No. 02-20843

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THERM-ALL, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

BRIEF FOR APPELLANT THERM-ALL, INC.

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CERTIFICATE OF INTERESTED PERSONS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 02-20843

THERM-ALL, INC.,
Defendant-Appellant.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Appellant, Therm-All, Inc., with its principal office in North Olmsted, Ohio, is a family-owned business with only one shareholder, Robert L. Smigel, who is its president and was acquitted in the instant matter.

2. Co-Appellant, Supreme Insulation, Inc., has its principal office in Kansas City, Missouri. Appellant respectfully directs this Court's attention to the Certificate of Interested Persons submitted by Supreme with its brief for a list of persons which have an interest in this matter as it pertains to Supreme.

3. As stated above, before the district court, Therm-All's president, Robert Smigel of Cleveland, Ohio, was a Defendant, but was acquitted by the jury.

4. Before the district Court, Supreme's president, Tula D. Thompson of Mission Hills, Kansas was a defendant, but was acquitted by the jury.

5. Appellant Therm-All's attorneys on appeal are Karl R. Wetzel, Wegman, Hessler & Vanderburg, 6055 Rockside Woods Boulevard, Suite 200, Cleveland, Ohio 44131. Mr. Wetzel was counsel at trial for Mr. Smigel before the district court.

6. Appellant Therm-All's attorneys at trial before the district court were Thomas R. Jackson, Jones Day Reavis & Pogue, 2727 North Harwood Street, Dallas, Texas 75201; and Stephen J. Squeri, Charles Kennedy and Isla Luciano, Jones Day Reavis & Pogue, 901 Lakeside Avenue, Cleveland, Ohio 44114. Jones Day counsel, collectively, withdrew as counsel for the Appellant for purposes of this appeal.

7. Appellant Supreme's attorneys on appeal are David Gerger, Foreman DeGuerin Nugent & Gerger, 300 Main Street, Houston, Texas 70002; and Curtis E. Woods, Sonnenschein Nath & Rosenthal, 4520 Main, Kansas City, Missouri 64111. Mr. Woods and co-counsel, Todd McGuire, were counsel for Ms. Thompson, president of Supreme, who was acquitted at trial before the district court. Mr. Gerger, with co-counsel Jennifer Ahlen, were counsel for Supreme at trial before the district court.

8. Appellee is the United States of America. Appellee's attorneys on appeal John Fonte, United States Department of Justice, Antitrust Division, Appellate Section, Room 10535, 601 D. Street, N.W., Washington, D.C. 20530; and Karen A. Sharp and A. Jennifer Bray, United States Department of Justice, Antitrust Division, Dallas Office, 1601 Elm Street, Suite 4950, Dallas, Texas 75201.

9. Before the district court the attorneys for the United States were Mark R. Rosman, Karen A. Sharp and A. Jennifer Bray, United States Department of Justice, Antitrust Division, Dallas Office, 1601 Elm Street, Suite 4950, Dallas, Texas 75201.

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REQUEST FOR ORAL ARGUMENT

The Defendant-Appellant, THERM-ALL, INC., respectfully requests oral argument. This appeal presents multiple complex issues surrounding a seven-week criminal antitrust trial in which two individual Defendants, who were presidents of corporations, were acquitted while the corporation Defendants were found guilty of violation of §1 of the Sherman Act. Specifically, issues with convincing arguments as to failure to prove any wrongdoing within the five-year statute of limitations, prosecutorial misconduct, post-trial production of discovery, erroneous jury instructions and insufficient evidence to prove guilt beyond a reasonable doubt are present before the Court. Oral discussion of the facts and the applicable precedent would benefit the Court.

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STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Southern District of Texas. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

ISSUE ONE: Whether the trial court erred in denying Defendant's Motion for Judgment of Acquittal or for New Trial (filed pursuant to Rules 29 (c) and 33 of the Federal Rules of Criminal Procedure) where the evidence was insufficient to show beyond a reasonable doubt that the alleged conspiracy continued beyond May 31, 1995 or within the limitation period.

ISSUE TWO: Whether the trial court erred in denying Defendant's Motion for Judgment of Acquittal or for New Trial (filed pursuant to Rules 29 (c) and 33 of the Federal Rules of Criminal Procedure) where the Government's statements during closing arguments rose to the level of prosecutorial misconduct that resulted in substantial prejudice to the Defendant.

ISSUE THREE: Whether the trial court's jury instructions were erroneous and confusing so as to substantially prejudice the Defendant by depriving it of a valid defense that was amply supported by the record.

ISSUE FOUR: Whether the trial court erred in denying Defendant's Motion for Judgment of Acquittal or New Trial (filed pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure) where the allegations, argument and theory put forth by the Government and upon which the Defendant was convicted was a fatal variance from the Indictment and supporting Bills of

Particular so as to violate the Defendant's Fifth Amendment Right to be charged by a Grand Jury.

ISSUE FIVE: Whether the Government's failure to provide discovery in accordance with Rule 16 of the Federal Rules of Criminal Procedure prejudiced the substantial rights of the Defendant.

ISSUE SIX: Whether the trial court erred in denying Defendant's Motion for Judgment of Acquittal or New Trial (filed pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure) where the evidence was insufficient to prove beyond a reasonable doubt that Defendant Therm-All, Inc. was guilty of violating §1 of the Sherman Act (15 U.S.C. §1).

STATEMENT OF THE CASE

A. Proceedings Below

On June 22, 1995, a federal grand jury issued subpoenas to various individuals and companies within the metal building insulation industry. Through their investigation, the Government identified ten companies and over twenty individuals as participants in a nationwide conspiracy to fix prices within the metal building insulation industry.[1] The Government, however, chose to proceed against only four companies (Therm-All, Inc.; Supreme Insulation, Inc.; Mizell Brothers, Inc. and Bay Insulation, Inc.) and only nine individuals (Robert Smigel, Tula Thompson, Huber Wallace Rhodes, Mark Maloof, Peter Yuch, Danny Fong and Jerry Killingsworth). Bay Insulation, Mizell Brothers, Huber Wallace Rhodes, Peter Yuch and Jerry Killingsworth entered into plea agreements whereby admitting to participating in a price fixing conspiracy in violation of §1 of the Sherman Act; Defendant Fong was acquitted of the same charges and Defendant Maloof was found guilty in a jury trial.[2]

On May 31, 2000, a federal grand jury, after a five-year investigation, returned an indictment against Therm-All, its president, Robert L. Smigel,

[1] See United States Supplemental Bill of Particulars. (Def. Ex. 1720)

[2] All of the alleged co-conspirator companies and individual Defendants were tried or entered pleas of guilty prior to the indictment of Defendants Therm-All, Supreme, Smigel and Thompson.

Supreme[3] and its president, Tula D. Thompson. The indictment charged that beginning as early as January 1994 and continuing at least until June 1995, the Defendants and co-conspirators entered into and engaged in a conspiracy to suppress and restrain competition by raising, fixing and maintaining prices of metal building insulation sold in certain regions of the United States in an unreasonable restraint of interstate trade and commerce in violation of §1 of the Sherman Act (15 U.S.C. §1). The indictment also charged, that in furtherance of this nationwide conspiracy[4], the Defendants and co-conspirators agreed to discuss prices to be charged, agreed to raise, fix and maintain prices and agreed to monitor and enforce compliance of the agreement.

On September 4, 2001, a jury trial commenced and on October 17, 2001 the jury returned a verdict finding the individual Defendants, Smigel and Thompson, not guilty while finding the corporate Defendants, Therm-All and Supreme, guilty. The corporate Defendants timely filed Motions for Judgments of Acquittal pursuant to Rule 29(e) of the Federal Rules of Criminal Procedure. On June 10, 2002, nearly seven months later, the trial court denied the corporate Defendants' respective Motions for Judgments of Acquittal. On July 3, 2002, the trial court sentenced Therm-All to a fine of one million five hundred thousand dollars

[3] Supreme has also filed a Notice of Appeal in the instant case.
[4] All other co-conspirators were charged in a regional conspiracy for the Southern District of Texas except Rhodes.

($1,500,000.) and Supreme to a fine of one million dollars ($1,000,000) and a term of five years probation for both corporate Defendants. Therm-All timely filed is Notice of Appeal on July 18, 2002.

Therm-All appeals its conviction.

B. Statement of the Facts

Corporate Defendant Therm-All came into existence in 1981 through the efforts of its president and sole shareholder acquitted Defendant Robert Smigel. Therm-All's main business is to laminate and sell laminated fiberglass products specifically for use in metal buildings. During the period in question, January 1994 through June 1995, Therm-All operated facilities in three separate locations; Cleveland, Ohio (its principal office), Wisconsin and Pennsylvania[5] and sold product solely in the Midwest region. During this relevant time, although there were over 100 companies that sold metal building insulation, not one company sold nationwide. (See Def. Ex. 1740) Due to shipping constraints and varying demand resulting from geographic climate conditions, the laminators of metal building insulation sold primarily in regions or locally. The laminated products ranged from thickness of 3" to 6", with the lesser thickness (and quality) being sold

[5] The Lancaster, Pennsylvania facility was purchased in May 1994 from DeVries corporation.

in the south and west regions and the 6" insulation being sold in Therm-All's region.[6]

In the fall of 1993, the suppliers[7] of fiberglass, which is the main component used in the production of insulation[8], announced that due to a shortage of fiberglass combined with an increase in residential buildings, the metal building insulation industry was to be put on "allocation." (Def. Ex. 1715) (Tr. 167) As such, during this period of allocation, the supply of fiberglass to the manufacturers of metal building insulation was to be restricted while in turn the cost of the fiberglass was to increase and the time of delivery of the fiberglass was to be lengthened and sporadic. (Tr. 166-68) (Def. Ex. 1703)

In reaction to the announcement of allocation and increase in cost of fiberglass, Therm-All, as well as the industry as a whole, issued new price lists to reflect this increase in cost.[9] (Def. Ex. 1704) From late 1993 through December 1994, the manufacturers of metal building insulation had three separate price

[6] Mizell Bros., admittedly, engaged in various illicit practices whereby selling lesser quality insulation, "mislabeled" insulation or not the thickness ordered by a customer.
[7] The four major suppliers of fiberglass in 1994-1995 were Owens Corning, Knauf, Manville and Certain Teed.
[8] The other components of metal building insulation are vinyl and glue that binds the vinyl to the insulation. Companies such as Therm-All would buy fiberglass, glue and vinyl and laminate the vinyl to the fiberglass and then sell it to metal building contractor companies.
[9] Prior to allocation, the metal building industry sparingly issued price lists and the cost of fiberglass had declined markedly since the late 1970's.

increases. (Tr. 187) (See "Price Lists"[10]) There was also a price increase specifically for "unfaced fiberglass" in March 1995. (Tr. 188) The price increases as issued by Therm-All and the other laminators were in conjunction and direct relation to the increases issued by the suppliers of fiberglass. (See Def. Ex. 1703 and 1704)

Contrary to the Government's theory, the evidence and testimony demonstrated that the various manufacturers' price lists were not drafted nor issued contemporaneously with each other. (See "Price Lists") In fact, the price lists of Appellant Therm-All, in an effort to be a market leader, were drafted and issued prior to any of the alleged co-conspirators, sometimes by as much as forty-five (45) days.[11] Further, and again contrary to the Government's theory of raising "fixing" and maintaining prices, the various manufacturers' price lists were not

[10] The Government introduced over 30 price lists. For purposes of its appeal, when Defendant refers to price lists it is limited to Ex. 25, 43C, 43G, 43K, 40, 460, 47A-E, 1, 18, 22, 28, 42C, 42K, 42Q, 5, 14, 17, 41C, 41E and 41G-J.

[11] Therm-All's practice was to notify customers of an increase and to issue new price sheets as far in advance of the effective date of the increase as possible, to allow customers and particularly contractors to plan deliveries and to bid their own jobs based on good information while synchronizing with cost increases from Therm-All's suppliers. (Tr. 2629-32, 2651-55) The record shows that Therm-All's price increases at issue in this case were in, in fact, announced far in advance of their respective effective dates:

INCREASE ANNOUNCED/PRIE SHEET ISSUED	**INCREASE EFFECTIVE DATE**
11/30/93 (announced) (Ex. 41A); Mid-Dec. 1993 (Price Sheets published) (Tr. 2651	02/14/94 (Ex. 41C)
05/10/94 (Ex. 41D)	07/15/94 (Ex. 41E)
10/17/94 (Ex. 41F)	12/15/94 (Ex. 41H)
01/24/95 (Ex. 411)	03/01/95 (Ex. 411)

similar in format and, more importantly, the prices stated on the price lists were not uniform amongst alleged co-conspirators as to amount associated with listed quantities. In fact, Therm-All's price list (Ex. 41C) did not even contain 5" insulation and its primary product, 6" insulation, was not even sold in the south and west regions where the alleged co-conspirators (Mizell, Bay and Supreme) operated and sold the majority of their products. (See "Price Lists") The only direct evidence of the alleged agreement was the purported communications of Rhodes and acquitted Defendant Smigel. All other evidence and testimony offered stemmed from Rhode's accusations. The prices set forth on the various manufacturer price lists were naturally within a few dollars of each other. Insulation is a commodity product, and like all commodity products, is going to be sold by competitors at very similar pricing. More importantly, prior to this period of allocation, the industry had always had price lists with similar pricing amongst competitors. Turning then to the unsupported testimony of Rhodes.

Fixing of Prices

Rhodes testified that twice in late 1993, he was contacted by Smigel to enlist Mizell Brothers, which Rhodes claimed to have agreed, into the alleged price fixing conspiracy. (Tr. 173-79) Although the Government produced hundreds of phone records, there was no phone record to support what Rhodes claimed to be

the genesis of the conspiracy.[12] (Tr. 997) Rhodes testified that in late January 1994, he had discussions with Smigel and exchanged faxes relating to the "fixing" of price sheets. Yet, Rhodes offered no explanation to the fact that Therm-All's price sheet was released to the industry 45 days prior in December 1993. (Tr. 2651, Def. Ex. 41A) Further, Smigel was not even in town to receive the fax Rhodes stated was an exchange of pricing information. (Def. Ex. 1114)

Rhodes testified that Smigel indicated to him that he had enlisted Maloof of Bay Insulation and Larry Zupon[13] of CGI into the conspiracy. (Tr. 173-79 and 189-90) Yet, no one from CGI or Bay Insulation ever corroborated these allegations and Smigel denied any and all involvement, which the jury validated with its verdict of not guilty, with Rhodes in the alleged conspiracy.

Rhodes testified that in each of subsequent price increases, July and December 1994, he had conversations with Smigel regarding the fixing of the price lists. Yet, as with the first price list, Therm-All's price lists of July and December 1994 were drafted and issued prior to Mizell Brothers, were dissimilar in format and product and were also dissimilar in pricing as to quantity. (See "Price Lists")

As to the alleged forming of the conspiracy, the fixing of prices and the collaboration of price sheets, the only witness the Government offered as to the

[12] The incredulous nature of this testimony is evidenced by the fact that the very Indictment upon which the Government prosecuted indicates the conspiring did not begin until January 1994.
[13] Rhodes could not even recall if it was Larry Zupon Sr. or Jr.

involvement of Therm-All was Rhodes. No other alleged co-conspirators or industry individuals testified to Therm-All's involvement in the conspiracy.

Maintaining of Prices

Regarding "policing activity" of the alleged conspiracy, Rhodes testified he had discussions with Smigel and other alleged co-conspirators regarding people not staying on the price list. (TR 338, 348, 545) Smigel, who the jury obviously believed, vehemently denied these accusations. (Tr. 2358) Engebretson, who was called as a witness with immunity by the Government, also denied any involvement in the conspiracy and recalled his conversations with Rhodes as being means to determine what the competition was doing in his market area. (Tr. 1367, 1454)[14]

As with the forming of the conspiracy, no other witness testified, nor was there any physical evidence that Therm-All participated in policing the price fixing agreement.

"Corroborative" Evidence of Rhodes' Testimony

1. Jack Mingle ("Mingle"), a Mizell employee who operated in the Pennsylvania / New York area, testified that Rhodes told him Therm-All was involved and policed the conspiracy. (Tr. 1775) However, Mingle readily

[14] The trial court in its Memorandum and Order, p. 4 R330, June 10, 2002, indicated the Government relied on inferences of Engebretson's testimony of his communications with competitors. As such, what is at play, is that the Government called Engebretson as its own witness, with immunity, who testified that the conspiracy did not exist but then argues inferences based on the denials.

admitted he had no direct knowledge of Therm-All's involvement and his sole source of information was Rhodes. (Tr. 1909) Mingle also testified that during allocation, Therm-All was competitive in the market. (Tr. 1848) What makes Mingle's testimony mere suspect is that the alleged occurrence (Spring 1994) when Mingle complained to Rhodes and Rhodes was to talk to Smigel ("policing activity") about discounting an account in his region, Therm-All had not yet purchased DeVries and was not operating in the area that Mingle and Rhodes allegedly complained.

2. Janne Smith, a Bay employee who worked directly for Maloof, provided tapes and testified as to conversations between Maloof and Rhodes regarding the conspiracy. Smith, however, readily admitted having no direct knowledge, had not received or known of phone calls with Therm-All nor knew of Therm-All's involvement in the conspiracy outside of Maloof's cryptic comments. (Tr. 2441-48) Smith's comments merely corroborated the Texas / Southern conspiracy for which Maloof was convicted and Rhodes admitted guilt.

3. Phone logs, listing hundreds of calls between alleged co-conspirators, did not identify a caller nor the matter of the conversations. Besides Rhodes, no other individual testified as to the content of the phone calls being illicit or about the conspiracy. More importantly, the uncontroverted evidence clearly demonstrated that during the period of 1994 through June 1995, Therm-All,

through its involvement in the National Insulation Association ("NIA"), made approximately the same amount of calls to non-conspirators as it did alleged co-conspirators. (Def. Ex. 1721 and 1736) In actuality, the phone logs demonstrate the existence of the Texas / Southern conspiracy and the improbability of a nationwide conspiracy. When comparing the phone contact of Mizell, Bay and Therm-All to conspirators and non-conspirators it is obvious that Therm-All's phone activity was driven by NIA. (Def. Ex. 1724 and 1734) This is further exemplified by the fact Therm-All's phone activity with alleged conspirators and non-conspirators is in conjunction with NIA meetings and not price list releases as argued by the Government. (Def. Ex. 1736)

4. Price lists, which the Government contends were the mechanism by which the conspiracy was carried out and policed, were dissimilar amongst the manufacturers in format, pricing and quantity representations. (See "Price Lists") Further, the various companies' price lists were drafted and issued at different times and distributed to customers throughout the industry. (See "Price Lists") The laminators price lists were issued in conjunction with the increases issued by the suppliers of fiberglass as reflected by timing of the issuance and percentage of cost increase. (Def. Ex. 1703 and 1704) The impossibility and fallacy of Rhodes' testimony, as well as the Government's theory of raising and fixing prices, becomes readily apparent in the examination of Defendant's Exhibit 1703 and

1704. The raising and fixing of prices was directly related to the increase in fiberglass cost (which is 90% of the laminator's cost) by the suppliers and not a result of a conspiracy. Allocation and the economics of supply and demand is what dictated the "raising and fixing" of prices.

5. Therm-All's internal memo to "stay on" the price sheets and not discount was not part of the conspiracy as the Government suggested. Rather, it was an effort by Therm-All to practice good business. (Tr. 2630-32) The reality, as both expert and lay witness testimony established, was that Therm-All salespeople continued to discount and were never reprimanded for discounting. (Def. Ex. 1707-1713, Tr. 2654) Further, the testimony throughout the course of trial was that salespeople for all the alleged conspirators continued to discount during allocation and the "theme" of the alleged conspiracy of "stick to the price list and not jump brackets" was ignored.[15]

All of the "corroborative evidence or testimony" is either hearsay stemming from Rhodes or innuendo created based upon Rhodes' testimony of alleged conversations and agreements which were denied at trial and unsupported by the Government's other witnesses. Further, it is clear that market conditions and suppliers increases, as opposed to conspiratorial activity, were directly related and

[15] The Government argued that although "stick to the price list and not jump brackets" may not have always been followed, it was still the edict of the conspiracy. This argument, although convenient, simply is wholly contradicted by the wide spread discounting throughout the industry.

the cause for the laminating industry to "raise, fix and maintain" their prices and similarity in pricing was to be expected of a commodity product.

SUMMARY OF THE ARGUMENT

The conviction of Therm-All should be reversed for the Government failed to put forth any evidence that Therm-All committed an overt act in furtherance of the conspiracy with the five-year statute of limitations period.[16] The Government offered thousands of invoices, hundreds of phone logs, multiple documents and the testimony of ten witnesses; yet, no direct evidence was produced that the conspiracy continued after May 31, 1995.

The Government's failure to provide relevant discovery until after the conclusion of the trial, the Government's statements during closing arguments and the Government's varying the theory of the case from the Indictment and supporting Bills of Particular prejudiced Therm-All from preparing a defense and influencing the jury so that its conviction should be reversed.

The Court's jury instructions were so erroneous and confusing so as to prejudice Therm-All from receiving a fair trial; as such its conviction should be reversed.

Outside the testimony of Rhodes, who unquestionably benefited from his testifying at trial, the Government offered no other direct evidence of Therm-All's

[16] 18 U.S.C. §3282.

participation in the nationwide price fixing conspiracy of which it was convicted. All other evidence was circumstantial and inference and generated from Rhodes. As such, but for the Government's misconduct and the trial court's errors, Therm-All would not have been convicted for the evidence was insufficient as a matter of law to sustain the conviction.

ARGUMENT

ISSUE ONE RESTATED: The trial court erred in denying Defendant's Motion for Judgment of Acquittal or for New Trial (filed pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure) where the evidence was insufficient to show beyond a reasonable doubt that the alleged conspiracy continued beyond May 31, 1995 or within the limitation period.

A. Standard of Review.

To satisfy the statute (of limitation) for conspiracy, the Government must prove that a conspirator committed an overt act in furtherance of the conspiracy in the five years before the indictment. United States v. Manges, 110 F.3d 1162, 1169 (5th Cir. 1997)

B. Simply stated, the Government failed to introduce any overt act by the Defendant, or any alleged conspirators, committed in furtherance of the conspiracy after May 31, 1995; as such, the evidence was insufficient to show beyond a reasonable doubt that the conspiracy continued within the five-year statute of

limitations period.[17] Unable to identify a specific overt act, the Government relied upon the following conclusions, inferences and innuendo as evidence the conspiracy continued past May 31, 1995.

1. Rhodes and Maloof's Post–Subpoena Acts of Concealment

The Government argued that the testimony of Janne Smith ("Smith") and Rhodes, relaying Maloof's and Rhodes' acts of concealment after the Grand Jury issued subpoenas in June 1995, establishes the conspiracy continued through June 1995. Specifically, Smith testified that Maloof told her to lie to the Grand Jury (Tr. 2351) and Rhodes testified he told Lief Nielson (Mizell Plant Manager) to conceal documents so Nielson would not be implicated in the conspiracy. (Tr. 558)[18]

The Supreme Court in Grunewald v. United States, 333 U.S. 391 (1957), addresses this very issue and held:

"We think that the Government's first theory that an agreement to conceal a conspiracy can, on facts such as these, be deemed part of the conspiracy and can extend its duration for the purposes of the statute of limitations – has already been rejected by this Court in Krulewitch v. United States [336 U.S. 440, 69 S. Ct. 716, 93 L Ed. 790] **[**21]** [supra], and in Lutwak v. United States, 344 U.S. 604, 73 S. Ct. 481, 97 L. Ed. 593 [supra].

"The crucial teaching of Krulewitch and Lutwak is that after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to

[17] As stated above, the indictment against Therm-All was returned on May 31, 2000. The Government, although charging other Defendants, chose not to indict Therm-All until over five years had elapsed from its initial investigation.

[18] The Government also cited to Exhibit 27(A) as an example of Rhodes attempting to conceal the agreement. Exhibit 27(a) was created on or about 03/20/95, thus is not germane to this issue.

conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. . . . Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases . . ."

Id. at 399, 401-402.

After the issuance of the Grand Jury subpoenas, there was clearly no purpose or objective in furthering the alleged conspiracy. Rhodes' and Maloof's acts of concealment were not aimed at furthering the alleged ongoing price-fixing agreement, but only at concealing evidence of their responsibility and involvement.

Rhodes' and Maloof's acts of concealment do not extend the limitations period applicable to Therm-All. United States v. Davis, 533 F.2d 921, 928-29 (5th Cir. 1976) (alleged act performed following accomplishment of conspiracy's objective "so that the defendants might better conceal their fraudulent scheme" was not in furtherance of the "main" conspiracy and did not extend the limitations period for it). The individual acts of Rhodes and Maloof to conceal their involvement in the alleged conspiracy are not, as a matter of law, overt acts in furtherance of the conspiracy nor were they a part of the scheme of the conspiracy.

2. Price Sheets

The Government argued that the price sheets effective December 1994 were in effect at least through June 1995. What is remarkable about this "conclusion" is

that it is wholly unsubstantiated by any testimony or, more importantly, any evidence of sales or transactions within the limitations period.

Not only is the Government's conclusion unsupported by testimony or evidence, it is, in fact, contrary to the testimony and the Government's theory at trial. Specifically, the Government itself argued in closing, the alleged conspiracy's objection was "to make more money and keep prices up during that allocation period." (Tr. 2951-52) However, as Mr. Leonardelli testified, by March or April, 1995, allocation had ended (Tr. 3051-52, 3064-65)[19] and with it, the premised foundation upon which the alleged conspiracy took root, based on the Government's own theory and arguments.

To determine the extent to which a conspiracy continues over time, the Court must determine the objectives of the conspiracy. United States v. Kissel, 218 US 601 (1910). Once the objectives of the conspiracy succeed or are abandoned; the mere continuance of the result of the crime does not continue the crime . . . for purposes of the statute of limitations. Kissel, supra at 607. United States v. Dyna Electric Co., 859 F.2d 1559, 1563 (11th Cir. 1988) (emphasis added).

Therefore, the price sheets of December 1994 without testimony or evidence that sales were generated there from after May 31, 1995 are not in and of

[19] The trial court in its Memorandum and Order, p. 19 R330, June 10, 2002, acknowledges that allocation had ended by late 1994 or early 1995.

themselves "overt acts" in furtherance of the alleged conspiracy. Quite frankly, the reason the Government could not put forth testimony or evidence of sales after May 31, 1995 based on these price lists was because allocation had ended months earlier. Price Sheets issued seven months prior, in and of themselves, are not overt acts in furtherance of the conspiracy unless there is evidence offered to show they were still in effect and there were sales based upon the price sheets . . . no such evidence was put forth.

3. Engebretson / Ferry Communications

The Government relies upon two entries, 66 and 67,[20] on Exhibit 10(E), and the inconclusive testimony of Engebretson[21] in a forlorn attempt to identify an overt act in furtherance of the conspiracy. Particularly, the testimony regarding those two entries which total less than four minutes, reads as follows:

MR. ROSMAN: And then if we could just quickly take a look at the last couple entries on 10-E for 66 and 67, please.

Q. And do you see 66, Mr. Engebretson? All the way to June, 1995, you're having conversations with Roger Ferry. Is that correct?

A. Yes. It looks like that.

Q. And then there's a fax. I think it's Entry 67.

A. Excuse me?

[20] The communications were on two separate days. The first on 06/08/95 for 1.2 minutes and the second on 01/15/95 for 1.7 minutes.

[21] The communications were allegedly with Roger Ferry, a CGI employee, who was curiously never called as a witness to confirm the conversations.

Q. 67, I believe, is a fax from you to Mr. Ferry?

A. It's my fax number. Yes.

Q. Okay.

MR. ROSMAN: All right. Thanks.

What is painfully obvious, is that at no time during the course of this short exchange is there a question or answer conferring that this conversation and/or fax were in relation to the conspiracy. Further, Engebretson was never asked regarding the subject matter of those entries nor does Exhibit 10(E) indicate the subject matter of these two communications.

As opposed to concrete evidence that those communications were an overt act in furtherance of the conspiracy, the Government engages upon speculation whereby piling inference upon inference. The Government's ill-fated logic is since Engebretson admitted to talking with Ferry one time about pricing,[22] it must be inferenced that the June 1995 communications were also about pricing.

Not only is the Government's speculation based upon unfounded inference, it is also contrary to the trial testimony of Engebretson. Engebretson testified he and Ferry had been friends for years and conversed and joked with each other from

[22] The admitted conversation the Government relies upon to build its inference pyramid was in reference to the Whitcamp account where he was giving "him (Ferry) a shot at the job." (Tr. 1366, 1468-71). Engebretson did not believe this was during the alleged conspiracy. (Tr. 1554-97, 1640)

time to time. (Tr. 1624-26, 1671) Engebretson never admitted faxing pricing information to Ferry and denied the existence of a price fixing conspiracy. (Tr. 1640)

There is simply no evidence as to the substance of those two communications or that they were in furtherance of the alleged conspiracy. Speculation based upon inference stacking is not sufficient to meet the Government's burden of proof. See United States v. Menesses, 962 F.2d 420, 427 (5th Cir. 1992); United States v. Aguiar, 610 F.2d 1296, 1303-04 (5th Cir.), *cert denied sub nom.* Morejon-Pacheco v. United States, 449 U.S. 827 (1980) and United States v. Nippon Paper Indus. Co., Ltd., 62 F.2d 173 (D. Mass. 1999).

The Government had ample opportunity to inquire further of Engebretson, produce the actual faxed document[23] or call Ferry to relate the substance of the communications . . . it did not. As such, the two communications (lasting les than four minutes) between Engebretson and Ferry are not an overt act in furtherance of the alleged conspiracy for it is not known the content or purpose of the communications. Speculation upon inference is not evidence upon which a Defendant should be convicted.

[23] The Government chose to introduce countless numbers of faxes, price lists, memoranda, letters and cryptic notes, yet curiously chose not to introduce this fax. If it were in regard to the conspiracy, most certainly the Government would have introduced it.

4. General Conclusory Testimony

Lastly, the Government relied upon vast, general sweeping testimony as evidence that an overt act took place. Specifically, the Government noted the testimony of Rhodes that the conspiracy "continued until subpoenas were served in June 1995" (Tr. 188[24]) and Janne Smith's "guess." (Tr. 2349[25]) Neither witness, however, testified to any act in furtherance of the conspiracy after May 31, 1995. In fact, both witnesses' general statements are in reference to the receipt of Grand Jury subpoenas in June 1995.

The mere assertions by these witnesses of the existence of an "ultimate fact" or element, in the most conclusory of terms and with no supporting detail or explanation - - let alone documentation - - is insufficient to satisfy the Government's burden of proof beyond a reasonable doubt on this aspect of its case so as to withstand challenge under Rule 29. Cf. Nippon Paper Indus., supra, 62 F. Supp. 2d at 179 (under Rule 29, "the Court can determine whether the inferences

[24] Mr. Rhodes' cited testimony reads as follows:

Q. And how long did your agreement last, Mr. Rhodes?
A. Until June of 1995.
Q. What happened in June of 1995?
A. That's when the FBI came in Mizell Brothers with a subpoena from the Justice Department.

[25] Ms. Smith's cited testimony reads as follows:

Q. Miss Smith, we've been discussing Mr. Maloof's agreement on pricing with competitors. When did that agreement end?
A. I guess after people started getting served subpoenas.
Q. And about when were the subpoenas served?
A. In June of '95, I think.
Q. Okay. Now - -
A. June or July.

that the Government asks the jury to draw are reasonable," and must reject evidentiary interpretations that are '"unreasonable, insupportable or overly speculative."') (quoting United States v. Spinney, 65 F.3d 231, 234 (1st Cir. 1995) Conclusory statements, without specific evidence to buttress, cannot be considered overt acts in furtherance of an alleged conspiracy.[26]

The fact that the Government's own evidence, phone logs, does not reflect any communication between the alleged conspirators after May 31, 1995, demonstrates that the conclusory statements of Smith and Rhodes are not overt acts in furtherance of the alleged conspiracy; but rather general sweeping statements in answer to when subpoenas were received.

The Government, contrary to what the evidence and testimony reflected, opined that the alleged conspiracy continued up until June 1995 when the Grand Jury issued subpoenas. However, the Government failed to introduce any direct evidence of an overt act in furtherance of the alleged conspiracy after April 1995. Which, not coincidentally, is the time that allocation ended and no further price lists were released. Simply, the Government's initial investigation began early 1995 and ended with Grand Jury subpoenas in June 1995 and that, not evidence, is how the Government formulated the conclusion of the conspiracy.

[26] "The functions of the overt act requirement in a conspiracy prosecution is simply to manifest the conspiracy is at work and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence. Yates v. United States, 354 U.S. 298 (1957); Kissel, supra at 607.

The Government had five years in which to bring an indictment against Therm-All and they chose not to while pursuing other alleged co-conspirators. Therm-All should not bear the burden of conviction for the Government's failure to meet its burden of proving an overt act in furtherance of the conspiracy within the statute of limitations period.

Therefore, the trial court erred in denying Therm-All's Motion for Judgment of Acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure; as such, Therm-All's conviction should be reversed.

ISSUE TWO RESTATED: The trial court erred in denying Defendant's Motion for Judgment of Acquittal or for New Trial (filed pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure) where the Government's statements during closing argument rose to the level of prosecutorial misconduct that resulted in substantial prejudice to the Defendant.

A. Standard of Review

In a review of a claim of prosecutorial misconduct the Court must undertake a two-step analysis. First, were the statements of the prosecutor improper. Second, if the statements were improper, did they, in light of the entire record, substantially effect the rights of the Defendant. United States v. Munoz, 150 F.3d 401 (5th Cir. 1998); United States v. Garza, 608 F.2d 659 (5th Cir. 1979).

In determining whether the prosecutor's statements prejudiced the Defendant's substantive rights, the Court must weigh: (1) the magnitude of the statement's prejudicing; (2) the effect of any cautionary instructions given; and (3) the strength of the evidence of the Defendant's guilt. Munoz, 150 F.3d at 415.

During closing arguments, the Government on several occasions deliberately argued facts to the jury for which there was no evidentiary support in the record. These arguments not only represented serious misconduct by the prosecution, but also resulted in substantial prejudice to Therm-All, as reflected by the jury's verdict and a review of the evidence.

1. Exhibit 200

The Government counsel characterized Exhibit 200 as a "draft Therm-All price sheet" that "[got] into Wally Rhodes' price book." (Tr. 2926-27) There was absolutely no evidence whatsoever to support this characterization of the exhibit. (The Government made this representation to the jury even though, when the exhibit was admitted over defense objection,[27] the Court expressly ordered the redaction of the Mizell Bros. Bates number since there had been no testimony as to where the document was located or how it came into the possession of Mizell. (Tr. 2788)) Therm-All objected both during and after the argument and, during the

[27] The Court also erroneously admitted Government Exhibit 200 over Therm-All's objections, without any authenticating testimony or other foundation evidence to establish what it was and where it came from. (Tr. 2781-90)

recess between the morning and afternoon sessions of argument, the Court cautioned the Government against using the exhibit further, or otherwise going outside the record (Tr. 2954-55) but the damage from this document and the Government's characterization of it was already done.[28]

2. Exhibit 5 ("Kaczmarek Handoff")

Defense counsel, anticipating the Government's arguments as to Exhibit 5 (Therm-All Draft Price List) being "handed off" by Therm-All Vice President Denny Kaczmarek to a CGI representative,[29] raised this issue in the jury charge conference of October 12.

> [By Mr. Squeri]: [T]he Government has asked on a number of occasions, asked of at least Mr. Smigel and, I believe, Mr. Engebretson on a number of occasions; if they were aware of Mr. Kaczmarek of Therm-All ever handing a price list to someone from CGI. In each instance, Your Honor, the answer was in the negative, was "No." And the Government never brought in any witness to prove that something like that ever did happen.

This prompted the Court to ask if the Government planned to argue this contention, to which Mr. Rosman unequivocally answered "No." The following colloquy confirmed this response:

> [By Mr. Rosman]: No. We are not going to argue that Mr. Kaczmarek - -
> [By Mr. Squeri]: - - or anybody from Therm-All handed it to him.
>
> [Mr. Rosman]: Right.

[28] Even after the Government failed to "connect it up", the Court declined to withdraw it from further consideration as evidence per Therm-All's request. (Tr. 2954)

[29] Again, curiously, the Government chose not to call either Kaczmarek or anyone from CGI to corroborate this allegation.

Defense counsel and the court relied on this representation. As events showed, that reliance was clearly misplaced. In the rebuttal closing argument of the Government, the prosecutor made the following comments relating to Government Exhibit 5:

[By Mr. Rosman]: And I asked Mr. Smigel was he aware of his vice-president of 20 years, his right-hand man, at the convention in 1994 handing off this price sheet to CGI, their biggest competitor, and he said "No." Now, they were both there together at that convention - - Mr. Smigel and Mr. Kaczmarek. Now does that make sense? Is that believable, knowing how closely those two men worked together and all the testimony you heard about that?

Therm-All's counsel objected immediately after the jury was excused for the day, at the conclusion of the Government's rebuttal argument, and thereafter renewed its objection prior to the jury commencing deliberations.[30] Instead of giving the instruction requested by Therm-All, [31] however, the Court gave a less specific and, ultimately, ineffective instruction.[32]

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[30] See Renewed Objections of Defendants Robert L. Smigel and Therm-All to Prosecutorial Misconduct in Closing and Request for Instruction.

[31] Therm-All's requested instruction read as follows: "You have heard the attorney for the Government, Mr. Rosman, during his argument yesterday and in questioning witnesses during the trial, refer to Mr. Kaczmarek of Therm-All allegedly passing to someone from CGI a copy of a Therm-All price sheet, which has been marked as Government Exhibit 5. The Government has introduced no evidence and there is none in this case, that Mr. Kaczmarek or any other Therm-All employee gave a Therm-All price sheet to anyone from CGI at any time. You are instructed that these questions and references by Mr. Rosman were improper, and that you must disregard them entirely.

[32] The Court's instruction essentially reiterated general instructions reminding the jurors that they must rely on their own recollections of the evidence, and that the arguments of counsel were not evidence in the case. It did not specifically refer to the Government's argument at issue here nor did it compensate for the prosecutor's serious, deliberate and repeated factual misrepresentations. United States v. Simtab, 901 F.2d 799 (9th Cir. 1990)

The prosecutor's argument was a bald and plainly improper representation by counsel to the jury of facts for which there is no evidentiary support in the record. The record contains only the unsubstantiated assertions of Government counsel, in the form of questions to witnesses who have no knowledge of the matter asserted. Even so, after describing the question and Mr. Smigel's negative response (i.e., that he was not aware), the prosecutor proceeded to argue as if the event was an established fact, asking the jury whether Mr. Smigel's response made sense, since Messrs. Smigel and Kaczmarek were "there together at that convention," and whether Mr. Smigel's lack of awareness was "believable, knowing how closely those two men worked together and all the testimony you heard about that?"

Moreover, the Government clearly and deliberately sandbagged the Defendants, misrepresenting its intention to argue the matter in closing, and then waiting to present the argument in its "rebuttal," following the Defendants' arguments. Defendants Smigel and Therm-All thus had no reason in their own argument to point out the lack of any evidence supporting the Government's assertion and no opportunity to do so after the prosecutor reneged on his assurances to them and to the Court.

As to Exhibits 200 and 5, the Government's arguments were specifically made to suggest communication of Therm-All price sheets to competitor's prior to

announcement of those increases in the market. There is no evidence on the record to corroborate these suggestions and improper inferences by the Government. The Government premised the theory of "fixing prices" upon the notion the alleged co-conspirators exchanged drafts to formulate price sheets. Yet, when it became clear the Government could not prove this premise, it simple resorted to deliberate misconduct to create a false impression upon the jury.

3. Engebretson / Ferry Communications

In its initial closing argument, the Government similarly argued that Mr. Engebretson "was talking to CGI - - his friend, Roger Ferry, at CGI about pricing and he was *sending him a price sheet*[33], exchanging pricing." (Tr. 2940) Here again, the Government's assertion that Engebretson even sent Ferry a single price sheet is unsupported by any testimony or other evidence in the record.

The Government also argued in its "rebuttal" closing that Government Exhibit 10E showed that "Mark Engebretson is faxing stuff to Roger Ferry, his competitor, right through June 1995, June 15, and he said that he was talking to Ferry about pricing." (Tr. 2986) In fact, the testimony said nothing about the subject matter of the communications reflected by these entries, and there was no evidence concerning surrounding events or transactions from which it could

[33] In June 1995, Therm-All's price list had been in the market for over seven months. Therefore, to suggest Engebretson was sending Ferry a price list in June 1995 is ludicrous and magnifies the deliberate and severe misconduct the prosecutor engaged upon.

reasonable be inferred that the subject matter was pricing as claimed by the Government. (Tr. 1525-26)[34] The Government never provided or introduced one piece of evidence that Engebretson and Ferry exchanged price sheets or participated in the conspiracy. Yet, the Government deliberately made false representations to the jury that infected the jury's deliberations.

In all of the above stated incidents, the prosecutor's argument was a plainly improper representation by counsel to the jury of facts for which there was no evidentiary support in the record. On two of the occasions, the argument was strategically done in rebuttal, not to anything Defendants argued, but so as to make it impossible for Defendants to refute the inaccurate impression left upon the jury.

"A prosecutor may not, in his closing argument, inject into his argument any extrinsic or prejudicial matter that has no basis in the evidence." United States v. Goodwin, 625 F.2d 693, 699 (5th Cir. 1980), citing United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978).

A prosecutor's duty in closing arguments is to be scrupulous and to avoid all efforts to obtain a conviction by going beyond the evidence before the jury or by putting the sanction of his office behind the testimony of the witnesses. United States v. Rodriguez, 585 F.2d 1234, 1243 (5th Cir. 1978), aff'd in part, rev'd in part on other grounds, 612 F.2d 906 (5th Cir. 1980) (en banc). The sole purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence. United States v. Herberman, 583 F.2d 222, 229 (5th Cir. 1978).

[34] This error goes hand in hand with the statute of limitations argument previously set forth in Issue 1.

United States v. Dorr, 636 F.2d 117, 120 (5th Cir. 1981) (remand for new trial required by prosecutorial misconduct in referring in closing argument to nonexistent defense theory).

Courts have consistently recognized that a prosecutor's misrepresentation of material evidence can have a significant impact on jury deliberations "because a jury generally has confidence that a prosecuting attorney is faithfully [*786] observing his obligation as a representative of a sovereignty." Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000); see also United States v. Solivan, 937 F.2d 1146 1150 (6th Cir. 1991) (Because jurors are likely to "place great confidence [*25] in the faithful execution of the obligations of a prosecuting attorney, improper insinuations or suggestions (by the prosecutor) are apt to carry (great) weight against a [***16] defendant" and therefore are more likely to mislead a jury); United States v. Smith, 500 F.2d 293, 295 (6th Cir. 1974). More importantly, the prosecutor's misrepresentation in this case held an even greater potential for misleading the jury because the misstated evidence was central to the Government's theory that Therm-All exchanged price lists with co-conspirators prior to their release to the industry.

The prosecutor's plainly improper arguments were clearly prejudicial to Therm-All. The prejudice resulting from these arguments, when considered in light of the record as a whole, was more than *de minimis* or conjectural. United

States v. Cabrera 201 F.3d 1243 (9th Cir. 2001); United States v. Fisher, 72 F.3d 1200 (5th Cir. 1990). The exhibits at issue (nos. 200 and 5), if accepted as characterized by the Government, represented the only physical evidence of Therm-All price sheets (or "drafts") coming into the possession of competitors prior to their general publication to the market. The Government clearly understood the significance not only of these exhibits but, more importantly, of its unsubstantiated version of what they were when it chose to argue its characterizations to the jury in closing without a shred of evidentiary support in the record. Those arguments which could not prove a direct link to Mr. Smigel but could nonetheless implicitly and uniquely point to Therm-All as an entity, were clearly prejudicial as they were intended to be. Consequently, and particularly in light of the acquittal of Mr. Smigel, there can be no serious doubt that the improper argument of these points was material to the jury's verdict against Therm-All.

The magnitude of the prosecutor's statements is obvious and the curative instruction was no more than the standard general precautionary instruction. The Court's refusal to specifically instruct the jury on these issues or withdraw the exhibits, allowed the Government to argue and persuade the jury on facts not in evidence. The strength of Therm-All's guilt is tenuous at best based upon the mere fact that Smigel, who was the alleged genesis of the conspiracy and the only link[35]

[35] Rhodes testified he was enlisted into the conspiracy by Smigel on behalf of Therm-All.

between Rhodes and Therm-All, was found not guilty. As such, in accordance with Munoz, supra, Therm-All's conviction should be reversed due to prosecutorial misconduct.

ISSUE THREE RESTATED: The trial court's jury instructions were erroneous and confusing so as to substantially prejudice the Defendant by depriving it of a valid defense that was amply supported by the record.

A. Standard of Review

The Court's charge must be both legally accurate and factually supportable. United States v. Cartwright, 6 F.3d 294, 300 (5th Cir. 1993). The Court's instructions regarding evidence of competitive behavior were erroneous and confusing to the jury so as to deprive the Defendant of a valid defense, as such is a reversible error. United States v. United States Gypsum Co., 438 U.S. 422, 464-66 (1978).

B. Jury Instructions

1. Competitive Pricing

The jury was instructed at least four times that the level of pricing and/or competitive pric ing could not be considered as evidence favorable to the defense. Specifically, the jury was instructed:

(a) that ". . . it does not matter whether the prices charged by a Defendant and co-conspirators were reasonable or unreasonable, high or low, fair or unfair." (Court's filed Jury Instructions at 15);

(b) that "the Government does not have to prove that the members of the conspiracy were successful in achieving any or all of the objects or goals of the conspiracy." (Id. at 17);

(c) that "[i]t is no defense . . . that the conspirators actually competed with each other in some manner. . . ." (Id. at 18-19);

(d) and, reiterating the instruction from page 17, that "[a]s noted earlier, the Government does not have to prove that any agreement was actually successful. Nor does the Government have to prove that the alleged conspiracy was actually carried out or that its purpose was accomplished." (Id. at 20)

Thus, although the jury was left to understand clearly how evidence of competitive pricing was not to be viewed as a defense, they received no instruction whatsoever as to how such evidence properly could be considered as favorable to the defense.

In United States v. United States Gypsum Co., 438 U.S. 422, 464-66 (1978), the Supreme Court found reversible error where a district court declined to give an instruction that the jury could consider a "resumption of competitive behavior' in determining whether withdrawal from a conspiracy had been proven by a defendant in a price fixing case. See also, Nippon Paper Indus., supra, 62 F. Supp. 2d at 190-92. The same result would be mandated here as in Gypsum. In this case, Therm-All did not seek an instruction going as far as the instruction sought in Gypsum, which would have allowed the jury to infer "withdrawal" from the alleged conspiracy based on evidence of competitive behavior. Therm-All merely sought an instruction informing the jury that it could infer that Therm-All did not conspire in the first place based on evidence of competitive behavior, i.e.,

"[a]ffirmative acts inconsistent with the object of the [alleged] conspiracy. . . ." Id. at 464. At the Government's urging, no such instruction was given in any form. The absence of such an instruction left the jury with no guidance as to how it properly could treat the evidence of competition in a way which might benefit the defense, to balance the repeated instructions requiring it to disregard evidence of competition as a defense. This was error which, in itself, justifies a new trial for Therm-All.

2. Intent as Element of Antitrust Violation

The Court in Gypsum addressed the issue of whether intent is a necessary element to prove for a criminal anti-trust violation, the Court held:

". . . a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices." Supra, at 436.

The Court further found ". . . intent is a necessary element of a criminal antitrust violation." Gypsum, supra at 444.

Therefore, it was imperative for the trial court to properly, clearly and correctly instruct the jury in the instant matter that the Government must prove beyond a reasonable doubt that Therm-All intended to commit the offense for which it was charged; the Court failed to do so. The Court instructed the jury as follows:

"Thus, the Government has to prove beyond a reasonable doubt that the Defendant knowingly agreed with a competitor to raise, fix and maintain prices, and that the Defendant actually intended to carry out the agreement in fact."

In best light, the trial court's instruction on this critical element is confusing; in reality, it is inaccurate. The elements of "knowingly" and "intent" carry with them vastly different meanings and proof necessary to prove beyond a reasonable doubt a crime charged. For the trial court to declare that the Government's burden was to prove "knowingly" is simply an inaccurate statement of the law.[36] For the court to later state "actually intended" does not cure or correct the misstatement of the law but further confuses the trier of fact.

To further compound the error and confusion, the trial court instructed as follows: "The Government need not prove that the Defendant specifically intended the ultimate effect of elimination or reducing competition." (P. 18 of Court's charge) Again, the Court has effectively told the jury that the Defendant need not intend to eliminate competition while engaged in conspiracy to do exactly that. The purpose of the Sherman Act, what the Government argued and what is the basis of a price-fixing conspiracy is to eliminate competition; yet, the Court again

[36] In a conspiracy, two different types of intent are generally required - - the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See W. LaFave & A. Scott, Criminal Law 464-465 (1972).

confused and incorrectly instructed the jury that Defendant need not intend to do what it was charged and what is prohibited.[37]

The Court's failure to instruct that "competitive pricing" could be considered as favorable to the defense and the Court's inaccurate and confusing instruction as to the Government's burden, to prove beyond a reasonable doubt the Defendant "intended", not just knowingly, to raise, fix and maintain pricing as well as eliminate competition, deprived the Defendant of a valid defense and its conviction should be reversed.

ISSUE FOUR RESTATED: Whether the trial court erred in denying Defendant's Motion for Judgment of Acquittal or New Trial (filed pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure) where he allegations, argument and theory put forth by the Government and upon which the Defendant was convicted was a fatal variance from the Indictment and supporting Bills of Particular so as to violate the Defendant's Fifth Amendment Right to be charged by a Grand Jury.

A. Standard of Review

Did a fatal variance exist between the conspiracy alleged in the Indictment, and supporting Bills of Particular and the proof at trial wherefore it affected the

[37] The indictment specifically charges that as part of the conspiracy, the Defendant "suppressed or restrained competition."

Defendant's substantive rights. United States v. Morrow, 177 F.3d 272, 291 (5th Cir. 1999)

B. The indictment in this case, as elaborated by the Government's various voluntary and supplemental bills of particulars, charged the Defendants with a single, nationwide conspiracy, but the evidence, viewed in the light most favorable to the Government, showed at least two separate alleged conspiracies, with separate origins and separate objectives - - only one of which even arguably implicated Therm-All. The result was the admission of extensive evidence of conduct in furtherance of a "Texas" or "southern" conspiracy which could not properly be attributed to Therm-All[38], but which nonetheless necessarily provided the sole basis for venue in this district, and may well have otherwise prejudiced Therm-All in the jury's deliberations.

The Fifth Circuit has adopted a practical, fact-driven approach to analyzing whether the evidence in a given case disclosed a single or multiple conspiracies. The principal factors considered in "counting conspiracies" for these purposes include "(1) the existence of a common goal, (2) the nature of the scheme, and (3) the overlapping of participants in the various dealings." United States v. Morris, 46 F.3d 410, 415 (5th Cir. 1995), *citing* United States v. Richerson, 833 F.2d 1147, 1153 (5th Cir. 1987); see also United States v. Pena-Rodriguez, 110 F.3d 1120,

[38] Therm-All, as the Government acknowledges, did not have a single transaction and did not compete or sell product in the State of Texas.

1126 (5th Cir. 1997). Applying these factors to the evidence in this case demonstrates that the single, nationwide conspiracy alleged by the indictment has not been proven and could not reasonably be found beyond a reasonable doubt.

1. No Common Goal

The general "common goal" continuously proclaimed by the Government - - that of "making money" - - is one shared by virtually all businesses and not germane to illegal conspiracies. "Making money" by raising prices is capitalism, not a common goal that can be uniquely attributed to the alleged conspiracy. The other "common goal" averred by the Government was to raise prices in the metal building industry is equally inane for there is no evidence of a single nationwide market for metal building insulation; in fact, expert testimony was to the contrary. The fact the industry was characterized by regional markets limited by the economics of geographic shipping restraints and the varied demand for different types of insulation within the regions negates the "common goal" identified by the Government. Simply, the metal building insulation industry did not have a nationwide market due to shipping limitations and differing product demand within regions. Therefore, any illegal common goal for a national conspiracy is equally impossible.

2. Nature of the Alleged Scheme

The "nature of the scheme" - - fix, maintain and police prices - - is equally implausible for a nationwide conspiracy. In this case, the "activities" or "continuous cooperation" of Therm-All in its geographic markets were not only unnecessary, but utterly irrelevant, to the success or continuous operation of the previously initiated Texas-based conspiracy to which Peter Yuch testified, and to which the majority of the Government's evidence related.

In connection with this analytical factor, the Fifth Circuit has explained

> [I]f [an] agreement contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, then such agreement constitutes a single conspiracy." [United States v.]Perez, 489 F.2d [51,] at 62 [(5th Cir. 1973)]. Similarly, in U.S. v. Elam, 678 F.2d 1234 (5th Cir. 1982), we stated that the existence of a single conspiracy will be inferred where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect or to the overall success of the venture, where there are several parts inherent in a larger common plan, id. at 1246.

Morris, 46 F.3d at 415-16.

The pricing of Therm-All in its region had absolutely no effect nor impact in Texas, California or other regions of the United States. The types of insulation sold within the regions and geographic shipping constraints make it impossible to fix, maintain and police pricing. As such, the "nature of the scheme" was not dependent on the companies within the industry but rather within the region within the industry. If a conspiracy existed, then any fixing and policy of prices would have to be done regionally and act irregardless of each other.

3. Overlapping Participants

Rhodes, again, is the only link that there was overlapping membership between the Texas conspiracy and the alleged nationwide conspiracy set forth in the Indictment. Review of Rhodes' testimony in best light, however, only demonstrates multiple conspiracies (California, Texas, Midwest and South) effected by similar means by entirely different groups of people. This type of "overlap" has been rejected by the Fifth Circuit and clearly illustrates that the Government was not able to prove a single, nationwide conspiracy. Morris, 46 F.3d at 415-16. At best, the Government established overlapping participants in multiple regional conspiracies.

In sum the Government has not proven the single nationwide conspiracy it set out to prove, but has, at most, presented evidence of multiple, separately initiated, and separately focused alleged conspiracies, in what were undeniably separate and distinct regional markets.

When analyzing claims that evidence of multiple conspiracies has prejudicially varied from an indictment charging a single conspiracy, the Fifth Circuit has noted that the "most common prejudice to a substantial right resulting from a variance is transference of guilt." Richerson, 833 F.2d at 1155; see also Morris, supra, 46 F.3d at 417. Such a "transference" is precisely the effect and purpose of the evidence presented here by the Government regarding Texas and

Southern transactions involving Rhodes and Mizell Brothers, and/or Maloof and Bay Industries, but having nothing to do with Therm-All or the other Defendants in this case. The admission of this extraneous evidence of a separately initiated conspiracy, with separate objectives in a separate geographic market, confused the record and unavoidably prejudiced Therm-All.

The improper joinder of Therm-All with Supreme and Ms. Thompson[39] for trial further exposes Therm-All to evidence concerning conduct in the California market where, as in Texas, Therm-All had no presence or interest. The single conspiracy theory also was a necessary predicate for requiring Therm-All to stand trial in the Southern District of Texas, despite the lack of any evidence that Therm-All did anything in this district or that any other alleged conspirator did anything here in furtherance of a conspiracy having any impact on markets in which Therm-All competed. Each of these factors, individually and cumulatively with the Texas evidence admitted against Therm-All, resulted in prejudice flowing directly from a theory of prosecution which the Government ultimately failed to prove. Without this evidence, the remaining proof against Therm-All was inefficient to sustain a verdict; therefore, Therm-All's conviction should be reversed.

[39] Although they stood trial as co-Defendants, at no time was any evidence introduced, or even questions asked of the co-Defendants, to their agreement with each other as joint participants in the alleged conspiracy. Also, Therm-All and Supreme did not compete during the relevant time.

ISSUE FIVE RESTATED: The Government's failure to provide discovery in accordance with Rule 16 of the Federal Rules of Criminal Procedure prejudiced the substantial rights of the Defendant.

A. Standard of Review

16(a)(1)(C) of the Federal Rules of Criminal Procedure requires the Government to permit defense counsel to inspect any and all tangible objects which are material to the preparation of its defense, or are intended for use by the Government as evidence in its case in chief at the trial or were obtained from or belonged to the Defendant.

To reverse a conviction for a discovery violation, it must be shown that it was prejudicial to the substantive rights of the Defendant. United States v. Ross, 511 2d 757 (5th Cir. 1975). The reviewing court must determine if the prosecutor's failure to provide discovery in accordance with Fed. R. 16(a)(1)(c) created a reasonable probability the trial result would have been different. Kyles v. Whitley, 514 U.S. 419 (1995).

B. On December 4, 2001, nearly two months after the trial had been concluded and R.29(c) motions had been filed, the Government produced phone records that had never been turned over to the Defendants pursuant to R.16(a)(1)(c). The

records produced included 21 separate records all for Therm-All individuals [40] that entailed 834 summary entries[41] from the year 1990 through 1995 (See, Pleading 359, Defendant's Notice of Filing of Additional Records Not on File). Although all 21 individuals were allegedly a part of the conspiracy, particularly, as to Engebretson there were 15 summary entries and to Smigel 31 summary entries. Further, and most importantly, of all these entries there is not one contact from Engebretson or Smigel to Rhodes / Mizell Brothers or Maloof / Bay Insulation or Maloof / Bay Industries Atlanta.

The importance of this information and the Government's failure to provide it cannot be understated especially in light of the Government's reliance upon the phone logs to corroborate Rhodes' testimony. The "absence" of phone contact, particularly between Smigel and Rhodes, is clearly information that would have aided the defense in its preparation for trial and would have also been critical in the cross-examination of Rhodes.

This is not a case where discovery was requested and it was denied. In the instant case, the Government had produced thousands of phone records in accordance with R. 16(a)(1)(c); it just never produced the records in question. As

[40] Of the 21 entries, one of the records was for Engebretson and six were for Smigel and/or Therm-All corporate office.
[41] The 634 "summary entries" entailed over a thousand pages of actual phone records.

such, there can be no argument the records were "material" for the Government's voluntary compliance as to all other phone records assumes that fact.[42]

Therefore, the remaining issue is whether the failure to produce the phone records prejudiced the substantive rights of the Defendants and created a "reasonable probability" the trial result would have been different. (Ross, supra; Kyler, supra) The jury's verdict of not guilty of Smigel obviously demonstrates that it did not wholly believe Rhodes. If reasonable doubt existed as to Smigel, who was the alleged genesis of the conspiracy and the person who made the agreement and Rhodes on behalf of Therm-All, then it is axiomatic that additional information that would have further demonstrated the Government's theory and Rhodes' testimony to be implausible and would have a "reasonable probability" of altering the verdict.

As stated above, Rhodes is the only direct link to Therm-All's involvement in the alleged conspiracy; all other evidence and testimony either is interpreted by Rhodes or hearsay generated from Rhodes. In this matter, the absence of evidence was evidence, for Defendants were straddled with the task of proving a negative -- the conspiracy did not exist. As such, any material evidence that would further

[42] Although "absence" of evidence can be exculpatory under Brady, since this issue involves a violation of R. 16(a)(1)(c) the less stringent test of what is "material" applies for this is a pretrial discovery violation.

demonstrate Rhodes' testimony to be untrue and self-serving was necessary for the Defendants to prepare its defense.

There can be little argument that the phone logs offered and argued by the Government were the central piece of evidence relied upon to corroborate Rhodes. The failure of the Government to provide this material information substantially effected the rights of the Defendant for it prevented the Defendant from adequately and completely preparing its defense and cross-examination on a central piece of the Government's case.[43]

"Reasonable Probability"? If the alleged central and main contact (Smigel) to Therm-All is found not guilty beyond a reasonable doubt, and his conviction rested upon the testimony of Rhodes as corroborated by the phone records; then it is certain that a further erosion of this house of cards would have occurred if Defendant would have the ability to use this critical material; and, in turn, would create a "reasonable probability" that the verdict for Therm-All would be different.

The Government's failure to produce hundreds of phone records of a named Defendant (Smigel) and of the Defendant corporation employees was material, as evidenced by the Government's reliance upon phone logs, and substantially prejudiced the Defendant from preparing its defense and cross-examination of

[43] The degree to which those rights suffer as a result of a discovery violation is determined not simply by weighing all the evidence introduced, but rather by considering how the violation affected the defendant's ability to present a defense. See United States v. Pascual, 606 F.2d 561 (5th Cir. 1979).

Rhodes on a critical area of corroboration; and, as such, created a "reasonable probability" the trial result would have been different as evidenced by the jury's acquittal of Smigel.

ISSUE SIX RESTATED: Whether the trial court erred in denying Defendant's Motion for Judgment of Acquittal or New Trial (filed pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure) where the evidence was insufficient to prove beyond a reasonable doubt that Defendant Therm-All, Inc. was guilty of violating §1 of the Sherman Act (15 U.S.C. §1).

A. Standard of Review

The test for sufficiency of proof on a motion for judgment of acquittal, and on review of the denial of such a motion, is whether the jury might reasonably conclude that the evidence, viewed in the light most favorable to the prosecution, is inconsistent with every reasonable hypothesis of the accused's innocence. United States v. Duncan, 164 F.3d 239, 242 (5th Cir. 1999); United States v. Fredericks, 586 F.2d 470, 474 (5th Cir. 1978); cf. United States v. Navar, 611 F.2d 1156, 1158 (5th Cir. 1980); United States v. Marable, 574 F.2d 224, 228-29 (5th Cir. 1978).

The appellate court's review de novo of a district's denial of a motion for acquittal and review of the evidence presented at trial in the light most favorable to the verdict to determine whether a reasonable jury could have found the Defendant guilty beyond a reasonable doubt. United States v. Herrera, 289 F.3d 311, 317 (5th

Cir. 2002); United States v. Ortega-Reyna, 148 F.3d 540 (5th Cir. 1998); United States v. Campbell, 52 F.3d 521 (5th Cir. 1995).

B. The evidence at trial, viewed in the light most favorable to the Government, was insufficient to prove beyond a reasonable doubt that Therm-All was guilty of the offense charged. The only direct evidence offered by the Government over a seven-week trial in support of the alleged "nationwide price fixing conspiracy" was the purported communications between Rhodes and acquitted Defendant Smigel. All other witnesses called by the Government either denied, had no knowledge of or could only state what Rhodes told them of the indicted Therm-All's involvement in the alleged conspiracy.[44] Simply, and in accordance with the testimony of the Government's only "eye witness," Therm-All's involvement in the alleged conspiracy was by way of Smigel's agreement with Rhodes.

The Government contended and argued it was Smigel who was the genesis of the conspiracy, it was Smigel who continuously contacted Rhodes to fix prices and police the agreement, it was Smigel who acted as intermediary on behalf of CGI in the agreement, and it was Smigel who ordered that discounting off the price

[44] Rhodes never testified that he had an agreement with Mark Engebretson, but only that he called Engebretson pursuant to his purported agreement with Smigel. In fact, Rhodes testified that he made Engebretson *aware* of the agreement he allegedly had reached with Smigel. (Tr. 334) He also testified later that he called Engebretson about quotes from Therm-All salesman Dean Anderson because he made "agreements with Therm-All," - - *not* with Engebretson. (Tr. 523-24) Further, Engebretson denied the existence of a conspiracy, so for the Government to argue the inference of the existence based upon the denial of the conspiracy by this one witness is absurd.

list was prohibited . . . all through, and only through, the testimony of Rhodes. In essence, if it were not for Smigel, the conspiracy would not have come to fruition and Therm-All would not have been involved.

The jury, however, chose not to believe the testimony of Rhodes, as well as the Government's arguments and remaining evidence, and acquitted Smigel. Therefore, it is axiomatic, if the jury found the evidence insufficient to convict Smigel, then the evidence against Therm-All must be insufficient as well.

Defendant does not contend that a corporate Defendant cannot be convicted if its agents are acquitted.[45] Rather, in the instant case, if the evidence against the agent (Smigel), who is the only link to the Defendant corporation, is found to be insufficient then it is implausible for the evidence against the corporation to be sufficient. But for Rhodes' testimony to his contact with Smigel, there is no evidence Therm-All was involved in the conspiracy. Therefore, the jury's verdict (as well as the trial court's denial of Therm-All's Rule 29(c) motion) is in contradiction and irrational in context of the Smigel acquittal. This Court has the authority to determine not whether the jury's decision was correct or not, but whether it was a rational decision. Herrera, supra at 317; United States v. Jaramillo, 42 F.3d 920, 923 (5th Cir. 1995).

[45] United States v. Service Stations, Inc., 657 F.2d 676 (5th Cir. 1981)

As stated above, the only direct evidence that Therm-All was involved in the conspiracy was Rhodes' testimony that he and Smigel agreed to, on behalf of their respective companies, to raise, fix and maintain prices. The Government produced no other witness who had conversations with Smigel, or any Therm-All employee for that matter, as to Therm-All's involvement in the conspiracy. Further to the point, the only other witness, Engebretson, the Government alleged was involved in the Therm-All conspiracy, denied (under immunity) his involvement or even knew of a conspiracy.

The acquittal of Smigel is in itself enough to demonstrate the evidence against Therm-All was insufficient. However, the remaining circumstantial evidence of conduct by Therm-All is equally or more consistent with a reasonable hypothesis of innocent, competitive behavior as it is with a theory of guilt, thus requiring acquittal of Therm-All. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

As to the "circumstantial, physical evidence" offered by the Government, again, there is no direct evidence linking Therm-All to the alleged conspiracy. All the circumstantial evidence offered was nothing more than inference based upon Rhodes' interpretations . . . the evidence, standing alone, could not be argued to implicate Therm-All in the alleged conspiracy.

1. Phone Logs

The phone logs, and faxes associated therewith, do not directly link Therm-All to the conspiracy. First of all, the majority were offered - - and rejected by the jury - - to implicate Smigel's involvement in the conspiracy through contact with Rhodes or Maloof. Second, of the hundreds of calls listed there is not one tape nor witness, outside of Rhodes, that indicates Therm-All's involvement in the conspiracy. Third, a review of the phone log summaries clearly demonstrates there existed an equally plausible theory of innocence. Specifically, the number of calls between Therm-All and non-conspirators was approximately the same as to alleged conspirators. (Def. Ex. 1721) In fact, with the recently produced discovery (see Issue Five) the amount of calls to non-conspirators increased while calls to alleged co-conspirators remained the same.

Smigel's involvement in NIA was the basis for his contact with non-conspirators as well as alleged co-conspirators. This theory of innocence was presented, buttressed with testimony and evidence, argued and accepted by the jury as evidenced by its acquittal of Smigel. All other phone contact was related to Engebretson, who denied involvement in the alleged conspiracy, who Rhodes admitted was not sure if he knew of the conspiracy and who supposedly acting under the direction of acquitted Defendant Smigel.

2. Similar Pricing

Similarly in pricing, as discussed above, is the nature of a commodity product and has been the course in the industry irregardless of allocation. The pricing of metal building insulation is similar for it is a commodity product in a competitive market. The concurrent raising of pricing was necessary to insure competition in a period of allocation.

The Government's theory of why pricing was raised and fixed was stated as follows:

> The Defendants in this case, Mr. Smigel and Miss [sic] Thompson, they had an opportunity and they saw an opportunity to make more money and keep prices up during that allocation period. They took that opportunity and agreed with their competitors to raise prices and to fix prices and keep the prices up during that allocation period. (Tr. 2951-52)

The Government's theory is illogical as a matter of common sense and economics for there is simply no need to agree to raise prices during allocation. The unrebutted testimony of Therm-All's economist also demonstrated that Therm-All's pricing was not consistent with the conspiracy alleged by the Government, but instead was consistent with unilateral competitive behavior in the context of a supply allocation and substantial cost increases. Therefore, similar pricing is not circumstantial evidence of a conspiracy at work; but, rather fundamental economics at play prior to and during the period of allocation.

3. Price Sheets

To begin, the price sheets of the various alleged co-conspirators were neither similar in format nor were they issued at concurrent times. In addition, the price lists differed as to products carried and groupings as to quantities. As such, outside of the similar pricing, which as seen above is to be expected, the price lists were actually evidence contrary to a conspiracy.

"Draft" price lists[46] of Therm-All did not exist as the Government inferred and certainly there was no evidence they were exchanged prior to Therm-All's issuance of their price list to the market. In fact, Rhodes testified he did not recall where he had gotten Therm-All's first price list but often got competitor price lists (before and after their effective dates) from customers.

The phone logs, similar pricing and price lists are the only pieces of circumstantial evidence offered to buttress the testimony of Rhodes. To draw inference on circumstantial evidence whose source and basis (Rhodes) has been rejected as believable by a jury is not sufficient evidence on its own to convict Therm-All.[47]

The circumstantial evidence offered cannot stand alone and has an equally plausible explanation of innocence; thus, this Court "must reverse a conviction if

[46] Again, the inability of the Government to directly link Therm-All's alleged involvement in the conspiracy with any physical evidence demonstrates the severe prejudice Therm-All suffered as a result of the Government's misconduct in its argument of Exhibits 200 and 5.

[47] Nippon Paper Industries, supra at 179; Spinney, supra at 234; Menesses, supra at 427.

the evidence construed in favor of the verdict 'gives equal or nearly equal circumstantial support to a theory of guilty or a theory of innocence of the crime charged." Jaramillo, supra at 923.

Therefore, what is left after determining the circumstantial evidence to have a plausible, equal theory of innocence, is the uncorroborated testimony of Rhodes. "As long as it is not factually insubstantial or incredible, the uncorroborated testimony of a co-conspirator, even one who chooses to cooperate with the Government in exchange for non-prosecution or leniency, may be constitutionally sufficient evidence to convict. Herrea, supra at 318; Pena-Rodriguez, supra at 1123 (emphasis added).

Here, the facts to support the uncorroborated testimony of Rhodes are the "circumstantial evidence" discussed above. No other testimony or evidence directly linked Therm-All to the conspiracy, so what is left is circumstantial evidence as interpreted and suggested by Rhodes. What results is a vicious circle of inference with Rhodes at the core. Such facts are not substantial nor credible for they do not stand independent of Rhodes and were rejected by the jury in its acquittal of Smigel.

If Rhodes uncorroborated testimony was disbelieved and insufficient as to Smigel, then how can it be believed and sufficient as to Therm-All . . . to argue

such would be illogical and irrational. If not for Smigel, the only link to Therm-All's alleged involvement, would Therm-All have been prosecuted?

The jury's finding of not guilty as to Smigel is paramount for Therm-All's guilt is premised solely on the acts of Smigel. The Government's case against Therm-All was totally dependent upon the testimony of Rhodes and the inferences drawn upon the circumstantial evidence which also was beckoned by the testimony of Rhodes. By its acquittal of Smigel the jury voiced its disbelief of Rhodes. The remaining circumstantial evidence is equally or more consistent with innocence than it is with the Government's theory of guilt. United States v. Fredericks, 586 F.2d 470, 474 (5th Cir. 1978); United States v. Marable, 574 F.2d 224, 228-29 (5th Cir. 1978). Specifically, the evidence of competition, discounting, market conditions and competitor contact as a result of legitimate industry activity (NIA) is inconsistent with the Government's theory of collusion and conspiracy; as such, the circumstantial evidence is not sufficient to sustain a guilty verdict.

In sum, the evidence against Therm-All is insufficient to sustain a verdict of guilty beyond a reasonable doubt as evidence by the jury's acquittal of Smigel, who was the agent tying Therm-All to the alleged conspiracy, and the tenuous circumstantial evidence that was put forth based upon Rhodes' testimony cannot stand alone. The evidence offered to and rejected by the jury as to Smigel is the

exact same and this Court should acquit Therm-All for the evidence is insufficient to sustain a verdict of guilty.

CONCLUSION

For the foregoing reasons set forth herein, as well as set forth during the trial before the district court[48], Therm-All respectfully requests that the verdict against it be set aside, and a judgment of acquittal be entered on its behalf. If the Court denies the request for judgment of acquittal, Therm-All respectfully requests a new trial.

Respectfully submitted,

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[48] Therm-All also adopts these grounds and arguments set forth by Supreme in its brief before this Honorable Court.

CERTIFICATE OF SERVICE

I, Karl R. Wetzel, certify that today, April 3, 2003, a 3 ½ inch disk containing a copy of the brief for Appellant as well as a paper copy of the brief, a copy of the record excerpts, and the official record in this case, consisting of 9 volumes of the pleadings and 28 envelopes of exhibits, were served upon John Fonte by overnight delivery to his office at United States Department of Justice, Antitrust Division, Appellate Section, Room 10535, 601 D. Street, N.W., Washington, D.C. 20530.

_____

Karl R. Wetzel

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c),undersigned counsel certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5th Cir. R. 32.2.7(b)(3), this brief contains 13,372 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word software.

3. Upon request, undersigned counsel will provide an electronic version of this brief and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

_____

Karl R. Wetzel

No. 02-20843

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THERM-ALL, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

RECORD EXCERPTS

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CERTIFICATE OF SERVICE

I, Karl R. Wetzel, certify that today, April 3, 2003, a copy of the Record Excerpts were served upon John Fonte by overnight delivery at United States Department of Justice, Antitrust Division, Appellate Section, Room 10535, 601 D. Street, N.W., Washington, D.C. 20530.

Karl R. Wetzel