No. 17-10269

IN THE
United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS JOYCE,
Defendant-Appellant.

On Appeal from the
United States District Court for the Northern District of California
No. 4:14-cr-607 (Hon. Phyllis J. Hamilton)

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

The district court's jurisdiction over this criminal bid-rigging case rested on 18 U.S.C. § 3231. It entered a judgment of conviction against Thomas Joyce under Fed. R. Crim. P. 32(k)(1). ER82-89.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court's final judgment was entered on June 14, 2017, ER82-89, and Joyce filed his notice of appeal on June 20, 2017, ER81, which was timely under Fed. R. App. P. 4(b)(1)(A).

STATEMENT OF THE ISSUE

Whether the district court correctly refused to carve out an exception to the rule that bid rigging is unlawful per se under Section 1 of the Sherman Act.

STATEMENT OF THE CASE

The U.S. District Court for the Northern District of California entered a judgment of conviction against Thomas Joyce for conspiring to rig bids in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The court sentenced Joyce to 12 months and 1 day of imprisonment, plus 3

[1] Joyce's Excerpts of Record are cited using "ER" followed by the referenced page number. Citations to "Dkt. No." refer to the filings below in the district court and are identified by their docket number.

years of supervised release. Joyce appeals his conviction. He is currently in custody with a projected release date of July 31, 2018.

A. Indictment and Disposition of Case

In December 2014, a federal grand jury returned an indictment charging Joyce and four co-conspirators with one count of conspiring to rig bids at public real-estate foreclosure auctions in Contra Costa County, California, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. ER121-24 (Indictment ¶¶ 1, 7-14).[2] The indictment alleged that the conspirators were competitors for the purchase of foreclosure properties at the Contra Costa County public auctions. *See* ER121-22 (*Id.* ¶¶ 1-6). Rather than submitting competing bids for the same property, however, they would designate one winner among them to "purchas[e] selected properties at public auctions at artificially suppressed prices." ER123 (*Id.* ¶ 11(d)). The indictment further alleged that, after the conclusion of the public auction for a particular property, the conspirators would hold a separate, private auction called a "round,"

[2] The indictment also included eight counts charging mail fraud in violation of 18 U.S.C. § 1341, ER125-27 (Indictment ¶¶ 15-21), which were dismissed before trial, ER26 (Aug. 15, 2016 Order 25); Sept. 29, 2016 Order (Dkt. No. 146).

wherein they would bid for the property by the amount they were willing to pay over the public auction winning price. ER124 (*Id.* ¶ 11(f)). And it charged that the winner of the round would pay the amount of his private bid to the round participants and take title to the property. *Id.*

Three of Joyce's co-defendants (John Michael Galloway, Nicholas Diaz, and Charles Rock) pleaded guilty to bid rigging. Diaz Judgment (Dkt. No. 284); Galloway Judgment (Dkt. No. 291); Rock Judgment (Dkt. No. 379). Joyce and his fourth co-defendant, Glenn Guillory, proceeded to separate jury trials. Both were found guilty of bid rigging. ER82-89 (Joyce Judgment); Guillory Judgment (Dkt. No. 338).[3]

B. Pertinent Pretrial Motions and Rulings

Prior to trial, Joyce and defendants Galloway, Diaz, and Guillory moved the court to adjudicate the case under the rule of reason instead of the per se rule that applies to bid-rigging, price-fixing, and market- or customer-allocation agreements among competitors. Defs.' Mot. (Dkt. No. 106); *see also* U.S. Opp. (Dkt. No. 115). They did not make a

[3] Guillory has also appealed from his conviction. *See United States v. Guillory*, No. 17-10407 (9th Cir.).

substantive argument in support of the motions, but rather asked the court to take judicial notice of briefs submitted in two other criminal cases before the same court involving the same or related bid-rigging conspiracies. *See* Exs. to Defs.' Mot. (Dkt. Nos. 106-1, 106-5) (Defs.' Mot. to Adjudicate, *United States v. Marr*, No. 4:14-cr-580 (N.D. Cal.); Defs.' Am. Mot. to Adjudicate, *United States v. Florida*, No. 4:14-cr-582 (N.D. Cal.)). Following a hearing, ER27-79 (July 27, 2016 Hr'g Tr.), the district court denied the motion, ER13-16 (Aug. 15, 2016 Order 12-15).

Consistent with its rulings in the *Marr* and *Florida* cases, the district court concluded that the type of conduct charged in the indictment "falls squarely within the per se category of bid-rigging, which is widely recognized as a form of price-fixing, which is 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [such restraints] have caused or the business excuse for their use.'" ER13 (*Id.* at 12) (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)). Accordingly, "[t]he court decline[d] defendants' invitation to carve out an exception from the per se rule that applies to bid-rigging simply because it took place during a recession or in the wake of a housing bubble, given the weight of

authority recognizing bid-rigging as a category of anticompetitive conduct subject to per se treatment." ER14 (*Id.* at 13); *see* ER13-16 (*Id.* at 12-15).

Also prior to trial, the United States moved to preclude Joyce and Guillory (the two defendants going to trial) from offering evidence or argument concerning the supposed reasonableness of, or justification for, their bid rigging. U.S. Mots. in Limine (Dkt. No. 179); *see also* Defs.' Opp. (Dkt. No. 205). After counsel for Guillory was rendered temporarily unable to participate in Guillory's representation due to health problems, the court proceeded with pretrial and trial for Joyce alone. *See* Jan. 20, 2017 Order 1-2 (Dkt. No. 232). The district court granted the United States' motion as to Joyce and excluded evidence or argument concerning any supposed justifications for the bid rigging. *Id.* at 2. The court explained that its decision followed from its "earlier ruling . . . denying defendants' motion to adjudicate the Sherman Act count pursuant to the rule of reason." *Id.*

C. Trial, Sentencing, and Judgment

Joyce was tried over a period of four days in January and February 2017. *See* Dkt. Nos. 249 (Trial Tr. Vol. II, pp. 180-392), 260

(Trial Tr. Vol. III, pp. 393-596), 261 (Trial Tr. Vol. IV, pp. 597-811), 262 (Trial Tr. Vol. V, pp. 812-97). As Joyce's counsel recognized in his opening statement, this was "a very straightforward case," in which "a lot of the evidence [was not] contested." Trial Tr. 204.[4]

1. The United States offered the testimony of seven witnesses. The first was Huey-Jen Chiu, who between 2008 and 2011 worked at a company that acted as a trustee to process foreclosures in Contra Costa County. *Id.* at 211 (Chiu). Chiu explained the California home-foreclosure process. A mortgage holder (usually a bank) forecloses on a home when the homeowner stops making the required mortgage payments. *Id.* at 213 (Chiu). The bank then offers the home for sale at public auction, typically on the steps of the county courthouse, and the home is sold to the highest bidder. *Id.* at 213-14 (Chiu). Following the auction, the foreclosure trustee receives the check for the home from the auctioneer, and once that check clears, the trustee issues the deed to transfer title to the buyer. *Id.* at 223 (Chiu). The trustee also sends the funds from the auction sale to the bank—often located out of state—to

[4] For readability, this brief quotes the transcripts in regular font style instead of the all-capitals used in the transcripts.

satisfy the debt on the property. *Id.* at 214, 226-27 (Chiu). Any amount left over is distributed first to any junior lienholders, and then to the former homeowner. *Id.* at 214 (Chiu); *see also id.* at 532-43 (testimony of Leonard Heter of JPMorgan Chase identifying checks processed between banks in different states for auction sales affected by the bid-rigging conspiracy).

Three of Joyce's co-conspirators (Thomas Bishop, Wesley Barta, and Joseph Vesce) testified, explaining their and Joyce's participation in the bid-rigging conspiracy at the Contra Costa County public foreclosure auctions. Between 2008 and 2011, the conspirators selected foreclosure properties for bid rigging "right before a sale" or "during an auction itself." *Id.* at 271, 273 (Bishop); *accord id.* at 462-63 (Vesce). As Bishop testified: "[i]f there was a property that was going to auction and if either I approached somebody else about not bidding or if I was approached by someone else about not bidding, and then you kind of knew that there were some people interested in bid rigging." *Id.* at 273-74 (Bishop). The conspirators gave each other signs or used certain phrases to indicate they had "made the agreement we are not going to bid against each other" at the public auction and designated a

particular conspirator to place the high bid. *Id.* at 274 (Bishop); *accord id.* at 333-35, 368 (Barta), 460-65 (Vesce). The purpose of the agreement not to bid against each other was to "buy [property] at the public auction for a lower price." *Id.* at 275 (Bishop); *accord id.* at 465 (Vesce).

If one of the conspirators won the public auction, the members of the group would then hold a private auction amongst themselves called a "round." *Id.* at 277 (Bishop), 335-36 (Barta), 465 (Vesce). "The people that participated in the rounds were the people that were part of the agreement during the public auction." *Id.* at 277 (Bishop). Not just anyone could participate in a round. "You needed to be a part of the group that was agreed upon prior to the end of the first [public] auction." *Id.* at 316 (Bishop).

During a round, the bidding would occur in a set order, with each bid reflecting the amount the bidder was willing to pay extra for the house over the public auction sale price (say, $100). *Id.* at 277-79 (Bishop), 338-39 (Barta). The bid amount would go up in intervals, with each participant either bidding at that interval or dropping out. *Id.* at 277-79 (Bishop), 338-40 (Barta). As Bishop explained, "you would keep

going around until everyone dropped out and there was only one person left, and then that person would buy the house." *Id.* at 278 (Bishop). The winning bid reflected the amount (from several hundred dollars to tens of thousands of dollars) that the round winner would pay to the other round participants, in addition to paying the auctioneer the public auction sales price. *Id.* at 278-79 (Bishop). "That extra money was, basically, being part of the agreement to not bid in the public auction, you would expect that if you did not buy the property in the round, you would be paid a portion of that extra money." *Id.*; *accord id.* at 336 (Barta), 466, 495 (Vesce). After the round, the public auction winner and the round winner would go back to the auctioneer, who would accept the round winner's check in the amount of the winning public auction bid for the property and add the round winner's name to the receipt of funds so that he would receive the deed to the property. *Id.* at 281 (Bishop), 340, 374 (Barta).

Bishop, Barta, and Vesce all testified that Joyce participated in bid rigging at the Contra Costa County public foreclosure auctions during the relevant time period. *Id.* at 284-88 (Bishop), 326 (Barta), 474, 483-85, 495 (Vesce). Barta identified multiple, specific occasions in

which Joyce agreed not to bid, or to stop bidding, at the public auction and later participated in a round for the selected property. *Id.* at 352-53, 356-71, 376-80 (Barta). For instance, Barta discussed the October 6, 2010 auction and round for a property at 3357 South Lucille (sometimes misspelled "Lucielle"). *Id.* at 375-81 (Barta). Only two people participated in the public auction for that property, and Barta placed the winning public bid of $343,900. *Id.* at 376-77 (Barta); Gov't Trial Ex. 651 (bid log). Afterward, eight people—including Joyce—participated in a private round for 3357 South Lucille. Trial Tr. 377-78 (Barta); Gov't Trial Ex. 280 (round sheet). Barta won the round with a bid of $19,800. Trial Tr. 378-81 (Barta); Gov't Trial Ex. 280 (round sheet). Joyce was one of the highest round bidders, and Barta's employer gave Joyce a payoff check in the amount of $5,290. Trial Tr. 379-81 (Barta); Gov't Trial Exs. 95 (check), 280 (round sheet).

Likewise, Vesce testified about rigging the bidding for 4003 Roland Drive. Trial Tr. 474-96 (Vesce). The auction and round for that property were secretly recorded by an undercover FBI agent, and Vesce discussed the video during his testimony. *Id.* at 476-94 (Vesce); *see* Gov't Trial Ex. 40 (video recording); Gov't Demonstrative Ex. 40T

(transcript). Vesce explained that Joyce agreed not to bid at the public auction for that property, that Joyce participated in the subsequent round that another participant won, and that Vesce then paid Joyce, on behalf of the winner, "[f]or not bidding at the public auction and for losing the round." Trial Tr. 495 (Vesce).

FBI Special Agent Steven Coffin testified about his January 2011 interview with Joyce. During that interview, Joyce admitted that he communicated with others during public auctions in Contra Costa County when he was interested in participating in a round for a particular property instead of bidding for it competitively at the public auction. *Id.* at 550-52 (Coffin). Coffin further testified that Joyce explained how the rounds worked, including how the winner of the round would pay off the other participants, and that Joyce admitted to participating in rounds. *Id.* at 551-54, 561-65 (Coffin). Joyce told Coffin that he personally made $10,000 from his participation in rounds. *Id.* at 574-75 (Coffin). Joyce also told Coffin about at least one instance when he paid another competing bidder not to bid against him. *Id.* at 588 (Coffin). At the end of the interview, Joyce turned over his

notebook, which contained his notes tracking his participation in many rounds. *Id.* at 565-66 (Coffin); Gov't Trial Ex. 2 (Joyce's binder).

FBI Special Agent James Kang identified documents relating to the affected auctions and rounds, including trustee and bank records of payments, "bid logs" created by auctioneers during the public auctions to record the identity of the bidders and the amounts of their bids, and "round sheets" created by the conspirators during the rounds to track the participants, their bid amounts, and the payouts owed to the losing round participants. Trial Tr. 635-74 (Kang). In particular, he discussed documents relating to a property on South 27th Street in Richmond that was sold at a public foreclosure auction in Contra Costa County on September 24, 2009. *Id.* at 649-54 (Kang). Joyce bid on that property at the public auction, but was not the highest bidder. *Id.* at 649-50 (Kang); Gov't Trial Ex. 481 (bid log). Joyce's name, however, appeared on the auctioneer's receipt of funds. Trial Tr. 653-54 (Kang); Gov't Trial Ex. 482 (receipt of funds). His and other conspirators' names appeared on a document listing the details of the round for the South 27th Street property. Trial Tr. 650-51 (Kang); Gov't Trial Ex. 63 (round sheet). And in an email from Joyce to his employer, Leslie (Les) Gee, Joyce

listed payout amounts owed to other conspirators for the round. Trial Tr. 651-53 (Kang); Gov't Trial Ex. 201 (email); *see also* Trial Tr. 728-30, 742-43 (Gee).

2. The defense offered two witnesses. The first was Gee, who employed Joyce during the relevant time period to appraise houses, identify potential clients for loans, participate in the rounds, and purchase foreclosure homes. Trial Tr. 683, 704-05, 720-21 (Gee). Gee has pleaded guilty to bid rigging public foreclosure auctions in Contra Costa County. *Id.* at 710, 718-20 (Gee). The second defense witness was Joyce himself. *Id.* at 746-86, 814-27 (Joyce).

Neither during nor after trial did Joyce move for a judgment of acquittal, *see* Fed. R. Crim. P. 29, or a new trial, *see id.* R. 33.

3. The jury found Joyce guilty. Trial Tr. 892 (court reading verdict); Jury Verdict (Dkt. No. 256). The district court held a sentencing hearing on June 7, 2017. June 7, 2017 Hr'g Tr. (Dkt. No. 328). On June 14, 2017, the court entered judgment against Joyce on the jury's verdict and sentenced Joyce to 12 months and 1 day of imprisonment, plus 3 years of supervised release. ER82-89 (Judgment).

4. Joyce now brings this appeal.

STANDARD OF REVIEW

The Court reviews de novo a district court's ruling that the conspiracy charged in the indictment is subject to the per se rule. *See United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991); *United States v. Miller*, 771 F.2d 1219, 1225-26 (9th Cir. 1985).

SUMMARY OF ARGUMENT

The United States pleaded and proved that Thomas Joyce engaged in a bid-rigging conspiracy. Under the per se rule, he was correctly convicted of violating Section 1 of the Sherman Act without inquiry into the conspiracy's effects. Joyce appeals on the ground that the district court supposedly erred when it denied Joyce's motion to adjudicate the case under the rule of reason. But all bid rigging is per se unlawful under the Sherman Act. The United States thus did not have to plead or offer evidence of actual anticompetitive effects, and the district court rightly rejected Joyce's arguments that the bid rigging was reasonable or otherwise justified. Joyce has failed to identify any error below. The judgment should be affirmed.

ARGUMENT

THIS CASE WAS CORRECTLY ADJUDICATED UNDER THE SHERMAN ACT'S PER SE RULE AGAINST BID RIGGING

Joyce engaged in garden-variety bid rigging. He does not contest the pleaded and proved facts: he and his co-conspirators agreed not to bid against each other for certain properties at public foreclosure auctions. "By interfering with the competitive bidding process in this way, there can be little doubt that [Joyce's] actions fell within the heart of the anticompetitive conduct prohibited by the Sherman Act." *United States v. Green*, 592 F.3d 1057, 1069 (9th Cir. 2010). His appeal therefore fails to raise any meritorious claim of error.

A. Bid Rigging Is A Per Se Unreasonable Restraint Of Trade In Violation Of The Sherman Act

In relevant part, Section 1 of the Sherman Act outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Courts have long interpreted the Act to prohibit only "unreasonable" restraints of trade. *E.g.*, *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982); *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The reasonableness of most restraints is assessed under the rule of reason. *Maricopa Cty. Med.*

Soc'y, 457 U.S. at 343. "As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Id.* Thus, "[w]hether a restraint of trade is unreasonable generally turns on 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.'" *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

But the rule of reason does not govern all restraints. *N. Pac. Ry.*, 356 U.S. at 5. Courts have long recognized that some categories of restraints should be subject to the per se rule, under which they are condemned as "*per se* unreasonable[]" and therefore "deemed to be unlawful in and of themselves." *Id.* These types of agreements and practices have such a known "pernicious effect on competition and lack of any redeeming virtue", *id.*, that courts may "predict with confidence that the rule of reason will condemn" them, *Maricopa Cty. Med. Soc'y*, 457 U.S. at 344. By "treating categories of restraints as necessarily illegal," the per se rule "eliminates the need to study the reasonableness of an individual restraint." *Leegin Creative Leather Prods., Inc. v.*

PSKS, Inc., 551 U.S. 877, 886 (2007). Thus, the rule of reason's "case-by-case analysis is unnecessary when the restraint falls into a category of agreements which have been determined to be per se illegal." *Brown*, 936 F.2d at 1045; *see United States v. Mfrs.' Ass'n of Relocatable Bldg. Indus.*, 462 F.2d 49, 51-52 (9th Cir. 1972) (discussing per se rule).

Bid rigging is a per se unlawful restraint. *Green*, 592 F.3d at 1068. Even Joyce recognizes this: "Bid rigging in general has been found to be a *per se* violation of Section 1 [of] the Act." Joyce Br. 12.

Bid rigging is "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982); *accord United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). It "is a form of price-fixing." *Ramsay v. Vogel*, 970 F.2d 471, 474 (8th Cir. 1992); *accord, e.g.*, *United States v. Guthrie*, 814 F. Supp. 942, 950 (E.D. Wash. 1993), *aff'd*, 17 F.3d 397, 1994 WL 41106 (9th Cir. 1994) (unpublished table decision); 12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2005a, at 73 (3d ed. 2012); ER13 (Aug. 15, 2016 Order 12).

Because bid rigging, like price fixing, is subject to the per se rule, "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). Likewise, "the law does not permit an inquiry into the[] reasonableness" of, or "economic justification" for, these restraints. *Id.* at 224 n.59; *accord Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647-50 (1980); *N. Pac. Ry.*, 356 U.S. at 5. Rather, "the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981) (quoting *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979)).[5]

[5] Joyce's discussion of legal principles relies in part on the panel decision in *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171 (9th Cir. 2010). *See* Joyce Br. 9-10. When the Court granted rehearing en banc in that case, however, it stated of the decision cited by Joyce: "The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *California ex rel. Brown v. Safeway, Inc.*, 633 F.3d 1210, 1211 (9th Cir. 2011). Much of the language that Joyce quotes now appears in Judge Reinhardt's dissent from the Court's en banc decision. *See California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1146-48 (9th Cir. 2011) (Reinhardt, J., dissenting).

B. Joyce Was Correctly Charged With, And Convicted Of, Per Se Illegal Bid Rigging

1. Joyce's arguments on appeal are irreconcilable with this clear and established precedent. He makes only two points in his brief, abandoning the bulk of the arguments raised in the *Marr* and *Florida* briefs for which he sought judicial notice below. Joyce first contends that the Court should have "engag[ed] in a[] fact-based analysis of the charged agreement and its actual [e]ffect on the market." Joyce Br. 12; *see id.* at 11-12. But that is precisely the type of "case-by-case analysis" that the per se rule renders "unnecessary." *Brown*, 936 F.2d at 1045. The per se rule "reflect[s] a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990) (quotation marks omitted); *see United States v. Alston*, 974 F.2d 1206, 1208 (9th Cir. 1992) (discussing same). It is thus the fact that Joyce's conduct involved "a particular kind of restraint"—bid rigging—that the district court correctly applied the per se rule. *Maricopa Cty. Med. Soc'y*, 457 U.S. at 344.

Although Joyce contends that the district court rested its decision on a mere "label," Joyce Br. 12, the decision below proves Joyce wrong.

The district court looked to the factual allegations of the indictment, ER13 (Aug. 15, 2016 Order 12), which it was obligated to accept as true for the purpose of ruling on Joyce's pretrial motion, *see, e.g.*, *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). The court explained that the indictment charged Joyce with entering "an agreement not to compete at public foreclosure auctions, designating which conspirator would win selected properties at the public auction, and holding secondary private auctions to determine the conspirator who would be awarded the selected properties and to determine the payoff amounts for those agreeing not to compete." ER13 (Aug. 15, 2016 Order 12). And as the court rightly recognized, those allegations described the "type of conduct [that] falls squarely within the per se category of bid-rigging." *Id.* It was thus the indictment's specific factual allegations that pleaded per se unreasonable bid rigging—not its use of any particular label. *See id.* And the trial evidence amply established the bid rigging alleged in the indictment; indeed, Joyce does not contest that the bid rigging conspiracy and his knowing participation in it were proven beyond a reasonable doubt.

Moreover, contrary to Joyce's argument, the "evidence submitted in support of the defendants' motion" did not "establish[]" the facts that Joyce now asserts. Joyce Br. 11; *see id.* at 11-12. The district court rightly rejected Joyce's arguments that "defendants' bid rigging agreement [was] implemented in only a small portion of the foreclosure auctions that took place as a result of the mortgage market meltdown" and that the bid rigging in this case "had no effect whatsoever on the pricing of the product auctioned homes in the marketplace" or on the "quantity of the real estate sold." *Id.* at 11. The offered evidence was irrelevant because, again, the type of conduct charged in the indictment "falls squarely within the per se category of bid-rigging." ER13 (Aug. 15, 2016 Order 12).

Specifically, evidence about the supposed small scale of the bid rigging and defendants' alleged inability to control the entire foreclosure market is of no moment. As observed above, bid rigging is a form of price fixing. *Ramsay*, 970 F.2d at 474. "Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market." *Socony-Vacuum Oil Co.*, 310 U.S. at 224 n.59.

Nevertheless, "a conspiracy to fix prices violates § 1 of the Act . . . though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity." *Id.*; *see also Superior Court Trial Lawyers Ass'n*, 493 U.S. at 430-31 (quoting Robert Bork, *The Antitrust Paradox* 269 (1978), for proposition that "[i]f small parties 'were allowed to prove lack of market power, all parties would have that right, thus introducing the enormous complexities of market definition into every price-fixing case'").

It therefore does not matter whether the charged agreement involved only "a few participants in a narrow set of public foreclosure auctions." Joyce Br. 11. Appellate courts (including this one) have repeatedly applied the per se rule to conduct that involves only a small number of transactions. *See, e.g.*, *Reicher*, 983 F.2d at 169-70, 172 (reinstating jury verdict of conviction for bid rigging a single contract); *United States v. Portac, Inc.*, 869 F.2d 1288, 1291 (9th Cir. 1989) (affirming bid-rigging convictions for single government timber sale); *United States v. Metro. Enters., Inc.*, 728 F.2d 444, 446-48, 453 (10th

Cir. 1984) (affirming conviction for conspiracy to rig bids to repave four portions of a highway in Oklahoma).

Likewise, Joyce's contention that the bid-rigging conspiracy did not affect the price or quantity of real estate sold—even if true—would not help Joyce because the United States did not have to plead or prove such effects. Bid-rigging agreements, like other horizontal price-fixing agreements, are deemed "unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry.*, 356 U.S. at 5. "They are all banned because of their actual or potential threat to the central nervous system of the economy." *Socony-Vacuum Oil Co.*, 310 U.S. at 224 n.59. Accordingly, "'the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances.'" *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999) (quoting *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998)). In any event, although proof of suppressed prices at the public auctions was unnecessary, Joyce's brief nowhere disputes that the conspirators refrained from bidding against each other for certain

properties in the public auction and afterward bid against each other—and bid higher—for those properties in the private rounds.

The district court also rejected Joyce's offered evidence on factual grounds because it was "not persuaded that defendants have offered 'plausible arguments' about the procompetitive effects of their agreement that would warrant analysis under the rule of reason." ER15 (Aug. 15, 2016 Order 14).[6] Joyce does not discuss the district court's rulings, much less identify any error in the court's assessment of the evidence. He has therefore waived any such argument on appeal. *See, e.g.*, *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) ("We review only issues which are argued specifically and distinctly in a party's opening brief." (quotation marks omitted)); *United States v. Hernandez*, 357 F. App'x 52, 53 (9th Cir. 2009) (applying rule in criminal case when the defendant "failed to argue [an] issue beyond a cursory assertion"); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th

[6] When the defendants in the *Marr* case moved in limine to admit the same evidence at trial (an additional step that Joyce did not take), the court concluded that the evidence was not only irrelevant and unduly prejudicial, but also improper opinion testimony that did not meet the evidentiary requirements for expert testimony. Pretrial Order No. 5, at 10, 13, *United States v. Marr*, No. 4:14-cr-580 (N.D. Cal. Apr. 28, 2017).

Cir. 1996) (holding that "[i]ssues raised in a brief that are not supported by argument are deemed abandoned," including those that are "referred to in the appellant's statement of the case but not discussed in the body of the opening brief").

2. Joyce's second contention, that courts are not sufficiently familiar with non-judicial public foreclosure auctions in the wake of a recession to condemn bid rigging under the per se rule, *see* Joyce Br. 12-14, is equally meritless and reflects a misunderstanding of the per se rule. Joyce mistakenly assumes that the per se rule needs to be justified anew on the specific facts of each case, in light of the particular industry involved. The Supreme Court expressly rejected that proposition almost 80 years ago: "Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Socony-Vacuum Oil Co.*, 310 U.S. at 222. Thus, "the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules." *Maricopa Cty. Med. Soc'y*, 457 U.S. at 351. The "'principle of per se unreasonableness . . . avoids the necessity for

an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable.'" ER16 (Aug. 15, 2016 Order 15) (quoting *N. Pac. Ry.*, 356 U.S. at 5).

Joyce also failed to persuade the district court on the facts. The court rightly held: "Defendants have not demonstrated that the housing foreclosure market was exceptional in any way other than the volume of properties available, or that defendants were precluded from competing in the open market." *Id.* Thus, the court concluded that Joyce's offered evidence did not prove that the charged bid rigging involved "a unique market." ER15 (*Id.* at 14). And because Joyce's brief does not offer any specific challenge to the district court's factual determination, any such argument is waived. *See, e.g.*, *Cruz*, 673 F.3d at 998; *Hernandez*, 357 F. App'x at 53.

* * *

The United States pleaded and proved that Joyce entered an agreement among competitors to rig bids, and Joyce does not dispute those dispositive facts. Accordingly, the district court correctly "decline[d] defendants' invitation to carve out an exception from the per

se rule that applies to bid-rigging." ER14 (Aug. 15, 2016 Order 13). Joyce has failed to demonstrate any error in the district court's decision. Its judgment should be affirmed.

CONCLUSION

The Court should affirm.

Respectfully submitted.

/s/ Mary Helen Wimberly

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January 18, 2018

STATEMENT OF RELATED CASES

The United States agrees with Joyce's statement of the related case currently pending before this Court: *United States v. Glenn Guillory*, No. 17-10407. Guillory was charged in the same indictment as Joyce, but separately tried.

In addition, there are two separately indicted cases arising out of the same Contra Costa County bid-rigging conspiracy or the related Alameda County bid-rigging conspiracy. *See United States v. Marr*, No. 4:14-cr-580 (N.D. Cal.); *United States v. Florida*, No. 4:14-cr-582 (N.D. Cal.). Currently pending appeals arising out of the *Marr* case are *United States v. Javier Sanchez*, No. 17-10519; and *United States v. Gregory Casorso*, No. 17-10528. Currently pending appeals arising out of the *Florida* case are *United States v. Alvin Florida, Jr.*, No. 17-10330; *United States v. Robert Alhashash Rasheed*, No. 17-10188; *United States v. John Lee Berry, III*, No. 17-10197; and *United States v. Refugio Diaz*, No. 17-10198.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-10269

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

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Signature of Attorney or Unrepresented Litigant: /s/ Mary Helen Wimberly

Date: 01/18/2018

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

CERTIFICATE OF SERVICE

I certify that on January 18, 2018, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel for Appellant.

/s/ Mary Helen Wimberly
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