UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: H-97-93
	)	
v.	)	Violations:
	)	
MARK ALBERT MALOOF,	)	15 U.S.C. §1
	)	18 U.S.C. § 371
Defendant.	)	FILED 6/11/97

UNITED STATES' MOTION IN LIMINE

Pursuant to Fed. R. Crim. P. 12(b), and for the reasons set forth in the accompanying Memorandum, the United States hereby moves that the Court enter an Order:

1. Prohibiting the defendant from offering or commenting on the following evidence on the grounds that it is irrelevant to the charges against him and the fact-finding duties of the jury:
   a. Evidence related to the punishment that may be provided by law for a violation of the Sherman Act (15 U.S.C. § 1); and conspiracy to commit wire fraud (18 U.S.C. § 371); and
   b. Evidence of the potential direct or indirect effects of a conviction of the defendant.
2. Prohibiting the defendant from offering evidence of the following on the basis that it is irrelevant to the antitrust violation with which the defendant is charged:

a. Evidence of economic justification for entering into and continuing to participate in a price-fixing agreement; and

b. Evidence of the economic reasonableness of prices charged by the defendant and his co-conspirators pursuant to the price-fixing conspiracy.

3. Invoking Rule 615 of the Federal Rules of Evidence excluding witnesses from hearing the testimony of other witnesses in the trial.

4. Prohibiting witnesses from reading transcripts of trial or pretrial testimony given by other potential or actual trial witnesses.

Respectfully submitted,

/S/

MARK R. ROSMAN
Attorney-in-Charge
Florida State Bar No. 0964387
U.S. Department of Justice
Antitrust Division
1601 Elm Street, Suite 4950
Dallas, Texas 75201-4717
(214) 880-9401

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MEMORANDUM IN SUPPORT OF
UNITED STATES' MOTION IN LIMINE

Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, the United States has filed a Motion in limine with the Court that addresses certain matters that are capable of resolution prior to trial. This Memorandum sets forth the reasons for the relief sought and the supporting legal authority.

I

INADMISSIBILITY OF EVIDENCE REGARDING PUNISHMENT
OR COLLATERAL CONSEQUENCES OF CONVICTION

In a federal criminal prosecution, the jury's sole function is to determine guilt or innocence. Evidence regarding punishment or the effects of conviction is thus irrelevant and inadmissible before the jury. The punishment provided by law upon conviction of a criminal violation is a matter exclusively in the province of the Court and should never be considered by the jury in any manner in arriving at their verdict as to guilt or innocence. See, e.g., Beavers v. Lockhart, 755 F.2d 657, 662 (8th Cir. 1985) ("Historically, the duty of imposing sentence has been vested in trial judges. . . .")(citing

United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974)); United States v. Brown, 744 F.2d 905, 909 (2d Cir.), cert. denied, 469 U.S. 1089 (1984) ("[T]he fact finding necessary for sentencing is the responsibility of the sentencing judge. . . ."); Turnbough v. Wyrick, 551 F.2d 202, 203 (8th Cir.), cert. denied, 431 U.S. 941 (1977) (defendant has no constitutional right to have punishment assessed by a jury). See also Pattern Jury Instr., Crim., 5th Cir., Instruction No. 1.21 (1990).

It is recognized that, when the pertinent statute does not vest responsibility for sentencing in the jury, the jury's duty is to find facts without consideration of the potential punishment:

> The authorities are unequivocal in holding that presenting information to the jury about possible sentencing is prejudicial. Breach of this standard has often been grounds for reversal. A jury is obligated to "reach its verdict without regard to what sentence might be imposed." [Citations omitted.] Absent a statutory requirement that the jury participate in the sentencing decision, nothing is left "for jury determination beyond the guilt or innocence of an accused."

United States v. Greer, 620 F.2d 1383, 1385 (10th Cir. 1980). Accord United States v. McCracken, 488 F.2d 406, 423 (5th Cir. 1974); United States v. Davidson, 367 F.2d 60, 63 (6th Cir. 1966); Lyles v. United States, 254 F.2d 725, 728 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958).

Evidence that relates to the issue of punishment upon conviction of a criminal offense has no bearing on the only question the jury in this case will be called upon to decide -- that of the guilt or innocence of the defendant. As the Fifth Circuit held in McCracken, "[e]xcept where a special statutory provision mandates a jury role in assessment or determination of penalty, the punishment provided by law for offenses charged is a matter exclusively for the court and should not be considered by the jury in

arriving at a verdict as to guilt or innocence." 488 F.2d at 423. Evidence dealing with possible fines or other collateral consequences of conviction is not probative of the issue of guilt or innocence. Since such evidence would not tend to prove or disprove any fact of consequence to the jury's determination of guilt or innocence, such evidence is not "relevant," as that term is defined by Fed. R. Evid. 401. Such evidence should, therefore, be excluded under Fed. R. Evid. 402, which specifically provides that evidence which is not relevant is inadmissible.

Punishment evidence is inadmissible not only during the parties' examination of witnesses, but also in closing argument. If the issue of punishment is raised during closing argument, the trial court should instruct the jury not to consider the matter of punishment in arriving at their verdict. Gretter v. United States, 422 F.2d 315, 319 (10th Cir. 1970). It is error to tell the jury the probable or potential consequences resulting from a particular verdict. United States v. McCracken, 488 F.2d at 424-25. The disposition of the defendant is "not a matter for the jury's concern." Pope v. United States, 372 F.2d 710, 731 (8th Cir. 1967), cert. denied, 401 U.S. 949 (1971).

Therefore, for the reasons discussed above, the United States respectfully requests that this Court enter an order that any evidence or argument relating to possible punishment upon, or collateral consequences of, conviction be excluded from the trial of this case.

II

INADMISSIBILITY OF EVIDENCE REGARDING REASONABLENESS OF PRICES AND ECONOMIC JUSTIFICATION

The United States anticipates that the defendant may try to introduce evidence of economic justification as a defense to the price-fixing conduct charged in the indictment, or may attempt to argue that the prices charged to customers under the price-fixing conspiracy were reasonable. Any such attempted arguments are irrelevant and therefore inadmissible under Fed. R. Evid. 402.

The defendant has been charged with conspiring to fix the price of metal building insulation in violation of the Sherman Act, 15 U.S.C. § 1. The Supreme Court has ruled that a price fixing conspiracy among competitors is a "classic example" of a per se violation of the Sherman Act. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9 (1984). See also Ancar v. Sara Plasma, Inc., 964 F.2d 465, 470 (5th Cir. 1992) (price-fixing agreements among competitors are illegal per se). Under the per se rule, the government need not prove that the fixed prices were unreasonable; it need only prove that the defendant agreed to fix prices. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. All Star Industries, 962 F.2d 465, 469 n.8 (5th Cir.), cert. denied, 506 U.S. 940 (1992).

As a per se violation, price-fixing agreements are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958). The Supreme Court explained:

> This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved. . . .

Id. Accord United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

Because a price-fixing conspiracy is presumed to be unreasonable activity as a matter of law, it cannot be justified or excused because the prices fixed were reasonable or because the conspiracy was motivated by good intentions, business necessity or a desire to benefit the public. Catalano, Inc. v. Target Sales, Inc., 446 U.S. at 647. See also United States v. All Star Industries, 962 F.2d at 475 n.21 ("Where there is a per se illegal price-fixing agreement, it is no defense that the agreement at issue did not have anticompetitive effects, or that defendant's motives were benevolent."). As the Supreme Court stated in Socony-Vacuum, "[w]hatever 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." 310 U.S. at 224 n.59.

Thus, the per se nature of the price fixing conspiracy makes any evidence of economic justification and reasonableness irrelevant and therefore inadmissible under Fed. R. Evid. 402.

III

EXCLUSION OF WITNESSES

By its Motion in limine, the United States invokes Fed. R. Evid. 615. This rule provides that, upon request by a party, the Court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. Rule 615 alters prior practice by removing the matter from the trial judge's discretion and making it a matter of right, at the request of a party. Advisory Committee's Note to Rule 615. Exceptions to the rule of exclusion are provided for: (1) a party who is a natural person; (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

The United States further requests that the Court enter an Order requiring, in addition to the exclusion of witnesses from the courtroom, that no witness or prospective witness may be shown or have read to him any transcript of another witness's pretrial or trial testimony or any part thereof, unless the witness qualifies for an exception to the rule of exclusion.

While Rule 615 does not directly address the question of whether showing or reading to a witness transcripts of prior testimony would violate a sequestration order, it is impossible to distinguish oral testimony from transcripts thereof in light of the purpose of the rule. The Supreme Court has addressed this issue in a manner that suggests that it would include the reading of transcripts within the ambit of Rule 615:

> [T]he court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony . . . . Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.

Sheppard v. Maxwell, 384 U.S. 333, 359 (1966).

The Fifth Circuit observed, even more directly, that the harm that Rule 615 attempts to avoid may be even more pronounced with a witness who reads testimony than with one who hears the testimony at trial:

> The purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion. [Citations omitted]. The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony. The court properly held that providing a witness daily copy constitutes a violation of rule 615.

Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981).

In light of the purpose of Rule 615, and the positions taken by the Supreme Court in Sheppard, and by the Fifth Circuit in Universal City Studios, the United States submits that the requested exclusion order should be entered.

CONCLUSION

For the foregoing reasons, the United States' Motion in Limine should be granted.

Respectfully submitted,

/S/

MARK R. ROSMAN
Attorney-in-Charge
Florida State Bar No. 0964387
U.S. Department of Justice
Antitrust Division
1601 Elm Street, Suite 4950
Dallas, Texas 75201-4717
(214) 880-9401

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ORDER

HAVING DULY CONSIDERED the United States' Motion in Limine and the response of the defendant,

IT IS HEREBY ORDERED that:

1. The defendant is prohibited from offering evidence or commenting on the punishment provided by law for a violation of the Sherman Act (15 U.S.C. § 1); and for conspiring to commit wire fraud (18 U.S.C. § 371);

2. The defendant is prohibited from offering evidence or commenting on the potential direct or indirect effects that a conviction in this case may have on the defendant;

3. The defendant is prohibited from offering evidence that the price-fixing conspiracy with which the defendant is charged was justified for economic reasons, and from offering evidence that the fixed prices were reasonable;

4. Fed. R. Evid. 615 has been invoked and, therefore, all potential witnesses in this case will be excluded from the courtroom so that they cannot hear the testimony of other witnesses; and

5. The parties are prohibited from providing to potential witnesses in this case transcripts of trial or pretrial testimony given by other potential or actual trial witnesses.

DONE AND ENTERED THIS _____ day of _____, 1997.

_____
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the United States' Motion In Limine, Supporting Memorandum of Law and Proposed Order was sent via Federal Express this _____ day of June, 1997, to:

J. Mark White, Esq.
White, Dunn & Booker
1200 First Alabama Bank Building
Birmingham, AL 32503

Albert C. Bowen, Esq.
Beddow, Erben & Bowen, P.A.
Second Floor - 2019 Building
2019 3rd Avenue, North
Birmingham, AL 35203

/S/
MARK R. ROSMAN
Attorney-in-Charge
Florida State Bar No. 0964387
U.S. Department of Justice
Antitrust Division
1601 Elm Street, Suite 4950
Dallas, Texas 75201-4717
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UNITED STATES' LOCAL RULE 7(B) STATEMENT

In accordance with Local Rule 7(B) of the United States District Court, Southern District of Texas, the undersigned counsel for the United States hereby states that a draft of this Motion was sent via facsimile and U.S. mail to Mr. J. Mark White, counsel for defendant, on June 6, 1997. Mr. White stated on June 10, 1997 that he will oppose this Motion.

/S/

MARK R. ROSMAN
Attorney-in-Charge
Florida State Bar No. 0964387
U.S. Department of Justice
Antitrust Division
1601 Elm Street, Suite 4950
Dallas, Texas 75201-4717
(214) 880-9401