UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No. H-94-58
	)	
v.	)	
	)	
GLAZIER FOODS CO.,	)	[filed 4/26/94]
	)	
Defendant.	)	
	)	

GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

Attached are the Government's proposed instructions to the jury. Additionally, the government requests that Fifth Circuit Pattern Jury Instruction No. 1.02 be given to the jury as a preliminary instruction.

Respectfully submitted,

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GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 1

INTRODUCTION

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.04 (1990); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 2

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened -- that is, in reaching your decision as to the facts -- it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.05 (1990); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 3

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all, [and no inference whatever may be drawn from the election of a defendant not to testify.] The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.06 (1990); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 4

EVIDENCE -- EXCLUDING ARGUMENT OF COUNSEL AND COMMENT OF COURT

As I told you earlier, it is your duty to determine the facts. In doing so you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.07 (1990); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 5

EVIDENCE -- INFERENCES -- DIRECT AND CIRCUMSTANTIAL

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the evidence.

Do not be concerned about whether evidence is "direct evidence" or "circumstantial evidence". You should consider and weigh all of the evidence that was presented to you.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.08 (Alternative A) (1990); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 6

ALL AVAILABLE EVIDENCE NEED NOT BE PRODUCED

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

Source: 1 Devitt & Blackmar, Federal Jury Practice and Instructions, § 17.18 (3d ed. 1977) (partial).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 7

CHARTS AND SUMMARY EXHIBITS

Certain charts and summaries have been admitted into evidence in order to summarize facts shown by documents and records which themselves are too voluminous to be conveniently examined in court. You should consider the evidence presented concerning the preparation and accuracy of those charts and summaries, and give each of them such weight as you believe it deserves.

Source: Court's instructions in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992) (modified); United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.) (modified); Sec. of Antitrust Law, American Bar Ass'n, Sample Jury Instructions in Criminal Antitrust Cases, No. 10 (1984); see also 1 Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, § 14.02 (4th ed. 1992).

Authorities: Moore v. Johns-Manville Sales Corp., 781 F.2d 1061, 1066 (5th Cir. 1986); United States v. Stephens, 779 F.2d 232, 239(5th cir 1985).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 8

AND/OR CAUTIONARY INSTRUCTION DURING TRIAL -- TRANSCRIPT OF TAPE RECORDED CONVERSATION

Exhibits _____ have been identified as typewritten transcripts of the oral conversations which can be heard on the tape recordings received in evidence as Exhibits _____. The transcripts also purport to identify the speakers engaged in such conversations.

I have admitted the transcripts for the limited and secondary purpose of aiding you in following the content of the conversations as you listen to the tape recordings, and also to aid you in identifying the speakers.

However, you are specifically instructed that whether the transcripts correctly or incorrectly reflect the content of the conversations or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcripts and from your own examination of the transcripts in relation to your hearing of the tape recordings themselves as the primary evidence of their contents. If you should determine that the transcripts are in any respect incorrect or unreliable, you should disregard them to that extent.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.40 (1990) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

Authorities: United States v. Chase, 838 F.2d 743, 748 (5th Cir. 1988), cert. denied, 486 U.S. 1035 (1989); United States v. Larson, 722 F.2d 139, 144 (5th Cir. 1983), cert. denied, 466 U.S. 987 (1984).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 9

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses [including the defendant] who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

In making up your mind and reaching a verdict, do not make

any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.09 (1990). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 10

CO-CONSPIRATOR -- PLEA AGREEMENT

You have heard evidence that Joseph M. Mobley and James Maurice Johnson have entered into plea agreements with the government. Their testimony was received in evidence and may be considered by you. You may give their testimony such weight as you think it deserves. Whether or not their testimony may have been influenced by their plea agreements is for you to determine.

Their guilty pleas cannot, however, be considered by you as evidence of this defendant's guilt. The guilty pleas can be considered by you only for the purpose of determining how much, if at all, to rely upon the testimony of these witnesses.

Source: Manual of Model Criminal Jury Instructions, Eighth Circuit, No. 4.04 (1989) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 11

UNINDICTED CO-CONSPIRATORS

The indictment refers to alleged co-conspirators and corporate co-conspirators who were not included in the indictment. You should not be concerned with or speculate about why alleged co-conspirators have not been included.

Source: Sec. of Antitrust Law, American Bar Ass'n, Sample Jury Instructions In Criminal Antitrust Cases, No. 18 (1984) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 12

CAUTION -- PUNISHMENT

If the defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussions.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.21 (1990). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 13

SINGLE DEFENDANT - MULTIPLE COUNTS

A separate crime is charged in each count of the indictment. Each count and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.22 (1990). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 14

CORPORATION CAN ACT ONLY THROUGH AGENTS

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by the accused, the law holds the accused responsible for such acts, the same as if the acts had in fact been done by the accused.

A corporation is in law a person, but, of course it cannot act otherwise than through its directors, or officers, or employees or other agents. The law, therefore, holds a corporation criminally responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority and to benefit the corporation.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a criminal case, need not be established by direct evidence, but may be established by circumstantial evidence.

Source: Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions, § 51A.07 (1992 supp.). Court's instructions in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992) (modified). ABA, Sample Jury Instructions in Criminal Antitrust Cases, No. 69 (1984) (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 15

APPARENT AUTHORITY

In order for a corporation to be responsible for the acts or statements of one of its agents, it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. Rather the corporation is legally bound by the acts and statements of its agents done or made within their apparent authority.

Apparent authority is the authority that outsiders could reasonably assume that the agent would have, judging from his position in the corporation, the responsibility previously entrusted to him or his office, and the circumstances surrounding the agent's past conduct. Thus, in order for a corporation to be legally responsible for the acts or statements of its agent, you must find that the agent was acting within his apparent authority.

Source: ABA, Sample Jury Instructions in Criminal Antitrust Cases, No. 69 (1984) (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 16

CONSPIRACY

The existence of a conspiracy is an essential element of the offenses charged in Counts I and III of the indictment and must be proved by the government beyond a reasonable doubt. A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that conspirators entered into any formal agreement; nor that they directly stated between themselves all of the details of a scheme. Similarly, the government need not prove that all the details of a scheme were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of a conspiracy were such, or that alleged conspirators actually succeeded in accomplishing their

unlawful objectives.

Mere presence at the scene of an event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 2.21 (1990) (modified). Court's instruction in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992) (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 17

COUNT I

OFFENSE CHARGED -- STATUTE DEFINING OFFENSE

Count I charges that beginning at least as early as 1985 and continuing until at least May 1990, the defendant entered into and engaged in a combination and conspiracy to suppress and eliminate competition by rigging bids for the award and performance of contracts to supply wholesale grocery products to certain school districts and other public entities in southeastern Texas, in unreasonable restraint of interstate trade and commerce in violation of Section I of the Sherman Antitrust Act. Section 1 of the Sherman Antitrust Act, provides in part that:

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

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

Source: 15 U.S.C. Section 1; Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions, §§ 51A.01, 51A.02 and 51A.04 (1992 supp.). Court's instructions in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992) (modified); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.)(modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 18

PURPOSE OF SHERMAN ANTITRUST ACT

The purpose of the Sherman Antitrust Act is to preserve or advance our system of free, competitive enterprise, and to encourage to the fullest extent practicable, free and open competition in the market place; all to the end that the consuming public may receive better goods and services at the lowest obtainable cost.

So, any unreasonable interference, by contract or combination or conspiracy, with the ordinary, usual and freely-competitive pricing or distribution system of the open market in interstate trade and commerce, constitutes an unreasonable restraint of interstate trade, and is in itself unlawful; and, if knowingly done, is a federal offense under the Sherman Antitrust Act.

Source: Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions, § 51A.03 (1992 supp.) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 19

ELEMENTS OF SHERMAN ACT OFFENSES

For you to find the defendant guilty of the crime charged in Count I of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the conspiracy described was knowingly formed, and was existing at or about the time alleged;

Second: That the defendant knowingly became a member of the conspiracy; and

Third: That the conspiracy either affected interstate commerce or occurred within the flow of interstate commerce.

Source: Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instruction, § 51A.15 (1992 supp.) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 20

SPECIFIC INTENT NEED NOT BE PROVED

To establish the required intent for Count I of the Indictment the government must prove beyond a reasonable doubt that the defendant knowingly did something which the law forbids. In this case, that means that the government must prove beyond a reasonable doubt that the defendant knowingly formed, joined or participated in a combination or conspiracy to rig bids. Since a combination or conspiracy to rig bids is unreasonable and illegal as a matter of law, the government does not have to prove that the defendants specifically intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade. If you find beyond a reasonable doubt that the defendant agreed to rig any of the bids alleged with one or more co-conspirators, then you must find the defendant guilty on Count I.

Source: Court's instructions in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992) (modified); United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.); see also 2 Devitt and Blackmar, Federal Jury Practice and Instructions, pp. 757-760 (Supp. 1988).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 21

MOTIVES PROMPTING CONSPIRACY IMMATERIAL

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

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

Source: Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions, § 51A.18 (1992 supp.) (modified for bid rigging). Court's instruction in United States v. All Star et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 22

INTERSTATE COMMERCE

An essential element of the offense charged in Count I and prohibited by the Sherman Act is that the unreasonable restraint must involve interstate commerce. The term "interstate commerce" includes the movement of products or services across state lines, or in the flow of interstate commerce, as well as entirely intrastate transactions that substantially affect interstate commerce.

To establish this element, it is sufficient for the government to demonstrate a substantial effect on interstate commerce generated by the conspirators' general business activities. The government need not show that the conspiracy itself actually had an effect on interstate commerce, although such proof would also be sufficient to establish this element.

The amount, quantity, or value of interstate commerce involved or affected is unimportant, so long as you find that the restraint charged in the indictment or the general business activities of the defendant related to the conspiracy had some effect upon interstate commerce.

Source: Court's instruction in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992) (modified); United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.)(modified).

Authorities: McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980); United States v. Young Brothers, Inc., 728 F.2d 682 (5th Cir. 1984), cert. denied, 469 U.S. 881 (1985); United States v. Cargo Service Stations, Inc., 657 F.2d 676, 679-680 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 23

IGNORANCE OF ANTITRUST LAWS NO DEFENSE

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

Thus, if the jury should find beyond a reasonable doubt from the evidence in the case that the conspiracy charged in Count I of the indictment was knowingly formed, and that the defendant knowingly became a member of the conspiracy as charged, then even if the defendant may have believed in good faith that what was being done was not unlawful, it would not be a defense.

Source: Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions, § 51A.17 (1992 supp.)(modified). Court's instruction in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992) (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 24

BID-RIGGING PER SE UNREASONABLE

Bid rigging is an agreement between two or more persons to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of bids. Bid rigging may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition among them.

Every conspiracy to rig bids is unlawful, regardless of the motives of the parties or any economic justification. This is because the aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition.

If there was a conspiracy as charged in Count I, it does not matter whether the prices paid to the defendants and co-conspirators were reasonable or unreasonable; high or low; fair or unfair. The Sherman Act makes illegal every conspiracy formed for the purpose of rigging bids. In this case, if you find beyond a reasonable doubt that the defendant was a member of a conspiracy to rig bids as alleged in Count I of the indictment, then you need not decide whether such conspiracy was reasonable or unreasonable because, as I have just explained, an agreement among competitors not to compete for contracts by submitting collusive bids is per se unreasonable and

a violation of the Sherman Act.

I further charge you that to constitute illegal bid rigging under the Sherman Act, it is not required that the conspirators agreed on the exact prices they will submit.

Source: 2 Devitt & Blackmar, Federal Jury Practice and Instructions, § 55.15 (3d ed. 1977); Sec. on Antitrust Law, American Bar Ass'n, Sample Jury Instructions in Criminal Antitrust Cases, No. 7 (1984); Court's instruction in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992); United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.)(modified).

Authorities: Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (no excuse that fixed prices are reasonable); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977); United States v. Young Brothers, Inc., 728 F.2d 682, 687 (5th Cir. 1984), cert. denied, 469 U.S. 881 (1985) (modified); United States v. Cadillac Overall Supply Co., 568 F.2d 1078 (5th Cir. 1978), cert. denied, 437 U.S. 903 (1979); United States v. Socony-Vacuum Oil Co., 310

U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 25

PROOF OF OVERT ACT UNNECESSARY

FOR SHERMAN ACT VIOLATION

In order to find that any of the defendants here was a party to the conspiracy charged in Count I of the indictment, it is not necessary that the evidence show that the defendant actually took any action to further or accomplish any object or purpose of the alleged conspiracy or that the defendant actually bid in accordance with the prices that may have been agreed upon or arranged.

What the law condemns is the agreement or understanding itself. In other words, the mere agreement or understanding, whether formal, informal, or tacit, to do one or more of the things charged in the indictment constitutes the offense. It is wholly immaterial in order to prove a violation of the Sherman Act whether the alleged conspiracy was ever actually carried out or whether its purpose was ever accomplished.

Source: 2 Devitt and Blackmar, Federal Jury Practice and Instructions, § 55.23 (3d ed. 1977) (adapted).

Authorities: Proof of overt act not necessary for Sherman Act violation: United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, n.59 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 402 (1927); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 26

COUNT II

OFFENSE CHARGED -- STATUTE DEFINING OFFENSE

Count II of the indictment charges that on or about August 15, 1989, in the Southern District of Texas, the defendant knowingly and willfully made and caused to be made certain false writings and documents, knowing the same to contain false, fictitious and fraudulent statements and entries as to material facts, in matters within the jurisdiction of the Veterans Administration, an agency of the United States of America.

Title 18 United States Code Section 1001 provides in part, that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States . . . makes any false, fictitious or fraudulent statements or representations . . .

shall be guilty of an offense against the United States.

Source: 18 U.S.C. § 1001; 2 Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions, §§ 37.05-37.06 (4th ed. 1990) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 27

COUNT II

ELEMENTS OF THE OFFENSE

For you to find the defendant guilty of the crime charged in Count II of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: that the defendant made a false statement to the Veterans Administration;

Second: that the defendant made the statement intentionally, knowing that it was false; and

Third: that the defendant made the false statement for the purpose of misleading the Veterans Administration.

It is not necessary to show that the Veterans Administration was in fact misled.

If you find that the government has proved these things, you do not need to consider whether the false statement was material, even though the language is used in the indictment. this is not a question for the jury to decide.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 2.46 (1990) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 28

ON OR ABOUT

You will note that Count II of the indictment charges that the offense was committed on or about August 15, 1989. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near August 15, 1989, the date stated in the indictment.

Source: Pattern Jury Instructions (Criminal Cases), Circuit, No. 1.19 (1990). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 29

COUNT III

NATURE OF OFFENSE - STATUTE DEFINING OFFENSE

Count III of the indictment charges that beginning at least as early as 1985 and continuing until at least as late as May 1990, in the Southern District of Texas, the defendant and co-conspirators did knowingly and willfully conspire, combine and agree with each other to commit offenses against the United States, that is, to use and cause to be used the United States mails in furtherance and execution of a scheme and artifice to defraud public school districts in southeastern Texas of money and property by means of false and fraudulent representations, in violation of 18 U.S.C. § 1341.

Title 18 United States Code Section 371 provides in part, that:

> If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to affect the object of the conspiracy . . ..

an offense against the United States has been committed.

Source: 18 U.S.C. § 371; 2 Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions, §§ 28.01-28.02 (4th ed. 1990) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 30

COUNT III ELEMENTS OF THE OFFENSE

The conspiracy charged in Count III of this indictment is a separate and different offense from the conspiracy charged in Count I. Furthermore, the elements of a conspiracy to commit mail fraud are different from those of a conspiracy to violate the Sherman Act.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That two or more persons made an agreement to commit the crime of mail fraud as charged in Count III of the indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

This last element is not an element of the conspiracy charged in Count I. In other words, the government must show an overt act in furtherance of the conspiracy only to prove the conspiracy to commit mail fraud, not to prove the Sherman Act conspiracy.

The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of

the agreement or conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt acts may, but for the alleged illegal agreement, appear totally innocent and legal.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 2.21 (1990) (modified); 2 Devitt, Blackmar and O'Malley, Federal Jury Practice And Instructions, § 28.07 (4th ed. 1990) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 31

COUNT III

CONSPIRACY: SUBSTANTIVE OFFENSE: ELEMENTS

To assist you in determining whether there was an agreement or understanding to commit mail fraud you are advised that the elements of mail fraud are:

First: That the defendant knowingly participated with his co-conspirators in creating a scheme to defraud public school districts in Southeastern Texas of money and property by means of false and fraudulent representations, as charged in Count III of the indictment;

Second: That the defendant acted with a specific intent to commit fraud;

Third: That the defendant mailed something or caused another person to mail something for the purpose of carrying out the scheme.

A "scheme to defraud" includes any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

A representation may be "false" when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the material mailed was false or fraudulent,

or that the alleged scheme actually succeeded in defrauding anyone, or that the use of the mails was intended as the specific or exclusive means of accomplishing the alleged fraud.

To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

Keep in mind that Count III of the indictment charges a conspiracy to commit mail fraud and not that mail fraud was committed. In a conspiracy to commit mail fraud the government does not need to prove an actual mailing, or that the defendant was actually involved in the mailings directly. Rather, the government must prove that the scheme to defraud reasonably contemplated the use of the mail or that the use of the mail was reasonably foreseeable or that the conspirators intended that the mails be used in furtherance of the scheme.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 2.54 (1990) (modified); Manual of Model Criminal Jury Instructions, Eighth Circuit, No. 5.06C (1989) (modified); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

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Authority: United States v. Maze, 414 U.S. 395, 399 (1974); United States v. Massey, 827 F.2d 995 (5th Cir. 1987); United States v. Green, 964 F.2d 365 (5th Cir. 1992).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 32 INTENT TO DEFRAUD

Count III requires the government to prove beyond a reasonable doubt that the defendant acted with a specific intent to commit fraud. To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.

An intent to defraud is accompanied, ordinarily, by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person.

Source: 2 Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions, § 40.14 (4th ed. 1990); Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 33

PROOF OF INTENT

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly and willfully done. As I have said, it is entirely up to you to decide what facts to find from the evidence.

But note, the standard of intent is different for Count I than it is for Count III.

Source: 1 Devitt and Blackmar, Federal Jury Practice and Instructions, § 14.13 (3d ed. 1977) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.)(modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 34

PERIOD OF THE CONSPIRACY

The evidence in the case need not establish the exact time during which the alleged conspiracies existed. It is sufficient if the evidence in the case shows beyond a reasonable doubt that the offenses charged in Counts I and III existed on dates, or during times, reasonably near the dates, or times, alleged in the indictment.

Source: 2 Devitt and Blackmar, Federal Jury Practice and Instructions, § 55.02 (3d ed. 1977) (partial). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 35

JURISDICTION AND VENUE

Before you can find the defendant guilty of committing the crimes charged in either Count I or Count III of the Indictment, you must find beyond reasonable doubt that within the five-year period immediately preceding March 21, 1994, some means, methods or practices were employed by or under the authority of the members of each of the alleged conspiracies within the Southern District of Texas.

This district includes Austin, Brazos, Colorado, Fayette, Fort Bend, Grimes, Harris, Madison, Montgomery, San Jacinto, Walker, Waller, and Wharton Counties.

Source: 2 Devitt and Blackmar, Federal Jury Practice and Instructions, § 55.25 (3d ed. 1977) (modified). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.)(modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 36

KNOWINGLY AND WILLFULLY

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully" as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.35 (1990) (modified). Court's instruction in United States v. All Star, et al., Crim. No. H-88-29 (S.D. Tex. 1990), aff'd, 962 F.2d 465 (5th Cir. 1992); United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 37

DUTY TO DELIBERATE - VERDICT FORM

To reach a verdict, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors, to consult with one another, and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. During your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

[Explain Verdict Form]

The foreperson will write the unanimous answer of the jury in the space provided for in each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the marshal. I will either reply in writing or bring you back into the courtroom to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

Source: Pattern Jury Instructions (Criminal Cases), Fifth Circuit, No. 1.25 (1990). Court's instructions in United States v. John J. Johnson, No. CR-H-92-152 (S.D. Tex.).

The foregoing jury instructions were given to the jury on this _____ day of _____ 1994.

_____
HONORABLE DAVID HITTNER
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that true and correct copy of the foregoing Government's Proposed Jury Instructions has been served upon Joel M. Androphy, Esq. and was sent via Certified Mail-Return Receipt Requested this ___ day of April, 1994, to:

Joel M. Androphy, Esq.
Berg & Androphy
3704 Travis Street
Houston, Texas 77002

"/s/"
JANE E. PHILLIPS
Attorney