IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Crim. No. CR-2-93-46
HAYTER OIL COMPANY, INC. OF GREENEVILLE, TENNESSEE d/b/a MARSH PETROLEUM COMPANY AND SONNY WAYNE MARSH,	)	
	)	
Defendants.	)	

UNITED STATES' PROPOSED JURY INSTRUCTIONS

Pursuant to Federal Rule of Criminal Procedure 30 and the Court's Order of August 6, 1993, the United States submits these proposed jury instructions and requests that the Court instruct the jury on the law contained in these instructions. The United States respectfully reserves the right to supplement, withdraw or modify these requests depending upon the evidence presented, the arguments of counsel, and the requests for instructions, if any, filed by the defendants.

Dated: November __, 1993

Respectfully submitted,

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TABLE OF CONTENTS

INTRODUCTION

These proposed jury instructions are based largely on the model instructions contained in Devitt, Blackmar & O'Malley, Federal Jury Practice & Instructions (4th ed. 1990 & Supp.), which is referred to hereinafter as "Devitt."

Where one of the government's proposed instructions cites a section of Devitt directly and without a citation signal (such as "e.g." or "see"), the proposed instruction is taken verbatim from the cited Devitt section, and the applicable changes are contained in brackets.

Where one of the government's proposed instructions cites an instruction in a section of Devitt with a citation signal, the cited section supports the proposed instruction.

For the Court's convenience, a citation to a specific section of Devitt indicates that both the specific section and all of the authority cited therein support the proposed instruction.

Government's Request No. 1

INTRODUCTION

Members of the Jury:

Now that you have heard all of the evidence [] and each of the arguments of counsel it becomes my duty to give you the final instructions of the Court as to the law that is applicable to this case and which will guide you in your decision.

[] It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them from the evidence received during the trial.

Counsel have quite properly referred to some of the applicable rules of law in their closing arguments to you. If, however, any difference appears to you between the law as stated by counsel and that as stated by the Court in these instructions, you, of course, are to be governed by the instructions given to you by the Court.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole in reaching your decisions.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a

violation of your sworn duty to base any part of your verdict upon any other view or opinion of the law than that given in these instructions of the Court just as it would be a violation of your sworn duty, as the judges of the facts, to base your verdict upon anything but the evidence received in the case.

You were chosen as juror for this trial in order to evaluate all of the evidence received and to decide each of the factual questions presented by the allegations brought by the government in the indictment and the pleas of not guilty by the defendants.

In deciding the issues presented to you for decision in this trial you must not be persuaded by bias, prejudice, or sympathy for or against any of the parties to this case or by any public opinion.

Justice through trial by jury depends upon the willingness of each individual juror to seek the truth from the same evidence presented to all the jurors here in the courtroom and to arrive at a verdict by applying the same rules of law as now being given to each of you in these instructions of the Court.

Authority

Devitt § 12.01 [Brackets contain applicable modifications].

Government's Request No. 2

JUDGING THE EVIDENCE

There is nothing particularly different in the way that a juror should consider the evidence in a trial from that in which any reasonable and careful person would treat any very important question that must be resolved by examining facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case for only those purposes for which it has been received and to give such evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the defendant be proved guilty beyond a reasonable doubt, say so. If not proved guilty beyond a reasonable doubt, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything other than the evidence received in the case and the instructions of the Court. Remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence because the burden of proving guilt beyond a reasonable doubt is always assumed by the government.

Authority

Devitt § 12.03.

Government's Request No. 3

EVIDENCE RECEIVED IN THE CASE --
STIPULATIONS, JUDICIAL NOTICE, AND INFERENCES PERMITTED

The evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them, all exhibits received in evidence, regardless of who may have produced them, all facts which may have been agreed to or stipulated; and all facts and events which may have been judicially noticed.[]

When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts.

The Court has taken judicial notice of certain facts or events. When the Court declares that it has taken judicial notice of some fact or event, you may accept the Court's declaration as evidence and regard as proved the fact or event which has been judicially noticed. You are not required to do so, however, since you are the sole judge of the facts.

Any proposed testimony or proposed exhibit to which an objection was sustained by the Court and any testimony or

exhibit ordered stricken by the Court, must be entirely disregarded.

Anything you may have seen or heard outside the courtroom is not proper evidence and must be entirely disregarded.

Questions, objections, statements, and arguments of counsel are not evidence in the case. []

You are to base your verdict only on the evidence received in the case. In your consideration of the evidence received, however, you are not limited to the bald statements of the witnesses or to the bald assertions in the exhibits. In other words, you are not limited solely to what you see and hear as the witnesses testify or as the exhibits are admitted. You are permitted to draw from the facts which you find have been proved such reasonable inferences as you feel are justified in the light of your experience and common sense.

Authority

Devitt § 12.03 [Brackets contain applicable modifications].

Government's Request No. 4

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two types of evidence which are generally presented during a trial -- direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him or it not guilty.

Authority

Devitt § 12.04.

Government's Request No. 5

INFERENCES FROM THE EVIDENCE

Inferences are simply deductions or conclusions which reason and common sense lead the jury to draw from the evidence received in the case.

Authority

Devitt § 12.05.

Government's Request No. 6

JURY'S RECOLLECTION CONTROLS

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

Authority

Devitt § 12.07.

Government's Request No. 7

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF AND REASONABLE DOUBT

I instruct you that you must presume the defendant[s] to be innocent of the crime charged. Thus the defendants, although accused of a crime in the indictment, begin[] the trial with a "clean slate" -- with no evidence against [them]. The indictment, as you already know, is not evidence of any kind. The law permits nothing but legal evidence presented before the jury in court to be considered in support of any charge against the defendant. The presumption of innocence alone therefore, is sufficient to acquit the defendant.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a

convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

Unless the government proves, beyond a reasonable doubt, that the defendant[s have] committed each and every element of the offense charged in the indictment, you must find the defendant[s] not guilty of the offense. If the jury views the evidence in the case as reasonably permitting either of two conclusions -- one of innocence, the other of guilt -- the jury must, of course, adopt the conclusion of innocence.

Authority

Devitt § 12.10 [Brackets contain applicable modifications].

Government's Request No. 8

VERDICT AS TO DEFENDANTS ONLY

You are here to determine whether the government has proven the guilt of the defendants for the charge in the indictment beyond a reasonable doubt. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons.

So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the defendants for the crime charged in the indictment, you should so find, even though you may believe that one or more other unindicted persons are also guilty. But if a[] reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the defendants not guilty.

Authority

Devitt § 12.11.

Government's Request No. 9

CREDIBILITY OF WITNESSES

You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness' testimony, only a portion of it, or none of it.

In making your assessment you should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness, in your opinion, is worthy of belief. Consider each witness's intelligence, motive to falsify, state of mind, and appearance and manner while on the witness stand. Consider the witness's ability to observe the matters as to which he or she has testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider also any relation a witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses

may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.

After making your own judgment or assessment concerning the believability of a witness, you can then attach such importance or weight to that testimony, if any, that you feel it deserves. You will then be in a position to decide whether the government has proven the charge beyond a reasonable doubt.

[]

Authority

Devitt § 15.01 [Brackets contain applicable modifications].

Government's Request No. 10

CREDIBILITY OF WITNESSES -- INCONSISTENT STATEMENTS

The testimony of a witness may be discredited or, as we sometimes say, impeached by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony
of that witness or give it such weight or credibility as you may think it deserves.

[]

Authority

Devitt § 15.06 [Brackets contain applicable modifications].

Government's Request No. 11

CREDIBILITY OF WITNESSES -- IMMUNIZED WITNESS

Under the law, Congress has granted the government the right to request that certain witnesses be compelled to testify after exercising their constitutional right against self-incrimination. In this case, the Court has, upon request of the attorneys for the government, compelled certain witnesses, some of whom are alleged co-conspirators, to testify and has granted them immunity from prosecution. Where a witness has testified under an immunity order, the testimony given by the witness cannot be used against him or her, except in a prosecution for perjury or making a false statement.

It is important for you to understand that it would be improper and in violation of your oath to question the wisdom or propriety of the policy of permitting the government to immunize certain witnesses, or the decision to obtain immunity for certain witnesses. As I told you earlier, your function as jurors is to determine the facts from the evidence and to apply those facts to the law as the Court instructs you on the law to arrive at a verdict. The matter of immunity is relevant, but only as to your

consideration of the credibility of witnesses who have been immunized.

Authority

United States v. Cheung Kin Ping, 555 F.2d 1069, 1073-74 (2d Cir. 1977);

United States v. Renfroe, 634 F. Supp. 1536, 1538-39 (W.D. Pa. 1986), aff'd, 806 F.2d 254 (3d 1986).

Government's Request No. 12

CREDIBILITY OF WITNESSES -- THE DEFENDANT AS A WITNESS

When a defendant elects to take the stand and testify, then he is a competent witness and you have no right to disregard his testimony merely because he is accused of a crime. When he does testify, however, he at once becomes the same as any other witness, and his credibility is to be tested by the same tests as are legally applied to any other witness. Therefore, you should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.

Authority

See Devitt § 15.12.

See Pattern Criminal Jury Instructions -- Basic Instruction 7.02B -- Prepared by Committee on Pattern Criminal Jury Instructions, District Judges Association, Sixth Circuit 1991.

Government's Request No. 13

CHARACTER EVIDENCE -- REPUTATION OF THE DEFENDANT

You have heard testimony about [defendant Sonny Wayne Marsh's] good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.

Authority

Instruction 7.09, Pattern Criminal Jury Instructions, Prepared by Committee on Pattern Criminal Jury Instructions, District Judges Association, Sixth Circuit 1991.

Government's Request No. 14

SIMILAR ACTS

During the course of the trial, as you know from the instruction I gave you then, you heard evidence that at a time other than the time charged in the indictment in this case, the [d]efendant[s] committed acts similar to the acts charged in the indictment. You may consider such evidence, not to prove that the [d]efendant[s] did the acts charged in this case, but only to prove the [d]efendant[s'] state of mind; that is, that the [d]efendant[s] acted as charged in this case with the necessary intent and not through accident or mistake.

Therefore, if you find (1) that the [g]overnment has proved beyond a reasonable doubt that the [d]defendant[s] did in fact commit the acts charged in the indictment, and (2) that the [d]efendant[s] also committed similar acts at other times, then you may consider those other similar acts in deciding whether the [d]efendant[s] committed the acts charged here [with the necessary intent] and not through accident or mistake.

Authority

Special Instruction 7, Pattern Jury Instructions, Criminal Cases, Prepared by Committee on Pattern Jury Instructions, District Judges' Association, Eleventh Circuit 1985 [Brackets contain applicable modifications].

United States v. Enstam, 622 F.2d 857, 870 (5th Cir. 1980), cert. denied, 450 U.S. 914 & 451 U.S. 907 (1981).

Government's Request No. 15

EXPERT TESTIMONY

(1) You have heard testimony of _____, an expert witness. An expert witness has special knowledge or experience that allows the witness to give an opinion.

(2) You do not have to accept an expert's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Authority

Instruction 7.03, Pattern Criminal Jury Instructions, Prepared by Committee on Pattern Criminal Jury Instructions, District Judges Association, Sixth Circuit 1991.

Government's Request No. 16

THE NATURE OF THE OFFENSE CHARGED

The indictment charges that the defendants violated a law of the United States known as the Sherman Antitrust Act, or "Sherman Act." Specifically, the indictment charges that, beginning at least as early as 1984, and continuing at least to the end of 1988, the exact dates being unknown to the grand jury, defendants Sonny Wayne Marsh and Hayter Oil Company, and others, engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the retail gasoline business in Greeneville, Tennessee, as defined in the indictment, in violation of Section One of the Sherman Act.

The indictment further charges that the combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise, and maintain retail prices of gasoline sold by the defendants and their co-conspirators within the Greeneville, Tennessee area, and that the defendants and co-conspirators did those things that they conspired to do, including:

(a) Discussing and agreeing on retail pricing strategies and prices for gasoline sold by

the defendants and co-conspirators within the Greeneville, Tennessee area;

(b) Coordinating among themselves changes in retail prices for gasoline sold within the Greeneville, Tennessee area;

(c) Telephoning or otherwise contacting one another to enforce compliance with agreed-upon retail price increases for gasoline within the Greeneville, Tennessee area; and

(d) Meeting to discuss pricing strategies and to collusively coordinate changes in retail prices for gasoline within the Greeneville, Tennessee area.

Authority

See Devitt § 51A.01.

Government's Request No. 17

THE STATUTE DEFINING THE OFFENSE CHARGED

Section 1 of Title 15 of U.S.C.[], commonly called the "Sherman Antitrust Act", provides, in part, that,

> "Every contract, combination ... or conspiracy, in restraint of trade ... among the several States ... is declared to be illegal. ....Every person who shall make any contract or engage in any ... conspiracy declared by sections 1-7 of this title to be illegal shall be ... guilty" of an offense against the laws of the United States.

Authority

Devitt § 51A.02.

Government's Request No. 18

PURPOSE OF THE SHERMAN ANTITRUST ACT

The purpose of the Sherman Act is to preserve and advance our system of free, competitive enterprise, and to encourage, to the fullest extent practicable, free and open competition in the marketplace so that the consuming public may receive better goods and services at a lower cost.

Section 1 of the Sherman Act provides in part that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is . . . illegal."

This section makes it unlawful for two or more persons to conspire to restrain competition in interstate commerce. I will explain the concept of conspiracy, which is the central element in this case, in more detail later. For now, you should note that a conspiracy is simply an agreement or mutual understanding, formal or informal, express or implied, entered into for an unlawful purpose to do an unlawful act or to commit a lawful act in an unlawful manner. The term "conspiracy" as I will use it means the same thing as "contract" or "combination."

Authority

National Society of Professional Engineers v. United States, 435 U.S. 679, 694-95, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978);

United States v. Co-Operative Theatres of Ohio, Inc., 845 F.2d 1367, 1370 (6th Cir. 1988)(per curiam);

United States v. Portsmouth Paving Corp., 694 F.2d 312, 317 (4th Cir. 1982);

See Devitt § 51A.03.

Government's Request No. 19

"EVERY PERSON" DEFINED

The term "every person" includes not only every individual, but also every corporation, partnership, or other association or organization, of every kind and character.

Authority

Devitt § 51A.04.

Government's Request No. 20

PER SE VIOLATIONS

The Sherman Antitrust Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming value, are illegal -- regardless of the extent of the harm they actually cause or the excuse for their use. Agreements to fix prices are included in this category of unlawful agreements. Therefore, if you find that the conspiracy charged in the indictment existed and that one or more defendants was a member of the conspiracy, you need not be concerned with whether the agreement was reasonable or unreasonable, or the justifications for the agreement, or the extent of the harm the agreement caused.

It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was a conspiracy to fix prices, it was illegal.

Authority

Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348-51, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982);

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646-47, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980);

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S. Ct. 811, 84 L. Ed. 1129 (1940);

United States v. Portsmouth Paving Corp., 694 F.2d 312, 317 (4th Cir. 1982).

Government's Request No. 21

PRICE FIXING

The indictment charges the defendants with a conspiracy to fix prices. A conspiracy to fix prices is an agreement or mutual understanding between two or more competitors to fix, control, raise, lower or maintain the prices charged or to be charged for products or services.

A price-fixing conspiracy is commonly thought of as an agreement to establish the same price. But prices can be fixed in other ways. For example, prices are fixed if the range or level of prices is agreed upon or if a minimum price is established. Thus, any agreement to increase retail gasoline prices in the Greeneville, Tennessee area by a certain amount, or to charge the same price, or to establish a fixed spread between the prices of different sellers of gasoline, or to refrain from lowering prices, is a price-fixing conspiracy.

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

If you find that either or both of the defendants entered into an agreement or understanding to fix, raise or maintain retail gasoline prices within the Greeneville, Tennessee area, it is simply no defense that all of the conspiracy participants did not always live up to every aspect of the agreement, or that the conspirators may not have been successful in achieving their objectives. Similarly, it is no defense that the conspirators actually competed with each other in some manner, or that they did not eliminate all competition between themselves. The agreement to fix, raise or maintain retail gasoline prices is the crime -- even if it was never carried out.

Bear in mind that similarity of competitive business practices does not, by itself, establish an agreement or understanding to fix prices, since such practices may be consistent with ordinary competitive behavior in an open market.

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

Authority

Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348-51, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982);

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213-18, 60 S. Ct. 811, 84 L. Ed. 1129 (1940);

United States v. Trenton Potteries Co., 273 U.S. 392, 397, 47 S. Ct. 377, 71 L.Ed. 700 (1927);

United States v. Society of Independent Gasoline Marketers, 624 F.2d 461, 465 (4th Cir. 1979), cert. denied, sub nom. Amerada Hess Corp. v. United States, 449 U.S. 1078 (1981).

Government's Request No. 22

CONSPIRACY TO FIX PRICES

A conspiracy to fix prices in or affecting interstate trade and commerce is, without more, an unreasonable restraint of trade which violates the Sherman Antitrust Act. Whether the prices agreed to be fixed were or are reasonable or unreasonable, or too high or too low is immaterial.

A price-fixing conspiracy, such as charged in the indictment, may consist of any mutual agreement or arrangement or understanding between two or more competitors or others, knowingly made, to sell at a uniform price, or to raise, or lower, or stabilize prices. So, a common plan or understanding, knowingly made, or arranged, or entered into, between two or more competitors, to adopt or follow or adhere to any pricing formula which will result in raising, or lowering, or maintaining at fixed levels, prices charged for goods or services sold in interstate trade and commerce, would

constitute a price-fixing conspiracy in violation of the Sherman Antitrust Act.

Authority

Devitt § 51A.13.

Government's Request No. 23

ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED

In order to sustain its burden of proof for the crime of conspiracy as charged in the indictment, the government must prove the following [three (3)] essential elements beyond a reasonable doubt:

First: That the conspiracy agreement, or understanding described in the indictment was knowingly formed, and [existed] at or about the time alleged;

Second: That the defendants Sonny Wayne Marsh and/or Hayter Oil Company knowingly became member[s] of the conspiracy, agreement, or understanding, as charged; and

[Third: That the trade or commerce restrained by the alleged conspiracy had a direct impact on goods in the flow of interstate commerce, or had a substantial effect on interstate commerce.]

[It is not necessary that the government prove every evidentiary fact or each incident in its sequence of events beyond a reasonable doubt; it is only necessary

that the evidence taken as a whole proves beyond a reasonable doubt the essential elements of the offense.

Similarly, the government is not required to prove the essential elements of the offense by any particular number of witnesses, or by every witness. The testimony of a single witness can be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged if you believe that the witness was truthful.]

Authority

Devitt § 51A.15 [Brackets contain applicable modifications];

United States v. Co-Operative Theaters of Ohio, 845 F.2d 1367, 1373 (6th Cir. 1988)(per curiam);

United States v. Gallo, 763 F.2d 1504, 1519-21 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986);

United States v. Beechum, 582 F.2d 898, 913 n.16 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979).

Government's Request No. 24

CONSPIRACY DEFINED -- PROOF OF AN AGREEMENT

The existence of a conspiracy is an essential element of the offense charged in the indictment that the government must prove beyond a reasonable doubt.

A conspiracy under Section 1 of the Sherman Antitrust Act is an agreement or understanding between two or more persons or corporations to join together to accomplish a common objective that would result in an unreasonable restraint of interstate commerce. The conspiracy charged in the indictment in this case is a combination or mutual agreement by two or more persons to fix, raise or maintain retail gasoline prices in Greeneville, Tennessee.

The type of relationship condemned by the law as a conspiracy is often described as a "partnership in crime" in which each member becomes the agent of every other member. To create such a relationship, two or more persons must enter into a mutual agreement or understanding that they will do an unlawful act, such as the price fixing charged in this case.

Proof of some type of formal agreement, written or oral, is not necessary to establish the existence of the charged conspiracy. Rather, a conspiracy can be inferred from a course of conduct and business dealings and, once

established, a conspiracy is presumed to continue until its termination is affirmatively shown.

There can be no conspiracy in the absence of a mutual agreement or understanding. It is the understanding or agreement to act together for an unlawful purpose that constitutes the crime. Thus, for you to find that a conspiracy was established in this case, you must find that at least one of the defendants and at least one other person or corporation had an agreement or understanding to fix retail gasoline prices in Greeneville.

An unlawful agreement or understanding may be shown if the proof establishes facts and circumstances from which it appears as a reasonable and logical inference that there was a common understanding to accomplish an unlawful purpose. Where it appears from the proven facts and related circumstances that the conduct or course of dealing pursued by two or more persons could not have been pursued, except as a result of a preconceived common understanding, it may be inferred that there was an implied agreement and a concert of action, that is, a conspiracy.

The government need not prove that all of the co-conspirators acted exactly alike, nor is it a defense to claim to have been forced or lured into joining the conspiracy by economic considerations, rising costs or other pressures.

You should also bear in mind that a conspiracy does not have to be completely formed in one place or at one time. It can be put together a little at a time and can be joined at different times or in different ways by each alleged conspirator. What must be proved beyond a reasonable doubt before you can convict each defendant is that the alleged conspiracy was knowingly formed, and that the defendant and at least one other person knowingly became members of the conspiracy charged in the indictment.

Authority

United States v. United States Gypsum Co., 438 U.S. 422, 463, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978);

United States v. General Motors Corp., 384 U.S. 127, 142-44, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966);

United States v. Singer Manufacturing Co., 374 U.S. 174, 192-95, 83 S. Ct. 1773, 10 L. Ed. 2d 823 (1963);

American Tobacco Co. v. United States, 328 U.S. 781, 809-10, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946);

United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990);

United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990), cert. denied sub nom. Thorpe v. United States, 498 U.S. 1093 (1991);

United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988)

See Instruction 3.02, Pattern Criminal Jury Instructions, Prepared by Committee on Pattern Criminal Jury Instructions, District Judges Association, Sixth Circuit 1991.

Government's Request No. 25

CONSPIRACY -- MEMBERSHIP

To convict a defendant, you must determine both that (1) the conspiracy charged in the indictment existed, and (2) that the defendant was a member of the conspiracy. That is, before you may find that the defendant became a member of the charged conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant knowingly participated in the unlawful plan .

One may become a member of a conspiracy without full knowledge of all of the details of that conspiracy, and without participating in every aspect of it. It is not necessary that all of the conspirators met together or agreed simultaneously, for a conspiracy may be joined at different times or in different ways by each conspirator. Nor is it necessary that each member of a conspiracy know every other member or the exact part that every other participant plays in the scheme.

When any number of persons associate themselves together in the operation of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership between them in which each member becomes an agent of all. As such, the act or declaration of one member in furtherance of the common

object is the act of all. For this reason, one who joins an existing conspiracy or who participates in only part of a conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy, or as if he had participated in every phase of it.

Authority

United States v. United States Gypsum Co., 438 U.S. 422, 463, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978);

Pinkerton v. United States, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946);

Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249, 38 S. Ct. 65, 62 L. Ed. 260 (1917);

United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990);

United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990), cert. denied sub nom. Thorpe v. United States, 498 U.S. 1093 (1991);

United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988)

United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986);

United States v. Stephens, 492 F.2d 1367, 1373 (6th Cir.), cert. denied, 419 U.S. 852 (1974)

See Instruction 3.03, Pattern Criminal Jury Instructions, Prepared by Committee on Pattern Criminal Jury Instructions, District Judges Association, Sixth Circuit 1991.

Governments' Request No. 26

SUCCESS OF CONSPIRACY IMMATERIAL

The government is not required to prove that the parties to or members of the agreement or conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

In other words, you may find that an illegal conspiracy was formed even if the defendants did not actually succeed in fixing, raising or maintaining retail gasoline prices within the Greenville, Tennessee area. Similarly, the proof need not show that a conspirator received any benefit from his or its participation in the conspiracy. The mere forming of the agreement or understanding to try to reduce competition violates federal law.

Authority

See Devitt § 28.08 (and cases cited therein);

United States v. Socony-Vacuum, 310 U.S. 150, 224-26 n.59, 60 S. Ct. 811, 84 L. Ed. 2d 1129 (1940);

Nash v. United States, 229 U.S. 373, 378, 33 S. Ct. 780, 57 L. Ed. 1232 (1913);

United States v. Foley, 598 F.2d 1323, 1331-32 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980).

Government's Request No. 27

PROOF OF OVERT ACT UNNECESSARY

The evidence need not show that the members of the alleged conspiracy did any act or thing to further, or accomplish, any object or purpose of the agreement or arrangement or understanding. Nor is it necessary for the evidence to show that a defendant actually adopted, or followed, or adhered to, any price schedule or formula or list which may have been agreed upon or arranged or understood.

What the evidence in the case must show, beyond a reasonable doubt, in order to establish the offense charged in [] the indictment, is that the conspiracy alleged was knowingly formed, and that one or more of the [defendants] knowingly became a member of the conspiracy at the beginning or afterwards during the existence of the conspiracy. As stated before, the success or failure of the conspirators to accomplish or achieve any object or purpose of the conspiracy is immaterial.

The gist of the crime charged in the indictment is knowingly making or arriving at an agreement, or arrangement, or understanding, in unreasonable restraint of interstate trade and commerce.

Authority

Devitt § 51A.19 [Brackets contain applicable modifications].

Government's Request No. 28 [if necessary]

WITHDRAWAL FROM THE CONSPIRACY -- AN AFFIRMATIVE DEFENSE

(1) [The defendants] have raised the defense that [they] withdrew from the conspiracy [on or] before July 20, 1988, and that the statute of limitations ran out before the government obtained an indictment charging [them] with the conspiracy.

(2) The statute of limitations is a law that puts a limit on how much time the government has to obtain an indictment. This can be a defense, but [the defendants] have the burden of proving to you that [they] did in fact withdraw, and that [they] did so [on or before] July 20, 1988.

(3) To prove this defense, [the defendants] must establish each and every one of the following things:

(A) First, that [they] completely withdrew from the agreement. A partial or temporary withdrawal is not enough.

(B) Second, that [they] took some affirmative step to renounce or defeat the purpose of the conspiracy. This would include things like voluntarily going to the police or other law enforcement officials and telling them about the plan; or telling the other members of the conspiracy

that [they] did not want to have anything more to do with it; or any other affirmative acts that are inconsistent with the purpose of the conspiracy, and that are communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members of the group, would not be enough.

(C) The third thing that [the defendants] must prove is that [they] withdrew [on or] before [July 20, 1988].

(4) The fact that [the defendants have] raised this defense does not relieve the government of its burden of proving that there was an agreement [and] that [the defendants] knowingly and voluntarily joined it [and remained members in the conspiracy after July 21, 1988]. Those are still things that the government must prove for you to find [the defendants] guilty of the conspiracy charged.

Authority

Instruction 3.11C, Pattern Criminal Jury Instructions, Prepared by Committee on Pattern Criminal Jury Instructions, District Judges Association, Sixth Circuit 1991 [Brackets contain applicable modifications].

Government's Request No. 29

CORPORATE CRIMINAL RESPONSIBILITY -- EXPLAINED

A corporation is a legal entity that may act only through its agents. The agents of a corporation are its officers, directors, employees, and certain others who are authorized by the corporation to act for it.

A corporate defendant is entitled to the same individual and impartial consideration of the evidence that the jury gives to a personal defendant. A corporation may be found guilty of the offense charged or be found not guilty of the offense charged under the same instructions that apply to a personal defendant.

In order to sustain its burden of proof for the crime of [price fixing] as charged in [] the indictment against defendant [Hayter Oil Company], the government must prove to you, beyond a reasonable doubt, that each of the Essential Elements of the Offense as given to you earlier was committed by officers, directors, employees or agents of the corporation.

In addition to the above, the government must also establish the following two (2) elements beyond a reasonable doubt in order to sustain its burden of proof as to defendant [Hayter Oil Company].

First: That each of the acts committed by [one or more] officers, directors, employees or agents were within

the course and scope of the employment or agency given to them by defendant [Hayter Oil Company], [] and

Second: That the officers, directors, employees or agents committed each of the Essential Elements of the Offense with the intent to benefit [the oil company].

In order to establish that an act was committed [] within the course and scope of employment, the evidence must show that the act or omission related directly to the general duties that the officers, directors, employees or agents were expected to perform by the defendant corporation. It is not necessary for the government to prove that the act was authorized by the corporation formally or in writing. [Indeed, the corporation can be found guilty of criminal conduct based on the unlawful acts of its officers, directors, employees or agents even if those acts were done against formal corporate policy or the employees' express instructions.]

[]

[To establish that officers, directors, employees or agents committed the Essential Elements of the Offense with the intent to benefit defendant Hayter Oil Company, it is not necessary for the government to prove that they intended to benefit only the corporation, and not themselves. The corporation can be found guilty if the officers, directors, employees or agents acted with the

intent of gaining personal benefits while also benefitting the corporation.]

Authority

Devitt § 18.05 [Brackets contain applicable modifications] (see also § 51A.07];

New York Central & Hudson Railroad Co. v. United States, 212 U.S. 481, 494-95, 29 S. Ct 304, 53 L.Ed. 513 (1909);

United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 42 (1st Cir. 1991);

United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990);

United States v. Bank of New England, N.A., 821 F.2d 844, 847 & n.2 (1st Cir.), cert. denied, 484 U.S. 943 (1987);

United States v. Automated Medical Labs., Inc., 770 F.2d 399, 406-07 & n.5 (4th Cir. 1985);

United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985);

Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1247 (1979).

Government's Request No. 30

INTERSTATE COMMERCE -- RESTRAINT

The third element of the offense charged in the indictment is that the alleged conspiracy was in restraint of interstate commerce. If you find beyond a reasonable doubt that the conspiracy as charged existed and that one or both of the defendants were members of it, you must then determine if the conspiracy was in restraint of interstate commerce.

Interstate commerce is not a technical legal concept, but a factual matter for you to determine from the evidence. Interstate commerce means, simply, the transaction of business across a state line or the movement of goods, products, material or money across a state line in the course of a business transaction. To restrain interstate commerce means to interfere with the ordinary, usual and freely competitive pricing or distribution system of the open market as it relates to such business transactions.

The element of restraint of interstate commerce can be established by the evidence by one or both of two ways -- either that (1) the conspiracy occurred in the flow of interstate commerce, or (2) that the conspiracy involved only a local business activity, but that business activity affected a substantial amount or quantity of interstate

commerce. Bear in mind that if the conspiracy occurred in the flow of interstate commerce, then it restrained interstate commerce, regardless of the amount or quantity of commerce it involved.

The indictment in this case alleges both methods of restraint. But the evidence need only prove that one or the other occurred to satisfy the interstate commerce element of the offense.

Authority

McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 242-46, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980);

Goldfarb v. Virginia State Bar, 421 U.S 773, 783-85, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975);

United States v. Women's Sportswear Manufacturing Ass'n, 336 U.S. 460, 464, 69 S. Ct. 714, 93 L. Ed. 805 (1949);

United States v. Yellow Cab Co., 332 U.S. 218, 225-29, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947); and

United States v. Georgia Waste Systems, Inc., 731 F.2d 1580, 1583 (11th Cir. 1984).

Governments' Request No. 31

PROOF OF KNOWLEDGE OR INTENT

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.

You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

Authority

Devitt § 17.07.

Government's Request No. 32

MOTIVE -- EXPLAINED

Intent and motive are different concepts and should never be confused.

Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

[]

Good motive alone is never a defense where the act done or omitted is a crime. The motive of the defendant is, therefore, immaterial except insofar as evidence of motive may aid in the determination of state of mind or the intent of the defendant.

Authority

Devitt § 17.06 [Brackets contain applicable modifications].

Government's Request No. 33

STATUTE OF LIMITATIONS

The statute of limitations for the offense charged in the indictment is five years. This means that you cannot find the defendant[s] guilty unless you find, beyond reasonable doubt, that a conspiracy continued or existed [on or after July 21, 1988, which is five years before the indictment was returned.]

This does not mean, however, that you must exclude from consideration evidence of [conspiratorial] acts or conduct prior to [July 21, 1988]. A conspiracy may be a continuing thing which may be proved by a composite of acts [extending beyond the statute of limitations]. You may, therefore, consider evidence of [the defendants'] conduct prior to [July 21, 1988] insofar as it may tend to prove a design or intent or pattern with respect to [their] conduct after [July 21, 1988].

Authority

Devitt § 51A.20 [Brackets contain applicable modifications].

Government's Request No.34

JURISDICTION AND VENUE

Before you can find [either] defendant guilty, you must find, beyond reasonable doubt, that within the five-year period immediately preceding [July 21, 1993,] some means, methods or practices were employed by or under the authority of the members of the alleged conspiracy within the [Eastern] District of [Tennessee.]

[In that regard, I instruct you that Greeneville, Tennessee, and Greene County, Tennessee, are within the Eastern District of Tennessee.]

Authority

Devitt § 51A.21 [Brackets contain applicable modifications].

Government's Request No. 35

VERDICT
ELECTION OF A FOREMAN
DUTY TO DELIBERATE
UNANIMITY
PUNISHMENT
FORM OF VERDICT
COMMUNICATION WITH THE COURT

Upon retiring to your jury room to begin your deliberation, you will elect one of your members to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

Your verdict must represent the collective judgment of the jury. In order to return a verdict, it is necessary that each juror agree to it. Your verdict, in other words, must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for himself and herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if [you become] convinced it is erroneous. Do not surrender your honest conviction, however, solely because

of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts of this case. Your sole interest is to seek the truth from the evidence received during the trial.

Your verdict must be based solely upon the evidence received in the case. Nothing you have seen or read outside of court may be considered. Nothing that I have said or done during the course of this trial is intended in any way, to somehow suggest to you what I think your verdict should be. Nothing said in these instructions and nothing in any form of verdict prepared for your convenience is to suggest or convey to you in any way or manner any intimation as to what verdict I think you should return. What the verdict shall be is the exclusive duty and responsibility of the jury. As I have told you many times, you are the sole judges of the facts.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict.

Forms of verdicts have been prepared for your convenience.

You will take these forms to the jury room and, when you have reached unanimous agreement as to your verdicts,

you will have your foreperson write your verdicts, date and sign the forms, and then return with your verdicts to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note, signed by your foreperson or by one or more members of the jury, through the bailiff. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the jury on any subject touching the merits of the case other than in writing or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even to the Court -- how the jury stands, numerically or otherwise, on the question of whether or not the government has sustained its burden of proof until after you have reached a unanimous verdict.

Authority

Devitt § 20.01 [Brackets contain applicable modifications].

THE BULLPEN

The following instructions will **not** be submitted to the Court on November 8, 1993.

Rather, the following instructions will be kept in the bullpen and presented to the Court in the charge conference, should they be needed to respond to the defendants' requests. The charge conference is scheduled to be held at the conclusion of proof and prior to argument.

Government's Request No. ____

EXTENT OF PARTICIPATION

The extent of a defendant's participation does not determine his guilt or innocence. A defendant may be convicted as being a conspirator even though he plays only a minor part in the conspiracy. Even a single act may be sufficient to link a defendant to a conspiracy where the act is such that you may infer from it participation in the criminal enterprise.

Authority

United States v. Scortz, 838 F.2d 876, 880 (6th Cir.), cert. denied, 488 U.S. 923 (1988)

United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986).

Government's Request No. ____

IGNORANCE OF ANTITRUST LAWS NO DEFENSE

It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law.

Thus, if the jury should find, beyond a reasonable doubt, from the evidence in the case that the conspiracy charged in [] the indictment was knowingly formed and that the defendant[s], knowingly became members of the conspiracy, as charged, then the fact that a defendant may not have known that [his or its] conduct was unlawful under a particular statute would not be a defense.

Authority

Devitt § 51A.17 [Brackets contain applicable modifications].

Governments' Request No. ____

REASONABLENESS OF PRICES -- RELEVANCE

The defendants have presented evidence regarding the reasonableness of prices charged for gasoline in Greeneville, Tennessee. You may consider this evidence only in determining whether the defendants joined in a conspiracy to fix, raise or maintain the prices of gasoline. You may not consider this evidence as any justification to the offense of price fixing as charged in the indictment.

Authority

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940);

United States v. Trenton Potteries, 273 U.S. 392, 395, 47 S. Ct. 377, 71 L. Ed. 700 (1927);

United States v. Portsmouth Paving Corp., 694 F.2d 312, 323-24 (4th Cir. 1982).

Governments' Request No.

MOTIVES PROMPTING CONSPIRACY IMMATERIAL

A conspiracy to fix prices in or affecting interstate trade and commerce is unlawful, even though the conspiracy may be formed or engaged in for what appear to the conspirators to be laudable motives.

A price-fixing conspiracy, such as charged in the indictment, cannot therefore be justified under the law, even though the conspiracy may have been formed, or engaged in, to prevent or halt ruinous competition, or to eliminate the evils of price cutting, or to give each competitor what the conspirators [thought] was his fair share of the market.

Authority

Devitt § 51A.18 [Brackets contain applicable modifications].