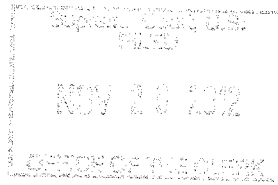


12-660

No.



IN THE
Supreme Court of the United States

STEVEN E. UHR, PETITIONER

v.

RESPONSIBLE HOSPITALITY INSTITUTE, INC.; ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a complaint alleging a highly-sophisticated, decades-old, public price-fixing conspiracy on retail alcohol sales, carried out under the pretence of promoting the public welfare and lowering dram-shop insurance premiums, involving innumerable hospitality and non-hospitality businesses working in concert with community business trade associations, health-policy organizations and local government officials, and presently active in dozens of communities throughout North America, should be dismissed as implausible even though the allegations are supported by substantial, direct and irrefutable evidence?
2. Whether allegations that a plaintiff in a price-fixing action purchased the fixed product from a participant in the price-fixing conspiracy during the course of the price-fixing conspiracy are sufficient to establish the plausibility that plaintiff was overcharged as a result of the conspiracy?
3. Whether price fixing is a scheme to defraud within the meaning of the mail and wire fraud statutes?

PARTIES TO THE PROCEEDING

Steven E. Uhr,
Petitioner,

v.

Responsible Hospitality Institute, Inc.;
Jim Peters; Diageo North America, Inc.;
Gary Zizka; American Beverage
Licensees, Inc.; John D. Bodnivich;
Distilled Spirits Council of the United
States, Inc.; Wine and Spirits Whole-
salers of America, Inc.; International
Downtown Association; Applebee's
International, Inc.; Famous Dave's of
America, Inc.; Chili's of Minnesota,
Inc.; Luby's Fuddruckers Restaurants,
LLC; Prudential Financial, Inc.;
Citibank, N.A.; Richard A. Yoast;
James F. Mosher; Robert Bruininks;
National Beer Wholesalers Association;
Richard Lyshek; Rick Petri,
Respondents.

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OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Eighth Circuit is reported at 473 F. App'x 517 (8th Cir. 2012). A copy of that opinion is attached to the appendix at 1a. The opinion of the United States District Court for the District of Minnesota is reported at No. 10-CV-4945, 2011 WL 4091866 (D. Minn. Sept. 14, 2011). A copy of that decision is attached to the appendix at 4a.

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit denying petitioner's *en banc* petition was handed down on August 22, 2012. A copy of the order is attached at 40a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by

imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. §15(a):

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

18 U.S.C. §1962(c):

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or

spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both."

18 U.S.C. §1343:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted

by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both."

STATEMENT

I. Proceedings Below

The initial complaint was filed by petitioner on December 21, 2010 pursuant to the Clayton Act, 15 U.S.C. §15(a). (Doc. No. 1.) The complaint charged sixteen organizations and eight individuals with participating in an ongoing conspiracy to fix prices on the sale of alcoholic beverages in communities throughout North America in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. *Id.* Eighteen of the twenty-four defendants were also charged with racketeering in violation of 18 U.S.C. §1962(c). *Id.* at 11. The charged enterprise was the price-fixing conspiracy, which allegedly involved numerous legitimate and

illegitimate organizations. Petitioner sought damages and injunctive relief. *Id.* at 11-12.¹

The district court had jurisdiction over this case pursuant to 28 U.S.C. §1331.

One of the defendants, Corporate 4 Insurance Agency, submitted an answer. (Doc. No. 4.) On January 18, 2011, an amended complaint was filed adding four defendants. (Doc. No. 20.) Subsequently, petitioner voluntarily dismissed five defendants without prejudice. (Doc. No. 119.)² Pursuant to a confidential settlement agreement Corporate 4 Insurance was dismissed with prejudice. (Doc. No. 123.)

All the respondents filed motions to dismiss for failure to state a claim upon which relief could be granted. (Doc. No. 20, 34, 44, 46, 63, 66, 73, 75-76, 83, 85, 86, 93, 99, 107, 110, 123, 133, 142, 147, 152.) Two respondents filed motions for sanctions. (Doc. No. 177, 184.)³ Petitioner filed a motion to amend the complaint to add additional allegations of the conspiracy. (Doc.

¹ Petitioner seeks only injunctive relief against Robert Bruininks, the former President of the University of Minnesota. Mr. Bruininks, who is being sued in a representative capacity, is also the only remaining respondent not charge with racketeering. (Subsequent to the filing of this case, Dr. Eric Kaler, the current president of the University of Minnesota, has been substituted for Mr. Bruininks pursuant to operation of Rule 25(d), Fed.R.Civ.Pro.)

² These defendants were Jeremiah Gallivan, Messerli & Kramer, James Wicka, Aurthur, Chapman, Kettering, Smetak and Pikala, P.A., and Downtown Madison, Inc.

³ Richard Petri and Jay Wanserski. Wanserski subsequently was dismissed pursuant to a confidential settlement agreement.

No. 133.) A copy of the second amended complaint ("complaint") is attached at App. 41a-64.

On September 14, 2011, the district court, Judge Patrick J. Schiltz presiding, entered a judgment granting petitioner's motion to amend, granting respondents' motion to dismiss, and denying the motion to dismiss. (Doc. No. 202.) The district court held that the charged single conspiracy was implausible to the point of being "preposterous." (App. at 23a.) The district court further ruled that, even if there was adequate evidence of price-fixing in some of the locations discussed in the complaint, there was not adequate evidence of collusion in the Twin Cities' market, the location of petitioner's alleged purchases. (App. at 21a-25a.) The district court further ruled that even if the allegations of collusion in the Twin Cities were sufficient to survive dismissal, petitioner had not adequately alleged injury and damages. The district court did not address the claim for injunctive relief. (App. at 25a-28a.)

The district court ruled that the RICO claim should be dismissed as implausible on the same rationale as the price-fixing claim. (App. at 29a-30a.)⁴ The district court further held that the alleged predicate offenses of mail fraud and wire fraud are not appropriate where the charged enterprise is a price-fixing conspiracy. (App. at 30a-31a.)

The Eighth Circuit Court of Appeals affirmed *per curiam*, ruling that "[t]he district court concluded

⁴ Petitioner did not contest that the RICO claim could not survive if the price-fixing claim was dismissed.

that the second amended complaint failed to properly allege the existence of a conspiracy or any predicate acts of racketeering activity. Having carefully reviewed the record and the applicable legal principles, we find no error in the district court's disposition of this matter." (App. at 2a.)

Petitioner's petition for rehearing *en banc* was denied by the Eighth Circuit Court of Appeals on August 22, 2012. (App. at 40a.)

II. Material Facts Evidencing Charged Price-Fixing Conspiracy

The material facts, viewed in the light most favorable to Petitioner, include the following:

Defendant Responsible Hospitality Institute, based in Santa Cruz, California, was founded in 1983 for the purpose of facilitating price-fixing in communities throughout North America. (App. at 45a-46a, ¶24.) RHI's website states that it "provides technical assistance that builds local capacity, incubates and shares cutting-edge information and proven strategies, and links a broad-based network of professionals who plan, manage and police dining and entertainment districts." (App. at 46a, ¶27.)

Defendant James Peters has been the president of RHI since its beginning. (App. at 45a, ¶24.) Eight defendants are on RHI's Board: 1) Diageo North America, Inc. ("Diageo") (a subsidiary of Diageo, plc, the largest alcohol producer in the world), 2) Gary Zizka (Diageo's VP of Public Policy), 3) American

Beverage Licensees (“ABL”) (trade association representing over 20,000 on-premise and off-premise alcohol retailers), 4) John Bodnivich (ABL’s executive director), 5) Distilled Spirits Counsel of the United States (“DISCUS”) (represents leading American distillers), 6) Wine and Spirits Wholesalers of America, Inc. (“WSWA”), 7) National Beer Wholesalers Association (“NBWA”), and 8) the International Downtown Association (“IDA”) (an association of over 600 community business trade associations worldwide). (App. at 42a-43a, ¶¶4-11.) Diageo, DISCUS, WSWA, and NBWA fund RHI’s activities. *Id.*

In 1983-1984 Peters authored several articles in hospitality industry trade publications urging bar and restaurants to stop offering drink promotions. (App. at 48a, ¶32.)

Around 1988 members of the Santa Cruz Restaurant Association (a chapter of the California Restaurant Association) agreed to a set of “responsible” beverage service practices including the elimination of volume discounts such as doubles and “fishbowls.” (Responsible Beverage Service (“RBS”) video at 0:42, 20:50.)⁵ Over four dozen establishments were trained in the program. *Id.* at 22:50.

The Santa Cruz agreement was featured in a 1989 video starring Defendants Peters and James Mosher intended to assist communities in establishing a “responsible beverage service” program. (App. at 48a-49a, ¶¶33-39.) The video, titled “Responsible Beverage

⁵ The video is found at Doc. No. 164-2. (Petitioner has uploaded “responsible beverage service” to YouTube.)

Service—Communities in Action,” states that responsible beverage service is “built on the premise that community interests must take the lead in setting standards for alcohol service and then work with the hospitality industry to ensure that these standards are met.” RBS video at 3:07. “It is this emphasis on community participation, combined with a training program that focuses on the drinking environment which makes the responsible beverage service program an effective model for confronting the question of alcohol use.” *Id.* at 3:22.

The video discusses five steps in establishing a sustainable RBS program. The first step is to “assess where the community is at in terms of alcohol related problems ... what groups have been active, what groups are potentially active, where is the potential leadership within the community for dealing with an issue like this ... how well organized the industry is itself and how well do they talk to each other because that will have a major impact on how you would design a program such as this.” *Id.* at 5:33. “Assessing where an individual community stands at the outset helps determine appropriate goals and the best strategy for introducing the program.” *Id.* at 6:08.

Step two is to generate and publicize alcohol-related controversies as a “catalyst” for change. *Id.* at 7:09. “As public concern increase[s], so [does] pressure for change.” *Id.* at 7:23. “Every community will find its own opportunity on which to build this type of awareness and concern. For instance, publicizing a fatal crash involving a driver who had been drinking at a local bar or restaurant can have a dramatic impact on

public sentiment.” *Id.* at 7:28. The objective is to “create an atmosphere in which the issue of alcohol service and use becomes a priority, establishing a favorable climate for change.” *Id.* at 7:40.

Step three is to reach consensus on the specific terms of the agreement. “As public concern grows, representatives from across the community [should] join together to reach a common ground on their expectations concerning the service of alcoholic beverages ...” *Id.* at 7:52.

The video indicates that such “expectations” should include price restrictions. For example, Peters tells the viewer that training must focus on management to ensure there are not “promotions and practices which override what the [server] training teaches.” *Id.* at 15:04.⁶

Step four -- “After an assessment has been made of the community, the issue of alcohol service has been established as a concern, and community members have

⁶ The video contains other pricing references at 4:05 (California Restaurant Association representative states that responsible beverage service allows hospitality businesses “to increase our sales through innovative marketing techniques”), 13:22 (Peters shown instructing a group of bar owners/managers that promotions are part of an establishment’s risk assessment), and 20:20 (bar manager says that “I don’t think that by selling more drinks or by giving them away at two for one that you are really doing yourself any good”). The video pretends that the participating establishments are acting contrary to their financial interests – “what I hope we’ve done is to let people know ... that business people aren’t just ruled and guided by the bottom line ...” *Id.* at 10:46.

reached agreement on community-wide standards, then a training program can be put into place.” *Id.* at 12:08.

The final step is to put into place a system to monitor and enforce the agreement. “Simply introducing an RBS program is not enough to ensure its success.” *Id.* at 20:24. If the program “is to be successful in the long run, the community must continue to monitor the hospitality industry and local government agencies to see that the established standards are being met.” *Id.* at 20:50.

The RBS video was distributed to bar owners and managers throughout the United States. (App. at 48a, ¶34.)

In 1994, RHI hosted a Responsible Hospitality Symposium at the Palmer Hilton in Chicago. (App. at 50a, ¶40.) RHI’s goal was “to provide the opportunity for organizations and individuals from diverse perspectives to focus on areas of agreement and develop strategies to promote responsible hospitality” and the primary objective of the symposium was to “create a mechanism to facilitate ongoing communication and collaboration.” (App. at 50a-51a, ¶42.) The preface to the final report states:

Hospitality is a wheel that drives community life. The hospitality industry is one of many community institutions comprising the spokes of the wheel. It is the merging of all interests that creates a hub and gives the community its strength.

Id.

In 1995 nineteen grocers on Milwaukee's Near Westside neighborhood agreed on minimum beer prices. (App. at 59a-60a, ¶82; Doc. No. 136-3 at 1-2.) The purported rationale was "to stop the deleterious effects ... brought about by the sale of beer in 22, 32 and 40 ounce containers." *Id.* The agreement was facilitated by two neighborhood business associations working with the Milwaukee Police Department's "weed and seed initiative." *Id.*

In 1996 a group of bars in the Pacific Beach neighborhood of San Diego held a press conference to announce a "community covenant" to "refrain from the use of price promotions or specials that encourage overconsumption and intoxication." (App. at 58a, ¶76; Doc. No. 175-2.) The stated reason was "because we care *about you!!!*" *Id.* (emphasis in original).

Defendant Mosher helped administer and monitor the Pacific Beach agreement. (App. at 58a, ¶77.) Steve Zolezzi, the president of the San Diego Food and Beverage Association and the former treasurer of RHI, also helped to facilitate the formation and operation of the agreement. (App. at 59a, ¶79.) Zolezzi is a frequent speaker at RHI-sponsored events around the country. *Id.* Marion Novak, a RHI employee and RWJF consultant, said that as a result of the agreement "[b]usinesses make more money because they are not selling alcohol at a loss. And if all the bars do it they remain competitive." (App. at 58a-59a, ¶78.)

In 1997 the conspiracy created another video designed to recruit and train members. Titled “ARM Yourself with Information,” this video was produced at the University of Minnesota and funded by a grant from the Robert Wood Johnson Foundation. (App. at 53a-54a, ¶¶51, 52, 55; ARM video at 13:42, 13:56.)⁷ ARM stands for the alcohol risk management consulting concept. ARM video at 1:07.

The video urges licensed establishments to adopt “a written list of practical and easily implemented alcohol risk management policies for the hospitality industry.” *Id.* at 1:35. The policies include the elimination of happy hours, all-you-can-drink specials, two for ones, pitchers, and promotions that target specific groups of individuals. *Id.* at 6:39. The stated rationale is “to prevent customers from becoming intoxicated which represents legal and financial risks to the establishment and its employees.” *Id.*

The video states that ARM “is not another do-gooder program created by people outside your business.” Rather, the “real insight” came from “owners and managers like yourselves who, along with attorneys and representatives from the insurance industry, helped to form a core program of intervention and training.” *Id.* at 2:40, 2:55.

The video features two attorneys, one insurance agent, and several hospitality industry personnel. One industry representative states – “I’ve looked at ARM’s policies and I believe that they’re good policies, and I

⁷ The ARM video is found at Doc. No. 164-2. (Petitioner has uploaded “alcohol risk management” to YouTube.)

stand behind all the different policies that they have.” *Id.* at 10:40.

Over 200 bars and restaurants in the Twin Cities agreed to participate in ARM training. (App. at 53a-54a, ¶53; Doc. No. 164-1 at 1.) The training was conducted by persons with hospitality industry experience who “keep a pulse on the industry. They know what works and what doesn’t.” ARM video at 3:45. Over seventy percent of the bars that received the so-called “full ARM” training agreed to implement some or all of the pricing restrictions. (Doc. No. 164-1 at 7.)

Defendants Peters and Mosher collaborated on the development and implementation of the ARM program. (App. at 54a, ¶54; Doc. No. 164-1 at 9, 175-4, 175-5.)

All four restaurant chain defendants participated in ARM training and provided testimonials to recruit others to participate in the program. (App. at 54a, ¶56; Doc. No. 175-11, 175-12.) An Applebee’s manager said -- “This was the most informative management training I’ve ever had and I got paid. We love the policy manual.” (Doc. No. at 175-12.) (ellipsis in original). A Chili’s manager said – “I have always wanted to have written policies, but never had the time Thanks ARM Project.” *Id.* (ellipsis in original).

The Complaint alleges that petitioner purchased alcohol at the four defendant restaurant chains in the Twin Cities during the course of the conspiracy and was

overcharged on some purchases as a result of the charged conspiracy. (App. at 61a, ¶88.)

in May 2000 the University of Wisconsin agreed with the Madison/Dane County Tavern League that it would “make sure that beer prices [at the student union] are at or above the local ‘market’ prices,” effectively removing the University as a significant competitive force in the marketplace. CITE.

In March 2002, Defendant (and attorney) Richard Petri mailed a letter to ten operators of beer gardens near Camp Randall Stadium in Madison, proposing they agree to the following output restrictions during football game days: 1) “during any one stadium special event, no more than ____ barrels of fermented malt liquor may be sold or served,” and 2) “staff dedicated to the sales and service of alcohol are limited to ____ at any one time.” (App. at 56a, ¶63; Doc. No. 136-2 at 4-7.) The letter states that the proposed restrictions are necessary to forestall possible adverse legislation and that “[f]or these special events, you are all at capacity; you are not really competing. A voluntary pact can result in relative peace with the residents without affecting you bottom line.” (Doc. No. 136-2 at 5.)⁸

⁸ Petri is a former Assistant City Attorney in Madison. (Doc. No. 136-2 at 4.) In that position he facilitated an agreement among liquor stores not to offer discounts during the annual Mifflin Street Block Party. (Doc. No. 175-3 at 1-5.) He is also a member of an RWJF subcommittee concerning alcohol policy. (App at 57a, ¶69.)

Petri states that he was asked to approach the bars by unnamed City officials. (Doc. No. 136-2 at 4.) Copied on his letter are three City of Madison alderpersons, two University of Wisconsin officials, and a Madison police sergeant. (Doc. No. 136-2 at 6.)

On September 12, 2002, over 35 bar owners near the University of Wisconsin-Madison campus held a press conference to announce that "we as a group, have agreed that we will **voluntarily** and **immediately** end all drink specials on Friday and Saturday nights after 8 P.M. in our establishments." (App. at 55a, ¶60; Doc. No. 136-1 at 5.) (emphasis in original.) The agreement was sponsored by the Madison/Dane County Tavern League and local beer distributors. (Doc. No. 136-2 at 1.) The stated justification was to "provide a proactive and substantive response to the hysteria surrounding student drinking habits" and to forestall legislation that may ban all drink specials city wide. (Doc. No. 136-2 at 1; 136-1 at 6.) The bar owners said that they "want to be part of the solution, not part of the problem." (Doc. No. 136-1 at 6.)

Defendant, bar owner and attorney Richard Lyshek drafted one of the two press releases announcing the agreement. (App. at 55a; Doc No. 136-2 at 1.) The release states that that "[w]e have our reservations about engaging in what could be considered illegal 'collusion in restraint of trade' but we feel this proactive position can cut through the fog and confusion surrounding the role of drink specials and [sic] disorderly conduct." *Id.* The release identifies nineteen "fully confirmed" participants and six others who indicated willingness "but confirmation not

received as of 9/12/2002,” and further states that “[i]t is anticipated that other taverns and restaurants not yet contacted will also be participating in this effort.” (Doc. No. 136-2 at 3.) However, Lyshek cautions that “while an attempt will be made to eliminate weekend drink specials, we are all independent businesses and economic pressures may prevent some from participating in this experiment.” *Id.* at 1.

The University of Wisconsin encouraged the bars to enter into their agreement pursuant to an “A Matter of Degree” grant that it and nine other schools received from the Robert Wood Johnson Foundation. (App. at 56a, ¶66.) Defendant Richard Yoast, head of alcohol policy at the American Medical Association, was the administrator of the grant program and was present in Madison the day prior to the public announcement of the September 2002 agreement. (App. at 56a-57a, ¶¶67-68.)

In October 2005, RHI sponsored a conference in Burlington, Vermont attended by “stakeholders” from Burlington, Boulder, Colorado, Edmonton, Alberta, Windsor, Ontario, Gainesville, Florida, and Athens, Georgia. (Doc. No. 136-1 at 1.) A memorandum summarizing the conference, purportedly drafted by a Boulder police sergeant, is available as a “tool” on RHI’s website. (App. at 52a, ¶44.)

The memorandum contains “specific suggestions” for managing hospitality districts, including:

Price competition in the hospitality industry has different consequences than the retail industry, which for the most part are not positive. Drink specials often indicate an establishment that is in trouble, and have the adverse effect of over indulgence. Collaboration between owners will help curb this type of price war. Community covenants can be created to discourage this type of marketing practice.

(Doc. No. 136-1 at 3.) The memorandum further recommends that "last drink data" be collected "to identify establishments that generate the majority of the problems,"⁹ and that "[a] comprehensive economic impact assessment of a hospitality district" be conducted "to provide baseline data for development and economic stability." *Id.*¹⁰

Similar conferences were held that year in Delray, Florida and Hollywood, California. *Id.* at 1. At the completion of the seminars "a best practice document will be produced and be available to assist communities in four core areas: a) hospitality, b) residential, c) safety, and d) development." *Id.*

⁹ "Last drink data" is collected by the police from individuals charged with committing an alcohol-related offense such as driving under the influence. The person is asked to identify the last place he was served alcohol. Since overconsumption is an indicator of low pricing, this data helps identify possible "cheaters" from a price-fixing arrangement.

¹⁰ "Before" data lets one measure the conspiracy's effectiveness.

In 2005 Defendant ABL recommended to its 20,000 plus members that they agree to a set of “integrated responsibility initiatives,” one of which was to use “promotions and drink specials that promote responsible consumption of alcohol.”¹¹ (App. at 52a, ¶45; Doc. No. 137-8.)

In 2006, a press conference was held to announce a new version of the Pacific Beach “community covenant.” (App. at 58a, ¶74.) The San Diego police chief and the local alderman attended the event. *Id.* at ¶75. The new agreement involved thirty licensed establishments and prohibited “advertising two for one drink specials or prices below two dollars for any alcoholic beverage sold in our establishments.” (App. at 58a, ¶74; Doc. No. 136-2 at 8.) The stated rationale was “Because we care!” (Doc. No. 136-2 at 8.)

Discover Pacific Beach (“DPB”), a local business trade association, took credit for having “brought together” the bars to sign the 2006 agreement. (App. at 58a, ¶77; Doc. No. 175-14 at 2.)¹² At the time, Defendants Citibank and Prudential were on the board of DPB. (App. at 59a, ¶¶80-81; Doc. No. 175-14 at 2.)

¹¹ In other words, don’t use promotions that may increase output and thus the risk of overconsumption. Of course, all price promotions increase output and thus the risk of overconsumption.

¹² “Discover Pacific Beach’s Hospitality Taskforce recently brought together thirty of Pacific Beach’s most popular restaurants, nightclubs and bars to sign the Pacific Beach Community Covenant. Developed ten years ago by responsible neighborhood businesses, the new version of the Community Covenant was developed in conjunction with residential activists.” (Doc. No. 175-14 at 2.)

In 2008 approximately twenty bars and restaurants in Breckenridge, Colorado issued a press release to announce an agreement not to offer shots for less than \$3.00 or drink specials after midnight. (App. at 64a, ¶84; Doc. No. 136-3 at 3.) The purported justification was to “improve the guest experience in our licensed establishments and minimize negative patron behaviors.” (Doc. No. 136-3 at 3.) The Chief of Police in Breckenridge is a speaker at RHI sponsored events. (App. at 64a, ¶85.)

In 2008, RHI contracted with Downtown Madison Inc., a business trade association in Madison, Wisconsin, to provide its facilitation services. (App. at 57a, ¶70.) Following an assessment of the marketplace, one of the recommendations was that hospitality businesses enter into marketing covenants to limit drink discounts. (App. at 57a, ¶71.) Defendants Petri and Lyshek participated in RHI’s “roundtable” discussions in Madison in connection with those efforts. (App. at 57a, ¶72.)

In 2009, RHI was hired by the Milwaukee Downtown Business Improvement District to facilitate collusion among licensed establishments in downtown Milwaukee. (App. at 60a, ¶83.)

REASONS FOR GRANTING THE PETITION

I. **The Eighth Circuit’s Ruling That A Charged Conspiracy May Be Implausible Even Where Supported by Direct and Reliable Evidence of Collusion is in Conflict with Other Circuits.**

This is an important case because of the nature and scale of the ongoing conspiracy. If this petition is denied, the massive conspiracy will continue unabated.

However, this is not a difficult case. The undisputable evidence not only passes the plausibility test; it establishes the existence of the charged conspiracy, and the participation of each respondent in that conspiracy, beyond a reasonable doubt. To contend that the charged conspiracy not only is implausible but defies “common sense”¹³ and is “facially preposterous”¹⁴ is to ignore precedent and turn a blind eye to the truth. If the reasoning below is accepted it is impossible to imagine any set of facts sufficient to survive a motion to dismiss a price-fixing claim.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007) the Court held that to survive a motion to dismiss a complaint alleging a violation of Section 1 of the Sherman Act must contain specific facts “plausibly suggesting (not merely consistent with) agreement” in restraint of trade. However, “[a]sking for plausible

¹³ App. at 21a.

¹⁴ App. at 23a.

grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Court further explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

Where, as here, the evidence of collusion is specific, reliable and direct, "the Supreme Court's concerns over the reasonableness of inferences in antitrust cases evaporates." *Intervest, Inc. v. Bloomberg*, 340 F.3d 144, 160 (3rd Cir. 2003). See also *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 99 (3rd Cir. 2010) (allegations of direct evidence that are adequately detailed are sufficient alone to meet the *Twombly* plausibility standard); *In re High Fructose Corn Syrup*, 295 F.3d 651, 654 (7th Cir. 2002) (because price fixing is a *per se* violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is "all the proof a plaintiff needs."); *Rossi v. Standard Roofing*, 156 F.3d 452, 466 (3rd Cir. 1998) (in direct evidence cases there is no need for inquiry into the plausibility of the claims or the rationality of defendant's motives); *Toledo Mack Sales & Service v. Mack Trucks, Inc.* 530 F.3d 204, 222 (3rd Cir. 2008) (noting that a statement by a vice president of the defendant was "direct evidence of collusion, which, if believed, requires no further inference"); *White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011) (so-called "plus factors" suggesting that

defendants are engaged in more than mere parallel behavior are “proxies” for direct evidence of agreement); *In re Plasma-Derivative Protein Therapies Antitrust Litigation*, 764 F.Supp. 2d. 991, 998 (N.D. Ill. 2011) (direct evidence of an agreement — such as an admission by an insider — is enough to permit a plaintiff to survive summary judgment).¹⁵

Petitioner acknowledges the highly improbable nature of the charged conspiracy. The case upends basic assumptions about the nature of price fixing. Typically, price-fixing conspiracies are short-lived because of the strong incentive to cheat. Conspiracies with many participants are particularly fragile and difficult to sustain over time. A thirty-year (and counting) price-fixing conspiracy involving hundreds of participants is, to petitioner’s knowledge, unheard of. Typically, the geographic scope of a price-fixing conspiracy is coextensive with the relevant geographic market for the fixed product. Typically, criminal price-fixing activity is conducted in secret and not announced at press conferences. Typically, upstream producers and distributors are victims of a price-fixing conspiracy among their downstream customers, not participants. Typically, businesses unrelated to the impacted markets are not active players in the conspiracy. Typically, law enforcement personnel are on the side of law and large, sophisticated public-interest organizations are keenly aware of their legal obligations. Where none of these assumptions hold true

¹⁵ *Twombly* itself suggests, but does not expressly hold, that direct reliable evidence is enough. 550 U.S. at 565, n. 11.

and deception is the conspiracy's hallmark, it is not surprising that intelligent outside observers are fooled.

The facts, however, are what they are. They are not figments of petitioner's imagination as respondents' argued below.¹⁶ Preconceived notions of how price-fixing conspiracies "typically" behave carry no weight where the plain evidence is to the contrary. Otherwise, the most sophisticated, devious and harmful conspiracies will flourish unabated under the theory that they could not possibly be true.

II. Purchases by Petitioner of Alcoholic Drinks from Respondent Restaurants During the Course of the Conspiracy Does Plausibly Establish Fact of Damages.

The complaint specifically alleges petitioner purchased alcohol from the four defendant restaurant chains (Applebee's, Chili's, Famous Dave's, and Fuddrucker's) in the Minneapolis-St. Paul area during the course of the conspiracy. (App. at 61a, ¶88.) The complaint seeks overcharge damages and injunctive relief. (App. at 64a.)

The district court found these allegations insufficient to plausibly state a claim for damages. "Uhr, of all people, should know when and where he purchased his drinks . . . and whether he was offered a drink special when he purchased his drinks. Nevertheless, Uhr fails to include any such factual matter in his complaint. . . . Nor does he identify *when*

¹⁶ Respondents' responsive brief before the Eighth Circuit at 16 ("imaginary nationwide conspiracy") and 39 ("illusory" conspiracy).

he purchased a drink at any of the [defendant] restaurants.” (App. at 26a.) “In the context of this case, common sense dictates that Uhr should be able to allege when and where he purchased his drinks and whether the restaurants at which he purchased his drinks were offering drink specials at the time. Uhr’s failure to do so renders his claim that these restaurants engaged in price fixing implausible.” *Id.* The court added that “[a] substantial percentage of the ARM participants *rejected* the recommendation that drink specials be curtailed, and Uhr does not know whether the restaurants where he bought his drinks were among this group.” (App. at 35a, fn 10. (emphasis in original).)

The decision below is in error in several respects. First, even if the district court was correct that the allegations of damages do not contain sufficient detail, it hardly follows that the lack of such specificity “renders [the] claim that these restaurants engaged in price fixing implausible.” (App. at 27a.) Whether there was a price-fixing conspiracy is a separate question from whether Plaintiff has plausibly alleged injury and damages.

Second, contrary to the district court’s assertion, the complaint does allege where the drinks were purchased – at the defendant restaurants in the Twin Cities’ market – and when the drinks were purchased – during the course of the charged conspiracy. (App. at 61a, ¶88.) Additional detail on these two issues, i.e., specific dates and addresses, would not render damages (or the existence of the conspiracy) any more or less plausible.

Third, whether a drink was purchased “on special” or at list price is not determinative on the damage question. A two-dollar “happy hour” drink special might have been priced at \$1.75 “but for” the conspiracy.¹⁷ This is a question of fact for discovery and expert testimony.¹⁸

Fourth, the fact that some ARM participants may not have increased prices as a result of their participation does make it implausible that petitioner was overcharged on at least one occasion. *Seventy two* percent of the participants in “full-ARM” training did increase their prices as a direct result of ARM. (Doc. No. 164-1 at 6.) It is not only plausible; it is probable that at least one of the four restaurant defendants was in that group. That all four assisted in ARM recruiting efforts only increases the likelihood that at least one of them was among the 72 percent. (Doc No. 175-11, 175-12.)

The decision below imposes way too high a burden on antitrust plaintiffs. The bars and restaurants participating in this conspiracy did not place asterisks on their menus noting which drinks were priced higher as a result of their involvement in the ARM program. But that seems to be what the courts below would require to allow this case to move forward. If that is the

¹⁷ The 2006 Pacific Beach Community Covenant precluded drinks priced below two dollars. (App. at 58a, §74.)

¹⁸ Throughout its opinion the district court appears to have lost sight of the fact that no formal discovery has occurred and “proof is largely in the hands of the alleged conspirators” *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

standard, the critical role of antitrust plaintiffs as "private attorneys general"¹⁹ will be severely undermined.

III. Mail and Wire Fraud Are Proper Predicate RICO Offenses Where the Charged Enterprise is a Price-Fixing Conspiracy.

The courts below ruled that the use of the mails (or wire) in furtherance of the charged price-fixing scheme does not constitute mail (or wire) fraud. Otherwise, "every price-fixing conspiracy would automatically constitute a RICO violation. Congress clearly did not intend that violations of the Sherman Act – which, after all, are not predicate offenses under RICO – automatically give rise to RICO liability." (App. at 31a.)

As a matter of simple logic this is not correct. While it often will be advantageous for price fixers to use the mails (and interstate wire communications) to further and conceal their conspiracy, such use is not an element of a Sherman Act violation. One can fix prices without placing anything in the United States mail. One can violate the Sherman Act without violating the RICO statute.

Further, the RICO statute is clear that mail fraud and wire fraud *are* predicate offenses. The statute does not say that they are predicate offenses except where, as here, the alleged enterprise is a price-fixing conspiracy. Absent ambiguity in the statute, Congressional intent is not material.

¹⁹ *Hawaii v. Standard Oil of California*, 405 U.S. 251, 262 (1972).

Case law supports Petitioner's position that a RICO charge can be maintained where the core offense is price fixing and the predicate offenses are mail fraud. See e.g., *New York v. Nasso Concrete Corp*, 202 F.3d 82, 87 (2nd Cir. 2000) (mail fraud charged as predicate RICO offenses in bid-rigging conspiracy case); *Sterling Interiors Group, Inc. v. Haworth, Inc.*, 1996 WL 537482 (S.D.N.Y.) at *1 (Plaintiff may bring civil RICO claim premised on alleged price-fixing scheme where the alleged predicate acts consist of mail and wire fraud); *Pennsylvania v. Derry Construction Co., Inc.*, 617 F.Supp. 940, 941 (W.D. Pa. 1985) (same); *Stolow v. Greg Manning Auctions, Inc.*, 258 F.Supp. 2d 236, 247 (S.D.N.Y. 2003) (same).

Further, the Justice Department regularly charges mail fraud where the core offense is price fixing. See, e.g., *United States v. Rubin*, 999 F.2d 194, 199 (7th Cir. 1993) ("the defendants' mail fraud was directly related to the price-fixing scheme and was not a separate course of conduct. It had no other purpose except to maintain and continue the price-fixing conspiracy). See also *United States v. Brighton Building & Maintenance, Co.*, 435 F.Supp. 222, 229 (N.D. Ill. 1977) (bid-rigging constitutes "scheme to defraud" and mailings in connection with scheme are actionable under 18 U.S.C. § 1341 even if the letters themselves contain no fraudulent statements or representations); *United States v. McKinnon Bridge Co., Inc.* 514 F.Supp. 546, 550 (M.D. Tenn. 1981) (mail fraud and the Sherman Act "have a substantial capacity for overlapping such that a single scheme might violate both laws. That situation does not forbid prosecution under both provisions, however.")

The extent of fraud in this case is difficult to overestimate. In all price-fixing and bid-rigging cases there is some degree of deception. *See Texas v. Allan Construction Co.*, 851 F.2d 1526, 1530-31 (5th Cir. 1988) ("It is true of any price-fixing conspiracy that it must remain concealed to be successful. Because price-fixing is illegal, public knowledge of the activity *usually* ends the agreement. This deceptive aspect of the conspiracy is . . . intended solely to 'cover up' the illegal act.") (Emphasis added). *See also Sterling Interiors V. Haworth*, 1996-2 Trace Cases P 71,557 (S.D.N.Y.) ("A rigged bid is, at some level, a misrepresentation: it is presented to the customer as though it were competitive when in fact it is not.")²⁰

Here, trickery is the *sine qua non* of the conspiracy. The two videos and the press releases and Petri's letter make this abundantly clear. Not only is the public fooled into thinking there is nothing unseemly going on, with a few notable exceptions the public health officials recruited as "worker bees" have no clue they are participating in a massive illegal enterprise. It is not possible to engage in a successful long-term criminal conspiracy in the public eye without

²⁰ As the Court has noted: "[E]very conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces." *Grunewald v. United States*, 353 U.S. 391, 402 (1957); *see also* 2 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 325, at 124 (1978) (stating that the participants to most clear-cut price-fixing agreements take elaborate efforts to disguise their activity).

a high level of deceit. Whatever else may be said of the conspirators, their skill at dishonesty deserves much admiration.

If the decision below is law, RICO plaintiffs in the Eighth Circuit may face a significant new obstacle unintended by Congress. Prosecutors may no longer be able to add fraud counts in price-fixing cases. Further, prosecutors may no longer be able to use fraud charges to prosecute individuals who attempt to fix prices but do not succeed. Such prosecutions cause one to think twice before soliciting a competitor. See *United States v. Ames Sintering Co.*, 1991-1 Trade Cas. (CCH) ¶ 69,362 at 65,453 (6th Cir. 1990) (unsuccessful solicitation by phone to enter into bid-rigging conspiracy constitutes wire fraud).

CONCLUSION

For the reasons stated. Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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