IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, **v.** **JAYSON JEFFREY PENN, et al.**, *Defendants.*	Case No. 1:20-cr-00152-PAB

RICKIE BLAKE'S MOTION TO DISMISS COUNT ONE
FOR FAILURE TO ALLEGE AN OFFENSE AGAINST HIM

The Superseding Indictment charges Mr. Blake with a single violation of the Sherman Act, 15 U.S.C. § 1. An indictment charging a conspiracy under § 1 of the Sherman Act "must descend to particulars and charge every constituent ingredient of which the crime is composed" through factual allegations. *Frankfort Distilleries, Inc. v. United States*, 144 F.2d 824, 830 (10th Cir. 1944) (en banc), *rev'd on other grounds*, 324 U.S. 293 (1945). The Government must allege and prove: (1) "that the conspiracy described in the indictment existed at or about the time alleged"; (2) "that the defendant knowingly became a member of the conspiracy"; and (3) "that the conspiracy described in the indictment either affected interstate [and/or foreign] commerce in goods or services or occurred within the flow of interstate [and/or foreign] commerce in goods

and services." *See*, *e.g.*, ABA Model Jury Instructions in Criminal Antitrust Cases (Feb. 2009) ("ABA Model Instructions"), ch. 3.C.[1]

As described in greater detail below, missing from the Superseding Indictment are non-conclusory factual allegations about Mr. Blake regarding the second element, *i.e.*, that Mr. Blake participated in an agreement in restraint of trade and that Mr. Blake knowingly joined that conspiracy, with intent to further its purpose of restraining trade. Other than making conclusory allegations that track the statutory language, with respect to Mr. Blake, the Superseding Indictment merely alleges that he made or received six phone calls from other chicken suppliers over the course of several years—without alleging what was said in any of these calls. At most, the factual allegations imply that, in some of these calls, Mr. Blake shared pricing information of his employer, Supplier-6, with competitors of his employer.

Missing are any allegations that Mr. Blake shared pricing information with the intent to align Supplier-6's bids with the bids of its competitors or received any pricing information in return. Indeed, the Superseding Indictment contains no non-conclusory factual allegations that Mr. Blake intended to affect the bids of Supplier-6 (or even possessed authority to affect the bids of Supplier-6) *or* that he intended to affect the bids of its competitors, much less that he intended to align competitors' bids with Supplier-6's bids in order to restrain competition.

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[1] *See also* Sand, 3 *Modern Federal Jury Instructions*, § 58.01 ("Sand"), Instruction 58-3 (Elements of the Offense) (identifying the same substantive requirements, broken out into four elements); 1-1 Antitrust Law Developments 1B, ABA Section of Antitrust Law, (8th ed. 2018). "Knowingly" joining the conspiracy means the defendant "act[ed] voluntarily and intentionally" and "joined the conspiracy . . . with the intent to aid or advance the object or purpose of the conspiracy." ABA Model Instructions ch. 3.K; *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978) (intent is an essential element of a Sherman Act § 1 offense). Because the Tenth Circuit's Pattern Jury Instructions do not include an instruction for antitrust offenses, Mr. Blake is relying on other sources with respect to these elements.

Independently, the Superseding Indictment also fails to allege that the charged agreement was an unreasonable restraint of trade. Rather, the Superseding Indictment relies on the *per se* rule to presume unreasonableness. Because such a presumption cannot constitutionally be applied in a criminal case, the Superseding Indictment's failure to include factual allegations regarding the unreasonableness of the alleged restraint of trade is fatal.

Because the allegations fail to state an offense against Mr. Blake, the Superseding Indictment should be dismissed as to him. *See* Fed. R. Crim. P. 7(c)(1), 12(b)(3)(B)(v).

BACKGROUND

On October 6, 2020, Mr. Blake and nine others were charged in a Superseding Indictment with one count of violating the Sherman Act, 15 U.S.C. § 1, by conspiring to fix prices and rig bids in the broiler chicken supply industry over at least a seven-year period, from 2012 to 2019. *See* Superseding Indictment, ECF No. 101 ("SI"), ¶ 1. Despite its length, Count One of the Superseding Indictment lacks the substance of an adequately alleged violation of 15 U.S.C. § 1 by Mr. Blake.

The Superseding Indictment contains generic conclusory allegations. Supposedly, all co-defendants "entered into and engaged in a continuing combination and conspiracy" that "consisted of a continuing agreement, understanding, and concert of action[,] . . . the substantial terms of which were to rig bids and to fix, maintain, stabilize, and raise prices and other price-related terms for broiler chicken products sold in the United States" (SI ¶¶ 1–2); all ten defendants and other, unnamed co-conspirators "participated in a continuing network of Suppliers and co-conspirators" (*id.* ¶ 47) and "utilized that continuing network" "to reach agreements and understandings to submit aligned . . . bids and to offer aligned . . . prices, and

price-related terms" (*id.* ¶ 48(a)); communicated "non-public information" to one another with a "shared understanding that the purpose of the conversations and communications was to rig bids, and to fix, maintain, stabilize, and raise prices and other price-related terms" (*id.* ¶ 48(b)); and monitored bids submitted and prices and price-related terms offered by chicken suppliers and other co-conspirators (*id.* ¶ 48(c)). The term "continuing network" is not defined in the Superseding Indictment; nor does it have any meaning in the context of antitrust law. The Superseding Indictment, moreover, does not descend into the particulars and make specific factual allegations, particularly with respect to Mr. Blake.

With respect to Mr. Blake, the allegations in the Superseding Indictment are particularly sparse. He is referenced just twelve times in over 145 paragraphs. After alleging that Mr. Blake worked at Supplier-6 (*id.* ¶ 21) and parroting language from the statute that he—along with all other defendants—was a member of a "continuing combination and conspiracy" (*see id.* ¶¶ 1, 47–50), the Superseding Indictment references Mr. Blake only with respect to four phone calls he made to, and two phone calls he received from, other broiler chicken suppliers' employees over a five-year period from November 2012 to September 2017 (*id.* ¶¶ 56, 58, 105(a), 122(a), 123(c), 142). The Superseding Indictment does not allege what Mr. Blake said or what was said to him in any one of those six calls.

The Superseding Indictment does not allege, even by implication, that in any of these calls Mr. Blake agreed to fix prices, rig bids, or knowingly furthered such an agreement by providing price information to or obtaining price information from competitors for use in assuring that the bids that were to be submitted by his employer would be fixed or aligned with bids to be submitted by his employer's competitors. At most, the Superseding Indictment

implies that in some of these calls, Mr. Blake may have shared some information with a competitor about what his employer intended to bid, without receiving similar information from the competitor.

First, the Superseding Indictment alleges that, during the same time period that suppliers were negotiating for QSR-1's business for calendar year 2013, Mr. Blake made one call to Scott Brady (*id.* ¶ 56 (November 13, 2012)), who worked for Supplier 2 (*id.* ¶ 15), and one call to Roger Austin (*id.* ¶ 58 (November 28, 2012)), who worked for Supplier 1 (*id.* ¶ 13). Mr. Brady allegedly texted Mikell Fries (at Supplier 2 (*id.* ¶ 14)) shortly after he spoke with Mr. Blake that "[Supplier-6] is .30 back on dark meat." *Id.* ¶ 56. Thus, the Superseding Indictment implies that Mr. Brady learned from Mr. Blake the revised bid that Supplier-6 might submit for QSR-1's business.

Second, the Superseding Indictment alleges that Mr. Austin called Supplier-1-Employee-4 the day after speaking with Mr. Blake and that Supplier-1-Employee-4 then sent a spreadsheet to Mr. Austin that contained Supplier-6's "8 Piece Quote[]" of $0.9632 per pound. *See id.* ¶¶ 58–59. It continues on, however, to allege that Supplier-6 ultimately submitted a different, lower bid (*id.* ¶ 61) and does not allege that the other suppliers bid a price that was identical to or aligned with Supplier-6's final bid.

Third, the Superseding Indictment alleges that Mr. Blake called Mr. Austin on September 3, 2014, during the period when suppliers were negotiating an increased margin at which to supply QSR-1 with 8-piece chicken-on-bone products in 2015. *Id.* ¶ 105(a). Mr. Austin and Mr. Brady allegedly spoke about two and a half hours after Mr. Austin concluded his call with Mr. Blake. *Id.* (alleging Blake-Austin call at 2:01 pm lasting eight minutes and alleging

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