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Government's Proposed Jury Instruction No. 1

The Functions of the Court and the Jury

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

Authority:

Pattern Criminal Federal Jury Instructions for the Seventh Circuit (1999) (hereinafter "Seventh Circuit Instruction") § 1.01.

Government's Proposed Jury Instruction No. 2

Testimony of Witnesses (Deciding What to Believe)

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things:

- the witness's intelligence;
- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the manner of the witness while testifying; and
- the reasonableness of the witness's testimony in light of all the evidence in the case.

[You should judge the defendants' testimony in the same way that you judge the testimony of any other witness.]

Authority:

Seventh Circuit Instruction § 1.03.

Government's Proposed Jury Instruction No. 3

What is not Evidence

Certain things are not evidence. I will list them for you:

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have read, seen, or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issue and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Authority:

Seventh Circuit Instruction § 1.06 (modified). United States v. Coduto, 284 F.2d 464 (7th Cir. 1961).

Government's Proposed Jury Instruction No. 4

Definition of "Direct" and "Circumstantial" Evidence

Some of you have heard the phrases "circumstantial evidence" and "direct evidence."

Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. All the evidence in the case, including circumstantial evidence, should be considered by you in reaching your verdict.

For example, direct proof that it is raining is the testimony of a witness, "I was outside a minute ago and I saw it raining"; circumstantial evidence that it is raining is the sight of someone entering the courtroom carrying a wet umbrella.

Authority:

Seventh Circuit Jury Instruction § 1.05 (first paragraph) and Committee Comment (last paragraph). This is a case where an explicit comparison between what is direct and circumstantial evidence is likely to assist the jury in understanding these concepts.

Government's Proposed Jury Instruction No. 5

Statute

Count I of the Indictment charges a violation of Section 1 of the Sherman Act, which provides that:

Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of an offense against the United States.

The term "person" includes individuals, corporations, partnerships, and every other association or organization of every kind and character.

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or monopolization of any business or industry, so that the consuming public may receive better goods and services at a lower cost.

Authority:

ABA Instruction 65 (first two paragraphs) and ABA Instruction 64 (last paragraph); this instruction was given in another criminal antitrust case in the Seventh Circuit, United States v. Schenkel's All Star Dairy, Inc., Crim. No. FCR 93-6 (N.D. Ind. 1994) (Lee, J.) (Instruction No. 15).

Government's Proposed Jury Instruction No. 6

Price Fixing – Elements

To sustain the charge of conspiracy to fix prices as charged in Count I of the Indictment, the Government must prove the following propositions:

One, that the conspiracy described in the Indictment was knowingly formed and was in existence at or around the time alleged;

Two, that the defendant knowingly became a member of the conspiracy; and

Three, that the conspiracy described in Count I of the Indictment either affected interstate commerce in goods or services or occurred within the flow of interstate commerce in goods and services.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count I.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of Count I.

Authority:

Seventh Circuit Instruction § 4.01 and the Court's Instructions in United States v. Hussmann Corp., 92 CR 129 (N.D. Ill. 1992) (Kocoras, J.) (criminal antitrust case; Instruction No. 6) (the interstate commerce element was excluded from the Court's charge after the Court entered a stipulation which satisfied the existence of the element); 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.15 (Pocket Part 1997).

Government's Proposed Jury Instruction No. 7

Conspiracy

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In deciding whether the charged conspiracy exists, you may consider the actions and statements of every one of the alleged participants. An agreement may be proved from all the circumstances and the words and conduct of all the alleged participants which are shown by the evidence.

In deciding whether a particular defendant joined the charged conspiracy, you must base your decision only on what that defendant did or said. In determining what that defendant did or said, you may consider that defendant's own words or acts. You may also consider the words or acts of other persons to decide what that defendant did or said, and you may use them to help you understand what that defendant did or said.

To be a member of the conspiracy, a defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant in the charged conspiracy.

A conspiracy is a kind of "partnership" and under the law each member is an agent or partner of every other member and each member is bound by or responsible for the acts of every other member done to further their agreement. The "agreement or understanding" need not be an express or formal agreement, be in writing, or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

Authority:

Seventh Circuit Instruction § 5.08 (modified) (first five paragraphs); Committee Comment Seventh Circuit Instruction § 5.08, See United States v. Espino, 32 F.3d 253, 259 (7th Cir. 1994), and United States v. Loscalzo, 18 F.3d 374, 383 (7th Cir. 1994) (“[W]hile only the defendant’s acts or statements could be used to prove that defendant’s membership in a conspiracy, evidence of the defendant’s acts or statements may be provided by the statements of coconspirators.”) (sixth and seventh paragraphs); Seventh Circuit Instruction § 5.08 (eighth paragraph); the last paragraph was given in United States v. Hussmann Corp., 92 CR 129 (N.D. Ill. 1992) (Kocoras, J.) (Instruction No. 9).

Government's Proposed Jury Instruction No. 8

Intent

In considering the charge in Count I of the Indictment, you must determine whether the evidence shows beyond a reasonable doubt that the defendant under consideration by you knowingly participated in the charged conspiracy to fix prices.

Knowingly means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.

In order to establish the offense charged in Count I of the Indictment, it is not necessary for the Government to prove that the Defendant knew that a conspiracy to fix prices and allocate sales volumes is a violation of the law.

Authority:

Seventh Circuit Instruction § 4.06 (modified) and Committee Comment (first two paragraphs); Committee Comment Seventh Circuit Instruction § 4.06 (last paragraph), the last paragraph is supported by United States v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1105-06 (7th Cir. 1979).

Government's Proposed Jury Instruction No. 9

Making a False Statement – Elements

To sustain the charge of making a false statement as charged in Counts III and IV of the Indictment, the government must prove the following propositions:

First, the defendant made a false statement;

Second, the statement was material;

Third, the statement was made knowingly and willfully, and

Fourth, the statement was made in a matter within the jurisdiction of the executive branch of the government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Authority:

Seventh Circuit Instruction for 18 U.S.C. § 1001, Part 2.

Government's Proposed Jury Instruction No. 10

Materiality – Definition

A statement is material if it had the effect of influencing the action of the Federal Bureau of Investigation (“FBI”), or was capable of or had the potential to do so. It is not necessary that the statement actually have that influence or be relied on by the FBI, so long as it had the potential or capability to do so.

Authority:

Seventh Circuit Instruction for 18 U.S.C. § 1001, Part 7.

Government's Proposed Jury Instruction No. 11

Willfully – Definition

The term “willfully,” as used in these instructions, means that the defendant knowingly performed an act, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally.

Authority:

Federal Jury Practice & Instructions, Fifth Edition § 17.05 (modified) (2000).

Government's Proposed Jury Instruction No. 12

Selection of Foreperson – General Verdict – Communication With Court

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

[Forms of verdict read]

Take these forms to the jury room, and when you have reached a unanimous verdict, your foreperson will fill, date, and sign the appropriate form (or your foreperson will fill in and date the appropriate form, and each of you will sign it).

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the marshal.

Authority:

Seventh Circuit Instruction § 7.01 (first three paragraphs), § 7.05 (last paragraph).

Government's Proposed Jury Instruction No. 13

Price Fixing — Defined

Count I of the Indictment charges the defendants with conspiring to fix prices. A conspiracy to fix prices is an agreement or mutual understanding between two or more competitors to fix, control, raise, lower, maintain, or stabilize the prices charged or to be charged for products or services.

A price-fixing conspiracy is commonly thought of as an agreement to establish the same price; however, prices may be fixed in other ways. Prices are fixed if a target or goal for prices is agreed upon or if, by agreement, various guidelines or formulas are to be used in computing them. They are fixed because they are agreed upon. Thus, any agreement to stabilize prices, to set a specific price, to maintain a specific price, to eliminate or limit discounts, to establish a fixed spread between wholesale and retail prices, to establish a fixed spread between the prices of different sellers, or to set other conditions of sale relating to price is illegal.

The aim and result of every price-fixing agreement, if successful, is the elimination of one form of competition. Therefore, if you find that a price-fixing conspiracy has been established, it does not matter whether the prices agreed upon were too high or too low or reasonable or unreasonable. It is not for you to determine whether particular price-fixing schemes are wise or unwise, healthy or destructive.

Evidence that the defendants and alleged co-conspirators actually competed with each other has been admitted to assist you in deciding whether they actually entered into an agreement or mutual understanding to fix prices. If the conspiracy charged in Count I of the Indictment is proved, it is no defense that the conspirators actually competed with each other

in some manner or that they did not conspire to eliminate all competition. Similarly, the conspiracy is unlawful even if it did not extend to all products sold by the conspirators or did not affect all of their customers.

If you should find that the Defendants entered into an agreement to fix prices, the fact that the defendants or their co-conspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense. The agreement is the crime, even if it is never carried out.

Similarity of competitive business practices of the defendants and alleged co-conspirators, or the mere fact that they may have charged identical prices for the same goods, does not alone establish an agreement or mutual understanding to fix prices, since such practices may be consistent with ordinary and proper competitive behavior in a free and open market.

A person may lawfully charge prices identical to those charged by competitors and still not violate the Sherman Act. A person may follow and conform exactly to the price policies and price changes of competitors; and such conduct, without more, would not be violative of the law, unless you find it was done pursuant to an agreement or mutual understanding between two or more persons, as charged in Count I of the Indictment.

Nevertheless, you may consider such facts and circumstances along with all other evidence in determining whether the similarity or identity of prices resulted from the independent acts or business judgment of the defendants freely competing in the open market, or whether it resulted from an agreement or mutual understanding between the defendants and one or more competitors.

Authority:

ABA Instruction 54 (modified); United States v. Misle Bus & Equipment Co., 967 F.2d 1227, 1235 (8th Cir. 1992) (discussing and upholding Instruction Nos. 17, 18, and 19, which defined bid rigging, price fixing, and customer allocation).

Government's Proposed Jury Instruction No. 14

Per Se Violations

The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be an unreasonable restraint on trade and are per se illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to fix prices. Therefore, if you find that the conspiracy charged in Count I of the Indictment existed and that one or more defendants was a member of that conspiracy, you need not be concerned with whether the agreement was reasonable or unreasonable, or the justifications for the agreement, or the harm done by it.

It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was such a conspiracy, it was illegal. If there wasn't, the defendants should be found not guilty.

Authority:

ABA Instruction 52; Court's Instructions in United States v. Hussmann Corp., 92 CR 129 (N.D. Ill. 1992) (Kocoras, J.) (Instruction No. 7).

Government's Proposed Jury Instruction No. 15

Interstate Commerce Requirement

An essential element of an offense prohibited by the Sherman Act is that the alleged unlawful conduct must involve interstate trade or commerce. The government must prove beyond a reasonable doubt that the conspiracy charged in Count I of the Indictment either occurred in the flow of interstate commerce or affected interstate commerce in goods and services. Proof of interstate commerce as to one defendant or co-conspirator in the conspiracy charged in Count I of the Indictment satisfies the interstate commerce element as to every defendant.

The term "interstate commerce" includes transactions or commodities that are moving across state lines or that are in a continuous flow of commerce from the commencement of their journey until their final destination in a different state. If the conduct challenged in Count I of the Indictment involves transactions that are in the flow of commerce, the interstate commerce element is satisfied and the size of any such transaction is of no significance. The conspiracy charged in Count I of the Indictment therefore would have occurred in the flow of interstate commerce if at least one defendant or one co-conspirator, in carrying out the charged conspiracy, crossed state lines or purchased equipment or supplies which were used in the sales of ready mixed concrete across state lines.

The term "interstate commerce" also includes transactions that are entirely within a state and are not part of a larger interstate transaction, if the conduct challenged in Count I of the Indictment has had an effect on some other appreciable activity demonstrably in interstate commerce. In determining whether the charged conspiracy has had an effect on some other appreciable activity in interstate commerce, you may add together the total amount of all of

the interstate transactions.

Although the Government must prove that the conspiracy charged in Count I of the Indictment either affected interstate commerce or occurred within the flow of interstate commerce in goods or services, the Government's proof need not quantify any adverse impact of the charged conspiracy or show that the charged conspiracy had any anticompetitive effect. It is a question of fact for the jury to determine whether the defendants' conduct charged in Count I of the Indictment involved interstate commerce.

Authority:

McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The law in support of this instruction is discussed in Section II.G at pages 11-12 of the Government's Trial Brief.

Government's Proposed Jury Instruction No. 16

Jury Not to Consider Unindicted Co-conspirators

In making a judgment in this case on the guilt or innocence of the defendants now here on trial, you will not be concerned with whether or not or why any others may or may not have been made defendants in this case. These are not matters for you to surmise or speculate upon. You are to consider only what is in evidence here before you as it relates to the guilt or innocence of the defendants now on trial.

Authority:

Based upon Sixth Circuit Instruction §3.06 (1991); Court's Instruction in United States v. Hussmann Corp., 92 CR 129 (N.D. Ill. 1992) (Kocoras, J.) (Instruction No. 11); Rogers v. United States, 340 U.S. 367, 375 (1951); United States v. Lopez, 6 F.3d 1281, 1288 (7th Cir. 1993).

Government's Proposed Jury Instruction No. 17

Party Other than an Individual

MA-RI-AL Corporation, d/b/a/ Beaver Materials, Corp. ("Beaver Materials"), must be given the same fair consideration as you would give an individual.

Authority:

Seventh Circuit Instruction § 1.08.

Government's Proposed Jury Instruction No. 18

Personal Responsibility of Corporate Agent

During the time period covered by the Indictment, defendant Chris A. Beaver was the Operations Manager for defendant Beaver Materials.

During the time period covered by the Indictment, defendant Ricky J. Beaver was the Commercial Sales Manager for defendant Beaver Materials.

A person is responsible for conduct that he performs or causes to be performed in behalf of a corporation just as though the conduct were performed in his own behalf. However, a person is not responsible for the conduct of others performed in behalf of a corporation merely because that person is an officer, employee, or other agent of a corporation.

Authority:

Section III of the Indictment (first three paragraphs); Seventh Circuit Instruction § 5.02 (fourth paragraph).

Government's Proposed Jury Instruction No. 19

Weighing the Evidence – Inferences

You should use your common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this “inference.” A jury is allowed to make reasonable inferences. Any inferences you make must be reasonable and must be based on the evidence in the case.

Authority:
Seventh Circuit Instruction § 1.04.

Government's Proposed Jury Instruction No. 20

Witnesses Requiring Special Caution

You have heard testimony from: Dan Butler and Price Irving, who are employees of Irving Materials, Inc.; Gus B. "Butch" Nuckols, an employee of Builder's Concrete and Supply Co., Inc.; and Scott Hughey, an employee of Hughey, Inc. d/b/a/ Carmel Concrete Products, Co. These individuals and their companies have pleaded guilty to an offense arising out of the same occurrence for which the defendants are now on trial in Count I of the Indictment. Their guilty pleas are not to be considered as evidence against the defendants. Under the plea agreements, these individuals and their companies will not be further prosecuted as long as they comply with their obligations under the plea agreements. You may give their testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony from Philip Haehl, and Richard Haehl, employees of Shelby Gravel, Inc. ("Shelby"). Shelby has applied for and been granted Corporate Leniency from the Government under the Government's Corporate Leniency Program. Under the Leniency Agreement, Philip Haehl, Richard Haehl, and their company, Shelby, will not be prosecuted as long as they comply with their obligations under the Leniency Agreement. In entering this agreement, Shelby, along with Philip Haehl and Richard Haehl, have stated that they were involved in the commission of the offense as charged against the defendants in Count I of the Indictment. You may give their testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Authority:

Seventh Circuit Instruction § 3.13 (modified).

Government's Proposed Jury Instruction No. 21

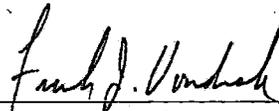
Department or Agency

The FBI is a part of the executive branch of the government of the United States, and statements concerning pricing discussions among competitors in the ready mixed concrete industry are within the jurisdiction of that branch.

Authority:

Seventh Circuit Instruction for 18 U.S.C. § 1001, Part 9.

Respectfully submitted,



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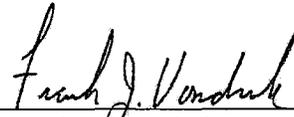
CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and accurate copies of the Government's Proposed Jury Instructions and Government's Motion for Reconsideration of Motion In Limine and Request for Oral Argument were served upon counsel for each defendant listed below by Federal Express, this 8th day of November 2006:
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