UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA *Plaintiff*,	§ §	
	§	
v.	§	5:24-CR-314-J
BG DALE BISCOE, RANDALL DAVID SHELTON, AND SIOUX EROSION CONTROL INC. *Defendants*.	§ § §	

DEFENDANTS' TRIAL BRIEF REGARDING THE DISTINCTION BETWEEN LAWFUL COMPETITIVE CONDUCT AND UNLAWFUL BID RIGGING

This case will require the jury to draw a line between lawful competitive conduct and unlawful bid rigging. Section 1 of the Sherman Act condemns *agreements* in restraint of trade, but it does not punish inherently lawful actions such as mere market awareness, the gathering of price information, or a company's decision to price in a manner consistent with its competitors' conduct. *See* 15 U.S.C. § 1. Because these lawful competitive practices may be confused with illegal bid rigging, Defendants respectfully submit this trial brief to assist the Court in preserving that distinction throughout trial—in its evidentiary rulings, jury instructions, and presentation of the issues. Additionally, although Defendants are mindful of this Court's General Rules for Trial admonishing counsel not to discuss the law during opening statements, Defendants respectfully request leave to explain this limited legal principle during opening statements. Without that framework, jurors may mistakenly equate lawful conduct with evidence of an unlawful agreement. Because the distinction is both counterintuitive and central to the issues the jury must decide, a brief explanation at the outset will assist the jury in understanding the evidence rather than confuse the law.

Argument

(1) The Sherman Act Requires Proof of an Agreement to Restrain Competition, Not Merely Communications or Information Sharing

The government will likely present evidence that competitors communicated before bids were submitted. But the mere act of meeting with competitors does not constitute a Section 1 violation. In *United States v. Suntar Roofing, Inc.*, for example, the Tenth Circuit approved a jury instruction that stated the point directly: "In the absence of an agreement on a course of action that is designed to eliminate competition, it is not unlawful for competitors to meet and exchange information necessary to preparation of a bid or discuss common aims or objectives or exchange information on independently derived prices." 897 F.2d 469, 475 (10th Cir. 1990).

More recently, criminal antitrust trials within the Tenth Circuit have approved similar jury instructions. In *United States v. Penn*, the court approved almost verbatim instructions: "It is not unlawful for competitors to meet and exchange information necessary to preparation of a bid or discuss common aims or objectives or exchange information on independently derived prices." 20-CR-152-PAB, ECF No. 1421 at 25–26 (D. Colo. July 7, 2022).

The Supreme Court has confirmed this principle. In *United States v. U.S. Gypsum Co.*, the Court addressed a criminal price-fixing prosecution in which competitors telephoned each other to verify prices offered to specific customers. 438 U.S. 422, 427–28 (1978). The Court held that "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects [because] . . . such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *Id.* at 441 n.16. Accordingly, such exchanges of information "do not constitute a *per se* violation of the Sherman Act." *Id.* at 441 n.16 (emphasis in original). Thus, even if the evidence shows competitors met and discussed business concerns or objectives, the jury cannot treat those meetings alone as dispositive of bid rigging.

(2) <u>The Mere Exchange or Collection of Price Information is Not Per Se Illegal</u>

The exchange of pricing information is often mistaken for evidence of bid rigging, but the Sherman Act does not treat such exchanges as per se unlawful. In *United States v. Citizens & S. Nat'l Bank*, the Supreme Court held that "the dissemination of price information is not itself a *per se* violation of the Sherman Act." 422 U.S. 86, 113 (1975). The same principle applies here: evidence that competitors were aware of each other's pricing does not by itself prove illegal bid rigging.

This legal standard has been applied in recent bid-rigging prosecutions within the Tenth Circuit. In *United States v. McGuire*, the court recognized that "[t]he Government has shown that the alleged co-conspirators shared pricing information in advance of bids, but this alone is insufficient to prove a conspiracy." 2022 U.S. Dist. LEXIS 257107, at *8–9 (D. Colo. Oct. 14, 2022). The court explained that "[p]rice fixing and bid rigging are unlawful acts . . . but the sharing of prices in advance of a bid is not *per se* unlawful." *Id.* at *9. Indeed, the Tenth Circuit has long held that "[t]he mere compilation and disseminating among competitors of statistics containing pricing information did not prove conspiracy in violation of the Sherman Act." *Morton Salt Co. v. United States*, 235 F.2d 573, 576 (10th Cir. 1956).

To be sure, the *Morton Salt* convictions were upheld based on substantially more than mere information exchange. *See id.* at 575–77. But that is precisely why Defendants ask the Court to preserve the distinction here. Where the evidence shows market intelligence rather than illegal bid rigging, the jury should not be permitted to equate the two. Indeed, the Third Circuit drew the precise line at issue here: "[a]n agreement to exchange prices, by itself, is not illegal; an agreement to fix prices is." *United States v. Cont'l Grp., Inc.*, 603 F.2d 444, 462 (3d Cir. 1979).

Courts have likewise recognized in various contexts that gathering competitor pricing information reflects ordinary competitive behavior. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir. 1999); *Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990) ("[I]t is well established that evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy."); *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872 (7th Cir. 2015) ("Express collusion violates antitrust law; tacit collusion does not."); *United States v. True*, 250 F.3d 410, 423 (6th Cir. 2001) ("Dissemination of price information alone, without a purpose to restrain competition, does not offend the Act."). These principles, while frequently articulated in civil antitrust cases, apply with particular force in criminal prosecutions where the government must prove its case beyond a reasonable doubt. "[I]t makes common sense to obtain as much information as possible of the pricing policies and . . . strategy of one's competitors" to maintain a competitive business edge—or to stay afloat. *See In re Baby Food*, 166 F.3d at 126. Courts can "without suspecting illegal collusion, expect competing [businesses] to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it . . . ." *In re Text Messaging*, 782 F.3d at 879. Taken together, these authorities establish that gathering competitor pricing information is ordinary market behavior and does not alone establish bid rigging.

Of course, price information exchanges are not categorically immune from antitrust scrutiny. These exchanges *can* violate the Sherman Act when the circumstances show that the exchange operates as an arrangement to stabilize prices. *See United States v. Container Corp. of Am.*, 393 U.S. 333, 337–38 (1969). But that is why the Court should carefully distinguish between the mere exchange of price information and illegal bid rigging.

(3) <u>Conscious Parallelism and Market Imitation are not Bid Rigging</u>

Nor does the fact that competitors ultimately submit similar bids transform otherwise lawful conduct into bid rigging. Courts have long recognized that parallel pricing may reflect independent economic decision-making rather than conspiracy. For instance, the Fourth Circuit has held that "conscious parallel business behavior per se does not establish a violation of the Sherman Act" and that a criminal conviction may not rest on parallel pricing alone. *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397, 400–01 (4th Cir. 1958) (citing *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954)). The Sixth Circuit reached the same conclusion in *Cont'l Baking Co. v. United States*, reversing criminal price-fixing convictions because the district court erroneously excluded defendants' evidence that uniform pricing reflected "an economically dictated practice of conscious parallelism of prices, rather than . . . any illegal conspiracy to fix prices." 281 F.2d 137, 141, 146 (6th Cir. 1960).

The Supreme Court has confirmed this principle. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007) (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)) (explaining even "conscious parallelism," a common reaction of businesses in a "concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions," is "not in itself unlawful"); *see also Theatre Enters., Inc.*, 346 U.S. at 541 (recognizing parallel business behavior does not conclusively establish agreement). Parallel business behavior is admissible circumstantial evidence of an agreement, but it "falls short of conclusively establishing agreement or itself constituting a Sherman Act offense." *Twombly*, 550 U.S. at 553 (citation modified); *see also Penn*, ECF No. 1421, at 24–25 (instructing the jury in a criminal prosecution that "[t]he mere fact that some or all of the defendants may have engaged in similar or parallel pricing does not by itself establish the existence of a conspiracy"); *United States v. Cont'l Grp., Inc.*, 603 F.2d 444, 465 (3d Cir. 1979) (instructing the jury that "[i]t is not enough to show only that the parties acted uniformly or similarly or in ways that may seem to be mutually beneficial").

Further, conscious parallelism is often a predictable byproduct of market structure. *See Morton Salt Co.*, 235 F.2d at 577. Where a local market contains only a limited number of competitors bidding on similar projects under common specifications, it is neither surprising nor inherently unlawful that one competitor's pricing may be influenced by its understanding of how other competitors are likely to respond. The Tenth Circuit confirms this economic principle in *Morton Salt*, recognizing that in an oligopolistic market for a standardized product, it may be "almost inevitable" that one company's pricing policies will be influenced by its competitors' probable reactions. *Id.*

Granted, the Tenth Circuit also recognized that such a market structure can "present a great opportunity and temptation to combine to maintain prices at an artificially high level profitable to all." *Id.* But *Morton Salt*'s point was not that oligopolistic pricing is inherently unlawful—it was that "each case demands a close scrutiny of its own facts." *Id.* (quoting *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 600 (1936)). This close scrutiny further emphasizes the need for clear and early distinctions between the lawful, predictable dynamics of a concentrated market and illegal price-fixing.

(4) The Court Should Grant Leave for Defendants to Address this Distinction in Opening Statements

The distinction between lawful competitive conduct and unlawful bid rigging is not abstract legal theory—it is the framework the jury will need to evaluate evidence from the government's first witness forward. Without understanding that competitor communications, price awareness, and similar bids are not inherently unlawful, the jury risks drawing impermissible inferences from the outset.

Defendants recognize that the Court's general rule prohibits the parties from discussing the law during opening statements. In this case, however, the distinction between lawful competitive conduct and unlawful bid rigging provides the framework through which the jury must evaluate virtually all of the evidence. Requiring the jury to hear two weeks of testimony before understanding that framework creates a substantial risk that jurors will mistakenly view lawful conduct as inherently suspicious. Accordingly, Defendants seek only to explain, in a brief and neutral manner, that competitor communications, market awareness, and pricing consistent with competitors' prices are common features of a competitive marketplace and, standing alone, do not establish an unlawful agreement.

Notably, this issue is not hypothetical, and at least one other district court that presided over a criminal antitrust trial permitted defense counsel to address this very distinction during its opening statement. In *Penn*, a criminal per se bid-rigging and price-fixing prosecution, defense counsel told the jury during opening that "the question you are going to have to decide in this case is whether [the defendant] got that information as part of a price-fixing agreement he was involved in or he got that as market intelligence to help him make his own decision about [his company's] price." Trial Tr. vol. 2, at 42–43, *Penn*, ECF No. 1134 (Oct. 26, 2021). Counsel used practical analogies—comparing the defendant's conduct to a gas station owner looking across the street at a competitor's price, or an airline checking a rival's fares—and told the jury: "That's not price fixing. That's market intelligence." *Id.* at 43. The government objected, characterizing the openings as "extremely argumentative" but the court overruled as it had not "heard anything that so far [it] would consider to be improper." *Id.* at 55. Defendants respectfully request the same opportunity here.

Permitting Defendants to address this distinction in opening will not prejudice the government. It will ensure that the jury evaluates the evidence through the correct lens from the beginning, rather than waiting until jury instructions to learn that much of what it has heard may be perfectly lawful.

Conclusion

The government's anticipated evidence regarding text messages, meetings, or similar bids may invite the jury to equate ordinary competitive behavior with illegal bid rigging. Defendants respectfully request that the Court (1) preserve this distinction throughout trial in its evidentiary rulings, jury instructions, and presentation of the issues; and (2) permit Defendants to address this distinction during opening statements. Evidence of competitor communications, lawful price information exchanges, or conscious parallelism does not, standing alone, establish a Section 1 violation. The jury should hear this distinction from the outset, rather than learning it for the first time in jury instructions after many days of testimony may have already shaped impermissible inferences.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2026, I electronically filed the foregoing document using the Court's CM/ECF system, thereby providing service on attorneys of record.

/s/ Stephen J. Green
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