IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JAYSON JEFFREY PENN,
2. MIKELL REEVE FRIES,
3. SCOTT JAMES BRADY,
4. ROGER BORN AUSTIN,
5. TIMOTHY R. MULRENIN,
6. WILLIAM VINCENT KANTOLA,
7. JIMMIE LEE LITTLE,
8. WILLIAM WADE LOVETTE,
9. GARY BRIAN ROBERTS, and
10. RICKIE PATTERSON BLAKE,

Defendants.

No. 20-cr-00152-PAB

DEFENDANT JAYSON JEFFREY PENN'S
MOTION TO DISMISS SUPERSEDING INDICTMENT

Defendant Jayson Penn, by and through undersigned counsel, respectfully requests that the Court invoke Federal Rule of Criminal Procedure 12(b)(3)(B)(v) and dismiss the superseding indictment for failure to state an offense. The superseding indictment is insufficient for three independent reasons.

First, the superseding indictment uses words like "agreement," "understanding," and "concert of action" in wholly conclusory fashion, and fails to allege an agreement with the specificity required by the Constitution. A "meeting of minds in an unlawful arrangement" is the *sine qua non* of any criminal Sherman Act Section 1 violation. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (requiring evidence that defendant made "a conscious commitment to a common scheme

designed to achieve an unlawful objective"); *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (explaining that the "crucial question" in a Section 1 case is whether the challenged conduct "stems from independent decision or from an agreement"). The superseding indictment does not satisfy that requirement. In an attempt to string together a coherent narrative, the superseding indictment instead relies on broad assertions, vague labels, and disparate communications that have no evident connection and do not particularize the asserted anticompetitive agreement. Because, in an antitrust case, "guilt depends so crucially upon . . . a *specific identification of fact*"—what the offending agreement was—the generic language in the superseding indictment does not satisfy the Sixth Amendment or Federal Rule of Criminal Procedure 7(c)(1). *See Hamling v. United States*, 418 U.S. 87, 118 (1974). The superseding indictment should be dismissed for failure to state an offense.

Second, the superseding indictment does not allege an agreement that is *per se* unlawful. Courts assess Section 1 agreements under one of two analytical frameworks to determine if the agreements unreasonably restrain trade: the *per se* rule or the "rule of reason." The government's longstanding position is that it will criminally prosecute only *per se* violations of the Sherman Act. *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1274 (10th Cir. 2018). A charging document's failure to clearly delimit *per se* violations with precise allegations raises serious due process concerns. *Cf. United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-42 (1978) (*Gypsum*) (noting that outside of *per se* violations, "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," making "the use of criminal sanctions in such circumstances . . . difficult to square with the generally accepted functions of the criminal law").

In contrast, rule of reason cases are subject to civil enforcement and require plaintiffs to allege a relevant market, market power, and anticompetitive effects—evidentiary predicates that do not apply in a *per se* case. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Courts analyze agreements to exchange pricing information under the civil rule of reason standard, not the *per se* framework. *Gypsum*, 438 U.S. at 441 n.16. Here, the superseding indictment alleges as the sole factual predicate for a Sherman Act violation the exchange of information between competitors. This is insufficient. The superseding indictment does not make any fact-based allegations of an agreement to *use* that information to fix prices, as must be proven to establish a criminal Sherman Act violation. Indeed, the superseding indictment does not allege factual allegations capable of establishing *any agreement*—including an agreement to exchange information—much less a *per se* unlawful agreement to rig bids or fix prices. Dismissal is independently warranted on this basis.

Finally, the superseding indictment does not allege that Mr. Penn knowingly and intentionally entered into any agreement. *See Gypsum*, 438 U.S. at 443 n.20. The superseding indictment omits the intent allegation necessary to plead a criminal antitrust case—that the defendant "knowingly joined and participated" in the conspiracy. No subsequent pleadings fill that void. This fundamental failing also renders the superseding indictment inadequate to meet constitutional requirements or satisfy Rule 7.

For each of these reasons, the Court should dismiss the superseding indictment.

FACTUAL BACKGROUND

On June 2, 2020, a grand jury indicted Mr. Penn and three co-defendants for allegedly violating Section 1 of the Sherman Act, 15 U.S.C. § 1. Indictment ("Ind.") ¶ 1. The indictment

alleged a price-fixing and bid-rigging conspiracy between 2012 and 2017 involving suppliers of broiler chicken products. *Id*. It described eight separate incidents of alleged conspiratorial activity relating to five customers and four different products. *Id.* ¶¶ 32-77. The indictment alleged that the defendants utilized a "continuing network" to reach agreements and understandings to submit "aligned" bids; to participate in conversations and communications relating to non-public information; and to monitor bids. *Id.* ¶ 29(a)-(c).

On October 6, 2020, a grand jury returned a superseding indictment against Mr. Penn and nine co-defendants, charging all defendants with one count of violating 15 U.S.C. § 1, and charging only co-defendant Jimmie Little with two additional counts. Superseding Indictment ("Super. Ind.") ¶¶ 1, 147, 151. The superseding indictment alleges a price-fixing and bid-rigging conspiracy spanning a seven-year period; relating to a larger number of suppliers, customers, and products; and identifies fourteen separate incidents that were allegedly part of the conspiracy. *Id.* ¶¶ 51-145. The fundamentals remain unchanged: the superseding indictment alleges that the co-conspirators utilized a "continuing network" to reach agreements and understandings to submit aligned bids; to participate in conversations and communications relating to non-public information; and to monitor bids. *Id*. ¶¶ 47, 48(a)-(c). The superseding indictment identifies Mr. Penn in six out of the fourteen incidents. As with the original indictment, there are no factual allegations from which a jury could infer an express or implied agreement. There are just allegations of data sharing that invoke a civil "rule of reason" analysis.

LEGAL STANDARD

An indictment that does not set forth all of the elements of the alleged crime is deficient. *United States v. Hathaway*, 318 F.3d 1001, 1009 (10th Cir. 2003) (dismissing indictment that

failed to allege a required and essential element of the crime for which the defendant was convicted). At a minimum, the indictment must (1) "contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend"; and (2) "enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling*, 418 U.S. at 117; *see also United States v. Washington*, 653 F.3d 1251, 1259 (10th Cir. 2011); *United States v. Fitapelli*, 786 F.2d 1461, 1463-64 (11th Cir. 1986) (reversing convictions for violation of 15 U.S.C. § 1 where indictment failed to allege element of the offense). "This test is embodied in Fed. R. Crim. P. 7(c)(1), which requires that an indictment be 'a plain, concise and definite written statement of the essential facts constituting the offense charged.'" *United States v. Salazar*, 720 F.2d 1482, 1486 (10th Cir. 1983).

While "an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity." *United States v. Resendiz-Ponce*, 549 U.S. 102, 109 (2007). If the language of the relevant statute does not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished," then the charging document "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Russell v. United States*, 369 U.S. 749, 765 (1965). In determining the sufficiency of an indictment, "a court generally is bound by the factual allegations contained within [its] four corners. . . ." *United States v. Welch*, 327 F.3d 1081, 1090 (10th Cir. 2003).

ARGUMENT

The superseding indictment does not sufficiently "set forth each element of the crime that

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