

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: PROCESSED EGG PRODUCTS	:	MULTIDISTRICT
ANTITRUST LITIGATION	:	LITIGATION
	:	
	:	
	:	
<i>THIS DOCUMENT APPLIES TO:</i>	:	No. 08-md-2002
ALL DIRECT ACTION PLAINTIFF CASES	:	

MEMORANDUM

PRATTER, J.

OCTOBER 31, 2019

INTRODUCTION

In an effort to crack an alleged conspiracy, the Direct Action Plaintiffs (DAPs) in this antitrust action seek to admit hundreds of co-conspirator statements against Defendants United Egg Producers (UEP), United States Egg Marketers (USEM), and Rose Acre Farms, Inc. To do so, the DAPs must prove the existence of the conspiracy they allege—a multi-pronged scheme to reduce the domestic supply of eggs as a means of increasing egg prices—by a preponderance of the evidence. To use the statements against each defendant, the DAPs must prove that each individual defendant knowingly agreed to join this overarching conspiratorial scheme. Finally, the DAPs must show that the statements were made by a co-conspirator in the course of and in furtherance of the overarching conspiracy.

Because the DAPs have proven the existence of the conspiracy and each defendant’s participation as required for this evidentiary ruling, many of these co-conspirator statements will be admissible at trial.

I. Background

This memorandum analyzes within the confines of the applicable rules of evidence whether an alleged conspiracy to reduce the domestic supply of eggs existed and if so, which defendants, if any, were members of the conspiracy. Because the analysis requires an extensive review of the evidence submitted by the parties, the Court provides only a brief Background.

The DAPs allege that the defendants participated in a single conspiracy to reduce domestic egg supply to increase egg prices by using three general tactics: (1) a series of short-term egg-supply reduction measures, (2) a long-term plan to reduce the supply of eggs under the pretext of an “animal welfare program,” and (3) exporting eggs at a loss.

A. Short-term Supply-Reduction Measures

The DAPs’ conspiracy theory begins with UEP. UEP is a cooperative that provides services to its members, including lobbying and marketing, concerning principally animal welfare, food safety, and environmental issues. The DAPs allege that UEP members agreed to a series of short-term programs designed to immediately reduce the supply of eggs beginning in 1999. These measures were implemented by a committee within UEP known as the “Marketing Committee.” Members of UEP were then to commit to implementing the measures. These measures included inducing hens to molt earlier than they naturally would,¹ slaughtering hens earlier, and reducing the hatching of chicks. UEP members were also encouraged to stop or slow considerably backfilling cages (that is, replacing dead hens with younger hens). These egg supply reduction measures reportedly succeeded in reducing flock size and driving the price of eggs up, and were implemented on a number of occasions.

¹ Molting is the process whereby hens lose their feathers and regrow them. Hens do not lay eggs when molting.

B. The Scheme to Reduce the Supply of Eggs Under the Pretext of a Certified Animal Welfare Program

The DAPs allege that UEP went beyond these short-term measures to create and implement its own certified animal welfare program intended to reduce egg supply but operating under the guise of improving the welfare of hens. The program's alleged goal of reducing the egg supply primarily relied upon requirements for increased cage space per hen. Compliance with this program was monitored by monthly reporting requirements and periodic audits. The cage-space requirement was supplemented by three additional requirements that ensured the certified program would have its intended effect: (1) the "100% Rule," which required that all of a producer's facilities, including those of its affiliates, comply with the Certified Program's cage-space requirements in order for any egg from that producer to be "certified;" (2) a prohibition on backfilling within the certified program; and (3) a rule that failing to comply with the cage-space or backfilling requirements would result in an "automatic fail" of an audit under the certified program—even though other shortcomings under the program (such as improper lighting or handling) did not result in an "automatic fail." The Certified Program was promoted as an animal welfare program with labels to that effect on egg packaging.

C. Egg Exports at a Loss

The final component of the alleged conspiracy was the exporting of domestic eggs at a loss. The DAPs allege that egg producers exported their eggs into foreign markets to drive up the domestic price of eggs. The scheme, implemented by members of USEM and managed through UEP's Export Committee, required all USEM members to either export their own eggs at a loss or sell their eggs to UEP at domestic prices and later receive a bill for the difference between the domestic price and the export price. USEM members who did not contribute eggs to the export scheme contributed money to help fellow members bear the burden of the export losses.

II. Legal Standard

Typically, out-of-court statements offered for the truth of the matter asserted are inadmissible hearsay. FED. R. EVID. 801(c). As explained in *United States v. Weaver*, 507 F.3d 178 (3d Cir. 2007), out-of-court statements can be admitted as non-hearsay co-conspirator statements if the moving parties—here, the DAPs—prove “by a preponderance of evidence that: (1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy.”² *Id.* at 181 (citations omitted); *see also Bourjaily v. United States*, 483 U.S. 171, 175 (1987). When deciding preliminary questions concerning the admissibility of evidence, “Third Circuit law requires [that] the Court make rulings favorable to Plaintiffs if Plaintiffs have presented, by a preponderance of evidence, sufficient facts to warrant admissibility.” *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 229 (E.D. Pa. 2016). The Federal Rules of Evidence similarly favor admissibility. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 375-76 (3d Cir. 2004).

For purposes of applying Federal Rule of Evidence 801(d)(2)(E), the quantity of evidence used to prove a conspiracy need not be great. The Third Circuit Court of Appeals “has held that the trial court’s determination need only be supported by ‘slight evidence.’” *United States v. Savage*, Nos. 7-550-03, 07-550-04, 07-550-05, 07-550-06, 2012 WL 5866068, at *2 (E.D. Pa. Nov. 20, 2012) (quoting *United States v. Provenzano*, 620 F.2d 985, 999 (3d Cir. 1980)). In making these factual determinations, a district court can consider the disputed hearsay statements themselves. *See* FED. R. EVID. 801(d)(2); *Bourjaily*, 483 U.S. at 181 (“[A] court, in making a

² In making its determination, the Court’s ruling “is one of admissibility of evidence only, and is not a ruling as to sufficiency of Plaintiffs’ evidence to prove liability as to any specific Defendant.” *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 229 (E.D. Pa. 2016).

preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted.”). However, the statements cannot on their own establish “the existence of the conspiracy or participation in it.” FED. R. EVID. 802(d)(2). Finally, the district court is to create a clear record of its preliminary factual findings.³ See *Domestic Drywall*, 163 F. Supp. 3d at 203.

III. Discussion

A. Defining Co-Conspirator “Statements”

Before the Court can complete the required *Weaver* analysis for the disputed co-conspirator statements, it must first determine what constitutes a “statement” for the purposes of Rule 801(d)(2)(E).

1. Scope of “Statement”

The parties agree that the Court must determine the admissibility of each statement. They disagree, however, as to how narrowly the Court must construe the term “statement” in completing this determination. The defendants insist that the Court must engage in a sentence-by-sentence analysis, analyzing whether each one meets all the requirements of Rule 801(d)(2)(E). The DAPs contend that the Court can examine all of the statements in a single document together and then admit the whole document.

In *Williamson v. United States*, 512 U.S. 594 (1994), the Supreme Court adopted a narrow definition of “statement” for the purposes of determining a statement’s admissibility under Rule

³ In determining the admissibility of co-conspirator statements, the Third Circuit Court of Appeals has noted a preference for a district court to conduct a pretrial evidentiary hearing and make its determination prior to trial. See *Weaver*, 507 F.3d at 187; *United States v. Continental Grp., Inc.*, 603 F.2d 444, 457 (3d Cir. 1979). Accordingly, this Court held an evidentiary hearing concerning the admissibility of the co-conspirator statements on September 27, 2019. The Court examined the evidence presented at this hearing to educate its pre-trial determination on the statements’ admissibility.

804(b)(3), the “statement against interest” exception to hearsay. In determining whether an out-of-court confession was admissible, the Supreme Court held that “statement” means “a single declaration or remark” rather than “a report or narrative” under Rule 804(b)(3). *Id.* at 599. This precludes a district court from “assum[ing] for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession.” *Id.* at 601. Rather, the district court must evaluate whether each statement in a confession is “truly self-inculpatory,” a sometimes “fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved.” *Id.* at 604.

Whether the Supreme Court’s “single declaration or remark” definition of “statement” applies broadly to all the hearsay-related rules or only to Rule 804(b)(3) as applied in *Williamson* is an open question. Promptly after *Williamson*, the Sixth Circuit Court of Appeals held that this narrow definition “extends to the other hearsay exceptions delineated in Rule 804,” as well as “Article VIII (Hearsay) of the Federal Rules of Evidence, entirely.” *United States v. Canan*, 48 F.3d 954, 960 (6th Cir. 1995). The court reasoned that “[t]his determination is consistent with the idea implicit in Rule 801(a): that there is an overarching and uniform definition of ‘statement’ applicable under all of the hearsay rules.” *Id.* In contrast, the First Circuit Court of Appeals “has not yet determined whether the definition of ‘statement’ adopted for Rule 804(b)(3) in *Williamson* also applies Rule 804(b)(5),” let alone all the hearsay rules. *United States v. Sposito*, 106 F.3d 1042, 1048 (1st Cir. 1997). Neither the DAPs, the defendants, nor the Court have located any Third Circuit Court of Appeals precedent directly addressing this specific question. Courts in the Third Circuit, however, approach hearsay statements narrowly. *See, e.g., Ciccarelli v. Gichner Sys. Grp., Inc.*, 862 F. Supp. 1293, 1298–99 (M.D. Pa. 1994) (finding immediately post-

Williamson that a hearsay analysis under Rule 804(b)(3) requires the district court determine which words within individual sentences qualify as self-inculpatory).

Due to the open nature of this question, the Court does not decide today whether the term “statement” must always be narrowly construed to require a sentence-by-sentence analysis under the hearsay and hearsay-related evidence rules. However, given the abundance of “statements” at issue here, however one might set the bar, and because the great number, length, and animated nature of the documents presented in this application to the Court, the Court accepts the task of analyzing each sentence individually for its admissibility. The Court’s sentence-by-sentence analysis is detailed in the Appendix to this Memorandum.

Even a sentence-by-sentence analysis, however, does not take place in a vacuum. The Supreme Court instructed in *Williamson* that determining whether a statement is self-inculpatory for the purposes of Rule 803(b)(3) “can only be determined by viewing it in context.” 512 U.S. at 603. Such context is also required under Rule 801(d)(2)(E) for determining whether a statement is in furtherance of the conspiracy. See *United States v. Duka*, 671 F.3d 329, 348–49 (3d Cir. 2011) (finding that district court did not abuse its discretion in holding statements were made in furtherance of the conspiracy where the district court “found that, *in the context of the overall conversation*, the . . . statements [were] intended to reassure . . . and maintain trust within the conspiracy”) (emphasis added); *United States v. Gutierrez*, 48 F.3d 1134, 1137 (10th Cir. 1995) (“When determining whether a statement was made in furtherance of a conspiracy we focus on the declarant’s intent in making the statement. The determination must be made by examining the context in which the statement was made.”) (citations omitted). Therefore, the Court will consider the context in which the statements were made.

2. *Non-Statements*

The defendants hope to save some of the disputed co-conspirator statements from admission under Rule 801(d)(2)(E) by arguing that they are not statements at all, rendering the hearsay rules inapplicable. The defendants are correct that if the offered evidence does not meet the definition of “statement,” the hearsay rules do not control its admissibility. *See* FED. R. EVID. 801 advisory committee’s note (“The effect of the definition of ‘statement’ is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion.”).

Rule 801(a) defines “statement” as an “assertion” and “hearsay” as a statement that, in relevant part, “a party offers in evidence to prove the truth of the matter asserted in the statement.” FED. R. EVID. 801(a), (c). The defendants contend that a selection of the disputed co-conspirator “statements” are not assertions at all, but “questions, inquiries, requests, directions, or other types of statements *that are not being offered for their truth.*” Def.s’ Post-Hearing Mem. at 26 (Doc. No. 2007) (emphasis added). Therefore, the defendants argue that Rule 801(d)(2)(E) cannot justify admission because each is not a “*statement . . . offered against an opposing party and made by the party’s coconspirator during and in furtherance of the conspiracy.*” FED. R. EVID. 801(d)(2)(E) (emphasis added).

To be sure, Rule 801(d)(2)(E) is not the proper tool for admitting non-statements. But the defendants eluded a fox in the henhouse only to run straight into the butcher. Breaking their argument down to its core, the defendants are telling the Court that some of the disputed co-conspirator statements are not admissible under the hearsay rules *because they are not hearsay to begin with.* *See United States v. Edwards*, 792 F.3d 355, 357 n.2 (3d Cir. 2015) (“[A] statement is hearsay only if it is offered ‘to prove the truth of the matter asserted.’”) (quoting FED. R. EVID.

801(c)(2)); *United States v. Daniels*, 48 F. App'x 409, 412 (3d Cir. 2002) (“If a party does not offer a statement into evidence for the purpose of establishing the statement's truth, such statement does not constitute hearsay.”) (citing *United States v. Reynolds*, 715 F.2d 99, 101 (3d Cir. 1983)). If the statements are not hearsay, then they are admissible evidence if relevant.⁴ See FED. R. EVID. 402; see, e.g., *United States v. Ballou*, 59 F. Supp. 3d 1038, 1073 (D.N.M. 2014) (admitting seven paragraphs of “commands, directives, or mandates” that “have no truth value, because they assert no facts” into evidence “because they are not ‘assertions,’ and thus not ‘statements’ under rule 801”).

Relatedly, the defendants argue that if the DAPs cannot admit the non-hearsay statements under Rule 801(d)(2)(E), then the jury should be instructed to consider the statements for only whatever limited purpose they are offered. A limiting instruction is appropriate when a statement that does have a truth value is offered for a purpose other than that truth, such as to show the effect on the listener. See, e.g., *Marks v. Marina Dist. Dev. Co., LLC*, 213 F. App'x 147, 153–54 (3d Cir. 2007) (finding “consistent with the sound exercise of discretion” the district court’s admission of testimony about a dispatch call that “was not being offered for the truth of the contents of the call, but to demonstrate their effect on the listener” where that testimony was immediately followed by a limiting instruction that “this aspect of [the witness’s] testimony was only admissible for a limited purpose”). Here, however, the defendants’ argument is that these statements are non-hearsay because they have no truth value to begin with. The Court fails to see why it would instruct the jury that it cannot consider statements for a truth value that they do not possess. Of course, should the DAPs seek to offer a hearsay statement for a non-hearsay purpose, the Court will consider a proper limiting instruction.

⁴ Subject to objections other than hearsay.

Having decided on a context-driven sentence-by-sentence statement determination, the Court turns to the traditional *Weaver* analysis.

B. Whether a Conspiracy Existed

To admit co-conspirator statements, the Court must find “by a preponderance of proof” that a conspiracy existed. *Bourjaily*, 483 U.S. at 175. To prevail on a Section 1 Sherman Act claim, a plaintiff must establish a “contract, combination . . . or conspiracy” in the restraint of trade. 15 U.S.C. § 1. Two or more entities enter into a conspiracy when they reach an agreement or understanding to commit a common illicit scheme. *Flat Glass*, 385 F.3d at 356. “[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quotation marks and citations omitted); see *Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) (“[T]he plaintiff must show that the defendant was a party to a contract, combination . . . or conspiracy in other words, a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme.”) (citations and quotation marks omitted).

Direct evidence is evidence that “a reasonable finder of fact must be able to use . . . to find a conspiracy with no further extrapolation.” *In re K-Dur Antitrust Litig.*, No. 1-1652, 2016 WL 755623, at *19 (D.N.J. Feb. 25, 2016) (citing *Ins. Brokerage*, 818 F.3d at 324 n. 23); see *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (defining direct evidence in a Section 1 conspiracy to be “evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted”). A “document or conversation explicitly manifesting the existence of the agreement in question” is direct evidence. *Ins. Brokerage*, 818 F.3d at 324 n. 23. However,

of course, a plaintiff need not demonstrate the existence of a formal or written agreement to evidence a commonly held agreement between co-conspirators. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 182 (3d Cir. 1970). A plaintiff can also rely upon circumstantial evidence, evidence which requires the finder of fact to make additional logical leaps to determine that a conspiracy occurred. *Id.*

In determining whether a single conspiracy exists, the Third Circuit Court of Appeals has focused on “(1) whether there was a common goal among the conspirators; (2) whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators; and (3) the extent to which the participants overlap in the various dealings.” *United States v. Fattah*, 914 F.3d 112, 168 (3d Cir. 2019). However, as already addressed in this litigation, “[a]ntitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy.” *In re Processed Egg Products Antitrust Litig.*, 821 F. Supp. 2d 709, 719 (E.D. Pa. 2011) (citations and quotation marks omitted) (alterations in original).

The evidence issue raised here is all the more challenging because the statements are almost all presented in newsletters and similar publications disseminated by a trade association. A trade association “can only be held liable for concerted action if it acted as an entity[,]” and concerted action does not necessarily “exist every time a trade association member speaks or acts.” *Alvord-Polk, Inc. v. F. Schumacher & C.*, 37 F.3d 996, 1007 (3d Cir. 1994) (citing *Nanavati v. Burdette Memorial Hosp.*, 857 F.2d 96, 117-18 (3d Cir. 1988)). Likewise, “pertinent legal authority is clear that participation in a trade group association and/or attending trade group meetings, even those meetings where key facets of the conspiracy allegedly were adopted or advanced, are not enough on their own to give rise to the inference of *agreement* to the conspiracy.” *Processed Egg Prods.*,

821 F. Supp. 2d at 722 (collecting cases) (emphasis in original).⁵ Common membership, meeting attendance, and “adoption of the trade groups’ suggestions” can, however, evidence “an opportunity to conspire” that the conspirator can then act upon to establish the common agreement. *Ins. Brokerage*, 618 F.3d at 349 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 n. 12 (2007); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007)) (emphasis added); *see also Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1242 n. 15 (3d Cir. 1993) (“Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place.”) (citations and quotation marks omitted).

In addition to establishing an opportunity to conspire, a plaintiff must evidence that alleged co-conspirators “acted other than independently” in adhering to the trade association’s programming or guidelines.⁶ *Ins. Brokerage*, 618 F.3d at 349. Joint action taken by competing

⁵ *See Ins. Brokerage*, 618 F.3d at 321 (noting that although common membership in a trade association and “common adoption of the trade groups’ suggestions” can evidence “an opportunity to conspire,” they are insufficient on their own to evidence a conspiracy under Section 1).

⁶ A prior ruling of this Court is instructive here. In reference to a defendant no longer in this case, this Court already noted that although a defendant’s membership to the UEP, leadership positions within the UEP, and attendance at various meetings in which the conspiracy was discussed “are not enough, in and of themselves, to support an inference that [the defendant] joined a conspiracy, they [did] indicate that [the defendant] had an opportunity to do so.” *In re Processed Egg Products Antitrust Litig.*, 902 F. Supp. 2d 704, 716 (E.D. Pa. 2012) (citing *In re Static Random Access Memory Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008)). This Court ultimately denied that defendant’s motion to dismiss, determining that allegations of the defendant’s participation in UEP’s chick hatch reduction and a supply adjustment program plausibly suggested that the defendant “took advantage of this opportunity and agreed to a common scheme to restrict the supply of eggs.” *Id.*

At an earlier stage in this litigation, this Court also denied a separate motion to dismiss from another defendant that “was a UEP member and held positions on the UEP Board and certain committees, and attended meetings, noting that allegations that “[the defendant] was in a position to observe and be aware of what other Defendants were doing, knew the implications of restricted supply and increased prices, and even likely benefited from the increased market prices” could not, on their own, solidify the defendant’s agreement to and participation in the conspiracy. *Processed Egg Prods.*, 821 F. Supp. 2d at 735. However, this Court again focused on the defendant’s “alleged adoption of the guidelines on chick hatch reduction, in conjunction with the

members of a trade association on behalf of the association as an entity can satisfy the conspiratorial element of a Section 1 claim. *Weiss v. York Hosp.*, 745 F.2d 786, 815-16 (3d Cir. 1984) (holding that coordinated actions by group of doctors, although each “an independent economic entity in competition with other doctors . . . are subject to scrutiny under Section 1 of the Sherman Act”) (citing *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 339 (1982); *Nat’l Soc’y of Prof’l Eng’r v. United States*, 435 U.S. 679, 682 (1978)); see also *Alvord-Polk, Inc. v. F. Schumacher & C.*, 37 F.3d 996, 1007 (3d Cir. 1994) (noting that if individual competitors act together for a trade association that the association “has engaged in concerted action so as to trigger potential Section 1 liability”).

1. Overview

Because the DAPs must prove that the conspiracy existed by a preponderance of the evidence, the Court examines the arguments and evidence presented by both the DAPs and the defendants. The DAPs presented an array of evidence⁷ at the evidentiary hearing held on September 27, 2019 that they believe establishes the formation of the conspiracy.⁸ In doing so, the DAPs submitted documents setting the stage for the conspiracy long before it was alleged to have officially hatched on May 15, 2000. In the 1980s, UEP called for an egg marketing order to restrict egg supply. The United States Department of Justice denied UEP’s request because

allegations of the defendant’s UEP membership, positions held on the UEP Board and committees, meeting attendance, “and expressed pointed comments about the egg market and industry practices” to plausibly show that the defendant did in fact assent to the overarching conspiracy. *Id.* at 735-36.

⁷ Federal Rule of Evidence 104 permits a Court to consider any unprivileged evidence that may otherwise be inadmissible when deciding preliminary questions of admissibility. Therefore, the Court considers all of the evidence submitted by the parties, regardless of whether the evidence itself is admissible.

⁸ The defendants likewise presented supplemental evidence after the hearing.

allowing the order would violate antitrust laws. Without assistance from the federal government to rely upon, the DAPs allege that UEP would later take its own measures to reduce egg supply.

As early as 1999, UEP and its members apparently were facing a period of great oversupply in egg production that drove the cost of egg products down. Scrambling to increase profit margins, UEP and its horizontal competitors allegedly settled upon a conspiratorial scheme to reduce domestic egg supply as a means to increase domestic egg prices. Through its “United Voices” newsletters—the UEP-produced publication dispersed to UEP members and others—UEP urged its members to review their supply demand needs as a first step to maximizing economic returns. Soon thereafter, UEP also recommended that its members to do their part to reduce the egg supply. *See* DAPs’ Formation Binder (hereinafter DAPs’ Form. Bind.), United Voices Newsletter at 2 (July 5, 1999) (Tab 14) (noting that “[i]t’s up to the individual producers to make [the] decision” whether they would “make the necessary adjustments to bring supply more in balance with demand”). UEP’s general urging reductions for supply were soon followed by UEP’s encouragement and instruction to participate in a broad supply-reducing conspiracy through three means: various short-term measures, the certified animal welfare program, and exporting eggs at a loss.

Because the existence of a conspiracy cannot be established exclusively by the statements themselves, the focus is upon the evidence presented independent from the alleged co-conspirator statements. However, the admissible individual statements themselves—as detailed in the Appendix to this Memorandum—underscore the existence of the conspiracy. For the purposes of admitting co-conspirator statements, the DAPs have successfully proven to the Court for this purpose by a preponderance of the evidence that a conspiracy existed. By this ruling the Court is *not* usurping the jury’s function of this point.

2. *Short-Term Supply Reduction Measures*

Facing oversupply throughout the egg industry, UEP turned first to short-term measures—including the early molting and slaughtering of hens—as a means to quickly reduce the egg supply. Through its “United Voices” newsletters, UEP implored its members to “do [their] part in early molting and early slaughter” to “adjust[] the supply side of the business” and ensure higher prices. DAPs’ Form. Bind., United Voices Newsletter at 2 (Apr. 19, 1999) (Tab 7).⁹ In May 1999, the UEP Board approved both of the short-term supply-reducing measures recommended by the Marketing Committee.¹⁰ After receiving the Board’s approval, UEP continued to heavily encourage its members to participate in additional molting and slaughtering initiatives.¹¹ At least some members did as instructed. *See* DAPs’ Form. Bind., United Voices Newsletter at 1 (June 7, 1999) (Tab 11). Finally, Board members were further “urged . . . to maintain their supply reduction programs,” DAPs’ Bind., UEP Bd. Of Dir. Meeting Minutes (Feb. 24, 2000) (Tab 22). According to the DAPs, UEP also knew early on that these short-term measures would not be enough on their own to achieve long-term supply reduction. *See* DAPs’ Form. Bind., United Voices Newsletter at

⁹ In this same newsletter, UEP Chairman Ken Looper also urged members to “do [their] part and make [the] industry profitable for everyone” through the “total disappearance” of 201.1 million old hens. *Id.* at 1.

¹⁰ Two months later, the Marketing Committee agreed to recommend that members continue early molting and slaughtering.

¹¹ *See, e.g.*, DAPs’ Form. Bind., United Voices Newsletter at 3 (May 24, 1999) (Tab 10) (“Waiting for someone else to make adjustments to their flock size only adds to your losses. Make the necessary adjustments and minimize your losses now without waiting for someone else to do the job.”); *id.* (“Follow UEP’s recommended early molt and early slaughter program. If possible take an additional 5% of your hens out of production. If everyone disposed of an additional 5% of their hens, this would reduce our current flock size to about 245 million hens and a profitable industry for all.”); DAPs’ For. Bind., United Voices Newsletter at 1 (June 7, 1999) (Tab 11) (“(1) Continue to molt hens at 60 weeks of age for the next 5 weeks. (2) Continue to slaughter or dispose of hens 5 weeks earlier than normal for the next 5 weeks.”).

2 (Apr. 3, 2000) (Tab 24) “(A massive sell-off of hens or molting must occur following Easter week in order to avoid severe depressed prices. Long-term, the industry must address this over-supply problem or face continued survival of the fittest.”).

The defendants did not submit any evidence to demonstrate their lack of participation in implementing these short-term measures. Instead, they argue that UEP merely recommended voluntary actions—not agreements—and that the DAPs insufficiently showed any producers’ adherence to the recommendations. The defendants’ argument is unavailing. First, albeit voluntary, these joint actions taken by competing members of a trade association can be evidence of a conspiracy. *See Weiss*, 745 F.2d at 815-16. Second, UEP admitted that at least some producers did in fact adhere to UEP recommendations for the early molt and slaughtering of hens which were made as means to reduce supply. *See* DAPs’ For. Bind., United Voices Newsletter at 1 (June 7, 1999) (Tab 11) (“The [Marketing] Committee applauded the actions taken by the members in following the early molt program . . .”). Third, regardless of the official “voluntary nature” of the requested actions, UEP’s communications suggest that the plan would only work if the members worked together. The Court is satisfied that the DAPs have shown by a preponderance of the evidence that the UEP-led short-term early molt and slaughter efforts were methods employed to advance a broader agreement to reduce the supply of eggs.

3. *Certified Animal Welfare Program*

The DAPs’ theory of the conspiracy largely focuses on the UEP’s adoption of its animal welfare guidelines and the creation of its Certified Program as a means to reduce egg supply under the guise of ensuring animal welfare. Disgruntled by the economic downturn in the egg market and realizing that short-term fixes would not be enough to alleviate his “concern[s] with the current economic conditions,” UEP Chairman Ken Looper sought to develop a “supply program for board

review.” DAPs’ Form. Bind., UEP Bd. of Dir. Meeting Minutes (May 12-13, 1999) (Tab 9). UEP created a Scientific Advisory Committee to recommend suggestions that the UEP’s Producer Committee would later draft into UEP’s animal welfare guidelines.¹² The DAPs argue that UEP created its Scientific Advisory Committee solely to lend artificial legitimacy to UEP’s animal welfare guidelines. Among the Scientific Advisory Committee members was poultry specialist Donald Bell, an early advocate for implementing various supply-reducing measures into the poultry industry.¹³

Gene Gregory, the Senior Vice President of the UEP, solicited Mr. Bell for a “12-month Supply Plan to Meet the Market Needs That Provides a Reasonable Return on Investment” and welcomed “any additional ideas.” DAPs’ Form. Bind., Letter from Gene Gregory to Don Bell and Lee Schrader (July 1, 1999) (Tab 12). In response, Mr. Bell wrote that “[c]orrection in the size of the nation’s layer flock can be attained by one of several ways:

¹² The UEP’s Producer Committee would incorporate the Scientific Advisory Committee’s recommendations into the guidelines.

¹³ In the early 1990s, Mr. Bell advocated for various supply reducing methods in the poultry industry. In a 1992 presentation Mr. Bell wrote that cage density, molting programs, age restrictions, and export initiatives were the most substantial factors impacting national egg production. DAPs’ Form. Bind., Don Bell, *Managing the Nation’s Laying Flock 1992* at sl. 14 (Tab 3). To alleviate an increase in egg production, Mr. Bell suggested implementing “[g]uidelines (e.g. welfare)” and “persuasion based upon sound data (e.g. UEP)” as potential “supply management systems.” *Id.* at sl. 37. In another report dated April 15, 1994, Mr. Bell urged that “more means less” in the egg industry: that “[t]he U.S. has no way to control its flock size other than through the persuasive influence of trade associations such as UEP. . . . Remember – in the egg industry, ‘more means less’ – it always has and it will always be so.” Don Bell, *An Eggs Economic Update* at 4 (Apr. 15, 1994) (Tab 4).

The defendants challenge Mr. Bell’s affiliation with UEP prior to signing his formal consulting agreement with UEP in February 2001. Although both the 1992 presentation and the 1994 report mention UEP, the DAPs have not established that these presentations were made to or on behalf of UEP. However, these early documents authored by Mr. Bell are indicative of the ideas he would later bring to the attention of UEP and its Scientific Advisory Committee.

1. A sensible industry-wide growth policy must be adhered to. This requires industry-wide commitment to a “reasonable” growth rate at no more than 3 million hens per year.
2. Extra birds must be removed from the nation’s flock permanently. An early molt is only a stop-gap way of correcting the problem. . . .
3. A 2-3% reduction in chick purchases would help to lower the future flock size, but the results would be slow.
4. An industry-wide policy of a minimum floor space allowance would result in a more ideal national flock size. It is currently estimated that 15-20% of the nation’s birds are housed at less than 48 square inches. If 48 square inches were adopted as the minimum space allowance, millions of extra birds would be eliminated.

DAPs’ Form. Bind., Letter from Don Bell to Gene Gregory (July 2, 1999) (Tab 13). Here, Mr. Bell explained that short-term methods, such as the early molting program already implemented, would fail to provide UEP’s desired long-term supply reduction effects. Instead, Mr. Bell focused on executing a longer-term solution to alleviate the UEP’s economic woes: requiring larger cage spaces per hen. According to the DAPs, UEP’s efforts were largely focused on reducing egg supply by requiring an increase in cage space per hen.

After receiving Mr. Bell’s guidance, UEP conducted a survey of its members to see whether they were interested in participating in a “supply adjustment program” adopting the methods suggested by Mr. Bell. DAPs’ Form. Bind., United Voices Newsletter at 3 (Aug. 2, 1999) (Tab 16); *see* DAPs’ Form. Bind., *Economic Survey of UEP Members* (Tab 17) (referring to the survey as inquiring into “whether the marketing committee should make recommendations to correct the over supply of eggs for the next 12-18 month [sic].”). The Marketing Committee described this survey as a method “to determine [membership] interest in UEP developing a program to adjust supply to meet the expected demand as well as their willingness to participate.” DAPs’ Form. Bind., UEP Marketing & Price Discovery Committee Meeting Minutes (July 15, 1999) (Tab 15). When encouraging its members to complete this survey, UEP reproduced Mr.

Bell's suggested methods to "correct[] . . . the nation's flock size" in a United Voices newsletter. DAPs' Form. Bind., United Voices Newsletter (Aug. 2, 1999) (Tab 16). UEP received overwhelmingly positive responses from those members that responded.¹⁴ UEP also solicited additional comments and recommendations from its members. The members recommended, among other suggestions, to increase cage space requirements and decrease density.

Backed by the support of its members, UEP's various committees focused their efforts upon bringing this plan to fruition. In a presentation to the Board, UEP Chairman Ken Looper and Marketing Committee Chairman Dolph Baker explained that egg producers "would realize severe financial losses" in the event "the egg industry did not voluntarily adjust the supply side of [the] business." DAPs' Form. Bind., UEP Annual Bd. Meeting and Exec. Conference Minutes (Oct. 14-15, 1999) (Tab 18). At this same Board meeting, Animal Welfare Committee Chairman Jeff Armstrong also presented the Scientific Advisory Committee's report "detailing the challenges of the industry and the opportunities to write humane guidelines to address these challenges," recommending in part "space allocation" as a solution. *Id.*

Finally, on May 15, 2000, the Animal Welfare Committee met to accept the recommendations and goals of the Scientific Advisory Committee and commit to creating official animal welfare guidelines. Participation in the UEP Certified Program requires compliance with

¹⁴ Sixty-eight members representing approximately 90 million laying hens—about 30% of the UEP members—responded to this survey. Of the responding members, the vast majority responded positively. Information on precisely which members responded is unknown. Additionally, the Court notes that besides inquiring into "some type of chick hatch reduction program," the survey did not solicit information on whether the members agreed to the specific methods suggested by Mr. Bell. Instead, the questions were phrased in more generalized terms—*i.e.* whether members agreed with Mr. Bell's predictions and whether a program should be developed to address said predictions. DAPs' Form. Bind., Economic Survey of UEP Members (Tab 17). As already noted, Mr. Bell's suggested methods were reproduced in the August 1999 United Voices newsletter promoting participation in the survey.

these guidelines. The Committee committed to increasing cage space per hen despite acknowledging that (1) it was not in any individual producers' economic self-interest to do so; (2) most or all of the producers in the industry would have to commit to justify the program; (3) the program would be perceived as a "pro-welfare" industry decision; and (4) "[a]n increase in space allowance would inevitably reduce the layer population and thereby reduce the surplus production problems affecting the industry over the past 20 years." DAPs' Form. Bind., UEP Animal Welfare Committee Meeting (May 15, 2000) (Tab A). The UEP implemented its initial guidelines, including its cage space restrictions, in 2002. Over the next few years, the guidelines would later add the 100% Rule, a prohibition on backfilling, and the audit system to enforce compliance. The DAPs assert that these additions—justified under the pretext of animal welfare—were similarly created to decrease the supply of eggs.

The defendants, however, contend that UEP developed its Certified Program to meet its customers' demands for a humane egg product. According to the defendants, the Certified Program's development and the producers' adherence to the guidelines were therefore a legitimate response to an industry crisis, not a part of an overarching conspiracy to reduce the supply of eggs.

In 1999, People for the Ethical Treatment of Animals (PETA) launched a public relations campaign against various fast-food companies and later grocery chains and retailers demanding the adoption of guidelines ensuring the humane treatment of animals used in creating food products. These demands included providing increased cage space for egg-laying hens. McDonald's (and later other fast food chains) acquiesced, requiring its egg suppliers to provide at least 72-75 square inches per bird and submit annual compliance audits. Concerned over potential public image issues, retailers—including some of the DAPs—turned to the Food Marketing Institute (FMI) to form an Animal Welfare Group composed of primarily animal scientists and

veterinarians to identify universal “scientific best practices” to ensure adequate animal welfare.¹⁵ Def.s’ Ex. 11, Hollingsworth Dep. 332:25-333:16. After FMI publicly announced its animal welfare policy, a couple of the DAPs urged egg suppliers to implement animal welfare reforms.

The defendants assert that around this same time period, egg producers were concerned that the attention given to animal welfare issues could lead to overly restrictive regulations or inconsistent contractual requirements. According to the defendants, this concern prompted UEP to form its Scientific Advisory Committee in part to develop an animal welfare program. As noted above, the Scientific Advisory Committee’s recommended, among other improvements, requiring more space per caged bird. UEP representatives also consulted FMI about UEP’s guidelines. In fact, FMI also considered cage space to be a “big issue” and urged UEP to reduce its phase-in schedule for implementing cage space restrictions from ten to six years. Def.s’ Ex. 20, Animal Welfare Conference Call (June 6, 2001). FMI’s independent expert advisors on its own animal welfare committee later recommended FMI members to follow the 2002 UEP Guidelines (incorporating the Scientific Advisory Committee’s recommendations) concerning egg and egg product suppliers. As recently as 2013, FMI again endorsed UEP’s guidelines.

The defendants assert that the guidelines’ cage space requirements,¹⁶ the 100% Rule, the backfilling limitation, and the audit requirements were all implemented solely for legitimate reasons. The Scientific Advisory Committee justified the 100% Rule on the basis that producers

¹⁵ FMI also worked with the National Counsel of Chain Restaurants in an effort to achieve more uniform standards throughout the industry.

¹⁶ Although the defendants assert that published university research demonstrates that these space requirements improve hen productivity and livability, they failed to submit the evidence they cited to substantiate their assertion. *See* Def.s’ Post-Hearing Mem. at 10 (Doc. No. 2007) (citing Defs.’ Ex. 17, Armstrong Dep. 79:21-81:2).

participating in a voluntary certified program should treat all of their birds in an equally humane manner. According to Dr. Armstrong, the Scientific Advisory Committee strongly opposed backfilling. Dr. Armstrong explained that backfilling negatively impacts bird welfare by exposing younger birds to disease-causing pathogens transmitted by older hens and increases social competition and stress. Def.s' Ex. 33, Letter from Jeff Armstrong to Paul Bahan (Oct. 4, 2004). Further, the defendants contend that the audits were simply legitimate initiatives to verify compliance with the guidelines.¹⁷ Finally, the defendants suggest that their non-conspiratorial intentions are demonstrated by the omission of explicit supply reducing restrictions in its guidelines, the voluntary nature of the Certified Program, and continued customer demands for the Certified Program.

Overall, the defendants do present evidence that the implementation of the UEP Guidelines and Certified Program could have been a response to customer demands, and they will be presenting such evidence and arguments to the jury. However, for the purpose of admitting co-conspirator statements, the evidence presented by the DAPs ultimately overcomes the argument now. Mr. Bell's recommendations—that UEP would later act upon—were vehicles by which he urged the producers to reduce egg supply, particularly through implementing cage space restrictions. UEP members supported and participated in this industry-wide supply reducing plan as recommended by Mr. Bell. The evidence can show that it is more likely than not that the

¹⁷ Although the defendants suggest that FMI and the DAPs support the audit program, they again omit the very deposition testimony cited for this proposition. *See* Def.s' Post-Hearing Mem. Memo at 11 (Doc. No. 2007) (citing Ex. 11, Hollingsworth Dep. 99:11-25; 356:22-364:5). Moreover, the defendants suggest that the DAPs' support for the audit program is evidenced by their demands to have audits performed. The DAPs' audit requests could easily—and logically—show that the DAPs sought to fulfill the steps required of them to secure UEP Certification, not because they believed the audits to be legitimate.

defendants acted upon a great opportunity to hide their true supply-reducing motivations under the guise of reacting to public animal welfare concerns.

The defendants' other arguments similarly fail at this juncture. Surely a supply-reducing measure need not label itself as such to reduce supply as intended. Moreover, voluntary participation of UEP members further *substantiates* the conspiracy. The fact that so many producers voluntarily joined the Certified Program—after receiving blatant solicitations that doing so would reduce supply—demonstrates that the producers knowingly joined in on the plan. The Court is satisfied that a preponderance of the evidence demonstrates for the present purposes that UEP's implementation of, and membership participation in, UEP's Certified Program was a part of an overarching conspiracy to reduce supply.

4. *Egg Exports*

The DAPs assert that UEP and its members exported eggs at a loss to reduce the domestic supply of eggs. Through UEP's management, USEM members exported domestic eggs to international markets. Mr. Gregory first urged UEP members in a letter dated February 2000 to participate in an export program “[i]n order to maximize the impact upon the domestic price for eggs.” DAPs' Form. Bind., Letter from UEP to UEP Members (Feb. 1, 2000) (Tab 20). Through its newsletters, UEP similarly urged members to participate in a second export order. Mr. Gregory also linked the exports to other alleged conspiratorial actions by writing to the UEP members:

In order to correct our over-supply problem and return to long-term profits for the industry, we must maintain our supply managements programs of reducing the flock size and reducing out chick hatch placements during 2000. Don't be mislead [sic] by short term price increases as a result of filling export orders. Do not plan your production based upon the potential of exporting large volumes. These export orders are a tremendous benefit but certainly not the final solution to our over-supply problem.

Id.

Conversely, the defendants argue that UEP focused exclusively upon removing surplus eggs from the domestic market, not exporting eggs at a loss.¹⁸ But they do not acknowledge that UEP advertised commitment to export orders to remove domestic eggs as a means “to improve the domestic price.” DAPs’ Form. Bind., United Voices Newsletter at 2 (Mar. 20, 2000) (Tab 21). The defendants also contend that UEP focused on receiving only “short-term benefits” from the exports and that short-term price efforts cannot be linked to a larger, overarching conspiracy. Mr. Gregory’s message quoted above, however, undermines this argument. Although UEP acknowledged the short-term benefits that the export provides, it further called for members to engage in “long-term plans of reducing the nation’s flock size . . . to return to profitable prices.” *Id.* Moreover, the success of a particular conspiratorial action is irrelevant to the larger inquiry into whether the conspiracy existed in the first place. Thus, a preponderance of the evidence similarly shows that USEM exports run managed by UEP were a part of an overarching conspiracy to reduce egg supply as a means to drive up domestic egg prices.

Therefore, the DAPs have sufficiently established the existence of a supply-reducing conspiracy through independent evidence. The admissible individual statements themselves also prove the existence of the conspiracy and are discussed in detail in the attached Appendix.

¹⁸ The defendants also assert that USEM began exporting eggs in 1981, long before the formation of the alleged conspiracy. However, for support they cite to a deposition reference that has nothing to do with the USEM exports. Def.s’ Post-Hearing Mem. at 16 (Doc. No. 2007) (citing Def.s’ Ex. 24a, D. Baker 67:1-22).

C. Whether the Party Against Whom the Statement is Offered is a Member of the Conspiracy¹⁹

The DAPs brought suit against UEP, Rose Acre, and USEM. As previously discussed, the DAPs sufficiently showed UEP's role in the conspiracy for purposes of admitting the co-conspirator statements. For the DAPs to use these statements against Rose Acre and USEM under Rule 801(d)(2)(E), the Court must also find that both Rose Acre and USEM were participants of the same overarching conspiracy to reduce egg supply. *See Weaver*, 507 F.3d at 181. "Many cases hold that a defendant who joins a conspiracy after it has been formed is responsible for statements made by existing co-conspirators prior to that defendant joining the conspiracy, assuming the prior statements were made during and in furtherance of the conspiracy. *United States v. Kemp*, 360 F. Supp. 2d 697, 703 (E.D. Pa. 2005) (citing *United States v. Jackson*, 757 F.2d 1486, 1490 (4th Cir. 1985)).

To participate in a conspiracy, the entity must have "knowledge of the conspiracy's illicit purpose when [it] performs acts which further that illicit purpose." *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) (collecting cases); *see In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734, 769 (E.D. Pa. 2015) (citing *Petruzzi's*, 998 F.2d at 1242-43). "The Supreme Court has explained that a party progresses from mere knowledge of an endeavor to intent to join it when there is informed and interested cooperation, stimulation, instigation. And there is also a stake in the venture which, even if it may not be essential, is not irrelevant to the question of conspiracy." *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 17 (D.C. Cir. 2004) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (quotation marks omitted)); *see In re Magnesium Oxide*

¹⁹ Participation in a conspiracy cannot be shown solely by the alleged co-conspirator statements themselves. Therefore, the Court focuses its analyses here on the evidence presented during, and supplementing, the evidentiary hearing.

Antitrust Litig., No. 10-5943, 2011 WL 5008090, at *17 (D.N.J. 2011)). “Knowledge of all particular aspects, goals, and participants of a conspiracy” is not necessary to establish an entity’s involvement in a conspiracy. *United States v. Adams*, 759 F.2d 1099, 1114 (3d Cir. 1985) (citing *Blumenthal v. United States*, 332 U.S. 539, 558 (1947)); see *Magnesium Oxide*, 2011 WL 5008090, at *17 (D.N.J. Oct. 20, 2011) (noting that a meeting of minds or a conscious commitment to a common scheme “does not require a showing that [the defendant] knew of or participated in every transaction in furtherance of or related to the alleged conspiracy”) (collecting cases). As discussed below, the Court finds that both Rose Acre and USEM had sufficient knowledge of the supply-reducing conspiracy.

1. *Rose Acre*

The Court finds that the DAPs have proven Rose Acre’s participation in this alleged conspiracy by a preponderance of the evidence. As discussed above, participation in trade associations and attending trade association meetings, on their own, do not establish an inference of an alleged co-conspirator’s agreement to the conspiracy. See *Processed Egg Prods.*, 821 F. Supp. 2d at 722. A defendant’s decision to act on the illicit opportunity it discovered through its associations and meeting attendance, however, can show agreement. The Court is satisfied that the DAPs demonstrated Rose Acre’s informed participation in the alleged conspiracy by a preponderance of the evidence.

a. Certified Animal Welfare Program

Rose Acre is the second largest egg producer in the United States. It is family-owned, with Marcus Rust serving as its chief executive officer. Rose Acre is vertically integrated, consisting not only of egg farms, but also including its own chick hatcheries, pullet farms, feed mills, breeding flocks, and egg processing facilities.

Rose Acre joined the UEP in February 2002 and joined the Certified Program in April 2002. Mr. Rust has been an active member of the UEP's Board of Directors since 2002. *See* DAPs' Rose Acre Knowledge Binder (hereinafter DAPs' Rose Acre Know. Bind.), Rust Dep. 220:7-9 (Mar. 5, 2014) (Tab 1) (telling UEP prior to joining that "[Rose Acre] had to be very involved or [it] [wasn't] going to be involved."). Mr. Rust is also a member of the UEP Animal Welfare Committee and Marketing Committee, the latter committee being one in which "[Rose Acre] wanted to make sure [it] [was] involved in every aspect[,] . . . mak[ing] sure [it] knew every part of the function that was going on." DAPs' Rose Acre Know. Bind., Rust Tr. Trans. 201:21-25 (May 11, 2018) (Tab 3). Rose Acre executive Greg Hinton also joined UEP's Marketing Committee. Another Rose Acre executive, Bryan (KY) Hendrix, joined the Producer and UEP Animal Welfare Committee.

Before Rose Acre applied to become a UEP certified producer, Mr. Hendrix wrote Mr. Rust and his family about the animal welfare program and audits:

This kind of reminds me of the 1980s when David Rust was fighting these Marketing Order problems here in America. I don't really know what this whole motive is but I think there is more to it than Animal Welfare. I think some people think it will make them rich or something. I have never been or never will be for quotas an [sic] it seems to me that is somewhat of the path they are taking.

DAPs' Rose Acre Know. Bind., Letter from KY Hendrix to Marcus Rust *et al.* (Mar. 14, 2002) (Tab 4). Less than two weeks later, Mr. Hinton attended an Animal Welfare Committee meeting²⁰

²⁰ At this same meeting, the committee moved to recommend various changes to the audit forms concerning the grade required to pass the audit; the amount of points allotted to the space allowance requirement, beak trimming, molting, handling & transportation; and a phase-in plan.

where the committee voted in favor of recommending the 100% Rule to the Board.²¹ The next day, Lois Rust wrote Mr. Hendrix a handwritten note:

Talked to Marcus last night [about the] UEP guidelines. They are good but we are concerned with the what [sic] looks like, the underlying purpose of the whole thing.

DAPs' Rose Acre Know. Bind, Letter from Lois Rust to KY Hendrix (Mar. 27, 2002) (Tab 7) (emphasis in original). Shortly thereafter, Rose Acre applied to become an "Animal Husbandry Certified Company."²² Rose Acre then participated in the audit program annually from 2003 to 2008.²³

Throughout the years, Mr. Rust and the other Rose Acre executives attended other various UEP Board and committee meetings. The DAPs assert that Rose Acre gained knowledge of UEP's supply-reducing conspiracy in large part through attending these meetings. Over the years, Messrs. Rust, Hendrix, and Hinton attended many meetings where the following topics, albeit among many others, were discussed: the cage space allowance; reconfirmation of the 100% Rule; the implementation of the backfilling prohibition; the establishment of a sub-committee to further develop the Certified Program; and general goals of reducing the nation's flock inventory.

²¹ In addition, Mr. Rust testified that he believes he voted in favor of approving the 100% when it was initially proposed. DAPs' Rose Acre Know. Bind., Rust Dep. 491:1-11 (Mar. 6, 2014) (Tab 2).

²² Rose Acre's application was celebrated by Mr. Gregory boasting—through both a United Voices newsletter and an email sent to Mr. Hendrix—that 100 companies representing the ownership of approximately 155 million layers committed to implementing UEP's guidelines. *See, e.g.*, Email from Gene Gregory to KY Hendrix *et al.* (Apr. 2, 2002) (Tab 10) ("Well we have hit a magic threshold. 100 companies have now filed the Application for Certification. Our total layers is now at about 155 million. They keep coming in.").

²³ The DAPs particularly focus upon Rose Acre's 2008 audit, an audit Rose Acre still passed after receiving 0 out of 10 points for the daily removal of dead, injured, euthanized, and depopulated layers in a humane way and in accordance with the UEP Guidelines.

During one Animal Welfare Committee meeting Mr. Hendrix attended, one opponent to the Certified Program raised concerns that the program is “not free market driven[,] may not be scientifically sound[,] [is] destroying industry production design, technology, and expertise[,] is deceptive and dishonest,” and urged members to eliminate the 100% Rule. DAPs’ Rose Acre Know. Bind., UEP Prod. Comm. for Animal Welfare (Jan. 23, 2006) (Tab 22). Another opponent expressed similar concerns questioning the Scientific Advisory Committee’s makeup and the 100% Rule. Though the Court would not credit silence as indicative of assent for these purposes, in response, Mr. Hendrix spoke in support of the Certified Program.

The DAPs also submit additional inculpatory correspondence. For instance, Mr. Hinton received an email from Mr. Gregory that stated:

The animal care certified program gave us a good roadmap for the future like no supply demand program could have. While it was never intended as a supply demand program it can be a good way to manage our business if we just return to the old days of flock disposal and molt schedules.

DAPs’ Rose Acre Know. Bind., Email from Gene Gregory to Greg Hinton *et al.* (May 6, 2004) (Tab 16). Moreover, John Rust, Marcus Rust’s brother, sent an email to Marcus expressing his view on the Certified Program. At the time John sent his email, he was a Rose Acre shareholder, but not yet an executive. John’s letter stated, in relevant part:

I don’t think we have anything to be ashamed of by putting as many hens per cage as conditions permit as that is doing what is economically right for consumers . . . rather than trying to restrict cage space to boost prices under the alleged agenda of animal rights.

We lose the moral right to argue for the continued right of low cost production costs when we ourselves are manipulating the system under false pretenses.

Def.’s Ex. 56, Email from John Rust to Marcus Rust (Feb. 13, 2008). Marcus defended the cage space requirements, responding:

[W]e have to have a defensible dimension that bears out the numbers so we can prove we are not hurting the bird which something around 63-70 is a very defensible position scientifically and numerically proveable-60 and under is not defensible-higher mortality and less production per chicken—we can defend the 67” and justify pricing to consumer—egg market is not high because of reduced birds but because of economic meltdown we had.

Def.’s Ex. 56, Email from Marcus Rust to John Rust (Feb. 13, 2008).

In response, the defendants argue that Rose Acre joined the Certified Program not to reduce supply but because its customers sought certified eggs.²⁴ The defendants assert that Rose Acre focused on increasing its supply during the alleged conspiracy period. For instance, Rose Acre expanded its layer size by acquiring and improving existing facilities and constructing new facilities, including the large Hyde County facility. Although Rose Acre began planning for this facility before becoming a certified producer, physical construction of the Hyde County facility did not begin until after Rose Acre already joined the Certified Program. The defendants contend that Rose Acre created its expansion plan as a means to offset any potential disruptions in egg supply that customers would experience as a result of implementing the Certified Program.²⁵ After Rose Acre executed its expansion plan, the defendants’ assert that Rose Acre’s layer inventory generally steadily increased annually throughout the alleged conspiracy period. The defendants

²⁴ In making this assertion, the defendants cite to another omitted deposition page. Rose Acre did, however, at least point to evidence to the effect that Walmart and Dutch Farms adjusted their egg prices by \$0.02 as a means of defraying costs associated with Rose Acre’s compliance with the Certified Guidelines. *See* Def. Ex. 50, Hinton Dep 255:8-257:23.

²⁵ Mr. Rust asserted that “[t]he whole design of the [Certified] [P]rogram was to allow a time period for [participants] to replace the housing.” Def.s’ Ex. 38, Rust Dep. 180:3-6.

argue that Rose Acre's supply and facility growth during the alleged conspiracy period evidences that it never joined in on a supply-reducing scheme.²⁶

Overall, the DAPs presented sufficient evidence to substantiate Rose Acre's knowledge of the broader conspiratorial plan to reduce supply for the pending evidence issue. Rose Acre attempts to counteract this evidence with its own documentation that Rose Acre offered "legitimate" rationales for the programs in response to opposition,²⁷ but it also could be that Rose Acre's expansion efforts could be an attempt to cheat the conspiracy it joined in on. On balance, therefore, the DAPs presented sufficient evidence to demonstrate that Rose Acre likely knew that the Certified Program was part of a broader supply-reducing conspiracy.

b. Short-Term Supply Reduction Measures

The DAPs point to Mr. Rust's attendance at both a UEP Board meeting and Marketing Committee conference call concerning the early molting of flocks and disposing of hens. During the conference call, a motion to recommend molting and disposal of spent hens six weeks earlier passed unanimously.²⁸ The defendants point to the fact that Rose Acre never participated in early molting, nor did it vote for the implementation of a proposed 5% flock size reduction between December 1, 2004 and July 1, 2005. However, a co-conspirator need not participate in every action

²⁶ In suggesting that the other egg producers knew of Rose Acre's expansion, Rose Acre cites to Mr. Baker's reference to Rose Acre's expansion as being "[i]n [his] opinion[,] . . . a downer on the market." Def.'s Ex. 24b, Baker Dep. 483:1-14. Although Mr. Baker's opinion alone does not represent the entire egg producer community's knowledge of Rose Acre's expansion, the Court credits it as some evidence of Rose Acre's contention.

²⁷ Nonetheless, a desire to coverup this conspiracy could be represented by Mr. Rust's concerns over the confidentiality of the USEM exports. *See* DAPs' Rose Acre Know. Bind., Email from Marcus Rust to Larry Seger (Aug. 9, 2007) (Tab 33).

²⁸ Mr. Rust suggests his vote against this recommendation was not recorded because he must have accidentally muted his phone during the call. However, Mr. Rust never pointed out any "mistake" in the meeting minutes referencing this vote as being unanimous.

taken in furtherance of the conspiracy. *See Magnesium Oxide*, 2011 WL 5008090, at *17. Although Rose Acre itself did not *act* upon the conspiratorial opportunity of which it was aware through Mr. Rust's attendance, Mr. Rust's attendance can be some evidence of Rose Acre's awareness of the supply-reducing purpose behind the short-term measures.

c. Egg Exports

The DAPs also focus on Rose Acre's involvement in USEM exports in 2007 and 2008. Mr. Rust attended a Marketing Committee meeting where an increase in price as a result of the export was reported. UEP also reported price increases resulting from the exports in a United Voices newsletter, "conclud[ing] that these exports have had a major positive impact upon shell prices and the financial conditions of shell egg producer/markers." DAPs' Rose Acre Know. Bind., United Voices Newsletter at 1 (Feb. 14, 2007) (Tab 31); *see* DAPs' Rose Acre Know. Bind., United Voices Newsletter at 1 (Apr. 27, 2007) (Tab 32).

Additionally, the DAPs highlight Rose Acre's concern over too many people discovering the specific details of the exports. In an email to Larry Steger, Mr. Rust expressed concern over the confidentiality of discussions concerning USEM exports and "issues that would stabilize and possibly influence the market." DAPs' Rose Acre Know. Bind., Email from Marcus Rust to Larry Seger (Aug. 9, 2007) (Tab 33).²⁹

In response, the defendants point out that Rose Acre has been exporting eggs since 1982. The defendants assert that Rose Acre joined USEM at a time when it was producing surplus eggs.³⁰ Mr. Rust testified that Rose Acre shipped only surplus eggs which have no domestic customer and

²⁹ In response, Mr. Seger agreed with Mr. Rust, noting that "a little peddler should not know our details." *Id.*

³⁰ The defendants cite to an omitted page of Mr. Rust's deposition. Def.s' Post-Hearing Mem. at 20 (Doc. No. 2007) (citing Ex. 38, Rust Dep. 128:6-20).

exported eggs only if prices received from exporting were better than what they could sell for in the domestic egg products market. These are arguments Rose Acre can make at trial. However, a preponderance of the evidence can show that Rose Acre more likely than not had knowledge of the coordinated export's role in the broader conspiracy and participated in the coordinated efforts anyway. The admitted co-conspirator statements can therefore be used against Rose Acre.

2. *USEM*

USEM is an entity organized to coordinate egg exports. According to the DAPs, UEP members were urged to join USEM as a means to export their own eggs at a loss. USEM argues that it intended to operate as an export cooperative that coordinated and facilitated exports in times of excess supply, not to join an overarching supply-reducing conspiracy. USEM argues that the DAPs therefore cannot summon sufficient evidence of its knowledge of an overarching conspiracy.

USEM and UEP entered into a renewable management agreement in which UEP agreed “to provide management services and the staff necessary to provide an export program and marketing conference calls for the members of USEM.” DAPs’ USEM Knowledge Documents (hereinafter DAPs’ USEM Know. Docs.), UEP-USEM Management Agreement, Ex. D, § 2. The agreement provides the following language in its Membership section:

Upon execution of this Agreement and during the term hereof, UEP shall solicit its members to become members of USEM for participation in the Export Program and Marketing Conference Calls. As a condition of membership, the applicant (current UEP or USEM member or any other qualified egg producer) must sign a new membership agreement and agree to an export commitment. USEM members shall not be required to pay annual dues providing they are dues paying members of UEP. Any member that is not a UEP member will be required as a condition of membership to pay USEM membership dues equal to those of UEP’s dues rate schedule. Membership dues paid directly to USEM will be received in USEM’s bank account.

Id. at § 5. The agreement otherwise states that both entities are independent Capper-Volstead Cooperatives, that UEP is not an agent of USEM, *Id.* at § 12, and that “UEP shall not participate in or have any responsibility for USEM activities or decisions in connection with its shell egg export or marketing conference call programs,” *id.* at § 9. USEM relies upon this language to suggest that it had no awareness of or participation in any overarching conspiracy orchestrated by UEP.³¹ These provisions, however, do not shield USEM from being knowledgeable (1) that Mr. Gregory encouraged UEP members to join USEM as agreed upon in the UEP-USEM contract, *Id.* at § 5, nor (2) that Mr. Gregory sent a USEM document to USEM members congratulating them for doing what they “intended and that was to improve domestic prices” through accepting an export order, DAPs’ USEM Know. Docs., Ex. H, Letter from Gene Gregory to All USEM Members (Nov. 25, 2002).

Pursuant to the agreement, Mr. Gregory communicated to UEP members in a letter that UEP “assume[d] the management of United States Egg Marketers (USEM) primarily for the purpose of coordinating industry-wide export shipments.” DAPs’ Rose Acre Know. Bind., Ex. E.,

³¹ USEM also urges the Court to treat this relationship similarly to how it treated an alleged relationship between UEP and the United Egg Association (UEA) in a prior ruling. *See generally Processed Egg Prods.*, 821 F. Supp. 2d at 750-55. In this prior ruling, the plaintiffs alleged that Mr. Gregory was the president of both UEP and UEA and that his joint leadership dragged UEA into the conspiracy. Among other things, the plaintiffs unsuccessfully alleged that Mr. Gregory’s joint leadership sufficiently linked his inculpatory writings published in the UEP United Voices newsletters to UEA’s alleged involvement in the conspiracy.

The situation UEA faced is distinguishable from the situation USEM now faces. Unlike USEM, UEA never entered into an agreement with UEP requiring UEP to provide the necessary management services of an export program alleged to be part of the conspiracy. Nor did UEA sign a contract requiring UEP to “solicit [UEP] members” to engage in potentially conspiratorial activities. DAPs’ USEM Know. Docs., UEP-USEM Management Agreement, Ex. D, § 5.

Letter from Gene Gregory to UEP Members (Aug. 29, 2000).³² To stress the importance of becoming a USEM member and committing to coordinated exports, Mr. Gregory explained:

We are hopeful that all UEP members including those not previously committed will recognize the benefit of the industry having a legal means by which we can collectively move eggs from the domestic supply to improve domestic prices.

Id. The attachment included with Mr. Gregory's letter explained that "[t]he intent of taking a large volume export order for a short period of delivery is to reduce the domestic supply and thereby increase the domestic price of eggs." DAPs' Rose Acre Know. Bind., Ex. E., Attach. to Letter from Gene Gregory to UEP Members (Aug. 29, 2000). The attachment explained: "The primary reason to be a supporter of the export effort is to help improve your egg price and thereby create a greater return to your business." *Id.* (emphasis in original); *see also id.* ("A substantial order usually tightens supply and results in a higher market for all eggs sold domestically."). Mr. Gregory stressed that industry-wide involvement is required for the export program to work as intended. *See id.* ("The success of any program is the involvement of the industry and therefore we call upon every egg producer to become involved.").

Through its "United Voices" newsletters, UEP updated its members on the UEP's Export Committee's decisions to reject one and accept two export orders. These newsletters again referenced supply reduction and its effect on prices. In an effort to solicit "[a]ny [UEP] member that is supportive of these initiatives to improve domestic prices through cooperative export efforts," UEP suggested it would not have had to deny one export order if only it had greater support of its members. DAPs' USEM Know. Docs., Ex. F, United Voices Newsletter at 1 (June

³² *See also* DAPs' Rose Acre Know. Bind., Ex. E., Attachment to Letter from Gene Gregory to UEP Members (Aug. 29, 2000) ("Under the management of UEP[,] [UEP] will strive to establish a United States Egg Marketers (USEM) committed shell egg export program for egg producers all across the U.S.").

12, 2000). The other newsletters reported on the approved export orders and commended USEM members that “have done their part to help improve egg prices,” thereby “tak[ing] [the] initiative to not only help themselves but to help the entire industry.” DAPs’ USEM Know. Docs., Ex. J, United Voices Newsletter at 1 (Nov. 4, 2002).

USEM argues that UEP’s solicitations of its own members to join USEM cannot demonstrate USEM’s knowledge of the conspiracy. USEM also argues that the letter Mr. Gregory sent “is a *memorandum on UEP letterhead addressed to UEP Members*” and can therefore only represent UEP’s knowledge. USEM’s Mem. at 4 (emphasis in original). However, the DAPs also present a *memorandum on USEM letterhead addressed to USEM Members* from Mr. Gregory which stated: “Congratulations! You did what you intended and that was to improve domestic prices with your decision to accept the 250-container export order.” DAPs’ USEM Know. Docs., Ex. H, Letter from Gene Gregory to All USEM Members (Nov. 25, 2002). USEM concedes that the document in question is in fact, “a USEM document.” USEM Mem. at 4. This USEM letter, on its own and particularly as supported by the other documents, establishes by a preponderance of the evidence for immediate purposes that USEM knew of the illicit purpose behind its agreement with UEP.

Realizing the inculpatory nature of the USEM letter, USEM reframes its argument. USEM contends that because this USEM document exclusively references only coordinated exports, it cannot show knowledge of a larger conspiracy to reduce supply. This argument misses the mark for two reasons. First, explicit within USEM’s “congratulation” to its members for doing what they “intended”—“to improve domestic prices” through its exports—is its intention to facilitate an overarching effort to reduce domestic egg supply, arguably as a means to raise egg prices. *Id.* Second, USEM’s argument concedes, as it must, that this USEM document—at the very least—

pertains to its coordinated exports. In doing so, USEM neglects the fact that the DAPs need not prove USEM's knowledge of *every* aspect of the common scheme. *See, e.g., Vitamins*, 320 F. Supp. 2d at 15 (“Although Plaintiffs must show that each Defendant had knowledge of an agreement as to the overall conspiracy, they need not show . . . knowledge, on behalf of the Defendant, of every detail of the alleged conspiracy.”); *In re Mercedes-Benz Anti-Trust Litig.*, 157 F. Supp. 2d 355, 375 (D.N.J. 2001) (“That a particular defendant may or may not have joined in a specific overt act in furtherance of the conspiracy . . . does not affect its status as a conspirator.”). This concession—along with the plain language of the letter—inevitably links USEM's role in facilitating the exports to the overall supply-reduction plan.

Finally, USEM suggests that its role in the export prong of the conspiracy cannot be foreseeably linked to the other two prongs of the conspiracy—the short-term measures and Certified Program. USEM's argument relies upon the following exception laid out in *Pinkerton v. United States*: “A defendant may not be held liable for the offenses of his co-conspirators if . . . the substantive offense committed by one of the conspirators ‘could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.’” *United States v. Bailey*, 840 F.3d 99, 112 (3d Cir. 2016) (quoting *Pinkerton v. United States*, 328 U.S. 640, 648 (1946); *see Fattah*, 914 F.3d at 169). The application of this *Pinkerton* exception here requires analyzing whether UEP's and other co-conspirator's actions in facilitating the short-term measures and Certified Program naturally flowed from the overall agreement to reduce egg supply. Both the UEP Certified Program and the short-term measures employed by UEP and its members are entirely foreseeable natural consequences of an agreement to reduce supply—they are in fact *direct means* of attempting to reduce the egg supply.

USEM's argument seemingly focuses on the foreseeability of the specific means taken in furtherance of an overarching conspiracy. But the purpose of this *Pinkerton* exception is to ensure that co-conspirators are not liable for the actions of other co-conspirators that reasonably fall entirely outside of the scope of an overarching conspiratorial goal. The three alleged prongs of the supply-reducing conspiracy seek to achieve the very same goal, albeit through differing means. Therefore, this *Pinkerton* exception is entirely inapplicable here.

Accordingly, the DAPs have established USEM's knowledge of and participation in the broader conspiracy by a preponderance of the evidence for purposes of the Court's consideration of the question of whether the admitted co-conspirator statements can therefore be used against USEM.

D. Whether the Declarant Was a Member of the Conspiracy

To admit a statement under Rule 801(d)(2)(E), the DAPs must prove the declarant was a member of the conspiracy. FED. R. EVID. 801(d)(2)(E). As detailed above, the DAPs have met this burden with regard to UEP, Rose Acre, and USEM.

The DAPs also seek admission of statements made by Cal-Maine Foods, Inc.; Sparboe Farms, Inc.; Mid-West Poultry Services; and Moark, LLC.³³ Admitting statements made by these entities therefore requires determining by a preponderance of the evidence whether they were also members of the co-conspiracy.³⁴ All five entities participated in the Certified Program and

³³ The DAPs also seek to admit a statement made to Tampa Farm Service, Inc. Although whether an addressee is a member of the conspiracy only becomes relevant in some limited circumstances under the "in furtherance" prong, the standard is the same: the DAPs must prove by a preponderance of the evidence that the addressee is a member of the conspiracy.

³⁴ The Court notes that the DAPs submitted various timeline exhibits with its post-hearing memorandum. These timelines were intended to show all five entities' participation and knowledge in the overarching conspiracy. However, the timelines heavily rely upon documents that the DAPs never submitted to the Court for consideration. In making its determination, the

completed the audits required of them through the program.³⁵ All five entities had a representative present at the UEP Annual Board Meeting and Executive Conference Meeting on October 14-15, 1999 and the Board of Directors meeting held on February 24, 2000.

During the October 14-15, 1999 meeting, Marketing Committee Chairman Baker and UEP Chairman Looper “suggested that if the egg industry did not voluntarily adjust the supply side of our business, very quickly, that prices would be at record low figures and all those producing eggs would realize severe financial losses.” DAPs’ Form. Bind., UEP Annual Bd. Meeting and Exec. Conference Minutes (Oct. 14-15, 1999) (Tab 18). Opening the meeting, Mr. Looper stated “that this meeting was extremely important because of so many pressing issues that needed to be addressed including the current supply/demand problem.” *Id.* Similarly, Randy Nelson, a UEP egg trader, presented at the February 24, 2000 Board “urg[ing] everyone to maintain their supply reduction programs” and announcing that a completed export order “had been a tremendous financial benefit for the industry.” DAPs’ Form. Bind., UEP Bd. of Dir. Meeting Minutes (Feb. 24, 2000) (Tab 22). Every entity except Midwest Poultry also attended other various meetings where details concerning both the Certified Program and the short-term measures were discussed. The DAPs show that Midwest Poultry attended meetings concerning only the Certified Program. Because these entities at least participated in the Certified Program, the DAPs have sufficiently shown their knowing involvement in the conspiracy.

Court therefore examines only the documents that the DAPs actually submitted through its “Conspiracy Formation” and “Rose Acre Knowledge” evidentiary submissions.

³⁵ The DAPs show that Cal-Maine, Tampa Farm Service, Mid-West Poultry Services, and Moark, LLC participated in audits from 2003 to 2008. Sparboe stopped completing audits in 2005.

E. Whether the Statements Were Made in the Course of the Conspiracy

To be admissible under Rule 801(d)(2)(E), a statement must have been made during the course of the conspiracy. *See Weaver*, 507 F.3d at 181. The DAPs allege that the conspiracy began on May 15, 2000 and continues through the present. Oral Arg. Tr. 156:3–4, Doc. No. 1972. All but one of the documents the DAPs seek to admit are dated from May 15, 2000 through July 16, 2008, placing them within the course of the conspiracy. One document, Tab 93,³⁶ is undated. However, the statements therein describe various discussions and motions from 2001 and 2002. The Court is satisfied that this document postdates May 15, 2000. Therefore, the Court finds that all the individual statements made in each document the DAPs seek to admit were made during the course of the conspiracy and that prong of admissibility is met.

F. Whether the Statements Were Made in Furtherance of the Conspiracy

To be admissible under Rule 801(d)(2)(E), a statement must have been made in furtherance of the conspiracy. As noted above, the Court has elected to perform a sentence-by-sentence analysis of the disputed co-conspirator statements. Due to the number of statements the DAPs seek to admit, this analysis is extensive. Whether each statement was made in furtherance of the conspiracy is analyzed in an Appendix to this Memorandum.

However, there is one overarching issue the Court will address here related to the “United Voices” newsletters. These newsletters are bi-weekly communications from UEP to its members. These members included Rose Acre, among many others. The DAPs seek to admit these statements on the grounds that they furthered the conspiracy by updating its members as to the status of the conspiracy. Statements explaining the current status of the conspiracy are admissible

³⁶ This “Tab” citation refers to DAPs’ Pre-Hearing Mem., App. A. (Doc. No. 1965-2).

as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” *Weaver*, 507 F.3d at 185 (citing *Ammar*, 714 F.2d at 252).

The defendants argue that the newsletters cannot ever be in furtherance of the conspiracy because they were widely distributed publications that reached beyond co-conspirators or even UEP members broadly. However, they cite no case law to support this narrow reading, and the Court has not uncovered any in its independent research.

The DAPs argue that regardless of the scope of their distribution, the “United Voices” newsletters were UEP’s primary method of communication with its members, and therefore with members of the conspiracy. DAPs’ Post-Hearing Supp. Mem. at 4 n.5 (Doc. No. 2008) (“Q. As the UEP president today, how do you communicate with UEP members? A. Mostly the United Voices Newsletter that goes out every two weeks”) (quoting C. Gregory Dep. At 64:20-23). Although the Court certainly does not find that all UEP members were necessarily members of the conspiracy, the DAPs have established that at least some were. The Court agrees that the “United Voices” newsletters were a form of communication to and among, and between co-conspirators. Although each statement within the “United Voices” newsletters must still be proven to be “in furtherance” of the conspiracy, the Court will not exclude the statements therein on the grounds of who they were made by or made to.

G. Whether the Co-Conspirator Statements are Cumulative and Prejudicial

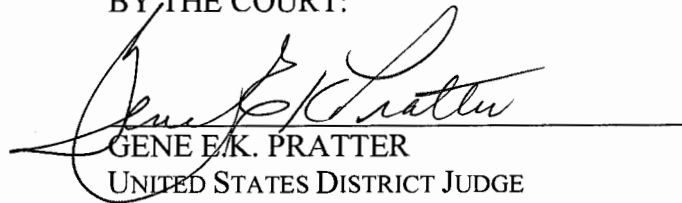
A district court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or needlessly presenting cumulative evidence. FED. R. EVID. 403. The defendants argue that the co-conspirator statements, specifically the “United Voices” newsletters, will result in both and should be limited on those grounds.

The cumulative or prejudicial nature of the statements will turn on how the DAPs seek to use them at trial, which the Court cannot now predict. However, the Court cautions that just because a statement was held in the Appendix to meet the requirements of Rule 801(d)(2)(E) does not mean the Court may not exclude it under Rule 403 if it determines the statements' arguable probative value is being substantially outweighed by prejudice, a decided risk if only because of the cumulative effect of these exhibits.

CONCLUSION

For the foregoing reasons, the Court finds that the DAPs have met their burden to justify potential admission of the disputed co-conspirator statements. An appropriate Order follows.

BY THE COURT:



GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

APPENDIX

Tab	ANALYSIS	
2	Made by/to a Co-Conspirator?	
<p>The DAPs contend that the statements in this document further the conspiracy by prompting and inducing committee members to vote on a motion that would advance plans for cage space allowances.</p>		
<p>Statements of inducement do not need to be made to members of the conspiracy because they are made to encourage <i>new</i> members to join the conspiracy. The same is true of statements prompting action that promotes the conspiracy. <i>See United States v. Maldonado-Rivera</i>, 922 F.2d 934, 958 (2d Cir. 1990) (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).</p>		
<p>Statement made by a co-conspirator? This memo was circulated at a UEP Animal Welfare Producer Committee meeting. The defendants do not challenge the document as not having been made by a co-conspirator. The Court finds that the statements, used to induce Committee members to join the conspiracy, were made by a co-conspirator.</p>		
<p>Statement made to a co-conspirator? Not required.</p>		
Disputed Statements		In Furtherance of the Conspiracy?
<p>1. Over the last 20 years (1980 to 1999), the greatest amount of egg income minus feed and pullet costs were derived from the least space allowance in small cages, but the opposite in larger cages.</p>		<p>This statement can be in furtherance of the conspiracy because it lays the foundation to induce the committee members to implement a uniform cage space rule by tying higher incomes to cage space measurements.</p>
<p>2. Voluntary increases in space allowances by the industry would reduce returns on investment for those participating companies compared to those not participating.</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The statement could be offered to prove that merely intermittent increases in space allowances would financially harm the industry. This can further the conspiracy by inducing the committee members to agree to a uniform rule.</p>
<p>3. Increasing space allowances for the industry can only be justified by individual egg producers if most or all producers participated.</p>		<p>This statement can be in furtherance of the conspiracy because it encourages participation by explaining that increased participation is key to the conspiracy’s success.</p>
<p>5. Increasing space allowances would have two major effects:</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. However, the statement, when read in its surrounding context, could be offered to prove that</p>

	increasing space allowances would have various effects. This statement can be in furtherance of the conspiracy because it encourages participation by describing those effects of increasing space allowances in a positive light.
a) A positioning of the industry as a pro-welfare step.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.
a) A positioning of the industry as a pro-welfare step. This could avoid space allowances being leveled by the government or a third party.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.
b). An increase in space allowance would inevitably reduce the layer population and thereby reduce the surplus production problems affecting the industry over the past 20 years.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. However, the statement could be offered to prove that increasing space allowances would have various effects, thus furthering the conspiracy because it encourages participation by describing those effects of increasing space allowances in a positive light, given the context of other statements that surplus production lowers prices and profits.
1. Do nothing and everything will go away - a) This is not probable considering the welfare activist's recent activities.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
5. Government or welfare association initiated legislation - a). Industry's lack of input c) Requirements may be excessive	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
6. Market forces will solve the problem as buyers will mandate additional space allowances.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.
Unfortunately, they will add more and more limitations as they have in Europe.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.

	<p>Unfortunately, they will add more and more limitations as they have in Europe. This could lead to abolishment of cages, beak trimming, molting, etc.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.</p>
	<p>Uniform application of minimum space requirements within the U.S. would:</p> <ol style="list-style-type: none"> 1. Place all producers on a level playing field 	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because the statement furthers the conspiracy and encourages participation by describing those effects of increasing space allowances in a positive light.</p>
	<ol style="list-style-type: none"> 2. It would be well-received by the public as a "pro-welfare" action 	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.</p>
	<ol style="list-style-type: none"> 3. It would reduce the over-production problem that has plagued the egg industry every 3-5 years. 	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.</p>
<p>4</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by inducing UEP members to commit to a coordinated export program.</p> <p>Statements of inducement do not need to be made to members of the conspiracy because they are made to encourage <i>new</i> members to join the conspiracy. The same is true of statements prompting action that promotes the conspiracy. <i>See United States v. Maldonado-Rivera</i>, 922 F.2d 934, 958 (2d Cir. 1990) (finding that statements that "prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates" the conspiracy are in furtherance of the conspiracy).</p> <p>Statement made by a co-conspirator? Yes, this is a memo circulated from Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Not required.</p>	
	<p style="text-align: center;">Disputed Statements</p> <p>SUBJECT: USEM Membership & Export Commitment</p>	<p style="text-align: center;">In Furtherance of the Conspiracy?</p> <p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>

<p>Effective September 15th UEP will assume the management of United States Egg Marketers (USEM) primarily for the purpose of coordinating industry-wide export shipments.</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join to export program by describing and promoting the exports as coordinated and industry-wide and providing context for the other statements.</p>
<p>Under UEP's management all existing export commitment by current USEM and UEP members will be terminated effective September 15th with the exception of the commitment to fill the 100 container order begin filled between September 15th and October 15th</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by informing them that current options will no longer be available and providing context for the other statements.</p>
<p>It is now imperative that everyone sign a new export commitment by filling out the USEM membership and export commitment form enclosed. We are hopeful that all UEP members including those not</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by describing it as "imperative."</p>
<p>HELP YOURSELF IMPROVE YOUR EGG PRICE.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>REASONS TO BE A PARTICIPANT IN A NATIONAL SHELL EGG EXPORT PROGRAM AND MEMBER OF USEM</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<ul style="list-style-type: none"> The success of any program is the involvement of the industry and therefore we call upon every egg producer to become involved. 	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because the statement could be offered for the truth that the UEP calls upon every egg producer to be involved in the export program. This can be in furtherance of the conspiracy because it induces producers to join the export program.</p>
<ul style="list-style-type: none"> The primary reason to be a supporter of the export effort is to help improve your egg price and thereby create a greater return to your business. 	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by tying the export program to increased prices and profits.</p>
<p>4. Exports on occasions are very helpful, useful and profitable to the U.S. egg producer.</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by tying the export program to increased profits.</p>

	<p>5. Exports remove inventory that may be burdensome to the U.S. market.</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by describing having too much inventory in a negative light.</p>
	<p>6. A substantial export order usually tightens supply and results in a higher market for all eggs sold domestically.</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by tying the export program to increased profits.</p>
	<p>8. Export opportunities normally come when the U.S. has too much supply and prices are low. The export order tightens supply, gives a temporary</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by tying the availability of an export opportunity to the concept of prices being too low.</p>
	<p>and prices are low. The export order tightens supply, gives a temporary boost to egg prices and buys time for the industry to get supply in line with domestic demand.</p>	<p>This statement can be in furtherance of the conspiracy because it induces others to join the export program by tying the export program to increased prices.</p>
	<p>The intent of taking a large volume export order for a short period of delivery is to reduce the domestic supply and thereby increase the domestic price of eggs.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because the statement could be offered for its truth value that the UEP's intent behind the export program is to reduce supply and increase price. This can be in furtherance of the conspiracy because it induces producers to join the export program so they can increase their prices.</p>
<p>6</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating them on the status of the minimum cage space rule and encouraging them to adopt a minimum cage space rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this is a letter from Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Yes, this document was circulated to all UEP members.</p>	
	<p style="text-align: center;">Disputed Statements</p> <p>The scientific recommendations were presented to UEP's Board of Directors for approval. A Producer Committee for Animal Welfare</p>	<p style="text-align: center;">In Furtherance of the Conspiracy?</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the</p>

		status of the conspiracy, specifically that scientific recommendations were presented to the Board of Directors.
	Directors for approval. A Producer Committee for Animal Welfare was formed with these goals in mind.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP formed a Producer Committee for Animal Welfare.
	1. Turn the scientific report into a set of husbandry guidelines for the industry.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the goals of the Producer Committee for Animal Welfare.
	2. Develop a phase-in plan for implementation.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the goals of the Producer Committee for Animal Welfare.
	The Scientific and Producer committee have developed a road map for the future. Recognizing the marketing and political pressure, they were	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the committees have a plan for the future.
	You may want to share a copy of these guidelines with your customers.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
7	Made by/to a Co-Conspirator?	
	<p>The DAPs contend that the statements in this document further the conspiracy by providing a status update on the short-term measures and exports and congratulating the increased price of eggs.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this is a letter from Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Yes, this letter was sent to Dolph Baker of Cal-Maine and Bob Krouse of Midwest Poultry, among others. Cal-Maine and Midwest are co-conspirators.</p>	
	Disputed Statements	In Furtherance of the Conspiracy?
	It has been an unbelievable year!!	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The

	<p>Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.</p>
<p>It has been an unbelievable year!! We began the year forecasting monthly egg prices below each month of the previous year. We</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the following sentences, it updates members as to the status of the conspiracy, specifically that egg prices improved from where they were originally forecasted.</p>
<p>It was those of you serving on the UEP Marketing Committee that made reasonable recommendations of reducing the flock size and reducing the chick hatch. The industry followed your</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior and following sentences, it updates members as to the status of the conspiracy, specifically that actions taken by the UEP Marketing Committee resulted in egg prices improving from original forecasts.</p>
<p>reducing the chick hatch. The industry followed your recommendations and adjustments were made without anyone going broke.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior and following sentences, it updates members as to the status of the conspiracy, specifically that actions taken by the UEP Marketing Committee resulted in egg prices improving from original forecasts.</p>
<p>It was those of you that are United States Egg Marketer (USEM) Members that supported the export efforts during the later part of the year. You helped reduce the domestic</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior and following sentences, it updates members as to the status of the conspiracy, specifically that actions taken by the USEM members resulted in egg prices improving from original forecasts.</p>
<p>the export efforts during the later part of the year. You helped reduce the domestic supply.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior and following sentences, it updates members as to the status of the conspiracy, specifically that actions taken by the USEM members resulted in egg prices improving from original forecasts.</p>
<p>So it is my opinion that you are responsible for this turn around.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees because the statement is an opinion. It is therefore not subject to the hearsay rules.</p>

<p>FINANCIAL IMPACT OF ACTIONS TAKEN BY UEP/USEM TO ADDRESS INDUSTRY ECONOMICS</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>																												
<p>Actions taken by UEP's Marketing, Price Discovery and USEM's Export Committees during the year 2000 have had a dramatic impact upon the financial condition of the shell egg industry.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP and USEM have impacted the industry's financial conditions.</p>																												
<p>Recommendations made by UEP's Marketing Committee to reduce the chick hatch and hen inventory resulted in improved egg prices starting in August.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP's reduction recommendations improved egg prices.</p>																												
<p>Exports being filled by members of USEM resulted in removing surplus eggs from the domestic supply.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that USEM exports removed surplus eggs from supply.</p>																												
<p>WHAT WAS THE IMPACT OF THESE ACTIONS?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>																												
<table border="1"> <thead> <tr> <th></th> <th colspan="3">Northeast Urner Barry Large Quote</th> </tr> <tr> <th>Month</th> <th>1999</th> <th>2000</th> <th>Increase</th> </tr> </thead> <tbody> <tr> <td>August</td> <td>70.9</td> <td>76.0</td> <td>+ 5.1 cents</td> </tr> <tr> <td>September</td> <td>65.9</td> <td>70.4</td> <td>+ 4.5 cents</td> </tr> <tr> <td>October</td> <td>60.0</td> <td>76.4</td> <td>+16.4 cents</td> </tr> <tr> <td>November</td> <td>71.2</td> <td>84.9</td> <td>+13.7 cents</td> </tr> <tr> <td>December</td> <td>68.9</td> <td>95.0 (est)</td> <td>+26.1 cents</td> </tr> </tbody> </table>		Northeast Urner Barry Large Quote			Month	1999	2000	Increase	August	70.9	76.0	+ 5.1 cents	September	65.9	70.4	+ 4.5 cents	October	60.0	76.4	+16.4 cents	November	71.2	84.9	+13.7 cents	December	68.9	95.0 (est)	+26.1 cents	<p>This excerpt is not a statement but a recitation summary from an available published independent source. It is therefore not subject to the hearsay rules.</p>
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<p>11</p>	<p>Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by evidencing Cal-Maine's intent to adhere to the short-term supply restrictions of the conspiracy.</p> <p>"Statements <i>between conspirators</i> which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy." <i>Weaver</i>, 507 F.3d at 182.</p> <p>Statement made by a co-conspirator? Yes, this is a commitment form by Cal-Maine and Cal-Maine is a co-conspirator.</p> <p>Statement made to a co-conspirator? The statement was made to UEP and UEP is a co-conspirator.</p>																												

Disputed Statements	In Furtherance of the Conspiracy?
<p>COMMITMENT TO CHANGE</p>	<p>The Court finds this statement does not assert any truth and the hearsay rules do not apply.</p>
<p>X I agree to reduce my flock size by 5% beginning November 5, 2001 and maintain this for a 6 month period and recognize that I may be required to validate this. (5% reduction can be achieved by selling 4 weeks earlier than normal schedule.)</p>	<p>This statement can be in furtherance of the conspiracy because it reassures a co-conspirator that another co-conspirator will take measures promoting the goals of the conspiracy.</p>
<p>X I agree to delay the hatch of baby chicks placements 4 weeks over a 6 month period beginning November 5, 2001. I further agree to authorize my chick supplies to verify this with UEP. (230 million ÷ 52 = 4.4 x 4 weeks = 17.6 million)</p>	<p>This statement can be in furtherance of the conspiracy because it reassures a co-conspirator that another co-conspirator will take measures promoting the goals of the conspiracy.</p>
<p>DO WE HAVE A PROBLEM?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>UEP's Marketing Committee thinks we have a serious problem.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP's Marketing Committee believes there is a "serious problem."</p>
<p>The following companies have already signed onto the program and their names will be featured in UEP's newsletter. Your company name will be added to this list and shown in</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that companies have already signed onto the program.</p>
<p>12 Made by/to a Co-Conspirator?</p>	
<p>The DAPs contend that the statements in this document further the conspiracy because they are meeting minutes that act as "records" of the conspiracy.</p> <p>The Third Circuit Court of Appeals has not defined "records" as a category of admissible co-conspirator statements. However, such records can inherently "inform [the co-conspirators] of the current status of the conspiracy[.]" <i>Weaver</i>, 507 F.3d at 185, and keep participants in the scheme "abreast of developments to induce their continued participation [in the conspiracy]," <i>United States v. Gibbs</i>, 739 F.2d 838, 846 (3d Cir. 1984). Such notes and records can also be said to be in furtherance of the conspiracy even if not distributed. <i>See United States v. Cerone</i>, 830 F.2d 938, 949 (8th Cir. 1987) (holding that notes documenting "numerous meetings among the conspirators and other events" were in furtherance of the conspiracy).</p> <p>Statement made by a co-conspirator? Yes, these are Gene Gregory of UEP's notes of a Producer Committee Meeting and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Not required.</p>	

Disputed Statements	In Furtherance of the Conspiracy?
Summary of Guidelines for Retail: The committee reviewed the latest version of the guidelines and made numerous changes. The latest revision will now be sent to the committee for final	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
There was considerable discussion about the phase-in timeline and a certification program to identify that producers were participating in the program. The following motions were made:	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
MOTION: It was moved by Bynum and seconded by Kreher to approve a phase-in schedule based on the hatch date of April 1, 2002 for achieving 61 average square inches per hen and a hatch date of October 1, 2003 for achieving 64 average square inches per hen and a hatch date of April 1, 2005 for achieving 67 average square inches per hen.	The defendants argue that this statement is not hearsay because it is a legally operative statement or verbal act. The Court disagrees because the statement can be offered for the truth that these actions occurred. This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
THE MOTION PASSED.	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
Audit Forms: The committee discussed the latest version of an audit form and made a few changes. It was recommended that Gene Gregory meet with Don Bell and Bill Baumgardt	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
changes. It was recommended that Gene Gregory meet with Don Bell and Bill Baumgardt (ARPAS) to get their input.	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
Guidelines For Other Customers: The committee discussed the advisability of sharing the UEP or Retail Guidelines with other customers. The following motion was made:	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
The following motion was made:	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
Meeting with FMI: Pope announced that he would try to set up a meeting with Food Marketing Institute (FMI) the week of December 10 th to present the Summary of UEP Guidelines for Retail.	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
Chairman Krouse appointed members to attend the meeting with Pope and Gregory. Those	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.

	<p>Chairman Krouse appointed members to attend the meeting with Pope and Gregory. Those selected to attend were: Bob Krouse – Garth Sparboe – and Kurt Kreher.</p>	<p>This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.</p>
14	<p>Made by/to a Co-Conspirator?</p>	
<p>The DAPs contend that the statements in this document further the conspiracy by inducing UEP members to increase cage space, reduce the domestic inventory of hens, and increase egg prices.</p>		
<p>Statements of inducement do not need to be made to members of the conspiracy because they are made to encourage <i>new</i> members to join the conspiracy. The same is true of statements prompting action that promotes the conspiracy. <i>See United States v. Maldonado-Rivera</i>, 922 F.2d 934, 958 (2d Cir. 1990) (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).</p>		
<p>Statement made by a co-conspirator? Yes, this is a commentary made by UEP President Al Pope and UEP is a co-conspirator.</p>		
<p>Statement made to a co-conspirator? Not required.</p>		
<p>Disputed Statements</p>		<p>In Furtherance of the Conspiracy?</p>
<p>“What Better Time to Reduce Cage Density and Put Money In Your Pocket!!!</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Give your animal welfare program a jump start by reducing the cage density to meet UEP’s Industry Animal Husbandry Guidelines. This action may be a</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>meet UEP’s Industry Animal Husbandry Guidelines. This action may be a worthwhile option to consider in addition to the Hatch & Molting Plan as recommend by the UEP Marketing Committee.</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>achieved if this option best suits your facilities and marketing plan. If at least 50% of the industry took these actions Producers could make a dollar to two a bird in 2002 instead of the projected losses.....substantial losses at that!!!</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees that this statement is likely being offered to show that UEP was trying to promote coordinated action, not for the truth that producers could make a dollar to two a bird in 2002.</p>

		<p>However, the statement does have truth value, and therefore the Court disagrees that the hearsay rules do not apply without first hearing the DAPs' intended use of the statement. This statement can be in furtherance of the conspiracy because it induces producers to join the conspiracy by tying concerted action to increased profits.</p>
<p>16</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by providing a status update on the audit form for certification.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this is a letter from Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Yes, this letter was sent to Ken Looper of Cal-Maine and Cal-Maine is a co-conspirator.</p>	
	<p style="text-align: center;">Disputed Statements</p> <p>We appreciate all the information you have sent concerning the audit and certification. I've waited to call or reply because of trying to get</p> <p>Based upon what we understood from the recent Board meeting and conversations with members since then, we have taken the chance of writing a certification and audit procedure knowing that we will be subject to considerable criticism. Someone, however, had to take the</p> <p>subject to considerable criticism. Someone, however, had to take the leadership on this critical issue. In writing this, I have sought the edit</p>	<p style="text-align: center;">In Furtherance of the Conspiracy?</p> <p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees that the DAPs are likely not offering the statement for its truth value that UEP appreciates the information it has been sent. However, this statement <i>could</i> be offered for that truth and would be subject to the hearsay rules. If so offered, this statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP appreciates receiving feedback related to measures that will help achieve the conspiracy's goals.</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP has written a certification and audit procedure.</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP has assumed leadership of certification and auditing.</p>

<p>leadership on this critical issue. In writing this, I have sought the edit and opinions of Bob Krouse, Garth Sparboe, and Kurt Kreher (all of which are committee members). They have been very helpful and</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically who has been involved in developing the certification and audit procedure.</p>
<p>which are committee members). They have been very helpful and supportive.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the leadership is cooperative.</p>
<p>In regard to your concern that producers will not be able to meet the guidelines established for molting. Let me first tell you that the</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP members were concerned with meeting the molting guidelines.</p>
<p>guidelines established for molting. Let me first tell you that the scientific committee was opposed to feed withdrawal for inducing a molt. Recognizing all the other inhumane problems that could occur if</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the committee's initial stance on feed withdrawal.</p>
<p>molt. Recognizing all the other inhumane problems that could occur if molting was not allowed, the committee finally gave the industry sufficient time to conduct research into non-feed withdrawal programs.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the industry had time to research non-feed withdrawal programs.</p>
<p>Based upon the research conducted through many years by Don Bell, the committee then made recommendations for molting programs with feed withdrawal. The intent of the recommendations was to return</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the committee made recommendations for molting programs with feed withdrawal based on research.</p>
<p>Please understand that a number of producers have asked me when this issue changed from an animal welfare issue to a supply demand program. In, saying so they are telling me that we should meet all the</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP has been asked when molting changed from an animal welfare issue to a supply issue.</p>
<p>program. In, saying so they are telling me that we should meet all the guidelines, not just the space allowance. So we're trying to listen to all</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that some producers support meeting all guidelines.</p>

<p>We also must be aware of the fact that we need to keep the support of our scientific committee, FMI, NCCR and USDA.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that it is important to the success of the conspiracy to keep the support of certain groups.</p>
<p>Space Allowance (Based Upon House Average) To Meet UEP Welfare Guidelines For White Egg Leghorn Hens</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees. When taken in context with surrounding statements, this statement informs the members of the status of the alleged conspiracy, specifically that there are specific space allowances required to meet the UEP guidelines.</p>
<p>To qualify as a "certified farm", the producer must commit to implementing UEP guidelines based upon the following schedule.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that a producer must commit to implementing the UEP guidelines on a set schedule to be certified.</p>
<p>CERTIFICATION For Eggs Produced By Animal Husbandry Certified Company</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Application For Certification Of Animal Husbandry "Certified Company"</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>The company understands that in order to achieve this certification, it must commit to meeting UEP guidelines on 100% of their egg production facilities.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court agrees because the document the DAPs have offered is unsigned, so no company adopted these statements and they cannot be used for their truth that the company would adhere to these actions. This statement is not subject to the hearsay rules.</p>
<p>The company commits to meeting the space allowance guideline as detailed below:</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court agrees because the document the DAPs have offered is unsigned,</p>

		<p>so no company adopted these statements and they cannot be used for their truth that the company would adhere to these actions. This statement is not subject to the hearsay rules.</p>
	<p>1. All day old chicks hatched after April 1, 2002 will be placed in the layer house based upon a house average of 56 square inches per hen.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court agrees because the document the DAPs have offered is unsigned, so no company adopted these statements and they cannot be used for their truth that the company would adhere to these actions. This statement is not subject to the hearsay rules.</p>
	<p>2. All day old chicks hatched after October 1, 2003 will be placed in the layer house based upon a house average of 59 square inches per hen.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court agrees because the document the DAPs have offered is unsigned, so no company adopted these statements and they cannot be used for their truth that the company would adhere to these actions. This statement is not subject to the hearsay rules.</p>
	<p>3. All day old chicks hatched after April 1, 2005 will be placed in the layer house based upon a house average of 61 square inches per hen.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court agrees because the document the DAPs have offered is unsigned, so no company adopted these statements and they cannot be used for their truth that the company would adhere to these actions. This statement is not subject to the hearsay rules.</p>
	<p>4. All day old chicks hatched after October 1, 2006 will be placed in the layer house based upon a house average of 64 square inches per hen.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court agrees because the document the DAPs have offered is unsigned, so no company adopted these statements and they cannot be used for their truth that the company would adhere to these actions. This statement is not subject to the hearsay rules.</p>
	<p>5. All day old chicks hatched after April 1, 2008 will be placed in the layer house based upon a house average of 67 square inches per hen.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because</p>

	<p>it is a form document. The Court agrees because the document the DAPs have offered is unsigned, so no company adopted these statements and they cannot be used for their truth that the company would adhere to these actions. This statement is not subject to the hearsay rules.</p>
<p>Provide assurance that all records of house identification, square inches of space per hen and results of completed audits are kept in strict confidence.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court disagrees because this portion of the document addresses UEP's promises and this is a UEP document. Therefore, this statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically what UEP will do for producers that apply to be certified.</p>
<p>Provide each company with the UEP Audit Form For Animal Husbandry Guidelines, which is intended for use by independent auditors.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court disagrees because this portion of the document addresses UEP's promises and this is a UEP document. Therefore, this statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically what UEP will do for producers that apply to be certified.</p>
<p>Upon receiving application, which implies a commitment, UEP will provide the company with a provisional <u>Certification Number</u> on a first come, first serve basis starting with the number 101.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court disagrees because this portion of the document addresses UEP's promises and this is a UEP document. Therefore, this statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically what UEP will do for producers that apply to be certified.</p>
<p>Upon receiving application, which implies a commitment, UEP will provide the company with a provisional <u>Certified Processing Plant Number</u> on a first come, first serve basis starting with the number 101-1.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted because it is a form document. The Court disagrees because this portion of the document addresses UEP's promises and this is a UEP document. Therefore,</p>

		<p>this statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically what UEP will do for producers that apply to be certified.</p>
	<p>Housing & Space Allowance:</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>17</p>	<p>Made by/to a Co-Conspirator?</p>	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of getting FMI to endorse the UEP Certified Program.</p>		
<p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p>		
<p>Statement made by a co-conspirator? Yes, this is a letter from Gene Gregory of UEP and UEP is a co-conspirator.</p>		
<p>Statement made to a co-conspirator? Yes, this statement was sent to KY Hendrix of Rose Acre, among others. Rose Acre is a co-conspirator.</p>		
<p>Disputed Statements</p>		<p>In Furtherance of the Conspiracy?</p>
<p>We believe that Food Marketing Institute (FMI) and the National Council of Chain Restaurants (NCCR) met with their animal welfare committee yesterday (2/12).</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because this statement can be offered for the truth that UEP believed this meeting took place. This statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically that this meeting took place, the importance of which is further contextualized with the surrounding statements.</p>
<p>Bob Krouse and Garth Sparboe will be attending this meeting with Al Pope, Ken Klippen and me.</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because this statement can be offered for the truth that these individuals were to attend this meeting. This statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically what course of action is planned to protect the conspiracy.</p>

	<p>We will again point out to FMI and NCCR the importance of working together on a planned phase-in schedule and for them to recommend to their members that the UEP guidelines be the only guidelines they endorse. Otherwise, we will continue to see PETA attacking each company separately such as they</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because this statement can be offered for the truth that this was UEP’s plan to address FMI and NCCR. This statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically what course of action is planned to protect the conspiracy</p>
	<p>they endorse. Otherwise, we will continue to see PETA attacking each company separately such as they have done to McDonalds - Burger King - Wendys - Applebees - Safeway - Domino's - Papa Johns and Little Caesars.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because this statement can be offered for the truth that if UEP does not. This statement can further the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP believes PETA will continue to attack companies if UEP does not take action.</p>
	<p>Wish us luck in our endeavor.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>18</p>	<p>Made by/to a Co-Conspirator?</p>	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>		
<p>Disputed Statements</p>		<p>In Furtherance of the Conspiracy?</p>
<p>“Animal Husbandry ‘Certified Company’”</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>

<p>Based upon a position adopted by UEP's Board of Directors in January a company must commit to meeting UEP guidelines on 100% of their egg production facilities designated for the grocery and/or foodservice trade. The Board will revisit this requirement on or before</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees and finds that this statement is offered for the truth that UEP's Board of Directors adopted a position that companies must meet the guidelines at 100% of their egg production facilities. It can be in furtherance of the conspiracy by providing a status update on the conspiracy to its members.</p>
<p>the grocery and/or foodservice trade. The Board will revisit this requirement on or before UEP's annual meeting in October to determine if the certification will remain as a company status or changed to a house, farm or complex. A number of questions have arisen regarding</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>A total of 29 companies representing the ownership of approximately 62 million laying hens have signed the application with many more expected before April 1st.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how many companies have applied for certification.</p>
<p>What conditions must a company meet in order to achieve the "certified" status?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Until such time that the company has passed an annual audit, the company and egg processing plant will be given a <i>provisional certification number</i> that requires the company to meet a number of qualifications including those listed below:</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the process that a company will undergo in becoming certified.</p>
<p>I. Meet cage space allowance on schedule as identified below:</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>■ All day old chicks hatched after April 1, 2002 will be placed in the layer house based upon a house average of 56 square inches per hen.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>■ All day old chicks hatched after October 1, 2003 will be placed in the layer house based upon a house average of 59 square inches per hen.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>

<p>■ All day old chicks hatched after April 1, 2005 will be placed in the layer house based upon a house average of 61 square inches per hen.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>■ All day old chicks hatched after October 1, 2006 will be placed in the layer house based upon a house average of 64 square inches per hen.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>■ All day old chicks hatched after April 1, 2008 will be placed in the layer house based upon a house average of 67 square inches per hen.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>2. Beginning on July 1, 2002, the company commits to meeting the guideline for beak trimming as each flock reaches the age at which time the trimming will be conducted.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>3. Beginning on July 1, 2002 the company commits to meeting the guideline for molting as each flock reaches the age at which time the molt will be induced.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>4. Beginning on July 1, 2002, the company commits to meeting the guidelines for handling & transportation for both pullets and spent hens as each flock reaches the age at which time this must occur.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>5. The company agrees to be audited annually by a 3rd party independent auditor to confirm that the company is meeting the guidelines.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>6. The company agrees to provide UEP with a copy of the audit results upon the completion of each audit.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>7. The company must recognize that passing the audit is necessary in order to maintain the certification status.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>

19	Made by/to a Co-Conspirator?	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p>		
<p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p>		
<p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>		
Disputed Statements		In Furtherance of the Conspiracy?
<p>The following egg production companies have filed an <i>“Application For Certification”</i> with UEP and have therefore committed to implementing Animal Husbandry Guidelines. By this</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that egg producers have applied for UEP certification.</p>
<p>By this commitment, these companies will begin to phase-in the cage space allowance with chicks hatched after April 1, 2002 and phase-in the guidelines for beak trimming, molting, handling & transportation starting on July 1, 2002.</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the requirements they must meet to become certified.</p>
<p>Provisional certification numbers are now being assigned for each company in the order by which the applications were received. These companies will be authorized to trade eggs</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the conspiracy is moving forward by assigning provisional certification numbers and the order in which those assignments are taking place.</p>
<p>which the applications were received. These companies will be authorized to trade eggs using the provisional certification number until an audit has been conducted at which time a fully certified status will be achieved. The list shown below is in the order by which</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the benefits of being given a provisional certification number. This also induces producers to apply for certification and promote the conspiracy.</p>
<p>fully certified status will be achieved. The list shown below is in the order by which applications were received by the UEP office.</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that egg producers have applied for UEP certification.</p>
<p>1. Wilcox Farms ... 56. Baer Brothers</p>		<p>This document lists 56 separate companies. The reasoning behind each is the same. The listing of each of these 56 companies can advance the conspiracy because it reports the status of the</p>

		<p>conspiracy to other members of the conspiracy, specifically which companies applied to be certified and committed to implementing the Animal Husbandry Guidelines.</p>
	<p>YOU SHOULD IMPLEMENT GUIDELINES</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
	<p>While I'm no economist and therefore look at things in a simple manner, here is an example to consider.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because this statement could be offered for the truth that Gene Gregory is not an economist, that he looks at things in a simple manner, or that the following statements are an example of the impact of implementing UEP guidelines. This statement can be in furtherance of the conspiracy because, when read with the following statements, it encourages producers to implement the guidelines by tying them to increased profits.</p>
	<p>While I'm no economist and therefore look at things in a simple manner, here is an example to consider. A producer with 100,000 layers housed at 53.3 square inches per hen would reduce their flock by 4,800 hens. If this producer currently had</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees. When taken in tandem with the following sentence, these statements are offered for the truth that a producer who adopted the guidelines with 100,000 layers housed at 53.3 square inches per hens would reduce their flock by 4,800 hens, increasing the cost of production 2 cents per dozen. This can further the conspiracy by encouraging producers to implement the guidelines by tying them to increased profits.</p>
	<p>a 40-cent cost of production, the cost would increase to 42-cents per dozen. If this producer currently had</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees. When taken in tandem with the previous sentence, these statements are offered for the truth that a producer who adopted the guidelines with 100,000 layers housed at 53.3 square inches per hens would reduce their flock by</p>

		<p>4,800 hens, increasing the cost of production 2 cents per dozen. This can further the conspiracy by encouraging producers to implement the guidelines by tying them to increased profits.</p>
	<p>What about a complex of multiple houses?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
	<p>a 40-cent cost of production, the cost would increase to 42-cents per dozen. What about a complex of multiple houses? An example could be for a complex of 10 - 100,000 size houses that might only have three (3) houses come due on the schedule for reduction between now and October of this year.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees. When taken in tandem with the following sentence, these statements are offered for the truth that a producer with these conditions would increase their costs 40.57 cents per dozen.</p>
	<p>for reduction between now and October of this year. If this was true, their costs would only increase to 40.57 cents per dozen.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees. When taken in tandem with the previous sentence, these statements are offered for the truth that a producer with these conditions would increase their costs 40.57 cents per dozen.</p>
	<p>If all the industry were to follow the guidelines through the first step this would result in a flock size reduction of 13 million hens. Place your own estimate on how much the egg market will rise if even half this reduction were to occur. So the</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees. This statement can be in furtherance of the conspiracy because, when read with the previous sentences, it informs the members of the status of the conspiracy, specifically how flock size would be reduced if the industry followed the guidelines. It also encourages producers to implement the guidelines by tying them to increased profits.</p>
	<p>Place your own estimate on how much the egg market will rise if even half this reduction were to occur.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
	<p>hens. Place your own estimate on how much the egg market will rise if even half this reduction were to occur. So the payback for making this first step to a "house average" of 56 square inches is tremendous.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees. This statement can be in furtherance of the conspiracy because, when read</p>

		with the previous sentences, it encourages producers to implement the guidelines by tying them to increased profits.
23	Made by/to a Co-Conspirator?	
The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy regarding the fact that a critical mass of producers have signed up for the program.		
Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i> , 507 F.3d at 185 (citing <i>Ammar</i> , 714 F.2d at 252).		
Statement made by a co-conspirator? Yes, these statements were made from Gene Gregory of UEP and UEP is a co-conspirator.		
Statement made to a co-conspirator? These statements were made to various egg producers, including KY Hendrix of Rose Acre. Rose Acre is a co-conspirator.		
Disputed Statements		In Furtherance of the Conspiracy?
Committee Members.		This statement can be in furtherance of the conspiracy because it demonstrates that the communications were made to members of the conspiracy.
Well we have hit a magic threshold.		This statement can be in furtherance of the conspiracy because it informs members of the status of the conspiracy, specifically that the conspiracy is proceeding in a positive manner in terms of hitting “a magic threshold.”
100 companies have now filed the Application for Certification.		This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how many companies have applied to be certified.
Well we have hit a magic threshold. 100 companies have now filed the Application for Certification. Our total layers is now at about 155 million.		This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the number of layers that are impacted by the applications for certification.
They keep coming in.		This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the conspiracy is still progressing.

	Gene	This statement demonstrates that the statements throughout were made by a co-conspirator, a necessary element for admission.
24	Made by/to a Co-Conspirator?	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p>		
<p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p>		
<p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>		
Disputed Statements		In Furtherance of the Conspiracy?
<p>As of April 1st, 100 companies representing the ownership of approximately 155 million layers had made a commitment to implement UEP’s Animal Husbandry Guidelines.</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how many companies have applied to be certified.</p>
<p>The list of companies in the order by which their application was received is shown below:</p>		<p>This statement can be in furtherance of the conspiracy because, when taken in tandem with the list that follows, it informs members of the status of the conspiracy, specifically which companies have applied to be certified and the order in which their applications were received.</p>
<p>Rose Acre Farms</p>		<p>This statement can be in furtherance of the conspiracy because, when taken in tandem with the prior statement, it informs members of the status of the conspiracy, specifically that Rose Acre Farms has applied to be certified.</p>
<p>BOARD ADOPTS WELFARE COMMITTEE RECOMMENDATIONS</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the board adopted committee recommendations.</p>
<p>UEP’s Producer Committee for Animal Welfare met in Chicago on March 26th to finalize their thinking on the audit procedures and audit forms. Additionally, the committee made some recommendations to UEP’s Board of</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the committee met regarding audit procedures and forms.</p>
<p>audit procedures and audit forms. Additionally, the committee made some recommendations to UEP’s Board of Directors via a conference call on April 4th. Those recommendations made and motions passed were:</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the</p>

		<p>status of the conspiracy, specifically that the committee made recommendations to the UEP Board of Directors.</p>
	<p>Those recommendations made and motions passed were:</p>	<p>This statement, when taken in tandem with the following list, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>
	<p>1. Change the meaning of a <u>Certified Company</u> status from 100% of producer/packer facilities to 100% of company facilities regardless of where or how eggs may be marketed.</p>	<p>This statement, when taken with the list's introductory phrase, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>
	<p>2. Assign 200 points to be awarded for all line items of an audit with a passing grade of 140 points required with chicks hatched after April 1, 2000 and 170 points with chicks hatched after October 1, 2003. However,</p>	<p>This statement, when taken with the list's introductory phrase, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>
	<p>with chicks hatched after April 1, 2000 and 170 points with chicks hatched after October 1, 2003. However, failure to meet the cage space allowance will be cause for failure of the audit regardless of the total points achieved.</p>	<p>This statement, when taken with the prior, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that failure to meet cage space allowance results in automatic audit failure.</p>
	<p>3. Any company coming on late in the program with layers housed after August 15, 2002 will need to adjust each flock hatched after April 1, 2002 to meet the space allowance guideline at that time.</p>	<p>This statement, when taken with the list's introductory phrase, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>
	<p>4. Each company should plan their chick placements based upon the company's history of growing livability for achieving the desired number of hens to meet the space allowance guideline at housing of layers. Each</p>	<p>This statement, when taken with the list's introductory phrase, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>

	<p>company would be expected to house no more hens than space allowance guidelines call for. Each</p>	<p>This statement, when taken with the prior, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that companies could only house the number of hens called for by the guidelines.</p>
	<p>5. Development of a welfare seal that may be used on cartons, cases, etc.</p>	<p>This statement, when taken with the list's introductory phrase, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>
	<p>6. That no more eggs may be marketed as certified than those produced by the certified company or purchased from other certified companies.</p>	<p>This statement, when taken with the list's introductory phrase, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>
	<p>7. Work with Uner Barry in the establishment of a market quote for certified eggs.</p>	<p>This statement, when taken with the list's introductory phrase, can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which recommendations were made and motions were passed.</p>
<p>25</p>	<p>Made by/to a Co-Conspirator?</p>	
<p>The DAPs contend that the statements in this document further the conspiracy by inducing new members to join the Certified Program by discussing its economic benefits.</p>		
<p>Statements of inducement do not need to be made to members of the conspiracy because they are made to encourage <i>new</i> members to join the conspiracy. The same is true of statements prompting action that promotes the conspiracy. <i>See United States v. Maldonado-Rivera</i>, 922 F.2d 934, 958 (2d Cir. 1990) (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).</p>		
<p>Statement made by a co-conspirator? Yes, this document was prepared by Don Bell of UEP and UEP is a co-conspirator.</p>		
<p>Statement made to a co-conspirator? Not required.</p>		
<p>Disputed Statements</p>		<p>In Furtherance of the Conspiracy?</p>
<p>Don Bell's Table Egg Layer Flock Projections and Economic Commentary - 2002</p>		<p>The Court does not find this statement induces new members to join the conspiracy, but it does find</p>

		that the statement arguably was made to conduct the business of the conspiracy, that is publicize UEP and the asserted ties between flock sizes and the economy.
	<i>(This report was written by Don Bell, University of California Poultry Specialist, emeritus, under the sponsorship of United Egg Producers)</i>	The Court does not find this statement induces new members to join the conspiracy, but it does find that the statement arguably was made to conduct the business of the conspiracy, that is publicize UEP and the asserted ties between flock sizes and the economy.
	Reducing the nation's average cage density can have numerous positive effects on the income and costs of individual producers and the industry as a whole. This was summarized extensively in our	This statement can be in furtherance of the conspiracy because it induces others to join by tying reducing cage density to increased prices.
	The one factor that was not discussed in detail was the effect of reduced numbers of chickens on U.S. egg prices. After 2+ years of losses, the emphasis must be on reducing the nation's flock size. Even	This statement can be in furtherance of the conspiracy because it induces others to join by explaining that the number of chickens in the country impacts the price of eggs. This is a foundation for the rest of the inducing statements.
	After 2+ years of losses, the emphasis must be on reducing the nation's flock size.	This statement can be in furtherance of the conspiracy because it induces others to join by stating that reducing flock size is the necessary response to years of losses.
	egg prices. After 2+ years of losses, the emphasis must be on reducing the nation's flock size. Even though many producers may not participate in United Egg Producer's animal husbandry guidelines, the more that do, the more the improvement in prices for everyone.	This statement can be in furtherance of the conspiracy because it induces others to join by tying increased participation in the guidelines to increased prices.
	Our analysis of price responses to layer numbers for the 1996 to 2001 period show a 0.69¢/dozen improvement in Mid West Urner-Barrv egg prices for each reduction of one million layers during that time period. This is equivalent to 15¢ per hen/year or \$40 million	This statement can be in furtherance of the conspiracy because it induces others to join by tying the guidelines to increased prices.
	million layers during that time period. This is equivalent to 15¢ per hen/year or \$40 million for the entire industry	This statement, when read in tandem with the prior, can be in furtherance of the conspiracy because it induces others to join by tying the guidelines to increased prices.
26	Made by/to a Co-Conspirator?	
	The DAPs contend that the statements in this document further the conspiracy by concealing the conspiracy.	
	"[S]tatements made for the purpose of concealing a conspiracy can further the conspiracy regardless of whether the addressee is a co-conspirator." <i>Weaver</i> , 507 F.3d at 186.	

<p>Statement made by a co-conspirator? Yes, this is an email from Gene Gregory of UEP and UEP is a co-conspirator.</p>	
<p>Statement made to a co-conspirator? Not required.</p>	
<p>Disputed Statements</p>	<p>In Furtherance of the Conspiracy?</p>
<p>Re: Econ Memo #14</p>	<p>The Court finds this statement does not assert any truth and the hearsay rules do not apply.</p>
<p>Don,</p>	<p>The Court finds this statement can further the conspiracy because it was made to conduct the business of the conspiracy, specifically to communicate from one co-conspirator to another about the following statements.</p>
<p>Can I make a suggest in your Econ Memo # 14.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Can I make a suggest in your Econ Memo # 14. In the second paragraph you mention UEP's cage density reduction proposal. I would prefer that we focus</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the following statements, it establishes the subject of the concealment is the purpose or effect of UEP's cage density reduction proposal.</p>
<p>mention UEP's cage density reduction proposal. I would prefer that we focus upon these changes as being animal husbandry guidelines which results in increase space per hen. I don't want anyone to think of this as a supply</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior and following statements, it establishes that Gene Gregory would like to conceal the supply benefits of the proposal by focusing on animal husbandry.</p>
<p>Increase space per hen. I don't want anyone to think of this as a supply reduction program even though we know the effect will be the same in the short-term.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior statements, it establishes that Gene Gregory would like to conceal the supply benefits of the proposal.</p>
<p>Gene</p>	<p>This statement demonstrates that the statements throughout were made by a co-conspirator, a necessary element for admission.</p>
<p>29</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by inducing UEP members to join the Certified Program.</p> <p>Statements of inducement do not need to be made to members of the conspiracy because they are made to encourage <i>new</i> members to join the conspiracy. The same is true of statements prompting action that promotes the conspiracy. <i>See United States v. Maldonado-Rivera</i>, 922 F.2d</p>

934, 958 (2d Cir. 1990) (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).	
Statement made by a co-conspirator? Yes, this is a memo prepared by Don Bell under the sponsorship of UEP. It can be fairly said to constitute a UEP document.	
Statement made to a co-conspirator? Not required.	
Disputed Statements	In Furtherance of the Conspiracy?
<i>(This report was written by Don Bell, University of California Poultry Specialist, emeritus, under the sponsorship of United Egg Producers)</i>	The Court does not find this statement induces new members to join the conspiracy, but it does find that the statement arguably was made to conduct the business of the conspiracy, that is publicize UEP and the asserted ties between cage density and the economy.
Gene Gregory asked me to include the effects of the industry's potential reduction of cage densities on our projection of egg prices that we provide the industry each month. Our current	The Court finds that this statement can further the conspiracy because it induces others to join by introducing the concept that reducing cage densities has an effect on projected egg prices.
recommendations of the two committees relative to minimum space allowances in cages. As of July 15, UEP has program commitments from 140 egg producers representing 190 million laying hens or 69% of the nation's 275 million laying hens. The program participants have agreed to meet the	The Court finds that this statement can further the conspiracy because it induces others to join by pointing to the large level of participation.
69% of the nation's 275 million laying hens. The program participants have agreed to meet the deadlines shown in Table 1 relative to all new flocks hatched after April 1, 2002. In other words,	The Court finds that this statement can further the conspiracy because, when read with the prior statement, it induces others to join by stating that a large number of producers have committed to certain space allowance deadlines.
average). If the previous flock was housed at 53 square inches, this would represent a 5.7% reduction in chicks purchased for the new flock.	The Court finds that this statement can further the conspiracy because, when read in context, it induces others to join by explaining how committing to the space allowance would reduce the number of chicks purchased for a new flock, which is later tied to increased profits.
At present, the UEP program commitments represent approximately 70% of the nation's laying flock. The net effect of this on the hatch of members is uncertain as only new flocks	The Court finds that this statement can further the conspiracy because it induces others to join by pointing to the large level of participation.
Results	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the

	<p>5. Mid-west Urner Barry egg prices (large, white) averaged 71.0 cents per dozen in 2001.</p> <p>Mid-west Urner Barry egg prices (large, white) averaged 71.0 cents per dozen in 2001. With 100% compliance and no growth, this price would increase to an estimated \$1.147 per dozen in 2010. With only 50% compliance and a 10% growth rate, prices are estimated to average</p> <p>in 2010. With only 50% compliance and a 10% growth rate, prices are estimated to average 77.9 cents per dozen in 2010.</p>	<p>hearsay rules.</p> <p>The Court finds that this statement can further the conspiracy because, when read with the following statements, it induces others to join by tying increased rates of participation to increased profits, and vice versa.</p> <p>The Court finds that this statement can further the conspiracy because, when read with the prior and following statements, it induces others to join by tying increased rates of participation to increased profits, and vice versa.</p> <p>The Court finds that this statement can further the conspiracy because, when read with the prior statements, it induces others to join by tying increased rates of participation to increased profits, and vice versa.</p>
30	Made by/to a Co-Conspirator?	
<p>The DAPs contend that the statements in this document further the conspiracy by congratulating members on their coordinated exports and egg prices.</p> <p>Congratulations are treated as “part of conspirators’ efforts to ‘inform each other as to the progress or status of the conspiracy.’” <i>United States v. Schlesinger</i>, 261 F. App’x 355, 358 (2d Cir. 2008) (quoting <i>United States v. SKW Metals & Alloys, Inc.</i>, 195 F.3d 83, 88 (2d Cir. 1999)). Therefore, like statements explaining the current status of the conspiracy, statements of congratulations are admissible as non-hearsay co-conspirator statements “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this is a memo prepared by Gene Gregory of UEP on USEM letterhead. Both UEP and USEM are co-conspirators.</p> <p>Statement made to a co-conspirator? Yes, this was sent to all USEM members and USEM is a co-conspirator.</p>		
Disputed Statements		In Furtherance of the Conspiracy?
<p>“TO: All USEM Members”</p>		<p>This statement can be in furtherance of the conspiracy because it demonstrates that the communications were made to members of the conspiracy.</p>
<p>SUBJECT: Major Export Benefit</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that there is a benefit to the exports.</p>

	<p>Congratulations!</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
	<p>You did what you intended and that was to improve domestic prices with your decision to accept the 250-container export order.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that domestic prices improved because of exports.</p>
	<p>Umer Barry's Midwest large quote was at 64 cents when we were negotiating this sales.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how pricing changed.</p>
	<p>Immediately prices began to rise and peaked at 88 cents within two weeks and stayed at that level for 23 days through the Friday proceeding Thanksgiving.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how pricing changed.</p>
	<p>On average, for 36 days from October 16 through November 22nd, the market averaged 85.4 cents or 21 cents daily average gain during the period.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how pricing changed.</p>
<p>31</p>	<p>Made by/to a Co-Conspirator?</p>	
	<p>The DAPs contend that the statements in this document further the conspiracy by updating UEP on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? The DAPs claim that this memo was written by Garth Sparboe and that Sparboe is a co-conspirator. The document that the DAPs offer is signed by William Rehm, President and CEO of Daybreak Foods, Inc., not Sparboe. The DAPs do not try to prove that Daybreak is a co-conspirator. Mr. Rehm testified in a deposition that he “believe[s]” it was drafted by somebody at Sparboe. The Court does not find this sufficient evidence to establish that this document was prepared by a member of the conspiracy for the purposes of admission under Rule 801(d)(2)(E).</p> <p>Statement made to a co-conspirator? Yes, UEP is a co-conspirator.</p>	
<p>32</p>	<p>Made by/to a Co-Conspirator?</p>	
	<p>The DAPs contend that the statements in this document further the conspiracy by providing a status update on the cage space rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p>	

<p>Statement made by a co-conspirator? Yes, this is a letter prepared by Gene Gregory of UEP and UEP is a co-conspirator.</p>	
<p>Statement made to a co-conspirator? Yes, this was sent to all Animal Certified companies.</p>	
Disputed Statements	In Furtherance of the Conspiracy?
<p>Animal Care Certified Companies</p>	<p>This statement can be in furtherance of the conspiracy because it demonstrates that the communications were made to members of the conspiracy.</p>
<p>Board Motion: The "house average" space allowance will be permitted for any buildings and equipment purchased or contracted for prior to April 1,2003 and installed by December 31, 2003. Any</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the details of a UEP Board motion relating to space allowances.</p>
<p>for prior to April 1,2003 and installed by December 31, 2003. Any equipment purchased or contracted for or built after these dates must accommodate the placement of hens after August 1,2008 at a minimum of 67 square inches per hen for White leghorns hens and 76 square inches for Brown egg layers.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the details of a UEP Board motion relating to space allowances.</p>
<p>Space Allowance: As you plan your schedule for future hatches, please remember that pullet chicks hatched after October 1, 2003 must be placed in the layer house at a "house average" of 59 square inches for White leghorn hens and 66 square inches for Brown egg layers.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically space allowance requirements.</p>
<p>Cost Recovery: It is disappointing to hear from some of you that your customer is unwilling to pay your increased costs to meet these guidelines. We still recommend that you only put the</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The truth value of this statement is that the UEP is disappointed by these statements. The Court finds this could be in furtherance of the conspiracy by informing the members of the status of the conspiracy, specifically of UEP's disappointment in the current state of affairs.</p>
<p>these guidelines. We still recommend that you only put the Animal Care Certified logo on the cartons of companies willing to pay the costs.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically UEP's suggestion for how to address complaints. This is also in furtherance because it prompts action to support the conspiracy.</p>

	<p>You should not get discouraged.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
	<p>We believe with 225 million hens committed to the program and the trading of AHC (Animal Husbandry Certified) eggs, and the flock reduction that has begun to take effect, egg prices have and will continue to reflect the impact of these welfare guidelines.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically UEP’s belief that egg prices will continue to increase.</p>
<p>33</p>	<p>Made by/to a Co-Conspirator?</p>	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>		
<p>Disputed Statements</p>		<p>In Furtherance of the Conspiracy?</p>
<p>Challenge To 100% Commitment of Welfare Guidelines</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>UEP’s Board policy is that a company must implement UEP’s animal welfare guidelines on 100% of their production facilities regardless of where or how eggs may be marketer in order to be considered as an Animal Care Certified Company.</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the 100% Rule.</p>
<p>A challenge to this 100% commitment was made during UEP’s January board meeting.</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the 100% Rule was challenged.</p>
<p>A special meeting was held on February 12th between representatives of those making the challenge and three members of the Animal Welfare Committee. A compromise was not</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that a meeting was held in response to this challenge.</p>
<p>challenge and three members of the Animal Welfare Committee. A compromise was not achieved. Committee Chairman, Paul Bahan determined that in due respect for the</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the</p>

		status of the conspiracy, specifically that the meeting did not result in a compromise.
	achieved. Committee Chairman, Paul Bahan determined that in due respect for the challenge committee, that they should have the opportunity to present their proposal to the entire Animal Welfare Committee.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the challengers would have the opportunity to present their challenge to the Animal Welfare Committee at large.
	The Animal Welfare Committee met via conference call on February 25 th and concluded that a compromise could not be reached therefore UEP's policy of 100% commitment would stand.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the 100% Rule is still in effect.
34	Made by/to a Co-Conspirator?	
	<p>The DAPs contend that the statements in this document further the conspiracy by updating members on a potential threat to the conspiracy and possible suggestions about how to avoid this threat.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252). Statements prompting action that promotes the conspiracy, however, do not need to be made to a co-conspirator. <i>See Maldonado-Rivera</i>, 922 F.2d at 958 (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).</p> <p>Statement made by/to a co-conspirator? These are emails between Gene Gregory of UEP and, among others, Mike Bynum of Tampa Farms. UEP and Tampa Farms are co-conspirators.</p>	
	Disputed Statements	In Furtherance of the Conspiracy?
	<p>From: Gene Gregory [mailto:gene@unitedegg.com] Sent: Monday, March 03, 2003 9:01 AM To: Paul Bahan; Adele Douglass; Jeff Armstrong; Ken Klippen; Joy Mench Cc: Mike Bynum</p>	This statement can be in furtherance of the conspiracy because it demonstrates that the communications were made to members of the conspiracy.
	I would appreciate each of you reading the speech that I presented at the AMI meeting in Kansas City.	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because the statement can be offered for the truth that Gene Gregory would appreciate these listeners reading his speech. This statement can be in furtherance of the conspiracy because, when read with the following statements, it was made to conduct the business of the conspiracy, specifically to request a review of the

		<p>speech and receive feedback to preserve the conspiracy.</p>
<p>I would appreciate each of you reading the speech that I presented at the AMI meeting in Kansas City. Then please let me know what I said that caused Chet England of Burger King to be so upset that he called Terrie Dort at NCCR and as such cancelled a meeting we had with Terrie and Karen Brown this week.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>	
<p>I am really getting concerned that we not lose our program.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that there is concern regarding the program's continuation.</p>	
<p>I am really getting concerned that we not lose our program. We may have to work with NCCR/FMI some on the auditing aspect. My biggest fear is that we not only lose the auditing function, but that the entire UEP program, which they have</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that its continuation may require working with NCCR and FMI.</p>	
<p>aspect. My biggest fear is that we not only lose the auditing function, but that the entire UEP program, which they have endorse, is supplanted by another program that may be less producer-friendly. Since they represent our customers, and</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the entire UEP program may be at risk.</p>	
<p>In regard to FMI and NCCR, their audit does not require a producer to meet the 100% rule. It only requires a producer to implement</p>	<p>The defendants argue that under Rule 1002, the DAPs must provide the FMI and NCCR audit requirements to establish the truth of the matter asserted in this statement. FED. R. EVID. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."). The Court agrees and finds that these statements are not admissible unless the audit requirements are also offered in an admissible fashion or the statements are offered for some purpose other than their truth.</p>	
<p>In regard to FMI and NCCR, their audit does not require a producer to meet the 100% rule. It only requires a producer to implement guidelines on the number of birds needed to fill each customer's request based upon the number of eggs they purchase. Their audit</p>	<p>The defendants argue that under Rule 1002, the DAPs must provide the FMI and NCCR audit requirements to establish the truth of the matter asserted in this statement. FED. R. EVID. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."). The Court agrees and finds that these statements are not</p>	

	<p>admissible unless the audit requirements are also offered in an admissible fashion or the statements are offered for some purpose other than their truth.</p> <p>guidelines on the number of birds needed to fill each customer's request based upon the number of eggs they purchase. Their audit does not recognize our "house average" space allowance. Their audit has several other things in it that are not in our guidelines. Their</p>	<p>admissible unless the audit requirements are also offered in an admissible fashion or the statements are offered for some purpose other than their truth.</p> <p>The defendants argue that under Rule 1002, the DAPs must provide the FMI and NCCR audit requirements to establish the truth of the matter asserted in this statement. FED. R. EVID. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."). The Court agrees and finds that these statements are not admissible unless the audit requirements are also offered in an admissible fashion or the statements are offered for some purpose other than their truth.</p>
<p>35</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by encouraging Dr. Jeff Armstrong to stop critiquing the audit procedures.</p> <p>Statements prompting action that promotes the conspiracy do not need to be made to a co-conspirator. <i>See Maldonado-Rivera</i>, 922 F.2d at 958 (finding that statements that "prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates" the conspiracy are in furtherance of the conspiracy).</p> <p>Statement made by a co-conspirator? No. This is a letter from Gene Gregory of UEP and UEP is a co-conspirator, however Gene Gregory is expressing his personal position and is not acting or communicating on behalf of the entity UEP. Therefore, the statements were not made by a co-conspirator and are inadmissible.</p> <p>Statement made to a co-conspirator? Not required.</p>	
<p>36</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by providing a status update on the Certified Program and congratulating members on their coordinated exports and egg prices.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but "only if the addressee is also a co-conspirator." <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this document was prepared by Al Pope of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? The DAPs have not offered sufficient evidence for the Court to conclude that the statements were made to a co-conspirator. The document was prepared for the International Egg Commission. The DAPs have explained that "the</p>	

International Egg Commission meeting included 45 members who would do country reviews and that U.S. Egg Producers would also attend these meetings.” Doc. No. 2008 at 22–23 (internal quotations omitted). However, this does not tell the Court which members or producers attended, or if any producers did in fact attend the specific meeting this was prepared for. The Court has made no finding that all egg producers were members of the conspiracy. Therefore, without more specificity regarding attendance, the Court cannot find that these statements were made to a co-conspirator for the purposes of admission under Rule 801(d)(2)(E). The DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.

37 **Made by/to a Co-Conspirator?**

The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.

Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” *Weaver*, 507 F.3d at 185 (citing *Ammar*, 714 F.2d at 252).

Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.

Disputed Statements

In Furtherance of the Conspiracy?

<p>The industry’s 4-year period of depressed egg prices and financial losses began a recovery period in mid-October 2002 that has carried forward through Easter of 2003.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that a period of poor economic conditions was improved.</p>
<p>There are possibly many theories for this recovery, however we believe there are at least four major reasons. They are:</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP attributes the improved economic conditions to four factors.</p>
<p>four major reasons. They are:</p> <ol style="list-style-type: none"> 1. Reduced chick hatch. 2. UEP’s Animal Care Certification Program. 	<p>When read with the prior statement, this statement list can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the reasons the UEP believes economic conditions improved.</p>
<p>The reduced chick hatch began to take place in October 2001 and has resulted in 16 of the past 18 months having smaller hatches than the comparable month a year earlier. By the</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that hatches are getting smaller.</p>
<p>a much smaller flock beginning in the second half of this year. The hatch reduction to meet UEP’s Animal Husbandry Guidelines began in April 2002 and will continue to provide a benefit until the industry begins building houses to replace lost production.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that these smaller hatches are providing a benefit.</p>

	<p>Producers should however, wait until they have evaluated the extent of improved layer performances before determining the additional housing needed to replace lost production.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that they should evaluate their layer performances in determining housing needs.</p>
	<p>We believe the major reason for the <i>Industry's Economic Recovery</i> must be attributed to the USEM export of 550 trailer loads of shell eggs during the period of late October through mid-March. We believe these exports have contributed nearly \$300 Million to</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP attributes economic success to the USEM exports.</p>
	<p>through mid-March. We believe these exports have contributed nearly \$300 Million to the industry recovery.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP attributes \$300 million industry recovery to the USEM exports.</p>
<p>39</p>	<p>Made by/to a Co-Conspirator?</p>	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p>		
<p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p>		
<p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>		
<p>Disputed Statements</p>		<p>In Furtherance of the Conspiracy?</p>
<p>Layer Inventory Shows Promising Sign</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the status of layer inventory is promising.</p>
<p>The May 1st layer inventory of 273.9 million layers was 3.4 million less than the previous month, 1.1 million less than on the same date a year ago and was the lowest monthly inventory since August 2001.</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the status of layer inventory compared to prior months and years.</p>
<p>The hatch reduction, to meet the space allowance guidelines of the Animal Care Certified Program are beginning to show egg market value improvements. This trend should</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that reducing layers is improving the egg market value.</p>

	<p>Program are beginning to show egg market value improvements. This trend should continue.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior sentence, it informs the members of the status of the conspiracy, specifically that UEP expects the improved egg market value to continue.</p>			
	<p>Producers Who Lead the Animal Welfare Movement</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>			
	<p>than animal welfare. Thanks to a group of dedicated producers who have served on UEP's Animal Welfare Committee, they have created the roadmap for an industry that has been the leader among all of animal agriculture in responding to this public issue. The Chairmanship of this committee has been difficult, demanded more time</p>	<p>This statement can be in furtherance of the conspiracy because, when read in context, it informs the members of the status of the conspiracy, specifically that producers have created a roadmap for responding to the public issue of animal welfare.</p>			
	<p>Barrie Wilcox of Wilcox Farms in Roy, Washington was the first Committee Chairman and was very involved with the Scientific Advisory Committee and achieving the endorsement for a set of Animal Husbandry Guidelines by the UEP Board of Directors. Bob Krouse of Midwest Poultry Services in Mentone, Indiana followed and led</p>	<p>The Court does not find that this statement furthers the conspiracy because it provides old information to the conspiracy members and conveys nothing new regarding the status of the conspiracy.</p>			
	<p>by the UEP Board of Directors. Bob Krouse of Midwest Poultry Services in Mentone, Indiana followed and led the committee through the period when the program changed from simply a set of husbandry guidelines to one that required a commitment from producers. Bob also was very involved in gaining the endorsement of FMI and</p>	<p>The Court does not find that this statement furthers the conspiracy because it provides old information to the conspiracy members and conveys nothing new regarding the status of the conspiracy.</p>			
<p>40</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by informing a co-conspirator of another co-conspirator's plan to instruct producers to keep restricting hen supply.</p> <p>"[S]tatements of future intent that set transactions integral to the conspiracy in motion and maintain the information flow among coconspirators meet the 'in furtherance' requirement." <i>United States v. Roberts</i>, 14 F.3d 502, 515 (10th Cir. 1993) (emphasis added).</p> <p>Statement made by a co-conspirator? Yes, this is an email from Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Yes, this email was sent to Ken Looper of Cal-Maine and Don Bell of UEP. Cal-Maine and UEP are co-conspirators.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%; text-align: center;">Disputed Statements</th> <th style="width: 50%; text-align: center;">In Furtherance of the Conspiracy?</th> </tr> </thead> <tbody> <tr> <td data-bbox="163 1386 1325 1495"> <p>It will be my goal over the next year to tell the industry that we need not replace 1 bird for 1 bird to maintain our egg market demand as we reduce hens to meet the animal welfare guidelines.</p> </td> <td data-bbox="1325 1386 2024 1495"> <p>This statement can be in furtherance of the conspiracy because it describes a co-conspirator's future intent to take action promoting the</p> </td> </tr> </tbody> </table>	Disputed Statements	In Furtherance of the Conspiracy?	<p>It will be my goal over the next year to tell the industry that we need not replace 1 bird for 1 bird to maintain our egg market demand as we reduce hens to meet the animal welfare guidelines.</p>	<p>This statement can be in furtherance of the conspiracy because it describes a co-conspirator's future intent to take action promoting the</p>
Disputed Statements	In Furtherance of the Conspiracy?				
<p>It will be my goal over the next year to tell the industry that we need not replace 1 bird for 1 bird to maintain our egg market demand as we reduce hens to meet the animal welfare guidelines.</p>	<p>This statement can be in furtherance of the conspiracy because it describes a co-conspirator's future intent to take action promoting the</p>				

		conspiracy.
	I'm not embarrassed that the industry is now realizing a good profit period and there is nothing wrong with large prices in the mid-80s.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that a co-conspirator approves of the current industry pricing.
	1. Currently, the nation's inventory of table egg layers is at 273 million hens.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the current inventory of layers.
	2. Umer Barry's Midwest Large Quote is in the mid-80's.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the current pricing quote.
	3. Based upon the "house average" space allowance to meet UEP's animal welfare guidelines, the industry will increase space from 53 inches to 67 inches for white leghorn hens over the next 5 years.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the anticipated changes in space allowance.
	4. This "house average" space allowance will therefore result in a flock reduction of 20.4% if new facilities are not built.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the anticipated flock impacts of these space allowances.
	5. Currently 225 million hens (82.4% of the nation's total layers) are committed to UEP's animal welfare program.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how many hens are covered by the animal welfare program.
	With good egg prices, will the industry stay committed?	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
41	Made by/to a Co-Conspirator?	
	The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.	
	Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but "only if the addressee is also a co-conspirator." <i>Weaver</i> , 507 F.3d at 185 (citing <i>Ammar</i> , 714 F.2d at 252).	
	Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.	

Disputed Statements	In Furtherance of the Conspiracy?
<p>Why Are Prices High?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Some retailers and food service customers are asking their egg suppliers why egg prices have risen to levels well above a year ago. Umer Barry's Midwest Large quote on August 22nd was \$1.03 compared to 66 cents on</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that egg suppliers are being asked about increased egg prices.</p>
<p>well above a year ago. Umer Barry's Midwest Large quote on August 22nd was \$1.03 compared to 66 cents on the same date of 2002 and 64 cents on the same date of 2001.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the status of egg prices.</p>
<p>While there may be many factors, the following are likely major reasons for price levels being as they are at this time:</p> <ol style="list-style-type: none"> 1. Industry making adjustments after 3 years of financial loss. 2. Exotic Newcastle disease in Southern California causing the depopulation of more than 3 million hens. 3. Implementing space allowance to meet the industry's Animal Welfare Guidelines. Guidelines that were endorsed by the Food Marketing Institute and the National Council of Chain Restaurants. 	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the factors that the UEP believes are responsible for current pricing.</p>
<p>July 1, 2003 layer counts (272.5 million) were 2.7 million less than last year's count (275.2).</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the status of egg prices.</p>
<p>First of month counts projected for the remainder of 2003, though are currently estimated to be 7.6 million fewer than in 2002 - 272.4 vs 280.0 million - extremely good news.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the status of projected egg prices.</p>
<p>Current year-end expectations (2003) are for 274.6 million hens compared to 281.7 million in 2002.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the status of projected egg prices.</p>
<p>This situation is improving each month.</p>	<p>This statement can be in furtherance of the conspiracy because, when taken with the other statements, it informs the members of the status of the conspiracy, specifically that the pricing projections are continuously improving.</p>

42

Made by/to a Co-Conspirator?

The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy and prompting members to stop backfilling.

Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” *Weaver*, 507 F.3d at 185 (citing *Ammar*, 714 F.2d at 252). Statements prompting action that promotes the conspiracy, however, do not need to be made to a co-conspirator. *See Maldonado-Rivera*, 922 F.2d at 958 (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).

Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.

Disputed Statements

In Furtherance of the Conspiracy?

Don't Screw Up A Good Thing

The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.

Umer Barry's Midwest Large quote averaged \$1.00 per dozen during August and 14.6 cents more during the first eight (8) months than during the same period a year earlier.

This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the status of egg prices.

When considering that the industry has reduced the pullet chick hatch by 14.7 million pullets since April 2002 things were looking promising for a prolonged period of profitability.

This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the status of egg prices.

fowl processor or because of trying to take advantage of high egg prices. It appears that producers may be moving spent hens to houses that were not previously intended for future use, then molting and holding onto a larger flock size. Backfilling of layer houses may also be adding to the increasing layer inventory. It is also assumed that

This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that producers may be taking actions that are increasing the number of layers.

Backfilling of layer houses may also be adding to the increasing layer inventory.

This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that backfilling may be taking place and increasing the number of layers.

One sure way of having poorer egg prices is by increasing egg supplies through holding hens longer and keeping hens that should be disposed. Don't screw up a good thing!!

This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that holding

	<p>Don't screw up a good thing!!</p>	<p>hens longer causes poorer egg prices. The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
43	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by congratulating the Certified Producers on the economic success of the Certified Program.</p> <p>Congratulations are treated as “part of conspirators’ efforts to ‘inform each other as to the progress or status of the conspiracy.’” <i>Schlesinger</i>, 261 F. App’x at 358 (quoting <i>SKW Metals & Alloys</i>, 195 F.3d at 88). Therefore, like statements explaining the current status of the conspiracy, statements of congratulations are admissible as non-hearsay co-conspirator statements “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this memo was prepared by Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? The DAPs have failed to provide sufficient evidence that these statements were made to a co-conspirator. Although they provide one deposition statement as evidence that the statements <i>could</i> have been sent to the Marketing Committee, the Board of Directors, or the general UEP membership, the Court finds that insufficient to hold that these statements were made to a co-conspirator. As such, the DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.</p>	
44	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>	
	<p style="text-align: center;">Disputed Statements</p> <p>Egg Prices At Record Levels</p> <p>Never in my more than 40 years in the egg industry have I ever seen egg prices at the current levels.</p>	<p style="text-align: center;">In Furtherance of the Conspiracy?</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p>

<p>Never in my more than 40 years in the egg industry have I ever seen egg prices at the current levels. We have used 1996 as the benchmark of when times were really good but never anticipated that prices could sustain producer prices above \$1.00 per dozen for any extended period. Large prices for all regions east</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the standards and expectations that UEP had for egg pricing.</p>
<p>sustain producer prices above \$1.00 per dozen for any extended period. Large prices for all regions east of the Rockies have now been above \$1.00 since September 25th and appeared headed for even higher levels.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p>
<p>Just a little over a year ago, Large prices were less than 70 cents per dozen and most of the industry was losing money. Since then many things have contributed to a change in both the supply and demand side</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p>
<p>losing money. Since then many things have contributed to a change in both the supply and demand side of the business. Today, Large prices are more than \$1.20 per dozen and Breaking Stock is being quoted</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that supply and demand have been impacted.</p>
<p>of the business. Today, Large prices are more than \$1.20 per dozen and Breaking Stock is being quoted over 80 cents per dozen. While supply has been reduced slightly, it appears that demand may be far</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p>
<p>greater than anyone can even calculate at this time. Consumers are still buying eggs and we have seen no resistance to price.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the conspiracy is safe from consumers resisting price or not buying eggs in the face of increased prices.</p>
<p>As we enter the holiday season the demand will likely become more aggressive and prices will likely go even higher. With the increasing demand, increasing population and the continued phase-in of cage space</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p>
<p>even higher. With the increasing demand, increasing population and the continued phase-in of cage space to meet the industry's animal welfare guidelines, prices are likely to continue at levels far above the past few years.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p>

45	Made by/to a Co-Conspirator?	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this memo was prepared by Don Bell of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Yes, this memo was emailed to Al Pope and Gene Gregory, both of UEP, and UEP is a co-conspirator.</p>		
Disputed Statements		In Furtherance of the Conspiracy?
<p><i>(This report was written by Don Bell, University of California Poultry Specialist, emeritus, under the sponsorship of United Egg Producers)</i></p>		<p>The Court does not find this statement updates members about the status of the conspiracy, but it does find that the statement was apparently made to conduct the business of the conspiracy, that is publicize UEP and the asserted ties between UEP measures and improvements to the industry economy.</p>
<p>What a Difference a Year Makes !</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>I've always found it to be of immense interest the rate at which the egg industry gets itself into and out of trouble – when it needs to. Could the industry have withstood another negative income year</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules. It also does not further the conspiracy because it conveys no new information to the listeners regarding the status of the conspiracy.</p>
<p>We are all aware of the extremely high (record high) egg prices that occurred in late November/early December of 2003. Annual egg price increases between 2002 and 2003 were estimated by the</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules. It also does not further the conspiracy because it conveys no new information to the listeners regarding the status of the conspiracy.</p>
<p>Annual egg price increases between 2002 and 2003</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the</p>

	<p>Consumer prices of less than \$1 per dozen may have become a thing of the past. Annual retail prices for 2003 were reported to be \$1.25 per dozen for the year and \$1.55 for December for the U.S.</p> <p>Regardless of the causes, the industry would be wise to attempt to duplicate these conditions in the future. The result was:</p> <p>future. The result was:</p> <p>- a huge improvement in industry revenue of ONE BILLION DOLLARS (or more) !! -</p>	<p>hearsay rules.</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding the status of egg prices.</p> <p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically regarding industry revenue.</p>						
46	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by prompting various egg producers to adopt additional short-term measures.</p> <p>Statements prompting action that promotes the conspiracy do not need to be made to a co-conspirator. <i>See Maldonado-Rivera</i>, 922 F.2d at 958 (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).</p> <p>Statement made by a co-conspirator? Yes, this is an email from Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Not required.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th data-bbox="163 995 1325 1036" style="text-align: center;">Disputed Statements</th> <th data-bbox="1325 995 2024 1036" style="text-align: center;">In Furtherance of the Conspiracy?</th> </tr> </thead> <tbody> <tr> <td data-bbox="163 1036 1325 1255"> <p>The animal care certified program gave us a good roadmap for the future like no supply demand program could have. While it was never intended as a</p> </td> <td data-bbox="1325 1036 2024 1255"> <p>This statement can be in furtherance of the conspiracy because, when read with the following sentence, it prompts the listener to use the animal care certified program to promote the conspiracy’s goals should the industry revert to former flock disposal and molt schedule practices.</p> </td> </tr> <tr> <td data-bbox="163 1255 1325 1472"> <p>no supply demand program could have. While it was never intended as a supply demand program it can be a good way to manage our business if we just return to the old days of flock disposal and molt schedules.</p> </td> <td data-bbox="1325 1255 2024 1472"> <p>This statement can be in furtherance of the conspiracy because, when read with the prior sentence, it prompts the listener to use the animal care certified program to promote the conspiracy’s goals should the industry revert to former flock disposal and molt schedule practices.</p> </td> </tr> </tbody> </table>		Disputed Statements	In Furtherance of the Conspiracy?	<p>The animal care certified program gave us a good roadmap for the future like no supply demand program could have. While it was never intended as a</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the following sentence, it prompts the listener to use the animal care certified program to promote the conspiracy’s goals should the industry revert to former flock disposal and molt schedule practices.</p>	<p>no supply demand program could have. While it was never intended as a supply demand program it can be a good way to manage our business if we just return to the old days of flock disposal and molt schedules.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior sentence, it prompts the listener to use the animal care certified program to promote the conspiracy’s goals should the industry revert to former flock disposal and molt schedule practices.</p>
Disputed Statements	In Furtherance of the Conspiracy?							
<p>The animal care certified program gave us a good roadmap for the future like no supply demand program could have. While it was never intended as a</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the following sentence, it prompts the listener to use the animal care certified program to promote the conspiracy’s goals should the industry revert to former flock disposal and molt schedule practices.</p>							
<p>no supply demand program could have. While it was never intended as a supply demand program it can be a good way to manage our business if we just return to the old days of flock disposal and molt schedules.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior sentence, it prompts the listener to use the animal care certified program to promote the conspiracy’s goals should the industry revert to former flock disposal and molt schedule practices.</p>							

48

Made by/to a Co-Conspirator?

The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.

Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” *Weaver*, 507 F.3d at 185 (citing *Ammar*, 714 F.2d at 252).

Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.

Disputed Statements

In Furtherance of the Conspiracy?

Are You Committed

The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.

think are important. Some have even said that I sound like a Baptist preacher. So today I'm asking are you committed? Are you committed to implementing and staying true to the Animal Care Certified program? Are you

The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.

? Are you committed to implementing and staying true to the Animal Care Certified program?

The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.

committed? Are you committed to implementing and staying true to the Animal Care Certified program? Are you committed to doing the things to make your company profitable? If you are committed, then it is time for you to

The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.

committed to doing the things to make your company profitable? If you are committed, then it is time for you to take a serious look at current events.

This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that there have been happenings that are important to note if the reader is committed to the success of the conspiracy.

While never intended as a supply adjustment program, the Animal Care Certified program is the only roadmap the industry has ever had for future planning. If you stay true to the program and manage it to meet the market

This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the Animal Care Certified program can be used for future planning.

<p>industry has ever had for future planning. If you stay true to the program and manage it to meet the market demand, it can provide the industry with prolonged profits. For many people, back filling to replace mortality was a</p>	<p>The DAPs argue that this statement is in furtherance of the conspiracy because it updates the members on the status of the conspiracy. The Court finds that this statement can be in furtherance of the conspiracy, but because it prompts the listener to stay true to the program, promoting the goals of the conspiracy.</p>
<p>demand, it can provide the industry with prolonged profits. For many people, back filling to replace mortality was a new production practice and maybe necessary to maximize profits but it is now time to rethink this position. Back</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that backfilling needs to be reevaluated.</p>
<p>new production practice and maybe necessary to maximize profits but it is now time to rethink this position. Back filling into unprofitable periods certainly doesn't make good business sense.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that backfilling may not be a good business practice.</p>
<p>UEP Chairman Roger Deffner in opening comments to the Board of Directors in Washington, D.C. made the following comments in regard to the Animal Care Certified program: "UEP's Board must remain disciplined in our focus to attain goals of the Animal Care Certified program. We must remain disciplined in maintaining the integrity</p>	<p>The defendants argue that this statement is inadmissible hearsay within hearsay when offered for the truth of Roger Deffner's statements. The Court disagrees. Mr. Deffner was a UEP Chairman and therefore his statements constitute those of a co-conspirator. He is prompting the Board of Directors to take actions promoting the goals of the conspiracy. Therefore, his statements are also admissible as co-conspirator statements and are not impermissible hearsay within hearsay.</p>
<p>focus to attain goals of the Animal Care Certified program. We must remain disciplined in maintaining the integrity of the program and must remain disciplined in our support of the Scientific Committee. We must remain disciplined</p>	<p>The defendants argue that this statement is inadmissible hearsay within hearsay when offered for the truth of Roger Deffner's statements. The Court disagrees. Mr. Deffner was a UEP Chairman and therefore his statements constitute those of a co-conspirator. He is prompting the Board of Directors to take actions promoting the goals of the conspiracy. Therefore, his statements are also admissible as co-conspirator statements and are not impermissible hearsay within hearsay.</p>
<p>of the program and must remain disciplined in our support of the Scientific Committee. We must remain disciplined in maintaining the confidence of government agencies and FMI."</p>	<p>The defendants argue that this statement is inadmissible hearsay within hearsay when offered for the truth of Roger Deffner's statements. The</p>

		<p>Court disagrees. Mr. Deffner was a UEP Chairman and therefore his statements constitute those of a co-conspirator. He is prompting the Board of Directors to take actions promoting the goals of the conspiracy. Therefore, his statements are also admissible as co-conspirator statements and are not impermissible hearsay within hearsay.</p>
	<p>The industry built an egg inventory prior to Easter expecting increasing demand.</p>	<p>The DAPs argue that this statement is in furtherance of the conspiracy because it updates the members on the status of the conspiracy. The Court finds that this statement can be in furtherance of the conspiracy, but because it prompts the listener, when read with the following statements, to be wary of large inventory, promoting the goals of the conspiracy.</p>
	<p>The industry built an egg inventory prior to Easter expecting increasing demand. The inventory was far too large, demand was far less than expected, and we began <u>panic</u> selling to rid ourselves of the inventory. We caused the</p>	<p>The DAPs argue that this statement is in furtherance of the conspiracy because it updates the members on the status of the conspiracy. The Court finds that this statement can be in furtherance of the conspiracy, but because it prompts the listener, when read with the surrounding statements, to be wary of large inventory, promoting the goals of the conspiracy.</p>
	<p>demand was far less than expected, and we began <u>panic</u> selling to rid ourselves of the inventory. We caused the market to free-fall in all regions by as much as 60 cents or more.</p>	<p>The DAPs argue that this statement is in furtherance of the conspiracy because it updates the members on the status of the conspiracy. The Court finds that this statement can be in furtherance of the conspiracy, but because it prompts the listener, when read with the previous statements, to be wary of large inventory, promoting the goals of the conspiracy.</p>
<p>49</p>	<p>Made by/to a Co-Conspirator?</p>	
	<p>The DAPs contend that the statements in this document further the conspiracy by suggesting the Chairman of the Board of Directors of UEP should encourage producers to maintain the Certified Program and induce others to join.</p> <p>Statements prompting action that promotes the conspiracy do not need to be made to a co-conspirator. <i>See Maldonado-Rivera</i>, 922 F.2d at 958 (finding that statements that “prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates” the conspiracy are in furtherance of the conspiracy).</p>	

Statement made by a co-conspirator? Yes, this is a memo from Al Pope of UEP and UEP is a co-conspirator.	
Statement made to a co-conspirator? Not required.	
Disputed Statements	In Furtherance of the Conspiracy?
UEP is at a critical point on a number of issues.	This statement can be in furtherance of the conspiracy because it prompts action promoting the conspiracy by emphasizing the critical nature of the situation, which could increase the likelihood that a listener would take action.
UEP is at a critical point on a number of issues. Your attendance at the Area Meetings and sharing the "Producer Board Chairman" voice on these issues is crucial and would be of significant importance. Some of these issues are as	This statement can be in furtherance of the conspiracy because it prompts action promoting the conspiracy by encouraging attendance at events and increased advocacy on the issues of concern to the conspiracy.
<ul style="list-style-type: none"> Industry Economics: Despite warnings, projections are that the flocks will increase by 10 – 12 million by year-end to an all time high of 290 million layers. Profitability is being jeopardized at a time when 	This statement can be in furtherance of the conspiracy because it focuses on threats to the conspiracy to prompt the listener to take action promoting and protecting the conspiracy.
<ul style="list-style-type: none"> Animal Care: "Staying the Course" increasing pressures will challenge the industry's "grit" to maintain the most successful UEP/Industry program EVER!! We need to urge <u>all</u> Producers 	This statement can be in furtherance of the conspiracy because it focuses on challenges to the conspiracy to prompt the listener to take action promoting and protecting the conspiracy.
UEP/Industry program EVER!! We need to urge <u>all</u> Producers to participate in this program. The "hold-outs" have "held-out" long	This statement can be in furtherance of the conspiracy because it encourages the listener to urge others to join the conspiracy, prompting action promoting the conspiracy.
participate in this program. The "hold-outs" have "held-out" long enough. We also need to do a better job of informing consumers of	This statement can be in furtherance of the conspiracy because it encourages the listener to urge others to join the conspiracy by emphasizing the prior statement, prompting action promoting the conspiracy.
enough. We also need to do a better job of informing consumers of the "Animal Care" seal.	This statement can be in furtherance of the conspiracy because it encourages the listener to inform consumers about the seal, prompting action promoting the conspiracy.

50	Made by/to a Co-Conspirator?	
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>		
Disputed Statements		In Furtherance of the Conspiracy?
<p>Egg Price Below Costs of Production</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that egg prices are lower than the cost of production.</p>
<p>How could we in a matter of just 22 weeks (see the graph) create a situation where egg prices have declined by more than 60 cents per dozen? Is it time for every egg producer</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>prices have declined by more than 60 cents per dozen? Is it time for every egg producer to take a serious look at their supply demand conditions? Why continue producing</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>to take a serious look at their supply demand conditions? Why continue producing surplus eggs or discounting them to find a market?</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Backfilling -- A Loophole of a Hangman's Noose? Editorial by: Al Pope</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Whose program is it anyway, this UEP Animal Care Certified program?</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>Whose program is it anyway, this UEP Animal Care Certified program? It's not really UEP's per se, and certainly not UEP's staff. No, the program belongs to those of you who are participating in the program. You decide how</p>		<p>This statement can be in furtherance of the conspiracy because, when read with the following sentence, it informs the members of the status of the conspiracy, specifically that it is not UEP's</p>

<p>No, the program belongs to those of you who are participating in the program.</p>	<p>alone but belongs to all members who participate. This statement can be in furtherance of the conspiracy because, when read with the prior sentence, it informs the members of the status of the conspiracy, specifically that it is not UEP's alone but belongs to all members who participate.</p>
<p>not UEP's staff. No, the program belongs to those of you who are participating in the program. You decide how the program operates.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that its members determine how it operates.</p>
<p>In this regard, the original intent of permitting Animal Care Certified companies to backfill was to accommodate those few extra, unexpected pullets from grow-out facilities. This option would avoid the destruction and waste of</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the intent behind permitting backfilling.</p>
<p>those few extra, unexpected pullets from grow-out facilities. This option would avoid the destruction and waste of what otherwise was a "productive bird". After hearing your concerns, the Animal Welfare Committee in May</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior statement, it informs the members of the status of the conspiracy, specifically what permitting backfilling would accomplish.</p>
<p>what otherwise was a "productive bird". After hearing your concerns, the Animal Welfare Committee in May 2003 changed the policy to allow for backfilling at any time with any age bird so long as the "house average" space allowance requirement was not exceeded.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the backfilling policy was changed following concerns from UEP members.</p>
<p>A year later, and while the ACC program was never a supply management program, the "backfill" provision (in my opinion) is contributing or even causing some of the disorderly marketing and poor egg prices that we are currently experiencing. Have we shot ourselves in the foot with this well intended provision? Is it a "noose"</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP believes the backfill provision is contributing to poor prices.</p>
<p>Have we shot ourselves in the foot with this well intended provision?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>currently experiencing. Have we shot ourselves in the foot with this well intended provision? Is it a "noose" that is "strangling" the opportunity of enjoying, once again, the favorable prices for our product we expected this fall?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>

	<p>It is your program. Once again, the Area Meetings are approaching and "your voice counts". It is one person's opinion but I do think you should eliminate or severely limit any "backfill" provisions and return to the favorable market conditions we enjoyed this past spring.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP urges that backfilling provisions should be eliminated or severely limited. This could also be fairly said to be in furtherance of the conspiracy by prompting action to promote the goal of increased prices.</p>
<p>52</p>	<p>Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but "only if the addressee is also a co-conspirator." <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>	
<p>Disputed Statements</p>		<p>In Furtherance of the Conspiracy?</p>
<p>Largest Attendance Ever For UEP Meeting</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that a UEP meeting had record attendance.</p>
<p>UEP's Annual Board Meeting & Executive Conference held in New Orleans drew an attendance of 330 people, which included representatives from 59 egg production companies with ownership of 185 million layers, representatives from 39 of the UEA Allied member companies, plus several UEA Further Processor and UEA Producer Packer companies.</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that a UEP meeting had record attendance.</p>
<p>The issue on most everyone's mind was the industry's current economic conditions.</p>		<p>The Court finds this statement does not assert any truth and the hearsay rules do not apply.</p>
<p>acceptable for profitable prices. The Board approved the following plan of action: <i>Hens currently scheduled for disposal between December 1, 2004 and July 1, 2005 must be disposed of four (4) weeks early or reduce your flock size by 5%.</i></p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically what plan the Board approved.</p>
<p>When asked if the members would be receptive to attending an "Economic Summit" for the purpose of evaluating both the supply and demand side of our business, there was a resounding "yes" response. Chairman Roger Deffner</p>		<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP members are receptive to attending an economic summit.</p>

	<p>both the supply and demand side of our business, there was a resounding "yes" response. Chairman Roger Deffner and Marketing Committee Chairman Dolph Baker have now scheduled this "Summit" for November 16th in Atlanta but will limit the attendance to only UEP members.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the logistical details for this summit.</p>
	<p>The subject of backfilling cages was a point of great discussion among all attendees.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that backfilling was discussed a lot.</p>
	<p>The subject of backfilling cages was a point of great discussion among all attendees. The Animal Welfare Committee took up this discussion but could not develop a recommendation for the Board. Because of the</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior statement, it informs the members of the status of the conspiracy, specifically that the Animal Welfare Committee did not make a recommendation on backfilling to the Board.</p>
	<p>Committee took up this discussion but could not develop a recommendation for the Board. Because of the importance of the issue, the committee will meet again in December for further discussions as well as to consider feeder space research projects, guidelines for cage-free production, who may market Animal Care Certified eggs, and other unresolved issues.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the Animal Welfare Committee will have another meeting to consider backfilling as well as other issues.</p>

54 **Made by/to a Co-Conspirator?**

The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.

Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” *Weaver*, 507 F.3d at 185 (citing *Ammar*, 714 F.2d at 252).

Statement made by a co-conspirator? Yes, this is a presentation by Gene Gregory of UEP and UEP is a co-conspirator.

Statement made to a co-conspirator? The DAPs have failed to provide sufficient evidence that these statements were made to a co-conspirator. They offer only that Gene Gregory testified that he *may* have presented all these slides at a summit where UEP members were in attendance. They do not attach his relevant deposition testimony. The DAPs do not sufficiently evidence that Mr. Gregory *did* present all the slides, let alone any of the slides. Therefore, the Court finds DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.

55 **Made by/to a Co-Conspirator?**

The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.

Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” *Weaver*, 507 F.3d at 185 (citing *Ammar*, 714 F.2d at 252).

<p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>				
<p>Disputed Statements</p>	<p>In Furtherance of the Conspiracy?</p>			
<p>The "economic summit" exposed a bleak picture of the supply side of the business.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that there is a bleak side to business's current supply.</p>			
<p>The "economic summit" exposed a bleak picture of the supply side of the business. With pullets currently in growing houses, we now can predict a layer flock of 13 million more hens in April 2005 than at the same month of 2004 if we do not find ways to dispose of older hens and increase the cull rate. If the hatch of 2005 is the same as</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that supply is predicted to increase.</p>			
<p>Option # 1 To dispose of hens that are currently scheduled for disposal between January 1 and April 30, 2005 four (4) weeks earlier than previously scheduled.</p>	<p>When read in context, this statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that this recommendation may be implemented by producers.</p>			
<p>Option # 2 To reduce their December 1, 2004 flock size by 5% between the dates of January 1 through April 30, 2005.</p>	<p>When read in context, this statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that this recommendation may be implemented by producers.</p>			
<p>Companies making their intentions known during the meeting were:</p> <table style="width: 100%; border: none;"> <tr> <td style="vertical-align: top;"> <p>Creighton Bros. Braswell Foods Mahard Egg Farms Tampa Farm Service Green Forest Egg Co. Feather Crest Farms Wilcox Farms Sunrise Farms of CA IVA, Inc. National Foods Corp.</p> </td> <td style="vertical-align: top;"> <p>Cal-Maine Foody American Egg Products Pearl Valley Eggs ISE Newberry Hillandale Farms of FL Kreher's Poultry Farm Mourk LLC Ohio Fresh Eggs Pilgrim's Pride</p> </td> <td style="vertical-align: top;"> <p>Fort Recovery Equity Crystal Farms Merrill's Egg Farms Randy Nelson Ventures Hillandale Farms of PA United Egg Marketing Corp. Berne Hi-Way Hatchery Hickman's Eggs Mid-west Poultry Services</p> </td> </tr> </table>	<p>Creighton Bros. Braswell Foods Mahard Egg Farms Tampa Farm Service Green Forest Egg Co. Feather Crest Farms Wilcox Farms Sunrise Farms of CA IVA, Inc. National Foods Corp.</p>	<p>Cal-Maine Foody American Egg Products Pearl Valley Eggs ISE Newberry Hillandale Farms of FL Kreher's Poultry Farm Mourk LLC Ohio Fresh Eggs Pilgrim's Pride</p>	<p>Fort Recovery Equity Crystal Farms Merrill's Egg Farms Randy Nelson Ventures Hillandale Farms of PA United Egg Marketing Corp. Berne Hi-Way Hatchery Hickman's Eggs Mid-west Poultry Services</p>	<p>This statement list can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically which companies participated in the meeting.</p>
<p>Creighton Bros. Braswell Foods Mahard Egg Farms Tampa Farm Service Green Forest Egg Co. Feather Crest Farms Wilcox Farms Sunrise Farms of CA IVA, Inc. National Foods Corp.</p>	<p>Cal-Maine Foody American Egg Products Pearl Valley Eggs ISE Newberry Hillandale Farms of FL Kreher's Poultry Farm Mourk LLC Ohio Fresh Eggs Pilgrim's Pride</p>	<p>Fort Recovery Equity Crystal Farms Merrill's Egg Farms Randy Nelson Ventures Hillandale Farms of PA United Egg Marketing Corp. Berne Hi-Way Hatchery Hickman's Eggs Mid-west Poultry Services</p>		
<p>56</p>	<p>Made by/to a Co-Conspirator?</p>			
<p>The DAPs contend that the statements in this document further the conspiracy by prompting Dolph Baker of Cal-Maine to follow through with engaging in short-term measures.</p> <p>Statements prompting action that promotes the conspiracy do not need to be made to a co-conspirator. <i>See Maldonado-Rivera</i>, 922 F.2d at 958 (finding that statements that "prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates" the conspiracy are in furtherance of the conspiracy).</p> <p>Statement made by a co-conspirator? Yes, this is a letter from Gene Gregory of UEP and UEP is a co-conspirator.</p>				

<p>Statement made to a co-conspirator? Not required.</p>	
<p>Disputed Statements</p>	<p>In Furtherance of the Conspiracy?</p>
<p>Dear Dolph:</p>	<p>The Court finds this statement can further the conspiracy because it was made to conduct the business of the conspiracy, specifically to communicate from one co-conspirator to another about the following statements.</p>
<p>You signed an intention form to implement one or both of the following options:</p> <p>#1: "To dispose of hens that are currently scheduled for disposal between January 1 and April 30, 2005, four (4) weeks earlier than previously scheduled."</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the following statements, it prompts the listener to fulfill the actions described therein, promoting the goals of the conspiracy.</p>
<p>#2: "To reduce my December 1, 2004 flock size by 5% between the dates of January 1 through April 30, 2005."</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the following statement, it prompts the listener to fulfill the actions described therein, promoting the goals of the conspiracy.</p>
<p>The plan only works if you fulfill your intention. Therefore, UEP will rely upon your statement and expect you to send UPE a signed letter stating when you have exercised your stated intention.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior statements, it prompts the listener to fulfill the actions described therein, promoting the goals of the conspiracy.</p>
<p>59</p>	<p>Made by/to a Co-Conspirator?</p>
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>	
<p>Disputed Statements</p>	<p>In Furtherance of the Conspiracy?</p>
<p>The Animal Care Certified program continues to receive support from the vast majority of the egg industry even though continual program refinements are made to maintain the program's integrity. Companies with ownership of approximately 230 million hens or</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the Animal Care Certified program still receives</p>

	<p>program's integrity. Companies with ownership of approximately 230 million hens or 80% of the industry are committed to the program and therefore are awarded the opportunity to market their eggs as Animal Care Certified. The following companies have</p>	<p>support from the industry. This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the extent of the program's membership.</p>
60	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of backfilling and auditing.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this is a letter from Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? The DAPs have failed to provide sufficient evidence that these statements were made to a co-conspirator. This letter was written to Craig Willardson of Norco Ranch, Inc. The DAPs have not pointed to any evidence establishing that Norco Ranch is a co-conspirator. The Court therefore finds the DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.</p>	
61	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy because they are meeting minutes that act as “records” of the conspiracy.</p> <p>The Third Circuit Court of Appeals has not defined “records” as a category of admissible co-conspirator statements. However, such records inherently “inform [the co-conspirators] of the current status of the conspiracy[.]” <i>Weaver</i>, 507 F.3d at 185, and keep participants in the scheme “abreast of developments to induce their continued participation [in the conspiracy],” <i>Gibbs</i>, 739 F.2d at 846. Such notes and records can also be said to be in furtherance of the conspiracy even if not distributed. <i>See Cerone</i>, 830 F.2d at 949 (holding that notes documenting “numerous meetings among the conspirators and other events” were in furtherance of the conspiracy).</p> <p>Statement made by a co-conspirator? Yes, these are Gene Gregory of UEP’s meeting notes and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Not required.</p>	
	<p style="text-align: center;">Disputed Statements</p> <p>Motion: It was moved by Mooney and seconded by Dean to recommend that the current “intentions program” for flocks to be disposed of 4 weeks earlier than previously scheduled and/or flock size reduction by 5% be extended through Labor Day. Carried.</p> <p>Carried.</p>	<p style="text-align: center;">In Furtherance of the Conspiracy?</p> <p>This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.</p> <p>This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.</p>

63	Made by/to a Co-Conspirator?	
<p>The DAPs contend that the statements in this document further the conspiracy because they are communications between two co-conspirators discussing how to maintain the Certified Program if the 100% Rule is no longer in effect.</p> <p>“[S]tatements made to conduct . . . the business of a . . . conspiracy” further the conspiracy. <i>United States v. Cox</i>, 923 F.2d 519, 527 (7th Cir. 1991).</p> <p>Statement made by/to a co-conspirator? Yes, this is an email communication between Gene Gregory of UEP and Bob Krouse of Midwest Poultry, both co-conspirators.</p>		
Disputed Statements		In Furtherance of the Conspiracy?
<p>I have always respected your right to have a different point of view than others on the animal welfare committee and respected the fact that you have always believed the program should be customer driven. I've respected the fact that you have been opposed to the 100% rule.</p>		<p>The Court finds that this statement does not further the conspiracy.</p>
<p>January Board meeting. As you know some producers have suggested a moratorium on further steps and changes to the program and others have suggested dropping the 100% rule.</p>		<p>This statement can be in furtherance of the conspiracy because, when read with the following statements, begins a conversation over how to conduct the business of the conspiracy in light of these suggestions.</p>
<p>1. If a moratorium was put in place would our scientific committee continue to support us if it appeared we were slowing down on the cage space phase-in?</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>4. If there is no 100% rule, should UEP be in the management of a "UEP Certified" program?</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>I strongly believe that the Animal Welfare Program must be managed by UEP.</p>		<p>This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy and suggests courses of action that would further the goals of the conspiracy.</p>
<p>I strongly believe that the Animal Welfare Program must be managed by UEP. UEP is the only organization capable of maintaining a program that can satisfy the scientific review committee, the industry and our customers.</p>		<p>This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy and suggests courses of action that would further the goals of the conspiracy.</p>
<p>6. If there is no 100% rule and UEP did not manage the program, wouldn't we expect the scientific committee to recommend the 67 to 86 square inches now - 4 inches of feeder space and no slant back cages if a retailer should ask for their recommendations? In</p>		<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The</p>

	Court agrees and it is therefore not subject to the hearsay rules.
space and no slant back cages if a retailer should ask for their recommendations? In other words, we have so far managed the timing on these and other guidelines and will we lose this ability?	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
Yes, all hell would break loose if UEP did not manage the program.	This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy and suggests courses of action that would further the goals of the conspiracy.
7. If UEP is not in the management of a program for the industry should we maintain an animal welfare committee or continue to engage a scientific advisory committee? If so,	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
animal welfare committee or continue to engage a scientific advisory committee? If so, what role would they play?	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
10. If there is no 100% rule, how many of our Certified companies will drop off the committed program?	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.
In the long term, the exact some number of companies will remain in the program with or without the 100% rule. I do not see any way to get around the economics of	This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy, including that the 100% Rule is not necessary to its success.
with or without the 100% rule. I do not see any way to get around the economics of this issue. If a large, critically important customer told me that they could (and would)	This statement can be in furtherance of the conspiracy because, when read with the previous statement, it advises a co-conspirator on how to conduct the business of the conspiracy, including that the 100% Rule is not necessary to its success.
this issue. If a large, critically important customer told me that they could (and would) buy eggs from another producer, not on the program, for two cents per dozen less and I had to match that price to keep the business what would I do? I would go back to 52	The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.

<p>I had to match that price to keep the business what would I do? I would go back to 52 sq. inches and stay in business rather than loose the customer. I strongly believe in</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the previous and following statements, it advises a co-conspirator on how to conduct the business of the conspiracy by identifying potential weaknesses with its current model.</p>
<p>sq. inches and stay in business rather than loose the customer. I strongly believe in the importance and overall correctness of the program but I am not willing to go broke for it.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the previous statements, it advises a co-conspirator on how to conduct the business of the conspiracy by identifying potential weaknesses with its current model.</p>
<p>13. Will some customers like Wal-Mart and Kroger lose respect for UEP and the industry if we disband the 100% rule?</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p>
<p>I do not think so.</p>	<p>This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy, including, when read with the previous statement, that the 100% Rule is not necessary to the industry's respect.</p>
<p>The 100% rule does not have anything to do with animal welfare.</p>	<p>This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy, including, when read with the previous statement, that the 100% Rule is not necessary to the industry's respect because it does not relate to animal welfare.</p>
<p>It was implemented by the industry to address other issues, long after the Scientific Review Committee made their recommendations.</p>	<p>This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy, including, when read with the previous statement, that the 100% Rule is not necessary to the industry's respect because it does not relate to animal welfare.</p>
<p>Gene, one of my concerns all along has been that we continue to use the guidelines for things that have nothing to do with animal welfare. The more requirements we pile on such as the 10</p>	<p>This statement can be in furtherance of the conspiracy because it advises a co-conspirator on</p>

		how to conduct the business of the conspiracy, including that the conspiracy is too focused on things that are unrelated to animal welfare.
	that have nothing to do with animal welfare. The more requirements we pile on such as the 100% rule or telling producers who they may and may not sell to, the more producers will find to be upset about.	This statement can be in furtherance of the conspiracy because it advises a co-conspirator on how to conduct the business of the conspiracy, including that too many guidelines may cause trouble.
64	Made by/to a Co-Conspirator?	
	<p>DAPs contend that the statements in this document further the conspiracy because they are meeting minutes that act as “records” of the conspiracy.</p> <p>The Third Circuit Court of Appeals has not defined “records” as a category of admissible co-conspirator statements. However, such records inherently “inform [the co-conspirators] of the current status of the conspiracy[,]” <i>Weaver</i>, 507 F.3d at 185, and keep participants in the scheme “abreast of developments to induce their continued participation [in the conspiracy],” <i>Gibbs</i>, 739 F.2d at 846. Such notes and records can also be said to be in furtherance of the conspiracy even if not distributed. <i>See Cerone</i>, 830 F.2d at 949 (holding that notes documenting “numerous meetings among the conspirators and other events” were in furtherance of the conspiracy).</p> <p>Statement made by a co-conspirator? Yes, these are Gene Gregory of UEP’s meeting notes and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? Not required.</p>	
	Disputed Statements	In Furtherance of the Conspiracy?
	Issues & Concerns Expressed By Producers:	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
	3. The 100% rule of the “UEP Certified” animal welfare program.	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
	13. The “UEP Certified” program is as such a market restriction.	This statement can be in furtherance of the conspiracy because it provides a record of the conspiracy in the form of meeting minutes.
71	Made by/to a Co-Conspirator?	
	<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p>	

<p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>	
<p>Disputed Statements</p>	<p>In Furtherance of the Conspiracy?</p>
<p>After more than three years without an export, the 55 members of United States Egg Marketers (USEM) were able to negotiate and approve an export for delivery of 90 container loads (approximately 76,500 cases) between the dates of October 30th and November 10th. The export was taken at a price considerably better than domestic</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that new export has been approved.</p>
<p>November 10th. The export was taken at a price considerably better than domestic breaking stock prices in hopes that it would improve domestic prices.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the export was made in the hopes of improving domestic prices.</p>
<p>Within one week after finalizing the export, domestic prices began to rise rapidly.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that domestic prices increased after finalizing the export.</p>
<p>Within one week after finalizing the export, domestic prices began to rise rapidly. Within a week Urner Barry's Large Carton quote had risen by more than 15 cents per dozen across all regions. Breaking stock prices rose by more than 10 cents per dozen.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior statement, it informs the members of the status of the conspiracy, specifically that domestic prices increased after finalizing the export.</p>
<p>Breaking stock prices rose by more than 10 cents per dozen.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior statements, it informs the members of the status of the conspiracy, specifically that domestic prices increased after finalizing the export.</p>
72	<p>Made by/to a Co-Conspirator?</p>
<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>	
<p>Disputed Statements</p>	<p>In Furtherance of the Conspiracy?</p>
<p>The members of United States Egg Marketers (USEM) voted on October 20th to approve an export for delivery of 90 container loads (76,500 cases) of shell eggs. On that date, the</p>	<p>This statement can be in furtherance of the</p>

	<p>conspiracy because it informs the members of the status of the conspiracy, specifically that USEM voted to approve an export.</p>
<p>The market began to react to the export by October 24th when USEM began to supply or purchase eggs to fill the export. By November 15th the Midwest Large quote had risen to</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the export and market reactions had a temporal connection.</p>
<p>purchase eggs to fill the export. By November 15th the Midwest Large quote had risen to \$1.05 cents per dozen and the quotes for other regions had moved to even higher levels.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the prior statements, it informs the members of the status of the conspiracy, specifically that prices increased after finalizing the export.</p>
<p>This was the first time that Umer Barry's quote has been above \$1.00 since March 2004.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that prices hit a certain level for the first time since March 2004.</p>
<p>\$18,000.00 over the one-day value on October 20th. Over the 18 market reporting days since the export was taken the Midwest price averaged 88.2 cents per dozen and on average 14.2 cents per day over the market quote of October 20th. During the 26-</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically what prices were following the export being taken.</p>
<p>average 14.2 cents per day over the market quote of October 20th. During the 26-production day period a producer with a million hens would have recognized improved revenues of more than \$220,000.00. Multiplied by the approximate 200 million hens</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how these prices could impact producers.</p>
<p>revenues of more than \$220,000.00. Multiplied by the approximate 200 million hens needed to fill the shell egg markets, this would have returned shell egg producers \$44 million. Not only has the shell egg producers benefited. Those producing and selling</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how these prices could impact producers.</p>
<p>Not only has the shell egg producers benefited.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that not only shell egg producers benefits from the export.</p>
<p>million. Not only has the shell egg producers benefited. Those producing and selling shell eggs to egg breakers at deals based upon the Breaking Stock quote have also received a major benefit as the quote for these eggs has moved up 16 cents per dozen.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that other members in the industry have seen increased monetary benefits.</p>

73	<p align="center">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>	
	<p align="center">Disputed Statements</p> <p>UEP’s Board, committee members and staff along with Dr. Jeff Armstrong, Mitch Head and Kevin Haley are fighting the battle to maintain a positive image of the egg industry and attempting to defend cage production while acknowledging that we support “freedom of choice.” We are, however, long past being able to defend cages</p> <p>acknowledging that we support “freedom of choice.” We are, however, long past being able to defend cages without science-based guidelines.</p>	<p align="center">In Furtherance of the Conspiracy?</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how the UEP Board and others are trying to defend the conspiracy.</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the conspiracy needs science-based guidelines to survive.</p>
75	<p align="center">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>	
	<p align="center">Disputed Statements</p> <p>HAPPY & PROFITABLE NEW YEAR</p> <p>The United States Egg Marketer (USEM) members have once again voted overwhelmingly to accept a sizable export of shell eggs. The sale of 300 container loads</p>	<p align="center">In Furtherance of the Conspiracy?</p> <p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court agrees and it is therefore not subject to the hearsay rules.</p> <p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that USEM voted to accept an export.</p>

	<p>overwhelmingly to accept a sizable export of shell eggs. The sale of 300 container loads (approximately 246,000 cases) will be delivered between January 8th and February 2nd.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how many container loads will be delivered and when.</p>
	<p>Since the announcement of USEM members in the UEP "United Voices" newsletter of November 16, the following new USEM members have been added: Rose Acre Farms</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that Rose Acre has been added as a USEM member.</p>
	<p>UEP's Production Planning Calendar (just recently published and distributed) forecast January and February Carton Large prices in the Midwest to average about 84 cents per dozen. With the delivery of such a large volume export, it is expected that prices will</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically forecasted prices.</p>
	<p>dozen. With the delivery of such a large volume export, it is expected that prices will exceed UEP's forecast. It is also believed that the announcement of USEM working on a</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because the statement could be offered for the truth that UEP expects prices to exceed its own forecast as a result of the export. This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that increased prices are expected.</p>
	<p>exceed UEP's forecast. It is also believed that the announcement of USEM working on a sizable export may have helped hold prices at higher levels the last week of December.</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because the statement could be offered for the truth that UEP believes that the announcement of the export helped keep prices higher. This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically what UEP believes is working to achieve its ends.</p>
<p>79</p>	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but "only if the addressee is also a co-conspirator." <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-</p>	

conspirator to other co-conspirators.	
Disputed Statements	In Furtherance of the Conspiracy?
Since mid-October the USEM members have now approved three exports for a total of 690 containers (approximately 566,850 cases). Considering the fact the nation's layer	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically how many exports USEM has approved and for how many containers.
690 containers (approximately 566,850 cases). Considering the fact the nation's layer flock inventory was virtually the same during the period of October through February of each year, we must conclude that these exports have had a major positive impact upon shell egg prices and the financial conditions of shell egg producer/marketers. Likewise,	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP has concluded that the exports have improved prices.
shell egg prices and the financial conditions of shell egg producer/marketers. Likewise, the exports have improved, to a lesser degree, breaker stock prices and have benefited those producers selling eggs based upon the Umer Barry breaking stock quote.	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP has concluded that the exports have improved breaker stock prices.
During a 17 week period of October 15 th through February 9 th Umer Barry's Midwest Large quote averaged \$102.5 compared to 78.6 cents per dozen during the same period a year earlier - 23.9 cents per dozen improvement. During the same period breaking stock	This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically the extent of the financial improvement from a year earlier.
year earlier - 23.9 cents per dozen improvement. During the same period breaking stock prices improved by 9.2 cents per dozen.	This statement can be in furtherance of the conspiracy because, when read with the prior, it informs the members of the status of the conspiracy, specifically the extent of the financial improvement from a year earlier.
81	Made by/to a Co-Conspirator?
<p>The DAPs contend that the statements in this document further the conspiracy by reflecting actions to be taken in the future facilitating the conspiracy.</p> <p>The defendants respond that all the statements in this document are inadmissible under the <i>Noerr-Pennington</i> doctrine.</p> <p>The <i>Noerr-Pennington</i> doctrine instructs that “a party who petitions the government for redress generally is immune from antitrust liability.” <i>Mariana v. Fisher</i>, 338 F.3d 189, 197 (3d Cir. 2003) (citations and quotations omitted). “That immunity is so potent that it protects petitioning notwithstanding an improper purpose or motive.” <i>Id.</i></p> <p>The highlighted statements in this document describe the UEP Board’s agreement to lobby legislatures for laws similar to the UEP program. The Court finds that, as statements related to a plan to engage in political action, the statements are not admissible to establish antitrust liability under the doctrine.</p>	

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Made by/to a Co-Conspirator?

The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.

Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” *Weaver*, 507 F.3d at 185 (citing *Ammar*, 714 F.2d at 252).

Statement made by a co-conspirator? Yes, this letter is from Gene Gregory of UEP and UEP is a co-conspirator.

Statement made to a co-conspirator? Yes, this a statement by Bob Krouse of Midwest Poultry and Midwest is a co-conspirator.

Disputed Statements

In Furtherance of the Conspiracy?

Over the weekend I found time to review your report and found it extremely interesting.

The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because it could be offered for the truth that Gene Gregory read the report and found it interesting. The Court does not find this statement provides a status update about the conspiracy, but it does find that the statement can further the conspiracy because it was made to conduct the business of the conspiracy.

Over the weekend I found time to review your report and found it extremely interesting. While I had always known that increasing cage space per hen with our animal welfare guidelines would have an impact upon supply, I had never seen it in the way you have now presented. This coupled with the fact that we do not allow for backfilling

The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because it could be offered for the truth that Gene Gregory knew that increasing cage space would impact supply. The Court does not find this statement provides a status update about the conspiracy, but it does find that the statement, when read with the following statement, can further the conspiracy because it was made to conduct the business of the conspiracy by evaluating the benefits of the guidelines.

never seen it in the way you have now presented. This coupled with the fact that we do not allow for backfilling cages and the industry concerned about new construction or remodeling because of possible legislation has contributed to extremely good egg prices.

The Court does not find this statement provides a status update about the conspiracy, but it does find that the statement, when read with the previous statement, can further the conspiracy because it was made to conduct the business of the conspiracy by evaluating how current events impact the benefits of the guidelines.

83	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? This presentation is titled “Marketing – Statistics 2007 Area Meetings.” The DAPs state that Greg Hinton of Rose Acre testified about the presentation at his deposition, but they do not attach the relevant portions of his deposition for the Court’s review. The document in question does not clearly state who prepared the document. Therefore, the Court is unable to conclude that this presentation was prepared by UEP or another co-conspirator. The DAPs have not met their burden to demonstrate that these statements were made in furtherance of the conspiracy.</p> <p>Statement made to a co-conspirator? The DAPs state that Greg Hinton of Rose Acre testified that Rose Acre attended Area Meetings, but again they do not attach the relevant portions of his deposition for the Court’s review. The Court does not know if Rose Acre attended some Area Meetings, all Area Meetings, or most importantly, an Area Meeting where this presentation was given. The Court cannot conclude that these statements were made to a co-conspirator. The DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.</p>
84	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this a statement by Bob Krouse of Midwest Poultry and Midwest is a co-conspirator.</p> <p>Statement made to a co-conspirator? Regardless of whether Midwest Poultry is a co-conspirator, the DAPs have offered no evidence that this study was sent to any fellow members of the conspiracy. Therefore, the DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.</p>
86	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the Certified Program and the 100% Rule.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? As a United Voices Newsletter, the statements contained in this document were made from a co-conspirator to other co-conspirators.</p>

	Disputed Statements	In Furtherance of the Conspiracy?
87	<p>Made by/to a Co-Conspirator?</p>	
	<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this a statement by Bob Krouse of Midwest Poultry and Midwest is a co-conspirator.</p>	
	<p>As we come to the end of a year of record egg prices, it is interesting to look back and review what happened to make the year profitable for most everyone. We believe the</p>	<p>The defendants argue that this is not an assertion offered for the truth of the matter asserted. The Court disagrees because the statement does have a truth value that it is interesting to review what made the year profitable. This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP describes the year as “profitable for most everyone.”</p>
	<ul style="list-style-type: none"> • UEP’s animal welfare guidelines continued to reduce the number of hens per house. 	<p>When read in context, this statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP believes this action contributed to good prices.</p>
	<ul style="list-style-type: none"> • Producers reduced their egg supply during the weeks between Easter and Labor Day. 	<p>When read in context, this statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP believes this action contributed to good prices.</p>
	<ul style="list-style-type: none"> • Very limited construction of new houses or remodeled houses during 2006 and 2007. 	<p>When read in context, this statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP believes this action contributed to good prices.</p>
	<ul style="list-style-type: none"> • Producers did a far better job of managing their business to meet supply/demand. 	<p>When read in context, this statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that UEP believes this action contributed to good prices.</p>

	<p>Statement made to a co-conspirator? Regardless of whether Midwest Poultry is a co-conspirator, the DAPs have offered no evidence that this study was sent to any fellow members of the conspiracy. Therefore, the DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy. Further, the DAPs concede that this document is nearly identical to Tab 84, which would be cumulative evidence that the Court is not inclined to admit.</p>
88	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? Yes, this is a PowerPoint by Gene Gregory of UEP and UEP is a co-conspirator.</p> <p>Statement made to a co-conspirator? The DAPs assert that this PowerPoint was presented at the March 2008 Pacific Egg and Poultry Association conference. They offer no evidence regarding which, if any, egg producers attended this meeting, and more specifically, whether any co-conspirators were in attendance. The DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.</p>
92	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? This is an article written by Joe Fortin of Moark for the Price Discovery Committee. Moark is a co-conspirator.</p> <p>Statement made to a co-conspirator? Regardless of whether Moark is a co-conspirator, the DAPs have offered no evidence that this article was sent to any fellow members of the conspiracy. Therefore, there is insufficient evidence for the Court to conclude that the statements therein were made to a co-conspirator. The DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.</p>
93	<p style="text-align: center;">Made by/to a Co-Conspirator?</p> <p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by a co-conspirator? The DAPs make no argument as to who prepared this document. A review of the document itself, however, shows that it was prepared by UEP. <i>See</i> Tab 93 (“While this policy has been discussed at three previous Board meetings, the UEP staff, Board and Committee are more than willing to listen and consider ideas that could improve the program. Working through the</p>

	<p>committee chairman and Board Chairman, <i>we</i> will give those with new ideas an opportunity to present these ideas before the committee”) (emphasis added).</p> <p>Statement made to a co-conspirator? Again, the DAPs make no argument as to whether anyone received this document. They state only that Bob Krouse of Midwest testified about the document, but they do not provide his relevant deposition testimony. The Court has no way to conclude that these statements were made to a co-conspirator. Therefore, DAPs have not met their burden to prove that the statements were made in furtherance of the conspiracy.</p>	
94	Made by/to a Co-Conspirator?	
	<p>The DAPs contend that the statements in this document further the conspiracy by updating members on the status of the conspiracy by informing them of a potential threat.</p> <p>Statements explaining the current status of the conspiracy are admissible as non-hearsay co-conspirator statements, but “only if the addressee is also a co-conspirator.” <i>Weaver</i>, 507 F.3d at 185 (citing <i>Ammar</i>, 714 F.2d at 252).</p> <p>Statement made by/to a co-conspirator? These are emails among UEP members and Cal-Maine employees, among others. The statements the DAPs seek to admit come from emails written by Gene Gregory of UEP and Chad Gregory, Senior Vice President of UEP. UEP is a co-conspirator. These emails can fairly be said to be between co-conspirators.</p>	
	<p>Disputed Statements</p>	<p>In Furtherance of the Conspiracy?</p>
	<p>I explained that Wal-Mart was one of the first retailers to support the UEP program and in fact if Wal-Mart had not done so, the industry would likely have not developed a program.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically of a conversation that Gene Gregory had with Wal-Mart.</p>
	<p>I told him I feared Wal-Mart’s current decisions may undermine [sic] our program and that the non-certified company has spent five 95) years trying to destroy or program.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically of a conversation that Gene Gregory had with Wal-Mart.</p>
	<p>None of this seemed to make a difference in their decision.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically of a conversation that Gene Gregory had with Wal-Mart.</p>
	<p>The bottom line is that I will contact USDA to see what I can find out.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically a step that Gene Gregory will take in response to his conversation with Wal-Mart.</p>

	<p>Second and most important point is that I think Wal-Mart has made the decision to award the business to Sparboe.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically to which company Gene Gregory believes Wal-Mart is awarding its business.</p>
	<p>This is incredibly disturbing news.</p>	<p>This statement can be in furtherance of the conspiracy because it informs the members of the status of the conspiracy, specifically that the events Gene Gregory described can be categorized as disturbing to the conspiracy.</p>
	<p>I have not been able to stop thinking about it all night.</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the surrounding statements, it informs the members of the status of the conspiracy, specifically of the severity of the issue.</p>
	<p>There has got to be something we can do – together!!!!!!</p>	<p>This statement can be in furtherance of the conspiracy because, when read with the surrounding statements, it prompts the listener to take action to preserve the conspiracy.</p>