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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LIANG CHEN,
DONALD OLGADO,
WEI-YUNG HSU, and
ROBERT EWALD,

Defendants.

Case No. 17-CR-00603-BLF

DEFENDANTS' NOTICE AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Before the Honorable Beth Labson Freeman
United States District Judge

Please take notice that, at a date and time convenient to this Court, Defendants Liang Chen, Donald Olgado, Wei-Yung Hsu, and Robert Ewald, by and through their counsel, will and do move for an order granting the motion listed below.

MOTION

Defendants Liang Chen, Donald Olgado, Wei-Yung Hsu, and Robert Ewald, by and through their counsel, respectfully move for an order dismissing the Indictment for lack of specificity and for failure to state an offense or, in the alternative, for an order that the government file a Bill of Particulars addressing the Indictment's inadequacies. This motion is based on the Fifth and Sixth Amendments to the United States Constitution, Federal Rules of Criminal Procedure 12(b)(3)(B)(iii), 12(b)(3)(B)(v), and 7(f), and all other applicable statutory and case law. This motion is based on the instant notice of motion and motion, the attached memorandum of points and authorities, the declaration of Daniel B. Olmos with attachments, the files and records in this case, and any and all other materials that may come to this Court's attention at the time of the hearing on this motion.

Respectfully submitted,

DATED: August 17, 2020

NOLAN BARTON & OLMOS, LLP

/s/ Daniel B. Olmos
DANIEL B. OLMOS

Attorney for Defendant
Wei-Yung Hsu

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Indictment in this case contains a non-exhaustive, partial list of alleged trade secrets. This partial list violates the Constitution's demand of fair notice of the charges and an opportunity to prepare the defense. Defendants Liang Chen, Donald Olgado, Wei-Yung Hsu, and Robert Ewald cannot discern from the Indictment precisely what alleged trade secrets they are accused of stealing and conspiring to steal. Defense counsel cannot effectively investigate whether the information is in fact a trade secret without knowing precisely what information is alleged to be a trade secret. In response to defense counsels' efforts since the last status conference in March 2020 to clarify and resolve this without Court intervention, the government provided additional details but then exacerbated the Indictment's infirmities by advising that its "summary" was not an exhaustive list of all the trade secrets it might present at trial. Moreover, for Counts Two through Twelve, the Indictment fails to specify what the alleged trade secrets are and, to the extent it alleges physical products as trade secrets, each of those counts fails to state an offense because the applicable statutes allow only "information" to be a trade secret – physical products cannot be. For these reasons, Defendants respectfully ask that the Court dismiss the Indictment for failure to provide sufficient notice and failure to state an offense. Alternatively, they ask that the Court order the government to file a Bill of Particulars setting forth a comprehensive, all-inclusive list of trade secrets the government intends to prove at trial.

STATEMENT OF FACTS

I. The Indictment's descriptions of the trade secrets.

The Indictment first lists "Applied's Trade Secrets" in Paragraph 10 of the Introductory Allegations section. All counts incorporate this paragraph. ECF No. 1 at ¶¶ 11, 19. Paragraph 10 alleges that Applied's technology "contained trade secrets" as defined in 18 U.S.C. § 1839(3), "*including the following"* six items:

a. The MOCVD LED Customer Tool, which "included, *but was not limited to*" the Multi-chamber capacity, the Autoloader Design, the Showerhead, and the Lamp Array Design.

b. Bills of Materials ("BOMs"), which contain "*the exact materials* used to create the MOCVD tool[.]"

c. *Recipes*, referring to recipes of chemicals used to create the MOCVD treatment of wafers.

d. *Prototypes*, which the Indictment doesn't identify but describes as "Prototypes of individual elements of the MOCVD tool that Applied maintained to advance the innovations designed by engineers to improve the MOCVD LED customer tool."

e. *Client Data* regarding the performance of the MOCVD LED tool.

f. *Marketing Materials and Plans* related to promoting the MOCVD LED tool, including PowerPoint presentations, and data and market analysis and projections.

ECF No. 1 at ¶ 10.a. through 10.f (emphasis added). Since the lead-in to this list states that the technology contained trade secrets "*including*" these six items, this is not an exhaustive list on its face.

Count One does not further specify which trade secrets are at issue in the alleged conspiracy. It incorporates the allegations from all the preceding paragraphs, including Paragraph 10, and accuses all four defendants of conspiring to (a) steal "trade secrets belonging to Applied," (b) copy "trade secrets belonging to Applied," and (c) possess "trade secrets belonging to Applied," all with the intent to convert "those trade secrets" to the economic benefit of *someone* other than Applied. *Id.* at ¶¶ 11-12 (words with meanings similar to steal, copy, and possess omitted).

The "Manner and Means" section of the Indictment alleges that the defendants conspired to steal "Applied's MOCVD technology," *id*. at 5:14-15, which "contained trade secrets[.]" *Id*. at 3:2. The defendants allegedly sought to download "confidential materials" and took "hardware" related to the MOCVD technology, but the Indictment does not identify those materials or the hardware. *See id*. at 5:16-19. The Indictment then alleges that Defendant Olgado downloaded BOMs and 16,000 Computer Aided Design ("CAD") drawings related to various aspects of the MOCVD tool. *Id*. at ¶ 15. All four defendants allegedly used email to discuss sharing "Applied's confidential materials[.]" *Id*. at ¶ 16. But this section does not specifically identify any alleged trade secret.

Similarly, the "Overt Acts" alleged in the Indictment do not specifically identify a single trade secret. These Acts consist mostly of emails amongst the defendants. Although this section of the Indictment refers to some things that could conceivably fall within the six-item list from Paragraph 10, the Indictment does not identify these items with specificity (except the "showerhead") nor does it identify them as trade secrets. *See e.g.*, *id.* at 6:20 (PowerPoint presentation), 6:24 (same), 7:16-17 (unspecified "CAD package"), 8:12-13 (unspecified "BOM"), 9:9 (showerhead).

Counts Two through Twelve allege possession of trade secrets and accuse all four defendants of receiving and possessing the "trade secrets identified" in a table listing each trade secret's Teamcenter Item ID numbers, Applied Part Numbers, and a Description. *Id*. at ¶ 20.

II. The parties' discussion regarding what specific "trade secrets" are at issue.

On April 1, 2020, one week after the last court hearing, undersigned counsel for Mr. Hsu wrote on behalf of all defense counsel "to seek clarification of the trade secrets being alleged by the government in this case." Decl. of Daniel Olmos Filed on August 17, 2020 ("Olmos Decl.") at ¶ 2, Ex. A ("Ex. A") at 1. Counsel asked the government to confirm that, for Counts Two through Twelve, the trade secret for each count was "the specific part identified in the Indictment for that count[.]" *Id*. For Count One, counsel noted the Indictment's open-ended, non-specific language and advised that "the descriptions of the alleged trade secrets in Paragraph 10 contain insufficient specificity to permit [defendants] to prepare a defense to Count One[.]" *Id*. at 2. Counsel explained that the open-ended language failed to provide adequate notice of which trade secrets were at issue in Count One beyond those expressly identified. *Id*. Counsel asked the government to clarify the trade secrets alleged in Count One. *Id*.

The defense requested a phone call with the government on May 14, 2020, to discuss the April 1 correspondence, which defense counsel documented in a letter dated June 12, 2020. *Id*. at ¶ 3, Ex. B ("Ex. B"). On the May 14 call, the government stated its intent to provide written clarification by the end of the month regarding Count One and further stated that, for Counts Two through Twelve, the alleged trade secrets were not in fact the parts identified in the Indictment's table in paragraph 20, but rather were unidentified design and process documents

and files related to each part. *Id*. at 1. The government agreed to identify those documents and files. *Id*. The defense's June 12 letter reiterated that the indictment's lack of specificity impeded defense investigation and trial preparation. *Id*.

On June 22, 2020, the government sent a 12-page letter in response to defendants' April 1, 2020 letter. *Id*. at ¶ 4, Ex. C ("Ex. C"). For Count One, the government wrote that defendants conspired "to steal trade secrets, specifically, [Applied's] MOCVD technology," and that they stole a "voluminous number of trade secrets, including over 16,000 CAD drawings containing Applied's MOCVD technology[.]" *Id*. at 1. The government then offered additional descriptions of the trade secrets described in Paragraph 10 of the Indictment (but continued to leave substantial uncertainty). *Id*. at 2-8. The government listed several CAD files that were "*examples* of trade secrets that the defendants conspired to steal and did steal." *Id*. at 2-4 (emphasis added). Regarding BOMs, the government suggested that *all* BOMs for the MOCVD "are Applied trade secrets," *id*. at 5 (first full sentence), and then listed seven BOM files as "examples of trade secrets" at issue in Count One and identified some MOCVD sub-assemblies for which the CAD files and BOMs were trade secrets. *Id*. at 5-6. Regarding the "Recipes" for the MOCVD tool, the government listed nine examples of trade secret recipes and also wrote that each recipe the defendants allegedly stole or conspired to steal was a trade secret. *Id*. at 6. The government identified three Prototypes of the MOCVD tool as trade secrets. *Id*. at 7. Last, for the Marketing Materials and Plans, the government listed three PowerPoint presentations that "reflect and/or are derived from Applied trade secret information[.]" *Id*. at 7.

For Counts Two through Twelve, the government explained that these 11 counts related to 11 components, and that the "CAD files and BOM information" for those components "were Applied trade secrets." *Id*. at 8. For each of the 11 components, the government identified at least one associated BOM and CAD file. *Id*. at 8-11.

Critically, the government also cautioned that the trade secrets referenced in the 12-page letter were a "*summary*" and that the "above-referenced trade secrets ***are not an exhaustive list***." *Id*. at 11 (last paragraph) (emphasis added). Further, the government expressly reserved "the right" to supplement the list in its June 22 letter with additional trade secrets. *Id*.

Defense counsel wrote the government on July 2 noting that the government's June 22 letter identified numerous trade secrets but did so as "examples" of trade secrets and wrote that the trade secrets "'include' (but are not limited to)" those listed in the letter. *Id*. at ¶ 5, Ex. D ("Ex. D"). Defense counsel asked the government to commit to the June 22 list as exhaustive and complete and to not add additional alleged trade secrets as trial approached. *Id*.

The government replied on July 8 and declined to commit to the June 22 list as exhaustive and complete. The government advised defense counsel to expect the government to use the items listed in the June 22 letter as evidence of the scheme to steal trade secrets, and to argue that those items listed in the June 22 letter are trade secrets. *Id*. at ¶ 6, Ex. E ("Ex. E"). The government noted it was still analyzing the evidence and that the government could possibly identify other trade secrets defendants stole in furtherance of the scheme. *Id*. Accordingly, the government again "reserve[d] the right to supplement the list of trade secrets" before trial and expressly did "not agree that the list contained in [the] June 22, 2020 letter is necessarily exhaustive and complete." *Id*. Finally, in the June 22 letter the government declined to limit its trial presentation of trade secrets to those secrets the government presented to the grand jury: "In general, we do not agree to any limitation on the scope of the possible trade secrets we will introduce at trial, so long as the evidence of those trade secrets is contained within the discovery provided." *Id*.

The government sent defense counsel a follow-up letter just last week, on August 10, 2020, in which in provided a 24-page chart listing over 350 different alleged trade secrets. *Id*. at ¶ 7, Ex. F ("Ex. F"). That list did not include several alleged trade secrets from the June 22 letter, although it did add several hundred more. Again, however, the government wrote that it is "continuing to analyze" the evidence in advance of trial and that "we reserve the right to supplement the list of trade secrets prior to the May 2021 trial date." *Ibid*.

ARGUMENT

I. The Indictment fails fairly to inform the defendants of the charges, fails to give sufficient notice to prepare a defense and plead double jeopardy, and fails to ensure that they will be tried only on facts found by the grand jury, all in violation of the

U.S. Constitution and Federal Rules of Criminal Procedure 7(c)(1), 12(b)(3)(B)(iii), and 12(b)(3)(B)(v).

A. The legal standards for an indictment under the Federal Rules and U.S. Constitution.

An indictment must meet the requirements of both the Due Process Clause and Federal Rule of Criminal Procedure 7. *United States v. Huping Zhou*, 678 F.3d 1110, 1113 (9th Cir. 2012). The Sixth Amendment guarantees a defendant the right "to be informed of the nature and cause of the accusation[.]" U.S. Const. Amend. VI.

An indictment satisfies the Due Process Clause if it (1) contains the elements of the offense "and fairly informs a defendant of the charge against which he must defend, and, [2] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Huping Zhou*, 678 F.3d at 1113 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). An indictment must contain the elements of the crime "in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy." *Id.* (quoting *United States v. Buckley*, 689 F.2d 893, 896 (9th Cir. 1982)). The charge must be "specific enough to protect the defendant against a subsequent prosecution for the same offense." *United States v. Bolton*, 908 F.3d 75, 88 (5th Cir. 2018) (quoting *United States v. Fairley*, 880 F.3d 198, 206 (5th Cir. 2018)).

Courts stress the importance of the requirement that an indictment give sufficient notice to prepare a defense. *See e.g.*, *United States v. Adamson*, 291 F.3d 606, 616 (9th Cir. 2002) (informing a defendant of the charge so he can "prepare his defense" is a "primary purpose" of an indictment); *United States v. Fleming*, 215 F.3d 930, 935 (9th Cir. 2000) (the indictment's "essential purpose" is giving notice so the defendant can adequately defend the case); *United States v. Khan*, 937 F.3d 1042, 1049 (7th Cir. 2019) (the "key question" is whether the indictment gave enough notice "to enable adequate trial preparation").

The constitutional notice requirement is also incorporated into the Federal Rules of Criminal Procedure. Rule 7(c)(1) requires that the indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged [.]". Rule 12

allows a defendant to contest defects in the indictment including a "lack of specificity" and the failure to state an offense. Rules 12(b)(3)(B)(iii) and (v).

B. The Indictment fails to provide sufficient notice for the defendants to prepare their defense and to plead double jeopardy.

To prepare for trial and effectively investigate and prepare possible defenses, defendants must know precisely which alleged trade secrets they allegedly stole or agreed to steal. The question whether a specific item qualifies as a trade secret is always "fact-intensive question to be resolved upon trial." *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 419 (4th Cir. 1999). Moreover, given the complex nature of the technology involved in AMAT's MOCVD tool, the issue will necessarily be the subject of expert testimony and opinion. Defense counsel cannot meaningfully prepare to meet this fact-intensive question without a *detailed, comprehensive and exclusive* specification of the alleged trade secrets that the clients assertedly stole or agreed to steal. For any particular alleged trade secret, the jury will have to decide whether Applied took "reasonable measures to keep such information secret," and whether the information derives independent economic value from not being generally known. *See* 18 U.S.C. § 1839(3). Additionally, the government must prove the alleged trade secret is not generally known to another person who can obtain economic value from its disclosure, *see id.*, and the defendants must know what the alleged trade secret is to investigate whether it is already generally known. Without knowing precisely what the alleged trade secrets are, the defendants cannot effectively investigate any of those issues.

Likewise, in any future prosecution the defendants would not be able to plead double jeopardy if the indictment does not precisely describe the alleged trade secrets for which defendants are on trial in this case. *United States v. Gordon*, 844 F.2d 1397, 1400 (9th Cir. 1988). Leaving the list of trade secrets open-ended and vague creates a danger of serial prosecutions based on the same alleged trade secrets, particularly because the parallel civil litigation alleges that there is an ongoing conspiracy.

The constitutional demand for specificity in providing notice is consistent with the United States Department of Justice's manual for prosecuting such crimes, which requires specificity about the trade secrets at issue:

> The government should ascertain *the specific information* the victim claims is a trade secret at the outset of the investigation. "[A] prosecution under the [EEA] must establish *a particular piece of information* that a person has stolen or misappropriated." 142 Cong. Rec. 27, 117 (1996).

U.S. Dept. of Justice, *Prosecuting Intellectual Property Crimes*, 162 (4th ed. 2013) ("DOJ IP Manual") (italics added, brackets in original).[1]

Here, the Indictment falls far short of the constitutional standard. Paragraph 10 lists *some* alleged trade secrets within the MOCVD LED technology, but the Indictment does not state a complete list. Paragraph 10's introductory words, "including the following [trade secrets]," ECF No. 1 at 3:3, indicate that what follows is a non-exclusive, partial list. *See* Black's Law Dictionary (11th ed. 2019) (definition of "include": "The participle *including* typically indicates a partial list"); *Bloate v. United States*, 559 U.S. 196, 219 (2010) (quoting Black's Law Dictionary and other authorities); *Arizona State Board for Charter Schools v. United States Dept. of Education*, 464 F.3d 1003, 1007 (9th Cir. 2006) ("In both legal and common usage, the word 'including' is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle."); *id.* at 1008 n.3 (quoting Black's Law Dictionary and the American Heritage Dictionary); *United States v. Ramos*, 695 F.3d 1035, 1040 (10th Cir. 2012) (the word "including" suggests it precedes a "non-exhaustive" list); *United States v. Hawley*, 919 F.3d 252, 256-57 (4th Cir. 2019) (the term "including" is not all-embracing but is an introductory term for an incomplete list of examples). Every count of the Indictment incorporates Paragraph 10's partial list. ECF No. 1 at ¶¶ 11, 19. Thus, the Indictment's non-exclusivity fails to "inform [the defendants] of the charge against which [they] must defend," as they are compelled to guess what information in addition to that set forth in

[1] Available as of July 31, 2020 at: https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/03/26/prosecuting_ip_crimes_manual_2013.pdf .

the indictment the government might characterize as a trade secrets at trial. *See Huping Zhou*, 678 F.3d at 1113. Numerous cases are instructive and support defendants' position.

In *Russell v. United States*, 369 U.S. 749, 755 (1962), the Supreme Court reversed convictions based on a defective indictment. The indictments accused defendants of refusing to answer questions when summoned before a congressional subcommittee, in violation of 2 U.S.C. § 192. *Id.* at 752. Each indictment stated that the questions the defendants failed to answer "were pertinent to the question then under inquiry" but did not identify the subject under inquiry. *Id.* at 752. That omission was important because the refusal to answer a question is criminal only when the question is "pertinent to a specific topic under subcommittee inquiry[.]" *Id.* at 768. The district court denied motions to dismiss, the defendants were convicted, and the Supreme Court reversed. *Id.* at 753-55.

The Supreme Court held that the indictments failed to provide constitutionally sufficient notice because they failed to identify the subject under inquiry. *Id.* at 767. The subject under inquiry was a "central" aspect of prosecution under this statute. *Id.* at 764. Omitting that "central" information "requires the defendant to go to trial with the chief issue undefined." *Id.* at 766. Failing to identify the subject under inquiry also left the prosecution "free to roam at large," shifting its theory of criminality as the cases progressed. *Id.* at 768.

Following *Russell*, numerous lower courts have enforced a defendant's Sixth Amendment right to be "informed of the nature and cause of the accusation" by dismissing indictments that fail to do so. The Ninth Circuit reversed convictions because of an invalid indictment in *United States v. Cecil*, 608 F.2d 1294, 1295 (9th Cir. 1979). The indictment there alleged conspiracies to commit marijuana-related offenses, and the district court denied a motion to dismiss. *Id.* at 1295-96. The Ninth Circuit reversed even though the indictment tracked the statutory language because the indictment failed to state overt acts and sufficient facts and circumstances pertaining to the conspiracies, and left the start and end dates of the conspiracies open-ended in both directions. *Id.* at 1296-97. The Ninth Circuit held the indictment failed to allege sufficient facts to prepare a defense and inform the accused of the "specific offense with which they were charged." *Id.* at 1297.

Similarly, the Tenth Circuit reversed convictions based on the indictment's failure to sufficiently inform defendant of the charges. *United States v. Curtis* 506 F.2d 985, 991-92 (10th Cir. 1974). In *Curtis*, the indictment charged defendant with mail fraud under 18 U.S.C. § 1341. *Id.* at 985. The indictment alleged a "scheme and artifice to defraud" "by means of false and fraudulent pretenses," *id.* at 988, but otherwise "left to speculation" details of the scheme or artifice and the actual false or fraudulent pretenses. *Id.* at 989. The Tenth Circuit compared the deficient indictment in *Curtis* to indictments in other cases that properly disclosed the nature of the scheme or artifice, "including the particular pretenses, representations or promises claimed to have been false." *Id.* at 990. *Curtis* reversed with instructions to dismiss the indictment because it failed to inform defendant of the nature of the scheme or artifice or the false pretenses forming a part of it. *Id.* at 992. Courts in this circuit have cited and applied *Curtis*'s holding. *See Cecil*, 608 F.2d at 1297; *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982).

More recently, in *United States v. Keuylian*, 23 F.Supp.3d 1126, 1128-29 (C.D. Cal.2014), the district court granted a motion to dismiss an indictment charging wire fraud, under 18 U.S.C. § 1343, for failing to sufficiently allege an offense. The indictment accused the defendant of executing a scheme to defraud by means of false and fraudulent pretenses, but failed to describe any misrepresentation, false pretense or promise, or act of deception by the defendant. *Id.* at 1128. The district court reasoned that the indictment suffered the same defect as in *Curtis*, namely, the indictment did not provide fair indication of the scheme or false pretenses. *Id.* at 1129. The court dismissed the indictment even though it tracked the statutory language. *Id.* at 1130.

Likewise, the Eleventh Circuit in *United States v. Schmitz*, 634 F.3d 1247, 1263-64 (11th Cir. 2011) vacated convictions based on a deficient indictment and held the district court should have granted a motion to dismiss. The indictment charged a former state legislator with theft from a program receiving federal funds under 18 U.S.C. § 666(a)(1)(A), and with "embezzle[ing], steal[ing], obtain[ing] by fraud and without authority convert to her own use, and intentionally misapply[ing]" the salary she received from the program. *Id.* at 1257. *Schmitz* held that the indictment failed to provide sufficient notice because, although it alleged a "scheme

to defraud," it did not provide any factual detail regarding the scheme. *Id.* at 1261. The indictment tracked the statutory language but still was not sufficient because it failed to allege facts or circumstances to inform the defendant "of these specific charges." *Id.* The deficient indictment required vacating four convictions. *Id.* at 1264.

These cases help illustrate the infirmities of the Indictment in this case. The open-ended, non-exhaustive description of the alleged trade secrets in Paragraph 10 fails to provide notice for similar reasons as the open-ended conspiracy timeline failed to provide notice in *Cecil*, 608 F.2d at 1296-97. The government's failure to allege the particular trade secrets at issue resembles the failure to allege the particular false pretenses or promises in *Curtis*, 506 F.2d at 992, and in *Keuylian*, 23 F.Supp.3d at 1129. And, just as the deficient indictments from *Russell* failed to allege the subject under inquiry, which was "central" to the charges, *see* 369 U.S. at 764, the Indictment here fails to allege a central fact: the identity of the alleged trade secrets. In short, the Indictment falls short of what the Constitution and Rule 7(c)(1) require.

In contrast, the Ninth Circuit's decision in *Buckley* provides a good example of an indictment which, while not as specific as it could be, still satisfies the Constitution. The indictment alleged mail fraud under 18 U.S.C. § 1341 based on a scheme to avoid a state law requiring disclosure of political contributions to legislators. *Id.* at 895. The district court dismissed the indictment on the ground that it failed to allege that the mailed lobbyist-disclosure form contained false information. *Id.* The district court would have upheld the indictment if it specifically alleged that the disclosure form was false. *Id.* at 898. But the Ninth Circuit reversed, holding that the indictment provided sufficient notice by alleging that mailing the form furthered the scheme to defraud. *Id.* at 898. The only way the mailed form could have furthered the scheme was for the form to be false, so the indictment "implicitly alleged the falsity of the disclosure report[.]" *Id.* at 898. Similarly, although the indictment did not "explicitly allege" that money was delivered to legislators, that allegation was necessarily implied when the indictment alleged that payments were omitted from the disclosure form; payments could not be intentionally omitted if none were ever made. *Id.* at 898-99. The Ninth Circuit upheld the indictment despite finding its allegations "barely sufficient[.]" *Id.* at 900.

Buckley does not help the government here. Neither the defendants nor this Court can read the Indictment's text to find an implied allegation that will save the Indictment. For example, had the Indictment alleged that Applied "had 12 trade secrets," and then listed 12 examples, it would be clear that the list of 12 examples is complete; the plain text would imply that the 12 examples are the "12 trade secrets" that Applied possessed. *Buckley* allows that analysis. But this Indictment does not necessarily imply any missing allegation. The defects in Paragraph 10 stem from an *explicit* open-endedness.

It is true that, for the conspiracy charge, the government does not need to prove the existence of actual trade secrets but instead must prove that the defendants reasonably believed certain information constituted trade secrets. *See United States v. Liew*, 856 F.3d 585, 594, 600 (9th Cir. 2017). The defendants' beliefs about whether certain information constituted a trade secret depends in significant part on whether they knew of facts showing the information was not generally known, that Applied took reasonable steps to keep it secret, and that it derived independent economic value from its secrecy. 18 U.S.C. § 1839(3). For example, consider the specific PowerPoint presentation alleged in paragraph 18(c) of the Indictment. EFC No. 1, at ¶ 18(c). The defense can investigate the defendants' beliefs about *that presentation*, whether they believed it to be a trade secret or not, and whether their belief was reasonable based on the information they knew. The defense cannot, however, investigate the defendants' beliefs about *unknown alleged trade secrets* absent from the Indictment, nor the *reasonableness of those beliefs*, as to which the government has purportedly reserved a right to surprise defendants at trial. That is why the Indictment's open-ended list of alleged trade secrets fails to provide sufficient notice to effectively prepare a defense. The defense must prepare to meet evidence for the defendant's beliefs *about something*, and the Indictment must specify what that "something" is. As the Indictment explicitly forces defendants to speculate which items the government may seek to prove are trade secrets and which items the government may seek to prove the defendants believed to be trade secrets, it fails to pass muster under the Fifth Amendment and Federal Rules.

In sum, the Indictment fails to fairly inform the defendants of the charges against which they must defend and fails to give sufficient notice to prepare his defense. The Court should correct those errors by dismissing the Indictment.

C. The Indictment's open-ended language and lack of specificity also fails to ensure that the defendants are prosecuted only on facts presented to the grand jury.

An indictment must also state the offense in enough detail to ensure the defendant is being prosecuted on the basis of facts presented to the grand jury. *Russell*, 369 U.S. at 769-70; *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994); *United States v. Pirro*, 212 F.3d 86, 93 (2d Cir. 2000). The Fifth Amendment's Indictment Clause "requires that an indictment contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury." *Pirro*, 212 F.3d at 92 (quoting *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999)).

The Supreme Court explained this rule in *Russell*, where the indictments failed to specify what topic was under congressional subcommittee inquiry when defendants refused to answer the subcommittee's questions. 369 U.S. at 769-70. The Court rejected the government's argument that a bill of particulars could cure the error, noting that the grand jury had to decide whether the questions the defendants refused to answer were "pertinent to" the subject under inquiry. *Id.* Allowing a prosecutor or court to later guess what was in the grand jurors' minds would deprive the defendant of the constitutional protections the grand jury provides, because "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." *Id.* at 770.

The Ninth Circuit reversed a conviction for this reason in *United States v. Du Bo*, 186 F.3d 1177, 1179-80 (9th Cir. 1999). The defendant was charged with extortion under the Hobbs Act, 18 U.S.C. § 1851, but the indictment did not allege the proper *mens rea*. *Id.* at 1179. This failure required dismissing the indictment because it failed to "ensure that he was prosecuted only on the basis of the facts presented to the grand jury[.]" *Id.* (quoting *Rosi*, 27 F.3d at 414). The Ninth Circuit could not discern whether the grand jury would have found the defendant acted with the proper *mens rea*, so it reversed. *Id.* at 1179-80. Failing to enforce the Fifth

Amendment's Grand Jury Clause would unlawfully "allow a court to 'guess as to what was in the minds of the grand jury at the time they returned the indictment[.]'" *Id.* at 1179 (quoting *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979)).

Similarly, here the grand jury found that the MOCVD LED technology "contained trade secrets . . . including" the ones listed in Paragraph 10. ECF No. 1 at 3:2-3; *id.* ¶ 10. But as noted above, the word "including" introduces a non-exhaustive, partial list. *See supra* Argument Part I.B. (citing Black's Law Dictionary and *Bloate*, 559 U.S. at 219, and other authorities). Here, it is impossible to know what *other* information the grand jury would have found to be a trade secret, if any. The open-ended Indictment creates a danger that the defendants will be prosecuted on the basis of alleged trade secrets other than those found by the grand jury.

Indeed, the government has explicitly reserved its right to argue at trial that unspecified items are trade secrets even though those items are not identified in the Indictment and therefore, presumably, were not submitted to the grand jury. The government denies any limit on "the scope of the possible trade secrets [it] will introduce at trial, so long as the evidence of those trade secrets is contained *within the discovery provided*." Ex. E (italics added). This bold claim exceeds the limit set in the Constitution's Grand Jury Clause, and is particularly unworkable in this case given the volume of discovery, which is several hundred gigabytes. The government cannot be to attempt to convict defendants at trial, based on alleged trade secrets that were not identified in the indictment but are contained "within the discovery provided." Neither this Court nor the defendants know whether the grand jury would have indicted based on additional facts within the government's discovery, so a prosecution based on those facts cannot stand. *See Du Bo*, 186 F.3d at 1179-80.

A conviction based on trade secrets contained "within the discovery provided" *but not* presented to the grand jury will violate the Fifth Amendment and the requirement that an indictment ensure the defendant is charged only on facts presented to the grand jury. A conviction on this basis would also constitute a constructive amendment to the Indictment. *See United States v. Mickey*, 897 F.3d 1173, 1183-84 (9th Cir. 2018) (describing constructive-

amendment rule). The Indictment's plain language invites that outcome and fails to ensure that the defendants are convicted only based on facts presented to and found by the grand jury.

D. Counts Two through Twelve lack specificity and improperly allege machine parts as trade secrets.

Counts Two through Twelve incorporate the open-ended list of trade secrets from Paragraph 10. ECF No. 1 at ¶ 19. These counts also accuse the defendants of receiving and possessing "the Applied trade secrets identified below," referring to a table on page 10. ECF No. 1 at 9:24. That table identifies the trade secret for each count by a Teamcenter Item ID number, an Applied Part Number, and a Description. ECF No. 1 at 10. These counts fail to provide sufficient notice and fail to state an offense.

1. The table on page 10 fails to provide sufficient notice because it does not inform the defendants whether the alleged trade secrets are actual machine parts or merely engineering drawings about those parts.

The Indictment confusingly uses three identifiers for each alleged trade secret in Counts Two through Twelve. The three identifiers seemingly refer to two different things as alleged trade secrets: either (a) machine parts or (b) CAD drawings for machine parts. The Indictment also uses three identifiers—Teamcenter Item ID, Applied Part No., and Description—without defining or explaining what is a Teamcenter Item ID or Applied Part Number. This ambiguity and lack of clarity means the Indictment fails to provide sufficient notice.

First, the "Description" column describes actual machine parts as the trade secrets, e.g., the Autoloader Base in Count Two, a Showerhead in Count Four, a Reflector in Count Six. ECF No. 1 at 10. This column suggests that actual machine parts are the alleged trade secrets.

Second, the Indictment appears to allege that the actual machine parts are the alleged trade secrets by listing an "Applied Part No." for each alleged trade secret. *Id.* A machine part likely has a Part Number assigned to it. That would be a reasonable inference, but the Indictment never defines "Applied Part Number" or explains to what the part number refers.

Third, the Indictment seems to change course by listing each alleged trade secret's Teamcenter Item ID. *Id.* The Indictment never defines "Teamcenter Item ID." But it does

allege that Teamcenter was a database housing CAD drawings that engineers created, and that defendant Olgado downloaded CAD drawings from Teamcenter. *Id*. at 3:8-10, 5:15-24. Those allegations suggest that the Teamcenter Item ID numbers refer to CAD drawings.

In sum, two columns suggest that the alleged trade secrets are *machine parts*, while a third column suggests they are *CAD drawings*. A sufficient indictment cannot leave the defendant guessing as to what the alleged trade secret is, or even whether it's an object or data within a database. This vagueness requires dismissing these counts for lack of notice.

2. These counts fail to state an offense by alleging machine parts as trade secrets.

To the extent that Counts Two through Twelve allege the trade secrets to be machine parts, these counts fail to state an offense because, by statute, physical products cannot be trade secrets.

Dismissing an indictment is required when it fails to allege the essential facts constituting an offense, such as where the alleged conduct is not actually prohibited by the statute. *See, e.g.*, *Pirro*, 212 F.3d at 91, 93 (affirming dismissal where government's proposed proof would not establish a crime within the statute's terms); Fed. R. Crim. P. 12(b)(3)(B)(v) (defense may move to dismiss indictment that fails to state offense).

The Economic Espionage Act ("EEA") defines trade secrets as "information," not physical products:

> [T]he term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information[.]

18 U.S.C. § 1839(3). This definition is broad but limited by its text to "information." Likewise, the DOJ Manual cited above instructs the Government to "ascertain the specific *information*" alleged to be a trade secret and to "establish a particular *piece of information*" someone stole or misappropriated. *See* DOJ IP Manual at 162 (italics added).

Although the EEA does mention the word "product" in one section, this inclusion actually supports the conclusion that products cannot be trade secrets. The law specifically requires that, for a person to be guilty of theft of trade secrets, the trade secret must be "*related to* a product or service used in or intended for use in interstate or foreign commerce." 18 U.S.C. § 1832(a) (italics added). The requirement that the trade secret be "related to a product" necessarily implies that the product itself is not the trade secret. This statutory text further supports the conclusion that a physical product cannot, itself, be a trade secret.

Since the statutory language is so clear, defense counsel has not found any published opinion interpreting the EEA directly stating that a commercial product cannot be a trade secret. The Central District of California, however, decided a case in 2011 interpreting the California Uniform Trade Secret Act, which employs a similar definition of trade secret as the EEA.[2] In *Mattel, Inc. v. MGA Entertainment, Inc.*, 782 F.Supp.2d 911, 970 (C.D. Cal. 2011), Judge Carter interpreted California's Uniform Trade Secrets Act to prohibit the plaintiff in a civil action from classifying a commercially-available product as a trade secret. The court wrote, "Mattel makes no effort to describe the 'trade secret' elements of this commercially-available product, other than to summarily claim that the system was customizable and customized by Mattel. The fact that Mattel's vague description precludes the Court from effectively determining whether information about the [product] derives independent economic value from not being generally known is precisely why California requires that a trade secret be alleged with particularity." *Id.*

Here, the Indictment seems to allege several physical products as trade secrets. Taking those allegations as true, Counts Two through Twelve fail to allege theft of any "trade secrets"

[2] The EEA definition of "trade secret" derives from the definition in the Uniform Trade Secrets Act, and federal courts therefore "consider instructive interpretations of state laws that adopted the UTSA definition without substantial modification." *United States v. Chung*, 659 F.3d 815, 825 (9th Cir. 2011).

as defined in 18 U.S.C. § 1839(3), so they fail to state an offense and the Court should dismiss these counts.

3. The government's expected trial presentation invites an unlawful constructive amendment to the Indictment.

As noted in the two preceding sections, the Indictment should be dismissed based on facial deficiencies. But when the defense asked the government to clarify what trade secrets are alleged in Counts Two through Twelve, the response raised a new problem: the likelihood of an unlawful constructive amendment at trial. This problem arises from the Indictment's plain text; the government's correspondence with defense counsel merely highlights and exacerbates the existing notice problem (and potential for further problems) with the Indictment's open-ended and vague description of the alleged trade secrets. This is yet another reason the Court should dismiss these counts.

A constructive amendment violates the Fifth Amendment's Grand Jury Clause and occurs when "the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." *Mickey*, 897 F.3d at 1182 (quoting *United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017)). There are two types of constructive amendments. First, where a complex of facts presented at trial distinctly differs from those set forth in the indictment. *Davis*, 854 F.3d at 603. Second, where the crime charged in the indictment is "substantially altered at trial, so it was impossible to know whether the grand jury would have indicted for the crime actually proved." *Id.* (quoting *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002)).

Here, when counsel for Mr. Hsu asked the government to confirm that, for Counts Two through Twelve, the trade secret was the specific part identified in the Indictment, *see* Ex. A (second paragraph), the government conceded in its June 22 letter that those counts reference "eleven components[.]" Ex. C at 8 (first paragraph after first bold heading). The government then asserted that the trade secrets are not the parts themselves (*as alleged in the Indictment*) but rather the "CAD files and BOM information for [those] eleven components[.]" *Id.* The government's letter listed as trade secrets several specific CAD files and BOM files that are not

referenced in the Indictment. *Compare id.* at 8-11 *with* ECF No. 1 at 9-10. And as noted, the government also has three times claimed that it could allege new trade secrets as trial approached, and claimed that neither the Indictment nor the government's June 22 and August 10 letters identified *all* the alleged trade secrets. *See* Ex. C at 11 (last paragraph of June 22 letter); Ex. E ("We do not agree that the list contained in our June 22, 2020 letter is necessarily exhaustive and complete."); Ex. F.

The government's stated approach invites an unconstitutional constructive amendment at trial by making it "impossible to know whether the grand jury would have indicted for the crime [they intend to] actually prove[]." *Davis*, 854 F.3d at 603. (It also exponentially complicates review of discovery and preparation for trial.) The grand jury included a table in the indictment listing only 11 alleged trade secrets. ECF No. 1 at 10. Yet the government's June 22 letter purports to add other alleged trade secrets, not identified in the Indictment, and then insists that even this expanded list is non-exhaustive. . Ex. C at 8, 11 (last paragraph). The August 10 letter subtracts some alleged trade secrets from the June 22 letter, but then adds several hundred more. Ex. F. In these circumstances, it is "impossible to know whether the grand jury would have indicted" based on these other alleged trade secrets. *See* 854 F.3d at 603.

In sum, the Indictment's plain text creates uncertainty about what alleged trade secrets will be at issue at trial. Far from clarifying the situation, the government's recent correspondence demonstrates that it does not feel constrained by the allegations in the Indictment and does not intend to be bound by the allegations of wrong-doing that were presented to the grand jury. In these circumstances, there is an untenable danger of an unconstitutional constructive amendment at trial. For these reasons, the Court should dismiss Counts Two through Twelve.

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II. Alternatively, the Court should order the government to file a Bill of Particulars.

A bill of particulars cannot save an invalid indictment. *Russell*, 369 U.S. at 769. But, if the Court finds the Indictment satisfies the constitutional requirements, the Court should order the government to file a bill of particulars, under Federal Rule of Criminal Procedure 7(f).

A bill of particulars has three functions: "[1] to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, [2] to avoid or minimize the danger of surprise at the time of trial, and [3] to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague, and indefinite for such purposes." *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979) (quoting *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976)).

The Indictment here suffers from all three deficiencies identified in *Giese*. First, as argued above, the indictment's lack of specificity identifying the alleged trade secrets impairs the defendants' ability to prepare for trial. Second, the Indictment presents a high risk of surprise at trial, especially considering that the government maintains that its trial presentation might include new alleged trade secrets that have not yet been identified. Last, the defendants cannot plead double jeopardy in a subsequent prosecution for similar offenses if they do not know precisely what trade secrets are at issue in this prosecution.

Accordingly, the defendants respectfully ask that the Court order the government to file a bill of particulars specifying the following two items, plus anything else the Court finds necessary:

1) For Count One, every alleged trade secret that was the target of the defendants' alleged conspiracy;
2) For Counts Two through Twelve, exactly what information constitutes the alleged trade secret.

See United States v. Trumpower, 546 F.Supp.2d 849, 852 (E.D.Cal. 2008) (ordering government to file bill of particulars identifying five specific things).

CONCLUSION

This case is about an alleged conspiracy to steal alleged trade secrets and actual theft of alleged trade secrets, yet the Indictment does not clearly inform the defendants or the Court what all the trade secrets are. An indictment that fails to provide such a crucial piece of information violates the Constitution's notice requirements, and the Court should dismiss it. Thus, the defendants respectfully ask the Court to either dismiss the Indictment or, alternatively, order the government to file a Bill of Particulars.

Respectfully submitted,

DATED: August 17, 2020

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