NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAVIER SANCHEZ, Defendant-Appellant.	No. 17-10519 D.C. No. 4:14-cr-00580-PJH-2 MEMORANDUM* (Filed Jan. 25, 2019)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY CASORSO, Defendant-Appellant.	No. 17-10528 D.C. No. 4:14-cr-00580-PJH-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL MARR, Defendant-Appellant.	No. 18-10113 D.C. No. 4:14-cr-00580-PJH-1

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief Judge, Presiding

Argued and Submitted January 16, 2019**
San Francisco, California

Before: CLIFTON and FRIEDLAND, Circuit Judges, and ADELMAN,*** District Judge.

Defendants Michael Marr, Javier Sanchez, and Gregory Casorso appeal their jury convictions for conspiring to suppress and restrain competition by rigging bids in property foreclosure sales in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which prohibits "contract[s], combination[s] . . . , or conspirac[ies]" that unreasonably "restrain[] trade or commerce."

1. We are bound by *United States v. Manufacturers' Ass'n of Relocatable Bldg. Industry*, 462 F.2d 49 (9th Cir. 1972). *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (holding that a three judge panel of this court is bound by prior circuit law unless "the reasoning or theory of [the] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority"). In *Manufacturers'*, we held that applying the per se rule in a criminal antitrust case did not violate the defendant's

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** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

constitutional rights. *Manufacturers' Ass'n*, 462 F.2d at 52. Defendants' argument that *Manufacturers'* is clearly irreconcilable with intervening Supreme Court antitrust decisions is unpersuasive, because the Supreme Court has continued to recognize categories of per se violations. *See Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283 (2018) ("A small group of restraints are unreasonable *per se*."); *F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 161 (2013) (noting that "it is *per se* unlawful to fix prices under antitrust law"); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the *category of arrangements* that are *per se* unlawful." (emphasis added)). Defendants' argument that *Manufacturers'* is clearly irreconcilable with intervening Supreme Court decisions relating to mandatory evidentiary presumptions in criminal law is irrelevant, because *Manufacturers'* held that the per se rule is not an evidentiary presumption *at all*. *Manufacturers' Ass'n*, 462 F.2d at 52. The district court therefore did not err in instructing the jury under the per se rule.

2. Defendants' proposed jury instruction, which would have instructed the jury that two entities are not competitors for purposes of Section 1, and therefore cannot conspire, if they are engaged in a joint venture, lacked support in the law or in the facts of this case. *See United States v. Thomas*, 612 F.3d 1107, 1120 (9th Cir. 2010) ("A defendant is entitled to have the judge instruct the jury on [his or her] theory of defense, provided that it is supported by the law and has some

foundation in the evidence." (quoting *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990)). That Defendants cooperated with other persons and entities for purposes of rigging bids does not mean they were not competitors. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010) (explaining that even "members of a legally single entity" have been held to have "violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity"). Thus, the district court did not err in rejecting the proposed instruction. *See Thomas*, 612 F.3d at 1120-21 (explaining that this court reviews de novo the question whether a proposed instruction was supported by law, and "for abuse of discretion whether there is a factual foundation for a proposed instruction").

3. Defendants did not preserve their argument that the district court's instruction defining bid rigging was overbroad. *See* Fed. R. Crim. P. 30 ("A party who objects to any portion of the [jury] instructions . . . must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate."). We thus review for plain error. *See* Fed R. Crim. P. 52(b); *Puckett v. United States*, 556 U.S. 129, 135 (2009) (outlining four prongs to plain error review). Here, even assuming the portion of the instruction that Defendants claim was overbroad should not have been included, it did not affect Defendants' substantial rights because the bid-rigging conduct Defendants were accused of clearly fell within the core of the instruction, not the allegedly overbroad part.

4. To the extent Defendants have argued that the district court's instructions amounted to a constructive amendment of their indictment, that argument fails. The indictment clearly stated that Defendants were accused of bid rigging. That the indictment also quoted *Standard Oil* in generally describing the Sherman Act violation—i.e., rigging bids *in unreasonable restraint of trade and commerce*—does not alter the fact that the bid-rigging charge was a charge of a per se antitrust violation. *See United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014) (explaining that there is no constructive amendment "when the indictment simply contains superfluously specific language describing alleged conduct irrelevant to the defendant's culpability under the applicable statute," and that "[i]n such cases, convictions can be sustained if the proof upon which they are based corresponds to the offense that was clearly described in the indictment"); *see also United States v. Joyce*, 895 F.3d 673, 679 (9th Cir. 2018) (holding that bid rigging was a per se violation and that "the district court did not err by refusing to permit [the defendant] to introduce evidence of the alleged ameliorative effects of his conduct," in an appeal by another co-conspirator involved in the same scheme as Defendants here).

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL MARR, JAVIER SANCHEZ, GREGORY CASORSO, and VICTOR MARR, Defendants.	Case No. 14-cr-00580-PJH **PRETRIAL ORDER NO. 2** (Filed Jun. 21, 2016)

Before the court are defendants' motions for a bill of particulars (doc. no. 65), to dismiss the mail fraud counts (doc. no. 67), to adjudicate the Sherman Act allegations pursuant to the rule of reason (doc. no. 66), and to suppress warrantless audio recordings (doc. no. 68). The parties have filed supplemental post-hearing briefs, and the matters are deemed submitted. The government's motion to exclude the declaration of defendant Gregory Casorso is DENIED, and defendants are granted leave to file the untimely declaration. The court ORDERS as follows:

1. Defendants' motion for a bill of particulars is DENIED. Doc. no. 65. The government has provided discovery in an organized manner, and defendants seek specific categories of detailed evidence which is not required of a bill of particulars. *United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir. 1985); *United*

States v. Giese, 597 F.2d 1170, 1180 (9th Cir. 1979) ("there is no requirement in conspiracy cases that the government disclose even all the overt acts in furtherance of the conspiracy"). The court has previously ordered early disclosure of the government's witness and exhibit lists, and of co-conspirator statements, to address defendants' concern about being able to prepare for trial more effectively and efficiently in light of the voluminous discovery.

2. Defendants' motion to dismiss the mail fraud counts is DENIED. Doc. no. 67. The indictment describes the alleged scheme to defraud and scheme to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and specifies the following information for each mail fraud count: (1) the individual defendants who knowingly caused the use of the mails (either United States mail or private or commercial carrier); (2) approximate date; (3) recipient; (4) sender; and (5) description of the item delivered. Indictment (doc. no. 1) ¶¶ 15-19, 30-34. The indictment sufficiently contains "the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy." *U.S. v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009) (citation omitted).

3. Defendants' motion to adjudicate the Sherman Act counts pursuant to the rule of reason is DENIED. Doc. no. 66. The indictment charges defendants with a conspiracy involving 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. This type of conduct 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 they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5 (1958).

Defendants cite *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1154-55 (9th Cir. 2003), where the court noted that it was appropriate to apply the rule of reason "because plausible arguments that a practice is procompetitive make us unable to conclude 'the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Id.* at 1155 n.8 (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294 (1985)). Neither *Paladin* nor *Northwest Wholesale Stationers* (both civil cases involving private litigants) involved an anticompetitive agreement that fell squarely within a per se category, and neither case stands for the proposition that defendants may offer plausible arguments in support of a rule of reason analysis to a category of economic activity that merits per se invalidation under Section 1 of the Sherman Act. *See Northwest Wholesale Stationers*, 472 U.S. at 293, 295-96 (distinguishing the wholesale cooperative at issue from group boycotts subject to

per se treatment, where the case "turns on . . . whether the decision to expel Pacific is properly viewed as a group boycott or concerted refusal to deal mandating per se invalidation"); *Paladin*, 328 F.3d at 1154-55 ("even if Northridge and MPC are, in a sense, competitors, the type of agreement at issue here cannot be considered one that will 'always or almost always tend to restrict competition.' ") (quoting *Northwest Wholesale Stationers*, 472 U.S. at 289). The court declines 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. *U.S. v. Green*, 592 F.3d 1057, 1068 (9th Cir. 2010) (affirming CR 05-208 WHA (N.D. Cal.)); *U.S. v. Romer*, 148 F.3d 359 (4th Cir. 1998); *U.S. v. Koppers Co., Inc.*, 652 F.2d 290, 295 (2d Cir. 1981).

By contrast to *Paladin* and *Northwest Wholesale Stationers*, where the courts considered whether the alleged conduct fit into the per se category of group boycotts, an alleged agreement not to compete at a public auction, to designate the winner at the public auction, and to negotiate payoffs for agreeing not to compete is the kind of agreement that courts have deemed to be unlawful under Section 1 of the Sherman Act, as recognized by the antitrust bar:

> The indictment charges the defendants with conspiring to rig the results of an auction. An auction-rigging conspiracy is an agreement

> between two or more persons to eliminate, reduce or interfere with competition for a product, job or contract that is to be awarded on the basis of auction bids. In this case, defendants have been charged with conspiring to rig the results of the [auction title or description] by deciding in advance which of them should be the successful bidder on particular items.

ABA MODEL JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES at 62-63 (2009)). As the government points out, the per se rule has been consistently applied in prosecutions for bid-rigging in the context of public foreclosure auctions, though admittedly the defendants in those cases did not litigate the application of the per se rule. *U.S. v. Romer*, 148 F.3d 359 (4th Cir. 1998); *U.S. v. Guthrie*, 814 F. Supp. 942 (E.D. Wash. 1993), *aff'd*, 17 F.3d 397 (9th Cir. 1994) (unpublished); *U.S. v. Katakis*, CR 11-511 WBS (E.D. Cal. March 11, 2014).

Even if the reasoning of *Paladin* could be extended to a per se bid-rigging prosecution, the court is not persuaded that defendants have offered "plausible arguments" about the procompetitive effects of their agreement that would warrant analysis under the rule of reason. Defendants argue that they were competing in a unique market, where the banks effectively dominated the market for foreclosed properties and set their own price as buyers by determining the opening bid as sellers at the public auction. This "unique position" of the banks is not unique to the time period charged in the indictment. As recognized by defendants' consultant, "In public foreclosure auctions, the

mortgage holder sets the opening bid amount. . . . If a third party does not bid higher than the opening bid, then the bank retains the property and is able to resell it in the open market." Andrien Decl. (doc. no. 66-1) ¶ 16. The fact that defendants are charged with an agreement not to compete during a time when there was a glut of foreclosures does not render their anti-competitive agreement subject to a "plausible argument" that their arrangement was "intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472 U.S. at 294, 296 (recognizing that wholesale purchasing cooperatives "are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects" and that "[t]he act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect").

Defendants have not demonstrated that the housing foreclosure market was exceptional in any way other than the volume of properties available, nor have they argued that they were precluded from competing in the open market. *See U.S. v. Alston*, 974 F.2d 1206, 1209 (9th Cir. 1992) (rejecting argument that that [sic] the agreement among dentists on higher co-payment fees to be paid by prepaid dental plans should have been analyzed under the rule of reason, holding that the health care market was not an exceptional market in which horizontal restraints on competition were necessary to make the product available on the market at all). Defendants were not prevented from entering the

market without an agreement not to compete; defendants could have openly competed in the public foreclosure auctions against the banks and other competitors, including co-conspirators. The Sherman Act violations charged in the indictment allege an agreement among competitors not to compete against each other at auction, a bid-rigging arrangement mandating per se treatment because "the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Northwest Wholesale Stationers*, 472 U.S. at 294. "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pac. Ry.*, 356 U.S. at 5.

4. The court has received supplemental briefs and audio recordings in support of defendants' motion to suppress. After reviewing the supplemental filings, the court will determine whether to set a further hearing on the motion to suppress. Doc. no. 68.

IT IS SO ORDERED.

Dated: June 21, 2016

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, *v.* MICHAEL MARR, JAVIER SANCHEZ, GREGORY CASORSO, and VICTOR MARR, Defendants.	Case No. 14-cr-00580-PJH **PRETRIAL ORDER NO. 5** (Filed Apr. 28, 2017)

On April 19, 2017, this matter came on for pretrial conference and for hearing on Victor Marr's motion to continue trial. The court previously held a hearing and ruled on defendants' motions to sever in the order entered October 12, 2016, which is hereby designated as Pretrial Order No. 4 (doc. no. 186). As stated on the record and summarized below, the court rules on the motions in limine and other disputed pretrial matters as follows:

* * *

II. Motions in Limine ("MIL")

A. Defendants' Motions in Limine

1. Defendants' Joint MIL to Admit Testimony Regarding Analysis of Auction Sale Prices

Defendants seek to admit testimony and evidence regarding the analysis by their consultant, Jeffrey

Andrien, of auction sale prices during and after the conspiracy period, despite the court's earlier ruling in Pretrial Order No. 2 denying defendants' motion to adjudicate the Sherman Act count pursuant to the rule of reason. Doc. no. 209. Defendants contend that they should be permitted to refute the allegations of the indictment that they suppressed competition by "purchasing selected properties at public auctions at artificially suppressed prices." Defendants also contend that the government's theory of the case, as argued in both trials in the related case *U.S. v. Florida*, CR 14-582 PJH and CR 14-582 JD, is that the difference between the public auction price and the secondary auction price would have gone to the beneficiaries, which is mere speculation based on anticipated testimony of cooperating witnesses that they would have bid more at the public auction but for the secondary auctions or rounds. Defendants argue that Jeffrey Andrien's analysis will disprove the government's key allegation that the secondary auction prices would have otherwise been added to the public auction bid prices.

In further support of defendants' motion in limine to admit the Andrien testimony is their separate brief in support of (1) defendants' proposed instruction requiring the jury to find "unreasonable restraint" as an element of bid rigging and (2) defendants' request to admit evidence whether the alleged agreement resulted in an unreasonable restraint. Doc. no. 212. Defendants contend that a conclusive presumption of unreasonableness under the per se rule violates their rights to due process and jury determination on the

element of an unreasonable restraint of trade to prove a Sherman Act violation. Doc. no. 212. Because this due process argument in support of defendants' proposed jury instruction is relevant to defendants' motion in limine to admit Andrien's testimony, and other disputed pretrial matters, the court addresses it at the outset.

a. Challenges to Per Se Rule

Defendants contend that excluding evidence of whether defendants' alleged bid rigging agreement restrained competition or suppressed prices at the public auctions would violate their right to due process and right to have a jury determine an essential element of the Sherman Act counts, namely, whether the alleged bid rigging was an unreasonable restraint of trade. In their brief in support of their proposed instruction on "unreasonable restraint" and their request to admit rule of reason evidence, doc. no. 212, defendants make the following arguments:

> (1) that unreasonableness of restraint of trade is a necessary element of a criminal violation of Section 1 of the Sherman Act under *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), despite 77 years of controlling authority, under *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) and its progeny, recognizing that price-fixing is conclusively presumed to be unreasonable and constitutes per se unreasonable restraint of trade under Section 1; and

> (2) that despite controlling Ninth Circuit authority holding that "[t]he per se rule does not operate to deny a jury decision as to an element of the crime charged, since 'unreasonableness' is an element of the crime only when no per se violation has occurred," *U.S. v. Manufacturers' Ass'n of the Relocatable Bldg. Ind.*, 462 F.2d 49, 52 (9th Cir. 1972) ("*Manufacturers' Ass'n*"), the development of due process jurisprudence, recognizing a defendant's right to a jury determination on every element of the crime with which he is charged, directly conflicts with the *Socony-Vacuum* per se rule, requiring the issue of the reasonableness of the combination in restraint of trade to be decided by the jury under an appropriate "rule of reason" instruction.

Under this line of reasoning, defendants urge the court to disregard *Manufacturers' Ass'n*, in which the Ninth Circuit squarely rejected a due process challenge to the *Socony-Vacuum* per se rule, on the ground that it has been effectively overruled by subsequent Supreme Court authority holding that a criminal defendant has a due process right to have a jury, not a judge, decide whether every element of a charged offense has been proven. In *Manufacturers' Ass'n*, the defendants appealed from their convictions in the Northern District of California for violating antitrust laws, on the ground that the per se rule as to price-fixing creates a conclusive presumption in violation of their rights to due process. The Ninth Circuit recognized that "since the accused is presumed innocent, he has the right to have each element of the crime charged submitted to

the jury," and that "[c]onclusive presumptions may not operate to deny this right." 462 F.2d at 50 (citing *Morissette v. United States*, 342 U.S. 246 (1952)).

Addressing the appellants' due process challenge to application of the per se rule, i.e., "that price-fixing is per se a violation of the antitrust laws and that the test of reasonableness has no application," the Ninth Circuit held that the "[a]ppellants' contention that the per se rule constitutes an unconstitutional conclusive presumption misunderstands the Sherman Act." *Id.* The court proceeded to explain that in interpreting the Sherman Act, the Supreme Court has enunciated two distinct rules of substantive law: "(1) certain classes of conduct, such as price-fixing, are, without more, prohibited by the Act; (2) restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable." *Id.* at 52. In other words, "the per se rule establishes a conclusive presumption that certain types of conduct are unreasonable" within the meaning of the Sherman Act, such as price-fixing agreements. *Id.* The court in *Manufacturers' Ass'n* squarely held that there is no right to a jury determination of unreasonableness for a per se violation:

> *Morissette*, *supra*, is inapposite. The per se rule does not operate to deny a jury decision as to an element of the crime charged, since "unreasonableness" is an element of the crime only when no per se violation has occurred. To put it differently "reasonableness" must be viewed as a legal term, and not in its ordinary

> sense. When the Court describes conduct as per se unreasonable, they do no more than circumscribe the definition of "reasonableness."
>
> While the appellants deserve credit for their ingenious and novel attempt to trap the Court in its own rhetoric, their contention that the per se rule should be set aside must be, and is rejected. The per se rule does not establish a presumption. It is not even a rule of evidence.

462 F.2d at 52.

Other circuit courts have cited *Manufacturers' Ass'n* with approval to hold that the per se rule does not deprive a defendant of the right to have each element of the offense submitted to the jury. *See United States v. Giordano*, 261 F.3d 1134, 1144 (11th Cir. 2001) (citations omitted); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984) (citations omitted). The government points out that every court of appeals to reach the question has similarly concluded that the per se rule is a matter of substantive law, and does not deprive the defendant of the right to jury trial. Doc. no. 235 at 2. *See United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683-84 (5th Cir. 1981) ("because fixing prices is by itself an unreasonable restraint of trade, an intent to fix prices is equivalent to an intent to unreasonably restrain trade"); *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981) ("Since the Sherman Act does not make 'unreasonableness' part of the offense, it cannot be said that the judicially-created per se mechanism relieves the Government of its duty of proving each element of a criminal offense under the

Act."); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979) ("Since the per se rules define types of restraints that are illegal without further inquiry into the competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.' ").

In support of their argument that the court should hold that *Manufacturers' Ass'n* has been effectively overruled by subsequent Supreme Court authority expanding on the rights to due process and jury trial, defendants cite a line of cases starting with *Carella v. California*, 491 U.S. 263 (1989) (per curiam), where the Court held that jury instructions imposing conclusive presumptions as to core elements of the crime violated the defendant's right under the Due Process Clause of the Fourteenth Amendment, which "denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." 491 U.S. at 265 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The Court in *Carella* cited clearly established Supreme Court authority recognizing that "[j]ury instructions relieving States of this burden violate a defendant's due process rights." *Id.* (citing *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979)). *Sandstrom*, in turn, relied on the holdings of *Morissette*, 342 U.S. at 274-75 (instruction that criminal intent was presumed from defendant's conduct "would conflict with the overriding presumption of innocence with which the law endows the accused and which

extends to every element of the crime"), and *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978) ("intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices"). *See Sandstrom*, 442 U.S. at 521-22.

Given this long line of cases recognizing that essential elements of the crime must be found by the jury, defendants do not raise a persuasive argument that this court should determine that decisions from *Winship* through *Sandstrom, Francis, Carella* and *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) "effected a sea change in understanding and applying a criminal defendant's right to Due Process" that "flatly precludes reliance on the per se rule here." Doc. no. 212 at 14, 16. The due process principles that defendants contend contravene the per se rule were considered by the court in *Manufacturers' Ass'n*, which cited *Morissette* as authority on the right to have every element of the crime submitted to the jury. *See Morissette*, 342 U.S. at 276 ("Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances."). Accordingly, the court declines defendants' invitation to disregard the holding of *Manufacturers' Ass'n* that "[t]he per se rule does not operate to deny a jury decision as to an element of the crime charged." 462 F.2d at 52.

b. Relevance

Defendants contend that they are entitled to defend the factual allegations made in the indictment, i.e., that defendants "artificially suppressed" prices at the public auction. Doc. no. 209 at 5-6 (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense") (internal citation and marks omitted)). *See* Indictment ¶¶ 10.d, 25.d. Defendants proffer Andrien's analysis of auction sale prices in Alameda and Contra Costa Counties, during and after the conspiracy period alleged in the indictment. Defendants contend that Andrien's analysis is based on an analytical model that is widely accepted for assessing the economic impact of alleged anticompetitive conduct in the marketplace, generally referring to MDL litigation without citing court opinions recognizing the purported methodology.

Defendants also contend that their analysis of auction sale prices will undercut the government's theory that the properties would have been sold at the secondary auction prices. Defendants point out that the secondary auction bidders told the FBI that one reason they participated in the secondary auctions was to make money from each other, with no intent to purchase the properties, suggesting that the bidding at the secondary rounds would have had no bearing on the prices bid at the public auction. Defendants argue that the participants' practice of selling each other insurance at the secondary auctions demonstrates that the insured bidder had no interest in purchasing the

property, but only to bid in the secondary rounds to drive up the price as high as he could to inflate the price to other bidders. Defendants further point to the practice of some bidders to have two "seats" at the secondary rounds, which amounts to a method of inflating the price of the property to other bidders at the rounds, to make more money from other bidders in the rounds, with no bearing on the prices bid at the public auction. Doc. no. 209 at 3-4.

The government opposes the defense motion to admit Andrien's testimony generally on the ground that a bid rigging conspiracy is a per se violation of the Sherman Act, and that evidence of the economic effect is irrelevant, and therefore inadmissible. The allegation that the conspiracy "artificially suppressed prices" does not go to an essential element of the crime, and the government is not required to prove all the allegations of the indictment. "The cases make clear that the government need not prove all facts charged in an indictment; instead, only enough facts to prove the essential elements of the crime must be demonstrated at trial." *U.S. v. Jenkins*, 785 F.2d 1387, 1392 (9th Cir. 1986) (citations omitted).

Each bid rigging charge requires the jury to find the following three elements: (1) an agreement to rig bids; (2) defendants knowingly participated in the agreement; and (3) their activities were in the flow of or affected interstate commerce. Because evidence of reasonableness or pro-competitive justification for bid rigging is not relevant in a per se case, it is not admissible under FRE 402. "Insofar as the language of an

indictment goes beyond alleging elements of the crime, it is mere surplusage that need not be proved." *Id.* (proof of federal insurance is not an essential element of the crimes charging false statements to obtain loans insured by the FHA, and allegations that appellants' false statements were directed to an FHA-approved lender were surplusage that did not have to be proved at trial). *See also United States v. Miller*, 471 U.S. 130, 136 (1985) ("[a]s long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime").

Even if defendants were permitted to rebut the allegations of the indictment related to artificially suppressed prices, the government argues that Andrien's analysis is irrelevant to the question whether the bid rigging conspiracy suppressed the prices of the selected properties and diverted money away from the banks and beneficiaries to the coconspirators, because Andrien analyzes the prices paid for ALL properties sold at the auctions, not the prices of the selected properties that were rigged, which are the subject of the indictment. Doc. no. 236 at 9. As the court held in the *Florida* pretrial proceedings, Andrien's analysis of the prices of all properties sold at public foreclosure auctions is irrelevant to the agreement to rig bids on selected properties as alleged in the indictment:

> The analysis proposed by defendants comparing post-conspiracy auction sales prices with

> the prices of all properties sold at auction during the charged time period is not relevant to the prices of the set of selected properties that defendants actually purchased. Thus, the analysis described by defendants is inadmissible as irrelevant pursuant to FRE 402.

Florida I, CR 14-582 PJH, doc. no. 284 at 6. The government points out that it has not noticed an economic expert as a trial witness, and has no intention to present statistical economic evidence on the prices of properties sold at auction to prove that defendants artificially suppressed prices. Doc. no. 236 at 11.

Defendants also argue that they are entitled to refute evidence and argument that coconspirators believed they could purchase properties for a lower price by participating in the rounds, when the evidence shows that many bidders at the rounds had no intent to purchase the properties, but participated in the rounds to drive up the secondary auction price to make money off of other bidders. The government responds that the evidence of the coconspirators' subjective beliefs, that they would economically benefit from bid rigging, is relevant to their motive for joining the conspiracy. The government would not offer evidence of their subjective beliefs to prove that bid rigging conspiracy actually lowered the price of the properties at public auction. Furthermore, Andrien's analysis would not be probative of the subjective beliefs of the coconspirators, and would not be relevant rebuttal evidence on that issue. Doc. no. 236 at 12-13.

The court determines that any analysis by Andrien about the effect of the bid rigging agreement on the auction prices would be irrelevant and is therefore inadmissible pursuant to FRE 402 ("Irrelevant evidence is not admissible."). The Andrien testimony is also inadmissible pursuant to FRE 403 because it is prejudicial and is likely to cause confusion of the issues.

c. Opinion Testimony

The government further objects to the admissibility of Andrien's analysis of auction sales prices as inadmissible opinion testimony because his analysis is not reliable and is not relevant to qualify as expert testimony. Doc. no. 236.

It is undisputed that Andrien is not a percipient witness and that his testimony is not admissible under FRE 701, which provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Defendants must establish the admissibility of Andrien's opinion testimony under FRE 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

On this record, defendants have not established that Andrien's opinion testimony "rests on a reliable foundation and is relevant to the task at hand" to be admissible under FRE 702. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) ("*Daubert I*"). In addition to the lack of relevance, discussed above, defendants have not established the reliability of Andrien's testimony by a preponderance of the evidence. *See Daubert I*, 509 U.S. at 593 (factors the court can consider in determining whether to admit expert scientific testimony under FRE 702 include whether the theory or technique employed by the expert is generally accepted in

the scientific community; whether it's been subjected to peer review and publication; whether it can be and has been tested; and whether the known or potential rate of error is acceptable). The government points out several factors that undermine the reliability of Andrien's testimony:

> i. Andrien has experience in business management, marketing and IP, but is not an economic expert, and does not have specialized knowledge in economics or economic modeling. His field of expertise appears to be in marketing, business management and intellectual property, but he does not appear to have any prior experience analyzing the real estate market.
>
> ii. Defendants do not show that Andrien's methodology has been subject to peer review, or "point to some objective source – a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like – to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("*Daubert II*"). The government points out that Andrien's analysis fails to cite economic literature that has analyzed collusion in auction settings. Doc. no. 236 at 4 and n.1 (citations omitted). The government adds that defendants do not cite any bid rigging cases or a specific expert opinion that has employed Andrien's model,

noting that defendants argue only generally that it is the "same basic model used in damage analysis in a wide range of federal and state cases." *Id.* at 5.

iii. Andrien's work was done specifically for this litigation, and did not grow "naturally and directly out of research they have conducted independent of the litigation." *Daubert II*, 43 F.3d at 1317 ("in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office").

iv. Andrien's analysis is flawed because he did not properly take variables into account, such as the effect of the recession, seasonality, availability of financing, and regional and demographic changes that affect housing prices. Doc. no. 236 at 6-7. Andrien also fails to explain why he only included 6 months of data for the post-conspiracy period ("Post-Period") to compare to the two-year conspiracy period ("Indictment Period"), and did not analyze housing prices before the conspiracy at all.

v. Andrien's analysis does not support his conclusion that auction prices slightly decreased after the conspiracy period so that the banks received less during the post-conspiracy period compared to the conspiracy period, because it fails to analyze the dollar amounts that the banks received, focusing only on the

> percentages paid over the opening bid. The government also challenges Andrien's conclusion that there is no evidence to suggest that auction prices were suppressed by the bid rigging, because he did not measure what prices should have been during the indictment period for the properties that were rigged, and only compared the prices of ALL properties offered at the auctions during the Indictment Period against the prices Post-Period.

Because defendants fail to demonstrate the admissibility of Andrien's opinion testimony under FRE 702, defendants' motion in limine to admit Andrien's testimony is DENIED.

* * *

B. Disputed Instructions

1. Instructions Applying Per Se Rule

Defendants object to the following instructions proposed by the government, which were given in *Florida I, Joyce*, and *Guillory*, on the ground that they fail to include the element of an "unreasonable restraint" on trade:

> Gov't No. 2: The Charge (9th Cir. Crim. Jury Instr. 1.2 and ABA Crim. Antitrust Instr. at 27; listing elements of bid rigging)
>
> Gov't No. 18: Per Se Violations (ABA Crim. Antitrust Instr. at 54)
>
> Gov't No. 19: Elements of the Bid Rigging Offenses (ABA Crim. Antitrust Instr. at 47)

Doc. no. 231. Defendants propose alternative instructions applying the rule of reason, to instruct the jury on "unreasonable restraint" of trade:

> Defs' No. 17: Elements of the Bid Rigging Offense
>
> Defs' No. 24: Theory of the Case – Rule of Reason

In their proposed instruction No. 17, defendants propose adding an element requiring "unreasonable restraint of trade" to the Elements of Bid Rigging, and adding language from the indictment, requiring the government to prove that a conspiracy existed "to suppress and restrain competition by rigging bids to obtain hundreds of selected properties offered at public auctions." Doc. no. 210 (Defs' No. 17). Defendants also propose a rule of reason instruction, Defs' No. 24, based on a model ABA instruction for civil antitrust cases applying the rule of reason.

As previously discussed, bid rigging is per se unreasonable within the meaning of the Sherman Act under clearly established federal law, and under controlling Ninth Circuit authority, "[t]he per se rule does not operate to deny a jury decision as to an element of the crime charged." *Manufacturers' Ass'n*, 462 F.2d at 52. Furthermore, because the government is not required to prove all the allegations of the indictment, only the elements of the offense must be given in the instruction, as proposed by the government's proposed instruction No. 19, which is based on the model ABA instruction on elements of the offense. The government's

proposed instruction on "Elements of the Offense" does not alter the bid rigging crime charged in the indictment so as to result in a constructive amendment, as argued by the defense. *See United States v. Davis*, ___ F.3d ___, 2017 WL 1363804, *1 (9th Cir. Apr. 14, 2017) ("A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them.") (quoting *United States v. Ward*, 747 F.3d 1184, 1190 (9th Cir. 2014)).

To the extent that the "knowingly" element of the model ABA instruction does not require "intending to help achieve" the anticompetitive objectives of the conspiracy to rig bids, as proposed by defendants' No. 17, such a finding of intent to produce anticompetitive effects is not required for a per se violation of the Sherman Act. *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991) ("a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the per se rule is designed to avoid.") (citations and internal marks omitted). Thus, defendants' objections to the government's proposed instructions Nos. 2 (The Charge), 18 (per se violations) and 19 (elements) applying the per se rule are OVERRULED.

Accordingly, the court adopts the government's proposed instructions Nos. 2, 18 and 19, and DENIES defendants' request to give Defs' Nos. 17 (elements) and 24 (rule of reason).

2. Bid Rigging

Defendants object to the government's proposed Instruction No. 20 (Bid Rigging), which was given in *Florida I, Joyce* and *Guillory*, on the ground that it relies on the per se rule. Defendants also generally object on the grounds that this instruction is confusing, internally inconsistent, mischaracterizes the law, and essentially directs a verdict of guilty, without explaining or citing specific language to support the objection. Doc. no. 231. Defendants propose an alternate instruction No. 18 entitled "Sherman Act Violations" which is loosely based on the same model ABA Bid Rigging instruction cited by the government. ABA Crim. Antitrust Instr. at 54-56, 61-63.

Defendants' proposed instruction (1) takes out introductory language explaining that conspiracy to rig bids is the first element of the offense, and (2) adds language to the ABA model instruction related to a joint venture or partnership. In support of their proposed version, defendants cite the instructions given in *U.S. v. Katakis*, CR 11-511 (E.D. Cal. 2014) which is factually distinguishable from this case and not binding here.

The court does not adopt defendants' proposed instruction No. 18 for two reasons. First, omitting the introductory language about conspiracy omits important context for the jury, particularly because the court will not give a separate conspiracy instruction where defendants are not charged with a separate conspiracy count apart from the bid rigging count, and the elements

of a bid rigging conspiracy are covered by the ABA model instruction on elements of the offense. Second, the proposed instructions about finding a joint venture or partnership could cause unnecessary confusion and mislead the jury. As the government points out in its objections, the government will try to prove an agreement between horizontal competitors, and there will be no evidence that the charged conduct was the product of a joint venture or partnership. Doc. no. 333 at 8. The government squarely addressed this argument in opposition to defendants' motion to adjudicate pursuant to the rule of reason, and defendants have not shown, even at this juncture, that there would be evidence of a joint venture in this case. Doc. no. 95 at 4 ("Joint bidding is a specific type of joint venture. It exists when two or more firms decide to submit a joint bid on a project, agreeing to share in the development, profits, and losses of the project, because each alone would not be willing to submit the bid.") (citing P. AREEDA & H. HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2005 (updated Aug. 2015); *Kearney v. Taylor*, 56 U.S. 494 (1853) (competition to purchase land was strengthened by the joint venture because it allowed individuals to pool their resources in order to submit a bid)).

The government's proposed modifications to the model ABA Bid Rigging instruction, as given in related bid rigging trials, are better tailored to the evidence in this case: referring to "properties sold at the auctions" rather than "products [services]"; omitting bracketed instructions that are not relevant; and specifying that

this instruction goes to the first element of the antitrust crime. The government also proposes including an instruction that a single conspiracy "may involve several subagreements or subgroups of conspirators," which the court approved in *Florida I* as part of a separate conspiracy instruction, and in *Joyce* and *Guillory.* The government does not propose the bracketed paragraphs of the model ABA instruction that defendants partially propose in their version of the Bid Rigging instruction. The court notes that the Bid Rigging instruction was given in *Florida I, Joyce* and *Guillory* with the bracketed paragraphs 4 through 7 of the model ABA Criminal Antitrust Instruction, at 61-62.

The court further notes that defendants did not request a single entity instruction, as given in *Florida* and *Guillory*: "An internal agreement only between owners and employees of the same company does not constitute a conspiracy." *Florida I*, doc. no. 318 (order re: request for single entity instruction). *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003) (holding that the single-entity rule applies to a company and its officers, employees and wholly owned subsidiaries; firms owned by the same person; and principal-agent relationships) (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984)). A single entity instruction here may address defendants' concern that the government's proposed instruction fails to define who is a competitor and fails to distinguish defendants who work together.

To ensure that the instruction is tailored to the evidence in this case, the court ORDERS the parties to

meet and confer on the applicability of the bracketed paragraphs of the ABA model Bid Rigging instruction, indicated in the government's proposed instruction No. 20, and a single entity instruction.

* * *

IT IS SO ORDERED.

Dated: April 28, 2017

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL MARR, JAVIER SANCHEZ, and GREGORY CASORSO Defendants.	Case No. 14-cr-00580-PJH-1 ORDER ISSUING FINAL JURY INSTRUCTIONS; RULING ON DISPUTED INSTRUCTIONS (Filed Jun. 1, 2017)

Having heard argument on the jury instructions remaining in dispute, including defendants' supplemental requested jury instructions, doc. no. 286, the court adopts the instructions jointly submitted by the parties in doc. no. 256, subject to defendants' reserved objections, adding Gregory Casorso's name to the bracketed portion of Instruction No. 30 on Defendant's Decision to Testify, and tailoring the bracketed portions of Instruction No. 33 on What Is Not Evidence. The court rules on the disputed instructions for the reasons stated on the record and as set forth below:

1. Defendants' first supplemental requested jury instruction proposes a description of the conspiracy charges using the language of the indictment. Doc. no. 286 at 1. Having reviewed the instructions and the indictment, the court GRANTS defendants' request to include a description of the conspiracy as charged in the indictment because several instructions, including No.

20 on Elements of the Bid Rigging Offenses and No. 21 on Bid Rigging, expressly refer to the conspiracy as charged or alleged in the indictment. Because the jury will not be provided with the indictment, these references to the indictment could potentially be confusing without providing a description of the conspiracy "as charged" in the indictment. The court overrules the government's objections that using the language of the indictment would be duplicative of the summary of charges included in Instruction No. 37, and that the government is not required to prove all the allegations of the indictment, because the jury will only be required to find the elements of bid rigging, including "that the conspiracy described in the indictment existed at or about the time alleged."

Rather than modifying Instruction No. 28 on Charges Not Evidence – Presumption of Innocence, as proposed by defendants, the court determines that the description of the conspiracy as charged in the indictment provides helpful context to the jury in Instruction No. 20 on Elements of the Bid Rigging Offenses, which is hereby modified in ¶ 1 as shown below in bold:

> Each defendant is charged with one or two counts of bid rigging, in violation of the Sherman Act, Section 1 of Title 15 of the United States Code. **One count of the indictment charges the defendants Michael Marr, Javier Sanchez, and Gregory Casorso with entering into and engaging in a conspiracy which consisted of a continuing agreement, understanding, and concert of action among the defendants**

and coconspirators to suppress competition by refraining from and stopping bidding against each other to purchase hundreds of selected properties at public auctions in Alameda County at noncompetitive prices. Another count of the indictment charges the defendants Michael Marr and Javier Sanchez with entering into and engaging in a conspiracy that consisted of a continuing agreement, understanding and concert of action among the defendants and coconspirators to suppress competition by refraining from and stopping bidding against each other to purchase hundreds of selected properties at public auctions in Contra Costa County at noncompetitive prices.

[¶] In order to establish the offense of conspiracy to rig bids as charged in the indictment, the government must prove each of these elements beyond a reasonable doubt:

One, that the conspiracy described in the indictment existed at or about the time alleged:

Two, that the defendant knowingly became a member of the conspiracy; and

Three, that the conspiracy described in the indictment occurred within the flow of interstate commerce.

If you find from your consideration of all the evidence that each of these elements has

> been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Because the court will give Instruction No. 19 on Per Se Violations of the Antitrust Laws, the jury will not be required to find whether the bid rigging conspiracy resulted in an unreasonable restraint of trade or whether the prices were actually non-competitive. Pursuant to the court's earlier rulings that this is a per se case, no argument as to reasonableness or lack of economic harm will be permitted in closing.

2. Defendants' requested instruction on Sherman Act Violations is DENIED for the reasons set forth in Pretrial Order No. 5, in light of the evidence presented at trial.

3. Defendants' requested instruction on rounds is DENIED as argumentative and potentially misleading and confusing; the court adopts the government's proposed instruction on rounds, doc. no. 255, which is hereby designated as Instruction No. 39-A, and will be renumbered as No. 39 when given to the jury.

4. Defendants' requested instruction on multiple conspiracies is DENIED; the court will give the Ninth Circuit model instruction without modification, as previously ordered.

5. Defendants' requested instruction on testimony of cooperating witnesses is GRANTED IN PART to include the individual names of the witnesses in Instruction No. 40, to which the government does not object. Their request to include the third paragraph is DENIED as duplicative of Instruction No. 42, in light of defense counsel's agreement to use the model instructions.

6. Defendants' request to instruct on an internal agreement between owners and employees is DENIED as duplicative of the identical language in Instruction No. 21 on Bid Rigging, as conceded by defense counsel.

7. Instruction No. 39 on Statements by Defendant has been WITHDRAWN by the government with no objection by defendants.

The final version of the jury instructions is attached to this order as Appendix 1.

IT IS SO ORDERED.

Dated: June 1, 2017

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL MARR, JAVIER SANCHEZ, and GREGORY CASORSO, Defendants.	CASE NO. CR 4:14-00580 PJH **FINAL JURY INSTRUCTIONS** (Filed Jun. 1, 2017)

* * *

INSTRUCTION NO. 19

PER SE VIOLATIONS OF THE ANTITRUST LAWS

The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to rig bids.

Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm,

if any, done by it. It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was, in fact, a conspiracy as charged in the indictment, it was illegal.

INSTRUCTION NO. 20

ELEMENTS OF THE BID RIGGING OFFENSES

Each defendant is charged with one or two counts of bid rigging, in violation of the Sherman Act, Section 1 of Title 15 of the United States Code. One count of the indictment charges the defendants Michael Marr, Javier Sanchez, and Gregory Casorso with entering into and engaging in a conspiracy which consisted of a continuing agreement, understanding, and concert of action among the defendants and coconspirators to suppress competition by refraining from and stopping bidding against each other to purchase hundreds of selected properties at public auctions in Alameda County at noncompetitive prices. Another count of the indictment charges the defendants Michael Marr and Javier Sanchez with entering into and engaging in a conspiracy that consisted of a continuing agreement, understanding and concert of action among the defendants and coconspirators to suppress competition by refraining from and stopping bidding against each other to purchase hundreds of selected properties at public auctions in Contra Costa County at non-competitive prices.

In order to establish the offense of conspiracy to rig bids as charged in the indictment, the government must prove each of these elements beyond a reasonable doubt:

One, that the conspiracy described in the indictment existed at or about the time alleged:

Two, that the defendant knowingly became a member of the conspiracy; and

Three, that the conspiracy described in the indictment occurred within the flow of interstate commerce.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

INSTRUCTION NO. 21

BID RIGGING

The indictment charges each defendant with one or two counts of conspiring to rig bids. Under the first element and for purposes of a violation of the Sherman Antitrust Act, a conspiracy to rig bids is an agreement between two or more competitors to eliminate, reduce, or interfere with competition for something that is to be awarded on the basis of bids. A conspiracy to rig bids

may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition among them.

The aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, exchanged information, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

If you should find that a defendant entered into an agreement to rig bids, the fact that he or his coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is not a defense. The agreement is the crime, even if it was never carried out. An internal agreement only between owners and employees of the same company does not constitute a conspiracy.

Evidence that the defendants and alleged coconspirators actually competed with each other has been admitted to assist you in deciding whether they actually entered into an agreement to rig bids. If the conspiracy charged in the indictment is proved, it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all competition. Nor is it a defense that the conspirators did not attempt to collude with all of their competitors. Similarly, the conspiracy is unlawful even if it did not extend to all properties sold at the auctions during the conspiracy period. A single conspiracy may involve several subagreements or subgroups of conspirators.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators.

On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, or merely by knowing that a conspiracy exists.

* * *

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAVIER SANCHEZ, Defendant-Appellant.	No. 17-10519 D.C. No. 4:14-cr-00580-PJH-2 Northern District of California, Oakland ORDER (Filed Apr. 3, 2019)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY CASORSO, Defendant-Appellant.	No. 17-10528 D.C. No. 4:14-cr-00580-PJH-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL MARR, Defendant-Appellant.	No. 18-10113 D.C. No. 4:14-cr-00580-PJH-1

Before: CLIFTON and FRIEDLAND, Circuit Judges, and ADELMAN,* District Judge.

Judge Friedland has voted to deny the petition for rehearing en banc, and Judge Clifton and Judge Adelman so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

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* The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

462 F.2d 49
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America,
Plaintiff-Appellee,
v.
MANUFACTURERS' ASS'N OF the
RELOCATABLE BUILDING INDUSTRY,
Defendant-Appellant.
UNITED STATES of America,
Plaintiff-Appellee,
v.
MODULUX INC., Defendant-Appellant.
UNITED STATES of America,
Plaintiff-Appellee,
v.
DESIGNED FACILITIES LEASING CO.,
Defendant-Appellant.
UNITED STATES of America,
Plaintiff-Appellee,
v.
VINNELL STEEL, Defendant-Appellant.
UNITED STATES of America,
Plaintiff-Appellee,
v.
SPEEDSPACE CORPORATION,
Defendant-Appellant.
Nos. 72-1037, 72-1038, 72-1029,
72-1051 and 72-1049.

|
June 5, 1972.
|
Rehearing Denied in No. 72-1038 June 27, 1972.

Attorneys and Law Firms

James J. Brosnahan (argued), Carl Hoppe (argued), of Eckhoff & Hoppe, James R. Madison (argued), Edward B. Rogin, William H. Orrick, Jr. of Orrick, Herrington, Rowley & Sutcliffe, San Francisco, Cal., John M. Carmack, of Gill & Baldwin, Los Angeles, Cal., Gordon Johnson, of Thelen, Marrin, Johnson & Bridges, San Francisco, Cal., for defendants-appellants.

Robert B. Nicholson (argued), Howard E. Shapiro, Walker B. Comegys, Acting Asst. Atty. Gen., Washington, D. C., Mark F. Anderson, Marquis L. Smith, San Francisco, Cal., for plaintiff-appellee.

Before ELY and CARTER, Circuit Judges and FERGUSON, District Judge.*

Opinion

JAMES M. CARTER, Circuit Judge:

In this appeal from convictions by a jury for violation of the antitrust laws and sentences imposing fines, the defendant corporations make various contentions. We address ourselves to one contention and affirm.

Appellants contend that the *per se* rule as to price-fixing, i. e., that price-fixing is *per se* a violation of the antitrust laws and that the test of reasonableness has no application, is in substance the creation of a

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* Honorable Warren J. Ferguson, District Judge, Central District of California, sitting by designation.

conclusive presumption and denies them due process in a criminal trial.

The use of presumptions in criminal law is limited by considerations of due process. Rebuttable presumptions which are arbitrary or irrational deny due process. A rebuttable presumption will be regarded as irrational and arbitrary unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *cf. United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965); *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943). And since the accused is presumed innocent, he has the right to have each element of the crime charged submitted to the jury. Conclusive presumptions may not operate to deny this right. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).[1]

Appellants' contention that the *per se* rule constitutes an unconstitutional conclusive presumption misunderstands the Sherman Act. The Act, in part, broadly provides that "[e]very contract, combination

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[1] The standard in non-criminal cases is somewhat different. Conclusive presumptions which result in arbitrary classifications are deemed invalid. *Schlesinger v. Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926). The legislature may not employ conclusive presumptions to legislate a fact which is at odds with actualities. *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932).

. . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1, Act of July 2, 1890, ch. 647, 26 Stat. 209.

In *Standard Oil Co. v. United States*, 221 U.S. 1, 60-68, 31 S.Ct. 502, 55 L.Ed. 619 (1911), and *American Tobacco Co. v. United States*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911), both civil cases, the Supreme Court interpreted the statute and spelled out the "Rule of Reason" as a limitation on the broad language of the Sherman Act,-i.e., that only unreasonable acts in restraint of trade and commerce were within the ambit of the statute.

In so doing, the Court disclaimed that it was changing the law as it existed in 1911. In *United States v. American Tobacco Co.*, *supra*, the Court stated:

> "The obscurity and resulting uncertainty, however, are now but an abstraction, because it has been removed by the consideration which we have given quite recently to the construction of the anti-trust act in the *Standard Oil Case.* In that case it was held, without departing from any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions

> (the Trans-Missouri Freight Association and Joint Traffic cases, 166 U.S. 290 [17 S.Ct. 540, 41 L.Ed. 1007] and 171 U.S. 505 [19 S.Ct. 25, 43 L.Ed. 259]). That such view was a mistaken one was fully pointed out in the *Standard Oil Case* and is additionally shown by a passage in the opinion in the Joint Traffic Case . . (171 U.S. 568, 19 S.Ct. 31). . . ." 221 U.S. at 178-179, 31 S.Ct. at 648.

In 1927 the Court decided *United States v. Trenton Potteries Company*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700. It sustained a criminal conviction for violation of the Sherman Act by price-fixing. The Court reviewed its antitrust holdings both before and after the *Standard Oil* and *American Tobacco Co., supra.* The Court concluded that price-fixing, in the cases decided both before and after *Standard Oil* and *American Tobacco*, had been held to be a *per se* violation of the Sherman Act without consideration of the rule of reasonableness. The Court, citing *Thomsen v. Cayser*, 243 U.S. 66, 84, 37 S.Ct. 353, 61 L.Ed. 597 and footnoting numerous lower court cases, pointed out that "the *Standard Oil* and *Tobacco* cases did not overrule the earlier cases" which held price-fixing to be illegal *per se.* 273 U.S. at 400, 47 S.Ct. at 380.

In *United States v. Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), a criminal case, the Court again reviewed its decisions on price-fixing. It stated:

> "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. And we reaffirmed that well-established rule in clear and unequivocal terms in *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 [60 S.Ct. 618, 84 L.Ed. 852] where we said:
>
> 'Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, *United States v. Trenton Potteries Co.*, 273 U.S. 392, [47 S.Ct. 377, 71 L.Ed. 700] and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, . . . '." 310 U.S. at 218, 60 S.Ct. at 842.[2]

Thus the Court has interpreted a broad and inclusive statute, and since the earliest days of the Act, has enunciated two distinct rules of substantive law: (1) certain classes of conduct, such as price-fixing, are,

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[2] The latest Supreme Court case considering the *per se* rule is *United States v. Topco Associates, Inc.*, 404 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (72), a civil case, involving allocation of territories. The case upholds the allocation as a *per se* violation, but is not otherwise pertinent.

without more, prohibited by the Act; (2) restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable. The first rule, in light of the second, *defines* certain classes of pernicious conduct as unreasonable. Roughly restated, the *per se* rule establishes a conclusive presumption that certain types of conduct are unreasonable. *See*, *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). This restatement, however, is no more than a pedagogic instrument, since the substantive rules of antitrust are no more rules of evidence than the substantive rules of any legal area.

Morissette, *supra*, is inapposite. The *per se* rule does not operate to deny a jury decision as to an element of the crime charged, since "unreasonableness" is an element of the crime only when no *per se* violation has occurred. To put it differently "reasonableness" must be viewed as a legal term, and not in its ordinary sense. When the Court describes conduct as *per se* unreasonable, they do no more than circumscribe the definition of "reasonableness."

While the appellants deserve credit for their ingenious and novel attempt to trap the Court in its own rhetoric, their contention that the *per se* rule should be set aside must be, and is rejected. The *per se* rule does not establish a presumption. It is not even a rule of evidence.

We have reviewed the appellants' other contentions, including their attack on the sufficiency of the

evidence and the correctness of the instructions and find no error.

The judgments are affirmed.