No. 98-21114

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK ALBERT MALOOF,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Because of the extent of the record and the number of issues raised, appellee believes that oral argument will be of assistance to the Court.

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3. Whether the government improperly relied on the guilty pleas of two witnesses as evidence of defendant's guilt.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

On May 15, 1997, a grand jury sitting in the Southern District of Texas indicted Mark Albert Maloof on one count of conspiring to fix the prices of metal building insulation, in violation of Section l of the Sherman Act (15 U.S.C. l), and one count of conspiring to commit wire fraud (18 U.S.C. 371, 1343). R. 1-8; RE 2.[1]

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[1] "RE" refers to the tab number in the Record Excerpts filed by appellant. "R" references are to the page numbers in Volumes 1-9 of the original record.

After an 18-day trial, a jury convicted Maloof on both counts on December 18, 1997. On December l, 1998, the court sentenced Maloof to 30 months on each count, to run concurrently, and a $30,847.01 fine. V.48, pp. 80, 97-98;[2] R.2268-2271; RE 4.[3]

Maloof filed a notice of appeal on December l, 1998. R.2250; RE 5.

B. Statement of Facts

The evidence at trial proved that defendant Mark Maloof and his competitors conspired to fix the prices for metal building insulation from early 1994 to 1995, by agreeing to issue uniform price sheets and by instructing their sales people not to discount or deviate from those price sheets.

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[2] "V" references are to Volumes 10 and above in the record, i.e., hearings and trial transcripts. These latter volumes were not transmitted to the attorneys by the court. The government's information concerning the appropriate volume references was graciously supplied by an assistant to appellant's counsel, who had obtained the information from the clerk's office. We attach a cross-reference sheet as an appendix to this brief, indicating the volume numbers we have used and the transcript and date to which that volume number corresponds.

[3] The court increased the base offense level, which was 10, by three for volume of commerce ($3,884,701.02) (U.S.S.G.§ 2R1.1(b)(2)(C)), four for "leader organizer" (U.S.S.G. § 3B1.1(a)), and two for obstruction of justice (U.S.S.G. § 3C1.1) for lying under oath on the witness stand, yielding an offense level of 19. V.48, pp. 74, 76-80. This produced a sentence range of 30-37 months, and a fine range of $30,800 to $154,200. Id. at 80, 97-98. The court's sentence was on the lowest end of that range.

During the period of the indictment, Maloof was the regional sales manager for Bay Industries, Inc., doing business as Bay Insulation Supply Co. ("Bay").[4] V.40, p. 37; V.39, pp. 10-11; V.34, p. 10. Metal building insulators, or laminators, such as Bay, purchase fiberglass insulation in various thicknesses ("R" values) from fiberglass manufacturers; laminate it; and sell it to metal building manufacturers or contractors for use as a heat insulator and moisture barrier in metal buildings. V.20, p. 317; V.40, pp. 20-21; V.34, p. 20. Three-inch white vinyl was the most common type of insulation used in Texas in 1994 and 1995. V.40, p. 33-34; V.21, p. 401; V.34, p. 20.

Bay, Brite Insulation, Mizell Brothers Co., and PBI were the four largest competitors in the metal building insulation market in Texas in the early to mid-1990's. V.40, p. 38; V.30, pp. 21-22; V.34, p. 35; V.41, p. 73. Bay and Brite were located in Houston; PBI and Mizell in Dallas. V.40, pp. 38-40). Bay, whose headquarters were in Green Bay, Wisconsin, opened an office in Houston in 1992 and, through low pricing and by hiring Mizell and Brite employees, took market share from Brite and Mizell in 1992 and 1993. Prices and profit margins for market participants dropped. V.40, pp. 43-45, 51; V.30, pp. 17-20.

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[4] Bay was called Bay Star in Texas to distinguish it from another company with the name Bay Insulation. V.40, p. 76.

Individual attempts to raise prices were unsuccessful. V.40, pp. 47-48; V.30, p.16. At the end of 1993, the major fiberglass manufacturers selling in Texas[5] announced a price increase and an "allocation" system, informing their laminator customers that they would be producing more residential insulation and less metal building insulation and that, as a result, supplies would remain at 1993 levels. V.40, pp. 48-49; V.28, p. 42; V.35, pp. 199-200.

In early January 1994, Mark Maloof called "Wally" Rhodes, the vice president of sales at Mizell Brothers, at his home in Atlanta.[6] V.40, pp. 56-59. Maloof had worked for Rhodes at Mizell from 1989 to 1991. He left in 1991 to work for Bay, and then became Bay's southern regional sales manager when Bay opened its Houston office. V.40, pp. 34-38. Maloof and Rhodes discussed the fiberglass manufacturers' announced allocation, the fact that prices in the market were low and costs were to increase, and the hard feelings generated by Maloof's leaving Mizell to join Bay. V.40, pp. 56-58. Maloof and Rhodes then agreed to raise their prices to essentially identical levels and to adhere to the prices in their

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[5] These manufacturers were Owens Corning, Certainteed, Manville, and Knauf. V.40, p. 23; V.30, p. 8.

[6] Maloof worked out of his home in Birmingham, Alabama, but had daily contact with the Houston office by telephone. V.44, pp. 8-9. Rhodes worked out of Mizell's headquarters in Atlanta. V.40, p. 13.

published price sheets. V.40, pp. 60-65. Maloof told Rhodes that Bay would be announcing a price increase later that month, with different prices for different "brackets," depending on the number of square feet per order, and that Bay would be sticking to that price sheet. V.40, p. 59. Rhodes said that, Mizell, too, would announce a price increase with bracket pricing, would sell "in the brackets," and would not "jump brackets" in order to give smaller jobs a better price. V.40, pp. 59-62. This agreement was in force until 1995 when grand jury subpoenas were served as part of a price-fixing investigation. V.40, pp. 62-63.

To carry out their agreement, Maloof faxed Bay's new price sheet to Rhodes and the two spoke by phone daily over the next week to firm up their prices. V.40, pp. 65-66.[7] After reviewing Bay's price sheet, Rhodes changed Mizell's prices to conform. Most prices were identical, but they agreed to vary some items by a dollar or two so that customers would not be suspicious. V.40, pp. 70-72, 88-96; GX 31A. Rhodes and Maloof also agreed on prices to their largest manufacturing customers, who generally got special pricing because they purchased in larger volume (V.34, pp. 20-21; V.30, pp. 110-111), ensuring that

[7] Maloof told Rhodes that he had to get Dan Schmidt's approval for the prices they agreed on, and later confirmed that he had received that approval. V.28, p. 22. Rhodes also had to get approval from his superior, Hix Mizell. V.28, pp. 25-26.

their numbers "would be close." V.40, pp. 97-99, 103-104, 106-112; GX 4a (Rhodes' handwritten notes indicate "good" next to customers he and Maloof discussed); also V.42, pp. 228-232 (same for subsequent increases). After Rhodes prepared Mizell's final price sheet, he faxed it to Maloof so Maloof could be sure "if this was going to work." V.40, p. 73. Bay was to announce its price increase in mid-January, and Mizell was to announce on February l. V.40, p. 70.

Rhodes and Maloof decided that other competitors should be involved in the agreement if it were going to succeed. V.40, pp. 117-118. They agreed that Rhodes should contact the people at Brite, since Brite was still hostile to Maloof because Bay had hired away Brite sales people and taken away Brite customers. V.40, pp. 118-119; also V.30, pp. 19-20; V.33, pp. 118-120.

On January 11, 1994, Maloof attended a convention of laminators in Kansas City with his boss, Bay President, Daniel Schmidt. Rhodes attended for Mizell, and Jerry Killingsworth and Peter Yueh attended for Brite. V.40, pp. 119-120; V.30, pp. 4-5, 22-24. Maloof and Rhodes met with one of the Brite representatives in the hall at a break in the meeting. Rhodes told Brite of their agreement and they secured Brite's agreement to join. V.30, pp. 25-30; V.33,

p. 216; V.40, pp.121-125.[8] Subsequently, Rhodes sent Mizell's and Bay's price sheets to Brite. Killingsworth used these sheets to prepare Brite's prices and Brite then announced prices that were nearly identical to Mizell's and Bay's. V.40, pp. 129; 144-146; V.30, pp. 36-37, 61-62. Salesmen at Brite, Bay, and Mizell were all instructed not to deviate from the prices on those sheets. V.40, pp. 146-147, 303-306; V.34, pp. 45, 80; V.30, p. 45; also GX 52C, 53A, 53D; V.40, pp. 150-155, 158-160, 180-187; V.30, pp. 40-45 (invoices showed that agreed-on prices were actually charged).

A fourth company, PBI Inc., was also brought into the conspiracy. Within a few weeks after his return from Kansas City, Killingsworth called Ron Trevathan and Jim Denton of PBI and told them of the agreement between Bay, Brite, and Mizell. He sent PBI the agreed-on pricing, and PBI joined the agreement by adopting and publishing the same prices and faxing the PBI price sheet to Killingsworth to indicate PBI's joinder in the scheme. V.33, pp. 67-72;

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[8] Rhodes testified that he had this conversation with Peter Yueh, Brite's executive vice president. Jerry Killingsworth, Brite's vice president of sales, recalled that he was the one who had the conversation with Rhodes in Maloof's presence, and that he told Yueh about it later. V.40, pp. 121-123; V.30, pp. 29-30. In any event, both Rhodes and Killingsworth agreed that Brite committed to the agreement and that, after the meeting, Rhodes and Killingsworth exchanged pricing information by fax and phone to carry out the agreement. V.40, p. 126; V.30, pp. 36-37, 45-46; V.33, p. 66.

see also V.21, pp. 399-403, 418-420 (customer testified that PBI and three other suppliers had identical pricing and salesmen were no longer offering discounts off price sheets as they had in the past; this made the customer suspicious); V.35, pp. 246, 281 (PBI owner asked Janne Smith, Bay's district sales manager in Houston, to send him Bay's price sheet).[9]

Rhodes acted as middle man in enforcing the agreement. When either Brite or Bay believed that the other was offering too low a price to a mutual customer, they would call Rhodes who would then try to verify the complaint or obtain an explanation. V.40, pp. 126-133; 136-141; 192-196, 212-213; V.35, pp. 135-139; also V.41, pp. 75-88, 93-94 (defense witness who worked in sales for Brite testified that she had concluded that there was an agreement between Brite and its competitors to "hold to the pricing" because Brite got complaints from PBI and Mizell when they did not stick to the price sheet, and Brite would similarly complain to them).[10] Rhodes complained to Maloof that Bay saleswoman Delores ("Dee") Hill was charging customers lower prices than those agreed to, and Hill was fired. V.42, pp. 202-203; V.34, pp. 55-57 (Maloof

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[9] The PBI owner, Jim Denton, died in 1995 before trial.

[10] Rhodes also helped Bay and Brite coordinate prices at their NCI and Whirlwind accounts, which Mizell did not serve. V.40, p. 133; GX 4d.

told Smith that Hill was making him look like a fool to Rhodes for not sticking to the price sheet); V.34, pp. 58-59 (Smith told Hill to revise the quote and Hill refused; Maloof then told Smith that Hill was "on her way out").

Two additional price increases were coordinated in 1994, and a third in 1995. V.42, pp. 218-232; 260-280; V.33, pp. 66-67; V.34, pp. 63-70 (June 1994 increase); V.42, pp. 342-361; V.33, pp. 74-75; V.35, pp. 123-124 (December 1994 increase); V.42, pp. 366-381 (March 1995 increase). For each increase, Maloof and his competitors exchanged proposed prices and agreed on new prices, as well as agreeing on particular prices at mutual large accounts. V.42, p. 232. Maloof also secured the agreement of his competitors to increase freight charges by raising the size of the order for which freight costs would be absorbed by the seller from $1500 to $1750. V.42, pp. 233, 244, 253-255; GX 3 (fax from Maloof to Rhodes on which Maloof circled $1750 freight charge and wrote "Let's do it"). Despite some cheating, the conspiracy was largely successful: for the first time price increases "stuck" in the marketplace. V.33, p. 74.

Maloof and his co-conspirators knew that their price-fixing agreement was illegal. V.42, pp. 344-346. Maloof took steps to avoid detection by using a false name when leaving messages and taking identifying information off fax headers

when transmitting price sheets to his competitors; and he and Rhodes told each other they would deny their activities to government authorities if they were ever found out. V.40, p. 68; V.42, pp. 344-346.

Although Maloof did not specifically tell Janne Smith, his division manager in Houston, about the agreement, Smith became aware of it because of changes in the way Bay did business beginning in 1994. For example, Bay had new price sheets with price "brackets" which Bay had not had before; those price sheets were distributed to customers, which had not been done before; and Maloof gave strict orders that sales people were not to deviate from those prices or jump brackets. V.36, pp. 96-101; see also V.24, pp. 572-573, 587-589 (defense witness Dee Hill also was suspicious that Maloof and Rhodes were discussing jobs and that "something was wrong"). Maloof questioned Smith if a Bay sales person deviated from the price sheet and instructed her to enforce the price sheets. V.34, pp. 42-47. In July 1994, Smith faxed Maloof a document on the "Eight Major Fundamentals of Antitrust Law," which she had received from her father. GX 1. She was worried that she and Maloof would get into trouble for price-fixing. V.34, pp. 81-87; V.35, pp. 118-120. Smith and Maloof discussed the document. The "first fundamental" was that "competitors may not agree on prices they charge for material." GX 1. Smith told Maloof that he and Wally

had been violating this first fundamental, and Maloof responded that he "couldn't go back and change what had already been done." V.34, pp. 85-86.[11] After Maloof learned that the government had served subpoenas on Bay in connection with its price-fixing investigation, Maloof told Smith "to lie her a-- off." V.35, p. 177.

Later in 1994, Smith decided to go to the federal authorities because of her concerns about Maloof's activities. V.35, pp. 140-142. She subsequently agreed to tape some of her conversations with Maloof in April and May 1995. V.35, pp. 140-143. Excerpts from these tapes were played to the jury. V.35, pp. 154-155; GX 11a-f (tapes); 12a-f (transcripts). The tapes showed that Maloof was well aware that Bay and its competitors were all charging the same prices, and that he did not want to "upset the balance" by permitting Bay sales people to discount. V.35, pp. 155-159; 160-162; GX 12a, pp. 12-13, 18, 20; GX 12b, pp. 4-5, 8-10. After Rhodes called Maloof to complain that Bay had offered a lower price to a customer, Maloof called Smith to determine whether it was true. V.35, pp. 167-168; GX 12d, pp. 25, 34. Once, when he decided to authorize a Bay salesman

[11] Nancy Jensen, a defense witness, testified that Smith also gave her a copy of the "Eight Fundamentals," expressing her concern that Maloof was discussing prices with his competitors. V.36, pp. 112-113.

to offer a lower price, he discussed with Smith how they could explain it to, or hide it from, Mizell and Brite. V.35, pp. 160-161, 164-166, 171-173, 283; GX 12b p. 5; GX 12c, pp. 23-24; GX 12f, pp. 5-6. He also tried to get evidence for Rhodes to take to Danny Fong at Brite to "use as ammunition" to prove that Brite was cheating on the agreement. V.35, pp. 170-172; GX 12e, pp. 8, 11-12.

In addition to the tapes and testimony of co-conspirators, as described above, price sheets, telephone records, faxes, and other documentary evidence confirmed the existence of the conspiracy charged. E.g., GX 1, 2, 4-8, 10a-b, 13-15, 22, 23, 31-33. The interstate phone calls and faxes also supported the wire fraud charges in count II.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion under Fed. R. Evid. 403 in excluding testimony detailing Wallace Rhodes' alleged marital infidelities because this evidence was (l) irrelevant to the issues; and (2) unfairly prejudicial.

The court did not prevent Maloof from presenting all relevant evidence to rebut the government's "consciousness of guilt" evidence. Maloof testified that he was offered immunity and declined it, giving an innocent explanation for his pricing policies. This is all that the cases on which Maloof relies require. E.g., United States v. Biaggi, 909 F.2d 662, 690-691 (2d Cir. 1990). The only way in

which Maloof's testimony was curtailed was in preventing him from suggesting that government agents had threatened or intimidated him when there was no evidence to support the suggestion and such allegations were irrelevant to the charges or any other issue in the case.

The government did not violate Brady v. Maryland when it failed to turn over two documents that Maloof claims would have impeached Jerry Killingsworth, one of the three witnesses who testified to Maloof's participation in this conspiracy. One document did not constitute impeachment evidence at all. The other was information that was available to the defendant and that, in any event, was not material because there is no reasonable probability that it would have altered the jury verdict.

The government did not improperly attempt to use the guilty pleas of Rhodes and Killingsworth as evidence of Maloof's guilt. The government was permitted to refer to the pleas because defense counsel had indicated he would rely on them to impeach Rhodes and Killingsworth. The court emphatically cautioned the jury that the pleas were to be considered for the limited purpose of evaluating credibility, not as substantive evidence of defendant's guilt.

There is abundant evidence to support the trial court's factual finding that the defendant was a "leader" and/or "organizer" of a conspiracy involving five or

more participants, thus warranting a four-level enhancement under U.S.S.G. §3B1.1(a). The evidence established that at least ten employees of four different companies participated in the conspiracy, and that Maloof was the originator of the charged conspiracy, a primary player in it, and the principal director and enforcer of the conspiracy within his own organization.[12]

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING THE DEFENSE FROM INTRODUCING EXTRANEOUS AND IRRELEVANT EVIDENCE ABOUT WALLACE RHODES' PERSONAL LIFE

Maloof claims that he was improperly precluded, both on cross-examination of Wallace Rhodes and in his own direct testimony, from presenting detailed evidence about Rhodes' alleged marital infidelities in order to "explain"

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[12] In the "factual" portion of his brief, the defendant has a lengthy section entitled "Restrictions Placed on the Defense by the District Court," in which he alludes to various alleged trial errors. Maloof Br. 21-24. Each of these claims was properly disposed of by the district court (see e.g., R.1307-09), and any suggestion of error is wrong. Moreover, none of the veiled claims is actually raised as an issue on appeal or briefed in the argument portion of the brief and thus any suggestion of error should be rejected as having been waived. United States v. Fulmer, 108 F.3d 1486, 1495 (1st Cir. 1997); United States v. Bell, 936 F.2d 337, 343 (7th Cir. 1991); Fed.R.App.P. 28(a)(9)(A).

his 81-minute telephone call to Rhodes on January 3, 1994. Maloof Br. 30-47.[13] The claim mischaracterizes the record and the relevance of such evidence to the issues in this case.

"Trial judges retain wide latitude to impose reasonable limits on questioning 'based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." United States v. Gray, 105 F.3d 956, 964-65 (5th Cir.), cert. denied, 520 U.S. 1246 (1997), quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). It is a "bedrock premise that district courts retain broad discretion in managing trials, including controlling the length and scope of cross-examination." United States v. Freeman, 164 F.3d 243, 249 (5th Cir.), cert. denied, 119 S.Ct. 1590 (1999). Such rulings are reviewed for "clear abuse of discretion." Freeman, 164 F.3d at 249.

The court's "wide latitude to impose reasonable limits on cross-examination [is] subject to the Sixth Amendment requirement that sufficient cross-examination be permitted to expose to the jurors facts from which they can draw inferences

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[13] The page references to "Maloof Br." in this brief are to the page numbers in the hard copy paper version that was served on the government. These page numbers do not coincide to the pages as printed out from the electronic version.

relating to the reliability of witnesses." United States v. Martinez, 151 F.3d 384, 390 (5th Cir. 1998), cert. denied, 119 S.Ct. 572, 833 (1999); citing United States v. Restivo, 8 F.3d 274, 278 (5th Cir. 1993). "In order to show an abuse of discretion related to the limitations placed on cross-examination, a defendant must show that those limitations were clearly prejudicial." Martinez, 151 F.3d at 390.

The district court in this case did not abuse its discretion in excluding as irrelevant and prejudicial the evidence relating to the marital problems of Wallace Rhodes.

A. There Was No Error In Limiting Cross-Examination

At trial, Maloof sought to cross-examine Rhodes on the subject of his alleged marital infidelities because, counsel claimed, Rhodes had testified that "they spent 81 minutes talking about prices and allocation" (V.28, p. 67, Maloof Br. 33). As the court pointed out, however, Rhodes had not testified that their "whole conversation" was about fixing prices. See ibid. Rather, Rhodes had testified on direct that various topics were discussed in that 81-minute conversation (V.40, pp. 57-59); and on cross-examination defense counsel elicited testimony about the specific other matters that were discussed. V.28, p. 20 ("We talked about price increases from the different manufacturers; talked about the family, his family; talked about Mizell brothers; talked about Bay

Insulation.")

Nor did the government ever claim that the entire 81-minute conversation was devoted to price fixing (see Maloof Br. 33-34) -- as defendant's own record excerpts show (RE 6). The government said in its opening statement that, after Rhodes and Maloof talked of many other matters in that "lengthy conversation," "by the end of that conversation they talked about price and how they were going to raise their prices, put out these price sheets, and stick to those price sheets and not give discounts, as they had in the past. And that is where, ladies and gentlemen, we will prove they crossed the line, they agreed on the pricing." V.18, pp. 13-14; RE 6 (emphasis added).

Thus, neither Rhodes nor the government claimed that the entire 81-minute conversation was devoted to price fixing. Rather, as the district court found in rejecting the defendant's argument, the point was not that Rhodes and Maloof "talked for 81 minutes about pricing," as defense counsel was suggesting (see Maloof Br. 33-34, citing V.28, pp. 67-68), but that, although they talked about other things, there was also "a lot of price discussion." Whether that discussion went on for 81 minutes or 50 minutes or 20 minutes was irrelevant. Ibid. The district court's ruling did not preclude Maloof from presenting any evidence he may have had establishing that they did not discuss pricing at all

during that or any other conversation. V.28, pp. 67-69.[14]

In addition, the district court correctly recognized that testimony concerning Rhodes' personal life must satisfy Fed. R. Evid. 403. As the court noted, the Rule 403 "balancing test that I need to apply, certainly in this circuit, goes first and foremost to the probativeness of the testimony. Right now I find it highly not probative. And I find it highly prejudicial. So, so far you are losing on both prongs. And under this Circuit, I've got to find that . . . the undue prejudice is substantially outweighed by probativeness." V.28, p. 68. For these reasons, the court did not abuse its discretion in excluding the evidence. United States v. $9,041,598.68, 163 F.3d 238, 254 (5th Cir. 1998) ("Rule 403 . . . is limited to excluding matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect," quoting United States v. Pace, 10 F.3d 1106, 1115-16 (5th Cir. 1993)).

This limitation on cross-examination did not violate the confrontation clause of the Sixth Amendment (compare Maloof Br. 35-36). The defense cross-examined Rhodes over the course of two days going into various areas of possible

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[14] Maloof essentially conceded at trial that the only evidence the defense had that no price discussion occurred at all in that January 3 conversation was the assertion of Maloof himself. V.28, pp. 67-68. Maloof, of course, was permitted to so testify. See part B, infra.

impeachment. The excluded evidence did not relate directly to Rhodes' credibility or his motivation to lie; it was not relevant to any of the charges and it, perforce, did not go "to the heart of the case." Compare United States v. Fisher, 106 F.3d 622, 633 (5th Cir. 1997), and United States v. Lowery, 135 F.3d 957, 959-960 (5th Cir. 1998) (evidence was "at the center of his affirmative defense"). The confrontation clause is not implicated where cross-examination into irrelevant matters is curtailed.[15]

Even if Rhodes' marital problems were deemed to be relevant impeachment matters, there is no reversible error unless the limits imposed were "clearly prejudicial." United States v. Landerman, 109 F.3d 1053, 1061 (5th Cir.), cert. denied, 118 S.Ct. 638 (1997). Even where a witnesses' evidence was "important to the government's case," there is no prejudice as long as "there was an abundance of other evidence to support the verdict." United States v. Cooks, 52

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[15] The cases on which Maloof relies are plainly distinguishable. In United States v. Mayer, 556 F.2d 245, 250 (5th Cir. 1977) and United States v. Landerman, 109 F.3d 1053, 1061-64 (5th Cir. 1997), the district court precluded cross-examination of defendant's deals with government and state prosecutors which had a clear bearing on the witness's possible motive to testify falsely. Similarly, in United States v. Davis, 639 F.2d 239, 245 (5th Cir. Unit B 1981), the court excluded evidence concerning the untruthfulness of a government witness, "without [whose testimony] the government would have no case."

F.3d 101, 104-105 (5th Cir. 1995).[16] There was an abundance of other evidence to support the verdict in this case. As the trial court held, there was "hefty evidence against Defendant" (R.1315), including the clear and unequivocal testimony of several co-conspirators that Maloof joined them in a price-fixing conspiracy (ibid.). The jury had the benefit of "extremely detailed questioning and cross-examination of these key witnesses" (R.1314). There was documentation supporting the government's case, including dozens of phone calls among co-conspirators at pivotal times, the competitors' price sheets and price increases which "were uncannily consistent for all the key products" (ibid.), and the four price increases by the conspirators during the relevant time period were "almost simultaneous and were virtually uniform." (R.1313). All this was "[i]ndependent of Defendant's own statements on the tape recorded

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[16] In Cooks, the court found no reversible error and no need for a new trial as to one defendant, but it upheld the district court's decision as a proper exercise of its discretion to award a new trial to a second defendant whose guilt rested solely on the testimony of a witness whose reliability was in question. 52 F.3d at 104-105. In Cooks, the limits that were placed on cross-examination related to the witness's possible motivation for testifying falsely to appease the government; Rhodes marital indiscretions, on the other hand, are not related to that kind of credibility question. Compare also United States v. Ballis, 28 F.3d 1399, 1403-06 (5th Cir. 1994), holding that, where charges of obstruction were based on defendant's conduct at two meetings with government prosecutors, it was error for court to exclude essentially all of the defendant's explanations for what occurred at the meetings.

conversations" (ibid.). Thus, any error in limiting testimony about Rhodes' marital infidelities would be harmless.

B. There Was No Error In Limiting Maloof's Testimony

Contrary to Maloof's claim (Maloof Br. 41-47), the trial court did not preclude him from presenting his version of the 81-minute telephone call to the jury. See V.44, pp. 62-68, RE 8.

Maloof testified that he called Rhodes on January 3 in response to Rhodes' request, and in that call Rhodes:

> expressed a dissatisfaction with working at Mizell Brothers and wanted [Maloof] to ask Dan [Schmidt] to get him a job. He had called me to complain about there was some Bay employees who had told some other Bay employees about his -- [court overrules government objection, and Maloof continues] Wally was either getting a divorce or had gotten a divorce and he called me.

V.44, p. 62. Although the court cautioned that it would not permit Maloof to get "too detailed" about "sensitive matters, such as Rhodes' marital situation," he could be "very general." Id. at 62-66. Maloof explained that Rhodes "wanted the [Bay] employees to stop talking about his domestic situation." Id. at 62-63. Maloof testified that the 81-minute phone call concerned "some" of these "personal matters," id. at 63-64, and that both the January 3 call and subsequent

calls that he placed to Rhodes' home were to discuss "the personal things that he wanted to talk about and the questions about gaining employment with Bay he did not want to talk about at Mizell Brothers." Id. at 65. Maloof testified that "90 percent" of the "time that [he] spoke with [Rhodes] had to do with either the employment or the personal matters." Id. at 65. Maloof testified that they also discussed allocation, and that he tried to get "market information from [Rhodes]" as well. Id. at 65-66.[17] In response to his counsel's question whether he had any "phone discussions with Mr. Rhodes about fixing prices in the metal building insulation business," Maloof responded: "Absolutely not." Id. at 67-68.[18]

Thus, although Maloof claims that he was unable to present his version of

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[17] Despite this testimony and despite Maloof's testimony at trial that, although he had worked with Rhodes at Mizell, he did not "have any sort of special relationship" with Rhodes (V.44, pp. 19-20), Maloof nevertheless tries to suggest that Rhodes asked Maloof to call him solely to complain to Maloof for 81 minutes about his personal problems.

[18] A reading of Maloof's testimony (V.44, pp. 61-69, RE 8) flatly contradicts Maloof's claim that his side of the story could not be "understood by the jury," and that "the court's repeated interruptions of and instructions to the defendant made his description of the call confusing and disjointed, and telegraphed to the jury the impression that the district court considered the defendant's testimony regarding this crucial telephone conversation to be improper, if not incredible." See Maloof Br. 45. Indeed, the court rarely interrupted the questioning and, when it did, the interruption was prompted more by the court's need to caution defense counsel not to lead the witness than by any effort to curtail Maloof's testimony. RE 8.

the 81-minute conversation to the jury because he could not delve into the details of Rhodes' marital infidelities, Maloof's own testimony belies the need for such detail. In fact, Maloof had ample opportunity to tell the jury that nothing illegal was discussed during that phone call and to explain the various matters discussed, the reasons why the call might have taken 81 minutes, and the fact that "absolutely" no discussion of pricing took place. That Maloof was not permitted to go into completely irrelevant details about one of the many matters discussed did not deprive him of "crucial relevant evidence necessary to establish a valid defense." Compare Maloof Br. at 47 and the cases there relied on.

The jury was thus fully able to evaluate the conflicting testimony of Rhodes and Maloof concerning the subject of the January 3 phone call, as the cases on which Maloof relies require. See Davis v. Alaska, 415 U.S. 308, 317 (1974); United States v. Cantu, 876 F. 2d 1134, 1137 (5th Cir. 1989); Greene v. Wainwright, 634 F.2d 272, 276 (5th Cir. 1981). That the jury decided to believe Rhodes and the other government witnesses does not establish that the district court abused its discretion in putting some limits on Maloof's testimony. See also United States v. Clavis, 956 F.2d 1079, 1096 (11th Cir. 1992) ("jury is free to reject a defendant's explanation as complete fabrication").

II. THE DISTRICT COURT DID NOT PREVENT DEFENDANT FROM REBUTTING THE "SPECIFIC INTENT" ELEMENT OF THE WIRE FRAUD COUNT OR "CONSCIOUSNESS OF GUILT" EVIDENCE

The district court permitted Maloof to testify at trial that he was offered but refused immunity in exchange for his cooperation during a meeting with FBI agents and government prosecutors on January 21, 1995, while the government's investigation was still pending. Maloof claims, however, that he felt "threatened" by the government agents during this encounter and should have been able to prove that he felt threatened. In support of this claim, he relies primarily on two statements made to him by the FBI that day and that are contained in an FBI 302 report: (l) that "the attorneys prosecuting the case said there was enough evidence right now to indict [you]" and, (2) "if indicted, [you] may face up to 37 months in prison." Maloof Br. 48-50, nn.10, 32.

Although the district court permitted Maloof to describe in general terms the circumstances surrounding the government's offer of immunity to him, the court refused to let Maloof testify about the statements that Maloof characterizes as threats. The court held that testimony concerning these statements was irrelevant, potentially confusing or misleading, and might have prolonged the trial. V.44, pp. 141-143. The court also refused to admit the FBI 302 report without the testimony of the author of the report, Agent Eldridge, whom Maloof

elected not to call as a witness. V.22, pp. 497-499, also V.44, p. 148. Maloof claims that evidence concerning these two statements was admissible to show that he lacked "specific intent" to commit wire fraud,[19] and to rebut the government's evidence of "consciousness of guilt." Maloof Br. 47-49. The district court, however, did not abuse its discretion in refusing to let Maloof testify concerning the statements by the FBI and in refusing to admit the hearsay FBI report.

Maloof was given ample opportunity to present his "consciousness of innocence" through testimony concerning the events of June 21. He testified that FBI agents came to his room at the Ramada Inn on that day, and that he accompanied them to the second floor of the hotel where he talked to the FBI

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[19] The "lack of specific intent" defense relates to the wire fraud count only. The elements of wire fraud are "(l) a scheme to defraud, and (2) the use of, or causing the use of, wire communications in furtherance of the scheme." United States v. Keller, 14 F.3d 1051, 1056 (5th Cir. 1994). "The requisite intent to defraud exists if the defendant acts 'knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to [himself].'" Ibid., quoting United States v. Shively, 927 F.2d 804, 814 (5th Cir.1991). The Sherman Act does not require specific intent, and neither the wire fraud statute nor the Sherman Act requires proof that defendant knew that what he was doing was illegal or that he specifically intended to break the law. See United States v. All Star Industries, 962 F.2d at 474-75 & n.18; citing United States v. MMR Corp., 907 F.2d 489, 495 (5th Cir. 1990). The trial court imposed concurrent sentences on Maloof on counts I and II; thus, even if the Court were to reverse on count II, that would not alter the sentence.

agents, and then to government attorneys, for an hour and a half. V.44, pp. 153-155. He was told that the government was investigating price fixing and he was asked if he would be willing to record Dan Schmidt and other individuals in exchange for immunity. Id. at 153. Maloof denied setting prices with other insulation companies and insisted that prices were set independently. He testified that he told the agents that he would not accept the immunity offer, even though he understood that the offer meant that if he cooperated and taped phone calls he would not be prosecuted. Id. at 154-155.[20]

Maloof also testified that, after this encounter, he went to Bay's offices where he met with Janne Smith who had also been served with a subpoena and was very upset. V. 44, p. 155-57. Smith told him that she thought the office had

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[20] Any suggestion that Maloof was unable to show that he had provided the prosecutors with a "completely innocent explanation for Bay's pricing behavior" (see Maloof Br. 51) is plainly refuted by the record. In fact, prior consistent statements that simply bolster a witness's credibility by repeating testimony given at trial are generally not admissible. Tome v. United States, 513 U.S. 150, 156 (1995); United States v Powers, 168 F.3d 741, 750 (5th Cir. 1999) (to be admissible, prior statement must, among other things, have been made before motive to fabricate arose); see also Galtieri v. Wainwright, 582 F.2d 348, 364 (5th Cir. 1978) ("since [defendant] adopted at trial the complete essence of his testimony before that grand jury, for the defense to have introduced the transcript would have been a repetitious, cumulative, and, we think, clearly improper use of a prior consistent statement"). The trial court nonetheless permitted Maloof to show that he gave the government the same explanation for Bay's price sheets and pricing policies on June 21 as he gave at trial.

been bugged and he suggested that they go for a car ride to the Seven Eleven in order to "get her to settle down." V.44, p. 157. He testified that he did not make any recommendation to her "about what she should do in response to the subpoena" and that, contrary to Smith's testimony, he did not "say words or words to the effect that she should lie her a-- off". Id. at 157-158. He testified that he never agreed "to fix, maintain, or set prices on metal building insulation with Wally Rhodes or anybody else," and that he pled "not guilty" "to the charges in this indictment." V.46, pp. 345-346.

Thus, Maloof was fully able to present his "consciousness of innocence" defense by showing that he was offered immunity and refused it.[21] This is all that is required under United States v. Biaggi, 909 F.2d 662, 690-691 (2d Cir. 1990), on which Maloof relies.[22]

Indeed, throughout his testimony, Maloof was given the opportunity to

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[21] In his pre-trial motions, Maloof moved to disqualify federal prosecutors Sharp and Rosman on the ground that they were potential defense witnesses. He claimed that he would call them to testify to the fact that he was offered immunity on June 21 and refused it. R.192, also R.238 (motion to dismiss indictment). The government agreed to stipulate to that, and the court denied the motion (indicating also that FBI agents would be available to testify to the events of June 21). V.13, pp. 7-8.

[22] Biaggi has not been adopted by this or any other circuit.

explain or refute any and all evidence against him concerning his "consciousness of guilt," including his explanation of his taped conversations with Janne Smith, his use of the name "Tom Coop" when calling Rhodes, and his purported lack of knowledge of the "Eight Fundamentals of Antitrust" which Smith testified she gave and discussed with him. Thus, unlike the cases on which he relies (Maloof Br. 55-56), Maloof was not prevented from attempting to refute the government's "intent" evidence.

The court's limited curtailment of Maloof's testimony concerning "jail or threats that this witness now claims occurred" (V.44, p. 140) did not diminish his ability to present that defense. As the court explained, such testimony would merely have served to suggest prosecutorial misconduct, which was extraneous and irrelevant under Rule 403. V.44, pp. 141-143. The suggestion that Maloof felt "threatened" by government agents "goes to all of the extraneous matters that you want to get in, which I feel under 403 to be: A, nothing more than a complete waste of time; B, distracting to the jury; C, completely irrelevant to the guilt or innocence of this defendant." Ibid.; see United States v. Larouche, 896 F.2d 815, 826 (4th Cir. 1990) (motion in limine preventing defendants from introducing claims of government harassment and vindictive prosecution upheld where only "real" jury issues related to defendants' guilt); United States v.

Komisaruk, 885 F.2d 490, 493 (9th Cir. 1989) (motion in limine precluding irrelevant statements made at press conference purporting to negate intent).[23]

Even if it were deemed error to exclude the FBI 302 statements and the fact that Maloof considered them to be "threats" (Maloof Br. 34), any error would be harmless in light of the wholly independent and convincing evidence that Maloof agreed with Rhodes and others to fix prices and adhere to published price sheets (see pages 20-21, supra). United States v. Lowery, 135 F.3d 957, 959 (5th Cir. 1998) ("A nonconstitutional trial error is harmless unless it 'had substantial and injurious effect or influence in determining the jury's verdict,'" quoting Kotteakos

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[23] The only evidence of threats or intimidation was Maloof's claim that he considered statements that he could be indicted and serve up to 37 months in prison to be "threats." See V.44, p. 149; see also V.22, pp. 508-510 (court asked for proffer as to what Maloof would testify to if permitted to testify about alleged threats or intimidation by government on June 21, and how such testimony would satisfy Rule 403, considering the court's duty to weigh the probativeness of testimony against its potential prejudice. The defendant never made such a proffer). The court gave Maloof the opportunity to pose interrogatories to the two FBI agents who were at the Ramada on the day in question. See R.1155-1160. As the answers to these interrogatories show, Maloof was given 35 minutes to shower and dress after the FBI came to his door, and he was then permitted to go unattended to purchase a pair of socks. Nothing in the reports suggests intimidation or harassment. R.1155-1160. If Maloof had been permitted to testify about what he considered to be threats, the government would then have wanted to present witnesses to refute those allegations and this would have prolonged the trial and confused the jury needlessly with matters that were not relevant to Maloof's guilt or innocence. See V. 44, pp. 141-142; RE 10 (court "precluded other witnesses on the basis of this ruling").

v. United States, 328 U.S. 750, 776 (1946)).

III. THERE WAS NO VIOLATION OF BRADY v. MARYLAND

Maloof claims that the government violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963), by failing to turn over two documents that allegedly impeached Jerry Killingsworth's trial testimony. Maloof Br. 57-73. The district court properly found no reversible error because, even assuming arguendo that the documents were covered by Brady, they were not material and there was no prejudice.

To overturn a conviction based on Brady, the defendant must show that the government "suppressed evidence that was favorable to the defendant and material to guilt or punishment." United States v. Gray, 105 F.3d at 968. Both exculpatory evidence and impeachment evidence fall within Brady. Giglio v. United States, 405 U.S. 150 (1972). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); Gray, 105 F.3d at 968. A "'reasonable probability' of a different result is shown when the suppression 'undermines confidence in the outcome of the trial,'" Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting Bagley), i.e., "when the non-disclosure could reasonably be taken to put the

whole case in such a different light as to undermine confidence in the jury verdict." United States v. Fisher, 106 F.3d 622, 634 (5th Cir. 1997) (internal quotations omitted), quoting Westley v. Johnson, 83 F.3d 714, 725 (5th Cir. 1996). No such error occurred in this case.

A. The Killingsworth Letter

The first document on which Maloof relies is a letter dated December 3, 1993, from Jerry Killingsworth to Tula Turner of Supreme Insulation in Kansas City, Missouri, enclosing Brite's "price sheets for North & South Louisiana and Texas []. South is Zone I, and North is Zone II." RE 11. Maloof claims that this letter contradicts Killingsworth's testimony at trial that Brite did not have a price sheet out at the time of the January 12, 1994 meeting in Kansas City; that Killingsworth never distributed the January 1, 1994 price sheet to customers; and that the January 1, 1994 price sheets were intended only for internal use. Maloof Br. 61-62.[24] The letter was not impeachment evidence, and there is no reasonable probability that its introduction at trial would have had any effect on the jury determination.

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[24] The government did not consider the letter Brady material because it was a letter to a competitor in Kansas City, Missouri, and involved sales outside of Texas, and thus not within the evidence admitted at trial. V.48, p. 7.

As the district court noted, the basic premise of Maloof's argument was not supported by the record. V.48, p. 18. First, Killingsworth in fact testified that Brite had price sheets prior to January 1, 1994, and that they were indeed distributed to certain special customers, although not to customers generally. Ibid., see V.33, pp. 127-143, 159. Second, whether Supreme was a "customer" of Brite is unclear. V.48, p. 18. Although Supreme bought some insulation from Brite for resale, Supreme was in the same business as Brite as a competitor, as its name Supreme "Insulation" suggests. Id. at 18-19. The letter corroborates this and even suggests that Supreme and Brite had their own price agreements vis a vis customers in Louisiana. Killingsworth told Supreme what Brite would charge for the materials, and then stated: "[t]he other prices are ones we suggest be quoted your customer based on market pricing for this area, but you are free to sell it for what you wish to over the minimum." RE 11 (emphasis added). Finally, defense counsel himself conceded that Supreme Insulation was a "competitor." V.34, p. 108 ("Supreme is a laminator in another part of the country. They are a competitor of ours in another part of the country.") . Thus, the letter was not "impeachment" evidence at all. "Supreme was not a Texas entity and was not a customer in the Texas market" (V.48, p. 19) -- the only market at issue in the case. And, as the district court noted,"to the extent that

[the letter was written] to a competitor [it] is inculpatory, if anything." V.48, p. 19.[25]

Even if the letter were viewed as impeachment evidence, it would not have affected the jury verdict. Despite Maloof's claim that this letter would have "destroyed" "[a] major premise of Killingsworth's testimony about th[e] disputed encounter" in Kansas City on January 12 (Maloof Br. 69), in fact the letter related not to the discussion and agreement reached in Kansas City, but to a totally tangential matter -- whether Brite had ever issued price lists to customers prior to that agreement. The letter did nothing to diminish the force of (l) Rhodes' testimony that he and Maloof agreed prior to January 12 to fix prices, (2) Rhodes' and Killingsworth's testimony that Brite was then recruited to join the conspiracy on January 12 in Kansas City, and (3) the remaining trial evidence, including forceful documentary evidence, that these three companies, along with PBI, reaffirmed, carried out, and policed their agreement throughout 1994 and into 1995.

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[25] Indeed, as the government advised the court (R.2162 n.2), Tula Turner and Supreme were targets of the government's on-going grand jury investigation into price fixing in the metal building insulation industry. See also V.34, p. 104-105 ("Supreme Insulation is a target of the ongoing government investigation"); Maloof Br. 62 (Brite letter was produced by Supreme pursuant to a grand jury subpoena).

B. Fong's Denial

Maloof also claims that the government should have disclosed a statement by Danny Fong to FBI agents on June 21, 1995, in which Fong denied that he or any other Brite employee was involved in any conspiracy to fix metal building insulation prices. Maloof Br. 64-65.

There can be no Brady violation, however, where the information at issue was known to the accused or could have been obtained with reasonable diligence. United States v. Meros, 866 F.2d 1304, 1307-08 (11th Cir. 1989); United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988); United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 736 (5th Cir. 1984). In this case, it was clear from the trial record that defense counsel had consulted with Fong's attorney who voluntarily provided defense counsel with Fong's exculpatory version of relevant facts. V.34, pp. 97-98 (defense counsel, Mr. Bowen, was in possession of letter from Fong's counsel characterizing what Fong's exculpatory position would be concerning alleged statements made by Fong to Maloof).[26] See also United States

[26] At sentencing the government represented that it "had reason to believe that the defense had . . . access to [Fong's denials] before the trial through his attorney, Mr. Tyson. They subpoenaed Mr. Fong for trial at the time." V.48, p. 8. Defense counsel did not deny this. Presumably the defense would not have subpoenaed Fong to testify unless it knew what Fong would say and that his testimony would be favorable.

v. Brown, 628 F.2d 471, 473 (5th Cir. Unit A 1980) ("nondisclosure of information that is merely repetitious, cumulative or embellishing of facts otherwise known to defense should not result in conviction reversal," quoting concurring opinion of Fortas, J. in Giles v. Maryland, 386 U.S. 66, 98 (1967)).

In any event, the district court properly held that suppression of the Fong statement did not violate Brady because the statement was not "exculpatory" at all as to Maloof,[27] and, even if Fong's denial impeached Killingsworth's testimony that Fong was involved, the denial was not "sufficiently material to justify a new trial." V.48, pages 20-21. As the district court found, the defense's cross-examination of Killingsworth was "extraordinar[ily] aggressive and wide-ranging" on "various topics and experiences and other things that gave counsel opportunities to demonstrate his bias, his interest in [sic] potential prejudice to the Defendant or the Defendant's company as well as his other issues of credibility." Ibid. "[T]he fact that Fong denies hearing from Killingsworth about the conspiracy and denies knowledge of the conspiracy would not materially add to the impeachment opportunity of the Defendant. The denial was one that one would expect from any individual in Fong's position." Id. at 21.

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[27] Fong's denial of any knowledge of a conspiracy involving Brite would not negate the existence of a conspiracy among Rhodes, Maloof, and others.

There is no reasonable probability that, had Fong's denial been disclosed to the defense, the jury would have reached a different result. Maloof's claim that, if the jury had learned of both the December 3 letter to Supreme Insulation and the Fong denial, the jury "would very likely not have credited Killingsworth's testimony at all" (Maloof Br. 71-72) ignores the record.

Killingsworth's testimony was strongly corroborated by Rhodes. And both witnesses' testimony was corroborated by convincing documentary evidence. Both Rhodes and Killingsworth testified that Brite was recruited into the conspiracy on January 12, 1994 in Kansas City by Rhodes and Maloof. Although Rhodes did the talking for himself and Maloof, Maloof was right there to lend his presence. See pages 6-7 & n.7, supra (compare Maloof Br. 71-72, suggesting otherwise). The only significant difference in their testimony was that Rhodes believed that he had talked to Peter Yueh from Brite, while Killingsworth testified that it was he who talked to Rhodes and then passed the information on to Yueh, his boss. Both witnesses agreed -- and faxes, notes, telephone records, and pricing documents substantiate it -- that Rhodes thereafter dealt with both Killingsworth and Yueh, as well as with Maloof, in enforcing the agreement through the exchange of price sheets and policing adherence to it.

Although Maloof claims that by discrediting Killingsworth "[t]he direct link

between the defendant and Brite would have been broken, and the entire prosection case would have hinged on Rhodes' credibility" (Maloof Br. 2), the assertion should be rejected on several counts. First, it was not Rhodes alone who linked Brite to the conspiracy. Rhodes' testimony was strong because it was corroborated not only by Killingsworth, but by documentary evidence and other evidence as well. Even defense witness Paula Jones, who had formerly worked for Brite, testified that Brite was part of a conspiracy with Rhodes and others to fix prices. V.41, pp. 75-84. Indeed, Maloof himself revealed in his tape-recorded conversation with Janne Smith that he considered Brite to be a member of the conspiracy and he wanted to get evidence that Brite was cheating on that agreement to confront Brite President, Danny Fong. GX 12e, p. 8. Second, even if Brite were not part of the conspiracy, it would not negate the existence of the conspiracy between Maloof and Rhodes. And finally, even if Rhodes' testimony alone were to be counted, it was strong enough to support the conviction.

In light of the abundant evidence of Maloof's participation in a conspiracy with both Brite and Mizell, the claimed impeachment evidence on which Maloof relies would not with any reasonable probability have had any bearing on the outcome of this trial. East v. Johnson, 123 F.3d 235, 239 (5th Cir. 1997) ("when

the testimony of a witness who might have been impeached by undisclosed evidence is strongly corroborated by additional evidence, the undisclosed evidence generally is not found to be material"). Accordingly, the cases on which Maloof relies are readily distinguishable. In Kyles v. Whitley, 514 U.S. 419 (1995), defendant's conviction for capital murder was reversed where the government had suppressed a host of exculpatory evidence, including evidence suggesting the culpability of a government informant, rather than the defendant. Similarly, in Linksey v. King, 769 F.2d 1034, 1042-43 (5th Cir. 1985), also a capital case, the court concluded that there was "a real possibility that the wrong man is to be executed." In East v. Johnson, supra, the state withheld evidence at sentencing that a witness, who testified in graphic detail about defendant's attacks on her and on whom the state had placed the most reliance, "was incapable of distinguishing between reality and [fantasy]." 123 F.3d at 239. Finally, United States v. Fisher, 106 F.3d 622, 634-635 (5th Cir. 1997), involved evidence that would have "severely impeached" the testimony of "the essential witness against [defendant]." In contrast to these cases, Killingsworth's testimony was strongly corroborated not only by other witnesses like Rhodes and Smith but also by abundant documentary evidence. Therefore, Maloof could not have been prejudiced by the government's failure to disclose the information at issue.

IV. THE GOVERNMENT DID NOT USE THE GUILTY PLEAS OF KILLINGSWORTH AND RHODES AS SUBSTANTIVE EVIDENCE OF DEFENDANT'S GUILT

Maloof claims that the government improperly used the guilty pleas of Rhodes and Killingsworth in its opening statement as substantive evidence of his guilt. Maloof Br. 73-81. The claim is wrong as a matter of fact and a matter of law.

"[A] witness-accomplice's guilty plea may be brought out at trial provided that (l) the evidence serves a legitimate purpose and (2) the jury is properly instructed about the limited use that they may make of it." United States v. Borchardt, 698 F.2d 697, 701 (5th Cir. 1983); United States v. Valley, 928 F.2d 130, 133 (5th Cir. 1991). A "legitimate purpose" exists for the government's use of a plea agreement "when the record reflects a defensive strategy to emphasize or rely on a co-conspirator's guilt." Valley, 928 F.2d at 133-134 (the government may raise the subject of guilty pleas absent a "timely unequivocal commitment not to raise the convictions"); United States v. Casto, 889 F.2d 562, 567 (5th Cir. 1989) (the government's use of a plea agreement is "insulate[d] . . . from error" where the defendant has "opened the door" to use of the plea agreement, and the court gives "a clear and strong cautionary instruction") (internal quotations and citations omitted).

In this case, the government had a legitimate purpose in introducing the plea agreements of Rhodes and Killingsworth. Before trial, defense counsel declined to make a commitment to the court that he would not rely on the plea agreements; indeed, he indicated an intention to rely on them to show that Rhodes and Killingsworth "were given special consideration." V.17, pp. 282, also 279-284. Just before the government delivered its opening statement, defense counsel again advised the court that he intended to rely on the plea agreements "to demonstrate bias and motive." See Maloof Br. 74-75. And defense counsel did just that -- in his opening statement (V.19, p. 20), at trial (V.29, pp. 130-132), and in closing (V.25, pp. 52-53, 61-63).

In these circumstances, the government's reference to the fact that Rhodes and Killingsworth pled guilty was proper, to take the sting out of the defendant's anticipated use of the agreements for impeachment. Valley, 928 F.2d at 134; United States v. Leach, 918 F.2d 464, 467 (5th Cir. 1990) (defendant cannot complain of government's use of guilty plea when he himself exploits the evidence by reference to the plea);[28] United States v. Casto, 889 F.2d at 567

[28] In Leach, on which Maloof mistakenly relies (Maloof Br. 78), the court upheld the government's use of a plea agreement to "'blunt the sword' of anticipated impeachment by revealing the [plea agreement] first" as to a witness who then testified at trial. 918 F.2d at 467. However, where a plea agreement

(government can bring out evidence of plea agreement first in anticipation of defense attack).

Contrary to Maloof's contention, the government did not rely on the plea agreements as substantive evidence of his guilt. After outlining what Rhodes' and Killingsworth's testimony would be, the government simply stated: "They pled guilty to the crime of price fixing and they will be sentenced." V.18, pp. 10-11; RE 12. As this Court held in United States v. Magee, 821 F.2d 234, 241 (5th Cir. 1987), the government is entitled to disclose in its opening statement that co-conspirators have pled guilty and been convicted in the course of outlining for the jury its expected evidence, which includes the testimony of those convicted co-conspirators.[29]

Nevertheless, Maloof complains that, in outlining Rhodes' and

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was also introduced against a co-conspirator who ultimately did not testify -- an unusual circumstance that is not present in this case -- the court found it to be plain error not to have given an appropriate cautionary instruction. Id. at 468.

[29] In sharp contrast is United States v. Fleetwood, 528 F.2d 528, 535 (5th Cir. 1976) (relied on at Maloof Br. 78), where the court pointed to the government's "repeated, methodical, and essentially unnecessary questioning" of witnesses concerning their guilty pleas, which "far overreached proper bounds." Moreover, the trial court had failed to give any cautionary instruction. Id. at 536 (emphasizing that its decision "turns on the facts of the instant case and the particular testimony in question").

Killingsworth's testimony in its opening, the government said that they "confessed" to meeting with Maloof and fixing prices with him. (This sentence directly preceded the sentence informing the jury that "[t]hey pled guilty.") See Maloof Br. 78. Maloof claims that the use of the term "confessed" amounted to an improper use of the plea agreement. But Maloof did not object to the prosecution's opening (or to the use of the term "confessed" in closing, see Maloof Br. 78, V.25, p. 4) at a time when the court could have corrected any alleged error, and thus cannot now claim that the jury was confused or misled by the government's phraseology. In any event, the court instructed the jury that arguments of counsel are not evidence and thus, as the court concluded, even if the jury could conceivably have been confused or misled by "the juxtaposition of which Defendant complains," any such confusion was corrected by the charge and "any error . . . is harmless." R.1305-06.

Maloof's complaint also makes little sense. Although he first suggests that the government improperly used the term "confess" in "the absence of any mention of plea agreements," he then claims that the use of the term was "calculated to link the defendant to the guilty pleas." Maloof Br. 78-79, emphasis added. Whatever Maloof's argument may be, the district court properly rejected the suggestion that the use of the term "confess" along with the guilty plea was

improper, holding that "[t]he sentences simply do not support this inference." R.1305 n.15.[30]

Finally, any error would certainly have been cured by the court's repeated and emphatic instructions. As soon as Rhodes testified that he had entered into a plea agreement with the government, the court interrupted the government's direct examination to caution the jury:

> The testimony as to Mr. Rhodes or any other witness' plea of guilt and resulting conviction is received for a limited purpose only . . . The testimony during this trial from this or any witness who has pleaded guilty and therefore has been convicted of violating the antitrust laws is not to be considered by you as any evidence of guilt of the defendant, Mr. Mark Maloof. These witnesses have pleaded guilty to the crimes charged in cases other than this one and the crimes charged are distinct from those charged against Mr. Maloof. The convictions of these witnesses are admitted for your consideration only so that you can weigh the believability or the credibility of these witnesses. Mr. Rhodes is a witness in this category. You will need to weigh the credibility of witness [sic], but a conviction and guilty plea are factors that you are permitted to consider in deciding what credibility or weight to give to a witness. So you may not consider this testimony as evidence of guilt of Mr. Maloof of the crimes charged in this case per se, but only the testimony to be considered

[30] The court noted that Maloof did not appear to be challenging the government's reference to the guilty pleas anywhere but in the opening statement, and that any such argument would be "frivolous." R.1306 & n.13.

> as to the credibility of the witness who has pled guilty, okay.

V. 42, pp. 408-409. The substance of this instruction was repeated when Killingsworth testified (V.30, p. 31) and in the final charge. R. 1130. Since "the almost invariable assumption of the law [is] that jurors follow their instructions" (Richardson v. Marsh, 481 U.S. 200, 206 (1987)), Maloof could not have been prejudiced by the government's references to the plea agreements of these witnesses.

Maloof claims that the failure of the court to give a cautionary instruction "immediately" after the government referred to the plea agreements in its opening statement constitutes error. Maloof Br. 50, citing United States v. DeLucca, 630 F.2d 294, 298 (5th Cir. 1980). But DeLucca did not so hold. To the contrary, the court noted that "[a] cautionary instruction is generally sufficient to dispel any prejudice that arises from informing the jury of a codefendant's plea of guilty," and upheld a conviction despite the failure to give an instruction at all. Ibid. In this case, moreover, Maloof did not ask for a curative instruction "immediately" following the government's reference to the guilty pleas in its opening statement. Rather, defense counsel immediately followed with his own opening that also discussed the guilty pleas, telling the jury that "the judge will give you some

instructions on how you take those witnesses' testimony . . . Mr. Yueh, Mr. Rhodes, and Mr. Killingsworth plea bargained in other cases. Listen carefully when that evidence is presented and listen to the judge's instructions." V.19, p. 20. Failure to give an "immediate" curative instruction therefore was not error, and certainly not plain error.

Thus, the standards for admitting the guilty pleas were fully satisfied, and there was no error. See United States v. Robins, 978 F.2d 881, 888-89 (5th Cir. 1992); United States v. Borchardt, 698 F.2d at 701; United States v. DeLucca, 630 F.2d at 298.[31]

V. THE TRIAL COURT PROPERLY ENHANCED MALOOF'S SENTENCE FOR HIS ROLE AS A "LEADER/ORGANIZER"

Maloof challenges the district court's four-level sentence enhancement under U.S.S.G. §3B1.1(a). A district court's finding that a defendant was a "leader" or "organizer" under U.S.S.G. §3B1.1 is reviewed for "clear error." United States v. Izydore, 167 F.3d 213, 221-222 (5th Cir. 1999); see also United States v. Lowder, 148 F.3d 548, 554 (5th Cir. 1998) ("[s]tressing the extreme

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[31] Since none of the trial errors asserted by Maloof constitutes error, there can be no "cumulative effect" of such asserted errors (five times zero is still zero). See Maloof Br. 80-81 (relying on cases in which numerous errors occurred).

deference of the 'clear error' standard" under §3B1.1 -- even where the "evidence is rather thin").

Section 3B1.1(a) provides that the court shall increase a defendant's offense level by 4 levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Maloof argues that the conspiracy did not involve "five or more participants" and he denies that he "was an organizer or leader." There is ample evidence, however, to support the district court's finding that Maloof was subject to a §3B1.1(a) enhancement.

A. The court's finding that the scheme involved more than five participants (V.48, p. 77) is not clearly erroneous. The participants included, at the very least, Maloof, Daniel Schmidt, and Janne Smith from Bay; Rhodes from Mizell; Killingsworth, Yueh, and Fong from Brite; and Jim Denton and Ron and Susie Trevathan from PBI.[32]

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[32] The trial court included "at a minimum Janne Smith . . . Nancy Jensen and Dee Hill . . . Rhodes and Killingsworth and others and their organizations." V.48, page 77. Maloof objects to the inclusion of Jensen and Hill on the ground that they denied any knowledge of the conspiracy and took no action to further it. Maloof Br. 84-85. But, although there is limited evidence in the record of their involvement, the record shows that Hill and Jensen were indeed aware of the conspiracy and of Maloof's plan to have them follow the published price lists. See V.34, pp. 55-60, 85; V.35, p. 208; V.36, pp. 112-113. The Court need not,

Maloof challenges the inclusion of Janne Smith on the ground that the district court erroneously stated that Smith's "criminal intent" was irrelevant. Maloof Br. 83. It is unclear what the court meant by its statement but, certainly, if it meant that Smith did not need a specific intent to restrain trade or to violate the law, that is an accurate statement of the law. United States v. All Star Industries, 962 F.2d 465, 474-475 & n.18 (5th Cir. 1992).

In any event, Smith had the requisite intent to be a participant. The Sentencing Guidelines provide that a "participant" is a person who is "'criminally responsible for the commission of the offense." §3B1.1, comment. (n.1). A person is criminally responsible for a Sherman Act violation when, knowing of the conspiracy's existence and purpose, she "knowingly joined or participated in" it. All Star Industries, 962 F.2d at 474 n.18, quoting United States v. Young Brothers, Inc., 728 F.2d 682, 687 (5th Cir. 1984); United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975) (where "a defendant knew of the conspiracy, associated himself with it and knowingly contributed his efforts during its life to further its design, he may be convicted of conspiracy"); Nelson v. United States, 415 F.2d 483, 486 (5th Cir. 1969) ("knowing of the criminal

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however, count Hill and Jensen as participants to affirm the sentence, since the "five participant" requirement is easily satisfied without them.

design, [he] acts in concert with the original conspirators"); see also United States v. Childress, 58 F.3d 693, 706-07 (D.C. Cir. 1995) (same for drug conspiracy which, unlike the Sherman Act, requires "specific intent").

Smith voluntarily and knowingly acted to further the purposes of the conspiracy by faxing pricing sheets to competitors and ordering her sales people to adhere to agreed-on prices. V.34, pp. 55-60, 66 (ordering Dee Hill to stick to the price sheet after Maloof told Smith that deviating from the list was making him look like a fool to Wally Rhodes); V.34, p. 70; V.35, p. 119 (Smith discussed prices with Rhodes when Maloof was out of office and faxed Rhodes a price sheet so he could coordinate their prices). Although Smith feared that she would be prosecuted for her involvement because she knew what she was doing was illegal (V.35, pp. 119, 121) -- and thus she ultimately decided to approach the government and, later, to cooperate in the investigation -- that does not negate her initial involvement and knowing acts to further the conspiracy. Maloof's factual argument that Smith lacked "criminal intent" (Maloof Br. 84-85) ignores the actual evidence adduced at trial and is based solely on the grand jury testimony of an FBI agent who did not have direct knowledge of the conspiracy and who did not testify at trial. Indeed, Maloof's claims that Smith could not testify to "co-conspirator" statements at trial did not rest on the assertion that she

lacked the requisite "criminal intent" to be a co-conspirator, but rather that (l) she "wasn't any longer a coconspirator" after she started cooperating with the government and thus statements made to her after that time were not admissible under the co-conspirator exception to the hearsay rule (an argument with which the court did not take issue); and (2) that she could not "conspire" with Maloof because they were employees of the same corporation (an argument that Maloof has not pursued on appeal).[33] See V.34, pp. 75-78; 89-90; see also V.34, pp. 77-78 (defense counsel concedes Smith could be a co-conspirator if she "knowingly and willfully joined a conspiracy with Danny Fong or Wally Rhodes".

Smith was thus properly included as a participant for §3B1.1(a) purposes. In addition to Smith, Maloof, Rhodes, and Killingsworth (making four participants already), many others participated in the conspiracy as well. These included: (l) Danny Fong (V.34, pp. 75-76, 100-101; V.35, p. 171, GX 11e,

[33] The court rejected Maloof's claim that Smith and Maloof could not be co-conspirators because they worked for the same company. Such a claim would only be valid if the government were charging an "intracorporate" conspiracy, which it is not. See Copperweld Corp. v. Independence Tube Co., 467 U.S. 752 (1984). When the court asked if there were any other arguments as to why Smith would not be a "co-conspirator," defense counsel did not offer any. V.34, pp. 90-91.

12e at 8, 12);[34] (2) Peter Yueh (V.40, p. 134; V.42, pp. 213, 240, 266); (3) Daniel Schmidt (V.40, pp.74, 79-80; see also note 7, supra); (4) unnamed Mizell sales people (V.42, p. 303); and (4) members of PBI, including Jim Denton, and Ron and Susie Trevathan (V.42, pp. 337-340; V.35, p. 246; V.33, pp. 69-73). Thus, the district court's finding that "at least" five participants were involved in this scheme is not clearly erroneous.[35] In fact, there were many more.

Finally, although the Court need not reach the issue because of the ample evidence discussed above, the four-level enhancement would have been appropriate even if the conspiracy did not involve five participants because the

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[34] The fact that Fong was ultimately acquitted of the charges does not negate his inclusion as a "participant." §3B1.1, comment (n.l); United States v. Upton, 91 F.3d 677, 688-89 (5th Cir. 1996) (affirming district court fact findings that, despite his acquittal, one Maness was involved in the scheme for purposes of §3B1.1 enhancement).

[35] Maloof claims (Br. 87) that the district court improperly double-counted by including Rhodes and Killingsworth as well as their "corporations." That is not so. The court included, inter alia, "Rhodes and Killingsworth and others and their organizations." V.48, page 77. There were certainly other individuals, both outside of and within the Mizell and Brite "organizations" that participated in the scheme, and were thus properly included. In United States v. Gross, 26 F.3d 552, 555-556 (5th Cir. 1994), on which Maloof relies, the court suggested that, generally, corporations might well be counted as "participants" under §3B1.1, but where the defendant was the sole criminally responsible agent acting for two alter ego corporations (of which he was the sole shareholder, sole officer, and sole director), it was improper to count the defendant and those two corporations as three separate participants. That was not done here.

conspiracy was "otherwise extensive." U.S.S.G. §3B1.1(a). "In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered." U.S.S.G. §3B1.1, comment. (n.3). "Moreover, the use of 'unknowing services' of outsiders may make the criminal activity otherwise extensive.'" United States v. Izydore, 167 F.3d 213, 224 (5th Cir. 1999), quoting guideline commentary. Thus, the court could affirm the sentence on this alternative basis. United States v. Giraldo, 111 F.3d 21, 24-25 (5th Cir.), cert. denied, 118 S. Ct. 322 (1997) (although district court erred in finding that defendant was an "organizer" of "assets" within meaning of §3B1.1(c), court would not vacate sentence where it could "say with assurance that the district court would have imposed an identical sentence" because defendant was an "organizer" of "criminal participants").

B. The district court's finding that Maloof was a "leader" or "organizer" of the scheme (V.48, pp. 76-77) is not clearly erroneous. Maloof initiated the charged conspiracy by calling Rhodes in January 1994 to solicit and obtain Rhodes' commitment to have Mizell follow Bay's price list. Rhodes 56-61. Maloof further organized the scheme by, among other things, periodically agreeing on new prices, exchanging price sheets with Rhodes to coordinate prices, monitoring and instructing his sales people to ensure Bay's adherence to

the agreement, and policing the activities of his competitors. See pages 5-12, supra; U.S.S.G. §3B1.1, comment. (n.4). Maloof also initiated and obtained agreement on new freight terms and charges. V.42, pp. 233-236. And Maloof was involved in the recruitment of Brite. He and Rhodes discussed the need to include Brite in the conspiracy and both of them met with Killingsworth in Kansas City to secure Brite's agreement to join their scheme. V.30, pp. 25-30. The "leader/organizer" sentence enhancement was thus properly applied. United States v. Hare, 150 F.3d 419, 425 (5th Cir. 1998) ("leadership status depends on such factors as the defendant's exercise of decision making authority, the nature of the defendant's participation in the commission of the offense, and the degree of control and authority the defendant exercised over others"), citing United States v. Ayala, 47 F.3d 688, 689-690 (5th Cir. 1995).

Although Rhodes played a leading role in the conspiracy as well, more than one person can qualify as a leader or organizer under §3B1.1(a). See U.S.S.G. §3B1.1, comment. (n.4); United States v. Gaytan, 74 F.3d 545, 561 (5th Cir. 1996); Hare, 150 F.3d at 425. In United States v. Ronning, 47 F.3d 710 (5th Cir. 1995), and United States v. Katora, 981 F.2d 1398 (3d Cir. 1992), on which Maloof relies (Br. 86-87), there were only two individuals in a scheme in which the court deemed both equally culpable. In this case, on the other hand, Maloof

supervised and ordered Bay employees to carry out the scheme; he initiated the charged conspiracy; and he helped recruit Brite. Both Ronning and Katora explicitly state that such activity warrants application of §3B1.1(a). Ronning, 47 F.3d at 712 ("a person must have been the organizer or leader of at least one other participant); Katora, 981 F.2d at 1403 (3d Cir. 1992) (where two participants organize a third party, they are both subject to §3B1.1 enhancement).[36]

Thus, the four-level §3B1.1(a) enhancement was appropriately applied.

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[36] Other cases relied on by Maloof are equally inapposite. United States v. Rojas-Martinez, 968 F.2d 415, 421 n.13 (5th Cir. 1992), rejected the contention that the trial court was required to make specific fact findings to support its conclusion that defendants acted as "managers and organizers" because the defendant had not supplied specific rebuttal evidence. In this case the trial court did make specific fact findings regarding Maloof's leader/organizer role. The court was not required to make additional "particularized findings" as to who the "others" in the conspiracy were in addition to the numerous participants specifically named (see Maloof Br. 86-87). Maloof did not present any "rebuttal evidence" to suggest that no "others" were involved.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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TRIAL TRANSCRIPT CROSS-REFERENCE LIST

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34	Janne Smith, Direct, 12/08/97
35	Janne Smith, Direct, Cross, Redirect, Recross, 12/09/97
36	Nancy Jensen, 12/10/97
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 1999, I served two paper copies and an electronic copy (3 1/2" disk) of the accompanying BRIEF FOR APPELLEE UNITED STATES by Federal Express Mail on the following:

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