UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	IP 06-CR-0061-02 M/F
	)	
CHRIS A. BEAVER, Defendant	)	Hon. Larry J. McKinney

UNITED STATES' SENTENCING MEMORANDUM

On November 16, 2006, a jury found Chris A. Beaver, hereinafter referred to as the Defendant, guilty of one count of conspiring to suppress and eliminate competition by fixing the prices at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area in violation of 15 U.S.C. §1, and one count of knowingly and willfully making a false statement in violation of 18 U.S.C. §1001. The conspiracy, as charged in the Indictment and as proved at trial, began in or about July 2000 and continued until May 25, 2004. For the reasons stated herein, the United States recommends that the Court sentence the Defendant to serve a period of incarceration of 36 months, serve a period of supervised release, and pay a fine of $350,000 or whatever amount the Court believes the Defendant has the ability to pay.

I. The Defendant Was an Active Participant in the Price-Fixing Conspiracy

Four of Defendant's co-conspirators testifying at his trial, Gus "Butch" Nuckols of Builder's Concrete & Supply, Co., Inc. ("Builder's"), Richard Haehl of Shelby Materials ("Shelby"), Price Irving of Irving Materials, Inc. ("IMI"), and Scott Hughey of Carmel Concrete ("Carmel"), all unequivocally placed the Defendant at the October 22, 2003 meeting at Butch Nuckols' horse barn where the group reached price-fixing agreements. Trial Tr. vol.1, 48:1-3; 52:23-54:5, Nov. 13, 2006; Trial Tr. vol.2, 153:1-10;156:3-8; 232:1-16; 236:17-25; 316:15-

317:4; 318:8-319:9, Nov. 14, 2006. While this was the only meeting of multiple competitors that the Defendant attended that was established at the Defendant's trial, it was not the start of the Defendant's involvement in the price-fixing conspiracy.

Long before the October 22, 2003 horse barn meeting, the Defendant had begun to take an increasingly active role in the management of his company, Ma-Ri-Al Corporation, a/k/a Beaver Materials. On May 25, 2004, during an interview with an FBI agent investigating the price-fixing conspiracy, the Defendant informed the investigator that while he was technically Beaver Materials' Operations Manager, he had become more involved in the company's pricing and sales over the last couple of years, Trial Tr. vol.3, 438:6-10, Nov. 15, 2006, and that he was being groomed to replace his father as President of Ma-Ri-Al Corporation. *Id.* at 439:14-19. The Defendant also informed the investigator that he held a position on Beaver Materials' Board of Directors. *Id.* at 439:10-13.

At approximately the same time, the Defendant's cousin, co-conspirator, and co-defendant Ricky J. Beaver ("Rick Beaver") was also being interviewed by an FBI agent. In his interview, Rick Beaver informed the investigator that he was responsible for sales at Beaver Materials, *id.* at 421:9-14, independently verified that the Defendant was "being groomed to be the next president of Beaver Materials," *id.* at 421:25-422:17, and informed the investigator that he shared a place on Beaver Materials' Board of Directors with the Defendant.[1] *Id.* at 422:21-423:1. Rick Beaver further explained that the Board of Directors made pricing and discount decisions for Beaver Materials. *Id.* at 422:18-423:5.

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[1] Allyn Beaver, the Defendant's father and President of Ma-Ri-Al, confirmed that at the time of the price-fixing conspiracy the Defendant was involved in helping to establish Beaver Materials' pricing and that Rick Beaver was working in sales. Trial Tr. vol.3, 553:20-554:1.

Thus, along with the other members of Beaver Materials' Board of Directors, both the Defendant and his co-defendant Rick Beaver, the sons of the company President and Vice-President respectively, *id.* at 439:25-440:3, were directly responsible for Beaver Materials' pricing. It was with their authority as members of Beaver Materials' Board of Directors, as individuals responsible for Beaver Materials' pricing, and as the next generation to take the reins at Beaver Materials that these two men attended price-fixing meetings with their competitors.

As the testimony of two of his co-conspirators established, Rick Beaver first reached price-fixing agreements with representatives of IMI, Shelby, Builder's, and Carmel at a meeting at Mr. Nuckol's horse barn in the summer of 2000.[2] Trial Tr. vol.2, 142:11-143:3; 145:1-9; 303:15-304:10; 306:22-307:23. In addition, all four of Rick Beaver's testifying co-conspirators place him at a following meeting of competitors at a Signature Inn where the group reached price-fixing agreements. Trial Tr. vol.1, 70:4-18; 72:9-24; Trial Tr. vol.2, 147:13-150:16; 218:15-219:21; 310:19-312:18. It was no secret Rick Beaver was talking to his competitors; the testimony of Allyn Beaver, Ma-Ri-Al's President, established that he knew that Rick Beaver was communicating with competitors. Trial Tr. vol.3, 159:20-22.

While Rick Beaver attended the meetings marking the beginning of the conspiracy, the Defendant began attending meetings and communicating more directly with Beaver Materials' competitors to solidify Beaver Materials' commitment to the conspiracy after Rick Beaver had made a mistake when pricing a few jobs in accordance with his understanding of the agreements.

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[2] One of the other testifying co-conspirators, Price Irving of IMI, was not involved with his company's pricing decisions in 2000, not becoming involved with pricing until 2002, and was thus not in attendance at the 2000 horse barn meeting. Trial Tr. vol.2, 216:2-4. The other testifying co-conspirator, Butch Nuckols of Builder's, although unsure whether anyone from Beaver attended this meeting, believed it was possible. Trial Tr. vol.1, 66:25-67:3.

One by one, representatives from Builder's, IMI, and Carmel each took the stand and testified that the Defendant replaced Rick Beaver at the October 22, 2003 horse barn meeting because Rick Beaver had made a couple of mistakes in his attempt to price in accordance with the agreements reached at the 2000 horse barn meeting and the Signature Inn meeting. Trial Tr. vol.1, 50:5-7; Trial Tr. vol.2, 232:12-233:3; 321:2-14. In addition, Allyn Beaver testified that he knew the Defendant was going to a meeting with competitors at Butch Nuckols' horse barn. Trial Tr. vol.3, 556:20-227:4.

As with the previous meetings attended by Rick Beaver, the group once again reached price-fixing agreements at the October 22, 2003 horse barn meeting. Trial Tr. vol.1, 52:23-54:5; Trial Tr. vol.2, 156:3-8; 236:17-25; 318:8-319:9. In addition, the Defendant took an active role in the conspiracy by offering to expand the conspiracy by contacting Jason Mann of American Concrete ("American"), Trial Tr. vol.2, 319:18-320:8, and by contacting his competitors to ensure compliance with the price-fixing agreement. *Id.* at 324:20-325:6.

Thus, while the Defendant's role in the conspiracy was most outwardly apparent beginning with his attendance at the October 22, 2003 horse barn meeting, the evidence introduced at trial clearly supports the Defendant's knowledge and approval of the conspiracy from its inception. Indeed, the Defendant began attending the conspirational meetings in an effort to ensure that Beaver Materials effectively implemented the agreements, agreements of which he was always aware and supported.

II. The Defendant's Base Offense Level Should Be Increased as a Result of His Conviction for Making False Statements in Violation of 18 U.S.C. § 1001

As previously noted, when an FBI agent interviewed the Defendant on May 25, 2004, the

Defendant began the interview by truthfully answering general questions concerning Beaver Materials and his role with the company. Unfortunately for the Defendant, his truthfulness ceased once the investigator began asking questions about the Defendant's role in the price-fixing conspiracy.

When asked whether he had attended any meetings at Butch Nuckols' horse barn, the Defendant denied being at any meeting and added that he didn't think that any other member of Beaver Materials had attended such a meeting, either. Trial Tr. vol.3, 440:24-441:5. Moreover, the Defendant couldn't speculate on what kind of discussion would occur at such a meeting, *id.* at 441:10-14, and consistently denied having any discussions with competitors about price fixing, price establishment or discounting. *Id.* at 441:22-442:10. When the interviewing agent pointedly asked the Defendant whether he had ever met with specific individuals from Builder's, Carmel, IMI, Shelby, or American, he denied ever meeting with any of these men either individually or collectively. *Id.* at 442:25-444:8.

Based upon these statements to the investigating FBI agent, the Defendant was convicted of making a false statement in violation of 18 U.S.C. § 1001. As a result of this conviction, the Defendant should receive a two-level upward adjustment for obstruction of justice pursuant to U.S.S.G. § 3C1.1.[3]

III. Volume of Commerce

The Defendant disputes the $50,000,000 volume of commerce attributable to him in the

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[3] Defense counsel astutely points out that pursuant to U.S.S.G. § 3C1.1 cmt. n.8, the Defendant cannot escape a two level increase in his base offense level because he was convicted of an obstruction offense coupled with a conviction for the underlying offense. Def.'s Obj. to Pre-Sentence Inv. Rep. at 6-7.

Presentence Investigation Report as unfairly encompassing all of the gross sales of Ma-Ri-Al Corporation during the period of the conspiracy. Arguing a lack of specific evidence that Ma-Ri-Al charged prices in conformity with the price-fixing agreements, the Defendant urges the Court to individually tailor the volume of commerce calculation to represent the actual volume of commerce attributable to the Defendant.

In *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000), the Seventh Circuit held that in determining the affected volume of commerce under U.S.S.G. § 2R1.1, "the Guidelines requires only that the government establish relevant conduct by a preponderance of the evidence, a standard that supports a rebuttable presumption that all sales during the conspiracy were affected by the illegal agreement." *See also, United States v. Hayter Oil Co., Inc.*, 51 F.3d 1265, 1273 (6th Cir. 1995) ("[W]e conclude that the volume of commerce attributable to a particular defendant convicted of price-fixing includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price.").

According to Ma-Ri-Al's own financial statistics, the company's concrete sales from 2000-2004 easily exceeded $60,000,000.[4] *See* Exhibit A. Even after prorating sales from 2000

[4] According to sales figures provided by Ma-Ri-Al, the company's concrete sales for the years 2000-2004 are as follows:

2000 - $10,814,203
2001 - $10,693,073
2002 - $13,474,830
2003 - $14,354,549
2004 - $14,276,623

In addition, Allyn Beaver's trial testimony is consistent with the proposition that Ma-Ri-Al Corporation's total annual sales over the conspiracy period exceeded $40,000,000. Trial Tr.

and 2004 to exclude the period not covered by the conspiracy, Ma-Ri-Al's annual sales easily exceed the $40,000,000 threshold for a six-level increase in the Defendant's base offense level pursuant to U.S.S.G. § 2R1.1.[5]

IV. The Defendant is Not Entitled to a Reduction in his Base Offense Level for Acceptance of Responsibility

A. The Defendant is not Entitled to a Reduction in his Base Offense Level Pursuant to U.S.S.G. § 3B1.2

The Defendant seeks a four-level decrease pursuant to U.S.S.G. § 3B1.2(a) as a "minimal participant" in the price-fixing conspiracy. The Defendant specifically references the definition of "minimal participant" found in U.S.S.G. § 3B1.2 cmt. n.3(C)(4), which instructs that "[u]nder this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and activities of others is indicative of a role as a minor participant." However, the application note further advises that "[i]t is intended that the downward adjustment for a minimal participant will be used infrequently." *Id.*

Evidence at trial, including Defendant's own statements, firmly established that the Defendant was on Beaver Materials' Board of Directors at the time of the price-fixing conspiracy, was being groomed to assume his father's position as company President, and was directly responsible for the company's pricing policies. Moreover, the Defendant's enthusiasm for successful implementation of the price-fixing agreements compelled him to begin attending

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vol.3, 551:3-20.

[5] Prorating concrete sales from July 2000-October 2000 and concrete sales from November 2003-May 2004 yields $11,932,764 in sales in addition to the $38,522,452 in concrete sales in fiscal years 2001-2003. Adding these totals reveals that Beaver Materials had a total of $50,455,216 in concrete sales over the conspiracy period.

conspirational meetings when it became apparent that Beaver Materials was not effectively implementing the agreements reached at previous meetings. These are not facts supporting a lack of knowledge or understanding of the scope and structure of the conspiracy, and are certainly not enough to support a downward departure that is specifically intended to be used infrequently.

B. The Defendant is not Entitled to a Reduction in his Base Offense Level Pursuant to U.S.S.G. § 3E1.1

The Defendant argues that he is entitled to a two level decrease in his offense level pursuant to U.S.S.G. § 3E1.1 in recognition of his acceptance of responsibility for his crime. However, U.S.S.G. § 3E1.1 cmt. n.2 instructs that a downward adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Moreover, U.S.S.G. § 3E1.1 cmt. n.4 indicates that because the Defendant's conviction for making false statements in violation of 18 U.S.C. § 1001 resulted in a two level enhancement in his base offense level pursuant to U.S.S.G. § 3C1.1, a two level decrease for acceptance of responsibility is ordinarily not available.

While U.S.S.G. §3E1.1 cmt. n.4 provides that "extraordinary cases" may exist in which adjustments under both §§3C1.1 and 3E1.1 may apply, this is not such an instance. In the instant case, after putting the government to its burden of proof at trial, the Defendant was convicted of one count of conspiring to suppress and eliminate competition in violation of 15 U.S.C. §1 and one count of making a false statement in violation of 18 U.S.C. §1001, resulting in a two-level enhancement pursuant to U.S.S.G. §3C1.1. Perhaps most importantly, however, the Defendant

cannot qualify for a two level decrease in his base offense level for his acceptance of responsibility when "the Defendant continues to maintain that he is not guilty of conspiring to fix prices" even after a jury of his peers has found otherwise. Def.'s Obj. to Pre-Sentence Inv. Rep. at 7.

V. Conclusion

As a result of the foregoing, the Government urges the Court to adopt the Presentence Investigation Report calculating the Defendant's Total Offense Level at 20 and a criminal history category of 1, providing for a Guidelines fine range within Zone D of 33 to 41 months. Specifically, the Government recommends that the Court sentence the Defendant to a period of incarceration of 36 months, a term of supervised release, and to pay a fine of $350,000 or whatever amount the Court deems the Defendant has the ability to pay.

Respectfully submitted,

ERIC L. SCHLEEF (IL Bar # 6275859)
FRANK J. VONDRAK
MICHAEL W. BOOMGARDEN
JONATHAN A. EPSTEIN
United States Department of Justice - Antitrust Division
209 S. LaSalle Street, Suite 600
Chicago, Illinois 60604
Tel: (312) 353-7530
Fax: (312) 353-1046

CONCRETE SALES ONLY BY YEAR						
YEAR		2000	2001	2002	2003	2004
SALES ALL PRODUCTS		$11,180,052	$11,792,446	$15,076,078	$15,966,599	$16,110,952
DUMP FEE SALES		0	($302,190)	($525,981)	($473,948)	($535,501)
SAND/GRAVEL SALES		($365,849)	($685,761)	($725,175)	($547,210)	($422,950)
SUNDRY SALES			(111,422)	(350,092)	(590,892)	(875,878)
CONCRETE ONLY SALES		$10,814,203	$10,693,073	$13,474,830	$14,354,549	$14,276,623
# TRUCKS RUN		40	41	43	47	47

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of United States' Sentencing Memorandum was served upon counsel for the Defendant, Chris A. Beaver, by Federal Express, this 5th day of February, 2007 at the following address:

Jeffrey Lockwood, Esq.
403 W. 8th Street, Suite #3
Anderson, IN 46016
(765) 649-1144

Stephanie J. Ivie
U.S. Probation Officer
101 U.S. Courthouse
46 E. Ohio Street
Indianapolis, IN 46204
(317) 229-3750

Eric L. Schleef
Attorney
United States Department of Justice
Antitrust Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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One by one, representatives from Builder's, IMI, and Carmel each took the stand and testified that the Defendant replaced Rick Beaver at the October 22, 2003 horse barn meeting because Rick Beaver had made a couple of mistakes in his attempt to price in accordance with the agreements reached at the 2000 horse barn meeting and the Signature Inn meeting. Trial Tr. vol.1, 50:5-7; Trial Tr. vol.2, 232:12-233:3; 321:2-14. In addition, Allyn Beaver testified that he knew the Defendant was going to a meeting with competitors at Butch Nuckols' horse barn. Trial Tr. vol.3, 556:20-227:4.

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Thus, while the Defendant's role in the conspiracy was most outwardly apparent beginning with his attendance at the October 22, 2003 horse barn meeting, the evidence introduced at trial clearly supports the Defendant's knowledge and approval of the conspiracy from its inception. Indeed, the Defendant began attending the conspirational meetings in an effort to ensure that Beaver Materials effectively implemented the agreements, agreements of which he was always aware and supported.

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Defendant began the interview by truthfully answering general questions concerning Beaver Materials and his role with the company. Unfortunately for the Defendant, his truthfulness ceased once the investigator began asking questions about the Defendant's role in the price-fixing conspiracy.

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Based upon these statements to the investigating FBI agent, the Defendant was convicted of making a false statement in violation of 18 U.S.C. § 1001. As a result of this conviction, the Defendant should receive a two-level upward adjustment for obstruction of justice pursuant to U.S.S.G. § 3C1.1.[3]

III. Volume of Commerce

The Defendant disputes the $50,000,000 volume of commerce attributable to him in the

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and 2004 to exclude the period not covered by the conspiracy, Ma-Ri-Al's annual sales easily exceed the $40,000,000 threshold for a six-level increase in the Defendant's base offense level pursuant to U.S.S.G. § 2R1.1.[5]

IV. The Defendant is Not Entitled to a Reduction in his Base Offense Level for Acceptance of Responsibility

A. The Defendant is not Entitled to a Reduction in his Base Offense Level Pursuant to U.S.S.G. § 3B1.2

The Defendant seeks a four-level decrease pursuant to U.S.S.G. § 3B1.2(a) as a "minimal participant" in the price-fixing conspiracy. The Defendant specifically references the definition of "minimal participant" found in U.S.S.G. § 3B1.2 cmt. n.3(C)(4), which instructs that "[u]nder this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and activities of others is indicative of a role as a minor participant." However, the application note further advises that "[i]t is intended that the downward adjustment for a minimal participant will be used infrequently." *Id.*

Evidence at trial, including Defendant's own statements, firmly established that the Defendant was on Beaver Materials' Board of Directors at the time of the price-fixing conspiracy, was being groomed to assume his father's position as company President, and was directly responsible for the company's pricing policies. Moreover, the Defendant's enthusiasm for successful implementation of the price-fixing agreements compelled him to begin attending

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B. The Defendant is not Entitled to a Reduction in his Base Offense Level Pursuant to U.S.S.G. § 3E1.1

The Defendant argues that he is entitled to a two level decrease in his offense level pursuant to U.S.S.G. § 3E1.1 in recognition of his acceptance of responsibility for his crime. However, U.S.S.G. § 3E1.1 cmt. n.2 instructs that a downward adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Moreover, U.S.S.G. § 3E1.1 cmt. n.4 indicates that because the Defendant's conviction for making false statements in violation of 18 U.S.C. § 1001 resulted in a two level enhancement in his base offense level pursuant to U.S.S.G. § 3C1.1, a two level decrease for acceptance of responsibility is ordinarily not available.

While U.S.S.G. §3E1.1 cmt. n.4 provides that "extraordinary cases" may exist in which adjustments under both §§3C1.1 and 3E1.1 may apply, this is not such an instance. In the instant case, after putting the government to its burden of proof at trial, the Defendant was convicted of one count of conspiring to suppress and eliminate competition in violation of 15 U.S.C. §1 and one count of making a false statement in violation of 18 U.S.C. §1001, resulting in a two-level enhancement pursuant to U.S.S.G. §3C1.1. Perhaps most importantly, however, the Defendant

cannot qualify for a two level decrease in his base offense level for his acceptance of responsibility when "the Defendant continues to maintain that he is not guilty of conspiring to fix prices" even after a jury of his peers has found otherwise. Def.'s Obj. to Pre-Sentence Inv. Rep. at 7.

V. Conclusion

As a result of the foregoing, the Government urges the Court to adopt the Presentence Investigation Report calculating the Defendant's Total Offense Level at 20 and a criminal history category of 1, providing for a Guidelines fine range within Zone D of 33 to 41 months. Specifically, the Government recommends that the Court sentence the Defendant to a period of incarceration of 36 months, a term of supervised release, and to pay a fine of $350,000 or whatever amount the Court deems the Defendant has the ability to pay.

Respectfully submitted,

ERIC L. SCHLEEF (IL Bar # 6275859)
FRANK J. VONDRAK
MICHAEL W. BOOMGARDEN
JONATHAN A. EPSTEIN
United States Department of Justice - Antitrust Division
209 S. LaSalle Street, Suite 600
Chicago, Illinois 60604
Tel: (312) 353-7530
Fax: (312) 353-1046

CONCRETE SALES ONLY BY YEAR						
YEAR		2000	2001	2002	2003	2004
SALES ALL PRODUCTS		$11,180,052	$11,792,446	$15,076,078	$15,966,599	$16,110,952
DUMP FEE SALES		0	($302,190)	($525,981)	($473,948)	($535,501)
SAND/GRAVEL SALES		($365,849)	($685,761)	($725,175)	($547,210)	($422,950)
SUNDRY SALES			(111,422)	(350,092)	(590,892)	(875,878)
CONCRETE ONLY SALES		$10,814,203	$10,693,073	$13,474,830	$14,354,549	$14,276,623
# TRUCKS RUN		40	41	43	47	47

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of United States' Sentencing Memorandum was served upon counsel for the Defendant, Chris A. Beaver, by Federal Express, this 5th day of February, 2007 at the following address:

Jeffrey Lockwood, Esq.
403 W. 8th Street, Suite #3
Anderson, IN 46016
(765) 649-1144

Stephanie J. Ivie
U.S. Probation Officer
101 U.S. Courthouse
46 E. Ohio Street
Indianapolis, IN 46204
(317) 229-3750

Eric L. Schleef
Attorney
United States Department of Justice
Antitrust Division