No. 05-10447

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DANIEL T. ROSE,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION
(HONORABLE SIDNEY A. FITZWATER)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not accept Rose's Statement but believes that oral argument may be useful to clarify factual or other issues that are not clear from the record.

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JURISDICTIONAL STATEMENT

The United States agrees with Rose's jurisdictional statement, except to add that the district court's jurisdiction was based on 18 U.S.C. 3231.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support the jury's finding that Rose knowingly participated in the conspiracy during the time period alleged in the Indictment.
2. Whether the district court clearly erred in finding that the evidence supported an adjustment to the offense level for Rose's aggravating role as a "manager or supervisor" of the criminal activity.
3. Whether the district court clearly erred in finding that the evidence supported an adjustment to the offense level for a volume of commerce affected by the conspiracy of more than $15 million.

STATEMENT OF THE CASE

In 1997, the Department of Justice opened a grand jury investigation into price-fixing in bulk vitamins. The investigation ultimately exposed a worldwide price-fixing and market-division conspiracy among domestic and foreign makers of bulk vitamins. The Department's subsequent prosecution of the cartel led to convictions for thirteen corporate officials (excluding Rose) and criminal fines exceeding $900 million.

In 1998, the Department learned of a price-fixing conspiracy involving choline chloride, a vitamin of the B-complex group, and the three manufacturers that controlled more than ninety-five percent of the United States market for choline chloride: DuCoa, L.P., Bio-Products, Inc., and Chinook Group Limited. Five officers of these companies pleaded guilty to violations of Section 1 of the Sherman Act, 15 U.S.C. 1, in the Northern District of Texas. Chinook Group pleaded guilty and was sentenced to pay a $5 million fine. DuCoa pleaded guilty and was sentenced to one year of probation and a $500,000 fine (based on inability to pay a greater fine).[1]

On June 4, 2003, a federal grand jury sitting in Dallas, Texas returned a one-count Indictment charging Daniel T. Rose, the former President of DuCoa, with participating in a "combination and conspiracy to suppress and eliminate competition by fixing the price, rigging bids, and allocating customers for choline chloride sold in the United States," from "[i]n or about August, 1997 and continuing [to] at least September 29, 1998," in violation of Section 1 of the

[1] Bio-Products and its officers, who had exposed the choline chloride conspiracy by approaching the Department of Justice and admitting their criminal conduct, met the terms of the Antitrust Division's long-established leniency program and were not prosecuted.

Sherman Act. R1-19.[2]

Rose's first trial ended on July 9, 2004, when the court declared a mistrial after the jury was unable to reach a unanimous verdict. R1-11. Re-trial began on December 6, 2004. Rose did not testify and did not call any witnesses. Jury deliberations began on December 14, 2004 and the jury returned a guilty verdict on December 16, 2004. R20-3; Rose Record Excerpts, Tab 4.

The district court subsequently denied Rose's motion for judgment of acquittal. Rose Record Excerpts, Tab 1, at 14. A Presentence Report was ordered and sentencing was scheduled for March 18, 2005, after the U.S. Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005).

The United States Probation Office, using the November 1, 2004 Federal Sentencing Guidelines Manual ("U.S.S.G."), calculated a Total Offense Level of 19 for Rose, based on a base offense level of 10 (U.S.S.G. § 2R1.1) plus an addition of one level for bid-rigging (U.S.S.G. § 2R1.1(b)(1)); five levels for a volume of affected commerce of more than $15 million (U.S.S.G. § 2R1.1(b)(2)(E)); and three levels for his role in the offense as a manager or supervisor in criminal activity involving five or more participants (U.S.S.G. §

[2] In this brief, R refers to the Record On Appeal followed by the volume and page number; Br. to Rose's brief; and GX to government exhibits.

3B1.1(b)). Based on a Criminal History Category of I, and the Sherman Act itself (maximum imprisonment of thirty-six months for offenses before June 2004), the Guideline Range of Imprisonment was thirty to thirty-six months. The Sherman Act provided for a maximum fine of $350,000 (15 U.S.C. 1).

Rose objected to the Presentence Report in two respects pertinent to this appeal. First, he argued that he was "the junior member of the conspiracy" and therefore that a three-level increase for being a manager or supervisor was inappropriate. Second, he contended that he "could not have been responsible for affecting any commerce prior to February of 1998." He therefore argued that the correct volume of commerce was approximately $9.8 million, which requires only a four-level increase in the offense level, not a five-level increase.

At sentencing, the district court overruled Rose's objections and adopted the findings of the Presentence Report as supported by a preponderance of the evidence. R21-7. After hearing allocution from Rose and from his counsel, who argued for "some sentence of home confinement and probation," R21-24, the court stated: "I have considered the guideline range and decided to sentence the defendant within the guideline range, although, as indicated, I'm going to sentence him at the bottom of the range." R21-26. The court added:

In determining the sentence in this case, I have considered all the factors

> that are set out in Title 18, United States Code, Section 3553(a)(1) through (7), inclusive, and I am in my view imposing a sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in section 3553(a)(2).
>
> I am imposing this particular sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, and to afford adequate deterrents to criminal conduct.

Id.

The court sentenced Rose to thirty months imprisonment, R21-26, with a recommendation that he be assigned to a federal prison camp in Illinois, near his home. R21-30. The court imposed a fine of $20,000, which represented the smallest fine allowable under U.S.S.G. § 2R1.1(c) given the volume of commerce of more than $16 million, plus one year of supervised release and a special assessment of $100. The government did not ask for restitution and the court did not impose any, saying "the court has determined that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution . . . outweighs the need to provide restitution to any victims." R21-26-27.

Rose is currently incarcerated, having reported to the Bureau of Prisons on June 14, 2005.

The district court entered final judgment on March 22, 2005. Rose Record

Excerpts, Tab 5. On March 28, 2005, Rose filed a notice of appeal. Rose Record Excerpts, Tab 2.

STATEMENT OF FACTS

Rose became President of DuCoa in August 1997.[3] DuCoa's main product line, representing thirty to thirty-five percent of its sales, was choline chloride. R13-163. Choline Chloride is a vitamin of the B-complex group and is also known as vitamin B4. *Id*. It is sold by manufacturers and resellers to customers in the animal nutrition industry, including large companies like Tyson Foods and Ralston Purina, R13-162, and is an ingredient necessary for the proper growth and development of animals. (R1-22; R13-161).

DuCoa's chief competitors in the manufacture of choline chloride were Chinook, a Canadian company with a marketing office in Minnesota and sales representatives in the United States, and Bio-Products, located near Cleveland, Ohio and owned by Mitsui, a Japanese company. R13-164. Between them,

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[3] Before his position at DuCoa, Rose had been President of NutriBasics, a related company owned by ConAgra. R13-178 (Hilling); R14-97 (Fischer). Before August 1997, DuCoa was a joint venture of DuPont and ConAgra. Rose became President of DuCoa as a result of a buyout in which DuCoa was purchased by employees and a group of outsiders. R13-189-90 (Hilling); R14-96-97 (Fischer). Rose had a $175,000 personal investment interest in DuCoa from the buyout. R14-97.

In 2001, DuCoa was sold to Trouw Nutrition USA, LLC. At the time of the Indictment, Rose was President of Trouw.

DuCoa, Chinook, and Bio-Products supplied more than ninety-five percent of the U.S. market for choline chloride. *Id*.

Five executives who knew and/or had worked with Rose from DuCoa, Chinook, and Bio-Products, testified against him at trial, including four who had pleaded guilty to violating Section 1 of the Sherman Act by participating in the choline chloride conspiracy: Lindell Hilling, Rose's predecessor as President of DuCoa; John L. "Pete" Fischer, DuCoa's former president of the basic products division, which included choline chloride, and Rose's direct subordinate, R14-90; Antonio Felix, DuCoa's former vice president for choline chloride from 1995 and a direct subordinate to Fischer, R16-195; and Fischer's counterparts at Chinook – John Kennedy, vice president of marketing and sales, R16-59, and at Bio-Products – Tom Sigler, vice president and general manager for the feed ingredient group. R15-82.

A. History of the Conspiracy

Hilling, who was President of DuCoa from shortly after its inception in 1987 until 1997, R13-159, testified that the three competitors began the conspiracy to fix prices and allocate customers in 1988, at a time when their market shares were roughly one-third of the market each. R13-166-67, 170. The purpose of the conspiracy was "to keep the market at one-third, one-third, or very

close to that." R13-170. The conspiracy "kept it [the price of choline chloride] up higher" than it otherwise would have been. R13-176. Fischer confirmed this history, explaining:

> That agreement came into effect, as I recall, in late 1988 and early 1989, and the basis of the agreement was that the three large competitors at that time, which were DuCoa, or DuCon actually at that time, Chinook and Bio-Products, agreed to allocate customers to the affect [sic] that it basically split the market share to one-third, one-third, one-third. And they – we also agreed that we would from time to time increase prices on a united basis. That agreement, as I mentioned, began '88, '89, and carried forward through most of 1998.

R14-99. In Fischer's words, the objectives of the conspiracy were "to limit competition," "to allow the competitors to increase prices when they agreed to," and to maintain "a stable marketplace." R14-99-100; *see also* R16-64 (Kennedy) ("an agreement to basically maintain shares of the choline chloride industry, to maintain existing accounts or customers, and to from time to time, including I think 1997, we had meetings to increase price."); R15-84, 97 (Sigler) ("we agreed to allocate customers, set pricing"; agreement was "that there was [sic] three competitors, and each of us would roughly have a third of the market").

The three companies fixed prices by agreeing to a list price for choline chloride. Hilling testified that although some customers would be given discounts from the list price based on the volume of their purchases, "we would all, in the

beginning, work from that [list] price." R13-171. The list price was set at face-to-face meetings between the competitors: "We met over 20 or 30 times, and we would discuss pricing. We would discuss allocating customers." R13-172. If prices declined significantly for some reason (e.g., because raw materials prices fell), the conspirators would "[c]all a meeting and get the prices up." R13-173. The companies took turns being the first to announce price increases, typically in a trade journal. R13-173-74.

The three companies allocated customers by agreeing that each company would have "protected accounts" – choline chloride buyers/users secretly assigned to only one manufacturer. The two companies not assigned to that customer would not attempt to poach its business by offering lower prices. Thus, Fischer explained the conspiracy to Rose in these terms:

> "[T]he market is being managed, there was – there is an agreement in effect that the market shares are allocated, we – each of the competitors have protected accounts where the other competitors are not supposed to – to go after those accounts, that we have had – have had past agreement of price increases.

R14-102.

The allocation was not perfect, and Hilling explained that the companies had "a spat from time to time, and we would trade customers and that type of thing." R13-173. But occasional disagreements, including poaching of

customers, did not mean that the agreement had ended: "No. No. Not in the least." R13-175. Poaching of a small number of customers did not negate the reality that the vast majority of the customers always were subject to the agreement. R13-176. When disagreements arose, the three companies simply called a meeting and made greater efforts to "monitor," R13-175, or police, their agreement. John Kennedy of Chinook similarly confirmed that in the conspirators' minds, incidents of cheating in 1997 did not mean the end of the agreement. "We were still talking. You were still able to reach Bio-Products or DuCoa and have a conversation about, say, some account that had just been taken in the marketplace, try to understand why they had taken the account." R16-67. Kennedy explained that "[t]here wasn't wholesale price cutting taking place." *Id*.

The conspiracy was executed by means of bid-rigging. When a choline chloride customer/buyer's account would come up for bids, whether quarterly or less frequently, whichever manufacturer had been secretly assigned to that customer – DuCoa, Chinook, or Bio-Products – would win that account by submitting the lowest bid, and the other two competitors deliberately would bid high in order to lose. R16-94 (Kennedy); R13-171-72 (Hilling).

In August 1997, when Hilling was preparing to leave DuCoa and be replaced by Rose, Hilling's understanding was that the conspiracy "was still in

effect." R13-177; *accord* R14-101 (Fischer); R16-65 (Kennedy). As Hilling explained, "[t]he conspiracy was our way of life. I mean, that's what we had to do to sell product and make the money that we were making." R13-180-81. DuCoa had written antitrust policies in place, but "we gave it lip service. I mean, we didn't pay any attention to that policy." R13-181.

At the time he left DuCoa, Hilling believed that Rose was aware of the conspiracy. R13-201-02. Kennedy similarly testified that he believed, at that time, that Rose simply would replace Hilling in the conspiracy. Indeed, Kennedy would have expected to have been warned by DuCoa if Rose was *not* involved in the conspiracy. R16-66.

B. Rose's Initial Involvement in the Conspiracy

In preparation for DuCoa's transition to Rose, Hilling "was asked to prepare a business update" and meet with Rose and Dr. Earnie Porta, a higher-level executive in the DuPont-ConAgra joint venture structure, at a Holiday Inn in Collinsville, Illinois on August 17 or 18, 1997. R13-190-91. Hilling prepared handwritten notes. "I didn't want my secretary to type it. I didn't put it on the computer. I realized – I thought that it should be kept confidential, and so I wrote it longhand in my handwriting. I made photocopies of it and passed it out to Dr. Porta and Dan Rose at the meeting." R13-191.

With respect to choline chloride, Hilling's notes said "settle market share issues," by which he meant that prices were going down, "another one of those rifts" had surfaced between the conspirators, and Rose and Porta should "get those things settled" with the other conspirators. R13-193. At the very top of the notes are the phrases "Settle Market Share Issues" and "Between Competitors." GX 2. *See also* R13-195 (Rose and Porta should "stop some of this bickering between the competitors").

Hilling further testified that "[w]e talked about settling this market share issues, and we talked about my not trusting Tom Sigler [of Bio-Products]. We talked about Koenig, who was president of Bio-Products not being part of the conspiracy. We talked about who we could possibly get in contact with at Mitsui to assist us in trying to get a read on Koenig." R14-83.

Hilling believed that he was talking openly with Rose about the conspiracy and thought his meaning was clear, even though he did not use the words "conspiracy" or "bid rigging." R13-198. "I thought he thoroughly understood what was going on." R14-53. When asked on cross-examination whether "the rest of the conversation wasn't in plain, unvarnished language, was it?" Hilling

replied "I thought it was." R14-54.[4] Rose took notes during the meeting, and Hilling identified the phrase "Between Competitors" on the notes used at the meeting, GX 2, as being in Rose's handwriting. R13-192-94.

Fischer testified that soon after this meeting, in September 1997, he talked to Rose about the conspiracy during a business trip that they took to Europe. R14-101. Because of developments in the choline chloride market, Fischer "felt that he needed to know that – about the agreement, so that he could decide how to manage from there." R14-102. Fischer told Rose about the three companies' agreement to allocate customers and their agreements to raise prices. *Id*. Rose appeared to understand, did not express any surprise, and did not tell Fischer that they had to stop because the conduct was illegal. *Id*.

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[4] Rose's assertion that "[a]t no time was Rose ever informed of the conspiracy between the competitors by Hilling," Br. 4-5, therefore misrepresents Hilling's testimony. While Hilling could not read Rose's mind, Hilling said repeatedly that he told Rose about the conspiracy. *E.g.*, R14-49. To illustrate (R14-83-84):

> Q. But the day he [Rose] began with the company, did he know about this conspiracy?
>
> A. In my opinion, he did.
>
> Q. And why is that?
>
> A. Based upon that conversation there.

Fischer then explained that after the trip to Europe, he and Rose "discussed what the agreement was in more detail." R14-107. "I basically outlined what the agreement was . . . and that the market had operated for, well, really since early 1989 in that way, where our protected accounts were not – were basically off-limits to the other competitors and we stayed away from – from their accounts." R14-108-09. Again, Rose did not tell Fischer that the activity was illegal or that DuCoa had to stop it. R14-109.

During the fall of 1997, there was "sniping" between the three companies over certain accounts, and DuCoa had been put up for sale, so Fischer discussed with Rose a strategy *to preserve the conspiracy*. R14-109-11, 115. Fischer explained the strategy:

> we intended to draw a line in the sand, and our strategy was going to be to take a major account from, in this case Bio-Products, to show that we were still dealing from a position of strength, and then once that occurred, we would basically have gotten their attention and we would then be able to negotiate, as we had in the past, either through phone conversations or face-to-face meetings, where we could bring equilibrium back into the marketplace[.]

R14-111.

The account to be taken was Tyson Foods, one of Bio-Products' largest customers. But Fischer repeated that the purpose of this plan was *not* simply to compete against Bio-Products, but to preserve the conspiratorial agreement by

bringing Bio-Products "back to the table to reallocate product to make the market back into equilibrium so that prices could be stabilized and margins increased." R14-115.[5]

In 1997, Tyson's needs for choline chloride were supplied in roughly equal portions by Bio-Products and Chinook. DuCoa's plan ultimately was put into effect by using a company called South Central Products, which was in turn supplied by DuCoa, as a Trojan Horse to underbid Bio-Products for Bio-Products' share of the Tyson account for the first quarter of 1998. R14-112-14 (Fischer); R16-68-9 (Kennedy).

C. The Atlanta Meeting

In January 1998, after DuCoa effectively had taken Tyson away from Bio-Products through the ruse of South Central Products, Fischer "arranged with Chinook for face-to-face meeting to be set up during the Southeastern Poultry Convention that's held in Atlanta each January[.]" R14-117. The participants were Rose, Fischer, and Felix from DuCoa; Sigler from Bio-Products; and Kennedy and another executive, Samuelson, from Chinook. R14-118; R15-102.

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[5] Kennedy similarly testified from Chinook's viewpoint that taking away a customer from DuCoa or Bio-Products was not simply a competitive act, but a means to enforce the agreement, saying: "there were times when we thought retaliation was needed, and it might bring us to the table quicker if we did that." R16-154-55.

Fischer testified that Rose not only knew about Fischer arranging this meeting, but Fischer told Rose that the meeting would be with Bio-Products and Chinook and also told him the purpose of the meeting. R14-117. Rose "gave me the okay to do it." *Id*.

Fischer knew "it was illegal what potentially was going to be discussed at that meeting," so others were not invited, and the meeting took place at a restaurant, not at the convention center. R14-119. As Kennedy described it, no one wanted to meet at the Poultry Show because "[w]e wouldn't have held a – a meeting of the conspiracy inside the convention center." R16-72. *See also* R15-102 (Sigler) (meeting was held "off-site so nobody would see").

The primary subject of conversation was that Bio-Products "was very upset about losing the Tyson business, and he [Sigler] was very forthright in demanding that we give the Tyson business back to him." R14-120 (Fischer). No agreement was reached on that subject, but the participants did agree "that we were going to try to at some later date have another meeting where we could – maybe it will all calm down and try to come to some agreements to bring the equilibrium back into the marketplace." R14-120-21. *See also* R16-74 (Kennedy) ("the future meeting was going to be one of those meetings where we tried to get the agreement back on track . . . and then also to increase prices.").

According to both Sigler and Kennedy, Rose actively participated in the discussion and never objected to the meeting or the subjects of conversation. R15-104-05; R16-74-5. Sigler would have remembered if Rose had objected to the discussion as illegal. R15-105. If Kennedy had thought Rose was *not* part of the conspiracy, he never would have broached the subjects that were discussed. R16-75. Rose, speaking on behalf of DuCoa, did *not* deny the existence of the conspiracy to Bio-Products; did *not* tell Bio-Products that DuCoa had won the Tyson account fair and square; and did *not* tell Fischer to stop meeting with DuCoa's competitors. R14-122 (Fischer).

D. The Chicago Meeting

Fischer then arranged the follow-up meeting for February 8, 1998 at the O'Hare Airport Hilton in Chicago, R14-123, involving the same participants. R14-127-28. Fischer told Rose the "idea was that we would have a meeting to reallocate volumes to bring the market share back more – on a more equal basis." R14-123-24. In preparation, "Mr. Felix and myself put together particular accounts that we felt could be moved over to Bio-Products and/or Chinook, if necessary, to reallocate the additional volumes that we picked up at Tyson. And we had discussions about those accounts and what their volumes were and when their contracts were due with Mr. Rose." R14-124.

Fischer also discussed with Rose "getting agreement with Chinook and Bio-Products at that meeting to increase prices on choline chloride for the following quarter, April 1st." *Id*. Fischer took with him a written price proposal, which he had discussed with Rose, "to bring it to the attention of the other competitors, Chinook and Bio-Products, to get their agreement to increase these prices effective April 1st." R14-124-26 & GX 104.

The meeting lasted four or five hours. R16-222 (Felix). "Total volume of the market itself was discussed first, then customers in terms of their volume were discussed and then prices." R14-128 (Fischer). With respect to customer allocation, there was "an agreement reached that a framework could be developed where certain amounts could be exchanged. And while it wasn't complete and total agreement, there was . . . an agreement that at certain times during the year we would begin switching certain accounts to equalize the volume." R14-129. For example, DuCoa's volume from a company called Roche "would be moved to Bio-Products. Volume at Cagle's, which I believe Chinook had, would be moved to Bio-Products." R14-130.

Felix, Sigler, and Kennedy described the same events and result. According to Felix, after Rose and Sigler heatedly discussed the Tyson account, "then at that point everybody, you know, just tried to open up a little bit. Then there was

discussion about other accounts that could be, you know, traded to compensate for that volume." R16-217. "[S]omebody would say, you know, you get Simmons, for example, from us, and this is 600 thousand pounds." R16-218. "[T]he idea was to see how can we compensate – how could we compensate the balance that Bio-Products had lost with our takeover of Tyson." R16-220. *See also* R15-114 (Sigler); R16-93, 96 (Kennedy) (Chinook was willing to give up accounts to maintain the agreement; Chinook agreed to transfer the Cagle's account to Bio-Products).

Fischer, Kennedy, and Felix all identified Rose's handwriting and notes on memoranda used at the Chicago meeting that reflected the accounts and volumes to be reallocated among DuCoa, Chinook, and Bio-Products. R14-139-51 (Fischer); R16-105-09 (Kennedy); R16-230-32 (Felix) and GX 46, 49, 50.

After the discussion of customers, "[w]e discussed putting into effect a price increase." R16-97 (Kennedy). Everyone agreed that the three companies would raise prices as of April 1, 1998, and would announce the increase through *Feedstuffs* magazine, a trade publication, and letters to customers. R15-121 (Sigler); R14-132-33, 135 (Fischer); GX 34, 35, 113. Sigler identified GX 33 as a price sheet that the conspirators drew up at the meeting. R15-121-22. Felix had prepared a price proposal for the group to consider, R16-232-34 and GX 11, but

"it was decided to – to go with higher prices than the ones proposed by DuCoa." R17-7. The agreed increase was four to five cents per pound for liquid choline chloride and three cents per pound for dry choline chloride. R17-15. *See also* R15-121 (Sigler) ("we settled on a nickel, per pound").[6]

All of the conspirators testified that, as in Atlanta, Rose was an active participant in the discussion; that he was "the one talking for DuCoa," R16-221 (Felix); that he took notes; and that he never objected either to holding a meeting with his competitors or to the subjects discussed. R14-130, 137 (Fischer); R15-115-16, 127 (Sigler); R16-94-96 (Kennedy); R16-219 (Felix). Fischer had "no doubt" that Rose was fully aware of what transpired. R14-137. According to Kennedy, "If Dan had said . . . that he was – he was not going to be part of the agreement, or if he said that we can't discuss this, it was illegal, in my estimation it would have been that the agreement was over and there would have been – no reason to have any discussions." R16-96.

Also similar to the Atlanta meeting, the conspirators took steps to keep the meeting secret because they knew it was illegal. Sigler testified that on his Bio-

[6] Rose's citation to Fischer's testimony (Br. 6, citing R14-128-30) pertains only to Fischer's explanation that the "total specifics of that agreement" to re-allocate customers were not "worked out totally" in Chicago. That portion of Fischer's testimony does not pertain to, and does not deny, that the conspirators reached a price-fixing agreement.

Products expense report for his trip to Chicago, he gave the reason as "meeting with customers" so that "other people wouldn't see what we were – who I was meeting with." R15-107 and GX 31. He did not send any letters or faxes to DuCoa before the meeting "[b]ecause what we were doing was illegal." R15-109. Kennedy, on his Chinook expense report, wrote "Conti," an abbreviation for Continental Grain, when in fact he did not visit that company. "I didn't want to write down that there was a conspiracy meeting." R16-91 & GX 81.

Felix testified that Rose told him to drive to Chicago with Fischer and "to pay cash for – for the hotel and for, you know, expenses that we had there." R16-213-14. "He [Rose] said you need to drive, and I suppose this was to – to avoid having records." R16-214. After the meeting, Rose told Felix to attribute his expenses for the Chicago trip to another recent meeting in Tennessee: "and I was asked to put it like if I had attended that meeting that I didn't." R17-17 & GX 94, 95. Felix's expense report therefore states that he was in Nashville, Tennessee, on the dates of the Chicago meeting, when in fact Felix was in Chicago. He did this "Because that's – that's what I was told – that's what I was told to put" by Rose. R17-21.

E. The St. Louis Meeting

The next conspirators' meeting took place on March 9, 1998, for roughly

three hours in the TWA Ambassadors Club at the St. Louis airport. R17-42, 150-51. The participants were Rose, Fischer, and Felix of DuCoa and Sigler of Bio-Products. Chinook was not represented. R14-157-58; R15-138.

Fischer described the purpose of the meeting as:

> we wanted to get a feel with a one-on-one with Mr. Sigler as to how he was taking the strategy to redistribute the volume. We needed to feel him out in terms of whether or not he was still going to support the price increase in April, and to try to see if there were some potential ways we could work together.

R14-157. According to Sigler, the purpose was "for DuCoa and Bio-Products to agree on which accounts that Bio-Products was going to get for the loss of volume in Tyson." R15-137.

The first subjects of discussion were "the accounts that they [DuCoa] were going to give to Bio-Products and some of the timing that was going to take place and – and the price increase." R15-138 (Sigler). Felix testified that "it had been decided Tyson was going to remain with us. It had been decided, again, that Cagle's was going to be traded." R17-39-40. Felix also identified Rose's notes, GX 50, as reflecting "the balances of the accounts and the compensation that needed to take place." R17-38.

With respect to the price increase, Sigler confirmed that Bio-Products had "put that in place." R15-140. Felix also recalled that Rose and Fischer told Sigler

what prices DuCoa intended to offer to several customers (Peterson, Simmons) after the price increase, and Sigler told them the price that Bio-Products intended to offer other accounts (Country Mark). R17-34-36, GX 109. The price increase ultimately succeeded "[b]ecause everybody and all of the other participants in the industry also increased the price at about the same level." R17-9 (Felix).[7]

The participants also discussed implementing their agreements by means of bid-rigging. According to Sigler, when the Tyson account would come up for bid again at end of March 2005, Bio-Products "would – we would bid higher. We wouldn't – we wouldn't go under and try to get the business back." R15-142. Put differently, "We were bidding not to win" in order to keep prices up and because "we had agreed on that we were going to get some volume back [through trading of accounts]." R15-144. Felix testified that Bio-Products followed through on this agreement and did not bid competitively for Tyson. R17-168.[8]

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[7] Bradley Reynolds of Animal Science Products, a premixer and wholesale distributor of feed ingredients to feed manufacturers, and in 1997-98 a customer of both Chinook and Bio-Products, R16-40-43, testified to the April 1998 price increase and recalled it as a significant, eleven percent increase. R16-45-46.

[8] Felix also recalled that in April 1998 he and Rose encountered John Kennedy of Chinook at the San Antonio airport as Felix and Rose were returning from a petrochemical industry convention. R17-44-45. "I just remember that at some point either myself or Mr. Rose asked him if the price increase was taking – was – how – how the price increase was being taken by the customers. . . . And he – I believe he said it was okay, and customers were taking it." R17-45.

As with the previous meetings, Rose was an active participant in both discussing the meeting's purposes beforehand and in the St. Louis meeting itself. R17-168 (Felix) (Rose was "leading the meeting on our part"); R14-158-59 (Fischer); R15-139 (Sigler).

F. The Downfall of the Conspiracy

In June 1998, Sigler was confronted internally at Bio-Products about his role in the conspiracy, and Bio-Products sought leniency from the Department of Justice. R15-149 & GX 39. DuCoa and Chinook were not aware of this dramatic change in circumstances: Sigler did not tell them, and he did not return their telephone calls during the summer of 1998. R15-152-53.

From DuCoa and Chinook's perspective, therefore, Bio-Products began to act very strangely – by actively competing and cutting prices. Fischer recalled that Bio-Products "became extremely aggressive in the marketplace beginning July 1st." R14-162. *See also* R14-195 (Bio-Products "got more aggressive in taking customers and more market share in 1998, in July"). Felix similarly testified that "Bio-Products started to go after our accounts again and prices were coming down." R17-46. Rose, Fischer, and Felix then gathered in Rose's office to call Kennedy at Chinook "to see if he knew what was going on in Bio-Products, because we couldn't get ahold of – of Mr. Sigler." R17-46-47. Kennedy also tried

to call Bio-Products "to figure out what had gone on, and why they had done what they had done," but he could not reach Sigler either. R16-118.

Despite the disruption caused by Bio-Products, DuCoa and Chinook persisted with the conspiracy until the FBI executed search warrants on DuCoa's and Chinook's offices on September 28, 1998. Fischer testified that he and Rose continued to contact Kennedy at Chinook up until that time. R14-161-62. Kennedy testified that had he been able to reach Sigler, "the ultimate goal would have been to try to have some sort of a – a meeting . . . so that we could see if we could get the agreement back in place." R16-120. Felix testified that DuCoa tried to "avoid" competing against Chinook. R17-48-49. The FBI raids ended the competitors' contacts with each other and, at DuCoa, any internal discussion of the conspiracy between Rose, Fischer, and Felix. R16-122 (Kennedy); R17-49-50 (Felix).

SUMMARY OF ARGUMENT

This was a classic case of a longstanding price-fixing, customer allocation, and bid-rigging conspiracy by the dominant producers of a commodity product. As Hilling testified, "[t]he conspiracy was our way of life. I mean, that's what we had to do to sell product and make the money that we were making." R13-180-81. Rose does not seriously contest the existence of the conspiracy before the second

half of 1997, and the evidence was more than sufficient for the jury reasonably to find, based on multiple co-conspirator testimony, that the conspiracy persisted throughout the period of Rose's involvement as alleged in the Indictment.

Likewise, the evidence was more than sufficient to meet the government's burden of showing that Rose knowingly joined an existing conspiracy, promoted it, and never tried to withdraw from it. Multiple witnesses testified that Rose, from the time he became President of DuCoa, was aware of the conspiracy, never objected to it, spoke on DuCoa's behalf at the conspirators' meetings, and agreed to fix prices and allocate customers in support of the conspiracy. The jury was entitled to reject Rose's unsupported characterization of the Tyson Foods incident as competitive. In fact, the evidence supported a finding that DuCoa's strategy was to *maintain and police* the conspiracy, and that DuCoa did not intend to keep the market share it gained from Tyson but instead tried to give it back to Bio-Products by re-allocating other customers.

With respect to sentencing, the district court properly adopted the findings of the Presentence Report concerning two enhancements because those findings were amply supported by the evidence. The enhancement for being a "manager or supervisor" was warranted because (1) Rose was the President of DuCoa and in that capacity spoke at meetings and agreed to fix prices and allocate customers on

behalf of his company; (2) Rose directly supervised Fischer and Felix in connection with their involvement in the conspiracy; (3) Rose approved Fischer's and Felix's actions in support of the conspiracy and never told them to stop participating; and (4) Rose directed Felix in particular to cover up evidence of conspiratorial meetings. The enhancement for more than $15 million in affected commerce was warranted because the evidence met the legal standard of showing that the conspiracy was at least minimally operational throughout the period alleged in the Indictment, and Rose did not (and does not) dispute that more than $16 million was affected when considering the full period of the Indictment.

The jury's verdict and the sentence therefore should be affirmed.

ARGUMENT

I. There Was More Than Sufficient Evidence To Support the Jury's Verdict

A. Standard of Review

"It is fundamental that we, as an appellate court, owe great deference to a jury verdict." *United States v. Walters*, 87 F.3d 663, 667 (5th Cir. 1996).

> Our review for sufficiency of the evidence following a conviction is narrow. We will affirm if a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt. We must consider the evidence, all reasonable inferences drawn therefrom, and all credibility determinations in the light most favorable to the prosecution.

United States v. Westbrook, 119 F.3d 1176, 1189 (5th Cir. 1997) (citations omitted). *See also United States v. Okoronkwo*, 46 F.3d 426, 430 (5th Cir. 1995) ("The jury is entitled to believe a witness unless the testimony is so incredible that it defies physical laws.").

"The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." *United States v. Jaras*, 86 F.3d 383, 387 (5th Cir. 1996); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356 (1983).

B. The Conspiracy Persisted Throughout the Time Period Alleged in the Indictment

Rose contends that the conspiracy was not functional in 1996-97 (Br. 13-15) and that the Atlanta, Chicago, and St. Louis meetings in 1998 (at which Rose was present) did not continue or re-establish it because they did not show a "meeting of the minds" on the objects of the conspiracy (Br. 16). This is a primarily a jury argument, which Rose's counsel made at trial. But the jury's finding that the conspiracy was operational during the period alleged in the Indictment (August 1997 through September 1998), as reflected in its guilty verdict, is fully supported by the evidence. Indeed, even assuming, incorrectly, that the evidence "would also

support an inference of innocence," this Court must still affirm. *United States v. Woolery*, 740 F.2d 359, 361 (5th Cir. 1984); *accord United States v. Colwell*, 764 F.2d 1070, 1072 (5th Cir. 1985) ("[A]n alternative hypothesis of innocence is inadequate grounds for reversal of a conviction.").[9]

The testimony was clear that, despite occasional sniping between the three companies, the conspiracy was active during the later part of 1997 as alleged in the Indictment. Hilling conceded that competitive activity picked up, R14-11, but this was minor; he estimated that in 1996 Bio-Products may have poached only three out of roughly 200 customer accounts that were "protected" under the conspiracy. R14-78-79. Fischer similarly explained that in 1997 "[t]he major key accounts

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[9] Rose's brief acknowledges, correctly, that a violation of Section 1 of the Sherman Act does not require proof of an overt act in furtherance of the conspiracy (Br. 10). But the brief also asserts that "evidence of an overt act implying the existence of the conspiracy during that time [when the defendant allegedly entered the conspiracy] is required[.]" *Id*. That statement is legally wrong.

But the Court need not address this issue here. First, the district court instructed the jury consistent with the government's position, not Rose's. Rose Record Excerpts, Tab 1, Court's Charge at 13 (instructing that to convict, the jury must find "that the conspiracy charged continued after June 4, 1998 and that the defendant was a member of it after that date"). Rose does not raise the instruction as an issue on appeal. Second, as shown in the text above, there was substantial direct evidence that the conspiracy was active in the second half of 1997. *See United States v. Therm-All, Inc.*, 373 F.3d 625, 636 (5th Cir.) (witness testimony held sufficient to prove that antitrust conspiracy continued into limitations period), *cert. denied*, 125 S. Ct. 632 (2004).

were still being respected by the competitors." R14-197. When Fischer briefed Rose on the conspiracy in September 1997, he did so in terms that assumed the conspiracy was operational. R14-101-02, 107-09. *See also* R14-205 (when Rose took over, "I told him there was an agreement in place and had been since 1988 where customers had been allocated and prices were fixed."). Kennedy testified that the agreement was in effect when Rose became President of DuCoa, R16-65, and specifically denied that cheating among the conspirators in 1996 meant that there was no agreement in place. R16-149, 179.

Rose asks this Court, as he asked the jury, to infer from certain facts that the companies were competing rather than conspiring in 1996-97 (Br. 13-14).[10] But no prosecution witness drew that conclusion, and Rose offered no witnesses of his own. All of the witnesses testified to the contrary, that the conspiracy in 1997 was just as Fischer described it in a passage quoted in Rose's own brief: "that each of

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[10] Some of these facts do not support the inference that Rose tries to draw. For example, Sigler testified that Bio-Products' construction of a new plant in Louisiana did *not* abrogate the conspiratorial agreement. R15-84. Hilling likewise testified that the new plant did not pose any risk to the one-third/one-third/one-third market division of the conspirators because it merely would replace an older Bio-Products plant in Kentucky. R14-74-75. Nor can any inference be drawn from the fact that customers often paid prices discounted from the conspirators' agreed list prices (Br. 5, 14). That the conspirators agreed on the list prices is sufficient to establish a Sherman Act violation, so the discounts are legally irrelevant. *See Plymouth Dealers Ass'n of N. Cal. v. United States*, 279 F.2d 128, 132-34 (9th Cir. 1960).

the competitors had protected accounts and that those accounts theoretically would not be tampered with by other competitors and that the market had operated for, well, really since early 1989 in that way[.]" Br. 13. The jury therefore was entitled to reject Rose's proposed inference and find, as it did, that the conspiracy was active throughout the period alleged in the Indictment. *See, e.g., United States v. Redd*, 355 F.3d 866, 873 n.6 (5th Cir. 2003) (appellate review is "limited to whether a reasonable jury could have resolved the conflicts as it apparently did"). That a price-fixing conspiracy may not be fully successful all of the time, or that its members may "cheat" on each other, is not uncommon and does not prevent the evidence from being sufficient to convict. *E.g., United States v. Andreas*, 216 F.3d 645, 679 (7th Cir. 2000); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1231 (8th Cir. 1992).

Rose's contention about "meeting of the minds" is contrary to the overwhelming weight of the testimony. First, at the Chicago meeting all of the conspirators indisputably agreed that the three companies would raise prices as of April 1, 1998, and would announce the increase through *Feedstuffs* magazine and letters to customers. R15-121 (Sigler); R14-132-33, 135 (Fischer); GX 34, 35, 113. This agreement was plainly within the scope of the conspiracy.

The participants also agreed to swap certain customer accounts to

compensate Bio-Products for the loss of Tyson Foods. Fischer testified that "while it wasn't complete and a total agreement, there was . . . an agreement that at certain times during the year we would begin switching certain accounts to equalize the volume." R14-129. For example, DuCoa's volume from a company called Roche "would be moved to Bio-Products. Volume at Cagle's, which I believe Chinook had, would be moved to Bio-Products." R14-130. Felix testified to the same effect:

> Q. . . . Did you also decide who would keep what customers in this meeting?
>
> A. Yes.
>
> Q. And what did you decide about that?
>
> A. Well, at the end it was decided that Cagle's should pass to – to Bio-Products; we will maintain Tyson, as we had; and Bio-Products will maintain the accounts that they have already taken from us and those – those kinds of situations.

R17-5. In cross-examination, Rose's counsel tried to press the witnesses to acknowledge that disagreement also occurred, but all of them stuck to their testimony that the conspirators agreed both to raise prices and re-allocate customers. For example, Kennedy was emphatic that "I believe there was full agreement" reached in Chicago. R16-184.

Second, at the St. Louis meeting, DuCoa and Bio-Products agreed again to

swap customers to compensate for the Tyson volume and further agreed to implement the agreement by bid-rigging. Sigler testified that "we had agreed on that we were going to get some volume back [through trading of accounts]." R15-144. When asked why Bio-Products subsequently did not bid competitively for the Tyson account, he explained:

> A. Because it was agreed to that we – we weren't going to.
>
> Q. In fact, you didn't – you not only didn't [sic] let [DuCoa] win, you also let them increase the price at Tyson, did you not?
>
> A. Yes.
>
> Q. Why is that?
>
> A. So that prices would go up everywhere, because I think I stated earlier that Tyson was kind of the – I don't know what you would call it, but they were the largest choline user at that time, so they kind of set the bottom of the – of the pricing.
>
> Q. Would you have ever done this if you didn't know that there was an agreement in place?
>
> A. No.
>
> Q. You knew you were going to get volume back for Tyson?
>
> A. Yes.
>
> Q. And you trusted them [DuCoa] enough to follow through with your end of the agreement, correct?
>
> A. Yes.

Q. And it worked exactly according to the plan, correct?

A. Yes, it did.

R15-146-47. All of this was within the scope of the conspiracy.

Third, even the Atlanta meeting, which did not result in any specific agreement concerning the Tyson account, did result in an agreement to meet again – and not for a legitimate purpose, but to "be one of those meetings where we tried to get the agreement back on track . . . and then also to increase prices." R16-74 (Kennedy).

The jury was entitled to believe each of these witnesses, even standing alone. To the extent there was any conflicting evidence, the jury had the right reasonably to resolve the conflict as it apparently did and find that the conspiracy persisted through the time that Rose participated. *Redd*, 355 F.3d at 873 n.6.

C. The Tyson Foods Incident Was Not Inconsistent With the Conspiracy

At trial, Rose's counsel argued that DuCoa's strategy of taking away the large Tyson Foods account from Bio-Products was a competitive act that showed that Rose, at least, was not part of an effective conspiracy. The jury rejected that argument, and it was entitled to do so because *all* of the testimony was to the contrary. Fischer testified squarely that the purpose of the Tyson strategy was *not* to

compete fairly, but to grab Bio-Products' attention and prod it into a negotiation that would re-establish the one-third/one-third/one-third market division of the conspirators:

> Q. Was the purpose of your plan with the defendant to take Tyson to restabilize the marketplace?
>
> A. Yes.

R15-66. *See also* R14-111-16. The Tyson incident thus was consistent with prior practice of the conspiracy: after incidents of customer poaching, the conspirators would hold a meeting to re-allocate choline chloride volume.

DuCoa had no intention of keeping the market share it gained from Tyson, because the conspirators subsequently held two meetings, in Chicago and St. Louis, at which DuCoa agreed to re-allocate some of its other accounts to Bio-Products to compensate for the loss of Tyson and re-balance the conspirators' market shares. R14-115 (Fischer) (intent was "to reallocate product to make the market back into equilibrium"); R15-115, 137-38; R16-93, 96, 217-18, 220; R17-39-40. *See also* R16-172-74 (Kennedy) (at the Chicago meeting, Chinook gave up the Cagle's account, "a fairly large account," to Bio-Products. "We were up against DuCoa. But DuCoa was up against Bio, so we didn't pass the account to DuCoa, we just gave the account directly to Bio, and so that helped compensate them."). And Sigler

testified that Bio-Products agreed *not* to compete for the Tyson account again but, instead, to engage in further bid-rigging so that DuCoa could keep the Tyson account while Bio-Products would be compensated with other accounts. R15-142-45. By contrast, not a single witness testified (because Rose offered none) that the Tyson incident represented fair competition.

Rose's suggestion that the Tyson incident constituted a withdrawal from the conspiracy (Br. 14-15) is meritless, because the facts do not even approach the high legal standard that must be satisfied to show withdrawal. "A defendant is presumed to continue in a conspiracy unless he makes a substantial affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose. The defendant has the burden of proving affirmative acts that are inconsistent with the conspiracy and are communicated in a manner reasonably calculated to reach his co-conspirators." *United States v. Torres*, 114 F.3d 520, 525 (5th Cir. 1997).

Rose does not meet this burden for several reasons. First, as shown above, the Tyson incident was in fact fully consistent with the conspiracy. Second, all of the co-conspirators testified that they believed Rose to be fully engaged in the conspiracy; no one expressed even the slightest sense that Rose intended to withdraw from, or even disagreed with, the conspiracy. R14-102, 109, 122, 130, 137, 158-59; R15-104-05, 115-16, 127, 139; R16-74-75, 94-96, 219, 221; R17-168;

see also R16-182 (Kennedy) (at the Chicago meeting, "I would have remembered an objection to it. I would have remembered someone saying that they disagreed, because we – we wouldn't have been able to have the meeting.").

Third, the facts reject any suggestion that a purpose to withdraw was communicated to any of the conspirators, because after Bio-Products lost the Tyson account, the conspirators, including Rose, held three meetings, plus numerous telephone contacts, to fix prices, allocate customers, and advance the purposes of the conspiracy through the summer of 1998. It is simply not credible to contend that DuCoa withdrew from the conspiracy in December 1997 when DuCoa, represented by Rose, participated in three conspiratorial meetings in the first half of 1998. The witnesses testified that even after Bio-Products turned itself in to the government in June 1998, Chinook and DuCoa, under Rose's direction, continued trying to make the conspiracy work. R14-161-62; R16-118-120; R17-46-47. Neither Rose nor DuCoa ever made any meaningful effort to withdraw.

In sum, the jury was entitled to find, because it was supported by testimony from multiple witnesses, that what Rose tries to characterize as competitive acts were in fact acts taken to police and promote the conspiracy, not to break from the conspiracy.

D. There Was More Than Sufficient Evidence of Rose's Knowledge of and Involvement In the Charged Conspiracy

"A person may be guilty as a co-conspirator even if he plays only a minor role, and he need not know all the details of the unlawful enterprise or know the exact number or identity of all the co-conspirators, so long as he knowingly participates in some fashion in the larger objectives of the conspiracy." *United States v. Westbrook*, 119 F.3d 1176, 1189 (5th Cir. 1997) (citations omitted).

The evidence that Rose knowingly participated in the conspiracy was substantial. Five witnesses, including Rose's immediate predecessor, his direct subordinate, his vice president for choline chloride operations, and two of his direct competitors, testified that:

- Rose was aware of the conspiracy at the time he became President of DuCoa, R13-201-02; R14-101-02; R16-65-66;
- Rose never objected to the conspiracy or to any acts taken in furtherance of it, and never voiced any intention to withdraw, R14-109; R15-105; R16-95-96;
- Rose never directed his subordinates to withdraw from the conspiracy, or even to stop meeting with DuCoa's competitors, R14-102, 109, 122;
- Rose approved the planning of meetings with DuCoa's competitors for the purpose of allocating customers, fixing prices, and rigging bids, R14-117-18; R15-12;
- Rose actively participated in meetings with Chinook and Bio-Products at which the three competitors allocated customers, negotiated fixed

prices, and planned bid-rigging, R15-104-05; R16-74-75; R17-168; and

- Rose actively participated in trying to cover up the meetings, including directing his subordinates to falsify their expense reports, R16-214; R17-17, 47-48.

Cf. United States v. Haversat, 22 F.3d 790, 796 (8th Cir. 1994) (defendant in antitrust conspiracy "did not simply 'swim with the crowd.' He jumped into the pool willingly.").

Rose did not testify himself and did not offer a single witness in his defense to rebut the government's evidence. He attempted to impeach the credibility of the government's witnesses, but "[o]bviously, the jury considered the witnesses testifying against [Rose] more credible than [Rose] himself." *Westbrook*, 119 F.3d at 1190. The jury was entitled to do so. "As long as it is not factually impossible or incredible, co-conspirator testimony is acceptable, even standing alone, to support a verdict." *United States v. Arnold*, 416 F.3d 349, 359 & n.14 (5th Cir. 2005).

The "mere presence" cases cited by Rose (Br. 21-22) are inapplicable here. First, the evidence showed far more than mere presence. As explained *supra*, pages 17, 19-20, 24, co-conspirators testified that Rose expressly participated in an explicit agreement to fix prices, trade customers, and engage in bid-rigging. Rose was not merely an uninvited onlooker, but the President of DuCoa who spoke on its

behalf at the conspirators' meetings. Rose also approved the actions of his subordinates in support of the conspiracy and directed them to attempt to cover up the conspiracy. *See* pages 14-16, 21, *supra*. And Rose was aware of and participated in meetings with physical evidence: the price sheets prepared by DuCoa and the other conspirators that they used to fix prices at the Chicago meeting. GX 11, 33, 34, 35, 113. Under these circumstances, the "mere presence" cases do not apply. *See Arnold*, 416 F.3d at 359 & n.12; *United States v. Montgomery*, 210 F.3d 446, 449 (5th Cir. 2000) ("The jury may rely on presence and association, along with other evidence"); *Torres*, 114 F.3d at 524 (same).[11]

Second, "[a] jury may find knowledgeable, voluntary participation from presence when it would be unreasonable for anyone other than a knowledgeable

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[11] By contrast, in *United States v. Jackson*, 700 F.2d 181 (5th Cir. 1983), and *United States v. Maltos*, 985 F.2d 743 (5th Cir. 1992), the cases cited by Rose in which the evidence showed only "mere presence," the facts were very different. In *Jackson*, there was "no evidence indicating that Whitley knew the nature or purpose of the meeting," and "no evidence indicating that Whitley was present during conversations in which the conspiracy was discussed." 700 F.2d at 185. Similarly, in *Maltos* "no evidence established that Maltos knew the content of the myriad phone calls his codefendants placed from public phones or that his own conversations, whether by phone or during meals with his codefendants, concerned the drug transactions." 985 F.2d at 747. The facts are manifestly different here: Rose's own quotations from the testimony (Br. 17-21) show that Rose knew the nature and purpose of the meetings, was present during discussions of the conspiracy, understood what was discussed, and participated in the conversations.

participant to be present." *United States v. Martinez*, 190 F.3d 673, 676 (5th Cir. 1999). Kennedy testified that, at the Atlanta meeting, if he had thought Rose was *not* part of the conspiracy, he (Kennedy) never would have broached the subjects that were discussed. R16-75. Kennedy similarly testified that, at the Chicago meeting, "[i]f Dan had said . . . that he was – he was not going to be part of the agreement, or if he said that we can't discuss this, it was illegal, in my estimation it would have been that the agreement was over and there would have been – no reason to have any discussions." R16-96. The jury reasonably could have found from this testimony that it would have been unreasonable for Rose to be present at those meetings if he was not a knowing participant in the conspiracy.

Although Rose attempts to portray himself as a passive onlooker at the meetings, and to shift blame to Fischer as the active conspirator on behalf of DuCoa (Br. 22-23), his spin on the facts is both unpersuasive and legally irrelevant. Rose's own brief quotes Fischer's testimony that Rose participated in the price-fixing in Chicago; that Rose agreed to the fixed prices; and that Fischer briefed Rose before the St. Louis meeting (Br. 19, 21). Fischer testified that Rose "gave me the okay" to set up the Atlanta meeting, R14-117, and "[c]ertainly I couldn't do anything without Dan's approval." R15-12. It was entirely reasonable for the jury to conclude that Rose, as Fischer's direct superior, was a knowing and active participant in the

conspiracy. Accordingly, the jury's guilty verdict should be affirmed.

II. The District Court Did Not Err in Sentencing Rose

A. Standard of Review

This Court reviews sentences imposed subsequent to *Booker* for "unreasonable[ness]." *United States v. Booker*, 125 S. Ct. 738, 765 (2005). The factors set forth in 18 U.S.C. 3553(a) "guide appellate courts . . . in determining whether a sentence is unreasonable." *Id*. at 766.

After *Booker*, "[i]f the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines." *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005), *petition for cert. filed* Mar. 31, 2005. "Given the deference due the sentencing judge's discretion under the *Booker/Fanfan* regime, it will be rare for a reviewing court to say such a sentence is 'unreasonable.'" *Id*.

The district court's factual findings are reviewed for clear error. *See Maine v. Taylor*, 477 U.S. 131, 145 (1986). This includes the determination that a defendant qualifies for an offense level adjustment for an aggravating role in the offense, e.g., *United States v. Peters*, 283 F.3d 300, 314 (5th Cir. 2002); *United States v. Floyd*, 343 F.3d 363, 371-72 (5th Cir. 2003), *cert. denied*, 541 U.S. 1054 (2004); *United*

States v. Miranda, 248 F.3d 434, 446 (5th Cir. 2001), and the determination of the amount of commerce affected under U.S.S.G. § 2R1.1. *See United States v. Giordano*, 261 F.3d 1134, 1144 (11th Cir. 2001); c*f. United States v. Glinsey*, 209 F.3d 386, 393 (5th Cir. 2000) (loss determination under § 2F1.1(b)(1) is a factual finding reviewed for clear error).[12]

B. The Enhancement for Acting As a "Manager or Supervisor" Was Appropriate

"A district court's factual findings are not clearly erroneous if they are 'plausible in light of the record as a whole.'" *Miranda*, 248 F.3d at 446 (quoting *United States v. Alford*, 142 F.3d 825, 831 (5th Cir. 1998)). "[A] district court may adopt facts contained in a Presentence Report (PSR) without further inquiry if the facts have an adequate evidentiary basis and the defendant does not present rebuttal evidence." *Peters*, 283 F.3d at 314. The PSR's finding here that Rose was a manager or supervisor was more than plausible, and Rose did not offer rebuttal

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[12] Rose agrees with this standard with respect to the amount of affected commerce, arguing that the district court "clearly erred" as a factual matter (Br. 29-30). But he suggests, citing a Second Circuit decision, that the "manager or supervisor" enhancement should be reviewed *de novo* (Br. 24). That position is both inconsistent with *Peters*, *Floyd*, *Miranda*, and other precedent in this circuit, and wrong: Rose did not argue below, and does not argue here, that the issue in this case involves any ambiguity in U.S.S.G. § 3B1.1(b) or requires any legal interpretation of the guidelines. Instead, his argument is the purely factual one that the evidence did not rise to the level of showing Rose to be a manager or supervisor.

evidence.

First, as President of DuCoa, Rose was the highest-level executive to attend the conspiratorial meetings. Rose had direct supervisory authority over both Fischer and Felix. Had he wanted to, Rose could have ordered them, at any time, to stop participating in the conspiracy, to stop meeting with competitors, or to take other actions inconsistent with the conspiracy. The fact that Fischer and Felix joined the conspiracy before Rose did does not preclude a finding that Rose acted as their manager or supervisor during the period that Rose participated in the conspiracy.

Second, Fischer testified that Rose expressly authorized and approved, as Fischer's supervisor, actions that Fischer took in direct support of the conspiracy. R14-117 (Rose "gave me the okay" to set up the Atlanta meeting); R14-208 (Rose made the decision to take Tyson away from Bio-Products); R15-12 ("Certainly I couldn't do anything without Dan's approval.").

Third, Rose acted as a manager of the conspiracy by directing Felix to hide his conspiracy-related expenses in order to cover up the conspiracy. R16-213-14 (Rose told Felix to drive to the Chicago meeting and pay cash for his expenses); R17-17, 21 & GX 94 (Rose told Felix to lie on his expense reports by attributing his Chicago expenses to a different meeting in Tennessee); R17-47-48 (Rose instructed Felix to use pay phone cards when calling competitors). *Cf. United States v. West*,

58 F.3d 133, 137 (5th Cir. 1995) (four-level increase for being "organizer or leader" was proper where defendant was involved in concealing illegal transactions "by the use of fictitious company names and the preparation of false invoices").

Fourth, Rose was not a passive participant in the meetings. Multiple witnesses testified that Rose spoke on behalf of DuCoa. R17-29-30 (Rose "let him [Sigler] know that [return of the Tyson account] was not going to be a possibility"); R16-221 (Rose was "the one talking for DuCoa"); R17-168 (Rose was "leading the [St. Louis] meeting on our [DuCoa's] part"); R15-104-05, 139; R16-74-75. Rose did not simply carry out the conspiracy: he acted as a manager by personally negotiating the fixed choline chloride prices. *Cf. United States v. Pofahl*, 990 F.2d 1456, 1481 (5th Cir. 1993) (enhancement for being a "manager" was proper where defendant, *inter alia*, negotiated the price of drugs).

In sum, "the facts paint a picture of a manager, not a minion." *United States v. Liu*, 960 F.2d 449, 456 (5th Cir. 1992) (upholding enhancement). Rose does not dispute any of these facts, "only the court's conclusion drawn from those facts." *Id*. The PSR did not have to find, as Rose argues (Br. 26), that Rose was the "kingpin" or "mastermind" of the conspiracy, because the PSR did not give Rose the four-level enhancement for being an "organizer or leader." Instead, the PSR gave Rose the lesser three-level enhancement, which required a correspondingly lower factual

showing. *See* § 3B1.1, Application Note 4 (distinguishing a leadership and organization role from "one of mere management or supervision").

Rose's reliance on *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000), is misplaced. The court of appeals there held that the district court erred by *not* giving Andreas the four-level increase for being an organizer or leader. Contrary to Rose's misreading of the opinion (Br. 27-28), the court held that Andreas *did* exercise more control than his co-conspirators and *did* deserve the four-level enhancement: "The fact that control over co-conspirators was not absolute and that he had to negotiate does not negate the conclusion that Andreas was the ultimate leader of the price-fixing cabal." *Id*. at 680.

But neither the PSR nor the district court here needed to find that degree of leadership or control to support the lesser three-level increase. Instead, the part of *Andreas* that is analogous here is the Seventh Circuit's conclusion that a three-level "manager or supervisor" increase was warranted for another defendant, Wilson, because Wilson spoke in conspiracy meetings on behalf of ADM and proposed ways to run the cartel. *See id*. at 680. Wilson was the head of ADM's corn processing division; Rose, by comparison, was a higher level manager as President of DuCoa. Accordingly, the district court did not clearly err by adopting the finding of the PSR.

C. The Enhancement for Volume of Commerce Affected Was Appropriate

The district court need not "undertake a 'burdensome inquiry' into the volume of commerce for sentencing purposes." *Giordano*, 261 F.3d at 1146. "It is enough for the district court to determine the periods during which the conspiracy was effective. Once the conspiracy is found to have been effective during a certain period, there arises a rebuttable presumption that all sales during that period were 'affected by' the conspiracy." *Id*.; *accord Andreas*, 216 F.3d at 678. The government's burden of showing that the conspiracy was effective is slight: "effective" means only that the conspiracy "was not a non-starter and was not completely ineffective for periods of time" or "effective to at least some extent during a certain period." *Giordano*, 261 F.3d at 1146 n.15.

The district court also can estimate, rather than precisely calculate, the volume of commerce. In an analogous context, this court has made clear that "[t]he loss calculation need not be precise and will be affirmed so long as it reasonably estimates the loss using reasonably available information." *Glinsey*, 209 F.3d at 393. "The defendant bears the burden of demonstrating that the information in the PSR is materially untrue." *Id*.

Here, the finding in the Presentence Report had an adequate evidentiary basis.

At trial, the government introduced a summary exhibit (GX 52), based on DuCoa, Chinook, and Bio-Products' own data (GX 55-57), that showed the total sales amount of choline chloride for the three companies, from August 22, 1997 to September 29, 1998, as $56,471,841.64. DuCoa's share of that total was shown as $16,115,785.36. Rose does not argue here that the admission of that exhibit was error. At sentencing, Rose did submit DuCoa data to show a volume of commerce of roughly $9.8 million for the period February through September 1998, but he did not offer anything to rebut the accuracy of the $16 million figure for the time period alleged in the Indictment.

There was ample testimony that the conspiracy was at least effective to some extent during the full time period encompassed by GX 52. Specifically, Hilling testified that while the conspirators' last face-to-face meeting, before Atlanta in early 1998, was in December 1996, there were numerous telephone contacts after December 1996. R14-32-33. The conspirators called each other by telephone "almost daily." R13-177. He testified that at the time he left DuCoa in the fall of 1997, the agreement was still in effect. R14-75. *See also* R16-65 (Kennedy) (agreement was in effect when Rose took over DuCoa). In fact, in August 1997 Hilling briefed Rose on the conspiracy as if it was fully in effect at that time. R14-53, 83; R13-198. As shown above, page 30 *supra*, Fischer similarly briefed Rose

on the conspiracy in September 1997 in terms that assumed the conspiracy was operational. *See also Giordano*, 261 F.3d at 1147 n.17 (that some conspirators "did not completely abide by the illegal agreement does not, however, mean that the conspiracy was a non-starter.").

Rose's contention also ignores the conspirators' Atlanta meeting in January 1998. While no agreement was reached on the limited topic of the Tyson account, the fact of the meeting itself is evidence that the conspiracy continued to function. And the conspirators did agree to schedule a follow-up meeting to, in Fischer's words, "go forward with – with – with the [conspiratorial] agreement." R14-123. Kennedy testified:

> I know that we made agreement to have another meeting, and that the – the future meeting was going to . . . [try] to get the agreement back on track, where we tried to look at customers that had been switching around and tried to get back to a – a market share customer agreement that everybody could agree on, and then also to increase prices.

R16-74. This agreement to meet again is further evidence that the conspiracy was not ineffective.

Accordingly, the district court correctly determined the PSR finding to be supported by a preponderance of the evidence and was entitled to adopt it without further inquiry. Rose's unsupported assertion that "choline chloride products were not affected until the meeting in Chicago in February 1998" (Br. 30) is wrong. In

fact, the market for choline chloride had been manipulated and perverted continuously, by repeated agreements to fix prices, by bid-rigging, and by agreed customer allocations, since the beginning of the conspiracy in the 1980's.

CONCLUSION

For the foregoing reasons, the judgment of conviction and sentence should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that today, October 7, 2005, I caused two paper copies of the accompanying BRIEF FOR APPELLEE UNITED STATES OF AMERICA, plus one IBM-formatted 3 1/2 inch computer diskette containing an electronic copy, to be served by Federal Express on each of the following:

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