No. 02-20843

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THERM-ALL, INC.; SUPREME INSULATION, INC.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Criminal No. H-00-362
Honorable Nancy F.. Atlas

REPLY BRIEF FOR APPELLANT SUPREME INSULATION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT[1]

I. THE JUDGMENT AGAINST SUPREME SHOULD BE REVERSED AND JUDGMENT OF ACQUITTAL ENTERED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE ITS GUILT BEYOND A REASONABLE DOUBT

The evidence the Government relies upon in its brief to demonstrate Supreme's guilt in a nationwide conspiracy is insubstantial, incredible, or both. While the Government asserts that "[s]everal witnesses implicated Supreme in the conspiracy," Govt. Br. 25, the record discloses that only one witness alleged Supreme was part of a "nationwide conspiracy": Wallace Rhodes of Mizell Brothers, who agreed to cooperate with the Government in exchange for leniency, and was granted that leniency only after his testimony at trial against these defendants. His uncorroborated testimony on the essential points of Supreme's alleged involvement in the conspiracy is factually insubstantial or incredible. He contradicts himself numerous times on key evidence, and the sheer falsity of his testimony is shown by other evidence that the Government proffered. Other than Rhodes' false testimony, the Government's case at trial and argument here rests on unreasonable inferences drawn from evidence that is consistent with lawful competitive behavior by Supreme.

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[1] Because of type volume limitations under Fed.R.App.P. 32(a)(7)(B)(ii), Supreme replies to certain, but not all, of the Government's arguments. In so doing, Supreme does not abandon any point or argument advanced in its principal brief. Pursuant to Fed.R.App.P. 28(i), Supreme adopts the statement of facts, points and arguments set forth in the Reply Brief for Appellant Therm-All, Inc. filed in this joint appeal.

No rational trier of fact could have found that the evidence presented by the Government, consisting entirely of false and incredible testimony of Rhodes, established the essential elements of the offense beyond a reasonable doubt. Therefore reversal of the judgment against Supreme is warranted. See *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996). Because the finding of guilt rested on the insubstantial or incredible testimony of Rhodes, the judgment against Supreme must be reversed. See *United States v. Herrera*, 289 F.3d 311, 318 (5th Cir. 2002); *United States v. Trevino,* 556 F.2d 1265, 1268-69 (5th Cir. 1977). And because the evidence here "construed in favor of the verdict 'gives equal or nearly equal circumstantial support to a theory of guilt or a theory of innocence of the crime charged,'" the conviction must be reversed. *United States v. Jaramillo*, 42 F.3d 920, 923 (5th Cir.)(citations omitted), cert. denied, 514 U.S. 1134 (1995).

A review of the evidence the Government relies upon demonstrates that the Government's case, and Supreme's conviction, is built on a house of cards dealt by Rhodes. The undisputed evidence proves Rhodes' inclusion of Supreme in his conspiracy with Bay and Brite to be a lie. And while the Government characterizes Supreme's appeal as going to the "weight" of the evidence and not its sufficiency, the lack of weight of Rhodes' false testimony demonstrates it was not sufficient, particularly when it was arguably "bolstered" by unreasonable inferences from otherwise lawful competitive acts by Supreme.

The Government asserts, as Rhodes testified, that Rhodes agreed with Ms. Thompson in January 1994 "to raise prices, use bracket pricing, and not go off the price sheets." Govt. Br. 5; Tr. 179-85. However, Rhodes actually testified he had no discussions with Supreme regarding its issuing a price list in January 1994, but that Maloof of Bay had told him in January 1994 that he had secured Ms. Thompson's agreement to do the same. Tr.183-84. Rhodes testified that after Maloof told him of his alleged conversation with Ms. Thompson, Rhodes himself talked directly with Ms. Thompson in January 1994 and she allegedly confirmed to him that Supreme was not going to "jump brackets" or sell below its "price sheet." Tr.184-85. Rhodes' testimony is simply not credible. The uncontroverted evidence was that while Bay and Mizzell introduced price sheets with quantity brackets for the first time in January 1994, apparently in compliance with their agreement to do so, Supreme had no price sheet until July 15, 1994.[2] Its salespersons used an internal cost document to determine price.[3] Thus, in January 1994 there were no "brackets" for Supreme not to "jump" and no price sheet for

[2]In January 1994, Supreme created a draft of a price guide, GX40A, for its Missouri, Alabama and North Carolina plants, but it was never used or disseminated. Tr.3638-41, 3155; 5470. No California price guide was even drafted at that time. Tr.3639, 3249-50.

[3] Each of Supreme's plant managers, the persons who sold product, testified that they did not use a price list to price to customers from January 15, 1994 to July 1994. Tr.3474, 5543-63, 5592-607. Instead they used an internal cost document. Tr.3147-55, Ex.10700-02.

Supreme to sell "below."[4] There simply was no Supreme price sheet.[5]

This is a crucial crack in the Government's theory and in Rhodes' story. Rhodes testified that the conspirators faxed one another their January 1994 price sheets and spoke on the telephone "to get the pricing in line with each other . . . within a couple of dollars of each other in each bracket." Govt. Br. 5-6; Tr. 186-87, 208-11. But since Supreme had no price sheet, and there was no evidence of Rhodes or Bay faxing their price sheets to Supreme, there simply was nothing to "get in line." While Rhodes testified to receiving other conspirator's price sheets so that he could get his price sheet in line, he conspicuously failed to testify that he received any price sheet from Supreme.

The remaining prong of Rhodes' alleged agreement with Supreme -- to raise prices -- is insubstantial to support guilt. The fact that Supreme raised its prices at or near the same time as other laminators -- a constant Government drumbeat to "prove" a conspiracy -- was the result of its mere passing on to its customers the across-the-board price increase instituted by all of the fiberglass manufacturers effective in January 1994 -- a purely competitive reaction to its suppliers' price increase. In fact, the fiberglass manufacturers purposely made the price increase

[4] There was no evidence that any of Supreme's competitors, including Mizell and Bay, ever were in possession of Supreme's draft of its February 1, 1994 Missouri-Alabama-North Carolina price list. Rhodes testified, however, that he and Bay's Maloof exchanged their January 1994 price sheets.

[5] Significantly, when Supreme's draft sheet, GX40A, is compared to Bay's and Mizell's price sheets, Supreme's prices are substantially different. See Exs.11001A, 11001E (attached).

large enough, coupled with a contrived allocation of product, so that laminators such as Supreme had no choice but to pass it on. Tr.3020-22, 3037-33.[6] Other laminators, whom the Government did not contend or argue were conspirators, including Daw of Salt Lake City, Utah, and South Insulation of North Carolina, also raised their prices because of the simultaneous price increases from fiberglass manufacturers, and not because of any agreement with competitors. Tr.5285-308, 5338-68.

Supreme introduced its first "price guide" for use in pricing to new or non-recurring customers in July 1994.[7] This price guide replaced the "cost sheet" that plant managers had used in pricing. See note 3. The Government points to Rhodes' testimony that he faxed Mizell's June 1994 price sheet (GX18) on May 20, 1994 to Supreme for it to use in setting its pricing. Govt.Br.25. This testimony is incredible for several reasons.

Rhodes testified that Mizell, Bay and Brite exchanged drafts of their new price lists prior to June 1, 1994, the date each of them agreed they would become

[6] In October 1993, the major fiberglass manufacturers uniformly announced supply allocation and an identical 8% price increase, effective February 14, 1995. Tr.3016-19; Ex.11249-50. On April 15, 1994, they identically announced another 8% increase, effective July 15, 1994. Tr.3026-27; Ex.11256. On September 1, 1994, they uniformly announced a third 8% increase, effective December 14, 1994. Tr.3036-37; Ex.11260, 11251-64.

[7] During the relevant time period, Supreme did have specific, special price lists for over 100 large, recurring customers. Tr.3106-08, 3110-18, 3141-43; Ex.11201, 11006-29, 11031-48, 11050-55. These customers were called “program accounts” and consisted primarily of metal building manufacturers and large construction companies. Specific prices were negotiated with these program accounts, normally annually, so that each one had its own customized price list, with negotiated final prices different from the general price guide prices. The Government did not allege that the pricefixing conspiracy extended to these program accounts.

effective. Tr.396-98, 870, 873; Ex.21. Supreme's first-ever general price guides, one for "North Carolina-Alabama-Kansas City" and one for "California," were made effective July 15, 1994, the effective date of the fiberglass price increases from all of the fiberglass manufacturers. *Id.*

Although they passed drafts among themselves, there was no evidence that Mizell, Bay or Brite provided Supreme any draft of their price sheets before they were finalized. Nor was there any evidence that Supreme provided any draft of its own July 15, 1994 "Missouri-Alabama-North Carolina" or "California" price guides to Mizell, Bay or Brite, or any other competitor before they were finalized.

At trial, Rhodes testified that he faxed Mizell's final June 1, 1994 price sheet to Ms. Thompson on May 20, 1994 (rather than the draft of it that he had provided Bay and Brite previously "prior to June 1," TR.875). Tr.372-80; Ex.18. He testified he did so in order that Supreme would be able to get its prices in line with those of Mizell. Tr.378. Before the grand jury, however, Rhodes testified to the exact opposite -- that is, that Ms. Thompson faxed her price list to him so he could get his prices in line with Supreme's. Tr.870-78. Thus, he changed his story at trial so that it would conform with his allegation that Supreme was part of the price sheet conspiracy. After all, if he had stuck to his grand jury testimony, his testimony that he, Bay and Brite had exchanged drafts before June 1, 1994 in order to get their prices in line would make no sense if Supreme had provided its

final price sheet to him and he had not shared it with Bay and Brite. Rhodes' clear lie cannot support the conviction.

Moreover, the mere fact that Rhodes and Supreme exchanged final price sheets does not support Rhodes' pricefixing story.[8] Rhodes testified that on June 7, 1994, about six weeks before Supreme's second price increase went into effect, Ms. Thompson faxed him Supreme's final July 15, 1994 price guide (Ex.4) so that Rhodes could make sure Mizell's June 1, 1994 price sheet was close. Tr.378-79,382-84. But by that time he had already finalized Mizell's price sheet with Bay and Brite. Rhodes admitted Mizell's June 1, 1994 price list was final before he faxed it to her and he made no changes to it after receiving Supreme's final July 15, 1994 price list. Tr.870-75. Supreme made no changes to its final July 15, 1994 price guide after receiving Mizell's final June 1, 1994 price sheet.[9] And, the fact that Mizell's, Bay's and Brite's price sheets were effective six weeks before Supreme's meant they charged substantially different prices during that six weeks. See, e.g., Ex.11001B. Thus, the exchanging of final price sheets by Mizell and Supreme, which were public documents provided to customers and

[8] While Supreme provided Mizell with its July 15, 1994 and December 15, 1994 price sheets prior to their effective date, Supreme similarly provided Brite with its December 15, 1994 price sheet prior to its effective date for a legitimate business reason. Mizell, Bay and Brite and other competing laminators purchased products or obtained quotes from Supreme. Ex.11268, 11271-83, 13111-12. The Government never contended that Supreme's provision of its price list to Brite was illegal.[8]

[9] Supreme had previously notified customers, as early as April 26, 1994, about the July 15, 1994 price increase. Tr.3164-67; Exs.9182, 9186, 9190.

readily available,[10] could not and did not result in the alignment of prices, and such conduct does not give rise to a reasonable inference of illegality. *Michael v. Intracorp*, 179 F.3d 847 (10th Cir. 1999)("Mere exchanges of information, even regarding price, are not necessarily illegal, in the absence of additional evidence that an agreement to engage in unlawful conduct resulted from, or was a part of, the information exchange."); accord *Wallace v. Bank of Bartlett*, 55 F.3d 1166 (6th Cir. 1995).

A comparison of Mizell's June 1, 1994 price sheets and Supreme's July 15, 1994 price guides show substantial differences in both the number of quantity brackets and in the prices themselves.

The bottom line is that the prices charged on Mizell's and Supreme's price lists are substantially different, while the prices charged by Mizell, Bay and Brite are identical. Compare Exs.40B (Supreme July 15, 1994 "NC-Al-KC" price guide), 42F (Mizell June 1, 1994 Southern Region price sheet), 43F (Bay June 1, 1994 Southern Region price sheet), and 44D (Brite May 23, 1994 price sheet); see Exs.1001C and 11001I (attached as Addendum). A comparison is striking. Supreme has <u>three</u> quantity brackets, 0 to 25,000 square feet, 25,000 to 50,000

[10] Representatives of fiberglass manufacturers collected various laminators' price sheets from various sources and readily provided them to Supreme for its use to compete with other laminators and to demonstrate a need for special low pricing of fiberglass in order to win jobs against other laminators, including Mizell and Bay. Tr.5390-95, Ex.22, 53. Similarly, Supreme often obtained competitors' price lists from customers who provided them in order to make Supreme undercut its competition. Tr.3485.

square feet and over 50,000 square feet. Mizell, Bay and Brite all have the identical four brackets: 0 to 10,000, 10,000 to 30,000, 30,000 to 50,000, and greater than 50,000 square feet. And the prices charged within those brackets are identical as among Mizell, Bay and Brite -- but are materially different from those charged by Supreme for the same quantities. For example, for 9,000 square feet of 3" white vinyl product, Supreme's price was $218 per thousand square feet, while Mizell, Bay and Brite all charged $220. For 24,000 square feet, Supreme's price remained at $218, but Mizell and Brite charged $209 and Bay charged $210. For 49,000 square feet, Supreme's price was $208, but Mizell's and Brite's price was $204 and Bay's price was $205. An examination of the price sheets reveals Mizell's, Bay's and Brite's prices on all other thicknesses and facings (over 30 different variations) to be identical or within a dollar of one another, while Supreme's prices are materially lower in some instances, and materially higher in others.

Moreover, Mizell's June 1, 1994 and Supreme's July 15, 1994 California prices are materially different and reveal Rhodes' lie that those prices were agreed upon. Compare Ex.40C (Supreme) and 42H (Mizell). Mizell's price sheet has the same four quantity brackets as its Southern Region sheet, Ex.42F. Supreme has the same three brackets as its "NC-AL-KC" price guide, Ex.40B. The prices are materially different as well. For 10,000 square feet of 3" white vinyl,

Supreme charged $269 per thousand square feet, while Mizell charged $264. For 30,000 square feet, Supreme charged $247, Mizell charged $259. For 50,000 square feet, Supreme charged $237 and Mizell charged $248.[11] Rhodes' assertion of a "nationwide pricefixing conspiracy" could not include Supreme with these differences in prices. Once again, his lie respecting Supreme is laid bare.

While the Government relied n Rhodes to make general conclusions in comparing the price sheets, an actual comparison, sheet by sheet, product by product, and quantity by quantity, demonstrates Rhodes is incorrect in saying Supreme's prices are "close" or "similar" to Mizell's. Govt.Br.6-7; Tr.221-24. They are not.

The Government's assertion that Supreme changed its freight charge policy in its July 15, 1994 price guides to conform with Mizell's freight charge policy is simply wrong. Govt.Br.11. First, Rhodes testified that he did agree on freight charges with Maloof of Bay and with Brite to set their freight charge policies at $1750. Rhodes testified that he did not discuss freight policy with Ms. Thompson or any one else at Supreme. Tr.388. Second, an examination of Ex.4, Supreme's July 15, 1994 price guide for "North Carolina-Alabama-Kansas City" shows "$1500" crossed out and a "2000" handwritten interlineation. However, that change was never finalized, as demonstrated by Ex.40, also offered by the

[11] Comparison of other products, numbering over 30, reveal similar material price differences.

Government, in which the freight charge policy remains at "$1500." Third, Mizell's Southern Region price sheet was the one it used in competition with Supreme's "North Carolina-Alabama-Kansas City" price guide. Mizell's June 1, 1994 price sheet for its Southern Region has a freight charge policy of $1750," i.e., markedly different from Supreme's freight charge policy, whether it was $1500 or $2000. Again, Rhodes is caught in a lie.

Rhodes' lies concerning Supreme's freight policy is compounded by the fact that when the laminators issued new price sheets in December 1994 in response to the fiberglass manufacturers' third uniform price increase, Mizell's, Bay's, and Brite's Southern Region freight charge policy remained identical at $1750. Supreme, however, changed its freight policy from a minimum dollar amount of an order to a minimum quantity of an order. Supreme's freight policy became "All orders under 7500 square feet are shipped freight prepaid and billed to customer," (Ex.19, 40D), while Mizell's, Bay's and Brite's remained "Orders under $1750 will ship FOB our dock, prepaid and charged back." Ex.20 (Mizell), Ex.43J (Bay), Ex.44F (Brite). These are markedly different freight policies and the differences have a substantial effect on prices.[12] Thus, Rhodes' story that Supreme agreed to the same freight charge policy is patently and demonstrably false.

[12] This is no small point. A customer's final price can be substantially affected by the freight charge.

Rhodes' testimony about Mizell's and Supreme's December price sheets again demonstrates that the facts do not conform with his tale of conspiracy. Rhodes testified that at the end of September 1994, he and Ms. Thompson agreed on the prices to be shown on their respective December 15, 1994 price sheets. Tr.461-62. However, Supreme's December 15, 1994 price guides were final by September 15, 1994, when Supreme notified its customers of the impending price increase from the fiberglass manufacturers. Tr.3229-34; Ex.11404, 11405B.

A comparison of Mizell's and Supreme's December 15, 1994 price sheets shows significant and material differences. Mizell's Southern and Western price lists had four brackets and its northern price list had, for the first time, five quantity brackets, emulating Bay's and Brite's lists. Exs.43G, 43K, 44H. Supreme's pricing brackets remained unchanged, with the same three quantity brackets set out in its July 15, 1994 price guides.

Significantly, the prices charged for various comparable quantities and thicknesses of laminated product were significantly different between the two companies' December 1994 pricing. Compare Ex.19 (Mizell's Southern Region price sheet) and Ex.20 (Supreme's "NC-AL-KC" price guide); see Ex.11001D (attached as Addendum). For example, 24,000 square feet of 3" white vinyl from Mizell is $228 per thousand square feet, while it is $242 from Supreme. Mizell

charged $222 for 31,000 square feet, while Supreme charged $231. And for 51,000 square feet, Mizell charged $218 and Supreme charged $221.

The same is true for the differences between Mizell's and Supreme's December 1994 prices in California. Compare Exs.40E and 42L. A comparison of the two price sheets demonstrated substantial disparity, ranging upwards from $9.00 to $17.00 per 1000 square feet for some products. Compare Exs.40E and 42L; see Ex.11001J (attached as Addendum).

Furthermore, while Rhodes testified that in early 1995 he agreed with Maloof and other competitors to fix the prices of unfaced insulation (insulation without the vinyl facing glued to it as a moisture barrier), Tr.799-800, Rhodes testified that he had not seen Supreme's February 15, 1995 unfaced pricing until trial. Tr.902-03. A comparison of the unfaced pricing shows Supreme's pricing, revised on February 15, 1995 (Ex.40F, 10715) was substantially lower than those of Mizell. Tr.801-08; compare Exs.40F and 42L; 11060. For example, Supreme's price for a truckload of 3" unfaced insulation was $169 per thousand square feet, while Mizell's price was $175. *Id.* And, significantly, Supreme's freight charge policy was set at $2000 of product, while Mizell's freight charge policy was set at $1500. When Mizell revised its unfaced pricing on March 1, 1995 (Ex.425), Mizell changed its quantity bracketing from "truckload" and "less than truckload," to 5 square feet quantities. Supreme remained with "truckload" and "less than

truckload" as its quantities for pricing. Ex.40G. Supreme's unfaced pricing were substantially different than those of Mizell. Compare Exs.40G and 42S. Once again, Rhodes' inclusion of Supreme in a nationwide conspiracy is directly contradicted by the facts.

Moreover, Rhodes' false inclusion of Supreme in the Mizell-Bay-Brite conspiracy is belied by the fact that while Mizell and Bay each had separate price sheets for Northern and Southern market regions, with different prices for each of those markets (Exs.42B, 42C, 42F, 42G, 42J, 42K, 43B, 43C, 43F, 43G, 43J, 43K), Supreme had one price guide for use with all non-program account customers located anywhere in the eastern half of the United States (Ex.40B, 40D). Bay sold customers in Missouri from a different price list than it sold customers in Alabama, while Supreme utilized the same price guide in pricing customers in Missouri, North Carolina and Alabama, and the prices thereon were markedly different from the Bay prices. Exs.40C, 10829, 10831.

The Government belittles a difference between Mizell's and Supreme's prices of a "few dollars."[13] But the testimony of Rhodes, Janne Smith of Bay, as well as non-conspiratorial competitors David Swenson of Daw and David Hales of South, demonstrated that a difference of as little as one dollar in price could mean

[13] There was no evidence that Supreme and Therm-All competed.

winning or losing a customer's job. Tr.3445, 5285-5308, 5338-68.[14] Moreover, the fiberglass manufacturers' prices were within a dollar of one another (see Ex.11249-50, 11256, 11260, 11251-64), hence one would expect prices among laminators to be within a "few dollars" of one another for such a fungible commodity. Moreover, as an examination of the price sheets of Mizell, Bay and Brite disclose, their prices were identical or within one dollar of one another. Supreme's prices, on the other hand, were several dollars different than those of Mizell, Bay and Brite, as noted above, and which can be confirmed by this Court from an actual comparison of the price sheets.[15] See Exs.11001A-J (attached as addendum). While the clearly identical pricing among Mizell, Bay and Brite does support Rhodes' testimony that the three of them fixed prices, the difference between their prices and Supreme's betrays Rhodes' effort to curry favor with the Government by broadening the arms of the conspiracy to include Supreme.

The Government points to Rhodes' testimony that he and Ms. Thompson of Supreme spoke about prices they each were to charge Rib Roof, a large contractor in California, on a particular project in February 1994. Govt.Br.27. Yet the

[14] Rhodes' own notes contained several entries dated *before* the alleged conspiracy period detailing instances where Mizell either won or lost a job because of a dollar or two difference. See, e.g., Ex.11413.

[15] Although Rhodes tried to dismiss the different quantity brackets between Supreme's price sheets and those of both Mizzell and Bay as inconsequential, the fact remains that because of the different brackets, specific product quantities were priced substantially different by Supreme than by Mizzell, Bay or Brite. Compare Exs.40B, 18 and 43F; 40C and 42H; 40D, 42J and 43J; 40E and 42L.

Government acknowledges that Supreme underbid Mizell on the project. Govt. Br. 27; Ex.60B. Although Rhodes swore that he and Thompson had already agreed on prices on their respective price lists in January 1994, Supreme did not have a price list from which to price product in California. Tr.3474. The evidence was uncontroverted that at no time did Supreme quote the Rib Roof job at the same price that Mizell quoted it. Tr.3504-43; Exs.19841-50, 10853-54, 11285. Supreme's California plant manager, Dan Cereghino, testified that he obtained Mizell's pricing which it had offered to Rib Roof from the customer itself, and discussed with Ms. Thompson a price that would be lower than Mizell's price. *Id.* Thus, despite Rhodes' efforts to make the competition for the Rib Roof job conspiratorial, the facts betray him.

The Government next turns to the testimony of Bay's Texas manager, Janne Smith, to bolster indirectly Rhodes' tale. Govt.Br.27. Ms. Smith testified that Maloof of Bay told her he had talked to Ms. Thompson about prices, but Ms. Smith never witnessed such conversations. In fact, in secretly taped conversations between Ms. Smith and Maloof (Ex.13) Maloof is heard commenting on Supreme's aggressive competition. Maloof made three references to Supreme in the conversations taped by Ms. Smith: that Supreme's Alabama plant pricing was "wild," that Supreme tried to steal Bay's account with its customer Whirlwind, and that he had complained to Ms. Thompson about her

southern sales representatives' discount pricing. Ex.13. The reasonable inference from these complaints is Supreme's successful competition against Bay. Moreover, Ms. Smith herself testified to Supreme's aggressive competition, as well as to the fact that Maloof was concerned that Supreme was undercutting Bay and made it difficult for Bay to stick to its own price list as he agreed with Rhodes to do. Tr.2376, 2400-03, 5603.[16]

The Government's gratuitous statement that Supreme's salespeople did not become free to exercise independent pricing authority until the summer of 1995, after the issuance of the grand jury subpoenas, Govt. Br. 8, is incorrect. Contrary to the Government's mistaken characterization of their testimony, Supreme's salespeople each testified that they were not directed to "stick" to the price guides and, in fact, had and used independent pricing authority throughout the alleged conspiracy period. Tr.3247, 3474-76, 3989-95, 4010, 3147-3155, 5543-63, 5592-607. The only exceptions were former Supreme employees Linda Welty and Jaime Miranda. But an examination of their entire testimony demonstrates that they, too, had the authority to discount off Supreme's price guides during the relevant period.

[16] The Government points to Ms. Smith's interpretation of one of Maloof's comments in the taped conversations that Bay did not lose the business of Crown Metal Buildings based on Supreme's lower price, but lost the customer for other, non-price, reasons. Govt. Br. 14; Tr.2335, Ex.13B. Contrary to Ms. Smith's speculation as to what Maloof meant in the comment -- which, in fact, made no mention of Crown -- Crown's president, Mr. Seagraves testified that Supreme won his business by pricing lower than Bay and another competitor. Tr.5538-40.

Supreme's plant managers testified that price guides were used primarily to assist a new or inexperienced employee in quoting to new customers. Tr.5543-63, 5592-607, 3471-80, 3989-95. Their testimony was that until such time as they felt comfortable quoting prices to new customers, new salespeople, including Jaime Miranda in California and Linda Welty in Kansas City, were instructed by the plant manager and by Supreme's marketing manager, Tomasina Miller, to quote the prices set forth on the price guides, and to seek the guidance of a plant manager, Ms. Miller, or Ms. Thompson before lowering the price. *Id*.

In this context, Ms. Welty's testimony that she was directed by Ms. Miller to "stick" to the price guide is placed in proper perspective, and does not prove Supreme's salespeople were directed not to discount. In fact, on cross-examination, Ms. Welty admitted that many of the customers to whom she sold were "program" accounts, each of whom had separate, negotiated special pricing which was not deviated from. With respect to other customers, Ms. Welty was forced to admit on cross-examination, after being shown dozens of transactions in which she, in fact, did discount from the price guide, that she was not directed to "stick'" to the price guide after she gained experience. Tr.2123-83.

Similarly, Jaime Miranda, Supreme's former California-based salesperson, testified that in March of 1995 Ms. Thompson provided him and the California plant manager, Dan Cereghino, with a copy of Mizell's December 15, 1994

Western Region price sheet and told them that she obtained the price sheet from Rhodes and Miranda should use it as a "guide" for his own competitive pricing, which he did for a few jobs. Tr.2004-06, 2085-87. Using a competitor's price sheet to measure one's own pricing, if not a result of an agreement to fix prices, is not illegal. The Government's attempt to spin Miranda's conduct into a corroboration of a pricefixing agreement between Rhodes and Thompson thus fails.

One more Rhodes' lie must be recounted to knock down any remaining remnant of the Government's house of cards. Rhodes testified that at a breakfast meeting on March 29, 1995 at a San Francisco trade meeting, he handed Ms. Thompson a copy of Mizell's December 15, 1994 Western Region price list. Ex.6; Tr.525-28. He testified that he had telephoned Ms. Thompson prior to the trade show, and told her he would have his "California price sheet ready" at the time of the show. Tr.526. However, the price list that he gave her at the breakfast was a copy of Mizell's California price list effective December 15, 1994 and which was four-months old and had long been available in the market from customers. Ex.6. Thus, he lied when he testified that he told her he would have his "California price sheet ready" by their March 29, 1995 breakfast. It, in fact, had been ready

since before December 15, 1994. Rhodes lied when he testified that the price sheet he gave Ms. Thompson at that breakfast was something that was new.[17]

Rhodes testified that he gave the California price list to Ms. Thompson at the breakfast, and in fact, the price sheet he gave her was the Mizell Western Region price sheet that had been issued by Mizell four months before. Ex.6. There was no evidence that Supreme changed its own California price list after Rhodes gave this old price sheet to Ms. Thompson on March 29, 1995. And, in fact, Supreme's California plant manager Cereghino testified that he had previously obtained the same California Mizell price list from a customer several weeks earlier. Tr.3485.

The Government ignores the uncontroverted evidence that Supreme had over 100 special price sheets for specific customers The evidence is uncontroverted that these customers and special price sheets were never discussed by Supreme with Rhodes or Maloof. Rhodes and Maloof, however, specifically discussed and faxed similar special price lists they had with the same and other customers. The Government cannot explain why Mizell and Bay included such customers in their conspiracy, but never discussed such customers with Supreme.

[17] Rhodes' pathetic and desperate attempt to persuade the jury that there was a nefarious purpose to the breakfast meeting is further exposed as a lie by the fact that he falsely testified that he paid for the breakfast, but did not report it on his expense reimbursement request in order to conceal it from his employer. Tr.531-34. In fact, Ms. Thompson, not Rhodes, paid for the breakfast. Tr. 3691-93; Ex.11147.

Similarly, the Government dismisses the fact that over 89% of Supreme's sales transactions from January 1, 1994 through June, 1995 were at prices other than the applicable bracket price on its price guides.[18] Moreover, it ignores, because it defeats its argument of a conspiracy involving Supreme, the evidence that Supreme sold its products to various customers at different prices. Tr.4128-36; Exs.11511A-D, 11529-40.

Other gaping holes in Rhodes' conspiracy story, set forth in Supreme's main brief, are ignored or unpersuasively dismissed by the Government. See Appellant's Br. 31-40. The Government has no rejoinder because the missing links in Rhodes' tale and the litany of pro-competitive acts by Supreme recounted there lay bare his lies regarding Supreme.

The evidence was insufficient to support a conviction of Supreme, and the judgment should be reversed.

[18] From January of 1994 to June of 1995, Supreme made 7,063 sales; only 798 of those sales (11%) were priced at Supreme's price guide price. A total of 5,585 of the 7,063 sales, or 79%, were below Supreme's price guide; 680 sales, or 10%, were above Supreme's price guide price. Tr.4100-15; Exs.11514A-H, 11526A-B, 11527A-B.

II. THE JUDGMENT AGAINST SUPREME SHOULD BE REVERSED AND JUDGMENT OF ACQUITTAL ENTERED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF FACT BY THE JURY THAT AN OVERT ACT IN FURTHERANCE OF THE ALLEGED CONSPIRACY OCCURRED WITHIN THE LIMITATIONS PERIOD

It is the Government that misreads the law relating to the application of the statute of limitations to violations of the Sherman Act. While proof of an overt act is not required to establish a violation of Section 1 of the Sherman Act, *United States v. Socony-Vacuum Oil Co.*, 310 150, 224-25 n.59 (1940), where a conspiracy is alleged, proof of an overt act is required to prove it was in existence during the limitations period. *Grunewald v. United States*, 353 U.S. 391 (1957). Otherwise, the statute of limitations never runs and the Government may bring charges forever.

Contrary to the Government's assertion, the Supreme Court in *United States v. Kissel*, 218 U.S. 601 (1910), did not hold that the statute of limitations continues to run until the conspiracy is abandoned or succeeds. The Court in *Kissel* noted that once initiated, a conspiracy continues until it is abandoned or succeeds <u>if</u> the conspirators make <u>efforts</u> to further the conspiracy:

> A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success.

Id. at 608. In *Kissel*, the Court recognized that proof of an overt act is the means by which the existence of the conspiracy within the limitations period is established:

> A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

Id.

The Sixth Circuit's opinion in *United States v. Hayter Oil Co.*, 51 F.3d 1265 (6th Cir. 1995), relied upon by the Government, misreads *Kissel* in holding that "once a [pricefixing] conspiracy has been established, it is presumed to continue until there is an affirmative showing that it has been abandoned." *Id.* at 1270-71, citing *Kissel*, 218 U.S. at 608; *United States v. Hamilton*, 689 F.2d 1262, 1268 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983). To the extent *Hayter Oil* is read to require no finding of an overt act establishing the existence of the conspiracy within the limitations period, as the Government asserts, *Hayter Oil* is wrongly decided and, in any event, is not the law of this Circuit.

Read according to the Government's interpretation, *Hayter Oil* would eviscerate the statute of limitations in conspiracy cases under the Sherman Act. If a conspiracy, once initiated, continues until success or abandonment, then it may never end because the Government could always argue that the conspiracy has continued indefinitely because "success," however defined, has yet to be achieved.

The Government likewise misreads *Nash v. United States*, 229 U.S. 373, 378 (1913), as holding that no overt act need be proven within the limitations period. The Court in *Nash* only held that a violation of the Sherman Act could be found with the proof of the creation of a conspiracy without any overt act in furtherance of it. *Id*. at 378.

The correct reading of *Kissel* and *Nash* is found in cases like *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991). There the court held that the "finding of an overt act is not necessary to a finding that a Sherman Act conspiracy has been formed." *Id*. at 1048, citing *Nash*, 229 U.S. at 378. But the court also held that the factfinder must "find that a member [of the conspiracy] committed an overt act in furtherance of the conspiracy" within the limitations period. *Id*., citing *United States v. Inryco, Inc.*, 642 F.2d 290, 294 (9th Cir. 1981), cert. dismissed, 454 U.S. 1167 (1982). The Ninth Circuit held that in instructing the jury as to both requirements, "the law was correctly stated." 936 F.2d at 1048. That is the what the District Court instructed in the instant case.[19]

This reading of *Kissel* and *Nash* is consistent with this Court's interpretation of 18 U.S.C. §3282, the applicable statute of limitations here. In *United States v. Davis*, 53 F.2d 921, 929 (5th Cir. 1976), this Court held that "[f]or purposes of the

[19] Thus, the Government's criticism of the District Court's instruction is unwarranted. See Govt. Br. 38 n.32.

statute of limitations [18 U.S.C. §3282] the overt acts alleged in the indictment and proved at trial mark the duration of the conspiracy."

Left with this correct statement of the law, the Government fails to point to any overt act that proved the existence of the alleged conspiracy after May 31, 1995.

The Government first points to the testimony of Supreme's California salesperson, Jaime Miranda, that in March 1995, Ms. Thompson told him to use a Mizell price list as "a guide," which he did for "a few jobs." Govt. Br. 36; Tr.2005. There was no evidence offered as to whether he, in fact, quoted any prices identical to those on the Mizell price list at any time after May 31, 1995, pursuant to any direction from Ms. Thompson.

Next the Government refers to Ms. Smith's taped conversations with Maloof of Bay on May 4 and 5, 1995. Govt. Br. 36-37. Of course, neither of these conversations regarding Supreme occurred after May 31, 1995. Similarly, the Government's reliance on a bid made by Mingle on May 15, 1995, Govt. Br. 37, does not fall within the limitations period.

Lastly, the Government, as an afterthought for the first time on appeal, cites sales invoices of Therm-All, Supreme, Bay and Mizell in early June 1995. Govt. Br. 38, n.30. But merely because these invoices show prices on certain jobs that are the same as those on a particular price list does not establish that those sales

were made in furtherance of any alleged conspiracy. There was no evidence, direct or otherwise, that any such sale was priced because of any direction to "stick" to a price list. This is particularly true with respect to Supreme. The evidence showed that Supreme priced the same quantity of product to different customers at various prices at all relevant times, including after May 31, 1995. Because Supreme priced the same products to different customers at different prices, even after May 31, 1995, sales after that date cannot establish the existence of the conspiracy within the limitations period. See, e.g., Exs.11514H, 11515-18, 11524-39.

For these reasons, even if there was sufficient evidence to support the jury's verdict that there was a conspiracy to fix prices in which Supreme was a member, the Government nevertheless failed to prove the existence of any such conspiracy within the applicable five-year statute of limitations period. The judgment must be reversed.

III. SUPREME SHOULD BE GRANTED A NEW TRIAL BECAUSE THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE

If the record as a whole does not support reversal and entry of judgment of acquittal in favor of Supreme, it nonetheless supports the granting of a new trial. The verdict against Supreme, especially in light of the verdict in favor of Ms. Thompson, was against the greater weight of the evidence as a whole. In light of the weight of unrebutted evidence recounted above in Point I, and in Supreme's principal brief, demonstrating false, inconsistent and contradictory evidence of

alleged guilt presented by Wallace Rhodes, and the competitive actions of Supreme that are inconsistent with, and contradict, its participation in a nationwide pricefixing agreement, the District Court erred in granting a new trial.

CONCLUSION

For the reasons set forth herein, as well as set forth in its principal brief, Appellant Supreme Insulation, Inc. respectfully requests that the verdict against it be reversed, and a judgment of acquittal be entered on its behalf, or alternatively, it be granted a new trial.[20]

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[20] Pursuant to Fed.R.App.P. 28(i), Supreme adopts the statement of facts, points and arguments set forth in the Reply Brief for Appellant Therm-All, Inc. filed in this joint appeal.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy (along with a diskette containing an electronic copy) of the foregoing Reply Brief for Appellant Supreme Insulation, Inc. was served on all counsel of record, as listed below, by Federal Express, on the 7th day of July, 2003:

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CERTIFICATE OF COMPLIANCE

This Reply Brief for Appellant Supreme Insulation, Inc. complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B)(ii) because:

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Dated: July 7, 2003

ADDENDUM