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Eagle Eyes Traffic Industrial Co., Ltd and E-Lite Automotive, Inc.

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

REPLY BRIEF IN SUPPORT OF 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
Judge: Hon. Richard Seeborg

I.

INTRODUCTION AND ARGUMENT

In its Opposition and later-filed Addendum, the government makes no attempt to address its complete failure to ensure that Defendants Eagle Eyes/E-Lite (collectively "Eagle Eyes" or "Defendants") (and Homy Hsu) were indicted on the basis of facts presented to a grand jury, including the two-tiered intent element required for a Sherman Act violation. Neither the government's Opposition, nor its Addendum, even contains the words "grand jury," let alone any discussion as to why antitrust indictments are purportedly exempt from the grand jury requirements of the Fifth and Sixth Amendments. This critical failure warrants dismissal of the Indictment and is not merely a formalistic and harmless error.

Because of the omission from the Indictment of an intent allegation, there is a constitutionally unacceptable likelihood that the intent element was not properly presented to the grand jury:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of *facts not found by*, and *perhaps not even presented to*, the grand jury which indicted him.

Russell v. United States, 369 U.S. 749, 770 (1962) (reversing conviction because indictment did not contain one element of charged crime).

Thus, to fulfill its constitutional purpose, "an indictment must furnish the defendant with a sufficient description of the charges against him [1] to enable him to prepare his defense, [2] *to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury*, [3] to enable him to plead jeopardy against a later prosecution, and [4] to inform the court of the facts alleged so that it can determine the sufficiency of the charge." United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979) (citations omitted).

The Tenth Circuit case upon which the government based its Addendum measured the antitrust indictment there only with respect to "notice" and "jeopardy," not based upon ensuring the defendant is prosecuted on the basis of facts presented to the grand jury. United States v. Metropolitan Enterprises, Inc., 728 F.2d 444, 453 (10th Cir. 1984). After Metropolitan Enterprises was decided, the Tenth Circuit adopted the exact grand jury presentation test used in the Ninth Circuit to measure the sufficiency of an indictment. See, e.g., United States v. Prentiss, 206 F.3d 960, 975-977 (10th Cir. 2000) ("if the element was not presented to a grand jury, there is nothing for a petit jury to ratify" because "*the petit jury cannot consider an element if it was not first presented to the grand jury and alleged in the indictment*") (emphasis added).

Because Eagle Eyes has raised this issue before trial, there is no reason to proceed with the present defective Indictment. United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (reversing conviction because, "if properly challenged prior to trial, 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"). Moreover, dismissal of the Indictment causes no unfair prejudice to the government because it has the option of obtaining a constitutionally sound one, after evaluating whether it has sufficient evidence of Eagle Eyes' (and defendant Homy Hsu's) intent. However, even if inconvenient, a dismissal is the only way to ensure that the government does not "deprive the defendant[s] [here] of a basic protection which the guaranty of the intervention of a grand jury was designed to secure," namely an indictment secured "on the basis of facts ... found by ... the grand jury," including the element of intent. Russell, 369 U.S. at 770; Cecil, 608 F.2d at 1296. For the reasons discussed below and in the Motion, the Indictment must be dismissed for failure to allege that Eagle Eyes acted with the requisite knowledge and intent.

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A. The Indictment Fails To Allege An Essential Element

The government does not dispute that "intent"—including its two-tiers (*knowing* participation in the alleged conspiracy and *intent* to help accomplish the object of the conspiracy)—is an essential element of a violation of Section 1 of the Sherman Act (15 U.S.C. § 1). Indeed, the government *cannot* deny this fact, because the United States Supreme Court has definitively held that intent is an "indispensible element" of a criminal antitrust case brought under 15 U.S.C. § 1. United States v. United States Gypsum Co., 438 U.S. 422, 436-437 (1978). The Ninth Circuit, as well, has expressly referred to this "two-tiered intent *element* of a Sherman Act violation …" United States v. Miller, 771 F.2d 1219, 1239 (9th Cir. 1985) (emphasis added).

See also United States v. Nippon Paper, 62 F. Supp. 2d 173, 179 (D. Mass. 1999) ("In a price-fixing case, the government must prove three elements: (1) that the conspiracy to fix prices described in the indictment was ***knowingly formed*** and existed at or about the time alleged in the indictment; (2) that the defendant ... ***knowingly became a member*** of the conspiracy to fix prices; and (3) that the conspiracy had an ***intended*** and substantial effect on commerce in the United States") (emphasis added).

Nor can the government deny, as stated in the Motion, the rule that "[a]n indictment must set forth each element of the crime that it charges." United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007). The Ninth Circuit requires that 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) (emphasis added).[1] This requirement ensures, among other things, that "defendant is prosecuted on the basis of facts presented to the grand jury ...." Cecil, 608 F.2d at 1296. "[I]f [an] element was not presented to a grand jury, there is nothing for a petit jury to ratify" because "the petit jury cannot consider an element if it was not first presented to the grand jury and alleged in the indictment." Prentiss, 206 F.3d at 975-977 (emphasis added).

[1] In its Opposition, the government proffers that none of these cases requires that a charge for violation of the Sherman Act explicitly allege the element of intent because the cases involved violations of statutes other than the Sherman Act. Opposition (Dkt. No. 77) at 5. However, these cases outline general principles of criminal procedure that are applicable regardless of the crime charged. The government offers no rationale (or authority) for why a charge of a violation of the Sherman Act should be subject to different constitutional standards.

Therefore, in order for a criminal defendant to have "the assurance that a body of fellow citizens had assessed the facts and determined that [the defendant] should face prosecution," the essential elements must be alleged in the indictment. Cecil, 608 F.2d at 1296. If an essential element is not alleged in the indictment, the indictment must be dismissed because it cannot be determined with certainty whether the grand jury found the omitted elements to be met. Russell, 369 U.S. at 770.

In United States v. Du Bo, 186 F.3d 1177 (1999), the defendant moved to dismiss an indictment alleging a violation of the Hobbs Act on the ground that it failed to allege the proper mens rea. Id. at 1179.[2] The trial court denied the defendant's motion to dismiss, but the Ninth Circuit reversed the trial court's decision after conviction, saying that the indictment's failure to allege an essential element of the crime failed to ensure that the defendant "was prosecuted only on the basis of the facts presented to the grand jury." Ibid. (internal quotation marks omitted). The Ninth Circuit concluded, "[w]e may only guess whether the grand jury received evidence of, and actually passed on, *[defendant's] intent*. Id.

The government knows how to properly allege intent in the antitrust context because it has done so before. See, e.g., United States v. Nat'l City Lines, 186 F.2d 562, 564 (7th Cir. 1951) ("The first count of the indictment ..., charged defendants with having ***knowingly*** and continuously engaged in an unlawful combination and conspiracy to secure control of ... companies which provide public transportation service"); United States v. Armour & Co., 137 F.2d 269, 271 (10th Cir. 1943) (indictment alleged "defendants ... engaged ***knowingly*** and continuously in a conspiracy to fix prices for the sale in the Oklahoma City livestock market of hogs"); United States v. Carrozzo, 37 F. Supp. 191, 193 (N.D. Ill. 1941) (indictment "charges that defendants '***knowingly*** have entered into and engaged in a combination and conspiracy unreasonably to prevent persons ... engaged in the manufacture of truck-mixers ... from selling

[2] The government attempts to distinguish Du Bo by pointing out that it alleges a violation of the Hobbs Act rather than the Sherman Act. Opposition (Dkt. 77) at 5. This distinction is without consequence, because Du Bo stands for the proposition that when an essential element of a crime is not sufficiently alleged in an indictment, including the necessary mens rea, the indictment is insufficient and must be dismissed. Du Bo, 186 F.3d at 1179. This is the exact proposition for which defendants cite the case.

and delivering truck mixers"); United States v. Wayne Pump Co., 44 F. Supp. 949, 952 (N.D. Ill. 1942) ("The indictments set out ... that all of the defendants ... ***knowingly*** have entered into and engaged in a combination and conspiracy to fix, maintain and control arbitrary, artificial and noncompetitive prices for the sale of computer pumps").

If the present Indictment is not dismissed, "[w]e may never know if the grand jury would have been willing to *ascribe criminal intent to* [the Eagle Eyes Defendants]." Du Bo, 186 F.3d at 1179 (emphasis added). On the other hand, if the Indictment is dismissed, and the government obtains a properly alleged one from a grand jury, then there will be no doubt that the government has honored its constitutional obligations in this regard.

B. The Government's "Implied Intent" Theory Violates Eagle Eyes' Grand Jury Rights and Ninth Circuit Law

Citing the Tenth Circuit's decision in Metropolitan Enterprises, the government contends that the Indictment is sufficient because the intent element of the present Indictment under 15 U.S.C. § 1 may be implied from the use of the term "conspiracy." This contention is not well-taken and should be rejected by this Court.

First, the government's position flatly contradicts Ninth Circuit law that "implied, necessary elements, not present in the statutory language," such as the two-tiered intent element required for a Sherman Act violation at issue here, "must be included in an indictment," and the omission of such an element from an indictment is so fundamental it warrants reversal of a conviction. Du Bo, 186 F.3d at 1179 ("Although not stated in the Hobbs Act itself, criminal intent-acting 'knowingly or willingly'- [was] an implied and necessary element," and its omission rendered indictment fatally defective); 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).

Second, the government's position does not respect the Ninth Circuit's decision in United States v. Alston, which distinguished between pricing agreements and conduct done with "mere acquiescence" (not a crime) and the same pricing agreements and conduct done with the requisite intent (a crime). United States v. Alston, 974 F.2d 1206, 1213 (1992). Alston held that the term

"price fixing" is a "term of art that is hardly self-defining," and may well involve non-criminal conduct. Id. It necessarily follows that the intent element for a Sherman Act violation cannot be implied by inserting the word "conspiracy" in front of the nondescript term "price fixing." Id. (emphasis added). This is why the Alston court *expressly* held that, to be sufficient, a criminal indictment must contain the allegation that "defendants ***knowingly*** conspired to fix and raise" prices. Id.

Third, explicitly alleging required elements in an indictment is the only way to ensure a defendant's constitutional right to be prosecuted on the basis of facts presented to the grand jury. Cecil, 608 F.2d at 1296. The government's suggested "implied element" approach leaves a court "to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment"—did they or did they not actually find the element of intent where it was only implied in an indictment? Russell, 369 U.S. at 770. Under Russell, the government's approach would "deprive[s] the [Eagle Eyes-related] defendant[s] of a basic protection which the guaranty of the intervention of a grand jury was designed to secure," and would permit them to "be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." Russell, 369 U.S. at 770. Indeed, the government's implied element theory appears to be no longer tenable, even in the Tenth Circuit. Cf., Metropolitan Enterprises, 728 F.2d at 453, with Prentiss, 206 F.3d at 975-977.

Finally, the cases cited by the government make clear that even if intent can be inferred from an allegation of conspiracy, this is merely the beginning of the analysis, and not the end. Even in Metropolitan Enterprises, the indictment there ***charged detailed overt acts*** in furtherance of the conspiracy to fix prices, and the district court found that "the requisite intent was ***implicit in the overt acts charged***." Id. at 452 (emphasis added). In this case, the present bare-bones Indictment alleges ***no overt acts***. Unlike the indictment in Metropolitan Enterprises, the lack of overt acts, and the omission of specific factual detail from the instant Indictment, provide no basis to imply the "two-tiered intent element of a Sherman Act violation …" Miller, 771 F.2d at 1239.

Neither Caywood v. United States, 232 F.2d 220 (9th Cir. 1956), nor Frohwerk v. United States, 249 U.S. 204 (1919), stand for the proposition that an allegation of "conspiracy" always

includes an allegation of intent. In Caywood, for example, the court held that an allegation of "conspiring to defraud the United States ***is in itself*** 'inconsistent with an honest purpose," so that the indictment sufficiently alleged intent. Id. at 225 (emphasis added). Likewise, the Frohwerk indictment involved acts of espionage during WWI, and contained overt acts and detailed allegations, including that Defendants "attempted to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States," which are plainly consistent with a treasonous purpose. In this case, the Alston decision renders this line of reasoning inapplicable because "price fixing" was held to be a "term of art that is hardly self-defining" which could refer to lawful or unlawful conspiracy-like conduct.[3] Alston, 974 F.2d at 1213.

C. The *Alston* and *Miller* Indictments Are Neither Relevant, Nor Persuasive

The government points to purported copies of the indictments in Alston and Miller to suggest that the fatally flawed Indictment in this case is sufficient. Opposition (Dkt. No. 77) at 4-5. The government claims that the language in the Indictment is "nearly identical" to the Alston and Miller indictments, claiming these were deemed sufficient by the Ninth Circuit. The problem with the government's argument is that the defendants in those cases did not challenge the sufficiency of the allegations of the element of intent. Therefore, neither of the District Courts nor the Ninth Circuit decided or even considered whether "intent" was sufficiently alleged. As such, the Court should disregard the Alston and Miller indictments.

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[3] The other cases relied on by the government to suggest that the intent element of an antitrust violation is implied are also inapposite. United States v. Brown, 926 F.2d 1042 (9th Cir. 1991) did not address the sufficiency of an indictment, but was instead considering the sufficiency of jury instructions in a case of a per se antitrust violation. United States v. Mobile Materials, Inc., 871 F.2d 902 (10th Cir. 1989), which was abrogated by the United States Supreme Court in Bloate v. United States, 130 S.Ct. 1345 (2010), did not consider whether the element of intent was sufficiently alleged in the indictment; nor was the issue of the sufficiency of the intent allegation in the indictment raised in United States v. Miller, 771 F.2d 1219 (9th Cir. 1985).

II.

CONCLUSION

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

Dated: February 28, 2012

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