

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No.: CR-24-314-J
)	
BG DALE BISCOE,)	
RANDALL DAVID SHELTON, and)	
SIoux EROSION CONTROL, INC.,)	
)	
Defendants.)	

RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS

The United States respectfully submits this response in opposition to the Defendants’ Joint Motion to Dismiss the Indictment (“Motion”), ECF 187. Under the Sherman Act, 15 U.S.C. § 1, agreements to fix prices and rig bids—the conspiracy with which the Defendants have been charged—are *per se* unreasonable restraints of trade subject to criminal prosecution. The *per se* illegality of these types of agreements is a substantive rule of law, not a mere evidentiary shortcut. And, as even the Defendants must concede, the Sherman Act and the decades of binding precedent applying the law provide them with clear notice that their agreement to fix prices and rig bids for erosion control products and services was illegal. The Court should deny the Motion.

I. BACKGROUND

In August 2024, a Federal Grand Jury returned an indictment charging the Defendants with conspiring to fix prices and rig bids for erosion control products and services. ECF 1. The Indictment alleged that “[t]he conspiracy engaged in by the

defendants and their co-conspirators was a *per se* unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).” *Id.* ¶9. In January 2025, the Defendants filed a joint motion to dismiss on the basis that, among other things, the Indictment was unconstitutionally vague. ECF 54 at 12-15. The United States filed a timely response in opposition that motion to dismiss. ECF 60. In March 2025, the Court denied that motion to dismiss. ECF 76. On May 13, 2026, the Defendants filed the instant Motion. The United States now responds.

II. LEGAL STANDARD

“An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense.” *United States v. Washington*, 653 F.3d 1251, 1259 (10th Cir. 2011) (quoting *United States v. Gama-Bastidas*, 222 F.3d 779, 785 (10th Cir. 2000)). However, “[a]n indictment or a portion thereof may be dismissed if . . . the statute creating the offense is unconstitutional.” *United States v. Minier-Tejada*, 633 F. Supp. 3d 408, 409-10 (D. Mass. 2022) (citing *United States v. Seuss*, 474 F.2d 385, 387 n.2 (1st Cir. 1973)); Fed. R. Crim. P. 12(b)(3)(B)(v) (requiring a defendant to move before trial on the basis of “a defect in the indictment . . . [for] failure to state an offense”). When considering a motion to dismiss an indictment, courts accept the factual allegations in the indictment as true. *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994) (citing *United States v. Sampson*, 371 U.S. 75, 78-79 (1962)).

III. ARGUMENT

A. The *Per Se* Rule Is a Constitutionally Sound Application of Substantive Law, Not an Evidentiary Presumption

The long-established and categorical prohibition of price-fixing and bid-rigging conspiracies under the Sherman Act is known as the *per se* rule. It is a legal recognition that any such agreements are inherently anticompetitive, and thus, illegal under the law. Accordingly, a jury need not make a factual determination of unreasonableness to satisfy the Defendants' right to trial by jury.

1. Price Fixing and Bid Rigging Are *Per Se* Violations of the Sherman Act

“[T]he [Supreme] Court has repeated time and again that § 1 [of the Sherman Act] ‘outlaw[s] only unreasonable restraints.’” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). The statutory words “restraint of trade” “took their origin in the common law,” *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50-51 (1911), and “at common law” certain categories of restraints were so pernicious that “there [was no] question of reasonableness open to the courts with reference” to them, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238 (1899). The “nature and character” of these agreements render them “within the purview of” Section 1’s prohibition because they necessarily “operate[] to produce the injuries which the statute forbade.” *Standard Oil*, 221 U.S. at 64-65. “As to these classes of restraints, . . . Congress . . . determined its own criteria of public harm and it [i]s not for the courts to decide whether in an individual case injury ha[s] actually occurred.” *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959); *see also Leegin*, 551 U.S. at

886 (“The *per se* rule, [by] treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.” (citation omitted)).

The Tenth Circuit has long held that price fixing and bid rigging are *per se* unreasonable under the Sherman Act. *Ass’n of Surgical Assistants v. Nat’l Bd. of Surgical Tech. & Surgical Assisting*, 127 F.4th 178, 186 (10th Cir. 2025) (discussing price fixing); *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992) (discussing bid rigging); *accord United States v. Aiyer*, 33 F.4th 97, 115 (2d Cir. 2022) (“In cases involving behavior such as bid rigging, . . . the Sherman Act will be read as simply saying: An agreement among competitors to rig bids is illegal.” (omission in original) (quoting *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981))); *United States v. Giordano*, 261 F.3d 1134, 1144 (11th Cir. 2001) (“It is as if the Sherman Act read: ‘An agreement among competitors to [fix prices] is illegal.’” (alteration in original) (quoting *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979))); *see also* September 8, 2025 Order, ECF 127, at 2-3. As Congress confirmed in 2020, “[c]onspiracies among competitors to fix prices, rig bids, and allocate markets are categorically and irredeemably anticompetitive and contravene the competition policy of the United States.” 15 U.S.C. § 7a note (Findings; Purpose of 2020 Amendment).

This categorical prohibition is known as the *per se* rule of antitrust law. *See, e.g., Leegin*, 551 U.S. at 886.

2. The *Per Se* Rule Is Not an Evidentiary Presumption

Because price fixing and bid rigging are categorically unlawful, the application of the *per se* rule to price-fixing and bid-rigging conspiracies is a matter of substantive law, not an evidentiary presumption or shortcut. *See, e.g., Giordano*, 261 F.3d at 1144 (“[T]he *per se* rule does not establish a presumption. It is not even a rule of evidence.” (quoting *United States v. Manufacturers’ Ass’n of Relocatable Bldg. Indus.*, 462 F.2d 49, 52 (9th Cir. 1972))); *Brighton*, 598 F.2d at 1106 (“Since the *Per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions.”). Accordingly, a jury need only find that a defendant engaged in price fixing or bid rigging to establish the central element in a Section 1 offense—that the defendant engaged in an unreasonable restraint of trade. *See Leegin*, 551 U.S. at 886. The power to find this element rests solely with the jury based on the evidence presented to them at trial. *See Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 974 (10th Cir. 1990).

The Defendants misstate the function of the *per se* rule by arguing that “the *per se* analysis is an evidentiary presumption that certain restraints on competition are unreasonable,” thereby taking a factual determination of unreasonableness away from the jury. Motion at 5. If the evidence shows that a defendant engaged in concerted action (or conspiracy), then the question becomes whether that concerted action was unreasonable. *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1272 (10th Cir. 2018) (citing *Leegin*, 551 U.S. at 885). Where a jury finds that a defendant engaged in price fixing or bid rigging, the *per se* rule ends the inquiry because the law defines the restraint as categorically

unreasonable. *Ohio v. American Express Co.*, 585 U.S. 529, 540 (2018) (noting that price fixing and bid rigging are inherently unreasonable (citation omitted)).

Thus, the function of the *per se* rule is not to lessen the government’s evidentiary burden. Rather, it is an “interpretation[] of the Sherman Act” to categorically prohibit a certain type of conduct. *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 432-33 (1990); *see also United States v. Trenton Potteries*, 273 U.S. 392, 400-01 (1927) (noting that numerous Supreme Court decisions “were made on the assumption that any agreement for price-fixing, if found, would have been illegal as a matter of law”).

As the Defendants concede, Motion at 2, every Circuit Court¹ to have considered similar challenges to the application of the *per se* rule in criminal cases has endorsed its use. *See, e.g., Koppers*, 652 F.2d at 293 (rejecting argument that jury instruction on *per se* rule “improperly withdrew the question of reasonableness from the jury by the use of a conclusive presumption” because “[t]his argument asks us in effect to overrule the Supreme Court’s decisions” establishing the *per se* rule). Indeed, in recent years, the Supreme Court has repeatedly declined to take up this exact issue. *See, e.g., United States v. Lischewski*, 860 F. App’x 512 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2676 (2022); *Sanchez v. United States*, 760 F. App’x 533 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 909 (2020). Nonetheless, the Defendants assert that the Tenth Circuit held differently in *Kemp*.

¹ In addition to the four Circuit Courts noted by the Defendants in their *see, e.g.* citation, Motion at 2 n.2, the Fifth and Seventh Circuits have also rejected such challenges. *See United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981) (rejecting due process challenge to the *per se* rule), *cert. denied*, 455 U.S. 1017 (1982); *Brighton*, 598 F.2d at 1106, *cert. denied*, 444 U.S. 840 (1979).

Motion at 5-6. In that case, the Tenth Circuit described the *per se* rule as an “evidentiary shortcut.” 907 F.3d at 1272.² The Tenth Circuit’s phrasing in *Kemp* must be understood, however, as what the Ninth Circuit referred to as a “pedagogic instrument” to help a reader or jury understand the elements of a *per se* violation. *Manufacturers’ Ass’n*, 462 F.2d at 52. Such explanatory language does not change a fundamental rule of binding precedent that certain types of restraints are “necessarily” unlawful. *See Leegin*, 551 U.S. at 886.

The Defendants try to shore up their argument by pointing to another district court’s observation that a similar argument was “analytically plausible.” Motion at 2 (quoting *United States v. McGuire*, 2022 WL 22983573, at *4 (D. Colo. Oct. 14, 2022)). Analytical plausibility, even if true, does not displace binding, black letter law. Indeed, the *McGuire* court affirmed that “no court of appeals [] endorsed” the argument advanced by those defendants before finding that the Section 1 indictment was sufficient. *McGuire*, 2022 WL 22983573, at *4.³ Accordingly, the Court should reject the Defendants’ argument.

² In *Kemp*, the district court ordered that a customer allocation agreement should be subject to a rule of reason analysis instead of the *per se* rule. 907 F.3d at 1268-70. On appeal, the Tenth Circuit held that it lacked interlocutory appellate jurisdiction over this issue but nonetheless encouraged the district court to “reconsider” its ruling on remand: “[t]o be sure, were the merits of the rule of reason order before us we might very well reach a different conclusion than did the district court. After all, ‘an agreement to allocate or divide customers between competitors within the same horizontal market, constitutes a *per se* violation of § 1 of the Sherman Act.’” *Id.* at 1270-78 (quoting *United States v. Sutar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990)), *on remand* 2019 WL 763796, at *2-4 (D. Utah Feb. 21, 2019) (reconsidering ruling and applying *per se* rule to agreement).

³ The Defendants note that the government ultimately filed an unopposed motion to dismiss the indictment in *McGuire* after the court ruled that the government had not established the existence of a conspiracy following a *James* hearing. Motion at 2 n.3. By contrast, this Court has already found that the charged conspiracy existed and that the “Defendants were

B. The Sherman Act Is Not Unconstitutionally Vague

In the Defendants' own words, "this Court is bound by precedent" that the Sherman Act is not unconstitutionally vague. Motion at 9. And the Defendants offer no good reason for why the Court could or should break with precedent. The Supreme Court squarely rejected a vagueness challenge to the Sherman Act over 100 years ago in *Nash v. United States*, holding that "there is no constitutional difficulty in the way of enforcing the criminal part of the [Sherman] [A]ct." 229 U.S. 373, 378 (1913). The Tenth Circuit did the same over 60 years ago in *Atlas Building Prods. Co. v. Diamond Block and Gravel Co.*, where it cited *Nash* and noted that Section 1 of the Sherman Act, among other parts of the statute, has long been sustained against claims of unconstitutional vagueness. 269 F.2d 950, 955 (10th Cir. 1959). In fact, "[n]o court has found section one of the Sherman Act unconstitutionally void for vagueness[.]" *United States v. Harwin*, 2021 WL 719614, at *7 (M.D. Fla. Feb. 24, 2021). *Nash* remains good law. See *Johnson v. United States*, 576 U.S. 591, 605 (2015) (quoting *Nash* as setting forth operative vagueness principles). And it remains true today as it was at the time of *Nash* that the Sherman Act categorically prohibits certain conduct as inherently anticompetitive. Compare 15 U.S.C. § 7a note ("[c]onspiracies among competitors to fix prices, rig bids, and allocate markets are categorically and irredeemably anticompetitive"), with *Standard Oil*, 221 U.S. at 64-65 ("nature and character" of these agreements render them "within the purview of" Section

members of the conspiracy." June 12, 2025 Order, ECF 109, at 2 (determining that all co-conspirator statements proffered by the United States at the *James* hearing "were made in the course of and in furtherance of the conspiracy").

l’s prohibition because they necessarily “operate[] to produce the injuries which the statute forbade”).

The Defendants again attempt to rely on the *McGuire* district court’s opinion, pointing to that court’s musings that the defendants in that case had “a point” regarding a vagueness challenge to the Sherman Act, Motion at 9 (quoting *McGuire*, 2022 WL 22983573, at *4), but that again fails—it ignores that the *McGuire* court denied those defendants’ motion to dismiss on that basis, among others. *McGuire*, 2022 WL 22983573, at *5.

Because there is no basis for this Court to disturb longstanding precedent, the Court should reject the Defendants’ argument.

IV. CONCLUSION

For the above reasons, the Court should deny the Defendants’ Motion to Dismiss.

Respectfully submitted this 22nd day of May, 2026.

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