20-3594-cr

IN THE
United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AKSHAY AIYER,
Defendant-Appellant.

On Appeal from the
United States District Court for the Southern District of New York
Case No. 1:18-cr-333 (Hon. John G. Koeltl)

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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RULE 26.1(b) DISCLOSURE STATEMENT

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

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

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INTRODUCTION

A general tenet of antitrust law is that rivals are supposed to compete, not coordinate. To this end, Sherman Act Section 1, 15 U.S.C. § 1, categorically prohibits competitors from agreeing not to compete on pricing—for example, through price fixing or bid rigging. This per se rule of illegality applies regardless of whether the agreement covered only a portion of the market, whether there were actual anticompetitive effects, and whether the participants' motivations were good or bad.

Akshay Aiyer traded foreign currencies for a major bank. He and a group of three traders at different banks—Chris Cummins, Jason Katz, and Nic Williams—agreed that, instead of competing, they would coordinate their pricing for certain currency pairs, such as the U.S. dollar (USD)-South African rand (ZAR). The object "of not competing with each other . . . was kind of an undercurrent that would just be there on a constant basis." GSA157:9-11 (Katz). Once, when Aiyer perceived the conspiracy to be particularly successful, he congratulated the other participants, saying "salute to first coordinated zar effort." GSA450. Another time, Aiyer laughed when Katz commented,

"conspiracies are nice," and responded that they "prolly shudnt puot this on perma chat." A1133.

Aiyer was charged with conspiring to fix prices and rig bids for foreign currencies. He argued that his conspiracy with competitor-traders was not a per se Section 1 violation because their coordination did not have anticompetitive effects and, in any event, he was unaware that it likely would have anticompetitive effects. Aiyer also argued for what amounted to a freestanding "productivity" defense, claiming that his competitive-effects evidence provided justification for his conduct—and that the court should have evaluated it before allowing the government to try the case under the per se rule.

The district court correctly rejected both arguments. On substantive grounds, the court recognized the antitrust principle—applicable to civil and criminal cases alike—that a defendant cannot make arguments prohibited by Section 1's per se rule to claim that the rule should not apply. On procedural grounds, after concluding that the restraint charged in the indictment was properly subject to the per se rule, the court rightly declined to hold a mini bench trial to evaluate

inadmissible economic evidence or to preclude the government from proving the charged offense to the jury.

At the conclusion of trial, during which both Cummins and Katz testified about their and Aiyer's participation in the conspiracy, a correctly instructed jury found Aiyer guilty of violating Section 1. The district court confirmed that the verdict was supported by "overwhelming evidence" that "proved that the defendant participated in the conspiracy to fix prices and rig bids as alleged," A1669—a finding Aiyer does not challenge on appeal.

After the verdict, Juror 6 wrote to the district court, claiming to have heard Juror 3 make comments during trial about possible outside research. Separately, defense counsel disclosed that Juror 4 had published podcasts during trial in which he complained about jury service. The court interviewed Juror 3 and determined that he had not conducted outside research and, even if he had looked up an attorney's picture online as Juror 6 wrote, that information would not influence a typical juror. The court also listened to the challenged podcasts and determined Juror 4 had not engaged in misconduct.

In sum, the district court correctly concluded that the government, having charged a per se offense, could try a per se case to the jury. The court correctly declined to engage in impermissible pretrial factfinding or to allow the defense to present evidence that the per se rule prohibits. And the court acted well within its broad discretion when it investigated post-verdict allegations of possible juror misconduct, finding no prejudicial misconduct occurred. This Court should affirm.

STATEMENT OF THE ISSUES

1. Whether, after determining that the government had charged a per se offense, the district court correctly concluded that the government could try a per se case to the jury.

2. Whether the district court acted within its discretion when it excluded part of Aiyer's competitive-effects evidence because it was irrelevant or, if relevant, substantially more prejudicial than probative.

3. Whether the district court acted within its discretion when conducting its post-verdict investigation of possible juror misconduct—reviewing the allegations of possible misconduct, interviewing one juror accused of conducting outside research, listening to the podcasts of

another juror accused of talking about the case during trial, and satisfying itself that no prejudicial misconduct occurred.

STATEMENT OF THE CASE

A jury convicted Aiyer of violating Section 1 of the Sherman Act, 15 U.S.C. § 1. The district court sentenced Aiyer to eight months of imprisonment, ordered two years of supervised release, and assessed a $150,000 fine. SPA2-3. Aiyer appeals only his judgment of conviction, A1663, and is currently released on bail.

I. Legal Background

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

Section 1 encompasses two different rules for determining whether a particular restraint is illegal. The first is the "per se rule," which recognizes that the Sherman Act deems some restraints categorically illegal due to their inherent nature rather than their demonstrated anticompetitive effect in a particular case—for example,

agreements among actual or potential competitors to fix prices or rig bids. *E.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981). The second is the "rule of reason," which "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 343 (1982).

This case involves price fixing and bid rigging. Price fixing is an agreement among actual or potential competitors "not to compete in terms of price or output." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 51 (2d Cir. 2010) (citation omitted). "[B]id rigging is a form of horizontal price fixing." *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018); *accord* A966:7-8 (defense counsel). It is "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982); *accord United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992); *see also Koppers*, 652 F.2d at 292-93 (describing conspiracy).

II. Factual And Procedural Background

A. Pretrial Proceedings

A grand jury returned an indictment charging Aiyer with one count of conspiring to restrain trade in violation of 15 U.S.C. § 1. A33. The indictment alleged that Aiyer and his co-conspirators "were competitors in the trading of CEEMEA [Central and Eastern Europe, the Middle East, and Africa] currencies with customers and in the interdealer market"; and that Aiyer "knowingly entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing prices of, and rigging bids and offers for, CEEMEA currencies," a per se violation of Sherman Act Section 1. A38-A39.

Aiyer moved to dismiss those portions of the indictment that described "behaviors" he contended did "not, as a matter of law, constitute crimes because they are not per se antitrust violations." A55. The district court denied the motion. It declined to consider the particular means and methods of the conspiracy individually because "[t]he indictment properly alleges a single overarching conspiracy," A191:9-10; and "[e]ach act committed by a coconspirator in furtherance

of the conspiracy need not be criminal in and of itself," A191:18-19; *see* A155:13 (Aiyer's counsel agreeing: "For sure."). The court further ruled: "The indictment alleges that the defendant conspired to suppress and eliminate competition by fixing prices of and rigging bids and offers for CEEMEA currencies. That is sufficient to state a per se violation of the Sherman Act." A192:10-14.

Both sides filed motions in limine, which the district court granted in part and denied in part. Among other things, the court granted the government's "motion to exclude evidence of pro-competitive effects of price fixing and bid rigging . . . without prejudice" to the parties' ability to raise the issue at trial. A315:13-16. The court recognized that "the defendant should not be able to argue that the pro-competitive effects of horizontal bid rigging or price fixing make such practices legal," A314:22-25, but also noted that the "evidence may be admissible for another purpose, such as to show the lack of intent by the defendant to enter into an agreement to fix prices or rig bids," A315:1-3. Because neither side had "articulated the specific evidence that is the subject of this motion," the court deferred ruling on specific evidence until trial. A315:9-10.

The district court denied without prejudice the government's motion "to preclude the defendant from raising a 'joint venture' defense pursuant to which the alleged price fixing and bid rigging were simply ancillary restraints." A315:19-22; *see* A317:21-23. The court stated that it could not make a final ruling on the motion "[w]ithout a specific proffer of the potential evidence that is sought to be excluded." A317:19-20. The court also declined to "hold a pretrial hearing to determine if there is sufficient evidence to support the existence of a joint venture," accepting Aiyer's argument that "such a pretrial hearing would be immensely inefficient." A317:4-9.

In addition, the district court denied Aiyer's motion "to exclude evidence of coordinated trading in the interdealer market or coordinated ruble pricing between the defendant and alleged coconspirator Katz." A330:2-4; *see* A331:7. The court noted that even the defense "acknowledges that there is no basis at this time" to grant the motion, A330:1-2, but confirmed also that the "defense is of course free to raise any arguments it wishes in the course of the trial," A330:9-10.

B. Aiyer Is Proved Guilty.

In closing argument, Aiyer's counsel recognized that there is "very little dispute between the parties about what the rand chat room participants said and what they did, including the trading activity they engaged in." GSA285:16-19. And after Aiyer was found guilty, the district court confirmed that the conviction was supported by "overwhelming evidence" that "proved that the defendant participated in the conspiracy to fix prices and rig bids as alleged." A1669.

1. Foreign-Exchange Market

The foreign-exchange (FX) market is "part of the capital markets where people exchange one currency for another currency." GSA3:8-10 (Dr. David DeRosa, economist). "Dealers" in the market "are mostly very large, well-capitalized banks" that "stand[] ready to buy or sell foreign exchange upon demand." GSA15:4-8. The interbank (or interdealer) market "is a part of the foreign exchange market" and describes "when the major dealers trade with each other." GSA24:13-16.

In the FX market, "everybody is a competitor," GSA42:3 (DeRosa), and each bank "is always a buyer and a seller at all times," GSA30:24.

Banks compete for the transaction business of large institutional customers, as well as for the most advantageous interbank trades. GSA31:18-GSA32:1. For both, "[i]t's all about price." GSA31:22; *accord* GSA19:1-23. The rate at which banks transact with customers is determined by the customer's selection of the bank offering the best exchange rate, GSA36:16-17, and the rate at which traders exchange currencies is determined by supply and demand, GSA6:25-GSA7:4, GSA7:23-GSA12:15.

Banks trade foreign currencies directly, through brokers, or through an electronic "broking" system such as the Reuters matching system. GSA25-GSA32 (DeRosa). Reuters is an online platform that allows traders to input proposed FX currency purchases (bids) or sales (offers or asks) and to accept other traders' proposals. GSA57:4-GSA61:12 (Cummins); GSA145:17-GSA146:2 (Katz). It also displays the best prices currently on the platform and the most recent trades—which give traders "an idea of which way the market may potentially go." GSA148:12-13 (Katz); *accord* GSA60:15-16 (Cummins); GSA147:8-GSA150:2 (Katz).

Outside of Reuters matching, when a customer, broker, or other trader solicits a price quote from a trader, that person typically asks for a two-way price (spread), meaning both the buy and the sell price. GSA15:8-10 (DeRosa); GSA113:4-24 (Cummins). The person requesting the quote identifies only the currency pair they are interested in exchanging and the quantity they want to trade. GSA25:11-18, GSA27:1-4 (DeRosa). They do not disclose their position—that is, whether they want to buy or sell—because that information might skew the trader's quote. GSA26:5-25. Indeed, when asked whether traders' disclosure of their positions would facilitate a trade between them, Dr. DeRosa responded: "I cannot see one good reason for doing that." GSA41:12; *see also* GSA64:14-19 (Cummins would not normally give his position or customer information to a rival).

Often, customers approach multiple banks for a price quote. GSA124:20-24 (Amy Flynn, Mellon Investments); GSA154:15-23 (Katz); GSA186:8-16 (Denise Simon, Lazard Asset Management). They do so with the expectation that the banks are competing to win their business by showing them the best price. GSA124:25-GSA125:7 (Flynn); GSA187:10-GSA188:10 (Simon). Customers also give banks conditional

orders—such as a stop-loss order to sell a particular currency held by the customer if it hits a certain low price on Reuters. GSA127:1-3 (Rob Davis, Putnam Investments). A stop-loss order is designed to mitigate loss. GSA127:7-17. Customers do not want the stop-loss breached because "at that point we're locking in a loss." GSA128:10-11. Customers give banks stop-loss orders with the expectation that the banks' traders will not move the market against them. GSA132:12-25. As one customer explained, "one of the most fundamental principles of trade execution imaginable" is that traders should "trade in a way that doesn't move the market against the client." GSA130:23-25.

2. Conspiracy

Aiyer and his co-conspirators—Cummins, Katz, and Williams—traded CEEMEA currencies, such as the South African rand (ZAR), the Russian ruble (RUB), and the Turkish lira (TRY). GSA47:8-12, GSA70:2-5, GSA98:8-19 (Cummins); GSA139, GSA162:18-20 (Katz). They worked for rival banks that competed for customers and trades. GSA46:10-GSA49:7, GSA63:7-20 (Cummins); GSA136:7-11, GSA154:15-23 (Katz).

Starting in 2010, Aiyer and Katz—plus Cummins in 2011 and Williams in 2012—agreed not to compete with each other on pricing. GSA50:3-GSA51:3, GSA69:4-GSA71:11, GSA74:11-23, GSA91:13-GSA92:1 (Cummins); GSA135:22-GSA136:11, GSA157:17-GSA158:5 (Katz). The object "of not competing with each other . . . was kind of an undercurrent that would just be there on a constant basis." GSA157:9-11 (Katz). They would coordinate "[w]hen the opportunity manifested itself," GSA157:8 (Katz), often using a real-time interbank chat, GSA54:22-GSA56:12 (Cummins); GSA144:8-21 (Katz); *see also* GSA490 (Cummins: "every man for himself (outside this chat)"). The general mechanics of the conspiracy were as follows: Instead of competing for customers' FX transactions, the conspirators coordinated their price quotes; and instead of competing for the most advantageous trades on Reuters, they coordinated the timing, price, and/or quantity of their bids and offers. *E.g.*, GSA50:4-15, GSA102:19-GSA103:18 (Cummins); GSA135:23-GSA137:3, GSA151:11-GSA152:3, GSA156:16-GSA157:16 (Katz). The conspiracy continued until July 2013, when Katz moved to London. GSA157:17-GSA158:5 (Katz).

The conspirators fixed prices and rigged bids for customer transactions by, as Cummins explained, "discussing pricing that we are all going to provide to the same client," even though "the client is performing a kind of competitive auction." GSA116:12-15. In this way, the conspirators were "remov[ing] the competitive nature of this auction." GSA116:17-18; *accord* GSA156:20-24 (Katz).

For example, on November 4, 2010, Aiyer and Katz realized the same customer was asking them for a USD/RUB quote. GSA166:25-GSA167:3 (Katz). As Katz explained, "once we determined that we were both being asked a price by the same customer, we agreed what bid we were going to show them between the two of us." GSA168:24-GSA169:1. In this instance, they knew that the customer was the seller and therefore was looking for the highest price. GSA168:10-14. Aiyer told Katz "the actual price that he has shown the customer," GSA169:12-13, which—pursuant to their ongoing agreement—Katz explained was a direction to "go with the rate below that, so that he [Aiyer] would win," GSA170:9-10. Katz complied, GSA170:11-13, and Aiyer won the trade, GSA193:17-23 (Ross Waller, FX-trading expert); *see* GSA497-GSA498 (summary). The conspirators then celebrated

their coordination against a customer for whom they should have been competing:

> Katz: conspiracies are nice
> Aiyer: hahaha
> Aiyer: prolly shudnt puot this on perma chat

A1133; *see also, e.g.*, GSA172:17-19 (Katz) (following similar episode, Aiyer called "[t]ricking the customer" in this manner "easy as pie").

The conspirators fixed prices and rigged bids for trades with other dealers by agreeing that they "were going to not compete with each other" on Reuters. GSA153:11 (Katz). They used Reuters to carry out their conspiracy "[b]ecause it was an effective way to signal things to the market." GSA153:3-4.

The conspirators used a variety of coordinated trading behaviors to manipulate the appearance of supply and demand on Reuters, which the government proved through evidence of dozens of different trading episodes demonstrating such behaviors. *See, e.g.*, GSA509 (identifying summary exhibits for 24 episodes). Oftentimes, this coordination included a period of time in which some of the conspirators agreed not to trade on Reuters while one of their co-conspirators was doing so. *E.g.*, GSA153:10-18 (Cummins). For example, on December 12, 2012,

when both Aiyer and Cummins were "interested in buying euros against Czech," GSA106:15-16, and therefore placing bids for the same currency pair on Reuters, Cummins asked Aiyer to "pull that bid," GSA495, meaning "cancel your interest to buy," GSA109:6. Initially, Aiyer did not see that request; when he did, he apologized, telling Cummins "sry." GSA495. Then, Aiyer waited a couple of minutes before asking Cummins: "u out?" GSA495. Cummins confirmed that he was and told Aiyer to "go for it." GSA496; *see* GSA110:14-23 (Cummins); GSA196-GSA197 (Waller); GSA504-GSA506 (summary). Similar conduct took place on September 23, 2011, when Aiyer and Cummins were both trying to buy dollars against the Turkish lira, and Cummins agreed to "pull my bids" because he and Aiyer did not "want to get in front of each other." GSA401; *see* A522:4-A523:9 (Cummins); GSA194:11-GSA195:16 (Waller); GSA499 (summary). Likewise, on May 20, 2013, Aiyer told Katz to "stop runnig this eu4rczk in my dface," A1238, and Katz agreed to "stop buying" so that he "wouldn't push the market against" Aiyer, GSA174:22-23; *see* GSA174:18-GSA179:14 (Katz); GSA197-GSA198 (Waller); GSA507-GSA508 (summary).

Sometimes, the conspirators' coordination of bids and offers on Reuters was designed to impact particular customer orders—for instance, by triggering a stop-loss order. Two or more conspirators would agree to "enter the market and begin selling at the same time in order to push the market lower." GSA119:15-17 (Cummins). By trading in this manner, the conspirators were "lock[ing] in a loss for" the customer. GSA89:7-8.

This happened on January 18, 2012, when Aiyer and Cummins had identical USD-ZAR stop-loss orders. GSA80:23-GSA81:1 (Cummins). Katz wrote, "why dont we drive it down there and keep some," GSA464, which Cummins understood to mean, "if you push it through now, it is likely that the market would bounce back and you could, you could make a profit selling higher if the market bounces higher," GSA81:13-16. Therefore, the group "work[ed] together on the stop-loss." GSA122:18; *see* GSA500-GSA503 (summary). Their efforts were successful, with Aiyer commenting, "wow tht went." GSA465. In a chat occurring later in the day, the group congratulated each other on their USD/ZAR stop-loss coordination:

Aiyer: salute to first coordinated
Aiyer: zar effort
Katz: yep
Katz: many more to come

GSA450.

Aiyer was a knowing participant in this conspiracy. *See, e.g.*, GSA71:2-23 (Cummins); GSA156:25-GSA157:21 (Katz). When Katz proposed to the conspirators that they escalate their collusive trading in general—saying "boys we need to push each other" and "knock things around"—Aiyer responded, "I agree." GSA427. At other times, Aiyer was the one to say, "we need to get the zar going." GSA410. Aiyer embraced what Katz described as one goal of the conspiracy—"operation NY ZAR domination," GSA416—telling Katz that "u should introduce me to the zar mafia," GSA395, that he "want[ed] in to the zar mafia," GSA396, and that, "between us," "we can ryun zar," GSA395.

C. Trial Proceedings

After the government rested its case, Aiyer moved for judgment of acquittal. A964-71. The court denied the motion. A971-73.

Both the government and Aiyer submitted proposed jury instructions with materially the same basic definition of price fixing. The instruction provided that "the goal of every price fixing conspiracy

is the elimination of one form of competition—competition over price" and further that, "if you find that the charged price-fixing conspiracy existed, it does not matter whether the prices agreed upon were high, low, reasonable or unreasonable." A392; *accord* A438. The district court gave this instruction to the jury. A1095:23-1096:3.

During the charge conference, Aiyer's counsel noted a "few things" about the district court's draft instructions. A1059:2. First, counsel argued that "any instruction on bid rigging was not necessary because there was no bid rigging proved." A1059:17-19. Second, counsel observed that the court had not included the defense's proposed instruction that coordinated Reuters trading and coordinated ruble trading were not price fixing or bid rigging. A1059:14-15; *see* A386. Otherwise, counsel did not argue that the instructions' definitions of price fixing or bid rigging were inaccurate—a fact that the court stated during a post-trial hearing, A1496-98, and that Aiyer's counsel confirmed: "On that point, your Honor, we're not contending that the jury instructions were wrong," A1498:3-4.

The jury found Aiyer guilty of the charged price-fixing and bid-rigging conspiracy. A1130. "The verdict was signed by all the jurors and confirmed by a poll of the jurors in open court." GSA371.

D. Post-Trial Proceedings

The day of the verdict, Juror 6 sent a letter to the district court expressing regret over the verdict and claiming that other jurors had failed to follow the court's instructions not to talk about the case before deliberations began, not to prejudge the defendant's guilt, and not to perform outside research. GSA371-GSA373. Defense counsel also reported that Juror 4 had published podcasts during and after the trial, complaining about jury service. GSA373-GSA374.

The district court concluded that most of the allegations of purported juror misconduct were insufficient to warrant further investigation. GSA377-GSA384. Among other reasons, the court had listened to Juror 4's allegedly offending podcasts, which included strong complaints about jury service, but also statements such as: "Again at the end of the day it's going to be a fair and just decision because I understand the gravity of what's going on." Nov. 4, 2019 podcast, 32:21-28. The court concluded that the podcasts "did not contain any evidence

of prejudice or evidence that the Juror did not deliberate fairly and impartially." GSA382.

As for the one allegation requiring further investigation—Juror 6's contention that one of the jurors had conducted outside research—the district court interviewed the allegedly offending Juror 3. It did so with counsel for both sides present "to determine whether any extraneous information came to the Juror's attention and if so whether the information was the kind that could be classified as prejudicial." GSA385. The court concluded it had not; Juror 3 "credibly explained that he had not looked up information about the case or counsel during trial." GSA387. And even if Juror 3 had seen a picture of defense counsel, as Juror 6 alleged, "such extraneous information does not rise to the level that it would likely influence a typical juror." GSA388. Accordingly, the court found "no basis to vacate the jury's verdict based on these allegations." GSA389.

The district court denied Aiyer's motion for judgment of acquittal or a new trial, A1600-62, and sentenced him to eight months' imprisonment, SPA2. The court also denied Aiyer bail pending appeal.

A1665-74. On December 2, 2020, a panel of this Court granted Aiyer's motion for bail in a summary order. Dkt. 54.

SUMMARY OF ARGUMENT

1. Aiyer argues that the district court had a legal obligation to evaluate his competitive-effects evidence and determine whether it sufficiently justified Aiyer's conduct to render the per se rule inapplicable. Aiyer is wrong, for at least three reasons.

First, Aiyer does not specify when he requested such a ruling, what relief he sought, in which order the district court denied his request, or why that denial was wrongful. Thus, Aiyer does not identify any purportedly erroneous ruling for this Court to review on appeal.

Second, Aiyer's contention that the district court had a duty to consider his competitive-effects evidence before deciding that the per se rule applies is contrary to established antitrust law applicable in both civil and criminal cases. Per se illegal restraints are those that the Sherman Act has deemed to be so inherently dangerous to the economy that they are, by definition, unreasonable as a matter of law. Factual unreasonableness—that is, demonstrated anticompetitive effect—is not part of the offense. Accordingly, if, as here, the challenged restraint is

an agreement among competitors not to compete on pricing, the per se rule applies—with two exceptions: (i) when the restraint satisfies the requirements of the ancillary-restraints doctrine and (ii) when the restraint is imposed in certain other contexts involving a potentially efficient joint venture, such as when the restraint is necessary to the availability of a venture product. Aiyer neither attempted to introduce evidence concerning, nor requested jury instructions on, either of these exceptions. Instead, he claimed entitlement to what amounted to a freestanding "productivity" defense. No such defense exists for per se violations.

Third, Aiyer's argument envisions pretrial judicial factfinding that is contrary to federal procedural rules. The grand jury charged Aiyer with a per se Section 1 violation, so the district court correctly permitted the government to try a per se case to the jury. There was no pretrial mechanism by which the court could have evaluated the sufficiency of the government's evidence or weighed it against the defendant's evidence. To the contrary, the Constitution requires that all factfinding of that nature be performed by the jury. Acceptance of Aiyer's argument thus would be unprecedented and unconstitutional.

2. Aiyer next claims that the district court erred by excluding certain of his evidence that, according to him, was relevant to the "unreasonableness" of the conspiracy conduct. Because factual unreasonableness is not part of a per se Section 1 violation, however, such evidence was irrelevant, or at the very least substantially more prejudicial than probative. The court correctly rejected it.

Aiyer also argues that the district court improperly excluded evidence relevant to Aiyer's defense that he lacked the requisite criminal intent. But the standard of intent that Aiyer describes—knowledge of probable anticompetitive effects—applies only to rule-of-reason cases where the government has proved actual anticompetitive effects. In per se cases, the government need show only that the defendant knowingly engaged in conduct that the law recognizes is a per se Section 1 violation. Aiyer's argument under an inapplicable standard of review fails to show any abuse of discretion, and he does not otherwise grapple with the reasoning of any of the court's evidentiary decisions.

3. In his final argument, Aiyer asks this Court to apply what amounts to a bright-line rule that, when one juror alleges another juror

has engaged in possible misconduct, the district court must interview both jurors in person. Such an inflexible rule is unwarranted—particularly where, as here, the district court satisfied itself that no prejudicial misconduct had occurred after interviewing the allegedly offending Juror 3. The court acted consistently with precedent when it decided to minimize invasive post-verdict inquiry into juror deliberations by taking the context of Juror 6's allegations into account when assessing their credibility. Moreover, the court concluded that even if it credited those allegations on the point of disagreement between the two jurors' accounts, that disagreement concerned only whether Juror 3 had seen a picture of defense counsel outside of trial—something that would not have influenced a typical juror. There was no prejudicial misconduct otherwise identified, and thus no abuse of discretion.

ARGUMENT

I. The District Court Correctly Determined That The Per Se Rule Governed This Case.

A. Aiyer Does Not Identify Any Error.

Aiyer contends broadly that, "[d]espite repeated requests by the defense, the district court refused to analyze the charged conduct in

light of the proffered economic evidence and decide whether it should be evaluated under the per se rule or the rule of reason." Aiyer's Opening Br. (Br.) 36. His vague reference to denied "repeated requests," however, does not identify which decisions were wrongful, or why. Nor does this reference offer the specificity necessary to determine whether any particular claim of error was preserved.

An assertion of error on appeal generally must arise from a decision rejecting the appellant's request for a ruling or granting the other side's request over the appellant's objection. *See, e.g.*, Fed. R. Crim. P. 30(d), 51(b); Fed. R. Evid. 103(a). The nature of that ruling and the basis for the claim of error determine the applicable standard of review. *See, e.g.*, *United States v. Rajaratnam*, 719 F.3d 139, 153 (2d Cir. 2013); *United States v. Szur*, 289 F.3d 200, 217 (2d Cir. 2002).

Aiyer fails, however, to perform the basic appellant task of identifying the *nature* of the ruling—or denial of a request for a ruling—that he challenges. He does not, for instance, argue that the district court erred in denying his motions to dismiss or his motions for judgment of acquittal or a new trial. He does not challenge a particular evidentiary ruling. He does not argue that the jury instructions failed

to define price fixing and bid rigging correctly under the law. And he does not argue that the evidence is insufficient to support the verdict. Thus, he leaves unanswered whether the challenged error is, for example, the exclusion of certain evidence, the admission of other evidence, the jury instructions, or something else.

Any such arguments about particular rulings are therefore waived. "It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Botti*, 711 F.3d 299, 313 (2d Cir. 2013) (citation omitted); *see also Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013) (challenge to ruling discussed only "obliquely and in passing" was waived). Moreover, Aiyer cannot correct the deficiency in his reply brief because "arguments not raised in an appellant's opening brief, but only in his reply brief, are not properly before an appellate court even when the same arguments were raised in the trial court." *McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005).

At most, Aiyer identifies two instances when the district court "could easily have," but did not, consider Aiyer's proffered economic

evidence to determine whether the rule of reason should govern the case instead of the per se rule. Br. 41. The first was "at the motion in limine stage," and the second was at the jury-instructions stage. *Id.* at 42. Aiyer identifies no legal obligation that the court shirked at those stages, offers no argument why the court abused its discretion, and fails to explain how any of the court's rulings at those stages were in any way erroneous. These arguments are also waived.

In short, Aiyer offers an argument in search of an error. He fails to identify any, rendering Section I of his brief deficient on its face.

B. The District Court Correctly Declined To Recognize A Freestanding "Productivity" Defense That Must Be "Assessed" By The Judge Before Trial.

To the extent Aiyer has raised a cognizable legal question subject to de novo review, his first argument fails because it is contrary to the law. Aiyer contends that the district court should have "analyze[d] the charged conduct in light of [his] proffered economic evidence," which would have shown that the per se rule did not apply because "the purported conspiracy to 'fix prices' and 'rig bids' did not actually have a material effect on supply, demand, or consumer price." Br. 36. The court correctly rejected Aiyer's efforts to use evidence and rationales

prohibited by the per se rule to argue that the rule should not apply. This Court should reject Aiyer's efforts as well. His argument demonstrates a basic misunderstanding of the per se rule.

1. The Per Se Rule, The Ancillary-Restraints Doctrine, And Other Joint-Venture Defenses

a. The Supreme Court has long interpreted Sherman Act Section 1's prohibition against "conspirac[ies] . . . in restraint of trade," 15 U.S.C. § 1, to mean that certain types of restraints are categorically—or per se—illegal. The "nature and character" of these agreements render them "within the purview of" Section 1's prohibition because they necessarily "operate[] to produce the injuries which the statute forbade." *Standard Oil Co. v. United States*, 221 U.S. 1, 64-65 (1911). "As to these classes of restraints, . . . Congress . . . determined its own criteria of public harm and it [i]s not for the courts to decide whether in an individual case injury ha[s] actually occurred." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959).

Per se illegal categories of restraints are illegal in and of themselves because, "[i]f successful, these conspiracies concentrate the power to set prices among the conspirators, including the 'power to control the market and to fix arbitrary and unreasonable prices.'"

United States v. Apple, Inc., 791 F.3d 290, 326 (2d Cir. 2015) (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)). "And even if unsuccessful or 'not . . . aimed at complete elimination of price competition,' the conspiracies pose a 'threat to the central nervous system of the economy' by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others." *Ibid.* (ellipsis added by *Apple*) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)).

Courts historically have considered three types of restraints to be core per se illegal restraints. They are agreements among competitors to fix prices, *e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); rig bids, *e.g.*, *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981); or allocate markets, *e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990). Just last year, Congress expressly confirmed courts' longstanding per se treatment of these restraints, agreeing that "[c]onspiracies among competitors to fix prices, rig bids, and allocate markets are categorically and irredeemably anticompetitive and contravene the competition policy of the United States." 15 U.S.C. § 7a note (Findings; Purpose of 2020 Amendment).

At issue in this case are price fixing and bid rigging (a form of price fixing). As the Supreme Court has explained, "price fixing is contrary to the policy of competition underlying the Sherman Act" and therefore "its illegality does not depend on a showing of its unreasonableness"—meaning actual anticompetitive effect. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956); *accord, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) ("antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances"). Likewise, "[i]n cases involving behavior such as bid rigging, which has been classified by courts as a per se violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" *Koppers*, 652 F.2d at 294 (citation omitted). For both restraints, the government "need prove only that [the challenged behavior] occurred in order to win [its] case, there being no other elements to the offense and no allowable defense." *Ibid.* (quoting Robert H. Bork, *The Antitrust Paradox* 18 (1978)).

b. When an indictment alleges an agreement among competitors not to compete on pricing, the case proceeds under the per se rule—with

two exceptions that the jury may consider if requested by the defense and sufficiently supported by admissible evidence. The first exception arises when a legitimate joint venture or similar business collaboration restricts activities outside of the collaboration. *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006).[1] Such a restriction will be evaluated under the rule of reason if it satisfies the two requirements of "the ancillary restraints doctrine." *Ibid.*; *Rothery*, 792 F.2d at 224. The restraint must be (i) "subordinate and collateral," *Rothery*, 792 F.2d at 224, to a "legitimate business collaboration, such as a business association or joint venture," *Dagher*, 547 U.S. at 7, and (ii) "reasonably necessary" to achieving that collaboration's procompetitive purpose, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd as modified in other part*, 175 U.S. 211 (1899); *accord Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment).

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[1] The hallmarks of a typical legitimate joint venture or similar business association are "fusions or integrations of economic activity," *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), wherein "multiple sources of economic power [are] cooperating to produce a product," *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 199, 203 (2010).

The second exception arises in other contexts in which "the restraint at issue was imposed in connection with some kind of potentially efficient joint venture." *Apple*, 791 F.3d at 326. This type of joint-venture defense exists, for instance, when a joint venture creates a new product, and "the 'restraints on competition are essential if the product is to be available at all.'" *Ibid.* (quoting *Am. Needle*, 560 U.S. at 203). The Supreme Court addressed such a circumstance in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979), when it recognized that, in order to offer a venture product for sale, the venture must, for practical reasons, "set the price of" that product. This setting of prices, in lay terms, might be "literally 'price fixing,'" *ibid.*, but it is not "price fixing" in the antitrust sense; therefore, it is "subjected to a more discriminating examination under the rule of reason," *id.* at 24.

Courts distinguish per se illegal restraints from similar-looking restraints that are subject to the ancillary-restraints doctrine or other joint-venture defenses by describing the former as "naked" restraints of trade. *See, e.g.*, *Dagher*, 547 U.S. at 7. The latter tends to be discussed only in civil cases because the government prosecutes only per se

offenses, which the district court effectively recognized when it distinguished the joint-venture line of cases as arising in the context of "civil antitrust case law." A1625 n.20.

2. The District Court Correctly Treated The Per Se Rule As Categorical.

Aiyer is wrong to contend that the district court was required to conduct "meaningful, on-the-record analysis of proffered economic evidence to determine whether the per se rule applies." Br. 43.[2] The per se rule is categorical: It "establishes one uniform rule applicable to all industries alike" that need not be "rejustified" in each application. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349, 351 (1982) (quoting *Socony-Vacuum*, 310 U.S. at 222).

The Supreme Court has already rejected Aiyer's argument—that "a court is required to consider the defendant's evidence and arguments on procompetitive justifications" before determining the per se rule applies. Br. 35. In *Maricopa County*, the respondents made a similar claim that "the per se rule is inapplicable because their agreements are

[2] Aiyer claims it is "undisputed" that civil per se cases require this type of analysis. Br. 1-2, 28, 39. Aiyer's contention is incorrect, as is his description of the matter as "undisputed." *See, e.g.*, U.S. Opp'n to Def. Bail Mot. 14-18 (Dkt. 44-1).

alleged to have procompetitive justifications." 457 U.S. at 351. The Court held that this "argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." *Id.* at 351; *accord, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967). Or, as the *Socony-Vacuum* Court put it in a criminal case: "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." 310 U.S. at 224 n.59.

This Court has acknowledged the same principle—in both civil and criminal cases. For instance, in a civil case, the Court observed that the per se rule "'reflects a longstanding judgment' that case-by-case analysis is unnecessary for certain practices." *Apple*, 791 F.3d at 321 (alterations omitted; quoting *FTC v. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990)). Similarly, in a criminal case, this Court recognized that "the per se rule makes certain conspiracies illegal

without regard to their actual effects on trade." *Koppers*, 652 F.2d at 295 n.6. Thus, there is no distinction between civil or criminal antitrust cases on this point, no "scarcity of controlling criminal case law" concerning this basic antitrust principle, and no ambiguity leaving room for application of the rule of lenity. *Contra* Br. 40.[3]

The per se rule does not, as Aiyer suggests, "violate basic principles of due process." Br. 43. It is unclear what "principles" Aiyer is referencing; he does not include any legal citation. To the extent Aiyer's cursory declaration preserves this argument, this Court has already rejected a constitutional challenge to the per se rule's categorical nature.

In *Koppers*, the defense argued that the per se rule could not be applied constitutionally absent a finding that the challenged agreement

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[3] The unpublished decision, *United States v. Coleman American Moving Services, Inc.*, Crim. No. 86-24-N (M.D. Ala. Aug. 8, 1986)—which resolved admissibility issues based on the undescribed allegations of a particular indictment—is not the "lone criminal decision either side cited on this issue," Br. 40 n.8. *But see, e.g.*, U.S. Opp'n to Mots. to Dismiss 3, 11-12, 15-18 (D. Ct. Dkt. 55) (quoting, e.g., *Socony-Vacuum* and *Koppers*). *Coleman* is unavailable on electronic databases, and Aiyer failed to provide a copy (here or below) as required by Fed. R. App. P. 32.1(b). *But cf.* Ex. G to Decl. in Supp. of Mot. to Dismiss, *United States v. Usher*, No. 1:17-cr-19 (S.D.N.Y. Nov. 17, 2017) (Dkt. 64-7) (attaching copy of decision).

was factually unreasonable. 652 F.2d at 293. Noting that "[t]his argument asks us in effect to overrule the Supreme Court's decisions" holding that "certain types of conduct, including price-fixing, are so patently anticompetitive that they violate the Act without proof of unreasonableness in each case," the Court "decline[d] the invitation." *Ibid.* The Court rejected the defense's constitutional argument that the per se rule "relieve[d] the government of its duty of proving each element of a criminal offense under the Act," explaining that "the Sherman Act does not make 'unreasonableness' part of the [per se] offense." *Id.* at 294.

Necessarily, then, because factual unreasonableness is not part of a per se Section 1 offense, effects-related argument or evidence offered to rebut factual unreasonableness is immaterial. A court therefore does not violate the defendant's constitutional rights by excluding it, for "[t]he accused does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

Aiyer is similarly wrong to argue that "application of the per se rule is effectively a directed verdict on the question of

'unreasonableness,' which the Supreme Court has held to be an element of all Section 1 violations." Br. 43. He conflates different meanings of the word "unreasonable." In Section 1 jurisprudence, the word "unreasonable" means any of three things, depending on the context in which it is used. It can refer to Section 1's statutory standard for unlawfulness, which is an element in every case. For example, the Supreme Court used the word in this manner when it said that "[t]his Court's precedents have . . . understood § 1 to outlaw only unreasonable restraints." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) (citation omitted). And as the *American Express* Court further recognized, "[r]estraints can be unreasonable," and thus meet the statutory standard, "in one of two ways," *ibid.*—the other two uses of "unreasonable." The term can describe the type of restraint that falls within Section 1's prohibition by definition—that is, a restraint that is per se unreasonable. *See e.g.*, *ibid.*; *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (the "principle of per se unreasonableness" identifies restraints "unlawful in and of themselves"). Or, the term "unreasonable" can describe a restraint that is unlawful because, as proved on case-specific facts under the rule of reason, the restraint has

an anticompetitive effect. *See, e.g.*, *Am. Express*, 138 S. Ct. at 2284; *Dagher*, 547 U.S. at 5 (under "rule of reason analysis, . . . antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive"). Accordingly, when a district court determines that the per se rule applies, it is performing the traditional judicial function of identifying the governing legal standard; it is not directing a verdict on any element.

In passing, Aiyer argues that prosecution under the rule of reason would raise "constitutional concerns" under the void-for-vagueness doctrine. Br. 49. His argument is merely hypothetical because he was not prosecuted under the rule of reason. It is also wrong, as the Supreme Court held over 100 years ago in *Nash v. United States*, 229 U.S. 373, 378 (1913). Indeed, *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978)—the case Aiyer cites in support of this argument—was decided under the rule of reason and defined an element for a rule-of-reason criminal prosecution. *See id.* at 441 n.16; Section II.B.2, *infra*. The Court noted the Department of Justice's discretionary policy of prosecuting only certain categories of restraints (the current version of which limits prosecutions to per se offenses), but did not suggest this

policy was constitutionally mandated. *See Gypsum*, 438 U.S. at 439-43. Moreover, whatever concerns may have existed regarding rule-of-reason prosecutions were alleviated by the Court's conclusion that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element." *Id.* at 443.

3. Aiyer Has Not Identified A Legal Basis To Consider His Justifications.

It is decidedly *not* the law, as Aiyer claims, that "conduct that technically would fall within the per se category may still warrant rule of reason analysis when it promotes productivity." Br. 33. There is no freestanding "productivity" defense to a per se offense. The cases Aiyer references for this proposition rest on a far narrower rule of law applicable to joint ventures and similar business associations in select circumstances, as this Court explained in *Apple* when the defendant raised a similar argument. *See also* Section I.B.1.b, *supra*.

In *Apple*, the defendant—like Aiyer here—cited cases such as *Broadcast Music, Inc.*, 441 U.S. 1, and *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004 (7th Cir. 2012), to support the broad proposition that price-fixing agreements among competitors are not per se illegal "if those agreements when adopted could reasonably have

been believed to promote enterprise and productivity." 791 F.3d at 325 (citation and quotation marks omitted); *cf.* Br. 33-36, 37, 46. This Court rightly rejected such a broad proposition because it was inconsistent with the law. Rather, "a participant in a price-fixing agreement may invoke only certain, limited *kinds* of 'enterprise and productivity' to receive the rule of reason's advantages." *Apple*, 791 F.3d at 326. As described by the Supreme Court, the decisions setting forth this principle are "limited to situations where the 'restraints on competition are essential if the product is to be available at all.'" *Ibid.* (quoting *Am. Needle*, 560 U.S. at 203). And "even if read broadly, these cases . . . apply the rule of reason only when the restraint at issue was imposed in connection with some kind of potentially efficient joint venture." *Ibid.* This necessary predicate did not exist in *Apple*, where "there was no joint venture or other similar productive relationship between any of the participants in the conspiracy." *Ibid.* The price-fixing conspiracy in *Apple* was thus per se illegal. *Id.* at 329.[4]

[4] Aiyer cites *In re Processed Egg Products Antitrust Litigation*, 962 F.3d 719 (3d Cir. 2020), once, without developing argument specific to that case. *See* Br. 33. The Third Circuit there held that courts may analyze "components of an alleged conspiracy separately," 926 F.3d at 725, seeming to reject the jury's determination that there was a single,

Aiyer's argument suffers from similar defects. He has never argued that he was part of a legitimate joint venture or that any joint-venture defense applied. For instance, he has not contended that the conspirators' conduct was necessary to the availability of a good or service—rendering the *Broadcast Music, Inc.* line of cases inapplicable. *Cf., e.g.*, *Broad. Music, Inc.*, 441 U.S. at 23 ("agreement on price is necessary to market the product at all"); *Socony-Vacuum*, 310 U.S. at 217 (distinguishing *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918), as a case involving a trade board's restriction that was "akin to rules of an exchange limiting the period of trading" and resulted in "the creation of a public market"); *Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 72 (2d Cir. 1988) (for "professional sporting events," "coordination is essential if the activity is to be carried out at all").

Aiyer also has not preserved an argument that the ancillary-restraints doctrine applies. At times before the district court, Aiyer suggested that it might apply, but he abandoned that argument after

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overarching conspiracy, *id.* at 728. This Court has correctly declined such an approach. *See, e.g.*, *Apple*, 791 F.3d at 319 (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

the court *denied* the government's motion to exclude evidence related to any joint-venture defense, A315-17. Aiyer opposed a pretrial hearing on this issue, A317, never argued to the jury that the ancillary-restraints doctrine or any joint-venture defense applied, and did not request a jury instruction on ancillary restraints or joint ventures, *see* A359-418. Even in Aiyer's post-trial motion for judgment of acquittal or a new trial, Aiyer did not claim either that the jury should have been instructed on these matters or that evidence relevant to them was improperly excluded. *See* A1317-1410. At most, Aiyer suggested indirectly that the court—at some unspecified time—should have considered applying the ancillary-restraints doctrine. *See* A1331, A1337, A1353. That argument, such as it was, came too late. *See* Fed. R. Crim. P. 30(d), 51(b); Fed R. Evid. 103(a); *see also* A1654 n.30 (noting defense's failure to request jury instructions on these issues).

By the time the case reached this Court, therefore, any argument concerning the applicability of the ancillary-restraints doctrine was forfeited. And in his opening brief, Aiyer additionally waived the argument by failing to contend that the district court plainly erred either by not instructing the jury on the ancillary-restraints doctrine or

by excluding evidence relevant to the doctrine. Accordingly, Aiyer's cited cases applying the ancillary-restraints doctrine are inapposite. *Cf., e.g.*, *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 725-31 (6th Cir.) (determining whether restraints imposed by a joint venture satisfy the ancillary-restraints doctrine), *cert. denied*, 140 S. Ct. 380 (2019); *Sulfuric Acid*, 703 F.3d at 1013 (restraints claimed to be "ancillary to" a "joint venture" between companies "to supply sulfuric acid to the U.S. market"); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-90 (7th Cir. 1985) (restraints imposed between companies that had "embark[ed] on a new venture—the building of a joint facility—that would expand output").[5]

In short, Aiyer failed to request any determination that the charged conduct was related to a legitimate joint venture, was necessary to the availability of a good or service, or satisfied the

[5] Aiyer cites *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), a case discussing the quick-look doctrine—an abbreviated version of rule-of-reason analysis. The Court there considered whether quick-look or full rule-of-reason analysis should apply to advertising restrictions that were not "obviously comparable to classic horizontal agreements to limit output or price competition." *Id.* at 773. Its decision is inapposite because the per se rule was not at issue; instead, the question presented assumed some version of the rule of reason applied. *See id.* at 759, 764-65.

ancillary-restraints doctrine. As a result, there was no legal basis for the court to consider his procompetitive justifications or to conclude that the agreement among Aiyer and his co-conspirators not to compete on pricing was anything other than per se illegal price fixing and bid rigging.

Aiyer cannot avoid this result by arguing that the government did not prove anticompetitive effects—that is, that the conspirators' coordinated trading "distorted actual (or even perceived) supply or demand." Br. 45. As Aiyer's brief elsewhere acknowledges, "[a]nticompetitive effects need *not* be proven in a per se case." Br. 32. In any event, Aiyer does not claim the evidence was insufficient to support the conviction, so this argument is beside the point.

Aiyer also cannot avoid this result simply by claiming the conduct was procompetitive. *See* Br. 46 (describing what the conspiracy supposedly "facilitated"). That is the very type of argument that the per se rule prohibits. Countenancing such an argument would be akin—logically at least—to allowing a prosecutor to argue that a defendant's right against self-incrimination does not apply *because* the defendant chose not to testify. Moreover, the Supreme Court has already rejected

such a strategy, stating that "[n]othing could be more inconsistent" with precedent than efforts to smuggle prohibited procompetitive-effects claims into an argument that the per se rule should not apply. *Catalano*, 446 U.S. at 649; *see id.* (rejecting arguments that price fixing made "the market more attractive to potential new entrants" and offered "increased price visibility").

C. The District Court Correctly Allowed The Government To Try The Charged Offense.

Aiyer's argument that the district court should have evaluated defense evidence before permitting the government to try a per case to the jury is wrong for the additional reason that it is contrary to federal procedural rules. The indictment properly alleged a per se Section 1 violation; therefore, the court correctly permitted the government to try a per se case to the jury.

1. Federal criminal prosecutions are governed by a different set of procedural rules than federal civil cases. Among other things, an indictment controls the proceedings in a criminal case more strictly than a complaint controls a civil case. Although a court may evaluate whether the indictment "state[s] an offense," Fed. R. Crim. P. 12(b)(3)(B)(v); *see United States v. Frias*, 521 F.3d 229, 235 (2d Cir.

2008), "[a] defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime," *Kaley v. United States*, 571 U.S. 320, 333 (2014). Rather, "[a]n indictment, . . . if valid on its face, is enough to call for trial of the charge on the merits." *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979) (quoting *Costello v. United States*, 350 U.S. 359, 363 (1956)).

In addition, due to the "'the inviolable function of the jury' in our criminal justice system," *United States v. Sampson*, 898 F.3d 270, 281 (2d Cir. 2018), the federal criminal procedural rules strictly limit courts' ability to assess the viability of the government's case. Before trial, the defendant may raise by motion only a "defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). If "a defense raises a factual dispute that is inextricably intertwined with a defendant's potential culpability, a judge cannot resolve that dispute on a Rule 12(b) motion." *Sampson*, 898 F.3d at 281. There is, accordingly, no procedural mechanism in a criminal case, akin to summary judgment in the civil context, which

allows courts to make a pretrial sufficiency evaluation of the government's evidence. *E.g.*, *id.* at 279; A1625-26.

At specified points during and after trial, a defendant may challenge the sufficiency of the government's evidence. "After the government closes its evidence or after the close of all the evidence," a defendant may move for "a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). After trial, a defendant also may move for judgment of acquittal. Fed. R. Crim. P. 29(c). The court's ability to assess the evidence on this type of motion is limited; it must allow the case to go to the jury (during trial), or sustain the jury's conviction (after trial), "if any rational trier of fact" could find "the essential elements of the crime beyond a reasonable doubt." *United States v. Binday*, 804 F.3d 558, 572 (2d Cir. 2015) (citation omitted).

2. In light of these principles, it is unsurprising that Aiyer fails to identify when the district court was obligated to, but did not, "assess argument and evidence on effects '*before* deciding' which antitrust rule applies." Br. 35 (citation omitted). Aiyer cannot point to any dereliction of duty at the motion-to-dismiss stage; to the contrary, the court would

have committed legal error if it had assessed the evidence at that juncture. *See Kaley*, 571 U.S. at 328-29; *Sampson*, 898 F.3d at 278-81; A190-91. In any event, Aiyer does not argue that the denial of his motions to dismiss was erroneous and thus has waived any such argument.

Aiyer instead suggests that the district court could have assessed his evidence when making rulings at two other stages of the proceedings. The first is "in connection with motions in limine," but all he cites for support are cases in which courts allowed or excluded evidence of particular defenses. *See* Br. 41. Aiyer has yet to describe a valid defense that he was prevented from presenting to the jury, *see* Section I.B.3, *supra*, so these cases do not help his argument.

The second is at the jury-instructions stage. Aiyer contends that the district court "could have instructed the jury to consider the reasonableness of Appellant's conduct." Br. 42. He does not, however, identify any legal principle, or describe admitted evidence, that would have allowed such an instruction. Moreover, Aiyer neither requested a reasonableness instruction nor objected to its absence at trial. "Failure to object in the manner prescribed by the rule . . . results in forfeiture of

de novo review of the error." *United States v. Grote*, 961 F.3d 105, 114 (2d Cir. 2020) (citing Fed. R. Crim. P. 30(d)), *cert. denied sub nom. Tucker v. United States*, No. 20-6936, 2021 WL 666770 (U.S. Feb. 22, 2021). Had Aiyer's opening brief claimed that the jury instructions were erroneous in this regard, such a claim could have been reviewed "under the far more exacting standard of plain error, as specified in Rule 52(b)," *ibid.*, for which "[t]he burden is on the defendant," *id.* at 116. But because Aiyer did not argue plain error in his opening brief, any such argument is waived.

3. The district court's adherence to the federal procedural rules did not, as Aiyer suggests, result in its "unblinking acceptance of the Government's per se labels." Br. 37. The court instead evaluated whether the indictment described restraints falling within the per se illegal category, and concluded that it did by alleging price fixing and bid rigging among competitors. *See* A192. After trial, the court again did not merely rest on "per se labels," Br. 37, but evaluated whether the government had proved the existence of those restraints—and concluded that it had, A1635.

Between these two rulings, the district court correctly left resolution of the facts underlying the per se characterization of the charged conspiracy to the jury. Aiyer appears to throw unspecified aspersions at the court's statement that the jury was responsible for deciding "whether a conspiracy to fix prices actually existed" because that issue was "a question of fact." A1625; *see* Br. 36 (quoting same). But the court's statement was correct. In another Section 1 per se case, the Supreme Court confirmed that it was appropriate to submit to the jury the analogous question of "whether a price-fixing agreement as described in the first count was entered into by the respondents." *Trenton Potteries*, 273 U.S. at 401. After all, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *United States v. Gaudin*, 515 U.S. 506, 514 (1995).

Moreover, Aiyer was not precluded from arguing to the jury that the government failed to prove a per se case. Aiyer argued, among other things, that there was no agreement among the conspirators, *see, e.g.*, GSA278-GSA284, GSA291-GSA295; that any agreement that may have existed was not an agreement among competitors, *see, e.g.*,

GSA296-GSA317; *cf.* Br. 46-48 (arguing factual issue); and that any agreement that may have existed was not an agreement not to compete on pricing, *see, e.g.*, GSA295-GSA296, GSA317-GSA361; *cf.* Br. 49-51 (arguing factual issue). The jury simply rejected these arguments when it found Aiyer guilty.

Aiyer's proposal, on the other hand, would turn the longstanding rules of criminal procedure on their head. Were this Court to accept Aiyer's argument that courts must look outside the indictment before trial and assess evidence related to the effects of the challenged restraint before determining that the per se rule applies, it would be mandating mini bench trials at the beginning of every criminal per se case. Such a regime would not only unconstitutionally usurp the factfinding function of the jury, but it would also cause "the per se rule [to] lose all the benefits of being 'per se.'" *Apple*, 791 F.3d at 326.

II. The District Court Acted Within Its Discretion When It Excluded Irrelevant Economic Evidence.

A. Evidentiary Rulings Are Reviewed Under The Abuse-Of-Discretion Standard.

Aiyer next argues that the district court "erred in refusing to admit evidence demonstrating the absence of anticompetitive effects of,

and procompetitive explanations for, the charged conduct." Br. 51-52. As this Court has recognized, a district court always enjoys "leave to set reasonable limits on the admission of evidence." *Szur*, 289 F.3d at 217 (citation omitted). "Thus, even where the exclusion of evidence affects the defense case, [the Court] afford[s] judges broad latitude" and reviews "evidentiary determinations for abuse of discretion." *Ibid.*

The district court's discretion is particularly broad in the circumstances presented here. "Whether to receive or exclude expert testimony is, under long-standing law, a matter confided to the sound discretion of the trial court, which will not be reversed unless an appellate court can say that the ruling is 'manifestly erroneous.'" *United States v. Diaz*, 878 F.2d 608, 616 (2d Cir. 1989) (citation omitted). Additionally, when the "proffered evidence . . . is collateral, rather than material, to the issues in the case," the district court "has wide discretion to exclude" it. *United States v. Scopo*, 861 F.2d 339, 345 (2d Cir. 1988).

B. The District Court Did Not Abuse Its Discretion.

1. Aiyer describes as "error" that the district court "precluded the jury from meaningfully evaluating the 'unreasonableness' of the

[conspiracy] conduct." Br. 52. Aiyer's argument here is largely the same as his first; both are based on the premise that an adjudicator should have evaluated whether his evidence supporting a supposed freestanding "productivity" defense rendered the per se rule inapplicable. *See* Br. 52-53.

No such defense exists, as already explained in Section I. Neither the court nor the jury evaluates whether a per se illegal conspiracy in fact "threatened to harm competition," Br. 53, because the Sherman Act has already made that decision for per se illegal restraints. There can be no "error" in precluding the jury from "meaningfully evaluating" the factual unreasonableness of the conduct, Br. 52, because "the Sherman Act does not make 'unreasonableness' part of the [per se] offense," *Koppers*, 652 F.2d at 294. Aiyer's second argument, like his first, is therefore contrary to established antitrust law.

2. Aiyer additionally argues that "the district court's exclusion of effects evidence was error because it significantly impaired the defense's ability to prove that [he] lacked the requisite criminal intent." Br. 53. But Aiyer fails to identify what specific evidence was offered as relevant to his intent, what particular decision rejected such evidence,

or why the court's basis for decision demonstrates an abuse of discretion. These arguments are therefore waived. To the extent that Aiyer offers an argument reviewable on appeal, it is premised on a deeply flawed conception of the "requisite criminal intent."

Although Aiyer is correct that intent is an element in all criminal Section 1 cases, he is wrong about the nature of that element in per se cases. In *Gypsum*, the Court held that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element." 438 U.S. at 443. It then addressed how that element should be applied in the specific context of a rule-of-reason case in which the government had proved the charged conduct had anticompetitive effects. The Court considered whether the standard should require, "in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing such effects." *Id.* at 444. The Court concluded it should not; instead, "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *Ibid.*

Forty years ago, in *Koppers*, this Court recognized that *Gypsum*'s description of the intent required in rule-of-reason cases does not govern per se cases. The *Koppers* Court noted that *Gypsum* itself had distinguished the case before it from a per se case. *See* 652 F.2d at 295 (quoting *Gypsum*, 438 U.S. at 440). This Court therefore rejected the defendant's argument that a jury instruction on intent "was in conflict with *Gypsum*[] because it did not require the jury to find that [the defendant] had also intended that the conspiracy result in anticompetitive effects." *Id.* at 296 n.6. "Since the per se rule makes certain conspiracies illegal without regard to their actual effects on trade, it would be illogical to refuse to allow a jury to consider whether the defendant's acts had resulted in an unreasonable restraint, on the one hand, and then require it to find the specific intent to produce those effects, on the other." *Ibid.*

As *Koppers* held, and Aiyer recognizes, *Gypsum* does not require the government to "prove that the defendant acted with the 'conscious object' of causing 'anticompetitive effects.'" Br. 54. But *Gypsum* also does not, contrary to Aiyer's contention otherwise, require the government to prove "that Appellant knew that effects on prices 'would

most likely follow' from his actions." *Ibid.* *Gypsum* expressly limited the standard requiring "that the defendant's conduct was undertaken with knowledge of its probable consequences" to "cases where anticompetitive effects have been demonstrated." 438 U.S. at 444 n.21. That cannot be the standard applicable to per se cases because, to quote Aiyer's brief, "[a]nticompetitive effects need *not* be proven in a per se case." Br. 32. Moreover, such a rule would be inconsistent with the *Koppers* Court's more general admonition that any standard requiring that the defendant "envision actual anti-competitive results" would be inappropriate in per se cases because it "would reopen the very questions of reasonableness which the per se rule is designed to avoid." 652 F.2d at 296 n.6. Instead, this Court explained, in per se cases, "nothing more is required than a showing that the defendant intentionally engaged in conduct that is a per se violation of the Sherman Act." *Id.* at 298.

Aiyer's cited "complex financial cases" do not help him. *See* Br. 55. They involve charged offenses requiring the government to prove an "intent to defraud," *United States v. Litvak*, 808 F.3d 160, 190 (2d Cir. 2015); or that "acts were done willfully, i.e., in bad faith or with evil

intent," *United States v. Collorafi*, 876 F.2d 303, 305 (2d Cir. 1989). Sherman Act Section 1 does not contain an analogous requirement that the government prove any equivalent "malice." *Koppers*, 652 F.2d at 298. The discussions of admissible intent evidence in Aiyer's cited "complex financial cases" thus have no relevance here.

Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), does not help Aiyer's criminal-intent argument, either. That decision addressed a distinct issue: the type of evidence required to demonstrate the existence of a predatory-pricing conspiracy and thereby withstand summary judgment. *See id.* at 588-98. Additionally, concerns particular to the restraint at issue—a predatory-pricing conspiracy, which "is by nature speculative," *id.* at 588—drove the Court's decision. The case thus has nothing to do with the criminal-intent element of a price-fixing and bid-rigging conspiracy.

3. Even a cursory review of the district court's reasoning in its evidentiary rulings shows that the court acted well within its discretion when it excluded certain of Aiyer's effects evidence. The court rightly recognized the distinction between admissible evidence offered to dispute whether Aiyer in fact knowingly engaged in the coordinated

trading activity as charged, and inadmissible evidence offered to show his particular motivation for, or the effectiveness of, the trading activity. The latter type of evidence, the court correctly observed, was both "not relevant" and "should be excluded under Rule 403 because its prejudicial impact substantially outweighs any arguable relevance." GSA228:13-15. Aiyer suggests that the court was inconsistent in its rulings, *see* Br. 54-55, but he fails to address the court's reasoning, which clarified why some evidence was allowed and other evidence was not, *see, e.g.*, GSA237:12-GSA238:8.

The district court allowed limited inquiry into effects and motivation on defense cross, for example, after Katz's direct included "evidence that the purpose of this was not only to set a price, to agree to set a price to a customer, but, rather, to move the prices up or down in order to be able to make more money." A821:24-A822:3. The court explained that, although it is "perfectly true that the violation is to fix prices or rig bids," "the government didn't end with that." A821:16-17. The court therefore allowed Aiyer's counsel to rebut these points by eliciting testimony concerning the extent to which the conspirators in

fact affected prices, based on what they knew, or were driven by a motivation to make more money. A821:10-A822:14.

On the other hand, when Aiyer's effects and motivation evidence was offered in what amounted to a call for jury nullification—on the ground that the conspiracy supposedly either lacked anticompetitive effect or was justified because it was procompetitive—the district court correctly excluded it. For example, the court excluded those portions of the proposed testimony of defense experts Richard Lyons and Dennis Carlton that were offered as "[e]vidence of pro-competitive effects, or the lack of harm." GSA228:12-13; *accord, e.g.*, GSA231:12-15.[6] It also rejected those opinions to the extent they were offered as evidence relevant to Aiyer's intent because there was "no evidence that the defendant was aware of . . . the underlying information [the experts] analyzed." GSA231:16-19; *accord, e.g.*, GSA228:16-25. But, as the court later noted when ruling on the admissibility of various defense exhibits, "witnesses could be re-called," GSA249:19, to establish the missing

[6] Aiyer's proffer described 19 opinions of Professor Lyons, A690-709, of which the district court excluded 4 in full and 1 in part, GSA226-GSA229, GSA233-GSA242. It also described 7 opinions of Professor Carlton, A785-93, of which the court excluded 2 in full and 1 in part, GSA229-GSA233, GSA242-GSA244.

foundation that the conspirators were "aware of what was going on in the market," GSA249:12-13. Aiyer simply declined to recall them.

The district court's careful treatment of Aiyer's evidence comported with precedent and fell well within its "broad latitude," *Szur*, 289 F.3d at 217, to determine whether evidence is admissible. Aiyer identifies no legal error. Nor does he offer any basis to conclude that, even if admissibility reasonably could have been decided a different way, the court's decision was an abuse of discretion.

III. The District Court Conducted The Post-Verdict Inquiry Into Possible Juror Misconduct In A Manner Well Within Its Broad Discretion.

A. The Abuse-Of-Discretion Standard Of Review Applies.

Aiyer's final argument is that, following post-verdict allegations of possible juror misconduct, the district "court's refusal to conduct a more exacting investigation requires that Appellant's conviction be vacated." Br. 60. This Court has admonished, however, that "district judges should be particularly cautious in conducting investigations into possible jury misconduct after a verdict." *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010). "[S]uch investigations are only warranted when there is 'clear, strong, substantial and incontrovertible

evidence, that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.'" *Id.* at 250 (citation omitted). Accordingly, "probing jurors for 'potential instances of bias, misconduct or extraneous influence' after they have reached a verdict is justified 'only when reasonable grounds for investigation exist.'" *United States v. Stewart*, 433 F.3d 273, 302 (2d Cir. 2006) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). And "when and if it becomes apparent that the above-described reasonable grounds to suspect prejudicial jury impropriety do not exist, the inquiry should end." *Moon*, 718 F.2d at 1234.

Given the "broad flexibility" afforded district courts "in responding to allegations of [juror] misconduct," this Court reviews "a trial judge's handling of alleged jury misconduct for abuse of discretion." *Sabhnani*, 599 F.3d at 250 (citation omitted).

B. The District Court's Investigation Was Not An Abuse Of Discretion.

1. Of the various allegations of possible juror misconduct that Aiyer describes in his statement of the case, *see* Br. 26-28, his opening brief claims error only with respect to the manner in which the district court investigated Juror 6's allegation that Juror 3 had conducted

outside research during trial, *see* Br. 5, 56. His brief does not offer any substantial argument challenging the court's determination that Juror 6's other allegations required no further investigation because they did not amount to "the kind of 'clear, strong, substantial and incontrovertible evidence that a specific nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.'" GSA377 (quoting *Moon*, 718 F.2d at 1234). Any argument about the court's decision not to investigate those additional allegations is therefore waived.

This leaves the category of conduct for which the district court concluded investigation was warranted because of the possibility that "extraneous prejudicial information was improperly brought to the jury's attention." GSA384 (quoting Fed. R. Evid. 606(b)(2)(A)). The court observed that Juror 6's letter "raised a possibility that [Juror 3] had conducted further outside research during the case in violation of the Court's repeated instructions." GSA385. The allegation thus fell within the "narrow" exception to Federal Rule of Evidence 606(b)(1)'s general prohibition against "testimony of a juror impeaching the verdict." *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994).

2. Aiyer challenges the district court's decision to resolve its investigation into possible juror misconduct with a credibility determination. He argues that the court abused its discretion by "accepting the self-serving denials of the accused juror," "without even hearing equivalent testimony from any other juror." Br. 56. Aiyer instead would have this Court impose the bright-line rule that, when one juror accuses another of possible misconduct, the district court is obligated to "hear live testimony from the accusing juror, or from a neutral eyewitness to the alleged misconduct." Br. 59.

Aiyer's argument fails to account for this Court's strong warnings against intrusive post-verdict inquiries into possible juror misconduct. He instead relies on decisions in a distinguishable context: Cases where "a credible allegation of juror misconduct [is made] during trial," in which circumstance the "court has an obligation to investigate and, if necessary, correct the problem." *United States v. Haynes*, 729 F.3d 178, 191 (2d Cir. 2013); *see also United States v. Resko*, 3 F.3d 684, 686 (3d Cir. 1993) (decision addressed "the appropriate remedy for juror misconduct discovered mid-trial"); *United States v. Herndon*, 156 F.3d

629, 632 (6th Cir. 1998) (court informed of potential juror-bias issue "[d]uring the jury deliberations").

When allegations of possible juror misconduct arise after the verdict, on the other hand, this Court requires greater caution. For "post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989). Given the particular sensitivity of post-verdict inquiries, this Court has never mandated in-person interviews of specific persons. *See Miller v. United States*, 403 F.2d 77, 84 (2d Cir. 1968) (district court "to determine what questions may be asked, of whom, where, and how"). To the contrary, the Court has instructed district courts to be "hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." *Moon*, 718 F.2d at 1234.

3. The district court acted with appropriate caution in investigating Juror 6's post-verdict allegations of outside research by Juror 3. In response to those allegations, the court interviewed Juror 3,

with counsel for both sides present. *See* RA13. The Court gave Juror 3 an opportunity to respond to Juror 6's allegation that Juror 3 "had looked up information on members of the counsel." GSA372 (quoting juror letter). Juror 3 stated that he had not. RA18:19. The Court also gave Juror 3 the opportunity to respond to Juror 6's allegation that Juror 3 had said to another juror: "'The judge said we cannot talk about or lookup information about the case, he never said that my girlfriend can't' and 'even my boss looked up the case.'" GSA372 (quoting juror letter). Juror 3 explained that he learned after trial that his office manager had done some research about the case, RA18:19-23; and his girlfriend had asked about the case during trial, "but I told her I was not allowed to speak about it," RA20:13-15. He confirmed that he did not receive any information from his boss or girlfriend about the case during trial. RA21:23-25. After the court finished its questions, "out of the presence of the juror, the Court asked" counsel "if there were any further questions for the juror and there were none." GSA385.

Based on this interview, and considering the context surrounding Juror 6's letter, the district court determined that there was no need for further inquiry because it had "become[] apparent that . . . reasonable

grounds to suspect prejudicial jury impropriety d[id] not exist." *Moon*, 718 F.2d at 1234; *see* GSA388-GSA389. The court rested its decision on two independently sufficient grounds.

First, the district court made a credibility determination concerning the two jurors, both of whom it had observed during trial. The court initially stated that "there [we]re inconsistencies between what Juror No. 3 has told us and what Juror No. 6 has told us," RA24:9-10, but it determined that "Juror No. 3's direct statements are more credible than the alleged comments that Juror No. 6 claims to have overheard," GSA387. Juror 3 was "forthcoming" and "credible" during his interview. *Ibid.* By contrast, the timing of Juror 6's letter raised suspicion. The court had instructed "the jurors to bring to the Court's attention during the trial if any juror violated the Court's instructions," but "Juror No. 6 brought his concerns to the Court only after he became dissatisfied with the unanimous verdict." GSA387-GSA388.

Second, even crediting Juror 6's allegations, there was no cause to disturb the verdict because any discrepancies between the jurors' accounts either were not material or concerned something unlikely to influence a typical juror. As for Juror 6's allegation about Juror 3's

comments regarding his boss and girlfriend, "Juror No. 6 never said that Juror No. 3 conveyed any information from his girlfriend or his boss that he learned. He simply made a comment that there was nothing in the Court's instructions that prevented the girlfriend or the boss from doing any research." RA25:16-20. Juror 6's description of what Juror 3 said thus was "not inconsistent" with Juror 3's statement that he did not receive any outside information about the case during trial. RA26:2. As for Juror 6's allegation that Juror 3 described for other jurors a picture he had seen of one of the attorneys, "such extraneous information does not rise to the level that it would likely influence a typical juror." GSA388 (citing *Bibbins*, 21 F.3d at 17). Accordingly, there was no basis "for a continuing juror inquiry." *Ibid.*

Aiyer's opening brief does not seriously engage with the district court's rulings concerning possible juror misconduct. He offers his own speculation about the motives of Jurors 3 and 6, *see* Br. 58, but does not explain why the court abused its discretion when assessing the jurors' credibility—which, as in the pre-verdict context, "the district court is best situated to evaluate," *United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2003). Aiyer declares that "the district court did not reconcile the

inconsistencies between the jurors' versions of events," Br. 58, but then ignores the second ground for the court's ruling, which did just that. He has therefore waived any argument as to this basis for decision. In short, Aiyer has failed to identify any abuse of discretion.

4. Aiyer ends with an argument that does not claim independent error, but instead appears to argue prejudice—that the district court's investigation into possible outside juror research was "particularly troubling" given Juror 4's podcasts complaining about jury service. Br. 59. Aiyer's argument lacks merit.

Aiyer speculates that, based on the remarks Juror 4 made in his podcasts, Juror 4 "would likely have little regard for his duty of impartiality." Br. 59. Aiyer's speculation falls far short of the standard for further inquiry—that is, "clear, strong, substantial and incontrovertible evidence, that a specific, nonspeculative impropriety has occurred." *Sabhnani*, 599 F.3d at 250 (citation omitted). His speculation also is based on a misleadingly truncated description of Juror 4's podcasts. Aiyer quotes a portion of a November 17, 2019 podcast in which Juror 4 said he was not paying attention and did not care what was going on at trial. *See* Br. 59. But Aiyer neglects to

include the fact that, in all of the relevant podcasts, *see* RA5, whenever Juror 4 made an inflammatory comment (like the one quoted), he disavowed it a short time later. *See* Nov. 4, 2019 podcast, 32:21-28 ("Again at the end of the day it's going to be a fair and just decision because I understand the gravity of what's going on."); Nov. 11, 2019 podcast, 35:51-53 ("I haven't broken it [the oath not to discuss the case] yet, but still."); Nov. 17, 2019 podcast, 5:46-53 ("... yeah of course I'm going to be unbiased. I'm going to care. I'm not going to—I'm not going to condemn somebody who I don't think deserves it, you know."). The district court commented on this fact in its written opinion on possible juror misconduct, noting that Juror 4 "said that he understood the gravity of his role and that he would render a fair and just decision." GSA382.

Although Aiyer claims that the district court "refus[ed] to inquire further," Br. 59, he overlooks that the court went beyond defense counsel's allegations concerning Juror 4's podcasts. The court listened to the relevant podcasts itself. *See* RA16:20-21; GSA373-GSA374, GSA382-GSA383. Then, based on this review, the court concluded that "nothing spoken by Juror No. 4 during his podcasts suggests that he

was biased against the defendant or that the defendant was prejudiced by Juror No. 4's podcasts in a way that would necessitate a post-verdict inquiry." GSA384. Aiyer fails to identify any abuse of discretion in this determination or explain how it demonstrates any prejudice. Aiyer thus has failed to show any error in the court's post-trial investigation into possible juror misconduct.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Circuit Rule 32.1(a)(4), because this Brief contains 13,968 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

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

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