IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 4:20-CR-358
	§	JUDGE MAZZANT
NEERAJ JINDAL (1)	§	
JOHN RODGERS (2)	§	
	§	

UNITED STATES' OBJECTIONS TO DEFENDANTS' PROPOSED JURY INSTRUCTIONS

The United States respectfully objects to the defendants' proposed jury instructions (Dkt. #78), as outlined below.

Defendants' Proposed Jury Instruction No. 1: Preliminary Instructions

Defendants' Proposed Jury Instruction No. 1 (Dkt. #78, at 2–8) is a variation on United States' Proposed Jury Instruction No. 1 (Dkt. #76, at 1–7). The United States objects to the defendants' insertion of a specific intent requirement for the price-fixing conspiracy (Dkt. #78, at 4–5). As the Court held in its order denying the motion to dismiss Count One, "a finding of intent to fix prices [equates to] an intent to unreasonably restrain trade" (Memorandum Opinion and Order Denying Motions to Dismiss ("Order"), Dkt. #56, at 24 (quoting *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 n.7 (5th Cir. 1981))). In other words, "[t]he intent element of a per se offense is established by evidence that the defendant agreed to engage in conduct that is per se illegal; the government is not required to prove that the defendant knew his actions were illegal or that he specifically intended to restrain trade or violate the law." *United States v. All Star Indus.*, 962 F.2d 465, 474 n.18 (5th Cir. 1992); *see also United States v. Young Bros, Inc.*, 728 F.2d 682, 687 (5th Cir. 1984); *Cargo Serv. Stations*, 657 F.2d at 681–84.

Defendants' Proposed Jury Instruction No. 2: Caution—Consider Only Crime Charged

Defendants' Proposed Jury Instruction No. 2 (Dkt. #78, at 9) is a subset of United States' Proposed Jury Instruction No. 3 (Dkt. #76, at 10). The United States objects to the defendants' deletion of the second paragraph of United States' Proposed Jury Instruction No. 3, which is based on *United States v. Faulkner*, 17 F.3d 745, 768 n.35 (5th Cir. 1994), and on Instruction No. 3.06 of the U.S. Court of Appeals for the Sixth Circuit's pattern jury instructions.

Defendants' Proposed Jury Instruction No. 3: Accomplice—Informer—Immunity

The United States objects to the defendants' proposed jury instruction on testimony by an alleged accomplice or informer (Dkt. #78, at 10). There is no alleged accomplice or informer in this case. One of the United States' witnesses entered into a *corporate leniency agreement* with the Antitrust Division of the Department of Justice, as explained in United States' Proposed Jury Instruction No. 2: Corporate Leniency Agreement (Dkt. #76, at 8–9). United States' Proposed Jury Instruction No. 2 accurately describes the Antitrust Division's corporate leniency program and its relevance to this case. Defendants' Proposed Jury Instruction No. 3 is either duplicative or likely to confuse the jury.

Moreover, Defendants' Proposed Jury Instruction No. 3 leaves out important language from the United States' Proposed Jury Instruction No. 2. The United States' instruction provides that "a conviction may be based solely upon the uncorroborated testimony of such a [corporate leniency] witness if the testimony is not incredible or otherwise insubstantial on its face, so long as you believe that testimony beyond a reasonable doubt" (Dkt. #76, at 8). That is a direct quotation of controlling Fifth Circuit caselaw. *See United States v. Acosta*, 763 F.2d 671, 689 (5th Cir. 1985) ("The law in this Circuit is clear as to the use of the uncorroborated testimony of an accomplice: 'a conviction may be based solely upon the uncorroborated testimony of an

accomplice if the testimony is not incredible or otherwise insubstantial on its face.'" (quoting *United States v. Silva*, 748 F.2d 262, 266 (5th Cir. 1984))). Because that "clear" holding of the Fifth Circuit applies in this case, it should be included in any jury instruction related to a corporate leniency agreement.

Defendants' Proposed Jury Instruction No. 4: Possible Parties to Count One Conspiracy

The United States objects to the defendants' proposed jury instruction on possible parties to the conspiracy (Dkt. #78, at 11). No corporation is charged in this case. Rather, Defendant Jindal and Defendant Rodgers are charged as individuals (Dkt. #21). Although it is true that at least two separate entities are required for an antitrust conspiracy, *see Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767–69 (1984), Defendants' Proposed Jury Instruction No. 4 about *corporate* entities is irrelevant and likely to confuse the jury.

Defendants' Proposed Jury Instruction No. 5: Knowingly Joined

Defendants' Proposed Jury Instruction No. 5 (Dkt. #78, at 12) is a variation on United States' Proposed Jury Instruction No. 9 (Dkt. #76, at 19–20). The United States objects to the defendants' insertion of a specific intent requirement for the price-fixing conspiracy (Dkt. #78, at 12). As the Court held in its order denying the motion to dismiss Count One, "a finding of intent to fix prices [equates to] an intent to unreasonably restrain trade" (Order, Dkt. #56, at 24 (quoting *Cargo Serv. Stations*, 657 F.2d at 683 n.7)). In other words, "[t]he intent element of a per se offense is established by evidence that the defendant agreed to engage in conduct that is per se illegal; the government is not required to prove that the defendant knew his actions were illegal or that he specifically intended to restrain trade or violate the law." *All Star Indus.*, 962 F.2d at 474 n.18; *see also Young Bros*, 728 F.2d at 687; *Cargo Serv. Stations*, 657 F.2d at 681–84.

The United States further objects to the defendants' deletion of the paragraph from United States' Jury Instruction No. 9 which explains that a price-fixing conspiracy is not a specific intent crime and that the jury "must disregard any questions on the reasonableness of the defendant's actions, their economic impact, or possible good motives" (Dkt. #76, at 19). United States' Jury Instruction No. 9 accurately states the law. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940); *United States v. Rose*, 449 F.3d 627, 630 (5th Cir. 2006); *All Star Indus.*, 962 F.2d at 474 n.18, 475 n.21; *Young Bros.*, 728 F.2d at 687; *Cargo Serv. Stations*, 657 F.2d at 681–84; *United States v. Cadillac Overall Supply Co.*, 568 F. 2d 1078, 1089–90 (5th Cir. 1978).

The United States further objects to the defendants' deletion of the paragraph from United States' Jury Instruction No. 9 which explains that if the jury finds that a defendant joined the conspiracy, "then the defendant remains a member of the conspiracy, and is responsible for all reasonably foreseeable actions taken in furtherance of the conspiracy, until the conspiracy has been completed or abandoned, or until the defendant has withdrawn from the conspiracy" (Dkt. #76, at 19–20). United States' Jury Instruction No. 9 accurately states the law. *See Smith v. United States,* 568 U.S. 106, 110-11, 113 (2013); *Pinkerton v. United States*, 328 U.S. 640, 645–48 (1956); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270-71 (6th Cir. 1995); Instructions, Instr. No. 18, *United States v. Lischewski*, No. 18-CR-00203, Dkt. #626 (N.D. Cal. Dec. 2, 2019) (Exhibit 3 to United States' Omnibus Motions *in Limine*); Trial Tr. 4727, *United States v. AU Optronics Corp.*, No. 09-CR-00110-SI, Dkt. #822 (N.D. Cal. Feb. 27, 2012) (Exhibit 7 to United States' Omnibus Motions *in Limine*).

Defendants' Proposed Jury Instruction No. 6: Conspiracy for Count One

Defendants' Proposed Jury Instruction No. 6 (Dkt. #78, at 13–14) is a variation on United States' Proposed Jury Instruction No. 6 (Dkt. #76, at 13–15). The United States objects to the defendants' insertion of a specific intent requirement for the price-fixing conspiracy (Dkt. #78, at 13). As the Court held in its order denying the motion to dismiss Count One, "a finding of intent to fix prices [equates to] an intent to unreasonably restrain trade" (Order, Dkt. #56, at 24 (quoting *Cargo Serv. Stations*, 657 F.2d at 683 n.7)). In other words, "[t]he intent element of a per se offense is established by evidence that the defendant agreed to engage in conduct that is per se illegal; the government is not required to prove that the defendant knew his actions were illegal or that he specifically intended to restrain trade or violate the law." *All Star Indus.*, 962 F.2d at 474 n.18; *see also Young Bros*, 728 F.2d at 687; *Cargo Serv. Stations*, 657 F.2d at 681–84.

Defendants' Proposed Jury Instruction No. 7: Individual Liability

Defendants' Proposed Jury Instruction No. 7 (Dkt. #78, at 15) is a variation on United States' Proposed Jury Instruction No. 11 (Dkt. #76, at 22). The United States' objects to the defendants' insertion of the sentence, "In order to find a manager or supervisor responsible for the acts of his subordinate, you must also find that the manager of supervisor was in a position to stop that subordinate who he knew was participating in that conspiracy from participating further, but failed to do so" (Dkt. #78, at 15). Although the defendants do not cite it, the United States understands the authority for that instruction to be *United States v. Misle Bus & Equipment Co.*, 967 F.2d 1227, 1235–36 (8th Cir. 1992). But the instruction is not included in the Fifth Circuit's pattern jury instructions, and it does not appear to reflect the law of the Circuit, *see Doyle v. F.T.C.*, 356 F.2d 381, 385 (5th Cir. 1966) (noting *United States v. Wise*, 370 U.S. 405, 416 (1962)).

The United States further objects to the defendants' insertion of the sentence, "Absent knowledge and intentional participation, a boss or supervisor is not responsible for the actions of his employees" (Dkt. #78, at 15). This sentence requires intentional, rather than knowing, participation—in direct conflict with the rest of the instruction and with *Wise*, 370 U.S. at 416.

Defendants' Proposed Jury Instruction No. 8: Actions Following Agreement

The United States objects to Defendants' Proposed Jury Instruction No. 8, which incorrectly states that the "government must prove that the claimed conspiracy . . . was formed with the intention to accomplish, by joint action, price fixing" (Dkt. #78, at 16). This amounts to a specific intent instruction. But as the Court held in its order denying the motion to dismiss Count One, "a finding of intent to fix prices [equates to] an intent to unreasonably restrain trade" (Order, Dkt. #56, at 24 (quoting *Cargo Serv. Stations*, 657 F.2d at 683 n.7)). In other words, "[t]he intent element of a per se offense is established by evidence that the defendant agreed to engage in conduct that is per se illegal; the government is not required to prove that the defendant knew his actions were illegal or that he specifically intended to restrain trade or violate the law." *All Star Indus.*, 962 F.2d at 474 n.18; *see also Young Bros*, 728 F.2d at 687; *Cargo Serv. Stations*, 657 F.2d at 681–84.

Defendants' Proposed Jury Instruction No. 9: Elements of Count Two

Defendants' Proposed Jury Instruction No. 9 (Dkt. #78, at 17–18) is a variation on United States' Proposed Jury Instruction No. 13 (Dkt. #76, at 25–27). The United States objects to the defendants' insertions of "unlawful" in the second element of Count Two (Dkt. #78, at 18). *See United States v. Brooks*, 681 F.3d 678, 700 (5th Cir. 2012) ("As to the conspiracy statute itself, ignorance of the law is no excuse, because "[t]he government is not required to prove that a defendant knew the purpose of the agreement was in fact unlawful, that is, in violation of a statute,

but the government must prove the defendant knew the purpose of the agreement." (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959))).

Defendants' Proposed Jury Instruction No. 10: Conspiracy for Count Two

Defendants' Proposed Jury Instruction No. 10 (Dkt. #78, at 19) is a variation on the United States' Proposed Jury Instruction No. 14 (Dkt. #76, at 28–29). The United States objects to the defendants' insertion of the word "unlawful" before "nature of a plan or scheme" in the first paragraph (Dkt. #78, at 19). *See Brooks*, 681 F.3d at 700 ("As to the conspiracy statute itself, ignorance of the law is no excuse, because "[t]he government is not required to prove that a defendant knew the purpose of the agreement was in fact unlawful, that is, in violation of a statute, but the government must prove the defendant knew the purpose of the agreement." (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959))). The United States further objects to the defendants' deletion of the second and third paragraphs of the United States' Proposed Jury Instruction No. 14, which concern indirect proof of a conspiracy and the nature of conspiracy. Those paragraphs are accurate statements of the law. *See United States v. Burton*, 126 F.3d 666, 670 (5th Cir. 1997); *United States v. Michel*, 588 F.2d 986, 1002 (5th Cir. 1979).

Defendants' Proposed Jury Instruction No. 11: Overt Act for Count Two

Defendants' Proposed Jury Instruction No. 11 is a subset of the United States' Proposed Jury Instruction No. 15 (Dkt. #76, at 30). The United States objects to the defendants' deletion of the first paragraph of the United States' instruction, which draws a helpful distinction between Counts One and Two. As the United States' Proposed Jury Instruction No. 15 explains, to prove the conspiracy charged in Count One, the government need not show an overt act. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *United States v. Rose*, 449 F.3d 627, 630 (5th Cir. 2006). By contrast, proof of an overt act is required for Count Two.

Defendants' Proposed Jury Instruction No. 12: Obstruction of Proceedings Before the Federal Trade Commission

Defendants' Proposed Jury Instruction No. 12 is a variation on the United States' Proposed Jury Instruction No. 16 (Dkt. #76, at 31–32). The United States objects to the defendants' characterization of the jury unanimity requirement as it applies to aiding and abetting (Dkt. #78, at 21). In particular, the United States objects to the insertion of "unanimously" before "find that a defendant violated 18 U.S.C. § 1505 by *either* of these two means" and the insertion of the final sentence, "However, you must unanimous agree upon the means through which the defendant violated 18 U.S.C. § 1505" (Dkt. #78, at 21).

The unanimity requirement "extends to every *element* of the offense." *United States v. Williams*, 449 F.3d 635, 647 (5th Cir. 2006) (emphasis added) (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)). But "unanimity is *not* required as to the particular *means* used by the defendant to commit a particular element of the offense." *Id.* (first emphasis added) (citing *Richardson*, 526 U.S. at 817). In *Williams*, the U.S. Court of Appeals for the Fifth Circuit left open the question "whether, under the general aiding and abetting statute [18 U.S.C. § 2], the jury's lack of unanimity on the defendant's role in the offense is sufficient for conviction." *Id.* at 648. But the Fifth Circuit strongly suggested that the answer to that question is "Yes." *See id.* at 647–48. "Under the general aiding and abetting statute, a person who aids and abets the commission of an offense is treated the same as a principal actor[.]" *Id.* at 647. Therefore, it is "unnecessary" to "cabin[] the defendant's role into a particular box." *Id.* at 648. "The jury will seldom be asked to make an independent determination of whether the defendant committed the offense as a principal or as an aider and abettor. Both are sufficient for conviction; both are treated the same for punishment." *Id.*

<u>Defendants' Proposed Jury Instruction No. 13: Unanimity of Theory—Count Three</u>

The United States objects to the defendants' proposed jury instruction on the unanimity requirement as to Count Three (Dkt. #78, at 22–23). The unanimity requirement "extends to every *element* of the offense." *Williams*, 449 F.3d at 647 (emphasis added) (citing *Richardson*, 526 U.S. at 817). But "unanimity is *not* required as to the particular *means* used by the defendant to commit a particular element of the offense." *Id.* (first emphasis added) (citing *Richardson*, 526 U.S. at 817). Here, the defendants seek unanimity on the means of satisfying the third element of Count Three—unanimity that is not required under controlling Supreme Court and Fifth Circuit precedent. *See id.*; *see also, e.g.*, *United States v. Talbert*, 501 F.3d 449, 451–52 (5th Cir. 2007) (unanimity not required for particular firearm under 18 U.S.C. § 922(g)(1)); *United States v. Villegas*, 494 F.3d 513, 514–16 (5th Cir. 2007) (same). "Although the right to a jury trial carries with it a right to a unanimous verdict, absolute factual concurrence is not mandatory and, indeed, would be unworkable." *Villegas*, 494 F.3d at 514. Accordingly, the general unanimity instruction contained in Joint Proposed Jury Instruction No. 15 (Dkt. #74, at 16–17) is sufficient for Count Three. *See* <u>Pattern Jury Instructions (Criminal Cases)</u>, United States Court of Appeals for the Fifth Circuit, No. 1.26 (2019).

<u>Defendants' Proposed Jury Instruction No. 14: Unanimity of Theory—Count Four</u>

The United States objects to the defendants' proposed jury instruction on the unanimity requirement as to Count Four (Dkt. #78, at 24–25). The unanimity requirement "extends to every *element* of the offense." *Williams*, 449 F.3d at 647 (emphasis added) (citing *Richardson*, 526 U.S. at 817). But "unanimity is *not* required as to the particular *means* used by the defendant to commit a particular element of the offense." *Id.* (first emphasis added) (citing *Richardson*, 526 U.S. at 817). Here, the defendants seek unanimity on the means of satisfying the third element of Count

Four—unanimity that is not required under controlling Supreme Court and Fifth Circuit precedent. *See id.*; *see also, e.g.*, *Talbert*, 501 F.3d at 451–52 (unanimity not required for particular firearm under 18 U.S.C. § 922(g)(1)); *Villegas*, 494 F.3d at 514–16 (same). "Although the right to a jury trial carries with it a right to a unanimous verdict, absolute factual concurrence is not mandatory and, indeed, would be unworkable." *Villegas*, 494 F.3d at 514. Accordingly, the general unanimity instruction contained in Joint Proposed Jury Instruction No. 15 (Dkt. #74, at 16–17) is sufficient for Count Four. *See* Pattern Jury Instructions (Criminal Cases), United States Court of Appeals for the Fifth Circuit, No. 1.26 (2019).

Dated: March 29, 2022

Respectfully submitted,

/s/ Matthew W. Lunder

MATTHEW W. LUNDER
Bar No. MT 8671
Email: matthew.lunder@usdoj.gov

JARIEL A. RENDELL
Bar No. DC 1027023
Email: jariel.rendell@usdoj.gov

RACHEL KROLL
Bar No. NY 5751748
Email: rachel.kroll@usdoj.gov

Trial Attorneys
U.S. Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 11300
Washington, DC 20530
(202) 476-0275

COUNSEL FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2022, I electronically served a true and correct copy of this document on Defendants' counsel of record by means of the Court's CM-ECF system.

/s/ Matthew W. Lunder
Matthew W. Lunder