

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) CAUSE NO. IP 06-CR-1, 2, 3
) Indianapolis, Indiana
-v-) November 16, 2006
) Volume IV
MA-RI-AL CORPORATION, d/b/a)
BEAVER MATERIALS, CORP.; et al.)
)
Defendants.)

Before the Honorable
Larry J. McKinney, Chief Judge

OFFICIAL REPORTER'S TRANSCRIPT OF
TRIAL

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TRANSCRIPTION

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JURY CHARGE 644

1 (Trial resumed, 9:00 A.M.)

2 (Jury not present)

3 THE COURT: Gentlemen, are we ready to proceed with
4 the jury? Have all your things set up?

5 MR. LOCKWOOD: We are, Your Honor.

6 THE COURT: All right, let's bring them in.

7 (Jury present)

8 THE COURT: You may be seated.

9 Good morning, ladies and gentlemen.

10 Any of you see or read anything about this case last night
11 or this morning?

12 All right, then, we will hear the final arguments of
13 counsel this morning, as we mentioned yesterday. We will hear
14 first from the Government.

15 Mr. Epstein.

16 MR. EPSTEIN: Good morning, ladies and gentlemen of
17 the jury. My name is Jonathan Epstein. I represent the United
18 States.

19 Before I begin I would like to thank all of you for
20 partaking your civic duty to come here and serve as juror in a
21 criminal trial, because one of the greatest things we have in
22 this country is if you are tried in a criminal matter you will
23 have the opportunity to be judged by a jury of your peers. So
24 I know when you were sitting in the jury selection you were
25 probably a little jealous of some of the people who got

1 eliminated and got to go home and didn't have to miss work.
2 But just know we do appreciate you gave your time to come here
3 to listen to this and to make adjustments in this matter.

4 I know this seems -- you have heard a lot of talk about
5 antitrust and price fixing and conspiracy, net prices, list
6 prices, discount agreements. It really boils down to a very
7 simple case. It involves things we all learned when we were
8 kids. You don't cheat, you don't steal, and you don't lie.
9 The defendants here cheated. They conspired and they violated
10 the law. They did something they knew they shouldn't be doing.
11 And they stole. By conspiring with their co-conspirators they
12 were able to charge a higher price than they would have been
13 able had they not conspired, and by doing so they took money
14 out of their customers' pockets.

15 And the defendants lied. When the FBI came to interview
16 them to find out information that is critical to their
17 investigation, what did they do? They told the FBI they were
18 not even aware of meetings at Nuckols' horse barn. They told
19 the FBI they had never even discussed prices with competitors.
20 And they told THE FBI they were unaware of any price fixing
21 agreements.

22 When you go back and begin your deliberations, ladies and
23 gentlemen of the jury, ask yourselves one question. If the
24 story that defense counsel has told you, the story that Rick
25 and Chris were at conspiratorial meetings, but they weren't

1 part of agreements, why wouldn't they have simply told the FBI
2 that? Why would they lie and tell the FBI they were never at
3 those meetings? Why? Because they knew what they were doing
4 was wrong, and they were doing it to cover up their cheating
5 and stealing.

6 Remember what Richard Haehl told you. You have his
7 testimony on the screen for you.

8 "I knew it was illegal, and I knew it from the start, and I
9 regret it."

10 This is a simple case because, as Judge McKinney will
11 instruct you shortly, the agreement is the crime even if it is
12 never carried out. Remember that. That is important.

13 There has been a lot of testimony about whether Rick Beaver
14 and Chris Beaver reached agreements with their competitors.
15 Judge McKinney also will instruct you as to what an agreement
16 is and what an agreement is not. An agreement need not be
17 express or formal. An agreement need not be in writing. And
18 an agreement need not even cover all the details of how it is
19 to be carried out. In other words, despite what you have heard
20 from defense counsel, you can have an agreement without a vote.
21 You can have an agreement without a show of hands. You can
22 have an agreement without writing on a slip of paper.

23 We know that when they walked out of the meetings everyone
24 was in agreement, and we know that Rick and Chris were part of
25 those agreements. How do we know they were in agreement?

1 Richard Haehl told you they were in agreement. Butch Nuckols
2 told you they were in agreement, and he pled guilty for his
3 involvement in that agreement.

4 Price Irving also told you there was an agreement. He also
5 pled guilty.

6 And Scott Hughey sat in that chair and told you there was
7 an agreement, and he also pled guilty.

8 Again, the agreement is the crime. And when Richard Haehl
9 walked out of that meeting he had committed a crime. When
10 Butch Nuckols walked out of that meeting he had committed a
11 crime. When Price Irving walked out he had committed a crime.
12 And when Scott Hughey walked out he had committed a crime. And
13 just as all these gentlemen had committed a crime, so did the
14 defendants, Rick and Chris Beaver.

15 And don't forget the fact that when the FBI interviewed
16 Chris and Rick Beaver they each flatly denied any knowledge of
17 pricing discussions among competitors. If Rick Beaver had not
18 agreed with his competitors, if he had not entered into an
19 illegal price fixing agreement, why wouldn't he have just told
20 the FBI, "I was at those meetings, sure, but I didn't agree to
21 anything." Or even, "Maybe some people agreed; I didn't." But
22 that is not what he told the FBI. And if Chris Beaver did not
23 agree with his competitors, if he had not entered into an
24 illegal price fixing agreement, why wouldn't he have simply
25 told the FBI that? Why did Rick Beaver and Chris Beaver lie to

1 the FBI? The answer is simple. They lied because they agreed
2 to limit discounts and they didn't want the FBI and the
3 Department of Justice to find out.

4 But the FBI and the Department of Justice did find out, and
5 now their lies tell you that they knew what they were doing is
6 wrong and they tried to conceal it.

7 Again, remember the evidence and the -- the evidence you
8 saw and the testimony you heard. You heard their
9 co-conspirators testify that Rick Beaver was at the July, 2000
10 horse barn meeting and that he agreed to limit discounts. And
11 you heard that Rick Beaver was at the Signature Inn meeting,
12 where he and his co-conspirators again reinforced their
13 agreement to limit discounts. And you heard the conspirators
14 tell you that long after the conspiracy had been established at
15 that first horse barn meeting, at the second horse barn meeting
16 in October, 2003, Chris Beaver now joined that agreement to
17 limit discounts.

18 Richard Haehl laid out all three meetings for you in his
19 testimony. He explained that at the July, 2000 horse barn
20 meeting everybody was involved in the discussion that was
21 there. And in the end there was just a consensus that we limit
22 the discounts to 5.50. 5.50 off net selling price.

23 And Richard Haehl told you that at the Signature Inn
24 meeting everybody there knew the reason they were there, and
25 that it was illegal, and nobody dissented. We didn't take a

1 vote, but in the end it was the agreement that we would limit
2 discounts to 5.50 off the net selling price of concrete.

3 Finally, Richard Haehl told you about the agreement at the
4 October, 2003 horse barn. There was an agreement. Nobody
5 disagreed, nobody dissented, nobody stood up and objected.

6 In addition to reaching agreements with their competitors
7 at those meetings Rick and Chris also took action to advance
8 the agreement. You heard Richard Haehl testify that Rick
9 Beaver called him to talk about pricing for a job for Greystone
10 that Beaver was bidding on and he wanted to find out what he
11 should be pricing at. Rick Beaver called to confirm pricing
12 for that job. And, as Richard Haehl testified, "Well, I
13 think -- I think he felt like we had an agreement to limit
14 discounts and IMI strayed from that number and he had bid
15 according to how we should bid. IMI had a lower price."

16 And you heard Price Irving testify that he and Rick Beaver
17 spoke in order to talk about pricing for Custom Concrete job,
18 the apartment complex in McCordsville, and that Beaver and IMI
19 were bidding against each other, and he wanted to make sure
20 they were pricing according to the agreement. Price Irving's
21 testimony is on the screen for you. "There was a job right
22 across from our McCordsville facility that Custom Concrete was
23 doing the concrete work on, and our sales staff told me that
24 Beaver had the low price. It was Custom's yearly contract
25 price to them, and I heard it was \$61. I heard that from one

1 of the sales staff. I'm not sure which one. I went to Dan
2 Butler, asked him about it. He said go ahead, call Rick. So I
3 did, and Rick confirmed that this was their contract price to
4 Custom." Rick is confirming his price with a competitor.

5 Scott Hughey testified that he and Rick Beaver spoke
6 several times about pricing on projects that Beaver and Carmel
7 were competing on in order to make sure they were pricing in
8 accordance with the agreement.

9 Scott Hughey also told you that he spoke with Chris Beaver
10 about pricing on projects that Carmel and Beaver were competing
11 on in order to make sure they were pricing in accordance with
12 what they had agreed to.

13 All the calls Rick Beaver and Chris Beaver were involved in
14 discussing pricing with their competitors was just as they had
15 agreed to do with their competitors at these conspiratorial
16 meetings. If you have a question about pricing, pick up the
17 phone and call a competitor. And that is what they did.

18 Scott Hughey told you that Chris Beaver told conspirators
19 at the meeting he was going to take the conspirators' message
20 back to Jason Mann at American. His testimony is on the
21 screen.

22 "And someone -- we were talking about who was going to tell
23 American Concrete about it, and I think Butch started to say
24 something, that he would. And then Chris said we are talking
25 to them about either they sold them some old software they had

1 and that they would trying to get ahold of Jason Mann and get
2 him the message on what we agreed on."

3 Allyn Beaver, Rick Beaver's own uncle, testified that he
4 even he knew, even his own uncle knew that Rick Beaver was
5 communicating with competitors. Even if you don't believe our
6 witnesses, their own witness told you that.

7 You have seen too much evidence and heard too much
8 testimony to ignore the fact that there is an agreement and
9 that the defendants were part of that agreement. Don't lose
10 sight of what we are talking about here, ladies and gentlemen.
11 We are talking about a price fixing conspiracy. Judge McKinney
12 will explain to you shortly the purpose of the Sherman Act, but
13 briefly, the Sherman Act, as we told you in the opening, is
14 designed to protect competition. It is competition like that
15 that allows customers like you and me to get the benefits of a
16 free and open marketplace so we can get the best possible
17 products at the lowest possible prices. Unfortunately, price
18 fixing conspiracies like the one in this case destroys that
19 competition. They undermine the free and open market, they
20 cheat customers by charging non-competitive prices, and they
21 deprive those customers of products and services.

22 And false statements. The false statement statute here is
23 to make sure that law enforcement agents like Special Agent
24 Schlobohm can affectively investigate criminal activity and
25 bring those involved to justice. The FBI investigates all

1 matter of crimes; bank robberies, political corruption,
2 terrorism, price fixing. If people were able to lie to the FBI
3 without any repercussions that would thwart investigations that
4 would allow conspiracies to go undetected and it would allow
5 crimes to go unpunished. We are not talking about a simple
6 lie. We are talking about a very important matter. The FBI
7 interviewed these people, understood them to be telling the
8 truth, and found out they weren't.

9 Count 1 of the indictment charges Rick Beaver, Chris
10 Beaver, and Beaver Materials with price fixing. A price fixing
11 conspiracy is an agreement between two or more competitors to
12 raise, lower, maintain, or stabilize the prices to be charged
13 for products and services. As Judge McKinney will explain to
14 you shortly, there are three elements. One, the conspiracy
15 existed. Two, the defendants knowingly participated in the
16 conspiracy. And three, there is an effect on interstate
17 commerce.

18 Regarding the first element that a conspiracy existed, a
19 conspiracy is simply an agreement between two or more people to
20 accomplish an unlawful purpose. Judge McKinney will instruct
21 you shortly any agreement to eliminate or limit discounts is
22 illegal.

23 And how do we know a conspiracy existed here? We know it
24 because Richard Haehl told you there was a conspiracy. Butch
25 Nuckols told you there was a conspiracy. Scott Hughey told you

1 there was a conspiracy. And Price Irving told you there was a
2 conspiracy. Defense counsel would have you believe there was
3 no agreement, but you know better than that. There was an
4 agreement. Why would Butch Nuckols plead guilty if there was
5 no agreement? Why would Price Irving plead guilty if there was
6 no agreement? And why would Scott Hughey plead guilty if there
7 was no agreement?

8 The second element, the defendants must have knowingly and
9 willingly participated in the conspiracy. The evidence clearly
10 shows that was the case. Ricky Beaver went to the first horse
11 barn meeting, where he agreed with his competitors to limit
12 discounts. He went back to the Signature Inn meeting and
13 reinforced that agreement with his competitors to limit
14 discounts. He called Richard Haehl to confirm pricing on a
15 project, as they had talked about at their meetings. He even
16 exchanged business cards with Price Irving. Why did he do
17 that? So they could contact each other and confirm their
18 pricing. And they did it on the McCordsville apartment job.
19 They called each other, as they had agreed to do, and discussed
20 pricing on a job they were competing on.

21 Chris Beaver went to the 2003 horse barn meeting, where he
22 agreed to limit discounts with his competitors. And you heard
23 Scott Hughey testify about several calls he had with Chris
24 Beaver trying to make sure pricing was in accordance with their
25 agreement.

1 And finally, as you saw the slide before, you heard that
2 Chris Beaver told his co-conspirators that he would reach out
3 to Jason Mann and get him the message on what we had agreed on.

4 The final element to a price fixing charge is interstate
5 commerce. Interstate commerce simply means business or
6 commerce across state lines. This isn't a real big issue in
7 this case, but just so I can remind you what the evidence you
8 saw was, Richard Haehl testifies that Shelby purchased \$500,000
9 worth of equipment from Blair, Nebraska, a company called
10 CONICO. They purchase approximately \$200,000, a year for
11 additives for the ready-mix concrete from Ohio. And they
12 purchase approximately \$3,000,000 worth of trucks in the
13 conspiracy period from a company in Oshgosh, Wisconsin.

14 And Price Irving read to you from his plea agreement -- I'm
15 sorry, from IMI's plea agreement where they spelled out that
16 the company purchased substantial quantities of equipment and
17 supplies for the manufacture and sale of ready-mix concrete
18 that were shipped into Indiana from outside Indiana.

19 And finally, you heard Scott not Hughey testify that Carmel
20 gets cement for its ready-mix concrete from outside the state
21 of Indiana.

22 Counts 3 and 4 of the indictment charge Rick and Chris
23 Beaver with making false statements. There are four elements
24 to a false statements count, four elements that must be proved.
25 The statement must be false, the statement must be material,

1 the statement was made knowingly and willfully, and the
2 statement was made in a matter within the jurisdiction of the
3 Executive Branch of the Federal Government. A statement is
4 false if is untrue when made and if it is known to be untrue at
5 the time the person is making it.

6 Second, a statement is material if it had the effect of
7 influencing the action of the FBI or if it was capable or had
8 the potential to influence the action of the FBI. As Judge
9 McKinney will instruct you shortly, the statement need not have
10 actually influenced or been relied on by the FBI.

11 The third element is the same as in the price fixing
12 conspiracy. The statement must have been made knowingly and
13 willfully.

14 And finally, the element that the statement must have been
15 made within the jurisdiction of the Executive Branch of the
16 Federal Government. Judge McKinney again will instruct you on
17 this point. The FBI is part of the Executive Branch of the
18 Government of the United States, and statements concerning
19 pricing discussions among competitors in the ready-mix concrete
20 industry are within the jurisdiction of that branch.

21 The defense makes much of the fact that the witnesses in
22 this case were co-conspirators. Remember when you consider
23 that fact that it wasn't us that chose these witnesses. It was
24 the defendants who chose them. They chose their conspirators.
25 We took the conspiracy as we found it. Would we have preferred

1 to have priests and Boy Scouts as witnesses? That would be
2 great. Unfortunately, they don't conspire to fix prices of
3 ready-mix concrete. The defendants chose their conspirators.
4 Ricky and Chris Beaver chose to conspire with Dan Butler and
5 Price Irving. They chose to align themselves with Richard
6 Haehl and Philip Haehl. They chose to fix prices with the
7 likes of Butch Nuckols. And Ricky and Chris Beaver chose to
8 reach agreements with Scott Hughey. The witnesses you heard
9 from were hand-picked by the defendants.

10 And these agreements, price fixing conspiracies, they are
11 secret by their very nature. As you heard, the conspirators
12 took precautions to make sure that their illegal conduct wasn't
13 found out. They met in private, secluded locations and they
14 invited only their fellow co-conspirators. Even when they were
15 reaching out to somebody they didn't invite them to the
16 meeting. They wanted to make sure they were in on the plan.
17 Only the people -- the only people who can tell us about the
18 conspiracy are the people who agreed to fix prices.

19 You heard testimony from four of the five conspirators,
20 three of which have pled guilty. Ask yourselves -- sorry, four
21 of the five companies, three of which have pled guilty. Why
22 would these companies plead guilty if they weren't? IMI paid
23 nearly 30 million dollars in fines. Builder's paid nearly 4
24 million dollars, and Carmel paid a substantial fine. Shelby
25 has restitution obligations to its victims, and all of those

1 companies still face civil liability and lawsuits that have
2 been filed against them and treble damages.

3 You have also heard testimony from four individual
4 co-conspirators, three of which have pled guilty. Defense
5 counsel has attacked the credibility of these witnesses, but
6 when you are weighing their credibility consider these facts:
7 They admitted their involvement in the conspiracy. They
8 entered into plea agreements which required their truthful
9 testimony. They have gone or are going to jail. Price Irving
10 has already served a prison term. Scott Hughey and Butch
11 Nuckols will be sentenced before Judge McKinney after this
12 trial. Each of those individuals has paid substantial fines
13 ranging up to \$100,000. But most importantly, each of those
14 individuals have taken responsibility for what they have done.
15 They have admitted that they agreed to fix prices with
16 competitors.

17 And as you assess their credibility, again, ask yourself
18 why would these men plead guilty if they weren't? But even
19 then you don't have to rely solely on their testimony. Each
20 witness' testimony is corroborated by testimony from other
21 witnesses and from documentary evidence you have seen. Notes,
22 calendar entries, those sort of things.

23 I would like to call your attention briefly to two more
24 jury instructions Judge McKinney will give to you shortly. One
25 relates to corporate liability. A corporation can only -- can

1 act only through its agents. That is, its directors, officers,
2 employees, and other persons authorized to act for it. Defense
3 counsel would have you believe that Allyn Beaver is the only
4 person who can bind the company. Simply not true. And you
5 don't even have to believe me. You can believe their own
6 witness. The company's counsel, when asked if that was true,
7 he told you it wasn't.

8 In addition, Judge McKinney will instruct you that a
9 corporation acts through its employees. Rick Beaver and Chris
10 Beaver are employees of Beaver Materials. And they are not
11 just any employees, they are managers of a family-owned,
12 family-run business. They are the sons of the owners and they
13 are being groomed to take over the company.

14 I would like to talk for a minute about the horse barn
15 meeting, the first one in July of 2000. Who was at that
16 meeting? We know Rick Beaver was there. We know Butch Nuckols
17 was there. We know of Scott Hughey was there. We know John
18 Huggins was there, and we know Richard and Philip Haehl were
19 there. And what was agreed to? Everyone walked away having
20 agreed to limit discounts. There was no disagreement. There
21 were no objections. Everyone agreed. And remember why they
22 were meeting in a private, secluded horse barn. As Butch
23 Nuckols testified, "Well, knowing it wasn't the right thing to
24 do we didn't want to be out in public doing this."

25 The competitors next met at the Signature Inn in the spring

1 of 2002. Why were they meeting again? People were cheating on
2 the agreement and they wanted to reaffirm their commitment to
3 try and get this to work. They wanted this to work. If there
4 was no agreement, or if the conspirators knew the agreement
5 wasn't going to work, why would they keep getting together?
6 The answer is simple. They wanted this to work. They were
7 committed to this agreement.

8 And who was at this meeting? Rick Beaver was there again.
9 Butch Nuckols was there again. Scott Hughey, Dan Butler, Price
10 Irving, and Richard Haehl. And what did they agree to at this
11 meeting? Everyone walked away again agreeing to limit
12 discounts. They all agreed to pick up the phone and call each
13 other if they needed to confirm a price. And, as you heard
14 from the examples I cited before, that is what they did. That
15 is what the defendants did. There is no disagreement, no
16 objections, no dissension. Everyone agreed.

17 The conspirators reconvened at Butch Nuckols' horse barn in
18 October of 2003. They were trying to shore up their agreement.
19 They wanted to make the agreement more effective. And this
20 time Chris Beaver came instead of Rick Beaver. All the
21 conspirators told you that Chris Beaver was there. Even Allyn
22 Beaver told you that Chris Beaver was there. And why did Chris
23 replace Rick? As Scott Hughey testified, Chris Beaver replaced
24 his cousin at the conspiratorial meetings because Rick was
25 confused about the discount agreement, and they all wanted the

1 agreement to work.

2 Who joined Chris Beaver at that horse barn meeting? A lot
3 of the same players. Butch knuckles. He was joined John
4 Blatzheim. Scott Hughey, Dan Butler, Price Irving, and Richard
5 and Philip Haehl. And again, they all walked out agreeing to
6 limit discounts. Beaver agreed, Builder's agreed, Carmel
7 agreed, IMI agreed, and Shelby greeted. At those meetings
8 Chris and Rick Beaver agree with their competitors to limit
9 discounts. Those are agreements. That is a price fixing
10 conspiracy, and that is the defendants' knowing and willing
11 participation in a price fixing conspiracy.

12 As I described with you earlier, Judge McKinney will
13 instruct you shortly the agreement is the crime. Nothing more
14 is needed. You heard from Butch Nuckols, Richard Haehl, Price
15 Irving, and Scott Hughey, and they all told you there was an
16 agreement to limit discounts. And they all told you that Rick
17 and Chris Beaver were parties to that agreement.

18 Did the agreement work perfectly? Of course not. Remember
19 why this conspiracy was formed. This conspiracy was formed
20 because the competitors were greedy. They wanted to make more
21 money. So it should come as no surprise that the evidence
22 shows they didn't always abide by that agreement. Sometimes
23 they did, sometimes they didn't. As Price Irving testified, I
24 guess we were all -- all the competitors were too selfish or
25 too greedy to lose our accounts that we have.

1 But even if they didn't abide by the agreement, that
2 doesn't mean there was no agreement.

3 Scott Hughey testified from that chair on cross-examination
4 when asked, "And if you're not doing it, that means you don't
5 have an agreement?"

6 His answer was, "No, it doesn't mean you don't have an
7 agreement. It means you were not abiding by the agreement. Or
8 you're violating the agreement."

9 And that's an important distinction under the law because
10 the law just requires an agreement. Even if they abide by the
11 agreement -- I'm sorry. Even if they do not abide by the
12 agreement, that's no defense.

13 As Judge McKinney will instruct you, if you find the
14 defendants entered into an agreement to fix prices, the fact
15 that the defendants or their co-conspirators did not abide by
16 the agreement is no defense.

17 When they walked out of their meetings, they knew there was
18 an agreement. They knew Beaver, Builder's, Carmel, IMI and
19 Shelby had agreed to limit discounts. That's why Butch Nuckols
20 pled guilty, that's why Price Irving pled guilty, that's why
21 Scott Hughey pled guilty.

22 I'd like to turn now to the false statements. Count 3 of
23 the indictment charges Chris Beaver falsely stated that he was
24 unaware of any representatives of a ready-mix concrete company
25 being involved in pricing discussions with competitors.

1 You heard testimony from Special Agent Freeman that on May
2 25th, 2004, when he was interviewed by the FBI, Chris Beaver
3 stated he had not attended any meetings with any principals of
4 other ready-mix concrete companies outside of Indiana Ready-Mix
5 Association meetings. And you heard Special Agent Freeman's
6 testimony that Chris Beaver told him he had never personally
7 met Butch Nuckols outside of trade association meetings or a
8 business conference that was held at Beavers' offices.

9 And the lies continued. Chris Beaver told Special Agent
10 Freeman he had never been to Nuckols' horse barn. He could not
11 imagine what kind of discussion would have occurred at the
12 horse barn, and he never had any discussions with any concrete
13 businesses in the area about price fixing, price establishment
14 or discounting. He told Special Agent Freeman he had never met
15 to discuss pricing with Butch Nuckols, Scott Hughey, Dan
16 Butler, Richard or Philip Haehl or Jason Mann. Chris Beaver
17 also told Special Agent Freeman that he had never met with
18 Jason Mann to convince him to join the co-conspirators in their
19 price fixing conspiracy and he had never collectively met with
20 the co-conspirators.

21 What's the evidence? The evidence you heard and saw is
22 that at Nuckols' October 22nd, 2000 horse barn meeting which
23 Chris Beaver attended, they discussed pricing. They discussed
24 a price increase, they discussed a winter surcharge. They
25 reached an agreement to limit discounts. They agreed to

1 contact each other to police the discount agreement. And Chris
2 Beaver, himself, agreed to contact Jason Mann and reach out to
3 him about the agreement. Even Allyn Beaver testified that
4 Chris Beaver attended a meeting at Nuckols' horse barn where
5 prices and discounts were discussed, and he believed Builder's,
6 Carmel, IMI, and Shelby were there.

7 You also have the telephone calls that Scott Hughey
8 testified to that Chris Beaver and he were involved in to
9 discuss pricing in accordance with the agreement. You heard
10 testimony about Chris Beaver's involvement on all these issues
11 from Butch Nuckols, Scott Hughey, Price Irving and Richard
12 Haehl.

13 Count 4 of the indictment charges Rick Beaver with making
14 false statements, in particular his statement to Special Agent
15 Karen Medernach, that he was unaware of any representative of a
16 ready-mix concrete company being involved in pricing
17 discussions with competitors. Specifically, Rick Beaver told
18 Special Agent Medernach he was unaware of any meeting, unaware
19 of any meeting at Nuckols' horse barn. He denied speaking with
20 anyone about setting prices. And he was not aware of or
21 participated in any meetings or discussions in which price
22 fixing or setting prices was discussed.

23 Fourth is what he told Special Agent Medernach during that
24 interview. What's the evidence? The evidence is not only did
25 he know about horse barn meetings, he attended them. He

1 attended a meeting in 2000, Nuckols' horse barn, where again
2 they discussed prices and they agreed to limit discounts.

3 He attended the Signature Inn meeting in 2002 where again
4 he and his competitors discussed prices, agreed to limit
5 discounts, and agreed to contact each other to police that
6 agreement.

7 You heard evidence that Rick Beaver exchanged business
8 cards with Price Irving for the purpose of contacting each
9 other to make sure they were pricing in accordance with the
10 agreement. And then you heard that's exactly what they did.
11 They called each other about the McCordsville job and they
12 talked about what they were pricing on that job.

13 You heard that Ricky Beaver talked to Richard Haehl about
14 their pricing to Greystone Concrete. Again, as they had talked
15 about in their meetings and per their agreements.

16 And again Scott Hughey told you that he also had telephone
17 conversations with Rick Beaver about pricing to make sure they
18 were in accordance with the agreement. You heard testimony on
19 all these points again from all of their co-conspirators: Butch
20 Nuckols, Price Irving, Richard Haehl, Scott Hughey.

21 FBI Special Agent Steve Schlobohm testified that at the
22 time these interviews were conducted investigators did not know
23 how or when the conspiracy began. The companies involved in
24 the conspiracy were known, but all the individuals representing
25 those companies were not known.

1 In fact, Special Agent Schlobohm testified that while there
2 was an understanding that Beaver was involved in the
3 conspiracy, at that time, at the time Rick and Chris were
4 interviewed, the FBI and Department of Justice believed it was
5 Gary Beaver who was involved. Moreover, at the time of those
6 interviews the investigators were not even aware of all the
7 meetings that the conspirators would be involved in. They were
8 unaware of the Signature Inn meeting. And they were unaware of
9 the number or extent of the horse barn meetings.

10 These interviews were important to the investigation. It
11 was a last chance for the FBI and Department of Justice to
12 develop leads and information about the conspiracy before the
13 conspirators were able to circle their wagons and conceal and
14 cover up their conspiracy.

15 You heard Special Agent Freeman testify that false
16 statements by witnesses can lead you down the wrong pass, waste
17 time in the investigation. Waste time and resources. Take you
18 away from the main focus of what you need to be working on.

19 And you heard Special Agent Medernach explain, "Persons
20 being untruthful in interviews impact investigations by
21 misleading investigators, closing down possible avenues of
22 follow-up interviews, investigation, records and other
23 interviews. It can just misdirect us." That's the danger of
24 making false statements when you're being interviewed by the
25 FBI.

1 I appreciate your attention and your patience. I promise
2 you I'm almost finished.

3 At the beginning of my closing argument I explained that
4 this case is about things we all learned when we were kids:
5 That you don't lie, you don't cheat, and you don't steal.
6 Pretty simple.

7 Again, the Defendants here, Rick and Chris Beaver and
8 Beaver Materials, cheated their customers by charging them a
9 collusive, noncompetitive price. They deprived those customers
10 of the ability to shop around and get a better product at a
11 better price.

12 And Rick Beaver, Chris Beaver and Beaver Materials stole.
13 By conspiring with their competitors, customers were forced to
14 pay more for the product than they would have been had they not
15 conspired. And, of course, Rick Beaver and Chris Beaver lied.
16 When the FBI interviewed them, they flat out lied.

17 Why did they lie? I think we all know. When you do
18 something wrong, you're held accountable for it. Rick and
19 Chris Beaver did wrong. They committed a crime and through
20 their actions Beaver Materials committed a crime. And then
21 they lied to the FBI to cover up the crime they had committed.
22 They should be held accountable for what they did.

23 Every step of the way the defendants had choices. From the
24 time Ricky Beaver met with co-conspirators in Butch Nuckols'
25 horse barn in July of 2000 to the October 2003 horse barn

1 meeting where Chris Beaver reached agreement with his
2 competitors, right down to the day the FBI showed up to
3 interview them, they had choices. They could have chosen not
4 to agree with competitors. They could have chosen to stand up
5 and say we're not going to do this. They could have stopped
6 meeting and stopped talking with competitors about prices.
7 They could have told the FBI the truth. But they didn't. They
8 chose to go to meetings and go along with the price fixing
9 agreements. They chose to meet with competitors over and over
10 in horse barns, in hotels. And they chose to engage in calls
11 with co-conspirators to keep the pricing in accordance with
12 what they had agreed to.

13 Ricky Beaver and Chris Beaver committed a crime. And
14 through them Beaver Materials committed a crime.

15 Ladies and Gentlemen of the Jury, you now have a choice.
16 While your decision is not an easy one, the facts before you
17 make the choice clear. The government asks that on the facts
18 you have seen and heard, the evidence you have seen and heard,
19 you find the Defendants Rick Beaver, Chris Beaver and Beaver
20 Materials guilty of all counts in the indictment.

21 Thank you.

22 THE COURT: Thank you, Mr. Epstein.

23 Mr. Lockwood.

24 MR. LOCKWOOD: Thank you, Your Honor. May it please
25 the Court. Ladies and Gentlemen of the Government, Mr. Voyles,

1 Ladies and Gentlemen.

2 My friends in the field of psychology tell me that you have
3 long since made your decision in this case and there's not much
4 point in me being up here. Their studies and statistics show
5 that jurors make up their mind as early as opening statement in
6 criminal cases.

7 Well, I don't believe that jurors take their duties quite
8 so lightly. But if you have already made up your mind in this
9 case, lend me some of your time. What I have to say won't hurt
10 you and I'll be brief. There's some things that need to be
11 said in this case, my obligation to say them, and I'm going to
12 say them now.

13 It's about the agreement. And the government's evidence
14 that Rick and Chris Beaver entered into a conspiratorial
15 agreement consists of a number of witnesses who have entered
16 into plea agreements upon which they depend for their future
17 happiness and security in many ways to assist the government.
18 And with those incentives in place, here's the testimony from
19 those witnesses:

20 "Why sure they agreed because they didn't say anything."

21 "Why of course they were in the agreement, they didn't get
22 up and walk out."

23 When you go to a meeting if you hear something you don't
24 agree to that's important and you don't say anything, does that
25 mean you agree with it?

1 We ought to elect our candidates that way. We'll just have
2 a series of town hall meetings and we'll have the candidates
3 come and speak and tell us where they stand on the issues. And
4 the number of people who walk out will be votes against them.
5 How is that?

6 That's not the way we live our lives, Ladies and Gentlemen.
7 You don't enter into an agreement unless there's some evidence you
8 entered into the agreement.

9 I have been around courthouses long enough, thirty-two
10 years or so, to know that good lawyers know where the
11 weaknesses are in their case. And these are excellent lawyers,
12 very skilled. Well trained, very experienced. And they know
13 where the weaknesses are in their case. And that's why you
14 hear these substitutes for evidence of an agreement:

15 Well, Ricky Beaver called somebody and wanted to confirm a
16 bid. Is that a conversation about price fixing?

17 Ricky Beaver did it twice. Called somebody and said, "Hey,
18 I heard so and so bid what's his face on such and such a job."
19 No conversation about price fixing.

20 What about Mr. Butch Nuckols who had, count them, twenty
21 eight separate face-to-face meetings over the course of this
22 conspiracy with co-conspirators at places like Sahn's
23 Restaurant, The Lone Star, anyplace he could find one of them
24 he was talking to them about fixing prices. That's evidence of
25 an agreement of price fixing, Ladies and Gentlemen.

1 How about the government's favorite lawyer -- or favorite
2 witness, Scott Hughey, thirty-two separate instances where he
3 met with or talked to competitors about price fixing. That's
4 evidence of a conspiracy to fix prices, Ladies and Gentlemen.
5 Not testimony that Chris Beaver promised to go talk to Jason
6 Mann and no evidence that it ever happened.

7 Where is Jason Mann? Where has he been to come in here and
8 say, "Yeah, Chris came to me and said, 'I need to get on board
9 with this, everybody else is doing it.'"

10 You know, I couldn't hardly believe my ears when
11 Mr. Epstein said that we had, the defense had hand picked
12 witnesses. Hand picked witnesses? Here are the names of the
13 conspirators that you didn't see testify in this case --

14 MR. VONDRAK: Objection, Your Honor. I'm sorry for
15 interrupting.

16 MR. LOCKWOOD: Sure.

17 MR. VONDRAK: There's no missing witness instruction.

18 THE COURT: There isn't, actually. He can make this
19 argument.

20 Go ahead.

21 MR. LOCKWOOD: Dan Butler, John Huggins, Jason Mann.
22 Do you think if that testimony would have been favorable we
23 would not have seen those witnesses? If they had not supported
24 the government's proposition. No, they lie -- or rely rather
25 on the testimony primarily of Scott Hughey.

1 Before I get to that though I want to show you an
2 instruction that illustrates my point as to just being
3 somewhere. This is -- I don't know if I know how to do this.
4 I think I can raise this arm up.

5 I'll let Karen save me. Karen will save me.

6 Thanks, Karen.

7 I don't know if you can see that, Ladies and Gentlemen. I'm
8 no good at any of this electronic stuff. I was born in a
9 different age altogether. But the highlight part of this says,
10 "Mere presence at the scene of an alleged transaction or event
11 or mere similarity of conduct among various persons, and the
12 fact that they may have associated with each other and may have
13 assembled together and discussed common aims and interests,
14 does not necessarily establish proof of the existence of a
15 conspiracy."

16 Later on in the same instruction the Court will say to you,
17 "In addition," the highlighted portion, "neither mere
18 association with conspirators, nor knowledge that something
19 illegal was going on, standing alone, will show that any
20 particular defendant was a member of a conspiracy."

21 You cannot get yourself caught up in an agreement by merely
22 staying silent. And so they try -- Scott Hughey. Now I want
23 to make sure you understand what I'm saying here. I do not for
24 a second believe that anyone has coerced or threatened Scott
25 Hughey. But an early mentor of mine, whose name was Theodore

1 Misliewski, we just called him "Ski" sky was the commanding
2 officer, he was a warrant officer. He was in charge of the
3 12th Criminal Investigation Attachments. I was in his command
4 in Korat, Thailand. And he used to tell us young
5 investigators, he said, "Do you know how to tell when a man is
6 lying to you? You take his statement. And you look at it very
7 carefully. And you study it very closely. And then you use
8 your common sense and your knowledge of human nature and you
9 see if it makes any sense to you. If it is contrary to your
10 common sense, if it runs counter to what normal people would do
11 under similar circumstances, then he's lying to you."

12 Let's talk a little bit about Scott's Hughey's testimony
13 that he called Rick Beaver several times and Chris Beaver once
14 or twice and during those conversations they both said, "Yeah,
15 we're on the team. We're not pricing jobs below this
16 agreement."

17 Remember that testimony? Remember when he said that?
18 Okay.

19 Mr. Hughey had been approached on May 25th, like everybody
20 else, by FBI agents. He ran to his lawyer, he lawyered up. He
21 has a right to do that.

22 Then about 90 days later in August of 2004 he's in Chicago
23 talking with the government team FBI agents. Don't you think
24 they asked him at the time what kind of conversations he had
25 with co-conspirators? Do you think these people are so inept

1 at their job they would not ask the basic simple questions that
2 are necessary to their investigation?

3 Do you not think they called his attention to telephone
4 calls and meetings he had had that they could use to prosecute
5 these conspirators?

6 He didn't tell them then about those phone calls. They
7 said Mr. Hughey, go back home. Take a look at your calendar.
8 Check some other records you may have available to you,
9 interview your employees if you have to, and make some notes
10 for us, will you, and bring us a little timeline.

11 And you heard the testimony, he did that. Thought about
12 it. Checked his calendar. Talked to an employee. Looked at
13 his, some kind of records. Took 2-3 hours to sit down and do a
14 timeline.

15 Went back up to Chicago, I believe it was in Chicago.
16 Yeah, it was in Chicago. And he sat down with the
17 investigators again. And they talked about this conspiracy.

18 Do you not think they asked him about his timeline? Do you
19 not think they asked him about conversations he had with other
20 conspirators at the time?

21 He had an extra -- August, September, October -- two months
22 to think about it. Talked to his lawyer about it.

23 They certainly know how to impress a person with their plea
24 agreements, I'll give them that. Boy, if you don't cooperate,
25 if you don't tell the truth, if you don't tell us everything

1 that you know about this, we're going to treat you like you
2 deserve to be treated. You don't think the incentive was there
3 for Mr. Hughey to remember these phone calls?

4 May 2006, clean up statement. In Indianapolis this time.
5 Bigger statement. Go through the whole thing again. Talk to
6 him about who he contacted. Getting ready for trial. Got to
7 have this information pinned down. Got to know what our
8 witnesses are going to say.

9 Mr. Hughey didn't remember these statements. But he gets
10 on this witness stand and tells you that he doesn't remember
11 when, but at some point in time he has this epiphany of memory.
12 And all of a sudden now, "Well, yeah, I called Rick Beaver and
13 he said we're on the team. We're holding the price line. Oh,
14 Chris, too. Yeah, Chris, I called him a couple times. He said
15 the same thing."

16 Ladies and Gentlemen, is that how you think you would
17 conduct your affairs? Do you think you would not remember
18 those things if you were interviewed under those circumstances?
19 Is that contrary to what you know about human nature?

20 If you don't believe beyond a reasonable doubt that it's
21 contrary to human nature, then you can't believe that man. And
22 if you don't believe that man, the rest of this evidence is
23 pretty shadowy. Pretty shadowy.

24 There's not one of us in here, I don't think, who would not
25 resent being convicted on the kind of evidence that you have

1 seen in this case. It just won't do.

2 This evidence just does not get you beyond a presumption of
3 innocence. It just does not get you to prove beyond a
4 reasonable doubt, Ladies and Gentlemen. Not if you assess it
5 and think about it in a fair way.

6 Let's talk about the misstatements that Chris made and the
7 misstatements to FBI agents that Ricky made. Because the
8 government has emphasized that and said to you that's evidence
9 they're guilty right there.

10 Well, I don't know that you can ever fully appreciate the
11 thought process that goes through a person's mind unless you
12 are served a search warrant along with your morning coffee. It
13 could be unsettling, to say the least. No one in this case on
14 behalf of the defense has ever said to you that Ricky Beaver
15 did not believe that the meetings he attended there was no talk
16 of price fixing.

17 Chris Beaver has never -- it's never been represented to
18 you Chris Beaver did not think because he just went to the
19 meeting that that was wrong. They thought they were in
20 trouble. They hadn't seen this instruction that I just showed
21 you. They were scared. And they made a mistake. They made a
22 misjudgment.

23 But in order for them to be criminally liable for those
24 statements, those statements must be material. And here is the
25 definition of material that I believe you will be read. I hope

1 you can see this. I can zoom it. I can read that. That is
2 that better? Okay.

3 Now I'm not going to try to kid you here. The government
4 doesn't have to prove to you that some FBI agent went off on a
5 wild goose chase because of these statements. They don't have
6 to prove to you that the FBI relied on them at all. All they
7 have to prove to you is that the statement was capable or had
8 the potential to mislead or influence the action of
9 investigators.

10 And I say to you right now, straight up, they couldn't
11 have. Why? Well, for one thing you know how this
12 investigation was conducted. It was conducted by having a
13 series -- or a number rather of field agents of the FBI to go
14 out and serve these warrants and interview as many people as
15 they possibly could on May 25th, 2004. And the case agent,
16 which may -- I'm not going to take some liberty here because I
17 don't know the FBI lingo. We might call them the agents in
18 charge of the investigation, Agent Schlobohm here, he was in
19 charge of having started the investigation. He already knew
20 quite a lot and he gets all this information together.

21 Before any report from Neil Freeman, who interviewed Chris
22 Beaver, or Ms. Medernach could ever get to the case agent,
23 their lawyer had already called Chicago and said my client's
24 made misstatements. Before the FBI agents were out of the
25 office they had a statement from Chris's father, Allyn, that

1 they knew, he knew, Chris was at a meeting. You can't be
2 mislead if you already know for sure that the statement is not
3 correct.

4 And yet no follow-up interviews. No attempts to clear this
5 up. They just went about their business and did their
6 investigation. It's okay, that's their choice. But now to
7 come into this courtroom and ask you to convict these boys for
8 making false statements when everybody else that they have
9 arrested who have admitted their parts in these conspiracy have
10 done, or some of them at least have done the same thing and
11 they haven't even been charged with it.

12 I'm not asking you for sympathy. This is no place for
13 sympathy. If you believe based upon Scott Hughey's testimony
14 that Ricky Beaver had conversations with him and that Chris
15 Beaver had conversations with him and that they are in this
16 conspiracy, you convict them. They can stand it if you can.
17 But I hope you will satisfy yourselves that there truly has
18 been evidence of these things in this case beyond a reasonable
19 doubt.

20 Now they haven't testified. They haven't testified. And
21 again I have lived in courthouses for thirty-two years and I
22 can tell you a lot of reasons why innocent men won't testify.
23 Well, one of them is advice of counsel. Another is they're
24 nervous. They're afraid their nervousness is going to be
25 misinterpreted by the jury as being guilty or telling a

1 falsehood.

2 Their stories have already been told in this case. From
3 the witness stand from other lawyers -- from other witnesses,
4 I'm sorry. From Allyn Beaver. You heard what he said. You
5 heard his testimony. We heard that Rick was being approached
6 by these people. We heard that he was meeting with them. We
7 didn't want that. We wanted to know what was going on. And so
8 I -- when Chris told me Dan Butler had called and invited him
9 to a meeting, I said, "Go and see what is going on."

10 Immediately after that meeting Chris called his dad and
11 said, "These guys are a bunch of fraternity boys. They all
12 know each other's kids. They all know each other's wives.
13 They all hang out at the same country club. I mean it's like
14 they meet all the time, dad."

15 Well, Allyn is no fool. And he says, "We're not doing
16 that." And that is where it stopped.

17 Neither of these young men had any authority to make any
18 agreement. The testimony of Chuck Mosley was that he never
19 heard of this price fixing. The only person that could set
20 those prices, the only person that could clear these things,
21 was Allyn Beaver. And how did they impeach Mr. Mosley, the
22 poor guy who is just a salesman and taking care of the lawn?
23 They said, well, you went to Florida and priced concrete down
24 there and came back and couldn't believe it was so high here
25 and so low in Florida, and it turns out he was talking about

1 some guy that sells cement flamingos. And they want to build
2 their case against these guys, these defendants, based on those
3 kind of misrepresentations, that kind of misleading
4 cross-examination.

5 If you want to hold it against somebody that they haven't
6 taken the stand in this case, hold it against me. Because one
7 of reasons you might not testify in a case if you are innocent
8 is on advice of counsel. So if you have an urge to disregard
9 the instructions of the Court that he will give you that you
10 are not to consider the fact that they haven't testified, if
11 you are inclined to not obey that commandment, and you want to
12 hold it against somebody, hold it against me.

13 One more thing and then I'm going to sit down. Mr. Voyles
14 is going to address you here in a minute and then Mr. Vondrak,
15 who is one of the -- it has been a pleasure trying these case
16 against these lawyers. They are ready, they are thorough, they
17 are prepared, they are courteous. It makes me glad I took up
18 this profession.

19 And I suspect he is going to use all the power of his
20 electronic geniuses to put on a light show. Well, I'm from
21 Alexandria, and we had a coach up there named Garth Comb.
22 Whenever Mr. Comb took our team, our basketball team to
23 Anderson to play the Indians, whenever you went to the Anderson
24 to see the Indians play in Wigwam the pregame show was
25 absolutely fantastic. Colored lights and they had the Indian

1 maiden and the Indiana chief, and they dance all around the gym
2 to the pom-poms, and most coaches would make their team stay in
3 the locker room until all of that falderal was over. Not Coach
4 Comb. He always said, "I wouldn't want to deprive my players
5 of such a great show." He said, "Just don't be intimidated by
6 it. Don't let it convince you beyond your common sense that we
7 can't beat these guys."

8 When you see this wonderful presentation that Mr. Vondrak
9 is going to give you in rebuttal pay attention to it, watch it
10 closely. I'm sure that it will be a great thing. But I can
11 answer it. I'll bet you I could if the law gave me an
12 opportunity to talk last. So answer it for us. Watch it with
13 the kind of an eye to does this really convince me, is this
14 really evidence of an agreement? Are these misstatements
15 really material? Were they really capable of sending anybody
16 off on some kind of a wild goose chase? What were the things
17 Mr. Epstein said.

18 Did they cause a single FBI agent to waste any time? When
19 the agent, you know, seven blocks away knew from Allyn's
20 father -- or from Chris's father, Allyn, that there had been a
21 horse barn meeting. When the evidence that they had made these
22 misstatements reached the Government in Chicago some three or
23 four days the report ever got to the case agent, did that cause
24 a misdirection in the investigation? Did that close down an
25 avenue of inquiry?

1 I said in opening statement I would stand here at this time
2 in the trial and ask you for your honest verdict, and I do that
3 now. I know that you have paid extremely close attention in
4 this case. I appreciate it, like Mr. Epstein and all of us.
5 We can't believe that the citizens, day in and day out, come
6 into these courtrooms and take their duty so seriously and act
7 so conscientiously. So let me add my thanks to his.

8 Send these boys back to their community with their
9 reputations and their character intact because it is the right
10 thing to do.

11 Thank you.

12 THE COURT: Thank you, Mr. Lockwood.

13 Mr. Voyles.

14 MR. VOYLES: If it please the Court.

15 Thank you, Your Honor.

16 Mr. Lockwood.

17 Mr. Vondrak and Mr. Epstein, Mr. Schleef.

18 Agent Schlobohm.

19 Ladies and gentlemen of the jury.

20 On behalf of my client, which is the corporation, it is
21 represented and it is here in person with Allyn Beaver.

22 The law is kind of an interesting situation where a company
23 can be charged with a crime, even though you don't see the
24 company or the company doesn't come into the courtroom. But
25 the people who own the company, or run the company -- in this

1 case Allyn Beaver -- is here personally on behalf of the
2 company.

3 When we were all together early on Monday morning and you
4 came in for a job interview you didn't want and we all talked
5 to you, one of the things that Judge McKinney talked to you
6 about was the presumption of innocence. When somebody -- in
7 this case, my client, Beaver Materials -- comes into a
8 courtroom they are presumed innocent. It is kind of a hard
9 concept sometimes. We think about it, we talk about it, and as
10 young people in school we are taught about it. But really when
11 you come into a courtroom and you are selected as a juror is
12 when it really kind of strikes home with you of what that
13 really means. And it means that from the time you were
14 selected until you are in the jury room, and even while you are
15 deliberating, the presumption of innocence continues. And it
16 is only set aside, if at all, if the Government's evidence in
17 this case can prove to each of you individually beyond a
18 reasonable doubt that the Beaver Materials Corporation was
19 engaged in a price fixing conspiracy.

20 And the concept of reasonable doubt we have to thank for
21 our forefathers, because there are countries in this world that
22 don't have a justice system like ours. It is a system of
23 accusations and immediate arrest and conviction. But we
24 decided hundreds of years ago to put into place, and one of the
25 things that we brought from England, was a situation where we

1 wanted people just like Allyn Beaver to come into the courtroom
2 and hear the evidence and then we wanted to give them a
3 standard of proof. We didn't want to say we are going to pick
4 you out because you happen to wear a gray suit or because you
5 look different than we do. We want to pick you out because we
6 think you did something you may not have done. So let's set a
7 standard of proof. Let's make our Government come into a
8 courtroom and let's make our Government prove to citizens like
9 each of you beyond a reasonable doubt whether or not the
10 evidence in a particular case could convince you that somebody
11 has violated a criminal statute. That is what we have in this
12 particular case.

13 One of the things that I like about trying cases is the
14 fact that I get a chance to talk to people like yourself. I
15 get an opportunity to talk about things that I feel very
16 strongly about. I feel very strongly about the jury system. I
17 feel very strongly about our government. I feel very strongly
18 about the judicial process and how it functions and how we see
19 it criticized. We pick up a paper and we read an article and
20 we think about things. But it is very seldom that you ever
21 hear a juror say, when they have made a decision, that they
22 felt they didn't reach deep down in their conscious and arrive
23 collectively at what they believed to be the right decision in
24 that case, no matter what the newspaper writes or the
25 television reporter says about the case, or the little snippets

1 you get during the day or at night. The people who really hear
2 all the evidence and the people who make the decision generally
3 come down to people like yourself, who honestly and fairly
4 judged all of the evidence, heard all of the witnesses, heard
5 all of the arguments and the instructions of the court, and
6 arrive at a fair decision.

7 The Court will tell you, and we have told you, you can't
8 convict someone on suspicion or conjecture. That is just not
9 what we do in this country. It is not what we do because it is
10 not right. It is not the thing to do. So we have to look at
11 the evidence. And we look at the logic of the evidence.

12 Let's talk about the president of Beaver Materials, Allyn
13 Beaver. What did the evidence show in this case on behalf of
14 the company, the company he runs, the company he has grown up
15 with, what did it do? It is interesting that when we were
16 cross-examining the Government's witnesses that we saw that the
17 people they brought to you, Scott Hughey, owns the company.
18 Butch Nuckols owns the company. Price Irving, the
19 vice-president, family runs the company. You never heard,
20 there was no evidence, that Allyn Beaver ever went to a
21 meeting, ever had a telephone call, ever went to a Hardee's,
22 ever went to a McDonald's, ever went anywhere to meet or talk
23 to these people about prices, about business, at all.

24 You got to hear from Allyn Beaver himself. He was called
25 as a witness on behalf of the company that he is president of.

1 And you are going to have to judge his testimony. And you are
2 going to have to judge him because that is the right that you
3 have as jurors. It is his credibility that is at stake. It is
4 his word. It is his honesty. It is his integrity that you
5 have to determine about whether his company was engaged in a
6 price fixing scheme.

7 And you heard that Allyn Beaver told you that during the
8 years of 2000 to 2004 there was really only one person in that
9 company that set the prices. That was Allyn Beaver. And I
10 don't think, after hearing the evidence, that you have any
11 doubt about who set the prices in that company. He talked to
12 other people. He listened to people who would give him advice,
13 but ultimately and absolutely when that concrete left that
14 plant and was sold to anyone he ultimately made the decision
15 about the price that was to be sold for. Not Rick Beaver, not
16 Chris Beaver; Allyn Beaver.

17 So in order for the Government to have a theory that we can
18 kind of put our hands around they have to have you believe that
19 Chris or Rick Beaver, who went to meetings where they,
20 according to the conspirators that were here and testified, who
21 pled guilty, because they were guilty. We pled not guilty, and
22 we are going to ask you to find us not guilty. And we are here
23 to test the Government's evidence. We don't care what the
24 other people did. We don't care what decisions they made. We
25 don't care when they reached into their hearts and decided they

1 were guilty. That was their choice. But we came to this
2 courtroom, and you told us when we selected you as jurors that
3 the presumption of innocence, the right to a trial, and the
4 fact that we entered pleas of not guilty, that each of you when
5 you took the oath understood and accepted that responsibility.

6 Another interesting thing is that when you look at the
7 evidence I got confused a few times. The benefit of
8 cross-examination is we get to test the Government's evidence.
9 And you got to see me cross-examine the Government witnesses.
10 Now, I got confused when I heard the Government, in their
11 closing argument, talk about this agreement. I heard Richard
12 Haehl say it was an attempt at an agreement. I heard
13 Mr. Irving say that it was an agreement to really call people.
14 And I wasn't sure that Mr. Nuckols ever understood what the
15 agreement ever was. But I did get to hear all of them say that
16 Chris Beaver and Rick Beaver didn't say anything at these
17 meetings. But yet the Government wants you to make my client,
18 the corporation, guilty because these young men went to a
19 meeting where they didn't talk and they came back to the
20 company. But what you did hear from the president of the
21 company after the last horse barn meeting was from his own son
22 that you don't want to be around those guys. I mean, when I
23 was talking in cross-examination to Mr. Haehl I used the term
24 that if their lips are moving, they are lying. That is what
25 these men did. As Mr. Allyn Beaver told you on the witness

1 stand, after Chris was talking to him immediately after leaving
2 the meeting, that it was like a fraternity. They were familiar
3 with each other. Well, they should be. They have been meeting
4 all around town in all these other places. Now they want you
5 to say, and the Government wants you to say, well, it was
6 private. Well, it certainly wasn't private at all of the other
7 places we have demonstrated during cross-examination where they
8 are holding these price fixing conversations. In public
9 restaurants. They didn't care. They didn't care about being
10 secret. They were caught up in their own scheme, their own
11 price fixing, their own situation on behalf of their own
12 companies. But you didn't hear, and there is no evidence that
13 Allyn Beaver or Beaver Materials in any way joined, acted in,
14 participated in any of those meetings or conversations. But
15 the Government wants you to convict this corporation over the
16 acts of these two young men. They want you to disregard
17 everything that Allyn Beaver told you about how he runs his
18 company on the witness stand.

19 When you were selected as jurors the Court asked you, do
20 you know Allyn Beaver? And what did you all say? No, we don't
21 know Allyn Beaver. You know why? Because that is what the law
22 requires. If you knew him and you had some knowledge about
23 him, then you probably wouldn't be a fair and impartial juror.
24 You would have some opinion, whether it was good or bad. So
25 the law says, well, how are we going to have people go on trial

1 and the people in the jury box don't even know them? What are
2 we going to do to help in situations so that somebody's
3 history, background, character, honesty, and integrity can be
4 brought to a jury? So the law says we are going to let them
5 have character witnesses. We are going to let them bring in
6 people who have known them their whole lives. And what do we
7 know about that? Well, what we know is this: That you can go
8 around your neighborhood, you can go into your home towns, and
9 you can know and see people. You hear about them, you see how
10 they conduct business, you see how they treat their families,
11 you know how they are with their neighbors, and you begin to
12 form an opinion about them. Are they good people? Are they
13 bad people? Are they honest people? Do they do things that
14 you would think a law abiding citizen would do? And you start
15 forming character opinions about them.

16 In this case we brought Luke Kenley to testify about Allyn
17 Beaver's, Chris Beaver's, and Ricky Beaver's character.
18 Somebody, particularly who had known Allyn since they were in
19 school together. It is a small community, Noblesville. There
20 is a chance for people to interact, to see, like in many of our
21 home towns. They get a chance to see how they are with their
22 neighbors, they get a chance to see how they are with their
23 families, they get a chance to see what they do in the
24 community, and they get a chance to see how they run their
25 business.

1 And what did you hear from Luke Kenley? What is Allyn
2 Beaver's reputation in the community for truth and honesty and
3 integrity? It is excellent. And he brings to us this panorama
4 of life that has gone on in the last 30 or 40 years where
5 quietly, without Allyn's acknowledge, he has observed him. He
6 is seeing him so that he can help you understand what is in
7 this man's heart, and how he acts with his business, his
8 family, his neighbors. And he did that for the two young men
9 that he met when they used to come through his grocery store,
10 or they wandered through the Boys and Girls Club in
11 Noblesville, and he got to assess their character, integrity,
12 and their credibility. And that is why the law permits you to
13 hear from character witnesses, to give you the information
14 about them that you don't have when you walk in to the
15 courtroom.

16 Ladies and gentlemen, I'm going to tell you a little story,
17 a story I heard a long time ago, and it involves a young boy.
18 And this young boy was fascinated with wood carving. He just
19 couldn't get enough of people carving things out of wood. And
20 he wanted to learn that skill. So what he would do, he would
21 watch people in his community that would work with their hands
22 and would carve things. And one day he wandered into this old
23 man's home, who was pretty well renowned in the community for
24 being a wood carver, and he said to him, "I would sure like to
25 watch you work sometime." The old man said, "Well, you are

1 welcome to do that." And he said, "I would like for you to
2 make me something. I would like to see how you do this." He
3 said, "Well, son, it just takes a lot of patience and a lot of
4 time. What would you like for me to make for you?" He said,
5 "Well, I have got this little block of wood that I have been
6 carrying around here for awhile, and I would like to have you
7 make a squirrel for me. Could you do that?" The old man
8 picked up the block of wood and looked at it. It was nice and
9 soft and the kind of wood you use to carve something, and he
10 said, "Sure, son, I can do that. Why don't you come back in
11 about a week and we will see how it goes." A week goes by, the
12 little boy shows up and knocks on the old man's door. Invited
13 in and there on the table was this beautiful squirrel about
14 this high, all perfectly carved, all rubbed and oiled. The old
15 man handed it to him and he said, "There, son." He said, "Boy,
16 that is beautiful." He said, "How did you do it?" He said,
17 "Oh, son," he said, "it was easy. I just cut away everything
18 that didn't look like a squirrel."

19 That is what happened in this case, ladies and gentlemen.
20 The Government has cut away everything that doesn't point to
21 the innocence of the MA-RI-AL Beaver Materials Corporation.
22 They just cut it away, said we are not wanting you to look at
23 that. But when you look at it and you compare it to what the
24 Government says, as opposed to what the Government's evidence
25 was, I believe you will come to the conclusion that Beaver

1 Materials, through their acting president, Allyn Beaver, never
2 went to a meeting, never agreed to fix any prices. When he was
3 interviewed by the FBI on May 25th, 2004, he told them, and he
4 told you on the stand that, when he heard that they had been in
5 a meeting, "Nobody fixes prices at Beaver Materials but me.
6 Those guys, you can't believe any of them. Stay away." And
7 that was it. There was no scheme, there was no agreement, and
8 there is nothing in this record that would convince you
9 individually beyond a reasonable doubt that Beaver Materials,
10 the MA-RI-AL Corporation, acting through and on behalf of the
11 president, Allyn Beaver, was involved in any conspiracy
12 whatsoever.

13 Mr. Lockwood indicated that when we are finished today and
14 sit down, that's the last time I'll be able to speak to you as
15 a lawyer in this case. That as the law provides it, the
16 government is entitled to have the last chance to argue to you.

17 But I believe that if there are any questions that you have
18 in the jury room, if there are any answers to speak on behalf
19 of my client or Allyn Beaver, that you will answer those
20 questions for us in the jury room. And I ask you on behalf of
21 Beaver Material, the MA-RI-AL Corporation, through and on
22 behalf of that man who is seated in this courtroom and has
23 looked at you and seen you and spoken to you as a witness in
24 this case, to go to the jury room, talk among yourselves, but
25 to come back in this courtroom and return a verdict of not

1 guilty on behalf of his company that he represents, that he's
2 worked his entire life for, and that you have to judge whether
3 or not that at any moment of his business career or life that
4 you have been asked to judge, whether or not you believe beyond
5 a reasonable doubt that he ever or that corporation ever
6 engaged in the conspiracy to fix prices.

7 He was proud of his company. He was proud of how he had
8 did his business. He was competitive. He was hard nosed. But
9 he was honest. And we know it because a person came to the
10 courtroom and told you all about him.

11 Long before you had heard of Allyn Beaver or the Beaver
12 corporation, long before you had ever heard of this case,
13 people in that community watched him, saw what he did, and
14 brought you that information.

15 So again, on behalf of my client and on behalf of Allyn
16 Beaver, their representative in this courtroom, I ask you and I
17 urge you to return a verdict of not guilty on behalf of his
18 company and on behalf of him who stands here in flesh and blood
19 representing his company, because that's all you can see. You
20 don't get to see the company. But you see this man. And he
21 stands for it. He's proud of it. He told you, and I urge you
22 to give him that dignity and permit him to go home and once
23 again engage in the kind of business that he was engaged in
24 fairly and honestly on behalf of his company and the citizens
25 of this state.

1 Thank you.

2 THE COURT: Thank you, Mr. Voyles.

3 Mr. Vondrak.

4 MR. VONDRAK: Thank you, Your Honor.

5 THE COURT: Before you start, anybody need a break at
6 this time? No.

7 In that case we'll hear from Mr. Vondrak, then we'll take a
8 break.

9 Go ahead, sir.

10 MR. VONDRAK: Thank you, Your Honor.

11 May it please the Court.

12 Mr. Voyles, Mr. Lockwood.

13 Ladies and Gentlemen, to hear Mr. Voyles and Mr. Lockwood
14 throughout the course of this trial, you would think that this
15 was a very complicated case. Were there meetings? Who was
16 there? Was Ricky there? Was Chris there? Were agreements
17 reached? Who reached those agreements? Did the agreement
18 work? Did Rick and Chris agree? But you know what, you don't
19 have to go any farther in the transcript or in the testimony of
20 this case than yesterday afternoon. And a lot of those
21 questions are answered for you.

22 Allyn Beaver sat in that chair and told you that he knew
23 that Chris Beaver had attended a horse barn meeting. And he
24 knew that Ricky Beaver had had contacts with his competitors.
25 So were there meetings amongst competitors? Yes.

1 Was Chris Beaver at those meetings? Yes.

2 Were there contacts with Ricky Beaver and his competitors?

3 Yes.

4 And you know that because Allyn Beaver sat in that chair
5 and told you so. And not only Allyn Beaver but Charles Sheeks
6 told you he knew that that happened. And he knew it because
7 Chris Beaver told him and Ricky Beaver told him that that had
8 happened.

9 So we come down to a very simple case. Did these
10 Defendants on behalf of MA-RI-AL Corporation doing business as
11 Beaver Materials enter into this agreement? And there was an
12 agreement. And the evidence in this case clearly showed that
13 there was an agreement.

14 You heard three witnesses testify about their plea
15 agreements with the government and that they pled guilty
16 because they had participated in that agreement. And that
17 their plea agreements required them to cooperate with the
18 government. And would they lie about the fact that they had
19 entered into this illegal agreement?

20 In the first place, why would they even enter into a plea
21 agreement if they didn't have an agreement? Did they look like
22 they were stupid enough to you that they would plead guilty to
23 something that they didn't do?

24 They told you that the agreement wasn't always successful.
25 But you will get a jury instruction that will tell you that the

1 agreement didn't have to always be successful to be a crime.
2 Scott Hughey, you remember Scott Hughey, the gentleman with the
3 dark hair, the dark suit, the white shirt and the sky blue tie.
4 He sat in that chair and he told you that there is a big
5 difference between violating an agreement and not having an
6 agreement in the first place.

7 You can believe Scott Hughey had an agreement because you
8 saw him on that stand and you saw him face withering
9 cross-examination from both Mr. Voyles and Mr. Lockwood. And
10 despite that cross-examination he told you that he had an
11 agreement with his competitors.

12 Look at the circumstances of these meetings. The meetings
13 were about limiting discounts. These people, these competitors
14 were with each other discussing limits, discussing prices.

15 You heard testimony about the participation of all of the
16 people in the room. You heard testimony about how big these
17 rooms were. All of these witnesses had the opportunity to
18 observe Chris Beaver and Rick Beaver. And all of them told you
19 that they believed they had agreements. Neither Chris nor
20 Ricky Beaver objected to anything that was said at the meetings
21 that they were at. Neither Rick nor Chris said you guys are
22 crazy, we're not going to go along with this.

23 They didn't walk out and say, "We're just not going to take
24 part in this." But when Scott Hughey told you that he called
25 Ricky Beaver several times, he told you that Ricky Beaver

1 wasn't surprised. And Ricky Beaver didn't say, "What agreement
2 are you talking about? What's this all about? Why are you
3 calling me?" Ricky Beaver knew what this was all about.

4 And if those witnesses that you heard didn't believe that
5 they had an agreement with Beaver Materials and with Ricky
6 Beaver and with Chris Beaver, why in God's name would they call
7 them back repeatedly to these meetings?

8 You heard about the lengths they went to to keep these
9 meetings secret. They didn't want anybody who wasn't in the
10 agreement to be at these meetings. They told you that's why
11 they drove out to Fishers to meet in a horse barn. They told
12 you that's why they met at a conference room at the Signature
13 Inn. And you heard Scott Hughey, he told you he didn't even
14 use a credit card to pay for that conference room.

15 They wanted these meetings to be secret because they knew
16 that they were discussing illegal agreements and reaching
17 illegal agreements and they didn't want anybody else who wasn't
18 a part of that agreement there.

19 So as far as the issue of agreement in this case, Ladies
20 and Gentlemen, there can be no reasonable doubt that these
21 conspirators had reached an agreement. The question for you is
22 whether these defendants joined that agreement.

23 And you will hear from Judge McKinney very shortly that the
24 agreement does not have to be expressed or formal or in
25 writing. They didn't have to raise their hands. They didn't

1 have to take a vote. But use your common sense, Ladies and
2 Gentlemen.

3 One instruction that defense did not point out to you is
4 that you don't check your common sense at the door when you go
5 in to deliberate.

6 Mr. Voyles during his opening and during his cross and
7 during his closing would have you believe that there has to be
8 some mystical approach to whether or not somebody has an
9 agreement. That if you don't specifically say I agree, that
10 you would have to be a clairvoyant in order to know that
11 somebody else had an agreement with you. Use your common
12 sense, Ladies and Gentlemen. You know that that's not the
13 case.

14 Walk into a restaurant, order dinner, order drinks. Walk
15 up after you're done eating and drinking and try walking out of
16 the restaurant and see if the owner of that restaurant didn't
17 think that he had an agreement with you when you ordered that
18 food and when you ordered those drinks.

19 That's an agreement, Ladies and Gentlemen. And since they
20 didn't put it in writing and since they didn't have a show of
21 hands, how can you know that these defendants entered into that
22 agreement? You look for things in the testimony. Look for
23 corroboration in this case. Because as time passes, all of you
24 know that memory gets a little bit weaker. But using your
25 common sense, you will know that you don't have to expect that

1 every single person remembers every single thing in the exact
2 same way.

3 It's reasonable to believe that five years from now each of
4 you will remember that you were on this jury. And it's
5 reasonable to believe that five years from now each of you will
6 remember the verdict that you rendered in this case.

7 Is it reasonable to believe that five years from now you're
8 going to remember everything that was said or even all of the
9 names of all of the people who served on the jury with you?

10 No.

11 So, when you hear one person talk about all of those kinds
12 of things, what do you look for? You look for corroboration.

13 Let's talk a little bit about corroborates in the case.
14 It's a very simple concept. It means one person tells you
15 something, somebody else tells you something, the two stories
16 fit together. Let's talk about the corroboration in this case.

17 You have heard testimony in this trial about three meetings
18 with conspirators. There was the first horse barn meeting.
19 There was the Signature Inn meeting. And there was a second
20 horse barn meeting. And you heard from Mr. Nuckols, you heard
21 from Mr. Haehl. And you heard from Mr. Irving and you heard
22 from Mr. Hughey. And you heard from each of them what they had
23 to say about each of these three meetings.

24 And let's start with the second horse barn meeting. You
25 heard Scott Hughey say that he had reached agreements with his

1 competitors. And you heard him say that Chris was there. And
2 you heard from Price Irving and you heard him say that he had
3 reached agreements with his competitors. And you heard him say
4 that he believed that he had reached an agreement with Chris.

5 And you heard from Richard Haehl. You heard Richard Haehl
6 tell you he believed he reached an agreement with his
7 competitors. You heard him say that he believed that he had an
8 agreement with Chris Beaver. And you heard from Butch Nuckols.
9 Butch Nuckols is the owner of the horse barn. He told you that
10 he believed that he had reached an agreement with his
11 competitors and that he had reached an agreement with Beaver
12 Materials. And he told you that Chris was at this meeting.

13 The meeting before that was the meeting at the Signature Inn.

14 And again you heard Scott Hughey tell you about that
15 meeting. You heard him tell you he had it at that hotel room
16 because he didn't want people to know that he was there. And
17 he told you that there was an agreement at the Signature Inn to
18 continue to shore up the agreement to limit discounts. And he
19 told you that he believed that he had reached agreements with
20 his competitors and that he reached agreements with Beaver
21 Materials and Ricky Beaver. And he told you that Ricky was
22 there. Mr. Irving also told you that Ricky was at that
23 meeting. Richard Haehl told you that Ricky was at the meeting.
24 And that he reached agreements with his competitors to limit
25 discounts.

1 And Butch Nuckols told you that he was at that meeting and
2 that Ricky was there. And that he had reached agreements with
3 his competitors to limit discounts.

4 Going all the way back to July of 2000, the first horse
5 barn meeting. Butch Nuckols told you that he had reached
6 agreements with his competitors.

7 Richard Haehl told you that Ricky was there, and that he
8 had reached agreements with his competitors.

9 Price Irving was not at that meeting.

10 But Scott Hughey also told you that Ricky was at that
11 meeting, that he reached agreements with his competitors.

12 That's the fancy light show that I have for you, Ladies and
13 Gentlemen. But that fancy light show is corroboration.

14 Throughout the trial you heard a lot of testimony elicited
15 on cross-examination about the fact of all these smaller
16 meetings where Chris wasn't there or Ricky wasn't there. But
17 you know what? What counsel didn't point out to you was in
18 those telephone calls that Scott Hughey told you about where he
19 called Ricky Beaver and the one or two phone calls where Scott
20 Hughey called Chris Beaver, those were discussions about
21 customers that those two companies had some business dealings
22 with.

23 During those telephone conversations you didn't hear that
24 IMI was a party to those conversations. You didn't hear that
25 Builder's Concrete was a party to those conversations. You

1 didn't hear that Shelby was a party to those conversations.

2 Why? There was no need. It wasn't their customer.

3 But you will also get an instruction from Judge McKinney
4 that says that to be a part of a conspiracy you don't have to
5 be at every single meeting. You don't have to have done every
6 single thing in the conspiracy. You don't have to be present
7 for every single conversation in the conspiracy.

8 You heard a lot about the responsibility of MA-RI-AL
9 Corporation. Mr. Voyles talked to you about what a good man
10 Allyn Beaver is. But you know what? Allyn Beaver is not a
11 defendant in this case.

12 And you heard from Mr. Sheeks and you will hear more
13 importantly on an issue of law from Judge McKinney that you
14 don't have to be the president of the company in order to bind
15 the company or make the company responsible for your actions.

16 But let's talk about that for a minute. Allyn Beaver took
17 the stand and testified and told you that before the second
18 horse barn meeting he knew that Chris was going to be there.
19 And he testified and told you that he knew that it was going to
20 be a meeting of competitors.

21 Allyn Beaver admitted what he had to admit to you. He had
22 to admit that he knew about the second horse barn meeting and
23 that it was going to be a meeting of competitors and that Chris
24 Beaver was going to be there. He had to admit that because
25 that was recorded in the FBI's statement. The FBI 302 of that

1 conversation.

2 But he denied what he had to deny. He had to deny that he
3 had any knowledge of agreements being reached at that meeting.

4 Allyn Beaver also admitted to you that Ricky Beaver had
5 contacts with competitors. And that he knew Ricky Beaver was
6 having contacts with competitors and that he continued to do
7 it. In other words, Allyn knew that the people who ran the
8 day-to-day operations of his company, the people who submitted
9 bids to their customers, the people who gave quotes to their
10 customers, were going to meetings with competitors where
11 pricing discussions were taking place.

12 Mr. Voyles points out that shortly after the investigation
13 in this case became known the company wanted -- Mr. Sheeks
14 wanted to contact The Department of Justice. So great. First
15 Chris Beaver lies to the FBI. And Rick Beaver lies to the FBI.
16 The next day they have a meeting. They sit down with
17 Mr. Sheeks. What do they find out? They find out that Allyn
18 Beaver had told the FBI about the horse barn meeting.

19 So what did they decide to do? They decide to say, "Well,
20 hey, wait a minute. Maybe we made," as they continually
21 referred to it, "a misstatement." A misstatement.

22 Shortly after that word was out that the search warrants
23 had been executed, the FBI's investigation in this case became
24 uncovered. You saw the phone bill dated May 26th, 2004. You
25 saw that that was a one minute and two second -- that was a one

1 minute, two second call.

2 Mr. Sheeks did not tell you how long he spoke with
3 Mr. Boomgarden that day.

4 Do you really think that Mr. Sheeks could have told
5 Mr. Boomgarden everything that he knew about Chris Beaver's and
6 Rick Beaver's contacts with competitors in one minute and two
7 seconds?

8 But beyond all of that, how much could he have possibly
9 told him during that? They want to have you believe that
10 somehow it was our responsibility to go out and chase them down
11 and say, "Is that what you really meant to say?"

12 A final point on that, that letter. And take a look at the
13 letter that Mr. Sheeks sent to Mr. Epstein. Take a look at
14 that letter. And how does that letter comport with what he
15 testified he wanted to tell Mr. Boomgarden? That letter says
16 one of my clients attended a meeting at Butch's barn. That's
17 not a coming forth and we're going to cooperate and we want to
18 put this all to bed.

19 So the question that you have to ask yourselves is, "Why
20 did they lie?"

21 And as Mr. Epstein said, I think you know why.

22 At the beginning of all of this case I told you that at the
23 end I would stand before you one last time and I would ask you
24 to return a verdict of guilty against each defendant in each
25 count which they are charged. I told you that the evidence

1 that you would see and hear during this trial would support
2 that verdict. And I said that I would ask you to return the
3 verdict of guilty for the simplest possible reason in the
4 world, they did it.

5 We have met our burden, Ladies and Gentlemen. It is time
6 for you to do your job. Thank you very much.

7 THE COURT: Thank you.

8 We'll take a short break at this time and then we'll come
9 back, I'll read you these final instructions, and you will have
10 a copy of the final instructions to go along with my reading
11 them to you. But as you go upstairs, don't discuss the case
12 among yourselves until I give it to you, and that will be just
13 a few minutes or so.

14 So we'll take a break at this time.

15 (A recess was held at 10:50 A.M.)

16 (Trial resumed, 11:10 A.M.)

17 (Jury not present)

18 THE COURT: All right, let's go get the jury.

19 I did ask the alternate juror if he wouldn't like to sit
20 here and listen to me read these instructions, and oddly enough
21 he said no.

22 MR. VONDRAK: No accounting for taste.

23 THE COURT: I guess. So when they come out I'm going
24 to excuse him. If they all make it down the stairs.

25 (Jury present)

1 THE COURT: You may be seated.

2 Those are the instructions you have with you, ladies and
3 gentlemen. As I read them to you I would like for you to read
4 along with me.

5 And I mention this to the alternate. You certainly have
6 the right to sit there and listen to me read all these
7 instructions, but you don't have to. And, to my amazement, as
8 I said, you have chosen not to have me just read these to you.
9 Thank you very much for your attention, sir.

10 ALTERNATE JUROR: Thank you.

11 THE COURT: You may be excused.

12 (Alternate juror excused)

13 FINAL JURY INSTRUCTIONS

14 INSTRUCTION NO. 1

15 Members of the jury, the evidence and arguments in this
16 case have been completed, and I will now instruct you as to the
17 law applicable to this case. It is your duty to follow all of
18 the instructions.

19 You must not question any rule of law stated in these
20 instructions. Regardless of any opinion you may have as to
21 what the law ought to be, you must base your verdict upon the
22 law as it is set out herein.

23 It is your duty to determine the facts from the evidence
24 in this cause. You are to apply the law given to you in these
25 instructions to the facts and in this way decide the case.

1 Perform these duties fairly and impartially. Do not
2 allow sympathy, prejudice, fear, or public opinion to influence
3 you.

4 Nothing I say now, and nothing I said or did during the
5 trial, is meant to indicate any opinion on my part about what
6 the facts are or about what your verdict should be.

7 INSTRUCTION NO. 2

8 If in these instructions any rule, direction, or idea be
9 stated in varying ways, no emphasis thereon is intended by me
10 and none must be inferred by you. For that reason, you are not
11 to single out any certain sentence or any individual point or
12 instruction and ignore the others, but you are to consider all
13 the instructions as a whole, and you are to regard each
14 instruction in light of all the others.

15 INSTRUCTION NO. 3

16 Opening statements of counsel are for the purpose of
17 acquainting you in advance with the facts counsel expect the
18 evidence to show. Closing arguments of counsel are for the
19 purpose of discussing the evidence.

20 During the course of the trial it often becomes the duty
21 of counsel to make objections and for me to rule on them in
22 accordance with the law. The fact that counsel made objections
23 should not influence you in any way.

24 INSTRUCTION NO. 4

25 You are the sole judges of the credibility -- that is,

1 the believability -- of the witnesses. Reconcile their
2 testimony on the theory that all are accurate and truthful, if
3 you can; but if you cannot, then you must determine whom you
4 will believe and whom you will not believe and what is the
5 truth.

6 In determining the credibility of the witnesses, you may
7 take into consideration their interest or lack of interest in
8 the result of this case; their manner and bearing on the
9 witness stand; their means or lack of means of knowing the
10 facts about which they have testified; how far, if at all, they
11 are either supported or contradicted by other evidence; their
12 power of memory or the lack thereof; inconsistent statements
13 made by them, if any; and from all the evidence you will give
14 to each witness the credit to which he or she is entitled.

15 Inconsistencies or discrepancies in the testimony of a
16 witness, or between the testimony of different witnesses, may
17 or may not cause you to discredit such testimony. Two or more
18 persons witnessing an incident or a transaction may see or hear
19 it differently; an innocent misrecollection, like failure of
20 recollection, is not an uncommon experience.

21 In weighing the effect of any discrepancy, you may consider
22 whether it pertains to a matter of importance or an unimportant
23 detail, and whether the discrepancy results from innocent error
24 or intentional falsehood.

25 INSTRUCTION NO. 5.

1 You should use your common sense in weighing the evidence
2 and consider the evidence in light of your own observations in
3 life.

4 In our lives, we often look at one fact and conclude from
5 it that another fact exists. In law we call this an
6 "inference." A jury is allowed to make reasonable inferences.
7 Any inferences you make must be reasonable and must be based on
8 the evidence in the case.

9 INSTRUCTION NO. 6

10 The evidence consists of the sworn testimony of the
11 witnesses, the exhibits received in evidence, stipulations by
12 counsel, and judicially noticed facts.

13 You are to consider only the evidence received in this
14 case. You should consider this evidence in light of your own
15 observations and experiences in life. You may draw such
16 reasonable inferences as you believe to be justified from
17 proved facts.

18 Certain things are not evidence. These include the
19 following:

20 First, testimony and exhibits that I struck from the
21 record, or that I told you to disregard, are not evidence and
22 must not be considered.

23 Second, anything that you might have seen or heard outside
24 the courtroom is not evidence and must be entirely disregarded.
25 This includes any press, radio, or television reports you might

1 have read, seen, or heard. Such reports are not evidence and
2 your verdict must not be influenced in any way by such
3 publicity.

4 Third, questions and objections by the lawyers are not
5 evidence. Attorneys have a duty to object when they believe a
6 question is improper. You should not be influenced by any
7 objection or by my ruling on it.

8 Finally, the lawyers' statements to you are not
9 evidence. The purpose of these statements is to discuss the
10 issues and the evidence. If the evidence as you remember it
11 differs from what the lawyers said, your memory is what counts.

12 INSTRUCTION NO. 7

13 Some of you might have heard the phrases "circumstantial
14 evidence" and "direct evidence." Direct evidence is the
15 testimony of someone who claims to have personal knowledge of
16 the commission of the crime that has been charged, such as an
17 eyewitness. Circumstantial evidence is the proof of a series
18 of facts that tends to show whether the defendant is guilty or
19 not guilty.

20 The law makes no distinction between the weight to be
21 given to either direct or circumstantial evidence. You should
22 decide how much weight to give to any evidence. All the
23 evidence in this case, including circumstantial evidence,
24 should be considered by you in reaching your verdict.

25 INSTRUCTION NO. 8

1 Each defendant is presumed to be innocent of the charge.
2 This presumption remains with the defendants throughout every
3 stage of the trial and during your deliberations on the
4 verdict, and is not overcome unless from all the evidence in
5 the case you are convinced beyond a reasonable doubt that each
6 defendant is guilty.

7 The Government has the burden of proving the guilt of
8 each defendant beyond a reasonable doubt, and this burden
9 remains on the Government throughout the case. No defendant is
10 required to prove his innocence or to produce any evidence.

11 INSTRUCTION NO. 9.

12 The indictment charges that the offenses were committed "at
13 least as early as... and continuing until" a certain date, "in
14 or about" a certain date, "in or about... through at least" a
15 certain date, and "as early as... through at least" a certain
16 date. Although the evidence need not establish with certainty
17 the exact date of an alleged offense, it must establish that
18 the offense was committed on a date reasonably near the dates
19 charged.

20 INSTRUCTION NO. 10

21 This is a criminal case brought by the United States of
22 America by way of a Grand Jury Indictment. The Indictment in
23 this case is the formal method of accusing each defendant of a
24 crime and placing him on trial. It is not evidence against the
25 defendants and does not create any inference of guilt.

1 In summary, each of the defendants is charged in Count
2 One with conspiracy to suppress and eliminate competition by
3 fixing the prices at which ready mixed concrete was sold in the
4 Indianapolis, Indiana, metropolitan area, in violation of
5 Section 1 of the Sherman Act.

6 Chris A. Beaver is charged in Count Three and Ricky J.
7 Beaver is charged in Count Four with making a false statement,
8 in violation of Title 18, United States Code, Section 1001.

9 More specifically, the Indictment as it pertains to the
10 defendants now before the Court, reads as follows:

11 INDICTMENT

12 COUNT ONE -- SHERMAN ACT CONSPIRACY.

13 The Grand Jury charges that:

14 I.

15 DESCRIPTION OF THE OFFENSE

16 1. The following corporations and individuals are hereby
17 indicted and made defendants on the charge stated below:

18 A. MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, CORP.;

19 B. CHRIS A. BEAVER;

20 C. RICKY J. BEAVER a/k/a RICK BEAVER;

21 * * *

22 2. Beginning at least as early as July, 2000 and
23 continuing until May 25, 2004, the exact dates being unknown to
24 the Grand Jury, the defendants and co- conspirators Irving
25 Materials, Inc., Builder's Concrete and Supply Co., Inc. and

1 other corporations and individuals entered into and engaged in
2 a combination and conspiracy to suppress and eliminate
3 competition by fixing the prices at which ready mixed concrete
4 was sold in the Indianapolis, Indiana metropolitan area.

5 * * *

6 The combination and conspiracy engaged in by the defendants
7 and their co- conspirators was in unreasonable restraint of
8 interstate trade and commerce in violation of Section 1 of the
9 Sherman Act (15 U.S.C. Section 1).

10 3. The charged combination and conspiracy consisted of
11 a continuing agreement, understanding, and concert of action
12 among the defendants and their co- conspirators, the
13 substantial terms of which were to fix and maintain the prices
14 at which ready mixed concrete was sold in the Indianapolis,
15 Indiana metropolitan area.

16 II

17 MEANS AND METHODS OF CONSPIRACY

18 4. For the purpose of forming and carrying out the
19 charged combination and conspiracy, the defendants and their
20 co-conspirators did those things that they combined and
21 conspired to do, including, among other things:

22 A. attending and participating in meetings among
23 competing ready mixed concrete producers to discuss the prices
24 at which ready mixed concrete was sold in the Indianapolis,
25 Indiana, metropolitan market. These meeting were held at

1 various locations, including, but not limited to, a horse barn
2 owned by a co-conspirator, Gus B. Nuckols III a/k/a Butch
3 Nuckols, president of Builder's Concrete and Supply Co., Inc.;

4 B. agreeing during those meetings and discussions to
5 increase prices of ready mixed concrete to be sold in the
6 Indianapolis, Indiana, metropolitan market;

7 C. agreeing during those meetings and discussions to
8 limit or eliminate discounts and implement surcharges applied
9 to ready mixed concrete sold in the Indianapolis, Indiana,
10 metropolitan market;

11 D. issuing price announcements and prices quotations in
12 accordance with the agreements reached;

13 E. selling ready mixed concrete pursuant to those
14 agreements at collusive and noncompetitive prices;

15 F. accepting payment for ready mixed concrete sold at the
16 agreed upon collusive and noncompetitive prices;

17 G. contacting co-conspirators to discuss the price of
18 ready mixed concrete sold by co-conspirators for the purpose of
19 monitoring and enforcing adherence to the price agreements;

20 H. attempting to conceal the conspiracy and
21 conspiratorial contacts through various means.

22 III

23 DEFENDANTS AND CO-CONSPIRATORS

24 5. MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, Corp.
25 ("BEAVER"), is an Indiana corporation with its headquarters in

1 Noblesville, Indiana. During the period covered by this Count,
2 BEAVER was engaged in the manufacture and sale of ready mixed
3 concrete in the Indianapolis, Indiana, metropolitan area and
4 elsewhere.

5 6. During the period covered by this Count, defendant
6 CHRIS A. BEAVER was the Operations Manager for defendant
7 BEAVER.

8 7. During the period covered by this Count, defendant
9 RICKY J. BEAVER a/k/a RICK BEAVER was the Commercial Sales
10 Manager for defendant BEAVER.

11 * * *

12 9. Various co-conspirators, not made defendants in this
13 Count, participated in the offense charged in this Count and
14 performed acts and made statements in furtherance of the
15 charged offense.

16 10. Whenever in this Count reference is made to any act,
17 deed, or transaction of any corporation, such allegation shall
18 be deemed to mean that the corporation engaged in such act,
19 deed, or transaction by or through its officers, directors,
20 agents, employees, or representatives while they were actively
21 engaged in the management, direction, control, or transaction
22 of its business or affairs.

23 IV

24 TRADE AND COMMERCE

25 11. Ready mixed concrete is a product whose ingredients

1 include cement, aggregate (sand and gravel), water, and, at
2 times, other additives. Ready mixed concrete is made on demand
3 and, if necessary, is shipped to work sites by concrete mixer
4 trucks. Ready mixed concrete is purchased by do-it yourself
5 and commercial customers, as well as local, state, and federal
6 governments for use in various construction projects,
7 including, but not limited to, sidewalks, driveways, bridges,
8 tunnels, and roads.

9 12. During the time period covered by this Count, the
10 corporate conspirators purchased substantial quantities of
11 equipment and supplies necessary to the production and
12 distribution of ready mixed concrete, which equipment and
13 supplies were shipped into Indiana from points of origin
14 outside Indiana.

15 13. During the period covered by this Count, the
16 activities of the defendants and co-conspirators that are the
17 subject of this Count were within the flow of, and
18 substantially affected, interstate trade and commerce.

19 V. JURISDICTION AND VENUE.

20 14. The combination and conspiracy charged in this Count
21 was carried out, in part, in the Southern District of Indiana
22 within the five years preceding the return of this Count.

23 ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE,
24 SECTION 1.

* * *

1 COUNT THREE -- FALSE STATEMENT

2 The Grand Jury charges that:

3 1. CHRIS A. BEAVER is hereby indicted and made a
4 defendant on the charge stated below.

5 2. From at least as early as July, 2000 through at least
6 May 25, 2004, defendant CHRIS A. BEAVER was the Operations
7 Manger for MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, Corp.

8 3. In October, 2003, CHRIS A. BEAVER attended a
9 meeting at a horse barn which was owned by Gus B. Nuckols III
10 a/k/a Butch Nuckols, president of Builder's Concrete and Supply
11 Co., Inc. That meeting was attended by representatives of
12 Irving Materials, Inc., Builder's Concrete and Supply Co., Inc.
13 and other corporate co- conspirators in the conspiracy which
14 the subject of Count One of this Indictment. During that
15 meeting, and while CHRIS A. BEAVER was present, the
16 coconspirators agreed to fix the price of ready mixed concrete
17 sold in the Indianapolis, Indiana metropolitan area. At
18 various other times between July, 2000 and May 25, 2004, CHRIS
19 A. BEAVER participated in discussions about prices or discount
20 amounts of ready mixed concrete with representatives of other
21 corporate co-conspirators in the conspiracy which is the
22 subject of Count One of this Indictment.

23 4. On May 25, 2004, in the Southern District of
24 Indiana, defendant CHRIS A. BEAVER knowingly and willfully made
25 a false statement which was material to a matter within the

1 jurisdiction of the executive branch of the Government of the
2 United States. Specifically, in connection with an
3 investigation by the Midwest Field Office of the Antitrust
4 Division, United States Department of Justice, CHRIS A. BEAVER
5 was interviewed by agents of the Federal Bureau of
6 Investigation and the Indiana State Police. During that
7 interview, CHRIS A. BEAVER falsely stated that he was unaware
8 of any representative of a ready mixed concrete company being
9 involved in pricing discussions with competitors.

10 ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE,
11 SECTION 1001.

12 COUNT FOUR -- FALSE STATEMENT

13 The Grand Jury charges that:

14 1. RICKY J. BEAVER a/k/a RICK BEAVER is hereby indicted
15 and made a defendant on the charge stated below.

16 2. From at least as early as July, 2000 through at least
17 May 25, 2004, defendant RICKY J. BEAVER a/k/a RICK BEAVER was
18 the Commercial Sales Manager for MA-RI-AL CORPORATION, d/b/a
19 BEAVER MATERIALS, Corp.

20 3. Between late 2002 and early 2003, RICKY J. BEAVER
21 a/k/a RICK BEAVER attended a meeting at an Indianapolis-area
22 hotel. That meeting was attended by representatives of Irving
23 Materials, Inc., Builder's Concrete and Supply Co., Inc., and
24 other corporate co-conspirators in the conspiracy which the
25 subject of Count One of this Indictment. During that meeting,

1 and while RICKY J. BEAVER a/k/a RICK BEAVER was present, the
2 coconspirators agreed to fix the price of ready mixed concrete
3 sold in the Indianapolis, Indiana metropolitan area. At
4 various other times between July, 2000 and May 25, 2004, RICKY
5 J. BEAVER a/k/a RICK BEAVER participated in discussions about
6 prices or discount amounts of ready mixed concrete with
7 representatives of other corporate co-conspirators in the
8 conspiracy which is the subject of Count One of this
9 Indictment.

10 4. On May 25, 2004, in the Southern District of
11 Indiana, defendant RICKY J. BEAVER a/k/a RICK BEAVER knowingly
12 and willfully made a false statement which was material to a
13 matter within the jurisdiction of the executive branch of the
14 Government of the United States. Specifically, in connection
15 with an investigation by the Midwest Field Office of the
16 Antitrust Division, United States Department of Justice, RICKY
17 J. BEAVER a/k/a RICK BEAVER was interviewed by agents of the
18 Federal Bureau of Investigation and the Indiana State Police.
19 During that interview, RICKY J. BEAVER a/k/a RICK BEAVER
20 falsely stated that he was unaware of any representative of a
21 ready mixed concrete company being involved in pricing
22 discussions with competitors.

23 ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE,
24 SECTION 1001.

25 INSTRUCTION NO. 11

1 Count One of the Indictment charges a violation of Section
2 1 of the Sherman Act, which provides that:

3 Every contract, combination in the form
4 of trust or otherwise, or conspiracy, in
5 restraint of trade or commerce among the
6 several States... is declared to be illegal."

7 The purpose of the Sherman Act is to preserve and advance
8 our system of free enterprise by encouraging, to the fullest
9 extent practicable, free and open competition in the
10 marketplace, and by preventing unreasonable restraint or
11 monopolization of any business or industry, so that the
12 consuming public may receive better goods and services at a
13 lower cost.

14 The term "person" includes individuals, corporations,
15 partnerships, and every other association or organization of
16 every kind and character.

17 INSTRUCTION NO. 12

18 In order to convict a defendant of conspiracy to fix
19 prices as charged in Count One of the Indictment, the
20 Government must prove beyond a reasonable doubt the following
21 propositions:

22 (1) That the conspiracy described in the
23 Indictment was knowingly formed and was in
24 existence around the time alleged;

25 (2) That a defendant knowingly -- that is,

1 voluntarily and intentionally -- became a
2 member of the conspiracy; and.

3 (3) That the conspiracy described in Count One of the
4 indictment either affected interstate
5 commerce in goods or services or occurred
6 within the flow of interstate commerce in goods
7 and services.

8 If you find from your consideration of all the evidence
9 that each of these propositions has been proved beyond a
10 reasonable doubt, then you should find the defendant guilty of
11 Count One.

12 If, on the other hand, you find from your consideration
13 of all the evidence that any of these propositions has not been
14 proved beyond a reasonable doubt, then you should find the
15 defendant not guilty of Count One.

16 INSTRUCTION NO. 13

17 Count One of the Indictment charges a conspiracy among
18 certain individuals, some of whom are not named as
19 co-conspirators because the Indictment says that the grand
20 jurors do not know who they are. A person cannot conspire with
21 himself and therefore you cannot find a defendant guilty of
22 conspiracy unless you find beyond a reasonable doubt that he
23 participated in the conspiracy as charged.

24 INSTRUCTION NO. 14

25 A conspiracy is an agreement between two or more persons

1 to accomplish an unlawful purpose. A conspiracy may be
2 established even if its purpose was not accomplished.

3 A conspiracy is a kind of "partnership" and under the
4 law each member is an agent or partner of every other member,
5 and each member is bound by or responsible for the acts of
6 every other member done to further their agreement. The
7 "agreement or understanding" need not be express or formal, be
8 in writing, or cover all of the details of how it is to be
9 carried out. Nor is it necessary that the members have
10 directly stated between themselves the details or purpose of
11 the scheme.

12 In deciding whether the charged conspiracy exists, you
13 may consider the actions and statements of every one of the
14 alleged participants. An agreement may be proved from all the
15 circumstances and the words and conduct of all the alleged
16 participants which are shown by the evidence. However, mere
17 presence at the scene of an alleged transaction or event, or
18 mere similarity of conduct among various persons, and the fact
19 that they may have associated with each other and may have
20 assembled together and discussed common aims and interests,
21 does not necessarily establish proof of the existence of a
22 conspiracy.

23 To be a member of a conspiracy, a defendant need not
24 join at the beginning or know all the other members or the
25 means by which the purpose of the conspiracy was to be

1 accomplished. The Government must prove beyond a reasonable
2 doubt that the defendant was aware of the common purpose, and
3 was a willing participant in the charged conspiracy, with the
4 intent to advance the purpose of the conspiracy. However, a
5 person who has no knowledge of a conspiracy, but who happens to
6 act in a way that advances some object or purpose of a
7 conspiracy, does not thereby become a member. In addition,
8 neither mere association with conspirators, nor knowledge that
9 something illegal was going on, standing alone, will show that
10 any particular defendant was a member of a conspiracy.

11 In deciding whether a particular defendant actually
12 joined the charged conspiracy, you must base your decision only
13 on what the defendant did or said. In determining what a
14 defendant did or said, you may consider the defendant's own
15 words or acts. You may also consider the words and acts of
16 other persons to decide what the defendant did or said, and you
17 may use them to help you understand what the defendant did or
18 said.

19 If it is established beyond a reasonable doubt that a
20 conspiracy existed and that a defendant was a member, then the
21 acts and declarations of any other member of that particular
22 conspiracy, done in furtherance of the objects of the
23 conspiracy and during its existence, may be considered as
24 evidence against the defendant. However, statements by any
25 alleged conspirator, which are not in furtherance of the

1 conspiracy, or made before its existence or after its
2 termination, may not be so considered.

3 INSTRUCTION NO. 15.

4 Count One of the Indictment charges the defendants with
5 conspiring to fix prices. A conspiracy to fix prices is an
6 agreement or mutual understanding between two or more
7 competitors to fix, control, raise, lower, maintain, or
8 stabilize the prices charged or to be charged for products or
9 services.

10 A price-fixing conspiracy is commonly thought of as an
11 agreement to establish the same price; however, prices may be
12 fixed by other ways. Prices are fixed if a target or goal for
13 prices is agreed upon or if, by agreement, various guidelines
14 or formulas are to be used in computing the prices. Thus, any
15 agreement to stabilize prices, to set a specific price, to
16 maintain a specific price, to eliminate or limit discounts, to
17 establish a fixed spread between wholesale and retail prices,
18 to establish a fixed spread between the prices of different
19 sellers, or to set other conditions of sale relating to price,
20 is illegal.

21 The aim and result of every price-fixing agreement, if
22 successful, is the elimination of one form of competition.
23 Therefore, if you find that a price-fixing conspiracy has been
24 established, it does not matter whether the prices agreed upon
25 were too high or too low or reasonable or unreasonable. It is

1 not for you to determine whether particular price-fixing
2 schemes are wise or unwise, healthy or destructive.

3 Evidence that the defendants and alleged co-conspirators
4 actually competed with each other has been admitted to assist
5 you in deciding whether they actually entered into an agreement
6 or mutual understanding to fix prices. If the conspiracy
7 charged in Count One of the Indictment is proved, it is no
8 defense that the conspirators actually competed with each other
9 in some manner or that they did not conspire to eliminate all
10 competition. Similarly, the conspiracy is unlawful even if it
11 did not extend to all products sold by the conspirators or did
12 not affect all of their customers.

13 If you should find that the defendants entered into an
14 agreement to fix prices, the fact that the defendants or their
15 co-conspirators did not abide by the agreement, or that one or
16 more of them may not have lived up to some aspect of the
17 agreement, or that they may not have been successful in
18 achieving their objectives, is no defense. The agreement is
19 the crime, even it is never carried out.

20 Similarity of competitive business practices of the
21 defendants and alleged co-conspirators, or the mere fact that
22 they may have charged identical prices for the same goods, does
23 not alone establish an agreement or mutual understanding to fix
24 prices, since such practices may be consistent with ordinary
25 and proper competitive behavior in a free and open market.

1 A person may lawfully charge prices identical to those
2 charged by competitors and still not violate the Sherman Act.
3 A person may follow and conform exactly to the price policies
4 and price changes of competitors; and such conduct, without
5 more, would not be violative of the law, unless you find it was
6 done pursuant to an agreement or mutual understanding between
7 two or more persons, as charged in Count One of the Indictment.

8 Nevertheless, you may consider such facts and
9 circumstances along with all other evidence in determining
10 whether the similarity or identity of prices resulted from the
11 independent acts or business judgment of the defendants freely
12 competing in the open market, or whether it resulted from an
13 agreement or mutual understanding between the defendants and
14 one or more competitors.

15 INSTRUCTION NO. 16

16 The Sherman Act makes unlawful certain agreements that,
17 because of their harmful effect on competition, are
18 conclusively presumed to be an unreasonable restraint on trade
19 and are per se illegal without inquiry about the precise harm
20 they have caused or the business excuse for their use.
21 Included in this category of unlawful agreements are agreements
22 to fix prices. Therefore, if you find that the conspiracy
23 charged in Count One of the Indictment existed and that one or
24 more of the defendants was a member of that conspiracy, you
25 need not be concerned with whether the agreement was reasonable

1 or unreasonable, or with the justifications for the agreement,
2 or with the harm done by it.

3 It is not a defense that the parties might have acted
4 with good motives, or might have thought that what they were
5 doing was legal, or that the conspiracy might have had some
6 good results. If you find that the conspiracy charged in Count
7 One of the Indictment existed beyond a reasonable doubt, it was
8 illegal. If you find that the Government has failed to prove
9 the charged conspiracy beyond a reasonable doubt, the
10 defendants should be found not guilty of Count One.

11 INSTRUCTION NO. 17

12 An essential element of an offense prohibited by the
13 Sherman Act is that the alleged unlawful conduct must involve
14 interstate trade or commerce. The Government must prove beyond
15 a reasonable doubt that the conspiracy charged in Count One of
16 the Indictment either occurred in the flow of interstate
17 commerce or affected interstate commerce in goods and services.
18 Proof of interstate commerce as to one defendant or
19 co-conspirator in the conspiracy charged in Count One of the
20 Indictment satisfies the interstate commerce element as to
21 every defendant.

22 The term "interstate commerce" includes transactions or
23 commodities that are moving across state lines or that are in a
24 continuous flow of commerce from the commencement of their
25 journey until their final destination in a different state. If

1 the conduct challenged in Count One of the Indictment involves
2 transactions that are in the flow of commerce, the interstate
3 commerce element is satisfied, and the size of any such
4 transaction is of no significance. The conspiracy charged in
5 Count One of the Indictment therefore would have occurred in
6 the flow of interstate commerce if at least one defendant or
7 one co-conspirator, in carrying out the charged conspiracy,
8 crossed state lines or purchased equipment or supplies, which
9 are used in the sales of ready mixed concrete, across state
10 lines.

11 The term "interstate commerce" also includes
12 transactions that are entirely within a state and are not part
13 of a larger interstate transaction, if the conduct challenged
14 in Count One of the Indictment has had an effect on some other
15 appreciable activity demonstrably in interstate commerce. In
16 determining whether the charged conspiracy has had an effect on
17 some other appreciable activity in interstate commerce, you may
18 add together the total amount of all of the interstate
19 transactions.

20 Although the Government must prove that the conspiracy
21 charged in Count One of the Indictment either affected
22 interstate commerce or occurred within the flow of interstate
23 commerce in goods or services, the Government's proof need not
24 quantify any adverse impact of the charged conspiracy or show
25 that the charged conspiracy had any anticompetitive effect. It

1 is a question of fact for the jury to determine whether the
2 defendants' conduct charged in Count One of the Indictment
3 involved interstate commerce.

4 INSTRUCTION NO. 18

5 The intent necessary to support a conviction for
6 conspiracy is that the defendant intended to join and associate
7 with the criminal design and purpose of the conspiracy. This
8 intent is more than knowledge, acquiescence, carelessness,
9 indifference, or lack of concern, but, rather, is informed and
10 interested cooperation.

11 If a defendant, with an understanding of the unlawful
12 character of the conspiracy, knowingly and willfully joins to
13 the conspiracy on one occasion, that is sufficient to convict
14 him of conspiracy even though he had not participated at
15 earlier stages in the scheme and even though he played only a
16 minor part in the conspiracy.

17 In order to establish the offense charged in Count One
18 of the Indictment, it is not necessary for the Government to
19 prove that a defendant knew that a conspiracy to fix prices and
20 allocate sales volumes is a violation of the law.

21 INSTRUCTION NO. 19.

22 In making a judgment in this case on the guilt or innocence
23 of the defendants now here on trial, you should not be
24 concerned with whether or not or why others may or may not have
25 been made defendants in this case. These are not matters for

1 you to surmise or speculate upon. You are to consider only
2 what is in evidence here before you as it relates to the guilt
3 or innocence of the defendants now on trial.

4 INSTRUCTION NO. 20

5 Defendant MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS
6 CORP., is a corporation. A corporation may be found guilty of
7 a criminal offense.

8 A corporation can act only through its agents -- that
9 is, its directors, officers, employees, and other persons
10 authorized to act for it.

11 To find MA-RI-AL guilty of conspiracy to suppress and
12 eliminate competition by fixing the prices at which ready mixed
13 concrete was sold in the Indianapolis, Indiana metropolitan
14 area in violation of Section 1 of the Sherman Act as charged in
15 Count One of the Indictment, the Government must prove beyond a
16 reasonable doubt the following:

17 (1) Each essential element of the crime
18 charged against MA-RI-AL
19 CORPORATION, d/b/a BEAVER MATERIALS CORP., as
20 outlined in Instruction 12, was committed by
21 one or more of its agents;

22 (2) In committing the offense, the agent or
23 agents intended, at least in part, to benefit
24 MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS
25 CORP; and

1 During the time period covered by the Indictment,
2 defendant Ricky J. Beaver was the Commercial Sales Manager for
3 defendant MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS CORP.

4 A person is responsible for conduct that he performs or
5 causes to be performed in behalf of a corporation just as
6 though the conduct were performed in his own behalf. However,
7 a person is not responsible for the conduct of others performed
8 in behalf of a corporation merely because the person is an
9 officer, employee, or other agent of that corporation.

10 INSTRUCTION NO. 22

11 You have heard testimony from: Price Irving, who is an
12 employee of Irving Materials, Inc.; Gus B. "Butch" Nuckols, an
13 employee of Builder's Concrete and Supply Co., Inc.; and Scott
14 Hughey, an employee of Hughey, Inc. d/b/a Carmel Concrete
15 Products, Co. These individuals and their companies have
16 pleaded guilty to an offense arising out of the same occurrence
17 for which the defendants are now on trial in Count One of the
18 Indictment. Their guilty pleas are not to be considered as
19 evidence against the defendants. Under the plea agreements,
20 these individuals and their companies will not be further
21 prosecuted as long as they comply with their obligations under
22 the plea agreements. You may give their testimony such weight
23 as you feel it deserves, keeping in mind that it must be
24 considered with caution and great care.

25 You also have heard testimony from Richard Haehl, an

1 employee of Shelby Gravel, Inc. ("Shelby"). Shelby has applied
2 for and been granted Corporate Leniency from the Government
3 under the Government's Corporate Leniency Program. Under the
4 Leniency Agreement, Richard Haehl and his company, Shelby, will
5 not be prosecuted as long as they comply with their obligations
6 under the Leniency Agreement. In entering this agreement,
7 Shelby, along with Richard Haehl, have stated that they were
8 involved in the commission of the offense as charged against
9 the defendants in Count One of the Indictment. You may give
10 Richard Haehl's testimony such weight as you feel it deserves,
11 keeping in mind that it must be considered with caution and
12 great care.

13 INSTRUCTION NO. 23

14 Chris A. Beaver is charged in Count Three of the
15 Indictment, and Ricky J. Beaver is charged in Count Four of the
16 Indictment, with making a false statement in violation of Title
17 18, United States Code, Section 1001.

18 Section 1001 provides, in pertinent part, that a person
19 commits the crime of making a false statement when he...

20 "...knowingly and willfully... makes
21 any materially false, fictitious, or fraudulent
22 statement or representation."

23 INSTRUCTION NO. 24.

24 In order to convict a defendant of making a false
25 statement, in violation of Title 18, United States Code,

1 Section 1001, as charged in Counts Three and Four of the
2 Indictment, the Government must prove beyond a reasonable doubt
3 the following elements:

- 4 (1) The defendant made a false statement;
- 5 (2) The statement was material;
- 6 (3) The statement was made knowingly and willfully; and.
- 7 (4) The statement was made in a matter within the
8 jurisdiction of the executive branch of the government of the
9 United States.

10 If you find from your consideration of all the evidence
11 that each of these propositions has been proved beyond a
12 reasonable doubt, then you should find the defendant guilty.

13 If, on the other hand, you find from your consideration
14 of all the evidence that any of these propositions has not been
15 proved beyond a reasonable doubt, then you should find the
16 defendant not guilty.

17 INSTRUCTION NO. 25

18 A statement is false or fictitious if untrue when made
19 and then known to be untrue by the person making it.

20 INSTRUCTION NO. 26

21 A statement is material if it had the effect of
22 influencing the action of the agents or officers who
23 investigated this matter, specifically, the Federal Bureau of
24 Investigation, or if the statement was capable or had the
25 potential to do so.

1 It is not necessary that the statement actually had that
2 influence or was relied upon by the agents or officers
3 investigating this matter as long as it had the potential or
4 capability to do so.

5 INSTRUCTION NO. 27

6 When the word "knowingly" is used in these instructions,
7 it means that the defendant realized what he was doing and was
8 aware of the nature of his conduct, and did not act through
9 ignorance, mistake, or accident. Knowledge may be proved by
10 the defendant's conduct, and by all the facts and circumstances
11 surrounding the case.

12 INSTRUCTION NO. 28

13 The term "willfully," as used in these instructions,
14 means that a defendant knowingly performed an act, deliberately
15 and intentionally, as contrasted with accidentally, carelessly,
16 or unintentionally.

17 INSTRUCTION NO. 29.

18 The FBI is a part of the executive branch of the government
19 of the United States, and statements concerning pricing
20 discussions among competitors in the ready mixed concrete
21 industry are within the jurisdiction of that branch.

22 INSTRUCTION NO. 30

23 Each Count of the Indictment charges each defendant
24 named in that Count with having committed a separate offense.

25 You must give separate consideration both to each Count

1 and to each defendant. You must consider each Count and the
2 evidence relating to it separate and apart from every other
3 Count.

4 Although the defendants are being tried jointly, you
5 must give separate consideration to each defendant. In doing
6 so you must analyze what the evidence in the case shows with
7 respect to each defendant, leaving out of consideration any
8 evidence admitted solely against some other defendant or
9 defendants. Each defendant is entitled to have his case
10 decided on the evidence and the law applicable to him.

11 You should return a separate verdict as to each
12 defendant and as to each Count. Your verdict of guilty or not
13 guilty of an offense charged in one Count should not control
14 your decision as to that defendant under any other Count.

15 Each of these instructions shall be considered by you as
16 applying to each Count, unless otherwise stated therein.

17 INSTRUCTION NO. 31

18 It is necessary that every essential element of the
19 crime charged in the Indictment in this case be proved by
20 evidence beyond a reasonable doubt, but it is not necessary
21 that each subsidiary or non-essential fact be proved beyond a
22 reasonable doubt.

23 INSTRUCTION NO. 32

24 A lawyer who calls a witness to testify in a criminal
25 trial may properly conduct interviews of such a witness before

1 he or she takes the witness stand at trial. It is not only
2 proper for counsel to conduct such interviews, it is counsel's
3 duty to do so. This is because lawyers are charged with the
4 duty of representing the evidence in the case to the jury in an
5 orderly and proper manner. Accordingly, you are advised that
6 there is nothing improper in a lawyer interviewing a witness
7 before he or she testifies.

8 INSTRUCTION NO. 33

9 You have heard testimony from Allyn Beaver. You should
10 judge his testimony in the same way that you judge the
11 testimony of any other witness.

12 INSTRUCTION NO. 34

13 The law does not compel a defendant in a criminal case
14 to take the witness stand and testify. No presumption of guilt
15 should be raised, and no inference of any kind should be drawn,
16 from the fact that a defendant has not testified.

17 The law never imposes upon a defendant in a criminal
18 case the burden or duty of calling any witnesses, or producing
19 any evidence.

20 INSTRUCTION NO. 35

21 I instruct you that the matter of the penalty to be
22 imposed or the disposition to be made of this case if a verdict
23 of guilty is reached is not before you, the jury, but that this
24 is a matter for the Court to determine or fix.

25 INSTRUCTION NO. 36

1 Neither by these instructions, nor by any ruling or
2 remark that I have made, do I mean to indicate any opinion as
3 to the facts or as to what your verdict should be. You are the
4 sole and exclusive judges of the facts.

5 INSTRUCTION NO. 37

6 During this trial I permitted you to take notes. Many
7 courts do not permit note-taking by jurors, and a word of
8 caution is in order. There is always a tendency to attach
9 undue importance to matters that one has written down. Some
10 testimony that is considered unimportant at the time presented,
11 and thus not written down, might take on greater importance
12 later in the trial in light of all the evidence presented.

13 Therefore, you are instructed that your notes are only a
14 tool to aid your own individual memory and you should not
15 compare your notes with other jurors' in determining the
16 content of any testimony or in evaluating the importance of any
17 evidence. Your notes are not evidence, and are by no means a
18 complete outline of the proceedings or a list of the highlights
19 of the trial. Above all, your memory should be your greatest
20 asset when it comes time to deliberate and render a decision in
21 this case.

22 If you did takes notes, you must leave your notes in the
23 jury room after your verdict has been returned.

24 INSTRUCTION NO. 38

25 The verdict must represent the considered judgment of

1 each juror. Your verdict, whether it be guilty or not guilty,
2 must be unanimous.

3 You should make every reasonable effort to reach a
4 verdict. In doing so, you should consult with one another,
5 express your own views, and listen to the opinions of your
6 fellow jurors. Discuss your differences with an open mind. Do
7 not hesitate to re-examine your own views and change your
8 opinion if you come to believe it is wrong. But you should not
9 surrender your honest beliefs about the weight or effect of
10 evidence solely because of the opinion of your fellow jurors or
11 for the purpose of returning a unanimous verdict.

12 The twelve of you should give fair and equal
13 consideration to all the evidence and deliberate with the goal
14 of reaching an agreement that is consistent with the individual
15 judgment of each juror.

16 You are impartial judges of the facts. Your sole
17 interest is to determine whether the Government has proved its
18 case beyond a reasonable doubt.

19 INSTRUCTION NO. 39

20 It is necessary from this time until you are discharged
21 to remain together in a group and in charge of the Bailiff.
22 You are not, during your deliberations, to talk with anyone,
23 other than your fellow jurors and the Bailiff. Make known to
24 the Bailiff any of your wants, and, if you wish to communicate
25 with me, place your questions in writing and the Bailiff will

1)
 Defendants.)

2

3 VERDICT FOR COUNT ONE.

4 As to the crime of conspiracy to suppress and eliminate
 5 competition by fixing the prices at which ready mixed concrete
 6 was sold in the Indianapolis, Indiana, metropolitan area, in
 7 violation of Title 15, United States Code, Section 1, as
 8 charged in Count One of the Indictment, we, the Jury, find the
 9 defendant:

10 Ma-Ri-Al Corporation, d/b/ Beaver Materials Corp.	Not Guilty	Guilty
12 Chris A. Beaver	Not Guilty	Guilty
13 Ricky J. Beaver a/k/a Rick Beaver _____	Not Guilty	Guilty

15 _____ Date
 FOREPERSON
 16 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF INDIANA
 17 INDIANAPOLIS DIVISION

18 UNITED STATES OF AMERICA,)
)
 19 Plaintiff,) CAUSE NO. IP 06-CR-1, 2, 3
) Indianapolis, Indiana
 20 -v-)
)
 21 MA-RI-AL CORPORATION, d/b/a)
 BEAVER MATERIALS, CORP.; et al.)
 22 CHRIS A. BEAVER; and RICKY J.)
 BEAVER a/k/a RICK BEAVER,)
 23 Defendants.)

24 VERDICT FOR COUNT THREE.

25 As to the crime of making a false statement, in violation

1 of Title 18, Section 1001, we, the Jury, find the defendant:

2	Chris A Beaver	_____	_____
3		Not Guilty	Guilty

4	_____	_____
5	FOREPERSON	Date

6
7

8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF INDIANA
 INDIANAPOLIS DIVISION

10	UNITED STATES OF AMERICA,)	
	Plaintiff,)	CAUSE NO. IP 06-CR-1, 2, 3
11	-v-)	
)	
12	MA-RI-AL CORPORATION, d/b/a)	
	BEAVER MATERIALS, CORP.; et al.))	
13	CHRIS A. BEAVER; and RICKY J.)	
	BEAVER a/k/a RICK BEAVER,)	
14	Defendants.)	

15 VERDICT FOR COUNT FOUR

16 As to the crime of making a false statement, in violation
17 of Title 18, Section 1001, we, the Jury, find the defendant:

18	Ricky J. Beaver a/k/a Rick Beaver	_____	_____
19		Not Guilty	Guilty

20	_____	_____
21	FOREPERSON	Date

22 THE COURT: Do we have a bailiff here to be sworn?
23 Yes.

24 (Bailiffs sworn)

25 THE COURT: All right, gentlemen, you may lead the

1 jury upstairs to begin their deliberation.

2 (The Jury retired to deliberate at 11:52 A.M.)

3 THE COURT: You may be seated.

4 Gentlemen, you are free now to go on about your business,
5 but I would rather you didn't stray too far away from the
6 courthouse. Let us know what your phone numbers are and how to
7 get in touch with you so that when the jury does return we
8 don't have to wait half the day for you.

9 All right, thank you very much.

10 (The court recessed at 11:55 A.M.)

11 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
12 FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE
13 MATTER.

13

14

GLEN L. CUNNINGHAM
OFFICIAL COURT REPORTER

DATE

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16

17

PATRICIA CLINE
OFFICIAL COURT REPORTER

DATE

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