

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v. 01 CR. 429(GBD)

5 A. ALFRED TAUBMAN and
6 ANTHONY J. TENNANT,
7 Defendants.

-----x

8
9 December 4, 2001
9:45 o'clock a.m.
New York, N.Y.

10 Before:

11 HON. GEORGE B. DANIELS,
12
13 District Judge

14 APPEARANCES

15 UNITED STATES DEPARTMENT OF JUSTICE
16 Antitrust Division
17 BY: JOHN GREENE
18 PHILIP CODY
PATRICIA L. JANNACO
DEBRA BROOKES

19 DAVIS, POLK & WARDWELL
20 Attorneys for defendant Taubman
21 BY: ROBERT B. FISKE, JR.
SCOTT W. MULLER
22 JAMES P. ROUHANDEH
GAIL JAQUISH

23 o 0 o

24

25

1 (Trial resumed)

2 (In open court; jury not present)

3 THE COURT: Be seated please.

4 Good morning.

5 All of our jurors have just arrived, so we are ready
6 to go. I did make some minor changes and some corrections on
7 the final jury charge, basically some words.

8 Does anybody have any objection to those changes?

9 MS. JANNACO: No, your Honor.

10 MR. FISKE: No, your Honor.

11 THE COURT: Also, just for the record, I did not
12 receive from either side an instruction with regard to venue,
13 nor did I put in any instruction with regard to venue. I
14 assumed that that was deliberate and there is no reason that I
15 should have instructed jury on that issue?

16 MR. FISKE: Venue?

17 THE COURT: Yes.

18 MR. FISKE: No, we are not contesting that issue.

19 THE COURT: I just wanted that for the record.

20 Then we are ready to go. I will charge them and they
21 will begin their deliberations.

22 We are lining them up now so we can bring them out.

23 (Continued on next page)

24

25

1 (In open court-jury present)

2 THE COURT: Please be seated.

3 Good morning, ladies and gentlemen.

4 Now, you are about to enter your final duty, which is
5 to decide the fact issues in the case.

6 Before do you that, I will instruct you on the law.
7 And you must pay close attention to me now. I will go as
8 slowly as I can and be as clear as possible.

9 Now, I told you at the very start of the trial that
10 your principal function during the taking of testimony would
11 be to listen carefully and observe each witness who testified.
12 It has been obvious to me and to counsel that you have
13 faithfully discharged this duty. It is evident that you
14 followed the testimony with close attention.

15 I will ask you to give me that same careful
16 attention, as I instruct you on the law.

17 You have now heard all the evidence in the case as
18 well as the final arguments of the lawyers for the parties.

19 My duty at this point is to instruct you as to the
20 law. It is your duty to accept these instructions of law and
21 apply them to the facts as you determine them, just as it has
22 been my duty to preside over the trial and decide what
23 testimony and evidence is relevant under the law for your
24 consideration.

25 On these legal matters, you must take the law as I

1 give it to you. If any attorney has stated a legal principle
2 different from any that I state to you in my instructions, it
3 is my instructions that you must follow.

4 You should not single out any instructions as alone
5 stating the law, but you should consider my instructions as a
6 whole when you retire to deliberate in the jury room.

7 You should not, any of you, be concerned about the
8 wisdom of any rule that I state. Regardless of any opinion
9 that you may have as to what the law may be -- or ought to
10 be -- it would violate your sworn duty to base a verdict upon
11 any other view of the law than that which I give you.

12 Now, your final role is to pass upon and decide the
13 fact issues that are in the case. You, the members of the
14 jury, are the sole and exclusive judges of the facts. You
15 must pass upon the weight of the evidence; you determine the
16 credibility of the witnesses; you resolve such conflicts as
17 there may be in the testimony, and you draw whatever
18 reasonable inferences you decide to draw from the facts as you
19 have determined them.

20 I shall later discuss with you how to pass upon the
21 credibility -- or believability -- of the witnesses.

22 In determining the facts, you must rely upon your own
23 recollection of the evidence. What the lawyers have said in
24 their opening statements, in their closing arguments, in their
25 objections, or in their questions is not evidence. In this

1 connection, you should bear in mind that a question put to a
2 witness is never evidence. It is only the answer which is
3 evidence. But you may not consider any answer that I directed
4 you to disregard or that I directed struck from the record.
5 Do not consider such answers. Nor is anything I may have said
6 during the trial or may say during these instructions with
7 respect to a fact matter to be taken in substitution for your
8 own independent recollection. What I say is not evidence.

9 The evidence before you consists of the answers given
10 by the witnesses -- the testimony they gave, as you recall
11 it -- and the exhibits that were received in evidence.

12 Since you are the sole and exclusive judges of the
13 facts, I do not mean to indicate any opinion as to the facts
14 or what your verdict should be. The rulings I have made
15 during the trial are not any indication of my views of what
16 your decision should be as to whether or not the guilt of the
17 defendant has been proven beyond a reasonable doubt.

18 I also ask you to draw no inference from the fact
19 that upon occasion I asked questions of certain witnesses.
20 These questions were only intended for clarification or to
21 expedite matters and certainly were not intended to suggest
22 any opinions on my part as to the verdict you should render or
23 whether any of the witnesses may have been more credible than
24 any other witness. You are expressly to understand that the
25 court has no opinion as to the verdict you should render in

1 this case.

2 As to the facts, ladies and gentlemen, you are the
3 exclusive judges. You are to perform the duty of finding the
4 facts without bias or prejudice as to any party.

5 Let me again emphasize that a lawyer's question is
6 not evidence. At times, a lawyer may have incorporated into a
7 question a statement which assumed certain facts to be true
8 and asked the witnesses if the statement was true. If the
9 witness denies the truth of a statement and if there is no
10 evidence in the record proving that the assumed fact is true,
11 then you may not consider the fact to be true simply because
12 it was contained in the lawyer's question.

13 The famous example of this is a lawyer's question to
14 a married witness; "When did you stop beating your wife?" You
15 would not be permitted to consider as true the assumed fact
16 that he ever beat his wife, unless the witness himself
17 indicated he had, or unless there is some other evidence in
18 the record that he had beaten his wife.

19 In short, questions are not evidence; answers are.

20 In determining the facts, the jury is reminded that
21 before each member was accepted and sworn to act as a juror he
22 or she was asked questions concerning competency,
23 qualifications, fairness and freedom from prejudice and bias.
24 On the faith of those answers, the juror was accepted by the
25 parties. Therefore, those answers are as binding on each of

1 the jurors now as they were then, and shoe remain so, until
2 the jury is discharged from consideration of this case.

3 You are to perform the duty of finding the facts
4 without bias or prejudice to any party. You are to perform
5 your final duty in an attitude of complete fairness and
6 impartiality.

7 The case is important to the government, for the
8 enforcement of criminal laws is a matter of prime concern to
9 the community. Equally, it is important to the defendant, who
10 is charged with a serious crime.

11 The fact that the prosecution is brought in the name
12 of the United States of America entitles the government to no
13 greater consideration than that accorded to any other party to
14 a litigation. By the same taken, it is entitled to no less
15 consideration. All parties, whether government or
16 individuals, stand as equals at the bar of justice.

17 Your verdict must be based solely upon the evidence
18 developed at trial or the lack of evidence.

19 It would be improper for you to consider, in reaching
20 your decision as to whether the government sustained its
21 burden of proof, any personal feelings you may have about the
22 defendant's race, religion, national origin, sex or age. All
23 persons are entitled to the presumption of innocence and the
24 government has the burden of proof, as I will discuss in a
25 moment.

1 It would be equally improper for you to allow any
2 feelings you might have about the nature of the crime charged
3 to interfere with your decision-making process.

4 To repeat, your verdict must be based exclusively
5 upon the evidence or the lack of evidence in the case.

6 Under your oath as jurors you are not to be swayed by
7 sympathy. You are to be guided solely by the evidence in this
8 case. The crucial, hard-core question that you must ask
9 yourselves as you sift through the evidence is: Has the
10 government proven the guilt of the defendant beyond a
11 reasonable doubt?

12 It is for you alone to decide whether the government
13 has proven that the defendant is guilty of the crime charged
14 solely on the basis of the evidence and subject to the law as
15 I charge you. It must be clear to you that once you let fear
16 or prejudice, or bias or sympathy interfere with your thinking
17 there is a risk that you will not arrive at a true and just
18 verdict.

19 If you have a reasonable doubt as to the defendant's
20 guilt, you should not hesitate for any reason to find a
21 verdict of not guilty. But on the other hand, if you should
22 find that the government has met its burden of proving the
23 defendant's guilt beyond a reasonable doubt, you should not
24 hesitate because of sympathy or any other reason to render a
25 verdict of guilty.

1 Your verdict must be based solely on the evidence
2 presented in the this courtroom in accordance with my
3 instructions. You must completely disregard any report which
4 you may have read in the press, seen on television, or heard
5 on the radio. Indeed, it would be unfair to consider such
6 reports, since they are not evidence and the parties have no
7 opportunity to contradict their accuracy or otherwise explain
8 them. In short, it would be a violation of your oath as
9 jurors to allow yourselves to be influenced in any manner by
10 such publicity.

11 You are about to be asked to decide whether or not
12 the government has proven beyond a reasonable doubt the guilt
13 of the defendant on trial. You are not being asked whether
14 any other person has been proven guilty. Your verdict should
15 be based solely on upon the evidence or lack of evidence as to
16 the defendant on trial, in accordance with my instructions and
17 without regard to whether the guilt of other people has or has
18 not been proven.

19 Anthony J. Tennant who is named in the indictment is
20 not on trial here. You are not to be concerned with that
21 individual, nor are you to speculate about the reasons why he
22 is not part of this trial, and this fact should not affect or
23 influence your verdict with respect to the Defendant A. Alfred
24 Taubman. You must base your verdict as to this defendant
25 solely on the basis of the evidence or lack of evidence

1 against him.

2 You may not draw any inference, favorable or
3 unfavorable, towards the government or the defendant on trial,
4 from the fact that certain persons were not named as
5 defendants in this case. The circumstances that any persons
6 were not named in this case must play no part in your
7 deliberations.

8 Whether a person was named as a defendant in this
9 case is a matter within the sole discretion of the United
10 States Department of Justice and the grand jury. Therefore,
11 you may not consider it in any way in reaching your verdict as
12 to the defendant on trial.

13 It is the duty duty of the attorney for each side of
14 a case to object when the other side offers testimony or other
15 evidence which the attorney believes is not properly
16 admissible. Counsel also have the right and the duty to ask
17 the court to make rulings of law and to request conferences at
18 the side bar out of the hearing of the jury. All those
19 questions of law must be decided by me, the court. You should
20 not not show any prejudice against an attorney or his or her
21 client because the attorney objected to the admissibility of
22 evidence, or asked for a conference out of the hearing of the
23 jury, or asked the court if a ruling on the law.

24 As I already indicated, my rulings on the
25 admissibility of evidence do not indicate any opinion about

1 the weight or effect of such evidence. You are the sole
2 judges of the credibility of all witnesses and the weight and
3 effect of all evidence.

4 Q. Now, the fact that one party called more witnesses or
5 introduced more testimony than the other does not mean that
6 you should necessarily find the facts in favor of the side
7 offering the most witnesses. By the same token, you do not
8 have to accept the testimony of any witness who has not been
9 contradicted or impeached, if you find the witness not to be
10 credible. You also have to decide which witnesses to believe
11 and which facts are true. To do this you must look at all the
12 evidence, drawing upon your own common sense and personal
13 experience.

14 In a moment, I will discuss the criteria for
15 evaluating the credibility; for the moment, however, you
16 should keep in mind that the burden of proof is always on the
17 government and the defendant is not required to call any
18 witnesses or offer any evidence, since he is presumed to be
19 innocent.

20 (Continued on next page)

21
22
23
24
25

1 Now, there are two types of evidence which you may
2 properly use in deciding whether a defendant is guilty or not
3 guilty. One type of evidence is called direct evidence.
4 Direct evidence is where a witness testified to what he or she
5 saw, heard or observed. In other words, what a witness
6 testifies about what is known to him or her of his or her own
7 knowledge by virtue of his or her own senses. What he or she
8 sees, feels, touches, hears, that is called direct evidence.

9 Circumstantial evidence is evidence which tends to
10 prove a disputed fact by proof of other facts. There's a
11 simple example of circumstantial evidence which is often used
12 in this courthouse. Assume that when you came into the
13 courtroom this morning the sun was shining and it was a nice
14 day. Assume that the courtroom blinds were drawn and you
15 cannot look outside.

16 As you were sitting here, someone walked in with an
17 umbrella which was dripping set and someone then walked in
18 with a raincoat which was also dripping wet. Now, you cannot
19 look outside of the courtroom and you cannot see whether or
20 not it is raining, so you have no direct evidence of that
21 fact. But on the combination of facts which I have asked you
22 to assume it would be reasonable and logical for you to
23 conclude that it had been raining that. That is all there is
24 to circumstantial evidence. You infer on the basis of reason
25 and experience and common sense from an established fact the

1 existence or the nonexistence of some other fact.

2 Circumstantial evidence is of no less value than
3 direct evidence for it is the general rule that the law makes
4 no distinction between direct and circumstantial evidence but
5 simply requires that before convicting a defendant the jury
6 must be satisfied of the defendant's guilt beyond a reasonable
7 doubt from all of the evidence in the case.

8 The evidence in this case consists of the sworn
9 testimony of the witnesses and the exhibits received in
10 evidence. Exhibits which have been marked for identification
11 but not received may not be considered by you as evidence.
12 Only those exhibits received in evidence may be considered as
13 evidence. You should consider the evidence in light of your
14 common sense and experience and you may draw reasonable
15 inferences from the evidence. Anything you may have seen or
16 heard about the case outside of the courtroom, again, is not
17 evidence and must be totally disregarded.

18 The government and the defense have both presented
19 exhibits in the form of charts and summaries. I decided to
20 admit some of these charts and summaries in place of or
21 together with the underlying documents that they represent in
22 order to save time and avoid unnecessary inconvenience. You
23 should consider the charts and summaries admitted into
24 evidence as you would any other evidence.

25 Other charts and summaries not admitted into evidence

1 were shown you to in order to make other evidence or testimony
2 more meaningful and to aid you in considering the evidence.
3 They are no better than the testimony or the documents upon
4 which they are based and are not themselves independent
5 evidence. Therefore, you are to give no greater consideration
6 to these schedules or summaries than you would give to the
7 evidence upon which they are based.

8 It is for you to decide whether the charts, schedules
9 or summaries correctly present the information contained in
10 the testimony and in the exhibits on which they were based.
11 You are entitled to consider the charts, schedules and
12 summaries if you find that they are of assistance to you in
13 analyzing the evidence and understanding the evidence.

14 The defendant did not testify in this case. Under
15 our Constitution he has no obligation to testify or to present
16 any other evidence because it is the prosecution's burden to
17 prove the defendant guilty beyond a reasonable doubt. That
18 burden remains with the prosecution throughout the entire
19 trial and never shifts to the defendant. The defendant is
20 never required to prove that he is innocent.

21 You may not attach any significance to the fact that
22 the defendant did not testify. No adverse inference against
23 him may be drawn by you because he did not take the witness
24 stand. You may not consider this against the defendant in any
25 way in your deliberations in the jury room.

1 During the trial you have heard the attorneys use the
2 term inference and in their arguments they have asked you to
3 infer on the basis of basis of reason, experience and common
4 sense from one or more established facts the existence of some
5 other facts. An inference is not a suspicion or a guess. It
6 is a reasoned logical decision to conclude that a disputed
7 fact exists on the basis of other facts which you know exist.

8 There are times when different inferences may be
9 drawn from different facts, whether proved by direct or
10 circumstantial evidence. The government asks you to draw one
11 set of inferences while the defense asks you to draw another.
12 It is for you and for you alone to decide what inferences you
13 will draw.

14 The process of drawing inferences from facts in
15 evidence is not a matter of guesswork or speculation. An
16 inference is a deduction or conclusion which you the jury are
17 permitted to draw, but not required to draw, from the facts
18 which have been established by either direct or circumstantial
19 evidence.

20 In drawing inferences you should exercise your common
21 sense. So while you are considering the evidence presented to
22 you, you are permitted to draw from the facts, which you find
23 to be proven, such reasonable inference as would be justified
24 in light of your experience.

25 Here again, let me remind you that, whether based

1 upon direct or circumstantial evidence or upon the logical,
2 reasonable inferences drawn from such evidence, you must be
3 satisfied of the guilt of the defendant beyond a reasonable
4 doubt before you may convict.

5 You had an opportunity to observe all of the
6 witnesses. It is now your job to decide how believable each
7 witness was in his or her testimony. You are the sole judges
8 of the credibility of each witness and the importance of his
9 or her testimony.

10 It must be clear to you by now that you are being
11 called upon to resolve various factual issues under the charge
12 in the indictment and in the face of the very different
13 pictures painted by the government and the defense which
14 cannot be reconciled. You will now have to decide where the
15 truth lies, and an important part of that decision will
16 involve making judgments about the testimony of the witnesses
17 you have listened to and observed. In making those judgments,
18 you should carefully scrutinize all of the testimony of each
19 witness, the circumstances under which each witness testified,
20 and any other matter in evidence which may help you in
21 deciding the truth and the importance of each witness's
22 testimony.

23 Your decision whether or not to believe a witness may
24 depend on how that witness impressed you. Was the witness
25 candid, frank and forthright? Or did the witness seem as if

1 or she was hiding something, being evasive or suspect in some
2 way? How did the way the witness testified on direct
3 examination compare with the way the witness testified on
4 cross-examination? Was the witness consistent in his or her
5 testimony or did he or she contradict himself or herself? Did
6 the witness appear to know what he or she was talking about,
7 and did the witness strike you as someone who was trying to
8 report his or her knowledge accurately?

9 How much you choose to believe a witness may be
10 influenced by the witness's bias. Does the witness have a
11 relationship with the government or the defendant which may
12 affect how or she testified? Does the witness have some
13 incentive, loyalty or motive that might cause him or her to
14 shade the truth, or does the witness have some bias or
15 prejudice or hostility that may have caused the witness,
16 consciously or not, to give you something other than a
17 completely accurate account of the facts he or she testified
18 to?

19 Even if a witness was impartial, you should consider
20 whether the witness had an opportunity to observe the facts he
21 or she testified about and you should also consider the
22 witness's ability to express himself or herself. Ask yourself
23 whether the witness's recollection of the facts stand up in
24 light of all of the other evidence. In other words, what you
25 must try to do in deciding credibility is to size up a person

1 in light of his or her demeanor, the explanations given and in
2 light of all the other evidence in the case, just as you would
3 in any important matter where you are trying to decide if a
4 person is truthful, straightforward and accurate in his or her
5 recollection. In deciding the question of credibility,
6 remember that you should use your common sense, your good
7 judgment and your experience.

8 In evaluating the credibility of witnesses you should
9 take into account any evidence that the witness who testified
10 may benefit in some way from the outcome of this case. Such
11 an interest in the outcome creates a motive to testify falsely
12 and may sway the witness to testify in a way that advances his
13 or her own interests. Therefore, if you find that any witness
14 whose testimony you are considering may have an interest in
15 the outcome of this trial, then you should bear that factor in
16 mind when evaluating credibility of his or her testimony and
17 accept it with great care.

18 This is not suggest that every witness who has an
19 interest in the outcome of a case will testify falsely. It is
20 for you to decide to what extent, if at all, the witness's
21 interest has affected or colored his or her testimony.

22 The government has called as witnesses people who are
23 named by the prosecution as co-conspirators but who were not
24 charged here as defendants.

25 For this reason you should exercise caution in

1 evaluating their testimony and scrutinize it with great care.
2 You should consider whether they have an interest in this case
3 and whether they have a motive to testify falsely. In other
4 words, ask yourself whether they have a stake in the outcome
5 of this trial. As I have indicated, their testimony may be
6 accepted by you if you believe it to be true and it is up to
7 you, the jury, to decide what weight, if any, to give to the
8 testimony of these witnesses.

9 You have heard the testimony of a witness who has
10 been promised that in exchange for testifying truthfully,
11 completely, and fully he will not be prosecuted for any crimes
12 he may have admitted either here in court or in interviews
13 with the prosecutors. This promise was not a formal order of
14 immunity by the court but was arranged directly between the
15 witness and the government.

16 The government is permitted to make these kinds of
17 promises and it is entitled to call as witnesses people to
18 whom these promises are given. You are instructed that you
19 may convict the defendant on the basis of such a witness's
20 testimony alone if you find that his testimony proves the
21 defendant guilty beyond a reasonable doubt.

22 However, the testimony of a witness who has been
23 promised that he will not be prosecuted should be examined by
24 you with greater care than the testimony of an ordinary
25 witness. You should scrutinize it closely to determine

1 whether or not it is colored in such a way as to place guilt
2 on the defendant in order to further the witness's own
3 interests; for such a witness, confronted with the realization
4 that he can win his own freedom by helping to convict another,
5 has a motive to falsify his testimony. Such testimony should
6 be received by you with suspicion and you may give it such
7 weight, if any, as you believe it deserves.

8 You have heard testimony from a government witness
9 who pled guilty to charges arising out of the same facts as
10 this case. You are instructed that you are to draw no
11 conclusions or inferences of any kind about the guilt of the
12 defendant on trial from the fact that a prosecution witness
13 pled guilty to similar charges. That witness's decision to
14 plead guilty was a personal decision about her own guilt. It
15 may not be used by you in any way as evidence against or
16 unfavorable to the defendant on trial here.

17 In this case there's has been testimony from a
18 government witness who pled guilty after entering into an
19 agreement with the government to testify. There is evidence
20 that the government agreed not to bring any further criminal
21 charges against the witness in exchange for the witness's
22 agreement to plead guilty and testify at this trial against
23 the defendant. The government also promised to bring the
24 witness's cooperation to the attention of the sentencing
25 court.

1 The government is permitted to enter into this kind
2 of plea agreement. You in turn may accept the testimony of
3 such a witness and convict the defendant on the basis of this
4 testimony alone if it convinces you of the defendant's guilt
5 beyond a reasonable doubt.

6 However, you should bear in mind that a witness who
7 has entered into such an agreement has an interest in this
8 case different than any ordinary witness. A witness who
9 realizes that he or she may be able to obtain his or own
10 freedom or receive a lighter sentence by giving testimony
11 favorable to the prosecution has a motive to testify falsely.
12 Therefore, you must examine the witness's testimony with
13 caution and weigh it with care. If after scrutinizing the
14 witness's testimony you decide to accept it, you may give it
15 whatever weight if any you find it deserves.

16 You have heard evidence that a witness made a
17 statement on an earlier occasion which counsel argues is
18 inconsistent with the witness's trial testimony. Evidence of
19 a prior inconsistent statement is not to be considered by you
20 as affirmative evidence bearing on the defendant's guilt.
21 Evidence of the prior inconsistent statement was placed before
22 you for the more limited purpose of helping you decide whether
23 to believe the trial testimony of the witness who contradicted
24 himself or herself. If you find that the witness made an
25 earlier statement that conflicts with his or her trial

1 testimony you may consider that fact in deciding how much of
2 his or her trial testimony if any to believe.

3 In making this determination, you may consider
4 whether the witness purposely made a false statement or
5 whether it was an innocent mistake, whether the inconsistency
6 concerns an important fact or whether it had to do with a
7 small detail, whether the witness had an explanation for the
8 inconsistency and whether that explanation appealed to your
9 common sense. That is exclusively your duty based upon all
10 the evidence and your own good judgment to determine whether
11 the prior statement was inconsistent and, if so, how much if
12 any weight to be given to the inconsistent statement in
13 determining whether to believe all or part of the witness's
14 testimony.

15 The defendant has called witnesses who have testified
16 to their opinion of his good character for honesty and
17 truthfulness and his good reputation in the community. This
18 testimony is not to be taken by you as the witness's opinion
19 as to whether the defendant is guilty or not guilty. That
20 question is for you alone to determine. You should, however,
21 consider the character evidence together with all the other
22 facts and all the other evidence in the case in determining
23 whether the defendant is guilty or not guilty of the charge.

24 Such character evidence alone may indicate to you
25 that it is improbable that a person of good character and

1 reputation would commit the offense charged. Accordingly,
2 after considering all the evidence, including testimony about
3 the defendant's good character and reputation, you find that a
4 reasonable doubt has been created you must acquit him of the
5 charge.

6 On the other hand, if after considering all of the
7 evidence including that of the defendant's character and
8 reputation you are satisfied beyond a reasonable doubt that
9 the defendant is guilty you should not acquit the defendant
10 merely because you believe he is a person of good character or
11 reputation.

12 You have heard testimony from expert witnesses. An
13 expert is allowed to express his or her opinion on those
14 matters about which he or she has special knowledge and
15 training. Expert testimony is presented to you on the theory
16 that someone who is experienced in the field can assist you in
17 understanding the evidence or in reaching an independent
18 decision on the facts.

19 In weighing the expert's testimony you may consider
20 the expert's qualifications, his or her opinions, his or her
21 reasons for testifying, as well as all of the other
22 considerations that ordinarily apply when you are deciding
23 whether or not to believe a witness's testimony. You may give
24 the expert testimony whatever weight, if any, you find it
25 deserves in light of all of the evidence in this case.

1 You should not, however, accept an expert's testimony
2 merely because he or she an expert; nor should you substitute
3 it for your own reason, judgment and common sense. The
4 determination of the facts in this case rests solely with you.

5 The question of possible punishment of defendant is
6 of no concern to the jury and should not in any sense enter
7 into or influence your deliberations. The duty of imposing
8 sentence rests exclusively upon the court. Your function is
9 to weigh the evidence in the case and to determine whether or
10 not the defendant is guilty beyond a reasonable doubt solely
11 upon the basis of such evidence. Under your oath as jurors,
12 you cannot allow consideration of the punishment which may be
13 imposed upon the defendant if he is convicted to influence
14 your verdict in any way or in any sense enter into your
15 deliberations.

16 Although the defendant has been indicted, you must
17 remember that an indictment is only an accusation, it is not
18 evidence. The defendant has pled not guilty to that
19 indictment.

20 As a result the defendant's plea of not guilty, the
21 burden is on the prosecution to prove guilt beyond a
22 reasonable doubt. This burden never shifts to a defendant for
23 the simple reason that the law never imposes upon a defendant
24 in a criminal case the burden of proof or duty of calling any
25 witnesses or producing any evidence.

1 The law presumes the defendant to be innocent of all
2 charges against him. I therefore instruct you that the
3 defendant is presumed by you to be innocent throughout your
4 deliberations until such time, if ever, you as a jury are
5 satisfied that the government has proven him guilty beyond a
6 reasonable doubt.

7 The defendant begins the trial here with a clean
8 slate. This presumption of innocence alone is sufficient to
9 acquit a defendant unless you as jurors are unanimously
10 convinced beyond a reasonable doubt of his guilt after a
11 careful and impartial consideration of all of the evidence in
12 this case. If the government fails to sustain its burden you
13 must find the defendant not guilty.

14 This presumption was with the defendant when trial
15 began and remains with him even now as I speak to you and will
16 continue with the defendant into your deliberations unless and
17 until, as I have said, you are convinced that the government
18 has proven his guilt beyond a reasonable doubt.

19 I've said that the government must prove the
20 defendant's guilt beyond a reasonable doubt. The question
21 naturally is, what is a reasonable doubt? The words almost
22 define themselves. It is a doubt based upon reason and common
23 sense. It is a doubt that a reasonable person has after
24 carefully weighing all of the evidence. It is a doubt which
25 would cause a reasonable person to hesitate to act in a matter

1 of importance in his or her personal life. Truth beyond a
2 reasonable doubt must therefore be proof of such a convincing
3 character that a reasonable person would not hesitate to act,
4 to rely and act upon it in the most important of his or her
5 own affairs. A reasonable doubt is not a caprice or whim, it
6 is not a speculation or suspicion; it is not an excuse to
7 avoid the performance of an unpleasant duty, and it is not
8 sympathy.

9 In a criminal case, the burden is at all times upon
10 the government to prove guilt beyond a reasonable doubt. The
11 law does not require the government to prove guilt beyond all
12 possible doubt. Proof beyond a reasonable doubt is sufficient
13 to convict. This burden never shifts to the defendant, which
14 means that it is always the government's burden to prove each
15 of the elements of the crime charged beyond a reasonable
16 doubt.

17 If after fair and impartial consideration of all of
18 the evidence you have a reasonable doubt, it is your duty to
19 acquit the defendant. On the other hand, if after fair and
20 impartial consideration of all of the evidence you are
21 satisfied of the defendant's guilt beyond a reasonable doubt
22 you should vote to convict.

23 With these preliminary instructions in mind let us
24 turn to the charge against the defendant as contained in the
25 indictment. I remind you that an indictment itself is not

1 evidence. It merely describes the charge made against the
2 defendant. It is an accusation. It may not be considered by
3 you as any evidence of the guilt of the defendant.

4 In reaching your determination of whether the
5 government has proved the defendant guilty beyond a reasonable
6 doubt you may consider only the evidence introduced or lack of
7 evidence.

8 The indictment in this case contains one count. The
9 charge arises under a federal law known as the Sherman Act.
10 The indictment charges that, from at least as early as
11 February of 1993 and continuing until at least December of
12 1999, the defendant and co-conspirators engaged in a
13 combination and conspiracy in unreasonable restraint of
14 interstate and foreign trade and commerce in violation of
15 Section 1 of the Sherman Act, 15 United States Code Section 1.
16 It charges that the combination and conspiracy consisted of a
17 continuing agreement, understanding and concert of action
18 among the defendant and co-conspirators, the substantial term
19 of which was to fix auction commission rates charged to
20 sellers in the United States and elsewhere.

21 Both the government and defense have elicited
22 testimony concerning other alleged agreements on such topics
23 of interest free advances, charitable contributions,
24 introductory commissions, guarantees, insurance charges and
25 the buyer's premium. I want to caution you that the

1 indictment does not charge the defendant with any crime with
2 respect to these subjects. The sole charge in this case is
3 that the defendant participated in a conspiracy to fix auction
4 commission rates charged to sellers. Accordingly, you may
5 consider evidence of other alleged agreements only to the
6 extent you believe it bears on that charge.

7 The purpose of the Sherman Act is to preserve and
8 encourage free and open business competition so that the
9 public may receive better goods and services at a lower cost.
10 Congress has determined that price restraints among
11 competitors are bad for commerce and therefore that
12 arrangements among competitors which attempt to fix prices are
13 illegal. It does not matter whether the prices agreed upon
14 are reasonable. Nor does it matter whether the prices are
15 actually affected by the agreement. Nor does it matter that
16 the prices are fixed in order to achieve some socially
17 desirable goal.

18 Thus, a price-fixing conspiracy cannot be justified
19 on the ground that it was formed to prevent or halt ruinous
20 competition or to eliminate the evils of price cutting or to
21 give each competitor what the conspirators think is its fair
22 share of the market. The law forbids competitors from
23 entering into any agreement which has as its purpose or
24 predictable effect the fixing or restraining of prices.

25 The defendant is charged have violating Section 16

1 the Sherman Antitrust Act by conspiring to fix auction
2 commission rates charged to sellers. That law provides that
3 "every contract, combination or conspiracy in restraint of
4 trade is declared illegal."

5 There are three elements the government must prove
6 beyond a reasonable doubt to convict the defendant of violates
7 Section 1 of the Sherman Act. First, that the conspiracy to
8 fix auction commission rates charged to sellers existed at or
9 about the time stated in the indictment. In this case, from
10 at least as early as February 1993 until at least December of
11 1999. Second, that the defendant knowingly and intentionally
12 became a member of that conspiracy, and third, that the
13 defendant joined that conspiracy with the intent to
14 unreasonably restrain competition.

15 As I have just told you, the first element that the
16 government must prove beyond a reasonable doubt is that the
17 price-fixing conspiracy charged in the indictment actually
18 existed. This is important because the part of the Sherman
19 Act we are concerned with outlaws certain joint activities by
20 competitors but not actions taken by single firm or
21 corporation.

22 A conspiracy is an agreement between two or more
23 persons to accomplish an unlawful purpose or to accomplish a
24 lawful purpose by unlawful means. The agreement itself is a
25 crime. Whether the agreement is ever carried out or whether

1 it succeeds or fails does not matter. Indeed the agreement
2 need not be consistently followed. Conspirators may cheat on
3 each other and still be conspirators. It is the agreement to
4 do something that violates the law that is the essence of a
5 conspiracy.

6 The government must prove, beyond a reasonable doubt,
7 that the particular conspiracy the defendant is charged with
8 participating in existed and existed at or about the time
9 alleged in the indictment. If you find that the conspiracy to
10 fix auction commission rates charged to sellers did not exist,
11 you cannot find the defendant guilty of the crime charged.
12 This is so even if you find that some conspiracy other than
13 the one charged in the indictment existed, and even though any
14 other conspiracy you may find existed had a purpose and or
15 membership similar to the conspiracy charged in the
16 indictment.

17 The first thing that is required for a conspiracy is
18 at least two separate parties. This means that in order to
19 find a conspiracy you must find that at least one or more
20 persons agreed with one or more other persons to fix auction
21 commission rates charged to sellers.

22 A corporation cannot conspire with its own officers
23 or employees. Nor can a corporation's employees conspire
24 among themselves. This is because a corporation, its officers
25 and employees are so closely related that they are deemed to

1 share a common purpose and are considered by the law to be one
2 actor. And as I have told you, a single actor cannot violate
3 this part of the Sherman Act.

4 In order to prove the conspiracy, it is not necessary
5 for the government to present proof of verbal or written
6 agreements. Very often in cases like this, such evidence is
7 not available. You may find that the required agreement or
8 conspiracy existed from the course of dealing between or among
9 the individuals through the words they exchanged or from their
10 acts alone. What the government must prove beyond a
11 reasonable doubt is that the members of the conspiracy in some
12 manner came to a mutual understanding to try to fix or attempt
13 to fix auction commission rates charged to sellers.

14 The government does not have to show that all the
15 means or methods which were agreed upon to accomplish this
16 goal were actually used. Nor does the government have to show
17 that all of the persons alleged to have been members of the
18 claimed conspiracy were in fact members. What the government
19 must prove is that the claimed conspiracy was knowingly
20 formed; that it was formed with the intention to accomplish by
21 joint action the fixing of auction commission rates charged to
22 sellers, and that the membership of the conspiracy was
23 essentially that claimed by the government.

24 The second element the government must prove beyond a
25 reasonable doubt is that the defendant joined the conspiracy

1 charged in the indictment knowingly and intentionally. That
2 is, the government must prove that the defendant knowingly
3 joined the conspiracy to fix auction commission rates charged
4 to sellers with the intent to aid or advance the purpose of
5 the conspiracy and not because of a mistake, accident or some
6 other innocent reason.

7 A person may become a member of a conspiracy without
8 full knowledge of all of the details of the conspiracy. It is
9 not necessary that the defendant be fully informed as to all
10 of the details of the conspiracy or its scope in order to be a
11 member. A person who knowingly and intentionally directs
12 another to implement the details of the conspiracy is just as
13 responsible as if he participated in every part of it.
14 Knowledge of the essential nature of the plan is enough.

15 On the other hand, a person who has no knowledge of a
16 conspiracy but who happens to act in a way which furthers some
17 purpose of the conspiracy does not thereby become a member of
18 the conspiracy. Similarly, knowledge of a conspiracy without
19 participation in the conspiracy is also insufficient to make a
20 person a member of the conspiracy.

21 A person who knowingly and intentionally joins an
22 existing conspiracy or participates only in part of a
23 conspiracy with knowledge of the overall conspiracy is just as
24 responsible as if he had been one of the originators of the
25 conspiracy or had participated in every part of it.

1 Your determination whether the defendant knowingly
2 and intentionally joined the conspiracy must be based solely
3 on the actions of the defendant. You should not consider what
4 others may have said or done. Membership of the defendant in
5 this conspiracy must be established by evidence of his own
6 conduct -- by what he said or did.

7 If you find that the defendant joined the conspiracy,
8 then the defendant is presumed to remain a member of the
9 conspiracy and is responsible for all actions taken in
10 furtherance of the conspiracy until the conspiracy has been
11 completed or abandoned or until the defendant has withdrawn
12 from the conspiracy.

13 As I've told you, the antitrust laws involved in this
14 case are concerned only with joint actions and agreements
15 among or between competitors, not with actions taken
16 independently by single competitor. The independent actions
17 of a person or business can never constitute a restraint of
18 trade in violation of the Sherman Act.

19 Thus, a business may choose to charge prices
20 identical to those charged by its competitors and still not
21 violate the Sherman Act. Indeed, a business may adopt
22 policies and prices identical to those of its competitors as
23 long as such actions are the result of an independent business
24 decision and not the result of an agreement or understanding
25 among competitors.

1 The third element that the government must prove
2 beyond a reasonable doubt is that the defendant joined the
3 conspiracy with the intent to unreasonably restrain
4 competition. The indictment charges the defendant with price
5 fixing. Because price fixing agreements always unreasonably
6 restrain competition, if you find that the charged conspiracy
7 was a price fixing conspiracy, that is, a conspiracy to fix
8 auction commission rates charged to sellers, and also find
9 that the defendant knowingly and intentionally joined that
10 conspiracy then you may find that the defendant joined the
11 conspiracy with the intent to unreasonably restrain
12 competition.

13 It is thus important to understand what a price
14 fixing conspiracy is. A price fixing conspiracy is an
15 agreement or mutual understanding between two or more
16 competitors to fix, control, raise, lower, maintain or
17 stabilize the prices charged for products or services.
18 Although a price fixing conspiracy is usually thought of as an
19 agreement among competitors to establish the same price,
20 prices may be fixed in other ways. Prices are fixed if the
21 range or level of prices is agreed upon or if, by agreement,
22 various formulas are used in computing them. Put simply,
23 prices are fixed when they are agreed upon. Thus, any
24 agreement to fix auction commission rates charged to sellers
25 is a price fixing conspiracy.

1 As I have told you, the goal of every price fixing
2 conspiracy is the elimination of one form of competition,
3 competition over price. Therefore, if you find that the
4 charged price fixing conspiracy existed it does not matter
5 whether the prices agreed upon were high, low, reasonable or
6 unreasonable. What matters is that the prices were fixed.

7 Moreover, it is no defense that the conspirators
8 actually competed with each other in some manner or they did
9 not conspire to eliminate all competition. Every conspiracy
10 to fix prices unlawfully and unreasonably restrains trade
11 regardless of the motives of the conspirators or any economic
12 justification they may offer.

13 Similarly, if you find that the defendant did
14 knowingly and intentionally enter into the charge agreement to
15 fix auction commission rates to sellers, you may find the
16 defendant intended to unreasonably restrain trade even if you
17 find that the defendant, or any of the other conspirators, did
18 not observe the agreement. What is important is that the
19 defendant entered into the agreement. The agreement is the
20 crime even if it is never carried out.

21 Of course, if the defendant never acted in accordance
22 with the agreement, that is evidence you should consider in
23 determining whether the defendant ever joined the charged
24 conspiracy in the first place.

25 You will recall that I admitted into evidence against

1 the defendant the acts and statements of others because those
2 acts and statements were committed by persons who, the
3 government charges, were also confederates or co-conspirators
4 of the defendant on trial.

5 The reason for allowing this evidence to be received
6 against the defendant has to do with the nature of the crime
7 of conspiracy. Conspiracy is often referred to as a
8 partnership in crime. Thus, as in other types of
9 partnerships, when people enter into a conspiracy to
10 accomplish an unlawful end, each and every member becomes an
11 agent for the other conspirators in carrying out the
12 conspiracy.

13 Accordingly, the reasonably foreseeable acts,
14 declarations, statements and omissions of any member of the
15 conspiracy and in furtherance of the common purpose of the
16 conspiracy are deemed under the law to be the acts of all of
17 the members and all of the members are responsible for such
18 acts, declarations, statements, and omissions.

19 If you find beyond a reasonable doubt that the
20 defendant whose guilt you are considering was a member of the
21 conspiracy charged in the indictment, then any acts done or
22 statements made in furtherance of the conspiracy by persons
23 also found by you to have been members of that conspiracy may
24 be considered against the defendant. This is so even if such
25 acts are were done and statements were made in the defendant's

1 absence and without his knowledge.

2 However, before you may consider the statements or
3 acts of a conspirator in deciding the issue of the defendant's
4 guilt, you must first determine that the acts and statements
5 were made during the existence and in furtherance of the
6 unlawful scheme. If the acts were done or the statements made
7 by someone whom you do not find to be a member of the
8 conspiracy or if they were not done or said in furtherance of
9 the conspiracy, they may be considered by you as evidence only
10 against the member who did or said them.

11 Ladies and gentlemen, you are about to go into the
12 jury room and begin your deliberations. If during those
13 deliberations you want to see any of the exhibits they will be
14 sent to you in the jury room upon request. If you want to any
15 of the testimony read back that will also be done here in open
16 court.

17 Please remember that it is not always easy to locate
18 what you might want, so please be as specific as you possibly
19 can in requesting exhibits or portions of the testimony which
20 you may want. Your requests for exhibits or testimony, in
21 fact any communication with the court, should be made to me in
22 writing, signed by your foreperson, given to one of the
23 marshals. I will respond to any question or request you have
24 as promptly as possible by having you return to the courtroom
25 so I can speak with you in person or sending into the jury

1 room whatever you have requested.

2 In any event, do not tell me or anyone else how the
3 jury stands on the issue of whether or not the defendant's
4 guilt has been proven until after a unanimous verdict has been
5 reached.

6 When you get into the jury room, before you begin
7 your deliberations you should select someone to be your
8 foreperson. The foreperson will be responsible for signing
9 all the communications to the court and for handing them to
10 the marshal during deliberations. So don't write me separate
11 notes. If there is something you want to say, discuss it,
12 have the foreperson sign the note and send it out through the
13 marshal and that's the procedure we want to follow with all
14 the notes.

15 The government, to prevail, must prove the essential
16 elements by the required degree of proof as already explained
17 in these instructions. If it has succeeded, your verdict
18 should be guilty; if it has failed, it should be not guilty.
19 To report a verdict it must be unanimous.

20 Your function is to weigh the evidence in the case
21 and determine whether or not the defendant has been proven
22 guilty solely upon the basis of such evidence. Each juror is
23 entitled to his or her opinion; each should, however, exchange
24 views with his or her fellow jurors. That is the very purpose
25 of jury deliberations, to discuss and consider the evidence,

1 to listen to the arguments of fellow jurors, to present your
2 individual views, to consult with one another and to reach an
3 agreement based solely and wholly on the evidence if you can
4 do so without violence to your own individual judgment.

5 Each of you must decide the case for yourself after
6 consideration with your fellow jurors of the evidence in the
7 case. You should not hesitate to change an opinion which,
8 after discussing with your fellow jurors appears erroneous.
9 However, if after carefully considering all of the evidence
10 and the arguments of your fellow jurors you entertain a
11 conscientious view that differs from the others, you are not
12 to yield your position simply because you are outnumbered.

13 Your final vote must reflect your conscientious
14 determination as to how the issue should be decided. Your
15 verdict, whether guilty or not guilty, must be unanimous.

16 I am going to give you a jury form to take with you
17 into the jury room. When you have reached a unanimous verdict
18 check either the guilty or not guilty box, the foreperson
19 should sign and date it, and then just send us a note saying
20 that you have reached a unanimous verdict. Bring the jury
21 form out with you when you come out and we will take the
22 verdict from you here in open court and take the jury form
23 from you.

24 If you do not understand or have forgotten any
25 portion of my instructions you may request that any portion of

1 my instructions be read back, clarified or explained. Let me
2 just see the lawyers at the sidebar.

3 (At the sidebar)

4 THE COURT: Mr. Fiske, do you have any objections to
5 the charge?

6 MR. FISKE: Not other than what we stated earlier,
7 your Honor.

8 MR. GREENE: No objection.

9 THE COURT: I am going to go ahead and excuse the
10 alternates. I know that you asked to instruct the alternates
11 not to speak to the press. If you agree, I am going to wait
12 until the alternates are out the back and have my court
13 attorney indicate to them, rather than do it here in open
14 court. I believe they have already begun to exchange
15 telephone numbers among each other. I am going to have
16 caution the alternates not to speak with any of the jurors
17 until after there is a verdict in this case. And then I am
18 going to have my court attorney escort them out the side door.

19 MR. FISKE: That's fine, your Honor.

20 MS. JANNACO: That's fine, your Honor.

21 (In open court)

22 THE COURT: First of all, Mr. Quinones, Ms. Moore and
23 Ms. Crawford, we fortunately we have twelve jurors who are
24 present and ready to begin deliberations. So with the consent
25 of the lawyers I am going to excuse you from any further

1 duties as alternate jurors at this time.

2 Let me emphasize that your service as alternate
3 jurors has assured the continuation of the trial had we lost
4 one of the regular jurors. I know that we have been here for
5 several weeks and that happens at time, everyone is very
6 conscientious throughout the weeks and I appreciate it. We
7 lost no one, but I want to thank you personally for your
8 participation and the careful attention that you gave to the
9 presentation of the evidence, and I want to emphasize to you,
10 obviously I recognize that jury service can be a minor or
11 major disruption of the professional and personal lives and I
12 appreciate and the parties appreciate the time and effort and
13 attention you gave to this case.

14 At this point I want to excuse you from any further
15 jury service. You can leave. You can stick around. I know
16 we ordered lunch, if you want to stay around for your lunch.
17 But at this point you are excused from any further jury
18 service with the thanks of the court. Thank you all very
19 much. Just go back to the jury room and get your belongings
20 out of the jury room.

21 (Alternate jurors excused)

22 THE COURT: Would you swear in the marshal.

23 (Marshal sworn)

24 THE COURT: Ladies and gentlemen, I know you already
25 know we took lunch orders from you. Hopefully we will give

1 you a better lunch than you had yesterday and on time. It
2 should arrive here sometime between 12:30 and 1 o'clock.

3 As I indicated to you, you can conduct yourself as
4 you wish. You can either suspend your deliberations and eat
5 and then continue after you eat or you can continue to
6 deliberate while you are eating lunch. But hopefully it will
7 be here sometime between 12:30 and 1 o'clock.

8 If you send us a note somewhere around 1 o'clock and
9 it takes us a little while to respond to you it is because I
10 am going to give the parties time to eat. We will respond to
11 you as promptly as possible if you send us any requests.

12 (Continued on next page)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: Ladies and gentlemen, you may now retire
2 to begin your deliberations.

3 (At 11:03 the jury commenced their deliberations)

4 THE COURT: As soon as their lunch arrives I will let
5 you know and you can probably grab some lunch. Just as long
6 as I know where you can be reached and you can get back here
7 in a few minutes I think that is fine.

8 (Recess)

9 (In open court; jury not present)

10 THE COURT: Please be seated. We have a note from
11 the jury asking for some exhibits.

12 Have you been able to agree and what the request is?

13 MR. FISKE: Your Honor, I think it fair to say we
14 have agreed with Mr. Greene that we can give them Exhibits 48,
15 45 and 49. There is no chart in evidence of meetings between
16 Mr. Tennant and Mr. Taubman. We can give them all the
17 Sotheby's board minutes for '94 which are in evidence, which
18 is January, March, June, October and December. And I think we
19 need clarification as to what they mean by "all damage papers
20 in one binder subpoenaed."

21 We are not quite sure what that question means.

22 THE COURT: My recollection was that you had in a
23 binder that you put before Mr. Davidge all of the papers that
24 he had produced and you took some of them out. But didn't you
25 put that whole binder in evidence?

1 MR. FISKE: What happened is Mr. Muller held up what
2 Mr. Davidge described as a thick group of notes, but that was
3 never put in evidence. The government offered some of
4 Mr. Davidge's exhibits and we offered some and we are prepared
5 to give them, if they want it, all of the documents of
6 Mr. Davidge's that are in evidence but that whole thick binder
7 is not. That never went into evidence.

8 MR. GREENE: Our records show that we believe that
9 binder is DX 67.

10 MR. FISKE: If that is what they mean, that is the
11 agenda book for the April 30 meeting and if that is what they
12 mean we will give them that.

13 THE COURT: I do have a recollection, as I am
14 thinking about it, I do have a recollection there was a thick
15 binder that was utilized with Mr. Davidge that was offered in
16 evidence, although it was not gone through specifically as to
17 each item in there.

18 Mr. Greene, you believe it's Defendant exhibit what?

19 MR. GREENE: I believe it's 67, your Honor.

20 THE COURT: Mr. Muller, which one was 67?

21 MR. MULLER: 67 is the briefing book which has the
22 agenda on the front and then 9 tabbed sections. Your Honor's
23 recollection is correct. There is a separate very thick
24 binder of materials that was subpoenaed which I showed to Mr.
25 Davidge and asked him some questions about its contents but

1 which I did not offer into evidence.

2 THE COURT: Did that have a number?

3 MR. MULLER: It did. That number was 470 I believe,
4 your Honor. No, excuse me, 607.

5 Bear with me one second, your Honor.

6 THE COURT: Sure.

7 MR. GREENE: 607?

8 MR. MULLER: Bear with me. I am confident it was not
9 offered into evidence.

10 THE COURT: If you can tell me what exhibit it was --

11 MR. MULLER: They are looking. I don't remember off
12 the top of my head.

13 THE COURT: What was it described as?

14 MR. MULLER: It was described -- it was all of
15 Mr. Davidge's documents subpoenaed and turned over to his
16 lawyer and in turn turned over to the Department of Justice.
17 I can't tell you the words I used to describe it.

18 It's defendant Exhibit 544. There are a number of
19 documents that came from that collection that were
20 individually offered but the collection as a collection was
21 not offered.

22 THE COURT: All right.

23 Let me go back for a second. You have agreed on all
24 the other exhibits. I assume the chart that they are asking
25 for is the chart that was used in summation that was admitted

1 into evidence. It's not in evidence. I am not going to send
2 it in unless the parties agree to send it in.

3 MR. FISKE: We don't agree, your Honor. It's not in
4 evidence.

5 THE COURT: All right.

6 MR. GREENE: We would suggest that you inform them
7 that the underlying documents are in evidence.

8 THE COURT: So you have 48, 45, 49 and the board
9 minutes of '94?

10 MR. FISKE: Yes, your Honor.

11 THE COURT: You have those ready to go in?

12 MR. FISKE: Yes, we do.

13 THE COURT: All right.

14 MR. GREENE: Two of the board meetings are in as
15 government exhibits and defense exhibits. The March and June
16 '94 are in I believe as 103 and 104.

17 MR. FISKE: We have all of them in as Exhibit 126,
18 135, 147, 580 and 156.

19 THE COURT: That is defense exhibits.

20 MR. FISKE: Yes.

21 THE COURT: You can handle it any way you want to.
22 If you also have government exhibits and it's the same thing
23 and you want to give it to them --

24 MR. GREENE: I suggest we give them both.

25 THE COURT: That is fine. Pull it together and give

1 them everything that is in evidence from both sides on that
2 issue.

3 Let me do this: I will just bring them right out and
4 tell them that the complete binder itself is not in evidence
5 though there were some documents in evidence from the binder
6 and if they wanted those documents that are in evidence from
7 the binder we can send them that and we will tell them that
8 the chart is not in evidence but if they want the underlying
9 documents that represent the calendar notations with the dates
10 they can ask for that and we will send those in.

11 Their lunch just arrived so let's bring them out now.
12 If you have all those exhibits, if you can put them all in one
13 place so I can give them to the marshals we can send them
14 right back in. Just put them right there together, the ones
15 you have agreed upon.

16 I have another note from the jury. They also want a
17 copy of subpoena to obtain all records for Sotheby's of people
18 who are responsible for pricing. I believe that was in
19 evidence, given to Reece and Neville. That is what is written
20 here.

21 MR. FISKE: We can get that.

22 THE COURT: And defense closing exhibit which states
23 "will see from above or something to that effect."

24 Do you know what they are referring to? It's an
25 exhibit in the closing that made reference to "see from above

1 or something to that effect."

2 Oh, I know what they are talking about, the exhibits
3 which refer to others on high.

4 MR. FISKE: I think Exhibit 48 has that in it and we
5 put up a chart that substituted Camoys for Tennant but that is
6 not in evidence. I think the only --

7 THE COURT: I show you the note but it says defense
8 closing exhibit which states "we will see from above or
9 something to that effect."

10 MR. FISKE: Maybe you have to ask them what they
11 mean.

12 THE COURT: All right. If you want to take a quick
13 look at the note before I bring them in.

14 Do we have the subpoena and what exhibit number that
15 is?

16 I will tell them that language was quoted from
17 Exhibit 48. I have the copy here.

18 MS. JANNACO: Your Honor, the subpoena is DX392.

19 THE COURT: Okay. Put that there please with the
20 others.

21 I think you put up on the chart during closing the
22 last line of Government Exhibit 48.

23 MR. FISKE: I didn't highlight it, Mr. Greene did,
24 but in my summation I took their chart and put Mr. Camoys in
25 place of Mr. Tennant alluding to that comment but we don't

1 have a separate exhibit.

2 THE COURT: All right.

3 MR. FISKE: I mean Camoys instead of Taubman. We
4 don't have an exhibit in evidence that says that.

5 THE COURT: I will explain that to them.

6 Let me bring them out.

7 (At 1:21 the jury returned to the courtroom)

8 THE COURT: Please be seated.

9 I know your lunch just arrived a few moments ago. I
10 apologize for interrupting your lunch but I wanted to go ahead
11 and quickly respond to your notes. In your first note, you
12 asked for government documents 48, 45 and 49. We have those
13 and we will send those in.

14 You also asked for a chart of meetings between
15 Tennant and Taubman. The chart that I believe you are
16 referring to was utilized in summation but was not an exhibit
17 in evidence. So that will not be sent in to the jury room.
18 But if you do want the underlying documents we can pull those
19 together and send those to you but send us another note back
20 if you want the underlying documents. The board meetings you
21 asked for, the '94 board meetings, are in evidence and we will
22 send those in immediately with you.

23 Also, you asked for "defense exhibit all Davidge
24 papers in one big subpoenaed binder." The entire binder was
25 not put in evidence but there were some documents that were

1 taken out of the binder that were identified and certain
2 documents were put in evidence. If you want the documents
3 that were put in evidence out of that binder send us a note
4 back and let us know that and we will send that in.

5 Your second note you wanted a copy of the subpoena to
6 obtain all records for Sotheby's of people who were
7 responsible for pricing, pricing given to Reece and Neville,
8 and I believe we have that and we will send that in. And you
9 also asked for defense closing exhibit which states "we will
10 see from above or something to that effect."

11 We believe that the reference you are referring to
12 there is a reference in Government Exhibit 48, that document
13 that reads in the last line "he and I should now withdraw but
14 stay in touch with view to seeing how things go and
15 intervening from on high if need be."

16 That is what we think you are referring to. I just
17 read from Government Exhibit in evidence 48.

18 If that is what you want -- is that what you want?

19 JUROR: Yes.

20 THE COURT: Don't send us back a note. We will send
21 that in right now.

22 Let us know if you want the underlying calendar
23 notations that reflect in the chart of meetings and whether or
24 not you want the Davidge papers that were put in evidence that
25 came out of that binder. Just send us a quick note and I will

1 send them back in. If we don't hear from you in the next ten
2 minutes we will let you take lunch and we will send these
3 right in.

4 You can go ahead and continue deliberations.

5 (At 1:25 the jury resumed their deliberations)

6 THE COURT: I realize they already asked for
7 Government Exhibit 48 anyway. We will go ahead and send that
8 in. We will wait a couple of minutes.

9 I would start pulling together those diary entries.

10 MR. FISKE: We have them all in one exhibit.

11 THE COURT: If you can pull together the Davidge
12 papers that came out of the binder in case they send us a note
13 right away. If so, unless you want me to we will send it
14 straight in if that is what they say they do want without
15 bringing you and them back to the courtroom. If we don't hear
16 from them in ten minutes I assume they changed their minds.

17 Just a second. You have to let me know, I have
18 Government Exhibit 49 that has some yellow stickies on it.

19 Is that part of the exhibit?

20 MS. JANNACO: Yes.

21 THE COURT: All of that is part of the exhibit put in
22 evidence?

23 MS. JANNACO: Yes.

24 THE COURT: All right.

25 MR. MULLER: Can I take a look at those?

1 THE COURT: Yes, you better take a look before it
2 goes in.

3 MR. MULLER: That is fine.

4 THE COURT: As I say, we will wait ten minutes and
5 take a half hour, 45 minutes to get yourself lunch.

6 (Recess)

7 (Continued on next page)

8 (In open court; jury not present)

9 THE COURT: We have a note from the jury requesting a
10 copy of judge's statement regarding the law to the crime
11 whether it's done or not. It seems to me the only thing they
12 can be asking for is the substantive charge with regard to the
13 elements of the offense in violation of the Sherman Antitrust
14 Act.

15 Does anybody have any other interpretation it could
16 possibly be?

17 MR. FISKE: That is probably what they want but it
18 would be useful to ask them.

19 THE COURT: Mr. Greene?

20 MR. GREENE: I think they want the substantive
21 evidence of the charge, your Honor.

22 THE COURT: Well, let me tell you what I would intend
23 to give to them if that is what they want and then I will ask
24 them just before I give it. I would start -- I think it
25 probably makes sense to start on page 50 and go to page 63.

1 That defines the Sherman Act and the elements of the offense.

2 MR. FISKE: How about 49, your Honor, the uncharged
3 conduct?

4 THE COURT: Mr. Greene?

5 MR. GREENE: I would oppose that request, your Honor.

6 THE COURT: That doesn't seem to go to the substance
7 of the offense. I think that is beyond what their request is.
8 I think I will stick with 50. I think that is the appropriate
9 place to start.

10 Let me bring them in and make sure that is what they
11 want and if they acknowledge that here in open court and we
12 have a consensus on that, then I will read them that section.

13 (At 3:50 the jury returned to the courtroom)

14 THE COURT: Be seated please.

15 Ladies and gentlemen, we received a note from you
16 asking for a copy of the judge's statement regarding the law
17 to the crime, whether it's done or not.

18 What I am assuming and discussing with the parties
19 what you are asking for is basically the definition of the
20 crime charged and the elements of the offense that must be
21 proven.

22 Is that basically that portion again?

23 Okay.

24 Then what I am going to do is go over that again with
25 you here in open court and the elements of the crime charged,

1 price fixing under the Sherman Antitrust Act.

2 Now, beginning in that portion of the charge that I
3 already gave you, the purpose of the Sherman Act is to
4 preserve and encourage free and open business competition so
5 that the problem may receive better goods and services at a
6 lower cost.

7 Congress has determined that price restraints among
8 competitors are bad for commerce and therefore that
9 arrangements among competitors which attempt to fix prices are
10 illegal. It does not matter whether the prices agreed upon
11 are reasonable. Nor does it matter whether prices are
12 actually effected by the agreement. Nor does it matter that
13 the prices are fixed in order to achieve some socially
14 desirable goal.

15 Thus, a price-fixing conspiracy cannot be justified
16 on the ground that it was formed to prevent or halt ruinous
17 competition, or to eliminate the evils of price cutting or to
18 give each competitor what the conspirators think its fair
19 share of the market. The law forbids competitors from
20 entering into any agreement which has as its purpose or
21 predictable effect the fixing or restraining of prices.

22 Now, the defendant is charged with violating Section
23 1 of the Sherman Antitrust Act by conspiring to fix auction
24 commission rates charged to sellers. That law provides that
25 every contract, combination or conspiracy, in restraint of

1 trade is declared illegal.

2 Now, there are three elements the government must
3 prove beyond a reasonable doubt to convict the defendant of
4 violating Section 1 of the Sherman Act.

5 First, that the conspiracy to fix auction commission
6 rates charged to sellers existed at or about the time stated
7 in the indictment, in this case that it existed from at least
8 as early as February '93 until at least December of '99.

9 Second, that the defendant knowingly and
10 intentionally became a member of that conspiracy;

11 And, third, that the defendant joined that conspiracy
12 with the intent to unreasonably restrain competition.

13 Now, as I have just told you, the first element is
14 that the government must prove beyond a reasonable doubt --
15 the first element the government must prove beyond a
16 reasonable doubt is that the price-fixing conspiracy charged
17 in the indictment actually existed. This is important because
18 the part of the Sherman Act we are concerned with outlaws
19 certain joint activities by competitors but not actions taken
20 by a single firm or a corporation.

21 Now, a conspiracy is an agreement between two or more
22 persons to accomplish an unlawful purpose or to accomplish a
23 lawful purpose by unlawful means. The agreement itself is a
24 crime. Whether the agreement is ever carried out or whether
25 it succeeds or fails does not matter. Indeed, the agreement

1 need not be consistently followed. Conspirators may cheat on
2 each other and still be conspirators. It is the agreement to
3 do something that violates the law that is the essence of a
4 conspiracy.

5 Now, the government must prove beyond a reasonable
6 doubt that the particular conspiracy the defendant is charged
7 with participating in existed, and existed at or about the
8 time alleged in the indictment. Now, if you find that the
9 conspiracy to fix auction commission rates charged to sellers
10 did not exist, you cannot find the defendant guilty of the
11 crime charged. This is so even if you find that some
12 conspiracy other than the one charged in the indictment
13 existed and even though any other conspiracy you may find
14 existed had a purpose and/or membership similar to the
15 conspiracy charged in the indictment.

16 Now, the first thing that is required for a
17 conspiracy is at least two separate parties. This means that
18 in order to find a conspiracy you must find that at least one
19 or more persons agreed with one or more other persons to fix
20 auction commission rates charged to sellers.

21 Now, a corporation cannot conspire with its own
22 officers or employees. Nor can an a corporation's employees
23 conspire among themselves. This is because a corporation, its
24 officers and employees are so closely related that they are
25 deemed to share a common purpose and are considered by the law

1 to be one actor. And, as I told you, a single actor cannot
2 violate this part of the Sherman Act.

3 In order to prove the conspiracy it is not necessary
4 for the government to present direct proof or verbal or
5 written agreements. Very often in cases like this such
6 evidence is not available. You may find that the required
7 agreement or conspiracy existed from the course of dealings
8 between or among the individuals through the words they
9 exchanged or from their acts alone. What the government must
10 prove beyond a reasonable doubt is that the members of the
11 conspiracy in some manner came to a mutual understanding to
12 try to fix or attempt to fix auction commission rates charged
13 to sellers.

14 The government does not have to show that all the
15 means or methods which were agreed upon to accomplish this
16 goal were actually used. Nor does the government have to show
17 that all of the persons alleged to have been members of the
18 claimed conspiracy were in fact members. What the government
19 must prove is that the claimed conspiracy was knowingly
20 formed; that it was formed with the intention to accomplish by
21 joint action the fixing of auction commission rates charged to
22 sellers; and that the membership of the conspiracy was
23 essentially that claimed by the government.

24 Now, the second element the government must prove
25 beyond a reasonable doubt is that the defendant joined the

1 conspiracy charged in the indictment knowingly and
2 intentionally. That is, the government must prove that the
3 defendant knowingly joined the conspiracy to fix auction
4 commission rates charged to sellers with the intent to aid or
5 advance the purpose of the conspiracy and not because of
6 mistake or accident or some other innocent reason.

7 A person may become a member of a conspiracy without
8 full knowledge of all of the details of the conspiracy. It is
9 not necessary that a defendant be fully informed as to all of
10 the details of the conspiracy or its scope in order to be a
11 member. A person who knowingly and intentionally directs
12 another to implement the details of the conspiracy is just as
13 responsible as if he had participated in every part of it.
14 Knowledge of the essential nature of the plan is enough.

15 On the other hand, a person who has no knowledge of
16 the conspiracy but who happens to act in a way which furthers
17 some purpose of the conspiracy does not thereby become a
18 member of the conspiracy. Similarly, knowledge of a
19 conspiracy without participation in the conspiracy is also
20 insufficient to make a person a member of the conspiracy.

21 A person knowingly and intentionally joins an
22 existing conspiracy or participates, or participates only in
23 part of a conspiracy with knowledge of the overall conspiracy,
24 is just as responsible as if he had been one of the
25 originators of the conspiracy or had participated in every

1 part of it.

2 Now, your determination whether the defendant
3 knowingly and intentionally joined the conspiracy must be
4 based solely on the actions of the defendant. You should not
5 consider what others may have said or done. The membership of
6 the defendant in the conspiracy must be established by
7 evidence of his own conduct by what he said or did.

8 Now, if you find that the defendant joined the
9 conspiracy, then the defendant is presumed to remain a member
10 of the conspiracy and is responsible for all actions taken in
11 furtherance of the conspiracy until the conspiracy has been
12 completed or abandoned or until the defendant has withdrawn
13 from the conspiracy.

14 Now, as I have told you, the antitrust laws involved
15 in this case are concerned only with joint actions and
16 agreements among or between competitors not with actions taken
17 independently by a single competitor. The independent actions
18 of a person or business can never constitute a restraint of
19 trade in violation of the Sherman Act.

20 Thus, a business may choose to charge prices
21 identical to those charged by its competitors and still would
22 not violate the Sherman Act. Indeed, a business may adopt
23 policies and prices identical to those of its competitors as
24 long as such actions are the result of an independent business
25 decision and not the result of an agreement or understanding

1 among competitors.

2 Now, the third element the government must prove,
3 beyond a reasonable doubt, is that the defendant joined the
4 conspiracy with the intent to unreasonably restrain
5 competition.

6 Now, the indictment charges the defendant with price
7 fixing. Because price fixing agreements always unreasonably
8 restrain competition, if you find that the charged conspiracy
9 was a price-fixing conspiracy, that is, a conspiracy to fix
10 auction commission rates charged to sellers, and also find
11 that the defendant knowingly and intentionally joined the
12 conspiracy, then you may find that the defendant joined the
13 conspiracy with the intent to unreasonably restrain
14 competition.

15 It is thus important to understand what a
16 price-fixing conspiracy is. A price-fixing conspiracy is an
17 agreement or mutual understanding between two or more
18 competitors to fix, control, raise, lower, maintain or
19 stabilize the prices charged for products or services.
20 Although a price-fixing conspiracy is usually thought of as an
21 agreement among competitors to establish the same price,
22 prices may be fixed in other ways. Prices are fixed if the
23 range or level of prices is agreed upon or if by agreement
24 various formulas are used in computing them. Put simply,
25 prices are fixed when they are agreed upon. Thus any

1 agreement to fix auction commission rates charged to sellers
2 is a price-fixing conspiracy.

3 As I have told you, the goal of every price-fixing
4 conspiracy is the elimination of one form of competition --
5 competition over price. Therefore, if you find that the
6 charged price-fixing conspiracy existed it does not matter
7 whether the prices agreed upon were high, low, reasonable or
8 unreasonable. What matters is that the prices were fixed.

9 Moreover, it is no defense that the conspirators
10 actually competed with each other in some manner or that they
11 did not conspire to eliminate all competition. Every
12 conspiracy to fix prices unlawfully and unreasonably restrains
13 trade regardless of the motives of the conspirators or any
14 economic justification they might offer.

15 Similarly, if you find that the defendant did
16 knowingly and intentionally enter into the charged agreement
17 to fix auction commission rates charged to sellers, you may
18 find the defendant intended to unreasonably restrain trade
19 even if you find that the defendant or any of the other
20 conspirators did not observe the agreement. What is important
21 is that the defendant entered into the agreement. The
22 agreement is the crime even if it is never carried out. Of
23 course, if the defendant never acted in accordance with the
24 agreement, that is evidence you should consider in determining
25 whether the defendant ever joined the charged conspiracy in

1 the first place.

2 With that instruction I am asking you that you
3 continue your deliberations. If you want something more than
4 that let me know and I will bring you back here.

5 Thank you.

6 (At 4:03 the jury resumed their deliberations)

7

8

9 (Continued on next page)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (4:25 p.m., in open court)

2 THE COURT: We have a note from the jury which reads
3 "We would like to adjourn for today and continue deliberating
4 tomorrow at 9:30 a.m. or whatever the judge decides." So we
5 are going to adjourn for the day and I'll ask them to come
6 back and go directly into the jury room tomorrow and when all
7 twelve jurors have arrived they can continue their
8 deliberations.

9 (Jury present)

10 THE COURT: Ladies and gentlemen, we received your
11 note which reads "We would like to adjourn for today and
12 continue deliberating tomorrow at 9:30 or whatever the judge
13 decides." So that's what we are going to do, is adjourn until
14 tomorrow at 9:30. What I am going to ask you to do is to to
15 come back at 9:30 tomorrow. The only thing is don't continue
16 your deliberations until all twelve members of the jury are
17 back in the jury room. You don't have to wait for us, just
18 come back at 9:30, go straight into the jury room and when the
19 twelve jurors arrive continue deliberations at that time.

20 Again, don't discuss the case overnight with anyone,
21 don't read any accounts or listen to any accounts of the trial
22 that might be in the news media and have a nice evening and
23 I'll you tomorrow morning at 9:30.

24 (Jury left the courtroom)

25 THE COURT: I'll see the parties tomorrow morning.
(Trial to Wednesday, December 5, 2001, 9:30 a.m.)

