No. 20-10211

IN THE

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA.,

Plaintiff-Appellee,

v.

CHRISTOPHER D. LISCHEWSKI,

Defendant-Appellant.

On Appeal from the
United States District Court for the Northern District of California
No. 3:18-cr-00203 (Hon. Edward M. Chen)

ANSWERING BRIEF FOR THE UNITED STATES

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RULE 26.1(b) DISCLOSURE STATEMENT

Defendant-Appellant, Christopher Lischewski, was convicted of participating in a conspiracy to fix the price of canned tuna in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The organizational victims of Lischewski's conspiracy include institutions throughout the United States, not all of which have been identified. Representatives from the following organizational victims testified at trial and/or spoke at Lischewski's sentencing:

- Safeway Inc., a subsidiary of Albertsons Companies, Inc., a publicly traded company;
- Olean Wholesale Grocery Cooperative, Inc., a subsidiary of C&S Wholesale Grocers, Inc., a privately held corporation; and
- Associated Wholesale Grocers, Inc., a privately held cooperative food wholesaler.

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STATEMENT OF JURISDICTION

The government agrees with Lischewski's jurisdictional statement. Lischewski's expected release date is June 18, 2023.

STATEMENT OF THE ISSUES PRESENTED

Whether Lischewski's conviction should be affirmed when (1) the district court correctly applied this Court's precedents upholding the per se rule and requiring intent to conspire for price-fixing offenses; (2) the jury instructions were clear, correct, and far from plainly erroneous; (3) the district court properly admitted Renato Curto's email as a business record and Joe Tuza's email as nonhearsay for Steve Hodge's state of mind; and (4) Lischewski's inability to identify a single error forecloses his "cumulative effect" theory.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant statutes and rules are reproduced in the addendum to this brief.

INTRODUCTION

After a five-week trial involving a dozen witnesses and hundreds of exhibits, Lischewski asks this Court to upend settled law, entertain belated, meritless jury-instruction challenges, and second-guess the district court's considered judgments about two exhibits. Noticeably absent from Lischewski's appeal is any dispute about the sufficiency of the evidence that he agreed with competitors to fix prices. For

good reason: The evidence is overwhelming and it confirms that the jury's verdict would be the same regardless of the purported "errors" Lischewski asserts on appeal.

As CEO of tuna manufacturer, Bumble Bee Foods, LLC, Lischewski conspired to fix prices with rivals StarKist and Chicken of the Sea (COS). Lischewski and his coconspirators not only struck a "truce" on price competition, but they also fixed list prices and net prices. Lischewski's significant role in this conspiracy was proven by the testimony of multiple coconspirators, several other witnesses, and a litany of documents (many written by Lischewski himself), establishing that the conspiracy existed and that he knowingly participated in it.

Rather than dispute this evidence, Lischewski raises instructional issues that he ignored or invited below. The conspiracy instruction is a prime example. Juries have long been instructed that a "conspiracy" is "an agreement or mutual understanding" to commit unlawful acts, and Lischewski proposed instructions using the same language. Yet he now asserts (Br.36-43) that the jury viewed the "mutual understanding" phrase "by itself" as an alternate theory of liability requiring only a "commonly held view," not a conspiratorial "agreement." Properly read as a whole, however, the instruction plainly stated that "conspiracy" is "an agreement or mutual understanding" to "*act together for some unlawful purpose*," and that "the crime" is "the *agreement* to act together." 1-ER-19 (emphases added). Lischewski's fragmented parsing of the instruction lacks merit.

Similarly unavailing are Lischewski's challenges to the "individual liability" and "knowingly joined" instructions. Those claims focus on language Lischewski proposed below, but which he now says is erroneous or confusing. Lischewski is wrong. The individual-liability instruction correctly explained the scope of his liability as a corporate officer for the conspiratorial acts of his subordinates (1-ER-30), and the knowingly joined charge explained the scope of his liability for the acts of coconspirators who were not his subordinates (1-ER-29). Contrary to Lischewski's assertions (Br.43-47), neither charge allowed the jury to assume that he joined the conspiracy: "before you may convict the defendant, the evidence must establish that the defendant joined the conspiracy." 1-ER-29; *see* 1-ER-30. No reasonable jury would have been confused by such instructions.

Lischewski's other assertions also lack merit. It was not "unfair" (Br.48-49) for the district court to follow governing law in instructing the jury that price fixing is harmful and by treating "lack of harm" evidence as irrelevant. The court also soundly exercised its discretion in admitting Renato Curto's email as a business record (after redaction and voir dire), and in admitting Joe Tuza's email for the nonhearsay purpose of showing a coconspirator's state of mind (with multiple limiting instructions). No sound reason exists to disturb those rulings.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On May 16, 2018, Lischewski was indicted for conspiring to fix prices in violation of 15 U.S.C. §1. 4-ER-698-706. On December 3, 2019, a jury found him guilty. 2-ER-112-20. On June 16, 2020, Lischewski was sentenced to 40 months' imprisonment, three years of supervised release, and a $100,000 fine. 1-ER-105-09.

II. FACTUAL BACKGROUND

A. Lischewski Promises Bumble Bee's New Owners Consistent, Aggressive Financial Growth

In December 2010, Lion Capital acquired Bumble Bee based in part on Lischewski's financial projections forecasting expansive growth through 2014. 2-SER-382-84; 2-SER-472. Lischewski projected, for example, that Bumble Bee would grow by almost 9 percent in 2011—"about two or three times higher than" the company's "normal growth rates" (7-SER-1514)—and reach earnings of $140 million (2-SER-528). Those projections were critical to Lion's strategy of growing and selling Bumble Bee within a few years (2-SER-374-75), and Lischewski knew that Lion would "ultimately move[] to exit" (15-SER-3463-64).

Lischewski stood to make $42 million from that sale, but only if Bumble Bee grew at a compound rate of about 8 percent each year. 2-SER-381-97; 15-SER-3515-17. Lischewski knew these were "challenging" goals (11-SER-2691), and that "canned tuna" had been "a steadily declining category for about 20 years" (11-SER-

2711). Because "continued growth with no hiccups is extremely difficult" (7-SER-1559), Bumble Bee could not hit Lischewski's targets unless its costs fell or revenues rose (2-SER-385).

But neither was happening in late 2010. Instead, fish costs were rising (6-SER-1361-62); Bumble Bee had budgeted millions for an industrywide advertising campaign (2-SER-519-21); and the tuna industry was entrenched in a "price war" (2-SER-512-15; 7-SER-1567-68). This made Lischewski's goals all the more challenging (2-SER-514-15), and any shortfalls would cost him millions when Lion eventually sold Bumble Bee.

B. Desperate To Preserve His $42 Million Interest In The Future Sale Of Bumble Bee, Lischewski Conspires To Fix Prices With StarKist And Chicken Of The Sea

Even before Lion purchased Bumble Bee, Lischewski knew by late 2010 that he was "going to be under tremendous pressure to deliver" on his financial promises in 2011. 15-SER-3460; 2-SER-528-30. He knew that "the lead contender will also be the most demanding – Lion," which meant he would "have to come out of the box strong." 15-SER-3458-59. Yet he also knew that a unilateral price increase would jeopardize Bumble Bee's sales volume, and that "[i]f all three companies raised their prices, it would be easier to make our numbers." 12-SER-2938; 12-SER-2807. Faced with this reality, Lischewski orchestrated a price-fixing conspiracy involving his employees (Scott Cameron and Ken Worsham), two StarKist

executives (Chuck Handford and Steve Hodge), and two COS executives (Mike White and Shue Wing Chan). The conspiracy began in November 2010 and involved three components: (1) a price-competition truce with StarKist; (2) agreements to raise list prices with both companies; and (3) agreements to fix net prices with both companies.

1. Lischewski orchestrates a price-competition "truce"

Anticipating Bumble Bee's sale, Lischewski devised a "[p]eace proposal" on price competition in Fall 2010. 4-ER-707. Following Lischewski's "direct order," Cameron brokered a "truce" with Handford (StarKist) in November 2010. 2-SER-531-39. As Handford explained to his StarKist colleagues, Bumble Bee was "waving the white flag." 15-SER-3518; 6-SER-1354-57. Under this truce, Bumble Bee would not compete on chunk-light tuna (StarKist's main product), and StarKist would not compete on solid-white tuna or "albacore" (Bumble Bee's main product). 2-SER-531-42; 6-SER-1353-61. Though it took time to realign pricing, both companies subsequently implemented Lischewski's truce. 2-SER-543-48.

2. Lischewski conspires to raise list prices

Lischewski also fixed the pre-discount, list prices sent to retailers. 3-SER-584-87; 7-SER-1614-20.

March 2011 list-price agreement. At Lischewski's behest, Cameron and Worsham coordinated a list-price increase with Handford (StarKist) "on a number

of important items." 3-SER-585-86; 7-SER-1587-89. They agreed that the companies would raise list prices by the same amount for chunk-light tuna and by similar amounts for solid-white tuna. 3-SER-587-95. They also agreed to "align everything" in terms of timing, with publication dates in March 2011 and effective dates in May 2011, which provided "an insurance policy" in case customers balked at the higher prices. 3-SER-586-98; 7-SER-1590-1600. Worsham also contacted White (COS) about raising prices, but rather than "take list pricing action" at that time, White and COS "adjust[ed] their net prices." 7-SER-1614-20.

Lischewski "was pleased" with this agreement, telling Cameron, "'Good job.'" 3-SER-588-601; 7-SER-1608. Because Bumble Bee and StarKist held dominant market positions, they could "execute the price increase without Chicken of the Sea," (7-SER-1618-20), and they did, publishing list-price increases in March 2011 with effective dates in May 2011 (3-SER-602-08). As agreed, Bumble Bee and StarKist announced identical prices for chunk-light tuna ($40.80/case), and similar prices for solid-white tuna ($66.72/case for Bumble Bee, and $65.28/case for StarKist). 3-SER-603-07.

January 2012 list-price agreement. By August 2011, Lischewski "realized we weren't going to be able to achieve" his goals. 12-SER-2843. Recognizing that StarKist "has put out a white flag," Lischewski warned Cameron and Worsham against any "show of aggressiveness" or other pricing that would "send the wrong

signals." 15-SER-3471; 7-SER-1654-58. Following Lischewski's orders, Worsham agreed with Hodge (StarKist) and White (COS) to "align the timing," "dates," and "amounts" of a list-price increase for January 2012, which Lischewski approved: "Okay. Good plan." 7-SER-1675-90; 15-SER-3474-75. Though Bumble Bee and StarKist were the dominant players, the "trifecta" of all three companies' increasing prices made the conspiracy "a slam dunk." 7-SER-1682-83.

Summer 2012 list-price agreement. On Lischewski's orders, Worsham soon agreed to another list-price increase with Hodge (StarKist), this time using staggered effective dates throughout July and August 2012. 7-SER-1695-1709; 8-SER-1748-53; 15-SER-3478-3509; 6-SER-1301-06. To "gain trust," Hodge gave Worsham a thumb-drive of "StarKist internal documents," which provided "hard copy" confirmation that StarKist was "doing what they said they were going to do." 7-SER-1704-12; 15-SER-3521-30. Worsham gave Lischewski copies of the documents and told him that they came from Hodge. 7-SER-1710-12.

3. Lischewski conspires to fix net prices

Lischewski also conspired to fix net prices, including promotional pricing and the quarterly "pricing guidance" that tells sales departments how much they can discount list prices. 3-SER-609-12; 9-SER-2121-22; 10-SER-2275-80.

StarKist. After the March 2011 list-price increase, Lischewski oversaw Cameron and Worsham's fixing of "guidance amounts and promotional price

points" with Handford and Hodge (StarKist). 7-SER-1620-21; 3-SER-611-20. Each quarter, Worsham would tell Lischewski that he and Hodge had "agreed to align pricing," and each quarter, Lischewski would approve: "'Okay. Got it.'" 8-SER-1761-63; 9-SER-2153-54. In particular, they agreed to end "10-for-10" ($1/can) promotions on solid-white tuna. 3-SER-609-11; 7-SER-1620-21. While this was "an attractive price point for retailers" and "a great value" for consumers, the conspirators agreed to "higher promoted price points, like 4-for-5" ($1.25/can). 3-SER-609-12; 9-SER-2135-38.

Cameron and Worsham enforced such agreements by confronting Handford and Hodge about prices that were "out of line with what we had agreed upon." 3-SER-621-24; 4-ER-787; 7-SER-1621-22; 6-SER-1285-98. Their efforts were effective. In the first quarter of 2011, Bumble Bee and StarKist ran 135 and 127 advertisements at or below the "10-for-10" price point, respectively, but in the fourth quarter of 2011, as a result of the agreement, Bumble Bee ran only one such advertisement, and StarKist only 26. 3-SER-636-38; 15-SER-3532-34.

Chicken of the Sea. Lischewski likewise agreed to limit promotional pricing with COS, and he vigilantly monitored Chan, whose low prices "frustrated" him (12-SER-2881-84). Using words like "Wow," "Crazy," and "Very aggressive," Lischewski repeatedly warned Chan that his "price is too low." 9-SER-2208-16; 5-ER-832-47. In March 2012, Lischewski confronted Chan in person and convinced

him to get "on the same page" in limiting promotions. 10-SER-2252-60. In June 2013, Chan reaffirmed his commitment to the conspiracy at an industry event, telling Lischewski, "'[d]on't worry about'" any "aggressive" COS press releases—they are "not my strategy." 10-SER-2269-73. Lischewski thanked Chan for his assurances (12-SER-2907), before emailing another warning: "I appreciate your comments the other day, but they sure aren't being reflected in the market." 5-ER-847; 10-SER-2273-74; *see* 3-SER-664-65. Chan's "take-away" was that he and Lischewski had "an understanding that we are not going to promote aggressively," and COS did in fact reduce its promotional spending around this time. 10-SER-2275-82.

In late 2013, David Roszmann took over control of COS's pricing. 10-SER-2397-98. When Lischewski confronted him about COS's "aggressive" prices, Roszmann "shook [his] head" and "didn't really respond." 10-SER-2399. He was taken aback by the "incredibly detailed" information Lischewski had about his nonpublic "pricing strategy." 10-SER-2400-03; 15-SER-3531. When the two met for breakfast, Lischewski almost immediately "brought up the aggressive pricing again," and Roszmann again "waved him off," prompting Lischewski to leave minutes later, without eating. 10-SER-2405-07.

C. Lischewski's Price-Fixing Conspiracy Is Uncovered In 2015, Just Before Bumble Bee Could Be Sold

In late 2014, Lion Capital agreed to sell Bumble Bee for roughly $1.51 billion. 2-SER-403-04. But Lischewski's conspiracy came to light while that transaction

was under review, and once the government's investigation became public in Summer 2015, the purchase agreement was terminated. 2-SER-473-74.

Lischewski tried to cover his tracks. At a meeting in December 2015, he placed his hand on Cameron's shoulder and warned him, "'The company has got your back to a point, as long as you and Kenny don't fuck it up.'" 3-SER-673-75. Cameron understood this "[a]s a threat," meaning "[d]on't cooperate" with the government. 3-SER-675-76. Lischewski's efforts failed. Cameron and Worsham confessed, as did Hodge (StarKist) and Chan (COS). Lischewski was indicted.

D. Lischewski Is Convicted Of Conspiring To Fix Prices After A Five-Week Jury Trial

Before trial, the district court ruled that, because price fixing is per se illegal, Lischewski could not proffer an "economic justification of the conspiracy," but he could offer "an alternative explanation that tends to negate the existence of an agreement." 1-ER95-96; 1-ER87-88; 1-ER97-103. Lischewski confirmed that this was his intention. 15-SER-3424-41; 15-SER-3391-97.

Lischewski's trial began in November 2019. Cameron and Worsham detailed Lischewski's role in the conspiracy. *E.g.*, 3-SER-588-601; 7-SER-1608. Chan (COS) testified that he and Lischewski agreed to not "promote aggressively." 10-SER-2275-82. Hodge (StarKist) also confirmed the conspiracy's existence and briefly discussed communications with StarKist executive Joe Tuza about low-price bids Bumble Bee submitted to Kroger in 2011. 6-SER-1392-98; 4-ER-829-30.

Concerned that Bumble Bee's bids would undermine the conspiracy, Tuza confronted Lischewski (12-SER-2815), and he emailed Hodge the same night: "According to C.L. [Lischewski] If BB went back to Kr[o]ger someone 'is going to be fired.'" 4-ER-831. Lischewski objected to Tuza's email as hearsay (3-ER-507-08), and the district court admitted it (with limiting instructions) to show Hodge's state of mind (1-ER-49-50). Hodge testified that he understood Tuza's email to mean that the conspiracy continued and that, if someone at Bumble Bee submitted low-price bids to Kroger, Lischewski "would fire said person." 6-SER-1396.

The government also called Renato Curto, CEO of Bumble Bee's raw-fish supplier, Tri Marine. Curto met with Lischewski often and reported their conversations to Tri Marine management via email. 5-SER-1093-99. Two such emails were offered at trial, one of which memorialized Lischewski's admission in August 2012 that Bumble Bee was colluding with StarKist. 5-ER-848-49. After allowing Lischewski to voir dire Curto, the district court admitted the redacted emails as business records under Federal Rule of Evidence 803(6). 5-SER-1092-1102; 15-SER-3420; 1-ER-89-90. Curto's August 2012 email stated in relevant part:

> StarKist. He says that they have no clue. But he now loves them. His people and SK people are talking constantly and have a good communication about how to go to market intelligently. (hello! [REDACTED]). SK has been very diligent lately: They have raised LM prices (and BBEE has been following), and they have followed BBEE in the price increase BBEE made on albacore. So margins are coming back although volumes are down.

5-ER-848; *see* 5-SER-1117 (noting "'LM'" means "light meat" or chunk-light tuna).

Lischewski's defense consisted of a character witness, pricing data presented by an economist, and his own testimony. Despite being a "hands-on" manager (15-SER-3456-57), Lischewski testified he "had no idea" that his company was conspiring to fix prices (11-SER-2684), and he denied any wrongdoing (12-SER-2930-31). According to Lischewski, he simply tried to achieve "peace" with his competitors, meaning that "everybody steps back and says we're going to accept the market shares we've historically had" so that "no one's attacking" or "coming after our market share." 11-SER-2712-13. Lischewski admitted that firms "attack" competitors "with price" (11-SER-2712), "market share comes out of competition" (13-SER-3027), and Bumble Bee could not achieve "peace" without its competitors (13-SER-3030).

The district court adopted many of Lischewski's proposed jury instructions, in whole or in part, including his definition of "conspiracy to fix prices" as "an agreement or mutual understanding" (15-SER-3402). 1-ER-21. The court also accepted Lischewski's revisions to other instructions. For example, the court modified the "individual liability" instruction so that Lischewski could be liable for "indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime." 4-ER-655-56. Similarly, it adopted Lischewski's revision to the "knowingly joined" instruction, limiting his liability for coconspirators' actions to

those "committed while" he "was a member of the conspiracy." 4-ER-617-18. After five weeks of trial, the jury found Lischewski guilty. 1-ER-112-13.

III. RULINGS UNDER REVIEW

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

SUMMARY OF ARGUMENT

I. The district court correctly adhered to this Court's precedents upholding the per se rule and requiring intent to conspire for price-fixing offenses. Lischewski's contentions flout longstanding antitrust law.

II. The jury instructions were clear, fair, and correct. Lischewski cannot show plain error and his newly raised challenges fail under any standard.

A. The "conspiracy" instruction correctly defined conspiracy as an "agreement or mutual understanding," and Lischewski requested the same formulation. Lischewski's belated challenge to that language improperly parses the "mutual understanding" phrase "by itself" (Br.35-43), while ignoring that the overall charge required proof that he "actually entered into an agreement to fix prices" (1-ER-21). Lischewski has shown no error, plain or otherwise.

B. The "individual liability" charge was also proper. As Lischewski admits (Br.45-46&n.11), corporate officers are conspirators if they knowingly authorize or order their subordinates' conspiratorial acts. The charge here closely paralleled that rule, holding corporate officers liable (as Lischewski requested) for

"indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime." 1-ER-30. That instruction was not erroneous, much less plainly so.

C. Nor was the "knowingly joined" instruction undermined by Lischewski's *Pinkerton* revision. The instruction made clear that conspirators are responsible for the entire conspiracy regardless of when they joined. 1-ER-29. While Lischewski's *Pinkerton* revision cabined his liability for the acts of coconspirators, the instruction was not plainly erroneous.

D. The district court's rulings on the per se rule were correct, prudent exercises of its discretion. Despite complaining that the court's adherence to governing law was "unfair" (Br.48-49), Lischewski does not deny that the per se instruction was legally accurate; that lack-of-harm evidence is irrelevant in price-fixing cases; or that the government may structure its closing arguments around the jury instructions. Here, too, Lischewski cannot show error, let alone plain error.

III. The district court's evidentiary rulings were sound.

A. Curto's email was a business record under Rule 803(6). It was created and retained pursuant to regularly conducted business activities, written the day after he met with Lischewski, and, despite ample opportunity, Lischewski could not show the email was untrustworthy. Lischewski's arguments on appeal go only to weight, not admissibility, and they lack merit in any event.

B. Tuza's email was admissible for the nonhearsay purpose of showing Hodge's state of mind, and the court's limiting instructions ensured that the email was not considered for its truth. Lischewski has shown no abuse of discretion, much less reversible error.

IV. Lischewski "cumulative" error theory fails because he identifies no errors to cumulate and the evidence against him is overwhelming.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOLLOWED GOVERNING LAW IN APPLYING THE PER SE RULE AND INSTRUCTING THE JURY ON MENS REA

Lischewski admits (Br.31-35) that settled law forecloses his lead arguments that the per se rule unconstitutionally eliminated the "unreasonableness" element of his offense, and that his conviction required proof of intent to unreasonably restrain competition. *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991); *United States v. Manufacturers' Ass'n*, 462 F.2d 49 (9th Cir. 1972). Both arguments do indeed contravene this Court's decisions, not to mention Supreme Court precedent.

First, the per se rule is an interpretation of the Sherman Act under which certain restraints, such as horizontal price fixing, are "in themselves unreasonable," and thus juries need not find "unreasonableness" in such cases. *United States v. Trenton Potteries*, 273 U.S. 392, 394-401 (1927); *see United States v. Socony-Vacuum*, 310 U.S. 150, 224 n.59 (1940) ("[T]he law does not permit an inquiry into

their reasonableness."). As Lischewski himself acknowledged below, the per se rule "establishes that price fixing, if proved, is unreasonable." 15-SER-3436 (emphasis omitted). The jury here thus found every element of the charged offense, and Lischewski's reliance (Br.34) on cases involving incomplete jury instructions (*Gaudin*) or burden-shifting evidentiary presumptions (*Francis*) is misplaced. *See United States v. Giordano*, 261 F.3d 1134, 1143-44 (11th Cir. 2001) (rejecting same theory); *Manufacturers'*, 462 F.2d at 52 ("The *per se* rule does not operate to deny a jury decision as to an element of the crime.").

Second, because per se offenses like price fixing "unquestionably" have "the requisite anticompetitive effects" as a matter of law, the government need not prove that defendants intended to harm competition in such cases. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440, 444-45 & n.21 (1978). Rather, "'intent to conspire to commit the offense is sufficient'" when, as here, "the defendant is charged with a per se violation." *Brown*, 936 F.2d at 1046 (quoting *United States v. Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir. 1981)); *see Giordano*, 261 F.3d at 1143 (same). Lischewski's conviction therefore did not require proof that he "intended to unreasonably restrain competition" (Br.34), and nothing in *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980), suggests otherwise as "the adequacy of the intent instruction was not at issue" there. *Brown*, 936 F.2d at 1046 n.3.

II. THE DISTRICT COURT'S JURY INSTRUCTIONS WERE CLEAR, FAIR, AND LEGALLY CORRECT

A. Unpreserved Instructional Claims Are Reviewed For Plain Error

Unless defendants raise their "specific objection and the grounds for the objection before the jury retires," instructional claims are reviewed for plain error. Fed.R.Crim.P.30(d), 52(b); *see United States v. Varela*, 993 F.2d 686, 688 (9th Cir. 1993) ("A general objection to the instruction does not suffice."). To justify relief under plain-error review, defendants must show "(1) an error; (2) that is plain; (3) that affects substantial rights; and, if (1)-(3) are met, (4) seriously affects the fairness, integrity, or public reputation of the proceeding." *United States v. Doe*, 705 F.3d 1134, 1148 (9th Cir. 2013).

"Meeting all four prongs is difficult." *Puckett v. United States*, 556 U.S. 129, 135 (2009). First, there must be unwaived error. *Id.* "To be plain, the error must be clear or obvious, and an error cannot be plain where there is no controlling authority on point." *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011) (quotations omitted); *see Henderson v. United States*, 568 U.S. 266, 269 (2013) (requiring issue to be "settled in the defendant's favor" at "time of appellate review"). For an error to affect substantial rights, "a defendant normally must make a specific showing of prejudice," *Puckett*, 556 U.S. at 135, 142 (quotations omitted), meaning that the error had a "substantial and injurious effect" on the verdict. *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) (quotations omitted). Finally,

"[e]ven after a reviewing court finds plain error under this three-part rubric, relief remains discretionary," *United States v. Hui Hsiung*, 778 F.3d 738, 747 n.4 (9th Cir. 2015), and defendants must show "a miscarriage of justice," *United States v. Singh*, 979 F.3d 697, 728 (9th Cir. 2020) (quotations omitted).[1]

B. The District Court Did Not Plainly Err By Instructing The Jury That A "Conspiracy" Is "An Agreement Or Mutual Understanding"

1. Lischewski did not specifically object to the "mutual understanding" language

Plain-error review applies given Lischewski's failure to object specifically to the "mutual understanding" phrase. Lischewski says (Br.29) he "preserved" this challenge by proposing an instruction without "mutual understanding," and by objecting to the denial of his instructions.

Lischewski is mistaken. Even with "a global objection," the "mere proposal of an alternate instruction does not satisfy Rule 30's standard of specificity." *United States v. Elias*, 269 F.3d 1003, 1017-18 (9th Cir. 2001). Here, Lischewski never specifically challenged the "mutual understanding" phrase (3-ER-614-82; 13-SER-3094-3100; 15-SER-3399-3404), and his own proposed instructions also defined conspiracy as "agreement or mutual understanding." 15-SER-3388; 15-SER-3383

[1] Lischewski has not invoked, and thus has forfeited, the narrow "exception" to plain-error review this Court sometimes recognizes for "a pure question of law" when "there is no prejudice to the opposing party." *United States v. Zhou*, 838 F.3d 1007, 1015-16 (9th Cir. 2016) (Graber, J., concurring) (cautioning this "exception contradicts Rule 52(b) and the Supreme Court's case law") (quotations omitted).

(same); 15-SER-3402-04 (same); 15-SER-3410-11 (same); *see* 15-SER-3443 ("agreement or understanding"); 15-SER-3406-07 (same); 15-SER-3444 ("mutual understanding"). Lischewski thus could not have purported to "renew" or "reserve" below (2-ER-124, 2-ER-165) the challenge he now asserts.

2. Lischewski shows no error in the conspiracy instruction, much less plain error

Lischewski cannot show that this instruction was plainly erroneous. *See United States v. Ching Tang Lo*, 447 F.3d 1212, 1228 (9th Cir. 2006) ("[A] jury instruction rarely justifies reversal of a conviction for plain error."). Courts review instructions as a whole rather than scrutinizing discrete words or phrases "in isolation." *Jones v. United States*, 527 U.S. 373, 391-92 (1999). As this Court has held, "[i]solated excerpts are not to be considered apart from their context, and, so considered, are not to be tortured into constituting error." *Benatar v. United States*, 209 F.2d 734, 742-43 (9th Cir. 1954); *see United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007) (same, instructions not "examined under a microscope").

The charge here stated that conspiracies are "a 'partnership in crime.'" 1-ER-19. "To create such a relationship, two or more persons must enter into an agreement or mutual understanding that they will act together for some unlawful purpose or to achieve a lawful purpose by unlawful means." 1-ER-19. The charge explained that "[i]t is the agreement to act together that constitutes the crime," rather than "[m]ere similarity of conduct" or "common aims and interests." 1-ER-19.

This instruction was clear and correct. Agreement and understanding are synonymous terms, and the jury would have understood them as such. An "agreement" is "[a] mutual understanding between two or more persons," and an "understanding" is "[a]n agreement, esp. of an implied or tacit nature." *Black's Law Dictionary* (11th ed. 2019); *Merriam-Webster's Dictionary of Synonyms* 32 (1984) ("agreement, accord, understanding"). Together, the terms form a unitary phrase conveying a single meaning, similar to "cease and desist," "null and void," or "covenant and agree." *See United States v. Atilla*, 966 F.3d 118, 125-26 & n.1 (2d Cir. 2020) (construing "evade or avoid" as a "unitary phrase" and noting that the terms of such a phrase need not be "an exact match").

History and precedent confirm as much. Juries have for more than a century been properly instructed that "conspiracy" requires "a mutual understanding to accomplish a common and unlawful design." *United States v. Babcock*, 24 F. Cas. 913, 915 (C.C.E.D. Mo. 1876); *see United States v. Pemberton*, 853 F.2d 730, 734 (9th Cir. 1988) ("'agreement or understanding'"); *United States v. Kenny*, 645 F.2d 1323, 1337 (9th Cir. 1981) ("'mutual understanding'"). Courts, too, have long treated "conspiracy" as "an affirmative act, measured by the mutual understanding of the participants." *United States v. Mack*, 112 F.2d 290, 292 (2d Cir. 1940) (Hand, J.); *see United States v. Moe*, 781 F.3d 1120, 1125 (9th Cir. 2015) ("'tacit understanding'" (quoting *Direct Sales v. United States*, 319 U.S. 703, 714 (1943))).

And it is hornbook law that a "tacit understanding will suffice" for conspiracy. 2 LaFave, *Substantive Criminal Law* §12.2(a) (3d ed. 2019); *see* 15A C.J.S. Conspiracy §129 (June 2020) ("agreement, combination, or mutual understanding").

Sherman Act conspiracies likewise "are on 'the common-law footing,'" and have been found based on an "informal gentlemen's agreement or understanding." *Socony*, 310 U.S. at 179, 252; *see Interstate Circuit v. United States*, 306 U.S. 208, 226-27 (1939) (inferring conspiracy where, "knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it"). As Lischewski noted below, antitrust conspiracies require "'a unity of purpose or a *common design and understanding*, or a meeting of minds.'" 15-SER-3404 (quoting *Am. Tobacco v. United States*, 328 U.S. 781, 810 (1946)) (emphasis added). This Court has never required more for jury instructions in price-fixing cases. *See Brown*, 936 F.2d at 1046 & n.3 (upholding instruction defining conspiracy as "'agreement'" or "'mutual understanding'").[2]

Lischewski asserts (Br.36-43) that this settled understanding of conspiracy is a "fallacy" because the "mutual understanding" phrase, "[t]aken by itself," may not mean "agreement." He maintains that the instruction might have let the jury convict

[2] *United States v. Therm-All, Inc.*, 373 F.3d 625, 638 (5th Cir. 2004) (same, "'agreement or mutual understanding'"); *United States v. Cont'l Grp., Inc.*, 603 F.2d 444, 462-63, 465 (3d Cir. 1979) (same, "'agreement or mutual understanding or meeting of the minds'").

based on "nothing more than a commonly held view," "mere shared belief and common conduct," or even "market knowledge" (Br.38-42).

But the language of a jury instruction is never "[t]aken by itself." It is analyzed "in the context of the entire charge" and "read in conjunction with other instructions." *Jones*, 527 U.S. at 391-92. The charge here stated that the "agreement or mutual understanding" must be to "*act together for some unlawful purpose*" (1-ER-19); "[p]rices are fixed if the range or level of prices is *agreed* upon" (1-ER-21); and antitrust law does not prohibit "competitors from joining together to carry out *lawful and legitimate* activities" (1-ER-24) (emphasis added). It also echoed this Court's Model Instruction 8.20 by precluding inferences of conspiracy from "[m]ere similarity of conduct" or "common aims and interests" (1-ER-19)—the same principle Lischewski insists (Br.39) would have properly charged the jury. By Lischewski's own account, then, the jury could not have convicted him based on a "commonly held view," "shared belief," or "market knowledge."

Lischewski's reliance on *Griffin v. United States*, 502 U.S. 46 (1991), is misplaced. Unlike in *Griffin*, the jury here returned a special verdict on a single theory. 1-ER-112-13. The charge defined one offense (conspiracy) with a unitary phrase (agreement or mutual understanding) that accurately described the crime's "successful consummation." *See Socony*, 310 U.S. at 253 ("[T]he conspiracy necessarily involved an understanding or agreement, however informal."). This

language cannot be decoupled into separate theories simply because its terms are connected by "or" (Br.40), especially since "mutual understanding" never appeared by itself as an independent definition of conspiracy. Lischewski offers no sound reason to think jurors would have isolated that two-word phrase and given it a meaning contrary to the charge overall. *See Brown v. Payton*, 544 U.S. 133, 143 (2005) ("Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.").[3]

Lischewski's challenge fails for the independent reason that, even if the instruction were erroneous, he has not shown it was plainly so. No "error can be plain error when the Supreme Court and this court have not spoken on the subject." *United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) (quotations omitted); *see Hui Hsiung*, 778 F.3d at 747 n.4 (same). Here, Lischewski identifies no controlling authority holding that defining "conspiracy" as "agreement or mutual understanding" is erroneous. Nor could he, as this Court and the Supreme Court have described conspiracy that way for decades. *Supra* pp.21-22.

3. Lischewski shows neither prejudice nor a miscarriage of justice

Regardless, Lischewski cannot show prejudice, much less a miscarriage of justice. *See United States v. Espino*, 892 F.3d 1048, 1053 (9th Cir. 2018) ("[T]he

[3] Lischewski is also wrong (Br.43) that *Griffin* "requires reversal." Even preserved claims of this "variety are subject to harmless-error analysis." *Skilling v. United States*, 561 U.S. 358, 414 (2010).

burden on the defendant is heavy."). The charge barred conviction unless the jury found that Lischewski agreed to fix prices, instructing that "the *agreement* to act together" is "the crime" (1-ER-19); that "the charged conspiracy" was an "illegal *agreement*" (1-ER-26-27); and that a "price-fixing conspiracy" is "an *agreement* to raise or lower a price" (1-ER-21) (emphases added); *see* 1-ER-20 ("unlawful agreement"); 1-ER-22 ("agreement to fix prices"). By contrast, "understanding" or "mutual understanding" were mentioned only occasionally, and always paired with "agreement." Reversal would not be warranted even under de novo review. *United States v. Kleinman*, 880 F.3d 1020, 1035 (9th Cir. 2017) (finding "two-sentence instruction" harmless that "was a small part of the court's final instructions").

The instructions and verdict form also confirm that the jury necessarily found an agreement here. The jury was instructed that, "to find a conspiracy, you must find that Bumble Bee *agreed* with one or more competing companies, to carry out the illegal acts that the government claims they carried out." 1-ER-38 (emphasis added). And the jury's verdict found a "*conspiracy* to fix prices" as "charged in Count One of the Indictment" involving "StarKist and Chicken of the Sea" (2-ER-112-13 (emphasis added)), which necessarily includes a finding that all three companies "agreed" to fix prices. Lischewski's failure to challenge that finding on appeal underscores that any purported "error" in this instruction was harmless. *See United States v. Thomas*, 612 F.3d 1107, 1129 (9th Cir. 2010) (finding charge

harmless where "jury necessarily found" requisite element).

The jury also necessarily found that Lischewski participated in the price-fixing agreement. The instructions stated that "you must acquit" if Lischewski was "not a member" of the "illegal agreement" "charged in the indictment" (1-ER-26), and Lischewski's theory-of-the-defense instruction argued he "did not enter into any price-fixing agreement" (1-ER-25). The jury's verdict, however, found Lischewski guilty "of *participating in* a conspiracy to fix prices ... as charged in Count One of the Indictment" (2-ER-112) (emphasis added)—the same conspiracy in which Bumble Bee "agreed" to fix prices with StarKist and COS (1-ER-38; 2-ER-113). In finding Lischewski guilty of "participating in" that agreement (2-ER-112-13), the jury necessarily found that he was "a member" of, and did in fact "enter into," the charged "price-fixing agreement" (1-ER-25-26). Given those unchallenged findings, different jury instructions would not, under any standard, yield a different jury verdict. *See Thomas*, 612 F.3d at 1129.

Nor has Lischewski shown that discretionary relief is necessary to preserve "the fairness, integrity, or public reputation of judicial proceedings." *Jones*, 527 U.S. at 389 (exercising plain-error discretion "sparingly"). Again, Lischewski used the "agreement or mutual understanding" formulation in his own proposed instructions and never objected to it. *Cf. Henderson*, 568 U.S. at 278-79 ("[T]hat a defendant did not object, despite unsettled law, may well count against the grant of

Rule 52(b) relief."). Overturning a conviction on the basis of a two-word phrase that the defendant himself requested would be just the sort of "'wasteful reversal[]'" that *undermines* (not preserves) the fairness, integrity, and public reputation of judicial proceedings. *See Singh*, 979 F.3d at 728 (quoting *Dominguez*, 542 U.S. at 82). This Court need not, and should not, exercise its Rule 52(b) discretion here.

C. The District Court Did Not Plainly Err By Giving Lischewski's "Alternative" Instruction On "Individual Liability"

1. Lischewski requested the language he now challenges

Plain-error review applies because the only charge Lischewski objected to was not given and he requested the language he now challenges. *United States v. Gadson*, 763 F.3d 1189, 1215 (9th Cir. 2014) ("[O]ne type of objection to an instruction does not necessarily preserve another."). Lischewski objected to the government's proposed charge, which was based on the ABA model, but which deleted language holding corporate officers liable for "indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime." 15-SER-3416-17 (alterations omitted). Lischewski's "alternative instruction," however, used that exact phrase, which he argued was "consistent with the Ninth Circuit precedent" and should be issued if "the evidence at trial warrants such an instruction." 4-ER-655-56 (citing *Brown*, 936 F.2d at 1047-48 & n.4).

Lischewski now says (Br.44) the passage he requested "has grave flaws." But he cannot seek reversal of his conviction based on language he proposed, particularly

when he does not contest the factual predicate for issuing his "alternative" charge (*i.e.*, "the evidence at trial warrants such an instruction"). *See Hui Hsiung*, 778 F.3d at 747-48 & n.4. This claim is reviewable, if at all, for plain error. *See id.*

2. Lischewski shows no error in the individual-liability instruction, much less plain error

Lischewski's challenge fails. Corporate officers are "liable for the illegal actions of subordinates if they knowingly authorized or consented to such behavior," because an officer who "'authorizes, orders, or helps perpetrate'" a conspiracy thereby "'knowingly participates.'" *Brown*, 936 F.2d at 1047-48 (quoting *United States v. Wise*, 370 U.S. 405, 416 (1962)).

Brown is instructive. The charge there stated that a corporate officer "'knowingly participates'" in a conspiracy if she "'knew of the existence of the conspiracy and knowingly authorized[,] ordered or consented to the participation of a subordinate in that conspiracy.'" *Id.* at 1047 n.4. Defendants claimed this instruction imposed liability "for merely knowing about the illegal conduct of others and failing to stop it." *Id.* at 1047. This Court held otherwise. While acknowledging that "knowing participation" "requires more than purely passive behavior" or "mere knowledge of the wrongdoing of others," the Court upheld the instruction because it required the jury to find that defendants "knowingly consented to their subordinates' participation in the conspiracy." *Id.* at 1048-50.

So too here. The charge stated that a "corporate officer" is liable "whenever

he knowingly participates in effecting the illegal conspiracy by directly participating in the conspiracy and/or indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime." 1-ER-30. "A person is responsible for conduct that he performs or causes to be performed on his behalf." 1-ER-30.

Lischewski complains (Br.43-46) that the language he requested allowed the jury to convict without finding that he participated in the conspiracy. Yet the charge as a whole made clear that the jury could convict only if Lischewski "knowingly" "became a *member* of the conspiracy" (1-ER-16), and that "mere knowledge of the conspiracy *without participation*" was "insufficient" (1-ER-29) (emphases added). It further stated that Lischewski was not "liable for the acts of a subordinate" unless he was "aware of" the conspiracy, "knew that the subordinate was participating in the conspiracy," and "knowingly *authorized*, *ordered*, or *consented* to" the subordinate's acts "for the purpose of furthering the conspiracy." 1-ER-30 (emphases added). This instruction was legally correct under *Brown*.

The special verdict form, moreover, asked jurors to decide whether Lischewski was guilty "of participating in a conspiracy to fix prices." 2-ER-112. This was the same conspiracy where Bumble Bee "agreed" to fix prices with StarKist and COS (1-ER-38), and the jury found Lischewski "GUILTY" of "participating in" that agreement (2-ER-112-13; 2-ER-118). No reasonable jury would have thought Lischewski could be convicted without proof of participation. *See Espino*, 892 F.3d

at 1053 (reviewing instructions and verdict "in conjunction").

Also misguided is Lischewski's detour into aiding-and-abetting liability. The rule that a corporate officer "knowingly participates" in a conspiracy if he "authorizes, orders, or helps perpetrate the crime" is not "'an aider and abettor theory.'" *Wise*, 370 U.S. at 412 n.4, 416. The rule follows from the Sherman Act itself, which covers "[e]very person" "engage[d] in any combination or conspiracy." 15 U.S.C. §1. In *Wise*, the Court held that a corporate officer could be indicted for price fixing "regardless of whether he [was] acting in a representative capacity." 370 U.S. at 416. The defendant there was charged in part for acts he "'authorized'" or "'ordered.'" *Id.* at 406. Yet he was a conspirator nonetheless because "one who authorizes, orders, or helps perpetrate" price fixing "knowingly participates in effecting the illegal contract, combination, or conspiracy." *Id.* at 416.

Wise refutes Lischewski's portrayal (Br.43-46) of this charge as "aiding and abetting liability." By recognizing that a corporate officer is a conspirator if he authorizes or orders conspiratorial acts, *Wise* speaks directly to the issue of conspiracy liability "based on the acts of another" (Br.46), and nothing in that case immunizes *indirect* action. *See* 370 U.S. at 414-16 (noting antitrust law must "bring all responsible persons to justice"). Otherwise, corporate officers could evade liability by orchestrating conspiracies through indirect gestures that are just as effective and inculpatory as direct commands. *See Esco Corp. v. United States*, 340

F.2d 1000, 1007 (9th Cir. 1965) ("A knowing wink can mean more than words.").

But even if *Wise* were not controlling, Lischewski effectively admits that *Brown* is: "a corporate officer could participate in a conspiracy by his own acts or *by directing his subordinates to participate*" (Br.45n.11 (emphasis added)). Contrary to Lischewski's suggestions, *Brown* would not have come out differently had the instruction there said "indirectly." The charge in *Brown* defined "'participating knowingly'" as "'encouraging, advising or assisting for the purpose of furthering the conspiracy.'" 936 F.2d at 1048. Because each of those actions can occur directly *or* indirectly, *Brown* does not support Lischewski's novel theory of indirect-participation immunity. Nor is *Brown* distinguishable for requiring defendants "to 'knowingly participate'" and "become a 'member of the conspiracy.'" The charge here required both findings (1-ER-16, 1-ER-30), and besides, knowingly *participating* in a conspiracy makes one a *member* of that conspiracy. *United States v. Bibbero*, 749 F.2d 581, 587-88 (9th Cir. 1984) (holding defendant was "a member" of conspiracy "while he was a participant").

In any event, Lischewski cannot show plain error given his failure to identify any controlling authority that the "indirectly" clause is erroneous. "A court of appeals cannot correct an error under plain error review unless the error is clear under current law." *United States v. Christensen*, 828 F.3d 763, 789-90 (9th Cir. 2015) (quotations, brackets omitted). Aside from his failed attempt to distinguish

Brown and *Wise*, Lischewski cites only two cases addressing aiding-and-abetting liability (*Shorty* and *Thum*), neither of which involved jury instructions, let alone a clear repudiation of this instruction. *See United States v. Shields*, 844 F.3d 819, 823 (9th Cir. 2016) (affirming where "no controlling case law" invalidated instruction).

3. Lischewski shows neither prejudice nor a miscarriage of justice

Lischewski likewise cannot show prejudice or a miscarriage of justice. The instructions made clear that Lischewski was "*not* responsible for the conduct of others performed on behalf of" Bumble Bee "merely because [he] is an officer," even if he advanced "some purpose of the conspiracy." 1-ER-30 (emphasis added). The jury was told instead "the evidence must establish that the defendant *joined* the conspiracy *with the intent* to advance the objective of the conspiracy." 1-ER-29 (emphases added).

The record also forecloses reversal. On plain-error review, a verdict that could "be based on a legally invalid ground" may be affirmed "if it was not open to reasonable doubt that a reasonable jury would have convicted the defendant on the valid ground." *Christensen*, 828 F.3d at 788 (quotations omitted). Here, even were the "indirectly" clause an invalid basis for conviction, Lischewski has raised no reasonable doubt that he *directly* participated in the conspiracy. Lischewski admits (Br.20) the evidence shows he "directed" Cameron "to enter into a truce" and "engage in the price-fixing," and that Cameron "kept Lischewski informed of his

agreements." Lischewski further recognizes (Br.18-19,23-24) the evidence establishing his collusion with Chan (COS), including his "'jab' emails," from which the jury could readily infer a conspiracy.

While he quibbles with his coconspirators' testimony (Br.19-28), Lischewski does not argue that such evidence was insufficient to show direct participation or that he might have been acquitted under different jury instructions. *See CLS v. Wu*, 626 F.3d 483, 486 (9th Cir. 2010) ("[A] bare assertion in the fact section of the opening brief will not preserve a legal argument."). No such argument could be made. The record shows Lischewski directly participated in the conspiracy, which along with the jury charge as a whole, leaves no doubt that the "indirectly" language was not prejudicial. *See United States v. Conti*, 804 F.3d 977, 981-82 (9th Cir. 2015) (finding instruction nonprejudicial given "strong and convincing evidence").

Nor is discretionary relief needed here to preserve "the integrity of the system," *Puckett*, 556 U.S. at 142-43, particularly since Lischewski requested the language at issue. *Cf. Henderson*, 568 U.S. at 278-79. Plain-error review is meant "to reduce wasteful reversals," *Singh*, 979 F.3d at 728 (quotations omitted), not "[t]o turn a criminal trial into a quest for error," *United States v. Young*, 470 U.S. 1, 16 (1985) (quotations omitted). A contrary approach "'encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *United States v. Perez*, 116 F.3d 840, 848 (9th Cir. 1997) (en banc) (quoting *Johnson v. United States*, 520 U.S.

461, 470 (1997)). Reversing here, based on instructional language Lischewski requested and defended below, would have precisely that effect and should not be granted. *See Puckett*, 556 U.S. at 143 (precluding relief where it would "compromise the public reputation of judicial proceedings").

D. The District Court Did Not Plainly Err By Adopting Lischewski's *Pinkerton* Revision To The "Knowingly Joined" Instruction

1. Lischewski requested the *Pinkerton* revision

Plain-error review applies here, too, because Lischewski asked for the "knowingly joined" instruction to be modified based on *Pinkerton v. United States*, 328 U.S. 640 (1946). 4-ER-617-18. The government's proposed instruction stated that, when a person "knowingly joins" a conspiracy, he "is just as responsible as if he had been one of the originators of the conspiracy or had participated in every part of it." 15-SER-3446; 15-SER-3413. Lischewski objected to this charge as "misleading and particularly dangerous in this case where there is a risk that the jury will find multiple conspiracies." 15-SER-3405. While continuing to object, Lischewski "proposed a revision" to the instruction:

> [A] person who knowingly joins an existing conspiracy, or participates in part of the conspiracy, with knowledge of the overall conspiracy, is ~~just as~~ responsible ~~as if he had been one of the originators of the conspiracy or had participated in every part of it~~ for actions of other members of the same conspiracy that were committed while the person was a member of the conspiracy, as long as the actions were committed during the course and in furtherance of the conspiracy and fell within the scope of the unlawful agreement and could reasonably have been

> foreseen to be a necessary or natural consequence of the unlawful agreement.

4-ER-617-18.

The passage in blue was not in the government's proposal, and the district court recognized that the government "objected to the *Pinkerton* instruction" because it limited coconspirator liability to acts committed while the defendant was "a member of the conspiracy." 13-SER-3117-18. Yet the district court adopted nearly all of Lischewski's revision (1-ER-29) based on his representation that "the instruction is consistent with Ninth Circuit law." 13-SER-3118; *see* 15-SER-3385 ("[A] defendant may be found guilty of actions committed by his coconspirators."). To the extent Lischewski seeks reversal based on language he requested and defended below (Br.46-47), his challenge is reviewable only for plain error, if at all. *See Hui Hsiung*, 778 F.3d at 747-48 & n.4.

2. Lischewski shows no error in the knowingly joined instruction, much less plain error

Lischewski identifies no error, plain or otherwise. Even if preserved, the issue would be reviewed for abuse of discretion, not de novo, because Lischewski asserts only that the *Pinkerton* language was "superfluous and confusing" (Br.46-47), not legally erroneous. *See United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010) ("[Defendant] not entitled to an instruction with wording of his own choosing.").

Lischewski's claim fails under any standard. Conspirators need not "act

simultaneously." *United States v. Grovo*, 826 F.3d 1207, 1215 (9th Cir. 2016). Rather, "when one joins an existing conspiracy, he 'takes it over as it is' and becomes liable for all that has gone before or may happen later." *Canella v. United States*, 157 F.2d 470, 476 (9th Cir. 1946); *see Socony*, 310 U.S. at 253-54 (similar). This rule predates the *Pinkerton* doctrine, which holds conspirators liable for one another's reasonably foreseeable *substantive* crimes. 328 U.S. at 646-47. Under the rule at issue here, regardless of substantive offenses, "the declarations and acts" of one conspirator are the "declarations or acts of co-conspirators," "even though made or done prior to the adherence of some to the conspiracy." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 393 (1948); *see Coates v. United States*, 59 F.2d 173, 174 (9th Cir. 1932) ("It is immaterial when any of the parties entered the polluted stream. From the moment he entered he is as much contaminated and held as though an original conspirator.").

The instruction here captured that principle. It told the jury that if a defendant "knowingly joins an existing conspiracy, or participates in part of the conspiracy, with knowledge of the overall conspiracy," he "is just as responsible for actions of other members of the same conspiracy." 1-ER-29. The instruction cabined this rule by allowing liability only for coconspirator actions "committed while" defendant "was a member of the conspiracy," and only if "the actions were committed during the course and in furtherance of the conspiracy and fell within the scope of the

unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement." 1-ER-29.

Lischewski asserts (Br.46-47) that the preceding sentence's *Pinkerton* language had "no place" in this prosecution, and he speculates it might have confused the jury into believing it could convict without finding that he joined the conspiracy "in the first place." But the instruction clearly stated that, "before you may convict the defendant, *the evidence must establish that the defendant joined the conspiracy* with the intent to advance the objective of the conspiracy—here, price-fixing." 1-ER-29 (emphasis added). Nothing in that charge was "equivocal," and the cases Lischewski cites (Br.47) do not suggest otherwise. *Bollenbach v. United States*, 326 U.S. 607, 613 (1946) (involving supplemental instruction that "was simply wrong" and "not even 'cursorily' accurate"); *United States v. Neilson*, 471 F.2d 905, 908-09 (9th Cir. 1973) (similar, instruction was "improper deviation from the language of the indictment").

Lischewski underscored the importance of this instruction, moreover, by repeatedly asserting that he could not have participated in the conspiracy because he never directly contacted Cameron and Worsham's counterparts at StarKist and COS. 11-SER-2682-85. Jurors needed to know why that was not a defense, and this charge served that purpose. It explained that, once Lischewski joined the conspiracy, he was a direct participant as a matter of law in collusion among Cameron, Worsham,

Hodge (StarKist), Handford (StarKist), and White (COS)—whether or not he ever contacted Hodge, Handford, or White. *See* 1-ER-29. That instruction was correct, amply supported by the evidence, and anything but "superfluous and confusing" (Br.46). *See Grovo*, 826 F.3d at 1215 (holding that, by joining "a conspiracy," one is "bound by all that has gone on," "even if unknown to him").

Either way, Lischewski has not shown the *Pinkerton* language was plainly or obviously wrong. *See United States v. Mikhel*, 889 F.3d 1003, 1032 (9th Cir. 2018) ("[A]n error cannot be plain where there is no controlling authority on point." (quotations omitted)). Lischewski himself argued below that "[t]he language that the Court used in the instruction is consistent with Ninth Circuit law," under which a "[d]efendant can be held liable for actions of his co-conspirators." 13-SER-3118 (quotations omitted); 15-SER-3385 (same). Lischewski thus cannot show even a "reasonable dispute" about this instruction's propriety, much less "clear or obvious" error under controlling law. *See Puckett*, 556 U.S. at 135.

3. Lischewski shows neither prejudice nor a miscarriage of justice

The *Pinkerton* language was not prejudicial or a miscarriage of justice. The instructions barred the jury from assuming Lischewski joined the conspiracy (*supra*, pp.36-37), and both sides argued the case to the jury on the premise that the government needed to prove "the defendant's participation in the conspiracy." 1-ER-134; *see* 14-SER-3235 (detailing "evidence of the defendant's participation");

14-SER-3261-64 (discussing "Lischewski's participation"). If anything, the *Pinkerton* revision made conviction harder by limiting Lischewski's responsibility for coconspirator conduct to actions "committed while" he "was a member of the conspiracy" (1-ER-29). *See Doe*, 705 F.3d at 1148 (affirming where "it is entirely likely" instruction "actually helped" defendant).

The evidence, moreover, shows Lischewski knowingly joined—and indeed orchestrated—the charged conspiracy. He directed and approved the price fixing with StarKist and COS. 2-SER-531-33; 3-SER-591-93; 3-SER-612; 7-SER-1653-54; 7-SER-1689-90; 8-SER-1762-63. He admittedly discussed bids and prices with competitors at StarKist (12-SER-2814-18) and COS (12-SER-2906-07). And he agreed to limit price promotions with Chan (COS), an agreement he enforced through collusive emails and in-person confrontations. 5-ER-832-45; 2-ER-289-99. In light of these facts, the *Pinkerton* language did not materially affect the verdict.

Lischewski has also not justified "an exercise of the court's discretion" under Rule 52(b), which must "be 'used sparingly'" and "'solely'" when "'a miscarriage of justice would otherwise result.'" *Singh*, 979 F.3d at 728-29 (quoting *Young*, 470 U.S. at 15). Not only did Lischewski propose the *Pinkerton* language below, but he argued it was "consistent with Ninth Circuit law" (13-SER-3118). *Cf. Henderson*, 568 U.S. at 278-79. That the district court adopted Lischewski's proposed revision is hardly a miscarriage of justice warranting plain-error relief.

E. The District Court Did Not Plainly Err In Its Jury Instruction And Evidentiary Rulings On The Per Se Rule

1. Lischewski did not adequately preserve these claims

Instructional and evidentiary claims cannot be preserved through generalized objections or objections on different grounds. *Gadson*, 763 F.3d at 1215; *United States v. Hayat*, 710 F.3d 875, 893-95 (9th Cir. 2013). Lischewski argued against any per se rule instruction (4-ER-652; 15-SER-3387), and he proposed revisions to that charge (15-SER-3380). Yet he never specifically objected or proposed revisions to the language he now says is "unfair" (Br.48)—namely, the "harmful effect" of price fixing (1-ER-18). In failing to raise that "particular objection" below, Lischewski limited his appeal to plain error. *Gadson*, 763 F.3d at 1215.

The same is true of his assertions (Br.6-7,48-49) that the district court "tied [his] hands" by excluding evidence that his scheme created "economic benefits." Lischewski did not object to the government's arguments on this issue (2-ER-130-35); he agreed "[a]s a general statement" that price fixing harms the economy (12-SER- 2938-39); and he disavowed contrary evidence: "To be clear: Mr. Lischewski has no intention of introducing so-called 'justification and effects' evidence at trial." 15-SER-3396. Lischewski represented below that he simply wanted to present evidence that no conspiracy existed: "We're not going to say that he entered into a price-fixing agreement but that agreement was reasonable. That's not the defense in this case." 15-SER-3429. Lischewski's belated claim that he was entitled to offer

evidence that his conspiracy was "reasonable and caused no harm" (Br.48-49) is reviewable only for plain error. *Hayat*, 710 F.3d at 893-95.

2. Lischewski shows no error in the per se instruction and related rulings, much less plain error

The district court's handling of the per se rule was not plainly erroneous, and even if preserved, the issue would be reviewed for abuse of discretion as Lischewski does not argue legal error. Nor could he. *See United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992) (approving similar instruction); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1235 & n.4 (8th Cir. 1992) (same). Price-fixing schemes are unlawful per se "because of their pernicious effect on competition and lack of any redeeming virtue," *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958), and as a result, "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense," *Socony*, 310 U.S. at 218; *United States v. Joyce*, 895 F.3d 673, 677-78 (9th Cir. 2018) ("The per se rule eliminates the need to inquire into the specific effects of certain restraints."). The district court properly followed that principle here.

The charge stated that the Sherman Act prohibits "certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are unreasonable restraints of trade." 1-ER-18. "Conspiracies to fix prices are deemed to be unreasonable restraints of trade and therefore illegal, without consideration of the precise harm they have caused or any business justification for their use." 1-ER-

18. The jury was told that if the government proves "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." 1-ER-18. "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." 1-ER-18. Rather, "[i]f there was, in fact, a conspiracy to fix the prices for canned tuna as alleged, it was illegal." 1-ER-18.

Instead of identifying an error in that charge, Lischewski insists (Br.48-49) it was "unfair" to instruct the jury that price fixing is harmful while "excluding contrary evidence." In his view, the per se instruction was "a club" that the government "swung" by stating in closing argument that price-fixing conspiracies "'disrupt[] our economy,'" "'st[eal] a few cents at a time,'" and "'[c]heat[] consumers of the benefits of free competition.'" Br. 48-49 (quoting 1-ER-130-35).

None of that comes close to showing reversible error. Lischewski does not deny that the instruction here reflects bedrock antitrust law. *Socony*, 310 U.S. at 218. He does not deny that lack-of-harm evidence is irrelevant in price-fixing cases. *Joyce*, 895 F.3d at 677-78. And he does not deny that the prosecution can frame its closing arguments around the jury charge, particularly when as here it is legally correct and the jury was told that "arguments by the lawyers are not evidence" (1-ER-7). *United States v. Scott*, 789 F.2d 795, 800 (9th Cir. 1986) ("[C]ounsel are

entitled to argue to the jury the law that will be encompassed in the instructions."). That Lischewski wishes the law were otherwise does not warrant reversal.

Lischewski's remaining assertions fail similarly. Even if a shorter per se charge would have been "enough" (Br.48), "the mere fact that an instruction is repetitive is not a basis for reversal, as long as the legal principles it enunciates are correct." *Lewy v. S. Pac. Transp. Co.*, 799 F.2d 1281, 1299 (9th Cir. 1986) (citing *Gebhard v. United States*, 422 F.2d 281, 288-89 (9th Cir. 1970) (similar)). Further, the government never "accused Lischewski of 'st[ealing] a few cents at a time'" from "the jurors" (Br.32), and this Court does "'not lightly infer'" the "'most damaging meaning'" from a prosecutor's remarks or "'that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" *United States v. Leon-Reyes*, 177 F.3d 816, 822-23 (9th Cir. 1999) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)).

Nor has Lischewski shown plain error given his failure to cite *any* decision of *any* court supporting his theories. That is reason enough to affirm, *see Christensen*, 828 F.3d at 789-90, particularly since all controlling authority squarely forecloses Lischewski's challenges. *Supra* pp.41-42. *See FTC v. Superior Ct. Trial Lawyers*, 493 U.S. 411, 434 (1990) ("Every such horizontal arrangement among competitors poses some threat to the free market.").

3. Lischewski shows neither prejudice nor a miscarriage of justice

Lischewski has also shown no prejudice, let alone a miscarriage of justice. The jury was told that price-fixing conspiracies are "illegal, *without consideration* of the precise harm they have caused," and that, "if you find that the government has met its burden with respect to each of the elements of the charged offense," then "you need not be concerned with" the "*harm, if any,* done by" the conspiracy. 1-ER-18 (emphases added). By separating the concept of "harm" from "the elements of the charged offense," the instructions made clear that liability did not depend on "harm," and nothing the government argued in closing changed that instruction. *See United States v. Begay*, 673 F.3d 1038, 1046 (9th Cir. 2011) (en banc) ("[A]n instruction carries more weight than an argument.").

Moreover, Lischewski proffered no evidence at trial that the conspiracy charged in the indictment was competitively benign nationwide. Instead, on the day of opening statements and after months of pretrial proceedings, Lischewski filed a document asserting only that his scheme had "no actual impact" if the "relevant market" were defined as "geographically limited" submarkets for "ready-to-eat proteins." 3-ER-565-70. But because market definition is unnecessary in price-fixing cases, *Trial Lawyers*, 493 U.S. at 430-31, Lischewski's assertions could not show that the charged conspiracy "caused no harm" (Br.48), much less that he did not agree "to fix prices," as the jury rightly found (2-ER-112).

For similar reasons, Lischewski cannot show that the district court's rulings threaten the fairness, integrity or reputation of the judicial system. "If the hypothetical retrial is certain to end in the same way as the first one, then refusing to correct an unpreserved error will, by definition, not result in a miscarriage of justice." *Singh*, 979 F.3d at 728. That rule applies here with particular force considering Lischewski agreed that price fixing is harmful (12-SER-2938-39); he disclaimed any "intention of introducing so-called 'justification and effects' evidence" (15-SER-3391-96; 15-SER-3426-29); and the evidence at trial established that list-price increases result in "a higher cost on shelf from both a regular retail and promotional perspective" (5-SER-1024). Lischewski accordingly cannot make the "case-specific and fact-intensive" showing necessary to obtain discretionary plain-error relief. *See Puckett*, 556 U.S. at 142.

III. THE DISTRICT COURT SOUNDLY EXERCISED ITS DISCRETION IN ADMITTING CURTO'S AND TUZA'S EMAILS

A. Evidentiary Rulings Are Reviewed For Abuse Of Discretion

Evidentiary issues are reviewed for abuse of discretion, giving "wide latitude to the trial judge" who "is in the best position to assess the impact and effect of evidence based upon what he perceives from the live proceedings." *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995). No such ruling warrants reversal if "it is more probable than not" it "did not materially affect the jury's verdict." *United States v. Fernandez*, 388 F.3d 1199, 1256 (9th Cir. 2004).

B. Renato Curto's Email Was An Admissible Business Record Under Rule 803(6)

The district court properly exercised its discretion under Rule 803(6) in admitting Renato Curto's (Tri Marine) email memorializing Lischewski's admission of collusion with StarKist. 5-ER-848 ("His people and SK people are talking constantly and have a good communication about how to go to market intelligently."). Emails qualify as business records under Rule 803(6) when (1) they are kept in the course of a regularly conducted business activity and made as a regular practice, (2) they are written at or near the time of the event, and (3) the opponent fails to show they are untrustworthy. Fed.R.Evid.803(6); *see* 30B Wright & Miller, Fed. Prac. & Proc. §6864 (2020 ed.) ("An email can qualify for admission under Rule 803(6).").[4] Here, the district court admitted Curto's email as a business record only after redacting certain passages, allowing Lischewski to voir dire Curto outside the presence of the jury, and finding the requirements of Rule 803(6) met. 5-SER-1091-1102. That was a sound, legally proper exercise of discretion.

[4] Although email was at one time "less of a systematic business activity," *Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994), courts now recognize that "an email can qualify as an admissible record of a regularly conducted business activity as long as the proponent satisfies the requirements of Rule 803(6)." *United States v. Daneshvar*, 925 F.3d 766, 777 & n.3 (6th Cir. 2019) (excluding emails where proponent "did not offer a qualified witness"); *see United States v. Cone*, 714 F.3d 197, 219-20 (4th Cir. 2013) (finding no reversible error in admitting emails that did not, "on this record," satisfy Rule 803(6)).

1. Curto's email satisfied the requirements of Rule 803(6)

The district court correctly found that Curto's email satisfied Rule 803(6). ***First***, Lischewski's own case law confirms Curto's email was "kept in the 'regular course' of a business activity" and "made pursuant to established procedures." *United States v. Foster*, 711 F.2d 871, 882-83 (9th Cir. 1983). In *Foster*, this Court rejected the argument that an "incomplete" drug ledger was not "kept in the course of a regularly conducted business activity." *Id.* The Court reasoned that, because the ledger's author "kept a record of most of her large drug transactions" as a "regular practice," it was "made pursuant to established procedures for the routine and timely making and preserving of business records." *Id.*

So too here. Curto testified that Tri Marine's regular practice was to "memorialize" client meetings (1-ER-75-76); Curto "consider[ed] it part of [his] job" to write such emails (1-ER-81-82); and Tri Marine and Curto retained such emails for future reference (1-ER-77-78). This evidence amply supports the district court's findings that Curto's email was created and retained as part of Tri Marine's regular business activities and its "clear practice of making these kinds of e-mail memorializations." 1-ER-82. While Lischewski fixates (Br.53) on the words "policy" and "business duty," neither term appears in Rule 803(6), and such labels are not talismanic. *Keogh v. Comm'r*, 713 F.2d 496, 499 (9th Cir. 1983) (admitting

financial diary kept for "occupation"); 30B Wright & Miller, §6864 ("Even records prepared independently by employees at their own direction can qualify.").

Second, Lischewski asserts (Br.51) that Curto "did not write the email 'at or near the time' of the conversation." But he never raised this issue below (3-ER-504-05), and cannot do so "for the first time on appeal." *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). Besides, Curto wrote the email *one day* after meeting with Lischewski, and Rule 803(6) has been held to encompass "an eleven-day interval," *Wheeler v. Sims*, 951 F.2d 796, 804 (7th Cir. 1992), and even several weeks, *see United States v. Huber*, 772 F.2d 585, 591 (9th Cir. 1985). Lischewski cites no authority for treating a single day differently.

Lischewski insists (Br.51-52) one day is too long here because "no evidence" suggests Curto jotted down notes immediately after the meeting. But Rule 803(6) requires no immediate "scribbling" (Br.52), and Curto testified that he customarily noted the "most important points" from each meeting at the end of the day, and based his "memo" on those notes. 1-ER-76-77. This evidence bolsters the district court's finding that Curto's email had an "assurance of reliability and accuracy" for purposes of "the nearness-in-time requirement." 1-ER-83; *see* 5-SER-1088. Lischewski's reliance (Br.52) on equivocal testimony elicited *after* the email was admitted cannot undermine the court's sound, threshold admissibility ruling.

Finally, Lischewski did not show that the email was untrustworthy. District courts have "wide discretion in determining whether a business record meets the trustworthiness standard." *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999) (quotations omitted). Because "inaccuracies, ambiguities, or omissions go to the weight and not the admissibility of the evidence," business records need only be "trustworthy for what they are"—they need not be proven "accurate before they are admitted." *Id.* at 978-79 (finding "crude" estimates of "questionable accuracy" trustworthy). That is particularly so when the recordkeeper relies upon it for future reference. *Foster*, 711 F.2d at 882-83 (finding drug ledger trustworthy despite "several blank pages and unrelated entries" because its author "had to rely on the entries," and thus had no reason to "distort or falsify them").

Here, Curto had no reason to falsify the statements of his friend and client, Lischewski. Rather, Curto's email had to be accurate because "it's important that everybody" at Tri Marine "is informed what was happening" (1-ER-75), and because Curto himself relied on such emails to "help me remember what I talk about" (1-ER-77). *See Foster*, 711 F.2d at 882-83. Lischewski's arguments (Br.54) about accuracy and Curto's memory go to *weight*, not admissibility, and they are meritless anyway because Curto testified that the email "was meant to reflect my understanding and my recollection of what was said" and that the email captured "my recollection" (3-ER-498-99). *See Scholl*, 166 F.3d at 978-79.

2. Curto's email did not materially affect the verdict

The conviction should be upheld regardless because Curto's email was far from the only direct proof that Lischewski knowingly participated in the conspiracy. *See Fernandez*, 388 F.3d at 1256. Worsham testified that Lischewski "knew everything" (7-SER-1540), and Cameron confirmed that Lischewski directed him to "[m]ake contact, wave the white flag, signal a truce" with StarKist (2-SER-532). *Supra* pp.5-11.

Lischewski nevertheless asserts (Br.54) that Curto's email contained "one of few" statements from him that "even arguably supported an inference that he was aware of collusion with StarKist." Yet the record shows otherwise:

- Lischewski authored the "[p]eace proposal" that laid the groundwork for a price-competition truce with StarKist. 4-ER-707; 2-SER-531-42.

- Lischewski admittedly directed Cameron "to gain information" that was not yet public about "what StarKist would be doing in the future" "[a]bout increasing prices" (12-SER-2972-74), writing in 2011: "What is SK planning to do???" "But will they announce a price increase? And how soon?" "I thought you said SK was indicating a price increase." 15-SER-3465-66.

- Lischewski admonished Cameron and Worsham in writing in 2011 that he "won't accept" any "show of aggressiveness" on prices now that StarKist "has put out a white flag," and he ordered them to "come up with a plan that protects us." 15-SER-3471; 7-SER-1654-58; 3-SER-640-42.

- Lischewski told Worsham to "'[m]ove forward'" with bringing Hodge into the StarKist collusion. 7-SER-1652-54.

- Lischewski ordered Cameron to "'[k]eep trying'" to get StarKist "'to see the light'" and agree to match Bumble Bee's exact price on solid-white tuna for the March 2011 list-price agreement. 3-SER-593.

- Lischewski approved the price fixing with StarKist by telling Cameron and Worsham "'Good job'" (3-SER-592); "Good plan" (7-SER-1689-90); "'Got it. Go for it. Move on.'" (7-SER-1605); and "'Got it. Go for it. Understood.'" (7-SER-1607).

- Lischewski demanded assurance from Cameron that "we are NOT being aggressive on the Kroger bid" in response to queries from Joe Tuza at StarKist (15-SER-3470), and Lischewski then "clos[ed] the loop with Tuza" by telling him the exact price of Bumble Bee's bid (13-SER-3000; 15-SER-3520).

Because this evidence establishes Lischewski's knowing participation in the conspiracy with Starkist, Curto's email did not materially affect the verdict.

The same would be true even if Curto's email were the *only* evidence on this point, because Lischewski's agreement with Chan (COS) by itself rendered him liable for the entire conspiracy, as did his role in Worsham's collusion with White (COS), *supra* pp.5-11. Once "a conspiracy is established, evidence of only a slight connection is necessary to support a conviction of knowing participation." *Grovo*, 826 F.3d at 1216. Defendants need not have "participated in all its enterprises" or "known all its details." *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001). Here, by participating in the conspiracy through COS, Lischewski became a full-fledged conspirator under this Court's decisions regardless of whether "he was aware of collusion with StarKist" (Br.54).

C. Joe Tuza's Email Was Admissible For The Limited Purpose Of Showing A Co-Conspirator's State Of Mind

The district court did not abuse its discretion in allowing Hodge (StarKist) to testify to his state of mind regarding Joe Tuza's email. 1-ER-50-53. Tuza was Hodge's colleague at StarKist, and after confronting Lischewski about Bumble Bee's bidding with Kroger in 2011, Tuza emailed Hodge: "According to C.L. [Lischewski] If BB went back to Kr[o]ger someone 'is going to be fired.'" 5-ER-831; 1-ER-50. Admitting this email as nonhearsay was not an abuse of discretion, much less reversible error, especially given the district court's clear, repeated limiting instructions.

1. Tuza's email was offered for a relevant, nonhearsay purpose, and was admissible, in any event, under Rule 801(d)(2)

Out-of-court statements are hearsay only when used for their truth, not for "state of mind." *United States v. Sayetsitty*, 107 F.3d 1405, 1415 (9th Cir. 1997). Lischewski admits (Br.26,55) that the district court "declined to admit" Tuza's email for its truth. The email was admitted only so that Hodge, a "coconspirator[]" who received it (1-ER-56), could testify that he understood it to mean that the conspiracy continued and that Lischewski would terminate the Bumble Bee employee responsible for the Kroger bid (6-SER-1396). Because Hodge was "reporting what he heard someone else tell him for the purpose of explaining" *his own* "thinking," his testimony was not hearsay. 30B Wright & Miller, §6719 (explaining that, "even

when the testifying witness relates out-of-court statements to explain his own state of mind," such testimony is not hearsay) (quotations omitted).

Despite acknowledging the relevance of "the state of mind of Handford and Hodge" below (1-ER-67; 6-SER-1459), Lischewski now asserts that "[n]o one cared about" Hodge's state of mind and that the email's "inculpatory statement" was its "only" value (Br.56-58). Not so. The government had to prove "that the charged price-fixing conspiracy existed" (1-ER-16), and Lischewski argued that no conspiracy existed (Br.26-27). Hodge's state of mind was relevant on both scores because, even if Tuza's email were false, Hodge's belief that the email indicated the conspiracy's continuation made the government's case more likely to be true, and Lischewski's defense less likely to be true. *See United States v. Johnson*, 875 F.3d 1265, 1279 (9th Cir. 2017) (admitting nonhearsay "relevant to rebutting [defendant's] theory").

In any case, Tuza's email was admissible under Rule 801(d)(2). *See United States v. Colorado City*, 935 F.3d 804, 813-14 (9th Cir. 2019) (affirming evidentiary rulings on alternate grounds). Statements "made to 'reassure' members of a conspiracy's continued existence" are admissible coconspirator statements under Rule 801(d)(2)(E). *United States v. Yarbrough*, 852 F.2d 1522, 1535-36 (9th Cir. 1988); *United States v. Mason*, 658 F.2d 1263, 1270 (9th Cir. 1981) (Kennedy, J.) ("Statements of reassurance ... are in furtherance of a conspiracy."). And statements

"offered against Defendant" as "his own statement" are admissible under Rule 801(d)(2)(A). *United States v. Pelisamen*, 641 F.3d 399, 410 (9th Cir. 2011).

Here, the district court found "by a preponderance of the evidence a price-fixing conspiracy and Defendant's participation in the conspiracy." 15-SER-3455; 15-SER 3452-53. The court also found that Tuza was "a coconspirator"; his email was sent in "May 2011" during the conspiracy; and the statement that "Defendant will fire someone" was attributed to Lischewski. 1-ER-55-56. The court further noted that "[s]tatements of reassurance" about "a conspiracy's continued existence" are "in furtherance of the conspiracy" (15-SER 3454) (quotations omitted), which precisely describes Tuza's email (*see* 6-SER-1396). Hence, while the district court did not rely on Rule 801(d)(2), the record supports the admission of Tuza's email as a coconspirator statement and Lischewski's remark as a party admission.

2. The district court's trial-management decisions were sound and its limiting instructions effective

Lischewski's complaints about the use of Tuza's email (Br.54-59) are in actuality attacks on the district court's management of the trial and its limiting instructions. His contentions fail at every turn. *See United States v. Larson*, 495 F.3d 1094, 1102 (9th Cir. 2007) (en banc) (emphasizing trial courts' broad "discretion to manage the presentation of evidence").

When the government first questioned Hodge about the email, the court instructed the jury, at Lischewski's urging, that the email was admitted for the

"limited purpose" of showing Hodge's "state of mind," not "to show the defendant's state of mind or the fact that he made any particular statement." 1-ER-48-50. When Hodge testified about his state of mind, the court repeated that admonition: "[A]gain, I'm going to instruct the jury that that statement is not being admitted for the truth." 6-SER-1396. When the government mentioned Hodge's testimony in closing, the court obliged Lischewski's request for "a reminder that this e-mail was admitted for purposes of going to the state of mind of those participants in the e-mail and not to prove the truth of any matter asserted in it." 2-ER-137. The court's final charge further stressed that, "when I have instructed you to consider certain evidence in a limited way, you must do so." 1-ER-7.

Lischewski now contends (Br.58-59) these instructions were inadequate and required jurors to perform "mental acrobatics." Yet Lischewski requested each instruction and never asked the court to modify them. Nor did he object to the only arguable use of Tuza's email as hearsay, during the government's opening statement (Br.54-55), which occurred five weeks before the jury retired to deliberate and immediately after it was instructed that "[a]n opening statement is not evidence" (3-ER-573). Insofar as his remaining contentions depend on the limiting instructions' being flawed, those contentions are reviewed for plain error. *United States v. Paulino*, 445 F.3d 211, 216 n.1 (2d Cir. 2006) (applying plain error where defendant "did not request that the district court expand on or clarify its limiting instruction").

Lischewski's claims fail under any standard. The district court did not abuse its discretion in allowing the government to ask Hodge "about the meaning of Lischewski's alleged statement" (Br.56) because Hodge testified only about his perception of Tuza's email, not whether Lischewski made any statement. 6-SER-1395-96. The court also correctly rejected Lischewski's assertion (Br.56) that the government tried to "maximize the amount of time" Tuza's email was displayed during Hodge's testimony: "I was very explicit with the jury more than once, and I actually said that part of the email is not admissible for the truth to determine whether or not Mr. Lischewski actually made those statements." 1-ER-51-52. Given its firsthand familiarity with the trial, evidence, and jury, the district court was in the best position to know that its contemporaneous limiting instructions "were sufficiently cautionary and curative" (1-ER-52). *See* 21A Wright & Miller, Fed. Prac. & Proc. §5066 (2d ed. Oct. 2020) ("[L]imiting instructions operate most effectively when given simultaneously with the relevant evidence.").

Nor did the court abuse its discretion in allowing the government to display Tuza's email while cross-examining Lischewski. *See United States v. Berber-Tinoco*, 510 F.3d 1083, 1093 n.3 (9th Cir. 2007) (emphasizing trial courts' "wide discretion" over "scope of cross-examination"). Lischewski testified on direct about the events surrounding Tuza's email (12-SER-2811-18), and he admits the "government was free to ask [him] if he had told Tuza that someone was going to be

fired" (Br.57). The district court thus correctly found that the government "d[id] not cross the line." 2-ER-238. Displaying Tuza's email, and recessing after Lischewski's said he did not "recall" making such a statement (2-ER-235), hardly suggests "the jury went home with the email fresh in its mind" (Br.57), or that "jurors unavoidably considered Tuza's email for its truth" (Br.59).

The district court also properly allowed the government to argue in closing about "how Steve Hodge understood these words" that "Joe Tuza wrote" (2-ER-138). *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1150 (9th Cir. 2012) ("The trial Judge has broad discretion in controlling closing argument."). Contrary to Lischewski's assertions (Br.57), the government never "used Tuza's email for its truth" in closing. Indeed, given the limiting instruction that preceded it, the government's argument could not "camouflage" (Br.58) hearsay unless the jury willfully ignored the court's admonitions to consider Tuza's email only for Hodge's "state of mind" (2-ER-137). *Zafiro v. United States*, 506 U.S. 534, 540 (1993) ("[J]uries are presumed to follow their instructions."). Lischewski offers no sound reason to think the jury disregarded those instructions.

3. Tuza's email did not materially affect the verdict

The Court should affirm Lischewski's conviction regardless. Putting Tuza's email aside, the record is replete with inculpatory statements by Lischewski—in the testimony of direct witnesses, in documentary evidence written by Lischewski

himself, and in Lischewski's own implausible testimony, which the jury was "entitled to" reject and take "as affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992); *see Scholl*, 166 F.3d at 979. For example:

- Lischewski admittedly sought "peace" with his competitors, such that "no one's attacking" and "everybody steps back and says we're going to accept the market shares we've historically had," while also admitting that competitors "attack" each other "with price" (11-SER-2712-13), and that "market share comes out of competition" (13-SER-3027).

- Lischewski admittedly (Br.18-19) was "peppering" Chan with emails during the conspiracy to complain about COS's "aggressive strategy" on pricing. 5-ER-832-45.

- Lischewski complained in writing about "rampant cheating" during the conspiracy. 15-SER-3476-77.

- Lischewski admittedly discussed COS's pricing "strategy" with Chan and "thank[ed]" Chan for assuring him that COS would not be "'aggressive'" in its price promotions. 12-SER-2906-07.

- Lischewski admittedly altered an email about COS's pricing (13-SER-3021-24), concealing his collusion with Chan by changing the phrase "He [Chan] told you guys he will be aggressive" (15-SER-3513) to "He [Chan] will continue to be aggressive" (15-SER-3510), and by deleting entirely: "He [Chan] told you guys simething [sic] then he acted as what he said but he can not judge if you guys acted as what you said" (15-SER-3513).

- Lischewski boasted about his "aggressive," "hands on" "management style" (15-SER-3456), yet claimed to have "no idea" his subordinates were conspiring to fix prices (11-SER-2684).

- Lischewski admitted that "[i]t's possible" his employees provided him non-public pricing information from competitors, and that this "may have happened occasionally." 12-SER-2964.

- Lischewski threatened Cameron not to cooperate with the government: "'The company has got your back to a point, as long as you and Kenny don't fuck it up.'" 3-SER-674-75.

This evidence confirms that Tuza's email did not materially affect the verdict. *See Mikhel*, 889 F.3d at 1049-50, 1059 n.27 (affirming where alleged hearsay was "merely a drop in an ocean of more probative evidence").

Reinforcing this conclusion are the district court's limiting instructions. *United States v. Thornhill*, 940 F.3d 1114, 1123 (9th Cir. 2019) (finding evidence harmless given limiting instruction). Lischewski admits (Br.58) that such instructions are "a useful tool," yet he cobbles together various cases to argue they are "not a sure-fire panacea" if the facts are "readily subject to misinterpretation." But Hodge's testimony was clear—he explained his perception of Tuza's email (6-SER-1396)—and Lischewski made no effort to challenge Hodge's explanation on cross. The cases Lischewski selectively quotes (Br.58) involved plainly inadequate or prejudicial instructions; out-of-court statements relevant only for their truth on a central issue that could not otherwise be proven; or evidence that was unfairly prejudicial or unconstitutional.[5] None of those decisions casts doubt on the district court's clear, cautionary instructions here.

[5] *United States v. Gomez*, 617 F.3d 88, 96 (2d Cir. 2010) (limiting instruction "did not cover the most damaging portion"); *United States v. Hearn*, 500 F.3d 479, 483-85 (6th Cir. 2007) (Confrontation Clause); *United States v. Haywood*, 280 F.3d 715, 723-25 (6th Cir. 2002) ("highly prejudicial evidence" of drug possession);

IV. LISCSHEWSKI'S "CUMULATIVE EFFECT" THEORY FAILS

Lischewski's failure to identify any error forecloses his "cumulative effect" theory. *Begay*, 673 F.3d at 1047 (finding "no cumulative prejudicial effect" without "any error below"). That is especially true given the overwhelming proof of Lischewski's guilt. As his own cases show (Br.59), a "conviction will generally be affirmed" under the cumulative-error doctrine when "the evidence of guilt is otherwise overwhelming." *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007).

The record here includes documentary evidence of Lischewski's participation in the conspiracy and the corroborated testimony of multiple coconspirators confirming his participation. *Supra* pp.4-13. It also includes Lischewski's inculpatory admissions at trial that he sought to achieve "peace" with competitors, that on multiple occasions he discussed pricing strategy with Chan (COS), and that he ordered Cameron to obtain nonpublic information about future StarKist price increases. *Supra* pp.50-51,58-59. This evidence confirms that, even had Lischewski shown multiple errors, they would not have affected the outcome of the trial, individually or cumulatively. *See Fernandez*, 388 F.3d at 1257 (finding "the

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United States v. Hill, 953 F.2d 452, 458 (9th Cir. 1991) (limiting instruction "underscore[d] the prejudicial aspect of the testimony"); *United States v. Prescott*, 581 F.2d 1343, 1352 & n.3 (9th Cir. 1978) (recognizing "as an alternative to excluding evidence," it "can be admitted with an appropriate limiting instruction").

cumulative effect" of preserved and unpreserved errors "harmless" when "it is more probable than not that, taken together, they did not materially affect the verdict").

CONCLUSION

This Court should affirm the judgment of conviction.

STATEMENT OF RELATED CASES

The United States is not aware of any related cases before this Court.

December 28, 2020

Respectfully submitted,

/s/ Bryan J. Leitch

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on December 28, 2020, I electronically filed the foregoing brief by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Bryan J. Leitch
Bryan J. Leitch

STATUTORY AND RULES ADDENDUM

TABLE OF CONTENTS

15 U.S.C. § 1. Sherman Act, Section 1

Every 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, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

CREDIT(S)
(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Pub. L. 93-528, § 3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 94-145, § 2, Dec. 12, 1975, 89 Stat. 801; Pub. L. 101-588, § 4(a), Nov. 16, 1990, 104 Stat. 2880; Pub. L. 108-237, Title II, § 215(a), June 22, 2004, 118 Stat. 668.)

Federal Rule of Criminal Procedure 30

Rule 30. Jury Instructions

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

CREDIT(S)
(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Apr. 29, 2002, eff. Dec. 1, 2002.)

Federal Rule of Criminal Procedure 52

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

CREDIT(S)
(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Federal Rule of Evidence 801(d)

Rule 801(d) Statements That Are Not Hearsay

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

CREDIT(S)
(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1938; Pub. L. 94-113, § 1, Oct. 16, 1975, 89 Stat. 576; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 25, 2014, eff. Dec. 1, 2014.)

Federal Rule of Evidence 803(6)

Rule 803(6) Records of a Regularly Conducted Activity

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(6) A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

CREDIT(S)
(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939; Pub. L. 94-149, § 1(11), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 13, 2013, eff. Dec. 1, 2013; Apr. 25, 2014, eff. Dec. 1, 2014; Apr. 27, 2017, eff. Dec. 1, 2017.)