UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	Cause No. IP 06- 61 -CR-01 M/F -02/ -03
v.	)	
MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, CORP.; CHRIS A. BEAVER; and RICKY J. BEAVER a/k/a RICK BEAVER,	)	Hon. Larry J. McKinney
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(c)

On November 16, 2006 the jury in the above-captioned matter returned verdicts of guilty against all defendants in Count 1 of the Indictment in this case, which charged them with price fixing in violation of the Sherman Act, 15 U.S.C. § 1.[1] The defendants challenge the sufficiency of the evidence to support the jury's guilty verdict and ask that this Court substitute a judgment of acquittal for the jury's verdict, or in the alternative, grant the defendants a new trial.[2] Defendants' Motion, p. 3. For the reasons discussed below, the defendants' motion should be denied.

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[1] The jury also found defendants Chris A. Beaver and Ricky J. Beaver guilty of making false statements to the FBI in violation of 18 U.S.C. § 1001, but the defendants' motion does not address those convictions. Since more than seven days have passed since the jury returned its verdict and was discharged by this Court, the defendants have waived their right to file a Motion for Acquittal on those counts. *See* Rule 29(c)(1) of the Federal Rules of Criminal Procedure.

[2] Although the defendants' Motion does not specifically say so, the request for a new trial is apparently made pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

It is well-established that in reviewing a claim of insufficient evidence, the Court should draw all inferences in favor of the prosecution and affirm the conviction if any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See* United States v. Hicks, 368 F.3d 801, 804-05 (7th Cir. 2004); United States v. Hacks, 162 F.3d 937, 942 (7th Cir. 1998). A challenge to the sufficiency of the evidence is a formidable task given the rigorous standard of review. United States v. Curtis, 324 F.3d 501, 505 (7th Cir. 2003); United States v. Seawood, 172 F.3d 986, 988 (7th Cir. 1999). This rigorous standard is the same whether the motion is for acquittal pursuant to Rule 29 or for a new trial pursuant to Rule 33. *See* United States v. Kosth, 257 F.3d 712, 718 (7th Cir. 2001).

In their motion, defendants cite to isolated excerpts from the transcripts in an effort to bolster their claim that there was insufficient evidence to convict them. However, a review of the record in this case clearly demonstrates that there was a sufficient basis for a reasonable trier of fact to find the elements beyond a reasonable doubt. The direct examinations of Nuckols (Daily Transcript pp. 28 - 73), Haehl (Daily Transcript pp. 122 - 62), Irving (Daily Transcript pp. 119 - 239) and Hughey (Daily Transcript pp. 288 - 326) all contain testimony from which a rational trier of fact could conclude that: (1) the conspiracy described in the Indictment was knowingly formed and in existence around the time alleged; (2) the defendants knowingly became members of that conspiracy; and (3) the conspiracy either affected interstate commerce or was within the flow of interstate commerce. Indeed, as this Court noted in ruling on the defendants' Rule 29 Motion at the end of the government's case in chief, the testimony of Hughey alone is sufficient to defeat a rule 29 motion. Daily Transcript p. 459.

Furthermore, although not necessary to convict the company, the testimony of Allyn

Beaver demonstrated that Chris A. Beaver and Ricky J. Beaver had pricing authority and discretion on behalf of their company. Daily Transcript pp. 553 - 54. There was also evidence that Allyn Beaver knew that both Chris A. Beaver and Ricky J. Beaver were communicating with their competitors about pricing. Daily Transcript pp. 551- 552.

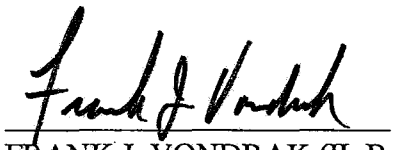
Finally, the defendants mischaracterize the United States' burden in a price fixing case when they say that there is little that defendants Chris A. Beaver or Ricky J. Beaver did or said. As is set forth in more detail in the United States' Trial Brief, the rule is firmly established that in a Sherman Act conspiracy the agreement itself constitutes the complete offense; once a *per se* unlawful agreement is proved, a complete violation is shown. *See* Nash v. United States, 229 U.S. 373, 378 (1913) ("the Sherman Act . . . does not make the doing of any act other than the act of conspiring a condition of liability."); United States v. Gillen, 599 F.2d 541, 545 (3rd Cir. 1979) ("The act of agreeing to fix prices is in itself illegal; the criminal act is the agreement."); United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 465 (4th Cir. 1979) ("The mere existence of a price-fixing agreement establishes the defendants' illegal purpose . . ."). The Sherman Act does not require proof of an overt act in furtherance of the conspiracy. *See* United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977) ("The heart of a Section One violation is the agreement to restrain; no overt act, no actual implementation of the agreement is necessary to constitute an offense.") (citation omitted); United States v. Dynalectric Co., 859 F.2d 1559, 1564 n.6 (11th Cir. 1988). *See Also* Court's Jury Instruction Number 15.

Nor was the United States required to show that the defendants said anything. An exchange of words is not required to prove conspiratorial conduct. Direct Sales Co., Inc. v. United States, 319 U.S. 703, 714 (1943). *See Also* Court's Jury Instruction Number 14,

Paragraph 2. Thus, there is sufficient factual basis for a rational trier of fact to conclude that the defendants joined the charged conspiracy. The United States was not required to show that they did anything more.[3]

Because the defendants have failed to meet their high burden of showing that, considering the evidence in the light most favorable to the government, no rational trier of fact could have convicted the defendants, the Defendants' Motion For A Judgment of Acquittal Pursuant To Federal Rule Of Criminal Procedure 29 (c) should be denied.

Respectfully submitted,



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[3] The United States does not concede that defendants Chris A. Beaver and Ricky J. Beaver said or did nothing. Witnesses (Nuckols, Haehl, Irving and Hughey) testified that they could not specifically recall what the Beavers said at meetings – not that they said nothing. Furthermore, Hughey testified that he specifically recalled telephone conversations with both defendants in furtherance of the charged conspiracy. Daily Transcript pp. 323 - 26.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and accurate copies of the GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(c) were served upon counsel for each defendant listed below by Federal Express, this 27th day of November 2006:

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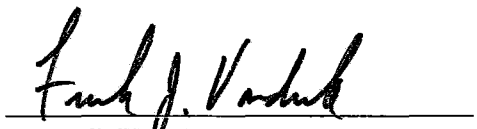

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