IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

JAVIER SANCHEZ, GREGORY CASORSO & MICHAEL MARR,
Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Honorable Phyllis J. Hamilton
District Court No. 4:14-cr-00580-PJH

ANSWERING BRIEF FOR THE UNITED STATES OF AMERICA

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

RICHARD POWERS
Acting Deputy Assistant Attorney General

E. KATE PATCHEN
MANISH KUMAR
ALBERT B. SAMBAT
MICAH L. RUBBO
ALEXIS J. LOEB
MICHAEL R. RABKIN
Attorneys

ROBERT B. NICHOLSON
FINNUALA K. TESSIER
ADAM D. CHANDLER
JONATHAN H. LASKEN
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-305-7420

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment against Defendants-Appellants Sanchez and Casorso on November 29, 2017, ER.77, 93, and Sanchez and Casorso filed timely notices of appeal on December 8 and 12, 2017, respectively, ER.75-76. *See* Fed. R. App. P. 4(a). The district court entered judgment against Defendant-Appellant Marr on March 21, 2018, ER.67, and Marr filed a timely notice of appeal on March 28, 2018, ER.66. *See* Fed. R. App. P. 4(a).

BAIL STATUS

Sanchez, Casorso, and Marr are incarcerated. According to the Bureau of Prisons' inmate locator, Sanchez's expected release date is September 22, 2019; Casorso's expected release date is June 27, 2019; and Marr's expected release date is August 7, 2020.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred by applying this Court's holding in *United States v. Manufacturers' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49 (9th Cir. 1972), that 15 U.S.C. § 1's per se rule is not an

evidentiary presumption and therefore does not violate criminal defendants' due process rights.

2. Whether the district court (1) erred by declining to give defendants' requested jury instruction, which stated that joint-venture partners necessarily constitute a single entity immune from liability under 15 U.S.C. § 1, or (2) plainly erred by using language from the American Bar Association's model criminal antitrust jury instructions to define bid rigging in its instructions to the jury.

STATEMENT OF THE CASE

I. Procedural History

On November 19, 2014, a grand jury returned an indictment charging Defendants-Appellants Michael Marr, Javier Sanchez, and Gregory Casorso with conspiring to suppress and restrain competition by rigging the bidding for hundreds of properties offered at public foreclosure auctions in Alameda County, California, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. ER.588-90.[1] The indictment further charged Marr and Sanchez with rigging bids for

[1] "ER" refers to Appellants' excerpts of record. "SER" refers to Appellee's supplemental excerpts of record.

hundreds of properties offered at public auctions in Contra Costa County, California, also in violation of 15 U.S.C. § 1.[2] ER.593-95.

On June 2, 2017, after a ten-day trial in the United States District Court for the Northern District of California, a jury found all defendants guilty on all charges. Marr was sentenced to 30 months imprisonment, 3 years of supervised release, and a $1,397,061.59 fine. ER.68-72. Sanchez was sentenced to 21 months imprisonment, 3 years of supervised release, and an $88,140 fine. ER.78-82. Casorso was sentenced to 18 months imprisonment, 3 years of supervised release, and a $20,000 fine. ER.94-98.

II. The Conspiracy to Rig Bids at Alameda and Contra Costa County Foreclosure Auctions

A. Real Estate Foreclosure Auctions

Homebuyers often finance their purchase through a mortgage—a loan secured by the house itself. If a homeowner fails to make a mortgage payment, the lender may foreclose on her home to "satisfy the debt." SER.12-13.

---

[2] The indictment also included six counts charging mail fraud in violation of 18 U.S.C. § 1341, which were dismissed on the government's motion before trial.

A lender "begin[s]" the foreclosure process by referring the defaulted mortgage to a trustee. SER.14. The trustee prepares a notice of default, records it with the County Recorder's Office, and sends a copy to anyone with an interest in the property. SER.15-16. The homeowner is given three months to make payment. SER.15.

If the homeowner does not pay, the lender selects a date for the sale of the property at auction, and the trustee prepares and records a notice of sale. SER.15-16. The lender sets an opening bid for the property, SER.18, which is published before the auction, SER.18-19.

The auction begins with announcement of the lender's opening bid. SER.19. Anyone may bid who is present and qualifies by demonstrating sufficient "funds to participate" in bidding on the property. SER.19-20. Bidders have sufficient funds if they can show the auctioneer enough money at "least" to match "the opening bid." *Id.*

After the auction concludes, the winning bidder gives the auctioneer cashier's checks equal to the winning bid. SER.21. The auctioneer sends those checks to the property's trustee, *id.*, who deposits them in a trust account, SER.24.

The trustee then uses the proceeds from the sale to settle the homeowner's debts. SER.24-25. First, the trustee sends the lender a check for the amount necessary to pay off the balance on the ex-homeowner's mortgage. *Id.* The trustee uses any remaining funds to satisfy debts owed to junior lienholders. SER.25. Any leftover money is returned to the "ex-homeowner." *Id.*

B. Defendants-Appellants

Some bidders at Alameda and Contra Costa County foreclosure auctions acted through LLCs or other partnerships. *See, e.g.*, SER.70, 108-09, 133, 195. The defendants in this case were the owner and employees of one such entity: Community Fund LLC.[3]

Community Fund LLC was one of the biggest buyers of properties at foreclosure auctions in Alameda and Contra Costa County—"possibl[y]" the biggest. SER.224. It was "the 800-pound gorilla in the room." SER.184. Community Fund had "about 20" employees, SER.150, was

[3] The individuals who participated in the conspiracy through other entities or individually were tried separately, and their convictions were the subject of separate appeals. *See infra* Statement of Related Cases.

"always able to have money available for the auctions," and had the "ability to borrow" more, if needed. SER.233.

Sometimes, Community Fund bid at foreclosure auctions to purchase properties for itself or its related company Community Realty Property Management. SER.147-48, 173-74. These properties were either renovated and resold, or held and used as "monthly rentals," SER.148, often being managed by a related company. Other times, Community Fund bid on behalf of clients who may (or may not) have wanted Community Fund to "fix[] up and rent[]" the property as well. SER.147-48, 227.

Defendant Michael Marr owned Community Fund. SER.151. In the early days of Community Fund, Marr himself participated in foreclosure auctions and rigged bids with Community Fund's competitors. SER.158-59. Later, Marr hired employees, introduced them as his "representative[s]" to those rigging bids on behalf of other LLCs or partnerships, SER.158, and orchestrated the rigging of bids by instructing his employees over the phone, SER.162-64. During sentencing, the Court determined that Marr rigged $69,853,079.69

worth of foreclosure auctions, 378 auctions in all, across Contra Costa and Alameda counties. SER.261.

Defendant Javier Sanchez was an employee of Community Fund. SER.154. Sanchez rigged numerous auctions in Alameda County and Contra Costa County on Community Fund's behalf. SER.84, 90, 154-55, 177.

Defendant Gregory Casorso was likewise an employee of Community Fund. SER.154. Casorso rigged Alameda Country foreclosure auctions on Community Fund's behalf. SER.87, 129-30, 154.

C. Defendants Rig the Foreclosure Auctions

From 2008 to 2011, defendants conspired with other bidders to rig the bidding at hundreds of foreclosure auctions in Alameda and Contra Costa counties. Their purpose was to increase their profit. SER.121. The conspirators agreed not to bid (or to stop bidding) at the public auction to "keep the price down," SER.63, and then split among themselves money that otherwise would have been used to purchase the property at the public auction. SER.32, 119-21, 216.

The conspirators used pre-determined verbal and non-verbal signals to stop bidding at ongoing auctions or refrain from bidding at upcoming

auctions. SER.117. Verbal signals included telling another bidder to "take it," *id.*, or asking whether the bidder was "willing to work," SER.34. Non-verbal signals included "looks, winks, points, those sorts of things." SER.117.

After the public auction, the conspirators held a second private auction or "round." SER.31-32, 112-13. The round determined "who actually wanted the property most," SER.171, and how much the other conspirators would be compensated for not bidding at the public auction, SER.73. The winner of the round secured the property by paying the depressed public auction price to the trustee and additional money to the losing participants in the round to "compensate" them for "stopping bidding at the first" auction. SER.113. When payment for a round was made, "[g]enerally the preference was for cash" because it is "[n]ot traceable." SER.76; *see also* SER.40-41.

The conspirators took steps to ensure that these payments were made only to actual or potential competitors. SER.105, 181. Thus, even "if you had an agreement not to bid prior to the public auction," the conspirators would "still make sure you had enough money to actually be a competitor, to purchase the property . . . at the public auction in

the first place." SER.180. Defendant Casorso confirmed this requirement: "I made anybody that was interested in participating in a round with me bid, qualify and bid at the public auction. I called this 'stress testing.'" SER.230.

The conspiracy was successful. For example, conspirator Bradley Roemer agreed with Casorso to rig the bidding for "2817 Market Street." SER.140. The foreclosing lender set the opening bid for this property at $144,315. SER.141. Casorso won the property at the public auction by bidding "a penny over" $144,315. *Id.* No one intervened to outbid Casorso—not Roemer, not the bank selling the property, and not anyone else. *Id.* As Roemer explained, however, he "would have" outbid Casorso at the public auction but for his agreement not to compete with Casorso. *Id.* Ultimately, because of the bid-rigging agreement, Roemer paid the funds he would have bid at the public auction to Casorso rather than the lender or homeowner, and took the property without ever submitting a bid at the public auction. *See* SER.136-141. Another time, Roemer was prepared to bid an "additional $36,600 at the public auction," but, due to the bid-rigging agreement, he paid $326,700 to the trustee and divided the $36,600 among the

conspirators, including a payment of $13,000 to Marr. SER.127-29; *see also* SER.216-17 (conspirator Danli Liu testifying to a number of round payments that she was prepared to submit as bids at the public auction but for the agreement not to compete).

The conspirators knew that what they were doing was wrong. As Marr's employee Barta recognized, agreeing not to bid at the public auction "wasn't something that – that we should have been doing." SER.171. Another conspirator, Danli Liu, was so troubled by her actions that she stopped agreeing to rig bids after becoming a parent because she "didn't want to do something illegal" "so that my baby will be ashamed of me later." SER.219. Douglas Ditmer testified to his concern that colluding at auctions was "illegal[ ]." SER.93-94. Yet the conspirators rigged bids anyway because "the FBI will never start a case." SER.215.

III. Rulings Under Review

Each ruling under review is identified below in the applicable argument section.

SUMMARY OF ARGUMENT

1. Defendants incorrectly argue that the district court violated their constitutional rights by instructing the jury that an agreement to rig bids violates 15 U.S.C. § 1's per se rule. As defendants acknowledge, Br. 32-33, this Court expressly rejected that argument in *United States v. Manufacturers' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49 (9th Cir. 1972). *Manufacturers'* is binding, and this panel should therefore reject defendants' attempt to reargue the issue.

Contrary to defendants' claims, *Manufacturers'* has not been overruled by subsequent developments in antitrust law or constitutional law. Just this term, the Supreme Court in *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283-84 (2018), confirmed *Manufacturers'* understanding of relevant antitrust law—that the term "unreasonable acts in restraint of trade" is defined by "two distinct rules of substantive law," 462 F.2d at 50-52. Defendants also fail to identify any decision that has called into question *Manufacturers'* understanding of relevant constitutional law—that the accused "has the right to have each element of the crime charged submitted to the jury"

and that "[c]onclusive presumptions may not operate to deny this right." *Id.* at 50.

2. a. Defendants wrongly challenge the district court's refusal to give their legally incorrect theory-of-defense instruction. Defendants requested that the jury be instructed to acquit under the single-entity rule if it determined that the defendants were engaged in a joint venture. Defendants were not entitled to such an instruction because they proffered no evidence that they and the competing bidders with whom they rigged bids constituted a single entity and because the requested instruction was legally incorrect—joint-venture partners are not, *ipso facto*, entitled to assert a single-entity defense, *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202 (2010).

Nor did the district court plainly err by failing to instruct the jury *sua sponte* on some other doctrine applicable to joint ventures. Defendants did not ask for such an instruction and did not offer evidence to support one. Indeed, defendants proffered no evidence of a legitimate joint venture—an agreement to do something other than suppress competition at auctions—that encompassed all or each of the rigged auctions.

Defendants incorrectly argue that their agreement to rig bids can be labeled a joint venture beyond the reach of the per se rule because they contend that it was motivated by a "plausible" procompetitive justification. Supreme Court precedent precludes this argument. Bid rigging is a form of horizontal price fixing and such agreements "are all banned" regardless of any asserted justifications for them. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

b. For the first time on appeal, defendants advance the incorrect contention that the district court instructed the jury with an overly broad definition of bid rigging. Read in context and as a whole, however, the jury instruction correctly defined bid rigging as any agreement among actual or potential bidders to eliminate competition among them.

Bid rigging is a form of price fixing that includes agreements to refrain from submitting competing bids to buy or sell a good or service. Defendants complain that by defining bid rigging to include "any other agreement with respect to bidding that affects, limits, or avoids competition among them," the district court's definition reaches any agreement that has any effect on bidding at an auction. In context, the

phrase cannot bear defendants' interpretation. Language before and after this phrase makes clear that the jury was instructed to convict only if the defendants agreed to eliminate competition among bidders at an auction. Moreover, the jury was also instructed to convict only if it found the agreement charged in the indictment—an agreement to "suppress competition by refraining from and stopping bidding . . . at public auctions." So even if the bid-rigging instruction was overly broad on its own, the jury was instructed only to convict if it, in fact, found bid rigging.

Moreover, even if the definition of bid rigging was erroneous, the error was harmless in light of the overwhelming evidence presented at trial. Defendants repeatedly concede in their brief to this Court that they made, and that the government presented overwhelming evidence of, agreements among the conspirators not to bid against each other at public auctions. Such conduct falls squarely within the definition of bid rigging.

ARGUMENT

I. The District Court Did Not Err by Instructing the Jury Under the Per Se Rule

Defendants' first assertion of error, Br. 26-42—that the district court applied an unconstitutional evidentiary presumption by instructing the jury that an agreement to rig bids is illegal "without inquiry about the precise harm [it] caused or the business excuse for [its] use," *see* ER.7—is foreclosed by *United States v. Manufacturers' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49 (9th Cir. 1972). Defendants concede as much, Br. 31-35, but contend that this Court can disregard *Manufacturers'* because it has been overruled as a matter of antitrust law and undermined by the evolution of constitutional criminal procedure, Br. 35-41. Both arguments are unavailing.

A. Rulings Presented for Review

In advance of trial, the United States submitted a proposed instruction on 15 U.S.C. § 1's per se rule. The proposed instruction stated that "agreements to rig bids" are unlawful "without inquiry about the precise harm they have caused or the business excuse for

their use."[4] SER.255. Defendants asked the court to instruct the jury under the "rule of reason" instead. Their proposed instruction stated that the "challenged bid rigging is illegal under Section 1 of the Sherman Act only if you find beyond a reasonable doubt that the competitive harm substantially outweighed the competitive benefit." ER.527; *see also* ER.524 (adding as a separate element of the offense that the conspiracy was an "unreasonable restraint of trade").

Defendants argued that instructing the jury on the per se rule would violate their due process rights by relieving the government of its

---

[4] The per se instruction read, ER.7, 272, in whole:

> The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to rig bids.
>
> Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it. It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was, in fact, a conspiracy as charged in the indictment, it was illegal.

burden to prove an element of the charged crime—unreasonableness—beyond a reasonable doubt. ER.499-520. "Defendants recognize[d] that the argument they advance[d]" was "rejected forty-five years ago in *United States v. Manufacturers' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49 (9th Cir. 1972)," ER.511, but argued that "*Manufacturers'* [] has been effectively overruled by subsequent Supreme Court authority expanding on the rights to due process and jury trial," ER.16; *see also* ER.517-19.

In a pretrial order, ER.11-60, the district court rejected defendants' argument. The court explained that the cases cited by defendants did not overrule *Manufacturers'* because *Manufacturers'* rested on the same principle as defendants' cases—"that essential elements of the crime must be found by the jury." ER.16-17. The court also noted that all the circuit courts of appeals to have heard such arguments had rejected them, some in reliance on *Manufacturers'*. ER.15-16.

At the close of trial, the court instructed the jury using the government's proposed instruction based on the per se rule. ER.7, 272.

B. Standard of Review

This Court reviews de novo "whether an instruction violates due process by creating an unconstitutional presumption or inference." *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994).

C. Defendants' Argument Rests on a Fundamental Misunderstanding of the Role of the Per Se Rule in Antitrust Law

This Court has long held that a jury in a per se case need not apply the rule of reason to assess the reasonableness of the challenged agreement. *Manufacturers'*, 462 F.2d at 52. Last month, this Court reaffirmed that conclusion in *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018), an appeal by an individual who conspired with Marr and Sanchez to rig bids in Contra Costa County, *see infra* Statement of Related Cases, *supra* n.3. As the *Joyce* court explained, "the government is relieved of any obligation to prove the unreasonableness of the specific scheme at issue" in a bid-rigging case because bid rigging violates Section 1's per se rule. *Joyce*, 895 F.3d at 677.

This Court's correct decision in *Joyce* rests on more than a century of antitrust jurisprudence. Section 1 of the Sherman Act proscribes "[e]very contract, combination in the form of trust or otherwise, or

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. The Supreme Court, however, has explained that Section 1 "prohibit[s] only unreasonable restraints of trade" and that a restraint is unreasonable if it violates either of two substantive rules of law—the rule of reason or the per se rule. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).

Just this term, the Supreme Court reaffirmed the long-established distinction between these two substantive rules of law explaining that "[r]estraints can be unreasonable in one of two ways." *Ohio v. American Express*, 138 S. Ct. 2274, 2283 (2018); *see Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978). "A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." *American Express*, 138 S. Ct. at 2283-84. "Restraints that are not unreasonable *per se* are judged under the 'rule of reason.'" *Id.*

The rule of reason is a "fact-specific assessment" used "to assess the restraint's actual effect on competition." *Id.* at 2284. For restraints governed by the rule of reason, the fact finder considers "the facts peculiar to the business to which the restraint is applied; its condition

before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable" along with the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained" and then determines whether the particular restraint is one that suppresses or promotes competition. *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

The per se rule, by contrast, holds that certain categories of "restraints imposed by agreement between competitors" are always unreasonable because they "almost always tend to restrict competition and decrease output." *American Express*, 138 S. Ct. at 2283-84 (quotation omitted). Restraints that fall within these defined categories "are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Accordingly, the government can prove that a defendant violated Section 1 by proving that the defendant knowingly entered into an agreement of a type that is categorically banned. *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992).

Price-fixing agreements among competitors, including agreements to rig bids, are one type of categorically unreasonable restraint. *Joyce*, 895 F.3d at 677. It is therefore proper to instruct the jury that "price fixing is per se illegal," and that if the government proves that the defendant knowingly joined a conspiracy to fix prices that affected interstate commerce, "it does not matter why the [prices] were fixed or whether they were too high or low; reasonable or unreasonable; fair or unfair." *Alston*, 974 F.2d at 1210; *see also Joyce*, 895 F.3d at 676-77 (explaining that if the government proves an agreement to rig bids, "any business justification for the defendant's conduct is neither relevant nor admissible"). Because the district court's instructions in this case did precisely that, the district court properly instructed the jury. *Compare Alston*, 974 F.2d at 1210, *with* ER.8-9.

D. Defendants' Due Process Challenge to the Per Se Instruction Is Foreclosed by *Manufacturers'*

Defendants' argument that the per se instruction creates an unconstitutional evidentiary presumption, Br. 26-42, is foreclosed by *Manufacturers'*, as defendants acknowledge, Br. 31-35.

In *Manufacturers'*, this Court recognized that "since the accused is presumed innocent, he has the right to have each element of the crime

charged submitted to the jury" and that "[c]onclusive presumptions may not operate to deny this right." 462 F.2d at 50 (citing *Morissette v. United States*, 342 U.S. 246 (1952)). The per se rule does not contravene this right, this Court held, because the per se rule is a substantive rule of law and therefore does "not establish a presumption. It is not even a rule of evidence." *Id.* at 52. *Manufacturers'* has not been overruled, *see infra* Part I.E, and therefore binds this panel, *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

Manufacturers' was not, as defendants claim, "wrong on the day it was decided," Br. 33, nor is it wrong today. *Manufacturers'* correctly observed that Section 1's proscription against "unreasonable acts in restraint of trade" is defined by "two distinct rules of substantive law." 462 F.2d at 50-52; *see also Alston*, 974 F.2d at 1208. Under the per se rule, "certain classes of conduct, such as price-fixing, are, without more, prohibited by the Act," and under the rule of reason, "restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable." *Manufacturers'*, 462 F.2d at 52. Although defendants claim that unreasonableness is no longer defined by "two separate and distinct" tests, *see* Br. 33, the Supreme Court, just

this term, reaffirmed that well-established understanding of antitrust law, *American Express*, 138 S. Ct. at 2283-84; *see also supra*, Part I.C.

Although courts, including the district court here, *see* Br. 27, sometimes refer to the per se rule as a "conclusive presumption that certain types of conduct are unreasonable," *Manufacturers'*, 462 F.2d at 52, such terminology is really just a "pedagogic instrument" to help a reader or jury understand the elements of a per se violation. *Id.* Such explanatory language does not change the fact that the per se rule is a "substantive[] rule of antitrust" and is "no more [a] rule[] of evidence than the substantive rules of any legal area." *Id.*; *see also United States v. Giordano*, 261 F.3d 1134, 1143-44 (11th Cir. 2001) ("Since the *per se* rules define types of restraints that are illegal without further inquiry into the competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: 'An agreement among competitors to fix prices is illegal.'" (quotation omitted)).

Defendants' argument to the contrary—that the per se rule is a presumption of unreasonableness adopted to shortcut application of the rule of reason and thereby "ease the strain" of civil antitrust litigation,

Br. 30-31—is wrong. The per se rule is not "only a rule of administrative convenience and efficiency," *FTC v. SCTLA*, 493 U.S. 411, 432 (1990) (internal quotation omitted), and the "administrative advantages" associated with per se rules "are not sufficient in themselves to justify the creation of *per se* rules," *Leegin*, 551 U.S. at 895.

Rather, as *SCTLA* explains, "*per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding." 493 U.S. at 433. While some "violations of such rules actually cause no harm," the rules are "justified by the State's interest in protecting human life and property." *Id.* The rules are "supported . . . by the observation that every speeder and every stunt pilot poses some threat to the community" and that a "bad driver going slowly may be more dangerous than a good driver going quickly, but a good driver who obeys the law is safer still." *Id.* at 434.

"So it is with . . . price-fixing" and other per se unlawful agreements. *Id.* "Every such horizontal arrangement among competitors poses some threat to the free market," *id.*, because "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of

competition." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). That elimination of competition is dangerous because "[t]he power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices." *Id.*; *see also Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 351 (1982) ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."). In other words, all such agreements are unreasonable not because they are presumed to fail the rule of reason inquiry at every moment of their existence, but because the elimination of competition resulting from them permits those "who fixed reasonable prices today [to] perpetuate unreasonable prices tomorrow." *Socony-Vacuum*, 310 U.S. at 221; *see also Trenton Potteries*, 273 U.S. at 397-98.

Nor does the fact that the word "reason" appears in both the phrase "unreasonable restraint of trade" and "rule of reason" make a restraint unreasonable only if it fails to pass muster under the rule of reason, as defendants mistakenly contend. Br. 35-37. Defendants' position, if accepted, would write the per se rule out of the law. *See United States v. Koppers Co.*, 652 F.2d 290, 293 (2d Cir. 1981) (explaining that the

argument that the per se rule is an unconstitutional evidentiary presumption "asks us in effect to overrule the Supreme Court's decisions" establishing the per se rule). It is unsurprising, then, that every court of appeals to hear defendants' argument, or a related one, has rejected it. *See, e.g.*, *Giordano*, 261 F.3d at 1143-44 (rejecting due process challenge to the per se rule as an unconstitutional presumption because "the per se rule does not establish a presumption" (quoting *Manufacturers'*, 462 F.2d at 52)); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984) (agreeing that the per se rule does not create an "irrebuttable presumption" (citing *Manufacturers'*, 462 F.2d at 52)); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. Unit B 1981) (rejecting due process challenge to the per se rule); *Koppers*, 652 F.2d at 293-94 (rejecting the argument that a jury instruction on the per se rule "improperly withdrew the question of reasonableness from the jury by the use of a conclusive presumption"); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979) (holding that "per se rules . . . are substantive rules of law, not evidentiary presumptions").

E. *Manufacturers'* Has Not Been Overruled

Defendants incorrectly argue that *Manufacturers'* has been overruled by intervening developments in substantive antitrust law and criminal procedure. Defendants cite no Supreme Court case that explicitly overrules *Manufacturers'* or is so "clearly irreconcilable" with *Manufacturers'* as to release this panel from its obligation to apply binding precedent. *See Miller*, 335 F.3d at 900.

1. Defendants incorrectly argue that, in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), and *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Supreme Court "rejected the claim that antitrust cases can be divided into neat categories," thereby eliminating any "binary framework" that previously existed and instead placing antitrust cases on a "spectrum." Br. 35-36. According to defendants, the per se rule is just one end of the spectrum and reflects nothing more than a presumption that if the restraint were analyzed under the rule of reason, then its anticompetitive effects would be deemed to outweigh its procompetitive benefits. Br. 34.

Defendants' reading of *NCAA* and *California Dental* is contradicted by the Supreme Court's subsequent decision in *Leegin,* which flatly

stated that the "rule of reason does not govern all restraints." 551 U.S. at 886. *American Express*, decided this term, is also irreconcilable with defendants' argument. As *American Express* explains, "[r]estraints can be unreasonable in one of two ways." 138 S. Ct. at 2283.

Moreover, neither *NCAA* nor *California Dental* supports defendants' argument that there is only a single rule of substantive law under the Sherman Act. In *NCAA*, the Court did not "break down its binary framework," as defendants suggest. Br. 35. Rather, the Court observed that "[s]ome activities" such as "league sports" "can only be carried out jointly," *NCAA*, 468 U.S. at 101 (quotation omitted), and held that agreements relating to such activities are subject to the rule of reason. *NCAA* never held that the per se rule is not a distinct substantive rule of law, it simply placed certain types of agreements beyond its reach. *Id.* at 99-103.

Nor can defendants advance their argument by relying, Br. 36, on *NCAA*'s footnote explaining that sometimes a "practice is not categorically unlawful in all or most of its manifestations" (and therefore not unreasonable per se), but that a particular application of the practice may nonetheless be so obviously anticompetitive that "the

rule of reason can . . . be applied in the twinkling of an eye." *NCAA*, 468 U.S. at 109 n.39. Neither this language, nor anything else in *NCAA* supports defendants' claim that the "quick look" is some kind of third, "intermediate category" of antitrust analysis "lying between *per se* and rule of reason cases." Br. 36. Rather, the "quick look" merely reflects a recognition that the rule of reason analysis has sometimes been "truncated" because the challenged agreement was obviously anticompetitive and the defendant advanced no credible countervailing procompetitive benefit. *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011). In other words, only a quick look—that is, an abbreviated *rule-of-reason* analysis—was required. *See, e.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

California Dental, meanwhile, addressed how much analysis is required under the rule of reason in any particular case. 526 U.S. at 770. There, the Court held that a lower court erred by using *NCAA*'s "abbreviated or 'quick-look' analysis under the rule of reason" because the challenged restraint's anticompetitive effects were not sufficiently obvious. *Id.* at 770-71. Accordingly, defendants' heavy reliance, Br. 37, on *California Dental*'s statement that "there is generally no categorical

line to be drawn between restraints that give rise to an intuitively obvious inference of anti-competitive effect and those that call for more detailed treatment" is misplaced. That statement refers to when the rule-of-reason analysis has been abbreviated because "the principal tendency of a restraint . . . follow[s] from a quick (or at least a quicker) look." *Cal. Dental*, 526 U.S. at 781. The question whether the per se rule is an application of the rule of reason was simply not at issue.

Defendants also rely, Br. 36, on *California Dental*'s observation that "categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear." 526 U.S. at 779, but that observation does not establish that the per se rule is a shortcut for the rule of reason. Rather, it reflects the fact that the rule of reason's competitive effects analysis has sometimes been applied in the "twinkling of an eye," while the per se rule's classification inquiry may require "considerable inquiry into market conditions . . . before any so-called '*per se*' condemnation is justified." *Id.* at 779-80.

Nor did *California Dental* "recognize[] that antitrust cases really exist on a 'spectrum' rather than in fixed categories." Br. 36 (quoting *Cal. Dental*, 526 U.S. at 780). Rather, *California Dental* specifically

"*cautioned against* the risk of misleading even in speaking of a 'spectrum' of adequate reasonableness analysis for passing upon antitrust claims," 526 U.S. at 780 (emphasis added), and cases decided by the Supreme Court after *California Dental* tellingly continue to treat the per se rule a separate rule of substantive law. *Leegin*, 551 U.S. at 886 (the "rule of reason does not govern all restraints"); *American Express*, 138 S. Ct. at 2283 ("Restraints can be unreasonable in one of two ways."); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (describing "per se rules" as "rules" that the Court "adopt[s]").

2. Defendants are also wrong to argue that "intervening developments in "due process rights and jury trial rights" have "undermined the rationale of *Manufacturers'*." Br. 38. The Supreme Court's modern jurisprudence on the constitutionality of evidentiary presumptions in criminal cases can be traced back at least to its 1952 decision in *Morissette v. United States*, 342 U.S. 246, issued twenty years before this Court decided *Manufacturers'*. In *Morissette*, the Supreme Court reversed a district court for violating a criminal defendant's constitutional rights by applying a conclusive presumption of criminal intent rather than submitting the question of intent to the

jury because such a decision "conflict[s] with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." 342 U.S. at 275. As the district court here correctly observed, ER.16-17, from *Morissette* to the present, the Supreme Court has analyzed the constitutionality of presumptions the same way, asking whether the presumption relieves the government of the burden of proving every element of the charged offense. *See, e.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam) (relying on *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979)); *Sandstrom*, 442 U.S. at 520-524 (applying *Morissette*).

Manufacturers' correctly relied on the law of conclusive presumptions articulated in *Morissette*. Defendants contend, however, that *Manufacturers'* could not have correctly understood the law on conclusive presumptions because it was not "clear[]" until *Carella*, Br. 38, that conclusive evidentiary presumptions are always prohibited. In defendants' view, *Ulster County v. Allen*, 442 U.S. 140, 158 (1979), decided after *Manufacturers'*, held that such conclusive presumptions are permissible in certain circumstances and the Court only recognized a categorical ban on such presumptions, defendants assert, in *Carella*.

Br. 38. Because some conclusive presumptions were allowed at the time *Manufacturers*' was decided, their argument goes, this Court's determination that the per se rule is not an unconstitutional conclusive evidentiary presumption must have been predicated on a determination that conclusive evidentiary presumptions are not unconstitutional.

There are several problems with defendants' argument. First, defendants misread *Manufacturers'*. That decision did not hold that the per se rule is a permissible conclusive evidentiary presumption; it held that the per se rule is not an evidentiary presumption *at all*. 462 F.2d at 52. Second, defendants misread *Ulster County*. That decision, the Supreme Court later explained, "did not . . . involve presumptions of the conclusive or persuasion-shifting variety," *Sandstrom*, 442 U.S. at 519 n.9, and so it could not have held that conclusive evidentiary presumptions are sometimes permissible. Finally, defendants misread *Carella*. That decision did not recognize a new rule that conclusive evidentiary presumptions are unconstitutional, but rather relied on a long line of cases finding such presumptions unconstitutional. *See Carella*, 491 U.S. at 265-66 (discussing *Sandstrom*, 442 U.S. at 514-15); *see Sandstrom*, 442 U.S. at 521-22 (discussing *Morisette*, 342 U.S. at

249, 274-75). In other words, *Carella* relied on precisely the same principle, articulated in *Morisette*, that this Court relied upon in *Manufacturers'*.

Nor do post-*Manufacturers'* cases addressing the right to trial by jury undermine the decision. *United States v. Gaudin*, for example, held that a jury must find each element of a crime beyond a reasonable doubt even if that element involves a mixed question of law and fact. 515 U.S. 506, 512-13 (1995). *Gaudin* is inapposite because *Manufacturers'* did not rest its decision on the premise that, in a per se case, the element of unreasonableness is a mixed question of law and fact. Instead, *Manufacturers'* expressly held that "unreasonableness"—to the extent that one defines unreasonableness by reference to whether a restraint passes muster under the rule of reason—"is an element of the crime only when no *per se* violation has occurred." 462 F.2d at 52.

Apprendi v. New Jersey is equally inapposite. That decision did not "raise any question concerning the State's power to manipulate the prosecutor's burden of proof by . . . relying on a presumption rather than evidence to establish an element of an offense." 530 U.S. 466, 475 (2000). Instead, *Apprendi* held that defendants have a right to have a

jury decide beyond a reasonable doubt any fact that increases the penalty for a crime beyond the prescribed statutory maximum. *Id.* at 490; *see also Blakely v. Washington*, 542 U.S. 296, 301 (2004) (reaffirming that any fact that increases the penalty for a crime beyond the statutory maximum must be found by a jury) (cited Br. 40). That holding does not expand Sixth Amendment rights in any way relevant to the analysis here.

3. Finally, defendants incorrectly argue that the Court should not follow *Manufacturers'* because it "does not make sense," which is purportedly demonstrated by the fact that it has "never again been cited by this Court, except once on a trivial procedural point." Br. 35. More likely, *Manufacturers'* has been cited infrequently in this circuit because subsequent defendants have not questioned it. Moreover, defendants' observation overlooks the fact that *Manufacturers'* has been cited with approval by the Third and Eleventh Circuits. *Giordano*, 261 F.3d at 1144 (quoting *Manufacturers'*); *Fischbach*, 750 F.2d at 1196 (citing *Manufacturers'*). Finally, this Court has recently reaffirmed that a jury considering a bid-rigging, or other price-fixing, agreement need

not consider the "unreasonableness of the specific scheme at issue." *Joyce*, 895 F.3d at 673; *see also Alston*, 974 F.2d at 1210.

II. The District Court Did Not Err in Giving the Model Bid-Rigging Instruction or in Rejecting Defendants' Proposed Single-Entity Instruction

Defendants incorrectly argue that the district court erred by refusing to instruct the jury, as they requested, that individuals engaged in a joint venture constitute a "single entity" and thus cannot conspire for the purposes of Section 1. Br. 51-53. Defendants' requested instruction was incorrect as a matter of law and unsupported by the evidence. The district court did not err by declining to give it.

Defendants also claim, for the first time on appeal, that a single phrase in the district court's bid-rigging instruction rendered it overly broad. Br. 42-54. Read in context, the challenged statement was part of an instruction that correctly defined bid rigging as any agreement to eliminate competition among bidders at an auction. Moreover, read as a whole, the jury instructions permitted defendants to be convicted only if the government proved, beyond a reasonable doubt, that they entered into a conspiracy to refrain from or stop bidding at public foreclosure auctions.

A. Rulings Under Review

In the first round of proposed jury instructions, defendants requested a bid-rigging instruction based on the American Bar Association's (ABA) Model Criminal Antitrust Jury Instruction on Bid Rigging that defined bid rigging to include, among other things, "any other agreement with respect to bidding that affects, limits, or avoids competition." SER.257-58. Defendants also requested that the bid-rigging instruction explain that individuals engaged in a joint venture constitute a "single entity" and thus cannot conspire for purposes of Section 1. Br. 53 (the "theory-of-defense instruction").

After a continuance, defendants submitted new proposed instructions, including a slightly modified theory-of-defense instruction.[5] *See* Br. 53. They also eliminated from their proposed bid-

---

[5] That proposed instruction states in pertinent part:

> Individuals are not actual or potential competitors for purposes of the Sherman Antitrust Act if they were acting together as a single entity or on behalf of a single entity. Likewise, individuals engaged in a legitimate joint venture or partnership and thus acting together as a single entity are not actual or potential competitors for purposes of the Sherman Act. A joint venture or partnership exists when persons who would otherwise be competitors combine their resources for a

rigging instruction the phrase that defined bid rigging as an agreement "about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition," ER.525, but otherwise continued to rely on the ABA model instruction, ER.526.

The defendants also objected to the government's instruction defining bid rigging, asserting that it relied on a "conclusive presumption that is violative of the defendants' right to due process." SER.253. Defendants "further object[ed]" that the instruction was "confusing, internally inconsistent, mischaracterizes the law, and essentially directs a verdict of guilty." *Id.*; *see also* SER.247-50 (discussing instruction but not arguing that it was overly broad).

In a pretrial order, the district court rejected defendants' general objection to the government's bid-rigging instruction because it was made "without explaining or citing specific language to support the

---

> common purpose and share the risks as well as the opportunities for gain.

ER.525.

objection."[6] ER.48. The court also declined to give the requested theory-of-defense instruction because it could cause unnecessary confusion and mislead the jury and because "the defendants have not shown, even at this juncture, that there would be evidence of a joint venture in this case." ER.49. The court instead instructed the jury that "[a]n internal agreement only between owners and employees of the same company does not constitute conspiracy," ER.9, 275; *see also* ER.50, in order to "address defendants' concern that the government's proposed instruction fails to define who is a competitor and fails to distinguish defendants who work together," ER.50.

Defendants again requested their theory-of-defense instruction during trial, SER.235-43, and the court again rejected it "for the reasons set forth in Pretrial Order No. 5, and in light of the evidence presented at trial." ER.3. The court's final instructions to the jury defined bid rigging as "an agreement among competitors about the

---

[6] Part I addresses defendants' separate due process objection, which was also rejected by the district court.

prices to bid," the "aim and result of" which, "if successful, is the elimination of one form of competition.[7] ER.9, 274.

B. Standard of Review

This Court reviews "de novo whether the instructions misstated or omitted an element of the charged offense." *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). A preserved jury instruction error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Anchrum*, 590 F.3d 795, 801 (9th Cir. 2009).

In order to preserve a jury-instruction challenge, a defendant must object to a jury instruction "with adequate specificity" by stating "distinctly the matter to which the party objects as well as the grounds of the objection." *United States v. Klinger*, 128 F.3d 705, 710 (9th Cir.

---

[7] The district court's bid-rigging instruction read, in pertinent part:

> A conspiracy to rig bids may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding, or any other agreement with respect to bidding that affects, limits, or avoids competition among them. The aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition.

1997); *see United States v. Peterson*, 538 F.3d 1064, 1071 (9th Cir. 2008). In the absence of a specific objection below, this Court reviews a challenge to jury instructions for plain error. Plain error review requires this Court to determine whether there is "(1) an error that is (2) plain and (3) affects substantial rights." *Peterson*, 538 F.3d at 1071. "Even if these conditions [are] met," this Court only exercises its discretion "to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1071-72.

When a district court rejects a proposed theory-of-defense instruction, this Court reviews that decision to determine whether the proposed instruction is "supported by law" and had "some foundation in the evidence." *United States v. Thomas*, 612 F.3d 1107, 1120 (9th Cir. 2010). This Court reviews the question whether an instruction is supported by law de novo, *id.* at 1121, and whether an instruction has a foundation in evidence for abuse of discretion, *id.* at 1120.

C. The District Court Did Not Err in Rejecting the Single-Entity Instruction

Defendants' only preserved jury-instruction challenge—that the district court erred by refusing to give their proposed theory-of-defense

instruction—is without merit. The instruction misstated the law and had no evidentiary basis.

i. The Defendants' Proposed Theory-of-Defense Instruction Misstated the Law

1. Defendants were not entitled to their theory-of-defense instruction because it did not correctly articulate the law as it relates to either the single-entity doctrine or any recognized joint-venture defense, and criminal defendants have no entitlement to a jury instruction that is not "legally accurate." *United States v. Hicks*, 217 F.3d 1038, 1045-46 (9th Cir. 2000); *see also United States v. Perry*, 550 F.2d 524, 532 (9th Cir. 1977). The defendants' proposed theory-of-defense instruction would have incorrectly told the jury that any individuals "engaged in a legitimate joint venture or partnership" were "acting together as a single entity" and therefore could not be convicted of violating the Sherman Act because they "are not actual or potential competitors." ER.525.

While it is true that Section 1 reaches only agreements "between separate entities," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (internal quotation omitted), both the Supreme Court and this Court have explicitly held that joint-venture partners

are not, *ipso facto*, a single entity entitled to immunity from liability under Section 1 of the Sherman Act, *Am. Needle*, 560 U.S. at 202; *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147-48 (9th Cir. 2003). "Competitors cannot simply get around antitrust liability by acting through a . . . joint venture," *Am. Needle*, 560 U.S. at 202, because an agreement "necessary or useful to a joint venture is still a[n agreement] if it deprives the marketplace of independent centers of decisionmaking," *id.* at 199 (internal quotations omitted); *see Freeman*, 322 F.3d at 1147-50. Thus, to be considered a single entity, joint-venture partners must prove—like any other defendants raising a single-entity defense—that all of the conspirators shared a "unitary decisionmaking quality" or "single aggregation of economic power" separate from the agreement to rig bids, *Am. Needle*, 560 U.S. at 196, and a correct jury instruction must so state.

Instead of defendants' faulty single-entity instruction, the district court gave a proper jury instruction on the single-entity doctrine to address defendants' concern that "the government's proposed instruction fails to define who is a competitor and fails to distinguish defendants who work together." ER.50. The court instructed the jury

that "[a]n internal agreement only between owners and employees of the same company does not constitute a conspiracy." ER.9, 275. Defendants do not challenge the correctness of this instruction, and because defendants' alternate single-entity instruction was incorrect, the district court did not err by declining to give it.

2. Defendants also appear to argue incorrectly on appeal that the district court erred by failing to instruct the jury that their agreement to rig bids could be labeled a joint venture. To be sure, some agreements among joint venturers are subject to the rule of reason, not the per se rule, and a defendant establishing necessary factual predicates may be entitled to an instruction explaining as much. *E.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-81 (6th Cir. 1898) (Taft, J.), *aff'd as modified*, 175 U.S. 211 (1899); *Dagher*, 547 U.S. at 5-8; Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701 (1998).

The most common such defense is the "ancillary restraints" doctrine, under which an otherwise per se unlawful agreement that is ancillary to a legitimate joint venture can be challenged only under the rule of

reason as a part of the joint venture. *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 337-39 (2d Cir. 2008) (Sotomayor, J., concurring); *see Polk Bros. Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985). To demonstrate that a restraint is ancillary, a defendant must come forward with proof of (1) "a separate, legitimate transaction" (2) to which the otherwise per se unlawful agreement is "subordinate and collateral," meaning that the restraint was agreed to in order "to make the main transaction more effective in accomplishing its purpose." *Rothery Storage*, 792 F.2d at 224. The other such defense applies when a defendant proves (1) a legitimate joint venture and (2) that the challenged agreement is "core activity of the joint venture itself." *Dagher*, 547 U.S. at 7-8.

Defendants, however, did not rely on the ancillary-restraints doctrine or any other applicable joint-venture doctrine to shield their bid-rigging agreement. Their proposed instruction and defense at trial was that if defendants are in any joint venture, then they "are not actual or potential competitors for purposes of the Sherman Act." ER.525. Defendants cannot escape the per se rule by labeling their agreement to rig bids as a "joint venture," Br. 50, because affixing the

label of "joint venture" to an agreement to eliminate competition does nothing to protect the challenged conduct, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951), *overruled on other grounds by Copperweld*, 467 U.S. 752; *Am. Needle*, 560 U.S. at 202. Thus, the district court did not err by refusing to instruct the jury that if defendants were engaged in a joint venture then their agreement to rig bids was not per se illegal because that instruction was not "legally accurate." *Hicks*, 217 F.3d at 1045-46.

Nor did the district court plainly err by failing to instruct the jury *sua sponte* on a joint-venture defense that defendants failed to present at trial. *United States v. Span*, 970 F.2d 573, 578 (9th Cir. 1992). To be sure, it is not uncommon for joint venturers to purchase inputs for their joint venture together, but such an agreement is not "joint bidding" or any other separate category of antitrust analysis. Depending on the nature of the joint venture, such agreements would be a specific application of the ancillary-restraints doctrine or *Dagher*'s core-conduct doctrine. *See supra* p.45. For example, members of a manufacturing joint venture may find it necessary jointly to purchase an input; such purchase would not be a per se violation of the antitrust laws because

the core-conduct or ancillary-restraints doctrine (depending on the facts of the case) would remove it from the per se rule's ambit. Defendants' proposed instruction, however, does not describe such a defense. Nor did defendants attempt to prove this theory of defense by, for example, demonstrating that each instance of bid rigging was attendant to an agreement among all of the conspirators engaged in the round jointly to renovate the purchased property. *See* Br. 47-53 (not discussing any such proof presented at trial).

On the other hand, "[j]oint ventures in bidding," as defendants construe the phrase, are far less "common." Br. 47. Indeed, defendants have not identified any reported appellate or Supreme Court decision applying the "joint bidding" defense contained in their proposed instruction in a Sherman Act case. Defendants rely on *Kearney v. Taylor*, 56 U.S. 494 (1853), but that case—decided decades before the Sherman Act was passed—only illustrates the inadequacy of their proposed instruction. In *Kearney*, a large piece of land "capable of being made a port of some business" was sold at public auction. *Id.* at 518. Acquiring and developing the land required "a considerable outlay of capital," which was "beyond the means" of any individual who might be

inclined to take an interest in it. *Id.* at 519. Several individuals interested in the sale formed a group for the purpose of "the building up of this little port and town, for the purpose of bidding in the property, and engag[ed] in the enterprise." *Id.* The resulting agreement was not anticompetitive because, under the circumstances, "the competition at the sale would [not] be as strong and efficient as it would by reason of the joint bid," and the purpose of pooling resources was to permit the bidding group to submit a bid beyond that which its individual members could afford. *Id.* at 520-21.

Assuming, *arguendo*, that the Court would apply *Kearney* to the Sherman Act, it cannot help defendants because their instruction omits—and they made no attempt to prove—that the thing to be purchased was "beyond the means" of the bidders absent a joint-bidding arrangement. *Id.* at 519; *see also Love v. Basque Cartel*, 873 F. Supp. 563, 577 (D. Wyo. 1995), *aff'd sub nom. Dry Creek Cattle Co. v. Basque Cartel*, 95 F.3d 1161 (10th Cir. 1996) (unpublished table op.) (defining "joint bidding" as an agreement in which bidders "pool their resources to place bids on property *which they would otherwise be unable to afford*" (emphasis added)). To the contrary, the evidence at trial

established that defendants could afford to compete individually in each of the foreclosure auctions at which they rigged bids. *See infra* Part II.D.ii.3. The district court, then, did not plainly err in declining to *sua sponte* instruct the jury on a joint-bidding theory that defendants never raised at trial. *Span*, 970 F.2d at 578; *see also United States v. Della Porta*, 653 F.3d 1043, 1052 (9th Cir. 2011) (holding that a district court does not plainly err by failing to instruct on a theory of defense where the theory requires proof beyond what defendants offer at trial).

3. Finally, defendants incorrectly argue that their proposed instruction was necessary because they had "plausible arguments" that their agreement to rig bids was procompetitive. Br. 52-53. The cases defendants rely on for this argument, *Paladin Assocs. Inc. v. Montana Power Co.*, 328 F.3d 1145, 1155 (9th Cir. 2003), and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985), are inapposite because they address group boycotts, not bid rigging. Group boycotts include agreements "by firms to disadvantage a competitor by persuading customers to deny that competitor relationships the competitor needs in the competitive struggle" and are a distinct category of antitrust analysis. *Paladin*

Assocs., 328 F.3d at 1154-55. Concerted refusals to deal among competitors constitute a per se unreasonable group boycott only if the refusal is "not justified by plausible arguments that the practices enhanced overall efficiency and made markets more competitive." *Id.* at 1155; *see also Nw. Wholesale Stationers*, 472 U.S. at 294-95. In other words, when an agreement is challenged as a group boycott, plausible arguments for why the agreement is procompetitive are a defense to the per se rule in and of themselves. *Paladin Assocs.*, 328 F.3d at 1155; *see Nw. Wholesale Stationers*, 472 U.S. at 294-95.

No such defense exists for bid rigging. Bid rigging is a form of price fixing, and price-fixing agreements are "are all banned because of their actual or potential threat to the central nervous system of the economy," regardless of any asserted procompetitive benefits. *Socony-Vacuum*, 310 U.S. at 222, 224 n.59 ("Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.").

In any event, defendants' asserted procompetitive justification is not cognizable under the Sherman Act. Defendants claim that they are permitted to rig auctions in order to counteract the market power of the

bank selling the home, Br. 52, thereby "level[ing] the competitive playing field," Br. 4. Contrary to defendants' claim, "the Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism." *United States v. Apple, Inc.*, 791 F.3d 290, 332 (2d Cir. 2015). Defendants are not allowed to engage in "horizontal collusion to" rig bids in order "to cure a perceived abuse of market power" by banks because, "[w]hatever its merit in the abstract, that preference for collusion over dominance is wholly foreign to antitrust law." *Id.* at 332. Indeed, if defendants were permitted to argue that they can eliminate competition by rigging bids whenever they are faced with the *potential* of losing in the competitive arena, "the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." *Socony-Vacuum*, 310 U.S at 221.

ii. The Single-Entity Instruction Was Not Supported by the Evidence Because No Reasonable Juror Could Have Found that Defendants Were Engaged in a Lawful Joint Venture

The district court correctly rejected defendants' proposed theory-of-defense instruction because no evidence supported it.

1. A single-entity instruction is appropriate only when there is evidence from which a rational juror could conclude that all of the conspirators shared a "unitary decisionmaking quality" or "single aggregation of economic power." *Am. Needle*, 560 U.S. at 196. Defendants point to no such evidence, and the record is devoid of any.

To the contrary, the record is clear that each conspirator who joined the bid-rigging agreement did so as a separate decision maker. Participation in a round required each conspirator to prove that he or she could have competed at the rigged auction but for the agreement not to bid. As one conspirator explained it, "if you had an agreement not to bid prior to the public auction and wanted to be in the round, we would then still make sure you had enough money to actually be a competitor, to purchase that property at the public . . . auction in the first place." SER.180. Defendant Casorso himself testified that "[a]s a general rule, I made anybody that was interested in participating in a round with me *bid, qualify and bid*, at the public auction" because "I wanted to know that they were really willing to bid" on the property at the public auction absent the agreement to stop bidding. ER.349 (emphasis added). That the conspirators paid each other from their

own cash reserves and checking accounts, SER. 1, 2, 3, 4-5, 6-7, 101-02, 124, 139, 144, 197-99, 202-03, further illustrates that the conspirators were not a single entity because they did not have a "single aggregation of economic power." *Am. Needle*, 560 U.S. at 196.

2. Defendants' argument that the record supports a joint-venture instruction (as opposed to the single-entity instruction they requested) is also mistaken. According to defendants, the conspirators engaged in a joint venture to "share and minimize the risks the round participants faced in competing with the powerful banks." Br. 52. The record evidence is irreconcilable with such an arrangement, however, and no rational juror could have found it.

First, there is no dispute—Defendant Casorso himself testified—that an individual was permitted to participate in the post-auction round only if he demonstrated to the other conspirators that he could have otherwise competed at the auction. *See* ER.349. Yet if the agreement not to bid was, as defendants contend, a joint venture designed to pool the resources of individuals otherwise unable to compete with banks at the auction, *see* Br. 52, it would make no sense to force each member to demonstrate the ability to compete at the auction. Instead, an

agreement to pool resources to compete with banks could have been furthered by those who lacked the funds to compete individually joining it because each such person increases the money available for submission of a joint bid. By contrast, limiting round participation to those who "had enough money to actually be a competitor," SER.180, can serve only one purpose—ensuring that no conspirator paid another conspirator for not bidding at the public auction unless that payment actually eliminated competition at the public auction.

Second, while defendants claim that they entered a joint venture to compete better against large banks, they do not cite a single instance of (1) bidding but losing to higher-bidding banks, or (2) the conspirators pooling their funds to outbid an actively bidding bank.[8] Defendants try to sidestep this fatal evidentiary gap by claiming that banks won many auctions because, in many instances, the property was so undesirable relative to the offer price that no one bid. Br. 8-9, 20. This confuses a

---

[8] Defendants' brief states that banks "could and would bid more than once." Br. 21. This statement has no cited factual support. Defendants fail to point to anything in the record that would establish that banks frequently bid more than once, let alone identify an instance where a bank won by bidding more than once.

failed attempt to sell with a powerful winning bid. It is true, as defendants assert, Br. 9, that banks set the opening bid at an auction and that if no one bid, the property reverted to the bank, ER.315; SER.18, 97-98, but that is simply because the bank was the seller. SER.28. More importantly, there is no evidence that Community Fund or other conspirators lost properties to banks because they had insufficient funds to outbid the bank's "winning" bid. To the contrary, Casorso admitted that Community Fund had millions of dollars with which to bid on properties. ER.449; *see also* ER.439-40, 448.

3. For the same reason, to the extent that a "joint bidding" defense exists, no evidence supports its application here. Community Fund was an "800-pound gorilla in the room." SER.184. Defendants brought millions of dollars in cashier's checks to the auctions, which was more than enough to purchase any individual property for which they rigged the bidding. ER.449; *see also* ER.439-40, 448; SER.221. Community Fund and its employees "were regulars so much that they didn't check our checks," even if the qualifying bid was over a million dollars. ER.436-37 (Casorso testifying about an instance where he qualified to bid with $1.6 million). No rational juror could conclude that defendants

were engaged in joint bidding because there was no evidence of any auction in which the opening bid or the final purchase price was "beyond [their] means." *Kearney*, 56 U.S. at 519.

D. The District Court Did Not Err, Let Alone Plainly Err, in Giving the ABA Model Bid-Rigging Instruction

Defendants' challenge to the district court's bid-rigging instruction was not preserved and lacks merit. The court's instruction, when read as a whole, accurately informed the jury that to convict defendants the jury must find an agreement to eliminate competition through bid rigging. In any event, in light of the overwhelming evidence against the defendants, any error was harmless.

i. Defendants' Challenge to the ABA Model Bid-Rigging Instruction Is Reviewed for Plain Error Because It Was Not Preserved

Defendants' claim that the bid-rigging instruction is overbroad is subject to plain-error review because defendants never properly raised it below. Fed. R. Crim. P. 30. Plain-error review applies unless a defendant "objected properly in the district court," which requires more than "object[ing] generally to [an] instruction." *United States v. Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989). Rather, a defendant must raise to

the district court the "particular objection" that she presses on appeal. *United States v. Gadson*, 763 F.3d 1189, 1215 (9th Cir. 2014).

Defendants never asserted in district court that the bid-rigging instruction was "grossly overbroad." *See* Br. 43. Indeed, defendants do not identify in the record, as required by Ninth Circuit Rule 28-2.5, where they raised an overbreadth objection below. Defendants instead point to the district court's order overruling their objection to the bid-rigging instruction as "confusing, internally inconsistent, mischaracterizes the law, and essentially directs a verdict of guilty." Br. 14 (quoting ER.48); *see also* SER.253. Defendants omit, however, the district court's reason for rejecting this objection: that it was made "without explaining or citing specific language to support the objection." ER.48; *see* Fed. R. Crim. P. 30; *Kessi*, 868 F.2d at 1102. If defendants believed the bid-rigging instruction was overly broad in some manner, they should have explained their concerns to the district judge. They did not.

Nor did defendants preserve their overbreadth challenge by objecting, *see* SER.253, to the instruction's statement that "the aim and result of every bid-rigging agreement, if successful, is the elimination of

one form of competition," ER.9, 274. This objection rested solely on defendants' claim that the "instruction relies on a conclusive presumption that is violative of the defendants' right to due process." SER.253; *see supra* Part I. Defendants' preserved argument that the bid-rigging instruction created an impermissible conclusive presumption is distinct from their unpreserved argument that the instruction is overbroad; a challenge to the former does not put the district court on notice of—and thereby preserve—a challenge to the latter. *See Gadson*, 763 F.3d at 1215 (explaining that "one type of objection to an instruction does not necessarily preserve another objection if there was no reason to believe the district court was fully aware of that objection" (citing *Kessi*, 868 F.2d at 1102)).

ii. The Jury Instructions Correctly Stated the Law

1. In any event, the district court did not err, let alone plainly err, by instructing the jury using the challenged language from the ABA's Model Criminal Antitrust Jury Instruction on Bid Rigging because the instruction given in this case correctly states the law. "[B]id rigging is a form of horizontal price fixing" in "which bidders agree to eliminate competition among them, as by taking turns being the low bidder."

Joyce, 895 F.3d at 677 (quoting *United States v. Fenzl*, 670 F.3d 778, 780 (7th Cir. 2012)). The district court properly instructed the jury that bid rigging includes agreements about, for example, "the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding," and that "[t]he aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition." ER.9, 274. The latter statement is a near-verbatim quotation from the Supreme Court's decision in *Trenton Potteries*: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." 273 U.S. at 397. The former recognizes that an agreement to rig bids can take many forms, consistent with longstanding Supreme Court precedent. *Socony-Vacuum*, 310 U.S. at 221-222 (explaining that "the machinery employed by a combination for price-fixing is immaterial").

Defendants' assertion that the district court erred simply because it relied on ABA model instructions, Br. 45, makes no sense. The ABA model instructions are based on the law. *See, e.g.*, ABA Section of Antitrust Law, Model Jury Instruction in Criminal Antitrust Cases 58-60 (price-fixing instruction referencing cases and past jury instructions

given by courts), 62-63 (explaining that the bid-rigging instruction mirrors the price-fixing instruction, and citing an additional past jury instruction given by a court specific to bid rigging), x (preface explaining that instructions are patterned off of instructions given by courts) (2009). The ABA model instructions are routinely used in criminal antitrust cases because Circuit pattern jury instructions rarely address antitrust cases, *see, e.g.*, United States Court of Appeals for the Ninth Circuit, Manual of Model Criminal Jury Instructions (2010), available at http://www3.ce9.uscourts.gov/jury-instructions/model-criminal (containing no substantive instruction on antitrust offenses). Indeed, defendants themselves consistently relied on the ABA model instructions in their own proposed instructions and initially requested the very ABA model language to which they now object. SER.257-58 (asking to charge the jury that bid rigging includes "any other agreement with respect to bidding that affects, limits, or avoids competition among some or all of the bidders"); ER.525-26.

2. Defendants incorrectly assert, Br. 46, that the instruction misstates the law by saying that bid rigging includes any "agreement with respect to bidding that affects . . . competition." ER.9, 274. That

argument, however, misconstrues the court's instruction by improperly "picking isolated phrases" instead of assessing the jury instructions "as a whole." *Hamling v. United States*, 418 U.S. 87, 107-08 (1974); *see also United States v. Kilbride*, 584 F.3d 1240, 1249 (9th Cir. 2009).

Here, immediately before the phrase on which defendants rely, the district court gave examples of agreements that eliminate competition: "[A]greement[s] among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding." ER.9, 274. Immediately following the quoted phrase, the court explained that "the aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition." *Compare* ER.9, 274, *with* Br. 46. Read as a whole, the instruction makes clear that only agreements to eliminate competition constitute bid rigging. *See Joyce*, 895 F.3d at 677 (bid rigging is "a form of price fixing in which bidders agree to eliminate competition among them" (quoting *Fenzl*, 670 F.3d at 780)).

Defendants also incorrectly argue that the instruction was improper because it permitted conviction based upon an agreement "to stop bidding." Br. 46. An agreement to stop bidding is bid rigging. Bid

rigging includes a conspiracy "pursuant to which contract offers are to be . . . withheld from a third party." *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992).

Defendants next rely on a statement from *BMI v. CBS*, 441 U.S. 1, 23 (1979), that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints," Br. 46, but *BMI* does not undermine the district court's instruction here. *BMI* simply recognized that while some agreements entered into by joint-venture partners "may be price fixing in a literal sense, [they are] not price fixing in the antitrust sense." *Dagher,* 547 U.S. at 6 (citing *BMI*, 441 U.S. at 9). The government never contested that a defendant presenting sufficient evidence to maintain a recognized joint-venture defense is entitled to an appropriate instruction. *See infra* Part II.A, II.C. That does not mean, however, that in order to define bid rigging correctly a court must instruct the jury on every legally cognizable defense to bid rigging regardless of the evidence at trial. *See infra* Part II.C.i.

Finally, the challenged language did not "turn[] *per se* illegality . . . on its head," as defendants claim. Br. 46. In support of their argument,

defendants assert that "it is legal in a variety of contexts for smaller market players to coordinate in order to effectively compete against larger entities." Br. 46. "[P]rice fixing" agreements are all banned, however, regardless of whether the parties to the agreement are large or small. *SCTLA*, 493 U.S. at 435.

The cases defendants cite, Br. 46-47, say nothing about permitting horizontal price-fixing agreements among small market participants. *Northwest Wholesale Stationers* did not reverse the "application of per se rule to [a] joint purchasing agreement," Br. 47, because no such challenge was made in that case. The plaintiff, Pacific, did "not object to the existence of the cooperative [purchasing] arrangement, but rather raises an antitrust challenge to Northwest's decision to bar Pacific from continued membership" in the joint-purchasing agreement. *Nw. Wholesale Stationers*, 472 U.S. at 295.

Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc. is equally unhelpful to defendants. 585 F.2d 821 (7th Cir. 1978). In that case, the court found that the defendants violated the per se rule by allocating markets and so the size or market power of the conspirators could not

have been a defense to application of the per se rule, as defendants contend. *Id*. at 826-33.

Moreover, *Ohio-Sealy* and defendants' other cases are inapposite because they address the legality of certain voluntary agreements among holders of intellectual property rights and licensees or franchisees, an issue that is unrelated to whether small competitors can agree to rig bids. *Wis. Music Network, Inc. v. Muzak Ltd. P'ship*, 5 F.3d 218, 220-21 (7th Cir. 1993) (validating national program offered by franchisor under which the franchisor negotiated a single contract for service and local franchisees were given the opportunity to perform work under that contract); *Ohio-Sealy*, 585 F.2d at 836-37 (program in which national company negotiated for national contracts and gave each "Sealy licensee" the "wholly voluntary" opportunity to participate in the agreement was not per se unlawful); *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 935-36 (2d Cir. 1980) (pooling of copyrighted material for sale is not a per se violation "if an alternative opportunity to acquire individual rights is fully available").

3. In any event, even if the bid-rigging instruction were itself overly broad, the jury instructions were correct as a whole. *See United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000) ("A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."). The jury was expressly instructed that, in order to convict, they had to find the conspiracy charged in the indictment, ER.8, 273, namely, a conspiracy to "suppress competition by refraining from and stopping bidding . . . at public auctions." ER.8, 272-73; *see also* ER.589, 593. Accordingly, defendants could not have been convicted, as they claim, on proof of "any agreement that merely 'affect[ed]' competition." Br. 46. Rather, the jury was required to find, and did find, that defendants conspired to stop or refrain from bidding at public foreclosure auctions, *see infra* Part II.D.iii, which is squarely within the definition of bid rigging, *Reicher*, 983 F.2d at 170 (bid rigging includes any agreement among competitors pursuant to which "offers are to be . . . withheld from a third party").

iii. Any Error in the District Court's Definition of Bid Rigging Was Harmless, Did Not Affect Substantial Rights, and Did Not Undermine the Integrity of Proceedings

Even if the district court erred or plainly erred by giving the bid-rigging instruction, defendants' convictions should not be reversed. Any such error was harmless, defendants' substantial rights were not affected, and the integrity of the proceedings was not undermined because any rational jury would have convicted defendants even if the bid-rigging instruction had not contained the challenged language. Defendants concede that there was "no dispute at trial that the defendants had agreed with other participants to stop bidding on multiple occasions." Br. 45; *see also* Br. 15-16 ("The central factual allegation in the Indictment—that the defendants Marr, Casorso, and Sanchez at times agreed with other participants in the foreclosure auctions in Alameda and Contra Costa counties to stop bidding against one another in order to participate in subsequent rounds—was never in dispute at trial."). There is therefore no dispute that the agreement proven at trial was an agreement to stop or refrain from bidding and not some other agreement that tangentially affected bidding at public foreclosure auctions.

This concession is unsurprising, as the trial record on this point is overwhelming. An undercover agent who infiltrated the conspiracy testified that he rigged bids with Sanchez and Casorso, SER.44-59, and that round money was owed by and paid to Marr, SER.37. The agent's testimony was supported by audio and video that he recorded. *See, e.g.*, SER.8-9 (transcript of recording of rigging an auction with Casorso). Four other conspirators who pleaded guilty testified to rigging bids with Casorso and/or Sanchez, and that Casorso, Sanchez, and other Community Fund employees rigged bids on Marr's behalf. SER.79-81, 115, 187-89, 192-93, 209-12. One such conspirator, Douglas Ditmer, testified to rigging auctions with Casorso up to "ten times per day." SER.80. Wesley Barta, an employee of Marr's, explained the roles of Casorso, Sanchez, Marr, and other Community Fund employees in the bid rigging. SER.162-63. Marr would be on the phone telling the employee "what to bid, how much to bid, how far to go" during the public auction and rounds, and the employee would engage in the actual bid rigging. *Id.*; *see also* ER.318-19 (Casorso explaining that his bids and agreements to engage in rounds were done on Marr's "instructions"). Barta also testified to watching Marr himself rig the

bidding at an auction and learning how to rig bids from Marr. SER.158-61. Even Casorso, testifying in his own defense, admitted "[y]es, I did," when asked "[d]id you ever agree to stop bidding at some point but you knew there was going to be a round?" ER.299.

The evidence also revealed no legitimate joint-venture conduct occurring after the round among the round participants: The only joint conduct engaged in by all the round participants—with the exception of carrying out their agreement not to bid—was "a private auction" to determine who should be "given the deed" and how to "divide . . . the money saved by artificially holding down the price of the property." *United States v. Romer*, 148 F.3d 359, 363 (4th Cir. 1998). Witness after witness testified that those round participants were competitors, as antitrust law uses the term. When Marr's employee Barta was asked "The bidders who you agreed to stop bidding with, were they your competitors?," he answered "Yes they were." SER.167. When asked to explain his answer, he said "[w]ell, they had the ability to purchase the house at the public auction, and if we didn't come to an agreement, they would continue to bid until perhaps they purchased that property at the public auction if we didn't come to an agreement." *Id.* Other

conspirators confirmed that the conspirators worked to limit the rounds to "people that actually were planning on bidding on the property in the public auction" to ensure that only the right people were "getting paid" for agreeing not to bid. SER.66-67; *see also* SER.206-07.

Casorso's testimony that he agreed to fix prices by rigging bids for "reasons" or benefits other than securing suppressed prices, Br. 19, such as additional time to research properties, is beside the point. Price fixing is illegal regardless of any "good intentions of the combining units" or "whether prices were actually lowered or raised." *Trenton Potteries*, 273 U.S. at 395; *see supra* Part I.C. Casorso's admission that he agreed to fix prices by rigging bids, ER.299, is an admission to the charged crime.

This overwhelming evidence, coupled with defendants' failure to identify evidence demonstrating something other than an agreement to refrain from bidding and divide the money saved by so refraining, belies their claim that the bid-rigging instruction permitted them to be convicted for entering into a legitimate joint venture that "affect[ed] competition" as a byproduct. Br. 54. A legitimate joint venture that encompasses bidding always "contemplates subsequent joint productive

activity"; for example, when a legitimate joint venture purchases land, "one would expect the joint acquisition *and development* of the acquired land." 12 Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2005d, 78 (3d ed. 2012) (emphasis added). Defendants, however, nowhere assert that every time the conspirators agreed to stop bidding it was because all of the round participants had also agreed to jointly renovate or maintain the acquired property.[9] Here, the evidence at trial revealed that the only joint conduct among all the round participants was "a private auction" to determine who should be "given the deed" and how to "divide . . . the money saved by artificially holding down the price of the property." *Romer*, 148 F.3d at 363. Such an agreement is an agreement to rig bids in violation of Section 1's per se rule, *id.*,

---

[9] As explained above, *see supra* Statement of the Case, Part II.B, defendants sometimes took on bidders as clients, bidding on their behalf at the auction and then jointly renovating the property with them. While such an agreement technically includes an agreement not to bid, it is not bid rigging. To the extent that this was the only agreement not to bid at a particular auction, that auction was excluded from the charged conspiracy and defendants' guideline sentence calculation. To the extent that the client-bidder pair conspired with a separate bidder not to bid, that agreement is bid rigging and was included within the conspiracy.

regardless of the agreement's effect on price or any asserted "business justification" for it, *Joyce*, 895 F.3d at 676-77; *see also supra* Part I.C. Thus, even if the district court's instruction permitted conviction for participation in a legitimate joint venture, that error would be harmless here because the overwhelming evidence at trial proved only an agreement to rig bids.

CONCLUSION

This Court should affirm the judgments below.

Respectfully submitted.

s/ Jonathan Lasken
Attorney

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

RICHARD POWERS
Acting Deputy Assistant Attorney General

E. KATE PATCHEN
MANISH KUMAR
ALBERT B. SAMBAT
MICAH L. RUBBO
ALEXIS J. LOEB
MICHAEL R. RABKIN
Attorneys

U.S. Department of Justice
Antitrust Division
450 Golden Gate Ave.
Room 10-0101, Box 36046
San Francisco, CA 94102
415-934-5300

August 27, 2018

ROBERT B. NICHOLSON
FINNUALA K. TESSIER
ADAM D. CHANDLER
JONATHAN H. LASKEN
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-305-7420

STATEMENT OF RELATED CASES

The government agrees with appellants' statement of related cases except that *United States v. Joyce*, No. 17-10269, and *United States v. Florida,* No. 17-10330, along with the appeals of Mr. Florida's co-defendants, *United States v. Rasheed*, No. 17-10188; *United States v. Berry*, No. 17-10197; and *United States v. Diaz*, No. 17-10198, are no longer pending in this Court. In each case, the appellant's conviction was affirmed. In *Rasheed* and *Diaz*, this Court order a limited remand for resentencing in light of intervening circuit precedent related to a condition of supervised release not challenged in this appeal.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-10519, 17-10528, 18-10113

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [13954] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Jonathan Lasken

Date: Aug 27, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

CERTIFICATE OF SERVICE

I, Jonathan Lasken, hereby certify that on August 27 2018, I electronically filed the foregoing Answering Brief for the United States of America and the accompanying Supplemental Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

August 27, 2018

s/ Jonathan Lasken

Attorney for the
United States of America