record at 5589 (Sept. 8, 1998), *United States v. Andreas*, (N.D. Ill.) (No. 96-762); Jury Charge at 148 (1995), *United States v. Lima*, (D.N.J.) (No. CR-95-280); Transcript of Record at 1773 (Nov. 21, 1995), *United States v. Prairie Farms Dairy, Inc.* (S.D.Ind.) (No. EV 94-17-CR); see generally *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (charging supra-competitive prices in response to other companies' behavior is not, without more, unlawful).