08-10149

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JUDY GREEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(HON. WILLIAM ALSUP)

BRIEF FOR THE UNITED STATES

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GLOSSARY

WITNESS LIST

WITNESS	AFFILIATION
Ayer, Catriona	USAC's SLD (Director, Form Processing)
Bennett, Thomas	FCC (Assistant Inspector General, Audits)
Boehm, William	Inter-Tel Tech. (Sales)
Colvin, John	NEC (Director, Public Sector Sales)
Emery, Robert	VNCI (CFO)
Favara, Richard	Expedition Networks (Owner); American Education Alliance (Founder)
Ferguson, Charles	NEC (Director, Sales Eng'g)
Gardiner, Brien	Philadelphia Academy Charter Sch. (CEO)
Green, Judy	Defendant
Holodnick, William	Muskegon Heights Pub. Sch. (Tech. Coord.)
Jones, Ricky	Covert Pub. Sch. (Teacher)
Kind, Jeffrey	Clover Tech. (Sales)
King, Jason	Inter-Tel Tech. (Sales)
Marchelos, George	VNCI (Sales)
Maynard, Duane	Howe Electric (Senior Estimator)
McNulty, Gerard	NEC (National Account Manager)
Mitchell, Raymond	West Fresno Elem. Sch. Dist. (Director, Tech.)
Molnar, George	Midwest Business Sys. (Owner)
Newton, Steven	Premio Computers (VP, Sales); Sema4 (Owner); Digital Connect Commc'ns (Owner)
Plesset, Erik	Digital Connect Commc'ns (Owner)
Qasim, Sohail	Inter-Tel Tech. (Regional Sales Eng'r) NEC (Senior Systems Eng'r)
Rodriguez, Richard	Luther Burbank Sch. Dist. (Superintendent)
Travis, Dorothy	Ceria M. Travis Academy (President)
Washington, Linda	W.E.B. DuBois Pub. Charter Sch. (Superintendent)
Wiseman, Jim	Midwest Telecomms. (Owner)
Wood, Daphne	Barnwell Sch. Dist. #19 (Director, Tech.)

STATEMENT OF JURISDICTION

The government agrees with appellant's jurisdictional statement. Br. 1-2. The district court entered judgment on March 19, 2008, and appellant timely noticed her appeal on March 26, 2008. Fed. R. App. P. 4(b)(1)(A).

ISSUES PRESENTED

1. Whether, in a wire fraud prosecution, the district court was required to instruct the jury on the interpretation of administrative rules that were merely part of the context of the fraud.

2. Whether substantial evidence supports the jury's verdicts.

3. Whether the district court abused its discretion when instructing the jury on the foreseeability of wirings.

4. Whether defendant's sentence was reasonable.

STATEMENT OF THE CASE

This case concerns several large frauds orchestrated by Judy Green involving the government's E-Rate Program, which subsidizes telecommunications and Internet infrastructure for low-income schools. On December 8, 2005, a grand jury returned a 22-count superseding

indictment (Indictment) against Green and eleven others:[1] eleven counts of wire fraud (18 U.S.C. §§ 1343, 2); ten counts of bid rigging (15 U.S.C. § 1; 18 U.S.C. § 2); and one count of conspiracy to commit wire fraud (18 U.S.C. § 371). DER:195-233.[2] Green was the only defendant who went to trial.[3]

On September 14, 2007, after a nineteen-day trial with 26 witnesses—including Green—and 156 exhibits, the jury convicted Green on all counts. The district court (Alsup, J.) denied Green's motion for acquittal on November 7, 2007, and denied her motion for a new trial on March 19, 2008.

On March 19, 2008, Green was sentenced to 90 months imprisonment, plus two years of supervised release and a special assessment of $2,200. DER:1-7. After the district court and this Court

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[1]Four additional coconspirators pled guilty prior to indictment. PSR ¶ 16.

[2]"DER" refers to Defendant-Appellant's Excerpts of Record, while "GER" refers to Government-Appellee's Supplemental Excerpts of Record.

[3]Seven of Green's indicted codefendants pled guilty, and charges against four corporate defendants were dismissed because the companies were either defunct or unable to pay fines. PSR ¶ 16.

denied bail, Green started serving her prison sentence on December 5, 2008.

STATEMENT OF FACTS

I. The E-Rate Program

A. Background

Congress created the E-Rate Program in 1996 to subsidize Internet and telecommunications infrastructure for poor schools. E-Rate is part of the Federal Communications Commission's (FCC) Universal Service program and is administered by the Schools & Libraries Division (SLD) of the non-profit Universal Services Administrative Company (USAC). Bennett Tr. 527-29 (DER:296-98);[4] Indictment ¶ 1 (DER:196-97). Funding comes from a Universal Service Fund charge on every consumer's phone bill. Bennett Tr. 530 (DER299). Every year, USAC receives fund requests "far exceed[ing]"[5] E-Rate's $2.25 billion cap. Bennett Tr. 530, 535, 588 (DER:299, 304, 332); Ayer Tr. 425 (GER:30) (40,000 applications per year).

[4] A list of trial witnesses and affiliations is provided at p. vi, above.

[5] The trial transcript uses only capital letters, so this brief alters capitalization to make quotations more readable.

E-Rate's subsidy is incomplete. Even the poorest schools must pay 10% of the cost of equipment and services funded by E-Rate to help ensure that schools "have a financial stake in what they're purchasing, since that will ensure that they're getting equipment at a good price and that they're prepared to make use of that equipment." Bennett Tr. 531-33, 552-53 (DER:300-02, 321-22).

E-Rate will not pay *any* portion of "ineligible" items, including any end-user equipment—personal computers, monitors, telephone handsets, printers, fax machines, etc.—even though the installed network may be useless without at least some of that equipment. Holodnick Tr. 286 (GER:8). Nor does E-Rate pay for any training, consulting, marketing, or management fees. Bennett Tr. 545, 612, 633 (DER:314, 356, 377). "Essentially, the Program pays for connectivity down to the wall switch." *Id.* at 536 (DER:305). USAC's website lists eligible and ineligible equipment and services, which it revises from time to time. Schools are responsible for knowing what is eligible and ineligible. Holodnick Tr. 284-85 (GER:6-7).

B. The Application Process

After developing a technology plan, a school submits FCC Form 470 to identify the general products and services for which it seeks E-Rate funding. USAC posts the Form 470 on its website, thereby "start[ing] the competitive procurement process" intended to "result in the selection of the best vendor at the lowest cost." Bennett Tr. 539-40 (DER:308-09). Once the school selects and contracts with the winning bidders—using price as a "primary factor," *id.* at 540 (DER:309)—it submits FCC Form 471.

Form 471 is the detailed "application for E-Rate funding." *Id.* at 542 (DER:311); Ayer Tr. 428 (GER:33). Block 5, Item 21 generally describes the equipment to be bought from each vendor (e.g., PBX[6]), and an attachment gives the specifics. Bennett Tr. 543 (DER:312). Item 23 identifies the total cost of eligible equipment and services, the funding requested (the remainder being the school's copay), and the cost of any ineligible equipment or services. See, e.g., X361 at 047-048 (GER:1402-03).

[6]A PBX is a telephone switch and system for a facility. Kind Tr. 1674 (GER:509).

Because USAC relies on the accuracy of the school's Form 471, Block 6, Item 25 requires the responsible school official to make the "critical" certifications that the school has "secured access to the resources necessary to not only pay for their co-pay amount, but also to make effective use of the goods and services that are being provided by the Program." Bennett Tr. 544-45 (DER:313-14); e.g., X361 at 069 (GER:1406).

USAC reviews the school's Form 471. Bennett Tr. 545-46 (DER:314-15). It reviews Block 5, Item 21 to ensure that funding is sought only for eligible equipment. *Id.* at 546 (DER:315). For "high risk applications," it conducts a "selective review" of the Block 6, Item 25 certification, requiring "voluminous" back-up to ensure that the school's procurement process, vendor contracts, and budget satisfy E-Rate requirements, and that the school can "pay for their portion." Ayer Tr. 458, 513 (GER:34-35); Bennett Tr. 546-47 (DER:315-16).

After reviewing Form 471, USAC issues a Funding Commitment Decision Letter to the school and vendors, "letting them know that the application has been funded and at what level" and for which

equipment. Bennett Tr. 548 (DER:317). The school files FCC Form 486 when it begins to receive the contracted equipment or services. Upon completion, the vendor sends one invoice to USAC (FCC Form 474) for the portion funded by E-Rate, and another invoice to the school for the balance. *Id.* at 549 (DER:318).

II. GREEN'S ILLEGAL SCHEMES IN 1998-2001

Between 1998-2001, Green's illegal conduct spanned eleven school districts in five states:

Counts	1, 12	West Fresno Elementary (California)
Counts	2, 13	Highland Park (Michigan)
Counts	3, 14	Covert (Michigan)
Counts	4, 15	Lee County (Arkansas)
Counts	5, 16	Jasper County (South Carolina)
Counts	6, 17	Ecorse (Michigan)
Counts	7, 18	Ceria Travis (Wisconsin)
Counts	8, 19	Muskegon Heights (Michigan)
Count	9	San Francisco Unified (California)
Counts	10, 20	W.E.B. DuBois (California)
Count	11	Luther Burbank (California)

Indictment ¶¶ 12-131 (DER:199-224). Counts 1-11 charged fraud, while Counts 12-20 charged bid rigging. The general scheme was the same in each district: (1) Green became the E-Rate "consultant" to a poor school district by promising a complete technology system—

including video conferencing—for free; (2) Green orchestrated the bidding to ensure that her preferred vendors, from which she received "kickbacks," won the contracts; (3) Green and the vendors inflated the price of E-Rate-eligible equipment by the amount of the district's copay and the cost of the ineligible equipment and services, including Green's kickbacks; (4) Green falsified Form 471 so that E-Rate funds would pay all project costs, including ineligible equipment and services and the school's copay; and (5) when USAC followed-up with financial questions, Green provided false budget information to mask the schools' inability to pay. See Dkt. 558 at 14 (citations omitted) (GER:1529).

A. Marketing E-Rate

Green acted as an E-Rate "consultant" to school districts, either as a principal of defendant ADJ Consultants[7] or as a sales representative of defendant Video Network Communications, Inc. (VNCI). Green signed most of these schools at conferences of the National Alliance of Black School Educators (NABSE). Marchelos Tr.

[7] "ADJ" stood for Allan, David, and Judy. Allan is Green's husband; David, their son. Green Tr. 2673-74 (GER:897-98).

916-19, 930-31, 973-76 (GER:156-59, 170-71, 189-92). At the 1999 conference, she and defendant George Marchelos demonstrated VNCI's video equipment and, using a script Green wrote, touted E-Rate as a way to bring technology to attendees' schools. *Id.* at 919-20 (GER:159-60); X028 (talking points) (GER:1082-85). Green dubbed VNCI's equipment "video to the desktop." Holodnick Tr. 303 (GER:9). It transmitted video over existing telephone lines using a PBX, thereby permitting video conferencing and "hook[ing] different types of attachments, cameras, VCR's, DVD's into the switch." Marchelos Tr. 899-900 (GER:150-51); Emery Tr. 2261 (GER:717). VNCI's equipment was "very high-end . . ., very cutting edge." Newton Tr. 703 (GER:55).

At the NABSE conferences and in subsequent meetings, Green promised school officials "bonus packages" (also referred to as "value-adds" or "in-kind donations") including "large monitors, cameras, things were not eligible, basically, for the E-Rate package." X028 at 388 (GER:1084); Marchelos Tr. 923-26 (GER:163-66). Other bonus items included personal computers, printers, student desks, large screen monitors, wall mounts, copiers, scanners, microphones, telephones,

"cameras, video cameras, and televisions, things would be needed to hook up the video system"—all ineligible for E-Rate funding. Holodnick Tr. 313 (GER:19).[8] One school even received a $700,000 television studio, while another got a new air conditioning system.[9]

Most importantly, Green promised that the entire system—eligible and ineligible equipment/services alike—would be provided to the school at "no charge." Marchelos Tr. 977 (GER:193); *id.* at 924-26 (GER:164-66) (discussing X028 at 388 (GER:1084) ("NO cost to District for anything")); Travis Tr. 2493 (GER:858) (Green told Ceria Travis no copay necessary); Holodnick Tr. 307, 326-27 (GER:13, 21-22) (Green promised "no out-of-pocket cost to our district;" copay would have been $1.6 million); Marchelos Tr. 1019-20 (GER:221-22) (Ceria Travis), 1036 (GER:238) (Lee County), 1045 (GER:247) (Jasper), 1046 (GER:248) (Ecorse), 1057 (GER:259) (West Fresno); Mitchell Tr. 1493-94, 1516 (GER:427-28, 450) (West Fresno); Washington Tr. 1578 (GER:472)

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[8]See also Newton Tr. 700, 796-97 (GER:52, 100-01); King Tr. 1395 (GER:400); Mitchell Tr. 1477 (GER:411); Colvin Tr. 1886 (GER:603); Rodriguez Tr. 2238 (GER:714).

[9]Colvin Tr. 1968-69 (GER:619-20); Travis Tr. 2492-93 (GER:857-58).

(DuBois); Rodriguez Tr. 2236 (GER:712) (Green told Luther Burbank "just to ignore" vendors' invoices); Jones Tr. 2403 (GER:814) (Covert).

B. Rigging Bids And Inflating Prices

1. Bid Rigging

As schools' E-Rate consultant, Green ensured that her preselected vendors were awarded the E-Rate contracts. First, she deliberately made the request for proposal (RFP) each school used[10] complex. Green told Steve Newton that the RFPs "had to be that way in order . . . to pare down the competition." Newton Tr. 694 (GER:46). Green's complex RFP "would tend to limit competition, simply because people would not be able to respond well to it. . . . The point was to limit competition in some way so that we would be more assured of being successful." Ferguson Tr. 1809 (GER:579). Green also gave her preferred vendors advance copies of the RFP because "the specifications in the proposals or in the RFP's were so ridiculous a company would not

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[10]See Green Tr. 2692 (GER:903) (RFPs identical except for "quantities" and "certain legal language"); Marchelos Tr. 978 (GER:194) (Green used an RFP "template"); Qasim 1716, 1732 (GER:535, 551); Ferguson Tr. 1806-07 (GER:576-77); Colvin Tr. 1883 (GER:600).

be able to go and ascertain exactly what was required. So Ms. Green gave me insight into what was actually required by the school district." Newton Tr. 866 (GER:140); see also Ferguson Tr. 1837 (GER:592).

Green orchestrated the bidding to ensure that her "prime contractor of choice" would be selected by each school. Emery Tr. 2303, 2316, 2319 (GER:759, 772, 775); X090 at 478 (GER:1108) (Green "owns the bid process"). She told which vendors to bid on which parts of which projects, and which to use as subcontractors. On West Fresno (Count 12), Green instructed Inter-Tel, Premio, and Sprig to act as subcontractors for, rather than bid against, Howe Electric. Inter-Tel had planned to bid the project until Green "directed" it to subcontract for Howe. Boehm Tr. 1265-67 (GER:364-66); Qasim Tr. 1701-07 (GER:520-26). Howe's Duane Maynard used those firms as subcontractors—even though he had "never even heard of them" and Sprig "did the same thing" as Howe—because "Judy made us use them." Maynard Tr. 1188, 1196 (GER:306, 314); see also *id.* at 1185-88 (GER:303-06) (Howe had no choice in subcontractors); Boehm Tr. 1268-69 (GER:367-68) (Inter-Tel had no previous relationship with Howe).

On Highland Park (Count 13), Inter-Tel, Premio, VNCI, and Clover agreed, at Green's behest, to limit their bids to certain portions of the project. See Newton Tr. 701 (GER:53); Boehm Tr. 1245 (GER:344); Qasim Tr. 1717 (GER:536) (Green said not to bid network services because "somebody else . . . was going to bid on that"). Prior to bid submission, Green told Jeffrey Kind that Clover "would be awarded the cabling contract." Kind Tr. 1672 (GER:507).

For the projects charged in Counts 14-19, Green, VNCI, and NEC agreed that NEC would be the prime contractor, pay VNCI 10% of the value of any E-Rate project VNCI brought to NEC, buy VNCI equipment, and use VNCI as a subcontractor for installation.[11] And on the DuBois project (Count 20), Green, VNCI, Inter-Tel, and NEC agreed not to bid against Howe for the project.[12]

[11]X084 (GER:1098-1103) (NEC's agreement with VNCI); Colvin Tr. 1989-91 (GER:621-23); McNulty Tr. 2058-60 (GER:631-33); Emery Tr. 2317-20 (GER:773-76).

[12]Maynard Tr. 1213-15 (GER:331-33) (Howe did not contact subcontractors because Green had "predetermined" that NEC and Inter-Tel would be the subcontractors); Qasim Tr. 1745 (GER:564) (Green told NEC to subcontract for Howe despite NEC's capability to bid on its own).

Firms went along with Green's bid rigging because she brought them lucrative E-Rate projects. Green steered E-Rate projects to vendors in exchange for a payment of 10% of any E-Rate funding that vendor received and their agreement to buy VNCI's video equipment, on which she also earned a sales commission.[13]

2. Price Inflation

The conspiratorial bids were bloated because they rolled all the ineligible items, district's copay, and Green's kickbacks into the cost of E-Rate-eligible equipment. Green told Inter-Tel "before every bid" to spread the cost of value-adds "between different items that were required as part of the bid," because "the quantities of these value-adds were quite substantial, and they added up to quite a big amount. And our typical margins did not allow for including just giving away that

[13]Newton Tr. 752-56 (GER:85-89) (Premio to pay Green $50,000 retainer plus 10% of any contract awarded); Emery Tr. 2276 (GER:732) (VNCI to pay ADJ 5% of the value of E-Rate projects Green brought to VNCI); *id.* at 2287 (GER:743) (Inter-Tel to pay VNCI 10%); *id.* at 2319 (GER:775) (NEC to pay VNCI 10%); Green Tr. 2708 (GER:904); X084 at 707 (GER:1100) (NEC's contract with VNCI); X271 (GER:1321-22) (fee calculation on NEC projects); Marchelos Tr. 960-61 (GER:184-85) (VNCI had 10% deals with Inter-Tel, Premio, NEC, and Excalibur).

equipment." Qasim Tr. 1710-11 (GER:529-30); see also pp. 43-45, below; Emery Tr. 2296-305 (GER:752-61) (discussing X254 (GER:1309-14) and X256 (GER:1315-19), showing vendor profit apart from amounts available to buy eligible and ineligible equipment); Newton Tr. 787-93 (GER:91-97) (same); Maynard Tr. 1201-02 (GER:319-20) (Green "told us to cover the cost of this [bonus] equipment in the E-Rate portion of the funding"; "[i]f there was to be a value-add, it would either have to come out of Howe Electric's pocket, which they weren't going to do that, or it would have to come from inflating the prices to the E-Rate Program").

When Inter-Tel's Qasim became concerned that this bid inflation would render Inter-Tel's bid uncompetitive, Green assured him that all participating vendors "had to provide the same give-aways or these freebies . . . [and would be] treating these costs exactly the same way as she had asked us to." Qasim Tr. 1711-12 (GER:530-31).

3. Vendor Selection

The bloated bids succeeded because Green chose the winning bids or had great influence over the school's decisionmaker.[14] Indeed, VNCI—and Green—would not get paid unless her preferred vendor won the contract. Qasim Tr. 1788 (GER:571).

Green reassured a Premio employee that it would be the winning bidder: "Well, of course you are. They are rigged." Newton Tr. 687 (GER:39). Similarly, when George Marchelos worried that VNCI's equipment might not be used at West Fresno because only Premio and Inter-Tel asked VNCI for equipment prices, Green responded, "What are you worried about? They are going to win, anyway." Marchelos Tr. 938-39 (GER:178-79).

In general, "[t]he decision of who to select would be Judy Green's. There would be a formal endorsement by the school district board, but she had control over what products would be presented and who would be recommended." Boehm Tr. 1255 (GER:354). Green picked the winning bidders for the Highland Park, Covert, Lee County, Jasper,

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[14]See, e.g., Marchelos Tr. 1067 (GER:269) (NEC won although Green said it was not the lowest bidder).

and Ceria Travis projects, and "helped" pick the winners at West Fresno, Ecorse, Muskegon Heights, and DuBois. Marchelos Tr. 985-87 (GER:201-03). The schools "would do what she asked, what she recommended." Ferguson Tr. 1807 (GER:577); see also *id.* at 1834 (GER:589) (Green was "confident . . . that the schools would follow her recommendations").[15]

Green eliminated "outside" vendors based on technical violations of the RFP,[16] yet would waive similar violations for her chosen vendors.[17] She also rejected vendors that otherwise fell out of favor.

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[15]See also X110 (GER:1121) (Green telling Covert "why we are going with NEC"); McNulty Tr. 2097-98 (GER:646-47) (Green told schools "[t]his is who we have chosen for you"); Rodriguez Tr. 2223-24 (GER:699-700) (Luther Burbank's superintendent had "no idea" how the winning bidder was selected and had no input into that selection); Mitchell Tr. 1483 (GER:417) (Green chose Howe Electric for West Fresno before bids were due); Newton Tr. 705 (GER:57).

[16]Washington Tr. 1576 (GER:470) (missed prebid conference); Molnar Tr. 2209-11 (GER:689-91) (same); Wiseman Tr. 2436-38 (GER:825-27) (cabling vendor disqualified despite bidding cable superior to that listed in RFP).

[17]Newton Tr. 695 (GER:47) (Premio's bid accepted despite missing the "mandatory" prebid conference); Colvin Tr. 1901 (GER:618) (discussing X088 (GER:1104-06), in which Green willing to waive bid bond requirement for NEC).

See McNulty Tr. 2127-29 (GER:662-64) (NEC not awarded Luther Burbank contract as "retribution" for seeking projects on its own).

C. Fraudulent Form 471s

After a district formally awarded its project to vendors, Green filled out or provided the information for Form 471, the application for E-Rate funds.[18] Most Form 471s in Counts 1-11 were written over a weekend in January 2000 at NEC's office in Cypress, California, where Green was "running the show." Marchelos Tr. 995 (GER:211); see also *id.* at 1061 (GER:263) (there was "only one person who really knew what she was doing, and that was Judy Green"); McNulty Tr. 2151 (GER:675) ("most of us were watching Judy work").

Each Form 471 contained several material falsehoods. The total project cost figures (Block 5, Column F) and the certifications (Block 6, Item 25) falsely stated that the district would pay its copay, when in reality, Green and her coschemers would invoice USAC for the full

[18]See Green Tr. 2714 (GER:910) (admitting that she prepared every Form 471 except San Francisco); Marchelos Tr. 1020-21, 1132-33 (GER:222-23, 299-300) (Green provided information for all Block 5s, including San Francisco).

project costs. See pp. 41-43, below. Further, Column G of each Block 5 represented that no money was going to ineligible items when Green knew that USAC was being asked to pay for millions of dollars in ineligible equipment, services, and her kickbacks.[19] See pp. 43-45, below.

The Form 471s also included false equipment specifications. All of Green's E-Rate projects included a PBX and VNCI's video switch, which worked with a PBX to provide video services. PBXs were always eligible for E-Rate funding, but VNCI's video equipment was ineligible until the 2001 funding year,[20] after all of the Form 471s of Counts 1-11 were submitted. Green knew that VNCI's video equipment was ineligible. In a January 2001 email to her boss, Green referred to

[19]See Green Tr. 2938 (GER:1051) (admitting that she entered "0" in Column G of each Block 5); X127 at 522-530 (GER:1189-97) (West Fresno); X138 at 025-033 (GER:1252-60) (Highland Park); X120 at 009-020 (GER:1142-53) (Covert); X117 at 004-015 (GER:1125-36) (Lee); X136 at 251-262 (GER:1217-28) (Jasper); X137 at 21.1, 21.5-21.15 (GER:1233, 1237-47) (Ecorse); X125 at 032-040 (GER:1161-69) (Ceria Travis); X361 at 004, 009, 012, 016, 034 (GER:1378, 1383, 1386, 1390, 1401) (Muskegon Heights); X133 at 096-103 (GER:1203-10) (San Francisco); X126 at 020-027 (GER:1174-81) (DuBois).

[20]Bennett Tr. 537, 610-11 (DER:306, 354-55); Emery Tr. 2271-72 (GER:727-28).

"ineligible VNCI products" and "$365,000 of VNCI (ineligible upgrade[s])." X256 at 444 (GER:1316). And she offered VNCI's equipment to schools as a bonus item, Emery Tr. 2321, 2337-38 (GER:777, 781-82), which she would not have done had that equipment been E-Rate-eligible.[21] Vendors also knew that VNCI's video equipment was "not E-Rate certified. Only the PBX itself . . . would be. . . . And so we wanted to put these two devices in the pricing in such a way that it would not easily be discernible that they were two different products, but they looked like part of the same device." Ferguson Tr. 1815 (GER:585).[22] The schools also knew it. E.g., Holodnick Tr. 304, 345-46 (GER:10, 25-26); Mitchell Tr. 1498 (GER:432).

So, to hide the ineligible VNCI video equipment, the PBX parts list submitted with the Form 471s contained false part numbers and descriptions. Green admitted that she "had to make certain that the parts list didn't contain key words that would deny funding for the

[21]See also McNulty Tr. 2144 (GER:668) (McNulty asked Ferguson "to help put the VNCI parts into our PBX pricing because according to Ms. Green they were not yet eligible for funding").

[22]See also Emery Tr. 2265, 2268-69 (GER:721, 724-25) (VNCI installed video on E-Rate projects knowing it was ineligible).

PBVX. . . . So certain things had to be recategorized." Green Tr. 2723 (GER:919). She "had Gerard [McNulty, of NEC] take out all the references to video, because the idiots at the SLD . . . will just deny it." Marchelos Tr. 1032 (GER:234). Instead of including explicit references to video parts, the Form 471s prepared at Cypress labeled the VNCI video parts with the prefix JP, SP, or VS.[23] *Id.* at 1030-31 (GER:232-33) ("[t]hey are physically parts, but those descriptions don't match anything that I'm aware of. . . . The JP parts . . . are supposedly VNCI video switch parts). The false part numbers and descriptions were so associated with Green that the "JP" prefix was chosen to represent a "Judy Part." McNulty Tr. 2094 (GER:643).

That NEC parts list became the template for Inter-Tel's parts list on the West Fresno, Highland Park, and San Francisco projects (Counts 1-2, 9). Marchelos Tr. 1049 (GER:251); King Tr. 1342-43 (GER:387-88). Inter-Tel used the parts descriptions—which Green

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[23]See X120 at 031 (GER:1154) (Covert); X117 at 023-025 (GER:1137-39) (Lee); X136 at 271-273 (GER:1229-31) (Jasper); X137 at 23.3 (GER:1248) (Ecorse); X125 at 047 (GER:1170) (Ceria Travis); X361 at 048-050 (GER:1403-05) (Muskegon Heights); X126 at 030 (GER:1184) (DuBois).

wrote—but changed the part numbers to 900- series rather than JP-series. King Tr. 1340-53 (GER:385-98); X023 (GER:1080-81); Marchelos Tr. 1054, 1056-57 (GER:256, 258-59) ("900 numbers represent Inter-Tel representations for the VNCI switch").[24] The descriptions of the JP- and 900- parts made no reference to video, which was "[n]o accident at all." *Id.* at 1055 (GER:257).

D. Fraudulent Responses To USAC Questions

For almost all the projects charged in Counts 1-11, USAC followed up the Form 471 applications with an "Item 25 review" to ensure that the school district could pay its copay. Green drafted the responses to those requests,[25] and provided USAC with false budget information. Green admitted: "I would just create that line item that said E-Rate to reduce the delays and to allow the E-Rate interviewer the ability to see it clearly." Green Tr. 2730 (GER:926); see also *id.* at 2729 (GER:925)

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[24] See X127 at 543-44 (GER:1198-99) (West Fresno); X138 at 037 (GER:1264) (Highland Park); X022 at 300-302 (GER:1077-79), X133 at 105-106 (GER:1212-13) (San Francisco).

[25] See Green Tr. 2884-85 (GER:997-98) (admitting she prepared Luther Burbank's Item 25 response); Mitchell Tr. 1504 (GER:438); Washington Tr. 1581 (GER:475); Rodriguez Tr. 2226 (GER:702).

("[I]t was much easier to . . . create an E-Rate line, so, okay, the person at the SLD . . . could say, oh, yes, here's E-Rate").

III. THE SCHEMES OF 2003-2004

Counts 21-22 addressed Green's fraudulent schemes of 2003-2004, in which she rigged fifteen E-Rate projects and orchestrated a separate agreement to deceive USAC into believing that the schools had secured funding for their copays.

A. Bid Rigging (Count 21)

In a January 2003 meeting at her office, Green allocated fifteen E-Rate projects between competitors Digital Connect (DCC) and Expedition Networks, and dictated the computer equipment and prices that each should bid on the same projects. Green Tr. 2914-20 (GER:1027-33) (discussing X511 (GER:1438-52)); Plesset Tr. 2468-69, 2472-75, 2480-81 (GER:840-41, 844-47, 852-53); Newton Tr. 822-824 (GER:121-23). The companies submitted these rigged bids to the fifteen schools. Plesset Tr. 2476-78 (GER:848-50); X364 at 089 (GER:1410); Favara Tr. 2369 (GER:798); Newton Tr. 825-26 (GER:124-25). Green then selected the winning bidder on each project. Newton

Tr. 826-27 (GER:125-26) (Green would "brag . . . that they completely relied on her for the selection of vendors"); *id.* at 830-31 (GER:129-30) (Green "very excited" that she could "capture [$23.3 million] for us"); Wood Tr. 2538, 2542 (GER:883, 887) (Green selected winning vendor and school had no input); X484 (GER:1430-35) (spreadsheet allocating projects between Digital Connect and Expedition).

Green stood to profit from these rigged bids because of agreements with DCC and Expedition that would pay her 5-10% of the funding received on any E-Rate project she brought to them. See Plesset Tr. 2461-62 (GER:833-34); Favara Tr. 2366-68 (GER:795-97); Newton Tr. 833 (GER:132) (discussing X484 (GER:1430-35)).

B. Conspiracy To Defraud (Count 22)

Green orchestrated a conspiracy with Richard Favara to deceive USAC into thinking that schools would pay their copays on the fifteen 2003-2004 projects. Favara controlled both Expedition Networks and the American Education Alliance (Alliance), a nonprofit formed to provide refurbished computers to underprivileged schools and children. Favara Tr. 2361 (GER:790). Green and Favara agreed to use Alliance

as a shell—it had no assets and had made no grants, *id.* at 2374-77 (GER:803-06)—with Expedition funding Alliance through its 20-30% profit on E-Rate projects, Alliance offering a "grant" to schools, and the school "paying" back the money to Expedition as its copay. *Id.* at 2372-75 (GER:801-04).

Accordingly, at her request, Favara made Green Alliance's Director of Grants.[26] Green sent Favara, who posted on Alliance's website, a financial overview "to make the company look stronger when she was talking to schools." *Id.* at 2375 (GER:804). That overview contained "outright lies" by representing that Alliance had assets of $32 million and had made substantial prior grants when, as Green and Favara knew, all of the numbers should have been zero. *Id.* at 2377-80 (GER:806-09); X315 at 085-086 (GER:1337-38).

Green used Alliance's website to entice schools to apply for E-Rate funding, promising Alliance grants. Gardiner Tr. 2507-09 (GER:867-69); Wood Tr. 2546-48 (GER:891-93). Subsequently, Green submitted

[26]See Favara Tr. 2372 (GER:801); Marchelos Tr. 1090-91 (GER:292-93) (Green told Marchelos that she had "landed . . . [being] Executive Director of a Foundation. And if you're nice to me, I'll help you get a grant").

the false Alliance financial statements and "grant" letters to USAC to deceive it into thinking that Alliance grants would enable each school to meet its copay obligation. See Gardiner Tr. 2510-14 (GER:870-74) (discussing X323 at 053-054, 067-068 (GER:1347-48, 1351-58)); Wood Tr. 2544-46 (GER:889-91) (discussing X317 (GER:1344-45)); Green Tr. 2909, 2912-13 (GER:1022, 1025-26) (discussing X327 at 037-038 (GER:1360-61)).[27]

IV. THE FRAUDULENT SCHEMES' BOTTOM LINE

As seen in the chart below, Green's fraudulent schemes spanned 26 school districts in seven states, and caused or intended to cause USAC to fund a total of $13.8 million in copays, $13.0 million in end-user equipment, $6.4 million in management and marketing fees, and $21.7 million in video equipment that it otherwise would not have funded. Of that amount, Green was personally slated to receive more than $3 million. See Newton Tr. 831 (GER:130) (Green told Newton to "be ready to write a big check for $2.33 million to her when all this

[27]These projects never were funded because USAC "suspected some kind of a collusive activity." Newton 827-28 (GER:126-27).

business came in") (discussing X484 (GER:1430-35)); Emery Tr. 2280 (GER:736) (discussing X487 (GER:1436-37), which shows $1.1 million in commissions due to Green); Favara Tr. 2368 (GER:797) (Green to receive 5-10% of any projects Expedition closed). See also Emery Tr. 2354-55 (GER:786-87).

FRAUD CALCULATIONS
(figures in dollars)

School	Copay	Video	Bonus Items	Mgmt./ Mktg. Fees	TOTAL
West Fresno	604,618	988,410	921,519	0	2,514,547
Highland Park	1,076,874	1,008,000	2,469,000	36,000	4,589,874
Covert	214,383	198,173	161,501	156,185	730,242
Lee County	601,178	545,380	1,012,196	572,367	2,731,121
Ecorse	537,667	728,069	1,922,000	361,187	3,548,923
Jasper County	1,432,507	2,175,574	1,806,000	823,225	6,237,306
Ceria Travis	119,243	132,938	422,633	87,558	762,372
Muskegon Heights	1,841,542	2,803,788	4,243,060	0	8,888,390
San Francisco	0	13,117,935	0	1,259,395	14,377,330
W.E.B. DuBois	344,975	0	102,636	0	477,611
Luther Burbank	151,653	49,290	0	125,000	325,943
2003–04 Projects	6,826,055	0	0	3,016,000	9,842,055
TOTAL	13,750,695	21,747,557	13,060,545	6,436,917	54,995,714

Source: Dkt. 611-2 (GER:1491-1515).

V. SENTENCING

A. Sentencing Guidelines

The district court, using § 2F1.1 (Fraud) of the 2000 Guidelines Manual, as Green had requested,[28] computed the total offense level of 30 as follows:

Sentencing Guideline (2000)		Level
Fraud Base Offense Level	§ 2F1.1	6
Loss, between $20-$40 million	§ 2F1.1(b)(1)(Q)	+16
More-than-minimal planning	§ 2F1.1(b)(2)	+2
Use of sophisticated means	§ 2F1.1(b)(6)(C)	+2
Role in Offense, Organizer	§ 3B1.1(a)	+4
TOTAL OFFENSE LEVEL		30

Green did not oppose any of the five offense-level elements listed above; indeed, she proposed a total offense level of 32. Sentencing Tr. 22-26 (DER:15-19); Dkt. 612 at 19-20 (GER:1479-80).[29] The court's offense

[28]Sentencing Tr. 18-19 (DER:11-12); *U.S. Sentencing Guidelines Manual* § 2F1.1 (2000).

[29]The court (over Green's objection) included copay amounts in the total loss calculation but excluded (per Green's request) the money spent on video PBX, though fraudulent. Sentencing Tr. 30-31, 36 (DER:23-24, 29). And although Green's counsel conceded that Green deserved a further two-point enhancement for lying at trial, the court did not impose one. *Id.* at 23, 33-34, 37 (DER:16, 26-27, 40).

level of 30 yielded a Guidelines sentencing range of 97-121 months imprisonment.

B. Sentencing Factors

Green argued for a below-Guidelines sentence "in the five-year range," saying that her "real motivation" was to help poor schools rather than for "personal gain," that she had "a fundamental disagreement with how the [E-Rate] program was operating," that defendants convicted in other E-Rate cases had received 3-5-year sentences, and that her codefendants had received even less. Sentencing Tr. 39-43 (DER:32-36).

The district court observed that "the evidence was overwhelming that Ms. Green was a big fraudster" in a "serious crime." *Id.* at 30, 50 (DER:23, 43); see also *id.* at 36 (DER:29) ("huge fraudster"). It described as "very weak" her excuses of helping poor schools or "blaming it on the confusion in the regulations": "You knew you were defrauding the system and did it on purpose, repeatedly." *Id.* at 50 (DER:43).

Nevertheless, the district court imposed a below-Guidelines sentence of 90 months, recognizing Green's age (60), her 30 years of public service as a teacher, her 40-year marriage, her previous clean record, and her recent bankruptcy. *Id.* at 50-54 (DER:43-47). The court wanted Green to have a "fighting chance" of "making ends meet" and not becoming a "ward of the State" when her imprisonment ended. *Id.* at 51, 47 (DER:44, 40).

The district court initially intended to assign the entire 90 months to the fraud counts (Counts 1-11), until it realized that wire fraud carried a statutory maximum of 60 months in 2000. *Id.* at 51-52 (DER:44-45). Instead, it imposed concurrent sentences of 60 months on Counts 1-11 and 21-22, running consecutively to concurrent 30-month sentences on bid rigging Counts 12-20. *Id.* at 53-54 (DER:46-47).

SUMMARY OF ARGUMENT

1. Green's argument that she was denied due process because she never received "fair warning" of E-Rate administrative rules is a red herring. As the district court found, "Green was charged with, prosecuted for, and found guilty of eleven counts of plain vanilla wire

fraud—not for possible violations of E-Rate administrative regulations." Bail Op. 4 (GER:1456). The Indictment and jury instructions made clear that Green was on trial for wire fraud, not regulatory violations, and the evidence of fraud was "overwhelming." Sentencing Tr. 50 (DER:43).

2. Ample evidence supports conviction on every count. On fraud Counts 1-11 and 21, the evidence showed that Green repeatedly hid the fact that E-Rate funds would be used to pay for *100%* of each district's *total* project costs—both eligible and ineligible costs—rather than *90%* of only *eligible* costs. Green filled out the Form 471 funding applications, which contained inflated cost figures on eligible equipment and falsely stated that no ineligible equipment would be used. Green also directed submission of false equipment lists, which hid from USAC that E-Rate funds would be used to purchase millions of dollars' worth of VNCI video equipment. And when USAC followed-up with questions about schools' finances, Green provided USAC with materially false budget figures. Green Tr. 2729 (GER:925).

On conspiracy Count 22, Green agreed with Richard Favara to use Alliance as a shell, funded by profits Favara's company Expedition Networks would earn on Green's E-Rate projects. Alliance would award "grants" to schools, which would use the money to cover their copay obligations to Expedition. Alliance had no assets, but Green wrote a financial overview falsely showing $32 million in assets, which she submitted to USAC to demonstrate the schools' ability to pay their copays through Alliance "grants."

On bid rigging Counts 12-20, Green orchestrated agreements under which at least one actual or potential competitor refrained from submitting a bid directly to the school in return for receiving a lucrative subcontract from Green's preferred vendor for that project. The jury was instructed that it could convict only upon finding that each agreement was "nothing more than a scheme to eliminate competition between two or more prospective bidders," Tr. 3182 (DER:99), and therefore rejected Green's claim that the agreements were ordinary "teaming" agreements.

3. The district court's wire fraud instruction was proper. Under *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989), a charged wiring need not be sent by the defendant or even another coschemer. Because Green actively participated in each fraudulent scheme, it was sufficient that each wiring "occurred during [her] knowing participation or [was] an inevitable consequence of actions taken while [she] was a knowing participant." *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002). The district court's instruction met that standard.

4. Green's 90-month sentence was reasonable. The district court properly considered all of the sentencing factors of 18 U.S.C. § 3553(a), including the need to avoid "unwarranted" sentencing disparities. Green deserved a harsher sentence than her codefendants because she was the most culpable yet never accepted responsibility. Further, proportionate to her offense, any disparity in sentencing between Green and defendants in other E-Rate cases was to her benefit, not detriment.

ARGUMENT

I. GREEN WAS PROSECUTED FOR WIRE FRAUD, NOT RULES VIOLATIONS

Green erroneously asserts that her prosecution violates the Due Process and Ex Post Facto Clauses because her conduct was "lawful when performed" and the E-Rate rules were confusing. Br. 28-31. The district court found this argument "specious," Dkt. 719 at 4 (GER:1456) (Bail Op.), and her argument has not improved over time.

The Indictment charged Green with wire fraud, not rules violations. For example, the Indictment charged that Green "deceived . . . USAC into believing" that: (1) each school sought funds "only for eligible equipment, when, in fact, the defendants had included the costs of ineligible end-user equipment and services . . . as part of the costs of the eligible equipment;" (2) each school "had the resources available to acquire . . . end-user equipment;" and (3) each school "had budgeted funds to pay [its] co-pay share." Indictment ¶¶ 9-10 (DER:199).

As the district court found, "Green was charged with, prosecuted for, and found guilty of eleven counts of *plain vanilla wire fraud*—not for possible violations of E-Rate administrative regulations. . . . The

FCC regulations were merely a backdrop against which Ms. Green made egregious fraudulent representations." Bail Op. 4 (emphasis added) (GER:1456). Indeed, the jury was instructed—at Green's request (Tr. 2834-35 (GER:1058-59))—that "the offenses charged in this case are *not* for violations of the FCC regulations." Tr. 3166 (emphasis added) (DER:83).[30] And the district court further told the jury *not* to convict for "backdating of contracts and various misrepresentations allegedly made to USAC," which violated E-Rate administrative rules but were not part of the wire fraud schemes charged in the Indictment. Tr. 3172-73 (DER:89-90).

Thus, jurors could convict only if they found "deceptions involving the copay and/or eligibility." Tr. 3173 (DER:90). And the evidence of Green's fraud involving copay and eligibility was, as Judge Alsup said, "overwhelming." Sentencing Tr. 50 (DER:43); see pp. 39-50, below.

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[30]Green suggests that that admonition was limited to bid rigging, Br. 36 n.8, but Green did not request it as such and the district court did not interpret it that narrowly. See Tr. 2834-35 (GER:1058-59); Bail Op. 4 (GER:1456). Instead, the instruction referred generally to "the offenses charged in this case." Tr. 3166 (DER:83).

The E-Rate rules and regulations were not a legal question for the judge to resolve, cf. Br. 34-38, and at most gave the jury background information. What matters are the Indictment's charges and the court's instructions to the jury, and those all related solely to wire fraud.[31] Green does not argue that the district court misstated the law of wire fraud. See Tr. 3168-73 (DER:85-90). Green was convicted because she repeatedly "misrepresented what the funds would be used for and the schools' ability to provide co-pays." Bail Op. 5 (GER:1457); see also Bail Tr. 7 (GER:1467) ("[S]he was representing to the agency that they [the school districts] were buying X, but in fact, they were buying Y"); *id.* at 8 (GER:1468) ("It was absolutely clear she phonied up"). That is classic fraudulent conduct, and the jury rejected Green's contention that she acted in "good faith" and was merely trying to bring to fruition "exactly what E-Rate was designed to achieve." Br. 46, 34. Green "knew [she was] defrauding the system and did it on purpose,

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[31]It is thus irrelevant that during the course of the trial, and outside the jury's presence, the district court asked the parties for further briefing on the E-Rate rules. Cf. Br. 32. The district court merely was being careful to understand the regulatory "backdrop." Bail Op. 4 (GER:1456).

repeatedly." Sentencing Tr. 50 (DER:43). See also Bail Op. 5 (GER:1457) ("[T]he justice system does not run on an ends-justify-the-means philosophy").

II. SUFFICIENT EVIDENCE SUPPORTS THE VERDICTS

Green attacks the sufficiency of the evidence on every count except Count 21.[32] Br. 43-60. "Claims of insufficient evidence are reviewed de novo" if raised below, *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004), but for plain error if not, *United States v. Romero*, 282 F.3d 683, 686-87 (9th Cir. 2002). "There is sufficient evidence to support a conviction if, 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Green's sufficiency challenges often devolve into ad hominem attacks on witnesses or claims that the testimony was "uncorroborated" or not "neutral, disinterested." See, e.g., Br. 4, 49, 51, 58. Such

[32]For the evidence supporting Count 21, see pp. 23-24, above.

attacks, however, are relevant only to witness credibility and the potential weight assigned by the jury, not to sufficiency of the evidence. The district court properly instructed the jury on weighing witness credibility, Tr. 3161-62 (DER:78-79), and the jury was entitled to believe government witnesses even had they consisted of "scoundrels, liars and brigands." *United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981) (citations omitted). Even "the uncorroborated testimony of co-conspirators is sufficient evidence to sustain a conviction unless incredible or unsubstantial on its face." *United Sates v. Alvarez*, 358 F.3d 1194, 1201 (9th Cir. 2004) (citations omitted); see also *United States v. Okoronkwo*, 46 F.3d 426, 430 (5th Cir. 1995) ("The jury is entitled to believe a witness unless the testimony is so incredible that it defies physical laws"). Green impeached witnesses and questioned evidence at trial. "The jury was aware of the challenges to [various witnesses'] credibility; nevertheless, it believed [them]. That was its proper prerogative." *United States v. Lopez*, 803 F.2d 969, 973 (9th Cir. 1986).

The jury similarly was "free to disbelieve" Green's own testimony and "infer the opposite of [her] testimony to support its verdict." *United States v. Cordova Barajas*, 360 F.3d 1037, 1041 (9th Cir. 2004); *United States v. Castro*, 476 F.2d 750, 753 (9th Cir. 1973) ("The jury could draw affirmative inferences of knowledge and intent from her denials"). Indeed, the district court found that Green had lied on the stand. Sentencing Tr. 34, 37 (DER:27, 30).

A. Sufficient Evidence Of Fraud (Counts 1-11)

Despite the district court's frequent post-conviction observation that the "evidence of hardcore fraud and intent to cheat was overwhelming," Bail Tr. 5 (GER:1457), and that Green "knew [she was] defrauding the system and did it on purpose, repeatedly," Sentencing Tr. 50 (DER:43), Green claims there was insufficient evidence of intent to deceive because she believed that vendors would cover the cost of bonus items, marketing fees, and the schools' copays out of their profits. Br. 43-51; Green Tr. 2689-90 (GER:900-01). Green did not question the sufficiency of evidence of fraud below, so review on appeal is for plain error. *Romero*, 282 F.3d at 686-87.

"Wire fraud has three elements: (1) a scheme to defraud; (2) use of the wires in furtherance of the scheme; and (3) a specific intent to deceive or defraud." *Shipsey*, 363 F.3d at 971. Intent "may be inferred from the defendant's statements and conduct," and "[d]eceitful statements of half-truths or the concealment of material facts is actual fraud." *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979). Green's fraudulent conduct generally fell into three categories—fraudulent Form 471 applications, fraudulent equipment lists, and fraudulent Item 25 materials—each of which was sufficient to convict her under § 1343.

1. Fraudulent Form 471s

A rational jury could easily find beyond a reasonable doubt that Green falsified each school's Form 471 E-Rate application and knew and directed vendors to inflate the cost of eligible equipment by the cost of ineligible equipment and services—a course Green concedes would be illegal (Br. 44)—rather than paying for them out of their "profits" (Br. 48-49). Green hid the fact that E-Rate funds would be used to pay for

100% of each district's *total* project costs—both eligible and ineligible costs—rather than *90%* of only *eligible* costs.

a. Block 5, Column F

Block 5, Column F of Form 471 directs applicants to specify the total cost of the proposed project. The applicant then subtracts any ineligible equipment and services (Column G) to reach its "prediscount" total (Column H). Of the prediscount total, the applicant is responsible for its copay (Column J),[33] and requests E-Rate funds for the remaining eligible project costs (Column K). See, e.g., X127 at 522-529 (GER:1189-96). Green, who filled out or provided the information for each Form 471,[34] knew that vendors would not seek to collect the copay from any school but would instead invoice USAC for the full cost of each project. She therefore fraudulently inflated the cost figures of

[33]For nearly all of Green's schools, the copay was 10% of eligible costs.

[34]See Green Tr. 2714 (GER:910) (admitting that she prepared every Form 471 except San Francisco); *id.* at 2716, 2721 (GER:912, 917); Marchelos Tr. 1020-21, 1132-33 (GER:222-23, 299-300) (Green provided information for all Block 5s, including San Francisco); King Tr. 1348 (GER:393); Marchelos Tr. 1079 (GER:281) (everything "had to be totally reviewed and could not be submitted unless she approved them"); see also p. 18, above.

Column F to include the amount of the copay, so that Column K—the amount requested from USAC—represented the full cost of the project.

Green told school officials they would not pay a copay. Marchelos Tr. 921-26, 977 (GER:161-66, 193); Holodnick Tr. 306-07 (GER:12-13) (Green promised "no out-of-pocket cost to our district;" copay should have been $1.6 million); Jones Tr. 2403, 2418-21 (GER:814, 816-19) (discussing X096 at 019 (GER:1113) ("vendors will provide bid items using only funds from SLD. Thus actual cost to District will be '0'")). She told vendors to invoice schools merely "to show the appearance that we were, in fact, expecting a copayment from them," Newton Tr. 706-08 (GER:58-60), and told school officials to lie if USAC asked if they had paid their copay. *Id.* at 793-95 (GER:97-99) ("Just tell them that you paid it. They are never going to check"); Rodriguez Tr. 2236-37 (GER:712-13) (Green said "just to ignore" vendors' invoices but that if USAC asked, the school should "say that we had the ability to pay them the copay").[35] Thus, Green knew that the schools were not going to pay

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[35] See also Marchelos Tr. 1019-20 (GER:221-22) ("No expectation that Ceria Travis was going to pay anything"), 1035-36 (GER:237-38) (Lee), 1045-46 (GER:247-48) (Jasper, Ecorse), 1057 (GER:259) (West Fresno); Maynard Tr. 1188 (GER:306) (Green told Howe Electric that

their copay and, therefore, that the figures in Column F were false and fraudulent.

b. Block 5, Column G

Block 5, Column G of Form 471 directs applicants to specify "[h]ow much of the $ amount in (F) [total cost] is ineligible?" See, e.g., X127 at 522 (GER:1189). Green admitted entering "0" in every Column G. Green Tr. 2938 (GER:1051); see p. 19 & n.19, above. Green knew, however, that "0" was false because each project included substantial ineligible equipment and services that should have been identified. Moreover, Green knew—and usually directed—that the costs of the school's copay and ineligible equipment and services were included in the reported "cost" of eligible equipment and services and would not come out of vendors' "profits" as give-aways.

> No. No. That wasn't what was to be done. . . . Because it was a ridiculous amount of value-added equipment. There's just no possible way you could give away all of that stuff and stay in business. It's impossible. . . . So she told me they had to be folded

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West Fresno would not pay copay); Mitchell Tr. 1492-94, 1516, 1559 (GER:426-28, 450, 461); Washington Tr. 1578 (GER:472) (Green said DuBois "would not have to pay any type of copayment"); McNulty Tr. 2158 (GER:682); Travis Tr. 2493 (GER:858).

> into the price of the entire project with the eligible products. And the only way that could be accomplished was to add it to the price of what we were providing that was eligible.

Newton Tr. 860-61 (GER:134-35).[36]

When Steve Newton met Green to discuss USAC's funding commitment for Luther Burbank, she designated the first 35% for vendor profit margin and the remaining 65% to cover ineligible equipment and other project costs. See *id.* at 787-93 (GER:91-97). Green used this same methodology for the Highland Park project. See Emery Tr. 2296-305 (GER:752-61) (discussing X254 (GER:1430-35) and X256 (GER:1315-19)). Similarly, she told Newton that "the only way that it could be done" was to add the cost of value-adds to cost of servers, and then add profit margin on top of that. Newton Tr. 698, 702 (GER:50, 54).[37] She told Howe Electric "to cover the cost of this [bonus]

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[36]See also Qasim 1709-11 (GER:528-30) (Green told Inter-Tel "before every bid" to spread the cost of value-adds "between different items that were required as part of the bid," because "the quantities of these value-adds were quite substantial, and they added up to quite a big amount. And our typical margins did not allow for including just giving away that equipment").

[37]See also Newton Tr. 697 (GER:49) ("I had to inflate the prices of the servers in order to accommodate the prices of the value-added items"); *id.* at 699 (GER:51) (Green told Newton "the only way you're

equipment in the E-Rate portion of the funding." Maynard Tr. 1201 (GER:319).[38] And Green told NEC to include $1.1 million in value-adds, plus VNCI's 10% fee, in the price of eligible equipment. Qasim Tr. 1736-39 (GER:555-58) (discussing X017 at 003 (GER:1076); *id.* at 1748-49 (GER:567-68) (discussing X121 ¶ 5 (GER:1155)).[39]

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going to be able to get the value-added items in on this is to add it to the server price"); *id.* at 702 (GER:54) (value-adds "were paid for [by E-Rate], so they weren't actually donated"); *id.* at 704-05 (GER:56-57); *id.* at 731-32 (GER:64-65) (Green knew that E-Rate funds would be used for ineligible VNCI video equipment); *id.* at 733 (GER:66) ($300,000 of the $1.4 million USAC paid Premio for the Highland Park project went for eligible servers and the rest went for VNCI's video equipment and value-adds); *id.* at 736 (GER:69); *id.* at 748-49 (GER:81-82); *id.* at 800-02 (GER:104-06) (Green knew that Sema4 was using E-Rate funds to pay for value-adds).

[38]See also Maynard Tr. 1201 (GER:319) (value-adds "would either have to come out of Howe Electric's pocket, which they weren't going to do that, or it would have to come from inflating the prices to the E-Rate Program"); *id.* at 1217-18 (GER:335-36) (Howe "wasn't in the business of giving stuff away").

[39]See also Qasim Tr. 1705-06 (GER:524-25) (Inter-Tel "combined" pricing for the PBX and the video switch "and came up with a single price," then "tacked" on profit margin); *id.* at 1718-20 (GER:537-39) (Green told Inter-Tel to include the cost of the value-adds in the price of the required items) (discussing X045 at 297 (GER:1087)); Boehm Tr. 1251-55, 1263, 1271-73 (GER:350-54, 362, 370-72) (Green knew that Inter-Tel inflated the cost of eligible equipment by the cost of the video equipment and value-adds); Mitchell Tr. 1492, 1513-16 (GER:426, 447-50) (Green told school E-Rate funds would be used to buy 500 computers and other ineligible equipment); Ferguson Tr. 1810-12

2. Fraudulent Equipment Lists

Schools must include equipment parts lists with their Form 471s (see Block 5, Item 21 of Form 471) to identify how E-Rate funds will be spent. The PBX parts lists submitted in this case, however, contained false part numbers and descriptions to hide that VNCI video equipment would be purchased with E-Rate funds. The lists identified parts that were nonexistent or were not going to be used in the PBX. Green blames the vendors for these misrepresentations, Br. 49-50, but the evidence was overwhelming that Green directed this subterfuge and therefore knew that false information was submitted to USAC.

The PBX parts lists were created at Cypress, when Green and others were preparing most of the Form 471s. For the projects of Counts 3-8 and 10, all of the part numbers beginning with JP, SP, or VS were VNCI video parts, but with descriptions that hid their video

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(GER:580-82) (per Green's instructions, NEC's prices on eligible equipment included the cost of both eligible and ineligible equipment); Colvin Tr. 1889-94 (GER:606-11) (describing how bonus items and VNCI's marketing fee were "directly costed into the project" before adding profit margin); McNulty Tr. 2076-77, 2101-02 (GER:635-36, 650-51).

nature. Marchelos Tr. 1029-32 (GER:231-34).[40] Green even admitted that she falsified NEC's parts lists: "I had to make certain that the parts list didn't contain key words that would deny funding for the PBVX. . . . So certain things had to be recategorized." Green Tr. 2723 (GER:919). Others corroborated her role. See Marchelos Tr. 1032 (GER:234) (Green told NEC's McNulty to "take out all the references to video, because the idiots at the SLD . . . will just deny it"); McNulty Tr. 2092-95 (GER:641-44); X131 (GER:1200) ("Judy has informed me that we will need component pricing for the PBX systems with the VNCI items rolled into the switch and they should not be easily discernble [sic] . . . and not show any overtly obvious video parts. . . . It will require a little creativity") (discussed at Ferguson Tr. 1814-17 (GER:584-87)).[41] Indeed, the false part numbers and descriptions were

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[40]See X120 at 031 (GER:1154) (Covert); X117 at 023-025 (GER:1137-39) (Lee); X136 at 271-273 (GER:1229-31) (Jasper); X137 at 23.3 (GER:1248) (Ecorse); X125 at 047 (GER:1170) (Ceria Travis); X361 at 048-050 (GER:1403-05) (Muskegon Heights); X126 at 030 (GER:1184) (DuBois).

[41]Thus, although Green is technically correct that NEC's McNulty ordered Charles Ferguson to create the parts list, Br. 50, Green ignores the fact that McNulty did so *at Green's behest*. See X131 (GER:1200) ("Judy has informed me . . .").

so associated with Green that the "JP" prefix was chosen to represent a "Judy Part." McNulty Tr. 2094 (GER:643). The misrepresentations were material because "the way we wrote it they [USAC] would have believed it to be eligible." Ferguson Tr. 1847 (GER:594); Green Tr. 2820 (GER:987) (funding requests would be denied if they included ineligible equipment).

The NEC parts list became the template for Inter-Tel's parts list on Counts 1, 2, and 9. At Green's direction, Marchelos Tr. 1049-50 (GER:251-52), Marchelos asked Inter-Tel's Jason King to prepare the PBX parts list for San Francisco, and said he "did not want any of the VNCI equipment to show up on the schedule of equipment." Marchelos wanted the Inter-Tel schedule "to look like an NEC parts schedule," which he sent King. King Tr. 1340-43 (GER:385-88); X022 (GER:1077-79). Green later told King to use the format of the NEC parts list. King, however, could not get the descriptions to "match up," so he called Marchelos, who told him to use the JP-part descriptions from X022—descriptions written by Green—because "these descriptions would be the ones that the SLD would fund." King Tr. 1345-53

(GER:390-98). King kept the descriptions, but changed the part numbers to 900- series rather than JP- series. See X023 (GER:1080-81). That list was used for the San Francisco, West Fresno, and Highland Park Form 471 applications. King Tr. 1353 (GER:398); Marchelos Tr. 1054-58, 1059-61 (GER:256-60, 261-63).

3. Item 25 Certification And Review

Green completely ignores her role in submitting fraudulent budget information to USAC when it asked schools to demonstrate that they have budgeted for their copay.

Green drafted the responses to USAC's Item 25 reviews,[42] and provided USAC with false budget figures. She submitted budgets that contained E-Rate allocations when no such line item existed in the actual budgets, and she inflated the actual budget allocations for

[42]See Green Tr. 2885 (GER:998) (admitting she prepared Luther Burbank's Item 25 response); Mitchell Tr. 1504 (GER:438) ("When I would receive it from the SLD, I would send it over to Ms. Green, and then she would send it back with the filled in answers, and then I would send it back to the SLD"); Washington Tr. 1581 (GER:475) ("Each time that I would get a request for response from the SLD, [Green] would prepare that request"); Rodriguez Tr. 2226 (GER:702) (Green prepared Item 25 response); McNulty Tr. 2108-09 (GER:657-58).

technology equipment and services. Green admitted that "I would just create that line item that said E-Rate . . . to allow the E-Rate interviewer the ability to see it clearly." Green Tr. 2730 (GER:926); see also *id.* at 2729 (GER:925) ("[I]t was much easier to . . . add a line item . . . and create an E-Rate line, so, okay, the person at the SLD . . . could say, oh, yes, here's E-Rate"). Although Green maintained that she "kept the bottom line the same," *id.* at 2730 (GER:926), the evidence was strongly to the contrary.[43] Thus, Green knew that false budget information was submitted to USAC.

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[43]See Mitchell Tr. 1510-13 (GER:444-47) (budget figures in X072 at 309, 313 (GER:1093, 1097) were "nowhere near this high" and "not accurate at all"); *id.* at 1525-26 (GER:459-60) (budget figures in X175 at 646 (GER:1285) were false); Washington Tr. 1589-1600 (GER:483-94) (discussing X354 (GER:1366-74), which falsely shows that school had $582,000 in budget for copay, when in fact school had "no funds in hand"); Rodriguez Tr. 2228-31 (GER:704-07) (discussing X281 at 126 (GER:1328), showing false budget figures submitted to USAC); Travis Tr. 2494-99 (GER:859-64) (discussing X158 at 048-49 (GER:1278-79) and X154 at 137 (GER:1270), which show that school had budgeted only $10,300 for technology but Green's response to USAC claimed budget of $245,587 for E-Rate); Green Tr. 2781-84 (GER:948-51) (same).

B. Sufficient Evidence Of Conspiracy (Count 22)

In Count 22, the jury convicted Green of conspiring to commit wire fraud, 18 U.S.C. § 371. To convict, the government had to show "(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime. The agreement need not be explicit; it is sufficient if the conspirators knew or had reason to know of the scope of the conspiracy and that their own benefits depended on the success of the venture." *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004) (citations omitted). See also *United States v. Hopper*, 177 F.3d 824, 829 (9th Cir. 1999) ("an agreement may be inferred from the [defendant's] acts pursuant to the scheme, or other circumstantial evidence"). Contrary to Green's contention, Br. 52, there was abundant evidence establishing both her intent and the conspiratorial agreement.

Green conspired with Richard Favara to deceive USAC into thinking that schools were prepared to pay their E-Rate copays on fifteen projects in 2003-2004. As explained earlier, Green and Favara agreed to use Alliance as a shell. See pp. 24-25, above; Favara Tr.

2372-75 (GER:801-04). They also agreed that Green would steer E-Rate projects to Expedition in return for a kickback of 5-10% of any E-Rate funding Expedition received. *Id.* at 2366-68 (GER:795-97).

Green's intent to defraud is plain. She had no reasonable expectation that Favara "could and would" fund Alliance, Br. 52, apart from the scheme charged in Count 22. She also knew that Alliance "had nothing . . . no financial condition." Favara Tr. 2374 (GER:803). Nevertheless, she sent Favara a financial overview to put on Alliance's website that contained "outright lies" representing that Alliance "had money and had been doing transactions like this for years." *Id.* at 2375-77 (GER:804-06); see also *id.* at 2378-80 (GER:807-09) (Green's figures showed Alliance assets of $32 million when truth was $0); X315 at 085-086 (GER:1337-38). Green then used Alliance's website—including the false financial information—to induce schools to use her for E-Rate applications. Wood Tr. 2546-48 (GER:891-93). She also sent documents to USAC falsely representing that Alliance had awarded a grant to the schools and falsely stating that Alliance had millions of dollars in assets. Gardiner Tr. 2507-14 (GER:867-74) (discussing X323

at 053-054, 067-068 (GER:1347-48, 1351-52)); Wood Tr. 2544-46 (GER:889-91) (discussing X317 (GER:1344-45)); Green Tr. 2909, 2912-13 (GER:1022, 1025-26) (discussing X327 at 037-038 (GER:1360-61)). Given the lengths that Green went to misrepresent Alliance's assets, a rational jury could conclude that she had the intent to defraud and did not have a reasonable expectation that Favara would fund Alliance apart from the scheme charged in Count 22.

Sufficient evidence also supports the agreement element of the statute. Favara agreed to make Green Alliance's Director of Grants to "giv[e] her stronger presence when talking to the schools." Favara Tr. 2372 (GER:801). He knew that Green's plan was to have Alliance award "grants" to schools to cover their copays, despite Alliance having no assets, yet he agreed to post Green's grossly false financial statements on Alliance's website. *Id.* at 2372-77 (GER:801-06). The sham was the means of concealing from USAC the fact that the schools were not going to pay their copays. Green and Favara were both affiliated with Alliance, and "[a]lthough each [conspirator's] level of participation differs with each act, all [conspirators] engaged in one or

more overt acts. . . . Viewing this evidence in the light most favorable to the government, . . . there was sufficient evidence to prove that [Green and Favara] were engaged in a single conspiracy." *Hopper*, 177 F.3d at 829-30.

C. Sufficient Evidence Of Bid Rigging (Counts 12-20)

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits agreements among competitors on bidding. Green does not challenge the jury instructions on bid rigging, see Tr. 3177-84 (DER:94-101), but claims that there was insufficient evidence to support the convictions on Counts 12-20. She is wrong.

Horizontal restraints "eliminate some degree of rivalry between persons or firms who are actual or potential competitors." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.). Firms are "competitors" if they "provid[e] the same service to customers." *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1210 (9th Cir. 1992) (citation omitted). Counts 12-20 charged that Green orchestrated a collusive agreement among at least two actual or potential competitors. Thus, it was not necessary to

prove that VNCI was a "common coconspirator" on every count or that *only* those firms that had relationships with Green bid, cf. Br. 55-56—the government had to prove merely that Green personally participated in each collusive agreement. Moreover, as a crime of conspiracy, the violation of Section 1 occurs when the agreement is reached. There is no requirement that the conspiracy succeed. Tr. 3179-81 (DER:96-98).

Here, pursuant to each agreement, at least one competitor refrained from submitting a bid directly to the school in return for receiving a lucrative subcontract from Green's preferred vendor for that project. Green argues, as she did at trial, that these arrangements were nothing more than ordinary "teaming" agreements. Br. 54.[44] The district court instructed the jury on the difference between legitimate teaming agreements and illegal collusion, Tr. 3181-82 (DER:98-99)—instructions that Green does not contest—and the jury found illegal collusion. Sufficient evidence supports those findings.

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[44]Green avers that her "team" member Sema4 did not initially win the Luther Burbank bid. Br. 56. The Indictment, however, did not charge Green with bid rigging on Luther Burbank.

1. Count 12

On West Fresno, Green instructed Inter-Tel, Premio, and Sprig to act as subcontractors for, rather than bid against, Howe Electric. Newton Tr. 742-46 (GER:75-79). Inter-Tel had the capability to bid on more of the project and had planned to bid directly to West Fresno until Green "directed" it to be Howe's subcontractor. Boehm Tr. 1264-70 (GER:363-69); Qasim Tr. 1698-1709 (GER:517-28) (Green told Inter-Tel which parts to bid on). Howe's Duane Maynard agreed to use those firms as subcontractors—although he had "never even heard of them" and Sprig "did the same thing" as Howe—because "Judy made us use them." Maynard Tr. 1188, 1196 (GER:306, 314); see also *id.* at 1185-88 (GER:303-06); Boehm Tr. 1268-69 (GER:367-68).

It is irrelevant that the West Fresno superintendent had independently expressed his desire to hire Howe. Cf. Br. 57. As the district court observed, if faced with competitive bids, the superintendent might have changed his mind, or at least the district could have benefitted from competition. Dkt. 558 at 8-9 (GER:1523-24). It is sufficient that the collusive agreement orchestrated by Green

"deprived [West Fresno] of the benefits of a competitive bidding process." *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1160 (4th Cir. 1986).

2. Count 13

On the Highland Park project, Inter-Tel, Premio, VNCI, and Clover agreed, at Green's behest, to limit their bids to certain portions of the project. Newton Tr. 701 (GER:53) (Green told Premio to bid only on servers); Boehm Tr. 1245 (GER:344) (Green told Inter-Tel to bid on "voice, data, and video"); Qasim Tr. 1717 (GER:536) (Green told Inter-Tel not to bid on network services because there was "somebody else who was going to bid on that"); see also Kind Tr. 1664 (GER:499) (Clover had capability to sell more than just cabling). Green told Clover's Jeffrey Kind that Clover "would be awarded the cabling contract," though bids had not yet been submitted. Kind Tr. 1669-76 (GER:504-11).

Although Inter-Tel may have "had a valid reason for not submitting a full bid," Br. 59, it became a conspirator once it *agreed* with its competitor not to submit a full bid. See *Brinkley*, 783 F.2d at 1160

(independent decision not to bid "went beyond unilateral action" when firm consented with competitor to give a "safe" bid). In bid rigging, "the determination of a per se antitrust violation depends on whether there was an agreement to subvert the competition, not on whether each party to the scam could perform." *United States v. Reicher*, 983 F.2d 168, 172 (10th Cir. 1992). The winning bidder could not submit its inflated bid with confidence until it had assurance that Inter-Tel would not compete for the contract. See *United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990).

3. Counts 14-19

The bid rigging convictions on Counts 14-19—the Covert, Lee, Jasper, Ecorse, Ceria Travis, and Muskegon Heights projects—turned on whether VNCI was NEC's competitor. Br. 59-60; Tr. 3057, 3108-09 (GER:1062, 1063-64). NEC and VNCI had an express agreement specifying their roles. See p. 13 & n.11, above; Emery Tr. 2318-20 (GER:774-76); X084 (GER:1098-1103). Green characterized that agreement as an ordinary teaming agreement, but that was a factual question and the district court instructed the jury to convict only if it

found that the agreement was "nothing more than a scheme to eliminate competition between two or more prospective bidders." Tr. 3182 (DER:99). Sufficient evidence supports the jury's finding.

In this case, a "potential" competitor is any vendor willing to act as "prime" contractor or "integrator"—dealing directly with the school and USAC, and managing subcontractors. Green does not dispute that NEC was a prime contractor—it bid and acted as such on six projects[45]—but she argues that VNCI "was both unwilling and unable, because of its small size and precarious financial situation, to act as a prime contractor." Br. 59. The evidence demonstrated otherwise.

VNCI served as prime contractor on the Highland Park project in 2000. Marchelos Tr. 1068-69 (GER:270-71). USAC funded that project in excess of $6.5 million, of which VNCI received $2.285 million simply "for being Prime." X240 at 974 (GER:1299). Highland Park was a "very large contract that involved deployment of wiring, local area networks, servers, et cetera." Emery Tr. 2290 (GER:746). VNCI

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[45]Marchelos Tr. 990 (GER:206) (NEC was prime contractor for projects in Counts 14-19); Emery Tr. 2316-18 (GER:772-74) (NEC was "prime contractor of choice").

supervised all of the subcontractors on that project. *Id.* at 2290-95, 2306-13 (GER:746-51, 762-69); X258 (GER:1320).[46] Because VNCI was the prime contractor on one large project, a rational jury could find that VNCI could act as prime contractor on other projects and, therefore, that VNCI and NEC were competitors. See also Emery Tr. 2314 (GER:770) (VNCI "contemplated" being prime on other projects).

Green asserts that VNCI was a manufacturer, not an integrator. Br. 59. This is beside the point. A "prime contractor" need not provide all—or any—of the services called for in an RFP, as long as it was willing to manage subcontractors and deal with the school and with USAC. Indeed, *none* of the prime contractors did all of the work itself,[47] and VNCI demonstrated its willingness and ability to supervise subcontractors on the Highland Park and, to a lesser extent, West Fresno projects. See Marchelos Tr. 956-58, 1124 (GER:180-82, 297); McNulty Tr. 2125 (GER:660).

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[46]See also McNulty Tr. 2125 (GER:660); X232 at 726 (GER:1298). VNCI was to receive $162,000 for "managing" the wiring subcontractor. Emery Tr. 2286, 2303 (GER:742, 759); X150 (GER:1265).

[47]E.g., Colvin Tr. 1870, 1898 (GER:599, 615) (NEC subcontracted data and cabling); McNulty Tr. 2077-78 (GER:636-37).

Nor does it matter that VNCI was small and in "precarious financial situation." Br. 59. Sema4 was "pretty much dormant" when it became prime contractor on Luther Burbank's 2001-2002 project. Newton Tr. 795, 802, 872 (GER:99, 106, 146). And Expedition Networks was "barely making ends meet" when it was awarded its projects of Count 21. Favara Tr. 2368 (GER:797). Nor does it matter that VNCI might not have qualified for bid bonds. Br. 60. As E-Rate consultant to the schools, Green offered to waive the bid bond requirement for other vendors. X088 at 796 (GER:1105). Moreover, a company can be a "competitor" within the meaning of Section 1 even if it lacks the ability to get bid bonds. See *MMR*, 907 F.2d at 497-98; *United States v. Finis P. Ernest23, Inc.*, 509 F.2d 1256, 1262 (7th Cir. 1975); see also *Reicher*, 983 F.2d at 171 (firms still "competitors" even "when one of the conspirators lacked the capacity to perform the contract"). Finally, regardless whether VNCI independently decided it would not bid as prime for any of the projects, it went beyond unilateral action when it agreed not to bid against NEC. See *Brinkley*, 783 F.2d at 1159-60.

Thus, a rational jury could find that VNCI and NEC were competitors and that VNCI agreed not to bid as prime contractor in return for a guaranteed 10% commission and a lucrative subcontract from NEC. "[A]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging *per se* violative of 15 U.S.C. § 1." *Id.* at 1160 (citation omitted). Green "had ample opportunity to persuade the jury otherwise; [she] failed, and this is not the forum to resolve competing factual claims." *Alston*, 974 F.2d at 1211.

4. Count 20

On the DuBois project, Howe Electric, NEC, Inter-Tel, and VNCI all attended the prebid conference, thereby entitling them to bid directly to the school. Washington Tr. 1574-75, 1660 (GER:468-69, 495). Sohail Qasim testified that NEC had the capability to bid for the project itself. Qasim Tr. 1745 (GER:564).[48] Instead, only Howe bid and

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[48]Green argues that NEC was not a "horizontal competitor[]" because it did not actually install cabling. Br. 58. But prime contractors such as NEC simply subcontracted out services that they did not perform, and NEC's lack of cabling prowess did not prevent it from being the prime contractor on each of the projects in Counts 14-19.

Green "predetermined" that NEC, Inter-Tel, and VNCI would be the subcontractors. Maynard Tr. 1207-16 (GER:325-34).[49] Though Howe had never used NEC as a subcontractor, it felt it had no choice and that "contacting other vendors would be just a waste of their time." *Id.* at 1215 (GER:333). Even if Howe later refused to work with Green on the project, Br. 58, the crime of bid rigging was complete when the agreement was made.

III. THE WIRE FRAUD INSTRUCTION WAS PROPER

Green challenges the instruction that the jury could convict her on Counts 8-11 if it found that the requisite wiring was transmitted by someone other than a coschemer, or that the wiring was reasonably foreseeable by any coschemer. Br. 38-43. This Court reviews de novo "whether a jury instruction misstates an element of a crime," but reviews the "formulation of an instruction" for abuse of discretion. *United States v. Peterson*, 538 F.3d 1064, 1070 (9th Cir. 2008).

See pp. 13 & n.11, 59 & n.45, above.

[49]Acting as the school's E-Rate consultant, Green disqualified the only other bid on the project—from a vendor with whom Green had no relationship. See Washington Tr. 1575-76 (GER:469-70).

Contrary to Green's argument, Br. 38, any error is subject to harmless error review, not automatic reversal. *Hedgpeth v. Pulido*, 129 S. Ct. 530, 530-32 (2008) (per curiam).[50] Regardless, no error occurred here.

Green claims that to convict, "the wire must have been sent by either Judy Green or a coschemer." Br. 39-41. That simply is not the law. A charged wiring is "sufficiently closely related" to the fraudulent scheme if "incident to an essential part of the scheme" or "a step in the plot." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (citation omitted); *United States v. Hubbard*, 96 F.3d 1223, 1228-29 (9th Cir. 1996). It can be sent by anyone, not just by defendant or another coschemer. Thus, in *Schmuck*, which involved rolled-back odometers on used cars, the "mailing" element of mail fraud was satisfied by the *defrauded party's* submission of the title application to the relevant

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[50] *Hedgpeth*, decided after Green filed her brief, repudiated *Lara v. Ryan*, 455 F.3d 1080, 1086 (9th Cir. 2006). See *Hedgpeth*, 129 S. Ct. at 531-32; cf. Br. 38. The Supreme Court held that when a jury is instructed on multiple theories of guilt, one of which is improper, harmless error analysis applies and "a reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 530-31, 532 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

state agency. 489 U.S. at 707.[51] Likewise, in *Shipsey*, the requisite wiring was done by the defrauded party, not a coschemer. 363 F.3d at 971-72. See also *Hubbard*, 96 F.3d at 1228.

Nor must the wire transmission have been "reasonably foreseeable to Judy Green herself." Br. 39. The district court properly instructed the jury that

> It is not necessary, however, that the Government prove the sender was a coschemer so long as the Government proves beyond a reasonable doubt that defendant or a coschemer knew or could have reasonably foreseen that the e-mail or FAX in question would be sent to carry out an essential part of the alleged scheme.

Tr. 3172 (DER:89). This instruction was consistent with the Ninth Circuit pattern instructions.[52] And, contrary to Green's claim (Br. 39), if a wiring was "reasonably foreseeable"—an objective standard—it

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[51]Case law interpreting the wire fraud and mail fraud statutes are "applicable to either." *Shipsey*, 363 F.3d at 971 n.10.

[52]"A mailing is caused when one knows that the mails will be used in the ordinary course of business or when *one can reasonably foresee* such use." *Ninth Circuit Manual of Criminal Model Jury Instructions* § 8.101 (2003) (emphasis added). "For a defendant to be guilty of an offense committed by a co-schemer [as part] [in furtherance] of the scheme, the offense must be one that *could reasonably be foreseen* as a necessary and natural consequence of the scheme to defraud." *Id.* § 8.101A (emphasis added).

does not matter whether it was actually foreseen by Green, a coschemer, or anyone else.

In any event, the contested wirings were reasonably foreseeable *by Green*. Green's active participation in the alleged schemes to defraud means that "'foreseeability' was not an issue" because the charges "involve [her] liability as a principal." *United States v. Lyons*, 472 F.3d 1055, 1070 (9th Cir. 2007). "The indictment alleges a scheme to defraud in which [Green] participated. Each of the [eleven] counts of [wire] fraud is based on a separate [wiring] in furtherance of the scheme to defraud . . . ." *Id.* at 1070 n.12. For the wirings that Green did not personally send, it is sufficient that they "occurred during [her] knowing participation or [were] an inevitable consequence of actions taken while [she] was a knowing participant." *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002).[53] Under parallel circumstances, *Stapleton* approved jury instructions that "limited

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[53]Thus, Green's reliance (Br. 39) on *United States v. Tarallo*, 380 F.3d 1174 (9th Cir. 2004), is misplaced. That case holds merely that a fraud conviction cannot be based on a coschemer theory of liability without giving the jury a coschemer instruction. *Id.* at 1183-84. The jury in our case, by contrast, did get such an instruction. Tr. 3171-72 (DER:88-89).

vicarious liability to acts of co-schemers during the life of the scheme and acts that were reasonably foreseeable as a necessary and natural consequence of the fraudulent scheme." *Id.* at 1118. The jury instructions here mirrored those in *Stapleton*. Tr. 3171-72 (DER:88-89).

It is irrelevant that Green was not physically present when the wiring was sent. Cf. Br. 41. Green does not claim that she withdrew from any of the schemes alleged in Counts 8-11, and the evidence would not support any such claim, for she did not take "'definite, decisive, and positive steps' to disassociate [herself] from the scheme." *United States v. Lothian*, 976 F.2d 1257, 1264 (9th Cir. 1992) (citation omitted). Indeed, Green was still scheduled to receive commissions on these projects, X487 (GER:1436-37); Green Tr. 2890 (GER:1003), which gives rise "to a sufficient inference of receipt of continued benefits from the scheme." *Lothian*, 976 F.2d at 1265.

Moreover, Green's involvement in the projects of Counts 8-11 was greater than she admits. Br. 41-42. For Muskegon Heights (Count 8), Green helped pick the winning bidder for the project, and supervised the preparation of the fraudulent Form 471 while personally inserting

the project cost numbers. Marchelos Tr. 986-87, 998, 1017 (GER:202-03, 214, 219); Green Tr. 2714 (GER:910). On San Francisco (Count 9), she prepared the Form 471, including the cost numbers, and worked with Inter-Tel's Jason King in developing the false PBX parts schedule that was included with the Form 471. Marchelos Tr. 1132-33 (GER:299-300); King Tr. 1345-48 (GER:390-93); Green Tr. 2715-16, 2791 (GER:911-12, 958).

For Luther Burbank (Count 11), Green prepared the false responses to USAC's Item 25 questions, acted as project manager in 2002, and helped submit false invoices to USAC. Green Tr. 2776-77, 2884-85 (GER:943-44, 997-98); Rodriguez Tr. 2225-31, 2235-36 (GER:701-07, 711-12); X013 (GER:1072); X281 at 126 (GER:1328); Newton Tr. 798-810 (GER:102-114). And on W.E.B. DuBois (Count 10), Green admits (Br. 42) she was involved in the project up until the funding commitment was received on October 22, 2000, X231 (GER:1291-97), which was well *after* she personally sent the charged wiring on June 28, 2000, X189 (GER:1287-90); Indictment ¶ 71 (DER:211).

Green does not contend on appeal that any of the charged wirings were unrelated to the "execution of the fraudulent scheme[s]," which was a jury question in any event. *Hubbard*, 96 F.3d at 1229. Her involvement in each of the schemes charged in Counts 8-11 was more than sufficient to support her convictions for wire fraud. See *Lothian*, 976 F.2d at 1265-66 (affirming convictions in which the wiring was the natural consequence of some event during "a time at which [defendant] was participating in the scheme").

IV. GREEN'S SENTENCE WAS REASONABLE

Green challenges her 90-month sentence as "unreasonable and violat[ing] due process requirements of proportionality and even-handedness." Br. 64. But Green herself recommended a sentence of 55-71 months, Dkt. 612 at 24 (GER:1484),[54] and the district court's decision to add 19 months to that was entirely proper. On appeal, "only a procedurally erroneous or substantively unreasonable sentence will be set aside." *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008)

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[54]See also Sentencing Tr. 41 (DER:34) (sentence should be "around five years, maybe a little more"); *id.* at 43 (DER:36) (asking for "something in the five-year range").

(en banc). Green's sentence is neither. This Court reviews the sentence for "abuse of discretion" in light of the "totality of the circumstances," and "may not reverse just because [it] think[s] a different sentence is appropriate." *Id.*

Green does not allege any procedural errors in sentencing. Her sole complaint is that her sentence is too severe when compared to her codefendants or to defendants in other E-Rate cases, allegedly in violation of 18 U.S.C. § 3553(a)(6). Br. 61-65.[55] Green, however, assigns too much weight to that sentencing factor and misconstrues its meaning; in any event, any disparity was justified.

Green assigns subsection (a)(6) paramount weight, but no factor should be "given more or less weight than any other." *Carty*, 520 F.3d at 991. Moreover, Green misreads § 3553(a)(6) as requiring sentencing parity among codefendants, Br. 62-64, when the real goal of that subsection is "to promote *national* uniformity in sentencing rather than uniformity among co-defendants in the same case." *United States v.*

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[55]Section 3553(a)(6) requires a district court to "consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (2007).

Saeteurn, 504 F.3d 1175, 1181 (9th Cir. 2007) (emphasis added) (quoting *United States v. Parker*, 462 F.3d 273, 277 (3d Cir. 2006)).

To the extent comparisons to Green's codefendants are relevant, § 3553(a)(6) cautions against only "unwarranted" disparities. As the district court found, Green deserved a harsher sentence than her codefendants because they all "pled guilty prior to trial, accepted responsibility and cooperated with the government. . . . Green was more culpable than her co-conspirators. Witnesses testified that she was the driving force of the charged frauds and conspiracies. Without doubt she was the ringleader and the hub of the conspiracy." Bail Op. 7 (GER:1459). Green even conceded a 4-point enhancement for being an organizer/leader. See Sentencing Tr. 23 (DER:16); *U.S. Sentencing Guidelines Manual* § 3B1.1(a) (2000). Thus, it is hardly surprising that her sentence was more severe.

Nor do Green's comparisons (Br. 65) to the sentences imposed in unrelated E-Rate prosecutions have merit. Indeed, in proportion to the offense, any disparity in sentencing between Green and the defendants in those cases was to Green's benefit, not to her detriment. As the

district court explained, the defendants in *United States v. Bokhari*, CR 04-0056 (E.D. Wisc. Jan. 28, 2005), pled guilty and accepted responsibility for their conduct; Green did not. Moreover, the $30 million loss in Green's case was nearly twice as large as that in *Bokhari*, yet her sentence was nowhere near twice as severe as the Bokharis' 72 months. Bail Op. 7, 8 (GER:1459, 1460).

Green's comparison to *United States v. Adame*, CR 06-1082 (S.D. Tex. Nov. 19, 2007), is even weaker. There the defendant was convicted on seven counts with a total loss of less than $1 million; Green, by contrast, was convicted on 22 counts with a loss of around $30 million, yet her sentence was only two-and-one-half times as severe as Adame's 36 months. Bail Op. 7 (GER:1459).

At bottom, a district court "must make an individualized determination based on the facts." *Carty*, 520 F.3d at 991. That is what the district court did here. It took into account the severity of the fraud and the "overwhelming" proof against her, Green's age, her years of public service as a teacher, her previous clean record, her recent bankruptcy, and her inability to make restitution. Sentencing Tr. 30,

36, 47, 50-54 (DER:23, 29, 40, 43-47). In light of the "totality of the circumstances," *Carty*, 520 F.3d at 993, the sentence of 90 months—below the Guidelines range of 97-121 months—was eminently reasonable.

CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted.

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STATEMENT OF RELATED CASES

This appeal is not related to any other appeal pending in this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,799 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in Century 14-point font.

Dated: February 27, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on FEBRUARY 27, 2009, I electronically filed the foregoing BRIEF FOR THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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