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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AU OPTRONICS CORPORATION, *et al.*, Defendants.	Case No.: CR-09-0110 (SI) **DEFENDANT DR. LAI-JUH CHEN'S PROPOSED JURY INSTRUCTION REGARDING LIABILITY OF SUPERIORS FOR ACTS OF SUBORDINATES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PROPOSED INSTRUCTION** Pretrial Conference Date: December 13, 2011 Time: 3:30 p.m. Courtroom: No. 10, 19th Floor Judge: Hon. Susan Illston

Defendant Dr. Lai-Juh Chen respectfully requests that the Court give the jury an instruction regarding the liability of a superior for the actions of a subordinate. Consistent with Supreme Court and Ninth Circuit caselaw, his proposed instruction makes clear that a conviction may rest only upon proof beyond a reasonable doubt that the superior intentionally joined the alleged conspiracy by actually participating in it – not by mere awareness of it combined with a passive failure to stop others from engaging in it.

I. INTRODUCTION

The Superseding Indictment (the "Indictment") charges a single count of conspiracy to commit price-fixing in violation of 15 U.S.C. § 1, the Sherman Act. The Indictment names two corporate defendants, AU Optronics Corporation ("AUO") and AU Optronics Corporation America. The Indictment also names six individual defendants who are either current or former employees of AUO, including defendant Dr. Chen. The government's case rests largely on its claim that AUO's attendance at meetings with its competitors, primarily the so-called "crystal meetings," was illegal and evidences a Sherman Act conspiracy to fix prices for TFT-LCD panels. The indictment alleges that Dr. Chen is criminally liable under the Sherman Act because he "authorized, ordered or consented to" his subordinates' attendance at "crystal meetings." Indictment ¶ 17(d).

Dr. Chen submitted certain preliminary jury instructions jointly with co-defendants on November 2, 2011, and will file a complete set of proposed jury instructions jointly with co-defendants. Here, however, he raises one critical jury instruction that is central to his defense—namely, that to be found guilty of price-fixing, he must have knowingly *participated* in the alleged conspiracy and such knowing participation requires active conduct, rather than the mere failure to stop the conduct of a subordinate.

In recent criminal antitrust cases, the government has offered an instruction that, in essence, holds a corporate officer strictly liable for the acts of his subordinate simply because he fails to stop the conduct. *See*, *e.g.*, *United States v. Gary Swanson,* Case No. 3:06-cr-00692-PJH

(N.D. Cal), Dkt No.185 (Jury Instruction No. 11) (the "*Swanson* Instruction"). The government's formulation of this instruction, as used for example, in the *Swanson* case, reads:

> To find [the defendant] liable for the acts of a subordinate, you must find beyond a reasonable doubt that he was aware of the existence of the conspiracy and that he knowingly authorized, ordered or consented to the participation of a subordinate in that conspiracy, ***or that he was in a position to stop a subordinate who he knew was participating in the conspiracy from further participation, but he failed to do so*****.**

The *Swanson* Instruction was never reviewed by the Ninth Circuit.[1]

The underlined clause, which appears now to be used by the government by rote in criminal Sherman Act cases, is completely contrary to common notions of criminal responsibility and fairness, not to mention applicable Supreme Court and Ninth Circuit case law. While the government may very much want to be able to convict a defendant of an antitrust offense for doing nothing, that is not the law of conspiracy.[2] And of course, a criminal Sherman Act violation is simply a conspiracy. Under the Supreme Court's decision in *United States v. Wise*, 370 U.S. 405 (1962), a corporate officer must have "knowingly *participated*" in the alleged conspiracy to be found liable. *Id.* at 416 (emphasis added). In *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991), the Ninth Circuit explained that "knowing particip[ation]" requires "more than purely passive behavior," and must be demonstrated by evidence of active participation in the alleged conspiracy. *Id.* at 1048.

The *Swanson* Instruction appears to come from ABA Antitrust Section sample jury instructions going as far back as 1984 that inappropriately grafted from the "responsible corporate

[1] Similar instructions have been given by district courts in other circuits. *See* Tr. of Record 38, Mar. 5, 1999, *United States v. Fong,* No. 4:98-cr-00430 (S.D. Tex.); Court's Instructions to the Jury 20, Feb. 20, 2003, *United States v. Kuhn*, No. 5:01-cr-00134-C (N.D. Tex.); Tr. of Record 2095-96, Sept. 18, 1998, *United States v. True*, No. 4:97-cr-00011-JHM (W.D. Ky.).

[2] In fact, the government's formulation is directly contrary to the Ninth Circuit's pattern criminal jury instructions relating to conspiracy and criminal responsibility. *See* 9th Cir. Crim. Jury Instr. No. 8.16 (Conspiracy – Elements) ("Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists"); *id.* No. 6.9 (Mere Presence) ("Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed the crime of [*crime charged*], unless you find that the defendant was a participant and not merely a knowing spectator.").

officer doctrine" that courts have applied to completely unrelated statutes requiring no mental state, like the Federal Food, Drug and Cosmetics Act. *See* Third Circuit Model Criminal Jury Instructions No. 7.07 cmt. ("The Supreme Court recognized in *United States v. Park*, 421 U.S. 658 (1975), and *United States v. Dotterweich*, 320 U.S. 277 (1943), that with respect to certain federal statutes that impose criminal liability *without any mental state requirement*, responsible corporate officers or agents may be held criminally liable without performing any acts, but instead for failing to prevent violations of the law.") (emphasis added).

Giving the government's formulation of this instruction to the jury would be reversible error. *See United States v. Henderson*, 243 F.3d 1168, 1171 (9th Cir. 2001) (where instruction misstates offense, "we reverse a defendant's conviction unless the misstatement was harmless beyond a reasonable doubt").

II. DR. CHEN'S PROPOSED INSTRUCTION

Dr. Chen respectfully requests that the Court give the following instruction:

PROPOSED INSTRUCTION NO. ** – LIABILITY OF SUPERIORS

Defendant Dr. Lai-Juh Chen is charged in the Indictment with knowingly joining in a single on-going conspiracy with defendant AUO, and certain of AUO employees, among others, to suppress and eliminate competition by fixing prices in the market for TFT-LCD panels in violation of Section 1 of Title 15 of the United States Code, commonly known as the Sherman Act. During the time of Dr. Chen's alleged involvement in the conspiracy charged in the Indictment, Dr. Chen was the Director of the Desktop (Monitor) Display Business Group of AUO.

A corporate officer is not criminally responsible for illegal acts committed by a subordinate on behalf of that corporation merely because of the officer's status as a supervisor of the subordinate, or solely because of the officer's failure to stop the conduct of his or her subordinates. Rather, a corporate officer is subject to conviction under Section 1 of the Sherman Act whenever he or she (i) directly participates in the conspiracy; or (ii) authorizes, orders or actively participates in the subordinate's perpetration of the crime.

Accordingly, to find Dr. Chen guilty of the conspiracy charged in the Indictment based on acts committed by a subordinate, you must find, beyond a reasonable doubt, that Dr. Chen (i) was aware of the existence of the conspiracy; (ii) knew that the subordinate was participating in the conspiracy; and (iii) knowingly authorized, ordered or actively participated in the subordinate's perpetration of the crime.

III. ARGUMENT

A. Case Law Requires a Corporate Officer to Engage in Active Conduct Before He Can Be Held Responsible as a Co-Conspirator with His Subordinates

To be found guilty of price-fixing, a corporate officer must "knowingly participate" in the alleged conspiracy. *Wise*, 370 U.S. at 416 ("[W]e hold that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly *participates* in effecting the illegal contract, combination, or conspiracy—be he the one who authorizes, orders, or helps perpetrate the crime . . . .") (emphasis added). Knowing participation requires active behavior by the corporate officer; mere passive conduct is inadequate. *Brown*, 936 F.2d at 1048 ("Although *Wise* does not define 'knowingly participates,' we agree that it requires more than purely passive behavior."); *see Reifert v. S. Cent. Wisconsin MLS Corp.*, 368 F. Supp. 2d 912, 914 (W.D. Wis. 2005) (citing *Brown* in determining that "mere knowledge of subordinate wrongdoing [is] insufficient to sustain liability for a corporate officer").

B. The *Swanson* Instruction and ABA Model Instruction 4.B.3 Misstate the Law of This Circuit

In *United States v. Swanson*, at the government's urging, the district court instructed the jury that it could find defendant Swanson guilty of price-fixing if it concluded that he knew of the conspiracy and did nothing to stop his subordinates from participating in it. The *Swanson* Instruction stated in relevant part:

> Defendant was a company official during the time of his alleged involvement in the conspiracy charged in the Indictment. To find him liable for the act of a subordinate, you must find beyond a reasonable doubt that he was aware of the existence of the conspiracy, and:

a. that he knowingly authorized, ordered or consented to the participation of a subordinate in that conspiracy; or

b. that he was in a position to stop a subordinate who he knew was participating in that conspiracy from further participation, but failed to do so.

Swanson, No. 3:06-cr-00692-PJH pg. 43 (Dkt. # 185) (Jury Instruction 11) (formatting adjusted). The *Swanson* Instruction appears to be based on a model criminal antitrust jury instructions promulgated by the American Bar Association. *See* American Bar Association Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* (2009), ch. 4, subsec. B.3, at 101-02 ("ABA Instruction") ("To find the defendant liable for the acts of a subordinate, you must find beyond a reasonable doubt that the defendant was aware of the existence of the charged conspiracy, that [he] [she] knew that the subordinate was participating in the conspiracy, and, finally, that [he] [she] was in a position to stop the subordinate from participating, but that [he] [she] failed to do so, or otherwise authorized, ordered, or helped to perpetrate the crime.").

The Court should not give either the *Swanson* Instruction or the ABA Instruction to the jury because they directly contravene *Wise* and *Brown*. As noted, *Wise* requires that a corporate officer must *knowingly participate* in alleged conspiracy. 370 U.S. at 416. And *Brown* defines knowing participation as "*more than purely passive behavior*." *Brown*, 936 F.2d at 1048 (emphasis added).

Accordingly, the *Swanson* and ABA Instructions' theory of officer liability—based entirely on passive inaction—is a misstatement of the law of this circuit on critical elements of an antitrust violation: the applicable *mens rea* (intent to agree) and *actus reus* (knowing participation). Moreover, the government's proposition that one can become a felon by doing nothing is contrary to more general, settled principles of criminal law. *See United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) ("It is a long-established principle that criminal law generally regulates action, rather than omission, and that '[f]or criminal liability to be based upon

a failure to act it must first be found that there is a duty to act . . . .'") (quoting 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.2 (2d ed. 2008)).[3]

C. The *Swanson* Instruction and ABA Model Instruction 4.B.3 Derive from a Flawed Interpretation of the "Responsible Corporate Officer Doctrine"

The *Swanson* and ABA Instructions are also inappropriate because they are premised on an incorrect application of the "responsible corporate officer" doctrine. The ABA Instruction, from which the *Swanson* Instruction is presumably derived, cites Model Third Circuit Jury Instructions § 7.07 (2009) as a source of authority . The Third Circuit instruction, in turn, states that a corporate agent "is not criminally responsible for illegal acts committed by another agent on behalf of that corporation merely because of (his) (her) status . . . *[unless the defendant had, by reason of (his) (her) position in the corporation, responsibility and authority either to prevent in the first instance, or promptly correct, the violation complained of, and failed to do so]*" (emphasis in original). The comment to the Third Circuit instruction states that "[t]he bracketed language at the end of the Instruction should be used in those cases in which the 'responsible corporate agent' doctrine applies."

The responsible corporate agent doctrine, however, cannot apply in a criminal price-fixing case because it is inapplicable to crimes with a *mens rea* element, such as criminal violations of the Sherman Act. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 435-36 (1978) ("[W]e hold that a defendant's state of mind or intent is an element of a criminal antitrust offense . . . . We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses."); ABA, Criminal Litigation, *Criminalizing Management Decisions:*

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[3] Two cases from other circuits support the *Swanson* and ABA Instructions. *See United States v. Gillen*, 599 F.2d 541, 547 (3d Cir. 1979); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1231, 1235 (8th Cir. 1992). Notably, however, in both of these cases the corporate officer actively participated in the conspiracy. *See Gillen*, 599 F.2d at 547 (affirming guilty verdict of company president in part because "he was in a position to order the price-fixing halted, but did not do so," but also finding that president had "direct involvement" in the scheme because of his attendance at price-fixing meetings in which he "was present and actively participated"); *Misle*, 967 F.2d at 1231 (citing *Gillen* in upholding jury instruction stating corporate official could be found liable for the acts of a subordinate if "he was in a position to stop a subordinate who he knew was participating in that conspiracy" in case where official had regularly participated in price-fixing meetings, reached agreement with other participants in price-fixing scheme and typically adhered to the prices and market allocation that had been agreed upon).

Prosecuting the Responsible Corporate Officer, Vol. 11, at 7 (Fall 2010) ("The responsible corporate officer doctrine provides that a defendant may be guilty if he or she had, 'by reason of his [or her] position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct,' the alleged violations of the law. . . . Use of the doctrine has been limited to cases involving regulatory or public-safety crimes that do not have a *mens rea* element.") (quoting *United States v. Park*, 421 U.S. 658, 673-74 (1975)); *see id.* (stating with regard to 3d Cir. Model Instruction 7.07: "While conspirators may be unaware of each act taken in furtherance of the conspiracy, the crime of conspiracy is predicated on a meeting of the minds regarding criminal activity. There must be evidence that each defendant reached an agreement or understanding with one other person involved in the conspiracy. By contrast, responsible-corporate-officer cases do not rely on any agreement—implicit or explicit—within the organization."); *see also United States v. White*, 766 F. Supp. 873, 895 (E.D. Wash. 1991) ("The 'responsible corporate officer' doctrine would allow a conviction without showing the requisite specific intent.").[4]

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[4] If the Court determines that there is any ambiguity as to whether the Sherman Act criminalizes inaction on the part of a corporate officer, the rule of lenity mandates that this ambiguity be resolved in favor of Dr. Chen. *See United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position [on the meaning of the statute] is unambiguously correct–we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."); *United States v. Iverson*, 162 F.3d 1015, 1025 (9th Cir. 1998) ("Under [the rule of lenity], when a criminal statute is ambiguous, we interpret the statute in favor of the defendant.").

IV. CONCLUSION

Dr. Chen's criminal responsibility in this case should not rest on a flawed, erroneous instruction that directs the jury to convict him even if he does not "directly participate" in the alleged conspiracy. The government's ability to rely on such an instruction in an antitrust prosecution should end with this case, where the Ninth Circuit has expressly prescribed a higher standard for liability and ruled out exactly what the government urges—conviction for "purely passive behavior." *See Brown*, 936 F.2d at 1048. Consequently, Dr. Chen respectfully requests that the Court give his proposed instruction on a corporate officer's liability for acts of subordinates.

Dated: November 30, 2011

Respectfully submitted,

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