No. 07-1381

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

CHRIS A. BEAVER,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION,
CASE NUMBER IP 06-CR-61 M/F
(HONORABLE LARRY J. McKINNEY, CHIEF JUDGE)

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not accept Chris Beaver's Statement in Support of Oral Argument 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 jurisdictional statement in Chris Beaver's brief is complete and correct.

STATEMENT OF THE ISSUES

1. Whether Chris Beaver waived the issue of the materiality of his false statements; whether the statements could be recanted; and whether the evidence was sufficient to support the jury's finding of materiality.
2. Whether the evidence was sufficient to support the jury's finding that Chris Beaver knowingly participated in a price-fixing conspiracy.
3. Whether the jury reasonably could have found the government's witnesses to be credible.

STATEMENT OF THE CASE

In 2003, the Department of Justice opened a grand jury investigation into price fixing of ready-mixed concrete in the Indianapolis, Indiana metropolitan area. The investigation ultimately exposed a price-fixing conspiracy consisting of five ready-mixed concrete producers: Builder's Concrete and Supply Co., Inc., Irving

Materials, Inc., Hughey, Inc. d/b/a Carmel Concrete, Shelby Materials, Inc., and Ma-Ri-Al Corp., which does business as Beaver Materials Corp.

Three of these companies, and seven of their individual officers, subsequently pleaded guilty to violations of Section 1 of the Sherman Act, 15 U.S.C. 1, in the Southern District of Indiana. Irving Materials pleaded guilty and was sentenced to pay a $29.2 million fine; Builder's Concrete pleaded guilty and was sentenced to pay a $4 million fine; and Carmel Concrete pleaded guilty and was sentenced to pay a $225,000 fine.[1]

On April 11, 2006, a federal grand jury sitting in Indianapolis returned a four-count Indictment charging Ma-Ri-Al Corp. and two of its executives, Operations Manager Chris A. Beaver and Commercial Sales Manager Ricky J. Beaver, and a separate individual, John J. Blatzheim, Executive Vice-President of Builder's Concrete and Supply, with participating in a "combination and conspiracy to suppress and

[1] Shelby Materials and two of its officers, Richard Haehl and Philip Haehl, were not prosecuted because they admitted their criminal conduct, helped expose the conspiracy, and met the terms of the Antitrust Division's long-established leniency program.

eliminate competition by fixing the prices at which ready mixed concrete was sold" in the Indianapolis metropolitan area from "at least as early as July, 2000 and continuing until May 25, 2004," in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Count 1). Tr. IV-650-57.[2]

The Indictment charged that the defendants and their competitors participated in meetings held at various locations, including "a horse barn owned by a co-conspirator, Gus B. Nuckols, III a/k/a Butch Nuckols, president of Builder's Concrete and Supply Co.," at which they agreed to increase prices, limit or eliminate discounts, implement surcharges, carry out and enforce their agreements, and attempt to conceal the conspiracy. Tr. IV-652.

Blatzheim, Chris Beaver, and Ricky Beaver also were charged with knowingly making false statements to federal law enforcement officers during the investigation, in violation of 18 U.S.C. 1001 (Counts 2, 3, and 4, respectively). On November 3, 2006, Blatzheim pleaded guilty to Count 1, violation of the Sherman Act. The government

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[2] In this brief, "Tr." refers to the trial transcript, followed by the volume and page number; "Beaver Br." to Chris Beaver's opening brief; and GX to government exhibits admitted into evidence at trial.

dismissed Count 2 against him.

Trial against Ma-Ri-Al, Chris Beaver, and Ricky Beaver began on November 13, 2006. Neither Chris Beaver nor Ricky Beaver testified, although the defense called four witnesses. At the close of the government's evidence, defendants moved for a judgment of acquittal, but only as to Count 1, based on the Sherman Act. The district court invited defense counsel for Chris Beaver and Ricky Beaver to raise "the other count against your client," but counsel responded: "I have no motion to make about that at this stage of the proceedings." Tr. III-457. The court denied defendants' motion. Tr. III-459. Jury deliberations began on November 16, 2006, and the jury returned a guilty verdict the same day against all defendants on Count 1 and Counts 3 (Chris Beaver) and 4 (Ricky Beaver).

Defendants subsequently moved for judgment of acquittal under Fed. R. Crim. P. 29, but their motion appeared to address only Count 1, the Sherman Act, and did not mention the convictions for making false statements. 11/22/2006 Defendants Motion For A Judgment of Acquittal Pursuant To Federal Rule of Criminal Procedure 29(c), pp. 2-

3.[3] On January 23, 2007, the district court denied defendants' motion in an order that did not mention the false statements count. 01/23/2007 Order On Defendants' Motion for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(c), pp.1-2. Presentence Reports were ordered and sentencing was scheduled for February 9, 2007 for Chris Beaver and Ricky Beaver, and February 15, 2007 (subsequently changed to February 22) for Ma-Ri-Al Corp.

On February 9, 2007, the district court sentenced Chris Beaver to a below-Guidelines term of 27 months imprisonment on each count, to be served concurrently, with a recommendation that he be assigned to a federal prison camp in Terre Haute, Indiana; a $5,000 fine; two years of supervised release; and a special assessment of $200. Ricky Beaver received the same sentence.

Chris Beaver is currently incarcerated at the Federal Prison Camp in Terre Haute, Indiana.

The court imposed a fine of $1.75 million on Ma-Ri-Al Corp., to be

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[3] The district court docket sheet for this case uses dates, rather than numbered entries, to identify the proceedings and papers filed in the district court.

paid in installments, and a $400 special assessment.

The district court entered final judgment against Chris Beaver and Ricky Beaver on February 20, 2007. Beaver Br. 50-55 (appendix). Also on February 20, 2007, Chris Beaver filed a notice of appeal. 02/20/2007 Notice of Appeal. Ricky Beaver and Ma-Ri-Al Corp. did not file notices of appeal.

STATEMENT OF FACTS

A. Introduction and Identification of Witnesses

Ma-Ri-Al Corp. is a family business headquartered in Noblesville, Indiana. During the period encompassed by the Indictment, Allyn Beaver was President of the company and 51 percent stockholder; his brother Gary Beaver was Vice-President and 49 percent stockholder. Tr. III-534. Chris Beaver, son of Allyn Beaver, was Operations Manager, and Ricky Beaver, son of Gary Beaver, was Commercial Sales Manager. FBI agents testified that Ricky and/or Chris Beaver said in FBI interviews that they served on the company's Board of Directors (along with Allyn Beaver, Gary Beaver, and Bob Matthews), Tr. III-

421-22, 431-32, 440.[4] Ricky Beaver told the FBI that Chris Beaver "was being groomed to be the next president of Beaver Materials." Tr. III-422. Allyn Beaver estimated that from 2001-2006, Ma-Ri-Al did an average of $10-$15 million in sales per year. Tr. III-551.

Allyn Beaver testified that between 2000 and 2004 he had sole authority to set prices for Ma-Ri-Al. Tr. III-540. But he also testified that Chris Beaver and Ricky Beaver were involved in pricing, Tr. III-542; admitted that he told the FBI that Chris Beaver was involved in pricing, Tr. III-554; admitted that he told the FBI that pricing was a collective effort by himself, Chris Beaver, and Bob Mathews, *id.*; and admitted that the company sales staff had authority to give discounts of up to $5-$6 on its own initiative. *Id.*[5]

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[4] Charles Sheeks, the company's corporate lawyer, testified for the defense that the only directors and officers were Allyn Beaver and Gary Beaver. Tr. III-476. Allyn Beaver also denied that Ricky Beaver or Chris Beaver were officers or directors. Tr. III-549.

[5] Similarly, Allyn Beaver testified that "any price that was set, or any price they wanted to discount – now Chuck [Mosley, a company salesman] kind of give [sic] a lot of $5.75 discounts, maybe some $7.75, but anything that they wanted to do other than that, it would have to go through me first[.]" Tr. III-537. The unanimous testimony of the government witnesses, however, was that the price fixing in this case was an agreement to limit discounts, initially, to $5.50 off the list price.

Ready-mixed concrete consists of cement, aggregate (sand and gravel), water, and, at times, other additives. Ready-mixed concrete is made on demand and, if necessary, shipped to work sites by concrete mixer trucks. It typically is purchased by do-it-yourself customers, commercial customers, and local, state, and federal governments for use in construction projects, including sidewalks, driveways, bridges, tunnels, and roads. Tr. I-30-31, II-290. Because ready-mixed concrete hardens or "sets" quickly, and thereby loses strength, producers' sales areas are limited by the time it takes their trucks to make deliveries, typically to no more than 90 minutes driving distance from the manufacturing plant. Tr. I-31-32, II-291.

Construction season in the Indianapolis area begins in the spring of the year, and at that time competitors in the ready-mixed concrete business typically send out letters, or price lists, to their customers to inform them of the prices to be charged. Tr. II-128; GX 4, 7, 18. During the period covered by the Indictment, the price lists typically featured a gross price (sometimes referred to as list price), a discount off the gross price for prompt payment, and a resulting net price. Tr. II-131-32, III-502; GX 4, 18. The net prices of competitors in the Indianapolis area

typically were either identical or nearly so. Tr. II-132 (Haehl) ("Most of our net prices are all either the same or fairly close."); III-515 (Mosley) (Ma-Ri-Al's price list was always in line with competitors' prices); GX 4, 7, 18, 38. Suppliers might then offer discounts off the net price for large jobs, to meet a competitor's price, or for other reasons. Tr. II-132-33. These additional discounts do not appear on the price list. *Id.*

In the 2000-2004 period, Ma-Ri-Al's chief competitors in the market for ready-mixed concrete in the Indianapolis area were Builder's Concrete, Irving Materials, Carmel Concrete, Shelby Materials, American Concrete, Prairie Materials, Lebanon Concrete, and Plainfield Concrete. Tr. II-291.

B. The Conspiracy Begins

In 2000, Gus Nuckols, President of Builder's Concrete, Tr. I-30, received a telephone call from John Huggins, Executive Vice-President of Irving Materials, asking to meet him for a beer. Tr. I-64. According to Nuckols, when they met at Sahm's restaurant in Fisher, Indiana, Huggins

> was very upset with me on some pricing that we put in the market. And I said to John that he and I could talk about it all day but nothing we could do about it, you know, unless everybody

> wanted to get on board. We were wasting each other's time. So we decided to get together as a group.

Tr. I-64-65. Specifically, "[w]e decided to meet in my horse barn and he called some people and I called some people." Tr. I-65.

The first meeting in Nuckols' horse barn took place on July 12, 2000. Tr. II-142. Nuckols explained that he invited his competitors to the horse barn because, "knowing it wasn't the right thing to do, we didn't want to be out in public doing this." Tr. I-46. *See also* Tr. II-142 (Haehl) ("[The horse barn] was private and, you know, what we were doing there was not legal.").

The participants were Scott Hughey, President of Carmel Concrete, Tr. II-289; Richard Haehl, Vice-President of Shelby Materials, Tr. II-122; his brother Philip Haehl; John Huggins from Irving Materials; and Nuckols and Tim Kuebler from Builder's Supply. Tr. I-66-67; II-143. Nuckols could not recall with certainty whether anyone from Ma-Ri-Al attended, but both Richard Haehl and Scott Hughey testified that Ricky Beaver represented Ma-Ri-Al. Tr. II-143 (Haehl); II-304 (Hughey).

Richard Haehl testified that "the main issue was the fact that

selling prices were declining and we needed to do something to get the price up." Tr. II-144. *See also* Tr. II-304 (Hughey) ("pricing was getting out of hand, meaning getting lower and lower, and we thought we needed to get together and stabilize the market by limiting discounts and getting the price up."). List prices were not declining, but actual sales prices were, because the competitors were granting their customers discounts off the net price. Tr. II-144-45. In Nuckols' words, the purpose of the meeting therefore was "to come up with an agreed limited discount." Tr. I-46; *see also* Tr. I-67.

The government witnesses all testified that a price-fixing agreement was reached. According to Haehl, "[e]verybody was involved in the discussion that was there, and in the end there was a consensus that we limit the discounts." Tr. II-145. *See also* Tr. II-146 (same); Tr. I-67 (Nuckols) (agreement that no one would exceed a discount of $3.50 off the net price, which meant a discount of $5.50 off the list price); Tr. II-306 (Hughey) ("And we agreed to set some discounts on what we would bid at no more than, so much off.").[6]

[6] Some witnesses described the agreement as a limit on discounts of $3.50, which referred to a discount from the net price, while others

No one present in the horse barn objected to limiting discounts or suggested that he would refuse to follow the agreement. Tr. I-68 (Nuckols). In Haehl's words, "[n]obody objected, nobody disagreed, nobody walked away." Tr. II-146. "Everybody had an opportunity. They could have left at any point in time and nobody did." Tr. II-184.

Haehl testified that Ricky Beaver was involved in the price-fixing discussion along with everyone else, although Haehl could not recall anything specific that Beaver said. Tr. II-145. Hughey left the meeting believing that he had an agreement with Ma-Ri-Al, and the other companies represented at the meeting, "[t]hat they would not discount on bid work more than the agreed amount." Tr. II-307.

C. Meeting at the Signature Inn

In May 2002, essentially the same group of conspirators held another price-fixing meeting at the Signature Inn, an Indianapolis-area hotel. Tr. I-68-69, 87. Nuckols explained that the meeting came about because "there was discussion with Scott Hughey I had, and again the prices were failing. And Scott said he would set it up and he reserved

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phrased the agreement as a limit of $5.50, which referred to a discount off the higher list price.

the room and we met there." Tr. I-69.

As with the initial horse barn meeting, the conspirators tried to keep their meeting secret because they knew the discussion was illegal. Nuckols and Hughey chose the hotel site because "[w]hat we were discussing was illegal," so the meeting was "not a meeting you want to have out in public. So it was kind of an off beat path place to meet." *Id.* *See also* Tr. II-147 (Haehl) (conspirators met "in a conference room there that was out of the way where nobody would see us" because "what we were doing was illegal"); Tr. II-309 (Hughey) ("we didn't think it would be appropriate to meet at anyone's office. It was a secret type meeting, didn't want everyone knowing you were there."); Tr. II-220 (Irving was nervous because he suspected the meeting was illegal). Hughey paid cash for the conference room because "I didn't really want a record, written record that we had the meeting." Tr. II-309-10.

The participants were Nuckols and another officer from Builder's; Price Irving, Vice-President and area manager for Indianapolis of Irving Materials, Tr. II-199, 217, 241, and his colleague Dan Butler; Hughey from Carmel Concrete; Richard Haehl from Shelby; and Ricky Beaver from Ma-Ri-Al. Tr. II-147-48, 219.

"The purpose of this meeting was to just reaffirm the bidding $5.50 [discount limit]," Tr. II-148 (Haehl), *i.e.*, to police the price-fixing agreement. Again, an agreement was made to limit discounts. Tr. I-72 (Nuckols); Tr. II-312 (Hughey) (agreement that "on bid work no one would bid more than I believe the discount was $3.50 off. And that if anybody found a number or was told they had a number less than this, they wouldn't deviate from that without talking to somebody or seeing it in writing.").

As at the 2000 horse barn meeting, no one indicated any objection to the agreement. Tr. I-88 (Nuckols). "Nobody disagreed. Nobody dissented." Tr. II-150 (Haehl).

Haehl testified that, as in the earlier meeting, Ricky Beaver was involved in the discussion, although Haehl could not recall any of Ricky Beaver's specific words. Tr. II-150. Nuckols recalled that Ricky Beaver did not object to the agreement or do anything to indicate that he would not go along with it. Tr. I-115.[7]

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[7] Price Irving recalled a meeting in Nuckols' horse barn in October 2002, after the Signature Inn meeting. The participants were Irving and Dan Butler from Irving Materials, Nuckols and Kuebler from Builder's, Hughey, Richard and Philip Haehl, and Ricky Beaver. Tr. II-

D. October 22, 2003 Meeting in the Horse Barn

In October 2003, Nuckols and Hughey met at a Hardee's restaurant in Fishers, Indiana and discussed "[t]hat our prices just were not doing well and they were going in the gutter and that we should get together and talk with our competitors." Tr. I-48. They planned a group meeting in Nuckols' horse barn and called the other competitors. Tr. I-48-49. The participants were Nuckols and Blatzheim from Builder's; Dan Butler and Price Irving from Irving Materials; Hughey from Carmel; and Richard and Philip Haehl from Shelby.

This time, Chris Beaver, rather than Ricky Beaver, attended the meeting for Ma-Ri-Al. Tr. I-47-48; Tr. II-153. Hughey testified that Nuckols told him "that Chris will be there instead of Rick. And he told me the reason was that Rick seemed to be confused about the discount." Tr. II-321. Irving similarly testified that he was told by his partner Dan Butler "that Rick [Beaver] had taken the prices or taken the previous agreement and made a mistake with it and it had let them [Ma-Ri-Al]

249, 257, 277-78. The conspirators discussed price fixing and agreed to limit their discounts to $5-$5.50. Tr. II-251, 257, 277-78.

quote jobs at too high a price. So they [Ma-Ri-Al] lost some business. And he was replaced by Chris." Tr. II-232. Put differently, Ricky Beaver had, by mistake, not carried out the conspirators' agreement properly, and the conspirators believed that Chris Beaver would not make the same mistakes. Tr. II-233 (Irving) ("If there was a mistake made, changing the personnel to correct that mistake would be an appropriate action.").

Nuckols had no doubt that an agreement was reached, Tr. I-52, and testified that he personally believed he had an agreement with each of the other competitors, specifically including Ma-Ri-Al and Chris Beaver, that no one would offer discounts of more than $5.50. Tr. I-53-54. Richard Haehl similarly testified that everyone, including Chris Beaver, agreed "to limit discounts on bid work to no more than $5.50 off the net selling price of concrete." Tr. II-155. *See also* Tr. II-317 (Hughey) (agreement reached "was that the maximum discount would be $5.50 off of net and at a time in the future that they would go to $3.50 off"); Tr. II-236 (Irving) ("When I left the meeting, I assumed that everybody was in agreement to stick to that [$5.50 discount limit]."). As in the previous meetings, "[n]obody disagreed. Nobody dissented.

Nobody stood up and objected." Tr. II-156 (Haehl); Tr. II-237 (Irving).

Chris Beaver was present for the entire meeting. Richard Haehl and Price Irving testified that Chris Beaver participated in the discussion, but they could not recall any of Chris Beaver's specific words. Tr. II-155 (Haehl), 236 (Irving). Nuckols did not recall Chris Beaver objecting to anything that was discussed or doing anything to indicate that he would not go along with the agreement. Tr. I-54-55, 114. And when a question arose of who would contact Prairie Materials and American Concrete, who were not represented at the meeting, "Chris [Beaver] said we're talking to [American] . . . about some software they had and that he would try to get ahold of Jason Mann and get him the message on what we agreed on." Tr. II-320 (Hughey); Tr. II-378 (Chris Beaver said he would "deliver the message to Jason Mann"); Tr. II-381 (Chris Beaver "was going to talk to him [Mann] about what we had agreed on").

Allyn Beaver testified that he suspected Ricky Beaver had been talking to Ma-Ri-Al's competitors. Tr. III-544. When Dan Butler of Irving Materials invited Chris Beaver to this meeting in Nuckols' horse barn, Allyn Beaver approved Chris Beaver's attendance "because I

wanted to see what in the world are we doing?" *Id.* Allyn Beaver denied ever being part of any price-fixing agreement with his competitors. Tr. III-546-47. He acknowledged, however, that on May 25, 2004, he told the FBI that Chris Beaver had attended a meeting of ready-mixed concrete companies in Nuckols' horse barn. Tr. III-545, 551-52.[8]

E. Enforcement Of and Compliance With the Agreement

In addition to their agreements on price discounts, the conspirators agreed on mechanisms to enforce their price-fixing agreements, and then attempted to carry out that enforcement. Nuckols explained that at the Signature Inn meeting the conspirators agreed to call each other by telephone and question each other's prices "[i]f you saw another competitor not going along with" the agreed

[8] In addition to the large group meetings at Nuckols' horse barn and the Signature Inn, sub-groups of conspirators met to discuss price fixing throughout the 2000-2004 time period. Ricky Beaver and Chris Beaver did not attend these meetings. *E.g.*, Tr. II-352-54 (Hughey met with Dan Butler to agree on a price for the Ripberger account; with Butler to discuss pricing on the Wilhelm job; and with Richard Haehl at Bob Evans and Cracker Barrel restaurants to discuss price fixing); Tr. II-259-60 (Nuckols, one or both Haehls, Hughey, Price Irving, and Butler met at the Micro Brewery on Indianapolis' south side in 2003); Tr. II-258 (Irving met with Hughey and Butler at a Burger King in fall 2002).

discount limit. Tr. I-73. Irving testified that "[w]hen we left the meeting, we felt that everybody was in agreement to call each other and confirm prices." Tr. II-224. *See also* Tr. II-222 (group agreed to "confirming prices by calling the competitors to see if they actually quoted that price").

Similarly, at the October 2003 meeting in Nuckols' horse barn, it was agreed that if a competitor was seen to be pricing out of line with the agreement, the conspirators were "[s]upposed to pick up the phone and, you know, call one of the people, one of the competitors and try to verify the price." Tr. II-157 (Haehl). *See also* Tr. I-55 (Nuckols) ("if you see someone not going along with the program, give them a call"); Tr. II-322 (Hughey) (agreement "not to deviate unless you see it in writing or call somebody"); Tr. II-282-283 (Irving) (multiple conversations with competitors to verify prices).

Consistent with this agreement, Hughey recalled one or two phone conversations with Chris Beaver after contractors reported to Hughey that Ma-Ri-Al had underbid Carmel. Tr. II-324-25. Chris Beaver denied undercutting the price-fixing agreement and said he was abiding by it. Tr. II-329 (Chris Beaver "said no, we're where we're supposed to

be."). *See also* Tr. II-392 (Hughey) ("[Beaver] was adhering to the agreement, and he was at the discount that was established in the agreement with everyone.").[9]

Beyond telephone calls among themselves, the conspirators attempted to enforce the price-fixing agreement by expanding their agreement to include Prairie Materials and American Concrete, competitors who were not represented at the horse barn and Signature Inn meetings. At the 2000 meeting in Nuckols' horse barn, Hughey said that he would contact Gary Matney, manager of Prairie, and Jason Mann at American Concrete to tell them about the agreement. Tr. II-146 (Haehl). Hughey testified that at the 2003 meeting, Chris Beaver said he would contact Jason Mann at American Concrete. *See* p. 17, *supra*. Hughey testified that he met with Gary Matney three times, and

[9] Irving, Haehl, and Hughey all testified to having similar telephone conversations with Ricky Beaver in which they confirmed Ma-Ri-Al's pricing, consistent with the agreement, or in which Ricky Beaver said that Ma-Ri-Al was abiding by the price-fixing agreement and not deviating from it. Tr. II-226-227 (Irving); Tr. II-157-59, 163, 195 & GX 10 (Haehl); Tr. II-323-24 (Hughey) (Ricky Beaver said "no, we didn't deviate. We were where we were supposed to be"); Tr. II-328 (Hughey) (Ricky Beaver said he was "[a]biding by the amount that we agreed upon.").

Jason Mann once, to discuss price fixing. Tr. II-302, 320, 356.

On at least one occasion, Nuckols and Fred "Pete" Irving met with Allan Oremus, who was Gary Matney's boss at Prairie Materials, to bring pressure on Matney because the conspirators believed that Matney was not participating in or abiding by the price-fixing agreement. Tr. II-270-72 (Irving); II-355 (Hughey) (Dan Butler and Peter Irving met with Oremus to bring pressure on Matney).

Despite the conspirators' attempts to enforce the price-fixing agreement, compliance with the agreement was imperfect. Some of the conspirators admitted to "cheating" on their co-conspirators from time to time by offering discounts greater than the agreed limit, but they also testified that they followed the agreement at other times. Thus, Hughey testified that Carmel followed the agreement with only rare exceptions that were the product of innocent mistake and not intentional cheating. Tr. II-308, 314. Hughey believed that Prairie also followed the agreement part of the time. Tr. II-355. Hughey believed that other companies sometimes followed the agreement and sometimes did not, "but mostly I think they did for a while." Tr. II-308.

Haehl testified that Shelby "bid sometimes according to the

agreement and sometimes not." Tr. II-188-89. Price Irving testified that Irving Materials violated the agreement only occasionally. Tr. II-253. *See also* Tr. II-280 (Irving followed the agreement sometimes).

Notwithstanding the cheating, the conspirators reaffirmed that they still had an agreement. Hughey, for example, rejected the suggestion that cheating means "you don't have an agreement. It means you're not abiding by the agreement or you're violating the agreement." Tr. II-366-67; *accord* Tr. II-370. Haehl similarly testified that despite some competitors "straying," his understanding was that the price-fixing agreement remained in place. Tr. II-149; *see also* Tr. II-196-97 (agreement existed, even if imperfect, because competitors sometimes followed it).

F. The Conspiracy Ends and Conspirators Lie to the FBI

The conspiracy ended on May 25, 2004, when the FBI executed search warrants on several ready-mixed concrete companies' offices. Richard Haehl explained that "when the FBI came in with search warrants we contacted legal counsel and we decided the best thing we can do is tell the truth." Shelby's counsel then contacted the Department of Justice and applied for amnesty. Tr. II-134; GX 8.

The FBI conducted 15-20 interviews simultaneously on May 25, 2004, in conjunction with the search warrants, in order to gather information and "to determine who knew that information, where perhaps evidence of the crimes could be located so we could gather that information." Tr. III-406 (FBI Special Agent Schlobohm). It was also important to conduct the interviews simultaneously so that witnesses could not "get together and either destroy evidence and/or concoct a story to protect their culpability." Tr. III-406-07.

Some conspirators admittedly lied to the FBI and destroyed evidence. Hughey testified that when the FBI interviewed him, he did not tell everything that he knew about the conspiracy, and then destroyed notes relating to the conspiracy on the same day. Tr. II-300. Nuckols similarly admitted that he did not tell the truth in his FBI interview. Tr. I-43, 74-75.

FBI Special Agent Freeman interviewed Chris Beaver at his home and then assisted in execution of a search warrant. Tr. III-436. The interview lasted about an hour and a half. Beaver was forthcoming and calm, and did not appear to be under the influence of drugs, alcohol, or medication. Tr. III-436-38. Beaver said he had become more involved

with pricing and sales at Ma-Ri-Al since 2002, and that he would be replacing his father as president. Tr. III-438-39.

Agent Freeman asked whether Chris Beaver had ever attended meetings in Nuckols' horse barn, and Beaver "denied being at any meeting. He said he didn't think any of the other family members part of [sic] Beaver Material had been at it either." Tr. III-441. When asked if he had ever attended meetings with competitors, Beaver told Agent Freeman "they do have Indiana Ready-Mix Association meetings that they periodically go to. And he said that was pretty much the extent of any meetings he would have with any of his competitors is just those meetings." *Id.* Chris Beaver "denied being involved with any kind of discussion of price fixing of any kind." Tr. III-442. Beaver further denied ever meeting with any of the competitor companies individually to discuss pricing and discount agreements. Tr. III-442-44.[10]

Charles Sheeks, Ma-Ri-Al's corporate lawyer, testified that he met

[10] Ricky Beaver, in his FBI interview, similarly denied having any discussions with competitors about price fixing for concrete and said he was not aware of any meeting in Butch Nuckols' horse barn. Tr. III-423. When asked if anyone else at Ma-Ri-Al could have been involved in a price-fixing conspiracy, Ricky Beaver said no. Tr. III-424-25.

with Chris Beaver, Ricky Beaver, and Allyn Beaver at his law office on May 26, 2004, the day after the FBI executed the search warrant on Ma-Ri-Al and interviewed the Beavers. Tr. III-479. They discussed the FBI interviews, and Ricky and Chris Beaver told Sheeks that they had not been truthful with the FBI. Tr. III-480. For example, Chris Beaver "said he told them [the FBI] he had not been [at a horse barn meeting], but he, in fact, had been at a meeting." Tr. III-483. Sheeks testified that with his clients' consent, he then called the Department of Justice on May 26 "and advised them that these gentlemen had made misstatements to their agents the morning before." Tr. III-480.

On cross-examination, Sheeks admitted that a follow-up letter he wrote to the Department of Justice on May 28, GX 45, did not identify whether Chris Beaver or Ricky Beaver had attended meetings in Nuckols' horse barn; did not say that both Chris Beaver and Ricky Beaver had made false statements; did not identify when the meeting took place; and did not say who else was present at the meeting. Tr. III-490, 498-99.

SUMMARY OF ARGUMENT

This was a classic case of a multi-year price-fixing conspiracy by

the dominant producers of a commodity product. Four members of the conspiracy, who knew the Beaver family and their company, testified squarely that there was a conspiracy to fix prices by limiting the discounts offered to customers; that the agreement was made and enforced at several secret meetings, including meetings in Butch Nuckols' horse barn; and that Chris Beaver participated in one of the most important meetings and joined the conspiracy. There is nothing "cynical" (Beaver Br. 3-5) about prosecuting someone who several witnesses identify as committing a crime.

Chris Beaver waived any argument about the materiality of his admittedly false statements by deliberately choosing not to raise the issue, in any form, before the district court. But even if the issue could be considered on appeal, his contention that the statements were not material because quickly "corrected" is wrong as a matter of law because the materiality of false statements is determined at the time they are uttered. 18 U.S.C. 1001 makes no provision for recanting or correcting false statements, and materiality turns on whether the statements were capable of influencing the government, not on whether they actually did so. In any event, the evidence was sufficient for the

jury to find materiality as it did.

Likewise, the evidence was more than sufficient to meet the government's burden of showing that Chris Beaver knowingly joined an existing conspiracy. The government witnesses testified repeatedly that they agreed to fix prices and believed that Ma-Ri-Al, through Chris Beaver, was part of the agreement because of his affirmative acts – participating in the October 2003 meeting, volunteering to help expand the conspiracy by contacting Jason Mann of American Concrete, and later reaffirming his adherence to the discount limit. That the conspirators sometimes "cheated" by offering more than the agreed discount means only that the conspiracy was not perfect; it did not prevent the jury from finding beyond a reasonable doubt that there was a functioning conspiracy.

Finally, Chris Beaver's argument that a reasonable jury could not believe the government's witnesses, because their testimony was "unreliable" (Beaver Br. 5), is baseless. This Court does not overturn jury verdicts by substituting its view of witness credibility for the jury's. Differences in recollection on secondary issues, which is all that Chris Beaver can cite, are commonplace in criminal trials and are for the jury

to resolve. Four co-conspirators testified against Chris Beaver, and the district judge, who observed all the testimony, noted that Hughey's testimony *alone* was sufficient to support a guilty verdict. Tr. III-459. Under these circumstances, there is no reason to second-guess the jury's guilty verdict.

ARGUMENT

I. Chris Beaver Was Properly Convicted of Making False Statements

A. Standard of Review

Ordinarily, a district court's denial of a judgment of acquittal is reviewed de novo. "A conviction is reversed only if, viewing the evidence in the light most favorable to the Government, no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *United States v. Pree*, 408 F.3d 855, 865 (7th Cir. 2005). But because Chris Beaver did not raise any issue concerning the materiality element of the false statement count – or indeed any argument at all about that charge – before the district court, the argument is waived or, at most, subject to review for plain error as explained below.

B. Chris Beaver Waived Any Argument Relating To the False Statement Count and Conviction

An intentional waiver precludes appellate review. *United States v. Olano*, 507 U.S. 725, 733-34 (1993); *United States v. Jacques*, 345 F.3d 960, 962 (7th Cir. 2003); *United States v. Thompson*, 23 F.3d 1225, 1231 (7th Cir. 1994). An accidental or negligent failure to object invokes the "strict standards of the plain error doctrine . . . which allows appellate courts to correct only particularly egregious errors for the purpose of preventing a miscarriage of justice." *United States v. McClellan*, 165 F.3d 535, 552 (7th Cir. 1999) (internal quotation and citations omitted); *United States v. Kuipers*, 49 F.3d 1254, 1258 (7th Cir. 1995).

Chris Beaver never made any argument to the district court about the false statement charge or conviction, much less the specific issue of materiality. First, at the close of the government's case when defendants moved for judgment of acquittal, his counsel argued two issues: (1) "that the government . . . has failed to establish a conspiracy that would permit this case to go to the jury on behalf of the corporation," Tr. III-455, and (2) "that there is no indication that these

individuals [Chris and Ricky Beaver] on their own behalf have in any way fathomed any kind of evidence that would indicate that they have joined the conspiracy." Tr. III-455-56. Defense counsel stated expressly that the motion was directed to "the count of the indictment returned on the issue of conspiracy to commit price fixing," Tr. III-456, and he never mentioned the false statement count or materiality. When the court asked whether defense counsel wanted to offer argument "on the other count against your client," counsel for Chris Beaver replied "Oh, no, sir. I have no motion to make about that at this stage of the proceedings." Tr. III-457.

Second, defendants never objected to the district court's jury instruction on materiality. *See* Instruction No. 26, Tr. IV-672-73. In fact, when the government suggested a modification to the instruction during the charge conference, counsel for Chris Beaver replied: "No objection." Tr. III-578. *See also* Tr. III-581 ("On behalf of Chris Beaver and Rick Beaver we have no objection to the instructions as modified and amended.").

Third, defendants' post-trial Motion for a Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(c) makes no mention

of the false statement conviction and never uses the word "materiality." The motion argues only that there was insufficient evidence of a price-fixing agreement and insufficient evidence that Chris and Ricky Beaver joined the conspiracy. 11/22/2006 Defendants Motion for a Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(c).

The district court did not understand defendants to be challenging the false statement conviction because, when the court denied defendants' motion, the court's Order mentions only that the jury "convicted all three defendants of the price fixing charge in Count I of the Indictment," does not mention the false statement conviction or materiality, and holds only that the jury could believe the government's witnesses and find sufficient evidence to convict Chris and Ricky Beaver of participating in the conspiracy. 01/23/2007 Order on Defendants' Motion for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(c).

Defense counsel's refusal to make any arguments concerning the false statement count, his failure to object to the jury instruction on materiality, and his failure to make any argument concerning the false statements count in his post-trial motion all indicate an intentional

waiver. But even if defendants' repeated failure to raise any alleged error on the false statement charge could be construed as accidental, Chris Beaver's contention does not withstand review for plain error.

Absent any objection from the defendants, it was not error, much less an egregious error, for the district court to submit the issue of materiality, which is clearly a jury question, to the jury. On one hand, defense counsel cross-examined the FBI witnesses in an attempt to show that the FBI knew all the important facts about the conspiracy before Chris or Ricky Beaver were interviewed, so that their false statements made no difference. *E.g.*, Tr. III-409 ("Q[.] So that wouldn't have been a surprise to you on May 25th, 2004, to learn that there had been meetings because you already knew that?"); Tr. III-410 ("Q[.] So . . . on the 25th, that information about at least two horse barn meetings was known to the FBI, correct?"); Tr. III-412-13. On the other hand, while the FBI witnesses conceded that they knew *some* basic facts before interviewing the Beavers, the agents explained that they did not know all of the critical facts. *E.g.*, Tr. III-409 ("We do [sic] not know everyone who had attended the horse barn meeting."); Tr. III-411 (FBI knew only that "Chris Beaver was somehow involved in the

conspiracy"); Tr. III-415 (FBI did not know when the conspiracy began or how it began). Given this testimony, it was not plain error to allow the jury to weigh the evidence and conclude that the false statements were material.

C. Chris Beaver's Materiality Argument is Meritless

The materiality of a false statement "must be measured at the point in time that the statement was uttered." *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998). The longstanding rule in every federal circuit is that the government need not show that it relied on the false statement in any way; "[i]t is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body." *Id.* at 306.[11] Instead, the test for materiality is whether the false statement has a tendency to influence

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[11] *Accord, e.g.*, *United States v. Di Fonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979) ("the agency need not actually have relied or acted to its detriment upon the false statement") (quoting *United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975)); *United States v. Sebaggala*, 256 F.3d 59, 65 (1st Cir. 2001) (same); *United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982) (same); *United States v. Hicks*, 619 F.2d 752, 754 (8th Cir. 1980) (same); *United States v. Goldfine*, 538 F.2d 815, 820-21 (9th Cir. 1976) (same); *Henninger v. United States*, 350 F.2d 849, 850 (10th Cir. 1965) (same).

or is *capable of* influencing a federal agency when it is uttered. *See id.* at 307; *United States v. Di Fonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979).

Because of this rule, and because 18 U.S.C. 1001 does not contain any "recantation" provision or safe harbor (unlike the perjury statute, 18 U.S.C. 1623(d)), Chris Beaver's argument that he can avoid conviction by recanting or "correcting" his admittedly false statements, and thereby render them immaterial (Beaver Br. 21-25), is legally erroneous and specifically has been rejected. *United States v. Sebaggala*, 256 F.3d 59, 64 (1st Cir. 2001) (initial false statement was not negated by subsequent declaration; "we see no basis for writing into section 1001 a recantation defense that Congress chose to omit").

To adopt Chris Beaver's position might allow suspects who deliberately lie to federal investigators and agencies to escape prosecution, and it obviously undermines the incentives that suspects and witnesses should have to tell the truth the first time they are interviewed. His position would embroil courts in subjective line-drawing over how much time a suspect should have to "correct" a false statement, and by analogy it would allow suspects to destroy evidence, as other defendants did here, but then avoid conviction for obstruction

of justice by re-assembling the documents days later. This cannot be the law.

Chris Beaver's argument is also factually wrong because his false statements – that he never attended competitors' meetings in Butch Nuckols' horse barn, that he never discussed pricing or price fixing with competitors, that he never contacted Jason Mann to convince Mann to join the conspiracy – were material, as the jury found. Chris Beaver's attendance at the October 2003 meeting was critical evidence supporting his indictment and showing that he was part of the conspiracy. Investigators could not determine the scope of the conspiracy, and in particular the involvement of Ma-Ri-Al, without knowing who attended the meeting and whether any of the Beavers attended. Thus, FBI Agent Schlobohm testified that before the interviews on May 25, 2004, "We do [sic] not know everyone who had attended the horse barn meeting." Tr. III-409. He further explained that, in fact, the FBI believed that *Gary* Beaver had attended meetings at Nuckols' horse barn, which turned out not to be correct. *Id.* at 409-411, 414. FBI Agent Freeman testified that two of the specific purposes of interviewing Chris Beaver were "to try and determine, if there was a

conspiracy, who the players were in this conspiracy" and "to determine whether or not Mr. Beaver had participated in a meeting at Butch Nuckols' horse barn." Tr. III-440.

Chris Beaver's false statements were *capable of* influencing the FBI, at the time he made them, by directing investigators' attention away from the October 2003 meeting, away from Ma-Ri-Al as a potential member of the conspiracy, and away from himself. FBI Agent Medernach testified that when a witness is not truthful with the FBI, "[i]t can mislead the investigators, closes down possible avenues of follow-up interviews, investigation, obtaining records, other interviews. It can just misdirect us." Tr. III-425. Agent Freeman testified that false statements in interviews "[c]an lead you down wrong paths, waste time in the investigation, waste time on resources. Take you away from the main focus of what you need to be working on." Tr. III-444. The jury was entitled to believe this testimony.

Chris Beaver's reliance on *United States v. Cowden*, 677 F.2d 417 (8th Cir. 1982) is misplaced. The holding of that case, which has not been followed elsewhere in more than twenty years, was based expressly on "the facts of this case," *id.* at 421, and did not purport to

announce any general rule. The specific facts were: (1) that Cowden corrected his false customs declaration with a true oral statement *on the spot*, and tried to correct it in writing *before* the customs inspector found Cowden's hidden currency, so that the original declaration actually did not violate the applicable regulations; and (2) that Cowden was *prevented* from filing a currency report by the customs inspectors, who did not properly follow their own regulations, acted in a way that was "manifestly unfair," and "contributed to the ultimate existence of a material false statement." *Id.* at 420-21.

Nothing comparable occurred here. There was no regulatory scheme under which it could be said that Chris Beaver's statements were not false, no suggestion that the FBI agents acted improperly or unfairly, and no claim or evidence that Chris Beaver somehow was prevented from telling the truth or correcting his statements *at the time he was interviewed*. Chris Beaver does not deserve any comparable sympathy, because only the intervention of Ma-Ri-Al's corporate attorney – after Sheeks, Chris Beaver, and Ricky Beaver learned that Allyn Beaver already had told the FBI that Chris Beaver attended a meeting at Nuckols' horse barn – spurred Chris Beaver to come clean

and try belatedly to correct his false statements.[12]

The jury therefore was entitled to believe the FBI witnesses and find, as it did, that Chris Beaver's admittedly false statements were material.

II. There Was More Than Sufficient Evidence To Prove A Price-Fixing Conspiracy and Chris Beaver's Participation In It

Chris Beaver's second issue is a sufficiency of the evidence argument, the crux of which is his claim that "the United States presented no evidence of an oral agreement, and no evidence of overt acts," Beaver Br. 28, and "it was not proven beyond a reasonable doubt that Chris Beaver joined a conspiracy to fix prices." *Id.* at 32.

A. Standard of Review

"We have said many times that a defendant making a sufficiency of

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[12] Chris Beaver's other cited cases do not support any judicial "amnesty." *United States v. Salas-Camacho*, 859 F.2d 788, 792 (9th Cir. 1988) and *United States v. Fern*, 696 F.2d 1269, 1275 (11th Cir. 1983) refused to follow *Cowden*, and both, plus *United States v. Nolan*, No. 93-35311,1994 WL 196756 at n.1 (9th Cir. 1994) (unpublished; does not meet the citation requirements of Fed. R. App. P. 32.1 (a)), held that delayed admissions did not reduce the materiality of earlier false statements. These cases are "not the scenario in Mr. Beaver's case," Beaver Br. 24, but neither do they affirmatively support any claim for leniency.

the evidence challenge bears a heavy burden and faces a nearly insurmountable hurdle." *United States v. Seawood*, 172 F.3d 986, 988 (7th Cir. 1999). *Accord, e.g.*, *United States v. Hicks*, 368 F.3d 801, 804 (7th Cir. 2004) ("The standard of review facing the defendants on their claim that the jury had insufficient evidence to convict is a daunting one.").

> We will overturn a jury verdict only if the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. We view the evidence in the light most favorable to the prosecution, and decide whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

United States v. Andreas, 216 F.3d 645, 670 (7th Cir. 2000) (citations and internal quotations omitted; emphasis in original).

B. The Government Proved a Price-Fixing Conspiracy

Chris Beaver's brief acknowledges that under the Sherman Act, the agreement to fix prices constitutes the violation, and the government need not prove separate overt acts. Beaver Br. 27-29; *see also* Tr. III-463 (district court comments: "it is the agreement, itself, that is the crime. And whether that crime ever gets carried out or not is not the issue for this jury.").

Three of the admitted conspirator witnesses testified that they made a price-fixing agreement at the July 2000 meeting in Nuckols' horse barn (Price Irving did not attend that meeting). In Nuckols' words:

> Q You believe that you reached an agreement with your competitors as to discounts?
>
> A Yes.
>
> Q Did everybody at the meeting agree on that discount?
>
> A To the best of my knowledge.

Tr. I-67-68. *See also* Tr. II-145-46 (Haehl); Tr. II-306 (Hughey) ("And we agreed to set some discounts on what we would bid at no more than, so much off.").

Three of the witnesses then testified that they made additional agreements, or reaffirmed the initial agreement, on at least two separate occasions. First, at the Signature Inn meeting in May 2002, as explained by Hughey:

> Q As a result of the Signature Inn meeting did you believe that you had reached an agreement with your competitors?
>
> A Yes, I did.
>
> Q And what was your understanding of that agreement?
>
> A That on bid work no one would bid more than I believe the

discount was $3.50 off. And that if anybody found a number or was told they had a number less than this, they wouldn't deviate from that without talking to somebody or seeing it in writing.

Tr. II-312. *See also* Tr. I-72 (Nuckols); Tr. II-150 (Haehl) (meeting "concluded with the decision to limit the discounts on bid work").

Second, all four conspirators testified to an agreement made in Nuckols' horse barn in October 2003, as explained by Price Irving:

Q Who agreed to stick to the $5.50 discount at this meeting?

A When I left the meeting, I assumed that everybody was in agreement to stick to that.

Q Who would everybody be?

A Scott Hughey, Butch Nuckols, John Blatzheim, one of the Haehls, and Chris Beaver.

Q And were these the same companies that were at the previous meetings?

A Yes.

* * *

Q Did you agree on a discount limit at this meeting, as well?

A Yes.

Q What discount limit did you agree upon?

A I think it was in the 5 to 5.50 off.

Q Was this the same discount you had agreed at the first horse barn meeting you attended?

A I think so.

Tr. II-236, 279. *See also* Tr. I-52-54 (Nuckols); Tr. II-155-56 (Haehl); Tr. II-317 (Hughey) (agreement reached "was that the maximum discount would be $5.50 off of net and at a time in the future that they would go to $3.50 off"). All of this testimony was direct evidence of price-fixing agreements that the jury reasonably could choose to believe.

Chris Beaver's brief suggests that there was no conspiracy because the competitors "cheated" on each other by undercutting prices. Beaver Br. 30-31, 37-38. But the law does not restrict the government to prosecuting only conspiracies that function perfectly. 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) (cartel members "cheated each other when they could," but that did not negate conspiracy); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1231 (8th Cir. 1992) ("Government witnesses testified that although Misle occasionally

'cheated' his co-conspirators by bidding lower than was agreed, he . . . reached mutual understandings with the other participants about prices . . . and usually adhered to the prices and market allocations upon which they agreed."); *United States v. Foley*, 598 F.2d 1323, 1333 (4th Cir. 1979) ("Since the agreement itself, not its performance, is the crime of conspiracy, the partial non-performance of Bogley does not preclude a finding that it joined the conspiracy") (citations omitted). Accordingly, the jury's verdict, which is based on the testimony of multiple government witnesses, is fully supported by the evidence notwithstanding any cheating that may have occurred.

C. Chris Beaver Joined the Conspiracy

"Coconspirators do not have to have a great deal of involvement with other conspirators." *United States v. Donovan*, 24 F.3d 908, 914 (7th Cir. 1994). A defendant "need not be aware of all the details of the conspiracy in order to be a coconspirator." *Id.* (citations omitted); *United States v. Miller*, 159 F.3d 1106, 1109-10 (7th Cir. 1998) (same). "[M]inor members of a conspiracy can be held accountable for every crime committed in furtherance and within the scope of the conspiracy because every member of the conspiracy benefits from the contribution of all of

the other members." *Donovan*, 24 F.3d at 914.

Once the existence of a conspiracy is established, the jury need find only a "participatory link" between the conspiracy and the defendant. *United States v. Hunt*, 272 F.3d 488, 495 (7th Cir. 2001), superseded by statute on other grounds; *United States v. Krankel*, 164 F.3d 1046, 1054 (7th Cir. 1998).

The evidence here more than satisfied what Chris Beaver himself describes as this "low threshold." Beaver Br. 29. First, Chris Beaver does not dispute that he attended the October 2003 meeting in Nuckols' horse barn. Beaver Br. 6. The government witnesses all testified that the purpose of that meeting was to fix prices and that the meeting's outcome was both an agreement to limit price discounts and an agreement to enforce the price-fixing agreement among the conspiring companies. Accordingly, while mere presence is insufficient to show that a defendant was acting in furtherance of a conspiracy, the jury reasonably could infer that Chris Beaver knew about the conspiracy and intended to go along with it because "presence or a single act will suffice if circumstances show that the act was intended to advance the ends of the conspiracy." *United States v. Crowder*, 36 F.3d 691, 695 (7th Cir.

1994); *United States v. Binkley*, 903 F.2d 1130, 1134 (7th Cir. 1990) (same).

The circumstances here showed that there was no reason to attend this meeting other than to learn about and participate in the conspiracy. Even Allyn Beaver, a defense witness, testified that he sent Chris Beaver to the meeting because he suspected that his company may have become involved in price fixing. Tr. III-544. Government witnesses testified to their understanding that Chris Beaver replaced Ricky Beaver so that Ma-Ri-Al would implement the price-fixing agreement correctly. *See* pp. 15-16, *supra*. Under these circumstances, the jury reasonably could attribute knowledge and participation to Chris Beaver. *See, e.g.*, *United States v. Molina*, 443 F.3d 824, 828 (11th Cir. 2006) ("A conspiracy conviction will be upheld . . . when the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him.") (citations omitted); *United States v. Martinez*, 190 F.3d 673, 676 (5th Cir. 1999) ("[a] jury may find knowledgeable, voluntary participation from presence when it would be unreasonable for anyone other than a knowledgeable participant to be present.").

Second, this was not a case of mere presence. Two witnesses testified that Chris Beaver participated in the discussion, although they could not recall Beaver's specific words. Tr. II-155 (Haehl); Tr. II-236 (Irving). Hughey also testified that "Chris [Beaver] said we're talking to [American] . . . about some software they had and that he would try to get ahold of Jason Mann and get him the message on what we agreed on." Tr. II-320; Tr. II-378 (Chris Beaver said he would "deliver the message to Jason Mann"); Tr. II-381 (Chris Beaver "was going to talk to him [Mann] about what we had agreed on"). The jury was entitled to believe Hughey and find from this testimony that Chris Beaver joined and agreed to assist the conspiracy by expanding it to another company that was not represented at the meeting.

Third, by both his actions – speaking at the meeting and volunteering to contact Jason Mann – and his non-actions – not objecting to the price-fixing agreement in any way and not leaving the meeting – Chris Beaver conveyed to the other conspirators that he was joining the agreement. That is what Richard Haehl meant when he testified: "[n]obody disagreed. Nobody dissented. Nobody stood up and objected." Tr. II-156 (Haehl); *see also* Tr. II-237 (Irving). In *United States v. Foley*,

598 F.2d 1323, 1332 (4th Cir. 1979), the court held that the evidence was sufficient for the jury to find that competitors, meeting at a dinner party, joined a price-fixing conspiracy where each of them "expressed an intention or gave the impression that his firm would adopt a similar [pricing] change." Chris Beaver gave the same impression.

Fourth, Hughey recalled post-meeting telephone conversations with Chris Beaver in which Beaver *denied undercutting the price-fixing agreement and said he was abiding by it*. Tr. II-329. *See also* Tr. II-392 (Hughey) ("[Beaver] was adhering to the agreement, and he was at the discount that was established in the agreement with everyone."). This is direct evidence of Chris Beaver's participation in the conspiracy.

III. The Jury Was Entitled to Believe the Government's Witnesses

Chris Beaver's third issue is the contention that the jury reasonably could not have convicted him because the only "credible evidence" presented by the government was the FBI agent testimony. He argues that "[t]he remaining testimony was completely unreliable because no two competitors said anything as a whole which could corroborate the testimony of the others." Beaver Br. 33-34.

A. Standard of Review

"[Q]uestions of credibility are solely for the trier of fact, [so] such arguments are wasted on an appellate court." *United States v. Henderson*, 58 F.3d 1145, 1148 (7th Cir. 1995) (internal quotations and citations omitted). *Accord, e.g., United States v. Johnson-Dix*, 54 F.3d 1295, 1306 (7th Cir. 1995) ("We will not second-guess the jury's credibility determinations in evaluating [defendant's] challenge to the sufficiency of the evidence.").

"Even when a conviction rests upon the uncorroborated testimony of an accomplice, the verdict will be upheld unless the testimony is incredible as a matter of law." *Crowder,* 36 F.3d at 696 & n.1 (citations omitted). *Accord, e.g., United States v. Ofcky*, 237 F.3d 904, 909 (7th Cir. 2001) ("It is well established that a conviction may be based solely upon the uncorroborated testimony of an accomplice. We will not reevaluate the credibility of testimony even if it is wholly uncorroborated.") (citation omitted); *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.").

B. Chris Beaver's Credibility Arguments are Meritless

The argument that government witness testimony was unreliable because the witnesses did not corroborate each other, Beaver Br. 33-34, is legally erroneous given the settled rule in this Circuit, cited above, that the testimony of an accomplice is sufficient for a conviction even if uncorroborated. The district court properly understood this rule when it commented that Hughey's testimony *alone*, if the jury chose to believe it, was sufficient for a reasonable jury to find the defendants guilty. Tr. III-459.

Nor did the government's testimony even remotely approach the extremely high "incredible as a matter of law" standard. The most that Chris Beaver cites is discrepancies among the witnesses about precisely which conspirators attended which meetings (Beaver Br. 34-37). But this type of discrepancy is commonplace and to be expected when witnesses testify in a trial that takes place years after the actual events. That witnesses have slightly varying recollections of events hardly makes their testimony incredible.[13]

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[13] Chris Beaver's inconsistency argument is also squarely contrary to the position that defendants took at trial. There, Mr. Voyles, counsel

Beyond this, the discrepancies that Chris Beaver spends pages of his brief spelling out are irrelevant to his conviction. He does not dispute that he attended the October 2003 meeting in Nuckols' horse barn, Beaver Br. 34; he does not dispute that price fixing was discussed there; and all the conspirator witnesses testified that an agreement was made. Differences in recollection about who *else* was there do not change these facts. Similarly, differences in recollection about sub-groups of the conspiracy that met outside the horse barn, Beaver Br. 36-37, do not undermine the fact that there was a price-fixing conspiracy. To the contrary, the multiple meetings of competitors strengthen the inference that there was a conspiracy, regardless of precisely which conspirators attended which meeting.

Chris Beaver suggests that the testimony was inconsistent on "who would call Jason Mann and Gary Matney." Beaver Br. 35-36. But Nuckols' testimony that he could not recall which conspirator would notify Jason Mann about the conspiratorial agreement, Tr. I-55 ("I

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for Ma-Ri-Al, when arguing defendants' motion for judgment of acquittal, said that the government witnesses "were all consistently accurate at least in portraying the meetings, their locations, the people who attended[.]" Tr. III-453.

believe there was some discussion that someone may contact American, but that is the best I can remember. I'm not sure who that was."), is not inconsistent with Hughey's testimony that Chris Beaver spoke up and volunteered to contact Mann. Tr. II-320 ("Chris said . . . he would try to get ahold of Jason Mann and get him the message on what we agreed on."). But even if there was an inconsistency, the jury is allowed to choose which evidence to credit.

Similarly, defendants tried to impeach Hughey, on the issue of his telephone calls with Chris Beaver, with notes of Hughey's FBI and Department of Justice interviews that do not report the telephone calls. *See* Beaver Br. 37. But the jury was entitled to believe Hughey, and he testified that in some or all of those interviews he *was never asked* about telephone conversations with the Beavers, Tr. II-384-85, which explains why the interview notes did not report them.

In sum, it was the jury's prerogative to believe the government's witnesses. *Henderson*, 58 F.3d at 1149. This does not mean that juries are "inherently reliable" (Beaver Br. 38-39) or never make mistakes. But under the jury system established by the Constitution, and the law of this and every other Circuit, appellate courts do not substitute their

views of witness credibility for the jury's determination simply because a convicted defendant does not like the witness' testimony.

CONCLUSION

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

Respectfully submitted.

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Dated: June 20, 2007

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STEVEN J. MINTZ

CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that today, June 20, 2007, I caused two paper copies of the accompanying BRIEF FOR APPELLEE UNITED STATES OF AMERICA, plus one copy of the electronic version of the brief, on CD-ROM, to be served by Federal Express on the following:

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