IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. AKSHAY AIYER, Appellant.	No. 20-3594-cr

RESPONSE OF THE UNITED STATES IN OPPOSITION TO APPELLANT AKSHAY AIYER'S EMERGENCY MOTION FOR BAIL PENDING APPEAL AND AN ADMINISTRATIVE STAY

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RULE 26.1(b) DISCLOSURE STATEMENT

Defendant Akshay Aiyer was convicted of knowingly entering into and participating in a conspiracy to fix prices of, and rig bids and offers for, currencies from Central and Eastern Europe, the Middle East, and Africa (CEEMEA), in violation of 15 U.S.C. § 1. The organizational victims of the conspiracy include institutions around the globe, not all of which have been identified. Representatives from the following organizational victims testified at trial:

- Lazard Asset Management LLC, a subsidiary of Lazard Ltd., a publicly traded company;
- Mellon Investments Corporation, a subsidiary of The Bank of New York Mellon Corporation, a publicly traded company; and
- Putnam Investments, a subsidiary Great-West Lifeco Inc., a publicly traded company.

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INTRODUCTION

Akshay Aiyer is not entitled to post-conviction bail because he has not overcome the presumption in favor of detention and has not demonstrated that his appeal will raise a substantial question of law or fact likely to result in reversal or a new trial. The district court correctly rejected his request for post-conviction bail on the ground that his three ostensible substantial questions were foreclosed by Supreme Court and Circuit precedent, by his lawyer's concessions, or by the factual record in the case. Aiyer's motion before this Court identifies three similar issues, and his motion should be denied for the same reasons.

STATEMENT

I. Legal Background

Section 1 of the Sherman Act bars "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Courts have long "understood § 1 'to outlaw only unreasonable restraints.'" *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

Section 1 encompasses two different rules for determining whether a particular restraint is illegal. The first is the "per se rule," which recognizes that some types of restraints are illegal in and of themselves "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). Examples of per se illegal restraints include agreements among actual or potential competitors to fix prices, *e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); rig bids, *e.g.*, *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981); or divide or allocate markets, *e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990). The second rule is the "rule of reason," which, "[a]s its name suggests, . . . requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982).

II. Factual And Procedural Background

At the conclusion of a three-week trial, a jury convicted Aiyer of violating Section 1 of the Sherman Act, 15 U.S.C. § 1. The conviction was supported by "overwhelming evidence" that "proved that the

defendant participated in the conspiracy to fix prices and rig bids as alleged." Nov. 12, 2020 Order 5 (Dkt. 274).[1]

As the government proved at trial, Aiyer and his co-conspirators—Jason Katz, Christopher Cummins, and Nicholas Williams—were foreign-currency traders at rival banks that competed to secure the best-priced currency trades on the foreign-exchange (FX) market. *E.g.*, Tr. 96:1-23, 108:18-22 (Dkt. 154) (Dr. David DeRosa, economist); Tr. 161:10-164:7, 191:7-16 (Dkt. 156) (Cummins); Tr. 822:7-11 (Dkt. 162) (Katz). The banks also competed for foreign-currency transaction business with large institutional customers. Tr. 111:17-113:17 (Dkt. 154) (DeRosa); Tr. 191:7-20 (Dkt. 156) (Cummins); Tr. 857:15-23 (Dkt. 164) (Katz).

Normally, the rate at which currencies were exchanged on the FX market was determined by supply and demand, Tr. 83:25-84:4, 84:23-89:15 (Dkt. 154) (DeRosa); and the rate at which banks transacted with customers was determined by the customer's selection of the bank offering the best exchange rate, Tr. 113:7-17 (Dkt. 154) (DeRosa). The

[1] Docket citations (Dkt.) refer to the district court ECF number.

conspirators hatched a scheme to corrupt these competitive processes, however, by eliminating avenues of competition among them. Instead of competing for the best trades, they agreed to coordinate their trading activity to manipulate the apparent supply and demand on the FX market and thereby affect trading price; and instead of competing for customers' foreign-currency transactions, they agreed to coordinate the prices quoted to customers. *E.g.*, Tr. 165:4-15, 259:19-260:18 (Dkt. 156) (Cummins); Tr. 821:23-823:3, 854:11-855:3, 859:16-860:16 (Dkts. 162, 164) (Katz).

Aiyer was a knowing participant of this conspiracy. *See, e.g.*, Tr. 211:2-212:1 (Dkt. 156) (Cummins); Tr. 859:25-860:21 (Dkt. 164) (Katz). For example, on November 4, 2010, when Aiyer and Katz coordinated their bidding to a customer so that Aiyer would win the customer's business at his desired price, the two conspirators communicated the following over an interbank chat service:

> 20:06:23 KATZ: conspiracies are nice
> 20:07:01 AIYER: hahaha
> 20:07:06 AIYER: prolly shudnt puot this on perma chat

GX-102 at 2. Similarly, on January 18, 2012, when Aiyer and Cummins, spurred on by Katz, coordinated their trades on an electronic

trading platform to drive down the price of the U.S. Dollar-South African Rand (USD-ZAR) currency pair, the group had the following exchange:

> 21:56:14 AIYER: salute to first coordinated
> 21:56:16 AIYER: zar effort
> 21:56:19 KATZ: yep
> 21:56:23 KATZ: many more to come

GX-171 at 6.

After hearing all the evidence, the jury found Aiyer guilty of the charged price-fixing and bid-rigging conspiracy. Tr. 2185:7-21 (Dkt. 180). "The verdict was signed by all the jurors and confirmed by a poll of the jurors in open court." Jan. 15, 2020 Order 1 (Dkt. 201).

The day of the verdict, Juror No. 6 sent a letter to the district court alleging, among other things, that Juror No. 3 had told other jurors that the court's instructions not to look up information about the case did not apply to his boss or girlfriend and that one of the attorneys looked skinny in a picture. Jan. 15, 2020 Order 1-3 (Dkt. 201). Defense counsel also reported that Juror No. 4 had recorded podcasts during and after the trial, complaining about jury service. *Id.* at 3-4.

In response to these allegations, the court conducted an interview of Juror No. 3, with counsel for both the government and the defense

present, "to determine whether any extraneous information came to the Juror's attention and if so whether the information was the kind that could be classified as prejudicial." *Id.* at 15. The court concluded it had not; the juror "credibly explained that he had not looked up information about the case or counsel during trial." *Id.* at 17. As for Juror No. 4's podcasts, the court reviewed them and determined that they "did not contain any evidence of prejudice or evidence that the Juror did not deliberate fairly and impartially." *Id.* at 12. Accordingly, the court found "no basis to vacate the jury's verdict based on these allegations." *Id.* at 19.

The district court denied Aiyer's motion for judgment of acquittal or a new trial, July 6, 2020 Order (Dkt. 230), and sentenced him to eight months' imprisonment, Judgment 2 (Dkt. 256). The court also denied Aiyer bail pending appeal. Nov. 12, 2020 Order (Dkt. 274). It concluded that Aiyer's arguments "simply ignore[d] the trial record," were "precluded by well-established authority," or merely "quarrel[ed] with [the court's] conclusions." *Id.* at 7, 9. In short, "none" of Aiyer's arguments were substantial, and each had been "previously denied based on well-settled precedent." *Id.* at 4.

LEGAL STANDARDS

The Bail Reform Act of 1984 "establishes a presumption in favor of detention" following a guilty verdict. *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004). The statute provides that a court "shall order" that a defendant convicted and sentenced to imprisonment "be detained," unless the defendant demonstrates, among other things, that the appeal "raises a substantial question of law or fact likely to result in" reversal or a new trial. 18 U.S.C. § 3143(b)(1)(B). This provision reflects Congress's view that, "[o]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (quoting H. Rep. No. 91-907, 2d Sess., at 186-87 (1970)); *see United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (following *Miller*'s section 3143(b) analysis).

A "substantial question" is "a close question or one that very well could be decided the other way." *Randell*, 761 F.2d at 125 (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). It also must be of a particular type: The substantial question must be "so

integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial." *Ibid.* (quoting *Miller*, 753 F.2d at 23). On these issues, "the burden of persuasion rests on the defendant." *Ibid.*

In reviewing a district court's decision to deny bail, this Court "examine[s] the district court's factual determinations for clear error" and reviews any "legal question de novo." *Abuhamra*, 389 F.3d at 317.

ARGUMENT

I. The District Court's Correct Determination That The Per Se Rule Applied To The Charged Conspiracy Follows Established, Binding Precedent.

Aiyer's first argument—that the district court "refus[ed] to decide whether the charged antitrust conspiracy fell within the 'per se' or 'rule of reason' categories of conduct proscribed by the Sherman Act," Mot. 2—is insubstantial in light of the record and significant precedent.

1. This first ostensibly substantial question is flawed in much the same way as was the first question in Aiyer's district court bail motion, although the argument has shifted somewhat before this Court. Previously, Aiyer challenged the district court's refusal to break apart

the charged conspiracy, "review and analyze the different means and methods alleged in an indictment," and "determine whether they are governed by the per se rule or the rule of reason." D. Ct. Bail Mot. 14 (Dkt. 261). His argument was demonstrably wrong based on precedent, *see, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[T]he machinery employed by a combination for price-fixing is immaterial."); *United States v. Apple, Inc.*, 791 F.3d 290, 325 (2d Cir. 2015) (similar), and the concessions of Aiyer's counsel at the hearing on Aiyer's motions to dismiss. There, the court recognized, without objection from Aiyer's counsel, that "we have an indictment that alleges a course of conduct, the ends of which is undisputed are per se violations of the law." June 3, 2019 Hr'g Tr. 7:1-3 (Dkt. 87). The court also stated the relevant legal principle: "All of the conduct alleged by the government doesn't have to be unlawful. A conspiracy can be furthered by means which are not unlawful." *Id.* at 6:10-12. Aiyer's counsel expressly agreed with this statement of the law. *See id.* at 6:13 ("Mr. Klotz: For sure."). This agreed-upon legal principle, established by precedent, foreclosed Aiyer's later argument that the court should

have characterized separately each individual behavior that made up the charged conspiracy.

After the district court rightly rejected this argument when it denied Aiyer's bail motion, Nov. 12, 2020 Order 4-7 (Dkt. 274), Aiyer now modifies his argument. He asserts that "[t]he district court erred in refusing to resolve, as a matter of law, whether the per se rule or the rule of reason applied" at all to the "charged antitrust conspiracy." Mot. 2, 9. This argument fares no better because it is based on a false premise—that the court did not "resolve" whether the per se rule applied. The court did just that and confirmed its decision on multiple occasions.

Before trial, the district court correctly determined that "[t]he indictment alleges that the defendant conspired to suppress and eliminate competition by fixing prices of and rigging bids and offers for CEEMEA currencies. That is sufficient to state a per se violation of the Sherman Act." June 3, 2019 Hr'g Tr. 43:10-14 (Dkt. 87). During trial, the court correctly instructed the jury on the applicable law by explaining the definitions of per se illegal price fixing and bid rigging. *See* Tr. 2131:12-2143:14 (Dkt. 180); *see also* Mar. 12, 2020 Hr'g Tr. 28:3-

4 (Dkt. 213) (following court's observation that Aiyer's counsel had not objected to these definitions, his counsel confirmed: "On that point, your Honor, we're not contending that the jury instructions were wrong."). After trial, the court ruled that Aiyer's proven conduct "constituted classic price fixing and bid rigging," July 6, 2020 Order 36 (Dkt. 230), which are "per se unlawful under the Sherman Act," *id.* at 29.

In arguing that the district court incorrectly treated the question whether the per se rule applied as "'a question of fact' for the jury in a criminal case," Mot. 11, Aiyer misinterprets the meaning of the court's statement that "whether a conspiracy to fix prices actually existed is a question of fact," July 6, 2020 Order 26 (Dkt. 230). When the court made this statement in its order denying post-verdict relief, the court had already, and correctly, determined that the per se rule governed the case and instructed the jury accordingly. The court was simply explaining why the jury had to resolve the question whether the alleged conspiracy "actually existed": because it was "a question of fact." *Id.* at 26-27. The court was not delegating to the jury the question whether the per se rule applied to the conspiracy—a distinction that Aiyer's

counsel acknowledged at a post-trial hearing. At that hearing, the court noted that "[t]he jury was not asked, 'Are these per se violations?'" Mar. 12, 2020 Hr'g Tr. 24:22-23 (Dkt. 213). Aiyer's counsel confirmed: "Correct, and they shouldn't have been." *Id.* at 24:24.

By determining the law that applied to the case, instructing the jury on that law, and directing the jury to apply the law to the facts as it found them, the district court respected the division of labor between the judge and the jury.[2] "In criminal cases, as in civil, . . . the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions." *United States v. Gaudin*, 515 U.S. 506, 513 (1995). "[T]he jury's constitutional responsibility," in turn, "is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514.

[2] Similarly, the district court correctly recognized that there is no procedural mechanism in a criminal case, akin to summary judgment in the civil context, which allows the court to make a pretrial evaluation of the government's evidence to determine whether the government has raised a genuine issue of material fact that the alleged conspiracy existed. *See* July 6, 2020 Order 26-27 (Dkt. 230); *United States v. Sampson*, 898 F.3d 270, 279 (2d Cir. 2018) ("the civil summary judgment mechanism does not exist in federal criminal procedure").

Aiyer's trial proceeded according to these principles, just as many prior antitrust criminal prosecutions have before it. As in *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396 (1927), for example, "the trial judge plainly and variously charged the jury that the combinations alleged in the indictment, if found, were violations of the statute as a matter of law." The court here instructed the jury that "[e]very conspiracy to fix prices unlawfully restrains trade regardless of the motives of the conspirators or any economic justification they may might offer." Tr. 2139:6-9 (Dkt. 180); *see also id.* at 2141:25-2142:3 (same for bid rigging). Also, as in *Trenton Potteries*, the court "fairly submitted to the jury the question whether a price-fixing agreement as described in the first count was entered into by" Aiyer and his co-conspirators. 273 U.S. at 401. It told the jury to decide whether the government had proved "that the conspiracy the defendant is charged with participating in actually existed" and that Aiyer "knowingly joined the conspiracy." Tr. 2131:15-19 (Dkt. 180). The jury then concluded that the government had met its burden and, applying the law to the facts as instructed, *see id.* at 2114:16-2115:9, found Aiyer guilty of the charged conspiracy, *id.* at 2185:7-21.

In short, because the record shows that the district court did what Aiyer claims it did not, there is no substantial question presented. The remainder of Aiyer's arguments on his first issue, Mot. 10-16, are dependent on this argument and therefore fall away as well. They are also insubstantial for independent reasons, as discussed next.

2. Aiyer's argument that there is a substantial question whether the district court should have "scrutinize[d] the economic context of the challenged conduct" to determine whether it had "some plausible procompetitive justification," Mot. 2, runs headlong into decades of Supreme Court and Circuit precedent, in both civil and criminal cases. "The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). It "'reflects a longstanding judgment' that case-by-case analysis is unnecessary for certain practices." *Apple*, 791 F.3d at 321 (alterations omitted; quoting *FTC v. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990)); *accord United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967) (civil) (price-fixing agreements "are unlawful under § 1 of the Sherman Act without

the necessity for an inquiry in each particular case as to their business or economic justification"). Only when, unlike in this case, the challenged restraint is "not unreasonable per se" is it "judged under the rule of reason, which requires courts to conduct a fact-specific assessment" of "the restraint's actual effect on competition." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (alterations, citation, and quotation marks omitted). Accordingly, where, as here, the government has charged a conspiracy, "the ends of which . . . are per se violations of the law," June 3, 2019 Hr'g Tr. 7:1-3 (Dkt. 87), "the plaintiff need prove only that it [the conspiracy] occurred" to demonstrate a Section 1 violation, *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981) (quoting Robert Bork, *The Antitrust Paradox* 18 (1978)).

This rule is not, as Aiyer claims, "novel." *Contra* Mot. 13. In addition to the civil cases cited above, many decisions in criminal cases have recognized that price fixing and bid rigging among competitors cannot be defended by economic justifications or claims of procompetitive benefits. *Contra* Mot. 3, 13 (suggesting no such criminal cases exist). In *Socony-Vacuum*, for example, the Court held that "Congress has not left with [courts] the determination of whether or not

particular price-fixing schemes are wise or unwise, healthy or destructive," 310 U.S. at 221, and thus "the law does not permit an inquiry into" the "economic justification" offered for price fixing in a given case, *id.* at 224 n.59; *see Trenton Potteries*, 273 U.S. at 401 (similar). In *Koppers*, this Court similarly observed that "ostensible justifications" were not permissible in per se cases. 652 F.2d at 294 (quoting *Socony-Vacuum*, 310 U.S. at 221). Likewise, in a market-allocation case, the Ninth Circuit recognized that a "case-by-case analysis" of actual effects was "unnecessary," *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991), and in a bid-rigging case, recognized that "any business justification for the defendant's conduct is neither relevant nor admissible," *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018).

The decisions Aiyer cites to support his argument that the economic context of a particular restraint must be evaluated on a case-by-case basis concern doctrines inapplicable here. Some rest on the "narrow" line of cases, *Apple*, 791 F.3d at 325, where courts have considered procompetitive justifications even when the challenged conduct looked like, but was not, "price fixing in the antitrust sense."

Texaco Inc. v. Dagher, 547 U.S. 1, 6 (2006).[3] "The Supreme Court has characterized these decisions as limited to situations where the 'restraints on competition are essential if the product is to be available at all.'" *Apple*, 791 F.3d at 326 (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010)). Moreover, such an analysis occurs only "when the restraint at issue was imposed in connection with some kind of potentially efficient joint venture." *Ibid.* (citing 11 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1908b (3d ed. 2010), and *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1013 (7th Cir. 2012)). If a defendant could invoke procompetitive justifications for price fixing outside of the joint-venture context, "the per se rule would lose all the benefits of being 'per se.'" *Ibid.* (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 & n.11 (1979)).

Aiyer's motion does not mention the existence of the circumstances necessary for this line of cases to apply: He does not argue that his price fixing and bid rigging were essential for the

[3] This type of case tends to arise only in the civil context because the challenged conduct is not clearly a naked restraint of trade, as the district court effectively recognized when it distinguished this line of cases as arising in the context of "civil antitrust case law." *See* July 6, 2020 Order 26 n.20 (Dkt. 230).

availability of any product, nor does he argue that he was engaged in any kind of joint venture. Accordingly, these decisions are inapposite.

Other decisions Aiyer references concern circumstances in which the Supreme Court has considered "a new per se rule" or "reexamin[ed] . . . the general validity of [a] per se rule," *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 351 n.19 (1982). *See* Mot. 11 (quoting *Leegin*, 551 U.S. at 886). Only the Supreme Court may "overrule one of its precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), however—meaning neither this Court nor the district court has the authority "to examine the economic justification of [the] particular application of [a] per se rule" that the Supreme Court has recognized, *Maricopa Cty.*, 457 U.S. at 351 n.19.

In sum, none of the cases Aiyer cites demonstrates a substantial question as to the correctness of the district court's classification of the charged price-fixing and bid-rigging conspiracy as per se illegal.

II. The District Court's Exclusion Of Certain Evidence Regarding Aiyer's State Of Mind And The Supposed Absence Of Anticompetitive Effects Was Compelled By Binding, Established Precedent.

Aiyer's next argument—challenging "the district court's refusal to admit evidence demonstrating that the charged conduct had

procompetitive effects or, at the very least, no competitive significance," Mot. 17—also fails to raise a substantial question. The court's exclusion of certain effects-related evidence did not flow from any "refusal to conduct the per se vs. rule of reason analysis," *ibid.*, because the district court conducted that analysis, *see* pp. 10-13, *supra*. Nor did the exclusion "fundamentally impair[] the defense's ability to dispute Mr. Aiyer's intent," Mot. 17, because the government was not required to prove that Mr. Aiyer intended anticompetitive effects, *see Koppers*, 652 F.2d at 296 n.6. Thus, there was nothing related to anticompetitive effects for Aiyer to "dispute." In any event, the court did not exclude all effects-related evidence. When Aiyer offered such evidence to refute the existence of the coordinated trading activity, or his knowledge of it, the court correctly allowed such evidence.

1. Aiyer ignores (as he did before the district court) that this Court concluded over 40 years ago that the government does not need to prove a defendant intended to produce anticompetitive effects in a per se case. In *Koppers*, the defendant challenged "the district court's charge on intent, which permitted the jury to convict if it found that the defendant had known the objective of the conspiracy to rig bids and had

intentionally become a member of it." 652 F.2d at 296 n.6. The defendant argued that the jury should have been required to find he "had also intended that the conspiracy result in anticompetitive effects." *Ibid.* This Court squarely "reject[ed] this contention," however, explaining that "the per se rule makes certain conspiracies illegal without regard to their actual effects on trade" and therefore "it would be illogical" to "require [the jury] to find the specific intent to produce those effects." *Ibid.* Instead, this Court held, "[w]here per se conduct is found, a finding of intent to conspire to commit the offense is sufficient." *Ibid.* This holding is a straightforward application of the per se rule, which recognizes that a per se illegal agreement is one that is "by its very nature a restraint on competition within the meaning of § 1 of the Sherman Act." *Id.* at 295.

Defendant's motion ignores this on-point, binding precedent and instead refers vaguely to "complex financial cases" describing the admissibility of certain evidence bearing on intent. *See* Mot. 17-18. The cited decisions, however, involve charged offenses requiring the government to prove an "intent to defraud," *United States v. Litvak*, 808 F.3d 160, 190 (2d Cir. 2015); or that "acts were done willfully, i.e., in

bad faith or with evil intent," *United States v. Collorafi*, 876 F.2d 303, 305 (2d Cir. 1989). Section 1 of the Sherman Act does not contain an analogous requirement that the government prove specific intent. Rather, the government must prove that "the conspiracy to fix prices and rig bids alleged in the indictment actually existed and that the defendant knowingly joined that conspiracy." July 6, 2020 Order 27 (Dkt. 230). The discussion of admissible evidence in Aiyer's cited "complex financial cases" has no bearing on this distinct standard of intent.

2. Aiyer refers generally to some of the effects-related evidence that the district court excluded, *see* Mot. 18-19, but his conclusory assertions do not demonstrate a substantial question. As the district court explained when rejecting the substantiality of this same issue, its evidentiary rulings correctly recognized the distinction between admissible evidence offered to dispute whether Aiyer in fact engaged in the coordinated trading activity as charged, and inadmissible evidence offered to show his particular motivation for, or the effectiveness of, the trading activity. *See* Nov. 12, 2020 Order 8 (Dkt. 274) (citing July 6, 2020 Order 54-57 (Dkt. 230)). For example, the court correctly excluded

certain opinions by Aiyer's experts, Professors Lyons and Carlton, *see, e.g.*, Tr. 1600:17, 1601:6-9, 1604:5-6, 1604:21 (Dkt. 172), that were offered for purposes foreclosed by the per se rule: to provide an "economic justification" for the conspiracy or to challenge its "effectiveness," *Socony-Vacuum*, 310 U.S. at 224 n.59. On the other hand, when Aiyer offered effects evidence to refute the existence of the coordinated trading activity, or his knowledge of it, the court allowed the evidence. *See, e.g.*, Tr. 1603:1-8 (Dkt. 172) (permitting such evidence for impeachment purposes).

The district court's careful treatment of this evidence comported with binding precedent and fell well within its "wide discretion" to determine what evidence is admissible at trial. *See United States v. Han*, 230 F.3d 560, 564 (2d Cir. 2000). Aiyer identifies no legal error; offers no basis to conclude that even if admissibility could have been decided a different way, the court's decision was an abuse of discretion; and fails even to explain how any such abuse of discretion would be, in his words, "fatal" to the government's case, Mot. 17, 19—presumably meaning sufficiently prejudicial to warrant a new trial. His second asserted question is thus insubstantial.

III. The District Court's Post-Verdict Inquiry Into Possible Juror Misconduct Was Consistent With Binding, Established Precedent.

Aiyer's final argument concerns the scope of the district court's post-verdict inquiry into possible juror misconduct. Aiyer argues the court should have done more to investigate the misconduct allegations. *See* Mot. 19-22. His argument is short on legal authority demonstrating any substantial question, however, which is understandable given that "district judges should be particularly cautious in conducting investigations into possible jury misconduct after a verdict," *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010), due to the potential for "evil consequences," *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989). "[P]robing jurors for 'potential instances of bias, misconduct or extraneous influence' after they have reached a verdict is justified 'only when reasonable grounds for investigation exist.'" *United States v. Stewart*, 433 F.3d 273, 302 (2d Cir. 2006) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). Moreover, "in the course of a post-verdict inquiry on this subject, when and if it becomes apparent that the above-described reasonable grounds

to suspect prejudicial impropriety do not exist, the inquiry should end." *Moon*, 718 F.2d at 1234.

Accordingly, Aiyer has a heavy burden to demonstrate a substantial question related to the scope of a post-verdict juror inquiry. The district court had "broad flexibility" over this "delicate and complex task." *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003) (citations and quotation marks omitted). In particular, as here, when the dispute concerns the scope of the inquiry adopted by the court "in weighing . . . competing accounts" of alleged juror misconduct, this Circuit "reviews a court's handling of alleged juror misconduct only for abuse of discretion precisely because the district court is best situated to evaluate jurors' credibility." *Id.* at 87.

Aiyer has not demonstrated even an arguable abuse of discretion on the part of the district court, much less one that would rise to the level of a substantial question on appeal. Aiyer makes a conclusory assertion that Juror No. 4's podcasting "represents serious misconduct." Mot. 20. Aiyer does not address the district court's conclusion that "nothing spoken by Juror No. 4 during his podcasts suggests that he was biased against the defendant or that the defendant was prejudiced

by Juror No. 4's podcasts in a way that would necessitate a post-verdict inquiry." Jan. 15, 2020 Order 14 (Dkt. 201). Nor does he explain how that conclusion either constitutes an abuse of discretion or raises any substantial question for appeal.

As for the scope of the district court's inquiry into the allegations concerning Juror No. 3's comments, Aiyer argues that the court should have solicited live testimony from Juror No. 6 to evaluate the truth of Juror No. 6's allegations instead of interviewing only Juror No. 3. *See* Mot. 20-21. In support of his argument, Aiyer attempts to draw a distinction between the "significant discretion" afforded the court in commencing the inquiry and the supposedly more limited discretion afforded the court in terminating the inquiry. *See ibid.* No such distinction exists. A district court has discretion to terminate the inquiry "whenever it becomes apparent *to the trial judge* that 'reasonable grounds to suspect prejudicial jury impropriety do not exist.'" *Stewart*, 433 F.3d at 303 (emphasis added; quoting *Moon*, 718 F.2d at 1234). Aiyer does not dispute that the court followed that approach here. *See* Jan. 15, 2020 Order 16-17 (Dkt. 201); Nov. 12, 2020 Order 9 (Dkt. 274).

In addition, Aiyer fails to demonstrate that a ruling in his favor on this issue would result in reversal of his conviction or a new trial. As the court correctly concluded, and Aiyer fails to meaningfully contest, "there is no reason to suggest that there was any prejudicial information improperly brought to the attention of the jury in this case," and "nothing that has come to light rises to the level that would warrant a new trial or any other sort of relief that the defendant might seek." Jan. 15, 2020 Order 16-17 (Dkt. 201); *see Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994) (explaining prejudice requirement). Accordingly, Aiyer fails to raise a substantial question related to alleged juror misconduct.

CONCLUSION

For the foregoing reasons, Aiyer's Emergency Motion for Bail Pending Appeal should be denied. Because Aiyer has not demonstrated any likelihood of success on his motion, an administrative stay also should be denied.

Dated: November 25, 2020

Respectfully submitted,

/s/ Mary Helen Wimberly

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CERTIFICATE OF COMPLIANCE

I certify that this Response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this Response contains 5,196 words, excluding the parts exempted by Fed. R. App. P. 27(d)(2) and 32(f).

I further certify that this Response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), applicable to motions filings under Fed. R. App. P. 27(d)(1)(E), because the Response has been prepared in New Century Schoolbook, 14-point font, using Microsoft Office Word Professional Plus 2019.

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