No. 02-20843

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THERM-ALL, INC., ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
(HONORABLE NANCY F. ATLAS)

BRIEF FOR THE APPELLEE UNITED STATES OF AMERICA

R. HEWITT PATE
Acting Assistant Attorney General

JAMES M. GRIFFIN
Deputy Assistant Attorney General

JOHN J. POWERS III
JOHN P. FONTE
Attorneys
U.S. Department of Justice
Antitrust Division
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-2435

DUNCAN S. CURRIE
MARK R. ROSMAN
KAREN J. SHARP
A. JENNIFER BRAY
Attorneys
U.S. Department of Justice
Antitrust Division
Thanksgiving Tower
1601 Elm Street
Suite 4950
Dallas, TX 75201-4717
(214) 880-9401

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

FEDERAL STATUTES AND RULES

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 15 U.S.C. §1 and 18 U.S.C. §3231. It entered final judgment and sentence on July 12, 2002. Appellants each filed a timely notice of appeal on July 18, 2002. R.357-58. This Court's jurisdiction rests on 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether substantial evidence supports the jury's verdicts that appellants knowingly participated in the single conspiracy charged in the Indictment.

2. Whether substantial evidence demonstrates that the conspiracy continued into the statute of limitations period.

3. Whether the court properly instructed the jury regarding the intent element in a price fixing prosecution.

4. Whether the government's inadvertent discovery violation prejudiced Therm-All.

5. Whether the court abused its discretion when it concluded that the government's closing argument did not prejudice appellants.

STATEMENT OF THE CASE

On May 31, 2000, a federal grand jury sitting in Houston, Texas indicted Therm-All, Inc. ("Therm-All"), its president, Robert Smigel ("Smigel"), Supreme

Insulation, Inc. ("Supreme"), and its president, Tula Thompson ("Thompson"),[1] for conspiring, from January 1994 through at least June 1995, to fix the prices of metal building insulation sold in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. R.1.

On October 17, 2001, after a seven-week trial, a jury convicted Therm-All and Supreme but acquitted Smigel and Thompson. R.279. On June 10, 2002, District Judge Nancy Atlas denied Therm-All's and Supreme's motions for acquittal or for a new trial. R.330. On July 12, 2002, the court sentenced appellant Therm-All to pay a fine of $1,500,000 and to serve a five-year term of probation. R.355. Supreme was fined $1,000,000 and sentenced to a five-year term of probation. R.356.

STATEMENT OF THE FACTS

1. Background

Metal building insulation laminators, such as Therm-All and Supreme, purchase unfaced fiberglass insulation in various thicknesses from fiberglass manufacturers, laminate it with a thin backing such as vinyl or aluminum foil, and then sell the laminated product to metal building manufacturers or contractors for

[1]During the time period at issue (January 1994 - June 1995), Tula Thompson's name was Tula Turner. Thus, references in the record to Tula Turner are to defendant Thompson.

use in metal buildings.[2] Tr.1740-47. During the conspiracy period, Therm-All, Supreme, Bay Insulation Supply Company ("Bay"), Mizell Brothers Company ("Mizell"), and CGI Silvercote ("CGI") were the largest competitors in the metal building insulation industry. Tr.1362-63, 1758; DX1740. Therm-All operated plants in Cleveland, Ohio, Columbus, Wisconsin, and starting in May 1994, Lancaster, Pennsylvania. Tr.155-56; Therm-All Br.6. Because Therm-All sold its products primarily in the Midwest from Minnesota to New York, its prices were considered "northern" prices. Tr.155, 208-09. Supreme operated plants in Fresno, California, Kansas City, Missouri, Birmingham, Alabama, and Greensboro, North Carolina, and therefore published prices for the "west" and "south." Tr.221-22, 1140-41, 1149, 1981-82. Although Therm-All and Supreme generally did not sell in the same areas, both of them competed vigorously with Bay, Mizell, and CGI.[3] Tr.154, 1362-63, 1758, 1986, 2224-25; DX1740; Supreme Br.5-6. In fact, Mizell published prices for the "north," "south" and "west," and Bay published prices for the "north" and "south." Tr.144, 217-18.

During 1992 and 1993 the metal building industry was expanding. But

[2]GX81A is a sample of metal building insulation.

[3]During opening argument as a demonstrative aid for the jury, the government used, without objection, a map of the United States depicting the locations of Therm-All, Supreme, Bay, Mizell and CGI. Tr.8-9. For the Court's convenience, that map is reproduced as Addendum A to this brief.

while more and more metal building insulation was being sold, prices kept falling. Individual attempts to raise prices in the early 90s were unsuccessful, and prices continued to drop. Tr.161 (prices were "as low as I've ever seen"), 162-64, 1763-64, 2223. In late 1993, the fiberglass manufacturers announced a price increase and an "allocation" system under which they would be producing more residential and less metal building insulation, thus limiting supply to the laminators. Tr.167-69, 1119-21. The laminators saw the price increase and allocation as an opportunity to raise and maintain higher prices.

2. The Conspiracy

In October 1993, during a convention in Dallas, Texas, the laminators discussed forming a committee to establish product and safety standards for metal building insulation. Tr.170-72. Subsequently, Smigel called Wally Rhodes, the national sales manager for Mizell, to discuss whether Mizell had any interest in supporting the laminators' committee. Tr.138-39, 173-74. A week or two later, Smigel again called Rhodes to discuss the committee. Near the end of that conversation Smigel mentioned the prevailing low prices in the industry, characterizing the situation as "a dog eat dog market." Tr.175-76. Smigel believed that Bay, which was expanding into many new areas at the time, was responsible for the low prices and Rhodes agreed. Tr.162, 176. Smigel then said

that he had agreed with Mark Maloof of Bay to increase and maintain prices. This would be accomplished, Smigel explained, by publishing price sheets with nearly identical prices, and "selling . . . on the price sheet, not coming below the price sheet and not jumping the brackets."[4] Tr.177. Rhodes "immediately" agreed that Mizell would do the same. Tr.177-78. Subsequently, in January 1994, Rhodes had similar conversations with Maloof and with Thompson in which they agreed to raise prices, use bracket pricing, and not go off the price sheets. Tr.179-85. Thus, by January 1994 Smigel, Thompson, Maloof and Rhodes had reached an agreement "to get the pricing up in the industry and make more money." Tr.185-86. Smigel subsequently brought CGI into the conspiracy.[5] Tr.189-90, 324-27, 539-40, 1784.

To carry out their agreement, the conspirators faxed each other their price sheets and spoke on the phone "to get the pricing in line with each other . . . within a couple of dollars of each other in each bracket," trying not to use the "exact" same prices so that customers would not get suspicious. Tr.186-87. For example,

---

[4]The published price sheets contained several price brackets. Each bracket stated a price based on the number of square feet ordered. Tr.213-15, 1768.

[5]Several smaller competitors were also recruited into the conspiracy. Peter Yueh, a former vice president of Brite Insulation, a company that sold primarily in Texas (Tr.1221, 1228), testified that Brite joined the conspiracy in January 1994. Tr.1236-39. Rhodes recruited Insulations, Inc. (Tr.359-62, 1791-95), and Maloof recruited Premier. Tr.460-61.

Rhodes received a copy of Therm-All's February 14, 1994 price sheet (GX14) from Smigel or someone in Smigel's office in January 1994 while Rhodes was working on Mizell's prices. Tr.193-94, 207-08, 981-82. Rhodes then "tried [his] best to get the numbers as close as [he] could . . . to [Smigel's] numbers without being identical in every bracket." Tr.214. When he finished, Rhodes faxed Mizell's draft northern price sheet (GX1) to Smigel "four to five days" before it became effective.[6] Tr.208-11. During trial, Rhodes compared Therm-All's (GX14) and Mizell's (GX1) February 1994 northern prices, and then Therm-All's (GX14) and Bay's February 1994 northern prices (GX43C), for two types of insulation popular in the north: all three price sheets had nearly identical prices for those products.[7] Tr.211-14, 219-20.

Rhodes also compared the February 1994 southern prices for 3-inch white

---

[6]Phone records confirm the fax was sent on January 26, 1994, the day after a 20-minute call between Mizell and Therm-All. GX10A at 8-9.

[7]The two products were reinforced vinyl ("Vinyl-Reinforced" on GX1, "PSK-VR" on GX14, and "WMP-VR" on GX43C) and standard duty poly-scrim-Kraft ("PSK-10" on GX1, "PSK-STD" on GX14, and "WMP-10" on GX43C). Tr.212-13, 2721-22. Although Rhodes only compared the 3-inch prices for those two products, prices for the 6-inch size of those two products were also very similar. *See* GX1, GX14, GX43C. In fact, Smigel admitted that Therm-All's and Mizell's December 1994 prices for 6-inch standard duty poly-scrim-Kraft were nearly identical. Tr.2721-22, 2802-03; GX41H & 42K.

vinyl from Mizell (GX42B), Bay (GX43B) and Supreme (GX40A).[8] Mizell's prices were identical to Bay's except for a one dollar difference in the first column, and both were very similar to Supreme's. Tr.221-24. And while Bay and Mizell had four columns and Supreme only three, Rhodes explained that was not a problem because the orders on which Supreme's last column price ($182) would apply generally would fall into either Bay's and Mizell's third price column ($185), or their last price column ($180). Tr.223-24.

Rhodes told Leif Nilsen, Mizell's California plant manager, that he had an agreement with "Miss Tula" of Supreme to keep the California prices up and, therefore, they were to stick to the price sheets.[9] Tr.1123, 1130-31. On one occasion, Rhodes called Nilsen and told him to "stand by the fax machine because she was going to fax [him] a copy of a price sheet," and Nilsen then received "Supreme's price sheet" with a Supreme fax header. Tr.1140-41. When Rhodes told Nilsen to compare Supreme's prices to Mizell's, Nilsen found them "very similar. They were off by a few dollars in the main items that [they] sold." Tr.1141.

---

[8]Three inch white vinyl was the biggest seller in both the south and west. Tr.222, 389, 1124-25, 1984-85, 2104-05, 2215-16, 3905.

[9]Mizell and Supreme were the only major competitors in California. Tr.1122, 1129, 1986-87.

Rhodes explained that exchanging price sheets with the other conspirators made pricing "a lot easier" because "once [he] had the price sheets from Supreme or from Bay or from Therm-All . . . [he] knew where [Mizell] was going to have to be on the pricing." Tr.225. Prior to 1994, however, laminators never exchanged their prices with competitors. Tr.225-26, 1266-67. Indeed, prior to 1994, Bay, Mizell and Supreme did not have price sheets. Tr.1766-67(Mizell), 2226(Bay), 3168-69(Supreme). Moreover, salespeople from Bay, Mizell, Supreme and Therm-All all explained that prior to 1994 they had considerable pricing freedom, but once the 1994 price sheets were issued they were instructed to stick to those prices unless they received authorization to deviate from them. Tr.1123(Mizell); Tr.1364-65; GX77A & B(Therm-All); Tr.1990-91, 2107-08, 2137, 2148; GX37(Supreme); Tr.2226-32(Bay).

Several witnesses explained how the various companies policed and enforced the agreement. Rhodes testified that when a conspirator believed another conspirator was offering too low a price to a mutual customer, they would call and try to verify the complaint or obtain an explanation. Tr.322, 338-39. For example, he said Smigel called him several times in 1994 complaining that Jack Mingle, a Mizell salesman in Pennsylvania, had jumped a bracket. Tr.323-25.

Mingle, who testified that Rhodes instructed him to stay on the price sheets

because "he had an agreement with the other laminators . . . to restrict themselves to quoting . . . on their price sheets" and that the other laminators were "Therm-All, CGI, Bay and Supreme," verified Rhodes' testimony. Tr.1775. Rhodes called Mingle three different times in 1994 after Mingle had jumped a bracket on a quote, and told Mingle that Smigel had given Rhodes a copy of Mingle's quote "and that Mr. Smigel was very disturbed that [Mingle] was . . . not staying in the brackets." Tr.1815-16. The first time Rhodes told Mingle to turn the order down, "basically turn the order over to Therm-All," but Mingle refused. Tr.1817. The second time Mingle again was told to "back off the quote and turn the job over to Therm-All" and he did. Tr.1818. When Rhodes called about a third customer Mingle "cut him off," telling Rhodes he would not discuss his pricing based on any information obtained from competitors.[10] Tr.1819-20. Prior to 1994, Mingle never heard Rhodes mention Smigel in relation to a Mizell account, and he never saw Rhodes using competitors' price sheets.[11] Tr.1953-54.

---

[10]Similarly, in February 1994, Mizell's Minnesota salesman sent Rhodes Therm-All's price sheet for Steel Structures, a metal building manufacturer (GX2). When Rhodes called Smigel and asked why Therm-All's prices were "so much lower" than Mizell's, Smigel asked Rhodes to fax the Therm-All sheet to him so that he could check on it. Rhodes then wrote Smigel's name and fax number on GX2 and faxed it to Smigel. Tr.327-32.

[11]Mingle testified that in March 1994, when he had questioned Rhodes about some of the prices on Mizell's February 1994 price sheet, Rhodes immediately pulled Therm-All's, Bay's and CGI's "original" price sheets out of

Nilsen also called Rhodes whenever he found Supreme pricing below the agreement and faxed him Supreme's quote. Rhodes would then tell Nilsen "he was going to call and see what was going on." Tr.1131-33. Rhodes generally called Nilsen back to say he had "discussed" the quote with "her" and that "[i]t won't happen again."[12] Tr.1133-34.

Similarly, Supreme called co-conspirators when it suspected they were not complying with the agreement. For example, Miranda told Dan Cereghino, his plant manager, that, according to a customer, Supreme's quote to that customer was higher than Mizell's quote. Cereghino told Miranda "that it's not supposed to happen" and then "he called Tula." Tr.1992-93, 1998. When Cereghino handed the phone to Miranda, Thompson asked him "are you sure" and then said "let me call you back." Tr.1998. When Thompson called back "momentarily" she told Miranda that "she had spoken to Wally," who Miranda understood was Rhodes, and that the customer was only "pulling [his] leg" so he should just "forget about it." Tr.2001.

Two additional price increases were coordinated in 1994, and a third – for

---

his briefcase to determine if there was an error. Tr.1797-1800.

[12]Nilsen remembered that on at least one such occasion Rhodes told him: "I've spoken to her. She said it was a mistake. Jim [Miranda] won't do it again." Tr.1134. Miranda was Supreme's California salesman. *Id.*

"unfaced" insulation – in 1995. Tr.187. For each increase, the conspirators exchanged proposed prices and agreed on new prices. Tr.372-89; GX4, 18 (Summer 1994 increase); Tr.461-83; GX19-20, 25 (December 1994 increase); Tr.487-97, 520-30; GX6 (March 1995 increase). For example, on May 20, 1994, Rhodes faxed Thompson Mizell's June 1, 1994 prices (GX18), and on June 7, 1994, she faxed him Supreme's July 15, 1994 prices (GX4). Tr.373, 379. Of particular note on page 1 of GX4, is a hand-written change from $1,500 to $2,000 as the cut-off point for prepaid freight. The change was made by Thompson to match Mizell's $2,000 cut-off point on GX18 that Rhodes had faxed her two weeks earlier. Tr.386, 420. Moreover, Tomasina Miller prepared Supreme's July 1994 prices at the same time that Rhodes had faxed his price sheet to Thompson. Tr.3341-42. Miller admitted that Supreme's and Mizell's last column prices (over 50,000 square feet) were the "same or similar" (Tr.3351-52), including Miller's handwritten change on her draft (DX10710) lowering the price for standard duty poly-scrim-Kraft from $239 to $234, which was Mizell's price. Tr.3344-45.

Rhodes testified similarly about the December 1994 increase. He had Mizell's southern price sheet for November 15, 1994 (GX42O) "ready to go" in September 1994. Tr.465-66. However, when Thompson faxed him Supreme's December 1994 price list on September 27, 1994, with considerably lower prices

(GX19), he lowered Mizell's prices "to bring them in line with Tula's sheet." Tr.476. Rhodes also made Mizell's final price sheet (GX20) effective December 15, 1994, to match Supreme's and Therm-All's effective date. Tr.466-77.

Similarly, on March 20, 1995, Rhodes made notes on a Mizell price sheet of his phone conversation with Mark Engebretson of Therm-All, including Engebretson's fax number, and that "per Mark E." "Therm-All was raising prices $55" on 5-inch unfaced insulation. Tr.1089, 1520-22; GX27A-B & E, GX28; DX11501. Engebretson's phone records for March 20, 1995 show several phone calls and faxes between Engebretson's residential office and Rhodes' office in Atlanta, Georgia.[13] GX10E at 8-9.

Despite some cheating, the conspiracy was largely successful: for the first time prices and profits rose in the marketplace. Rhodes explained that the goal of the agreement "was to raise the prices" and that they "were able to achieve that . . . . So, bottom line, [they] made more money," making the agreement "very successful." Tr.250, 1081-82. Even Smigel admitted that in 1993, at least 90 percent of Therm-All's sales had discounts of more than 5 percent, and the year

[13]Rhodes also identified GX17 as Therm-All's July 1994 price sheet that Bay sent him to use in preparing Mizell's northern prices (Tr.407-08), and GX25 as Bay's December 1994 northern prices that Smigel faxed him. Tr.461-62, 480-83.

"ended up by being a break-even year." Tr. 2773-74. But in 1994 and 1995, "the price sheets were being followed a lot more," Therm-All was "doing a lot better than . . . in 1993," and only 44 percent of Therm-All's sales had discounts of more than 5 percent. Tr.2773-76.

Indeed, prices were raised so much that it did not matter for a particular sale whether the laminators jumped one or more brackets or even priced a little below the sheet altogether, because they still would make more profit than they had made before the price increase. Tr.250-56, 270-73; *accord* 2776 (Smigel admitting that if a salesman jumped a bracket on the 1994 price sheets profits would still be "decent"). This was so, Rhodes explained, because profit margins in 1993 were generally no better than 8 to 15 percent, but in 1994 and 1995 even prices in the lowest brackets could produce a 20 percent profit. Tr.1082. Engebretson from Therm-All admitted that the last bracket on the price sheets was Rhodes' "barometer." Tr.1399. Other witnesses corroborated Rhodes' testimony that profits rose in 1994 and 1995. Tr.1122, 1134 (1994 prices "considerably" higher than in 1993), 1144-45, 1274-75.

The conspiracy ultimately was foiled by Bay's Houston division manager, Janne Smith. Through her daily conversations with Maloof, Smith found out about

the conspiracy "a little at a time."[14] Tr.2251-52. Becoming concerned that what Maloof was doing "was illegal and that [she] might get into some kind of trouble," Smith decided to contact federal authorities. Tr.2264-65, 2313.

Smith subsequently agreed to cooperate with the government's investigation, including taping some of her conversations with Maloof in April and May 1995. Tr.2314-15, 2320-46; GX12A-D & 13A-D. The tapes show that the conspiracy took price out of the buyer's decision by making one laminator's price "the same price as everybody else." Tr.2324-25; GX13A at 18-20 ("[w]e equalized the prices to make it simple"); *accord* GX13B at 9 ("the prices are set"). The tapes also show that when Bay lost Crown Metal Building's business to Supreme, "the pricing [was] the same. So, the pricing [was] not the reason [Bay] lost their business." Tr.2335; GX13B at 23. They further show that Maloof was "always trying to find out . . . if anybody's doing anything off the price sheet so he can call them and confront them

[14]For example, in May 1994, Maloof was in Smith's office talking on the phone with Rhodes about the summer 1994 increase in the southern prices for white vinyl, using a Mizell draft price sheet (GX21) as a guide. Tr.2256-57. When he hung up he told Smith to make a copy of Mizell's prices "because that's where [Bay's] prices were going to be," and that "he was going to call Tula . . . and tell her these were the prices for the new price increase." Tr.2257-58. Although Supreme did not compete with Bay in Texas, it did compete in the rest of Maloof's southern area (Tr.2330), and on many occasions Maloof told Smith that he had talked with "Tula" and that "everything was going okay over there." Tr.2259-60.

about it," because "Tula, and Wally and . . . Bob Smigel [and] Zupon [of CGI] . . . let [Bay] know when they find one little thing [Bay] did wrong." Tr.2336-37; GX13B at 23.[15]

The conspiracy continued in full force until the government served subpoenas on June 22, 1995 (Tr.188, 2349, 4772), after which "[t]hings started returning to how they were before and things started becoming competitive again." Tr.2352; *accord* Tr.2115 (Supreme's price sheets became only "guidelines" in the summer of 1995). Indeed, since then prices have "dropped dramatically" from the December 1994 price sheet levels that were in effect at that time. Tr.1128.

SUMMARY OF ARGUMENT

Most of appellants' arguments are simply variations of a single theme: the evidence must be insufficient to support the jury's determination that they knowingly participated in the single conspiracy charged in the indictment within the period of the statute of limitations because the jury acquitted Smigel and Thompson. The acquittals, however, are irrelevant. In fact, as the district court determined in its post-trial opinion, the evidence is more than sufficient to support the jury's guilty

[15]GX13B is a tape of a May 4, 1995 conversation of Smith warning Maloof that one of her salesmen was going to be bidding a job below the price sheet and, therefore, that Rhodes might call him to complain. Tr.2327-28; GX13B at 5-6, 23-24. Maloof responded that Smith "was doing the same thing that Supreme had done and that he had told them they'd better control their people." Tr.2330-31; GX13B at 5-6.

verdicts.

1. Appellants' attack on the sufficiency of the evidence is bottomed on their erroneous assumption that Rhodes' testimony must be ignored because of the jury's acquittals. The Supreme Court, however, rejected that notion more than 70 years ago. Moreover, several witnesses implicated appellants in the charged conspiracy, including their own employees. And both the testimony of those witnesses and Rhodes' testimony is corroborated by the evidence. Thus, the evidence is more than sufficient to support the jury's guilty verdicts.

Similarly, appellants' statute of limitations defense is based on their legally erroneous belief that, in this price fixing case, the government was required to prove an overt act in furtherance of the conspiracy within the limitations period. Because price fixing is *per se* illegal, the government's only burden was to show that the conspiracy was still in existence during the period of the statute of limitations. In fact, the evidence establishes that the conspiracy continued to operate within the limitations period and that the conspirators, including appellants, made sales at prices fixed by their agreement during that statutory period.

Finally, the evidence fully establishes the single nationwide conspiracy charged in the indictment. The conspirators shared the common goal of raising prices and cooperated with each other whether they sold insulation regionally or

nationwide. Thus, Therm-All's claim of a prejudicial variance is meritless.

2. The court properly instructed the jury. The court's instructions adequately covered Therm-All's theory that pricing was competitive, and allowed defense counsel to argue that the evidence supported that theory. Moreover, Therm-All's proposed instruction was flawed because it improperly characterized the evidence. Finally, this Court long ago rejected the claim that a specific intent instruction is required in a *per se* illegal price fixing case.

3. Therm-All's claim that it was prejudiced by the government's inadvertent discovery violation is specious. Therm-All never presented its prejudice claim to the trial court, so it is reviewed for plain error. And because Therm-All's absence of telephone contact argument does not refute the direct evidence of its participation in the conspiracy, no plain error occurred.

4. Nothing the government said during closing argument prejudiced the appellants. Indeed, virtually everything appellants complain of here is supported by the record. And when the court was given the opportunity to do so by way of an objection, it immediately remedied any potential error with a cautionary instruction. Moreover, given the substantial evidence of guilt and the specificity of the court's overall instructions, the court did not abuse its discretion when it rejected appellants' attack on the prosecutor's remarks.

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICTS

A. Standard of Review

This Court reviews *de novo* the denial of appellants' motions for acquittal. *United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 2002). In reviewing the sufficiency of the evidence, the Court must uphold the verdicts if there is substantial evidence, viewed in the light most favorable to the government, to sustain the jury's decision. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Medina*, 161 F.3d at 872; *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996). The test is whether "a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *Lopez*, 74 F.3d at 577; *accord United States v. Ibarra*, 286 F.3d 795, 797 (5th Cir. 2002). When viewing the evidence, the government must be given the benefit of all reasonable inferences. *Glasser*, 315 U.S. at 80; *Ibarra*, 286 F.3d at 797; *Lopez*, 74 F.3d at 577. And when, as here, there is direct evidence from a member of the conspiracy, "[a]s long as it is not factually insubstantial or incredible, the uncorroborated testimony of a co-conspirator, even one who has agreed to cooperate with the government in exchange for non-prosecution or leniency, may be constitutionally sufficient to convict." *United States v. Herrera*, 289 F.3d 311, 318 (5th Cir. 2002); *accord United States v.*

Trevino, 556 F.2d 1265, 1268-69 (5th Cir. 1977). Additionally, a conspiracy may be proved wholly by circumstantial evidence, *e.g.*, *United States v. Leal*, 74 F.3d 600, 606 (5th Cir. 1996); *United States v. Rodriguez-Mireles*, 896 F.2d 890, 892 (5th Cir. 1990), which is to be treated no differently than any other evidence. *Holland v. United States*, 348 U.S. 121, 139-40 (1954); *United States v. Scott*, 678 F.2d 606, 609-10 (5th Cir. 1982).

The jury is the sole judge of credibility, and the evidence need not exclude every reasonable hypothesis except that of guilt. *Lopez*, 74 F.3d at 577; *United States v. Salazar*, 66 F.3d 723, 728 (5th Cir. 1995). Thus, the reviewing court may not weigh the evidence or substitute its credibility assessments for those of the jury. *Lopez*, 74 F.3d at 577-78 (court must accept jury's credibility determinations unless "testimony is incredible or patently unbelievable"); *United States v. Pena-Rodriguez*, 110 F.3d 1120, 1123 (5th Cir. 1997) (to be incredible witness' testimony must be factually impossible). Finally, if a defendant testifies in a criminal case, it is "well within [the jury's] province" to disbelieve him and reject his explanation. *Edmond v. Collins*, 8 F.3d 290, 294 n.10 (5th Cir. 1993). In fact, the jury may view a defendant's false statement as substantive evidence of "a consciousness of guilt." *United States v. Colmenares-Hernandez*, 659 F.2d 39, 42 (5th Cir. 1981).

B. Therm-All And Supreme Engaged In A Long-Term Price Fixing Conspiracy

1. Consistency In The Jury's Verdicts Is Not Required

Appellants' attack on the sufficiency of the evidence is bottomed on their erroneous belief that because "the jury found the evidence insufficient to prove the guilt of Ms. Thompson [and Smigel], *ipso facto*, the evidence against Supreme [and Therm-All] must be insufficient as well." Supreme Br.27; Therm-All Br.50. The error in their argument is that the acquittal of Smigel and Thompson "does not show that [the jury was] not convinced of [their] guilt." *Dunn v. United States*, 284 U.S. 390, 393 (1932). As the Court explained in *United States v. Powell*, 469 U.S. 57 (1984), appellants' "argument necessarily assumes that the acquittal [of Smigel and Thompson] was proper – the one the jury 'really meant.' *This, of course, is not necessarily correct*; all we know is that the verdicts are inconsistent." 469 U.S. at 68 (emphasis added). Because acquittals are not the equivalent of a factual finding of innocence, appellants are wrong that the acquittals necessarily mean that the evidence against Smigel and Thompson was insufficient. Rather, the jury may have correctly decided that the corporate defendants were guilty, but "then through mistake, compromise, or lenity arrived at an inconsistent conclusion" with respect to

Smigel and Thompson.[16] *Id.* at 57; *accord id.* at 63 (juries possess "'the unreviewable power . . . to return a verdict of not guilty for impermissible reasons'") (quoting *Harris v. Rivera*, 454 U.S. 339, 345-46 (1981)); *United States v. Gordon*, 780 F.2d 1165, 1176 (5th Cir. 1986) (same).

Nor would the result be different if, as appellants also erroneously claim, the jury acquitted "the only link to the Defendant corporation[s]." Therm-All Br.50; *accord* Supreme Br.27-28. Indeed, this Court settled that very issue in *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676 (5th Cir. 1981), when it rejected the corporate "appellants[']assert[ion] that they are entitled to a judgment notwithstanding the verdict *since every person who could have acted as their agent has been acquitted* of criminal wrongdoing." 657 F.2d at 684-85 (emphasis added) (citing *Dunn, supra*, and *United States v. Dotterweich*, 320 U.S. 277, 279 (1943)). Because the Court in *Powell* reaffirmed *Dunn* and specifically refused to recognize exceptions to the rule announced in that case, 469 U.S. at 61-62, 69, Supreme's invitation (Br.29) for this Court to "revisit" *Cargo Services* must be rejected.

Appellants are "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence." *Powell*, 469 U.S. at 67. But

---

[16]Indeed, defense counsel specifically and repeatedly informed the jury that an individual's conviction in this case "carries jail, penitentiary time." Tr.78, *accord* Tr.49, 72, 821, 5958.

that review must "be independent of the jury's determination" to acquit Smigel and Thompson. *Id.* Thus, this Court must review all the evidence, including Rhodes' testimony, in the light most favorable to the government, and resolve any conflicts in the testimony in a way consistent with the guilty verdicts.[17] *See id.; Dunn*, 284 U.S. at 392-93. When reviewed under that correct standard, the evidence is more than sufficient to support the jury's guilty verdicts.

2. Therm-All

The record overwhelmingly establishes Therm-All's direct and continuing participation in the conspiracy, from its earliest days to its last. Smigel called Rhodes to recruit him into the conspiracy – which he did successfully – after Smigel had already agreed with Bay's Maloof to raise and maintain prices. Tr.176-78. Indeed, it was Therm-All's prices (GX14) that Rhodes matched in January 1994 when he developed Mizell's first-ever northern price sheet (GX1).[18] Tr.207-08,

[17]As Therm-All concedes (Br.49), the record contains "direct" evidence of Therm-All's and Supreme's participation in the conspiracy. Since this prosecution is not based entirely on circumstantial evidence, cases in which there is "virtually equal circumstantial evidence of incrimination and exoneration," *United States v. Reveles*, 190 F.3d 678, 686 (5th Cir. 1999), or cases in which "for every inference of guilt that may be drawn from the evidence, there is an equal and opposite benign inference to be drawn," *United States v. Ortega-Reyna*, 148 F.3d 540, 545 (5th Cir. 1998) (Therm-All Br.48-49, 51; Supreme Br.29-30), are irrelevant. *Compare Trevino*, 556 F.2d at 1268.

[18]Therm-All is wrong that "Rhodes testified he did not recall where he had gotten Therm-All's first price list." Br.54. Rhodes testified that although he could

214, 981-82.

Rhodes' notes on GX27A, that "per Mark E." on "3/20/95" Therm-All was raising prices "$55" on 5-inch unfaced insulation, reflect his telephone conversation with Engebretson that day.[19] Tr.1520-25; GX27B. Engebretson's phone records confirm that he made an eleven-minute call to Rhodes that morning, that a few minutes later Rhodes called him back on another four-minute call, which was then followed by faxes between the two individuals.[20] Tr.1520-25; GX10E at 8-9. Engebretson's phone records strongly corroborate Rhodes' testimony that he spoke with Engebretson about the conspiracy (Tr.330-31, 490, 522-24) by showing that on several occasions when Engebretson spoke with Rhodes (or Bay), those calls were immediately preceded and/or followed by calls between Engebretson and Therm-All's "headquarters."[21] *Eg*., Tr.1407-08, 1435-37, 1440, 1448-56, 1465-66. Rhodes

---

not remember the precise way in which he received GX14, he unequivocally received it "*from* Smigel or someone in his office." Tr.207-08, 981-82 (emphasis added).

[19]Similarly, Rhodes' notes on GX2 showing Smigel's name and fax number, corroborate his testimony that when he called Smigel to complain about Therm-All's low prices to Steel Structures, Smigel asked Rhodes to fax him Therm-All's pricing. *See* note 10, *supra*.

[20]Engebretson testified that Rhodes was the only person he would call at Mizell. Tr.1435.

[21]For example, on May 11, 1994, the day after Therm-All announced its July 1994 price increase, Engebretson talked to headquarters for 16 minutes then

even sent Engebretson Mizell price sheets so that Therm-All could "use the same prices as [Mizell]." Tr.522-23; GX28. Rhodes also called Engebretson to complain when Therm-All salesman Dean Anderson "was a little bit off the price sheet or had jumped a bracket." Tr.523-24. Rhodes did so "[b]ecause if we had made the agreements with Therm-All, then they needed to be selling it on the price sheet." *Id*. In fact, Engebretson admitted that he called Rhodes "to complain . . . to kind of call him on the carpet" when Dean Anderson reported to Engebretson that Mizell had quoted low. Tr. 1399-1401. And Engebretson admitted that he discussed at least one customer's bid with Roger Ferry at CGI. Tr.1366, 1468-72.

As noted previously, Rhodes and Mingle both testified that Smigel called Rhodes several times to complain about Mingle's pricing. *See* pp. 8-9, *supra*. In fact, Therm-All's Pennsylvania plant manager called Rhodes in February 1995 with the same complaint. Tr.537-39. Given the totality of this evidence, it is not surprising that Therm-All's price lists were so similar to Mizell's, as even Smigel admitted.[22] *See* note 7, *supra*. Indeed, pricing directly from those price sheets

---

immediately called Rhodes. Tr.1448-56. Similarly, on June 1, 1994, the day Bay announced its price increase, after Engebretson talked with Bay's Atlanta plant manager, Guy Young, for 28 minutes, he immediately called headquarters. Tr.1465-66, 2215.

[22]For example, when Mingle questioned Rhodes about the correctness of Mizell's February 1994 price sheet, Rhodes compared those prices to Therm-All's, Bay's and CGI's price sheets – not to any Mizell cost information. Tr. 1797-1800.

resulted in identical quotes to American Building Systems in May 1995 by Therm-All, Mizell and CGI. Tr.1826-27; GX41H, GX43K, GX87. *See* pp. 37-38, *infra.* Thus, the evidence is more than sufficient to support the jury's guilty verdict with respect to Therm-All.

3. Supreme

Several witnesses implicated Supreme in the conspiracy. Rhodes explained that both he and Maloof spoke with Thompson in January 1994 when she agreed to raise Supreme's prices. Tr.179-85. Indeed, the striking similarity in the February 1994 Supreme (GX40A), Mizell (GX42B) and Bay (GX43B) prices for 3-inch white vinyl bears this out.[23]

Additionally, Rhodes sent Supreme his June 1994 price sheet (GX18) on May 20, 1994, to help Supreme in setting its increase. Tr.373. Miller, who was preparing Supreme's price guide at that exact time (Tr.3341-42), changed the price for standard duty poly-scrim-Kraft from $239 to $234 in her handwritten draft (DX10710) to match Mizell's price on GX18. And when Thompson faxed Supreme's July price sheet to Rhodes on June 7, 1994 (GX4), it contained a handwritten change in the

[23]GX40A is a Supreme "Price Guide" with an "Effective Date [of] 2-1-94" and contains prices virtually identical to Bay's and Mizell's. Supreme asserts that GX40A is merely a "draft" that was "never used." Br.9. The jury, however, was free to draw its own inferences from the document.

freight charge from $1,500 to $2,000 to match Mizell's price on GX18. Tr.386, 420.

Similarly, a comparison of Mizell's proposed November 15, 1994 price sheet (GX42O), with Supreme's December 1994 sheet (GX19) and Mizell's final December 1994 sheet (GX20), supports Rhodes' testimony that he had the November prices "ready to go" in September 1994 when Thompson faxed him Supreme's lower prices on September 27, 1994. Tr.465-66. Rhodes thereafter lowered Mizell's prices "to bring them in line with Tula's sheet," and changed Mizell's effective date to December 15, 1994, to match Supreme's and Therm-All's effective date. Tr.466-77.

Nilsen was instructed to stick to the price sheets because of Mizell's agreement with "Miss Tula." Tr.1123, 1130-31. And immediately after Rhodes called Nilsen and told him to "stand by the fax machine" because "she" was sending him a price sheet, Nilsen received Supreme's price sheet with a Supreme fax header. Tr.1140-41. When Nilsen compared Supreme's prices to Mizell's, as Rhodes instructed, he found the prices "very similar." Tr.1141. Nilsen also reported to Rhodes on several occasions when Supreme priced below the agreement, and after Rhodes had "discussed it" with "her," he would tell Nilsen "[i]t won't happen again." Tr.1132-34.

Miranda also confirmed that Thompson discussed pricing with Rhodes. He explained that after he reported a suspected low Mizell bid to Thompson, she called

him back to say that she had confirmed through "Wally" that Mizell's price was not lower than Supreme's. Tr.2001. Miranda also admitted that after Thompson gave him a Mizell price sheet (GX6) and instructed him to "stick" to it, he placed it right "up front" in his price book and subsequently "used this Mizell pricing as [his] own for a few jobs at least." Tr.2005-06. *See* p. 36, *infra.*

Rhodes' own notes confirm his pricing discussions with Thompson. *E.g.*, GX9A ("go $248 per Tula"); *see* Tr.287-88. After Rib Roof had changed the specifications for its Hesperia, California project, Rhodes made himself a note to "requote $198" and to "Tell Tula." Tr.288-89; GX9A. Subsequently, Mizell prepared a bid for $198 on February 9, 1994 (GX60E), and Supreme prepared a bid for $197 on February 11, 1994 (GX60B),[24] the same day a 13-minute phone call between Mizell and Supreme took place. GX10A at 14. Similarly, Smith's testimony that Maloof talked prices with Thompson (Tr.2257-58, 2260, 2306) was corroborated by Maloof's tape recorded conversations. *Compare* Tr.2330-31 *with* GX13B at 5-6, and Tr.2336-37 *with* GX13B at 23. In sum, as with Therm-All, the evidence is more than sufficient to support the jury's guilty verdict with respect to Supreme.

[24]Thus, Supreme's suggestion that it "was working to obtain all of Rib Roof's business . . . by offering it 'nationwide' pricing" (Br.40-41) is not persuasive.

4. Appellants' Other Arguments Go To The Weight – And Not The Sufficiency – Of The Evidence

As they unsuccessfully argued to the jury and in their post-trial motions for acquittal, appellants again claim that there are several plausible explanations as to why their actions were at least as consistent, if not more consistent, with competitive conduct as with price fixing. They point to differences in the structure and specific prices in the many price sheets, the fact that many sales were made below the applicable price sheet level, their economists' assessment of the market conditions for their "commodity" products, legitimate reasons for phone calls between competitors, and the fact that on occasion laminators received competitors' price sheets from mutual customers. Therm-All Br.51-57; Supreme Br.29-43. The district court, however, rejected each of these contentions, R.330 at 8-21, explaining that appellants' "arguments largely relate to the weight of the Government's case, not its legal sufficiency." *Id.* at 17. Indeed, the court did "not agree that the evidence, when construed in the light most favorable to the guilty verdict, is as consistent with guilt as innocence," because "[a]t the very least, Rhodes' testimony . . . defeats [appellants'] contention." *Id.* at 18.

Appellants' claim that there was no showing that they "provided any drafts of [their] . . . price guides to any competitor" proves nothing. Supreme Br.34; Therm-All Br.54. The evidence shows that, at the very least, Mizell conformed its February

1994 northern price sheet to Therm-All's (p. 6, *supra*), Supreme conformed its July 1994 price sheet to Mizell's (p. 11, *supra*),[25] and Mizell conformed its December 1994 prices to Supreme's (pp. 11-12, *supra*). Supreme's claim that GX6 (the March 1995 version of Mizell's December 15, 1994 western price sheet) was three months old and already in its possession for several weeks prior to Thompson receiving it from Rhodes at their March 29, 1995 breakfast meeting (Br.39), does not explain why Thompson told Miranda to "stick" to those prices when she gave him GX6, and why he put it "up front" in his price book and used those Mizell's prices as his own.[26] Tr.2005-06. *See* p. 36, *infra.*

Appellants' reliance on differences in price sheets and on non-conforming sales also proves nothing. Price fixing conspiracies are rarely, if ever, fully successful all of the time, and cheating by co-conspirators is not uncommon. *E.g., United States v. Andreas*, 216 F.3d 645, 679 (7th Cir. 2000)*; United States v. Misle Bus & Equip. Co.*,

---

[25]The evidence concerning Supreme's July 1994 prices also refutes Supreme's claim (Br.34) that "Supreme's price guides were created independently by Tomasina Miller . . . without any reference to any price sheet of a competitor." *See* pp. 11, 25-26, *supra.*

[26]Although GX6 is dated December 15, 1994, a comparison of the "unfaced" prices on of page 2 of GX6 and on page 2 of GX42L – an earlier version of Mizell's December 15, 1994 western price sheet – shows substantial changes were made to those prices. Tr.3565-66. In fact, those changes correspond in large part to the handwritten notes that Rhodes made on GX27A in March 1995.

967 F.2d 1227, 1231 (8th Cir. 1992). Thus, while some sales did not conform exactly to the price sheets, the jury was free to conclude that the evidence as a whole established the price fixing agreement charged in the indictment. Indeed, the evidence showed that the conspirators were not concerned with precise pricing unless they knew they were "head to head" with a co-conspirator. *E.g.*, Tr.1132. Appellants' argument fails to account for this fact. As the district court correctly noted: "[i]t is unclear that the conspirators bid against each other on all or even most of the jobs they performed. If they did not bid against each other, it was possible that the conspirator would be unaware of the discounting in which its competitor was engaged."[27] R.330 at 15 n.17.

Moreover, the fact that the conspirators agreed on the prices they put on their price lists is sufficient to establish a Sherman Act violation even if customers routinely paid prices discounted from those listed prices. For example, in *Plymouth Dealers Ass'n of Northern Calif. v. United States*, 279 F.2d 128 (9th Cir. 1960), the Ninth Circuit held:

> The competition between the Plymouth dealers and the fact that the dealers used the fixed uniform list price in most

[27]For example, when discussing a call from Therm-All's Pennsylvania plant manager complaining about a Mingle bid, Rhodes testified that he "did not know at the time until [he] found out later" that Therm-All also submitted a bid. Tr.538-39.

> instances only as a starting point, is of no consequence. It *was* an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed, it had to do with, and had its effect upon, price.
>
> The fact that there existed competition of other kinds between various Plymouth dealers, or that they cut prices in bidding against each other, is irrelevant.

279 F.2d at 132-33 (footnote omitted). The price sheets here similarly "had to do with, and had [their] effect upon, price." Indeed, in *Plymouth Dealers*, as here, the list price was artificially raised "so that the ultimate percentage of gross profit over the [dealers'] factory price could be higher." *Id.* The specific goal of the conspiracy was to eliminate the vicious competition in the market place; *i.e.*, to "get the pricing up in the industry and make more money." Tr.185-86; *see* R.330 at 9 (agreement allowed the conspirators to sell at artificially inflated prices "without serious concern that competitors would publish and ***routinely*** accept significantly lower profit margins") (emphasis in original). Rhodes was not the only witness to testify that the conspirators "were able to achieve that," that they "made more money." Tr.250. Even Smigel admitted that in 1995, after allocation had ended, Therm-All still was following the price sheets "a lot more" and "doing a lot better than . . . in 1993." Tr.2773-76. As Rhodes explained, the prices on the price sheets were so high that, as in *Plymouth Dealers*, so long as the conspirators priced on the sheet, or even a little

below it, they would still make a larger profit than when they were competing. *See* p. 13, *supra*.

If appellants were correct that there was no price fixing agreement, then at the very least the wide-spread availability of insulation by the end of 1994 and the end of allocation "should have revived active competition. But, it did not appear to do so until the grand jury subpoenas were served." R.330 at 19-20. Indeed, the evidence shows that even though the allocation did not affect California sales after September 1994, the conspirators were still able to raise prices in December 1994 and sell at those higher prices. Tr.1120-21, 1128-29. And the conspirators were still pricing directly from their agreed upon price sheets in the middle of June 1995, long after allocation had ended. *See* p. 38 & n.30, *infra.*

In sum, the district court was correct that "[t]he jury had sufficient direct and circumstantial evidence to find Defendants Therm-All and Supreme guilty beyond a reasonable doubt," and that it "simply" cannot be said "as a matter of law that the voluminous evidence in the record was insufficient to support these verdicts." R.330 at 20-21.

Finally, Supreme argues alternatively that it should be granted a new trial because the verdict is against the weight of the evidence. Br.59. The district court rejected this claim noting that "[i]t does not contravene the interests of justice to

allow these convictions to stand." R.330 at 34-35. This Court reviews the district court's denial of a new trial for an abuse of discretion. *E.g. United States v. Robertson*, 110 F.3d, 1113, 1118 (5th Cir. 1997). The question is not whether some other result is more reasonable. Rather, the evidence must establish that "it would be a miscarriage of justice to let the verdict stand." *Id.* at 1118. Given the voluminous direct and circumstantial evidence of Supreme's guilt, there was no miscarriage of justice.

C. The Jury Correctly Determined That The Conspiracy Continued Into The Period Governed By The Statute Of Limitations

The indictment in this case was returned on May 31, 2000. R.1. Accordingly, under the relevant statute of limitations, 18 U.S.C. §3282, the government was required to prove, and the jury was instructed to find (Tr.5870-71), that the conspiracy continued after May 31, 1995. Appellants contend that there is no evidence to support the jury's finding that the conspiracy continued past that date. In so arguing, they ignore well-established principles of Sherman Act conspiracy law and substantial evidence of record proving that the conspiracy continued into the limitations period.

In *Grunewald v. United States*, 353 U.S. 391 (1957), the Court explained that, for statute of limitations purposes, "*where substantiation of a conspiracy charge requires proof of an overt act*, it must be shown both that the conspiracy still

subsisted within the [limitations period], and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period." *Id.* at 396-97 (emphasis added). In a price fixing case, however, "the price-fixing agreement itself constitutes the crime." *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940)); *accord United States v. All Star Industries*, 962 F.2d 465, 474-75 & nn.20 & 21 (5th Cir. 1992) (in *per se* illegal price fixing case, it is no defense that agreement was "never implemented"); *Cargo Service Stations*, 657 F.2d at 683-84. This is so because, as Justice Holmes explained nearly a century ago, the Sherman Act is based solely on the common law governing criminal conspiracies and does not require proof of any overt act "other than the act of conspiring." *Nash v. United States*, 229 U.S. 373, 378 (1913); *accord Socony-Vacuum*, 310 U.S. at 224-25 n.59; *Hayter Oil*, 51 F.3d at 1270 ("Proof of an overt act is not required to establish a violation of §1 of the Sherman Act").[28]

Accordingly, a Sherman Act conspiracy, like a common law criminal conspiracy, is a "partnership in criminal purposes" that continues "up to the time of abandonment or success." *United States v. Kissel*, 218 U.S. 601, 608 (1910); *All Star*

[28]15 U.S.C. §1 provides in relevant part: "Every . . . conspiracy, in restraint of trade or commerce among the several states . . . is . . . illegal. Every person who shall . . . engage in any . . . conspiracy hereby declared to be illegal shall be deemed guilty of a felony."

Industries, 962 F.2d at 477. Thus, Supreme completely misstates *Kissel*. Br.50. In fact, where a criminal conspiracy contemplates the receipt of illicit profits, whether or not the charging statute makes the receipt of those profits illegal, the conspiracy continues until those illegal profits are received. *United States v. Girard*, 744 F.2d 1170, 1172-74 (5th Cir. 1984); *accord United States v. Northern Improvement Co.*, 814 F.2d 540, 542-43 (8th Cir. 1987) (antitrust bidrigging conspiracy held to continue until payment received); *United States v. A-A-A Electrical Co.*, 788 F.2d 242, 244-45 (4th Cir. 1986) (same); *United States v. Helmich*, 704 F.2d 547, 549 (11th Cir. 1983); *United States v. Mennuti*, 679 F.2d 1032, 1035 (2d Cir. 1982).

Price fixers typically intend to fix prices for as long as they can maintain their agreement without getting caught. In this case, for example, Rhodes testified that, given the long-prevailing low prices in the "dog eat dog market" (Tr.175-76), the objective of the conspiracy was "to get the pricing up in the industry, to make more money" (Tr.185-86), that "the whole deal . . . was to raise . . . our prices through the industry." Tr.250. *See United States v. Dynalectric Co.*, 859 F.2d 1559, 1563 (11th Cir. 1988) (the "objectives of the conspiracy" dictate "the extent to which a conspiracy continues over time"). Thus, the indictment charged "a continuing agreement . . . to raise, fix and maintain prices." R.1 at 3. And both Rhodes and Smith testified that the conspiracy continued in full force until the government issued

subpoenas on June 22, 1995. Tr.188, 2349, 4772. *See Hayter Oil,* 51 F.3d at 1267 ("Once grand jury subpoenas . . . were issued . . . price fixing . . . stopped"); *United States v. Portsmouth Paving Corp.,* 694 F.2d 312, 319 (4th Cir. 1982) (same).

Both Therm-All (Br.19) and Supreme (Br. 50-51) are wrong that any price fixing conspiracy lasted only during the fiberglass manufacturers' allocation period, which ended no later than March 1995. No evidence establishes that the conspiracy was to run concurrent with the allocation. Indeed, after Thompson's March 29, 1995 San Francisco breakfast meeting with Rhodes during which he gave her Mizell's price list for the western region (GX6), Thompson immediately "told [Cereghino] to run out to the car and get his price book" so she could compare GX6 to Supreme's prices. Tr.3879-80. She then made a copy "at the hotel" and gave the price sheet to Miranda, her California salesman. Tr.3880. Because Thompson told Miranda to "stick to the price sheet" when she gave it to him, he took GX6 back to his office and put it in his price book right "up front." He later "used this Mizell pricing as [his] own for a few jobs at least." Tr.2004-06. Similarly, Nilsen was also able to charge the higher prices in Mizell's December 1994 price sheet notwithstanding the fact that by September 1994, months before the allocation officially ended, the allocation was no longer affecting his California sales. Tr.1120-21, 1128-29.

Tape-recorded conversations on May 4-5, 1995 (GX13A-D) also show the

conspiracy operating in full force. On May 4, 1995, Smith called Maloof to warn him that one of her salesmen went below the price sheet and, therefore, that Rhodes might call him to complain. *See* note 15, *supra*. During that conversation, Maloof chided Smith for potentially "[u]psetting the balance," explaining that "everybody's got a little work *right now* so everybody's okay, and *the prices are set*." GX13B at 9 (emphasis added). And the conspirators were still policing their agreement, as Maloof explained when he told Smith that he was constantly checking to see if Supreme was deviating from its price sheet. *Id.* at 22-23; *see* Tr.2336-37. The next day Maloof told Smith that if they could get a copy of a letter that Brite had sent to Red Dot offering Red Dot a low price, Maloof could "give that to Wally Rhodes [who] told [Maloof] that he would call Danny Fong [of Brite] and jump on him with both damn feet." GX13D at 5, 8.

On May 15, 1995, Mingle submitted a bid to American Building Systems (GX87) for 76,000 square feet of 4-inch poly-scrim-Kraft vinyl replacement ("PSK-VR"). Tr.1822-24. Mingle explained that he took his bid price of $289 directly from Mizell's December 15, 1994 price sheet that was in effect at that time (GX43K), because American Building was one of the customers that Rhodes had previously called him about when Smigel complained to Rhodes that Mingle was jumping brackets. Tr.1824-27; *see* Tr.1818 (Smigel complaining about Mingle's earlier quote

to American Building). On his copy of the bid sheet (GX87) Mingle made notes of his subsequent conversation with John Adams of American Building, who told Mingle that "CGI, Therm-All and Mizell were exactly equal in price for that project" at $289,[29] and that they had "lost to State [Laminating] by $17 [per 1,000 square feet]." Tr.1826-27; GX87. And sales invoices establish that the conspirators, including Therm-All and Supreme, made numerous sales directly from their price sheets in June 1995.[30]

Thus, testimony, bid sheets and sales invoices each establish that in May and June 1995, both Supreme and Therm-All were, like Mizell and Bay, still taking their prices "right off the damn sheet." GX13B at 9, 23; *accord* Tr.1827-28; GX41H & 42K. And, as the district court found when denying appellants' post trial motions,

---

[29]The price on Therm-All's December 15, 1994 price sheet for 76,000 square feet of 4-inch PSK-VR was also $289 per 1,000 square feet. GX41H.

[30]GX86B, which was admitted into evidence and was with the jury during deliberations, consists of eleven boxes containing thousands of invoices from Bay, CGI, Mizell, Supreme and Therm-All, from January 17, 1994 through June 22, 1995. *See* Therm-All Br.15. Those invoices are summarized in GX86A. To avoid burdening the Court with this voluminous exhibit, we did not forward GX86B to the Court with the rest of the government's exhibits. *See* Unopposed Motion To Supplement Record On Appeal With Government's Trial Exhibits, filed April 18, 2003, at 1 n.1. GX86B includes at least 90 invoices for sales that were made by Bay, Mizell, Supreme, and Therm-All, between June 1, 1995 and June 22, 1995, at the applicable bracket price on the December 1994 price sheets that were in effect at that time. Attached as Addendum B to this brief is an example of one such invoice from each of those four companies. If the Court so requests, we will provide the remaining 86 such invoices, or the entire GX86B.

"there is no evidence that any conspirator abandoned the purposes of the conspiracy prior to receiving the Government's June 1995 subpoenas." R.330 at 32-33. Indeed, it was not until the summer of 1995 that Supreme's price lists became "guidelines" and were no longer mandatory. Tr.2115; *accord* Tr.2352 (it was only after the subpoenas were served that "[t]hings started returning to how they were before and things started becoming competitive again"). Because a price fixing conspiracy "is presumed to continue until there is an affirmative showing that it has been abandoned," *Hayter Oil*, 51 F.3d at 1270-71,[31] the record evidence more than supports the jury's conclusion that the conspiracy at issue continued into June 1995.

Finally, appellants' claim that the government was required to prove an overt act in furtherance of the conspiracy during the limitations period is legally wrong. Therm-All Br.16-17; Supreme Br.43-46. As we have already noted, the government is not required to prove an overt act in a Sherman Act prosecution. *Socony-Vacuum*, 310 U.S. at 224-25 n.59; *Nash*, 229 U.S. at 378. This is true even when the defendant claims that the Sherman Act conspiracy did not continue into the statute of limitations

[31] *Accord Portsmouth Paving*, 694 F.2d at 318 (same); *United States v. Hamilton*, 689 F.2d 1262, 1268 (6th Cir. 1982) ("where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn") (internal quotes omitted).

period. Rather, "the government is only required to prove that the agreement existed during the statute of limitations period" (*Hayter Oil*, 51 F.3d at 1270), and can rely on the presumption that a Sherman Act conspiracy continues until it has been abandoned or its objectives accomplished. *E.g.*, *Kissel*, 218 U.S. at 608; *A-A-A Electrical*, 788 F.2d at 245-46. As we have already noted, the evidence in this case established that the price fixing conspiracy continued into the limitations period, at least until the grand jury subpoenas were served on June 22, 1995.

Because the Sherman Act does not require proof of an overt act, cases interpreting statutes that do require proof of an overt act are simply irrelevant. For example, the case appellants cite, *United States v. Manges*, 110 F.3d 1162, 1170 (5th Cir. 1997), was a mail fraud prosecution pursuant to 18 U.S.C. §371, an overt act statute. But cases interpreting statutes that have an overt act requirement "have no bearing upon [the Sherman Act]." *Nash*, 229 U.S. at 378; *see Hyde v. United States*, 225 U.S. 347, 359 (1912) (noting difference between common law conspiracy statute like the Sherman Act and statutes that do require proof of an overt act); *Fiswick v. United States*, 329 U.S. 211, 216 n.4 (1946) (same); *Huff v. United States*, 192 F.2d 911, 914-15 (5th Cir. 1951) (Section 371's overt act requirement "lies behind" rule that statute of limitations runs from last overt act).

But even if proof of an overt act during the period of the statute of limitations is

required in a Sherman Act prosecution, overt acts were proved in this case.[32] As we have already noted, both witness testimony and sales invoices establish that appellants and other conspirators continued to make sales from their price sheets pursuant to their agreement to fix prices until the grand jury subpoenas were served in June 1995. Thus, appellants continued to profit from their illegal agreement during the period governed by the statute of limitations. In *Girard,* a mail fraud prosecution requiring proof of an overt act, this Court held that a "perfectly legal" payment to someone who had fraudulently obtained a bid was an overt act in furtherance of the conspiracy because the conspiratorial agreement included obtaining that payment. 744 F.2d at 1172-74. For the same reasons, the sales on the price sheets that appellants and their co-conspirators continued to make and profit by during the statute of limitations period were overt acts in furtherance of their price fixing agreement. *See Helmich,*

---

[32]The district court's statute of limitations jury instruction was not a model of clarity on the issue of whether the government was required to prove an overt act during the limitations period. The jury was correctly instructed that "[a] Sherman Act conspiracy is deemed to continue until all of its objectives have been accomplished or the conspiracy abandoned." Tr.5871. But the very next sentence states that the government is required to prove "some action was taken by a conspirator in furtherance of the conspiracy" within the limitations period. To the extent this sentence is interpreted to require proof of an overt act, it is inconsistent with the prior sentence in the instruction and legally wrong as explained above. But appellants were not prejudiced by any error in this instruction. Even assuming the instruction is interpreted as requiring proof of an overt act, it simply imposed a greater burden of proof on the government that, as explained *infra*, the government met.

704 F.2d at 549 (payoff to defendant for transmitting government secrets constituted overt act and continued conspiracy even though statute under which defendant was charged made the transmittal of the secrets, not the payoff, the crime); *Mennuti*, 679 F.2d at 1035 (mail fraud conspiracy continued until each conspirator received agreed payoff). Therefore, even if appellants are correct in arguing that proof of an overt act was required in this case – and they are not – the evidence still fully supports the jury's determination that the conspiracy continued into the statute of limitations period.[33]

D. There Was No Prejudicial Variance Between The Indictment And The Evidence

The jury convicted appellants on the single price fixing conspiracy charged in the indictment, and that conviction is an implicit finding that the evidence proved the existence of the single nationwide conspiracy charged. *E.g. United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995). The jury was instructed to determine whether or not that single conspiracy existed, and that it "must return a not guilty verdict" if it found "that the single national conspiracy alleged in the indictment has not been proven." Tr.5869-70. The jury is presumed to have followed its instructions. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Therm-All, however, contends that the evidence

[33]The district court also correctly found that evidence of post-May 1995 acts of concealment satisfied the statute of limitations. R.330 at 32 n.34.

showed multiple conspiracies. Br.38-43. The district court correctly rejected this claim. R.330 at 22-25.

To prevail on its variance argument, Therm-All "must prove (1) a variance between the indictment and the proof at trial; and (2) that the variance affected [its] 'substantial rights.'" *Morris*, 46 F.3d at 414. When reviewing the evidence to determine whether it supports the jury's finding of a single conspiracy, this Court applies the same standard of review stated on pages 18-19, *supra*, that it applies to all of the jury's findings of fact. 46 F.3d at 415. The relevant factors in "counting conspiracies" are the existence of a common goal; the nature of the scheme; and the overlap of participants. *Id.*

1. *A common goal*. Therm-All argues that any suggestion that the conspirators' goal was "to raise prices in the metal building industry" for the purpose of "making money" is "inane." Br.40. But in *Morris*, a decision relied on by Therm-All (Br.39, 41, 42), this Court explicitly found that "[t]he common goal of [all the conspirators] was to derive personal gain . . . to profit from the illicit [activity]." 46 F.3d at 415; *accord United States v. Morrow*, 177 F.3d 272, 291 (5th Cir. 1999) (same).[34] In this case, the conspirators had the common goal of ending the fierce competition that, pre-conspiracy, was producing "break-even" performance, by raising prices and increasing

[34]Therm-All also cites *Morrow*. Br.39.

their profits. Tr.2773-74. Moreover, it was Smigel, who only did business in the *north*, who initially complained about Bay's low prices, and who characterized the situation as a "dog-eat-dog market." Tr.175-76. Thus, Therm-All cannot confine the goal of eliminating those prices to "a 'Texas' or 'southern' conspiracy." Br.39.

2. *Nature of the scheme.* Therm-All erroneously claims that this factor points to multiple conspiracies because Therm-All's pricing "in its region had absolutely no effect nor impact in . . . other regions." Br.41. But it was Bay's aggressiveness and low prices that prevented 1993 price increases from sticking and, in fact, sent the market into a price war. And it was a nationwide allocation by the fiberglass manufacturers that provided the impetus for the conspirators to fix prices in all markets. In fact, without the continuous cooperation of all of the conspirators whether they sold nationwide like Bay or in a region like Therm-All, the conspiracy would have collapsed as prices and profit margins fell. *Morris*, 46 F.3d at 415-16 (continuous cooperation is evidence of a single conspiracy).

In *Morris*, this Court explained that "the existence of a single conspiracy will be inferred where the activities of one aspect of the scheme are *necessary or advantageous* to the success of another aspect or to the overall success of the venture." 46 F.3d at 416 (emphasis added). Rhodes explained that the conspiracy covered all Mizell locations – north, south and west – and that the conspiracy operated the same

way outside Texas as in Texas. Tr.187, 1087. All of the participants, Smigel, Thompson, Maloof and Rhodes, had company-wide pricing authority, and they "implemented the scheme in all their offices." R.330 at 24. Indeed, all the evidence concerning the way prices were set, the similarity and timing of the price sheets, and the policing activity (pp. 4-15, *supra*), makes no distinction between geographic regions. And as Maloof explained when he chided Smith for pricing below Bay's price sheet, "[b]eing competitive" is "what causes the how low can we go game" thereby "upsetting the balance." GX13B at 9-10. Thus, sales on the price sheets, wherever they occurred, were "advantageous" if not absolutely necessary to the overall success of the venture – making each of the co-conspirators more profitable.[35] *Morris,* 46 F.3d at 416; *accord United States v. Morgan,* 117 F.3d 849, 859 (5th Cir. 1997).

3. *Overlap of participants.* In *United States v. Richerson,* 833 F.2d 1147 (5th Cir. 1987), this Court explained that "[p]arties who knowingly participate with core conspirators to achieve a common goal may be members of an overall conspiracy." 833 F.2d at 1154. It further explained:

---

[35]This point applies to the individual participants as well as the corporations. Rhodes testified that his compensation amounted to 5 percent of the net profits from all five of Mizell's locations. Tr.1087. And as presidents and owners of their respective companies, Smigel's and Thompson's "profitability" was directly linked to that of Therm-All and Supreme.

> A single conspiracy exists where a "key man" is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal . . . . The members of a conspiracy which functions through a division of labor need not have an awareness of the existence of the other members, or be privy to the details of each aspect of the conspiracy.

833 F.2d at 1154 (citation omitted). Therm-All recognizes that Rhodes was a key man or "link" to a nationwide conspiracy, but inexplicably claims that "[t]his type of 'overlap' has been rejected by the Fifth Circuit." Br.42 *citing Morris.* But in *Morris,* this Court expressly agreed that "[a] single conspiracy exists where a 'key man' is involved in and directs activities, while various combinations of other participants exert individual efforts toward a common goal." 46 F.3d at 416-17 (quoting *Richerson*, 833 F.2d at 1154). And in this case, there were at least two key men – Rhodes and Maloof – who were responsible for the pricing and profits of the two laminators that sold in the largest geographical regions.

In short, the evidence is more than sufficient to support the jury's finding of a single nationwide conspiracy. But even if a variance occurred, Therm-All cannot show that its "substantial rights" were affected. Generally, when an indictment alleges a single conspiracy "but the government proves multiple conspiracies and a defendant's involvement in at least one of them," then "there is no variance affecting that defendant's substantial rights." *Morrow,* 177 F.3d at 291; *accord Morgan*, 117

F.3d at 859. Additionally, the jury instructions in this case (Tr.5869-70, 5871-72), which are virtually identical to the instructions given in *Morris,* 46 F.3d at 418, and *Morgan,* 117 F.3d at 859, guarded against any transference of guilt. Accordingly, there was no prejudicial variance in this case.

II. THE JURY WAS PROPERLY INSTRUCTED

A. Standard of Review

The trial judge retains broad discretion in formulating jury instructions, and it is sufficient if the charge given adequately states the applicable law. Jury instructions are reviewed as a whole, and the adequacy of the entire charge must be evaluated in the context of the whole trial. Thus, failure to give a requested instruction on a defense theory that is supported by the evidence constitutes reversible error only when the charge as a whole does not adequately present the theory. *E.g., All Star Industries,* 962 F.2d at 472-74; *United States v. Harrelson,* 705 F.2d 733, 736-37 (5th Cir. 1983).

B. The Court's Intent Instructions Were Correct

Therm-All argues that "[t]he jury was instructed . . . that the level of pricing and/or competitive pricing could not be considered as evidence favorable to the defense." Br.34-36. It further claims that *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978), requires the government to prove that defendants specifically

intended "to effectuate the object of the conspiracy."[36] Br.36-38 & n.36. Therm-All's first argument is simply wrong; its second is frivolous, having been expressly rejected in *Cargo Services, supra.*

1. The court instructed the jury that, among other things, a "conspiracy" is "*an agreement*" and, specifically, that price fixing "is *an agreement* . . . to raise, lower or stabilize prices." Tr.5864, 5867 (emphasis added). The jury was further instructed that it could not convict appellants unless it found that they had "knowingly formed, joined or participated in" the single nationwide conspiracy charged in the indictment. Tr.5870-71. And while the jury was told that price fixing is *per se* illegal (Tr.5870-72), it was also given guidance concerning the evidence it had to evaluate in reaching its verdict. Specifically, the jury was told that:

- "Mere similarity of prices charged does not, *without more*, establish the existence of a conspiracy . . . . Nor is it illegal to . . . exchange pricing information *without more*" (Tr.5872) (emphasis added);

- "A person or company may lawfully charge prices identical to those charged by competitors and may even copy the price lists of a competitor or follow and conform exactly to the price policies and charges of a competitor *as long as the person or company does not do so pursuant to a price-fixing agreement* or mutual understanding with a competitor" (Tr.5873) (emphasis added);

[36]Supreme adopts Therm-All's jury charge arguments. Br.60.

- "Conduct that is as consistent with permissible competition or independent action as with illegal collusion, *standing alone,* is not sufficient to prove that the Defendant joined the conspiracy" (*id.*) (emphasis added); and

- "*You should consider all of the evidence,* giving it the weight and credibility you think it deserves, *when determining whether* similarity of pricing resulted from independent acts of businesses *competing freely* in the open market *or* whether it resulted from *a mutual agreement* or understanding between two or more conspirators" (*id.*) (emphasis added).

Given these instructions, Therm-All's claim that the jury was precluded from considering evidence of "competitive pricing" is nonsense. Indeed, defense counsel argued at length to the jury that although the government claimed that there was "some kind of *agreement*[,] [t]he objective *evidence simply doesn't support that conclusion. What we have is lots of competition* still going on." Tr.5905 (emphasis added). And defense counsel specifically relied on the court's instructions in emphasizing that the evidence established nothing but innocent "competitive activity:"

> I also want you to keep in mind the jury instruction that really kind of goes to this conduct. What the Judge read to you this morning . . . the instruction she gave you is this: "Conduct that is as consistent with permissible competition or independent action as with illegal collusion, standing alone, is not sufficient to prove that the defendant joined in the conspiracy."
> Conduct that's consistent with competitive activity, that is what we strived to put on in our case [that] demonstrated to you, when you look at the facts, that what we did in 1994 and 1995 was to aggressively compete.

Tr. 5970-71. Immediately following this comment counsel stated that "*my job . . . in the next hour* is to kind of marshal the facts . . . so you know what the evidence really shows." Tr.5971 (emphasis added). Then, beginning with "*our competitive conduct started in late 1993*" (*id*.) (emphasis added), counsel summarized for the next 40 pages all the "competitive activity and all the competition" (Tr.6008) allegedly demonstrated by the evidence. Tr.5971-6009.

Thus, as the district court correctly noted, appellants "were given freedom to introduce any and all evidence of their pricing practices and sales" and "[n]othing the Court included in the instructions prevented the jury from considering Defendants' factual arguments that the sales they actually made were inconsistent with their having entered into any price fixing agreement." R.330 at 37.

Since appellants were able to present their theories and arguments concerning the case to the jury, there was no need for any additional jury instruction on the subject of competitive pricing. *See United States v. Park*, 421 U.S. 658, 674-75 (1975) (jury instructions must be evaluated within the context of the entire trial, including arguments of counsel). In any event, appellants' proposed instruction on that issue was flawed. It would have told the jury that "[e]vidence that the defendants actually competed with each other or other alleged conspirators . . . has been admitted. . . ." R.269 at 1815 ("Rider18"). In fact, while both appellants and the government had

introduced evidence concerning appellants' pricing and other conduct during the period of the alleged conspiracy, the jury had the responsibility of determining whether that evidence was evidence of competition or collusion. Appellants' proposed Rider 18 would have usurped that jury function by telling the jury that evidence of competition had been introduced and, therefore, as the district court recognized, would have been an improper comment on the evidence. Tr.5821-22; R.330 at 37. And while appellants discussed possible revisions to their proposed Rider 18, the court correctly concluded that all of their proposals had a similar flaw and, in any event, would have added nothing to the court's instructions. Tr.5821-26. Accordingly, the district court correctly advised defense counsel that they should take the factual arguments that they were trying to have the court make for them in the instructions, and make those arguments directly to the jury. Tr.5822, 5826. This counsel did, and the fact that the jury was ultimately not persuaded by their arguments simply reflects the strength of the government's case, not any error in the court's instructions.

Finally, *Gypsum*, relied on by Therm-All (Br.35-36), is irrelevant. *Gypsum* concerned a jury instruction that allowed "only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." 438 U.S. at 463-64. Because the instruction placed "confining blinders" on the jury's ability to

consider evidence of withdrawal, the Court "conclude[d] that the unnecessarily confining nature of the instruction, standing alone, constituted reversible error." *Id*. at 464-65. In contrast in this case, as shown above, defense counsel used the court's instructions as a springboard into a 40-page argument on their theory of the defense. Moreover, contrary to Therm-All's claim (Br.35), the *Gypsum* Court did not find "reversible error" because the trial court "declined" to give the defendants' proposed instruction. Rather, it found the instruction actually given "unnecessarily confining," and instructed that "[i]f a new trial takes place, an instruction correcting this error and giving the jury broader compass on the question of withdrawal must be given." 438 U.S. at 465.

In short, because a defendant is not entitled to its specific wording of an instruction, and because the jury's instructions, taken as a whole, adequately covered the defense theory, the court did not abuse its discretion in refusing defendant's specific wording. *E.g.*, *United States v. Martin*, 790 F.2d 1215, 1219 (5th Cir. 1986); *Harrelson*, 705 F.2d at 737.

2. Therm-All also argues that *Gypsum* required the government to prove that it specifically intended to suppress or restrain competition in a price fixing case. Br.36-38. This argument is frivolous because it was expressly rejected by this Court in *Cargo Services.* Indeed, like Therm-All, the defendants in *Cargo Services* relied on

Gypsum to argue that the court was required to "instruct the jury that it must find an intent on the part of [defendants] to bring about anticompetitive effects." 657 F.2d at 681. Finding "appellants' reliance on *Gypsum* to be misplaced" (*id.*), the Court explained that because price fixing is *per se* unlawful, "the intent to fix prices is equivalent to the intent to unreasonably restrain trade." *Id.* at 682-83; *accord All Star Industries*, 962 F.2d at 473-74 (collecting cases); *United States v. Young Bros., Inc.*, 728 F.2d 686, 687 (5th Cir. 1984) (to establish *per se* unlawful bidrigging conspiracy, "the government was required to show that appellant *knowingly* joined or participated in the conspiracy") (emphasis added). Because the district court's intent instructions are indistinguishable from the instructions approved in *All Star*, 962 F.2d at 474, and *Cargo Services*, 657 F.2d at 681, Therm-All's claim of error is frivolous. *Compare* p. 48, *supra*.

III. THE GOVERNMENT DID NOT PREJUDICE THERM-ALL BY FAILING TO PRODUCE PHONE RECORDS

Therm-All asserts (Br.44-48) that the government violated Fed. R. Crim. P. 16 by not disclosing certain Therm-All telephone records to it until after the trial. Therm-All contends only that there was a "discovery violation." Br.44. It does not refer to the telephone records as "exculpatory." *See Brady v. Maryland*, 373 U.S. 83 (1963). Nor does it dispute the government's contention that the discovery violation was inadvertent. R.359 at 2197. Therm-All's argument, which was never presented to the

district court, is not properly before this Court and, in any event, Therm-All was not prejudiced by the inadvertent discovery violation.

On December 4, 2001, the government sent defense counsel a letter stating that it had "found in the files of an unrelated matter," additional Therm-All telephone records that had not been produced.[37] R.359 at 2197. Two weeks later, on December 19, 2001, the government forwarded those telephone records to Therm-All's counsel. And even though Therm-All's post-trial motion for acquittal or new trial was pending at that time,[38] Therm-All never supplemented its motion with an argument that the government prejudiced it by not providing those phone records earlier.

Therm-All now argues for the first time on appeal that the government's failure to produce the phone records before trial was prejudicial. Br.44-48. Because Therm-All's failure to assert its discovery claim below "result[ed] in its forfeiture," there is no reason for this Court to consider the argument for the first time on appeal. *United States v. Calverly*, 37 F.3d 160, 162 (5th Cir. 1994) (*en banc*). If Therm-All believed that it had been prejudiced by the government's inadvertent violation of the discovery rules, it should have advised the district court of the violation so that it could have

---

[37]As Therm-All notes, during discovery "the Government had produced thousands of phone records." Br.45.

[38]The court did not issue its order denying Therm-All's motion until June 10, 2002. R.330.

decided what remedy, if any, was appropriate. But even if Therm-All can make this argument for the first time on appeal, this Court can reverse only if it finds plain error. Fed. R. Crim. P. 52(b); *United States v. Olano,* 507 U.S. 725, 731-32 (1993); *United States v. Vital,* 68 F.3d 114, 119 (5th Cir. 1995) ("(1) there must be an error; (2) the error must be clear, obvious or readily apparent; and (3) this obvious legal error must affect substantial rights"). "Rule 52(b) is permissive, not mandatory." *Olano,* 507 U.S. at 736; *accord Calverly*, 37 F.3d at 164. Thus, where a question of fact was "capable of resolution by the district court" if the issue had been raised, this Court has declined to find plain error. *Vital*, 68 F.3d at 119. Moreover, "plain forfeited errors affecting substantial rights should be corrected on appeal only if they 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" *Calverly*, 37 F.3d at 164 (quoting *Olano,* 507 U.S. at 736).

In this case, the factual issue of whether Therm-All was prejudiced by the discovery violation could have been decided by the district court and, therefore, this Court should decline to find plain error. In any event, Therm-All's specific claim of prejudice is unclear. It apparently argues that some subset of the phone records pertain to Smigel and Engebretson, and that the subset contains no calls between either of them and Mizell or Bay. *See* Br.45. Therm-All claims that this "'absence' of phone contact . . . is clearly information that would have aided the defense." *Id.* But as with

its claim about the overall sufficiency of the evidence, Therm-All's claim of prejudice is based on the erroneous assumption that Smigel's acquittal "obviously demonstrates that [the jury] did not wholly believe Rhodes." Br.46. We have already established that Smigel's acquittal is irrelevant and that Rhodes' testimony must be viewed in the light most favorable to the government. *See* pp. 20-22, *supra*. Under these circumstances, there is no reason to believe that additional telephone records, that by themselves prove nothing, would have had any impact on the jury's verdict.

In any event, Therm-All's "absence of contact" argument was fully argued to the jury as a prong of the defense. *E.g.*, Tr.5894-95, 5946-52, 5960-61. It is not clear how the additional telephone records would have strengthened that argument. In fact, absence of contact during select periods of time could not refute the direct evidence of Therm-All's participation in the conspiracy, including testimony of Smigel's agreements on prices, Smigel's policing of the agreement, and Engrebretson's involvement, all of which is corroborated by documentary evidence. *See* pp. 22-25, *supra*. And if telephone records were important to its defense, Therm-All did not need any help from the government to establish what its own telephone records either proved or did not prove. In short, Therm-All has in no way demonstrated that the government's action affected the fairness or integrity of the trial.

IV. THE GOVERNMENT'S CLOSING ARGUMENT DID NOT PREJUDICE APPELLANTS

A. Standard Of Review

Therm-All (Br.26-33) and Supreme (Br.60-61) each claim that during closing argument, the government improperly argued facts that were not adduced at trial. In denying their post-trial motions, the district court concluded that if any error occurred, its curative instructions and the substantial evidence of guilt rendered the error harmless. R.330 at 48-55. This Court reviews the trial court's denial of a new trial motion based on prejudicial remarks by the prosecutor during closing argument for abuse of discretion. *E.g., United States v. Jefferson,* 258 F.3d 405, 412 (5th Cir. 2001). "Prosecutorial misconduct is not a ground for relief unless it casts serious doubt upon the correctness of the jury's verdict." *Styron v. Johnson,* 262 F.3d 438, 449 (5th Cir. 2001). When determining prejudice, a prosecutor's comments must be reviewed in the context of the entire trial. *United States v. Munoz,* 150 F.3d 401, 415 (5th Cir. 1998). In doing so, this Court considers three factors: "'(1) the magnitude of the statement's prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant's guilt.'" *Morrow,* 177 F.3d at 298 (quoting *United States v. Tomblin,* 46 F.3d 1369, 1389 (5th Cir. 1995)). Finally, the district court's "assessment of the prejudicial effect carries considerable weight." *Morrow,* 177 F.3d at 298.

B. Supreme

1. Supreme's claim that the government improperly used Miranda's grand jury testimony "to bolster Rhodes' (sic) testimony" (Br.61) is factually wrong. During rebuttal, the prosecutor discussed Miranda's testimony that Thompson had told him to use the prices on GX6 "that she had just gotten from Wally Rhodes." Tr.2975. The prosecutor then noted that: "Now, [defense counsel] wants to say that was six and a half years ago; but at the time he testified to the grand jury, which is closer in time to those events, he said the same thing."[39] Tr.2975-76.

The prosecutor's reference to grand jury testimony was based on testimony during the trial. When Miranda was asked "did [Thompson] tell you how she got a hold of the price sheet?" Miranda answered: "Well, *like I testified at the grand jury*, I have a vague recollection of her saying that she might have got that from Mr. Rhodes."[40] Tr.2004-05 (emphasis added). Miranda also said that he had testified before the grand jury in 1997. Tr.1999. Supreme never objected to this testimony. Thus, the prosecutor's statement was factually correct and no error occurred. In any

[39]During closing argument, when discussing Miranda's testimony about GX6, Supreme's counsel argued: "Is he making that up or was it a conversation that he had six and a half years ago?" Tr.6020; *see* Tr.6035.

[40]Miranda had previously read into evidence, without objection, his grand jury testimony that when he and Cereghino called Thompson about a reported low Mizell bid, Thompson told Miranda "let me call Wally because this is not supposed to happen." Tr.2001.

event, after Supreme objected to the prosecutor's statement, the district court immediately gave the following limiting instruction (Tr.2976-77):

> There is no evidence from the grand jury before us, period . . . . But, even if there is any grand jury [testimony] on this or any other point, it is not introduced for the truth. You may not rely on grand jury testimony, period, for anything except . . . credibility of a witness . . . . But do not credit what the lawyers say. Lawyers are giving you their arguments and it's only argument. It is not evidence.[41]

Under these circumstances, the district court correctly denied Supreme's post trial motion concluding that "[t]he government had a right to respond within the record." R.330 at 50. The district court also concluded that "there was no prejudice from any error the Government may have made" because "[t]here were ***many*** hours of closing argument after an extended trial," the prosecutor's comment "was a minor one in context," and "the Court [properly] instructed the jury." R.330 at 50 (emphasis in original). Thus, as in *Morrow*, "[t]he district court maintained admirable control over this long, complicated trial and effectively cured any questionable or improper comments by the prosecutor with an instruction to the jury." 177 F.3d at 299.

2. Supreme's further claim (Br.60) that the government improperly suggested that Rhodes' plea agreement was evidence of a nationwide price fixing conspiracy is

[41]The court gave another long grand jury testimony instruction just prior to the jury's deliberations. Tr.6069-70.

specious.[42] After the prosecutor stated "why would any person admit to more criminal involvement than he was actually involved in," the Court told him that his "arguments are susceptible to misinterpretation . . . . You need to clean that up . . . make it clear that [Rhodes'] plea of guilty is to be considered by the jury only as it weighs on his own credibility." Tr.2958. The prosecutor then stated:

> I just got in a little trouble. I need to point out to you, ladies and gentlemen, and just remind you, as the judge told you, that Mr. Rhodes' plea agreement comes in to you to solely assess his credibility and not as evidence against the Defendant in this case. And that's absolutely true.

Tr.2959-60. And after the court reminded the jury: "And that is in the charge that I have given you. The existence of that plea agreement is not evidence against anybody in this trial,"[43] the prosecutor added: "I don't want anyone to think that I was arguing that, because that would be something that I would not be allowed to argue." Tr.2960. Thus, if there was any error in the prosecutor's comment, the court corrected it on the spot and prevented any prejudice to Supreme.

---

[42]Rhodes' plea agreement to an information charging a nationwide price fixing conspiracy was admitted into evidence. GX48A & B.

[43]In its charge to the jury, the court explained at length that Rhodes' conviction and plea agreement were admitted only for credibility purposes and "are not evidence of anything else," and especially "are not evidence that any of the Defendants on trial is guilty of the crime charged in the indictment." Tr.5859.

C. Therm-All

Therm-All's attack on the government's closing is also meritless. Therm-All first erroneously claims that "[t]he Government premised the theory of 'fixing prices' upon the notion the alleged co-conspirators exchanged drafts" and that "the Government could not prove this premise." It then argues that the government misrepresented GX5 and GX200 during closing "to suggest communication of Therm-All price sheets to competitor's (sic) prior to announcement of those increases in the market." Br.29-30. As an initial matter, Therm-All's claim ignores direct evidence that Mizell conformed its February 1994 price sheet to Therm-All's, and that Engebretson called Rhodes on March 20, 1995 with Therm-All's new prices for unfaced insulation. *See* pp. 22-23, *supra.*

In any event, the district court correctly noted that the government's characterization of GX200 as a "draft Therm-All price sheet" (Tr.2926) was appropriate because "Smigel eventually admitted this characterization of the document." R.330 at 51. In fact, Smigel admitted that GX200 is a copy of a Them-All price sheet with a September 1994 Therm-All fax header, and is identical to Therm-All's December 15, 1994 price sheet (GX5) except that any information identifying Therm-All was removed from GX200, and for that reason it was not "something . . . that would have gone out to the customers." Tr.2791-93, 2802; GX41H. Thus, since

GX200 is not something that would have been faxed to customers, the jury could reasonably conclude that in September 1994, weeks before Therm-All announced its December prices to the public on October 17, 1994 (Tr.2794; GX41F), Therm-All faxed those prices to a competitor. Consequently, the prosecutor's statement that "When Mr. Smigel was asked, 'How did this get into Wally Rhodes' price book?' he didn't know" (Tr.2927), could not have prejudiced Therm-All.[44] In any event, the court immediately instructed the jury that this was only "argument by counsel. It's argument only. It's not evidence. If the argument should differ from your views, you follow your own views of the evidence." *Id.* Under these circumstances, there could be no prejudice.

Therm-All fairs no better with its claim that the government wrongly implied that Therm-All vice-president Dennis Kaczmarek "handed off" a draft Therm-All price list (GX5) to CGI. Br.28. Specifically, the prosecutor had argued: "I asked Mr. Smigel was he aware of [Kaczmarek] . . . handing off this price sheet [GX5] to CGI. . . and he said 'No.' . . . Now does that make sense? Is that believable?"[45] Tr.2970.

---

[44]The court explained that it ordered the Mizell bates number to be redacted from GX200 because it was offered after Rhodes testified. R.330 at 51 n.58.

[45]Therm-All's claim that the government "sandbagged the Defendants" by "waiting to present their argument in its 'rebuttal'" (Br.29) is specious. As the court noted, "it's not that [the prosecutor] broke a deal. [The defense] opened the door to some comment about Exhibit 5 . . . . Frankly, the defense made every argument known to man on Exhibit 5." Tr.6055.

Therm-All did not object to this statement until "after the jury was excused for the day" (Br.28),[46] and even then did not offer a curative instruction.[47]

Smigel admitted that the handwriting on GX5 was Kaczmarek's. Tr.2760-61. And Therm-All's counsel acknowledged that "[i]f [the prosecutor] would have said, 'Well, this ended up in CGI's file. We don't know how. But *it's a Therm-All draft*,' that's proper argument." Tr.6058 (emphasis added). Indeed, when rejecting Therm-All's post-trial motion the court noted that "[t]he fact that the document was in CGI's files was also uncontroverted." R.330 at 54.

Thus, the court correctly concluded that "[t]he only potential criticism of the Government's argument was the reference to the manner in which the document may have reached CGI's files . . . [although] [i]t was within the range of several reasonable inferences that the document reached CGI's files because of conduct by someone from Therm-All." R.330 at 54. Consequently, immediately before the jury retired to deliberate, the court instructed the jurors that "questions that are not adopted by witnesses, those questions are not evidence. [And that applies] to questions by

---

[46]Thus, Therm-All denied the court an opportunity to correct any error when it occurred. Therm-All's belated objection, therefore, should be reviewed only for plain error. *United States v. Baptise*, 264 F.3d 578, 591 (5th Cir. 2001).

[47]Therm-All submitted a proposed curative instruction the following morning. R.270 at 4.

government lawyers . . . . Does everybody understand that? Okay."[48] Tr.6070-71. Under these circumstances, no prejudice occurred.

Finally, Therm-All's attack on the government's comments about Engebretson's testimony (Br.30-31) is completely without merit. Neither Therm-All nor any other defendant objected to those comments. Thus, they are reviewed for plain error. *E.g.*, *Munoz*, 150 F.3d at 415.

Engebretson testified: "Where pricing came up, I would have to say I had a conversation with Roger Ferry with CGI" (Tr.1366), and "I remember one specific time *I talked to him about pricing*." Tr.1468 (emphasis added). In fact, Ferry faxed Engebretson a CGI bid to "show [Engebretson] that CGI had not lowered its price." Tr.1472. And GX10E, Engebretson's telephone summary, shows that on June 8, 1995, Engebretson had a short conversation with Ferry, and that he sent him a fax on June 15, 1995. Tr.1525-26.

During closing, the prosecutor made two references to this evidence:

> You've heard that [Engebretson] was talking to CGI - - his friend, Roger Ferry, at CGI about pricing and he was sending him a price sheet, exchanging pricing (Tr.2940).
>
> [I]f you look at Government's Exhibit 10-E, Mark

[48]The court properly rejected Therm-All's overly broad proposed instruction because it would have "invade[d] the province of the jury." R.330 at 53-54, *see also* Tr.6063-64.

> Engebretson is faxing stuff to Roger Ferry, his competitor, right through June of 1995, June 15th, and he said that he was talking to Ferry about prices (Tr.2986).

Given the testimony noted above, everything in these two passages is directly supported by the record except the statement that Engebretson was sending Ferry a price sheet, which the prosecutor appears to correct immediately by saying "exchanging pricing." The district court therefore rejected Therm-All's claim, noting that "[t]he Government was entitled to seek the inferences [that it did]" and, in any event, that any "error was harmless in light of the balance of the evidence of record." R.330 at 55. Additionally, as noted above, the court repeatedly instructed the jury, including just before deliberations (Tr.6070-71), that the lawyer's statements were argument not evidence. Thus, as in *Munoz*: "These circumstances do not evince plain error." 150 F.3d at 415.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted.

R. HEWITT PATE
Acting Assistant Attorney General

DUNCAN S. CURRIE
MARK R. ROSMAN
KAREN J. SHARP
A. JENNIFER BRAY
Attorneys
U.S. Department of Justice
Antitrust Division
Thanksgiving Tower
1601 Elm Street
Suite 4950
Dallas, TX 75201-4717
(214) 880-9401

JAMES M. GRIFFIN
Deputy Assistant Attorney General

JOHN J. POWERS III
JOHN P. FONTE
Attorneys
U.S. Department of Justice
Antitrust Division
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-2435

CERTIFICATE OF SERVICE

I, John P. Fonte, a member of the bar of this Court, hereby certify that today, June 6, 2003, I caused two paper copies (along with a 3 ½ inch diskette containing an electronic copy) of the accompanying BRIEF FOR APPELLEE UNITED STATES OF AMERICA to be served by Federal Express on the following:

Karl R. Wetzel, Esquire
Wegman, Hessler, Vanderburg & O'Toole
6055 Rockside Woods Boulevard
Suite 200
Cleveland, Ohio 44131

Curtis E. Woods, Esquire
Sonnenschein Nath & Rosenthal
4520 Main Street
Suite 1100
Kansas City, Missouri 64111

_____
JOHN P. FONTE

CERTIFICATE OF COMPLIANCE WITH Fed. R. App. P. 32(a)

Certificate Of Compliance With Type-Volume Limitation, Typeface Requirements, And Type Style Requirements

1. This appellee's brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 15,911 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Word Perfect 10.0 word processor used to prepare it, and therefore is within the 16,000 word limitation set by this Court's order of June 2, 2003.

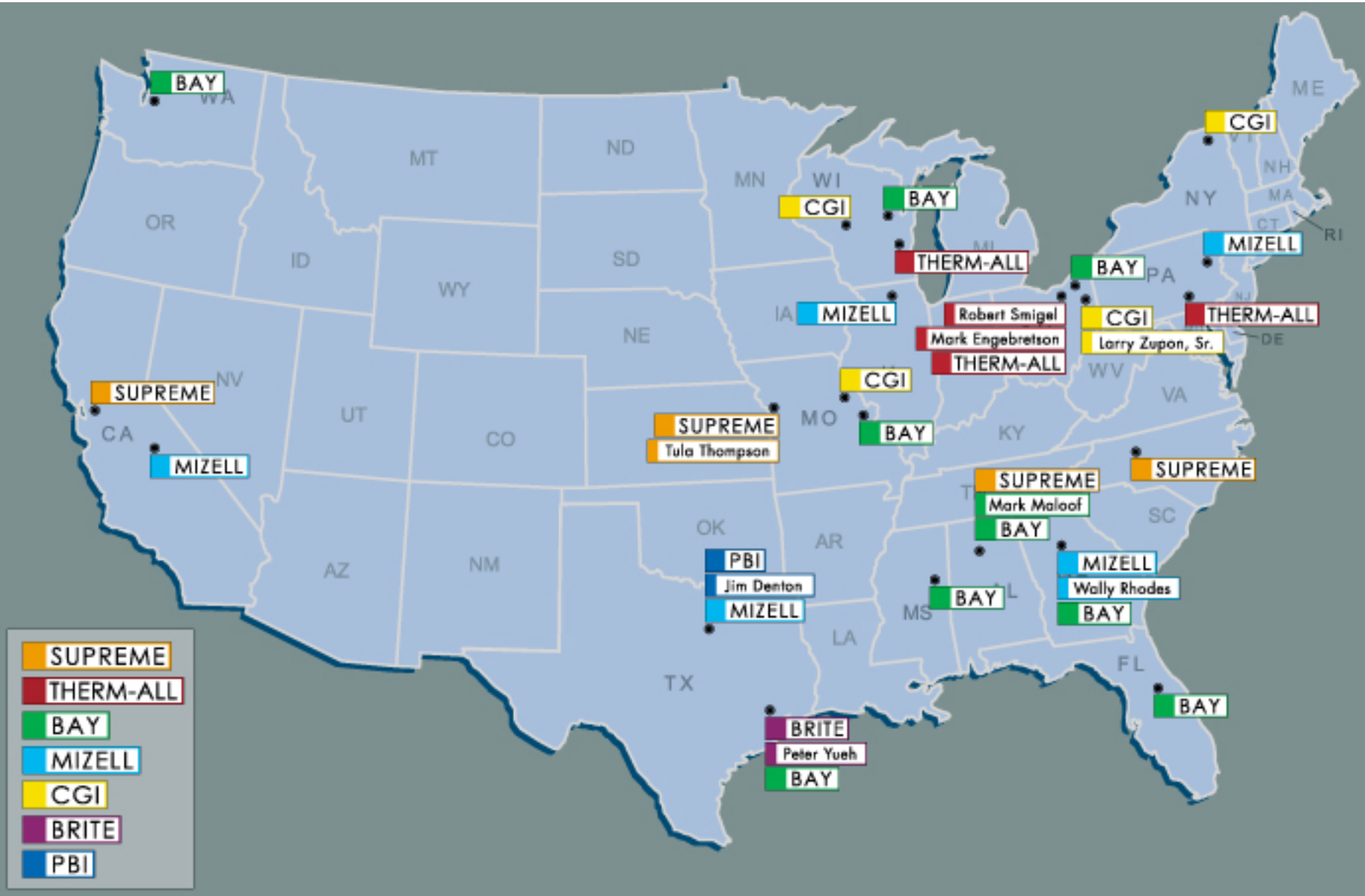
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Word Perfect 10.0 in 14-point New Times Roman.

_____

JOHN P. FONTE

Dated: June 6, 2003

ADDENDUM A


BAY
CGI
BAY
THERM-ALL
MIZELL
BAY
CGI
THERM-ALL
Robert Smigel
Mark Engebretson
THERM-ALL
MIZELL
CGI
Larry Zupon, Sr.
SUPREME
CGI
BAY
SUPREME
Tula Thompson
SUPREME
Mark Maloof
BAY
SUPREME
MIZELL
PBI
Jim Denton
MIZELL
BAY
MIZELL
Wally Rhodes
BAY
BAY
BRITE
Peter Yueh
BAY
MIZELL
SUPREME
THERM-ALL
BAY
MIZELL
CGI
BRITE
PBI

ADDENDUM B

Bay Insulation of Ohio

A DIVISION OF BAY INDUSTRIES INC.

2160 WEST 106TH STREET • CLEVELAND, OH 44102
PHONE 216-961-0800 • FAX 216-961-5556

9040	1
6/22/95	

SOLD TO
84 Lumber
P.O. Box 8484
Pittsburgh ,PA
15330

SHIP TO
84 Lumber
WBVC Rd
RR6
Buckhannon, WV
26201

37393	6/20/95	130007	51	DDB	94720		TRANS	COLLECT

2376	2376	0	3" THK MBI WITH WHITE VINYL 2-3" TABS	SF	.249		591.62

BG0182927

COMMENTS
PLEASE REMIT TO:
P.O. BOX 8005 GREEN BAY, WI 54308
THANK YOU FOR YOUR ORDER

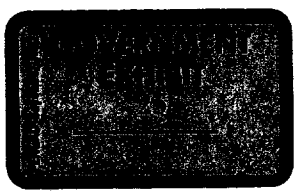
TERMS
NET 30

	591.62
MISC. CHARGES	.00
FREIGHT	60.00
.000% SALES TAX	.00
	651.62

NUMERICAL

Bay Insulation Supply Co.
A DIVISION OF BAY INDUSTRIES INC
1330 Elizabeth Street • P.O. Box 8005 • Green Bay, WI 54308
Phone 414-437-5184 • Fax 414-435-6384

		0-10 MSF	10-30 MSF	30-50 MSF	50-100 MSF	100-OVER M
WHITE VINYL (WV)	3" R-10	$249	$235	$230	$222	$217
	3½" R-11	275	265	260	255	245
	4" R-13	290	280	270	270	260
	6" R-19	398	385	372	365	359
WHITE POLYPROPYLENE SCRIM KRAFT (WMP-VR)	3" R-10	272	265	257	248	242
	3½" R-11	295	288	280	275	267
	4" R-13	313	300	296	289	281
	6" R-19	425	410	400	397	387
VINYL REINFORCED VINYL (VRV)	3" R-10	282	275	267	258	252
	3½" R-11	305	298	290	285	277
	4" R-13	323	310	306	299	291
	6" R-19	435	420	410	407	397
FOIL SCRIM R-3035-HD (FSK)	3" R-10	280	271	262	255	250
	3½" R-11	304	295	285	282	273
	4" R-13	320	311	304	297	290
	6" R-19	435	416	404	399	391
WHITE METALIZED POLYPROPYLENE (WMP-10)	3" R-10	292	282	271	266	259
	3½" R-11	315	307	300	290	285
	4" R-13	325	315	310	304	295
	6" R-19	440	422	413	408	399
WHITE METALIZED POLYPROPYLENE (WMP-30)	3" R-10	313	302	295	288	279
	3½" R-11	335	326	319	310	304
	4" R-13	359	349	339	329	322
	6" R-19	469	455	445	434	424
POLYPROPYLENE SCRIM FOIL #8144 (PSF)	3" R-10	313	302	295	288	279
	3½" R-11	335	326	319	310	304
	4" R-13	359	349	339	329	322
	6" R-19	469	455	445	434	424
VINYL SCRIM FOIL #5800 (VSF-STD)	3" R-10	350	335	330	325	320
	3½" R-11	375	363	360	355	345
	4" R-13	390	380	375	365	357
	6" R-19	495	485	475	465	459



MB0110707

EFFECTIVE 12/15/94

NO TAXES INCLUDED

TELEPHONE
404-875-9361

MIZELL BROS. CO.

99 ARMOUR DRIVE, N.E. • ATLANTA, GEORGIA • 30324

REMIT PAYMENT TO:

MIZELL BROTHERS COMPANY
P.O. BOX 102152, 48 ANNEX
ATLANTA, GA 30368

ATL
30319

SOLD TO
WES-CO INT'L INC
3961 E. RAINES ROAD

MEMPHIS, TN 38118

SHIP TO
CARGILL CORN MEAL PLANT
SHIPPING/RECEIVING BLDG
2330 BUOY STREET
MEMPHIS, TN 38113

INVOICE DATE	INVOICE NUMBER	CUSTOMER ORDER DATE	CUSTOMER ORDER NUMBER	FREIGHT	DATE SHIPPED	SHIP VIA
06/15/95	11843	06/12/95	7416	PREPAID	06/15/95	CSZ W/O 8762-18

INSULATION ROLLS	INSULATION LENGTH	ORDERED	SHIPPED	BACK ORDERED	UNIT	DESCRIPTION	PRICE	PER	GROSS EXTENSION	NET TOTAL
15	34.00	2550	2550	0						
15*		2550*	2550*	0	SF	G.F.I. R-10 APPROX 3" X 60" WITH VW-UL25 EMB WHITE VINYL 2-3" TABS 66"	240.00	M	612.00	

MB0317783

MERCHANDISE TOTAL	TERMS	FREIGHT CHARGES	SALES TAX STATE	SALES TAX RATE	SALES TAX AMOUNT	PAY THIS AMOUNT
612.00	NET 30 DAYS	69.81	TN	8.250	50.49	732.30

SEQUENCE COPY

TOTAL

MIZELL BROS. CO.
99 ARMOUR DRIVE, N.E. • ATLANTA, GEORGIA • 30324
Phone: (404) 875-9361

Southern Region

NAIMA 202 Pre-Engineered Metal Building Insulation
U.L. Flame Spread Rated 25/Net Price Per MSF (One Thousand Square Feet)

Effective December 15, 1994

Facing- one-6 or two-3" tabs	Appr. Thick	"R" Val	0-10,000 sq ft	10-30,000 sq ft	30-50,000 sq ft	Over 50,000
Vinyl - White	3	10	240	228	222	218
Widths 36", 48" 60", & 72"	3.5	11	276	270	267	258
	4	13	300	288	282	269
	5	16	360	354	348	342
Perm Rating - 1.0	6	19	409	397	387	375
Vinyl-Reinforced Vinyl	3	10	274	266	261	253
Widths 36", 48", 60", & 72"	3.5	11	315	307	292	287
	4	13	328	320	313	303
	5	16	388	383	376	371
Perm Rating - .090	6	19	443	432	421	409
Poly-Scrim Kraft - Vinyl Replacement	3	10	265	255	250	243
Widths 36", 48", 60", & 72"	3.5	11	303	298	291	280
	4	13	321	315	303	290
	5	16	387	381	375	370
Perm Rating - .090	6	19	434	423	413	398
Foil-Scrim Kraft	3	10	270	258	252	245
Widths 36", 48", &72"	3.5	11	306	300	294	288
	4	13	330	318	312	302
	5	16	390	384	378	372
Perm Rating - .02	6	19	447	426	420	408
Poly-Scrim Kraft - 10	3	10	279	267	261	255
Widths 36", 48", 60", &72"	3.5	11	315	310	303	298
	4	13	339	327	322	314
	5	16	399	393	387	381
Perm Rating - .02	6	19	452	440	429	420
Poly-Scrim Kraft - 30	3	10	298	286	279	274
Widths 36", 48", 60", & 72"	3.5	11	334	327	322	315
	4	13	358	346	339	332
	5	16	417	411	405	399
Perm Rating - .02	6	19	472	463	456	447

SUPREME INSULATION

METAL BUILDING INSULATION SPECIALISTS

P.O. Drawer 8009
Greensboro, NC 27419
Phone (910) 299-9930
Fax (910) 852-0961

Kansas City, MO (816) 861-8892
Birmingham, AL (205) 323-6279
Fresno, CA (209) 268-6330

INVOICE # 18967

CUSTOMER NO DELJIM

BILL TO:

DEL-JIM

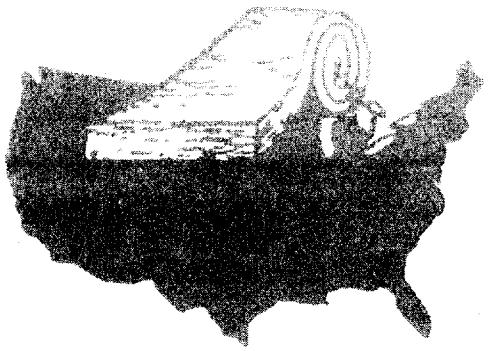
SHIP TO:

DEL-JIM
THIRD & TENNESSEE
FORT CAMPBELL, KY

06/08/95	MILAN	ORIGIN	C.O.D.
FORT CAMPBELL, KY	ORDER 06/14/95	SI	17189

1050	3X72WV-400	3" X 72" MBI-WHITE VINYL	0.242000	254.10
1	SHIP	SHIPPING CHARGES	65.000000	65.00

MATERIAL SAFETY DATA SHEETS AVAILABLE ON REQUEST



SI-MO-83257

Thank You

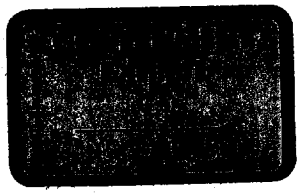
NonTaxable Subtotal	319.10
Taxable Subtotal	0.00
Tax	0.00
Total	319.10

PLANT

SUPREME PRICE GUIDE
EFFECTIVE 12-15-94

NORTH CAROLINA--ALABAMA--KANSAS CITY

	0-25 MSF	25-50 MSF	50 MSF & OVER
3" R-10			
W/V	242	231	221
WMP-VR	264	253	243
FSK	275	264	254
WMP-2820	287	276	266
PSF-8144	298	287	277
VRF-LD	348	337	327
VRF-HD	398	387	377
VRP-3	360	349	339
3.5" R-11			
W/V	284	271	259
WMP-VR	306	293	281
FSK	317	304	292
WMP-2820	329	316	304
PSF-8144	340	327	315
VRF-LD	390	377	365
VRF-HD	440	427	415
VRP-3	402	389	377
4" R-13			
W/V	299	282	269
WMP-VR	321	304	291
FSK	332	315	302
WMP-2820	344	327	314
PSF-8144	355	338	325
VRF-LD	405	388	375
VRF-HD	455	438	425
VRP-3	417	400	387
6" R-19			
W/V	412	393	376
WMP-VR	434	415	398
FSK	445	426	409
WMP-2820	457	438	421
PSF-8144	468	449	432
VRF-LD	518	499	482
VRF-HD	568	549	532
VRP-3	530	511	494



MB0110727

ALL ORDERS UNDER 7500 SF ARE SHIPPED FREIGHT PREPAID AND BILLED TO CUSTOMER

Therm - All, Inc Invoice Review

Order Date: 06/13/95
Order # 38804
Revision Date 06/14/95
Invoice #: 16301 06/19/95

SOLD 612052

NORTH AMERICAN STEEL
1920 NORTHWEST BLVD.
COLUMBUS OH 43212

For:

NORTH AMERICAN STEEL
1920 NORTHWEST BLVD.
COLUMBUS OH 43212

Ship To:

SERIANNI HARDWOODS
910 ADDISON ROAD
PAINTED POST
NY 14870

CONTACT: ANALISA **PHONE** **FAX** 614-488-7454 **TERMS** N30

PURCHASE ORDER# **DUE DATE:** 06/22/95 **DIST.MGR.** **DIST.#** 102

Lin	Tot. Rolls	Ship Today	Tot Invioce	Thick -ness	Width	Length	FACING	S.F.	TABS	DESCRIPTION	Unit Pric	UOM	EXTENSION	Item Type	Ware House
1	20	20	20	3	72	65.5	WHITE VIN	7860	2-03	3"X72" MBI W/ WHITE VINYL FACING	$251.00	M	$1,972.86	I	TAW01
2	2	2	2	0	0	0	3"X150'	0		VINYL PATCH TAPE 3"X150'	$16.00	EA	$32.00	A	TAW01

SubTotal(Price)	:	$2,004.86
Tax	:	$160.39
Freight	:	$0.00
Total	:	$2,165.25

Therm-All Inc.

Insulation Solutions for Metal Buildings

Therm-All Price Sheet
Effective 12/15/94

FACING	R-VALUE	0-10 MSF	10-30 MSF	30-60 MSF	60-100 MSF	100 + MSF
.0032 Vinyl	10 (3")	$251	$244	$237	$229	$222
(W.V.)	11(3-1/2")	$274	$267	$259	$252	$245
	13 (4")	$294	$286	$278	$270	$262
	19 (6")	$400	$391	$382	$373	$364
Poly-Scrim Kraft	10 (3")	$273	$266	$259	$251	$244
Vinyl Replacement	11(3-1/2")	$295	$288	$281	$274	$267
(PSK-VR)	13 (4")	$314	$306	$298	$289	$281
	19 (6")	$426	$417	$408	$398	$389
Foil-Scrim-Kraft	10 (3")	$280	$273	$265	$258	$250
(FSK)	11(3-1/2")	$303	$295	$288	$281	$273
	13 (4")	$320	$313	$306	$298	$291
	19 (6")	$437	$426	$415	$404	$393
Poly-Scrim-Kraft	10 (3")	$291	$283	$275	$267	$259
Standard Duty	11(3-1/2")	$314	$306	$298	$290	$282
(PSK-STD)	13 (4")	$325	$318	$310	$303	$295
	19 (6")	$440	$426	$418	$408	$401
Poly-Scrim-Kraft	10 (3")	$312	$304	$296	$287	$279
Hvy. Duty (PSK-HD)	11(3-1/2")	$335	$327	$319	$310	$302
Poly-Scrim-Foil	13 (4")	$360	$351	$342	$332	$323
(PSF)	19 (6")	$470	$459	$448	$436	$425
Vinyl-Reinf.-Polyester	10 (3")	$366	$358	$351	$343	$335
(VRP-3)	11(3-1/2")	$389	$381	$372	$364	$355
	13 (4")	$402	$395	$388	$380	$373
	19 (6")	$521	$511	$502	$492	$482

◆◆ **Standard Roll Widths: 48",60", 72" ; Standard Tab Widths: 2-3" or 1-6"◆◆**

Roll lengths under 25': Add $30/MSF

36" Wide rolls: add 3% to above prices

CGI 39324

Therm-All Inc. 31387 Industrial Parkway • North Olmsted, Ohio • 44070 (800)886-9494
2422 Gehman Lane • Lancaster, Pennsylvania • 17602 (800)836-0801
145 Commercial Drive • Columbus, Wisconsin • 53925 (800)837-9693