No. 07-1381

United States Court of Appeals
For The Seventh Circuit

United States,
Plaintiff-Appellee,

v.

Chris Beaver,
Defendant-Appellant

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 06-61-CR-1-3
The Honorable Chief Judge Larry J. McKinney

Brief and Required Short Appendix of
Defendant-Appellant, Chris Beaver

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Oral Argument Requested

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 07-1381

Short Caption: United States v. Chris Beaver

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R.A.P. 26.1 by completing #3):

Chris Anthony Beaver, Defendant-Appellant

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

McNabb Associates, P.C.
Lockwood, Williams & Happe

(3) If the party or amicus is a corporation:

I) Identify all its parent corporations, if any; and

N/A

II) List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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N/A

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TABLE OF CONTENTS

TABLE OF CONTENTS VI

TABLE OF AUTHORITIES VIII

STATEMENT IN SUPPORT OF ORAL ARGUMENT XII

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 6

SUMMARY OF ARGUMENT 17

ARGUMENT 18

ISSUE ONE: THE FALSE STATEMENTS UTTERED BY CHRIS BEAVER WERE NOT MATERIAL AS A MATTER OF LAW. 18

Standard of Review 18

ISSUE TWO: NO CONSPIRACY IN VIOLATION OF 15 U.S.C. § 1 WAS PROVEN BEYOND A REASONABLE DOUBT 25

Standard of Review 25

ISSUE THREE: THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION ON COUNTS ONE AND THREE OF THE INDICTMENT.. 32

Standard of Review 33

Discussion 33

CONCLUSION 42

CERTIFICATE OF COMPLIANCE 44

CERTIFICATE OF SERVICE 45

"SHORT" APPENDIX 46

CERTIFICATE OF COMPLIANCE RULE 31(E)(1) 47

APPENDIX TABLE OF CONTENTS 48

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval, 532 U.S. 275 (2001)................................. 30

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 30

Brogan v. United States, 522 U.S. 398 (1998)............................... 23

Cement Mfrs. Protective Assn. v. United States,

268 U.S. 588 (1925)... 31

Grunewald v. United States, 353 U.S. 391 (1957) 29

Maple Flooring Assn. v. United States, 268 U.S. 563 (1925)........ 31

United States v. Allied Asphalt Paving Co.,

451 F. Supp. 804 (N.D. Ill. 1978).. 31

United States v. Chavin, 316 F.3d 666 (7th Cir. 2002)........... 18, 26

United States v. Citizens & Southern Nat'l Bank,

422 U.S. 86 (1975)... 31

United States v. Container Corp. of America,

393 U.S. 333 (1969)... 31

United States v. Cowden, 677 F.2d 417 (8th Cir. 1982)................ 24

United States v. Fern, 696 F.2d 1269 (11th Cir. 1983)................. 25

United States v. Gaudin, 515 U.S. 506 (1995).............................. 22

United States v. Hayat, No. 2:05-cr-00240 (E.D. Cal. 2006) 40

United States v. Hickok, 77 F.3d 992 (7th Cir. 1996) 33

United States v. Hoover, 175 F.3d 564 (7th Cir. 1999) 18, 26, 33

United States v. Mangine, 302 F.3d 819 (8th Cir. 2002) 38

United States v. Masten, 170 F.3d 790 (7th Cir. 1999) 33

United States v. Moore, 446 F.3d 671 (7th Cir. 2006) 20

United States v. Nolan,
1994 U.S. App. LEXIS 12357 at *9, n.1 (9th Cir. 1994) 24

United States v. Pree, 408 F.3d 855 (7th Cir. 2005) 18, 25, 33

United States v. Salas-Camacho, 859 F.2d 788 (9th Cir. 1988) ... 25

United States v. SBC Comms., Inc.,
2007 U.S. Dist. LEXIS 22947 (D.D.C. 2007) 4

United States v. Shabani, 513 U.S. 10 (1994) 29

Whitfield v. United States, 543 U.S. 209 (2005) 27

Statutes

15 U.S.C. § 1 .... passim

18 U.S.C. § 1001 .... 7, 19, 20

18 U.S.C. § 371 27

18 U.S.C. § 1347 27

18 U.S.C. § 1956(h) 27

21 U.S.C. § 846 27

Other Authorities

2 Charles A. Wright, *Federal Rules of Criminal Procedure* § 467 (1982) 18, 26

ANTITRUST DIVISION, U.S. DEPT. OF JUST., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 5 (2005) 28

ANTITRUST DIVISION, U.S. DEPT. OF JUST., HORIZONTAL MERGER GUIDELINES 25 (1992) 32

Death Penalty Info. Cent., *Innocence: List of Those Freed From Death Row* (last visited May 14, 2007) 38

Innocence Proj., *Understanding the Causes: Informants* (last visited May 14, 2007) 39

Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989) 40

Rules

Fed. R. Crim. Proc. 29(a) 19

U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 23

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 27

Regulations

19 C.F.R. § 148.16 25

Statement in Support of Oral Argument

This appeal presents a question of whether Mr. Beaver's false statements were material as a matter of law, whether it was proven beyond a reasonable doubt that Mr. Beaver joined a price fixing conspiracy, and whether there was sufficient evidence to support a conviction. Oral argument is required in order to clearly elucidate the materiality of Mr. Beaver's false statements, the existence of a conspiracy involving Mr. Beaver, and the sufficiency of the evidence that led to Mr. Beaver's conviction.

Jurisdictional Statement

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 Indiana, Indianapolis Division. Notice of appeal was timely filed on February 20, 2007 in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

District Court Jurisdiction was based on 18 U.S.C. § 3231 as Mr. Beaver was charged with offenses against the law of the United States.

Statement of Issues

1. Issue One: Whether Chris Beaver's False Statements Were Material as a Matter of Law.

2. Issue Two: Whether There Existed a Conspiracy to Which Chris Beaver Joined.

3. Issue Three: Whether There Was Sufficient Evidence to Support a Conviction.

STATEMENT OF THE CASE

It was a purely throw-away comment, one that was quickly, and appropriately, stricken by the district court. But it was a comment which fully crystallized the cynical nature of the prosecution against Chris Beaver. Charles Sheeks, corporate counsel for Beaver Materials, Corporation, was asked by Frank J. Vondrak, the government's attorney, whether SBC tracked time from the moment the call was initiated or from the moment the call was picked up on the other end. Mr. Sheeks stated "I don't know how SBC does that. I would guess they bill you for it." (Tr. Vol. III, page 497)[1] Mr. Vondrak replied by saying "Phone company doesn't let us get away with anything," to which Mr. Sheeks said "I don't think they do. They never have me." (Tr. Vol. III, page 497) And then Mr. Vondraks unleashed a zinger. "Problem with monopoly, right?" asked Mr. Vondrak, a comment which was immediately ordered by the court to be stricken. (Tr. Vol. III, page 497)

[1] References to the record are to the transcripts of the trial United States v. MA-RI-AL Corporation, d/b/a Beaver Materials et al., No. 06-61-cr-1-3 (S.D. Ind. 2006) conducted from November 13-16, 2006.

As prosecutorial asides go, it certainly wasn't the worst thing a prosecutor could say, and it probably had little bearing on the outcome of trial. Putting aside the fact that monopolies and collusion among competitors are quite different things, however, the audacious cynicism behind such a comment should give one pause, especially when one considers how SBC—which was Southwestern Bell before it gobbled up Pacific Telesis, Ameritech, and Southern New England Telephone Corporation—came to operate in Indiana. And now SBC has merged with AT&T, leaving just AT&T and Verizon as the only two major phone companies in the country; what was once a system of seven regional phone companies, became just two. To be sure the Antitrust Division required some divestiture, see United States v. SBC Comms., Inc., 2007 U.S. Dist. LEXIS 22947 (D.D.C. 2007) (No. 05-2102), but the merger was, in the end, approved by the very Department of Justice division saying something at Mr. Beaver's trial that was too cute by half.

The cynicism extends to at least one other company involved in the allegations of price-fixing in the ready-mix concrete

industry. Richard Haehl, the vice-president of Shelby Materials, testified that two weeks before the Beavers and Beaver Materials went to trial, his accountant contacted Beaver's accountant about possibly purchasing Beaver Materials, because he "had heard that Beaver may be, you know, they may sell their business." (Tr. Vol. II, pages 174-75) What better way to expand business than fingering a competitor, and once the dirty work of destroying the targeted company is completed by the federal government, you can swoop in like a vulture, scooping up the carcass for pennies on the dollar.

Cynicism, by itself, is assuredly not a valid basis for a reversal. A review of the evidence, however, shows unreliable witness testimony, an utter lack of behavior which suggests there was ever an agreement between Mr. Beaver and the conspiracy, and false statements which were quickly remedied. Quite simply, Mr. Beaver should never have been convicted.

Statement of Facts

Sometime in July of 2000, a group of competitors met at Butch Nuckols horse barn in Indiana. Chris Beaver was not present at this meeting.

Sometime in the fall of 2002, a group of competitors met at a Signature Inn in Indiana. Chris Beaver was also not at this meeting.

Sometime in October, 2003, the competitors again met at Mr. Nuckols horse barn. Chris Beaver was present at this meeting.

Dozens of other meetings were held in the Indianapolis area among everyone but Chris Beavers in the periods between the July 2000 horse barn meeting and May 25, 2004.

On May 25, 2004, Special Agent Neil Freeman conducted an interview with Chris Beaver, during which interview, Mr. Beaver claimed he was not present at Butch Nuckols' horse barn. Also on this date, search warrants were executed at ready-mix concrete manufacturers in the Indianapolis area, including at Beaver Materials. (Tr. Vol. III, page 436)

On May 26, 2004, corporate counsel for Beaver Materials, Charles Sheeks, contacted Michael Boomgarden to tell him that Mr. Beaver had not been fully truthful with Mr. Freeman. (Tr. Vol. III, page 480)

On May 28, 2004, Mr. Sheeks sent a letter to Jonathan Epstein, informing Mr. Epstein that "one of the employees of my client made a misstatement to one of your agents to the effect he had not attended a meeting at what has been referred to as … 'Butch's barn.' … He did, in fact, attend the meeting." (Tr. Vol. III, page 490)

On April 11, 2006, an indictment was filed against Chris Beaver, alleging, in count one, an antitrust conspiracy in violation of 15 U.S.C. § 1, and, in count three, false statements in violation of 18 U.S.C. § 1001.

Mr. Beaver's trial began on November 13, 2006.

During this trial, Butch Nuckols testified that the following people were present at the October, 2003 horse barn meeting: Dan Butler and Price Irving from IMI[2], Scott Hughey from Carmel,

[2] Rather than simply assuming that it is understood what the business names mean, it should be noted that "IMI" is Irving Materials, Inc.; "Carmel" is Carmel Concrete; "Shelby" is Shelby

Philip Haehl and perhaps Richard Haehl from Shelby (his memory was a little hazy), and Chris Beaver from Beaver Materials. (Tr. Vol. I, pages 47-48) He also testified that the primary purpose of the meeting was to discuss prices, but it was also "a real informal meeting with some discussions on the Indiana Ready Mix Concrete Association reorganization." (Tr. Vol. I, pages 49-50) According to Mr. Nuckols, the plan was to limit discounts to $5.50 off of the published list price. (Tr. Vol. I, page 54) He testified that he assumed that Mr. Beaver had signed on to the conspiracy, but he could not point to anything specific that Mr. Beaver said or did to support that assumption. (Tr. Vol. I, page 54) He also testified that someone, he thought Scott Hughey, would contact Gary Matney, while someone else would contact American, "but that is the best [he could] remember. [He was] not sure who that was." (Tr. Vol. I, page 55) He also admitted, during cross examination, that in addition to the horse barn meetings, he had meetings with competitors at Bynum Steakhouse (Timothy Kuebler, Richard Haehl, and Philip Haehl present), the Olive

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Materials; "Builder's" is Builder's Concrete; "American" refers to American Concrete; and "Beaver Materials" refers to MA-RI-AL Corporation, d/b/a Beaver Materials, Corp.

Garden (Philip Haehl, Timothy Kuebler, and Richard Haehl present), at another place in the fall of 2001 (Dan Butler, John Huggins, and Tim Kuebler present) (though he couldn't remember precisely where), the Adam's Mark Hotel (Pete Irving, and Allan Oremus present), the Micro Brewery (one or both of the Haehls, Scott Hughey, Price Irving, and Dan Butler present), and the Loon Lake Lodge (Price Irving, Dan Butler, and John Blatzheim present); at none of these meetings was any person from Beaver Materials. (Tr. Vol I, pages 84-86, 91-92) He also admitted to making phone calls after various meetings, but never to Chris Beaver, or any Beaver for that matter. (Tr. Vol. I, pages 89, 97) He also testified that he could not recall a July 2003 meeting at his horse barn. (Tr. Vol. I, page 90) He also testified that Gary Matney called him and told him that if he ever saw one of his trucks on the airport job again, he would burn 40 of them. (Tr. Vol. I, page 103) He also orally agreed that there was no vote taken or any showing of hands to signal assent to a conspiracy. (Tr. Vol. I, page 109) Finally, he agreed with the statement "Nobody had agreed to anything because you found out there

wasn't anybody living up to any kind of agreement about $5.50, didn't you?" (Tr. Vol. I, page 117)

The next person to testify, Richard Haehl, stated that the following people, in addition to himself, were at the October, 2003 horse barn meeting: Chris Beaver from Beaver Materials, Butch Nuckols and John Blatzheim from Builder's, Scott Hughey from Carmel, Dan Butler and Price Irving from IMI, and Philip Haehl from Shelby. (Tr. Vol. II, page 153). He testified that the purpose of the meeting was to recommit to limiting discounts to $5.50 off the net selling price. (Tr. Vol. II, page 154) He also stated that Scott Hughey was the contact with Gary Matney and Jason Mann. (Tr. Vol. II, pages 154-55) He could not recall anything specific that Chris Beaver said, nor could he recall anything specific that any person said. (Tr. Vol. II, page 155) He determined that everyone was in agreement because "Nobody disagreed. Nobody dissented. Nobody stood up and objected." (Tr. Vol. II, page 156) He agreed that he had never called Chris Beaver, and had perhaps only "seen him at some of the industry functions … one time or a couple of times." (Tr. Vol. II, page 168) He also testified

that he did not recall meeting Scott Hughey at a number of locations to discuss price fixing, and, indeed, if Mr. Hughey were to testify to that effect, he would be mistaken about that. (Tr. Vol. II, page 170) Indeed, he stated that the only meetings he remembers were the two meetings in the barn and at the Signature Inn. (Tr. Vol. II, pages 171-72) He also acknowledged that he had authorized his accountant to contact Beaver Materials two weeks before trial in an attempt to purchase Beaver Materials. (Tr. Vol. II, pages 174-75) He also concurred with the statement "If you tell me you are going to do something and you don't do it, does that mean we have an agreement or not?" by replying "I guess not." (Tr. Vol. II, page 186)

The next witness, Price Irving from IMI, testified that he was not present at the 2000 horse barn meeting, but he was present at the Signature Inn meeting in 2002. (Tr. Vol. II, page 218) He testified that at that meeting he did not feel that anyone had reached an agreement to set prices or discounts, only to call each other to verify prices. (Tr. Vol. II, page 224) He also testified that he called Rick Beaver to verify a price, and that price was

$61. (Tr. Vol. II, page 227) He later testified—despite what he said about the 2002 Signature Inn meeting—that, by the time the October 2003 horse barn meeting rolled around, a five to five-and-a-half dollar discount had been the basis of a "previous agreement on the limiting of discounts." (Tr. Vol. II, page 228) He also stated that "[t]he basic problem with the agreement is that no one wanted to give up their customers. So they were quoting them with the lower price. You were not going to lose your customer. … You're going to match or beat their price to keep your customer." (Tr. Vol. II, page 228) He also testified that the following individuals were at the 2003 meeting at Butch Nuckols' horse barn: Scott Hughey from Carmel, Butch Nuckols and John Blatzheim from Builder's, either Richard Haehl or Philip Haehl from Shelby, and Chris Beaver from Beaver Materials. (Tr. Vol. II, page 232). He also could not recall what Chris Beaver said or did during the meeting, and he did mention that no one raised their hand in a vote or stated their assent. (Tr. Vol. II, pages 235, 237) He also agreed that there isn't anything intrinsically wrong with calling competitor to verify a price. (Tr. Vol. II, pages 245-46)

He also agreed to the statement “If I say I’m going to walk out the door right now and not ask you any more questions, but I continue to ask you questions, does that mean we have an agreement, or not? … It means we don’t have an agreement, doesn’t it?” (Tr. Vol. II, page 247) He also testified that he was at meeting at the horse barn in October 2002, which was also attended by Butch Nuckols, Tim Kuebler, Scott Hughey, Richard and Philip Haehl, Dan Butler, and Rick Beaver. (Tr. Vol. II, page 249) He also testified that he met at a Burger King in the fall of 2002 (Mr. Hughey and Mr. Butler in attendance), the Micro Brewery (Scott Hughey, Dan Butler, Philip Haehl, and Butch Nuckols in attendance), the Loon Lake Lodge (Dan Butler, Butch Nuckols, and John Blatzheim in attendance), and a Cracker Barrel (Scott Hughey in attendance). (Tr. Vol. II, pages 258-61) No Beaver was present at any of those meetings, and he also testified that he made a number of phone calls to enforce the agreement, but none to any of the Beavers. (Tr. Vol. II, pages 261-62) He also testified that he never met with Scott Hughey at the Pyramids, at a McDonald’s, or at a later Cracker Barrel meeting. (Tr. Vol. II, page 263) He also testified

that he never had his sales force implement the discounting plan and that he went merely to observe, and that he didn't know what Mr. Beaver was at the meetings for, either. (Tr. Vol. II, page 265)

The final substantive witness, Scott Hughey, stated he met with the following individuals at Butch Nuckols' horse barn in October of 2003: Butch Nuckols, John Blatzheim, Dan Butler, Price Irving, Richard and Philip Haehl, and Chris Beaver. (Tr. Vol. II, pages 316-17) He also testified that Dan Butler would contact Gary Matney, and that Mr. Nuckols started to offer to tell American Concrete, but Mr. Beaver "said we're talking them about either they sold them sold old software or they had talked to them about some software they had and that he would try to get hold of Jason Mann and get him the message on what we agreed on." (Tr. Vol. II, page 320) He also testified that he called Rick Beaver "several" times, and then, after the October 2003 horse barn meeting, he would call Chris Beaver. (Tr. Vol. II, page 323) He called Chris Beaver once or twice, and only after a project they had bid on had been undercut by Beaver Materials. (Tr. Vol. II, page 325) He also testified that he had not mentioned phone calls

to the Beavers at any of the meetings with the government for which an FD-302 was generated. (Tr. Vol. II, pages 334-35, 336-37) He also testified that he had a number of meetings with competitors outside the horse barn and Signature Inn meetings, none of which were with Chris Beaver. For example, he testified that he met with Butch Nuckols and Tim Kuebler in 2002 to discuss the Estridge project; he met with Dan Butler to discuss the Ripberger account; he met with Dan Butler in Mr. Butler's truck at some point to discuss the Wilhelm project; he met with Richard Haehl at a Chi-Chi's where he told Mr. Haehl that he thought it would be good if they stuck with the agreement; he met with Richard Haehl at a Bob Evans in 2002; he met with Dan Butler at Sam's Bar and Grill in January, 2002; he met with Richard Haehl at a Cracker Barrel; and he met with Gary Matney on three different occasions (Tr. Vol. II, pages 351-57) All of these discussions involved price fixing. He also testified that he met with Rick Beaver at a Dairy Queen, but that meeting was not on the timeline he prepared for the government. (Tr. Vol. II, page 358) He also testified that there were only two horse barn

meetings, one in 2000, and one in 2003. (Tr. Vol. II, page 363) He also stated that he couldn't recall specifically what anyone said at the meeting, but that no one stood up and said that they agreed. (Tr. Vol. II, page 378)

On November 16, 2006, Mr. Beaver's trial concluded and he was convicted on both counts.

On February 9, 2007, Mr. Beaver was sentenced to 27 months imprisonment.

On February 20, 2007, Mr. Beaver's "Judgment in a Criminal Case" was filed in the District Court. Also on this date, Mr. Beaver's "Notice of Appeal" was filed in the District Court.

On February 27, 2007, Mr. Beaver's "Appellant's Docketing Statement" was filed in this Honorable Court.

SUMMARY OF ARGUMENT

Appellant, Chris Beaver, argues three issues in this appeal. First, Mr. Beaver argues that his false statements to Special Agent Neil Freeman were not material as a matter of law because they 1) were not capable of influencing Mr. Freeman's investigation, and—somewhat related—2) they were corrected almost immediately. Second, Mr. Beaver argues that, to the extent a conspiracy to fix prices existed, Mr. Beaver did not join that conspiracy. Finally, Mr. Beaver argues that there was insufficient evidence to sustain a conviction on either count one or count three of the indictment.

ARGUMENT

ISSUE ONE: The False Statements Uttered by Chris Beaver Were Not Material as a Matter of Law.

Standard of Review

"The district court's denial of a judgment of acquittal is reviewed de novo." United States v. Pree, 408 F.3d 855, 865 (7th Cir. 2005). The motion should be granted if "the evidence is sufficient to sustain a conviction." Id., (citing 2 Charles A. Wright, *Federal Rules of Criminal Procedure* § 467, at 655 (1982).). A conviction is reversed only if, viewing the evidence in the light most favorable to the Government, no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Id., (citing United States v. Chavin, 316 F.3d 666, 672 (7th Cir. 2002).). "A defendant has a heavy burden in challenging a conviction based on the sufficiency of the evidence." Id., (quoting United States v. Hoover, 175 F.3d 564, 570 (7th Cir. 1999).)

Discussion

At the close of the United States' case, Mr. Beaver's trial counsel moved under Rule 29(a) of the Federal Rules of Criminal Procedure for a judgment of acquittal.[3] (Tr. Vol. III, page 452) The Seventh Circuit has "identified five elements of a 'false statements' charge under § 1001(a)(2), which, stated more generally, also apply to a scheme to conceal a material fact prohibited by § 1001(a)(1)[4]: (1) the defendant must make a statement ...; (2) the statement must be false, or there must be acts amounting to concealment; (3) the statement or concealed facts must be material; (4) the person must make the statement ...

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[3] Fed. R. Crim. Proc. 29(a) (2007) states:
(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

[4] 18 U.S.C. § 1001(a) (2007) states:
(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

knowingly and willfully; and (5) the statement or concealed information must concern a matter within the jurisdiction of a federal department or agency." United States v. Moore, 446 F.3d 671, 677 (7th Cir. 2006). Of these elements, it is uncontested that Mr. Beaver made a statement, that it was false, that he made the statement knowingly or willfully, and that the matter was within the jurisdiction of a federal department or agency. The only contested element for the purposes of this appeal is whether Mr. Beaver's statement was material.

Special Agent Neil Freeman testified that, on the morning of May 25th, 2004, at approximately 7:00 in the morning, he interviewed Mr. Beaver at his home. (Tr. Vol. III, page 436) This interview lasted approximately one-and-a-half hours. (Tr. Vol. III, page 437) During the course of this interview, Mr. Beaver was asked "if he had attended any meetings at Butch Nuckols' horse barn," to which Mr. Beaver replied that he had not. (Tr. Vol. III, page 441) As was adduced later that day when Charles Sheeks testified, this was a false statement, and it is the basis of this

response that caused Mr. Beaver to be charged under 18 U.S.C. § 1001.

The day after discovering that Mr. Beaver informed Mr. Freeman that he had never been at Mr. Nuckols' horse barn, Mr. Sheeks interviewed Mr. Beaver and adduced that he had not been entirely truthful with Mr. Freeman. (Tr. Vol. III, page 480) In an attempt to alleviate this problem, Mr. Sheeks called Michael Boomgarden, an attorney with the Department of Justice, whose business card Mr. Beaver had been given. (Tr. Vol. III, pages 480-81) Mr. Sheeks testified that he spoke to Mr. Boomgarden, telling him that "the statements that [Mr. Beaver] had made on the 25th were inaccurate and [he] wanted to correct them." (Tr. Vol. III, page 481) On May 28, 2004, Mr. Sheeks also wrote a letter to Jonathan Epstein, in which it was stated "One of the employees of my client made a misstatement to one of your agents to the effect he had not attended a meeting at what has been referred to as … 'Butch's barn.' … He did, in fact, attend the meeting." (Tr. Vol. III, pages 489-90)

A false statement is material if it has "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." United States v. Gaudin, 515 U.S. 506, 509 (1995). Mr. Beaver's statement, however, did not influence, nor was it capable of influencing, the decision of the decisionmaking body to which it was addressed, because it was remedied the very next day. Special Agent Freeman testified that his report on Mr. Beaver's interview was forwarded to the case agent approximately three or four days after the interview. (Tr. Vol. III, page 450) Asked whether "it would have been helpful … if the FBI and the government lawyers who are in charge of this investigation had been informed the very next day that Chris had made misstatements," Mr. Freeman said "I guess it would have slightly helpful. I'm not sure what the difference of three or four days would make." (Tr. Vol. III, page 450-51) As has been shown, Mr. Sheeks did forward that information to the government within that period of time. Indeed, rather than subverting the investigation, as Mr. Freeman testified happens when an individual makes a false statement because it

"[c]an lead you down wrong paths, waste time in the investigation, [and] waste time on resources," (Tr. Vol. III, page 444) the rectification by Mr. Beaver and Mr. Sheeks brought the searchlight squarely in his face, which means that the misstatement was not capable of subverting the investigation and therefore was not material.

If this Honorable Court chooses to find that the misstatements were material, it is suggested that there is amnesty available to individuals who take affirmative steps to alleviate the harm caused by their behavior. While, the Supreme Court of the United States dispensed with the "exculpatory 'no'" doctrine in Brogan v. United States, 522 U.S. 398 (1998), Mr. Beaver's case is differentiated from Brogan, and indeed other cases involving false statements, in that Mr. Beaver took affirmative steps to alleviate the misstatements. Amnesty is a legitimate goal in federal jurisprudence. For example, the commentary to section 2B1.1 of the U.S. Sentencing Guidelines Manual states that the loss amount calculation for financial crimes will be reduced by "[t]he money returned, and the fair

market value of the property returned and the services rendered, by the defendant … to the victim before the offense was detected." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. note 3(E)(i). In other words, a person who takes steps to alleviate the harm caused by his behavior is giving a certain amount of amnesty. Likewise, in an unreported case in the Ninth Circuit, a defendant argued that he corrected his prior misstatements, and therefore could not be prosecuted for false statements. United States v. Nolan, 1994 U.S. App. LEXIS 12357 at *9, n.1 (9th Cir. 1994) (No. 93-35311). The Ninth Circuit found the argument "without merit," but only "because [defendant] only admitted making false statements after he was confronted with the conflicting testimony of a codefendant." Id. Such is not the scenario in Mr. Beaver's case, because he affirmatively corrected his misstatements well before he knew of any codefendants' statements.

Indeed, Mr. Beaver's case is similar to the situation involved in United States v. Cowden, 677 F.2d 417 (8th Cir. 1982). In that case, the defendant wrote a false statement on a customs declaration form; almost immediately thereafter, he corrected it

orally. Cowden, 677 F.2d at 420. The Eighth Circuit overturned the conviction because of the principle that an individual should be able to amend his statement before the discovery of the false statement has been found. Id., (citing 19 C.F.R. § 148.16(b).). Indeed, the courts which have found Cowden unavailing for a defendant, have done so when the defendant attempts to correct misstatements, but only after the defendant obtained information that the government knew the statements were incorrect. See United States v. Salas-Camacho, 859 F.2d 788, 792 (9th Cir. 1988); United States v. Fern, 696 F.2d 1269, 1275 (11th Cir. 1983).

Therefore, it is respectfully submitted that Mr. Beaver's false statements to Special Agent Freeman were not material as a matter of law because they were not capable of influencing the investigation, due to the fact that they were rectified in a timely and speedy manner. Thus, Mr. Beaver's conviction under count 4 of the indictment should be overturned.

ISSUE TWO: No Conspiracy in Violation of 15 U.S.C. § 1 was Proven Beyond a Reasonable Doubt

Standard of Review

"The district court's denial of a judgment of acquittal is reviewed de novo." United States v. Pree, 408 F.3d 855, 865 (7th Cir. 2005). The motion should be granted if "the evidence is sufficient to sustain a conviction." Id., (citing 2 Charles A. Wright, *Federal Rules of Criminal Procedure* § 467, at 655 (1982).). A conviction is reversed only if, viewing the evidence in the light most favorable to the Government, no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Id., (citing United States v. Chavin, 316 F.3d 666, 672 (7th Cir. 2002).). "A defendant has a heavy burden in challenging a conviction based on the sufficiency of the evidence." Id., (quoting United States v. Hoover, 175 F.3d 564, 570 (7th Cir. 1999).)

Discussion

At the close of the United States' case, Mr. Beaver's trial counsel moved under Rule 29(a) of the Federal Rules of Criminal Procedure for a judgment of acquittal. (Tr. Vol. III, page 452) To prove a violation of 15 U.S.C. § 1[5], the government must prove

[5] 15 U.S.C. § 1 (2007) states:

beyond a reasonable doubt the following, as provided in the jury instructions: 1) that the conspiracy was knowingly formed and was in existence around the time alleged; 2) that the defendant knowingly—that is, voluntarily and intentionally—became a member of the conspiracy; and 3) that the conspiracy affected interstate commerce in some way. (Tr. Vol. IV, page 659)

Certain conspiracies, such as those charged under 18 U.S.C. § 371, require proof of an overt act. Others, such as those done under 21 U.S.C. § 846, and 18 U.S.C. §§ 1956(h) & 1347, or—apparently—15 U.S.C. § 1, do not. See Whitfield v. United States, 543 U.S. 209, 214 (2005). This provides for, of course, the theoretically confounding situation where two people who merely agree to, say, possess with intent to distribute more than 1.5 kilograms of cocaine base, but who do absolutely nothing in furtherance of that conspiracy, can be sentenced to twenty years in prison. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(1.5 kilograms of cocaine base carries a base offense level of 38). That shocking result rarely, if ever, presents itself, mainly because there is almost always some sort of overt act committed which negates the tough question of determining whether it is manifestly unfair to punish individuals who do absolutely nothing besides make an agreement. Indeed, as the Antitrust Division's own primer on criminal enforcement of the Sherman Act says, "In most Sherman Act prosecutions, prosecutors allege and prove an oral agreement and overt acts." ANTITRUST DIVISION, U.S. DEPT. OF JUST., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 5 (2005) *available at* http://www.usdoj.gov/atr/public/guidelines/209114.pdf.

Mr. Beaver's case, however, falls into that supermodel-slim category of cases where the United States presented no evidence of an oral agreement, and no evidence of overt acts. Indeed, the only instances where any specific prices on a Beaver project were mentioned, which would be evidence of an overt act, the price was *not* in conformity with the conspiracy. For example, Price Irving of Irving Materials, Inc., testified that he called Rick Beaver

because he had heard that Beaver Materials had priced a job at $61, which presented a larger discount—by approximately nine dollars—than had been at the center of the supposed agreement. (Tr. Vol. II, page 227) Scott Hughey, indeed, testified that that the two times he claimed to have called Chris Beaver was because Beaver Materials had undercut the competition. (Tr. Vol. II, page 325)

But no matter. The Supreme Court has ruled that it is the very act of conspiring, and nothing else, which leads to criminal liability. United States v. Shabani, 513 U.S. 10, 16 (1994) ("[t]he prohibition against criminal conspiracy, however, does not punish mere thought; the criminal agreement itself is the *actus reus* and has been so viewed since [1705]."). Dismissing its own previous rulings warning against over-reaching and expansive conspiracy prosecutions as mere dicta, the Supreme Court has set an incredibly low threshold for prosecution. See Shabani, 513 U.S. at 14 (dismissing statements in Grunewald v. United States, 353 U.S. 391, 404 (1957) that the Supreme Court "will view with disfavor attempts to broaden the already pervasive and wide-

weeping nets of conspiracy prosecutions" as mere dicta which "says little about the views of Congress.").

The United States, then, merely had to prove that a conspiracy existed, and that Chris Beaver joined the conspiracy. To do that, the United States offered four individuals—Butch Nuckols, Richard Haehl, Price Irving, and Scott Hughey—who testified that an agreement existed. As discussed elsewhere, these witnesses were entirely unreliable.

How exactly, then, can one prove an agreement, in the absence of oral agreements or overt acts? Indeed, the Supreme Court of the United States, in Alexander v. Sandoval, 532 U.S. 275 (2001) bristles at the notion that "silence implies agreement." Sandoval, 532 U.S. at 285 n.5 ("The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found it unnecessary (and did not wish) to address, under compulsion of JUSTICE STEVENS' new principle that silence implies agreement."). Where there is no proof of an express agreement, business behavior is admissible circumstantial evidence. See American Tobacco Co. v. United

States, 328 U.S. 781, 809 (1946) ("Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose.") But there was no proof of Beaver Material's business behavior offered, other than to show that Beaver Materials was undercutting the competition.

The United States emphasized alleged contacts between members of the conspiracy and the Beavers, for the purpose of verifying prices. "[T]he dissemination of price information is not itself a *per se* violation of the Sherman Act." United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113 (1975) (citing Maple Flooring Assn. v. United States, 268 U.S. 563 (1925); Cement Mfrs. Protective Assn. v. United States, 268 U.S. 588 (1925).). Indeed, the "test is not whether a criminal anti-trust defendant obtains information about potential bidders; it is whether 'the exchange of price information has had an anti-competitive effect [on] the industry, chilling the vigor of price competition." United States v. Allied Asphalt Paving Co., 451 F. Supp. 804, 815 (N.D. Ill. 1978) (citing United States v. Container Corp. of America, 393 U.S. 333, 337 (1969).). As demonstrated,

supra, the only price verifications with Beaver Materials established that Beaver was undercutting the competition, which is the very sort of competitive behavior that the Antitrust Division points to when it approves a horizontal merger. ANTITRUST DIVISION, U.S. DEPT. OF JUST., HORIZONTAL MERGER GUIDELINES 25 (1992) *revised* 1997, *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.pdf ("A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels.").

It is therefore respectfully submitted that it was not proven beyond a reasonable doubt that Chris Beaver joined a conspiracy to fix prices, and thus, his conviction on count one should be vacated and his case remanded to the District Court for further proceedings.

ISSUE THREE: There was Insufficient Evidence to Support a Conviction on Counts One and Three of the Indictment.

Standard of Review

When reviewing a conviction for sufficiency of evidence, the Seventh Circuit considers the evidence in the light most favorable to the government, and all inferences are drawn in the government's favor. United States v. Masten, 170 F.3d 790, 794 (7th Cir. 1999). Reversal is appropriate only when the record contains no evidence, however weighed, from which the jury could have found guilt beyond a reasonable doubt. United States v. Hickok, 77 F.3d 992, 1002 (7th Cir. 1996). "A defendant has a heavy burden in challenging a conviction based on the sufficiency of the evidence. United States v. Pree, 408 F.3d 855, 865 (7th Cir. 2005) (quoting United States v. Hoover, 175 F.3d 564, 570 (7th Cir. 1999).).

Discussion

Five individuals, four competitors and an FBI Special Agent, testified against Chris Beaver. The only credible evidence to come from this testimony was from Special Agent Freeman who testified accurately that Mr. Beaver uttered a false statement when he was interviewed on May 25, 2004. As has been shown

supra, these false statements were not material as a matter of law. The remaining testimony was completely unreliable because no two competitors said anything as a whole which could corroborate the testimony of the others. Indeed, just about the only thing that the four agreed upon was that none of the competitors were setting their discounts from the net price to the supposedly agreed-upon $5.50, that Chris Beaver said nothing specific that anyone could remember, and that they only assumed there was an agreement because people were at these meetings.

Take the testimony about who was present at Butch Nuckols' horse barn meeting of October, 2003, for example. Mr. Nuckols testified that himself, Dan Butler, Price Irving, Scott Hughey, Philip Haehl, perhaps Richard Haehl, and Chris Beaver were present. (Tr. Vol. I, page 47-48) Chris Beaver has already acknowledged his presence at this meeting. Richard Haehl, however, testified that those present at the October, 2003 meeting were himself, Butch Nuckols, John Blatzheim, Scott Hughey, Dan Butler, Price Irving, Philip Haehl, and Chris Beaver. (Tr. Vol. II, page 153) Price Irving testified that, in addition to himself, the

following individuals were present at the horse barn meeting of October, 2003: Scott Hughey, Butch Nuckols, John Blatzheim, either Richard Haehl or Philip Haehl, and Chris Beaver. (Tr. Vol. II, page 232) Scott Hughey testified that those present at the October, 2003 meeting, in addition to himself, were Butch Nuckols, John Blatzheim, Dan Butler, Price Irving, Richard and Philip Haehl, and Chris Beaver. (Tr. Vol. II, pages 316-17) If one chooses to believe Mr. Hughey, then that means that Butch Nuckols' recollection was incorrect, and that Price Irving's recollection was incorrect. If, however, one chooses to believe Price Irving, then Mr. Haehl's, Mr. Nuckols', and Mr. Hughey's recollection was incorrect. And so on and so forth.

Then there is the testimony about who would call Jason Mann and Gary Matney. Mr. Nuckols testified that Mr. Hughey would call Mr. Matney, and someone else, but he wasn't sure who, would contact Mr. Mann. (Tr. Vol. I, page 55) Mr. Haehl's testimony was silent as to this occurrence, as was Mr. Irving's. Mr Hughey testified that Dan Butler would contact Mr. Matney, but that Mr. Beaver would contact Mr. Mann. (Tr. Vol. II, page

320) One would think, however, that Mr. Nuckols, who was purportedly about to volunteer to contact Mr. Mann, would have recalled that Chris Beaver would call instead, if Mr. Hughey's testimony is to be believed.

None of the witnesses could corroborate precisely who they met with outside the horse barn meetings, except that it was never with Chris Beaver. Mr. Nuckols testified that he met with Timothy Kuebler, Richard Haehl, Philip Haehl, Dan Butler, John Huggins, Pete Irving, Price Irving, Scott Hughey, Allan Oremus, and John Blatzheim in various combinations and in various places. (Tr. Vol. I, pages 84-86, 91-92). Mr. Haehl, on the other hand, stated that the only meetings he remembers were the July, 2000 and October, 2003 meetings at the horse barn and the 2002 meeting at the Signature Inn; he vehemently denied meeting with Scott Hughey. (Tr. Vol. II, pages 170-72) Mr. Irving testified that there was an October, 2002 meeting at Mr. Nuckols' horse barn (Tr. Vol. II, page 249) This was something that no other person recalled or mentioned. He also stated that he met with Scott Hughey, Dan Butler, Philip Haehl, Butch Nuckols, and John

Blatzheim at various places and on various dates. (Tr. Vol. II, pages 258-61) He, however, denied ever meeting with Scott Hughey at the Pyramids, at a McDonald's, or at a Cracker Barrel. (Tr. Vol. II, page 263) Scott Hughey said that he met with Butch Nuckols, Tim Kuebler, Dan Butler, Richard Haehl, and Gary Matney, at various locations and on various dates. (Tr. Vol. II, pages 351-57) He did not meet, however, with Chris Beaver.

Finally, when it comes to phone calls, the only person to say that he had had a phone call with Chris Beaver was Scott Hughey, who had not informed the government in two memorialized meetings that he had done so. (Tr. Vol. II, page 323) But he testified that he did so after discovering that Beaver Materials had undercut him. (Tr. Vol. II, page 325)

Indeed, the only thing that is unanimous among the four witnesses is that no vote was ever taken, no person voiced their assent to the supposed conspiracy, and that projects were being undercut by the competitors. There is near-unanimity among the witnesses that an agreement without adherence is not really an agreement at all. (Tr. Vol. I, page 117; Tr. Vol. II, page 186; Tr.

Vol. II, page 247) Price Irving, in fact, testified that he went to the meetings only to observe, because he was making more money by *not* adhering to any agreement. (Tr. Vol. II, page 265) (It might be noted that Allyn Beaver testified that he sent Chris Beaver to the October, 2003 horse barn meeting for observational purposes. (Tr. Vol. III, page 544)) Mr. Irving also said, regarding the 2002 meeting at Signature Inn, that there was no agreement to set prices or discounts (Tr. Vol. II, page 224) even though the other competitors testified that there was one.

Now, the United States is likely to argue that "the jury evidently found at least some of those witnesses credible." United States v. Mangine, 302 F.3d 819, 823 (8th Cir. 2002). It would be easier to accept such an axiomatic statement if juries didn't make mistakes and if juries were inherently reliable. Since 1973, according to the Death Penalty Information Center, 124 individuals have been exonerated after having been convicted by a jury and sentenced to death. Death Penalty Info. Cent., *Innocence: List of Those Freed From Death Row* (last visited May 14, 2007) at

http://www.deathpenaltyinfo.org/article.php?scid=6&did=110. According to the Innocence Project, more than 200 individuals have been exonerated solely due to DNA testing, and "[i]n more than 15% of cases of wrongful conviction overturned by DNA testing, an informant … testified against the defendant." Innocence Proj., *Understanding the Causes: Informants* (last visited May 14, 2007) at: http://www.innocenceproject.org/understand/Snitches-Informants.php. The juries may have found witnesses credible in those 200-plus cases, but it turns out that those juries got it wrong.

It is thus a legal fiction to say that juries are inherently reliable or that they are fastidious proponents of the tenet "innocent until proven guilty." In Lodi, California, for example, Hamid Hayat is in the process of arguing for a new trial based on a juror who came forward with an affidavit stating that the jury foreman instructed the jurors that—notwithstanding exhortations by the judge that an individual is presumed innocent until proven guilty—they had to process the evidence "with a slant towards

guilt," made statements such as all Muslims look alike, and routinely discussed the case, the evidence, and the news coverage of the case with jurors prior to deliberations. See Affidavit of Arcelia Lopez in Support of Defendant's Motion for New Trial, United States v. Hayat, No. 2:05-cr-00240 (E.D. Cal. 2006) (D.E. 329, Attachment 1). Furthermore, in 1989, Phoebe C. Ellsworth, the Frank Murphy Distinguished University Professor of Law and Psychology at the University of Michigan Law School, conducted a study of 216 test jurors. Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989). This group of 216 test subjects viewed a two-and-one-half-hour video of a mock trial, and was afterward divided into groups of twelve to deliberate. Id. at 211. The deliberations were videotaped, and the results were illuminating: while the jurors "fairly well" determined factual issues, correct legal conclusions were made only fifty-one percent of the time, unclear legal conclusions were made twenty-eight percent of the time, and incorrect references were made twenty-one percent of the time. Id. at 219.

There is no possible way a rational trier of fact could find beyond a reasonable doubt that Mr. Beaver was a member of a conspiracy to fix discounts. Therefore, it is respectfully submitted that there was insufficient evidence to sustain a conviction, and his conviction on count one of the indictment should be vacated and his case remanded to the District Court for further proceedings.

CONCLUSION

If this Honorable Court concludes that Chris Beaver's false statements were not material as a matter of law, it is respectfully requested that his conviction on count three of the indictment be vacated and his case be remanded to the District Court for further proceedings.

If this Honorable Court concludes that it was not proven beyond a reasonable doubt that Chris Beaver joined a conspiracy to fix prices, it is respectfully requested that his conviction on count one of the indictment be vacated and his case be remanded to the District Court for further proceedings.

If this Honorable Court concludes that there was insufficient evidence to support Chris Beaver's conviction, it is respectfully requested that his conviction on count one of the indictment be vacated and his case be remanded to the District Court for further proceedings.

Respectively submitted,

/s/ Christopher M. Choate
Christopher M. Choate
Attorney for Appellant
Chris Beaver

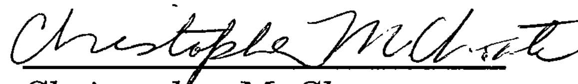
Dated: May 25, 2007

07-1381

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,613 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in size 14 Century font.

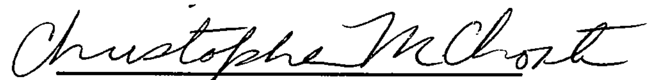


Christopher M. Choate
Attorney for Appellant
Chris Beaver

Dated: May 25, 2007

CERTIFICATE OF SERVICE

I, Christopher M. Choate, certify that today, May 25, 2007 a "proof or final" copy of the brief for appellant, was served upon Assistant United States Attorney Steven J. Mintz, Department of Justice, Antitrust Division, 950 Pennsylvania Avenue N.W., Washington, DC 20530.



Christopher M. Choate
Counsel for Appellant
Chris Beaver

"SHORT" APPENDIX

I, Christopher M. Choate, hereby affirm that all materials required by Circuit Rule 30(a) & (b) are included in the appendix.

Circuit Rule 30(a) and (b) states, in pertinent part:

> (a) *Contents.* The appellant shall submit, bound with the main brief, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court or administrative agency upon the rendering of that judgment, decree, or order.
>
> (b) *Additional Contents:* The appellant shall also include in an appendix:
>
> (1) Copies of any other opinions, orders, or oral rulings in the case that address the issues sought to be raised. If the appellant's brief challenges any oral ruling, the portion of the transcript containing the judge's rationale for that ruling must be included in the appendix.

Christopher M. Choate
Counsel for Appellant
Chris Beaver

Dated: May 25, 2007

CERTIFICATE OF COMPLAINCE
WITH CIRCUIT RULE 31(e)(1)

The undersigned certifies that, to his knowledge, the documents contained in this Appendix are not available to him electronically.

Christopher M. Choate
Counsel for Appellant
Chris Beaver

Dated: May 25, 2007

Appendix Table of Contents

JUDGMENT IN A CRIMINAL CASE 49

DISTRICT COURT RATIONALE FOR DENYING MOTION FOR ACQUITTAL 56

JUDGMENT IN A CRIMINAL CASE

UNITED STATES DISTRICT COURT

SOUTHERN District of INDIANA

UNITED STATES OF AMERICA
V.
CHRIS A. BEAVER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:06CR00061-002

USM Number: 08207-028

Jeffrey Lockwood
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

X was found guilty on count(s) 1 and 3
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count(s)
15 U.S.C. § 1	Sherman Antitrust Act Violation	5/25/04	1
18 U.S.C. § 1001	Making False Statements	5/25/04	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/9/2007
Date of Imposition of Judgment

Signature of Judicial Officer

Honorable Larry J. McKinney, Chief U.S. District Court Judge
Name and Title of Judicial Officer

2/20/07
Date

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 27 months, each count, concurrent

X The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a minimum security facility, specifically, to the federal prison camp in Terre Haute, Indiana.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____________ ☐ a.m. ☐ p.m. on ____________ .

☐ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on ____________ .

☐ as notified by the United States Marshal.

X as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ____________ to ____________

a ____________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ____________
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 2 years

Count 1 - 1 year; Count 3 - 2 years, concurrent

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of ure substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of ach month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall pay any fine that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.
2. The defendant shall provide the probation officer access to any requested financial information while any remaining fine balance is owed.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) ______________________________ ____________________
Defendant Date

______________________________ ____________________
U.S. Probation Officer/Designated Witness Date

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ 5,000.00	$

☐ The determination of restitution is deferred until ______. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ ________	$ ________	

☐ Restitution amount ordered pursuant to plea agreement $ ________

The defendant shall pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the X fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ ______________ due immediately, balance due

☐ not later than ______________________ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B X Payment to begin immediately (may be combined with ☐ C, ☐ D, or X F below); or

C ☐ Payment in equal ___________ (e.g., weekly, monthly, quarterly) installments of $ ___________ over a period of __________ (e.g., months or years), to commence _________ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal ___________ (e.g., weekly, monthly, quarterly) installments of $ ___________ over a period of __________ (e.g., months or years), to commence _________ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within __________ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Fine shall be paid within 90 days of sentencing.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Defendant Name	Case Number	Joint & Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

District Court Rationale for Denying Oral Motion of Acquittal

1 signed the motion and we would join in the argument to the
2 extent that it applies to those Defendants. Thank you.
3 THE COURT: Did you want to raise the other issues
4 today or --
5 MR. LOCKWOOD: If I may now, sir, if it's convenient.
6 THE COURT: Now is the time.
7 MR. LOCKWOOD: May I get my notes?
8 THE COURT: Yes, you may.
9 MR. LOCKWOOD: Your Honor, we would like to present
10 evidence under Rule 1006 of the --
11 THE COURT: I don't mean that.
12 MR. LOCKWOOD: I'm sorry.
13 THE COURT: I meant on the other count against your
14 client.
15 MR. LOCKWOOD: Oh, no, sir. I have no motion to make
16 about that at this stage of the proceedings. Thank you.
17 THE COURT: Sure.
18 MR. VONDRAK: Your Honor, Mr. Voyles correctly states
19 that when a defendant files a motion pursuant to Rule 29 of the
20 Federal Rules of Criminal Procedure, the Court must view the
21 evidence in the light most favorable to the government. Using
22 that standard, the government has met its burden sufficient to
23 survive a Rule 29 challenge.
24 As this Court is well aware, there are three elements of
25 violation of the Sherman Antitrust Act: That a conspiracy

1 existed, that the defendant knew of the existence of that
2 conspiracy, and that the defendant joined that conspiracy.
3 Mr. Voyles was incorrect when he stated what the burden of
4 proof was as far as the government, as far as the corporation
5 is concerned. There is no need for the government to prove
6 that a high ranking officer was the person who joined the
7 conspiracy. In fact, the evidence in this case is clear that
8 Ricky Beaver was the person who was issuing quotes for bids and
9 had authority to issue those bids.
10 There is no standard -- there is no burden on the
11 government to prove it was an officer of the corporation or
12 that it was the president of the corporation. Any agent
13 acting -- and I believe Your Honor is considering a jury
14 instruction along these lines. Any action by an agent who has
15 authority to do so can bind the corporation.
16 As far as the defendant's activity or lack thereof at the
17 conspiratorial meetings, we have had evidence from Butch
18 Nuckols, Richard Haehl, Price Irving and Scott Hughey that each
19 of the individual Defendants attended conspiratorial meetings
20 and that at the conclusion of those meetings they believed that
21 the two individual Defendants were members of that conspiracy.
22 In addition, we do have evidence that was adduced yesterday
23 from Mr. Hughey that he had conversations with Ricky Beaver and
24 also a conversation or two with Chris Beaver related to pricing
25 pursuant to the conspiracy. So even though that isn't a burden