IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-3097

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL D. ANDREAS,
Defendant-Appellant,

No. 99-3098

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRANCE S. WILSON,
Defendant-Appellant,

No. 99-3078

UNITED STATES OF AMERICA,
Plaintiff-Cross-Appellant,

v.

MICHAEL D. ANDREAS and
TERRANCE S. WILSON,
Defendants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

(Hon. BLANCHE M. MANNING)

BRIEF FOR APPELLEE AND CROSS-APPELLANT UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

Appellants' jurisdictional statements are complete and correct as to Nos. 99-3097 and 99-3098. In the government's cross-appeal, the district court had jurisdiction, pursuant to 15 U.S.C. 1 and 18 U.S.C. 3231. This Court has jurisdiction under 18 U.S.C. 3742(b) and 28 U.S.C. 1291. The district court sentenced appellants on July 9, 1999, entered judgment orders on August 16, 1999, and amended judgment orders on August 25, 1999. ABr. A1-11, WBr. VIII-XIX.[1] The United States filed a timely cross-appeal on August 12, 1999 (No. 99-3078).

STATEMENT OF THE CASE

On December 3, 1996, appellants Michael D. Andreas ("Andreas") and Terrance S. Wilson ("Wilson"), together with Mark E. Whitacre and Kazutoshi Yamada, were charged in a one-count indictment with conspiring to suppress and eliminate competition, by fixing the price and allocating the volume of lysine offered for sale in the United States and other countries, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. SA 1-9. Appellants were convicted after a 2-month jury trial.[2] Appellants' motions for new trials or judgments of acquittal were denied December 30, 1998. SA 196. On July 9, 1999, each was sentenced to two years in jail and a $350,000 fine. SA 1026-27. The district court (SA 240) and this Court denied appellants' motions for bail pending appeal.

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[1] "ABr." and "WBr." refer to appellants Andreas' and Wilson's briefs in this Court. "SA" refers to their joint appendix while "GA" refers to the government's supplemental appendix. "Dkt.No." refers to the district court docket number while "G.Ex." and "G.Ex./SH" refer to government trial and suppression hearing exhibits. "Tr." and "STr." refer to the trial and suppression hearing transcripts.

[2] Whitacre was also convicted but voluntarily dismissed his appeal. Yamada was not tried and remains a fugitive.

STATEMENT OF FACTS

Appellants were convicted of conspiring to restrain trade in lysine, an amino acid necessary for animals' growth. Commercial lysine is produced through a fermentation process and sold as a supplement for animal feed. Tr. 902-903. Lysine is a commodity product bought primarily on the basis of price. Tr. 905, 2167, 2170.

Appellants were officers of Archer Daniels Midland Company ("ADM") during the conspiracy period. ADM is a large agricultural processing company that manufactures products used by the food and beverage industry; its global sales in 1994 were approximately $13 billion. GA 6. Andreas was vice chairman of ADM's board of directors and executive vice president, focusing on sales and marketing. Tr. 759-60, 2607. Wilson, president of ADM's Corn Processing Division, reported to Andreas. Tr. 2606-07. Whitacre, president of ADM's BioProducts Division, was responsible for production, sale, and distribution of lysine. Tr. 2611, 2810.[3]

ADM entered the lysine market in 1991 and significantly expanded industry capacity with its large new plant. Tr. 908-09, 938, 1683. A Korean producer, Cheil Jedang Ltd. ("Cheil") also entered the market. Tr. 913. Three other companies were already in the market in 1991: Ajinomoto Co., Inc. ("Ajinomoto"), and Kyowa Hakko Kogyo Co., Ltd. ("Kyowa") of Japan; and, Miwon Foods Company, Ltd. ("Miwon") of Korea.[4] The foreign lysine producers (except Cheil) had United States subsidiaries, and some also had foreign subsidiaries, including

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[3] On November 5, 1992, about 5 months after the conspirators' first meeting, Whitacre became a cooperating witness for the United States, recorded audiotapes of the conspiracy at the direction of FBI agents, and is not chargeable as a conspirator on or after that date. See, e.g., Tr. 5584.

[4] Miwon subsequently became Sewon Company, Ltd.

Eurolysine, S.A., a Paris-based company part-owned by Ajinomoto (Tr. 2163) during the conspiracy. Before ADM and Cheil entered the market, there had been periodic price-fixing among the existing three producers. Tr. 906-08, 1683, 4145. The new ADM lysine production resulted in oversupply, and a price war pushed prices down. Tr. 909, 915, 2173-75.

In June 1992, when lysine was selling below 70 cents per pound, Wilson and Whitacre met representatives from Ajinomoto, Eurolysine, and Kyowa in Mexico City. Tr. 914-15. During this meeting, Wilson wrote on a blackboard how much the companies were losing by competing, and they discussed a "target" price at which the companies could sell "if we stop the competition." Tr. 4147-50. Ajinomoto's Kanji Mimoto ("Mimoto") testified that the participants tentatively agreed to phased-in price increases and also tried to reach a "quantity allocation agreement." Tr. 917-18. Wilson, who did most of the talking for ADM (Tr. 916, 927-28; see also Tr. 2176), asserted that ADM's company policy was that it must be allotted the same share of sales as the industry leader -- Ajinomoto. Tr. 916. Ajinomoto's Hirokazu Ikeda's ("Ikeda") notes of the meeting (GA 62-67) confirm that ADM wanted the same market share as Ajinomoto, one-third of global sales. Tr. 925. Wilson insisted that the companies select an auditor and report sales volumes for established periods, or, alternatively, that all members meet periodically and confirm each company's volumes. Tr. 926-27. The Japanese companies promised to discuss the proposal with the Korean lysine manufacturers. Ikeda's notes state that "[i]f the discussions go smoothly, we will aim for prices at the level of $1.05/lb del[ivere]d for North America/Europe ... by October, and $1.20/lb ... in December .... All the companies are in basic agreement on the above." GA 64; Tr. 926.

Alain Crouy ("Crouy"), who worked for Eurolysine, testified that the purpose of the meeting was to end the price war, through discussions of price and volume, and that an

agreement was reached as to price, subject to approval by non-attendees. Tr. 2171-77. Crouy's detailed meeting notes (GA 82-89; Tr. 2177-98) stated that "[n]o one else in ADM knows about this meeting except Andreas." GA 84; see also Tr. 4172 (Wilson states that only Whitacre and top management (Andreas) know about "these meetings").[5]

After the Mexico City meeting, Miwon, which had not attended the meeting, increased its price to 80 cents. Tr. 4150-511. Whitacre called Yamamoto and Mimoto the next week, and they agreed to increase their prices to 80 cents. Tr. 935-40, 4151-55; G.Ex. 219T (Yamamoto's notes of Whitacre's call). The conspirators later agreed to two further price increases (to 95 cents and $1.05) to take effect in August and October 1992. Tr. 4155-60; G.Ex. 220T. ADM increased its prices as agreed, as did the other conspirators, and the United States price of lysine rose in the summer of 1992 to $1.05. Tr. 936-37, 4161, 2199.

In October 1992, all five lysine producers met together for the first time in Paris. Tr. 941, 4162. Whitacre and Wilson represented ADM. Id. Instead of discussing the legitimate topics listed on a fake agenda for the meeting, prepared by Eurolysine (G.Ex. 9; Tr. 946-47, 2200), the conspirators discussed and agreed on new lysine prices. Tr. 947-55, 2200-01, 4163-64; GA 68-72 (Mimoto's meeting notes listing agreed-on prices); G.Ex. 128 (Miwon meeting notes).

In late 1992 or early 1993, lysine supplies began to outpace demand, and prices began to fall. Tr. 960, 4164-65. The conspirators attributed the price decline to the absence of a volume allocation agreement (Tr. 960, 4164-65), and Ajinomoto officials met with ADM in Decatur on

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[5] ADM initially kept the conspiracy a secret from its sales people and refused to allow the Japanese and Korean companies to contact them about the scheme. See, e.g., Tr. 2180, 4172. Wilson cautioned Whitacre not to put on his expense reports that he had met with coconspirators. G.Ex. 4/28/93 1B43-S5 at 215. See also G.Ex. 78, 197 (Wilson expense reports giving incorrect reasons for travel).

April 30, 1993, to address the situation. Tr. 1685. At that meeting (Tr. 1688, 2203-04), Andreas told Ajinomoto's Yamada that ADM had anticipated that ADM's entry would "confuse" a mature market, but that "out of chaos usually comes ah, order," and that ADM would now be pleased to "get involved." G.Ex. 4/30/93 1B46-WE-S1 at 24-25. Andreas also told Yamada that the only way to "stabilize" lysine is "from the supply side." Id. at 45. Andreas urged use of a trade association and emphasized that it would take more than two companies to achieve "stability." Id. at 24, 36-37. ADM's President, James Randall, added that ADM's philosophy is that "our competitors are our friends. Our customers are the enemy." Id. at 32. Yamada agreed that everyone understands that "it is necessary to adjust the supply delivery." Id. at 49.

Shortly before this meeting, Wilson and Whitacre had met Eurolysine officials in Chicago. Tr. 2203-05. Wilson told them that ADM had done as it promised in Mexico City to raise the price to $1.05. As to the subsequent fall in price, Wilson agreed that volume had to be controlled or "prices go down." G.Ex. 4/28/93 1B43-WE-S2 at 84, 88-89; -S4 at 176.

ADM and Ajinomoto officials met in Tokyo on May 14, 1993, to discuss allocating the market to improve prices. Tr. 2231-43; G.Ex. 5/14/93 1B52-WE, 1B54-WE. Wilson explained at length the mechanics of a price-fixing and volume allocation conspiracy involving citric acid (hereinafter "citric"), of which ADM was a member, and suggested that the lysine conspiracy should use similar methods. G.Ex. 5/14/93 1B54-WE-S1 at 1-11. Wilson said that when, as in citric, volumes are allocated, there is no need to monitor the price-fixing agreement closely because, "[a]s long as the volume turns out okay[,] [i]f they want to sell it for less money, that's their business." Id. at 6. Wilson said that volume allocation is preferable to customer allocation, because customers become suspicious when competitors decline to give price quotes because of

an illegal customer allocation agreement. Id. at 11.[6] No volume allocation agreement was reached at this meeting (Tr. 2232), but Wilson promised to tell Andreas that Yamada was "flexible." G.Ex. 5/14/93 1B54-WE-S3 at 45.

All five companies met on June 24, 1993, in Vancouver, Canada. E.g., Tr. 961, 1702-03, 4165-67; GA 90-94 (Yamamoto's meeting notes); G.Ex. 134T (Miwon meeting summary). The parties reached an agreement on prices, but again failed to agree on allocating sales volume because "everybody want[ed] a bigger share." Tr. 961, 4165-72. Whitacre briefed Andreas about the meeting. Tr. 3840-41. In a taped telephone call to Ikeda the following day, Wilson and Whitacre told Ikeda that ADM would try to maintain the price "agreed ... [t]he other day" at the Vancouver meeting and would maintain current levels of sales if lysine prices remained stable. Tr. 1705-06; G.Ex. 6/29/93 1B11-WE-S1 at 1-3. All five companies raised prices by agreement during the summer of 1993. Tr. 4172-73.

The conspirators met in Paris again on October 5, 1993. Tr. 984, 3850. A week later, Mimoto, who used the alias "Mr. Tani" when leaving messages for Whitacre (Tr. 972-73), called Whitacre and told him that the Paris meeting was valuable because they "could confirm the new price schedule." Mimoto also agreed that there would be problems again unless a volume agreement was worked out and that an upcoming Yamada/Andreas meeting was therefore key. G.Ex. 10/13/93 1B47-WE-S1 at 20-22. Whitacre briefed Andreas on the Paris meeting (see infra, p. 15).

[6] ADM employee Barrie Cox described the citric conspiracy in essentially the same terms as Wilson. Tr. 2603, 2614-52. The purpose of the volume allocation was to discourage price-cutting. Tr. 2633.

Andreas and Yamada negotiated a volume allocation agreement at an October 25, 1993, meeting (which the FBI videotaped) in Irvine, California. See Tr. 1706-07, 1730-31. Andreas told Yamada that ADM wanted to sell the same volume of lysine as it sold in 1993, plus a reasonable amount of the industry growth, and threatened to use its extra capacity to drive down prices if the other companies "don't agree" and "there becomes a free-for-all." GA 100-101; G.Ex. 10/25/93 1B56-57-58-SVHS-S1 at 133, 171; -S2 at 189. Yamada agreed to present the Irvine agreement to the other three lysine producers. Tr. 1707-10, 1731-33; G.Ex. 28 (fax from Ajinomoto to Miwon informing them of Ajinomoto/ADM agreement, and Kyowa's adoption of it); G.Ex. 223 & Tr. 4174-77 (Yamamoto's notes of meeting with Ajinomoto on November 10, 1993, at which Ajinomoto reported on Irvine agreement); G.Ex. 23 (easel sheet used at the Irvine meeting to show the sales allocation plan).

The next step was a meeting in Tokyo on December 8, 1993, attended by Wilson and Whitacre for ADM and by representatives of Ajinomoto, Kyowa, and Miwon. Tr 1006-70, 1733, 4179-86, GA 95-99 (Yamamoto's meeting notes). Cheil was not invited because the other companies regarded its volume demand as unreasonable. Tr. 1006-07. The purpose of the meeting was to agree on lysine prices for the coming quarter and on the remaining quantity allocations and the mechanics of allocating lysine sales. Tr. 1049-51, 4180, 4183-86. The resulting agreement closely resembled the citric conspiracy earlier described to the participants by Wilson, and indeed Ikeda described the plan adopted as "ADM's proposal." E.g. GA 131-141; see also Tr. 1058, 1067, 1648; G.Ex. 142T (Sewon meeting summary). Each conspirator was allocated both a percentage of the market, and an actual tonnage figure, based on estimated world market. GA 113-19; Tr. 1061-62. The group broke these allocations down by region, as a guideline for the conspirators. GA 125-30; Tr. 1064-65. Wilson discussed monitoring the

agreement under cover of trade association meetings. He also discussed the year-end compensation provision of the agreement pursuant to which any conspirator that sold more than its allocated share at the end of the year would have to make amends by buying lysine from a conspirator that had sold less than its allocated share. But there would be no need for compensation if "we all come within 1%." GA 134; see also Tr. 1067. The parties also agreed on the need for an audit, but not on how to conduct it. Tr. 1058-59. Ikeda listed the assigned allocations (GA 103), while Wilson proposed that monthly numbers be reported to Mimoto (GA 105), and that if one company gets too far ahead of its allocation, it must slow down (GA 131-32). See also Tr. 1067. Wilson warned the group to be careful about the telephone, and said that it was better not to meet in person, except quarterly. GA 140. Then Wilson threatened that, if there were another price war, ADM would increase its lysine volume. GA 144-45.

At their next meeting in Hawaii on March 10, 1994 (videotaped by the FBI), the conspirators, including Wilson and Whitacre, discussed how the volume allocation agreement was working, reported their recent sales figures (Tr. 1081-96, 4189-95; G.Ex. 12 (Mimoto chart showing allocations and January results); G.Ex. 137T (Sewon meeting summary)), and agreed on prices worldwide. GA 3-4. The companies discussed who was ahead or behind schedule in allocated sales, and Wilson recommended continuing monthly reporting, as well as regional targets. G.Ex. 3/10/94 1B94,95,96,98-S1 at 22-36. They also talked about whether to admit Cheil to the allocation conspiracy -- and then discussed association business "just in case." G.Ex. 3/10/94 1B94,95,96,98-S2 at 120-30. After lunch, a Cheil representative joined the meeting and accepted an allocation of 17,000 tons. Tr. 4192, 4194. Wilson explained the mechanics of the conspiracy to him. G.Ex. 3/10/94 1B94,95,96,98-S3 at 179-203. See also G.Ex. 225 (Yamamoto's meeting notes). He also urged the conspirators to "trust each other" and not be

"manipulated by . . . buyers." G.Ex. 3/10/94 1B94,95,96,98-S4 at 238-39. He emphasized that ADM's competitors were its friends and that, while customers were necessary, "they are not my friends." G.Ex. 3/10/94 1B94,95,96,98-S4 at 239. He told the conspirators to "put the prices on the board ...[and] all agree that's what we're gonna do and then walk out of here and do it." Id.

After the Hawaii meeting, prices generally were maintained at the agreed-on level for 1994.[7] Tr. 1101-02, 4213. The lysine producers reported their sales quantities to Mimoto on a monthly basis (GA 4-5), and Mimoto prepared and distributed to the conspirators tables showing the monthly reports and comparing actual sales with allocated sales. GA 73 (Mimoto summary for January to May 1994, showing ADM's allocated sales as 27% and its actual world sales as 25.2%); Tr. 1097-1101, 4210-11. Wilson did not attend the conspirators' regular meetings after the Hawaii meeting, because the allocation agreement was settled, and Wilson was not involved in day-to-day lysine business. Tr. 1103-04. However, in October 1994, Wilson and Andreas met in Chicago with Mimoto and Yamada and they discussed Sewon's (see n.4, supra) request for a bigger 1995 allocation. Tr. 1105-06.

The conspirators continued to meet quarterly until the conspiracy ended. Tr. 1129-32, 1137. See also Tr. 958, 4214-17. At a January 1995 meeting in Atlanta videotaped by the FBI, the conspirators (except Sewon) agreed that they would stay at the same shares in 1995, and all 5 companies agreed on global prices. Tr. 1131, 4216-17; G.Ex. 138T (Sewon meeting summary). Mimoto collected sales volume figures for December 1994, and the parties agreed that they were

[7] Whitacre and Wilson discussed the numbers reported to Mimoto for May 1994, which showed Miwon and Kyowa ahead. Wilson asked Whitacre what "are they doin' about it." Wilson also told Whitacre not to leave the paper with May figures lying on his desk, because someone could easily figure out what it was. G.Ex. 7/13/94 1B110-S1 at 21-22.

"right on target" for the allocation. GA 151-67; Tr. 1132.[8] Because the actual 1994 sales were very close to the allocation, it was not necessary to use the agreed-upon compensation system. Tr. 4216. The conspiracy ended abruptly on June 27, 1995, when a search warrant was executed at ADM. Tr. 1140-41, 3896, 4217. During interviews with the FBI that night, Andreas denied that there could be price-fixing in the lysine industry and said nothing about price-fixing by Asian lysine producers. Wilson denied that anyone at ADM had exchanged sales or production figures with competitors. Tr. 3590-91.

SUMMARY OF ARGUMENT

In 1991, ADM had the opportunity to free American consumers from the power of a foreign price-fixing cartel. But after building the world's largest lysine plant, entering the market and driving lysine prices down, ADM did not break the foreign cartel. Rather, it built a more effective cartel. The three ADM executives most responsible for this betrayal of the American consumer were convicted by the jury in this case. Appellants' arguments attacking this verdict are without merit.

1. Andreas supervised and directed ADM's entry into what he knew was a price-fixing cartel. He instructed Wilson and Whitacre about what to say at cartel meetings they attended, at which prices were fixed, and he was briefed by them after those meetings. He had three important meetings with Yamada. Andreas told Yamada that ADM could be trusted to do what it said it would do and he persuaded Yamada at Irvine to agree to a sales volume allocation

[8] Mimoto prepared a table for the conspiracy members showing the quantities reported from January to November 1994. G.Ex. 16; Tr. 1133-36. Mimoto also prepared a report of the Atlanta meeting that showed final results for 1994. GA 74-81; Tr. 1137-40.

proposal that the other conspirators subsequently endorsed. The evidence was plainly sufficient to support the jury's guilty verdict.

2. The existence of a "criminal cartel" that appellants knew was fixing prices was both conceded by appellants at trial and proved by overwhelming evidence. Tr. 765, 775. Appellants persuaded the cartel participants to allocate their sales volumes. Both the intended and actual effect of the agreement was to limit the output of lysine and raise its price. Such a naked restraint on price and output is, as the district court rightly held, per se unlawful. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984)("NCAA"); United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940); General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594-95 (7th Cir. 1984).

3. Appellants' claim that the Cox immunity letter precludes their prosecution ignores both the plain language of the letter and the ADM plea agreement to which that letter refers. The letter was sent to Cox pursuant to Fed.R.Crim.P. 11(e)(6)(D) and, as that rule indicates, any protection provided by the letter expired once ADM pled guilty. Moreover, the ADM plea agreement, which was substantially drafted when the Cox letter was sent, expressly permits the government to prosecute appellants and to use the testimony of ADM employees against them.

4. The district court did not abuse its discretion in permitting testimony about the citric conspiracy. The citric conspiracy was intricately related to the lysine conspiracy. Wilson repeatedly urged the other conspirators to follow the citric model in the lysine conspiracy, and Andreas participated in conversations during which the citric conspiracy was mentioned. Cox's testimony about citric was necessary for the jury to understand not only what Wilson and Andreas were talking about when they discussed the citric and lysine conspiracies but also how the lysine conspiracy functioned after the conspirators agreed to allocate sales volumes. Cox's

testimony was also directly relevant to appellants' defenses that they had never intended to agree and did not make deals. Finally, the district court correctly concluded that Cox's testimony was not unfair.

5. The court did not abuse its discretion in admitting the audiotapes into evidence. These internally consistent tapes were also consistent with videotapes made by the FBI and with the testimony of four coconspirator witnesses and many exhibits. Whitacre was plainly acting "under color of law" when he made the tapes because he had agreed to be a cooperating witness. Moreover, the tapes were not made for a criminal or tortious purpose. Finally, the tapes were properly authenticated by evidence that included the testimony of a tape expert.

The court also did not abuse its discretion in excluding the testimony of an FBI agent about allegations that Whitacre had made concerning supposedly exculpatory tapes. The testimony would have been hearsay and would have proved nothing because Whitacre did not admit to destroying any tapes. Moreover, the allegations were extremely unreliable because Whitacre subsequently retracted them and there is other evidence that they were a hoax.

6. The jury was fully and correctly instructed on the issue of intent. The court's instructions permitted appellants to make all of their intent arguments to the jury. Accordingly, the court did not abuse its discretion in refusing to give additional instructions.

7. The prosecutor did not improperly comment on appellants' failure to testify during closing argument, nor did he vouch for any of the government's witnesses. He directed the jury's attention to lies appellants told the FBI before they were charged and to inconsistencies between the defenses presented at trial and what appellants had told the FBI. Such remarks are proper and are not an indirect comment on appellants' failure to testify. Moreover, the district court either sustained objections or told the jury to disregard most of the comments about which appellants

now complain. Thus, even if the prosecutor had said something improper, any error was harmless.

8. Even assuming that appellants have not waived the argument, the district court correctly computed the volume of commerce affected by the violation. Following the express language of the Antitrust Guideline and its commentary, the court correctly included all dry lysine sales made by ADM during the conspiracy period.

9. After correctly finding that the conspiracy was extensive, the district court ignored evidence and precedent in refusing to adjust appellants' offense levels upwards for their roles in the offense. Unrebutted evidence, which the district court ignored, showed that at least four ADM executives knowingly participated in the scheme under Andreas's control. Moreover, as a member of the collective leadership of the conspiracy, Andreas combined the carrot of higher potential prices and the stick of threatened expanded output by ADM to persuade the other firms to adopt volume allocations that gave ADM the second largest share of the market. The court committed legal error in holding that role insufficient to warrant an upward leadership adjustment merely because Andreas could not unilaterally impose the allocations.

Wilson successfully used his experience from the citric conspiracy both to guide Whitacre in his dealings with their lysine co-conspirators, and to convince them that they should adopt a more effective cartel structure. This managerial role is plainly more culpable than the mere adoption or implementation of his recommendations.

ARGUMENT

I. The Evidence was Sufficient to Support Andreas' Conviction

Andreas, but not Wilson, challenges the sufficiency of the evidence to support his conviction. ABr. 39-42. The district court rejected this claim (SA 171-74), and this Court should affirm because a reasonable trier of fact, viewing the evidence in the light most favorable to the government, could have found the essential elements of the offense beyond a reasonable doubt. See United States v. Taylor, 31 F.3d 459, 464 (7th Cir. 1994).

Andreas contends that there was "no evidence of anyone telling Andreas about price-fixing" and relies heavily on Andreas' statements that ADM does not make "deals." But there was abundant evidence that Andreas knew about, authorized, and participated in the lysine conspiracy.

Andreas attended three meetings with coconspirators to implement the conspiracy, and he authorized and supervised Wilson and Whitacre's activities in furtherance of the conspiracy. Andreas knew about the June 1992 Mexico City organizational meeting at which ADM agreed to fix prices (GA 84). On April 30, 1993, Andreas met with Ajinomoto's Yamada in Decatur and told Yamada that ADM anticipated that its entry would "confuse" the market, but that ADM now would "get involved" and "stabilize" lysine from the "supply side" (see supra, p. 5).[9] Wilson and Whitacre reported to Andreas on the May 1993 Tokyo meeting, and discussed further strategy

[9] Andreas briefed Whitacre on what to say at an April 15, 1993 meeting with Kyowa's Yamamoto, and subsequently asked Whitacre how the meeting had gone. Andreas told Whitacre that he was willing to reduce sales, but not until the price "gets up to where it belongs," and suggested that ADM would ultimately compromise with the Japanese on the size of its allocation. G.Ex. 4/15/93 1B32-S1 at 1-10; G.Ex. 4/16/93-1B41-S1 at 1, -S2 at 18. The day before Andreas' meeting with Yamada, Andreas discussed with Wilson and Whitacre what Andreas planned to say, including Andreas' negotiating position on the volume ADM would demand. G.Ex. 4/29/93 1B48-S1 at 4-19. On the day of the meeting, Andreas again rehearsed ADM's negotiating position on volume allocation. G.Ex. 4/30/93 1B47-S1 at 1-4. Andreas, Wilson, and Whitacre discussed what happened at the April 30 meeting, and the need for Ajinomoto and ADM to reach agreement "before we go to the others." G.Ex. 4/30/93 1B46-S2 at 144-152.

with him. G.Ex. 5/17/93 1B57-S1 at 1-9. Whitacre also briefed Andreas about the Vancouver meeting. Tr. 3840-41. Andreas confirmed that Whitacre had told the other conspirators that ADM would raise its prices by “another nickel” in July and told Whitacre to tell the other companies that ADM would stay at its current volume. Andreas also said that he would like to meet with Yamada alone. G.Ex. 6/28/93 1B7-S1.

Andreas was briefed about the October 5, 1993, Paris meeting. Andreas asked, "how did it come out?" Whitacre told Andreas that the volume agreement still needed to be worked out, but that there is "an official association now" and that the producers had agreed not to build any more capacity. Andreas then asked "[a]re we gonna start sending in volumes yet?" and Whitacre replied that volume information would not be provided until there was a "volume understanding." G.Ex. 10/12/93 1B46-S1 at 11-18; Tr. 3851-52.[10]

At the Irvine meeting, Andreas bargained with Yamada for a favorable share of volume and threatened to use ADM’s extra capacity to drive down prices if the other companies did not agree (supra, at p. 7). As the district court noted, the videotape of this meeting "clearly dispelled any question in the minds of the jurors as to Andreas’ keen interest in controlling the sales volume to ensure that prices remained high." SA 173.[11]

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[10] Prior to the Irvine meeting, Andreas agreed with Whitacre that ADM broke up "the club" in lysine and remarked that those companies did not trust ADM, so he wanted to meet alone with Yamada at Irvine to tell him that "[t]hese guys are fighting ... and you and I are losin’ all the money ...[s]o maybe we oughta come to an agreement." Andreas observed that in citric, ADM bought a company that was already "in the club," but lysine is "not there yet." G.Ex. 10/12/93 1B46-S3 at 38-40, 43-44.

[11] Another tape recorded Whitacre and Andreas discussing what had happened at the Irvine meeting, including Yamada’s private conversation with Andreas. Andreas believed that his presence brought the deal to a conclusion. G.Ex. 10/25/93 1B54-S1 at 7-28.

Andreas was also briefed by Wilson about the Tokyo meeting where allocations were finalized.[12] And in October 1994, Andreas participated in his third meeting with coconspirators to discuss the progress of the conspiracy. During this meeting, Mimoto told Andreas and Wilson that Sewon had stopped reporting volume, but nonetheless had promised to "respect the price." Tr. 1127; G.Ex. 10/13/94 1B121-WE-S4 at 141-42, 148. Mimoto noted and Wilson agreed that "supply and demand is almost balanced now." -S4 at 151.

The jury could reasonably have disbelieved Andreas' statements about not making deals. The evidence plainly shows that Andreas supervised and directed ADM's involvement in the lysine cartel. Indeed, Wilson cautioned Andreas to stop saying that ADM does not make deals, "[c]ause in their view we make deals" and such a statement might cause the coconspirators not to trust ADM. SA 657. In fact, Andreas told Yamada that ADM was a company that could make a decision, was not afraid to make its intentions known, and could be trusted to do what it said it would do. G.Ex. 4/30/93 1B46-S1 at 26-29; see also G.Ex. 4/29/93 1B48-S1 at 4. And when Wilson told Ikeda that Andreas said that ADM does not make deals, the statement produced laughter. SA 647 (cited at ABr. 40). Finally, while Andreas claimed at trial that he tried to break up the cartel, he falsely told the FBI that price-fixing was an impossibility in the lysine market.

There was thus abundant evidence for the jury to conclude, beyond any reasonable doubt, that Andreas was an active member of the price-fixing and allocation conspiracy, both in person and through the activities of subordinates, whom he authorized and supervised. See United States v. Wise, 370 U.S. 405, 413 (1962)(corporate officials liable for subordinates' actions they

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[12] On tape, Andreas told Whitacre that he had debriefed Wilson about the Tokyo meeting. Andreas agreed with Whitacre that "we're doin' a lot better now than we were 6 months ago." G.Ex. 12/9/93 1B78-S1.

supervise); United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1236 (8th Cir. 1992); United States v. Gillen, 599 F.2d 541, 546-47 (3d Cir. 1979).

II. The Agreement To Allocate Sales Volumes Was Per Se Unlawful

Appellants contend (ABr. 19-39; WBr. 3) that the district court erred in instructing the jury (SA 480-489) that agreements among competitors to allocate sales volumes are per se unlawful. This contention is wrong.

1. Like any other jury instruction, the court's instructions on sales volume allocation must be viewed not only in the context of the entire instruction but also within the context of the entire trial. United States v. Park, 421 U.S. 658, 674-75 (1975) (explaining that "seemingly prejudicial" instruction may in fact be appropriate when viewed in context of the entire record). The indictment charged that the conspiracy had two objectives: to fix prices and allocate sales volumes. SA 2. At their first meeting in Mexico City in June, 1992, the conspirators discussed both price-fixing and allocating sales volumes. While they agreed to fix prices at both this and subsequent meetings, they were initially unable to reach a sales volume allocation agreement because the other conspirators viewed ADM's market share allocation demands as unreasonable. The predictable result was that their price-fixing was not as effective as it could have been, particularly when seasonal demand was low. Tr. 913-14, 924-27, 960, 2231, 4164-65.

To minimize the temptation to cheat on their price-fixing agreement, maintain agreed prices, and make policing that agreement easier, Wilson, acting on instructions from Andreas, repeatedly urged the conspirators to agree to allocate sales volumes in addition to fixing prices. See pp. 3-6, supra. When Wilson failed to finalize a volume agreement, Andreas intervened personally, met Yamada at Irvine, and negotiated an agreement that could be presented to the other conspirators and was eventually finalized in Tokyo and Hawaii. See supra, pp. 7-9. This

agreement was in addition to a prior agreement not to build any new capacity. G.Ex. 10/12/93, 1B46-S1 at 14.

2. The district court instructed the jury that it could convict appellants if it concluded that they had conspired either to fix prices or to allocate sales volumes. United States v. Kramer, 711 F.2d 789, 797 (7th Cir. 1983) (single conspiracy to commit different offenses is a single criminal offense, and defendant can be convicted if he committed either offense). Both types of agreement, the court explained, were per se unlawful. After stating the elements of a Sherman Act violation and explaining the per se rule (SA 482-83), the court told the jury that a sales volume allocation agreement "is an agreement between competitors to divide sales of a particular product among the various competitors . . . for example, where two or more competitors agree among themselves that such competitor will limit its sales to a certain amount." SA 486. The jury was further instructed, among other things, that a business has the right unilaterally to determine the terms on which it will sell its products, that it is not unlawful in the absence of an agreement to charge the same price as a competitor, and that sharing information or stating "intentions concerning the prices and quantities of a product" does not by itself prove the existence of a conspiracy. SA 486-87.

The court's instructions were correct. Certain types of agreement "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se" under the Sherman Act. State Oil v. Khan, 522 U.S. 3, 10 (1997); Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). The antitrust laws do not require proof that such an agreement is actually anticompetitive in the particular circumstances. NYNEX Corp. v. Discon, Inc., 119 U.S. 493, 497 (1998). An agreement among competitors as to the price they charge is the "archetypal example" (Catalano, Inc. v. Target Sales, Inc., 446 U.S.

643, 647 (1980)), but other "naked restraints of trade with no purpose except stifling competition" (White Motor Co. v. United States, 372 U.S. 253, 263 (1963)) are also illegal per se.

Participants in a cartel may employ various techniques in their effort to increase profits by selling less output at higher prices. Simply agreeing on price may suffice, but individual participants have a powerful incentive to increase their output, which places downward pressure on prices. Simply agreeing on output, on the other hand, may be difficult to enforce if competitors cannot readily ascertain how much other firms are selling. Cartel participants may thus determine that a combination of price and output restraints works best. They may also divide the market, or otherwise agree not to compete for certain sales, in an effort to limit individual participants' incentives and opportunities to undermine the success of the cartel. The cartel's choice of techniques makes no difference to the legal analysis under the Sherman Act. See Socony Vacuum, 310 U.S. at 223.

Per se treatment is applied when a practice is "one that would always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979). Agreements among competitors to restrict their output thus are clear per se violations. See NCAA, 468 U.S. at 98-100 & n.19; FTC v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411, 423 (1990). So are naked horizontal agreements not to compete for particular sales. See, e.g., Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990) (per curiam). As this Court explained in General Leaseways (744 F.2d at 594-95): "[a]n agreement on output . . . equates to a price-fixing agreement . . . Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects."

Naked restraints on price or output have been repeatedly condemned as per se unlawful. For example, in Socony-Vacuum, 310 U.S. at 190-91, a glut in the spot market for gasoline prompted the major oil refiners to engage in a concerted effort to purchase and store surplus "distress" gasoline. The refiners assigned themselves "dancing partners" whose distress gasoline they agreed to buy in order to prevent price decreases. See Arizona v. Maricopa County Medical Society, 457 U.S. 332, 345 (1982). Although the agreement did not fix prices directly, it was nonetheless illegal per se; "the machinery employed by a combination for price-fixing is immaterial." Socony-Vacuum, 310 U.S. at 223. Similarly, in Sugar Inst., Inc. v. United States, 297 U.S. 553, 601-02 (1936), the Court held per se "unlawful an agreement to adhere to previously announced prices and terms of sale, even though advance price announcements are lawful and even though the particular prices and terms were not themselves fixed by private agreement." Catalano, 446 U.S. at 647. See also Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692-93 (1978); Superior Court Trial Lawyers, 493 U.S. at 422-23.[13]

Courts have condemned agreements to restrict production as per se violations. Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978) (restricting production of uranium); Virginia Excelsior Mills, Inc. v. FTC, 256 F.2d 538, 539-40 (4th Cir. 1958) (agreeing not to increase productive capacity and to allocate orders among themselves

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[13] Appellants argue (ABr. 33), relying on Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839 (9th Cir. 1996), that the worldwide nature of the conspiracy made per se treatment inappropriate. But the court there believed that "the alleged illegal conduct occurred in a foreign country." Id. at 843. Even assuming that Sammi was correctly decided, a questionable assumption (Phillip Areeda and Herbert Hovenkamp, Antitrust Law ¶ 273b, at 376-79 (1997)), the conspirators in this case fixed prices and allocated sales volumes in the United States and elsewhere both at meetings held in the United States and at meetings held outside of the United States. See also United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997), cert. denied, 118 S. Ct. 685 (1998).

based on productive capacities). In any event, it is not a precondition to per se treatment, as appellants suggest (ABr. 21), that courts have previously confronted exactly the same factual scenario. While courts do not condemn as unlawful per se practices with which they have little experience and which have uncertain competitive effects (White Motor Co., 372 U.S. at 263 (vertical distribution arrangements)), they do not hesitate to apply the per se rule to cartel conduct that may differ from that in prior cases but that nevertheless falls within the ambit of naked horizontal price-fixing, output restraints, or market division agreements. See, e.g., Catalano, 446 U.S. at 647-49 (agreement to stop giving credit "tantamount" to an agreement to eliminate discounts; "traditional per se rule against price-fixing" applied); Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995) (an agreement establishing geographic limitations on the areas in which lawyers could advertise, although they were free to practice law anywhere in the area, "sufficiently approximates an agreement to allocate markets, so that the per se rule of illegality applies"); United States v. Coop. Theatres of Ohio, Inc., 845 F.2d 1367 (6th Cir. 1988) (applying per se rule to agreement not to actively solicit a competitor's customers); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 151-55 (E.D.Wis. 1983) (movie "splits" are type of price-fixing and unlawful per se, notwithstanding prior Justice Department view that rule of reason applied and the absence of a "chain of cases finding splits to be illegal"), aff'd, 756 F.2d 502 (7th Cir. 1985).

3. There can be no doubt that the sales volume allocation agreement alleged and proved in this case is a naked restraint on competition, and is thus unlawful per se. The conspirators had already agreed on prices, and had acted to limit output by agreeing not to build additional capacity. G.Ex. 10/12/93 1B46-S1 at 14. ADM had existing unused capacity, however, and Andreas threatened at the Irvine meeting to flood the market with lysine if the conspirators could

not agree on a volume allocation. GA 100-01. Wilson later repeated that threat (GA 144). This ADM threat and demand for a volume allocation agreement meant that ADM would not utilize the full capacity of its plant and would restrict its sales to its allocated share of the market if its coconspirators similarly restricted their sales. See, e.g., G.Ex. 10/12/93 1B46-S1 at 14. The cartel responded by adopting a volume allocation agreement. Participants were assigned a volume of sales, and their monthly sales were to be checked to determine whether they had exceeded their quota. They agreed to "cut back" on volume as necessary to stay within the quota.

By agreeing on actual tonnages each conspirator would sell for 1994 and 1995, the conspirators on two occasions directly agreed to restrain output. Further, the agreement as to percentage share was itself a device calculated to restrict cartel output and maintain high prices. By capping the individual participant's market share, the agreement eliminated each firm's incentive to seek additional sales by undercutting the agreed-on price.[14]

The district court instructed the jury that a volume allocation agreement is an agreement "to divide sales of a particular product among the various competitors," thereby identifying clearly the element that makes the volume allocation agreement in this case a per se offense. The court's example made clear that an agreement pursuant to which "two or more competitors agree among themselves that such competitor will limit its sales to a certain amount" is such an agreement. That instruction was correct and sufficient to explain the law governing naked horizontal volume allocation agreements.

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[14] Indeed, a volume allocation agreement might be a more effective strategy for a cartel seeking to depress output and keep prices high than a simple agreement dividing customers or geographic markets. A percentage-based agreement enables a single participant with a substantial quota to hold down industry output by limiting its own sales (thereby requiring other participants to limit their sales in order to keep their market shares from increasing).

4. Appellants nonetheless contend that the volume allocation agreement proved in this case should not have been treated as a per se offense.[15] Their arguments are without merit.

Appellants argue that the volume allocation agreement did not actually have the effect of diminishing output or competition in the United States (ABr. 31-33). The government, however, is not required to prove an actual effect on prices or output from per se unlawful conduct. Catalano, 446 U.S. at 649 ("when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se"). In any event, the volume allocation agreement functioned as intended by the cartel; the agreed-on price of lysine held relatively steady throughout 1994, and the conspirators reported that their 1994 sales closely matched their allocations. Tr. 1132-36, 4215-16; GA 160-67. Even if output increased in 1994, that merely demonstrates that the cartel found it profitable to peg output at a slightly higher level; there is no reason to assume that 1994 output would not have been higher than it was if individual firms had been free to compete for sales in excess of their assigned quotas.

Equally unavailing are appellants' arguments that the volume allocation agreement served procompetitive purposes. This volume allocation agreement was undertaken by a hard-core cartel; there is nothing in the record to suggest that the agreement was ancillary to any legitimate joint venture or other efficiency-enhancing integration of economic activity. Indeed, at trial,

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[15] Appellants' assertion that they did not have "fair warning" (ABr. 36-39) that allocating sales volumes violated the Sherman Act is nonsense. Allocating sales volumes is simply another way of restricting output and fixing prices -- conduct that has long been viewed as a criminal violation of the Sherman Act. Appellants' "prejudicial variance" argument (ABr. 39) ignores the plain language of the indictment. SA 2.

appellants conceded the existence of "a criminal cartel from Asia" that they knew "were price fixers" and admitted that they had attended meetings with members of this "criminal cartel." Tr. 765, 775; see also Tr. 761-62, 786, 830, 842, 5781-82.

Appellants now belatedly argue (ABr. 34) that their restraints on competition were procompetitive because they kept firms from leaving the market. As the Supreme Court replied to a similar argument (defending price-fixing on the ground that it encouraged entry):

> If that potential justifies horizontal agreements among competitors imposing one kind of voluntary restraint or another on their competitive freedom, it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases.

Catalano, 446 U.S. at 649. Similarly, appellants' claim that ADM was entitled to participate in a cartel because foreign competitors could otherwise reap the benefits of its efforts to promote lysine sales (ABr. 34) proves too much. Some free-riding by competitors is inevitable whenever a firm makes efforts to boost industry demand, but the antitrust laws do not provide blanket sanction to cartels as a solution.

Appellants also assert (ABr. 35-36) that the sales volume allocation agreement was ancillary to a procompetitive information exchange. But there was no evidence of a procompetitive information exchange in this case. The conspirators exchanged information about future prices and sales, in furtherance of the cartel's efforts to raise price. Even if there had been such a procompetitive exchange, moreover, the sales volume allocation would not have

been ancillary to it.[16] See General Leaseways, 744 F.2d at 595 (per se rule applied when there was no organic connection between the restraint and the cooperative needs of the enterprise).

Finally, appellants' complaint (ABr. 20, 24-25) that the jury should have been instructed that it had to find an output restriction is plainly wrong. The jury was correctly instructed, among other things, that it could not convict appellants unless it found that they had knowingly and intentionally become members of the conspiracy charged in the indictment by either agreeing to fix prices or allocating sales volumes and that sales volume allocation requires proof of an agreement to divide sales among the competitors. SA 482-491. There is no requirement in a per se case that the government prove an output restriction. That sales volume allocation agreements (like other naked restraints) "always or almost always tend to restrict competition and decrease output" simply explains why, if the jury finds such an agreement, the agreement is illegal as a matter of law. Broadcast Music, 441 U.S. at 19-20.

5. The district court also correctly observed that the sales volume allocation agreement in this case is per se unlawful because it was in furtherance of a price-fixing agreement. Appellants never disputed the existence of "a criminal cartel from Asia" that they knew was fixing prices. Tr. 765, 775. Moreover, the jury necessarily concluded that the evidence established the existence of the price-fixing conspiracy charged in the indictment because it convicted Whitacre.[17] And it was this "criminal cartel" that appellants made more effective by persuading

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[16] See also SA 482- 491 (jury instructed that it could not convict unless it found that appellants had knowingly and intentionally agreed to allocate sales volumes or fix prices); SA 486-87 (jury instructed that information exchange was lawful unless it "was part of a conspiracy to fix or control prices or allocate volumes").

[17] Whitacre became a cooperating witness long before a sales volume allocation agreement was finalized. See n.3, supra.

its members to agree to allocate their sales volumes. Accordingly, the sales volume allocation agreement was in furtherance of price-fixing that appellants facilitated rather than reported to the government.

Appellants complain (ABr. 20) that the jury was not instructed that it must find that sales volume allocation was in furtherance of the price-fixing conspiracy. But a naked horizontal sales volume allocation is per se illegal; the jury need not make any additional findings about its purpose or effect. Further, the absence in the instruction of the words "in furtherance of the price-fixing conspiracy" was immaterial, because appellants conceded that a price-fixing conspiracy existed. If the jury found that the evidence showed the volume allocation, it necessarily also found that the allocation was in aid of the price-fixing -- because price-fixing was not contested, and because of the natural effect of output restrictions on price.

6. Finally, while the jury was instructed that it could convict if it found either a conspiracy to fix prices or a sales volume allocation conspiracy, there is no reason to believe that the jury convicted anyone of only allocating sales volumes. In convicting Whitacre, the jury necessarily concluded that the price-fixing conspiracy charged in the indictment existed before Whitacre became a cooperating witness in November 1992. The uncontradicted testimony concerning that period established that Wilson was the primary spokesperson for ADM at the Mexico City and Paris price-fixing meetings he attended and that Andreas was the only other ADM official who was aware of the real purpose of those meetings and had to approve any agreements made at those meetings. See pp. 3-4, supra. Accordingly, the most plausible interpretation of the jury's verdict is that it convicted all defendants of price-fixing and any error in the sales allocation jury instruction was harmless. Appellants were not prejudiced by evidence concerning an agreement to allocate sales volumes because that same evidence was admissible to

prove price-fixing. And because there is sufficient evidence to support a finding that appellants conspired to fix prices, this Court can affirm the judgment on that basis alone. Griffin v. United States, 502 U.S. 46, 51-56 (1991); United States v. Gonzalez, 93 F.3d 311, 320-21 (7th Cir. 1996); United States v. Robinson, 96 F.3d 246, 250 (7th Cir. 1996); United States v. Cotton, 101 F.3d 52, 56 (7th Cir. 1996).

III. After ADM Pled Guilty, The Cox Immunity Letter Conferred No Benefits On Appellants

The district court correctly rejected appellants' argument (WBr. 21-26; ABr. 52-53) that they are third-party beneficiaries of an October 11, 1996, letter from the Antitrust Division to Cox's counsel, relating to a proffer of evidence by Cox. See, e.g., SA 31-39, 185-187.

Cox was interviewed by the government on October 11 and 12, 1996, as a precondition to the government's execution of a plea agreement with ADM. SA 32. The ADM plea agreement provided for a reduction in fines in return for ADM's cooperation in the citric investigation. Id.. The interview with Cox provided the government with a preview of ADM's promised cooperation and enabled ADM to obtain a U.S.S.G. § 8C4.1 departure from the fine that it otherwise would have been required to pay on the citric count in the information. Id.; GA 190-91. The ADM plea agreement explicitly excluded appellants from the immunity and non-prosecution protection extended to other ADM employees (GA 193-94). ADM was aware that the government intended to prosecute appellants and to use testimony and information given by cooperating ADM employees, including Cox, against them.

Prior to interviewing Cox, the government provided a letter to his counsel that expressly referred to the "proposed [ADM] plea agreement" and stated that the government needed to interview Cox to assess the value of ADM's proffered cooperation, which included the

cooperation of its employees. SA 27. The letter stated that the government had obtained a court order granting statutory immunity to Cox and that, if Cox was truthful and complete in providing information during the interview, "the United States and ADM will execute the contemplated plea agreement." SA 27-28. The letter acknowledged that statements made by Cox and information provided by him during the interview were covered by the immunity order and could not be used against him in a criminal prosecution. It then stated (SA 28):

> Further, the United States acknowledges that statements made by Mr. Cox and information provided by Mr. Cox during the interview are covered by Federal Rule of Criminal Procedure 11(e)(6) and also may not be used directly or indirectly against ADM or any of its employees, subsidiaries, or affiliates in any criminal prosecution.[18]

Rule 11(e)(6)(D) prohibits the use of statements made during plea bargain discussions that "do not result in a plea of guilty." The letter, extending Rule 11(e)(6), confirmed that not only Cox, but also ADM and its employees (including Andreas and Wilson) were protected from the government's use of Cox's statements if the plea agreement fell through after Cox was interviewed. In that unlikely event, the letter, coupled with Rule 11(e)(6), provided that ADM and its employees would be in no worse position than before Cox's cooperation. Once the plea agreement was signed and ADM pled guilty on October 15, 1996, the government was free to make use of Cox's statements against anyone but Cox. Indeed, it did use Cox's statements against ADM at the plea hearing without objection by ADM. GA 202-03.

Appellants rely on the letter's final clause ("may not be used directly or indirectly against ADM or any of its employees") to argue that they are third-party beneficiaries of this

[18] A letter containing the quoted language was also sent to ADM. SA 29.

agreement.[19] They assert that the clause shows that the parties -- Cox, ADM and the government -- intended to prevent Cox's testimony from being used directly or indirectly against any ADM employee, even Wilson and Andreas, in any circumstance. This is the type of argument this Court has held "ignore[s] all common sense . . .[and] epitomizes why a lot of people hate lawyers." Wilson v. Washington, 138 F.3d 647, 650 (7th Cir. 1998), cert. denied, 119 S. Ct. 147 (1998).

Most of the "clear" "propositions of law" that appellants cite in support of their argument (WBr. 22-23) are irrelevant. Unlike almost all of the cases appellants cite, this case does not involve any agreement that the government made with appellants; there is no letter to appellants promising them anything and no claim by appellants that the government misled them. And the only plea bargain at issue is the ADM plea bargain. Finally, appellants make no claim that they did anything in reliance on the Cox letter and, indeed, do not contend that they were even aware of the Cox letter prior to their indictment. United States v. Traynoff, 53 F.3d 168, 170-71 (7th Cir. 1995) (recognizing that government is not required to "fulfill every agreement or offer it makes" and refusing to enforce government agreement to dismiss a matter because the defendant had not acted in reliance on it).

Accordingly, at best, appellants are third-party beneficiaries of the Cox letter. But exactly because any desperate defendant could claim to be the third-party beneficiary of an agreement to which he was not a party, appellants have the burden of proving that the letter was intended to

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[19] They also argued that they were entitled to a hearing under Kastigar v. United States, 406 U.S. 441 (1972). But Kastigar has no application to this case. The Fifth Amendment right against self-incrimination does not protect appellants from use of Cox's statements, because that right is strictly personal and "can only be invoked by the individual whose testimony is being compelled." Moran v. Burbine, 475 U.S. 412, 433-34 n.4 (1986); see also, United States v. Bustamante, 45 F.3d 933, 942-43 (5th Cir. 1995); SA 37-39, 185-86.

benefit them as they claim. See, e.g., Corrugated Paper Prod., Inc. v. Longview Fibre Co., 868 F.2d 908, 910 (7th Cir. 1989); Williston on Contracts (3d ed. Jaeger) §356A at 836 & nn.3, 4. They do not come close to proving that the Cox letter conferred any benefits on them once ADM pled guilty.

First, conspicuous by its absence in appellants' briefs is any reference to Fed.R.Crim.P. 11(e)(6), even though that rule is cited in the same sentence that the clause on which appellants rely appears and has been relied on by both the government and the district court (SA 186) in rejecting appellants' argument. As we have already noted, that reference confirms that any benefits conferred by the letter expired once ADM pled guilty.

Moreover, it is manifest that the parties did not intend to deal with more than the Rule 11(e)(6)(D) contingency. Not only does the government deny any intention to confer any benefits on appellants, but neither Cox nor ADM (which received a similar letter) has ever claimed that the government violated any agreement with them, or filed anything suggesting that they intended the letter to benefit appellants if ADM pled guilty.

Finally, contrary to appellant's assertions (WBr. 24), the district court correctly examined the surrounding circumstances to determine the intent of the parties. The letter itself referred to the proposed ADM plea agreement, and that agreement, while not filed until after Cox was interviewed, was substantially drafted before the Cox letter was sent, as the letter itself suggests.[20] Moreover, the relation of the quoted clause to the rest of the sentence and the letter itself was not entirely clear from the letter itself. See, e.g., United States v. Rourke, 74 F.3d 802, 807 (7th Cir. 1996) (meaning of term not clear and definite; court properly turned to extrinsic

[20] Cox's interview began on a Friday; the ADM plea agreement was filed the next business day.

evidence). Further, this Court, applying federal common law, looks to the surrounding circumstances to determine whether a contract involving the federal government creates a third-party beneficiary. See, e.g., Price v. Pierce, 823 F.2d 1114, 1121 (7th Cir. 1987); D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1480-83 (7th Cir. 1985).

The government would not simultaneously have both conditioned the plea agreement, which permits use by the government against Wilson and Andreas of information provided by ADM cooperating employees (GA 193-95), on Cox's satisfactory proffer, and promised not to use Cox's testimony against the very employees the government intended to prosecute. Nor could the government have used Cox's testimony at the plea hearing, without objection by ADM, if appellants' reading were correct. Further, appellants' reading is inconsistent with Paragraph 22 of the Plea Agreement (GA 199), which provides that it "constitutes the entire agreement between the United States and [ADM] concerning the disposition of the criminal charges in this case."

In short, appellants' third-party beneficiary argument ignores both the plain language and context of the letter on which they rely and the contemporaneously-drafted ADM plea agreement.

IV. Cox's Testimony About The Citric Conspiracy Was Properly Admitted

The lysine conspiracy was consciously modeled on a price-fixing and volume allocation conspiracy in the citric industry, in which ADM participated. SA 96-98, 188-192. Indeed, Wilson repeatedly urged the conspirators to apply the citric model to lysine. E.g., GA 86 (Crouy notes); G.Ex. 4/28/93 1B43-S2 at 89-95, S4 at 181. At the Tokyo meeting in May, 1993, Wilson explained to the conspirators at length how the citric conspiracy worked, and how its format could be applied to lysine. G.Ex. 5/14/93 1B54-S1 at 1-11. Andreas was involved in three separate taped conversations during which the citric conspiracy was discussed. G.Ex. 10/12/93

1B46-S3 at 43-44)(Andreas stating lysine conspiracy is "not there yet" compared to citric conspiracy); G.Ex. 10/25/93 1B56-58-S1 at 159-161 (discussing submitting numbers to association, like citric); G.Ex. 10/13/94 1B121, 124-S1 at 14-16 (Andreas, Whitacre, and Wilson comparing roles in citric conspiracy with lysine conspiracy).

In this Court, Andreas does not object to the numerous references to the citric conspiracy that the jury heard on tape. Rather, he contends (ABr. 42-46) that Cox's testimony about the citric conspiracy should not have been admitted against him. He asserts that there is no evidence that he was involved in the citric conspiracy, that Cox's testimony "did not implicate Andreas in the citric conspiracy" (ABr. 45), and that he should have received a limiting instruction preventing the jury from using Cox's testimony against him.[21] The district court, however, did not abuse its discretion in admitting Cox's testimony. United States v. Adames, 56 F.3d 737, 742 (7th Cir. 1995); United States v. Ramirez, 45 F.3d 1096, 1101 (7th Cir. 1995); United States v. Mounts, 35 F.3d 1208, 1214 (7th Cir. 1994) ("An abuse of discretion occurs only when no reasonable person could take the view of the trial court").

1. Because Andreas does not object to the numerous references to the citric conspiracy on tape, claims that any discussions of citric during taped conversations involving him were "innocuous" (ABr. 43), and contends that Cox's testimony "did not implicate" him in that conspiracy (ABr. 45), Andreas cannot argue that he was prejudiced by Cox's testimony. Fed. R. Crim. P. 52(a). And insofar as Andreas contends that Cox's testimony did not implicate him, Fed. R. Evid. 404(b) has no application, because that rule addresses only evidence of crimes or

[21] In the district court, Andreas also unsuccessfully argued that he had not received proper notice that the citric evidence would be introduced against him. SA 191-92. That argument is not in Andreas' brief on appeal and is waived.

wrongs committed by the person against whom the evidence is offered. United States v. Gonzalez-Sanchez, 825 F.2d 572, 579-83 (1st Cir. 1987); United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983).

Further, Rule 404(b) did not apply to Cox's testimony about citric because it was "directly related to the charged offense" and it was not offered against Andreas to prove "other crimes, wrongs, or acts." To the extent that evidence is of the same crime or wrong that is charged or alleged, Rule 404(b) by its terms simply does not apply.[22] As the Advisory Committee Notes, 1991 Amendment, state, the Rule "does not extend to evidence of acts which are 'intrinsic' to the charged offense." The district court correctly held that the citric evidence was intrinsic because it showed how Wilson obtained the expertise to organize the lysine conspiracy, the origin of the lysine conspiracy's structure, and how the lysine conspiracy was intended to function. SA 189-90; see, e.g., United States v. Akinrinade, 61 F.3d 1279, 1285-86 (7th Cir. 1995) ("evidence concerning the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime," not within 404(b)); Adames, 56 F.3d at 742; Ramirez, 45 F.3d at 1101-02 (evidence concerning marijuana and a gun found in defendant's apartment was admitted at his trial for conspiring and attempting to possess cocaine with intent to distribute). Accord United States v. Gibson, 170 F.3d 673, 680-83 (7th Cir. 1999). The conspirators, particularly Wilson but also Andreas on three separate occasions, repeatedly discussed the citric conspiracy in the middle of their recorded discussions of the lysine

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[22] Andreas cannot rely on Huddleston v. United States, 485 U.S. 681 (1988). That case involved whether a trial court must make a preliminary finding before permitting Rule 404(b) evidence. Cox's testimony, however, was not admitted pursuant to Rule 404(b) and, in any event, Huddleston requires only a showing that Rule 404(b) evidence is relevant. Id. at 689-691. The district court concluded that it was. SA 97-98; 189-91.

conspiracy. Andreas' failure to object on appeal to these recorded discussions of the citric conspiracy is an implicit acknowledgment of the direct relationship between the two conspiracies. Gibson, 170 F.3d at 682 ("gun discussions were so intertwined with the drug negotiations that admission of the portions of the taped conversations pertaining to gun sales was necessary to enable the jury to fully understand and make sense of the underlying negotiations for the sale of crack cocaine").

Because evidence concerning the citric conspiracy was not subject to Rule 404(b), Cox's testimony explaining the citric conspiracy was admissible if it was relevant and did not result in "unfair prejudice" under Fed.R.Evid. 403. Advisory Committee Notes on Rule 404(b), 1972 Proposed Rules. The citric evidence was probative of Wilson's guilt in the lysine conspiracy. Wilson (who does not object to citric evidence on appeal) repeatedly compared the citric conspiracy to lysine, and he put his intent at issue when he claimed that he was only pretending to fix lysine prices. Evidence that directly implicates one conspirator is admissible during a conspiracy trial whether or not it implicates other conspirators.

Cox's testimony was also relevant to Andreas, because the testimony helped the jury to interpret taped conversations, some of which involved Andreas, about the lysine and citric conspiracies, and to understand the origins and operation of the lysine conspiracy. While Andreas dismisses those taped conversations as "innocuous" (ABr. 43), the jury had the right to hear about the citric conspiracy. Ramirez, 45 F.3d at 1101. Cox provided the evidence necessary to understand what Wilson and Andreas were talking about when they discussed citric and lysine. Gibson, 170 F.3d at 681-82; Ramirez, 45 F.3d at 1102-03. Cox's testimony also rebutted Andreas' defense that ADM does not make deals and never intended to agree to fix lysine prices or allocate sales volumes. Park, 421 U.S. at 676-78 (evidence of prior violations admissible to

rebut defense that defendant had justifiably relied on subordinates); Ramirez, 45 F.3d at 1102 (evidence concerning marijuana "directly relevant" to defendant's "claim that he was an innocent bystander rather than a member of the [cocaine] conspiracy"). Finally, the district court correctly ruled (SA 98, 192) that Rule 403 did not preclude Cox's testimony because the evidence, although inculpatory, was not unfair. It was not likely to evoke an emotional response from the jury causing it to base its decision on considerations apart from the evidence. See, e.g., Gibson, 170 F.3d at 682-83; Adames, 56 F.3d at 742; Ramirez, 45 F.3d at 1103.

2. Even assuming that 404(b) applied to Cox's testimony, the district court did not abuse its discretion in admitting the evidence. United States v. Long, 86 F.3d 81, 83 (7th Cir. 1996) (listing four Rule 404(b) criteria). Cox's testimony was relevant and related to matters other than propensity to commit a crime -- showing intent to conspire, an important issue in the case, and the nature, origin, and context of the lysine conspiracy. It also placed in context other references at trial to citric. SA 97-98, 189-92. There is no dispute as to the existence of the citric conspiracy. And the probative value of the citric evidence far outweighed any possible danger of unfair prejudice (Fed. R. Evid. 403). SA 97-98, 198-91. Accordingly, nothing in 404(b), even if it applied, precluded admission of Cox's testimony.

Finally, Andreas was not unfairly deprived of a limiting instruction (ABr. 45). The court declined to give a limiting instruction during trial but told appellants that they could renew their requests at the conclusion of the case (Tr. 2710-12). Andreas did not do so;[23] the only relevant instruction that he offered (#7) (GA 182) would have precluded the jury from considering Cox's testimony against Andreas for any purpose. Since the district court correctly held that Cox's

[23] Wilson requested and received a limiting instruction concerning Cox's testimony. Tr. 5596-97.

testimony was admissible against Andreas, that instruction was wrong and the district court did not abuse its discretion in refusing to give that instruction. A district court is not required to edit incorrect limiting instructions submitted by a defendant or to invent a limiting instruction that the defense has not requested. United States v. Shelton, 669 F.2d 446, 465 (7th Cir. 1982) ("[t]here is no requirement to give an instruction that is inaccurate or misleading"). Indeed, the district court could have reasonably concluded that having lost the battle to keep the jury from considering Cox's testimony against him, Andreas preferred to rely on his argument that Cox had not implicated him in the citric conspiracy and did not want any limiting instruction.

V. Evidentiary Rulings Concerning the Whitacre Tapes Were Correct

Appellants contend (WBr. 30-38, ABr. 53) that the district court erred in admitting into evidence the tapes made by Whitacre[24] and in excluding (SA 461) testimony of FBI agent Athena Varounis, concerning later-retracted statements that Whitacre made to her (ABr. 46-48, WBr. 3). The district court, however, did not abuse its discretion when it admitted the tapes into evidence and excluded Agent Varounis' testimony. See United States v. Brady, 145 F.3d 889, 892 (7th Cir. 1998)(standard of review for evidentiary rulings).

A. Appellants Failed to Establish Their Standing To Suppress The Whitacre Tapes

The district court correctly held (SA 47, 62-63A) that appellants had failed to meet their initial burden of establishing standing to suppress the Whitacre tapes. Each failed to identify which of the tapes that they sought to suppress actually contained their voices. Id.

[24] Appellants do not challenge admission of videotapes made by the FBI, with Whitacre's consent and assistance, of the Irvine, Hawaii, and Atlanta meetings. They also ignore the fact that they introduced into evidence numerous Whitacre tapes, claiming that they were authentic and contained exculpatory conversations. E.g., Andreas Ex. 613C, 619I.

Under both Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. 2510 et. seq., and the Fourth Amendment, a defendant cannot argue that evidence must be excluded because someone else's rights were violated. United States v. Williams, 737 F.2d 594, 616 (7th Cir. 1984); Womack v. Meiszner, 466 F.2d 555, 558 (7th Cir. 1972). A person who was not a party to an intercepted conversation does not have standing to seek suppression of evidence gathered from the interceptions. United States v. Thompson, 944 F.2d 1331, 1336, 1339 (7th Cir. 1991). Coconspirators are not entitled to special status. Alderman v. United States, 394 U.S. 165, 171-172 (1969).

The burden of proof was on appellants to establish standing. See, e.g., Rakas v. Illinois, 439 U.S. 128, 132 n.1 (1978) ("proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated"); United States v. Williams, 580 F.2d 578, 583 (D.C.Cir. 1978); United States v. Montoya-Eschevarria, 892 F. Supp. 104, 106 (S.D.N.Y. 1995). Appellants should have itemized on the record, under penalty of perjury, the recordings on which their voices appeared. Id. This was not merely an academic exercise, because, in the absence of such a statement, they remained free to claim at trial that their voices were not captured on tape. Id. Indeed, appellants did contend that they had been framed through "manipulation and fabrication of unreliable evidence." See, e.g., DktNo. 93 at 9. Moreover, some of the tapes played at trial do not contain their voices but rather record conversations between Whitacre and one of the government's trial witnesses. E.g., G.Ex. 11/9/92 1B1; G.Ex. 7/13/93 1B21; G.Ex. 11/30/93 1B69.

B. The Tapes Were Admissible

Title III (see 18 U.S.C. 2511(1)), generally prohibits intentionally intercepting oral communications (for example, by tape recording). An interception is lawful, however, if the

person "is a party to the communication" and "acting under color of law to intercept" the communication (18 U.S.C. 2511(2)(c)). An interception is also lawful "where such person is a party to the communication," unless the communication is intercepted "for the purpose of committing any criminal or tortious act" in violation of state or federal law. 18 U.S.C. 2511(2)(d). Contrary to appellants' contention (WBr. 35-38), the tapes were admissible (see 18 U.S.C. 2515) under both sections.

1. Under Color of Law. Cooperating witnesses "who record private conversations at the direction of government investigators are 'acting under color of law,'" under 18 U.S.C. 2511(2)(c). United States v. Haimowitz, 725 F.2d 1561, 1582 (11th Cir. 1984). See also, e.g., Obron Atlantic Corp. v. Barr, 990 F.2d 861, 864 (6th Cir. 1993); United States v. Shields, 675 F.2d 1152, 1156-57 (11th Cir. 1982); United States v. Tousant, 619 F.2d 810, 813 (9th Cir. 1980), United States v. Craig, 573 F.2d 455, 473, 474 n.13, 476 (7th Cir. 1977). Appellants argue that Whitacre was not acting "under color of law" because the government "exercised practically no control at all over [him]." WBr. 36-37. The district court, however, disagreed, finding that "Whitacre was supervised, and directed in his cooperation with the government" (SA 49, 63-63A). There is no reason for this Court to disturb this basically factual determination.

The initial tape recording that Whitacre made on November 9, 1992, of his conversation with Yamamoto to demonstrate the existence of the conspiracy was directly monitored by FBI agent Brian Shepard. Tr. 2843-47. Whitacre thereafter signed a cooperation agreement (SA 10-12 (text), 890-92), in which he agreed to act in a "covert capacity" "solely at the direction and under the supervision of agents of the FBI and [the U.S. Attorney's] office" and agreed to follow all their directions. See also G.Ex. 52 (taping consent forms signed by Whitacre). Whitacre's status was "cooperating witness" -- that is, an individual whose identity is concealed until he

testifies and who furnishes substantial information in an operational role, collecting evidence, at the direction of the FBI. SA 877-78, 897; Tr. 2894-96.[25]

The FBI gave Whitacre a microcassette recorder and tapes and directed him how to use them. It also sometimes gave him a reel-to-reel Nagra recorder, made specifically for law enforcement uses. STr. 145, 574-75; Tr. 2883-84. Agent Shepard maintained and tested the devices; he affixed them to Whitacre's body on occasion. Tr. 2885-86. Whitacre made 120 to 130 tapes during the investigation. Tr. 2890.

The FBI scheduled frequent meetings with Whitacre to discuss recent and expected developments, talk about future taping, and pick up tapes and documents. Tr. 2889-90, 3780-82.[26] And it cautioned Whitacre when he exceeded his instructions. STr. 557-59; Tr. 2904-05; compare WBr. 5 n.4. FBI Form 302's memorialize more than 160 meetings, on average at least a meeting per week. Tr. 3994-96. The FBI agents often picked up the tapes the day they were made; usually pick-up was within two days. STr. 576; Tr. 2890-91, 3994. Fewer tapes were collected after the conspiracy was well-established. Tr. 2906-07. An FBI agent listened to almost all the tapes as soon as they were received, and discussed them with Whitacre. STr. 60, 197; Tr. 2891. There were several layers of review of Whitacre's actions both within the FBI and by Department of Justice attorneys. Tr. 2898.

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[25] By contrast, an informant is someone whose identity is concealed and just furnishes information to the FBI. SA 898; Tr. 2895. Informants, but not cooperating witnesses, are subject to a suitability determination. Tr. 2897; compare ABr. 4.

[26] Contrary to appellants' contention (WBr. 5), there was no credible evidence that Whitacre failed to turn in tapes that he made, only that he might have failed to return all the blank tapes that he was given. See STr. 197-98.

Whitacre was instructed to tape particular scheduled meetings (STr. 576) and entire conversations involving violations of federal criminal statutes, but not to record legitimate ADM business. SA 886-87, 887A; Tr. 2899. Whitacre had to have discretion concerning which conversations he taped because it was not possible to run tapes constantly during the 2 1/2-year investigation. Further, the FBI could not attend meetings within ADM to supervise Whitacre, or get transmissions from the ADM plant, or infiltrate the lysine conspiracy. STr. 76, Tr. 2899-2901.

In these circumstances, Whitacre was clearly acting under color of law in making the audiotapes. He had formal status as a cooperating witness, and his recording activities were supervised to the extent possible, considering the nature of the investigation. See SA 63-63A. Craig, on which appellants principally rely (WBr. 36), is not to the contrary; this Court held only that the degree of supervision in Craig was adequate under Section 2511(2)(c), not that the same degree of supervision was necessary in every case. 573 F.2d at 476. Indeed, Whitacre's supervision by the FBI was greater than that approved in Obron. In Obron, the government by letter acknowledged witness Owen's cooperation and set out terms, and it instructed him on how to conduct himself during recording. Owen used his own equipment to record and decided which conversations to tape. In contravention of instructions, Owen failed to keep a log of conversations. There were no procedures for regular meetings, and contact for a 10-month period was negligible. In total, there were about 50 contacts between Owen and DOJ. 990 F.2d at 862-65. In both this case and Obron, the "undisputed evidence of continuous, albeit irregular, contact between [the cooperating witness] and [DOJ], following their explicit request that he

assist them in this very way and their instructions on how to conduct the calls, outweighs the lack of direct DOJ supervision over the recording process ..." Id. at 865.[27]

2. Criminal or Tortious Purpose. Whitacre's taping was not "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. 2511(2)(d). See also, Thomas v. Pearl, 998 F.2d 447, 451 n.5 (7th Cir. 1993) (person acting under color of law is, by definition, not committing a crime or tort). Appellants had the burden of proving an unlawful purpose by a preponderance of the evidence. United States v. Zarnes, 33 F.3d 1454, 1469 (7th Cir. 1994). While they charge that Whitacre made the tapes in hopes of advancing his career at ADM, by discrediting other ADM officials (WBr. 37), they utterly fail to explain why "career advancement" (id.) is tortious or criminal.[28] Further, to the extent that Whitacre made the tapes to curry favor with the government and obtain leniency, taping a conversation in hopes of turning the tape over to the

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[27] Appellants' contention (WBr. 6, citing SA 74-76) that the FBI's supervision of Whitacre violated DOJ guidelines is both irrelevant and incorrect. Internal guidelines do not create any rights that a defendant can enforce against the government. United States v. Caceres, 440 U.S. 741, 751-52 (1979) (failure of government agency to follow internal guidelines on electronic surveillance did not raise constitutional issues). In any event, the guidelines that the district court quoted when it criticized the FBI (SA 74-75 n.1) (SA 1094-95 (text)) apply to undercover operations. See SA 1094. Undercover operations involve undercover employees, who must be employees of law enforcement agencies. GA 171. Whitacre's taping was thus not an undercover operation, and the cited guidelines were inapplicable. Tr. 2894; STr. 715 (cited policy did not apply to cooperating witnesses).

[28] Appellants incorrectly state (WBr. 37) that "[a]t the time he began taping Whitacre acknowledged that no one at ADM was price-fixing." In fact, ADM had already fixed prices at meetings in Mexico City and Paris before Whitacre ever spoke to the FBI. The first tape was made to confirm Whitacre's claim that a price-fixing conspiracy was taking place. See supra, p. 39.

Steering conversations (WBr. 37) is a permissible strategy in covert investigations. See, United States v. Russell, 411 U.S. 423, 435-36 (1973) ("there are circumstances when the use of deceit is the only practicable law enforcement technique available").

government to obtain a better deal for oneself is not an unlawful purpose under Section 2511(2)(d). Zarnes, 33 F.3d at 1469 (collecting cases).

Appellants also argue (WBr. 37-38) that Whitacre made the tapes in order to "escape[] investigation and prosecution for his extortion attempt" and to "ke[ep] his embezzlement from being discovered,"[29] but they do not substantiate their claim. Under subsection (d), the "purpose" of the taping must be "committing any criminal ... act" -- such as blackmail or extortion. By-Prod. Corp. v. Armen-Berry Co., 668 F.2d 956, 960 (7th Cir. 1982); United States v. Jones, 542 F.2d 661, 670 n.18 (6th Cir. 1976). This statutory formulation does not appear to encompass taping as a diversionary tactic, to conceal, rather than commit, a crime. As to appellants' unproven claim that Whitacre intended fraudulently to appropriate the $6 million that Ajinomoto allegedly was demanding from ADM, only one conspiracy-related tape was made before Whitacre admitted to the FBI that he had fabricated the virus sabotage story. Accordingly, the taping can hardly have diverted the FBI from this matter. And appellants failed to explain how taping provided cover for Whitacre's admitted embezzlement activities. Shepard testified that he did not know about or suspect the embezzlement while Whitacre was making tapes for the FBI (SA 370B; Tr. 2866), and appellants did not show how the trail of the lysine conspiracy could have led to evidence of Whitacre's embezzlement, but was deflected by the taping. In short, as the district court held (SA 49-50), appellants "failed to establish a logical link between Whitacre's alleged criminal motives and his actions."

C. Admission of Tapes Recorded by Whitacre Did Not Deny Appellants Due Process

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[29] Whitacre was convicted of embezzling from ADM and sentenced to nine years in prison. SA 370B.

Appellants contend (WBr. 34-35) that the Whitacre-made tapes were so unreliable that their admission denied them due process. The district court, however, correctly concluded after an evidentiary hearing that the tapes were admissible.

While appellants contend that Whitacre selectively recorded conversations and omitted exculpatory matters, they have not identified any specific exculpatory matters that could have been taped but were not.[30] Indeed, the Whitacre tapes are amply corroborated by the videotapes made by the FBI, by contemporaneous documents, and by coconspirators who testified at trial. Moreover, the tapes are internally consistent. STr. 655-56. And it is undisputed that selective taping was appropriate to the extent that Whitacre was instructed not to record matters that did not relate to criminal violations.

Further, appellants fail to cite any decision where selective taping by a government witness was held to deprive a defendant of a fair trial. Appellants were given wide latitude to prove and argue their selective taping claim to the jury, as well as to attack Whitacre's credibility and motivations. See SA 77, 163. See also United States v. Chaudhry, 850 F.2d 851, 857 (1st Cir. 1988) (the proper venue for challenge to completeness of tapes is at trial). In these circumstances, appellants cannot show any lack of fairness, and certainly not denial of due process. See United States v. Feekes, 879 F.2d 1562, 1564-66 (7th Cir. 1989)(rejecting argument that government decision not to tape conversations that "could" have been exculpatory violated

[30] In the district court, appellants complained that the government should have recorded the Andreas/Yamada lunch at Irvine. But since Whitacre did not attend that lunch, the government could not have recorded that conversation without a Title III court order. However, 18 U.S.C. 2516 provides that a Title III court order can be obtained only in certain types of investigations. The Sherman Act, 15 U.S.C. 1, is not listed in Section 2516.

due process); Chaudhry, 850 F.2d at 857 (rejecting argument that selective recording violated due process rights).

Appellants also allege (WBr. 6, 34) that Whitacre destroyed or altered exculpatory taped evidence.[31] There is no evidence supporting these allegations. Whitacre told Agent Varounis, who investigated Whitacre's claims regarding evidence destruction, that Agent Shepard asked Whitacre to destroy exculpatory evidence. But Whitacre claimed that he did not comply. See SA 1077-80 (FBI Form 302). Thus, even crediting Whitacre's account, no evidence was destroyed.[32] More important, Whitacre later by affidavit retracted the allegation (see SA 76, 78, 180-81; GA 178-79), and dismissed his lawsuit against Shepard (SA 13H) in which he made the same allegation (SA 160-62) -- facts that appellants fail to mention. Agent Shepard testified that Whitacre was not told to destroy evidence. STr. 11, 297. Accordingly, appellants' claim of destruction of evidence has no basis in fact, as the district court held (SA 181-82), and their due process rights were not violated. See also infra, pp. 46-49.

Finally, in addition to all of the other evidence that the government presented at trial to authenticate the tapes, a tape expert, Bruce Koenig, testified (Tr. 3651-93) that there was no evidence of splicing or physical additions or deletions. Tr. 3676-78, 3682. While some of the tapes had been "bulk erased" (presumably by an erasing machine), there is no way to determine who did those erasures, or whether there was anything on the tape before it was erased. Tr.

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[31] To prevail on their motion to suppress, appellants have the burden of proving that the government failed to preserve evidence, that the government acted in bad faith, and that the missing evidence was exculpatory and to some extent irreplaceable. California v. Trombetta, 467 U.S. 479 (1984); United States v. Watts, 29 F.3d 287, 289-90 (7th Cir. 1994). Appellants fail to meet even the first requirement: showing destruction of evidence.

[32] Further, according to Whitacre, the tapes to which Shepard referred contained exculpatory comments concerning only the citric acid and fructose industries. SA 1077-78.

3685. Koenig was also able to identify two instances of over-recording, which can occur if the recording is not backed up completely before recording over earlier material. However, neither bulk erasing nor over-recording affects the authenticity of the most recent recording. Tr. 3684, 3687-88. It was Koenig's expert opinion that none of the final recordings was altered after it was made. Tr. 3688.

Under these circumstances, the tapes played at trial were both properly authenticated and a reliable account of appellants' criminal conduct.

D. The Court Properly Excluded Agent Varounis' Testimony

Appellants attempted to call FBI agent Athena Varounis in order to ask her about statements made to her by Whitacre and his wife on April 16, 1997, as reflected on two FBI Form 302's. Tr. 4840-44. Varounis had investigated Whitacre's allegations (made in the winter of 1996-1997 after Whitacre learned that he would be indicted for fraud and antitrust violations) that Agent Shepard had told him in March or April of 1993 to get rid of exculpatory taped evidence about price-fixing in the citric and fructose industries. SA 1076-80, 1082.

Varounis' testimony would have been hearsay, but appellants urged that it was nonetheless admissible under Fed.R.Evid. 804(b)(3) as recounting a statement against penal interest. Contrary to appellants' claims (ABr. 46-48, WBr. 3), the district court did not abuse its discretion (United States v. Johnson, 137 F.3d 970, 974 (7th Cir. 1998)) or deny due process in excluding the Varounis testimony under Rule 804(b)(3).[33] SA 461 (evidence "totally improper"); SA 175-84.

[33] Andreas complains that the court broke its promise that the defendants "would be 'permitted to probe the allegations of evidence tampering or destruction at trial'" (ABr. 46 citing SA 72). However, this promise obviously was limited by evidentiary rules.

An exception to the hearsay rule applies if the declarant is "unavailable as a witness"[34] and if the statement "at the time of its making so far ... tended to subject the declarant to ... criminal liability... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3). In addition, where the "statement tend[s] to expose the declarant to criminal liability and [is] offered to exculpate the accused ...corroborating circumstances [must] clearly indicate the trustworthiness of the statement." Id.; United States v. Garcia, 897 F.2d 1413, 1420 (7th Cir. 1990).

Contrary to appellants' contention (ABr. 47), the carefully framed statements that Whitacre and his wife made to Varounis did not tend to subject Whitacre or his wife to criminal liability for obstruction of justice. Whitacre was careful to tell Varounis that he had not destroyed, altered, or edited the hypothetical exculpatory ADM tapes, or any other tapes made in connection with the ADM investigation, and that he never instructed his wife to destroy any. SA 1080. He told Varounis that he had made copies of some of the tapes generated during the ADM investigation and that these copies (as well as originals of tapes of his conversations with Shepard) were sent to an acquaintance, David Hoech. Whitacre told Varounis that he did not know if Hoech still had those tapes. SA 1079. Whitacre thus did not admit to obstruction of justice, so his statement was not against penal interest.[35] Mrs. Whitacre similarly did not admit to committing a crime.

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[34] Whitacre and his wife were unavailable because they asserted their Fifth Amendment right not to testify. SA 1019-1020G. The court upheld the government's refusal to immunize Whitacre's wife. SA 69-71.

[35] The district court also pointed out that Whitacre may have concluded that the punishment for obstruction of justice was less severe that for antitrust violations, and for that reason his statements were not against penal interest. SA 178-80.

Further, corroborating circumstances did not "clearly indicate the trustworthiness of the statement[s]" (Rule 804(b)(3)). Whitacre disavowed his allegations and admitted that they were a fabrication. In an affidavit dated January 26, 1998, filed in his fraud sentencing proceedings, he stated that the part of his lawsuit against Agent Shepard alleging that Shepard told him to get rid of tapes was false. GA at 178-79. He stated that he had copied some of the ADM tapes, but had given the FBI every original tape with ADM personnel or its competitors, and had not altered any original tape. Id. Recanted statements are hardly "trustworth[y]."[36]

The recanted statements also appear to be exceptionally self-serving. Whitacre made them only after the investigation became public, after ADM told the government about Whitacre's embezzlement and after Whitacre was informed in October 1996 that he would be indicted on fraud and price-fixing charges. See SA 160. Whitacre may well have seen the allegations as a way of derailing the entire price-fixing prosecution, by preventing the use of the tapes against anyone. Further, although one of the tapes created by Whitacre contains remarks by Hoech about some tapes, the meaning of these allusions is unclear (SA 184). Moreover, in a December 18, 1997, letter to Wilson's counsel Hoech stated: "I never had any knowledge of tape recordings between Brian Shepard and Mark Whitacre regarding Whitacre being asked by Brian Shepard to destroy tapes." GA 172-73. And Mrs. Whitacre was involved in Whitacre's

[36] Prior to the recantation, other evidence showed that the allegation was a hoax. It first surfaced on November 6, 1996, as an anonymous fax to ADM -- but ADM traced it to Whitacre by using a caller I.D. Dkt.No. 111 at 19 & Ex. 5. Whitacre then created corroborating documents that he later admitted were false. Id. at 19-20. One of the tapes that he claimed recorded Shepard telling Whitacre to destroy a tape was allegedly taped on a date when Whitacre was not in Illinois and could not have met with Shepard. Id. at 21 & Ex. 1, 8. Whitacre went so far as to create a transcript of this imaginary conversation. Id.

fraudulent activities and thus had a motive to support Whitacre even beyond usual spousal loyalties. See SA 70, 182-83.

Therefore, the Whitacres' statements to Agent Varounis lacked all credibility. Indeed, the court would have been justified in barring Agent Varounis' testimony about the Form 302's under Fed.R.Evid 403. Its exclusion was well within the court's discretion, and did not deny appellants a fair trial.

VI. The Trial Court's Instructions Were Complete And Correct

Appellants claim that the trial court erred in failing to give five proffered instructions concerning intent and burden of proof. ABr. 48-51; WBr. 26-30. To the extent that the proposed instructions correctly state the law, they were fully and properly covered in the charge. Thus, the district court did not abuse its discretion in refusing to give additional instructions.

"Even a defendant who is entitled to an instruction on a particular theory of defense is not necessarily entitled to have his or her particular instruction presented to the jury." United States v. Brack, 1999 WL 605640 at *10 (7th Cir. August 6, 1999). This Court "`defer[s] to the substantial discretion of the district court for the specific wording of the instructions, and in rejecting a proposed instruction, so long as the essential points are covered by the instructions given.'" United States v. Koster, 163 F.3d 1008, 1011 (7th Cir. 1998), cert. denied, 119 S. Ct. 2366 (1999), quoting United States v. Scott, 19 F.3d 1238, 1245 (7th Cir. 1994); accord Brack, 1999 WL 605640 at *10.

Appellants argue that Andreas Instructions 19 and 19(b) and Wilson Instructions 29 and 30 were essential to present their defense theory that there was no agreement because they did not "intend to abide by the agreement." See SA 122-127; WBr. 27. The district court's charge on intent, however, which was taken verbatim from Wilson Instruction 28 (GA 9), was a correct

statement of the law and fully incorporated the essence of appellants' theory (SA 490-91, emphasis added):

> You must determine whether the evidence shows beyond a reasonable doubt that the defendant knowingly and intentionally became a member of the charged conspiracy to fix prices and allocate sales volumes. "Knowingly" means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident.
>
> In order to find that the defendant acted knowingly, you must find that he voluntarily and intentionally became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it.

SA 488 (emphasis added):

> The Government must prove beyond a reasonable doubt that he was aware of the common purpose and was a willing participant in the charged conspiracy.

SA 491-492 (emphasis added):

> Knowledge of a conspiracy without participation in the conspiracy is also insufficient to make a person a member of the conspiracy.

Thus, in order to convict, the jury was required to find that appellants (l) had knowledge of a common or "mutual" purpose, (2) were willing participants in efforts to achieve that common purpose, and (3) intended to help accomplish the conspiracy's goal. The rejected instructions would have added nothing of substance to those given. See, e.g., United States v. Given, 164 F.3d 389, 394 (7th Cir. 1999) (where court correctly charged concerning "knowingly," it did not err in refusing more specific "good faith" instruction), cert. denied, 1999 WL 413022 (10/04/99). Because the jury was fully and correctly instructed concerning intent, the cases on which Wilson relies are readily distinguishable because in those cases the defense "theory was not included elsewhere in the charge." United States v. Meyer, 157 F.3d 1067, 1075

(7th Cir. 1998) (emphasis added), cert. denied, 119 S. Ct. 1465 (1999); accord United States v. Fawley, 137 F.3d 458, 472 (7th Cir. 1998). [37]

A reading of the charge also belies Andreas' claim that the court failed to tell the jury it "could consider lack of trust, failure to agree on material terms, and aggressive competition as evidence of lack of intent to reach agreement." ABr. 50. The court told the jury that it could consider actual pricing evidence "to conclude that the defendants never entered into the agreement charged" (SA 485), and that "[e]vidence that the defendants and alleged co-conspirators actually competed with each other" could be considered "in deciding whether they actually entered into an agreement to fix prices" (SA 484). The court also told the jury that parallel behavior, mere presence at meetings, phone calls, identical pricing, and exchanges of price information, were not of themselves illegal in the absence of an actual agreement to fix prices. SA 485-487, 491-92. When taken with the instructions concerning the need to find knowing and intentional participation in the conspiracy, the charge as a whole amply apprised the jury of the intent requirement in the context of this case.

Andreas Instruction 20 was properly refused as well. It provided that "words and conduct equally consistent with permissible competitive behavior as with illegal conspiracy do not, without more, support an inference of conspiracy" (SA 124). The Committee Comment to the 1980 pattern instructions which were in effect at the time of trial expressly recommended against giving the very "dual hypothesis" instruction that was the subject of Andreas 20. Federal

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[37] The district court also correctly found that Andreas Nos. 19, 19(b) and Wilson No. 29 (SA 122-23, 126) were misleading in suggesting, inter alia, that "the agreement to conspire did not exist if the parties did not intend to comply with all of its objectives." SA 193-94. A trial judge has broad discretion to refuse instructions that are confusing, over-broad, or misleading. Brack, 1999 WL 605640 at *10.

Criminal Jury Instructions of the Seventh Circuit § 3.02 (1980). Moreover, the substance of this instruction was subsumed in the court's repeated instructions that the government must prove every element of the offense, including "intent," "beyond a reasonable doubt" (SA 476, 482, 483). In light of the reasonable doubt instructions, the jury could not have convicted on evidence that was "as consistent with legal conduct as . . . with . . . illegal price-fixing," and Instruction 20 was properly refused on that basis alone. And Instruction 20 could have undermined this Circuit's repeated admonitions that any attempt to define "reasonable doubt" presents risks of misleading or confusing the jury and should not be undertaken. Federal Criminal Jury Instructions of the Seventh Circuit § 2.07 (1980), citing cases; United States v. Blackburn, 992 F.2d 666, 668 (7th Cir. 1993).[38] The district court properly concluded, therefore, that the proposed instructions at issue were "redundant," and "n[o] additional instruction was necessary to inform the jury to acquit if they found that Andreas and Wilson lacked the requisite intent to conspire." SA 194.

The district court rejected Wilson 30 (SA 127) on the additional ground that it was "purely argumentative" and "completely devoid of any law." SA 195; see United States v. Menting, 166 F.3d 923, 926-927 (7th Cir. 1999). Wilson, of course, was free to and did argue strenuously throughout the trial that he lacked the requisite intent to agree because, although "appearing to enter into understandings with competitors," his real intent "was to obtain market information, or to deceive his competitors, or to lull them into a false sense of security" (compare

[38] In United States v. Delay, 440 F.2d 566, 568 (7th Cir. 1971), on which Andreas relies (ABr. 49), the court reversed a conviction where the evidence was "equally consistent with a theory of innocence." But the holding rested on the insufficiency of the evidence, not on the insufficiency of the charge.

Wilson 30 with GA 22-27, 49).[39] There can be no doubt, therefore, that appellants fully presented their defense to the jury. See United States v. Briscoe, 896 F.2d 1476, 1512 (7th Cir. 1990), quoting United States v. Bailey, 859 F.2d 1265, 1277 (7th Cir. 1988) ("we review the [sufficiency of jury] instructions in the context of the overall trial and arguments by counsel").

Moreover, the legal substance of Wilson 30 was given in the charge. When the court asked Wilson what evidence supported his claim that he did not intend to abide by the agreement, counsel pointed only to ADM price evidence as allegedly inconsistent with a price agreement. GA 55. The jury had been instructed, however, that such pricing evidence was to be considered "in deciding whether [defendants] entered into an agreement to fix prices. Such evidence may lead you to conclude that the defendants never entered into the agreement charged." SA 485. Thus, the jury was fully informed of the defense's theory and the relevant legal standards for evaluating the evidence.

Finally, Wilson's claim that he was denied a fair trial because the government misstated the correct legal standard for intent in its closing (WBr. 30) should be rejected. The court instructed the jury to follow the law given to it by the court (SA 474-75). Jurors are presumed to obey the court's instructions. Richardson v. Marsh, 481 U.S. 200, 206 (1987). Moreover, during the prosecution's closing, the defendant objected to only one of the three statements he now cites as error.[40] Wilson objected that the government had misstated the law on intent, and that

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[39] Counsel for Andreas made similar arguments in closing, arguing that, although he discussed sales volumes with competitors, it was for purposes of securing market information. GA 16-21.

[40] Two of the statements related to an entirely different argument, i.e., that "the agreement is the crime" even if the conspirators take no steps to carry it out, or fail, or cheat on each other. Tr. 5604-05, 6088. Those were entirely correct statements of the law. See, e.g., Socony-Vacuum Oil Co., 310 U.S. at 224-226 n.59. Moreover, no objection was made at the

"[defendant] has to have the intent to agree" (SA 555). The court sustained the objection, stating "If you want to talk about the law, maybe you might want to read the instruction as it's verbatim given." SA 555-56. When defense counsel again objected that the prosecution was "unwilling to read" the instruction, the court responded: "The jury, as I indicated, has sat here. They have heard the facts. They have been instructed on the law. The instructions will go back with them when they begin to deliberate" (SA 556).

The jury was well aware that it was to follow the law as instructed by the court. Those instructions were complete and correct. There was no error.

VII. The Government's Closing Argument Was Not Improper

Andreas (ABr. 52) and Wilson (WBr. 11-21) complain that the prosecutor's closing arguments were improper and violated their Fifth Amendment rights.[41]

A. Fifth Amendment claims.

Appellants assert (WBr. 11-16) that the prosecutor in closing argument on two occasions referred to their failure to testify at trial.[42] The record does not support this claim.

1. The prosecutor did not improperly comment on appellant's failure to testify when he drew the jury's attention to the statements that Wilson and Andreas made on June 27, 1995, when they were interviewed by the FBI. The first problem with this argument (WBr. 11) is that appellants failed to object to the prosecutor's comment when it was made, although they made

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time, so Wilson cannot now object in the absence of plain error.

[41] This Court gives plenary review to constitutional claims regarding alleged comments on failure to testify and allegations of prosecutorial misconduct. Chapman v. California, 386 U.S. 18, 24-26 (1967); Rodriguez v. Peters, 63 F.3d 546, 560-61 (7th Cir. 1995).

[42] Appellants do not contend that reference to their silence prior to trial independently violated due process or other constitutional rights. WBr. 11-13.

other contemporaneous objections to the prosecutor's closing (SA 511, 513E). Only after the prosecutor's argument was finished, and the jury had left the courtroom, did defense counsel take any action, moving for a mistrial. SA 516-17. Appellants thus waived any objection, and their claim should be examined only for plain error. See United States v. Johnson, 26 F.3d 669, 678 (7th Cir. 1994); United States v. Sepulveda, 15 F.3d 1161, 1186 (1st Cir. 1993) (an adequate objection is an objection "to the offending statements when and as they are uttered," in order to permit the government to "clarify ambiguities and correct mislocutions in a timely manner"); see also DeRance, Inc. v. PaineWebber, Inc., 872 F.2d 1312, 1326 (7th Cir. 1989) (objection to rebuttal made after rebuttal but before jury charge untimely and waived).

In any event, the prosecutor's comment was not a reference to appellants' failure to testify at trial, but a fair attack on inconsistencies between their statements in June 1995 and both the evidence and the defenses presented at trial. Specifically, the prosecutor stated (SA 514):

> There's one more event to talk about, and that event occurred on June 2[7], 1995, when the investigation became public and the scheme ended. Remember search warrants were executed that day, and the FBI interviewed Mr. Wilson and Mr. Andreas. And independently Mr. Wilson and Mr. Andreas had the same response to being interviewed. They lied...

The prosecutor then spent some time listing the questions that Wilson and Andreas were asked and underlining inconsistencies between their answers and the evidence and defenses at trial. These included Wilson's assertion to the FBI that he had never heard of using a trade association as a cover for price-fixing; Andreas' claim that his father, not he, made the decisions at ADM; Wilson's assertion that ADM does not exchange sales and production figures with competitors; and Andreas' statement that price-fixing is impossible in the lysine business. SA 514-15. The prosecutor pointed out that, when interviewed on June 27, 1995, Wilson and Andreas did not give the defenses that they raised at trial -- for example, that, although there was price-fixing

going on, ADM only pretended to participate. And he asked the jury to consider why appellants did not mention their current defenses when interviewed (SA 515-16):

> when you're hearing all those defenses, ask yourselves why didn't we hear those defenses from Mr. Wilson and Mr. Andreas on June 27, 1995? That was their opportunity if they had a defense. They were confronted. That was their opportunity to give all these defenses... [I]f [the new defenses] were true, you would have heard them given to the FBI by Mr. Wilson and Mr. Andreas in June of 1995.[43]

Thus, the prosecutor's remarks were directed, not to appellants' silence at trial, but to statements they made in June 1995 when compared to their trial defenses. In addition, the prosecutor's remarks were a fair response to the defense's questioning of Agent Shepard, in which the defense glossed over Andreas' inconsistent statements, and emphasized Andreas' cooperativeness and his desire to break up the Asian cartel. Tr. 3503-08. The remarks cannot raise a Fifth Amendment self-incrimination issue because, while the Fifth Amendment grants a right to remain silent, "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie." Brogan v. United States, 118 S. Ct. 805, 810 (1998). Thus, "[i]t was legitimate to point out that although defendant had offered alleged explanations before indictment, he had offered different ones at trial." United States v. Scott, 660 F.2d 1145, 1168 (7th Cir. 1981). See also United States v. Patterson, 23 F.3d 1239, 1248 (7th Cir. 1994) ("prosecutor need not ignore the circumstances and evidence surrounding the prior inconsistent statements"); United States v. Isaacs, 493 F.2d 1124, 1165-66 (7th Cir. 1974) (defendant's pretrial statements to investigators

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[43] The court cautioned the jury: "Yesterday during Mr. Lassar's opening argument, he made several comments which I am now going to instruct you to disregard... Mr. Lassar told you that if the defendants had a defense they should have revealed it at the time they were confront[ed] by the FBI. The defendants have absolutely no obligation to tell the FBI anything. And Mr. Lassar's suggestion to the contrary must be ignored." It then reiterated the presumption of innocence, and stated that any suggestion by the prosecutor to the contrary must be ignored. SA 550.

and grand jury were in evidence; prosecutor could comment on their falsity, calling them "lies").[44]

In referring to appellants' June 1995 statements, it was not "the prosecutor's manifest intention to refer to the defendant's silence" at trial, nor were the remarks "of such character that the jury would 'naturally and necessarily' take [them] to be a comment on the defendant's silence" at trial. United States v. Cotnam, 88 F.3d 487, 497 (7th Cir. 1996). There is no logical connection between what appellants chose to tell (and not tell) the FBI in June 1995 and whether they took the stand at their trials in 1998. Accordingly, there was no error. Id.

We recognize that, in her order denying a motion for a mistrial, Judge Manning disagreed, saying that the prosecutor told the jury that "defendants Andreas and Wilson refused to talk to the FBI and invoked their right to counsel," which drew attention to the defendants' failure to testify at trial. SA 135. But we fail to see why a jury would be reminded, by a defendant's prior refusal to talk to the FBI, of the defendant's failure to testify at trial. More important, Judge Manning was mistaken: the prosecutor said neither of these things; indeed, his point was that the appellants did talk to the FBI and that they lied.

Judge Manning also concluded (SA 136) that, because only appellants could explain why they lied to the FBI, reference to their lying was a comment on their subsequent failure to testify.

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[44] Petitioner's reliance (WBr. 11-12) on Ex rel. Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987) is misplaced. In that case, the constitutional error was the state prosecutor's comments at trial on the defendant's initial refusal to say anything to the police. Id. at 1015, 1017-18. Savory did not contest in this Court the admission of later conflicting exculpatory statements he made to the police. Id. at 1015. In the present case, the issue was not complete refusal to talk to the FBI, but exculpatory statements made to the FBI that conflicted with other evidence in the case and with later-offered defenses -- an issue clearly not decided in Savory. As to United States v. Sblendorio, 830 F.2d 1382, 1395-96 (7th Cir. 1987) (WBr. 12), the court reviewed for plain error and affirmed the conviction; although it called the prosecutor's comments "inappropriate," it did not decide precisely what error had been committed or why.

But if this line of reasoning were correct, any prosecutorial reference to a defendant's misstatements to the police that only the defendant can explain would be off-bounds if the defendant did not testify; this is clearly not the law. See, e.g., Isaacs, 493 F.2d at 1140, 1166; cf. United States v. Rose, 12 F.3d 1414, 1421 (7th Cir. 1994) (false exculpatory statements made to law enforcement officials have independent probative force).

2. Wilson also objects to the prosecutor's statement (SA 552-53) that "[w]e heard about the citric acid conspiracy, completely unrebutted in testimony from Barrie Cox, who is currently working at ADM in charge of citric acid." He argues that these words drew attention to his failure to testify, because only he could have rebutted Cox.[45] This claim is without basis in fact. A comment about "unrebutted" testimony violates a defendant's Fifth Amendment rights only "if the only person who could have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself." Cotnam, 88 F.3d at 497. It must be "'highly unlikely that anyone other than the defendant could rebut the evidence.'" Id.; United States v. Butler, 71 F.3d 243, 255 (7th Cir. 1995).

In this case, it would indeed have been difficult for Wilson or anyone else to argue that a citric conspiracy did not exist, because Wilson himself was recorded describing its workings. But there were many who could have spoken to the details of the conspiracy, which included four companies in addition to ADM. Tr. 2615-21. Contrary to Wilson's contention (WBr. 12), Cox named many other conspiracy members with whom he engaged in various conspiratorial meetings and conversations (e.g., Tr. 2625-28, 2630-35, 2639, 2642-45), so the jury knew that

[45] Wilson's counsel objected immediately, and the court said "sustained," although it did not expressly tell the jury to disregard the remark. SA 552-53.

there were others besides Wilson who might be able to rebut Cox's testimony. See also G.Ex. 206, 207 (listing individual members).[46] Thus, the jury could not have taken the prosecutor's reference as a comment on Wilson's failure to testify.

3. Even if the comments about the FBI interviews and Cox's unrebutted testimony were error, there would be no basis for reversal. As the district court properly observed in denying the mistrial, it "strongly admonished the jury to completely disregard the comments regarding the defendants' refusal to talk to the FBI" and reminded them that appellants' failure to testify could not be held against them. SA 140. The court was "convinced" that the "jury w[ould] consider nothing but the evidence adduced at trial." SA 141. The strong, timely, curative instruction indicates that any error was harmless beyond a reasonable doubt. United States v. Buege, 578 F.2d 187, 189 (7th Cir. 1978); United States v. Greer, 467 F.2d 1064, 1073-74 (7th Cir. 1972). A jury is presumed to follow instructions. United States v. Moore, 115 F.3d 1348, 1358 (7th Cir. 1997); cf. Greer v. Miller, 483 U.S. 756, 764-65 (1987); United States v. Higgins, 75 F.3d 332, 333-34 (7th Cir. 1996).

Further, the evidence against appellants was overwhelming. SA 171-74 ("[t]here is an abundance of evidence" that supports the convictions). See Greer, 467 F.2d at 1073-74. This evidence included the audio- and videotapes recording the conspirators' meetings and multiple conversations in which Wilson, Andreas, and Whitacre discussed strategy for the lysine conspiracy; the live testimony of four coconspirators; and documents contemporaneously created by the coconspirators describing the conspiracy. Thus, whether the standard is plain error (United States v. Olano, 507 U.S. 725, 734 (1993) (error must have affected outcome of district

[46] Wilson complains that these individuals were not "within American subpoena power," but does not claim that the jury had reason to believe that they were unavailable.

court proceedings)) or error that is harmless beyond a reasonable doubt (Dortch v. O'Leary, 863 F.2d 1337, 1344 (7th Cir. 1988) (case so overwhelming that error would not likely have changed result of trial)), there was no reversible error.[47]

B. Additional claims of prosecutorial misconduct.

1. Appellants argue (WBr. 16, ABr. 52) that the prosecutor impermissibly "vouched" for his case. But neither appellant made contemporaneous objections to the remarks they now attack and, for the reasons previously stated, they can complain only of plain error. See United States v. Renteria, 106 F.3d 765, 766-67 (7th Cir. 1997).

In any event, in context, the statement was entirely permissible. The prosecutor said (SA 503-04):

> I think that you're going to see -- and you probably suspect this already -- that the case that has been presented here by the Government is one of the most compelling and powerful that has ever been presented in an American courtroom. Why do I make a statement like that? Well, the most powerful evidence you could ever have would be a videotape of the defendant committing the crime... You've got it.... The next best would be an audiotape of the defendant committing the crime. You've got that... In addition to that, you've got four co-conspirators who testified...

[47] Appellants complain that the district court used the wrong standard in ruling on their Fifth Amendment claims. However, its use of a five-part due process standard (SA 139-41) finds support in recent cases in this Circuit (United States v. Butler, 71 F.3d 243, 254 (7th Cir. 1995); United States v. Osourji, 32 F.3d 1186, 1191 (7th Cir. 1994); United States v. Reed, 2 F.3d 1441, 1449-50 (7th Cir. 1993); but see Cotnam, 88 F.3d at 498 n.11 (references to failure to testify "more properly considered" under Fifth Amendment test). In any event, the court's decision would have been the same under either test, because the factors -- strength of the evidence and immediate, curative instructions -- relevant to Fifth Amendment error were decided against appellants by the court. Because this Court considers whether a constitutional error was "harmless beyond a reasonable doubt" without giving particular deference to the trial court (Chapman, 386 U.S. at 24-26) (appellate court "must be able to declare a belief that [error] was harmless beyond a reasonable doubt")), there would be no reason to remand for application of the correct standard.

The evidence summary continued from there. Clearly, the prosecutor was not vouching for his personal belief in the defendants' guilt, but foretelling how the jury would view the evidence once it began deliberations. See, e.g., United States v. Whitaker, 127 F.3d 595, 606-07 (7th Cir. 1997) (prosecutor's comment prefaced with "I believe that you will find" not impermissible vouching), cert. denied, 118 S. Ct. 1098 (1998). The government may comment on the strength of its case as long as this reflects reasonable inferences from the record. United States v. Goodapple, 958 F.2d 1402, 1409-10 (7th Cir. 1992).

Moreover, the court gave the jury an instruction before closing arguments continued (GA 15):

> [D]uring the course of Mr. Lassar's closing argument he made reference to the strength of the evidence in this case as compared to other cases. Such references to other cases are totally irrelevant. So I would instruct you that you should absolutely disregard any statements or references comparing this case to any other case, and you should decide this case solely on the evidence presented in this case without regard to any comparison to any other case.

Based on the factors outlined in Rodriguez v. Peters, 63 F.3d at 558, any error was harmless. The vouching, if any, was minimal; the court gave a curative instruction; appellants had an opportunity (and did) argue the strength of the government's case; and the weight of the evidence was heavily against appellants. This comment could not have affected the outcome of the trial. Id.

2. Wilson also objects (WBr. 16) that the following statement by the prosecutor (SA 557A) was impermissible vouching:

> Should they have used Mark Whitacre [as a cooperating witness]? Well, ... we've read the end of the book. So when we ask that question, we've read the end of the book first. We saw the videotapes of Hawaii and Irvine and we know that the defendants are guilty. So it's easy in hindsight to go back.

Wilson's counsel objected at that point, and the court immediately sustained the objection and instructed the jury to disregard the comment. Id.

In context, the "we know" does not refer to the prosecutor or the government, but to all who have listened to the evidence. It therefore does not constitute vouching. Further, the court immediately told the jury to disregard the comment. The jury must be assumed to follow the court's directions (Richardson, 481 U.S. at 206) and no harm was done: the vouching, if any, was minimal; a curative instruction was given; appellants had already addressed in depth the strength of the evidence; and the weight of the evidence was overwhelming against them. Rodriguez, 63 F.3d at 558.

3. Finally, Wilson objects (WBr. 17) to a comment by the prosecutor, referring to Wilson's and Andreas' June 27, 1995 statements to the FBI (SA 515-16):

> You're not going to hear those lies from the attorneys because the attorneys have an advantage over their clients. The attorneys have heard all the evidence the government has. They know before trial about all the tapes and all the witnesses, and so they have constructed new defenses for your benefit that they're going to argue to you, not the ones that their clients came up with, and that's evidence to you that the defenses you're going to hear are not true because if they were true, you would have heard them given to the FBI by Mr. Wilson and Mr. Andreas in June of 1995.

Appellants waited until the closing argument was completed and the jury had left the room before making any objection. For the reasons already discussed, this objection came too late, and the comment can be reviewed only for plain error. Further, the court cautioned the jury when they returned that (SA 550-51):

> Mr. Lassar['s] ... reference to the fact that lawyers will construct defenses ... is inappropriate. You are instructed that you should absolutely disregard any such statements by Mr. Lassar concerning other counsel in this case. Defense counsel, in my view, have acted properly throughout these proceedings, and any argument to the contrary by Mr. Lassar must be ignored.

The prosecutor's statement was not an improper attack on the character of defense counsel, but rather an entirely permissible attack on defense theories. The government of course may not mislead the jury about defense counsel's probity. Hennon v. Cooper, 109 F.3d 330, 333 (7th Cir. 1997), cert. denied, 118 S. Ct. 72 (1997). But a comment on the defense theories, including an assertion that defense theories are fabricated, is permissible, if the evidence supports that assertion. United States v. Valez, 46 F.3d 688, 692 (7th Cir. 1995); Craig, 573 F.2d at 493-94. In this case, it was proper to comment to the jury on the difference between the statements that Wilson and Andreas made to the FBI on June 27, 1995, and the defenses offered at trial. It did not impugn the ethics of defense counsel to suggest that they had reviewed the entire record and presented the legal theory most consistent with the evidence; that, after all, is the function of defense counsel. But if the defense theories are inconsistent with the defendants' earlier statements, the government may bring this fact to the jury's attention.

In any event, the statement, if improper, did not create reversible error. Improper attacks on defense counsel require a new trial only if, considering the trial as a whole, the remarks were inflammatory and "so infected the entire trial with unfairness so as to render the conviction a denial of due process." United States v. Williams, 31 F.3d 522, 528-29 (7th Cir. 1994); United States v. Howard, 774 F.2d 838, 848 (7th Cir. 1985). In this case, the court gave a strong cautionary instruction that "dissipated any possible prejudice" (Pierson v. O'Leary, 959 F.2d 1385, 1388 (7th Cir. 1992)), and the remarks, which were hardly inflammatory, could not have affected the outcome of the trial.[48]

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[48] Appellants urge (WBr. 18-21) that, even if none of their arguments establish reversible error, the arguments taken together require reversal. But, as we have explained, none of the allegations describes error at all and the court's vigorous instructions would have corrected any error that occurred; therefore the alleged errors, even when viewed cumulatively, were harmless.

VIII. The District Court Correctly Computed the Volume of Commerce Affected By the Violation

Appellants argue (ABr. 51-52; WBr. 3) that the district court incorrectly calculated "the volume of commerce . . . affected by the violation" (U.S.S.G. §2R1.1(b)(2)) because, following United States v. Hayter Oil Co., Inc., 51 F.3d 1265 (6th Cir. 1995), it included all domestic sales of dry lysine made during the course of the conspiracy. In their view, Hayter Oil was wrongly decided and, relying on United States v. SKW Metals & Alloys, 4 F. Supp.2d 166, 171-72 (W.D.N.Y. 1997), they argue that the court should have included "only those sales . . . for which the conspirators successfully achieved their illegally-fixed target price." Id.

An issue is deemed waived on appeal when it is "`adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation'." United States v. Tracy, 989 F.2d 1279, 1286 (1st Cir. 1993); see also, United States v. Watson, 1999 WL 637059 at *4 (7th Cir. 1999); United States v. Bell, 936 F.2d 337, 343 (7th Cir. 1991). Appellants' one-page argument on the Hayter Oil issue is perfunctory. Appellants do not discuss the commentary to §2R1.1 or any of the reasons given by the court in Hayter Oil in support of its interpretation of that Guideline. Instead, they simply cite the district court opinion in the SKW case (which the government has appealed) that disagreed with Hayter Oil. They do not even bother to explain why they believe that SKW is correct and Hayter Oil is wrong. In short, appellants have failed to develop any argument in support of their assertion that the district court erred in following the Hayter Oil opinion. Accordingly, their argument should be summarily rejected. Bell, 936 F.2d at 343.

In any event, the district court correctly applied §2R1.1 in this case. In Hayter Oil, the court examined the plain language and commentary to that Guideline and concluded that both

supported its view that the volume of commerce affected by a price-fixing conspiracy includes all sales of the goods and services within the scope of the conspiracy, even if the conspiracy is not always completely successful. Indeed, the Guidelines commentary confirms that the Sentencing Commission refused to base antitrust offense levels on the damage caused or profits made by the defendants because such calculations are difficult and that it intended the government to have the benefit at sentencing of the per se rule (which makes the success of a conspiracy irrelevant). U.S.S.G. §2R1.1, comment. (n. 3), and (backg'd). Accordingly, the district court in this case correctly included all domestic dry lysine sales made by ADM during the course of the conspiracy in its volume of commerce calculations.[49]

IX. The Sentences of Andreas and Wilson Should Have Been Increased Due to Their Leadership and Managerial Roles in the Conspiracy

The district court sentenced appellants to 24 months in prison, the minimum allowed under the Sentencing Guidelines for offense level 17.[50] The Presentence Investigation Report ("PSI") recommended, and government argued, that Andreas' offense level should be increased by 4 under U.S.S.G. §3B1.1 because he was a "leader" of the conspiracy, and Wilson's by 3 levels because he was a "manager." These enhancements would have increased Andreas's sentence to 36 months,[51] and Wilson's to at least 33 months. The court rejected them because it

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[49] Appellants' claim (ABr. 52) that the conspiracy had no effect on commerce is both irrelevant for the reasons stated in Hayter Oil and factually wrong. Appellants ignore the overwhelming evidence of price-fixing in this case, as well as testimony that ADM charged the agreed-on price most of the time. E.g., Tr. 1000 (ADM "kept their promise about 90%").

[50] The base offense level was 10. U.S.S.G. §2R1.1(a). The base level was then increased by 7 because the volume of commerce affected was over $100 million. U.S.S.G. §2R1.1(b)(2).

[51] A Guideline offense level of 21 carries a theoretical minimum sentence of 37 months, but the maximum under the Sherman Act is 36 months. The statutory maximum controls.

found appellants no more culpable than their coconspirators, but key findings are clearly erroneous and infected by legal error.[52] The district court's interpretation of the Guidelines is reviewable *de novo,* and its findings of fact are reviewable for clear error. United States v. Emerson, 128 F.3d 557, 562 (7th Cir. 1997).

U.S.S.G. §3B1.1 is designed "to punish with greater severity leaders and organizers of criminal activity," United States v. Sierra, 1999 WL 615231, *4 (7th Cir. Aug. 13, 1999), depending on the size of the criminal organization and the defendant's relative responsibility for the offense. §3B1.1, Background. Subsection (a) requires a four-level offense enhancement for a defendant who was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive;" subsection (b) a three-level increase for a defendant who was a "manager or supervisor (but not an organizer or leader)" of such a criminal activity; and subsection (c) a two-level increase for leaders and managers of less extensive criminal activities. The Commentary defines a "participant" as a person criminally responsible for the commission of the offense, whether or not convicted (Note 1), and requires that the defendant "must have been the organizer, leader, manager, or supervisor of one or more other participants" (Note 2). It also notes that "[t]here ... can be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy" (Note 4). Thus, "the ultimate question is one of relative responsibility for the crime .... [S]o long as a defendant organized or supervised a criminal activity involving four other participants, a District Court can apply §3B1.1(a)." United States v. Kamoga, 177 F.3d 617, 621 (7th Cir. 1999), cert. denied, 1999 WL 689271 (10/12/99).

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[52] In contrast to appellants, Whitacre did receive an adjustment in his offense level for being a manager.

The lysine price-fixing conspiracy was plainly "extensive" enough to bring it within §3B1.1(a) and (b), because of both the number of participants and its "sheer girth," as the district court found. SA 225-26. The only issue is the relative responsibility of appellants.

1. Andreas

The PSI concluded that Andreas was an organizer or leader of the conspiracy both in his relationship to his subordinates at ADM and with respect to the participants from the other firms. SA 207. Andreas' primary response to this conclusion was a denial of guilt with respect to the conspiracy, or at least a contention that he was only a "minimal participant," contentions that the district court emphatically dismissed as inconsistent with the jury's verdict and its own view of the evidence. SA 219-20, 223-24. But the court agreed with Andreas that he controlled only three ADM executives (Andreas, Wilson, and Whitacre) who were knowing participants in the scheme, not enough to make him a "leader" under §3B1.1(a).[53] SA 224-25. Its finding that "none of the [other] ADM sales executives knew, let alone participated in the conspiracy" (id.) is clearly wrong. The findings cites only one witness, who said nothing about the subject.[54] It

[53] This Court has held that "to merit a four-point enhancement for one's leadership role under § 3B1.1(a) when the criminal activity involved five or more participants, the defendant must have had control, direct or indirect, over at least four other participants in the offense." United States v. Hall, 109 F.3d 1227, 1234-35 (7th Cir. 1997), cert. denied, 118 S. Ct. 153 (1997). It adopted that rule from the Tenth Circuit. United States v. McGuire, 957 F.2d 310, 316-17 & n.4 (7th Cir. 1992). The Tenth Circuit subsequently abandoned the rule in United States v. Cruz Camacho, 137 F.3d 1220, 1224 n. 3 (10th Cir. 1998), citing the 1993 addition of Note 2 to §3B1.1, which states that the defendant must be the leader of "one or more other participants." See Guidelines, App. C, Amendment 500. This Court has not addressed the effect of the amendment, and it need not do so here.

[54] Cox, the witness cited by the court (SA 225), gave no testimony on the point. Cox had no responsibility for lysine (GA 6-8), so there is no reason why he should know whether the lysine sales executives knew of the conspiracy. See GA 218-19.

also ignores contrary evidence submitted at the sentencing phase from two ADM sales executives. GA 204-20.

For example, Marty Allison stated that he and two other sales executives, Alfred Jansen and John Ashley, were told of the price-fixing and volume allocation agreements after the Irvine meeting in October 1993 and met with their counterparts from the other companies to implement them on a regional basis. GA 213-18.[55] In ignoring probative, undisputed evidence that at least three sales executives knowingly participated (thus bringing the number of ADM participants Andreas supervised, directly or indirectly, to at least four, even after the defection of Whitacre to the government), the court committed clear error.

More important, in applying the factors suggested in Commentary, Note 4, the district court rejected the argument that Andreas should be held accountable as a leader because it was not convinced that "Andreas' conduct vis-a-vis his foreign competitors was greater to make him the 'brains' of the outfit," or a "kingpin or supervisor any greater than other corporate executives involved in the lysine conspiracy." SA 226. It found rather that (id.):

> When compared with Ikeda, Yamada, Crouy, Chaudret, and Yamamoto, Andreas and Wilson were equals. The only thing that makes them worse than their counterparts was their inability to cut a deal with the government to avoid prosecution.

It thought, moreover, that Andreas could not coerce the executives of the other companies, who "all had authority over their own underlings and exerted their own autonomy," and, indeed, had been fixing prices before he came on the scene. SA 227. Instead, he had to negotiate a mutually

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[55] Trial evidence indicated that Andreas was reluctant to disclose the conspiracy to the sales staff, and the government's closing argument stressed that evidence to show Andreas's awareness that his activity was illegal (*e.g.*, GA 10-11). That evidence, however, related to the period before the Irvine agreement, and Allison said that they were told about the conspiracy after that agreement. The court gave no reason for ignoring the sentencing evidence.

beneficial agreement with "all of the 'kingpins' (yes, plural)." Id. Finally, it found no evidence that Andreas enjoyed a larger share of the unlawful profits than his foreign peers and concluded that he "bears no greater culpability than his contemporaries, and thus, does not deserve a four-point enhancement." Id.

The court ignored both the ordinary meaning of the word "leader" and Circuit precedent. To be a "leader" does not require an ability to compel obedience. The dictionary definition includes not only a "commander," but also a "guide," or "a person who by force of example, talent, or qualities of leadership plays a directing role, wields commanding influence, or has a following in any sphere of activity or thought." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1283 (1981). Under these definitions, the person who is followed because he is persuasive is as much a leader as one who is followed because he is feared. Moreover, given the voluntary nature and lack of formal organization of most criminal groups, it is clearly the broader meanings that the Guidelines intended. As this Court has noted, "control" is not a decisive factor, and even to the extent it is relevant, it "does not mean that others must have played marionette to the defendant's puppeteer," but simply that he had a supervisory or organizational role. Kamoga, 177 F.3d at 621, citing United States v. Mustread, 42 F.3d 1097, 1104 (7th Cir. 1994). The question, therefore, is the degree of Andreas's influence, not coercive power.

Moreover, even if the other conspirators engaged in price-fixing before ADM entered the market, Andreas is still responsible for any leadership role he subsequently undertook. See United States v. Evans, 92 F.3d 540, 545 (7th Cir. 1996), cert. denied, 520 U.S. 1120 (1997). Nor does the existence of other "kingpins" exonerate him. As noted in Evans, "[t]he guideline does not exclude the concept of collective leadership." Id. That Andreas had to negotiate with Yamada does not bring Andreas and Yamada down to the level of responsibility of the second

tier executives, such as Wilson and Whitacre, who carried out their orders. Since the purpose of §3B1.1 is to apportion punishment to degree of responsibility for a multi-participant crime, it is irrelevant if Andreas is no more culpable than Yamada, and Wilson no more than Ikeda. The question, rather, is whether Andreas and Yamada were more culpable than Wilson and Ikeda. They plainly were. As in Evans, the top tier executives effectively formed a "board of directors" for the conspiracy that collectively decided to establish the conspiracy and how it would work. Collectively, they had more than four subordinate participants reporting to them. The Guidelines contemplate that more than one person may qualify as a leader of a criminal conspiracy, Commentary, Note 4, and under Evans the fact that fewer than four participants report directly to any one "director" does not bar attributing a four level increase to each of the directors.

Andreas, therefore, plainly had the type of organizational role that this Court has held to define a "leader" under §3B1.1(a). He made the decisions for ADM about its participation in the scheme, including both its original bargaining position and the decision to compromise.[56] His proposal at Irvine for apportioning shares was the one ultimately adopted. Indeed, his threats to use ADM's production capacity to flood the market and drive down prices were a major factor in bringing those firms into the volume allocation scheme to stabilize prices. And as agent for his corporate principal, he demanded and received "a larger share of the fruits of the crime" (Commentary, Note 4) for his principal, second only to the share received by Ajinomoto, the

[56] The fact that Andreas "negotiated" volume allocation amounts with Yamada does not strip Andreas of leadership status. The ability to negotiate deals is a hallmark of a leader or organizer. See, e.g., United States v. Barnes, 993 F.2d 680, 685 (9th Cir. 1993) (defendant organizer or leader where he negotiated price of cocaine and logistics of delivery); United States v. Avila, 905 F.2d 295, 298 (9th Cir. 1990) (same). Indeed, such horse trading is precisely the type of give-and-take to be expected in an Evans-type collective leadership.

established market leader.[57] For a firm that had only recently entered the market, that was a substantial coup, and a powerful demonstration of Andreas's influence within the conspiracy.[58]

Antitrust conspiracies by definition consist of agreements among independent business entities. If their independence automatically forecloses a finding that any one member is a "leader," then the enhancement for leadership in the antitrust context (or, for that matter, in the context of agreements between two Mafia dons) becomes a dead letter. As a practical matter, that is nonsense, and the acceptance of any such principle would defeat the Guidelines policy of imposing greater punishment on those who take the initiative to form and direct criminal conspiracies.

2. Wilson

The PSI also recommended a 3-level enhancement for Wilson as a "manager or supervisor" of the conspiracy. Neither Wilson nor the court negated any of the factual basis for that recommendation, which should therefore be accepted as true. See United States v. Magana, 118 F.3d 1173, 1204 (7th Cir. 1997), cert. denied, 118 S. Ct. 1104 (1998). Indeed, the district court conceded that "the numerous audio and videotapes show him taking a prominent role in the discussions to regulate the objectives of the conspiracy," but rejected an enhancement under §3B1.1(b) because (SA 228):

> his role did not appear to be any greater than that of the other foreign lysine competitors or otherwise influenced or controlled [*sic*] their participation in the lysine conspiracy. Rather, the court agrees with Wilson's description of his

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[57] The 1994 volume allocations, out of a total market of 248,000 tons, were: Ajinomoto, 84,000 tons; ADM, 67,000; Kyowa, 46,000; Miwon, 34,000; Cheil, 17,000. GA 2.

[58] Whatever the direct reference of the "larger share" clause, the Guideline considerations are not exclusive, United States v. Sierra, 1999 WL 615231 at *4, and do not preclude reference to corporate profits in assessing the leadership role of a corporate official.

> participation - he was a "co-equal" with his co-conspirators - no more or less culpable than the rest of his co-conspirators.

Those findings significantly understate Wilson's role in the offense. As with Andreas, the court erred by unrealistically insisting on control and ignoring Wilson's palpable influence over the conspiracy.

While Wilson had no formal supervisory power within ADM with respect to lysine–as head of the Corn Products Division he was on the same corporate level as Whitacre–he took on the task of helping to organize the price-fixing operations in light of his prior experience in the citric conspiracy. That function was a crucial one. Whitacre, as expected, took his cues from Wilson in the price-fixing arrangements,[59] and Wilson's coaching of the other conspirators significantly improved the conspiracy's effectiveness. See United States v. Dillard, 43 F.3d 299, 306-308 (7th Cir. 1994)(enhancement warranted where "operation simply could not have flourished without [defendant`s] contacts and expertise"). Prior to ADM's entry into the lysine market, the Japanese and Korean producers had fixed prices on an ad hoc basis with no formal structure. From the first meeting in Mexico City through the Hawaii meeting, Wilson was the voice of authority at conspiracy meetings. Wilson insisted on structure, including regular meetings under the cover of a legitimate trade organization, and sales volume allocations enforced through both regular reports to a central record keeper and compensation from those who oversold their quotas to those who undersold. While the others resisted until ADM compromised on the market share issue, they ultimately adopted the structure Wilson suggested —a structure that eliminated cheating on prices.

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[59] Wilson even taught Whitacre to falsify his travel documentation regarding meetings with coconspirators. G.Ex. 4/28/93 1B43-T5 at 214-15.

The role of planning and advocating a more effective price-fixing arrangement, especially when backed by the economic leverage of ADM's production capacity, is more culpable than merely accepting such a plan when it is proposed, as the other conspirators did. In insisting on control, the district court erred in the legal standard it applied and in its conclusion that Wilson was no more culpable than the other conspirators.

CONCLUSION

The judgments of conviction should be affirmed and the case remanded to the district court for re-sentencing based on a correct application of U.S.S.G. § 3B1.1.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH LENGTH REQUIREMENTS

Pursuant to Fed.R.App.P. 32(a)(7), the undersigned hereby certifies that this Brief for Appellee and Cross-Appellant United States of America complies with the type-volume requirements of that Rule and this Court's order of September 29, 1999, permitting a brief of not to exceed 24,000 words. It contains 23,697 words, according to the word-counting program of the word processing system (WordPerfect for Windows 7.0) used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 1999, I served a copy of BRIEF FOR APPELLEE AND CROSS-APPELLANT UNITED STATES OF AMERICA and the accompanying GOVERNMENT'S SUPPLEMENTAL APPENDIX by first-class mail on the following:

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