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INDIANAPOLIS DIVISION
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SOUTHERN DISTRICT
OF INDIANA
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA v. MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, CORP.; CHRIS A. BEAVER; RICKY J. BEAVER a/k/a RICK BEAVER; and JOHN J. BLATZHEIM, Defendants.	)	IP06-CR-0061 -01M/F -02 -03 -04 Hon. Larry J. McKinney

UNITED STATES' TRIAL BRIEF

This brief will address some of the legal and evidentiary issues that may arise at trial.[1]

I. INTRODUCTION

Count One of the Indictment charges MA-RI-AL Corporation (d/b/a Beaver Materials, Corp.), Chris A. Beaver, Ricky J. Beaver (a/k/a Rick Beaver), and John J. Blatzheim with entering into and engaging in a combination and conspiracy to suppress and eliminate competition by fixing the prices at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. Price-fixing conspiracies such as the one detailed in the Indictment are *per se* violations of the Sherman Act.[2] *See* Section III., *infra*. *See also* Northern Pacific Rwy. Co. v. United States, 356 U.S. 1, 5 (1958); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 223 (1940).

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[1] The United States has addressed a number of relevant legal issues in several pre-trial motions. The United States will not repeat the issues raised in those motions in this brief.

[2] The Indictment also charges defendants Chris Beaver, Ricky Beaver, and John Blatzheim with one count each of violating 18 U.S.C. § 1001 for making false statements.

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II. PROOF OF A SHERMAN ACT CONSPIRACY

The defendants are charged with one count of violating Section 1 of the Sherman Act, which states in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . 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 a felony . . . .

15 U.S.C. § 1. Section 1 of the Sherman Act thus declares every contract, combination, and conspiracy in restraint of trade to be illegal. In this case, the United States must show the following to prove that the defendants engaged in a Sherman Act conspiracy: (1) that the conspiracy described in the Indictment was knowingly formed, and was existing at or about the time alleged; (2) that the defendants knowingly became members of the conspiracy; and (3) that the conspiracy restrained interstate trade or commerce.[3]

The rule is firmly established that in a Sherman Act conspiracy the agreement itself constitutes the complete offense; once a *per se* unlawful agreement is proved, a complete violation is shown. *See* Nash v. United States, 229 U.S. 373, 378 (1913) ("the Sherman Act . . . does not make the doing of any act other than the act of conspiring a condition of liability."); United States v. Gillen, 599 F.2d 541, 545 (3rd Cir. 1979) ("The act of agreeing to fix prices is in itself illegal; the criminal act is the agreement."); United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 465 (4th Cir. 1979) ("The mere existence of a price-fixing agreement establishes the defendants' illegal purpose . . ."). The Sherman Act does not require proof of an overt act in furtherance of the conspiracy. *See* Socony-Vacuum, 310 U.S. at 224 n.59 ("And it is likewise well settled that conspiracies under the Sherman Act are not

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[3] For more full discussion of the intent required to prove a violation of Section 1 of the Sherman Act, *see* "Memorandum of Law in Support of United States' Motion in Limine to Exclude Improper Evidence and Arguments Concerning Defendants' Lack of Intent to Violate, or Ignorance of, the Antitrust Laws."

dependent on any overt act other than the act of conspiring.") (*citing* Nash, 229 U.S. at 378); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977) ("The heart of a Section One violation is the agreement to restrain; no overt act, no actual implementation of the agreement is necessary to constitute an offense.") (citation omitted); United States v. Dynalectric Co., 859 F.2d 1559, 1564 n.6 (11th Cir. 1988). In fact, whether the agreement is actually carried out or whether it succeeds or fails is immaterial. *See* Trenton Potteries, 273 U.S. at 402 (noting that "the offensive agreement or conspiracy alone, whether or not followed by efforts to carry it into effect, is a violation of the Sherman Law.") (citation omitted); Socony-Vacuum, 310 U.S. at 224 n.59; Plymouth Dealers' Assoc. of Northern California v. United States, 279 F.2d 128, 132, 133 (9th Cir. 1960); Flom, 558 F.2d at 1183.

The United States will introduce testimonial, documentary, direct, and circumstantial evidence, all of which will amply demonstrate that: (1) a conspiracy to fix prices at which ready mixed concrete was sold was knowingly formed at or about the time alleged in Count One of the Indictment; (2) that the defendants knowingly joined the conspiracy; and (3) that the conspiracy restrained interstate trade or commerce.

III. PRICE FIXING IS A *PER SE* VIOLATION OF THE SHERMAN ACT

Conspiracies to fix prices are *per se* violations of Section 1 of the Sherman Act. Northern Pacific, 356 U.S. at 5 (finding that price fixing is a *per se* violation of the Sherman Act because of its "pernicious effect on competition and lack of any redeeming virtue . . ."); National Collegiate Athletic Assoc. v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 99-100 (1984) (describing price fixing as "perhaps the paradigm of an unreasonable restraint of trade.") (footnote omitted); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (describing price fixing as "the archetypal example" of a *per se* violation); Socony-Vacuum, 310 U.S. at 218, 223; Trenton Potteries, 273 U.S. at 397-98. An agreement among competitors to eliminate discounts is indistinguishable from an agreement to fix prices for purposes of the Sherman Act –

both are condemned as *per se* illegal. *See* Catalano, 446 U.S. at 648 ("An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing.") (footnote omitted); Godix Equipment Export Corp. v. Caterpillar, Inc. 948 F. Supp. 1570, 1576 (S.D. Fla. 1996) ("An agreement to eliminate discounts would be equivalent to an agreement to fix prices and would thus be subject to the 'per se' antitrust approach.") (*citing* Catalano, 446 U.S. at 648). *See also* In re Wheat Rail Freight Rate Antitrust Litigation, 579 F. Supp. 517, 538 (N.D. Ill. 1984) (finding that agreement among defendants, which did not fix prices but which had a direct effect on prices, constituted price fixing and, thus, was subject to *per se* condemnation).

The law regarding the meaning and effect of the *per se* rule was laid out more than half a century ago. As the Supreme Court wrote in Socony-Vacuum:

> Any combination which tampers with price structures is engaged in an unlawful activity. . . . The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.

Socony-Vacuum, 310 U.S. at 221. *See* Arizona v. Maricopa Co. Medical Society, 457 U.S. 332, 344-48 (1982); F.T.C. v. Superior Court Trial Lawyers Assoc., 493 U.S. 411, 433-34 (1990).

The *per se* rule is a substantive rule of law, not merely an evidentiary presumption. It governs those restraints which the courts have determined to be inevitably unreasonable and anticompetitive. *See* id. at 432-33 ("The *per se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands."); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir. 1979) (approving government's contention that "Since the Per se rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions."); United States v. Manufacturers' Assoc. of Relocatable Building Industry, 462 F.2d 49, 52 (9th Cir. 1972). In

reaffirming the validity of *per se* proscriptions, the Supreme Court has noted that in the context of certain conduct, such as price fixing, "[t]he character of the restraint produced by such an arrangement is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984).

Consequently, in a case involving price fixing, the United States need not prove that the *per se* conspiracy was carried out or had any anticompetitive effect on the market. *See* Trenton Potteries, 273 U.S. at 402; Socony-Vacuum, 310 U.S. at 224, n.59; American Tobacco v. United States, 328 U.S. 781, 810 (1946) ("A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act, although such restraint or monopoly may not have been actually attempted to any harmful extent.") (citation omitted); Plymouth Dealers', 279 F.2d at 132, 133; Gasoline Marketers, 624 F.2d at 465; United States v. Fischbach and Moore, Inc., 750 F.2d 1183, 1195-96 (3d Cir. 1984) (citations omitted). Moreover, a price-fixing conspiracy cannot be excused or justified because the prices set were reasonable or because the conspirators were motivated by good intentions, business necessity, or a desire to benefit the public. N.C.A.A., 468 U.S. at 101 n.23; Catalano, 446 U.S. at 646-47; Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930) (*quoting* Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912)). In fact, because *per se* agreements are illegal without regard to economic justification, inquiry into the reasonableness of a particular *per se* agreement is unwarranted.[4]

> The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or

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[4] *See* "Memorandum of Law in Support of United States' Motion in Limine to Exclude Improper Evidence and Arguments Relating to the effects of, or Justifications for, the Charged Conspiracy."

> unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

Trenton Potteries, 273 U.S. at 397-98. Subsequently, in Socony-Vacuum, the Supreme Court spoke even more emphatically on this point:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has good intentions of the members of the combination. . . . Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.

Socony-Vacuum, 310 U.S. at 221-22. *See* id. at 224 n.59 ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.") (citation omitted).

Therefore, price-fixing conspiracies, such as the one charged in Count One of the Indictment, have long been condemned as *per se* illegal; any inquiry into the reasonableness of the prices fixed, the motives of the conspirators, economic rationale for the conduct, or any other justifications for the illegal activity is unwarranted and would only serve to confuse the issues and distract the jury from its duty to determine the guilt or innocence of the defendants.

IV. A *PER SE* UNLAWFUL AGREEMENT NEED NOT BE EXPLICIT OR FORMAL; CIRCUMSTANTIAL EVIDENCE MAY BE RELIED UPON TO PROVE A SHERMAN ACT CONSPIRACY

The evidence in a *per se* conspiracy case need not show that the conspirators entered into an express or formal agreement. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948) ("It is not necessary to find an express agreement in order to find a conspiracy. It is

enough that a concert of action is contemplated and that the defendants conformed to the arrangement.") (citations omitted); United States v. Consolidated Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978); Esco Corp. v. United States, 340 F.2d 1000, 1006-08 (9th Cir. 1965). The evidence need only show that the conspirators came to a mutual understanding to accomplish a common, unlawful purpose. *See* American Tobacco, 328 U.S. at 809-10.

> It is well settled that "[n]o formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose." Clearly a tacit understanding created and executed by a long course of conduct is enough to constitute agreement, even without personal communication.

United States v. Beachner Constr. Co., Inc., 555 F. Supp. 1273, 1281 (D. Kan. 1983) (*quoting* American Tobacco, 328 U.S. at 809 and *citing* Direct Sales Co., Inc. v. United States, 319 U.S. 703, 714 (1943)).

Similarly, an exchange of words is not required to prove conspiratorial conduct. *See* Direct Sales, 319 U.S. at 714. It has long been recognized that a "course of dealing" or a "knowing wink" can mean as much as a formal conspiratorial agreement. *See* American Tobacco, 328 U.S. at 809-10 ("The essential combination or conspiracy . . . may be found in a course of dealing or other circumstances as well as in an exchange of words."); Esco, 340 F.2d at 1007 ("A knowing wink can mean more than words."); Paramount Pictures, 334 U.S. at 151 ("An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act."); Consolidated Packaging, 575 F.2d at 126.

Moreover, both a conspiracy and a defendant's participation may be proven by circumstantial evidence, including the conspirators' conduct. *See* Hamling v. United States, 418 U.S. 87, 124 (1974) ("The existence of an agreement may be shown by circumstances indicating that criminal defendants acted in concert to achieve a common goal.") (citation omitted); Eastern

States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600, 612 (1914) ("It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done . . ."); Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975); United States v. Durrive, 902 F.2d 1221, 1229 (7th Cir. 1990) ("Of course, we will continue to . . . accept circumstantial evidence as support, even sole support, for a conviction."); United States v. Bullis, 77 F.3d 1553, 1560 (7th Cir. 1996) (noting in the context of a criminal trial for conspiracy to rig bids, allocate customers, and fix prices, "Circumstantial evidence is sufficient to demonstrate the existence of a conspiracy . . ."); United States v. Pazos, 993 F.2d 136, 139 (7th Cir. 1993) (noting that "because circumstantial evidence can be the sole support for a conspiracy conviction, the government is not required to present direct evidence that a defendant joined the conspiracy.") (citation omitted); United States v. Redwine, 715 F.2d 315, 319 (7th Cir. 1983). Because of the secret and often sophisticated nature of conspiracies, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" Glasser v. United States, 315 U.S. 60, 80 (1942) (*quoting* United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1939)). *See* United States v. Hooks, 848 F.2d 785, 792 (7th Cir. 1988) ("Because a conspiracy is by its nature secret, its existence and common purpose must often be proved by circumstantial evidence."); United States v. Nesbitt, 852 F.2d 1502, 1510 (7th Cir. 1988).

Consequently, "wide latitude is allowed [the prosecution] in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged." Nye & Nissen v. United States, 168 F.2d 846, 857 (9th Cir. 1948). *See* Clune v. United States, 159 U.S. 590, 592-93 (1895) (finding that the government was properly permitted to introduce circumstantial evidence of a conspiracy where that evidence "even remotely" tended to establish the conspiracy); Garrison v. United States, 135 F.2d 877, 878 (5th Cir. 1943) ("Wide latitude is allowed in the presentation of evidence as to the facts and

circumstances in a conspiracy case."). This is particularly true in antitrust conspiracy cases. United States v. General Electric Co., 82 F. Supp. 753, 903 (D. N.J. 1949).

V. PROOF OF INTERSTATE COMMERCE

An element of proof in a Sherman Act case is that the conspiratorial activities had a relationship to interstate commerce. The United States need not prove that the *conspiracy* itself took place in, or affected, interstate commerce, but rather that the conspirators' *business activities* took place in, or affected, interstate commerce. *See* McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242-43 (1980); Hammes v. Aamco Transmissions, Inc., 33 F.3d 774, 779 (7th Cir. 1994) (the "activities of the [parties], such as purchasing equipment and mailing fees, either occurred in or affected interstate commerce . . . was sufficient to confer jurisdiction when read together with the substantive allegations of the complaint.").[5] Thus, the interstate commerce jurisdictional requirement of the Sherman Act may be satisfied by proof that one or more of the conspirators' business activities took place in the flow of interstate commerce (the "flow" theory) or by proof that such activities had or were likely to have "an effect on some other appreciable activity demonstrably in interstate commerce." (the "effect" theory). McLain, 444 U.S. at 242-43 (citation omitted).

Congress' power to legislate pursuant to the Commerce Clause is extremely broad;[6] "in

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[5] The Supreme Court has found that both an agreement to fix prices that is never carried out and a price-fixing agreement that completely fails in its objective, violate the Sherman Act even though neither could have resulted in any adverse impact on interstate commerce. *See* Socony-Vacuum, 310 U.S. at 224 n.59 ("It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which Section 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.") (citation omitted).

[6] *See* Wickard v. Filburn, 317 U.S. 111 (1942) (Congress' Commerce Clause authority reaches the farmer who grows wheat for his own consumption, because even wholly intrastate activity can affect commerce); Perez v. United States, 402 U.S. 146 (1971) (Congress' Commerce Clause authority reaches local loans made by a loanshark, because loansharks compete with interstate lenders and provide money for interstate crime); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (Congress' Commerce Clause authority reaches

enacting Section 1 [of the Sherman Act] Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . .'" Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194 (1974) (*quoting* United States v. South-Eastern Underwriters Assoc., 322 U.S. 533, 558 (1944)). *See* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329 n.10 (1991). And, as Congress's power under the Commerce Clause has expanded, so too has the reach of the Sherman Act. *See* Hospital Bldg. v. Rex Hospital Trustees, 425 U.S. 738, 743 n.2 (1976); Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 135 (3d Cir. 1978). The Seventh Circuit has found that the scope of the Sherman Act is coextensive with Congress's Commerce Clause authority. *See* Hammes, 33 F.3d at 779. *See also* Harold Friedman, 587 F.2d at 135.

In Summit Health, 500 U.S. at 322, the Supreme Court confirmed this expansive understanding of the Commerce Clause requirements as applied to the Sherman Act. The Court rejected petitioners' argument that the conspiratorial activity of a Los Angeles hospital and a peer review committee at that hospital to restrain respondent's ophthalmological practice failed to satisfy the interstate commerce requirement because the conduct was entirely local in nature. Id. at 330-33. The Court found two flaws in the petitioners' argument:

> First, because the essence of any violation of § 1 is the illegal agreement itself – rather than the overt acts performed in furtherance of it – proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful. . . . Thus, respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction.
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> Second, if the conspiracy alleged in the complaint is successful, "'as a matter of practical economics'" there will be a reduction in the provision of ophthalmological services in the Los Angeles market. In cases involving horizontal agreements to fix prices or allocate territories within a single State, we have based jurisdiction on a general conclusion that the defendants'

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service of small, family-owned restaurants and hotels because they obtain food from out of state and serve interstate travelers).

agreement "almost surely" had a market-wide impact and therefore an effect on interstate commerce . . .

Summit Health, 500 U.S. at 330-31 (citations and footnotes omitted).

The price-fixing agreements the defendants and their co-conspirators entered into constitute *per se* violations of the Sherman Act.[7] By their very nature *per se* restraints have a substantial effect on commerce. *See* Hospital Bldg., 425 U.S. at 745; United States v. Suntar Roofing, 897 F.2d 469, 478 (10th Cir. 1990); United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970) ("Where there is a per se violation, the effect upon interstate commerce follows as a matter of law and is conclusively presumed.") (citation omitted). Horizontal restraints of trade "almost invariably reduce competition among the participants[,]" result in higher prices and fewer sales, and therefore "inevitably affect interstate commerce." Burke v. Ford, 389 U.S. 320, 321-22 (1967). *See* Fischbach & Moore, 750 F.2d at 1192 ("Because the activities involved in this case, price-fixing and bid rigging, are *per se* violations, the government is not required to prove any adverse impact on interstate commerce.") (citations omitted); United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1259-61 (7th Cir. 1975). *Cf.* United States v. Columbia Steel Co., 334 U.S. 495, 522-23 (1948) ("For example, where a complaint charges that the defendants have engaged in price-fixing . . . then the amount of commerce involved is immaterial because such restraints are illegal per se.").[8]

The "flow" theory of interstate commerce is satisfied when the challenged conduct occurs in interstate commerce, or, if the challenged conduct involves purely local activities, when such conduct is an integral part of a larger interstate transaction. *See* Goldfarb v. Virginia State Bar,

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[7] *See* Section III., *supra*.

[8] Therefore, the interstate commerce requirement in the instant case is likely satisfied by the fact that the defendants entered into price-fixing agreements, which are *per se* illegal. However, in the interest of completeness, a more full explanation of the contours of the interstate commerce requirement and its application in the instant case has been provided.

421 U.S. 773, 784-85 (1975);[9] United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297-98 (1945); Suntar, 897 F.2d at 479 (interstate commerce requirement satisfied by proof that goods used by conspirators in the conduct of their business were shipped from other states into Kansas). Even if an activity is local in nature and is not an integral part of a larger interstate transaction, it nonetheless comes within the ambit of the Sherman Act if "it has an effect on some other appreciable activity demonstrably in interstate commerce." McLain, 444 U.S. at 242 (*citing* Copp Paving, 419 U.S. at 202). *See* United States v. Georgia Waste Sys., Inc., 731 F.2d 1580, 1583 (11th Cir. 1984). Under the "flow" theory the test is qualitative rather than quantitative; if the challenged business activity is in commerce, as it is in this case, "no specific magnitude need be proved." Goldfarb, 421 U.S. at 785 (citation omitted).[10]

The interstate commerce requirement is satisfied, and jurisdiction established, under the "effect" theory if the defendants' activities affected interstate commerce.[11] The Supreme Court has affirmed that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Assoc., 336 U.S. 460, 464 (1949); *see* Hospital Bldg., 425 U.S. at 744. Moreover, "the amount of interstate

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[9] In McLain, the Supreme Court made clear that its decision in Goldfarb was based on the "flow" theory of interstate commerce. McLain, 444 U.S. at 244.

[10] *See* notes 11-12 and accompanying text.

[11] While some cases have suggested that the effect on interstate commerce must be substantial, in Hammes, 33 F.3d 774 (7th Cir. 1994), Judge Posner rejected any such substantiality requirement. "Though some cases state otherwise, the complaint would not have to add that the restraint was substantial. No such limitation is stated in the [Sherman] Act." Id. at 779. Moreover, because "Congress's power over interstate commerce is now understood not to be limited to activities that *substantially* involve or affect [interstate] commerce[,]" and because the Sherman Act "goes to the limit" of Congress's power, "an antitrust conspiracy that by raising the price of some good or service made in one state and sold in another reduced the quantity sold would be within the reach of the Act even if both the traffic affected, and the conspiracy's effect on that traffic, were small." Id. at 779 (citations omitted). For a general discussion of why the Seventh Circuit disavows a substantiality requirement, *see* id. at 779-81.

or foreign trade involved is not material since § 1 of the Sherman Act brands as illegal the character of the restraint not the amount of commerce affected." Socony-Vacuum, 310 U.S. at 224 n.59 (citations omitted). *See* Hammes, 33 F.3d at 780 ("The effect on interstate commerce would be small. No doubt it is small in this case. But it is not required to be large, or even measurable . . .").[12] With that understanding, federal courts have consistently found the interstate commerce requirement satisfied on minimal showings of commerce affected. *See* Summit Health, 500 U.S. at 333 (exclusion of one ophthalmologist from the Los Angeles market satisfied the interstate commerce requirement); Finis P. Ernest, 509 F.2d at 1261 (interstate purchases of $9,307 satisfied the Sherman Act's interstate commerce requirement); Feminist Women's Health Center v. Mohammad, 586 F.2d 530, 539 (5th Cir. 1978) (health center's purchase of $10,017 worth of out-of-state supplies, provision of $26,400 worth of medical service to out-of-state patients, and interstate travel expenses of $4,341 were sufficient to establish Sherman Act jurisdiction). *See also* Hammes, 33 F.3d at 779-80 ("Cases almost too numerous to cite either find or, because the proposition is rarely questioned, assume on this basis that conspiracies among local sellers affect interstate commerce within the meaning of the Sherman Act.") (citations omitted).

The United States' will present ample evidence to satisfy the Sherman Act's interstate commerce requirement. First, as noted above, the mere fact that the price-fixing conspiracy engaged in by the defendants and their co-conspirators was a *per se* violation of the Sherman Act obviates the need for in-depth analysis because by their very nature, *per se* restraints have a

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[12] Like the "flow" theory, the "effect" theory of interstate commerce jurisdiction does not require that the impact of the defendants' activities on interstate commerce be quantified. *See* McLain, 444 U.S. at 243 ("Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct.") (citation omitted); Suntar, 897 F.2d at 478 ("[N]either the 'in commerce' nor 'effect on commerce' test requires the government to *quantify* the adverse impact of the challenged activity.") (emphasis in original).

substantial effect on interstate commerce. Moreover, during the period covered by the conspiracy conspirators purchased equipment and supplies used in the manufacture, distribution, and sale of ready mixed concrete from outside the state of Indiana. In connection with the purchase and sale of that equipment and those supplies, contracts, bills, and other forms of business communications were transmitted between locations in Indiana and locations outside Indiana. The business activities of the defendants and their co-conspirators, including the purchase of equipment and supplies used in the manufacture, distribution, and sale of ready mixed concrete from outside the state of Indiana, are sufficient to establish that the operations of the conspirators and the conspiratorial conduct in which they engaged, were within the flow of, and substantially affected, interstate trade or commerce.

VI. THE EVIDENCE NEED NOT SHOW THAT ALL THE MEANS, MANNERS, OR METHODS CHARGED IN THE INDICTMENT WERE AGREED UPON

The United States need not prove that all of the means or methods of effectuating the conspiracy set forth in Count One of the Indictment were agreed upon or that all means or methods agreed upon were actually used or put into operation. *See* Socony-Vacuum, 310 U.S. at 250 ("A variation between the means charged and the means utilized is not fatal. And where an indictment charges various means by which the conspiracy is effectuated, not all of them need be proved.") (citations omitted). *Cf.* Boyle v. United States, 259 F. 803, 805 (7th Cir. 1919) (affirming convictions for conspiring in violation of section 1 of the Sherman Act and noting, "Where the object of the conspiracy is unlawful, as in this case, it is unnecessary to set forth the means by which the object is accomplished.") (citation omitted); American Tobacco, 328 U.S. at 809 (noting in the context of a Section 2 Sherman Act conspiracy , "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns.").

Nor is the United States required to prove that the conspiracies continued for the duration charged in Count One of the Indictment. As the lower federal courts have long established:

> Allegations of time in an indictment need not in general be strictly proven unless the charge is of an offense which could be committed only at that time, as for instance on a Sunday. We see no reason why the time at which a conspiracy was formed or at which it ended should stand under any other rule.

Cooper v. United States, 91 F.2d 195, 198 (5th Cir. 1937). *See* Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 401 (4th Cir. 1958).

Similarly, it is not necessary that the conspirators know all of the other conspirators, know all of the details of the conspiracy, or know of, or participate in, each conspiratorial act or transaction. *See* Blumenthal v. United States, 332 U.S. 539, 556-557 (1947); United States v. Liefer, 778 F.2d 1236, 1247 n.9 (7th Cir. 1985) ("The government need not show that the defendant was acquainted with or knew all the co-conspirators, or knew each detail of the conspiracy, or played more than a minor role in the conspiracy.") (citations omitted); Consolidated Packaging, 575 F.2d at 127 ("It is well understood that a conspirator need not know all the other conspirators, nor have direct contact with them.") (citations omitted); United States v. Spudic, 795 F.2d 1334, 1337 (7th Cir. 1986) ("[I]t is not necessary for each coconspirator even to agree to or actually participate in every step of the conspiracy. . . . A coconspirator need not be, and often is not, aware of everything being done to further the conspiracy."); United States v. Boucher, 796 F.2d 972, 975 (7th Cir. 1986).

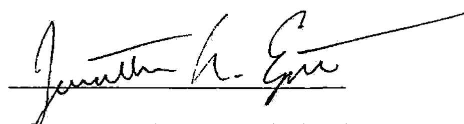
The United States will prove that the price-fixing conspiracy alleged in Count One of the Indictment existed, that the defendants knowingly joined that conspiracy and that the conspiracy restrained interstate trade or commerce, all in violation of Section 1 of the Sherman Act. Such a showing is sufficient to prove the defendants engaged in an illegal conspiracy notwithstanding the possibility that some of the means of effectuating the conspiracy alleged in Count One of the Indictment were not established or employed, that the duration of the conspiracy deviated from the time period alleged in Count One of the Indictment, or that the conspirators did not know all of the other conspirators, all of the details of the conspiracy, or each conspiratorial act. Such

minor variations which suggest that the conspiracy took a slightly different form or that the participants were engaged in only parts of the conspiracy, do not negate the conclusion that a price-fixing conspiracy existed and that the defendants knowingly joined that conspiracy.[13]

VII. CONCLUSION

This concludes the analysis of the primary legal and evidentiary issues that the United States expects may arise during the trial.

Respectfully submitted,



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[13] As courts have consistently recognized, conspiracies are, by their very nature, secretive and not prone to having their fine details and operating minutiae discovered by investigators. *See* Blumenthal, 332 U.S. at 557; In re Bromine Antitrust Litigation, 203 F.R.D. 403, 413 n.13 (S.D. Ind. 2001) ("By its very nature, a conspiracy to price fix is secret.") (citation omitted); Hooks, 848 F.2d at 792. Therefore, courts have found that conspiracies can be proven and defendants found guilty for their participation therein despite variances that do no affect the substance of the allegations. *See* Id.; Socony-Vacuum, 310 U.S. at 250.