96-10671

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10671

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MRS. BAIRD'S BAKERIES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE THE UNITED STATES OF AMERICA

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STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns, in part, the proper interpretation of the United States Sentencing Commission's Antitrust Guideline, U.S.S.G. 2R1.1 (1995), and the fines to be imposed pursuant to that Guideline for per se violations of the Sherman Act, 15 U.S.C. 1. The United States believes that oral argument will assist the Court in understanding the Sentencing Commission's intent, including its belief that proper application of the Antitrust Guideline would aid the government's antitrust enforcement effort by discouraging conduct prohibited by the Nation's antitrust laws.

TABLE OF CONTENTS

JURISDICTION 1

ISSUES PRESENTED 1

STATEMENT 2

I. COURSE OF PROCEEDINGS 2

II. STATEMENT OF FACTS 3

A. The Price Fixing Conspiracy 3

B. Sentencing 9

SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICT 15

A. Standard Of Review 15

B. Mrs. Baird's Engaged In A Long-Term Price Fixing Conspiracy 16

C. The Jury Correctly Determined That The Conspiracy Continued Into The Period Governed By The Statute Of Limitations 22

II. THE JURY WAS PROPERLY INSTRUCTED 24

III. THE DISTRICT COURT PROPERLY REFUSED TO SEVER COUNT TWO FROM THE INDICTMENT 30

A. Standard Of Review 31

B. The Court's Refusal To Sever Did Not Produce Any Prejudice, Much Less Sufficient Prejudice To Warrant Reversal Of The Conviction 32

IV. THE COURT PROPERLY APPLIED THE SENTENCING GUIDELINES . . 34

A. Standard of Review 35

B. The Court's Findings Are Not Clearly Erroneous . . . 36

C. The Government Was Not Required To Prove That The Price Fixing Conspiracy Was Successful 37

D. The Sentencing Commission Was Not Arbitrary Or Capricious When It Established 20 Percent Of The Defendant's Volume Of Commerce As The Base Fine For Per Se Antitrust Violations 43

CONCLUSION 49

TABLE OF AUTHORITIES

CASES

Alvord-Polk v. F. Schumacher, 37 F.3d 996 (3rd Cir. 1994), cert. denied, 115 S. Ct. 1691 (1995) 21

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 42

Christopher M. v. Corpus Christi Independent School District, 933 F.2d 1285 (5th Cir. 1991) 49

Coggeshall v. United States (The Slavers), 69 U.S. (2 Wall.) 383 (1865) 15

Crist v. Dickson Welding, Inc., 957 F.2d 1281 (5th Cir.), cert. denied, 506 U.S. 864 (1992) . . 27

FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 42

Glasser v. United States, 315 U.S. 60 (1942) 15

Grunewald v. United States, 353 U.S. 391 (1957) 23

Holland v. United States, 348 U.S. 121 (1954) 15

Huff v. United States, 192 F.2d 911 (5th Cir. 1951), cert. denied, 342 U.S. 946 (1952) 22

Hyde v. United States, 225 U.S. 347 (1912) 23

Jackson v. Virginia, 443 U.S. 307 (1979) 15

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 42, 46

Koon v. United States, 116 S. Ct. 2035 (1996) 36, 48

Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167 (7th Cir. 1990) 21

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 40

Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37 (7th Cir. 1992) 21

Stinson v. United States, 113 S. Ct. 1913 (1993) 35, 41, 46

United States v. Alessandroni, 982 F.2d 419 (10th Cir. 1992) 36

United States v. All Star Industries, 962 F.2d 465 (5th Cir.), cert. denied, 506 U.S. 940 (1992) 23, 30, 41

United States v. Arzola-Amaya, 867 F.2d 1504 (5th Cir.), cert. denied, 493 U.S. 933 (1989) 31, 33, 34

United States v. Ballard, 779 F.2d 287 (5th Cir.), cert. denied, 475 1109 (1986) 30

United States v. Beasley, 90 F.3d 400 (9th Cir. 1996) 36

United States v. Bermea, 30 F.3d 1539 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995) 30, 34

United States v. Bi-Co Pavers, Inc., 741 F.2d 730 (5th Cir. 1984) 27, 33

United States v. Branch, 850 F.2d 1080 (5th Cir. 1988), cert. denied, 488 U.S. 1018 (1989) . 22

United States v. Cargo Service Stations, Inc., 657 F.2d 676 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982) 30

United States v. Casel, 995 F.2d 1299 (5th Cir.), cert. denied, 510 U.S. 978 (1993) 16

United States v. Castro, 15 F.3d 417 (5th Cir.), cert. denied, 115 S. Ct. 127 (1994) 31, 33

United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir.), cert. denied, 434 U.S. 938 (1977) 20

United States v. Cooperative Theatres of Ohio, Inc, 845 F.2d 1367 (6th Cir. 1988) 42

United States v. Dunham Concrete Products, Inc., 475 F.2d 1241 (5th Cir.), cert. denied, 414 U.S. 832 (1973) 33

United States v. Fields, 72 F.3d 1200 (5th Cir.), cert. denied, 1996 W.L. 183444 (1996) 31, 33, 35

United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980) . . 20

United States v. Harrelson, 705 F.2d 733 (5th Cir. 1983) 25

United States v. Hayter Oil Co., 51 F.3d 1265 (6th Cir. 1995) 38- 42, 47

United States v. Headrick, 963 F.2d 777 (5th Cir. 1992) 35

United States v. Heath, 970 F.2d 1397 (5th Cir. 1992), cert. denied, 507 U.S. 1004 (1993) . . 16

United States v. Kissel, 218 U.S. 601 (1910) 22, 24

United States v. Lane, 474 U.S. 438 (1986) 33

United States v. Leal, 74 F.3d 600 (5th Cir. 1996) 15

United States v. Loalza-Vasquez, 735 F.2d 153 (5th Cir. 1984) 33

United States v. Lopez, 74 F.3d 575 (5th Cir.), cert. denied, 116 S. Ct. 1867 (1996) 15, 16

United States v. Lueth, 807 F.2d 719 (8th Cir. 1986) 34

United States v. Magee, 821 F.2d 234 (5th Cir. 1987) 28

United States v. Mathena, 23 F.3d 87 (5th Cir. 1994) 35, 36, 37

United States v. Misle Bus & Equipment Co., 967 F.2d 1227 (8th Cir. 1992) 17

United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977) . . 33

United States v. Natel, 812 F.2d 937 (5th Cir. 1987) 25, 29, 30

United States v. OBanion, 943 F.2d 1422 (5th Cir. 1991) 25

United States v. Pofahl, 990 F.2d 1456 (5th Cir.), cert. denied, 510 U.S. 898 (1993) . 28, 33, 34

United States v. Pompey, 17 F.3d 351 (11th Cir. 1994) 36

United States v. Reed, 658 F.2d 624 (8th Cir. 1981), cert. denied, 455 U.S. 1002 (1982) 34

United States v. Rivera-Gomez, 67 F.3d 993 (1st Cir. 1995) 28

United States v. Rodriguez-Mireles, 896 F.2d 890 (5th Cir. 1990) 15

United States v. Salazar, 66 F.3d 723 (5th Cir. 1995) 15

United States v. Scott, 678 F.2d 606 (5th Cir.), cert. denied, 459 U.S. 972 (1982) 16

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 23, 30, 40, 41

United States v. Thevis, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) 27

United States v. Tracy, 989 F.2d 1279 (1st Cir.), cert. denied, 508 U.S. 929 (1993) 30

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 41

Williams v. United States, 112 S. Ct. 1112 (1992) 35, 37

Zafiro v. United States, 113 S. Ct. 933 (1993) 28, 31, 34

STATUTES AND RULES

Antitrust Amendments Act of 1990, Pub. L. No. 101-588, sec. 4, 104 Stat. 2879,
2880 (1990) 44

15 U.S.C. 1 . . . . 1, 2, 11

18 U.S.C. 3231 1

18 U.S.C. 3282 22

18 U.S.C. 3742(a) 1

18 U.S.C. 3742(e) 35

28 U.S.C. 1291 1

Fed. R. App. P. 4(b) 1

Fed. R. Crim. P. 8(a) 30

Fed. R. Crim. P. 14 . . . . 30, 31

Fed. R. Crim. P. 30 27

Fed. R. Evid. 404(b) 33

U.S.S.G. 1B1.1 43

U.S.S.G. 1B1.7 . . . . 35, 461

U.S.S.G. 2R1.1 . . . . passim

U.S.S.G. 8C2.4 9,10

U.S.S.G. 8C2.5 48

U.S.S.G. 8C2.6 48

U.S.S.G. 8C2.7 48

U.S.S.G. 8C3.3 48

MISCELLANEOUS

Hearings Before the United States Sentencing Commission Concerning Alternatives To Incarceration (July 15, 1986) (Statement of Douglas H. Ginsburg, Assistant Attorney General Antitrust Division) 45

Mark A. Cohen & David T. Scheffman, The Antitrust Sentencing Guideline: Is The Punishment Worth The Costs?, 27 Am. Crim. L. Rev. 331 (1989) 45

Webster's Third New International Dictionary 1160 (unabr. 1981) 38

6 Phillip E. Areeda, Antitrust Law, ¶ 1422b (1986) 19, 20

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE THE UNITED STATES OF AMERICA

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. 3231 and 15 U.S.C. 1. This Court has jurisdiction pursuant to 18 U.S.C. 3742(a) and 28 U.S.C. 1291. The district court filed its judgment on May 30, 1996, and Mrs. Baird's Bakeries, Inc. filed a timely notice of appeal, pursuant to Fed. R. App. P. 4(b), on June 7, 1996.

ISSUES PRESENTED

1. Whether substantial evidence supports the jury's guilty verdict.

2. Whether substantial evidence demonstrates the existence of the conspiracy during the statute of limitations period.

3. Whether the district court properly instructed the jury regarding the elements of an offense that the jury must find to convict a defendant of an crime that is *per se* illegal under the

Sherman Antitrust Act.

4. Whether the district court abused its discretion when it refused to sever Count Two from the indictment.

5. Whether the district court's findings at sentencing concerning the scope and duration of the conspiracy are supported by the evidence, and whether its application of the Antitrust Sentencing Guideline, U.S.S.G. 2R1.1, was correct.

6. Whether the Sentencing Commission acted arbitrarily or capriciously when it established 20 percent of a corporate antitrust defendant's volume of commerce as its base fine, U.S.S.G. 2R1.1(d)(1).

STATEMENT

I. COURSE OF PROCEEDINGS

On September 28, 1995, a federal grand jury sitting in Dallas, Texas, returned a two-count indictment against appellant, Mrs. Baird's Bakeries, Inc. ("Mrs. Baird's"), and its former president, Floyd Carroll Baird ("Carroll Baird"). Count One of the indictment charged a conspiracy to raise, fix, and maintain the prices of bread and bread products sold to customers in East Texas, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Count Two charged a similar conspiracy in West Texas.

The case was tried before a jury which convicted Mrs. Baird's on Count One. Mrs. Baird's was acquitted on Count Two and Carroll Baird was acquitted on both counts. After denying Mrs. Baird's motions for a judgment of acquittal and a new trial, the district court sentenced Mrs. Baird's to pay a fine of $10 million, and to 5 years probation plus 2,500 hours of community

service.

II. STATEMENT OF FACTS

A. The Price Fixing Conspiracy

The Indictment charged, among other things, that Mrs. Baird's and its co-conspirators "agreed to raise, fix and maintain prices for bread and bread products sold to customers in East Texas"[1] from at least 1977 through at least March 1993 (1 R. at 3). During this period, Mrs. Baird's sold "Mrs. Baird's" bread and other bread products while its co-conspirator and largest competitor in East Texas, Flowers Industries, Inc. ("Flowers"), sold "Sunbeam" bread and bread products. Mrs. Baird's and Flowers sold the majority of the "branded" bread in East Texas (4 R. at 168-69).[2]

Stanley Oler, who became Mrs. Baird's director of sales for East Texas in early 1986, understood that Mrs. Baird's could compete with Flowers in East Texas as long as their wholesale prices were the same (5 R. at 234). He testified that if one

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[1]The Government's Bill of Particulars (1 R. at 51) described East Texas as:

> that area east of the Dallas-Fort Worth metroplex where both the Mrs. Baird's Dallas bakery and the Flowers' Tyler bakery distributed bread and bread products. This area of distribution overlap can generally be described as running from the eastern edge of the Dallas-Forth Worth metroplex eastward to and including Shreveport, Louisiana, and from the Red River in the north to Crockett in the south.

[2]"Branded" bread is sold under the bakery's brand name, such as Mrs. Baird's, Sunbeam or Wonder. "Private label" bread may be baked by the major bakeries who sell branded bread, but it is packaged and sold under the supermarket's private label name, such as Minyard's (4 R. at 166-67).

bakery sold its bread at a higher wholesale price than its competition, that bread would be handicapped because the lower cost bread would have a competitive advantage and stand to gain market share (id. at 223-24, 234). Thus, Oler explained, if either Mrs. Baird's or Flowers attempted to raise prices without some assurance that the other would follow suit, that bakery would "be out on a limb" (id. 227-28).

To avoid leaving Mrs. Baird's "out on a limb", Oler began having contacts with Steve Green, the director of sales in East Texas for Flowers, to discuss proposed bread product price increases (4 R. at 168-69, 172-173).[3] Oler admitted that between 1986 and 1992 he and Green had these conversations many times (id. at 177). Oler explained that this "cooperation" over price increases between Flowers and Mrs. Baird's was necessary to keep the bakeries from losing market share (5 R. at 227-28). Neither Oler nor Green, however, had authority to set or change prices. Rather, Oler reported to and received pricing decisions from Carroll Baird, while Green received instructions from his supervisor, Woody Rochelle, a Flowers regional vice-president (4 R. at 170, 172-73, 189; 5 R. at 228, 233).

The contacts between Oler and Green followed a regular pattern. Generally, either Flowers or Mrs. Baird's would send a price increase letter to the headquarters of various grocery

[3]Oler testified that he was aware that Mrs. Baird's was discussing prices with its competitors even prior to his appointment as director of sales for East Texas, because he once heard Carroll Baird tell Mrs. Baird's Dallas bakery manager "to contact . . . the manager of Continental Baking Company to arrange a price increase" (4 R. at 197-98; 5 R. at 392-94).

chains that gave two to four weeks notice of the effective date of intended price increases (5 R. at 220-21, 259). If Flowers had sent out a price increase letter, Green would call Oler before the effective date of the change and ask if Oler had seen the letter.[4] If Oler had not seen the letter, he would agree to meet Green at one of several local restaurants, where Green would give him a copy of the letter (4 R. at 185; 5 R. at 222-23, 270-71). Between 1986 and 1992 Green and Oler met several times to exchange price letters (4 R. at 185; 5 R. at 421). Once Oler had the price increase letter, Green would ask Oler for Mrs. Baird's response (4 R. at 175-76; 5 R. at 220, 270-71). The reason Green asked how Mrs. Baird's was going to respond to the letter was to find out before the effective date of Flowers' increase whether Mrs. Baird's was going to increase its prices too (4 R. at 177; 5 R. at 235-36). Indeed, Mrs. Baird's knew that Flowers would rescind its proposed increase before it went into effect if Mrs. Baird's decided not to match the proposed prices (5 R. at 235-36).

After Oler had Flowers' price increase information, he would give it to Carroll Baird and ask him what response he should give to Green (4 R. at 176, 186-87; 5 R. at 222-23, 416-17). Carroll

[4]Oler testified that the bakeries' price letters were generally available from various sources once they were in the market and that "occasionally" he would obtain a Flowers price increase letter from a source other than Green (5 R. at 261, 267-68, 324). Thus, Mrs. Baird's is wrong in claiming that Oler obtained the letters from grocery stores "[o]n most . . . occasions" (Br. 4 & n.1). Its record citations establish only that the stores would "tell [Mrs. Baird's] that one of [its] competitors had one of these price letters out in the market" (5 R. at 265) (emphasis added); accord id. at 262.

Baird was aware of the fact and nature of Oler's contacts with Green, and that Flowers was awaiting Mrs. Baird's response (4 R. at 177-78, 189).[5] Indeed, Carroll Baird instructed Oler on "how to communicate with [Mrs. Baird's] competitors," including specific instructions not to make those contacts using a company phone (4 R. at 189-91; 5 R. at 412). Rather, he told Oler to use a pay phone or his home phone for those calls (4 R. at 190-91; 5 R. at 412).[6]

Flowers would not increase its prices unless it knew that Mrs. Baird's would raise its prices too (5 R. at 235, 417). After Carroll Baird decided whether to raise prices, Oler would relay that decision to Green with Carroll Baird's knowledge (4 R. at 177, 189; 5 R. at 416-17). Thus, Flowers would know whether Mrs. Baird's was going along with its proposed price increase prior to the effective date of the increase (5 R. at 221-22). If Oler told Green that Carroll Baird decided that bread product prices should not be increased, Flowers would rescind its price increase letter prior to the effective date (4 R. at 178-79; 5 R.

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[5]Oler also explained that, on occasion, he would have these discussions about competitors' prices with Vernon Baird who, until he died in 1992, was in charge of Mrs. Baird's (4 R. at 181; 5 R. at 313-15). Oler was sure that Vernon Baird also was aware of the fact and nature of his contacts with Green because, he testified, "there were times I had conversations with Vernon and he would give me information to take back to a competitor or to give to a competitor" (5 R. at 426-27).

[6]Oler told the grand jury that he knew the reason Carroll Baird told him not to use a company phone to contact competitors was because, "at least in a definition that I understood it, that would involve collusion or price-fixing" (5 R. at 230). Thus, he testified at trial that he knew when he started talking with Green that those contacts were illegal, and he assumed Carroll Baird also knew they were illegal (id. at 230-31).

at 221-23, 225, 417). Between 1986 and 1992, however, there were occasions when Carroll Baird told Oler to match a Flowers proposed price increase (4 R. at 171, 180, 189-90; 5 R. at 264-65). When Oler told Green that Mrs. Baird's would match the price increase, Flowers would let its price increase letter take effect, and Carroll Baird would tell Oler to issue a Mrs. Baird's price letter with prices identical to those proposed by Flowers for most bread and bread products sold in East Texas, including white and wheat bread (4 R. at 179-81; 5 R. at 264-65, 418-19).[7] When the bakeries raised their wholesale prices, the retail prices also increased (4 R. at 182).

Carroll Baird removed Oler as director of sales for East Texas in either 1991 or 1992 (5 R. at 231-32, 353-55, 422-23, 434-35).[8] However, when Oler was reassigned, Byron Baird specifically told him that either he or his brother Carroll would continue making the contacts with competitors that Oler was making as director of sales (5 R. at 232-33, 357, 423).[9] And the

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[7]White and wheat bread were the bakeries' major sellers (4 R. at 164, 180-81).

[8]Oler was given notice in December that effective in January he would no longer be director of sales for East Texas, but he could not remember whether his reassignment became effective in 1991 or 1992 (5 R. at 231-32, 353-54, 422-23, 434-35). However, Oler's testimony that he had engaged in pricing discussions with Green between 1986 and 1992 (4 R. at 177; 5 R. at 224) suggests that the effective date was 1992.

[9]Oler testified that he and Byron Baird had stood "outside the corporate office doorway in the hallway and [Byron] looked at me and he said from now on Carroll and I will take care of the competitive contacts, and I said fine" (5 R. at 357). Accord id. at 423 (Byron Baird did not say the contacts would stop, he said "that he and his brother Carroll Baird would continue those contacts").
(Footnote continued on next page)

contacts did continue. Oler testified that when he later met Green at a function, Green said "something to th[e] effect" that "continuing into '92 and '93, the contacts with competitors and agreements on prices continued" (id. at 232-33). Indeed, Oler had related that on one occasion in 1993, Mrs. Baird's had raised its prices but was forced to rescind the increase shortly thereafter because Flowers did not raise its prices too (id. at 225, 278-79). Oler explained that Green told him that on that occasion the "agreement" that Carroll Baird and Woody Rochelle "had had on fixing prices had gone awry" (id. at 232-33, 278, 282-83).[10]

An audio tape recording of a November 1992 telephone conversation between Oler and Green (Exhibit 1) confirms the existence of the price fixing conspiracy.[11] Oler called Green to

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Oler also explained that because of his close relationships with the presidents of the food chains, Carroll Baird had him continue to sign Mrs. Baird's price increase letters even after his reassignment (5 R. at 263-65). Thus, while the Baird brothers took over from Oler the pricing discussions with competitors, Oler continued to sign the price letters.

[10]According to Oler, the reason Mrs. Baird's actually raised its prices in 1993 when Flowers did not, and was forced to lower them soon thereafter, was because, as Green had told him, "Woody Rochelle and Carroll Baird screwed that up" (5 R. at 282-83). Thus, Mrs. Baird's assertion that "it is completely unknown what Green meant by his unsolicited remark" (Br. 27) is incorrect.

[11]Mrs. Baird's attempts to minimize the importance of this tape by claiming that the government did not establish when the tape was made (Br. 10 n.3). But Mrs. Baird's never objected to the admission of the tape at trial and does not challenge its admission on appeal. Indeed, at trial defense counsel claimed that the conversation occurred in November 1992 (5 R. at 432). In fact, toward the end of their conversation Oler tells Green that after he comes back from hunting "this weekend" he is going to go again "on Thursday," and Green responds "Thanksgiving Day, huh," to which Oler replies: "Yeah" (Exhibit 1).

complain that one of Green's salesman was selling bread too cheaply in East Texas (5 R. at 288-89). Specifically, Oler stated that the salesman "is charging 76 cents for white bread . . . and I wonder if that's something we've missed" (7 R. at 656) (emphasis added). Green replied: "That's a very good possibility," but then suggested "No . . . nothing happening, its just the damn salesman, I'm sure" (id. at 658-59). Oler noted that one of Mrs. Baird's salesmen "caught it" when he saw that "the retail price is a little cheaper" (id. at 658). Oler explained that "our man talked to yours" and learned the wholesale price was low, and that he then "raised the question and [I -- you know, I was sent the note and I said, well,] I'll check into it" (id. at 658-59; Exhibit 1). Oler then opined: "If it is, probably it's nothing more than a little glitch that can be handled" (id. at 659) (emphasis added). Oler admitted that when he learned of this incident of low pricing by a Flowers' salesman, he only discussed it with Green and never reported it to anyone at Mrs. Baird's (5 R. at 419-20).

B. Sentencing

Under U.S.S.G. 8C2.4(a), the base fine for Mrs. Baird's conviction would be the "greatest of: (1) the amount from the [guidelines'] table . . ., or (2) the pecuniary gain to the organization . . ., or (3) the pecuniary loss from the offense caused by the organization." However, when applying section 8C2.4(a), the Antitrust Guideline specifies that "[i]n lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce." U.S.S.G.

2R1.1(d)(1). In its Commentary to that Guideline, the Sentencing Commission "estimated that the average gain from price-fixing is 10 percent of the selling price [and that] [b]ecause the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3)." U.S.S.G. 2R1.1, comment. (n.3) ("Application Note 3").

At the May 30, 1996 sentencing hearing, Mrs. Baird's acknowledged that, based on the record, "we cannot compute the pecuniary gain" (2 Supp. R. at 79).[12] It argued, however, that, at most, that gain would be roughly 2 percent of Mrs. Baird's sales (id. at 40, 49-50, 71, 79). Relying on Application Note 3, supra, it then argued that because the Sentencing Commission at least "implicit[ly]" set the 20 percent pecuniary loss from price fixing at twice the average 10 percent pecuniary gain, in this case the loss for section 2R1.1(d)(1) purposes should only be 4 percent (id. at 7, 79-80). Finally, claiming that there was no evidence that the conspiracy went beyond the sale of white and wheat breads, Mrs. Baird's contended that in computing the volume of affected commerce the court should use only 60 percent of Mrs. Baird's total bread product sales, which represented the sales of those two breads (id. at 69-70).

The court rejected Mrs. Baird's suggestion that it could recalculate the 20 percent figure in Guideline 2R1.1(d)(1) to 4 percent (2 Supp. R. at 51). It therefore held that the proper

[12]Mrs. Baird's expert testified that computing the actual pecuniary gain "would be a difficult task under the best of circumstances" (2 Supp. R. at 40).

calculation of the base fine was the 20 percent of the volume of commerce specified in the Guideline (id. at 81). It then decided that the volume of commerce "should be based on all bread products" (id. at 80). However, "[i]n the alternative," it also agreed with the government's contention (id. at 72-75) that even if the court only considered sales of white and wheat bread from 1986 through 1992, the Guideline base fine still exceeded the $10 million statutory maximum (id. at 80-81).[13] Finally, the court refused to depart downward from the Guideline's fine rejecting, among other things, Mrs. Baird's argument that high-ranking corporate personnel were not involved in the conspiracy (id. at 83-92).

SUMMARY OF ARGUMENT

1. Substantial evidence supports the jury's guilty verdict. On a regular and continuing basis from 1986 to 1992, Oler, on behalf of Mrs. Baird's, and Green, on behalf of Flowers, discussed the future prices for bread products in East Texas. Mrs. Baird's and Flowers knew that their cooperation over price increases was necessary to avoid losing market share. Each company also knew that the other would not raise prices, and indeed would rescind any outstanding proposed price increase

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[13]See 15 U.S.C. 1. Mrs. Baird's volume of commerce for all bread products for the years 1986 through 1992 was $112 million, and if that figure is reduced using Mrs. Baird's 60 percent figure for white and wheat bread, the volume of commerce is $67 million (2 Supp. R. at 74). Twenty percent of $112 million is $22.4 million, and 20 percent of $67 million is $13.4 million. At the hearing, government counsel mistakenly calculated 60 percent of $112 million to be $82 million instead of $67 million (id. at 74). However, given the $10 million statutory maximum fine, this mathematical error does not affect the outcome in this case. See note 27, infra.

letter, unless the second agreed to match any prices proposed by the first. Thus, the purpose of the exchange of proposed price increase letters and discussions about them was to come to an agreement on whether bread prices should be increased or maintained at their current levels. Moreover, Oler policed the prices in the market and reported discovered discrepancies to Green so that they would be corrected. This activity, which established a course of conduct over many years, describes a classic price fixing conspiracy. Mrs. Baird's is simply wrong that it and Flowers were involved a lawful exchange of price information, and that they made all of their pricing decisions independently.

Moreover, the evidence shows that the price fixing conspiracy continued into 1993. Oler admitted that he regularly had these conversations with Green until he was reassigned in 1991 or 1992. He further explained that when he was reassigned, he was instructed that although he would continue to issue Mrs. Baird's price letters, Byron and Carroll Baird would take over contacting the competitors. And those contacts continued up until the time that Carroll Baird and Woody Rochelle from Flowers "screwed up" a 1993 price increase that Mrs. Baird's had proposed.

2. Mrs. Baird's is wrong that the jury was improperly instructed. The court correctly instructed the jury concerning the essential elements of the price fixing conspiracy charged in the indictment. Based on those instructions, Mrs. Baird's argued at length to the jury that, to convict, it must find an agreement

to fix prices, and that any exchange of price information is not unlawful unless done pursuant to such an agreement. Mrs. Baird's challenge to the jury instructions, like its substantial evidence argument, is built on the false premise that the evidence establishes only lawful price exchanges. But the court's jury charge neither deprived Mrs. Baird's of its defensive theory, nor misstated the law. Accordingly, the court did not abuse its discretion when it refused to give the additional instructions requested by Mrs. Baird.

3. The district court did not err when it refused to sever Count Two from the indictment. Mrs. Baird's contrary argument is based on the claim that at trial the government failed to prove that the "West Texas" price fixing conspiracy charged in Count Two continued into the statute of limitations period. But whether this argument is correct or not, Mrs. Baird's has failed to show any prejudice from the court's refusal to sever Count Two. The evidence concerning the two conspiracies was not complicated and was easy to compartmentalize. Moreover, the court specifically instructed the jury to consider each offense against each defendant separately. The fact that the jury acquitted Mrs. Baird's on Count Two and acquitted Carroll Baird on both counts, is convincing evidence that it did so.

4. The court correctly applied the Antitrust Sentencing Guideline, which sets the base fine for a corporate defendant as "20 percent of the volume of affected commerce." U.S.S.G. 2R1.1(d)(1). As the court noted, in this case if it considered only Mrs. Baird's sales of white and wheat bread from 1986

through 1992, the base fine exceeded the statutory maximum. If sales of other bread products are added to that figure, as the record shows they should, the base fine only becomes larger.

Mrs. Baird's is wrong that the government had to prove at sentencing which of Mrs. Baird's sales were affected by the violation. To count for sentencing purposes only the volume of commerce done by conspirators during the time that it was proven that a conspiracy succeeded in raising prices, rather than all of the commerce done during the time that the conspiracy was in effect, is to force the United States to prove the very thing that the Commentary to the Antitrust Guideline expressly states that it need not prove, i.e., when the violation was damaging consumers. Under the Sentencing Guidelines, as under the Sherman Act itself, it is not the day-to-day effectiveness of the conspiracy that matters, but the existence of an agreement to replace competition with cooperation.

Finally, Mrs. Baird's also is wrong that the Antitrust Guideline is arbitrary or capricious. As the Commentary explains, the Sentencing Commission established the base fine as 20 percent of the volume of commerce expressly to relieve the government of having to prove the amount of harm caused by the violation. Moreover, the Commission specifically recognized that there would be cases in which the actual gain would be substantially less than 10 percent, the same argument that Mrs. Baird's makes in this case. In this situation, the Commission instructed the sentencing court to consider that fact in setting the fine within the Guidelines' range. Accordingly, the district

court's computation of the base fine in this case was a correct application of the Antitrust Guideline.

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICT

A. Standard Of Review

In reviewing the sufficiency of the evidence supporting a conviction, an appellate court must uphold the verdict if there is substantial evidence, viewed in the light most favorable to the government, to sustain the jury's decision. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Lopez, 74 F.3d 575, 577 (5th Cir.), cert. denied, 116 S. Ct. 1867 (1996). The test is whether "a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." Lopez, 74 F.3d at 577 (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). When viewing the evidence, the government must be given the benefit of all reasonable inferences. Glasser, 315 U.S. at 80; Lopez, 74 F.3d at 577; United States v. Salazar, 66 F.3d 723, 728 (5th Cir. 1995). The jury is the sole judge of credibility, and the evidence need not exclude every reasonable hypothesis except that of guilt. Lopez, 74 F.3d at 577; Salazar, 66 F.3d at 728. Moreover, a conspiracy may be proved wholly by circumstantial evidence, e.g., United States v. Leal, 74 F.3d 600, 606 (5th Cir. 1996); United States v. Rodriguez-Mireles, 896 F.2d 890, 892 (5th Cir. 1990) (citing Coggeshall v. United States (The Slavers), 69 U.S. (2 Wall.) 383, 401 (1865)), which is to be treated no differently than any other evidence. Holland v. United States,

348 U.S. 121, 139-40 (1954); United States v. Scott, 678 F.2d 606, 609-10 (5th Cir.), cert. denied, 459 U.S. 972 (1982).

Juries are free to use common sense, and to apply common knowledge, observation, and experience gained in the ordinary affairs of life. United States v. Heath, 970 F.2d 1397, 1402 (5th Cir. 1992), cert. denied, 507 U.S. 1004 (1993). Thus, the reviewing court may not weigh the evidence or substitute its credibility assessments for those of the jury. Lopez, 74 F.3d at 577-78 (court must accept jury's credibility determinations unless "testimony is incredible or patently unbelievable"); United States v. Casel, 995 F.2d 1299, 1304 (5th Cir.) (to be incredible "witness' testimony must be factually impossible"), cert. denied, 510 U.S. 978 (1993).

B. Mrs. Baird's Engaged In A Long-Term Price Fixing Conspiracy

The evidence fully supports the jury's conclusion that Mrs. Baird's knowingly participated in a conspiracy to fix the wholesale price of bread and bread products sold in East Texas beginning at least in 1986 and continuing into 1993. On a regular and continuing basis from 1986 until 1992, Oler and Green, on behalf of Mrs. Baird's and Flowers, discussed the future price of bread and bread products in East Texas (4 R. at 177; 5 R. at 222, 416). These pricing discussions occurred after Flowers or Mrs. Baird's announced a price increase, but before the date the proposed prices were to take effect (5 R. at 220, 222-23). Flowers and Mrs. Baird's each knew that a proposed price increase would not take effect unless both companies agreed to the proposed prices (5 R. at 235-36).

The purpose of these discussions was to come to an agreement on whether bread product prices should be increased or maintained at their current levels. Thus, if Flowers was proposing the increase, Oler would relay both the proposed prices and Flowers' request for a response to Carroll Baird (4 R. at 175-76, 186; 5 R. at 222). And if Mrs. Baird's disagreed with the proposed prices, Flowers would rescind its price letter and would not allow its proposed increase to take effect (4 R. at 178-79; 5 R. at 221-23, 225, 417). In contrast, on those occasions between 1986 and 1992 when Carroll Baird decided that Mrs. Baird's would match Flowers' increase,[14] Flowers let its proposed prices take effect, and Carroll Baird had Oler send out a Mrs. Baird's price increase letter with prices matching the new Flowers prices (4 R. at 179-81; 5 R. at 264-65, 418-19).[15]

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[14]Mrs. Baird's grudgingly concedes (Br. 5, 6) Oler's testimony that he sometimes told Flowers that Mrs. Baird's would increase its prices in response to a price increase proposed by Flowers. It then suggests that this testimony and all of Oler's testimony concerning price increases should be ignored because he could not identify any specific price increase (Br. 5, 7, 21). But the jury decided to believe Oler's testimony notwithstanding his alleged lack of specific recollection. As we have already noted (pp. 15-16, <u>supra</u>), that credibility determination is not subject to appellate review.

[15]Even assuming that Mrs. Baird's or Flowers on occasion appeared to act independently (Br. 5), that does not undermine the jury's verdict. Price fixing conspiracies are rarely, if ever, fully successful all of the time, and cheating by co-conspirators is not uncommon. <u>See</u>, <u>e.g.</u>, <u>United States v. Misle Bus & Equipment Co.</u>, 967 F.2d 1227, 1231 (8th Cir. 1992). Thus, the fact that Mrs. Baird's reduced its prices in December 1991 did not preclude the jury from concluding that the evidence, when viewed as a whole, established the price fixing conspiracy charged in the Indictment. Indeed, Mrs. Baird's reliance on the fact that in 1993 it implemented a price increase that Flowers did not match (Br. 5, 17 n.11, 22) is misplaced, since Oler explained that "Woody Rochelle and Carroll Baird screwed that up" (5 R. at 282-83), and Mrs. Baird's was therefore forced to

Under these circumstances, Mrs. Baird's contention that it was simply involved in a "lawful" exchange of future price information, and that Mrs. Baird's and Flowers made all of their pricing decisions independently (Br. 9-22), ignores the evidence. The district court carefully explained to the jury (7 R. at 639-40) the differences between the type of lawful conduct that Mrs. Baird's claims that it was engaged in and price fixing. The jury, by its guilty verdict, plainly rejected Mrs. Baird's self-serving explanation of its conduct. Indeed, a company engaged in "lawful" conduct does not need to try to hide that conduct from scrutiny by instructing its employees to use pay phones or private phones rather than company phones when contacting competitors (4 R. at 190-91; 5 R. at 412). And if Mrs. Baird's and Flowers were making "independent" pricing decisions, Oler would have called his superiors at Mrs. Baird's rather than Green when Oler discovered that a Flowers' salesman was charging a lower price than Mrs. Baird's (see pp. 8-9, supra). The jury was entitled to conclude that Oler was policing a price fixing agreement and had discovered "a little glitch that [could] be handled" by Green (7 R. at 659).

In any event, Mrs. Baird's and Flowers were not simply exchanging future price information. When the two bakeries exchanged price increase information, that exchange was accompanied by a request for either a positive or negative response to the proposed prices, followed by action in accordance

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rescind the increase "a short period of time" later (id. at 225, 278-79).

with the response -- either rescission of the proposed increase and thus maintenance of existing prices, or mutual price increases. Indeed, Oler knew that Flowers would rescind any proposed price increase before it went into effect if Mrs. Baird's decided not to raise prices too (5 R. at 235-36).[16] Thus, Mrs. Baird's suggestion that Flowers and Mrs. Baird's were independently setting prices is pure nonsense.

Flowers and Mrs. Baird's both knew that their "cooperation" over price increases was necessary to avoid losing market share (5 R. at 227-28). Their course of conduct over many years demonstrates that they were giving each other "mutual assurances to use the information involved in [a] particular way." 6 Phillip E. Areeda, Antitrust Law, ¶ 1422b, at 134 (1986). In other words, when either company led with a proposed price increase letter, it was asking the other "should we raise our prices to these higher levels or should we maintain existing

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[16]Oler testified (5 R. at 235-36):

Q. If your interest is only in gathering information, why are you relaying what Carroll Baird tells you about your prices to a competitor?

A. Well, it was to let them know whatever the decision was that the Baird's (sic) had made.

Q. Right. To let them know that you're either going with them or you ain't.

A. That's right.

Q. Because if you ain't going with them, they're not increasing their prices?

A. Yes.

prices," because the actual pricing decisions -- either to maintain existing prices or to increase prices -- were always made in unison with knowledge of each other's action. Such activity describes a classic price fixing conspiracy. Id. at 135; see, e.g., United States v. Foley, 598 F.2d 1323, 1331-32 (4th Cir. 1979) (evidence that defendants knew mutual cooperation was "essential", together with evidence that each defendant "expressed an intention" to adopt the same price increase, was enough to allow jury to find price fixing conspiracy), cert. denied, 444 U.S. 1043 (1980).

That Oler was reluctant to admit that there was an express agreement to fix prices is irrelevant since the jury was free to infer that agreement from the course of conduct. For example, in United States v. Champion Int'l Corp., 557 F.2d 1270, 1273 (9th Cir.), cert. denied, 434 U.S. 938 (1977), "[t]he government was unable to introduce direct evidence of an express agreement," but was able to establish that "the defendants advised each other about the future sales upon which they were most likely to bid" and then subsequently did not bid against each other. On these facts, the court had no difficulty rejecting the argument "that there was no conspiracy -- just the exercise of ordinary common sense by individual bidders." 557 F.2d at 1272.

The cases on which Mrs. Baird's relies are simply irrelevant. "Conscious parallelism" or information exchange cases merely establish the unremarkable proposition that "[c]ommunications alone, although more suspicious among competitors . . . do not necessarily result in [Sherman Act]

liability." Alvord-Polk v. F. Schumacher, 37 F.3d 996, 1013 (3rd Cir. 1994), cert. denied, 115 S. Ct. 1691 (1995) (Br. 20). But this case, unlike the cases relied on by Mrs. Baird's, involves much more than simply announcing a future price increase.[17] Rather, both Mrs. Baird's and Flowers wanted to know if the other would support a proposed price increase and then reacted in accordance with the competitor's response. Thus, the evidence plainly established that Mrs. Baird's and Flowers would only raise prices in unison and would otherwise maintain existing prices. Oler policed the maintenance of existing prices by complaining to Green when he discovered Flowers charging a lower price. These facts, plus Oler's use of private phones rather than company phones, provide ample evidence to support the jury's conclusion that Mrs. Baird's had conspired to fix prices and had not simply engaged in a lawful information exchange. As the court in Alvord-Polk explained, "it is . . . when those communications rise to the level of an agreement, tacit or otherwise, that they become an antitrust violation." 37 F.3d at 1013. The facts of this case are fully consistent with the jury's determination that there was "an antitrust violation" (id.) rather than lawful conduct.

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[17]For example, in Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37 (7th Cir. 1992) (Br. 12), there were no conversations between competitors about whether they would match each others price lists, and the lists did not provide the actual sales prices because every buyer received some type of a discount. 971 F.2d at 53-54. Similarly, in Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167 (7th Cir. 1990) (Br. 15-16), there was no evidence that any company requested another company's response to its proposed commission policy, that such a response was given, and that the companies then acted in unison. See 906 F.2d at 1172-74.

Finally, Mrs. Baird's argument that either the Indictment was constructively amended or that there was a material variance from the Indictment (Br. 28-30) must be rejected. Those claims are nothing more than a variation on its erroneous theme that only a lawful price exchange was proven. For the above stated reasons, its claims collapse with its premise.

C. The Jury Correctly Determined That The Conspiracy Continued Into The Period Governed By The Statute Of Limitations

The indictment in this case was returned on September 28, 1995 (1 R. at 1). Accordingly, under the relevant statute of limitations, 18 U.S.C. 3282, the government was required to prove that the conspiracy continued after September 28, 1990. Mrs. Baird's contends that the government failed to prove that the conspiracy continued past that date (Br. 22-28). Its argument ignores the record and well-established principles of conspiracy law that demonstrate the conspiracy continued into 1993.

Once a conspiracy has been established, it is presumed to continue until it has been abandoned or its objects have been accomplished. E.g., United States v. Kissel, 218 U.S. 601, 608 (1910) (Sherman Act conspiracy); United States v. Branch, 850 F.2d 1080, 1082 (5th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); Huff v. United States, 192 F.2d 911, 915 (5th Cir. 1951), cert. denied, 342 U.S. 946 (1952). Since the agreement itself constitutes the crime in a price fixing case, the government need only establish the existence of the price fixing agreement within the statute of limitations period, and that the defendant knowingly and voluntarily was a party to that agreement. See,

e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 & n.59 (1940); United States v. All Star Industries, 962 F.2d 465, 474-75 (5th Cir.), cert. denied, 506 U.S. 940 (1992). Proof of an overt act is not necessary to obtain a conviction. E.g., Socony-Vacuum, 310 U.S. at 224 n.59. However, proof of an overt act taken in furtherance of the illegal conspiracy within the statute of limitations period would demonstrate the continued existence of the conspiracy. See, e.g., Grunewald v. United States, 353 U.S. 391, 396 (1957); Socony-Vacuum, 310 U.S. at 252-54 (overt acts either expressly or impliedly contemplated by conspiracy keeps the conspiracy alive); Hyde v. United States, 225 U.S. 347, 369 (1912).

In this case, there is no evidence that the conspiracy ended before Oler was reassigned, and there is no evidence that he was reassigned prior to December 1990, a date within the statutory period. Indeed, Oler testified that he and Green regularly communicated with each other during the time that he was director of sales in East Texas -- from 1986 until early 1991 or 1992 (4 R. at 177, 185; 5 R. at 421).[18] When Oler was reassigned, which even Mrs. Baird's admits occurred no earlier than December 1990 (Br. 24), Byron Baird specifically told him that "from now on Carroll and I will take care of the competitive contacts" (5 R. at 357) (emphasis added); accord id. at 423 (after Oler's reassignment, Byron and Carroll Baird "would continue those contacts")(emphasis added).[19] This testimony clearly indicates

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[18] See note 8, supra.

[19] See note 9, supra.

that the contacts had not stopped prior to Oler's reassignment, and that the Baird brothers intended to continue to do what Oler had been doing prior to his reassignment -- discussing proposed price increases with Flowers to determine if they should be implemented or if the current prices should be maintained. This testimony alone proves that the pricing contacts, and thus the conspiracy, did not end when Oler was reassigned and, therefore, continued at least into 1991. See Kissel, 218 U.S. at 608.

But, in fact, the record demonstrates that the conspiracy actually continued into 1993. Thus, Oler testified that in 1993 an "agreement" that Carroll Baird and Woody Rochelle "had had on fixing prices had gone awry" because "Woody Rochelle and Carroll Baird screwed that up" (5 R. at 232-33, 282-83). This testimony is fully consistent with Byron Baird's statement at the time of Oler's reassignment that he and his brother would continue competitive contacts and, therefore, demonstrates that the conspiracy had not ended prior to that "screw up." In sum, the jury had more than enough evidence to conclude that the conspiracy had not been abandoned before September 28, 1990, the beginning of the statute's five-year limitations period.

II. THE JURY WAS PROPERLY INSTRUCTED

Based on its claim that the evidence demonstrates only price exchanges and not price fixing, Mrs. Baird's argues that the district court erred by: 1) failing to give that part of its proposed instruction 18 that explained that price announcements and price exchanges alone are not unlawful; 2) refusing its proposed instruction 17 that explained that the mere solicitation

of an agreement to fix prices is not unlawful; and 3) instructing the jury that the government did not have to prove an actual effect on prices (Br. 31-38). In fact, the district court's jury instructions contained a correct and adequate statement of the law and the district court did not abuse its discretion in refusing to give the additional instructions requested by Mrs. Baird's.

The trial judge retains broad discretion in formulating jury instructions, and it is sufficient if the charge given adequately states the applicable law. Jury instructions are reviewed as a whole, and the adequacy of the entire charge must be evaluated in the context of the whole trial. E.g., United States v. O'Banion, 943 F.2d 1422, 1429 (5th Cir. 1991); United States v. Natel, 812 F.2d 937, 942-43 (5th Cir. 1987); United States v. Harrelson, 705 F.2d 733, 736-37 (5th Cir. 1983) (failure to give a defendant's proposed instruction "warrant[s] reversal only where the charge considered as a whole does not correctly reflect the issues and the law").

In this case, the court correctly instructed the jury concerning the essential elements of the price fixing conspiracy charged in the Indictment. Specifically, the jury was instructed that the government was required to prove beyond a reasonable doubt the existence of the price fixing conspiracy charged in the Indictment (7 R. at 634), that a conspiracy is "an agreement by two or more persons" (id. at 634-35) (emphasis added), and that a price fixing conspiracy is an "agreement . . . to sell at a uniform price, or to raise, or lower, or stabilize prices" (id.

639) (emphasis added). The jury was further instructed that the government was required to prove that the defendant knowingly joined the price fixing conspiracy (id. at 638), that mere presence or similarity of conduct does not establish membership in a conspiracy (id. at 636), that each defendant's guilt was to be considered separately (id. at 631-32), and that the defendants were not on trial for "any act or conduct or offense not alleged in the indictment" (id. at 631). Finally, the jury was carefully instructed that it had to find an agreement to fix prices and could not convict solely on the basis of similar or identical prices (id. at 640-41) (emphasis added):

> Mere similarity or identity of prices charged does not, without more, establish the existence of a price-fixing . . . conspiracy such as is charged in Counts One and Two of the indictment. A business may lawfully charge prices identical to those charged by competitors, and still not violate the Sherman Antitrust Act. A business may even copy the price list of a competitor or follow and conform exactly to the prices charged by a competitor; and that, without more, would not be a violation of the law, unless such act were done pursuant to an agreement . . . such as charged in Counts One and Two of the indictment.

During closing argument, defense counsel relied on the court's instructions to argue at length that the existence of an agreement must be the jury's primary focus (id. at 673, 688), and "that merely exchanging price information between companies is not illegal" (id. at 688).

Notwithstanding the fact that the court's instructions enabled Mrs. Baird's to argue to the jury that it had not agreed to fix prices but had lawfully exchanged price information, it

now contends that the jury should have been instructed, among other things, that announcing a price increase in advance is not unlawful unless done pursuant to an agreement to fix prices (Br. 31). But, as Mrs. Baird's concedes, the district court had agreed to give this charge, which was part of Mrs. Baird's proposed instruction 18, but "inexplicably omitted" it, without prior notice, from the court's final instructions (ibid.). Mrs. Baird's never objected to this omission after the court charged the jury, however; thus the district court may not have been aware of the fact that it had omitted an instruction it had previously agreed to give.

Since "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict," Fed. R. Crim. P. 30, the applicable standard of review that must be applied to Mrs. Baird's belated complaint about the "inexplicably omitted" (Br. 31) instruction is plain error. E.g., United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 735 (5th Cir. 1984). The fact that Mrs. Baird's objected at the charging conference to the court's refusal to give any of its proposed instructions does not excuse its failure to object when the court subsequently neglected to give a proposed instruction that the court had previously accepted. See, e.g., Crist v. Dickson Welding, Inc., 957 F.2d 1281, 1286-87 (5th Cir.) ("Objections at the charge conference do not automatically relieve counsel of the duty to object at the close of the instructions before the jury retires"), cert. denied, 506 U.S. 864 (1992); United States v. Thevis, 665 F.2d

616, 645 (5th Cir.) (purpose of Rule 30 is to inform trial judge of possible errors so he can correct them before jury deliberates), cert. denied, 456 U.S. 1008 (1982).

But regardless of the standard of review applied, none of Mrs. Baird's complaints about the jury instructions warrant reversal. While the omitted portion of proposed instruction 18 would have told the jury, among other things, that announcing a price increase in advance would not, without more, violate the Sherman Act, the jury was instructed that a business can "copy the price list of a competitor" or charge the same prices as a competitor without violating the Sherman Act (7 R. at 640-41). And, as we have already noted, defense counsel argued to the jury that exchanging price information or letters with competitors is not illegal (id. at 688). Finally, the jury was expressly instructed that it could not convict unless it found that Mrs. Baird's had agreed to fix prices.

Since "[j]uries are presumed to follow their instructions," the jury could not have convicted Mrs. Baird's for engaging in lawful conduct. United States v. Pofahl, 990 F.2d 1456, 1483 (5th Cir.) (quoting Zafiro v. United States, 113 S. Ct. 933, 938 (1993), cert. denied, 510 U.S. 898 (1993); accord United States v. Rivera-Gomez, 67 F.3d 993, 999 (1st Cir. 1995)("jurors are not children, and our system of trial by jury is premised on the assumption that jurors will scrupulously follow the court's instructions"). Accordingly, the fact that the district court neglected to give all of proposed instruction 18 was not error, plain or otherwise. See United States v. Magee, 821 F.2d 234,

240 (5th Cir. 1987)(refusal to instruct jury that "[m]ere similarity of conduct or the fact that [defendants] may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy" held not erroneous because charge given "read as a whole, accurately reflect[ed] the law"); Natel, 812 F.2d at 942-43.

Nor did the court abuse its discretion when it refused to instruct the jury "that solicitation of an agreement to fix prices does not constitute a price fixing conspiracy" (Br. 33). As we have already noted, the court's instructions required the jury to find that Mrs. Baird's had agreed to fix prices. The court's emphasis on the need to find a price fixing agreement enabled defense counsel to argue to the jury at length that the government had failed to prove any agreement (7 R. at 673, 688). Thus, the court's instructions, when viewed as a whole, were adequate.

Finally, Mrs. Baird's contention (Br. 35-38) -- that "[i]n light of the evidence adduced by the Government, the trial court abused its discretion by instructing the jury that the Government need not demonstrate an effect on prices" to prove that the price fixing conspiracy charged in the indictment existed -- is specious. This argument is a variation on Mrs. Baird's erroneous theme that only lawful price exchanges were shown. But the Indictment charged price fixing not price exchanges, and the jury was instructed that it had to find that Mrs. Baird's had agreed to fix prices. Because Mrs. Baird's recognizes that the court's instruction is "appropriate for per se unlawful price fixing

cases" (Br. 37), its argument is frivolous. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. at 218-22 ; United States v. All Star Industries, 962 F.2d at 474-75 (approving per se instruction similar to that given below); United States v. Cargo Service Stations, Inc., 657 F.2d 676, 683 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982).

In short, because "the district court 'did not deprive [Mrs. Baird's] of [its] defensive theory' and did not misstate the law," its jury charge must be upheld. Natel, 812 F.2d at 942-43.

III. THE DISTRICT COURT PROPERLY REFUSED TO SEVER COUNT TWO FROM THE INDICTMENT

Mrs. Baird's asserts (Br. 38-42) that the district court caused it "specific and compelling prejudice that requires a new trial" by refusing to sever Count Two from the Indictment. In making this argument, Mrs. Baird's correctly notes (Br. 38) that it filed a motion under Fed. R. Crim. P. 8(a) claiming improper joinder, in addition to its motion under Fed. R. Crim. P. 14 seeking severance. However, it does not repeat its misjoinder argument in this Court and thus has waived the issue. E.g., States v. Tracy, 989 F.2d 1279, 1286 (1st Cir.), cert. denied, 508 U.S. 929 (1993). Therefore, this Court can "confine [itself] to the severance argument actually presented in the[] briefs." United States v. Bermea, 30 F.3d 1539, 1572 (5th Cir. 1994) (citing United States v. Ballard, 779 F.2d 287, 295 (5th Cir.), cert. denied, 475 U.S. 1109 (1986)), cert. denied, 115 S. Ct. 1113 (1995). And that severance argument is based solely on Mrs. Baird's contention that Count Two allegedly was barred by the statute of limitations. This argument is nothing more than a

claim that the government failed to produce substantial evidence that the West Texas conspiracy continued into the statute of limitations period; it does not show any error in the court's refusal to sever Count Two, or that it was prejudiced by the court's refusal to do so.

A. Standard Of Review

Motions to sever are committed to the sound discretion of the trial judge. Zafiro v. United States, 113 S. Ct. at 938-39. Thus, a district court's denial of a motion for severance is reviewable only for an abuse of discretion. E.g., United States v. Fields, 72 F.3d 1200, 1214 (5th Cir.), cert. denied, 1996 W.L. 183444 (1996); United States v. Arzola-Amaya, 867 F.2d 1504, 1516 (5th Cir.), cert. denied, 493 U.S. 933 (1989). Moreover, Fed. R. Crim. P. 14 does not require any particular relief "even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Zafiro, 113 S. Ct. at 938 (emphasis added). Thus, this Court has explained that "[a]ny prejudice that exists can generally be cured through jury instructions." United States v. Castro, 15 F.3d 417, 422 (5th Cir.), cert. denied, 115 S. Ct. 127 (1994). Consequently, to demonstrate an abuse of discretion, a convicted defendant must show that the court's failure to sever directly "compromise[d] a specific trial right of one of the defendants, or prevent[ed] the jury from making a reliable judgment about guilt or innocence." Zafiro, 113 S. Ct. at 938; accord Arzola-Amaya, 867 F.2d at 1517.

B. The Court's Refusal To Sever Did Not Produce Any Prejudice, Much Less Sufficient Prejudice To Warrant Reversal of The Conviction

Mrs. Baird's argues that the government failed to prove that the West Texas conspiracy charged in Count Two of the Indictment continued past September 1990 and, therefore, that Count II was barred by the statute of limitations (Br. 39-41). Conveniently ignoring the fact that both it and Carroll Baird were acquitted with respect to Count Two, it then argues that the evidence of wrongdoing under Count Two "no doubt impacted the jury's consideration of Count I" (Br. 41); accord Br. 42 ("the inescapable conclusion is that this evidence [under Count Two] impermissibly infected the jury's consideration of allegations made in Count I"). Even accepting Mrs. Baird's self-serving description of the government's evidence with respect to Count Two, the district court did not abuse its discretion in refusing to sever that count.

During a bench conference on Mrs. Baird's motion to sever, the district court found sufficient, for the purpose of denying the severance request, the government's response that it would show that prices that were fixed in West Texas prior to September 1990 continued in effect past that date (5 R. at 205-06). While the Government believes that the evidence it presented at trial established that the conspiracy charged in Count Two continued into the statutory period, no useful purpose would be served in repeating this evidence here given the jury's decision to acquit with respect to Count Two. Unless Mrs. Baird's can establish that it was prejudiced by the district court's refusal to sever

Count Two, its severance argument must be rejected.[20]

This Court has held on numerous occasions that a supposition that evidence has "spilled over" from one defendant or count and prejudiced a defendant does not constitute compelling prejudice. E.g., United States v. Fields, 72 F.3d at 1215; United States v. Pofahl, 990 F.2d at 1483; United States v. Loalza-Vasquez, 735 F.2d 153, 159 (5th Cir. 1984); United States v. Morrow, 537 F.2d 120, 136 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977). This is particularly true where, as in this case, the evidence is not complicated, the jury can easily compartmentalize the evidence, and the jury is carefully instructed "to consider each offense separately and each defendant individually." Arzola-Amaya, 867 F.2d at 1516.

In this case, the evidence concerning the East Texas and West Texas conspiracies was not complicated and was easy to compartmentalize. See United States v. Lane, 474 U.S. 438, 450-51 & n.13 (1986) (evidence of different offenses distinct and easily segregated by the jury); Pofahl, 990 F.2d at 1483 (same). Moreover, the district court here specifically instructed the jury to consider each offense against each defendant separately, and to find sufficient evidence to support an individual guilty verdict (7 R. at 631-32). See, e.g., Fields, 72 F.3d at 1215; Castro, 15 F.3d at 422; Pofahl, 990 F.2d at 1483; and Arzola-

[20]In any event, the evidence of the West Texas conspiracy would have been admissible under Fed. R. Evid. 404(b), even if the court had granted the motion to sever. See, e.g., United States v. Bi-Co Pavers, Inc., 741 F.2d at 736-37; United States v. Dunham Concrete Products, Inc., 475 F.2d 1241, 1250 (5th Cir.), cert. denied, 414 U.S. 832 (1973).

Amaya, 867 F.2d at 1516. "'[J]uries are presumed to follow their instructions.'" Pofahl, 990 F.2d at 1483 (quoting Zafiro, 113 S. Ct. at 939). Indeed, that the jury acquitted on three of the four possible results "demonstrat[es] that the jury properly followed the judge's instructions." Arzola-Amaya; 867 F.2d at 1516; accord United States v. Bermea, 30 F.3d at 1574 ("mixed verdicts . . . demonstrate that the jury was not confused"); United States v. Lueth, 807 F.2d 719, 731 (8th Cir. 1986)(such a split verdict is "'convincing evidence that the jury was able to separate the proof'") (quoting United States v. Reed, 658 F.2d 624, 630 (8th Cir. 1981), cert. denied, 455 U.S. 1002 (1982)).

In short, if the court erred in refusing to sever Count Two, the error did not substantially affect the jury's verdict and, therefore, was harmless.

IV. THE COURT PROPERLY APPLIED THE SENTENCING GUIDELINES

Mrs. Baird's argues that in applying the Antitrust Guideline the district court miscalculated the relevant volume of commerce (Br. 44-47). It also argues that the court failed to identify which of Mrs. Baird's sales during the conspiracy period actually were affected by the violation (Br. 45-47). Alternatively, it (Br. 47-50) and amicus curiae, Washington Legal Foundation (Amicus Br. 11-16) ("amicus"), argue that because the government could not prove that the loss caused by the violation was 20 percent of Mrs. Baird's sales, the court erred when it followed the Antitrust Guideline's specific direction to "use 20 percent of the volume of affected commerce" when computing the base fine. U.S.S.G. 2R1.1(d)(1). In fact, the district court's factual

findings are fully supported by the evidence, and the district court correctly applied the Antitrust Guideline.

A. Standard of Review

Pursuant to 18 U.S.C. 3742(e), a reviewing court must uphold a sentencing court's factual findings "unless they are clearly erroneous." E.g., United States v. Fields, 72 F.3d at 1215; United States v. Headrick, 963 F.2d 777, 779 (5th Cir. 1992). Interpretation of the Sentencing Guidelines presents a question of law which is reviewed de novo. E.g., United States v. Mathena, 23 F.3d 87, 89 (5th Cir. 1994); Hendrick, 963 F.2d at 779. The interpretation of any Guideline (or statute) must begin with its plain language. E.g., Williams v. United States, 112 S. Ct. 1112, 1119 (1992)(construing the "plain language" of the Guidelines); Mathena, 23 F.3d at 91. The Sentencing Commission's Commentary to the Guidelines is "authoritative," and Commentary that "functions to 'interpret [a] guideline or explain how it is to be applied', U.S.S.G. § 1B1.7, controls." Stinson v. United States, 113 S. Ct. 1913, 1917-18 (1993)(citing Williams v. United States, 112 S. Ct. at 1120). Indeed, the Commentary is the equivalent of "an agency's interpretation of its own legislative rule" and, therefore, provided that the Commentary "does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the [guideline]'." Stinson, 113 S. Ct. at 1919 (citations omitted); accord Mathena, 23 F.3d at 93.

Moreover, interpretation of the Guidelines, like that of a statute, cannot lead "to an absurd result contrary to clear

legislative intent." United States v. Pompey, 17 F.3d 351, 354 (11th Cir. 1994)(quoting United States v. Alessandroni, 982 F.2d 419, 420-21 (10th Cir. 1992)); accord Mathena, 23 F.3d at 93. Finally, a sentencing court's decision not to depart from the Guidelines is reviewable only for an abuse of discretion. Koon v. United States, 116 S. Ct. 2035, 2046-48 (1996); United States v. Beasley, 90 F.3d 400, 402-03 (9th Cir. 1996).

B. The Court's Findings Are Not Clearly Erroneous

Under the Antitrust Guideline, the sentencing court must determine "the volume of commerce attributable" to the defendant "in goods or services that were affected by the violation." U.S.S.G. 2R1.1(b)(2). The court determined that the goods affected by the price fixing violation in this case included all bread products sold by Mrs. Baird's during the course of the conspiracy, and it found that for "the seven-year period" from 1986 through 1992, that figure was $112 million (2 Supp. R. at 80-81). Mrs. Baird's does not dispute the accuracy of the $112 million figure; however, it argues (Br. 44-45) that the record precluded the court from including in the volume of commerce calculation: 1) any sales made after Oler was reassigned in December 1990; and 2) sales of any bread products other than white or wheat bread (Br. 44-45). These claims are specious. For example, its claim that Oler was reassigned in December 1990 ignores evidence that the reassignment in fact took place in December 1991. See note 8, supra. In any event, there is absolutely no evidence that Mrs. Baird's quit the conspiracy prior to the "agreement" that Carroll Baird and Woody Rochelle

"screwed up" in 1993. See p. 8 & n.10, supra.

Moreover, the record shows that the price letters that Green and Oler exchanged were "product listing[s]" that contained prices for "each one of [their] branded items" (4 R. at 172), and that when Carroll Baird had Oler match a Flowers price increase it would be for "most products" (id. 180). Thus, the court did not err by concluding that the volume of commerce included all bakery products sold by Mrs. Baird's from 1986 through 1992. In any event, as the court explained, even if sales of only white and wheat bread are considered during that time period, the base fine still exceeds the statutory maximum. See p. 11 & n.13, supra. Thus, no error occurred.

C. The Government Was Not Required To Prove That The Price Fixing Conspiracy Was Successful

Mrs. Baird's argues that the district court erroneously assumed "that every pricing decision resulted from a price-fixing agreement" (Br. 45). But the district court's decision to include all sales made by Mrs. Baird's during the period of the conspiracy is fully supported by the evidence, and is a correct application of the Antitrust Guideline.

1. As we have already noted (p. 36, supra), a defendant's volume of commerce "is the volume of commerce done by him . . . in goods or services that were affected by the violation." U.S.S.G. 2R1.1(b)(2). The meaning of the phrase "affected by the violation" can be discerned from its common everyday usage, and such usage is the first and best guide to how the Guideline should be interpreted. Williams, 112 S. Ct. at 1119; Mathena, 23 F.3d at 91. The word affect "is synonymous with the term

'influence'," which in turn can be defined as the power "'to affect or alter the conduct, thought, or character of by direct or intangible means'." United States v. Hayter Oil Co., 51 F.3d 1265, 1272-73 (6th Cir. 1995)(quoting Webster's Third New International Dictionary 1160 (unabr. 1981)). Accordingly, while "the volume of commerce . . . affected by the violation" surely includes any bread products sold by Mrs. Baird's at prices clearly inflated by the conspiratorial agreement, the natural and ordinary meaning of "affected" is broader than that narrow interpretation. Rather, "affected" commerce must include all commerce that was influenced by or subject to the price fixing agreement. Because that agreement had the capacity of causing an effect on Mrs. Baird's prices at all times during the duration of the conspiracy, regardless of what price it or any other conspirator actually was charging, Mrs. Baird's volume of commerce must include all sales it made during the duration of the single conspiracy charged in the indictment. See Hayter Oil, 51 F.3d at 1273.

Moreover, the context in which the Sentencing Commission used the phrase "affected by the violation" is also highly significant. The language chosen by the Sentencing Commission eliminates from volume of commerce calculations: 1) any sales of products not covered by the price fixing agreement, and 2) any sales that took place either before the conspiracy formed or after it terminated.[21] For example, if Mrs. Baird's had sold

[21]The Guideline definition of volume of commerce also serves to base a particular defendant's fine only on his sales of the price-fixed-goods, and not on the additional sales of those goods

dairy products in addition to bread products, its sales of dairy products would not be included in the volume of commerce calculation because they were not part of the conspiratorial agreement to fix bread product prices. But nothing in the plain language of the Antitrust Guideline even suggests that the Sentencing Commission intended a court to exclude from a defendant's volume of commerce sales of a product that was the direct object of a price fixing agreement, simply because the government was unable to demonstrate that they were made at an agreed-on price. See Hayter Oil, 51 F.3d at 1273.

In this case, the violation found by the jury was fixing the price of bread products, and the evidence presented at trial established that Mrs. Baird's and Flowers maintained existing prices unless both companies agreed to raise prices to a new level. The fact that Oler policed incidents of "low" pricing when he discovered them (Exhibit 1) fully supports the view that all pricing decisions were made in accordance with the price fixing conspiracy. Moreover, Mrs. Baird's is wrong that "Oler and Green discussed price information only in 'some cases'" (Br. 45) (quoting 5 R. at 222). Oler testified that while he and Green "would have a conversation" in "some cases," that "sometimes it wouldn't be a conversation; sometimes Mr. Green would hand [him] the price letter" which Oler "in turn" gave to Carroll Baird (5 R. at 222). This testimony, in conjunction with Oler's admission that he spoke with Green about price increases "many times" between 1986 and 1992 (4 R. at 172), and the fact

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that were made during the conspiracy by his co-conspirators.

that Oler policed incidents of "low" pricing when he found them (Exhibit 1), demonstrate that the two companies were in constant contact over prices and, therefore, that the conspiracy was at all times affecting their sales. Accordingly, the evidence fully supports the conclusion that all sales made during the period of the conspiracy "were affected by the violation," U.S.S.G. 2R1.1(b)(2), and should be included in the volume of commerce calculations.

2. In any event, Mrs. Baird's argument has an additional flaw. In order to prove whether a particular "pricing decision resulted from a price-fixing agreement" (Br. 45), the government would have to prove the day-to-day success of the conspiracy. The Antitrust Guideline plainly does not require such proof.

The Commentary to the Antitrust Guideline establishes that the Commission intended the Guideline to be interpreted in a manner consistent with the per se rule which makes the success of any price fixing conspiracy irrelevant. The Sentencing Commission recognized that certain anticompetitive agreements or practices forbidden by the Sherman Act, such as price fixing, are so plainly anticompetitive that they are described "as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect." U.S.S.G. 2R1.1, comment (backg'd). See Socony-Vacuum Oil Co., 310 U.S. at 223-24; Hayter Oil, 51 F.3d at 1273 (citing National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)). The Sentencing Commission expressly stated that only conduct that is per se unlawful is subject to the Antitrust Guideline. U.S.S.G. 2R1.1,

comment. (backg'd). Since the Commission expressly endorsed the per se rule, the Antitrust Guideline must be interpreted in accordance with that rule. E.g., Stinson, 113 S. Ct. at 1919; Hayter Oil, 51 F.3d at 1273-74.

A price fixing agreement violates the Sherman Act even if it is never implemented or is completely unsuccessful. Socony-Vacuum, 310 U.S. at 224 n.59. Thus, the government is not required to prove that a price fixing agreement had an anticompetitive effect in relevant markets. Rather, the government need only prove the existence of the alleged agreement, and that defendants knowingly entered into the conspiracy. E.g., All Star Industries, 962 F.2d at 474-75. Accordingly, in a price fixing case, the government does not have "the burden of ascertaining from day to day whether [the price fixed by agreement] has become unreasonable through the mere variation of economic conditions." United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927). Thus, Mrs. Baird's suggestion that it predominately was selling bread at reasonable prices (Br. 46) is irrelevant.[22]

The Supreme Court specifically has instructed that the purpose of the per se rule "in part is to avoid a burdensome inquiry into actual market conditions in situations where the

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[22]Mrs. Baird's also is wrong in asserting (Br. 46) that the conspiracy could not have been affecting prices "for over thirty-three months between 1990 and 1993" because price decreases "unilaterally" set by Mrs. Baird's were in effect during that time. Indeed, the taped telephone conversation between Oler and Green (Exhibit 1) that defendants' counsel identified as being made in November 1992 (5 R. at 432) shows Oler policing prices during that "thirty-three month[]" period.

likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n.25 (1984) (emphasis added); accord FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 433 (1990); Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350-51 (1982); United States v. Cooperative Theatres of Ohio, Inc, 845 F.2d 1367, 1373 (6th Cir. 1988) (determining the effects of a price fixing conspiracy would require an "incredibly complicated and prolonged economic investigation"). Mrs. Baird's contention, however, requires an examination of facts that are irrelevant under the per se rule, and would require the government at sentencing to make "a burdensome inquiry into actual market conditions," Jefferson Parish Hospital Dist. No. 2, 466 U.S. at 15 n.25, even though such an inquiry is not required at trial. Hayter Oil, 51 F.3d at 1274 ("it clearly appears that the Sentencing Commission intended that the government have the benefit of a per se rule both at trial and at sentencing to avoid the protracted inquiry into the day-to-day success of the conspiracy.").[23] But that is exactly the inquiry that the Sentencing Commission understood is completely irrelevant under the per se rule. Whether the conspirators were always successful in their objective of raising or maintaining prices, and whether Mrs. Baird's always charged

[23]Thus, amicus is wrong when it argues that although "price-fixing schemes . . . are per se illegal, . . . [i]t does not necessarily follow . . . that for purposes of sentencing those same per se rules should also be employed in determining the volume of affected commerce" (Amicus Br. 11).

the agreed-on price, was irrelevant to its guilt and punishment so long as the jury concluded that it had knowingly participated in the single price fixing conspiracy charged in the indictment. Nothing in the Antitrust Guideline even suggests that facts that were immaterial in determining defendants' guilt should determine their sentences. If the Sentencing Commission had intended to have judges ignore the per se rule at sentencing notwithstanding the Commission's express endorsement of that rule, it certainly would have said so. Compare U.S.S.G. 2R.1.1 with U.S.S.G. 1B1.1, comment. (nn.1(b) & (j)) (defining "bodily injury" and "serious bodily injury," and noting in each case that "[a]s used in the guidelines, the definition of th[e] term is somewhat different than that used in various statutes"). Consequently, Mrs. Baird's volume of commerce includes all of its sales during the course of the conspiracy.

D. The Sentencing Commission Was Not Arbitrary Or Capricious When It Established 20 Percent Of The Defendant's Volume Of Commerce As The Base Fine For Per Se Antitrust Violations

Both Mrs. Baird's (Br. 47-50) and amicus (Amicus Br. 12-16) argue that the district court incorrectly applied the Antitrust Guideline when it set the base fine as 20 percent of Mrs. Baird's volume of commerce, as expressly required by U.S.S.G. 2R1.1(d)(1). Notwithstanding its admission that "we all agree we cannot compute the pecuniary gain" in this case (2 Supp. R. at 79), Mrs. Baird's contends that its gain was, at most, 2 percent (Br. 49-50). It and amicus then argue that the court should have set the base fine at twice that amount, i.e., 4 percent of its volume of commerce, and that the Guideline's inflexible 20

percent figure is, therefore, arbitrary and capricious (Br. 48-50; Amicus Br. 15-16). These claims ignore the deterrence rationale of the Antitrust Guideline.

After explaining that the Antitrust Guideline applies only to per se violations, the Commission explained that "[t]he controlling consideration underlying this guideline is general deterrence." U.S.S.G. 2R1.1, comment. (backg'd) (emphasis added). It also explained that "the most effective method to deter [these crimes] is through imposing short prison sentences coupled with large fines" and, therefore, that "substantial fines are an essential part of the sentence" (id.) (emphasis added). This language has been part of the Commission's Commentary since the Guidelines were adopted in 1987. See U.S.S.G. 2R1.1, comment. (backg'd) (1987). If Congress had seen fault with this approach it could have blocked the Commission. Instead, Congress endorsed the Commission's approach by increasing the statutory maximum fine for corporations ten-fold in 1990, from one to ten million dollars. Antitrust Amendments Act of 1990, Pub. L. No. 101-588, sec. 4, 104 Stat. 2879, 2880 (1990).

Thus, amicus is wrong in relying on pre-Guidelines antitrust fines (Amicus Br. 9-10). Both the Sentencing Commission and, more importantly, Congress recognized that pre-Guidelines fines were far too low to achieve general deterrence and raised them substantially. Indeed, the fine imposed in this case would have been only $1 million if Congress had not raised the statutory maximum fine in Sherman Act cases in 1990. Therefore, to the extent that amicus and Mrs. Baird's wish to complain about high

fines in Sherman Act cases, they should direct those complaints to Congress rather than to this Court. And to the extent they complain about the fine imposed in this case, they simply ignore the deterrent effect of that fine on other would-be antitrust violators, and the Commission's intent to use high fines for that very purpose.

Moreover, contrary to what the amicus brief argues (Amicus Br. 13-15), the Sentencing Commission had a factual basis for estimating in Application Note 3, supra, that the average gain from price fixing is 10 percent. See Hearings Before the United States Sentencing Commission Concerning Alternatives To Incarceration (July 15, 1986) (Statement of Douglas H. Ginsburg, Assistant Attorney General Antitrust Division) ("Based on our experience . . . price fixing typically results in price increases of at least 10 percent").[24] And the Commission also carefully explained why it set a corporate antitrust violator's base fine at 20 percent of its volume of commerce. Contrary to the claim of both Mrs. Baird's and amicus, it did not intend to base an antitrust violator's "substantial fine" on the amount of damages or harm caused by the violation, because the Commission did not want sentencing judges determining the actual day-to-day

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[24] Amicus' reliance (Br. 14-15) on Mark A. Cohen & David T. Scheffman, The Antitrust Sentencing Guideline: Is The Punishment Worth The Costs?, 27 Am. Crim. L. Rev. 331 (1989) ("Cohen & Scheffman"), is misplaced. Although that article did discuss a study of seven price fixing cases in the bread industry which suggested "an 'average' price fixing markup of just under one percent," the article itself explained that "[o]f course, these results were from settlements, not awards." The authors then appear to vacillate on whether those settlement results "probably understate the actual markup" or overstate it. 27 Am. Crim. L. Rev. at 345 & n.66.

effect of a per se violation of the antitrust laws. Rather, "[t]he offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute." U.S.S.G. 2R1.1, comment. (backg'd.) (emphasis added). Moreover, the Commission fully recognized that "pre-guidelines . . . fines increased with the volume of commerce" (id.), again demonstrating its intention to have antitrust fines vary with the volume of commerce rather than gain or loss.

Finally, the Commission emphasized that "[t]he purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss." Application Note 3, supra. This language directly tracks the Supreme Court's explanation that the per se rule itself exists in part "to avoid a burdensome inquiry into actual market conditions" because per se conduct "render[s] unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." Jefferson Parish Hospital Dist. No. 2, 466 U.S. at 15 n.25. Indeed, even Mrs. Baird's own expert admitted that computing the gain from price fixing is "a difficult task under the best of circumstances" (2 Supp. R. at 40). Since Commentary that "'interpret[s a] guideline or explain[s] how it is to be applied', U.S.S.G. § 1B1.7, controls", Stinson, 113 S. Ct. at 1917-18, the Court must reject Mrs. Baird's and amicus' claim that it was arbitrary or capricious to set the base fine at 20 percent of the

volume of commerce instead of a demonstrated level of loss caused by the violation.

In fact, the Commission explicitly recognized that in any given case a defendant's gain could be "substantially less" than the estimated 10 percent. Application Note 3, supra.[25] In such cases, the loss caused by the violation coincidently would be smaller. However, because the Commission never intended that the base fine should equal the loss or harm caused by the violation, the Guideline does not provide for setting the base fine at a demonstrated level of loss, as Mrs. Baird's and amicus contend. Rather, the Commission expressly instructed: "In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range." Id.[26] The Commission therefore expressly foresaw the argument

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[25]Interestingly, the Sentencing Commission's language -- "substantially less than 10 percent" -- is virtually identical to Mrs. Baird's claim that in this case its gain was "significantly less than the 10%." Compare U.S.S.G. 2R1.1, comment. (n.3) with Br. 49.

[26]Amicus is wrong in contending that this language suggests that "the Commission expressly envision[ed] that actual profit computations will be made at the sentencing hearing" (Amicus Br. 12), and that "the Antitrust Guideline expressly envisions case-by-case computation of actual monopoly overcharges" (id. at 13). The Commission's express purpose in adopting the Antitrust Guideline was to provide the government at sentencing with the same per se presumption it enjoys at trial. Hayter Oil, 5 F.3d at 1274. Indeed, the Commission's choice of language -- "cases in which the actual monopoly over charge appears to be . . ." (Application Note 3, supra) (emphasis added) -- suggests a far simpler sentencing hearing demonstration than an "actual profit computation" (Amicus Br. 12).

that Mrs. Baird's now makes and rejected it.[27]

In sum, when it set the base fine as 20 percent of a corporate defendant's volume of commerce, the Sentencing Commission was focusing on its "controlling consideration [of] general deterrence," which it envisioned would be achieved by "large" or "substantial fines" and, concomitantly, the burden that the government should face in having those fines implemented. It expressly was not attempting to set the base fine as the amount of loss caused by the violation. Consequently, the Guideline, which explicitly envisions a sentencing court taking into account situations where a defendant's overcharges "appear" to be substantially more or less than 10 percent, by imposing a sentence at the high or low end of the Guideline range respectively, is neither arbitrary nor

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[27]The Guideline fine range is calculated by multiplying the base fine by the minimum and maximum multipliers that are established by the culpability score. See U.S.S.G. 8C2.6-8C2.7. The presentence report recommended a culpability base score of 5, to which Mrs. Baird's did not object, plus a 4 point increase under U.S.S.G. 8C2.5(b)(2)(A), to which Mrs. Baird's did object, for a total culpability score of 9. Under U.S.S.G. 8C2.6, the minimum and maximum multipliers for a culpability score of 5 are 1 and 2 respectively, and for a score of 9 they are 1.8 and 3.6 respectively. Thus, in this case, absent the statutory maximum, Mrs. Baird's Guideline fine range would have been $13.4 million to $26.8 million using a volume of commerce of $67 million and a culpability score of 5. See note 13, supra. Of course, both the minimum and maximum fines in the Guideline range would be larger if either a culpability score of 9, or a volume of commerce of $112 million, or both, are utilized.

Moreover, as this case demonstrates, there are limitations on the actual fine that can be imposed, such as the statutory maximum fine, despite the fine that is produced by an appropriate calculation under the Guidelines. Accord U.S.S.G. 8C3.3 (providing for downward departure based on defendant's inability to pay). Additionally, a defendant can always attempt to demonstrate that its case is so extraordinary that a downward departure is appropriate. See Koon, 116 S. Ct. at 2045.

capricious.[28]

CONCLUSION

Both the judgment of conviction and the sentence imposed should be affirmed.

Respectfully submitted,

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[28]Amicus' final argument (Amicus Br. 16-17) -- that the court abused its discretion by not granting a downward departure because this is "clearly an atypical price-fixing case" -- improperly presents an issue not raised by Mrs. Baird's either in the district court or in this Court. It therefore must be rejected. See Christopher M. v. Corpus Christi Independent School District, 933 F.2d 1285, 1293 (5th Cir. 1991). Moreover, after evaluating the reasons for which Mrs. Baird's did seek a departure (2 Supp. R. at 83-92), the court did not abuse its discretion when it denied Mrs. Baird's motion. Indeed, after it found no legitimate basis on which it should depart, it noted that "because of the maximum [statutory] fine there's already been a downward departure in effect . . . [by] maybe as much as half" (2 Supp. R. at 92). See note 27, supra.