UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

UNITED STATES OF AMERICA	:	18 Cr. 333 (JGK)
v.	:	
AKSHAY AIYER,	:	
Defendant.	:	

---x

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION
TO DISMISS THE INDICTMENT IN PART FOR FAILURE TO ALLEGE A CRIME

WILLKIE FARR & GALLAGHER LLP
Martin Klotz
Michael S. Schachter
Jocelyn M. Sher
Samuel M. Kalar
787 Seventh Avenue
New York, New York 10019
T: (212) 728-8000

Attorneys for Defendant Akshay Aiyer

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

I. The Foreign Exchange Market 2

II. The Rand Chat Room 4

III. The Indictment 5

IV. The Behaviors Challenged By The Indictment, As Amplified By The Government's List Of Key Trading Incidents 5

V. The Government Challenges Certain Behaviors That Cannot Be Resolved On A Motion To Dismiss 6

ARGUMENT 7

I. Relevant Legal Standards 8

A. Criminal Antitrust Prosecutions Are Confined To Per Se Violations Because Of The Intent Requirement For Criminal Liability 8

B. Whether Conduct Is To Be Analyzed As A Per Se Violation Or Under The Rule Of Reason Is An Issue Of Law For The Court 9

C. Per Se Violations Are Extremely Rare, And The Trend Has Been To Limit The Applicability Of The Per Se Rule 9

II. Legal Standards Applied To The Conduct At Issue 11

A. The Coordinated Trading In The Interdealer Market Challenged By The Indictment Is Not A Per Se Violation 11

1. The Coordinated Trading at Issue Is Not Traditional Bid Rigging or Price Fixing. 12

2. Any Agreements Among the Alleged Coconspirators Regarding Coordinated Trading Were Related to the Procompetitive Functions of the Rand Chat Room and for this Reason, Too, Must Be Analyzed Under the Rule of Reason. 17

3. Suggestions That the Rand Chat Room Participants Engaged in Deceptive or Manipulative Behavior Add Nothing to the Government's Antitrust Claim. 22

B. Behaviors Arising Out Of Vertical Relationships Between The Parties Must Be Analyzed Under The Rule Of Reason 23

III. To The Extent The Challenged Behaviors Are Not Per Se Violations, The Indictment Must Be Dismissed 26

CONCLUSION 30

TABLE OF AUTHORITIES

Case Page(s)

Apex Oil Co. v. DiMauro,
713 F. Supp. 587 (S.D.N.Y. 1989)....................9, 16, 22

In re ATM Fee Antitrust Litigation,
554 F. Supp. 2d 1003 (N.D. Cal. 2008)....................19, 20

Board of Trade of City of Chicago v. United States,
246 U.S. 231 (1918)....................16, 17, 27

Blanksteen v. N.Y. Mercantile Exch.,
879 F. Supp. 363 (S.D.N.Y. 1995)....................9

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., *("BMI")*
441 U.S. 1 (1979)....................10, 18, 19

Craftsmen Limousine, Inc. v. Ford Motor Co.,
363 F.3d 761 (8th Cir. 2004)....................9

Falstaff Brewing Co. v. Stroh Brewery Co.,
628 F. Supp. 822 (N.D. Cal. 1986)....................23

Gatt Commc'ns, Inc. v. PMC Assocs., LLC,
No. 10 Civ. 8 (DAB), 2011 WL 1044898 (S.D.N.Y. Mar. 10, 2011)....................10, 26

Granite Partners, L.P. v. Bear, Stearns & Co.,
17 F. Supp. 2d 275 (S.D.N.Y. 1998)....................9, 14

Granite Partners, L.P. Bear, Stearns & Co.,
58 F. Supp. 2d 228 (S.D.N.Y. 1999)....................14, 15

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007)....................7, 10, 23, 24, 27

Major League Baseball Properties, Inc. v. Salvino, Inc.,
542 F.3d 290 (2d Cir. 2008)....................26

McNally v. United States,
483 U.S. 350 (1987)....................28

nFinanSe, Inc. v. Interactive Commc'n Int'l, Inc.,
No. 1:11-CV-3728-AT, 2012 WL 13009231 (N.D. Ga. July 24, 2012)....................11, 20

Palmer v. City of Euclid, Ohio,
402 U.S. 544 (1971)....................29

Phillips Getschow Co. v. Green Bay Brown Cty. Prof'l Football Stadium Dist.,
270 F. Supp. 2d 1043 (E.D. Wis. 2003)....13, 22

Polk Bros. v. Forest City Enters. Inc.,
776 F.2d 185 (7th Cir. 1985) .... *passim*

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986)....10, 21

Skilling v. United States,
561 U.S. 358 (2010)....1, 28, 29

In re Southeastern Milk Antitrust Litig.,
739 F.3d 262 (6th Cir. 2014) 9

State Oil Co. v. Khan,
522 U.S. 3 (1997)....7, 9, 10

In re Sulfuric Acid Antitrust Litigation,
703 F.3d 1004 (7th Cir. 2012) 25, 26

Telectronics Proprietary, Ltd. v. Medtronic, Inc.
687 F. Supp. 832 (S.D.N.Y. 1988)....23

Texaco Inc. v. Dagher,
547 U.S. 1 (2006)....7, 8

TMT Management Group, LLC v. U.S. Bank National Ass'n,
Civ. No. 14-4692 (MJD/JSM), 2016 WL 730254 (D. Minn. Jan. 4, 2016)....23

United States v. Aleynikov,
676 F.3d 71 (2d Cir. 2012)....7

United States v. Coleman Am. Moving Services, Inc.,
Crim. No. 86-24-N (M.D. Ala. August 8, 1986) 11

United States v. Guthrie,
No. 93-30066, 1994 WL 41106 (9th Cir. 1994) 29

United States. v. Lanier,
520 U.S. 259 (1997)....28

United States v. Nat'l Dairy Prods. Corp.,
372 U.S. 19 (1963)....29

United States. v. Nippon Paper Indus. Co.,
109 F.3d 1 (1st Cir. 1997)....7

United States v. Realty Multi-List, Inc.,
629 F.2d 1351 (5th Cir. 1980) 9

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940)..25

United States v. Stavroulakis,
952 F.2d 686 (2d Cir. 1992)...6

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978)...8, 18, 27, 28, 29

Statues, Rules and Regulations

15 U.S.C. § 1 7

Other Authorities

Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, Section 1909b (2018) 9

Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law Section 2001a (2018)........................15

FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION:
ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (Apr. 2000)..12, 19

U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION: ANTITRUST DIVISION MANUAL
(Apr. 2015)...8, 9, 27

U.S. DEPARTMENT OF JUSTICE ANTITRUST RESOURCE MANUAL (November 2017)................15, 23

Defendant Akshay Aiyer respectfully submits this Memorandum of Law in support of his Motion to Dismiss the Indictment in Part for Failure to Allege a Crime (the "Motion").

PRELIMINARY STATEMENT

The Antitrust Division of the Department of Justice (the "Government") has indicted Akshay Aiyer for violating Section 1 of the Sherman Act based on trading behaviors that did, or were designed to, facilitate transactions, decrease transaction costs, and improve the pricing he offered to his customers. Although this prosecution is framed as an attempt to protect competition, it is ill-considered and legally flawed.

Criminal prosecution under the Sherman Act is limited to obvious, "naked" restraints of trade that can have no legitimate explanation. Such restraints—classic price fixing, bid rigging, and customer allocation—are deemed per se unlawful and provide the basis for presuming the criminal intent that is a necessary element of every crime. But in order to merit per se condemnation and to allow criminal intent to be presumed, the conduct must unmistakably fit a well-defined per se category. As we discuss below, there is a strong presumption that conduct challenged as anticompetitive should not be condemned as illegal per se, but should instead be analyzed under the rule of reason.

The Government here seeks to criminalize behavior by Mr. Aiyer that is not a traditionally-recognized naked restraint of trade, and to the extent the Indictment challenges such conduct, it must be dismissed. *See Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (reversing conviction under honest services fraud statue because statute, if construed to apply beyond traditionally recognized contexts, would pose constitutional void for vagueness issues).

Mr. Aiyer moves to dismiss most of the conduct attacked by the Indictment because that conduct is far removed from the classic, naked cartel behavior that is properly the subject of

criminal prosecution. The conduct was situated in the context of a collaboration among traders—called a "chat room"—that was reasonably calculated to increase output and decrease price in the trading of foreign exchange ("FX") currencies. Each of the behaviors as to which Mr. Aiyer moves was reasonably related to an efficiency–enhancing aspect of the collaboration in which he was participating. The conduct was not naked and unmistakably anticompetitive, cannot permit the inference of criminal intent, and cannot support a criminal indictment.

STATEMENT OF FACTS

I. The Foreign Exchange Market

Currencies are among the most extensively traded financial instruments in the world. (*See* Affidavit of Richard Lyons (the "Lyons Aff."), dated Mar. 21, 2019, ¶ 5.) In 2013, the end of the alleged conspiracy period, currencies had average daily turnover volumes of about $5.36 trillion, compared to the $173.1 billion average daily turnover for U.S.-traded securities that year. (*Id.*) The South African rand, an emerging market currency that is a primary focus of the Government's investigation here, had average daily turnover of about $60 billion in 2013. (*Id.*) The Russian ruble, another currency that is at the center of the Government's investigation, had an average daily turnover of about $86 billion in 2013. (*Id.*)

Global banks, known as "dealers" or "market makers," hire FX traders to quote currency prices to the banks' customers, fill customer orders, and trade with other market makers in the interdealer market. (Indictment ¶¶ 2-3.) The banks' customers are highly sophisticated financial institutions, such as "corporations, money managers, insurance companies, pension funds, hedge funds, central banks, and investment companies," among others. (*Id.* ¶ 2.) Upon request, a market maker will typically provide a customer with a "'two-way' price quote[ ], comprised of the 'bid' (the price at which the dealer will buy the base currency from the customer, in exchange for an agreed-upon amount of the counter currency) and the 'offer' (the price at which the dealer

will sell the base currency to the customer, in exchange for an agreed-upon amount of the counter currency)." (*Id.* ¶ 3.) The difference between the bid price and the offer price, called the "spread," is the price of the FX trader's market making services. (*See* Declaration of Martin Klotz (the "Klotz Decl."), dated Mar. 22, 2019, ¶ 3.)

The spread reflects in part a trader's perception of the risk that the currency will increase or decrease in value to his detriment during the time that he holds a position in the currency. (Lyons Aff. ¶ 17.) Because most FX customers expect to engage in both buying and selling, the trader's "spread" is, to the customer, a cost of doing business—narrower spreads are less costly than wider spreads. (Klotz Decl. ¶ 3.) Traders at different banks compete to show the tightest spreads to win customer business. (Indictment ¶ 3.)

The FX market, where currencies are traded in pairs, is over the counter, meaning "[t]here is no single, official marketplace for FX transactions." (*Id.* ¶ 2.) Instead, trading is fragmented among many different venues. When a customer wishes to engage in an FX transaction, it can transact directly with other customers, contact brokers who act as intermediaries, or transact with a dealer, either on the dealer's electronic platform or via direct communication. Like their customers, market makers can offset their positions "by contacting each other directly, by using brokers who act as intermediaries, and by using anonymous electronic platforms." (*Id.* ¶ 9.) One such interdealer platform, the Thomson Reuters interdealer platform ("Reuters"), figures prominently in the Government's case but accounted for only about 6.6% of the total currency trading volume in 2013. (Lyons Aff. ¶ 11.) "[T]rading among FX traders is referred to as the 'interdealer market,'" which is distinct from the end-user customer market. (Indictment ¶ 9.)

II. The Rand Chat Room

Mr. Aiyer participated in a multi-party Bloomberg instant messaging chat room (the "Rand Chat Room") through which he and certain other New York-based traders in the rand and other emerging markets currencies, Jason Katz, Christopher Cummins, and Nicholas Williams, communicated throughout the course of the day. The Rand Chat Room was created on September 16, 2011, and ceased operating on January 31, 2013. Mr. Aiyer, Mr. Katz, and Mr. Cummins participated in the chat room throughout its life, and Mr. Williams participated from February 23, 2012 to October 24, 2012.

One of the Rand Chat Room's primary purposes was the exchange of market information. (*See* Indictment ¶ 22(a); Lyons Aff. ¶¶ 22-23.) By gaining insight into a larger percentage of order flow in the market, the Rand Chat Room participants were able to eliminate some uncertainty regarding future price movements. (Lyons Aff. ¶ 23.) Another principle focus of the Rand Chat Room was to solicit, and ultimately transact, with the chat room participants who had opposing open risk positions, i.e., buying and selling from each other when one was long a particular currency and another was short. (*Id.* ¶¶ 22, 24-25.) In these circumstances, two participants could "match off" and convert a position at risk of gain or loss to a position of neutrality. (*Id.* ¶¶ 24-25.) These "matching off" trades, which occurred regularly among Rand Chat Room participants, were beneficial to both parties involved, allowing them to identify a trading counterparty quickly and at lower transaction costs. (*Id*. ¶ 25.) These benefits, in turn, made it possible for each of the Rand Chat Room participants to quote narrower spreads—i.e., lower prices—to their respective customers. (*Id.* ¶ 30.)

The data speak for themselves. In the 70 trading days the Government has identified as reflecting conduct concerning which it may introduce evidence at trial, *infra*, the parties expressly solicited match off transactions 1,142 times and actually matched off 162 times. (*Id.*

¶ 26.) In the instances of matching off trades for which the relevant data are available, these transactions produced average financial benefits of approximately $10,000 to *both* the buyer and the seller for *each* transaction. (*Id.* ¶ 29.)

III. The Indictment

The Indictment charges Mr. Aiyer with a single count of conspiracy to violate Section 1 of the Sherman Act by "fixing prices of, and rigging bids and offers for, CEEMEA currencies traded in the United States and elsewhere." (Indictment ¶¶ 20-23.) The Indictment alleges that, from October 2010 until July 2013, Mr. Aiyer and the other Rand Chat Room members carried out their conspiracy by:

- "engaging in near-daily conversations through private electronic chat rooms … to reveal their currency positions, trading strategies, bids and offers on Reuters, customer identities, customer limit order price levels, upcoming customer orders, and planned pricing for customer orders, among other information" (*id.* ¶ 22(a));
- "agreeing to suppress and eliminate competition among themselves … by coordinating their bidding, offering and trading" (*id.* ¶¶ 22(b), (c), (d));
- "agreeing on pricing to quote to customers" (*id.* ¶ 22(f)); and
- "employing measures to conceal their actions" (*id.* ¶ 22(g)).

IV. The Behaviors Challenged By The Indictment, As Amplified By The Government's List Of Key Trading Incidents

On January 31, 2019, in response to Mr. Aiyer's request for more particulars, and pursuant to the Court's December 17, 2018 scheduling order (ECF No. 43), the Government provided Mr. Aiyer with a list of 80 allegedly collusive trading-related episodes that occurred on

70 days, reflecting conduct about which the Government may offer evidence at trial, and thereby providing specificity as to the actual conduct in dispute.[1]

The different types of information sharing and trading-related behaviors at issue in the Indictment, as amplified by the Government's list of key trading incidents, are described in detail in the accompanying Declaration of Martin Klotz. By this Motion, Mr. Aiyer seeks dismissal of the Indictment to the extent it rests on certain of these behaviors on the grounds that the behaviors do not, as a matter of law, constitute crimes because they are not per se antitrust violations. These behaviors include the following:

- Coordination of trading between two or more Rand Chat Room participants in the interdealer market to permit one or both traders to eliminate risk positions in a timely and cost-effective manner (Klotz Decl. ¶¶ 17-23); and
- Coordination between Mr. Katz and Mr. Aiyer in the quoting of ruble prices to customers, where Mr. Katz intends to eliminate the risk from a customer transaction by engaging in an off-setting transaction with Mr. Aiyer (*Id.* ¶¶ 6-12).

V. The Government Challenges Certain Behaviors That Cannot Be Resolved On A Motion To Dismiss

Mr. Aiyer moves for dismissal of the Indictment to the extent it challenges the above-mentioned behaviors because they are not per se Sherman Act violations. There are other behaviors that, based on the Government's identification of conduct underlying the Indictment, may still be at issue in this action, including: 1) the allegation that the Rand Chat Room participants agreed to fix the spreads they were quoting to customers; 2) the allegation that the Rand Chat Room participants agreed on prices to quote particular customers at specific times; 3) the allegation that the Rand Chat Room participants conspired to manipulate benchmark

[1] It is perfectly permissible for the Court to consider these additional facts when ruling on this Motion. *See United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992) (when construing an indictment "common sense must control, and … [the] indictment must be read to include facts which are necessarily implied by the specific allegations made") (internal citation omitted).

currency prices set during a "fix"; and 4) the allegation that the Rand Chat Room participants conspired to push a currency price through a stop loss level. (*See id.* ¶¶ 3-5, 13-16.) Mr. Aiyer maintains that these behaviors never took place, that they do not, understood in context, constitute per se Sherman Act violations, and/or that they are barred by the statute of limitations. Nonetheless, for purposes of this Motion, Mr. Aiyer does not dispute that there may be questions of fact that preclude the Court from currently ruling on the sufficiency of these allegations.

ARGUMENT

A criminal action must be dismissed if "it fails to allege a crime within the terms of the applicable statute." *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012). In this action, the Government has charged Mr. Aiyer with violating Section 1 of the Sherman Act, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 1 of the Sherman Act is not intended to be interpreted literally. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)[2] ("This Court has not taken a literal approach to th[e] language [of Section 1 of the Sherman Act]."). Instead, it has long been recognized that the Sherman Act is a common-law statute, *see Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007), and "[a]lthough [it], by its terms, prohibits every agreement 'in restraint of trade,' … Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[2] Mr. Aiyer cites to civil cases throughout this Motion, relying on the long-standing proposition that the Sherman Act is to be interpreted the same manner in both civil and criminal cases. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

A charged Sherman Act violation can be adjudicated under one of two standards: the rule of reason or the per se standard. The rule of reason standard presumptively governs challenged restraints. Only a handful of specific behaviors are deserving of per se treatment, and hence properly the subject of criminal charges. *See Texaco Inc.*, 547 U.S. at 5 ("[T]his Court presumptively applies rule of reason analysis[.] … *Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'") (internal citation omitted). The behaviors at issue in this Motion are not per se illegal.

I. Relevant Legal Standards

A. Criminal Antitrust Prosecutions Are Confined To Per Se Violations Because Of The Intent Requirement For Criminal Liability

Intent is an indispensable element of a criminal offense. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). In a criminal antitrust case, intent is defined as "knowledge of likely [anticompetitive] effects." *Id.* at 444, 446. As the Supreme Court has acknowledged, assessment of this element poses a "hazard" in the antitrust context, in which the market effects of challenged conduct are often "imprecisely predictable" and therefore difficult to "know[ ]" for purposes of intent. *Id.* at 439 (quoting Report of the Attorney General's National Committee to Study the Antitrust Laws 349 (1955)).

For this reason, the criminal process is reserved for conduct regarded as per se illegal, whose recognizable, "unquestionably anticompetitive effects" allow for the presumption of intent. *Id.* at 440-41; *see also* U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION: ANTITRUST DIVISION MANUAL, at 54 (Apr. 2015). By contrast, when the conduct falls into the gray zone of uncertain effects—some or all of which may be procompetitive—the per se standard does not apply and thus criminal process is not proper. *U.S. Gypsum Co.*, 438 U.S. at 440-41; U.S.

DEPARTMENT OF JUSTICE ANTITRUST DIVISION: ANTITRUST DIVISION MANUAL, at 54 (Apr. 2015); *United States v. Realty Multi-List, Inc*., 629 F.2d 1351, 1365 (5th Cir. 1980) ("When the Courts are uncertain of the competitive significance of a particular type of restraint, they decline to apply the per se label.").

B. Whether Conduct Is To Be Analyzed As A Per Se Violation Or Under The Rule Of Reason Is An Issue Of Law For The Court

The decision of which standard to apply to an alleged restraint, the per se rule or the rule of reason, is an issue of law for the court. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, Section 1909b (2018) ("[T]he selection of a [standard] is entirely a question of law"); *see also Craftsmen Limousine, Inc. v. Ford Motor Co.,* 363 F.3d 761, 772 (8th Cir. 2004); *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 274 (6th Cir. 2014).

The mere fact that the Indictment uses per se language such as "fixing prices" or "rigging bids and offers" does not control. *See Blanksteen v. N.Y. Mercantile Exch.*, 879 F. Supp. 363, 369 (S.D.N.Y. 1995) (Koeltl, J.) ("Even if this case were somehow shoehorned into the plaintiff's characterization of a group boycott, it is clear that the defendant's actions do not fall into a category of actions likely to have a predominately anticompetitive effects. Consequently, per se analysis is not warranted."); *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275, 296 (S.D.N.Y. 1998) ("Affixing certain labels to alleged conduct is insufficient to invoke *per se* treatment"); *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 597 (S.D.N.Y. 1989) ("[T]he mere talismanic invocation of the term 'price-fixing' is [insufficient] to bring the *per se* rule to bear.").

C. Per Se Violations Are Extremely Rare, And The Trend Has Been To Limit The Applicability Of The Per Se Rule

It is presumed that the rule of reason standard applies to challenged restraints. *State Oil Co.*, 522 U.S. at 10. Courts are disinclined to find that an alleged conspiracy is subject to per se

condemnation and do so only where the charged conduct is "plainly anticompetitive and … without redeeming virtue." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) ("*BMI*") (internal quotations omitted). Identifying per se price fixing should generally be a "simple matter." *Id*.

In the past few decades, courts have significantly limited the applicability of the per se rule. For example, courts have found that arrangements that fix prices or otherwise restrict competition are not per se illegal if they are ancillary to a legitimate business venture. *See Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.) (because an agreement not to sell competing products may have "contribute[d] to the success of a cooperative venture that promises greater productivity and output," it was an ancillary restraint and therefore not subject to the per se rule); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (defendant's policy of terminating agents of van line that did not transfer their independent operation to separate and distinct companies, which could be characterized as a boycott or refusal to deal, was not per se illegal and was an ancillary restraint that was reasonably necessary to further the procompetitive aspects of the joint venture).

Vertical minimum and maximum price fixing, previously prohibited as per se violations (minimum price fixing had been per se illegal for almost 100 years), have also recently been held to be subject to a rule of reason analysis. *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 882 (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 20 U.S. 373 (1911)); *State Oil Co.*, 522 U.S. at 3 (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)). Mixed vertical and horizontal relationships too must be analyzed under the rule of reason, even if the parties to the relationship are also competitors for some purposes. *Gatt Commc'ns, Inc. v. PMC Assocs., LLC*, No. 10 Civ. 8 (DAB), 2011 WL 1044898, at *3 (S.D.N.Y. Mar. 10, 2011) (citing *Beyer Farms,*

Inc. v. Elmhurst Dairy, Inc., 35 F. App'x 29, 29 (2d Cir. 2002)); *see also nFinanSe, Inc. v. Interactive Commc'ns Int'l, Inc.,* No. 1:11-CV-3728-AT, 2012 WL 13009231, at *6 (N.D. Ga. July 24, 2012).

The trend in civil antitrust law to limit the reach of the per se rule should apply with even greater force in criminal matters. *United States v. Coleman Am. Moving Services, Inc*., Crim. No. 86-24-N, slip op. at 3 (M.D. Ala. August 8, 1986) ("[T]he court must make 'considerable inquiry into market conditions before [concluding that] the evidence justifies a presumption of anticompetitive conduct.' This requirement is particularly important in criminal cases.") (internal citations omitted).

II. Legal Standards Applied To The Conduct At Issue

A. The Coordinated Trading In The Interdealer Market Challenged By The Indictment Is Not A Per Se Violation

Much of the Government's case at trial apparently will focus on coordinated trading by two or more alleged coconspirators on Reuters. (*See* Klotz Decl. ¶ 17.) In almost every instance of such coordination, one party has, and has disclosed to the other parties, a risk position that he is attempting to eliminate. His disclosure invites a party with an opposing risk position to engage in a matching off transaction that reduces both parties' risk in a convenient and cost-effective manner. Such transactions are legitimate and pro-competitive, and the data show they occurred routinely. (Lyons Aff. ¶ 26.)

If no such match-off is possible, however, the parties with no risk position may refrain from front-running the party seeking to eliminate his risk position,[3] or they may refrain from

[3] Front-running is buying in front of a party who needs to buy, or selling in front of a party who needs to sell, in the hope of profiting when the other party's purchases or sales move short-term prices in a direction favorable to the front-runner. The front-runner causes short-term prices to move to the disadvantage of the other party, and the front-runner's profit comes at the expense of the party who needs to buy or sell.

trading altogether so that the party who needs to buy or sell can post bids or offers that "test" the market in an to attempt to locate a counterparty. (Klotz Decl. ¶ 18.) When disclosure of a risk position by one party elicits the information that another party has the same risk position, the party with the smaller risk position may allow the party with the larger risk position to trade out his position first, or the two parties may coordinate their trading in other ways to minimize the impact of their trading on the price. (*Id.*)

Because this behavior in all of its forms may alter the timing of bids or offers posted on Reuters, the Government apparently concludes that it is bid rigging.

In certain instances, when a party is seeking to exit a risk position, another party may assist him in this effort by posting bids or offers intended to create the impression of market movement. (*Id.* ¶ 20.) The Government apparently contends that this behavior is either bid rigging or price fixing.

1. The Coordinated Trading at Issue Is Not Traditional Bid Rigging or Price Fixing.

According to the Government, the Rand Chat Room participants' occasional coordination of trading on Reuters to assist each other in unwinding risk positions amounts to bid rigging and/or price fixing. The Government is mistaken. The Government itself recognizes that per se Sherman Act violations like bid rigging and price fixing necessarily "tend[ ] to raise price or to reduce output." FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION: ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, at 3 (Apr. 2000). These pernicious likely effects are missing from the conduct at issue here.

Bid rigging is commonly understood to mean an:

> agreement by [competitors] who were ostensibly competing against one another for the work that had the effect of forcing purchasers … to pay inflated prices for those services. Under the scheme devised by the [competitors], they would discuss their bids for various projects among themselves prior to submitting them, agree on which of them would be

> the low bidder on which project, and then arrange for the others to refrain from bidding or to submit intentionally high bids on that project so that it would be awarded to the chosen [competitor] at an inflated price.

Phillips Getschow Co. v. Green Bay Brown Cty. Prof'l Football Stadium Dist., 270 F. Supp. 2d 1043, 1050 (E.D. Wis. 2003).

There are a number of very important differences between the behavior of the Rand Chat Room participants and traditional bid rigging as described in *Phillips Getschow Co*. In traditional bid rigging, one competitor either declines to bid, or submits a deliberately inflated bid, so that another competitor can win a contract at an inflated price. Supply is artificially depressed, and price is artificially increased. These effects are irreversible.

In the Reuters trading at issue, supply (or demand) in the interdealer market is not eliminated, but at most deferred, and only for a matter of minutes. Because deferred bids or offers are ultimately posted, there is no impact on the total activity level in the interdealer market. The collaboration includes a small fraction of bidders on the Reuters interdealer platform, which itself represents only about 6.6% of currency trading volume. The collaboration does not foreclose or impede other market participants from bidding as they please. The behavior at issue is a trade execution strategy that may disadvantage a counterparty in a specific transaction at a specific moment, but it is not expected to influence output or price to end-users. (Lyons Aff. ¶ 37.)

Because this strategy is not likely to affect aggregate end-user supply or demand, it is not likely to affect long-term currency prices in any significant or systematic way. (*Id.*)

Finally, the Reuters trading at issue has no tendency to widen the spreads that market makers quote to end-user customers and may allow traders to narrow their spreads. Spreads are

the price of the service in which market makers compete, and the trading at issue neither increases this price nor depresses the volume of market making services to end-users. (*Id.* ¶ 30.)

In *Granite Partners, L.P.*, 17 F. Supp. 2d 275, and in the subsequent opinion in the case, *Granite Partners, L.P. v. Bear, Stearns & Co.*, 58 F. Supp. 2d 228 (S.D.N.Y. 1999), the court addressed civil allegations of collusive "sham" bidding by broker-dealers purportedly undertaken to harm a customer, a group of related funds that had purchased securities from the broker-dealers and on which the broker-dealers had made margin calls. *Granite Partners*, *L.P.*, 58 F. Supp. 2d at 235. The broker-dealers allegedly provided sham "lowball" accommodation bids to each other to meet documentary requirements for liquidating securities held by the broker-dealers for their customer and on which they made the margin calls. *Id.* at 237. The claimed "bid rigging" by the broker-dealers was, as described by plaintiffs, patently dishonest and designed to justify "deeming" sales of the securities to the broker-dealers at below-market prices. *Id*. According to the complaint, after the broker-dealers used the sham bids to obtain the holdings at the rigged discount, they resold them on the market at a profit. *Id.* at 235.

The court twice held that the rule of reason applied to plaintiffs' sham bidding allegations. *Granite Partners, L.P.*, 17 F. Supp. 2d at 297; *Granite Partners*, *L.P.*, 58 F. Supp. 2d at 238. Following the dismissal of plaintiffs' original claims, plaintiffs amended their complaint, but the *Granite* court again dismissed the claims:

> It was emphatically the holding of [the original *Granite* opinion] that the anticompetitive impact of the Brokers' alleged bidding conspiracy was neither obvious nor easily ascertainable, and that therefore the [plaintiff] could not maintain its antitrust claims against the Brokers merely by alleging *per se* violations of the Sherman Act.

Granite Partners, *L.P.*, 58 F. Supp. 2d at 238.

* * * * *

> While the Brokers might have recovered an untoward windfall upon resale, even one impossible without improper collusion, the [plaintiff] has not alleged that the *collusion* itself had any impact whatsoever on the secondary market for [the securities], or upon the price at which the Funds' [securities] were resold.

Id. at 243 (emphasis in original).

The *Granite* case involved conduct that is similar to what the Government finds objectionable here: coordinated conduct potentially harmful to counterparties. Even assuming these facts, however, the *Granite* court twice held they did not make out an *antitrust* violation, as distinct, possibly, from some other type of harm or wrong.

The behavior at issue in this case is also not traditional price fixing. Price fixing is intended to maintain prices at or above an artificially high level for some sustained period of time. Like bid rigging, it reduces supply and raises prices. The Government itself recognizes that price fixing "usually involves most of the competitors in the particular market." U.S. DEPARTMENT OF JUSTICE ANTITRUST RESOURCE MANUAL (Nov. 2017), https://www.justice.gov/jm/antitrust-resource-manual-1-attorney-generals-policy-statement; *see also* Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law, Section 2001a (2018) (cartels maintain prices through monopoly power).

Here, it is not obvious—and there is no claim—that the alleged coconspirators could influence the price of any currency for any sustained period of time. (Lyons Aff. ¶ 37.) Similarly, there is no claim that the Reuters trading at issue increased spreads to end-user customers, the price of market making services. Whether or not the trading coordination disadvantaged a counterparty in a specific transaction, it had no durable or market impact. (*Id.*)

In *Apex Oil Co.*, the court held that coordinated trading that affects price as a collateral consequence of disadvantaging a counterparty is not price fixing. Plaintiff, Apex Oil, held a short position in heating oil futures and alleged that a group of long defendants coordinated their

demands for oil delivery in a manner that was meant to force Apex into defaulting on its contracts. 713 F. Supp. at 593. Among other claims, Apex alleged "that the long defendants conspired to nominate for early delivery for the purpose of and with the effect of raising prices for … heating oil," and argued that the conspiracy was a per se violation of Section 1 of the Sherman Act. *Id.* at 596. The court disagreed. It observed that:

> [B]ehavior that hurts or even destroys a competitor is not illegal under the Sherman Act unless it also adversely affects competition. Further, acts that may be tortious, fraudulent, or violative of contracts between the parties do not, without more, fall within the ken of the antitrust laws.

Id. at 595.

As *Granite Partners, L.P.* and *Apex Oil Co.* make clear, per se conduct is condemned because of its necessary, predictable anticompetitive effects on end-users. *See id.* at 598. *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918) highlights the importance of assessing the nature of the restraint for the likelihood of anticompetitive effects in order to justify per se treatment. The government brought suit against the Board of Trade of the City of Chicago (the "Board"), a commercial center through which grain was traded, alleging price fixing in the grain market. The restraint at issue was the Board's rule setting the price at which members of the Board must make a certain kind of trade, referred to as "grain to arrive," during the period of time following "the call," a finite period during which "grain to arrive" was traded between Board members on the Board's premises. *Id.* at 237. Specifically, the rule prohibited members from bidding on grain to arrive at any price other than the closing bid at the end of the call. *Id.* A Northern District of Illinois court ruled in favor of the government, but the Supreme Court reversed.

The government's case in *Board of Trade*, much like the case here, "rested upon the bald proposition" that the conduct was illegal price fixing—without identifying any likely

anticompetitive effects. *Id.* at 238. The Supreme Court observed that "[the government] made no attempt to show that the rule was designed to or that it had the effect of limiting [output]; or of retarding or accelerating shipment; or of raising or depressing prices; . . . or that it resulted in hardship to any one." *Id.*

In considering the alleged restraint, the Court concluded that, because of its limited scope, there could be "no appreciable effect on general market prices." *Id.* at 240. The rule was limited in terms of time (only after the call), the number of market actors involved (only members of the Board), and the volume of product affected (only grains "to arrive" shipped to Chicago within the designated period). *Id.* at 239-40. Because of these limitations, the Court concluded that the restraint, by design, was without any likely anticompetitive effects. The alleged conduct addressed in this Motion is unsuitable for per se treatment for these same reasons.

2. Any Agreements Among the Alleged Coconspirators Regarding Coordinated Trading Were Related to the Procompetitive Functions of the Rand Chat Room and for this Reason, Too, Must Be Analyzed Under the Rule of Reason.

Cooperation among competitors is not only permitted, but should be encouraged. As Judge Easterbrook succinctly put it: "Cooperation is the basis of productivity. … The war of all against all is not a good model for any economy." *Polk Bros., Inc.*, 776 F.2d at 188. Ignoring this principle entirely, the Indictment is based on the false premise that any and all collaboration among Mr. Aiyer and his alleged coconspirators was unlawful. This is not the law.

The procompetitive benefits of the collaboration among the Rand Chat Room participants are obvious and measurable. (*See* Lyons Aff. ¶¶ 22-30.) Market information is critical to assessing the risk of, and setting the price for, a currency transaction. (*Id.* ¶ 23.) The more information a market maker has about factors influencing the price movement of a currency, and

about his ability to offset his risk position at a particular time, the better able the market maker is to set his prices competitively. (*Id.*)

The Rand Chat Room operated as a venue where participants monitored market information, a place where they shared their views regarding potential price movements, their current open risk positions, and customer order flow, all with an eye towards understanding whether and when currency prices could move to their disadvantage. The Indictment itself highlights the information-sharing functions of the Rand Chat Room. It alleges that the participants "engage[d] in near-daily conversations…to reveal their currency positions, trading strategies, bids and offers on Reuters, customer identities, customer limit order price levels, upcoming customer orders, and planned pricing for customer orders, among other information." (Indictment ¶ 22 (a).)[4]

The Rand Chat Room was also a venue in which the participants functioned as counterparties of one another. The chat room participants frequently sourced liquidity from one another and were quickly able exit risk positions as a result. "Matching-off" was also a lower-cost alternative to trading through brokers or on the interbank electronic platform. (*See* Lyons Aff. ¶ 25.)

The cooperation among the Rand Chat Room participants was not a restraint designed to restrict output and increase costs, but a cooperative effort to manage risk. Such "cooperative arrangements are also not usually unlawful," making per se treatment improper. *BMI*, 441 U.S. at 23; *see also* FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE ANTITRUST

---

[4] Exchanges of information, even among competitors, are not per se illegal. *U.S. Gypsum Co.*, 438 U.S. at 441 n.16 ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act.") (collecting cases).

DIVISION: ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, at 6 (Apr. 2000) ("The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways … [They] may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration.").

When cooperation is undertaken pursuant to a legitimate, procompetitive business arrangement, it does not run afoul of the antitrust laws. In *BMI,* CBS brought a suit against BMI and ASCAP, who were licensing agencies for composers, authors, and publishers. 441 U.S. 1. The main issue in the case was "whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws." *Id.* at 4. The Supreme Court held that it was not, explaining that per se treatment may not be appropriate even when "two or more potential competitors have literally 'fixed' a 'price.'" *Id.* at 9. The challenged conduct was not a naked restraint, but rather a means of integrating sales, monitoring, and enforcement against unauthorized copyright use that resulted in the "substantial lowering of costs, which is of course beneficial to" all sides of the market. *Id*. at 21.

In re ATM Fee Antitrust Litigation, 554 F. Supp. 2d 1003 (N.D. Cal. 2008) also shows that the per se standard should not be applied when a transactional cooperative endeavor is at issue. The *In re ATM Fee Antitrust Litigation* court declined to apply the per se analysis to an agreement among competitor banks concerning fees to be charged for transactions on ATMs used in common. The court held:

> This case concerns a joint venture that – although not economically integrated – is highly integrated in the sense that members create a new market by fusing complementary resources. Because the [ ] network is a valid joint venture – rather than a mere cartel cloaked in the guise of a joint venture – one would

> expect that it is responsible for creating significant and beneficial efficiencies that could not otherwise be accomplished. Under the circumstances, it seems inappropriate to the Court to subject such a venture's conduct to a per se analysis.

554 F. Supp. 2d at 1016-17.

Similarly, in *nFinanSe, Inc.*, a seller of prepaid debit cards sued a company that was both a competing seller of such cards and a distributor of its own and competitors' cards to participating merchants. Defendant, in an effort to promote the use of its own and other competitors' prepaid cards, organized a network that allowed consumers to reload cards at a standard fee regardless of whose card they used. Plaintiff, who competed primarily on price, sued, alleging that the network was a per se horizontal price fixing agreement. The court disagreed and dismissed the complaint in relevant part. It held:

> Even on the face of nFinanSe's pleadings, the Network appears to be a "bona fide joint venture" designed by a GPR reload pack distributor to integrate the reload software of multiple GPR card providers into a centralized card reload system. The Network's efforts to fix the price of GPR card reloads may have some anticompetitive impact. However, it is clear even from the [complaint] that the Network as a whole is not a sham agreement designed only to obscure illegal horizontal price fixing.

nFinanSe, Inc., 2012 WL 13009231, at *6.

Here, too, the Rand Chat Room is a valid cooperative venture rather than a cartel masquerading as a joint venture. Driven by a common need to manage risk, the participants created both a forum for sharing information and a new trading venue that allowed quick, inexpensive transactions that benefited all parties.

The doctrine of ancillary restraints, which distinguishes between "naked" restraints and those that are "ancillary" to larger cooperative endeavors whose success they promote, is particularly applicable to the Rand Chat Room participants' practice of not trading against each other. *See Polk Bros., Inc.*, 776 F.2d at 188-89. In *Polk Bros.*, *Inc.*, plaintiff was an appliance dealer seeking an injunction to enforce a noncompetition agreement with defendant, a building

products dealer that was housed in the same building as plaintiff. The agreement restricted defendant from selling any of the same products as plaintiff—an agreement that would be traditionally classified as a horizontal market division among competitors. Importantly, however, the collaboration expanded output: in providing a venue where consumers could purchase different, but complementary, items for their home, the parties were providing a convenience that attracted customers.

The Seventh Circuit reversed the district court's finding that the covenant was per se illegal, holding that because the parties' agreement not to sell certain competing products may have "contribute[d] to the success of a cooperative venture that promises greater productivity and output," it was an ancillary restraint and therefore not subject to the per se rule. In reaching this conclusion, the Seventh Circuit noted that "[a]ntitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Id.* at 188. The court further noted that the agreement not to compete prevented one participant to the collaboration from "free riding," or exploiting the arrangement for its sole benefit and to the detriment of other participants. *Id.* at 190; *see also Rothery Storage & Van Co.*, 792 F.2d at 212.

The same analysis applies here. The Rand Chat Room was a forum that helped its participants understand currency price movements and provided a prompt, convenient, and cost-effective forum for trading to reduce risk. These benefits allowed the Rand Chat Room participants to be more competitive in the prices they quoted to end-users. (Lyons Aff. ¶ 30.) In order to reap these benefits, however, it was important that the Rand Chat Room participants could be comfortable that the information they shared was not used against them. The limited trading coordination addressed in this Motion provided this comfort. Were it not for this

coordination, information-sharing by the Rand Chat Room participants—and the beneficial transactions between participants to which it led—would have been undermined. (*See* Klotz Decl. ¶ 19; Affidavit of Dennis W. Carlton (the "Carlton Aff."), dated Mar. 22, 2019, ¶¶ 24, 27.)

Significantly, the trading coordination the Government challenges here was front and center in *United States v. Usher,* 1:17-cr-00019-RMB (S.D.N.Y. 2018). In *Usher*, there was extensive, uncontradicted testimony that FX traders would not share position information with each other if they were worried that the traders to whom they disclosed this information would use it to trade against them to their disadvantage. (Klotz Decl. ¶ 19.) Because these behaviors advanced legitimate purposes of interdealer coordination, they cannot be treated as per se violations of the antitrust laws.

3. Suggestions That the Rand Chat Room Participants Engaged in Deceptive or Manipulative Behavior Add Nothing to the Government's Antitrust Claim.

The Government has identified a number of instances in which one Rand Chat Room participant assisted another in "spoofing" other participants in the interdealer market. (*Id.* ¶ 20.) The Government has also identified a handful of instances, all in 2011, in which, the Government contends, two Rand Chat Room participants engaged in a fictitious trade in the interdealer market. (*Id.* ¶ 23.) For the reasons discussed previously, these behaviors, if they occurred, were not classic price fixing, bid rigging, or any other per se antitrust violation and do not belong in a criminal antitrust indictment.

"[A]cts that may be tortious, fraudulent, or violative of contracts between the parties do not, without more, fall within the ken of the antitrust laws." *Apex Oil Co.*, 713 F. Supp. at 595. In *Phillips Getschow Co.*, the court held that favoritism shown by a stadium developer toward a preferred bidder on a construction project did not constitute "bid rigging." 270 F. Supp. 2d at 1051 ("[I]mproperly allow[ing] . . . new and lower bids" amounted to "improperly disclos[ing]

what should have been a sealed bid" but did not constitute a per se or rule of reason antitrust claim"). Similarly, in *TMT Management Group, LLC v. U.S. Bank National Association*, Civ. No. 14-4692 (MJD/JSM), 2016 WL 730254 (D. Minn. 2016), the court declined to find bid rigging where a competitor bribed a bank official to accept its bid for a portfolio of delinquent accounts rather than a rival's more attractive bid. *See also Telectronics Proprietary, Ltd. v. Medtronic, Inc*. 687 F. Supp. 832, 837 (S.D.N.Y. 1988); *Falstaff Brewing Co. v. Stroh Brewery Co*., 628 F. Supp. 822, 826 (N.D. Cal. 1986) (purpose of Sherman Act "was not to subject all business and commercial torts to the scrutiny of federal [antitrust] law").

The Government's examples of alleged coordinated spoofing or other deceptive trading are not antitrust violations.

B. <u>Behaviors Arising Out Of Vertical Relationships Between The Parties Must Be Analyzed Under The Rule Of Reason</u>

Vertical restraints are not the proper subjects of criminal enforcement. *See* U.S. DEPARTMENT OF JUSTICE ANTITRUST RESOURCE MANUAL (Nov. 2017) ("Vertical resale price maintenance, which is an agreement on price between a manufacturer and its distributors (or a distributor and its retailers), may not be prosecuted criminally"); *see also Leegin Creative Leather Prods., Inc.*, 551 U.S. at 882 ("[V]ertical price restraints are to be judged by the rule of reason"). The Government has ignored this long-standing principle in formulating the present charges.

The Indictment accuses Mr. Aiyer and his coconspirators of "agreeing on pricing to quote to customers, including customers who had solicited competing prices in the same CEEMA currency pair from two or more of the coconspirators." (Indictment ¶ 22(f).) The Government has identified numerous instances in which Mr. Katz consulted Mr. Aiyer about the appropriate price to show to a customer when approached to do a ruble transaction and analogizes the

behavior to classic price fixing. (Klotz Decl. ¶¶ 10-12.) The Government, however, misunderstands the relationship between Mr. Aiyer and Mr. Katz in the Russian ruble.

Mr. Aiyer was one of the principal, most aggressive, and least costly ruble dealers in New York. (*Id.* ¶ 6.) His volume of ruble business was more than 40 times greater than that of Mr. Katz. (Lyons Aff. ¶ 39.) As a result, Mr. Katz frequently turned to Mr. Aiyer for advice on the appropriate price to quote to customers, and for Mr. Aiyer to serve as an offset should Mr. Katz win the customer business. (*See* Klotz Decl. ¶¶ 7, 9.) Significantly, in virtually every instance in which Mr. Katz consulted Mr. Aiyer about what price to quote a customer for a ruble transaction, he immediately offset his risk position in a transaction with Mr. Aiyer if the customer transacted with Mr. Katz. (Lyons Aff. ¶ 40.) The transactions identified by the Government reflect a classic vertical relationship, with Mr. Aiyer as the supplier and Mr. Katz as a distributor. [5]

Leegin Creative Leather Products makes clear that in this context, discussions of, and agreements on, prices to quote to customers are perfectly permissible. In *Leegin*, the Supreme Court held that the application of the per se standard to vertical minimum pricing agreements was inappropriate. The Court concluded that justifications for vertical price restraints are similar to those for other vertical restraints that had previously been held to be governed by the rule of reason. 551 U.S. at 890. It therefore overruled its previous holding that vertical price restraints are per se illegal.

---

[5] On the 17 dates that the Government has flagged that relate to the ruble, Mr. Cummins consulted Mr. Aiyer about ruble pricing on five occasions. (Lyons Aff. ¶ 41.) Mr. Cummins was not responsible for trading the ruble at Citibank and presumably contacted Mr. Aiyer when the Citi ruble trader was unavailable. (Klotz Decl. ¶ 8.) In fact, Mr. Aiyer's ruble trading volume was more than 1,800 times greater than Mr. Cummins' volume. (Lyons Aff. ¶ 39.) In the five instances that Mr. Cummins asked Mr. Aiyer for a ruble price, Mr. Cummins appears to have won the customer business once, although a corresponding transaction does not appear in Mr. Cummins' book. (*Id.* ¶ 41.) The Government has not identified any problematic ruble transactions involving Mr. Williams. (Klotz Decl. ¶ 8.)

Here, Mr. Aiyer's competitive pricing of the ruble to Mr. Katz, who in turn was able to quote Mr. Aiyer's narrow spreads to customers, increased competition. The vertical arrangement between Mr. Aiyer and Mr. Katz allowed both to compete more effectively. Mr. Katz could be a more effective ruble market maker because he could rely on Mr. Aiyer to help reduce his risk trading a currency with which he was uncomfortable, while Mr. Aiyer gained indirect access to customers to whom he otherwise would have had no access at all. Without Mr. Aiyer's willingness to serve as a market maker to Mr. Katz, there would have been fewer market actors, less market activity, and less competitive pricing. Such an arrangement should not be subject to per se condemnation.

In *In re Sulfuric Acid Antitrust Litigation*, Judge Posner concluded that a complex vertical distribution agreement should not be subjected to per se treatment. In that action, chemical companies that purchased sulfuric acid brought suit against Canadian and U.S. producers of sulfuric acid, alleging that the producers conspired to fix prices. *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1008 (7th Cir. 2012). In an effort to gain access to the U.S. markets, the Canadian producers established a U.S. distribution network through U.S. producers of sulfuric acid. *Id.* at 1008-09. The U.S. producers entered into "shutdown agreements," under which "each producer would curtail its own production and be compensated for this by the Canadian companies' selling sulfuric acid to it (for resale) cheaply enough to make distribution more profitable than production." *Id.* at 1009. The district court ruled that the case could not proceed on a theory of per se liability. *Id*. at 1008. The Seventh Circuit affirmed. Contrasting the case with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)—a case on which plaintiffs relied—the Seventh Circuit observed that the sole aim and effect of the agreement was not to raise prices. Instead:

> [T]he aim was to facilitate entry into the U.S. market, which would (and eventually did …) lower prices and prevent the shutdown of Canadian smelting operations, which would have reduced output and raised the price of sulfuric acid in the United States. The overall effect was thus to lower rather than to raise price.

In re Sulfuric Acid, 703 F.3d at 1012. The aims and benefits of the distribution arrangement between Mr. Aiyer and Mr. Katz are similar to those at issue in *In re Sulfuric Acid*, making per se treatment equally unsuitable in this case.

The Government has also pointed to a limited number of instances that differ from the previous examples because the customer approached both Mr. Katz and Mr. Aiyer simultaneously, either directly or through a broker, and the two discussed who should quote what price to the customer. (Klotz Decl. ¶ 11.) Notwithstanding the superficial resemblance to price fixing, it is clear in these instances that Mr. Katz viewed his relationship to Mr. Aiyer as vertical: if he won the customer business, he intended to enter immediately into an off-setting transaction with Mr. Aiyer, and when he won the customer business, he did so. (*Id.*; Lyons Aff. ¶ 40.) This is a case of dual distribution. In all instances the Government complains of in which Mr. Katz transacts with a customer in the ruble, Mr. Aiyer serves as a supplier, but he sometimes also deals directly with customers himself. *Gatt Communications*, *Inc.* makes clear that the rule of reason applies to such dual distribution cases. 2011 WL 1044898, at *3 ("[B]ecause Plaintiff [ ] pled that the parties to the alleged agreement ha[d] a relationship with both horizontal and vertical elements, the Plaintiff's Sherman Act claim must be evaluated under the rule of reason."); *see also* Carlton Aff. ¶ 30, n.29.

III. To The Extent The Challenged Behaviors Are Not Per Se Violations, The Indictment Must Be Dismissed

The issue on this Motion is not whether the conduct is permissible under the rule of reason, but whether the rule of reason applies. *See Polk Bros., Inc.*, 776 F.2d at 189; *Major League Baseball Properties, Inc. v. Salvino, Inc*., 542 F.3d 290, 334 (2d Cir. 2008). Whether to

apply the rule of reason standard or the per se standard hinges on what the likely *effects* of the alleged restraint are. *Polk Bros., Inc.*, 776 F.2d at 189; *cf. Board of Trade*, 246 U.S. at 240. The per se standard applies only to alleged restraints with "unquestionably anticompetitive" effects. *U.S. Gypsum Co.,* 438 U.S. at 440; *see also Leegin Creative Leather Prods., Inc.*, 551 U.S. at 886 ("To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects") (quoting *Cont'l T. V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 50 (1977)). Conversely, the per se rule does *not* apply to restraints whose likely effects are not precisely discernible; in such circumstances, the rule of reason applies. *U.S. Gypsum Co*., 438 U.S. at 440.

As detailed in the preceding sections and explained by Profs. Carlton and Lyons, none of the behaviors at issue in this case is unquestionably anticompetitive, the requirement for application of the per se standard. Every alleged behavior has a plausible pro-competitive explanation or, at least, has ambiguous, imprecisely discernible effects. (*See* Carlton Aff. ¶¶ 33-35.) In any event, the challenged conduct does not fall within traditionally-recognized per se categories.

To the extent the Indictment does not attack clear, traditionally-recognized categories of naked anti-competitive conduct, the Indictment should be dismissed. As the Government itself acknowledges in its own Antitrust Division Guidelines, criminal process is not appropriate for the types of conduct at issue in this Motion—conduct without unquestionably anticompetitive effects, which is therefore subject to the rule of reason. *See* U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION: ANTITRUST DIVISION MANUAL, at 54 (Apr. 2015) (reserving "criminal investigation and prosecution" for "*per se* unlawful agreements" only). To proceed otherwise—i.e. to criminalize rule of reason conduct whose effects are unclear—would be to threaten the

constitutional right to fair notice. *See U.S. Gypsum Co*., 438 U.S. at 440-41; *United States v. Lanier*, 520 U.S. 259, 272 (1997).

In *Skilling v. United States, supra*, the former CEO of Enron Corporation was convicted, *inter alia*, of conspiring to violate the honest services fraud statute, 18 U.S.C. §1346. Skilling's conduct involved falsification of Enron's financial records, but it did not involve accepting bribes or kickbacks, conduct traditionally recognized as honest services fraud under the mail fraud and wire fraud statutes prior to *McNally v. United States*, 483 U.S. 350 (1987). The Supreme Court held that Congress, in its post-*McNally* enactment of the honest services statute, plainly intended to criminalize traditional bribery and kick-back schemes. Beyond this, however, the Court found the statute to be hopelessly vague. Because Skilling's conduct was not within the categories of behavior traditionally recognized as criminal fraud, the Court held that to extend the reach of the statute to encompass Skilling's conduct "would raise the due process concerns underlying the vagueness doctrine." 561 U.S. at 408. "To preserve the statute without transgressing constitutional limitations," *id*. at 408-09, the Court limited its applicability and reversed Skilling's conviction.

Here, as in *Skilling*, Section 1 of the Sherman Act is hopelessly vague. "The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *U.S. Gypsum Co*., 438 U.S. at 438. Unless confined to traditionally-recognized categories of plainly anti-competitive behavior, the statute fails to assure that criminal responsibility does not attach where one could not reasonably understand that one's contemplated conduct is proscribed. *Skilling,* 561 U.S. at 402-03; *Lanier*, 520 U.S. at 272. In

short, confining criminal antitrust prosecutions to traditionally-recognized per se violations is not simply a matter of government discretion, it is constitutionally required.[6]

Conduct subject to per se condemnation may not raise a fair notice issue: the conduct may speak for itself, and to understand it may be sufficient to understand that it is anticompetitive. The fair notice problem is acute, however, as applied to rule of reason conduct. *U.S. Gypsum Co*., 438 U.S. at 440-41; *see also United States v. Nat'l Dairy Prods. Corp*., 372 U.S. 29, 33 (1963). Without the obvious "unquestionably anticompetitive effects" that characterize per se conduct, defendants are not on notice that their rule of reason conduct may be a crime. *U.S. Gypsum Co*., 438 U.S. at 441. As the Supreme Court explained of rule of reason conduct: "[T]he behavior proscribed by the [Sherman] Act is difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-41. This difficulty that is attendant to all rule of reason cases is the essence of the constitutional issue of fair notice. *United States v. Guthrie*, No. 93-30066, 1994 WL 41106, at *2 (9th Cir. Feb. 10, 1994) ("notice concerns . . . arise when criminal liability is imposed for conduct within the 'grey zone' to which the rule of reason applies"); *see also Palmer v. City of Euclid, Ohio,* 402 U.S. 544, 546 (1971) (*"*[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.").

[6] *Skilling* provides a second and related reason for construing vague criminal statues narrowly: "Further dispelling doubt on this point in the familiar principle that 'ambiguity concerning the ambit of criminal statues should be resolved in favor of lenity.'" 561 U.S. at 410 (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)).

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Aiyer's Motion to Dismiss the Indictment in Part for Failure to Allege a Crime.

Dated: March 22, 2019
New York, New York

By: /s/ Martin Klotz
WILLKIE FARR & GALLAGHER LLP
Martin Klotz
Michael S. Schachter
Jocelyn M. Sher
Samuel M. Kalar
787 Seventh Avenue
New York, New York 10019
T: (212) 728-8000

Attorneys for Defendant Akshay Aiyer