No. 02-20843

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THERM-ALL, INC., ET AL.,

Defendants-Appellants.

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MOTION FOR LEAVE TO FILE A REPLY TO
RESPONSES TO PETITION FOR REHEARING EN BANC

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Pursuant to Fed. R. App. P. 27 & 37(e), and Fifth Cir. R. 27.1.13 & 35.3, appellee, the United States of America, respectfully requests leave to file a reply to the responses to its petition for rehearing *en banc.* Neither the Federal Rules of Appellate Procedure nor this Court's rules permit or prohibit a reply to responses to a petition for rehearing *en banc*. However, under the Federal Rules, the party seeking relief typically has an opportunity to reply to any opposition to the relief being sought. *See, e.g.,* Fed. R. App. P. 28(c) (permitting reply brief). Indeed, Fed. R. App. P. 27 was amended in 1998 with new section 27(a)(4) to allow a party who submits a motion to file a reply to any response. *See* Fed. R. App. P. 27 Advisory Committee Notes, 1998 Amendments.

In the instant case, the United States seeks leave to file a reply to allow it to explain to the Court that the appellants' responses fail to address several arguments made by the United States in its Petition. For example, appellants do not even mention cases such as *United States v.*

*Spero*, 331 F.3d 57 (2d Cir. 2003), discussed in our petition at pages 7-10. Those cases clearly hold that where a conspiracy statue "does not require proof of an overt act," then "once the Government [meets] its burden of proof by establishing that the [alleged] conspiracy existed, it [is] entitled to a presumption that the conspiracy continued" into the statute of limitations period without further proof that an overt act was taken in furtherance of the conspiracy within the limitations period. 331 F.3d at 60-61 (citing similar cases form several circuits). The Sherman Act, 15 U.S.C. § 1, like the Rico conspiracy statute at issue in *Spero*, does not require proof of an overt Act. By not even acknowledging the existence of *Spero* and cases like it, the appellants fail to address the fact that the panel majority's decision has created a split in the circuits. Moreover, appellants make several assertions in their responses that have no basis in law or are not supported by the record evidence in this case. The United States seeks an opportunity to respond to these inaccuracies.

Finally, granting this motion should not prejudice appellants. The Court received their responses on Wednesday, February 25, 2004, and our reply, which is accompanying this motion, will reach the Court on Friday, February 27, 2004.

The undersigned has contacted counsel for both appellants and they have stated that they intend to file objections to this motion.

Wherefore, the Court should grant the United States leave to file a reply to appellants' responses to the petition for rehearing *en banc.*

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2004, I served a true copy of the foregoing Motion For Leave To File A Reply To Responses To Petition For Rehearing En Banc upon:

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No. 02-20843

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THERM-ALL, INC., ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

# REPLY OF THE UNITED STATES OF AMERICA TO APPELLANTS' RESPONSES TO PETITION FOR REHEARING EN BANC

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## INTRODUCTION

In its Petition for Rehearing En Banc, the United States argued that the panel majority made three significant legal errors in concluding that the price fixing conspiracy in this case did not continue into the period of the statute of limitations. *En banc* review is appropriate to review these legal errors because the decision of the panel majority conflicts with numerous decisions of the Supreme Court, this Court, and other courts of appeals.

- First, the panel majority's holding that the government was required to prove an overt act, or some further act of conspiring, within the limitations period was contrary to *Nash v. United States*, 229 U.S. 373, 378 (1913), had no statutory basis, and ignored how courts interpret other statutes that, like the Sherman Act (15 U.S.C. § 1), also do not require proof of an overt act (*United States v. Spero*, 331 F.3d 57, 60 (2d Cir. 2003) (RICO conspiracy)). Petition pp. 7-9.
- Second, the panel majority's conclusion that "highly persuasive [evidence] that the conspiracy existed up through May 15, 1995" was "impotent in showing that the conspiracy existed past May 31, 1995" (Slip op. at 12), was contrary to prior decisions of the Supreme Court, this Court, and other courts of appeals holding that a "conspiracy is presumed to continue unless the defendant makes a 'substantial' affirmative showing of withdrawal, abandonment, or defeat of conspiratorial purpose." *United States v. Branch*, 850 F.2d 1080, 1082 (5th Cir. 1988). Petition pp. 9-12.
- Finally, the panel majority's conclusion that the United States had not proved an overt act, or some further act of conspiring, within the limitations period reflected a misunderstanding of both the Sherman Act and how the conspirators in this case used

agreed-on price lists in furtherance of the conspiracy both prior to and during the limitations period. Petition pp. 12-15.

In their responses, appellants simply ignore some of the Government's arguments outlined above. Indeed, they fail even to acknowledge the numerous RICO conspiracy cases cited by the Government that expressly support its position that it is not required to prove an overt act within the limitations period. To the extent that they do respond to the Petition, their arguments are either legally wrong or irrelevant.

ARGUMENT

1. Appellants' claim (Therm.R. 6-9; Sup.R. 2-6) that the government is required to prove an overt act or some further act of conspiring within the limitations period in a Sherman Act case ignores the plain language of *Nash* and fails to respond to arguments made in the Government's Petition.[1]

First, the Supreme Court in *Nash* expressly rejected this argument when it plainly stated that its prior decisions in *Hyde v. United States*, 225 U.S. 347, 359, 367-70 (1912), and *Brown v. Elliott*, 225 U.S. 392, 401 (1912), "have no bearing" on the Sherman Act because that statute does not require proof of an overt act. *Nash*, 229 U.S. at 378. Both *Hyde* and *Elliott* involved a conspiracy statute requiring proof of an overt act and, among other things, the effect of that requirement on a statute of limitations defense. In those cases, the Court held that a conspiracy generally continues until the last overt act by any of the conspirators. *Hyde*, 225 U.S. at 359, 367-70; *Elliott*, 225 U.S. at 401; *see Fiswick v. United States*, 329 U.S. 211, 216 (1946) (citing

[1] Supreme, but not Therm-All, erroneously contends (Sup.R. 2 n.2) that the Government did not make its *Nash* argument in the district court. *See*, *e.g.*, Tr. 5803-04.

*Elliott* as holding that statute of limitations "runs from last overt act"); *United States v. Flaharty*, 295 F.3d 182, 192 (2d Cir. 2002); *United States v. Reed*, 980 F.2d 1568, 1583 (11th Cir. 1993). These holdings have "no bearing" (*Nash*, 229 U.S. at 378) on a Sherman Act prosecution because the Sherman Act, unlike the statute at issue in *Hyde* and *Elliott*, does not require proof of an overt act. Accordingly, both the panel majority and appellants are wrong in contending that the government is required to prove an overt act or some further act of conspiring within the statutory period. *Nash*, 229 U.S. at 378.

Second, appellants simply ignore the Government's argument that no statute requires it to prove an overt act within the statutory period. With respect to the Sherman Act, *Nash* expressly holds that the Sherman Act does not require proof of an overt act. Nor does the applicable statute of limitations, 18 U.S.C. § 3282, contain any such requirement. That statute simply requires evidence that the offense "shall have been committed" within five years of the date an indictment is returned.

When a statute defining an offense does not require proof of an overt act, like the Sherman Act or RICO, then the offense is "committed" as soon as two or more persons agree to do that which those statutes prohibit. And such a conspiracy continues, and thus the crime is being "committed," "up to the time of abandonment or success." *United States v. Kissel*, 218 U.S. 601, 608 (1910); *United States v. Torres Lopez*, 851 F.2d 520, 522 (1st Cir. 1988); *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983); *United States v. Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980) (narcotics distribution and importation conspiracy; "[f]or limitations purposes, the conspiracy may be deemed terminated when, in a broad sense, its objectives have either been accomplished or abandoned, *not* when its last overt act was committed") (emphasis

added).

In contrast, when a statute defining a conspiracy offense does require proof of an overt act, the crime has not been "committed" until there has been both an agreement prohibited by the statute and an act in furtherance of that agreement. *Hyde*, 225 U.S. at 369-70; *Fiswick*, 329 U.S. at 216. Accordingly, when the offense itself requires proof of an overt act, the statute of limitations begins to run on the date the last overt act is committed. *Fiswick*, 329 U.S. at 216; *Huff v. United States*, 192 F.2d 911, 914-15 (5th Cir. 1951). The panel majority failed to appreciate this fundamental difference. Accordingly, its conclusion that the government is required to prove an overt act or some further act of conspiring within the limitations period is incorrect with respect to the Sherman Act.

As did the panel majority, appellants also ignore the annalytically indistinguishable RICO conspiracy cases cited by the Government that plainly hold that the government is not required to prove an overt act within the statutory period even when the statute of limitations is at issue. *Spero*, 331 F.3d at 60 (citing cases from several circuits). Because the Sherman Act, like the RICO conspiracy statute, does not require proof of an overt act, there is a clear conflict between the panel majority's decision and the RICO cases.

None of the cases appellants cite in fact holds that the Government is required to prove an overt act during the statutory period in a Sherman Act case. Indeed, most of the cases they cite involve conspiracy statutes that require proof of an overt act and thus are governed by the rule of *Hyde* and *Elliot* rather than the rule of *Nash*. *See*, *e.g.*, *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957) (18 U.S.C. § 371); *United States v. Manges*, 110 F.3d 1162, 1170 (5th Cir. 1997) (18 U.S.C. § 371); *United States v. Davis*, 533 F.2d 921, 926 (5th Cir. 1976) (18

U.S.C. § 371).[2] Nor do the two Ninth Circuit decisions appellants cite, *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), and *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991), support the panel majority's conclusion that the government is required to prove an overt act within the limitations period. *Inryco* simply involved an indictment that a district court had dismissed because it erroneously believed that a bid rigging conspiracy "terminated when the last bids were submitted" and did not include the date on which the designated winning bidder rewarded a co-conspirator for its complementary bids, which was within the limitations period. 642 F.2d at 292-93. The Ninth Circuit correctly reversed without discussing either *Nash* or *Hyde*.[3] *Brown* is even less helpful to appellants. In *Brown*, the Ninth Circuit affirmed a Sherman Act conviction notwithstanding the defendants' claim that the jury had been given inconsistent instructions concerning the need to prove overt acts. The court found "no plain error in these instructions." 936 F.2d at 1048.

Supreme (Sup.R at 5-6) also claims that the Government has been inconsistent on the issue of whether proof of an overt act is necessary within the limitations period, quoting a prior version of a manual the Antitrust Division uses to provide background information to law enforcement agents assisting in its investigations. But how the Division elects to explain the Antitrust laws to non-attorney law enforcement agents is irrelevant in determining what the

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[2] Strangely, Therm-All also relies on (Therm.R. at 8) an unpublished Ninth Circuit decision that does not even involve a statute of limitations issue. *United States v. Wallace*, 44 Fed.Appx. 85 (9th Cir. 2002).

[3] While the government is not required by *Nash* to plead or prove overt acts during the statutory period in a Sherman Act case, the Government, in the exercise of its prosecutorial discretion, can elect to allege and prove overt acts. *See United States v. Miller*, 771 F.2d 1219, 1226 (9th Cir. 1985) (overt acts are one "means of proving that the conspiracy had not expired"); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995) (same).

Supreme Court plainly held in *Nash*.[4] *See United States v. Caceres*, 440 U.S. 741, 752-53 (1979) (government regulations confer no benefits or rights on defendants).

2. Appellants contend (Sup.R. 6-11; Therm.R 9-11) that the settled rule that once the government proves the existence of a continuing conspiracy, that conspiracy is presumed to continue absent evidence of termination or withdrawal, does not apply absent proof of overt acts within the limitations period. In making this argument, they once again simply ignore the numerous RICO conspiracy cases cited in the Government's Petition that squarely contradict their argument. *See*, *e.g.*, *Spero*, 331 F.3d at 60-61. It is only because Supreme completely ignores these RICO cases that it can erroneously claim no court has presumed the continued existence of a continuing conspiracy without proof of overt acts in the limitations period. Sup.R. 10. In fact, the rule applied in RICO conspiracy cases is a rule that applies generally to "conspiracy statutes that do not require proof of an overt act." *Coia*, 719 F.2d at 1124. And as the Eleventh Circuit subsequently explained, in determining that the conspiracy at issue in *Coia* continued into the statutory period the court did not mention any predicate acts or overt acts in the limitations period but relied solely on the continuing conspiracy presumption. *United States v. Gonzalez*, 921 F.2d 1530, 1547-48 (11th Cir. 1991). As we have already noted, the Sherman Act is simply another example of a statute that does not require proof of an overt act.

Moreover, appellants' lengthy discussion of *United States v. Kissel*, 218 U.S. 601 (1910), ignores that *Nash* was decided after *Kissel*, and that the panel majority in this case agreed that the

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[4] The language that Supreme quotes is not in the current version of this Manual. *An Antitrust Primer For Federal Law Enforcement Personnel* (Sept. 2003). This Manual is posted on line at the Antitrust Division's website, *available at* http://www.usdoj.gov/atr/public/guidelines/201436.wpd.

Government had proved a price fixing conspiracy that began by at least January 1994 and continued until at least May 15, 1995. Slip op. at 2, 12. Because the Government met its burden of proving the existence of a continuing conspiracy, it was entitled to the presumption recognized in *Kissel* that the conspiracy continued absent evidence that it terminated or that a defendant had withdrawn. *Spero*, 331 F.3d at 61.

Supreme also contends that "the statute of limitations becomes a hollow, meaningless shell" (Sup.R. 9) if a continuing conspiracy can be presumed to continue into the statutory period. A similar argument was expressly rejected by the Supreme Court in *Hyde* (225 U.S. at 369). The government always has the burden of proving beyond a reasonable doubt that the conspiracy existed and was continuing. The defendant is free to offer evidence of termination of or withdrawal from the conspiracy more than five years prior to the indictment. *Id.* There was no evidence of either termination or withdrawal prior to the statutory period in this case. Appellants could have terminated their agreement sooner, or one or both of them could have withdrawn from the conspiracy by issuing independently determined price lists. That they continued to violate the Sherman Act rather than cease their criminal activity does not mean that the conspiracy can be prosecuted "forever." *Spero*, 331 F.3d at 60 (noting defense attorney's claim that "'once you joined an organized crime family, the conspiracy would continue in perpetuity until you left the family'"). The statute of limitations applies once they cease their criminal activity, not before.

Finally, Therm-All contends (Therm.R. 10-11) that the conspiracy terminated when the fiberglass manufacturers ended their allocation in March 1995. But the jury, by its guilty verdict, expressly rejected this argument. Moreover, both the panel majority and Judge Reavley in dissent rejected it as well. Indeed, the panel majority agreed that the record contains "highly persuasive

[evidence] that the conspiracy existed up through May 15, 1995" (slip op. at 12), a date well after the fiberglass manufacturers' allocation period ended. Thus, appellants' factual contention is not supported by the evidence.

3. Appellants contend that the Government failed to prove any overt acts within the limitations period because, they claim, there is no evidence that they were still using price lists containing agreed-on prices at that time. Sup.R. at 11-14; Therm.R. 11-14. In fact, the panel majority found that the conspirators, including appellants, had agreed on "significant price increases" on four separate occasions during the conspiracy including December 1994. Slip op. at 2. After agreeing on new price lists in December 1994, the conspirators continued to use those price lists into the limitations period. There is absolutely no evidence in the record that any conspirator adopted new price lists before the conspiracy ended or otherwise stopped using the agreed-on price lists. Indeed, the testimony the panel majority found to be "highly persuasive" that the conspiracy was still in existence on May 15, 1995 involved bids, including a Therm-All bid, based on December 1994 agreed-on price lists. Slip op. at 12; GX41H (Therm-All Dec. 1994 price sheet), GX43K, GX87, Tr. 1818-27. Moreover, as we have previously noted, there are at least 90 invoices in the record (GX86B)[5] from the statutory period reflecting sales at exactly the prices listed on the December 1994 price lists.[6] Appellants fail to explain why they were still

[5] Appellants also contend (Therm.R. 13, Sup.R. 14) that the invoices in GX86B are simply proof of interstate commerce and cannot be used to show that the conspiracy continued into the statutory period. But GX86B was admitted into evidence just like every other Government exhibit. The jury was not instructed that it could consider the exhibit only in determining whether the government had proved the interstate commerce element of the offense. Indeed, no such limiting instruction was even requested.

[6] Therm-All claims (Therm.R. 12, n. 8) that "[t]he Government's attempt to negate the panel's recognition that [the 90] invoices were less than five percent of the total sales is

charging prices shown on those December 1994 price lists if, as they contend, they stopped using them. Nor do they point to any evidence in the record establishing that they issued new price lists replacing the December price lists before the statutory period began.

Appellants also claim (Sup.R. at 14, Therm.R. at 12-14) that they made numerous sales at prices other than at the applicable price bracket price and that such sales prove the conspiracy had ended by June 1995. As we explained in the Petition (Pet. 12-14), the record does not support their argument. Indeed, the record establishes that discounting was commonplace throughout the conspiracy. Tr. 250-56, 270-73, 1081-82, 1122, 1134, 1144-45, 1274-75, 1399 (price sheet's last bracket was the "barometer"), 2776. Moreover, even the panel majority found that the conspiracy existed from January 1994 until at least May 15, 1995 (slip op. at 2, 12), notwithstanding Supreme's assertion that most of its sales during that period "were at prices other than the prices on its price guides." Sup.R. 14.

Finally, appellants' discussion of *Plymouth Dealers' Ass'n of Northern California v. United States,* 279 F.2d 128 (9th Cir. 1960), is premised on their contention that they were no longer using the December 1994 agreed-on price lists during the statutory period. Because, as explained above and in our Petition, the record fully supports the Government's contention that the conspirators were still using the December 1994 price lists during the statutory period, appellants' attempts to distinguish *Plymouth Dealers* are not persuasive.

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unauthentic [sic]. . . ." First, the Government was only addressing sales during June 1995. Second, our point was that we were not aware of any support in the record for the panel majority's five percent statement (Slip op. at 13. ). Therm-All cites nothing in the record to support the panel majority's statement. Finally, Supreme's suggestion (Sup.R. at 14) that there were "thousands" of invoices during the statutory period is simply wrong.

## CONCLUSION

The petition for rehearing *en banc* should be granted and the judgments of conviction should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, John P. Fonte, a member of the bar of this Court, hereby certify that today, February 26, 2004, I caused two copies of the accompanying Reply of the United States of America to Appellants' Responses to be served by Federal Express on the following:

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