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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION  
15

16 UNITED STATES OF AMERICA,	)	CASE NO. CR 11-0573 JSW
	)	
17 Plaintiff,	)	GOVERNMENT'S TRIAL MEMORANDUM
	)	REGARDING PROPOSED DEFENSE THEORY OF
18 v.	)	THE CASE INSTRUCTIONS
	)	
19 WALTER LIEW, USA PERFORMANCE	)	
TECHNOLOGY, INC., AND ROBERT	)	
20 MAEGERLE,	)	
	)	
21 Defendants.	)	
	)	

23 The United States objects to the defense theory of the case instructions suggested by the  
24 defendants. A defendant is entitled to have the judge instruct the jury on his theory of defense, provided  
25 that it is supported by law and has some foundation in the evidence. *United States v. Lopez*, 885 F.2d  
26 1428, 1434 (9<sup>th</sup> Cir.1989). A failure to give such instruction is reversible error; but it is not reversible  
27 error to reject a defendant's proposed instruction on his theory of the case if other instructions, in their  
28

1 entirety, adequately cover that defense theory. *United States v. Mason*, 902 F.2d 1434, 1438 (9<sup>th</sup> Cir.  
2 1990).

3  
4 **A. Robert Maegerle**

5 Maegerle's proposed instruction is directly contrary to *United States v. Shipsey*, 363 F.3d 962,  
6 967-68 (9<sup>th</sup> Cir. 2004). *Shipsey* says:

7 Our case law is well settled that a criminal defendant has 'no right' to *any* good faith instruction when  
8 the jury has been adequately instructed with regard to the intent required to be found guilty of the crime  
9 charged, notwithstanding the normal rules governing 'theory of the defense' requests." *Id.* at 367 (citing  
10 five Ninth Circuit cases on point).

11 In his proposal to the government, Maegerle proposes an instruction that says simply that he  
12 "had a good faith belief that the information he provided to Walter Liew and USAPTI did not contain  
13 trade secrets. If you find that Defendant Maegerle acted in good faith, you must acquit him."

14 This instruction is precisely the instruction that the Court stated it would not give. It does no  
15 more than use the term "good faith," which is not mentioned in any of the statutes charged in this case.  
16 The specific intent instructions provided by the Court in connection with the charges are more than  
17 adequate to advise the jury of the law.

18  
19 **B. Walter Liew**

20 The government also objects to the defense instruction proposed by Walter Liew.

21 Liew proposed the following to the government:

22  
23 USAPTI and Walter Liew contend that they entered into commercial contracts to provide  
24 engineering services to Chinese companies for their 30K and 100K titanium dioxide  
25 projects. In performing these engineering services, USAPTI and Mr. Liew received  
26 designs and information from Robert Maegerle. Mr. Liew relied upon Mr. Maegerle's  
27 judgment and experience as to what Mr. Maegerle could disclose based on his many  
28 years of work at Dupont.

26 The government objects to this proposal for the following reasons:

- 27 (1) We object to the third sentence because it is not supported by the evidence. There is no  
28 evidence as to what Mr. Maegerle communicated to Mr. Liew regarding "what Mr. Maegerle

1 could disclose based on his many years of work at DuPont.” There no evidence that Liew  
2 believed that Maegerle was free to provide DuPont proprietary information to him or  
3 USAPTI. Liew relies *entirely* on two documents, Exhibits 694 and 1008. There is no  
4 contextual or corroborating evidence. There is no evidence that Liew wrote or read these  
5 documents. These documents concern only the ability of Maegerle to work after he left  
6 DuPont – neither says that he was permitted to share confidential or proprietary information  
7 or that he communicated such a thought to Liew. All of Liew’s own confidentiality  
8 agreements with his employees make clear that individuals may never share confidential or  
9 proprietary information after they leave their employment. In sum, there is not an adequate  
10 factual basis for this instruction and the Court would give it an inappropriate imprimatur by  
11 including it in the jury instructions.

12 (2) The third sentence runs into precisely the problem identified by *Shipsey*, which is a comment  
13 on the defendant’s good faith belief covered by the other instructions regarding specific  
14 intent. The proposed instruction is a stealth good faith instruction and should be treated as  
15 such.

16 (3) Counts 6, 7, and 9 do not involve information provided to Liew by Maegerle, so these counts  
17 should not be included.<sup>1</sup>

18 (4) Counts 1, 2, 3, and 5 are broader than just that which Maegerle may have provided to Liew  
19 and thus should be limited.

20 (5) The entire instruction, as drafted, is far more specific than a jury instruction should be. Jury  
21 instructions should focus on elements and should not discuss particular evidence. None of  
22 the other instructions focus on particular evidence. The focus suggested by Liew on  
23 particular evidence would make this instruction different than any of the other instructions  
24 and is thus inappropriate.

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<sup>1</sup> Defendants have indicated that they may change their proposal to reflect this objection.

1 **C. Preamble**

2 If the Court gives any theory of the defense instruction, the government requests the following  
3 preamble:

4 Defendants have requested that the Court give the following summary of their  
5 defense. This summary is provided by defendants, not the Court. The Court is relating it  
6 to you, but expresses no opinion on the merits or facts of this defense. It is not the role of  
7 the Court to comment on the facts and the Court's summary of the defense theory should  
8 not be considered either approval or disapproval of that theory.

9 The preambles proposed by the defense do not adequately distance the Court from the theories  
10 presented by the defense.

11 Respectfully submitted,

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