UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA	)
	) CASE NO. 97-0853-CR-MIDDLEBROOKS
v.	)
	) Judge Donald M. Middlebrooks
ATLAS IRON PROCESSORS, INC., et al.,	)
	) **GOVERNMENT'S TRIAL BRIEF**
Defendants.	)

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Government's Trial Brief

I. Introduction

This memorandum addresses some of the legal and evidentiary issues that may arise at trial.[1] Section II — Law Applicable To The Offense — deals with legal issues relating to the proof of a violation of the Sherman Act. Sections III-V — Witness Testimony, Admissibility Of Documents, and Admissibility of Evidence Outside the Charged Conspiracy, deal with various evidentiary issues that are likely to occur during trial.

II. Law Applicable To The Offense

A. The Elements Of The Crime

The Defendants are charged with one count of violating the Sherman Act, 15 U.S.C. § 1, which states in pertinent 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 . . . .

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 prove the following elements of the Sherman Act conspiracy with which the Defendants are charged:

> One, that the conspiracy agreement, or understanding described in the indictment was knowingly formed, and was existing at or about the time alleged;
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> Two, that the defendants Atlas Iron Processors, Inc., Sunshine Metal Processing, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., David Giordano, and Randolph J. Weil knowingly became members of the conspiracy, agreement, or understanding, as charged.

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[1] For the convenience of the Court, each topic addressed in the Trial Brief is treated for citation purposes as if it were a separate brief. For example, the first time a case is used with respect to a particular topic (e.g., Section II.B, "The Agreement Is The Crime"), the cite includes the circuit and year decided even if that case had been previously cited in another part of the Trial Brief.

See Government's "Proposed Jury Instruction: The Essential Elements of the Offense Charged," based on Devitt and Blackmar Federal Jury Practice and Instructions § 51A.15 (1997 pocket part).

B. The Agreement Is The Crime

The rule is firmly established that in a Sherman Act case the agreement itself constitutes the complete offense. Nash v. United States, 229 U.S. 373, 378 (1913); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977) (In Sherman Act prosecutions, the "indictment need not allege, nor the proof show, a specific contract."); see also United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991). The principal difference between the Sherman Act, 15 U.S.C. § 1, and the general criminal conspiracy statute, 18 U.S.C. § 371, is that the Sherman Act does not require proof of an overt act in furtherance of the conspiracy. United States v. Dynaelectric Co., 859 F.2d 1559, 1565 n.6 (11th Cir. 1988). Once a per se unlawful agreement is proved, a complete violation is shown. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n.59 (1940). See also, Flom, 558 F.2d at 1183. ("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 . . . ."); United States v. Dynaelectric Co., 859 F.2d 1559, 1565 n.6 (11th Cir. 1988) ("We note that an overt act is not required for a §1 Sherman Act conspiracy violation.").

The per se rule is a substantive rule of law, not merely an evidentiary presumption, which governs those restraints that the courts have determined to be inevitably unreasonable and anticompetitive. In reaffirming the validity of per se proscriptions, the Supreme Court has stated that when prices are fixed, "The 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 Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984). Consequently, in a case involving price fixing or volume allocation, the prosecution need not prove that the conspiracy had an anticompetitive effect on the market. Construction Aggregate Trans., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 781 (11th Cir. 1983) ("Normally, automatic condemnation under the per se rule occurs merely upon a finding that the defendant engaged in the restrictive conduct alleged; proof of anticompetitive effect in a relevant market need not be demonstrated."); Midwestern

Waffles, Inc., v. Waffle House, Inc., 734 F.2d 705, 719-20 (11th Cir. 1984) ("Generally, horizontal allocations of markets are said to be per se violations of the antitrust law, and, therefore, it is unnecessary to make any further showing of their anticompetitive effect."). In fact, it is not even necessary to prove that the agreement worked. United States v. Fischbach and Moore, Inc., 750 F.2d 1183, 1192, 1195-96 (3d Cir. 1984) (citing Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958)); Socony-Vacuum Oil Co., 310 U.S. at 220-22; United States v. Trenton Potteries, Inc., 273 U.S. 392, 396-97 (1927)).

C. Specific Intent Need Not Be Proved

In United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 684 (5th Cir. Unit B 1981), the Fifth Circuit held that the specific intent which the government needs to prove in a *per se* case such as this is inherent in the charge itself:

> [A]ppellants argue that intent to restrain competition is an element of a violation of the Sherman Act and that the instruction of the district court improperly allowed the jury to convict absent a finding of intent. We agree that intent is an element of a criminal antitrust offense. We do not agree, however, that the instruction of the district court improperly allowed the jury to convict absent a finding of criminal intent. The jury was instructed that "the Government must prove beyond a reasonable doubt that the defendants knowingly formed, joined or participated in a conspiracy to fix, raise, maintain or stabilize retail prices of gasoline in Florida." In other words, the jury was instructed that the Government must prove that appellants intended to fix prices. As we discussed above, because fixing prices is by itself an unreasonable restraint of trade, an intent to fix prices is equivalent to an intent to unreasonably restrain trade; therefore, a finding that appellants intended to fix prices supplies the criminal intent necessary for a conviction of a criminal antitrust offense.

Id. (citations omitted) (emphasis added).

In other words, to prove that the Defendants violated the Sherman Act with the requisite intent, the United States must simply prove that the Defendants knowingly participated in the charged conspiracy. See United States v. Koppers Co., 652 F.2d 290, 295-96 n.6 (2d Cir. 1981); United States v. Continental Group, Inc., 603 F.2d 444, 460-66 (3d Cir. 1979); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106-07 (7th Cir. 1979). And the United

States need not prove that the Defendants had a specific intent to restrain trade. In Sherman Act cases dealing with per se offenses like price fixing and sales allocation, proof of knowing participation in the charged conspiracy suffices to prove the Defendants' intent. United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 533 (4th Cir. 1985); Cargo Serv. Stations, 657 F.2d at 684; United States v. SIGMA, 624 F.2d 461, 464-65 (4th Cir. 1979); United States v. Continental Group, Inc., 603 F.2d 444, 460-62 (3d Cir. 1979); United States v. Gillen, 599 F.2d 541, 545 (3d Cir.1979); United States v. Foley, 598 F.2d 1323, 1335 (4th Cir. 1979); Brighton Bldg. & Maintenance Co., 598 F.2d at 1106-07 (7th Cir. 1979).

D. *Per Se* Unlawful Agreement Need Not Be Explicit or Formal

The evidence need not show that the members of the conspiracy entered into an express or formal agreement, or that they directly stated (orally or in writing) what their object or purpose was to be, or the details of it, or the means by which the object or purpose was to be accomplished. American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939). Indeed, an exchange of words is not required. Direct Sales Co. v. United States, 319 U.S. 703, 714 (1943); Esco Corp. v. United States, 340 F.2d 1000, 1008 (9th Cir. 1965). As one court held:

> 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., 555 F. Supp. 1273, 1281 (D. Kan. 1983) (quoting American Tobacco, 328 U.S. 781, 809 (1946)).

Furthermore, as the Fifth Circuit stated in United States v. Morado, 454 F.2d 167, 174 (5th Cir. 1972): "[T]his circuit is committed to the principle that proof of such an agreement may rest upon inferences drawn from relevant and competent circumstantial evidence -- ordinarily the acts and conduct of the alleged conspirators themselves." Or, as the Eleventh Circuit stated more recently, "To sustain a conviction for conspiracy . . . [p]roof could be by direct or circumstantial evidence; if circumstantial, 'reasonable inferences, and not mere speculation, must support the

jury's verdict.'" United States v. Brazel, 102 F.3d 1120, 1131 (11th Cir. 1997). See also United States v. Metropolitan Enters., Inc., 728 F.2d 444, 451 (10th Cir. 1984) ("The agreement need not be shown to have been explicit. It can be inferred from the facts and circumstances of the cases."). It has been long recognized that a certain "course of dealing" or a "knowing wink" can mean as much as a formal conspiratorial agreement. 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 1000, 1007 (9th Cir. 1965) ("A knowing wink can mean more than words."). Thus, to secure a conviction, the United States must show that the defendant, "knowing that concerted action was contemplated and invited . . . gave [his] adherence to the scheme and participated in it." Interstate Circuit, 306 U.S. at 226 (1939); see also United States v. MMR Corp., 907 F.2d 489, 495 (5th Cir. 1990) ("It is enough that the government shows that the defendants accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade.").

E. The Evidence Need Not Show That All The Means Or Methods Charged In The Indictment Were Agreed Upon

The evidence need not establish that all of the means or methods set forth in the Indictment were agreed upon, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 249-50 (1940); United States v. Boucher, 796 F.2d 972, 975 (7th Cir. 1986); that all means or methods agreed upon were actually used or put into operation, United States v. Trenton Potteries Co., 273 U.S. 392, 402 (1927); or that all persons alleged to have been conspirators were such, Weiss v. United States, 103 F.2d 759, 759-60 (3d Cir. 1939).

As is true in most conspiracies, all of the Defendants in this case did not participate in all of the conspiratorial acts. Specifically, not all of the conspirators attended every conspiratorial meeting. It is, however, well established that all of the defendants in a conspiracy need not have participated in all of the conspiratorial acts, nor even be aware of all the conspiracy's details to be found guilty. See United States v. Becker, 569 F.2d 951, 960 (5th Cir. 1978) ("Every defendant need not participate in every transaction in order to make out one conspiracy.") (citations omitted); Brazel, 102 F.3d at 1131-32 ("A defendant may be culpable even if he or she played a minor role in the conspiracy, since a conspirator need not know the details of each act making up

the conspiracy."); United States v. Parrado, 911 F.2d 1567, 1571 (11th Cir. 1990) ("It is axiomatic that a co-conspirator need not know all the details of the conspiracy and yet is responsible for the acts of his co-conspirators.").

F. The Government May Prove A Narrower Conspiracy Than Alleged

The Supreme Court has held that at trial the government may prove a narrower conspiracy than alleged. United States v. Miller, 471 U.S. 130, 135-40 (1985); see also United States v. Mobile Materials, Inc., 881 F.2d 866, 874 (10th Cir. 1989). In Miller, the Court upheld the defendant's conviction even though the trial proof only supported a "significantly narrower . . . though included, fraudulent scheme." Miller, 471 U.S. at 131; see also United States v. Sutera, 933 F.2d 641 (8th Cir. 1991). There was nothing improper about Miller's conviction because the narrower offense for which he was convicted "was clearly and fully set out in the indictment." Miller, 471 U.S. at 144.

In this case, the charged overall conspiracy involved two objectives — price fixing and customer allocation — both of which are violations of the Sherman Act. Under Miller and Eleventh Circuit law, the jury can convict if it finds that a particular defendant was a member of a conspiracy to commit either one of these types of illegal conduct. See Fed. R. Crim. P. Rule 7 ("It may be alleged in a single count . . . that [the defendant] committed [the offense] by one or more specified means."), and the concomitant Advisory Committee Note ("[Rule 7 was] intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways."). United States v. Alvarez, 735 F.2d 461, 465 (11th Cir. 1984), overruled on other grounds by, United States v. Perez, 960 F.2d 1569, 1574 (11th Cir. 1992); United States v. James, 528 F.2d 999, 1014 n.20 (5th Cir. 1976).

In Alvarez, the Eleventh Circuit held:

> It is well-settled in this circuit that where a conspiracy has multiple objectives, a conviction will be upheld so long as the evidence is sufficient to show that the defendants agreed to accomplish at least one of the objectives.

Here, the two objectives of the conspiracy were price fixing and customer allocation, and the rule that can be drawn from Alvarez is this: a Defendant may be convicted if the jury unanimously finds that Defendant agreed to fix prices or allocate customers — or both. Along

those same lines, the evidence may show that, while the defendants agreed to set the purchase price of scrap metal in a given number of categories, they ended up purchasing scrap at the prices they set in most, but not all, of the agreed-upon categories. Based on the reasoning in the above cases, this set of facts should not prevent the jury from convicting the defendants in this case.[2]

Finally, it is well settled in the Eleventh Circuit that the government needs to prove only that the conspiracy existed during any relevant time period alleged in the indictment and that this period was within the statute of limitations. See, e.g., United States v. Harrell, 737 F.2d 971, 975 n.4 (11th Cir. 1984).

G. Proof Of Interstate Commerce

An element of this Sherman Act case is that the alleged illegal activities had a relationship to interstate commerce. This requirement may be satisfied by proof that one or more of the conspirators' business activities took place in the flow of interstate commerce (the "in the flow of commerce" theory) or by proof that the activities had or were likely to have "an effect on some other appreciable activity demonstrably in interstate commerce" (the "effect on commerce" theory). McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242 (1980). It is important to remember that, with both of these theories, even a trivial impact on interstate commerce may be sufficient to bring the activities complained of within the purview of the Sherman Act. Cargo Serv. Stations, 657 F.2d at 679 (antitrust case holding congressional power to regulate commerce so broad it encompasses growing of wheat for consumption by one's family); see also United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1086 (5th Cir. 1978).

A key aspect of proof of interstate commerce is that proof of interstate commerce as to one defendant or co-conspirator brings the activities of the entire group within the ambit of the Sherman Act. United States v. Foley, 598 F.2d 1323, 1328 (4th Cir. 1979); Safeway Stores Inc. v. FTC, 366 F.2d 795, 797-98 (9th Cir. 1966).

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[2] As discussed earlier, it is also true that even if the defendants did not follow through with their price-fixing agreement on any of the categories of scrap they originally named, the act of agreeing to fix prices alone is enough to make them guilty of violating § 1 of the Sherman Act. See, e.g., Nash, 229 U.S. at 378; Flom, 558 F.2d at 1183.

The "flow" of interstate commerce consists of the "practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974). The flow theory of commerce is satisfied when the challenged conduct occurs in interstate commerce. Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975). The "effect" on interstate commerce theory is satisfied if the activity "has an effect on some other activity demonstrably in interstate commerce." McLain, 444 U.S. at 242. A jury may find an "effect" on interstate commerce even if the conspiracy is "wholly local in nature." United States v. Georgia Waste Sys., Inc., 731 F.2d 1580, 1583 (11th Cir. 1984). The Supreme Court has affirmed that if "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 Ass'n, 336 U.S. 460, 464 (1949).

Although the government needs to satisfy the interstate commerce requirement under only one of these theories, in this case the government's evidence will easily satisfy this requirement under both theories. During the conspiracy, both of the corporate conspirators — Atlas Iron Processors, Inc. and Sunshine Metal Processing, Inc. — purchased cars for scrap from the Bahama Islands and shipped large quantities of scrap metal across Florida state lines and into various states in the Union (including Alabama and Georgia), as well as foreign countries such as Turkey, Korea, and many countries in Europe. Consequently, the conspirators' business activities were both in the flow of, and substantially affected, interstate and foreign trade and commerce.

III. Evidentiary Issues — Witness Testimony

A. Indefiniteness Of Recollection Is No Impediment To Testimony

Some of the witnesses called by the government may qualify their testimony by such expressions as "I think," "I believe" or "to the best of my recollection." Moreover, these prosecution witnesses cannot always specify the exact dates of particular communications in which they engaged or specifically recall when in a conversation a particular statement was made. The witnesses may have only a general recollection of some meetings or conversations, and they may have difficulty distinguishing one specific meeting or conversation from another,

although they may be positive that they participated in a number of such meetings or conversations.

The conspirators in this case had numerous contacts with each other in which they furthered their conspiracy. Most of these contacts occurred more than six years ago. Although the government's witnesses will identify a number of specific meetings and conversations, under the circumstances it is understandable that any particular witness may not be able to easily distinguish each meeting or conversation that occurred during the conspiracy or remember every detail of each meeting or conversation. Nonetheless, it will be important for the jury to hear about the numerous meetings and conversations that took place so that the jury fully understands the nature of the conspiracy.

The degree of detail any witness recalls about specific meetings or events goes to the weight of the testimony, not to its admissibility. Such testimony is admissible over objection that it is not based upon the witness' personal knowledge.[3] Rule 602 of the Federal Rules of Evidence sets forth the requirement of a foundation for testimony:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

The standard which Rule 602 sets is a liberal one. Although Rule 602 requires personal knowledge, it "does not require that the witness' knowledge be positive or rise to the level of absolute certainty." M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 681 F.2d 930, 932 (4th Cir. 1982); see also United States v. Powers, 75 F.3d 335, 340 (7th Cir. 1996) (holding that

[3] Even a witness with a substantial memory problem is competent to testify under Federal Rules of Evidence 601, which states that "[e]very person is competent to be a witness except as otherwise provided in these rules." The Federal Rules of Evidence specify that only two groups of persons, judges (Rule 605) and jurors (Rule 606), are incompetent to testify, and courts have held that even persons with severe psychiatric problems are competent witnesses. United States v. Ramirez, 871 F.2d 582, 583-584 (6th Cir. 1989) (defendant who was heavy user of cocaine held to be competent witness).

witness's inability to recall dates did not require exclusion of testimony since Rule 602 only requires personal knowledge). As McCormick notes:

> While the law is exacting in demanding firsthand observation, it is not so impractical as to insist upon preciseness of attention by the witness in observing, or certainty of recollection in recounting the facts. Accordingly, when a witness uses such expressions as "I think," "My impression is," or "In my opinion," this will be no ground of objection if it appears that he merely speaks from an inattentive observation, or an unsure memory, though it will if the expressions are found to mean that he speaks from conjecture or from hearsay.

E.W. Cleary, McCormick on Evidence § 10, at 24-25 (3d ed. 1984) (citations and footnotes omitted). As Judge Weinstein observed, "The judge should admit the testimony if the jury could find that the witness perceived the event to which he is testifying, since credibility is a matter for the jury." 3 Weinstein's Evidence ¶ 602[02], at 602-11 (1993).

In cases involving criminal antitrust conspiracies, courts have routinely held that an imperfect recollection is no bar to admissibility. In United States v. MMR Corp., 907 F.2d 489, 496 (5th Cir. 1990), a government witness was permitted to testify as to the existence of a bid-rigging agreement between his corporation and the defendant, even though the witness was unable to recall exactly when he specifically became aware of the agreement. The court emphasized the existence of certain circumstantial evidence indicating that the witness: 1) had significant contact with defendants; 2) had attended both of the meetings between other representatives of his corporation and defendant; and 3) had negotiated the defendant's subcontract, which was to serve as defendant's pay-off for participation in the bid rigging. The court held that this evidence, although circumstantial, was sufficient to find that the witness had the requisite personal knowledge of the agreement to testify as to its existence. Id.

In another criminal antitrust case, United States v. Miller, 771 F.2d 1219, 1236 (9th Cir. 1985), the court affirmed that an imperfect recollection would not bar the admission of a witness' testimony concerning a series of telephone conversations he had with a co-conspirator. "Because there were a number of conversations, [the witness] was unable to recall the exact dates on which the conversations occurred." However, the witness was able to recall four conversations within

five years of the trial, which was within the time period covered by the indictment. "Such an approximate time frame," the court held, "provides a sufficient foundation for admissibility." Id.; accord United States v. Barshov, 733 F.2d 842, 849 (11th Cir. 1984) (affirming trial court's admission under Fed. R. Evid. 801(d)(2)(E) of testimony that either of two co-conspirators had asked witness to alter documents, although he could not recall which).

Further, in United States v. Peyro, 786 F.2d 826 (8th Cir. 1986), the court affirmed the trial court's refusal to strike the testimony of a co-conspirator's girlfriend, who acknowledged on direct examination "'some very substantial memory problems'" and that she was "'emotionally unbalanced,'" and stated on cross-examination: "'I don't remember anything very well. There are, like, certain moments I know I remember, but nothing at all specific in any of it.'" Id. at 830 (quoting trial transcript). Observing that the trial court determined that the witness had "a broad, general recollection" of the matters to which she testified, the appellate court concluded that the trial court had not abused its discretion in refusing to strike the testimony. Id. at 831. Moreover, the court noted, no prejudice ensued, since the witness' failings "were laid bare for the jury's consideration." Id.

In addition, testimony based on imperfect recollection is admissible over objection that it is "opinion" or "speculation" whenever the witness either observed or participated in what he is testifying about. See Fed. R. Evid. 701. The witness' lack of definitiveness is for the jury to evaluate. United States v. Nimmo, 380 F.2d 10, 11-12 (4th Cir. 1967); see also Government of the Virgin Islands v. Knight, 989 F.2d 619, 630 (3d Cir. 1993) ("The relaxation of the standards governing the admissibility of [lay] opinion testimony relies on cross-examination to reveal any weaknesses in the witness' conclusions.").

In this case, the government's witnesses will be called upon to testify as to matters they personally observed. Some of their recollection may not be perfect, and their testimony may be qualified by such expression as "I think, "I believe" or "to the best of my recollection." But this does not render their testimony inadmissible, rather it goes to the weight the jury should place on such testimony.

B. A Witness May Testify To The Meaning Of Terms Used By Conspirators And His Or Her Understanding Of Their Statements

In this case, the government may ask witnesses what they understand is the meaning of certain words and phrases they used at the time or were used by a conspirator. While the meanings of the words or phrases may not be immediately apparent to the jury, the witnesses who participated in the conspiracy will be able to explain what the words and phrases mean to them, thereby greatly assisting the jury's understanding of the evidence.

Fed. R. Evid. 701 specifically makes such lay witness opinion or inference testimony admissible if it is: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701. The Eleventh Circuit has admitted lay opinion and inference testimony which meets the criteria of Rule 701. For example in United States v. Awan, 966 F.2d 1415, 1430 (11th Cir. 1992), the Eleventh Circuit affirmed the district court's decision pursuant to Rule 701 to allow an United States Customs special agent "to explain phrases regarding international transactions involving correspondent banks, numbered accounts, time deposits using collateralized loans, and how drug traffickers shield themselves from law enforcement" because the jury would likely be unfamiliar with the terms and concepts used in the world of high finance. See also United States v. Russell, 703 F.2d 1243, 1248 (11th Cir. 1983).

Other circuit courts have made similar rulings concerning opinion testimony about the meaning of words and phrases. See, e.g., United States v. Simas, 937 F.2d 459, 465 (9th Cir. 1991) (allowing testimony as to meaning of vague and ambiguous statements); United States v. De Peri, 778 F.2d 963, 977 (3d Cir. 1985) (allowing testimony about language in taped conversation "composed with unfinished sentences and punctuated with ambiguous references . . . as if he were using code"); United States v. Phillips, 593 F.2d 553, 558 (4th Cir. 1978) (allowing "insider" conspirator to testify as to "meaning of the cant of conspirators"); James Bakalis & Nickie Bakalis. Inc. v. Simonson, 434 F.2d 515, 518 n.5 (D.C. Cir. 1970) (holding that "[a] witness may . . . testify as to what he understood to be the true meaning of the words used by another."). United States v. Kozinski, 16 F.3d 795, 809 (7th Cir. 1994) (allowing a lay testimony that an unnamed person was actually a drug dealer's customer). In United States v. Urlacher, 979 F.2d 935, 939 (2d Cir. 1992), the court affirmed the admission of a witness' interpretations of certain comments made by the defendant during taped conversations. The court ruled that the

witness' interpretations were rationally based on his perceptions and that "his testimony was helpful to the jury's understanding of the often confusing and disjointed discussions on the tapes." Id.

The lay opinion testimony to be offered in this case will be based on the witness' personal observations and will facilitate an understanding of factual issues. Under the rule, such testimony should be admitted because it will appreciably help put "the trier of fact in possession of an accurate reproduction of the event." Notes of Advisory Committee, Fed. R. Evid. 701; 3 Weinstein's Evidence ¶ 701[02], at 701-29 (1993). As the Ninth Circuit held in United States v. Brooks, 473 F.2d 817, 818 (9th Cir. 1973), "[a] declarant obviously intends that his statement to a witness be understood; it is hardly improper to allow the witness to state what was understood."

Therefore, in discussing conversations that occurred during the charged conspiracy, a witness may use certain words and phrases which may not be familiar to the members of the jury. Similarly, a witness may be asked to testify about conspiratorial conversations or documents that involved words and phrases that are vague or ambiguous. This issue may arise, *inter alia*, when Sheila McConnell discusses her understanding of the price fixing agreement between Sunshine and Atlas. In either case, the witness may then be asked to explain to the jury what these words and phrases meant. It will be clear that the witness' opinion as to the meaning of the words and phrases is rationally based upon personal observation. Furthermore, the opinion testimony will be helpful to a clear understanding of the evidence and the determination of a fact in issue, i.e., whether the defendants knowingly participated in a conspiracy to fix prices and allocate customers. Without such explanation of the meanings of the conspiratorial words and phrases, the evidence would be unclear to the jury. Because this testimony meets both of the requirements of Fed. R. Evid. 701, it is admissible in this case.

C. A Witness May Testify About Whether An Agreement Or Understanding Was Reached By The Conspirators

The central issue in a Sherman Act case is proof of an agreement — in this case an agreement to fix prices and allocate sales volumes. Accordingly, a witness is permitted to testify as to whether an agreement was reached in any particular meeting or conversation. Such testimony satisfies the requirements of Federal Rule of Evidence 701: it is helpful to the jury

because it describes a key fact in the case and is based upon the witness' own personal observations, knowledge and inferences. [4] Furthermore, the evidence is not excludable on the theory that it invades the province of the jury or that it calls for a conclusion of the witness. Fed. R. Evid. 704.

In United States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963), the court explained:

> The words 'agreement', 'permission', 'understanding', 'assurance' have well-established lay meanings. Various employees of defendants who had been shown by the government to have had some contact, telephonic or personal, with another defendant, were asked the question whether they had made any agreement or had any understanding about prices, etc.
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> * * *
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> It is our understanding that witnesses in antitrust cases have uniformly been permitted to testify concerning the existence of agreements and understandings. In numerous court opinions, references are made to such testimony without any suggestion that questions as to agreements and understandings were objectionable.

Id., at 889-90 (citing Continental Baking Co. v. United States, 281 F.2d 137, 143 (6th Cir. 1960)). Under Fed. R. Evid. 704, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Therefore, testimony about whether an agreement or understanding was reached by the conspirators is permissible because the terms "'agreement,' 'understanding,' 'promise,' or 'commitment' to fix prices . . . have well-established lay meanings and do not demand a conclusion as to the legal implications of the conduct." United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1234 (8th Cir. 1992) (quoting United States v. Baskes, 649 F.2d 471, 478 n.5 (7th Cir. 1980)).

In United States v. MMR Corp., 907 F.2d 489, 495-96 (5th Cir. 1990), the Fifth Circuit rejected the defendant's objections to the testimony of a government witness concerning the existence of an agreement with the defendant to rig bids on a construction project for an

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[4] See Section III.B for a discussion of Rule 701.

electrical power plant. The witness could testify as to the existence of an agreement because he was a direct participant in the agreement and had personal knowledge of the underlying facts of his testimony.

As recognized by Standard Oil, several other criminal antitrust cases, without specifically discussing the issue, provide additional support for the admissibility of testimony about whether an agreement was reached. For example, in United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 680 (5th Cir. Unit B Sept. 1981), the government witness allowed to testify that retail gasoline competitors met and reached an "implied understanding" concerning the appropriate price difference.[5] In United States v. Portsmouth Paving Corp., 694 F.2d 312, 318 (4th Cir. 1982), the government's witness was allowed to testify that he met with his competitors and that "[a]t the meeting we agreed to not fight, to get along, try to provide work. Everybody get [sic] their share of work." In the same vein, the government's witness, Broce, in United States v. Metropolitan Enter., Inc., 728 F.2d 444, 447 (10th Cir. 1984), testified that he met with the defendant to rig the bids on a highway job. During the meeting, the defendant "agreed to go along with" Broce and to "protect" Broce's bid. Id.; see also United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 529 (4th Cir. 1985) (government witness testified that defendants concurred with a plan to rig bids on a sewer construction project); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1104 (7th Cir. 1979) (government's witness testified that he and various competitors all agreed to the plan of collusive bids).

In United States v. Thompson, 708 F.2d 1294, 1298 (8th Cir. 1983), the court allowed a witness to testify that the defendant "was involved in the conspiracy." First, the witness testified that the defendant was present when stolen construction equipment was brought into a storage yard and that the defendant moved one of the machines. Thereafter, the witness was allowed to state his opinion that the defendant was involved in the conspiracy. This opinion was a shorthand rendition of his knowledge of the total situation and the collective facts. In short, after

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[5] See also Lubbock Feed Lots, Inc., v. Iowa Beef Processors, Inc., 630 F.2d 250, 263 (5th Cir. 1980) (holding that cattle trader (Guss) whose desk was near the desk of another trader (Heller) was allowed to testify as to his "understanding" of the nature of Heller's business deals even though Guss had no direct involvement in those deals).

eliciting a factual foundation to show that witnesses personally observed or personally talked to the defendant, witnesses have been allowed to summarize the facts known to them by expressing an opinion about the involvement of the defendant in the crime charged.

In a recent case in which the district court erroneously excluded a witness' opinion that a defendant had accidentally fired a gun, the Third Circuit explained why witnesses are permitted to offer their opinions and are not limited simply to reciting their observations:

> If circumstances can be presented with greater clarity by stating an opinion, then that opinion is helpful to the trier of fact. Allowing witnesses to state their opinions instead of describing all of their observations had the further benefit of leaving witnesses free to speak in ordinary language.
>
> In this case, an eyewitness' testimony that [the defendant] fired the gun accidentally would be helpful to the jury. The eyewitness described the circumstances that led to his opinion. It is difficult, however, to articulate all of the factors that lead one to conclude a person did not intend to fire a gun. Therefore, the witness' opinion that the gun shot was accidental would have permitted him to relate the facts with greater clarity, and hence would have aided the jury.

Government of the Virgin Islands v. Knight, 989 F.2d 619, 630 (3d Cir. 1993) (citations omitted).

Similarly, the witnesses in this case may have difficulty articulating all of the verbal and nonverbal acts tending to show that a defendant entered into the charged conspiracy, and they should therefore be permitted to supplement their observations with an opinion that a defendant participated in the agreement. The foundation for such testimony will be a description of who participated in conspiratorial meetings and conversations, where these meetings and conversations took place, and what subjects were discussed. Thus, where a government witness is unable to recall the specific words or acts which conveyed the agreement, the court should allow that witness to state that there was such an agreement as a "shorthand rendition of [his] knowledge of the total situation and collective facts." United States v. McClintic, 570 F.2d 685, 690 (8th Cir. 1978) (witness permitted to testify that defendant knew certain merchandise had been fraudulently obtained).

D. This Court Has The Discretion To Limit Cross-Examination

This Court has the authority under the Federal Rules of Evidence to limit cross-examination of witnesses. Rule 611(a) provides that:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

And Federal Rules of Evidence 611(b) states in part that: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."

Furthermore, the Eleventh Circuit has emphasized that, "A trial court has the authority and responsibility to control the examination of witnesses and the presentation of evidence in order to achieve the objectives of ascertaining truth and avoiding needless consumption of time." Haney v. Mizell Mem'l Hosp., 744 F.2d 1467, 1477 (11th Cir. 1984); see also United States v. Bartiasa-Rodriguez, 17 F.3d 1354, 1371 (11th Cir. 1994) ("Neither the Confrontation Clause nor the Due Process Clause restricts a trial judge's broad discretion to exercise reasonable control over the order in which litigants interrogate witnesses and present evidence."); United States v. Allen, 772 F.2d 1555, 1557 (11th Cir. 1985) (extent of cross-examination is within the trial court's discretion and court must exercise reasonable control over the examination of witnesses to protect them from harassment or undue embarrassment); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (trial judge retains wide latitude to impose reasonable limits on cross-examination based on concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"). Thus, this Court has discretion to limit cross-examination even when the purpose of the questioning is to elicit evidence of witness bias pursuant to the defendant's Confrontation Clause rights.

In evaluating limitations on cross-examination, the Eleventh Circuit has held:

> [A] trial judge may limit cross-examination without infringing the defendant's sixth amendment rights where '(1) the jury, through the cross-examination permitted, was exposed to facts sufficient for it to draw inferences relating to the reliability of the witness; and, (2)

> the cross-examination conducted by defense counsel enabled him to make a record from which he could argue why the witness might have been biased.'

United States v. Bennett, 928 F.2d 1548, 1554 (11th Cir. 1991) (superseded by statute on other grounds) (quoting United States v. Calle, 822 F.2d 1016, 1020 (11th Cir. 1987)). Put another way, "A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he properly can argue why the witness is less than reliable." Using this standard, the Eleventh Circuit has repeatedly upheld decisions by district courts to limit cross-examination. Bartiasa-Rodriguez, 17 F.3d at 1370; See, e.g., Bennett, 928 F.2d at 1554-55; United States v. Burke, 738 F.2d 1225, 1227-28 (11th Cir. 1984); United States v. Haimowitz, 706 F.2d 1549, 1559 (11th Cir. 1983).

The power of this Court to limit cross-examination is particularly important when, as is the case here, there are multiple defense counsel. Multiple defense counsel in a case creates a significant likelihood that, at some point, cross-examination will become "repetitive or only marginally relevant." See, e.g., Gordon v. United States, 438 F.2d 858, 862-63 (5th Cir. 1971) (upholding district court's decision to limit cross-examination as necessary to keep an eleven-defendant trial "orderly and efficient"); United States v. Sanders, 962 F.2d 660, 678-79 (7th Cir. 1992) (upholding ruling by district court that full cross-examination of witness by all defendants would needlessly consume time); United States v. Jorgenson, 451 F.2d 516, 519-20 (10th Cir. 1971) (upholding trial court's limitation on repetitive questioning by counsel for five codefendants). While defense counsel may seek to avoid this problem by having one attorney take the lead in cross-examining each witness, defense counsel may still attempt to obtain, by way of improper repetitive questioning, what they could not obtain if cross-examination were appropriately limited. Van Arsdall, 475 U.S. at 679. Consequently, under established Eleventh Circuit precedent, this Court has the discretion to limit cross-examination if defense counsel attempt to engage in such improper questioning.

E. Circumstances In Which The Government May Use Leading Questions On Direct Examination

Federal Rule of Evidence 611(c) provides that:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Under Federal Rule of Evidence 611(a), the judge is vested with the general authority to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence." And Rule 611(c), governing the use of leading questions, vests broad discretion in the trial judge. United States v. Hewes, 729 F.2d 1302, 1325 (11th Cir. 1984). See also United States v. O'Brien, 618 F.2d 1234, 1242 (7th Cir. 1980). A trial court's decision as to whether leading questions will be allowed is reviewed for abuse of discretion. Id.

As this Court knows, a question is only leading if it suggests the desired answer. 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 611.06[2][a] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1998) ("The 'essential test of a leading question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory. The evil to be avoided is that of supplying a false memory for the witness.'" [citation omitted]). For example, a question such as "Did Mr. Smith ever go to those meetings?" is not leading if the examiner expects a negative answer. An affirmative question which seeks a negative answer is by definition not leading.

Rule 611(c) provides for exceptions to the general prohibition on the use of leading questions in direct examination where the witness is hostile or biased, or where it is necessary to develop the testimony of the witness. Leading questions are also permissible to elicit testimony on (1) preliminary matters, Id. at § 611.06[2][b]; (2) to refresh the recollection of a witness. Id.; and (3) where the witness is called to disprove prior testimony of another witness, Id. The government may be required to use leading questions under some or all of these exceptions

during trial, but will herein discuss only the exceptions regarding interrogation of hostile or biased witnesses.

Under Rule 611(c), leading questions are appropriate where a witness is hostile. If a witness is "identified with an adverse party," Rule 611(c), the government does not have to establish that the witness is hostile. Such persons are "automatically regarded and treated as hostile." Notes of Advisory Committee on Proposed Rule 611, Subdivision (c).

The most obvious situation in which a witness will be identified with an adverse party during this trial will be if the United States elects to call a current or former employee of one of the defendant companies. Also, between when this brief is filed and when this case commences, one or more of the defendants may choose to plead guilty and the government may decide to call that defendant to testify. Even though a defendant who agrees to plea would be testifying pursuant to a plea agreement, that witness would have an obvious bias in favor of the remaining defendants, especially if he was or they were members of the same nuclear family or worked for the same corporate defendant. Given this obvious bias against the government's case, the government should be allowed, if necessary, to use leading questions with such witnesses. See, e.g., Stahl v. Sun Microsystems, Inc., 775 F. Supp. 1397, 1398 (D. Colo. 1991) (permissible for plaintiff to use leading questions on direct examination of its witness who was a former employee of defendant and who remained clearly identified with the defendant through previous employment and ongoing relationship with a key witness who was at trial on behalf of the defendant).

IV. Evidentiary Issues — Admissibility Of Documents

A. Authentication Of Documents

Fed. R. Evid. 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This standard provides the district court broad discretion in that determination. United States v. Lopez, 758 F.2d 1517, 1521 (11th Cir. 1985) (trial court's determination of admissibility of evidence undisturbed absent a clear abuse of discretion); United States v. Russell, 703 F.2d 1243, 1249 (11th Cir. 1983).

The jury, as fact finder, is the ultimate arbiter of whether real evidence is authentic. See McCormick et al., McCormick On Evidence § 227 (2d ed. 1972) ("if a prima facie showing is made, the writing or statement comes in, and the ultimate question of authenticity is left to the jury."). The role of the trial court is to determine, as an initial matter, if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). The test is whether any rational juror could possibly conclude that the evidence in question is authentic. United States v. Natale, 526 F.2d 1160, 1173 (2d Cir. 1975) (prosecution only needed to prove a rational basis from which the jury could conclude that the exhibit was authentic). Once the proponent of the evidence makes out a *prima facie* showing for authenticity, then the evidence should be submitted to the jurors for consideration of its authenticity, and the burden shifts to the opponent of the evidence to convince them that the evidence is not authentic. United States v. Caldwell, 776 F.2d 989, 1003 (11th Cir. 1985) ("Rule 901 . . . makes the court's determination of authenticity merely a preliminary evaluation and leaves the ultimate decision on genuineness to the jury."). The prima facie showing need not consist of a preponderance of the evidence. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1219 (E.D. Pa. 1980), aff'd in part, rev'd on other grounds, 723 F.2d 238 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986).

Documents can be authenticated in many ways, including testimonial evidence and from the face of the documents themselves. Fed. R. Evid. 901(b); 902. The evidence of authentication may include hearsay and other evidence normally inadmissible at trial. United States v. Franco, 874 F.2d 1136, 1139 (7th Cir. 1989). And the evidence of authentication may be either direct or circumstantial. United States v. Parker, 749 F.2d 628, 633 (11th Cir.1984); United States v. Grande, 620 F.2d 1026, 1035 (4th Cir. 1980); Esco Corp. v. United States, 340 F.2d 1000, 1013 (9th Cir. 1965).

With respect to business records, the Eleventh Circuit has held, "It is not necessary that the person who actually prepared the business record testify, nor that the document be prepared by the business which has custody of it, so long as other circumstantial evidence suggests the trustworthiness of the record." United States v. Hawkins, 905 F.2d 1489, 1494 (11th Cir. 1990). That is to say, if the document or its preparation indicates its trustworthiness, the document can

be admitted. Parker, 749 F.2d at 633; see also United States v. Whitaker, 127 F.3d 595, 601 (7th Cir. 1997) (holding that documents seized from corporate conspirator's computer satisfied the authenticity requirements of 901(a)). Indeed, the mere fact that the document came from the files of a co-conspirator may, in appropriate circumstances, be enough to warrant its admission. United States v. Black, 767 F.2d 1334, 1341-42 (9th Cir. 1985); In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 284-85 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986); see also Whitaker, 127 F.3d at 601 (holding that agent who seized documents from corporate conspirator's files could provide the authenticity requirements of 901(a)).

B. Admissibility Of Documents Used During The Conspiracy

During trial, the Government will offer into evidence various documents used during the conspiracy ("conspiracy documents").[6] These conspiracy documents are relevant because they tend to prove the existence of the conspiracy. Fed. R. Evid. 401.

The conspiracy documents are admissible because they are: (1) written statements in furtherance of the crime and therefore constitute co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E); (2) business records admissible under the business records exception to the hearsay rule, Federal Rule of Evidence 803(6); and (3) present sense impressions explaining events made at the time the declarant perceived the occurrence under Federal Rule of Evidence 803(1).

1. The Conspiracy Documents Are Admissible As Co-conspirator Statements Under Federal Rule of Evidence 801(d)(2)(E)

Most of the conspiracy documents the government will offer are co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). These documents are not hearsay because the Federal Rules of Evidence provide that a "statement" is not hearsay if it "is offered against a party" and it is "a statement by a co-conspirator of a party during the course of and in furtherance

[6] These documents include: (1) notes, memoranda, and minutes of conspiracy meetings; (2) diaries and date books of conspirators; (3) price announcements; (4) charts made by the conspirators during conspiracy meetings; (5) score sheets or tabulations of sales volumes circulated among the conspirators between meetings; and (6) travel records of the conspirators.

of the conspiracy." Fed. R. Evid. 801(d)(2)(E). A "statement" is "an oral or written assertion." Fed. R. Evid. 801(a).

Admission of co-conspirator statements against a defendant is proper where the government establishes by a preponderance of the evidence that: (1) a conspiracy existed, (2) the conspirator and the defendants against whom the conspirator's statement is offered were members of the conspiracy, and (3) the statement was made during the course and in furtherance of the conspiracy. United States v. James, 590 F.2d 575, 582 (5th Cir. 1979). Under James, this Court can examine the hearsay statements that are being sought to be admitted in determining the statement's admissibility. See Bourjaily v. United States, 483 U.S. 171, 181 (1987).

The Eleventh Circuit recognizes the admissibility of written co-conspirator statements under Rule 801(d)(2)(E) where such statements are deemed in furtherance of the conspiracy. Whether a statement is "in furtherance of the conspiracy" is determined on the particular facts of each case. United States v. Monroe, 866 F.2d 1357, 1363 (11th Cir. 1989). That determination is a finding of fact and cannot be overturned unless clearly erroneous. United States v. Posner, 764 F.2d 1535, 1537 (11th Cir.1985). The in furtherance of the conspiracy standard must not be applied too strictly, "lest [the Court] defeat the purpose of the exception." United States v. James, 510 F.2d 546, 549 (5th Cir. 1975); see also United States v. Ayarza-Garcia, 819 F.2d 1043, 1050 (11th Cir. 1987). On review, the Court applies a liberal standard in determining whether a statement is made in furtherance of a conspiracy. United States v. Santiago, 837 F.2d 1545, 1549 (11th Cir. 1988).

As explained in Monroe, 866 F.2d at 1363, this liberal standard means these statements may take many forms:

> Statements made by one conspirator to a fellow conspirator identifying yet another conspirator for the purpose of affecting future dealings between the parties are held to be in furtherance of a conspiracy. United States v. Caraza, 843 F.2d 432, 436 (11th Cir.1988); United States v. Patton, 594 F.2d 444, 447 (5th Cir. 1979). Also, when a conspirator provides information to his coconspirators necessary to keep them abreast of the conspiracy's current status, such statements are properly admitted as coconspirator declarations. United States v. Pool, 660 F.2d 547, 562 (5th Cir. Unit B 1981). Conversations made by conspirators to prospective coconspirators for membership

> purposes are also considered acts in furtherance of the conspiracy. United States v. Shoffner, 826 F.2d 619, 628 (7th Cir. 1987). Statements can be made in furtherance of a conspiracy if meant to allay suspicions or fears of others. [United States v. Posner, 764 F.2d 1535, 1538 (11th Cir. 1985)].

Id. (some citations omitted).

In this case, most of the conspiracy documents to be offered by the government were used in furtherance of the conspiracy and constitute co-conspirator statements. For example, Sheila McConnell's notes of the Sea Ranch meeting were used to keep track of what the fixed prices were on which types of scrap and in which geographical markets so the defendants could implement and maintain these artificially-low fixed prices. Scale tickets will show the prices at which scrap was sold record the price-fixing and market allocation schemes in action. Diaries and date books recorded upcoming meetings and, in some cases, the illegal nature of those meetings. Claims for travel reimbursements indicate the presence of co-conspirators in the Miami area on the dates they are alleged to have committed conspiratorial acts. Since all of the conspiracy documents were used to further the charged conspiracy, they should be admitted as co-conspirator statements under Rule 801(d)(2)(E).

2. Virtually All Of The Conspiracy Documents Constitute Business Records Admissible Under Federal Rule Of Evidence 803(6)

As part of her regular course of business practice, Sheila McConnell kept notebooks containing pricing and customer information used in buying scrap for Atlas. One of these notebooks will be introduced as evidence at trial. This notebook contains notes of the price fixing and customer allocation meeting at Sea Ranch on October 24, 1992. The notebook itself, and the specific notes of the Sea Ranch meeting are admissible under Federal Rule of Evidence 803(6) as business records. Rule 803(6) permits admission of documents containing hearsay provided that the documents were: 1) made at or near the time of the transaction; 2) by or from information transmitted by a person with knowledge; 3) if kept in the course of a regularly conducted business activity; and 4) if it was the regular practice of that business activity to make such records.

The "unusual reliability" of business records is said to be established because they are systematically checked, because they are produced regularly and continually which produces habits of precision, because the businesses themselves actually rely upon them, and because as part of their jobs employees have a duty to make accurate records. United States v. Fendley, 522 F.2d 181, 189 (5th Cir. 1975).

The trial court has wide discretion in determining whether a business record offered for introduction into evidence has the inherent probability of trustworthiness. United States v. Jones, 554 F.2d 251, 252 (5th Cir. 1977); Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980). Under Bourjaily, it is clear that when determining, under Rule 104(a), whether documents are admissible under the business records exception to the hearsay rule, this Court must base its findings on the preponderance of evidence. Bourjaily, 483 U.S. at 175-76. Furthermore, such evidence may include hearsay and other evidence normally inadmissible at trial. Id. at 177-78 (Rule 104 permits the court to consider any evidence whatsoever, bound only by the rules of evidence with respect to privilege).

"The touchstone of admissibility under the business records exception to the hearsay rule is reliability, and a trial judge has broad discretion to determine the admissibility of such evidence." United States v. Bueno-Sierra, 99 F.3d 375, 378 (11th Cir. 1996). To be admitted under this exception, the person who actually prepared the documents need not have testified so long as other circumstantial evidence and testimony suggest their trustworthiness. Itel Capital Corp. v. Cups Coal Co., 707 F.2d 1253, 1259-60 (11th Cir. 1983). Put in other words:

> Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation. Testimony by the custodian of the record or other qualified witness that the record is authentic and was made and kept in the regular course of business will suffice to support its admission

United States v. Veytia-Bravo, 603 F.2d 1187, 1191-92 (5th Cir. 1979).

As the court noted in another antitrust case, "'the testimony of the custodian or other qualified witness is not a sine qua non of admissibility in the occasional case where the requirements of qualification as a business record can be met by documentary evidence,

affidavits, or admissions of the parities . . . .'" In re Japanese Elec. Products Antitrust Litig., 723 F.2d 238, 288 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986) (quoting Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1236 (E.D. Pa. 1980), aff'd in part, rev'd on other grounds, 723 F.2d 238 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986)). Moreover, a record is admissible even if the recorder was not told to make such records, or did not make the record available to others in his business. United States v. Hedman, 630 F.2d 1184, 1198 (7th Cir. 1980). In this case the government will offer scale tickets which show individual transactions where the defendants purchased scrap metal from the victims of their price-fixing conspiracy. Even though the witnesses who identify the scale tickets may not be the persons who produced the documents, there should be no problem with them identifying the tickets for admission into evidence as long as they are otherwise "qualified" witnesses.

The government's witnesses will testify that the documents being offered were prepared at or near the time the activity recorded occurred, by a person with knowledge, that it was a regular business practice to prepare or record the information, and that the documents were maintained in the ordinary course of business. It is also true, however, that "[t]he routiness or repetitiveness with which a record is prepared is not the touchstone of admissibility under the business records exception," in fact, "Rule 803(6) should be interpreted so that the absence of routineness without more is not sufficiently significant to require exclusion of the record." United States v. Jacoby, 955 F.2d 1527, 1537 (11th Cir. 1992). In short, "Nonroutine records made in the course of a regularly conducted 'business' should be admissible if they meet the other requirements of Rule 803(6) unless 'the sources of information or other circumstances indicate lack of trustworthiness.'" Id. (quoting 4 J. Weinstein and M. Berger, Weinstein's Evidence § 803(6)[03], at 803-182 (1991)).

The Government will offer into evidence Sheila McConnell's notes which summarize a conspiracy meeting she attended with some of the defendants. The government's witness will testify these notes were prepared in the ordinary course of business because it was part of the attendee's job to go to the meeting, record the results, and then take action in accordance with what was decided at the meeting. Jacoby and Hedman are particularly important as they apply to the notes of this conspiratorial meeting.

The government will also offer diaries or calendars kept by the conspirators. These diaries and calendars were kept as part of a regular business practice. Diaries and calendars are also admissible as business records. See, e.g., Sabatino v. Curtiss Nat'l Bank of Miami Springs, 415 F.2d 632, 636 (5th Cir. 1969) ("[P]rivate records, if kept regularly and if incidental to some personal business pursuit, are competent evidence . . . ."). See also United States v. McPartlin, 595 F.2d 1321, 1347-50 (7th Cir. 1979). In McPartlin, the government sought to admit into evidence desk calendar-appointment diaries authored by and containing records of the daily business activities of one of its witnesses, William Benton. The diaries were kept solely for use by the witness and the entries were recorded at or near the time of the activity. The defendant argued that the diaries were unreliable because the entries were not sequential and because only the witness relied on them. The court upheld their admissibility as business records, finding that the diaries fulfilled all the requirements which justify admission of business records under Fed. R. Evid. 803(6) because the diaries were kept as part of a business activity and the entries were made with regularity at or near the time of the described event. The court went on to further find that, "Most importantly, these diaries satisfied the central rationale of the business record exception: since Benton had to rely on the entries made, there would be little reason to distort or falsify the entries." Id. at 1347. The court further noted that the diaries were kept in accord with the widespread practice of business executives to maintain such records. Id. at 1348.

Letters created by another business but regularly received, maintained and relied upon by the recipient are also admissible as business records, United States v. Keplinger, 776 F.2d 678, 692-94 (7th Cir. 1985), as are reports, raw data and memos from other entities which were maintained and relied upon by the recipient. Id.

Travel records are also admissible as business records even when such records are falsified on occasion to cover up a crime. See, e.g., United States v. Pearson, 508 F.2d 595, 597 (5th Cir. 1975) (guest registration cards of hotel admissible under business records exception to hearsay); United States v. Sinclair, 74 F.3d 753, 760 (7th Cir. 1996) (duplicate copies of bank officer's expense reports, kept by the bank in the ordinary course of business, admitted to prove bank officer used them to help disguise kickbacks). Therefore, all travel records relating to the Defendants' attendance at conspiracy meetings are admissible as business records.

3. Certain Conspiracy Documents Are Admissible As "Present Sense Impressions" Under Federal Rule of Evidence 803(1)

The notes conveying the agreements reached at the Sea Ranch conspiracy meeting and prepared during that meeting are also admissible under Federal Rule of Evidence 803(1) as "present sense impressions." Rule 803(1) excepts from the hearsay rule statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." Present sense impressions are deemed admissible because the "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." Advisory Committee Notes for Fed. R. Evid. 803(1). Statements are admissible under the Rule even though the declarant is available as a witness. Fed. R. Evid. 803; United States v. Ferber, 966 F. Supp. 90, 97 (D. Mass. 1997).

Because they possess the requisite indicia of reliability required by Rule 803(1), notes prepared by co-conspirators attending the conspiracy meetings recording details of conversations and events constitute present sense impressions admissible under Rule 803(1).

IV. Evidentiary Issues — Admissibility of Evidence Outside the Charged Conspiracy

The grand jury's indictment charged the conspiracy began "at least as early as October 24, 1992," and continued "at least until November 23, 1992, the exact dates being unknown to the Grand Jury . . . ." In its *Bill of Particulars* the United States wrote, "By way of further explanation, the United States believes that the conspiracy alleged in the Indictment ended sometime in January, 1993." The government intends to introduce evidence from the conspiracy period. In addition, the government intends to introduce evidence which pre-dates and post-dates the conspiracy. There is ample Eleventh Circuit precedent for introducing evidence outside the charged conspiracy. As the Court held in United States v. Van Dorn, 925 F.2d 1331, 1338 (11th Cir. 1991), "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and

circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

With respect to pre-conspiracy evidence, in United States v. Lehder-Rivas, 955 F.2d 1510, 1516 (11th Cir. 1992), a case involving a conspiracy to deliver cocaine, the Eleventh Circuit found the "roles and motives of the various co-conspirators . . . would have been incomprehensible to the jurors had the prosecution failed to trace the formation of the conspiracy to its origin," and, therefore, ruled the evidence admissible under Rule 404(b) as it pertained "to a chain of events forming the context, motive and set-up of the crime." Id. (citations and quotations omitted).

With respect to post conspiracy evidence, Lehder-Rivas is also instructive. In that case the Eleventh Circuit held, "Carefully circumscribed evidence of criminal activity after the conclusion of the conspiracy may be admissible to 'complete the story' of the conspiracy." Id. at 1516. The Court concluded that prejudice can be minimized by "instructing the jury before and after such evidence [i]s admitted that the evidence must be considered only to determine whether the conspiracy and continuing criminal enterprise charged in the indictment in fact existed during the time frame set forth in the indictment." Id. (citations omitted).

In this case, the government intends to call witnesses to testify about meetings between various of the defendants which preceded the conspiracy. These meetings are essential if the jury is to have a proper understanding of the "roles and motives of the various co-conspirators." Lehder-Rivas, 955 F.2d at 1516. The government also intends to introduce evidence of the prices at which the defendants purchased scrap after November 23, 1992. As the defendants continued to purchase scrap at the conspiratorial prices more or less through the end of the year, this evidence will be necessary to "complete the story" of the conspiracy.[7] Id. The government

[7] Evidence of illegal activity which occurred after November 23, 1992, is, of course, within the conspiracy charged in the indictment ("at least until November 23, 1992, the exact dates being unknown to the Grand Jury . . . .") and the *Bill of Particulars* ("By way of further explanation, the United States believes that the conspiracy alleged in the Indictment ended sometime in January, 1993."). The government makes this alternative complete-the-story argument in anticipation of the defendants' objections to the introduction of post-November 23, 1992, evidence.

may also introduce evidence of the defendants' motivation for entering the price-fixing conspiracy. This evidence should also be admissible under Mills to show the defendants' motivation for their criminal behavior.

Respectfully submitted this ___ th day of January, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were sent via Federal Express to the Office of the Clerk of Court on this 19th day of January 1998. Copies of the foregoing were served upon the defendants via Federal Express on this 19th day of January 1998.

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