

1 ALBERT B. SAMBAT (CSBN 236472)
MICAHA L. RUBBO (CSBN 267465)
2 ALEXIS J. LOEB (CSBN 269895)
MICHAEL A. RABKIN (ILRN 6293597)
3 U.S. Department of Justice
4 Antitrust Division
450 Golden Gate Avenue
5 Box 36046, Room 10-0101
San Francisco, CA 94102
6 Telephone: (415) 934-5300
alexis.loeb@usdoj.gov
7

8 Attorneys for United States of America

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 UNITED STATES OF AMERICA,

14
15 v.

16 MICHAEL MARR,

17 Defendant.
18

CASE NO. CR 4:14-00580 PJH

19
20 **UNITED STATES' SENTENCING**
MEMORANDUM FOR DEFENDANT
MICHAEL MARR

21
22 Court: Hon. Phyllis J. Hamilton
23 Date: October 18, 2017
24 Time: 2:30 p.m.
25 Place: Courtroom 3, 3rd Floor
26
27
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INTRODUCTION

1
2 In a multi-year bid-rigging conspiracy perpetrated by dozens of individuals in Alameda and
3 Contra Costa County, Michael Marr stands out as the most culpable of all. Marr ran the organization
4 that was the largest player in both conspiracies – yet he was hardly hands off, directing multiple
5 employees on a daily basis to rig bids, organize rounds, and make payoffs. He orchestrated the
6 corruption of over 1,000 auctions for foreclosed homes worth tens of millions of dollars.

7 He was also the glue that kept the conspiracies together. The bid rigging occurred on a daily (or
8 near-daily) basis for almost three years and involved a large cast of players and thousands of
9 transactions. Marr perpetrated the conspiracies with a team of employees who, at his direction, were
10 among the most prolific bid-riggers on the courthouse steps. He also held everyone in the conspiracy
11 accountable for their participation. His employees often created the round sheets that recorded the
12 outcome of each bid rig, and his organization kept careful running tabs of what he and his coconspirators
13 owed each other. He made sure these debts were not forgotten, organizing meetings with coconspirators
14 to settle up and making sure, for lesser participants, that the appropriate payments were made and
15 received at the courthouse steps. Even though he might buy millions of dollars' worth of properties in a
16 few days, Marr was not above tracking the dollars and cents of every individual payoff in which his
17 organization was involved – and making sure those precise amounts were paid. This was a natural role
18 for him because his organization was present in, if not organizing, almost all of the bid-rigging
19 agreements that took place.

20 Tabulating Marr's involvement in the conspiracy produces staggering numbers, and these
21 numbers reflect only what was captured in documents that the government managed to collect. Marr's
22 organization rigged the bidding for over 1100 properties. His total volume of commerce, reflecting the
23 purchase price of the properties and payouts owed for each property purchased, is \$79,600,077.01. And
24 his organization earned nearly \$2 million in payoffs from hundreds of other properties it rigged. No
25 other organization even comes close to these numbers. Because of the gravity of the harm his
26 organization caused and the pivotal role he played in the conspiracy, the government recommends that
27 the Court sentence Marr to a term of custody of 57 months and fine him \$3,980,003.83, a high-end

28 //

1 Guidelines sentence. The government further recommends that Marr be ordered to pay \$1,785,403.88
2 in restitution, representing the illegal payoffs he was owed.

3 **PROCEDURAL HISTORY**

4 On November 19, 2014, a grand jury returned an indictment against Marr, along with his
5 employees Javier Sanchez, Gregory Casorso, and Victor Marr. Marr was charged with two counts of
6 violating the Sherman Act, 15 U.S.C. § 1, as well as with mail fraud. The indictment alleged that Marr
7 participated in conspiracies to rig bids at foreclosure sales in Alameda and Contra Costa counties
8 beginning as early as June 2008 through January 2011. On September 8, 2016, the mail fraud counts
9 were dismissed by motion of the government. Order Granting Revised Mot. to Dismiss (Dkt. 173).
10 Victor Marr's trial was later severed. Pretrial Order No. 5 (Dkt. 247).

11 Trial against Marr, Sanchez, and Casorso began on May 15, 2017. On June 2, 2017, the jury
12 convicted all three defendants on all counts. Jury Verdict (Dkt. 291).

13 **SUMMARY OF FACTS**

14 The government concurs with the description of the bid-rigging conspiracy contained in the
15 Presentence Report (PSR). This section summarizes the evidence of Marr's role in the bid-rigging
16 conspiracies.

17 **I. Marr's Businesses**

18 Marr operated various business entities relating to real estate in the course of participating in the
19 Alameda and Contra Costa County bid-rigging conspiracies, including Community Realty Property
20 Management ("CRPM") and Community Fund, LLC (collectively, "CFUND"). CRPM primarily
21 managed rental properties, while Community Fund was the entity that took title to homes that were
22 purchased at the foreclosure auctions. PSR ¶ 22; Loeb Decl. Ex. A (Trial Tr. 1473:1-11).

23 Marr and Community Fund offered various services to investor clients interested in purchasing
24 properties at real estate foreclosure auctions, in exchange for commissions. Loeb Decl. Ex. A (Trial Tr.
25 2158:12-2159:6; 2225:18-20). But Marr also purchased properties at the foreclosure auctions for
26 himself. Often he turned them into rental units. In 2011, Casorso estimated that Marr owned 1,000
27 rental units in Oakland alone. *Id.* at 2218:23-25, 2225:5-7.

28 //

1 Community Fund was a large operation. In addition to the five or six auction representatives he
2 employed to bid at the foreclosure auction, *id.* at 1434: 7-15, Marr had three or four office employees
3 dedicated to researching properties, *id.* at 2221:22-24, and at least four or five “floaters” who drove
4 around to look at properties. Barta estimated that Marr had about twenty employees helping him
5 purchase properties every day. *Id.* at 1427: 5-9. And Marr’s business model was profitable. *Id.* at
6 1426:23-25. Casorso testified that CFUND was sometimes purchasing upwards of two properties a
7 day. *Id.* at 2219:12-14.

8 **II. Marr’s Participation In The Bid-Rigging Conspiracy**

9 The documentary, testimonial, and audiovisual evidence presented at trial overwhelmingly
10 implicated Marr in the bid-rigging conspiracies from 2008 until 2011. From the beginning, bid rigging
11 was part of CFUND’s business model. As shown by, for example, the hundreds of round sheets
12 admitted at trial, Marr and his employees routinely reached agreements to stop bidding at the Alameda
13 and Contra Costa County foreclosure auctions as part of two criminal bid-rigging conspiracies.

14 At first, Marr attended the auctions and participated in the collusive conduct himself. Loeb Decl.
15 Ex. A (Trial Tr. 1443:11-1444:11). As his business expanded, he brought on a core group of trusted
16 employees to represent him at auctions and organize the bid rigging on his behalf. *Id.* at 1443:11-
17 1444:11; 1448:10-1449:15; 2245:25-2246:1; PSR ¶ 23. Among them were Wesley Barta, Gregory
18 Casorso, and Javier Sanchez. PSR ¶ 23; *Id.* at 1444:1-11. Marr directed the actions of these employees
19 at the auctions, including by selecting which properties to bid for and determining when to participate in
20 bid-rigging agreements. PSR ¶ 24; *see also* Loeb Decl. Ex. A (Trial Tr. at 1421:13-20; 1424:14-16;
21 1447:1-1448:7 (Barta testimony)). For example, the undercover agent captured recordings of Marr’s
22 employees obtaining bid-rigging-related directions over the phone from Marr for properties located on C
23 Street in Oakland and Roland Drive in Concord. *Id.* at 672:23-673:17; 695:11-695:20). Phone records
24 corroborated these communications. Loeb Decl. Ex. C (Exs. 50-004, 50-006 (Community Fund phone
25 directory); 1596-008 (phone record reflecting calls between Marr and Casorso within 30 minutes of
26 public auction for C Street property), 1596-011 (phone record reflecting calls between Marr and Barta
27 within 30 minutes of auction for Roland Drive property); Loeb Decl. Ex. A (Trial Tr. 2083:7-2085:24
28 (FBI agent testimony regarding same)). Marr would also sometimes communicate directly with the

1 other conspirators in order to facilitate the agreement. For example, Contra Costa County real estate
2 investor Charles Rock testified that he reached an agreement with Marr over the telephone to pay one of
3 Marr's employees, Alex Martinez, \$1,000 to stop bidding at an auction on a home. Loeb Decl. Ex. A
4 (Trial Tr. 1845:2-1847:3). Coconspirator Douglas Ditmer recalled an occasion where Marr and
5 Ditmer's partner, Shiells, negotiated a payoff in which Marr paid Ditmer \$15,000 to drop out of the
6 auction for a property located on West Ruby Hill in Pleasanton. *Id.* at 1011:13-1018:22.

7 Marr used his employees to control the auctions and to pressure others to participate in the bid-
8 rigging conspiracies. His employees often instigated agreements, led rounds, and kept the round sheets
9 that became the record of the conspiracy. PSR ¶ 28; *see, e.g.*, Loeb Decl. Ex. A (Trial Tr. 1835:14-16
10 (Rock testimony that Sanchez organized rounds)); (Trial Tr. 2246:11-13; 2270:17-18) (Casorso
11 testimony that he and Sanchez frequently led rounds). Three of those employees (Casorso, Sanchez, and
12 Barta) have been convicted of bid rigging.

13 Marr participated in the conspiracies in other ways as well. For example, Marr kept detailed
14 records of the amounts owed for rounds, chiefly through the ledgers tracking the money owed among
15 the members of the conspiracy. *See, e.g.*, Loeb Decl. Ex. A (Trial Tr. 1597:1-1601:5); Loeb Decl. Ex. B
16 (Ex. 17) (demonstrative summarizing Community Fund ledgers). These ledgers recorded every single
17 payment owed between Marr and his coconspirators, calculated down to the dollar. Many of these
18 ledgers were seized from Marr's offices, along with copies of reconciliation payments issued by Marr to
19 other coconspirators. *Id.* at 1229:7-1242:11 (describing seizure of records); *see, e.g., id.* at 1611:5-
20 1614:17; 1616:5-1616:17; 1637:3-16:40:10 (Barta testimony regarding examples of ledgers and checks);
21 Loeb Decl. Ex. B (Exs. 17 (demonstrative summarizing Community Fund ledgers), 58-005 (ledger of
22 payments owed to Marr from coconspirator Doug Moore), 59-012 (ledger of payments owed between
23 Marr and coconspirators Dominic Leung and Hilton Wong), 59-015, 59-016 (checks to Leung and
24 Wong signed by Marr), 63-006 (ledger of payments owed by coconspirator Keith Slipper to Marr)).
25 Many of the ledgers included Marr's handwritten annotations, showing his direct involvement. *See,*
26 *e.g.*, Loeb Decl. Ex. B (Ex. 63-18) (ledger of payments owed between Marr and Slipper with Marr's
27 handwriting on the bottom); Loeb Decl. Ex. A (Trial Tr. 1646:13-17 (testimony discussing same)).

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1 Marr also met with his coconspirators periodically to reconcile the amounts owed for multiple
2 rigged properties. For example, Ditmer testified about instances in which Ditmer's partnership and
3 Marr's organization met and made reconciliation payments to settle up for dozens of rounds at a time,
4 with Ditmer's partnership or Marr issuing checks for tens of thousands of dollars. Loeb Decl. Ex. A
5 (Trial Tr. 894:10-13; 898:10-15; 1051:25-10:54:3; 1056:24-1058:10; 1063:10-1066:18); Loeb Decl. Ex.
6 B (Exs. 61-28, 451, 459) (Ditmer partnership ledgers showing payments owed between Ditmer's
7 partnership and Marr), 61-31, 61-32, 61-33, 471, 524, 841 (checks from Marr to Ditmer and partners);
8 61-27 (check from Ditmer's partner to Community Realty).

9 Marr's deep knowledge of the conspiracy allowed him to use the rounds to maximize his profits.
10 With multiple employees at the auction and substantial economic power, Marr was often able to arrange
11 to have multiple employees in a round (or multiple "seats"). PSR ¶ 28. According to Casorso, he
12 demanded that he be allowed to have a second seat in the rounds. Loeb Decl Ex. A (Trial Tr. 2246:22-
13 2247:4). Having multiple seats in a round was lucrative. An extra seat meant an extra payoff from the
14 round – or, if Marr won a property in the round, a second "seat" would dilute other coconspirators' share
15 of the payouts, reducing the amount Marr would have to pay. *Id.* at 660:19-25; 690:24-
16 691:1)(undercover FBI agent's explanation of seats); 1478:14-20 (Barta's explanation of multiple seats).
17 Marr was also able to bring even more bidders in the round under his control by "insuring" them,
18 reducing the funds he owed for properties he won and earning additional payoffs for properties he did
19 not. *Id.* at 954:2-956:2 (Ditmer's explanation of insurance); 1465:1-21 (Barta testimony regarding
20 Marr's insurance strategy).

21 As the hundreds of round sheets and bid-rigging ledgers admitted at trial document, Marr is
22 ultimately responsible for rigging the auctions for hundreds of foreclosed properties between June 2008
23 through January 2011 in Alameda and Contra Costa counties. Loeb Decl. Ex. B (Trial Exs. 7, 8, 17)
24 (charts compiling lists of round sheets and ledgers). Day after day, Marr sent employees to the steps to
25 buy properties and earn payoffs through the bid-rigging scheme. *Id.*; *see also* Loeb Decl. Ex. A (Trial
26 Tr. 2246:6-10) (Casorso participated in rounds on a daily basis). Even if it was his employees who were
27 physically at the auctions, though, Marr was the money behind the organization. *See, e.g.,* Loeb Decl.
28 Ex. A (Trial Tr. 2200:17-18) (Casorso testimony that it was "Mr. Marr's money on the table"). When it

1 came to payoffs, Barta testified that he passed on all the money he collected to Marr “[b]ecause I was
2 the employee of Mike’s and it wasn’t my money to keep. He knew it was coming and he expected it.”
3 *Id.* at 1586:20-25.

4 **ARGUMENT**

5 **I. Guidelines Calculations**

6 **A. Defendant Marr’s Guidelines Range Is 46 to 57 Months**

7 The government concurs with the Guidelines calculation in the PSR, except that the Court should
8 also impose a four-level upward adjustment for Marr’s role in the offense. Marr’s total offense level
9 should be 23, as calculated below:

10	i. Base Offense Level (§2R1.1(a))	12
11	ii. Submission of Noncompetitive Bids (§2R1.1(b)(1))	+1
12	iii. Volume of Affected Commerce (§2R1.1(b)(2)(C))	+6
13	iv. Role in the Offense Adjustment (§3B1.1(a))	+4
14	v. Acceptance of Responsibility (§3E1.1)	0
	Total Offense Level	23

15 An offense level of 23 results in a Guidelines range of 46 to 57 months for a defendant in
16 Criminal History Category I.

17 **1. Marr’s Volume Of Commerce Is Above \$50 Million**

18 Under the Guidelines, the base offense level is adjusted upward depending on the “volume of
19 commerce attributable to the defendant,” which is “the volume of commerce done by him or his
20 principal in goods or services that were affected by the violation.” U.S.S.G. §2R1.1(b)(2). Marr’s
21 volume of commerce is \$79,600,077.01, reflecting the fact that his organization acquired 412 properties
22 through the bid rigging scheme, paying \$76,641,991.01 in public-auction purchase prices and owing an
23 additional \$2,958,086 in payoffs to coconspirators for those properties. Loeb Decl. Ex. D (property list).
24 This \$79,600,007.01 figure represents what Marr was willing to pay to purchase the rigged properties.
25 The government therefore concurs with the Probation Officer’s recommendation to apply a six-level
26 enhancement for a volume of commerce of more than \$50 million. *See* PSR ¶ 37; U.S.S.G
27 §2R1.1(b)(2)(C).

28 //

1 The 412 properties Marr’s organization purchased through rounds or straight payoffs were
2 identified through a detailed review of the coconspirator and trustee documents collected during the
3 investigation. Evidence of the sale price and the total amount bid in the round (or the negotiated payoff
4 amount) supports including each property on the list. This methodology – valuing each rigged property
5 a defendant or his principal purchased as the sum of the purchase price of the property at the public
6 auction plus any payoff – is the same one that the government and the Court have applied when
7 sentencing defendants in the related cases.

8 In his response to the PSR, Marr claims that an estimate of the harm actually caused by the bid
9 rigging should, if available, be used to determine his offense level instead of the volume of commerce –
10 even though volume of commerce is plainly what the Guidelines use to calculate the offense level. He
11 argues that an “expert,” Jeffrey Andrien, has concluded that the bid rigging did not cause any harm, so a
12 zero-dollar figure should be used, submitting the same declaration from Andrien that he has submitted to
13 the Court in support of two previous unsuccessful motions.

14 Marr is wrong on both fronts. The Sentencing Guidelines base the offense level on volume of
15 commerce, not harm. Every person sentenced by the Court or Judge Donato in the real estate cases has
16 had his offense level determined using the volume of commerce. The background to the relevant
17 guideline explains, “The offense levels are not based directly on the damage caused or profit made by
18 the defendant because damages are difficult and time consuming to establish. The volume of commerce
19 is an acceptable and more readily measurable substitute.” U.S.S.G §2R1.1, comment. (backg’d).

20 The volume of commerce is not necessarily designed to approximate the actual damages or harm
21 such that the two are interchangeable, as Marr suggests. For example, fines under the antitrust
22 guidelines are based on a percentage of the volume of commerce, recognizing a distinction between
23 harm and volume of commerce. *See, e.g.*, 2R1.1, Application Note 3 (“[I]t is estimated that the average
24 gain from price-fixing is 10 percent of the selling price” and providing for the use of a “percent of the
25 volume of commerce” when calculating an organizational fine).¹ Rather, the Sentencing Commission

26
27 ¹ This may be one reason why the dollar amounts triggering point increases in the antitrust
28 guideline (2R1.1) are much higher than the dollar amounts in the fraud guidelines, which are in fact
based on loss. For example, a volume of commerce of between \$50 million and \$100 million leads to a
six-point increase under 2R1.1. Under Section 2B1.1, the fraud guideline, a loss of \$50-\$100 million
would lead to an increase of at least 22 levels.

1 chose to base offense levels on volume of commerce, not pecuniary harm. Nowhere do the guidelines
2 direct the Court to use damages instead of volume of commerce even where damages can be readily
3 calculated. The Commission has instead chosen to use volume of commerce as the basis for
4 determining the offense level.²

5 Even were Marr correct that courts should use harm instead of volume of commerce in cases
6 where harm can be readily determined, the declaration from his “expert” Andrien again fails to provide a
7 reliable measure of harm. As the government explained in its opposition to the defendants’ motion to
8 admit Andrien’s testimony, Andrien’s opinion (that the bid rigging conspiracies caused no harm) is
9 unreliable. Opp. to Defs.’ Mot. *in Limine* to Admit the Testimony of Jeffrey Andrien at 3-10 (Dkt. 236).
10 The Court agreed that the defendants had not established the reliability (or relevance) of Andrien’s
11 opinions. Pretrial Order No. 5 at 13 (Dkt. 247). In summary, harm is not a 1:1 substitute for volume of
12 commerce under the Guidelines, and Andrien’s declaration does not provide a reliable measure of any
13 harm.

14 If anything, Marr’s approximately \$79 million volume-of-commerce *undervalues* his role in the
15 conspiracy. According to the Guidelines, “the volume of commerce attributable to an individual
16 participant in a conspiracy is the volume of commerce done by him or his principal in goods or services
17 that were affected by the violation.” U.S.S.G. §2R1.1(b)(2). Therefore, Marr’s volume-of-commerce
18 calculation only reflects the relatively fewer auctions in which he acquired a property, not any of the
19 auctions where he received a payoff after losing the round. While Marr purchased 412 properties
20 through the bid-rigging conspiracies, he rigged an additional 751 properties. These 751 properties
21 (roughly 65% of the rigged auctions involving Marr’s organization) result in a zero volume of
22 commerce and do not increase his guidelines range. The six-level volume-of-commerce adjustment is
23 actually lenient because it is based on only a minority of transactions where Marr’s illegal conduct
24 affected commerce.

25 //

26 //

27 ² Judge Donato rejected a similar argument from defendant Robert Rasheed, who had asked for
28 an effects-based calculation of his offense level rather than one based on volume of commerce. Loeb
Decl. Ex. E at 8:18-9:3, 10:24-11:24 (Sentencing Hearing Transcript, *United States v. Robert Rasheed*,
No. 14-cr-582).

1 Section 3B1.1(a) provides: “If the defendant was an organizer or leader of a criminal activity that
2 involved five or more participants or was otherwise extensive increase by 4 levels.” The Guidelines
3 state that “[t]he Commission’s intent is that this adjustment should increase with both the size of the
4 organization and the degree of the defendant’s responsibility.” U.S.S.G. §3B1.1 comment. (backg’d).
5 Marr ran the largest organization involved in a conspiracy that lasted for over two years and has resulted
6 in over 40 convictions. He should receive the highest adjustment.

7 **(i) The Court Has Not Ruled that No Participants in the Conspiracy**
8 **Should Receive an Adjustment for an Aggravating Role**

9 As an initial matter, in his objections to the draft PSR, Marr incorrectly argues that the Court
10 ruled that the aggravating-role adjustment should never apply to the real-estate bid-rigging conspiracies.
11 After originally recommending that Marr receive the four-level increase, Probation removed its
12 recommendation from the final PSR. Probation appears to have done so after Marr’s response to the
13 PSR represented that “Judge Hamilton has stated on the record that there were no organizers or leaders
14 of this activity.” Marr’s response is based on comments the Court made while sentencing John
15 Galloway in March, 2017, when the Court declined to impose a role-in-the-offense enhancement.

16 Marr’s response—and the PSR—provides an incomplete picture of what the government
17 understands to be the Court’s current view. Galloway was only the third member of either conspiracy to
18 be sentenced by the Court. The next sentencing after Galloway’s was Thomas Joyce’s, which occurred
19 after the Court had conducted two more trials, including Marr’s. At Joyce’s sentencing, in June, 2017,
20 the Court acknowledged that an enhancement for an aggravated role in the offense is appropriate in
21 certain circumstances in these cases: “There are a few that are less culpable, substantially less culpable
22 and there are a few that are substantially more culpable. And those few will get an adjustment downward
23 or an adjustment upward, but everybody else is pretty much in the same position.” *See* Loeb Decl., Ex. F
24 at 31:18-21 (Transcript of Sentencing Hearing, *United States v. Joyce*, No. 14-cr-607).⁴ Marr’s response
25 to Probation neglected to mention the Court’s updated comments.

26 //

27 _____
28 ⁴ At Joyce’s sentencing, the Court also stated, “I now know more about Mr. Galloway than I did
when I actually sentenced him, and query if he were before me whether or not I would give him the
same sentence.” Loeb Decl. Ex. F at 55:11-17.

1 The Court should not treat Marr and Galloway equally in terms of their roles in the offense.
2 Galloway (for whom the government sought a three-level upward adjustment, not a four-level one)
3 actually worked for the Marr organization and had his real estate license listed with Marr during the
4 conspiracy. Loeb Decl. ¶ 9. And Marr was a leader of the conspiracy on a different level. While
5 Galloway did direct his younger brother in the conspiracy, his organization was far less sophisticated
6 than Marr's, with its roughly 60 employees. Loeb Decl. ¶ 8. Marr directed a whole team operating
7 across two counties. Galloway was involved in 275 acts of bid-rigging; Marr's total is more than four
8 times that, and his volume of commerce is more than ten times what Galloway's was. App'x A,
9 Sentencing Mem., *United States v. Galloway*, No. 14-cr-607, Dkt. 277 (volume of commerce
10 calculation).

11 Marr also exercised a great deal of control and power over the conspiracies as a whole. His
12 economic power – which he used to orchestrate an astounding amount of bid rigging – allowed him to
13 control the rules of the conspiracy and gain a greater share of the profits. As the Court explained, many
14 of the individuals involved in these conspiracies were similarly situated. But there are a few who stand
15 out as being “substantially more culpable.” Marr is one of those individuals.

16 **(ii) Marr Exercised Control Over More Than One Participant in Each**
17 **Conspiracy and the Each Conspiracy Included More than Five**
Participants

18 To qualify for a four-level upward adjustment, a defendant must have exercised control over one
19 other participant involved in the commission of the crime. *United States v. Barnes*, 993 F.2d 680, 685
20 (9th Cir. 1993). Section 3B1.1(b) also requires that there be at least five participants (although “there is
21 no requirement . . . that the defendant exercise authority over at least five participants before the
22 enhancement can be applied”). *Id.* at 685 (citation omitted). A defendant manages or supervises
23 another if he exercises “some degree of control or organizational authority” over that person. *United*
24 *States v. Koenig*, 952 F.2d 267, 274 (9th Cir. 1991).

25 Here, the evidence at trial established that there were at least five participants in the bid-rigging
26 conspiracies in each of Alameda and Contra Costa counties. Ditmer and Barta introduced round sheets
27 authored by various members of their organizations involving properties that were rigged in both
28 counties. *See* Loeb Decl. Ex. B (Exs. 7-8). The round sheets implicated dozens of coconspirators in

1 both counties. *See, e.g.*, Loeb Decl. Ex. B (Exs. 200, 501 ((round sheets))). Five coconspirators involved
2 in the Alameda County conspiracy – Barta, Ditmer, Bradley Roemer, Danli Liu, and Casorso – testified
3 at trial. Three coconspirators who were also involved in Contra Costa County, Barta, Ditmer, and Rock,
4 also testified at trial and implicated several other coconspirators. The undercover agent alone implicated
5 at least six coconspirators in Alameda County in the round for the house located on Berlin Way,
6 Oakland, and at least five Contra Costa County coconspirators in the round for the house located on
7 4003 Roland Drive, Concord. Loeb Decl. Ex. A (Trial Tr. 638:9-11; 703:14-17). In addition, well over
8 five coconspirators in each county have pleaded guilty to or been at trial for bid rigging.

9 Additionally, Marr exercised control over many participants in the conspiracies. He was the
10 CEO, with over 60 employees at one point. *See* Loeb Decl. Ex. B (Ex. 50-06). Beyond Casorso, Barta,
11 and Sanchez, other employees were involved in rigging bids for Marr at the auctions, including Alex
12 Martinez and Guillermo (Memo) Sanchez. *See, e.g.* Loeb Decl. Ex. A Trial Tr. 1434: 7-14 (Barta
13 identifying Marr’s auction representatives); 2247:15-21 (Casorso noting Martinez’s and Memo
14 Sanchez’s participation in rounds). At trial, there was no dispute that Marr directed his employees’
15 conduct at the auctions. *See, e.g., id.* at 898:2-9 (Ditmer testimony regarding knowledge that Sanchez
16 worked for Marr); 1421:1-20; 1435:4-1436:6; 1447:1-1448:4; 1449:9-12 (Barta testimony regarding
17 Marr’s authority and Sanchez’s responsibilities); 2258:7-15 (Casorso testimony that Marr would direct
18 Casorso to deliver envelopes to other bidders); 2260:19-2261:3 (Casorso testimony that Marr would tell
19 him when to drop out of a round).

20 (iii) **The Guidelines Factors Support Applying the Four-Level Increase**

21 Having established that the conspiracy included at least five participants, and that Marr
22 supervised at least one other person’s involvement in the conspiracy, the remaining issue for the
23 application of the enhancement is whether Marr was a leader or organizer of the conspiracies. He was.

24 The factors outlined in the commentary to Section 3B1.1 support this conclusion. Section 3B1.1
25 states that courts should consider factors including (1) the exercise of decision making authority, (2) the
26 nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the
27 claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or
28 organizing the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and

1 authority exercised over others. U.S.S.G. §3B1.1, comment. (n.4). These considerations all weigh in
2 favor of applying the four-level adjustment for Marr’s role as a leader and organizer of the conspiracy.⁵

3 **a. Recruitment of Accomplices**

4 Marr recruited several accomplices. Most significantly, he recruited Casorso, Sanchez, and
5 Barta into his company – and into the bid-rigging conspiracies. All three played major roles in the
6 conspiracies in both counties and were either convicted of bid rigging or pleaded guilty.

7 Marr trained these accomplices in the process of rigging bids and doing rounds. When asked
8 who instructed him to participate in bid rigging, Barta stated, “Michael Marr showed me how to do it
9 and made clear it was part of my job and he expected me to do it.” Loeb Decl. Ex. A (Trial Tr. 1443:4-
10 7). When Barta first attended a public auction, Marr accompanied him. *Id.* at 1443:15-20. Marr taught
11 Barta how to buy a house at the public auction, and how the agreements to stop bidding at the public
12 auction and do rounds were formed. *Id.* at 1448:10-1449:8. Barta observed Marr do a round at a bus
13 stop, and Marr explained to Barta how the rounds worked, showing him a round sheet. *Id.* at 1444:12-
14 20. Marr introduced Barta to the other round participants. *Id.* at 1444:21-1445:1. Marr explained to
15 Barta how the rounds worked and showed him a round sheet. *Id.* at 1445:18-23. Casorso also testified
16 that Marr (along with Sanchez) taught him how to do rounds. *Id.* at 2327:7-9. Sanchez had started
17 working for Marr when he was only a teenager, later moving up within the organization and regularly
18 participating in rounds, among other duties. *Id.* at 2270:3-25.

19 Marr’s organization also brought competitors into the conspiracy and kept them from defecting.
20 For example, Roemer testified that Casorso “involved me in the process” of bid rigging. Loeb Decl. Ex.
21 A (0Trial Tr. 1276:6-12). Barta taught coconspirator Timothy Powers how rounds worked. Loeb Decl.
22 ¶ 10. And Marr himself told coconspirator Charles Gonzales that rounds were a part of the process of
23 buying property at the trustee sales, and that Marr and others would outbid Gonzales to block him from
24 buying property if he refused to participate. Loeb Decl. ¶ 11.

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28 ⁵ In a recent sentencing for another major conspirator, Alvin Florida Jr., Judge Donato applied the four-level leader/organizer enhancement. *See United States v. Florida*, No. 14-cr-00582, Dkt. 498.

1 **b. Exercise of Decision-Making Authority, Degree of**
2 **Participation in Planning and Organizing the Offense, Degree**
3 **of Control and Authority Exercised Over Others**

4 Marr, of course, was the head of Community Fund – and exercised full decision-making power
5 accordingly. Once he sent his employees to the auctions, Marr did not sit back. He remained actively
6 involved, directing them to rig bids, make payoffs, and get into rounds.

7 Marr’s organization had far more people and more money at the auction than most – if not all –
8 of his competition. Barta testified that Marr was the “800-pound gorilla” at the auctions. Loeb Decl.
9 Ex. A (Trial Tr. 1489:4-6). Being the head of the most economically powerful participant at the
10 auctions enabled Marr, usually through his top representatives at the auctions – Casorso, Sanchez, and
11 Barta – to play a greater role in leading the conspiracy. Through his employees, Marr could take charge
12 at the courthouse steps and decide whether a property should be rounded and who should be allowed to
13 participate. He could muscle his way in to get an extra “seat” in the rounds. Marr also played a key role
14 organizing the conspiracy by tracking payoffs owed among the coconspirators and coordinating
15 meetings to settle the debts.

16 Marr was indisputably in charge of Community Fund. Loeb Decl. Ex. A (Trial Tr. 1428:1-3).
17 As Barta put it, he was “the boss, the owner.” *Id.* at 1428:20-21. Casorso described his role as
18 “represent[ing] Mike Marr at the Alameda auctions.” *Id.* at 2245:25. Marr decided which properties he
19 wanted his employees to buy. *Id.* at 1424:14-16 (“If Mike wanted me to buy a house, he’d tell me which
20 one, and I wanted to make sure I didn’t miss the house for him.”) On any given day, Marr had about
21 twenty people helping him research and buy properties at the auctions. *Id.* at 1427:5-9 (Barta). As
22 noted above, beyond Casorso, Barta, and Sanchez, several other employees participated in the bid-
23 rigging conspiracies on Marr’s behalf, including Alex Martinez and Memo Sanchez. *Id.* at 1434:3-
24 1434:15. In addition, a “lot of people,” called floaters, drove by properties in the morning to gather
25 intelligence for Marr. *Id.* at 2164:3-8 (Casorso testimony). Marr also had employees who brought
26 cashier’s checks back and forth between the auctions. *Id.* at 2172:8-9 (Casorso). Other employees
27 conducted property research at the office. *Id.* at 2222:21-2222:25.

28 As the boss, Marr had full authority to direct his employees to participate in bid rigging – an
authority he exercised, as Casorso and Barta described. Loeb Decl. Ex. A (Trial Tr. 1445:13-17 ((Marr

1 told Barta to participate in rounds); 1449:9-12 (Barta needed Marr’s authority to agree to stop bidding at
2 the public auction and hold a round). Casorso explained that Marr’s typical “instructions” were to let
3 the bidding at the public auction start and then decide whether to reach an agreement to stop bidding.
4 *Id.* at 2174:23-2175:2. Casorso also testified that Marr would tell him when to drop out of a round. *Id.*
5 at 2260:19-2261:3. Marr also directed his employees in situations involving straight payoffs for bid
6 rigging, such as by instructing them to “make an offer that goes both ways.” *Id.* at 2283:22-2284:8
7 (Casorso testimony that he would make such offers at Marr’s direction).

8 Barta similarly testified that he needed Marr’s authority to agree to stop the bidding at the public
9 auction and hold a round. Loeb Decl. Ex. A (Trial Tr. at 1421:13-20; 1424:14-16; 1447:1-1448:7;
10 1449:9-11). Barta recognized, “I had to have his approval. It was his money. I was his employee. I
11 was just there at his beckon.” *Id.* at 1457:19-24. Reflecting this reality, coconspirator John Shiells did
12 not even bother to write down the name of Marr’s employees participating in many rounds, writing only
13 “MM” or “MM2” – meaning Michael Marr’s representatives. *Id.* at 913:13-15; Loeb Decl. Ex. B (Ex.
14 706) (round sheet). When coconspirator Charles Rock faced competition from Marr’s employee Alex
15 Martinez, Rock knew to ask Martinez to get Marr on the phone to negotiate the payoff. Loeb Decl. Ex.
16 A (Trial Tr. 1845:23-1847:3).

17 Marr’s control was extensive. He exercised control over his own employees – at times dictating
18 their every move – and over the conspiracies generally. Marr instructed his employees at the auctions
19 over their cell phones. Barta testified, “I had Mike on the phone the whole time I was at the public
20 auction, as well as through the rounds. He instructed me on what he wanted me to do.” Loeb Decl. Ex.
21 A (Trial Tr. 1447:1-3). Marr told Barta “what to bid, how much to bid, how far to go,” in both the
22 public auctions and the rounds. *Id.* at 1448:3-9. During the public auctions and the rounds, Barta tried
23 to relay as much information over the phone to Marr as he could. *Id.* at 1457:6-10; 1464:21-24.
24 Casorso confirmed that he was on the phone with Marr during the public auctions and the rounds, and
25 that Marr would tell him when to drop out of a round. *Id.* at 2260:19-2261:4. In this way, Marr
26 involved himself in even the minute details of the agreements, often dictating even the order in which
27 his employees participated in the round. *Id.* at 1464:11-19.

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1 He also checked the paperwork carefully. He collected his employees' round sheets (before
2 transitioning the collection responsibility to Sanchez) and personally reviewed them each day. Loeb
3 Decl. Ex. A (Trial Tr. 2271:1-6; 1436:10-16). In fact, Casorso even had a notation he would make on
4 his round sheets, RWM (Reviewed With Mike), after they had been reviewed by Marr. *Id.* at 2271: 7.
5 Marr also made his own notes on the round sheets and sales summaries. *Id.* at 1498:22-1499:3; Loeb
6 Decl. Ex. B (Ex. 50-001) (notes written on Javier Sanchez payoff notes); Loeb Decl. Ex. A (Trial Tr.
7 1652:19-1653:15 (identifying Marr's handwriting on Ex. 50-001)). Marr also signed many of his
8 employees' round sheets to note that he had read and approved them. *Id.* at 1644:2-9.

9 In his objection to the PSR, Marr erroneously argued that he should not receive a four-level
10 adjustment because *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984) and
11 *American Needle Inc., v. National Football League*, 560 U.S. 183, 190-96 (2010) mean that his control
12 over his own employees cannot be the basis for an adjustment under the Sentencing Guidelines. The
13 two cases do not say that. Both stand for the proposition that a Sherman Act violation cannot occur if
14 members of one entity conspire *only with themselves*. They do not apply here, where the evidence
15 introduced at trial showed that Marr and his employees participated in bid-rigging conspiracies along
16 with other real estate investors. The bid rigging did not occur only within CFUND – nor could it have,
17 given the presence of so many other investors at the auctions. *Copperweld* and *American Needle* did not
18 create any sort of rule that members of the same company cannot be accomplices in a conspiracy – a
19 common feature of many antitrust conspiracies.

20 In any event, Marr also exercised control over the conspiracies generally. Through his
21 employees, particularly Sanchez, Barta, and Casorso, Marr often took charge of the bid rigging at the
22 courthouse steps. Describing the Contra Costa conspiracy, Charles Rock explained: “Mr. Sanchez is a
23 powerful individual...he and Mike Galloway and Wes Barta, to some extent, sort of were in charge of a
24 lot of the place, in my experience.” Trial Tr. 1835:5-8; *see also* Loeb Decl. ¶ 12 (identifying Barta and
25 Sanchez as the biggest players at the Contra Costa County auctions). They initiated bid rigging
26 agreements. *See, e.g.*, Loeb Decl. Ex. A (Trial Tr. 1835:14-16) (Rock testimony that Sanchez organized
27 agreements); Loeb Decl. ¶ 13 (Barta and Sanchez initiated and organized many rounds), ¶ 14 (Casorso
28 and Sanchez commonly organized rounds in Alameda County; Sanchez frequently organized them in

1 Contra Costa County)). Agreeing that he “typically” ran rounds in Alameda County, Casorso
2 explained, “If I had tendered Michael Marr’s money and placed it at risk, then I made it my
3 responsibility to host the round.” Loeb Decl. Ex. A (Trial Tr. 2246:11-13). Casorso also testified that
4 Sanchez frequently led rounds. *Id.* at 2270:17-18.

5 Marr’s substantial economic might gave him the power to decide that any property should be
6 rounded because he had the financial resources to drive up the price if a coconspirator refused. *See,*
7 *e.g.*, Loeb Decl. Ex. A (Trial Tr. 1824:7-25 (Rock testimony that Sanchez would outbid others if they
8 refused to do a round); Loeb Decl. ¶ 15. And if another bidder reneged on an agreement to hold a round,
9 Marr’s representatives could retaliate – they could outbid the bidder in future auctions and “frustrate
10 them severely,” according to Casorso. Loeb Decl. Ex. A (Trial Tr. 2251:15-2252:6; 2252:10-14).

11 After the public auctions, during the rounds, Marr’s employees continued to control the
12 proceedings. They were the ones who often led the rounds; in that role, they got to decide when the
13 round would take place, the speed of the round, the increments of round bidding, and who was in and
14 who was out. Loeb Decl. Ex. A (Trial Tr. 1829:2-7 (Rock testified that “Wes Barta, Javier Sanchez and
15 Mike Galloway” led rounds); *Id.* at 1456:8-11 (Barta testimony that winner of the public auction could
16 have some control over participants in the round); *Id.* at 2200:15-22 (Casorso testimony regarding
17 benefits of running a round); Loeb Decl. ¶¶ 16-17. Marr’s employees often made round sheets, which
18 became a kind of official record of the round results, which other members of the conspiracy would note
19 down. *See, e.g.*, Loeb Decl. Ex. A (Trial Tr. 1829:21-1830:6 (Rock got copies of round sheets from
20 Sanchez and Barta)); Loeb Decl. ¶¶ 18-19.

21 Marr was also able to control the rounds by frequently providing insurance to other bidders (who
22 were not part of Community Fund) when he wanted a property. Loeb Decl. Ex. A (Trial Tr. at 1465:1-
23 21). By providing as much insurance as possible, Marr could reduce the payoff he owed to each
24 participant in the round by 50%. *Id.* at 1466:3-10. He could also control when the insured bidders
25 would drop out of the round, as Ditmer testified. *Id.* at 1193:20-25.

26 In addition, Marr exercised control by leading the process of tracking and making payoffs from
27 the rounds or straight payoffs. PSR ¶ 26. He maintained extensive records relating to his transactions
28 with nearly every other member of the conspiracy – collections of ledgers, photocopies of checks, and

1 round sheets, stored in file folders in a box that the FBI found in the attic of his office. Loeb Decl. Ex.
 2 A (Trial Tr. at 1228:10-1234:16; 1238:24-1241:10 (testimony of FBI agent regarding discovery of box
 3 and its contents in Marr’s attic); Loeb Decl. Ex. B (Ex. 61-34 (Ditmer ledger); 71-013 (Roemer ledger);
 4 71-014 (copy of check) (sample documents FBI agent identified as found in file folders); Loeb Decl. Ex.
 5 A (Trial Tr. at 1596:5-23; 1598:1-15; 1600:7-10); Loeb Decl. Ex. B (Exhibit 17 (summarizing ledgers
 6 that tracked bid-rigging payments owed).

7 Marr organized reconciliation meetings with other members of the conspiracy to settle up for the
 8 rounds. PSR ¶ 26; Loeb Decl. Ex. A (Trial Tr. 2272:8-11) (Casorso testimony). As summarized by
 9 Ditmer, “he was he was the final determining factor of who -- how much money was going -- the -- how
 10 the money was going to be divvied out.” *Id.* at 894:7-9.

11 **c. Nature of Participation in Offense and Nature and Scope of**
 12 **Illegal Activity**

13 The undercover agent recorded Barta warning him that “you don’t want to piss us off...of
 14 everybody on the steps.” Loeb Decl. Ex. B (Ex. 110TB 6:21-25). The undercover agent responded, “I
 15 know, you’re the biggest player,” and Barta replied, “It will cost you a lot of money.” *Id.* at 7:1-2.

16 Barta was not the only one to attest to Marr’s economic power at the auctions. Ditmer
 17 characterized Marr as one of the “major players” and testified that Marr’s employees participated in
 18 rounds a majority of the time. Loeb Decl. Ex. A (Trial Tr. 890:13-15, 892:21-25; 892:21-25; 894:24-
 19 895:2).⁶ Roemer testified that Marr’s organization was the most frequent purchaser of properties at the
 20 Alameda County auctions and the most frequent round participant. *Id.* at 1278-79.

21 Marr’s organization had the most employees and was the most sophisticated and well financed
 22 real-estate operation participating in the bid-rigging conspiracies in both counties. Marr’s employees
 23 often brought millions of dollars in cashiers’ checks to the auctions. *See, e.g.*, Loeb Decl. Ex. B (Exs.
 24 1871, 2194, 2306). Marr’s organization was involved in rigging *nearly 1200* properties in both
 25 counties, multiple times more than any other defendant who has been convicted in the real estate cases.

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27 ⁶ The only other individual Ditmer mentioned as a significant participant in the conspiracy in
 28 both counties, George Cheng, agreed to receive a four-point adjustment as a leader/organizer. Loeb
 Decl. Ex. G (Plea Agreement ¶ 8, *United States v. Chung Li Cheng, a/k/a George Cheng*, No. 14-cr-593
 (Dkt. 23).

1 See PSR ¶ 28. Marr’s extensive participation indicates a high correlation between the Marr
2 organization’s presence at the auctions and the bid-rigging conduct. In short, there are few if any rounds
3 that were uncovered in this investigation that did NOT have an employee of Marr, working under his
4 direction, involved.

5 The evidence of Marr’s preeminent role is not limited to the testifying witnesses. In this
6 investigation, 37 individuals have pleaded guilty and sat for debrief interviews with the government of
7 varying lengths and frequency – and all 37 talked about Michael Marr. For example, coconspirator
8 Jorge Sum said that Marr’s group initiated rounds and nicknamed them the “Big Fish.” Loeb Decl. ¶ 23.
9 George Cheng, a significant participant in the conspiracy, believed that Marr attempted to enter rounds
10 in approximately two out of every three auctions that took place. *Id.* ¶ 24. Timothy Powers described
11 Marr as the “godfather” of the Contra Costa County trustee sales, and Marr’s employees as his
12 sergeants; Michael Renquist called Marr a big player. *Id.* ¶ 25. Thomas Franciose observed that, among
13 the round participants, Marr was the biggest buyer at the Alameda County auctions. *Id.* ¶ 26.

14 **d. Claimed Right to Larger Share of Fruits of the Crime**

15 Finally, as the head of CFUND, Marr was entitled to the lion’s share of the illicit proceeds from
16 the bid-rigging conspiracies. His employees turned over the payoffs from rounds they received. For
17 example, Barta testified that money he collected from the rounds went to Marr. Loeb Decl. Ex. A (Trial
18 Tr. at 1586:20-1587:22). Casorso also testified that Marr and the other round participants were the ones
19 who paid each other; it was “Marr’s money on the table” in the rounds. *Id.* at 2260:3-8; 2200:15-19.
20 Casorso said he was merely a “courier” who delivered round payments. *Id.* at 2289:22. Other members
21 of the conspiracy understood that, when they owed money from the rounds to someone from
22 Community Fund, Marr was the one they ultimately owed. *See, e.g., id.* at 913:3-7 (Ditmer testimony).

23 Marr also claimed a larger share of the bid-rigging payoffs than his competitors by obtaining
24 multiple spots (seats) for his employees in many rounds, which would either increase his payoff (if
25 another bidder won the round) or reduce the amount he would have to pay out (if Marr won). Loeb
26 Decl. Ex. A (Trial Tr. 660:19-25; 690:24-691:1) (undercover FBI agent’s explanation of seats); *Id.* at
27 2246:22-2247:4 (Casorso testimony that Marr sought multiple seats in a round)). As coconspirator
28 Brian McKinzie explained, Marr started claiming two seats in many rounds in 2008 or 2009, perceiving

1 that he could dictate the activity associated with the rounds. Loeb Decl. ¶ 22. The hundreds of round
 2 sheets introduced at trial are replete with examples of multiple Community Fund employees
 3 participating in a round.

4 **e. Marr Should Receive the Four-Level Upward Adjustment**
 5 **Because of His Leadership in the Conspiracies**

6 In sum, the factors identified in Commentary Note 4 support the application of U.S.S.G.
 7 §3B1.1(a) to Marr. Marr oversaw his employees and codefendants' participation in the bid rigging and
 8 he was a leader in the conspiracies generally. Considerations of equity and relative culpability also
 9 support applying the upward adjustment to Marr. Of all the individuals who participated in the related
 10 bid-rigging conspiracies in Alameda and Contra Costa County, Marr, is by far the most culpable.
 11 Marr's conduct during the conspiracies was extensive and continuous. He headed the largest
 12 organization involved in the conspiracies, controlling multiple employees at the courthouse steps who
 13 organized the bid rigging at his direction and for his profit. No other defendant in the real estate
 14 investigation rigged more homes or purchased more rigged properties during the charged period than
 15 Marr's organization.

16 As the Court rightly recognized, while many in this conspiracy were similarly situated, there are
 17 some who are "substantially more culpable." Marr is one of them, and his offense level should reflect
 18 that fact. A four-level enhancement is appropriate to accurately reflect Marr's significant role in the
 19 conspiracies.

20 **4. No Adjustment for Acceptance of Responsibility Applies**

21 The government agrees with the PSR that Marr is not entitled to any reduction for acceptance of
 22 responsibility under U.S.S.G. §3E1.1(a). A defendant may receive a two-level offense reduction if he
 23 "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. §3E1.1(a). In general,
 24 acceptance of responsibility credit is not available to a defendant who "puts the government to its burden
 25 of proof at trial." U.S.S.G. §3E1.1 comment. n.2.

26 Marr's response to the PSR claims that his offer to enter a conditional guilty plea prior to trial
 27 manifested an acceptance of responsibility. It did not. First, Marr has never showed any contrition or
 28 remorse for the offense. *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) ("To receive

1 the two-point downward adjustment, a defendant must at least show contrition or remorse.”). His
2 “acceptance of responsibility” statement in the PSR says “I accept responsibility,” but goes on to
3 provide a series of excuses for his conduct – excuses which lack credibility. For one, Marr claims that
4 he did not even go to public auctions and learn about the agreements to stop bidding until 2008;
5 witnesses, including Ditmer, Dominic Leung, and Keith Slipper, have stated that Marr was involved
6 several years earlier. *See* Loeb Decl. Ex. A (Trial. Tr. at 1075:22-24) (Ditmer testimony that Marr
7 began participating in rounds between approximately 2000 and 2004); Loeb Decl. ¶ 27 (Keith Slipper
8 and Marr met in approximately 2004 or 2005 and Marr offered to pay Slipper a percentage of round
9 money if Slipper represented Marr at the auctions; Leung observed that Marr started attending trustee
10 sales in approximately 2004 or 2005). Marr also says that he was “influenced by the other bidders at the
11 public auction,” but the record shows that it was often Marr’s employees who instigated the bid rigging,
12 as discussed above. He never acknowledges the illegality of his conduct, nor does he take responsibility
13 for the fact that he led so many others to participate in it and was so deeply involved. When the Court
14 denied Thomas Joyce’s request for a downward adjustment for acceptance, it observed that Joyce – who
15 was far less culpable than Marr – had not demonstrated “acceptance as to the illegality and his
16 contribution to the conspiracy.” Loeb Decl. Ex. F at 28:21-24 (Transcript of Sentencing Hearing,
17 *United States v. Joyce*, No. 14-cr-607). The same is true here. And even were Marr to express genuine
18 remorse at sentencing, however, Comment 2 makes clear that the reduction is not intended to apply to a
19 defendant who goes to trial, is convicted, and only then expresses remorse.

20 Second, Marr’s attempt to negotiate a conditional guilty plea with stipulated facts does not entitle
21 him to an adjustment because Marr was not willing to fully admit guilt. *United States v. Schales*, 546
22 F.3d 965, 976 (9th Cir. 2008) (defendant must admit all of his guilt, cooperation notwithstanding, before
23 receiving downward adjustment). That is why the negotiations failed.

24 Changes Marr submitted to the stipulated facts demonstrate that he was not willing to accept
25 responsibility for his crimes. *See* Loeb Decl. Ex. H (May 10 e-mail from Marr’s counsel and
26 attachment). For example, Marr refused to refer to the Alameda County conspiracy as a “continuing”
27 agreement, declining to acknowledge that there was a single, ongoing conspiracy, as charged in the
28 indictment. *Id.* ¶ 5. He also deleted any reference to the conspiracy as an agreement to “suppress

1 competition” – even though, by definition, that is what a bid-rigging agreement is. *Id.*; see also Jury
2 Instr. No. 21 (Dkt. 293) (“a conspiracy to rig bids is an agreement between two or more competitors to
3 eliminate, reduce, or interfere with competition...”).

4 During those negotiations, Marr sought to characterize the rounds as legitimate resales. Instead
5 of admitting that the rounds determined “payoff amounts and the conspirators who would be awarded
6 the selected properties,” he suggested that the rounds were “to bid for and sell the properties purchased
7 at the public auction...” Loeb Decl. Ex. H ¶ 6. Relatedly, his redline also severed any connection
8 between the round payoffs and the agreements to stop bidding (again preserving his ability to argue that
9 rounds were innocent resales and not evidence of the conspiracy). *Id.* (deleting admission that members
10 of the conspiracy were involved in “[n]egotiating, making, and receiving payoffs for agreeing not to
11 compete with coconspirators”). This notion that money exchanged between the coconspirators had
12 some innocent explanation was later belied by the trial record and again shows a failure to accept
13 responsibility. It also ignores all of the evidence of straight payoffs that members of the conspiracy
14 made to each other to drop out of public auctions (which were unquestionably payments to stop
15 bidding). Marr also would not admit that he “personally negotiated payoffs for stopping or refraining
16 from bidding,” even though, for example, he personally spoke on the phone with Charles Rock and
17 negotiated a \$1000 payment in exchange for dropping out of the bidding for a property on Doris Drive
18 in Pleasant Hill. Loeb Decl. Ex. A (Trial Tr. 1845:2-1847:3).

19 Third, once the plea negotiations failed, Marr went to trial and contested several factual elements
20 of guilt. He persistently denied his participation in the charged conspiracy. In his Rule 29 argument at
21 trial, Marr opened by saying that the government “failed to prove each element on each count.” Loeb
22 Decl. Ex. A (Trial Tr. 2093:24-2094:1). Marr first disputed whether the evidence showed that there was
23 a single conspiracy (in each county) as charged in the indictment, characterizing the conduct as a series
24 of one-off transactions: “the evidence shows at best that every single auction was different. At every
25 single auction, there were different people there. Every single auction, there was a different agreement,
26 whether to bid, whether not to bid.” *Id.* at 2094:16-2094:23. Disputing the existence of the single,
27 ongoing conspiracy charged in the indictment was one issue the Court raised when Thomas Joyce

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1 requested (and did not receive) an adjustment for acceptance of responsibility. Loeb Decl. Ex. F 24:13-
2 23; 26:11-13; 28:24 (Transcript of Sentencing Hearing, *United States v. Joyce*, No. 14-cr-607).

3 Marr then disputed whether the evidence showed that he “personally entered into an agreement
4 to reduce or eliminate competition at the auction” – even though every percipient witness to the
5 conspiracy called by the government testified that the members of the conspiracy agreed not to bid
6 against each other at the auctions. Loeb Decl. Ex. A (Trial Tr. 2094:24-2095:2). Marr even contested
7 the element of interstate commerce, saying that there “hasn’t been any proof” that any of the funds from
8 the auctions were sent across state lines. *Id.* at 2095:10-14.

9 Marr’s denials continued through closing argument. He contested whether he “made the specific
10 agreement the government has charged.” Loeb Decl. Ex. A (Trial Tr. 2470:1-3). He again disputed the
11 existence of a single, county-wide conspiracy, claiming that the bid rigging involved only “multiple tiny
12 little conspiracies at the auctions,” and repeatedly argued, “the government has failed to prove beyond a
13 reasonable doubt the single overarching conspiracy that they charged....At best, they've shown many,
14 many different agreements at many, many different auctions with many different people for many
15 different reasons.” *Id.* at 2473:25-2474:3; 2474:22-2475:12; 2476:19-25; 2486:6-24. He also denied
16 that the evidence showed any agreement between Marr and his competitors, despite the testimony of
17 numerous other participants at the auctions who had rigged bids with Marr. *Id.* at 2477:2-6.

18 Marr also said, “there’s no agreement to eliminate or reduce competition...these three
19 defendants, in fact, competed vigorously for the properties they bought at the foreclosure auctions...”
20 Loeb Decl. Ex. A (Trial Tr. 2484:10-12). He later claimed there was merely “an agreement to make
21 money in the rounds.” *Id.* at 2485:17-18. As he explained at sidebar, “We’re saying we didn’t enter the
22 illegal agreement in the first place.” *Id.* at 2186:24-25.

23 With this argument, Marr denied the bid-rigging charges at the most basic level. The jury
24 instructions defined bid rigging as “an agreement between two or more competitors to eliminate, reduce,
25 or interfere with competition for something that is to be awarded on the basis of bids.” Jury Instr. No.
26 21 (Dkt. 293). Marr was willing to admit that he had reached agreements with other bidders at the
27 auctions – but denied that those agreements rose to the level of bid rigging. Marr should not receive
28 credit for accepting responsibility for bid rigging when he has steadfastly refused to acknowledge that

1 that is what he did. In summary, Marr may argue that he went to trial to preserve his challenge to the
 2 validity of the *per se* rule and its application to this case, but once he got to trial, he challenged many
 3 more aspects of the charges against him.⁷

4 Fourth, the Ninth Circuit has recognized that a defendant who admits he committed the *actus*
 5 *reus* of the crime but claims he is not guilty because he lacks intent does not qualify for acceptance of
 6 responsibility. *United States v. Burrows*, 36 F.3d 875, 883 (9th Cir. 1994) (defendant’s position
 7 “incompatible with acceptance of responsibility” where he “freely admitted committing the *actus reus* of
 8 the crime” but “maintained even after trial that he had a complete defense based on his purported lack of
 9 *mens rea*”). Marr’s defense was similar. He did not contest participation in some rounds and
 10 agreements (although he disputed others),⁸ but asked the jury to acquit him because “the government has
 11 to show that they have the intent” and did not do so. Loeb Decl. Ex. A (Trial Tr. 2469:25-2470:3).

12 Finally, the majority of the factors guiding the application of the adjustment for acceptance of
 13 responsibility weigh against giving Marr any such adjustment. For example, Marr did not voluntarily
 14 terminate or withdraw from the conspiracy (§3E1.1, comment. (n.1(B)), make voluntary payment of
 15 restitution (C), provide any assistance to authorities (E), voluntarily resign from any office or position
 16 held during the offense (F), or timely manifest any acceptance of responsibility (H). By contrast,
 17 Thomas Joyce, who, like Marr, went to trial and did not deny that he had taken part in rounds, met twice
 18 with FBI in 2011 and provided considerable information regarding his conduct – and he did not receive
 19 any adjustment for acceptance of responsibility.

20 Under the Guidelines, it is a “rare situation” where a defendant clearly demonstrates acceptance
 21 of responsibility despite going to trial. U.S.S.G. §3E1.1 comment. n.2. This is not one of those rare

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23 ⁷ Marr’s argument that he did not reach an agreement to suppress competition is different from
 24 his argument that bid-rigging should not be *per se* illegal. Marr made this very point at trial:

25 And not only the jury instruction, but the indictment... both of them say
 26 that that’s what the agreement was, to suppress, reduce or eliminate
 27 competition. The ruling on the *per se* is a different issue.

27 Loeb Decl. Ex. A (Trial Tr. 2189:10-15).

28 ⁸ For example, Marr disputed whether he (through Casorso) participated in the bid-rigging
 agreement involving a home located at 3058 Berlin Way, Oakland. Loeb Decl. Ex. A (Trial Tr. 791-92).
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1 situations. Marr contested a range of factual issues at trial and has not demonstrated full acceptance. No
2 adjustment should apply.

3 **B. Marr's Fine Range is \$796,000.77-\$3,980,003.85**

4 Under Section 2R1.1(c)(1), the fine for an individual convicted of an antitrust offense is one to
5 five percent of the volume of commerce. Here, Marr's fine range is \$796,000.77 to \$3,980,003.85, as
6 calculated in the PSR. According to the Guidelines background, "The Commission believes that most
7 antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline,
8 at least over time on an installment basis." U.S.S.G. §2R1.1, comment. (backg'd). The Guidelines
9 further state, "Substantial fines are an essential part of the sentence." *Id.*

10 As of the date of the PSR, Marr had not submitted financial worksheets to probation. Should the
11 Court decide that Marr lacks the ability to pay the guidelines fine, the government requests that the
12 Court order the defendant to perform an "equally burdensome" amount of community service, as the
13 Sentencing Guidelines advise. U.S.S.G. §2R1.1 comment. (n.2). Marr's fine range is \$796,000.77 to
14 \$3,980,003.85. Applying the \$100 per hour rate that Judge Donato used to order community service in
15 *United States v. Florida* (for Robert Rasheed and John Berry) would result in 7,960 to 39,800 hours of
16 community service.

17 **C. Marr Owes \$1,785,403.88 In Restitution**

18 The Court should order restitution in the amount of \$1,785,403.88. While the Mandatory Victim
19 Restitution Act (MVRA), 18 U.S.C. § 3663, does not apply to this case, restitution is permitted under 18
20 U.S.C. § 3583(d) (restitution as a discretionary condition of supervised release). The Court has ordered
21 restitution in many of the related cases.

22 In ordering restitution, a district court must make "a reasonable estimate of the loss, given the
23 available information." *United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010) (citation omitted). The
24 evidence upon which the court makes its calculation is acceptable so long as such evidence is supported
25 by "sufficient indicia of reliability." *Id.* at 1073.

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1 The restitution amounts here are based on the bid-rigging payoffs (from rounds or straight
2 payoffs) that Marr's organization was owed during the conspiracy.⁹

3 The property list attached as Exhibit D to the Loeb Declaration reflects the rigged auctions
4 involving Marr or his employees, based on the government's analysis of the documentary and
5 testimonial evidence gathered during the investigation. The payoffs that coconspirators were willing to
6 make to acquire a property are the best measure of the amounts that would have been bid at the public
7 auction (and paid to the trustees or homeowners) but were not, because the coconspirators agreed to stop
8 bidding at the public auctions and make payoffs to each other instead.

9 For example, Charles Rock testified about a property on Heritage Oaks in Pleasant Hill. He
10 researched the property ahead of the auction and was interested in purchasing it. Loeb Decl. Ex. A
11 (Trial Tr. 1853:19-26). At the public auction, however, Mr. Rock agreed to drop out after bidding only
12 a penny over the opening bid, letting another member of the conspiracy win the public auction. *Id.*
13 1854:13-19. The property was then rounded, and Rock won, owing his coconspirators \$7,000 for the
14 round. *Id.* 1856:12-1860:4. That \$7,000 was money he was willing to pay for the property, and it was
15 money he did not bid at the public auction because the conspiracy enabled him to drop out first and save
16 his money to make a payoff in the round.

17 **II. Sentencing Recommendation**

18 Based on Marr's role in leading and organizing the conspiracy, his refusal to accept
19 responsibility or show remorse, and the significant volume of commerce affected by this conspiracy, the
20 Guidelines suggest a custodial sentence of 46 to 57 months. The factors under 18 U.S.C. § 3553(a) do
21 not support any departure or variance below the Guidelines sentence. Rather, these factors and the
22 Guidelines commentary support a 57-month sentence, at the high end of the range, commensurate with
23 the fact that Marr is the *most* culpable defendant in the entire real-estate investigation. The most
24 compelling factors weighing in favor of the proposed term of imprisonment are the need for the sentence

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27 ⁹ It was standard procedure for an investor to go into an auction with a maximum amount he or
28 she was willing to pay for the home. See, e.g., Loeb Decl. Ex. A (Trial Tr. 1268:15-21) (Roemer's
description of his "strike price.").

1 to reflect the seriousness of the offense, afford adequate deterrence, and avoid an unwarranted
2 sentencing disparity. *See* 18 U.S.C. § 3553(a)(2).

3 The government further recommends that the Court order a fine at the top of the Guidelines
4 range, which is \$796,000.77-\$3,980,003.85. The minimum \$20,000 fine is inappropriate given the
5 hundreds of properties that Marr acquired through the conspiracy, his leadership role, and failure to
6 demonstrate inability to pay.

7 **1. The Government's Proposed Sentence Reflects The Seriousness Of The**
8 **Offense, Promotes Respect For The Law, And Provides Just Punishment**

9 Marr was a leader of the criminal conspiracies that were carried out day after day on the
10 Alameda and Contra Costa County courthouse steps. Marr's awareness that what he was doing could be
11 against the law did not deter him from pursuing a business model that corrupted the auction process as
12 just another way of doing business. When Barta expressed concern over the legality of rounds, Marr
13 told Barta that it was part of his job and that he had no choice. Loeb Decl. Ex. A (Trial Tr. 1446:4-11).
14 Even when news of an FBI investigation into bid rigging in San Joaquin County became public in 2010,
15 Marr did not stop rigging bids – instead, he simply told Casorso to be more careful at the auctions. *Id.* at
16 2311:11-2312:4. Concerns about legality did not persuade Marr to deviate from that business model, in
17 which he sent several employees to rig the auctions daily, stacked the rounds with people working for
18 him to maximize the payouts, and meticulously tracked every bid-rigging transaction, down to the last
19 dollar.

20 The government recommends a sentence at the high end of the sentencing guidelines because
21 Marr's violation of the law was so egregious, and because he influenced so many others to break the law
22 too. He was ultimately responsible for rigging the bidding for over 1,100 foreclosed houses. His
23 fastidious devotion to tracking every deal (as seen in his ledgers) made sure that his coconspirators
24 would make good on the payoffs for each property they rigged. He directed a squad of employees who
25 ensured that the bid rigging endured, day after day, instigating agreements, organizing rounds, and
26 collecting payoffs, until the FBI intervened. New investors at the courthouse steps often felt that they
27 had no choice but to participate in the scheme if they wanted to have a chance to buy properties. And in

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1 the six years since he first learned of the FBI's investigation, Marr has not expressed contrition or
2 remorse for his participation in the conspiracies.

3 A 57-month sentence is the highest the government has sought thus far in the real-estate cases.
4 Marr's conduct warrants it. His rigged property total (1163) means that his organization was rigging an
5 average of two properties a day, five days a week, for the entire duration of the conspiracy. This dwarfs
6 the totals for other leaders in the conspiracies. For example, his volume of commerce is three times
7 greater than George Cheng's, another leader of the conspiracy in both counties. Loeb Decl. Ex. G (Plea
8 Agreement ¶ 8, *United States v. Chung Li Cheng, a/k/a George Cheng*, No. 14-cr-593 (Dkt. 23)
9 (\$24,704,142 volume of commerce). Cheng agreed to a four-point enhancement based on his role in the
10 offense. Marr's volume of commerce is also more than seven times higher than Alvin Florida's. Loeb
11 Decl. Ex. I (U.S. Sentencing Mem. at 9, *United States v. Florida*, No. 14-cr-582 (Dkt. 491)). Florida
12 received a four-point enhancement too.

13 A 57-month sentence is also necessary because the use of volume of commerce to calculate
14 sentences for bid rigging results in an "understatement of seriousness" in bid-rigging cases. U.S.S.G.
15 §2R1.1 comment. (n.6), comment. (backg'd.) ("The Commission believes that the volume of commerce
16 is liable to be an understated measure of seriousness in some bid-rigging cases."). As high as Marr's
17 \$79 million volume of commerce may be, it still reflects only the fraction of rigged properties purchased
18 through his organization (412 out of 1163); it does not include any of the hundreds of properties where
19 Marr or his employees merely demanded payoffs or took part in rounds (such as the Doris Drive
20 example discussed above, where Marr exacted a \$1,000 payment from Charles Rock to drop out of the
21 auction). The Commission recommends that "[t]he court should consider sentences near the top of the
22 guideline range" in bid-rigging cases. *Id.* comment. (n.6). The Court should correct for the
23 understatement of seriousness in Marr's guidelines calculation by imposing a sentence at the top of the
24 range.

25 A high-end Guidelines fine is also necessary to reflect the seriousness of the offense and provide
26 just punishment. A minimum \$20,000 fine would be the equivalent of perhaps half a dozen round
27 payoffs, or one month's rent payments on a small number of houses. It would be only three percent of
28 even a low-end Guidelines fine (which itself is only one percent of Marr's volume of commerce, and

1 excludes 751 properties where Marr was owed a payoff). Marr's employees rigged over 1,000 bids on
2 his behalf. He used the conspiracies to acquire hundreds of properties, building his real-estate empire.
3 The Court should limit the financial windfall that Marr will reap from the over two years of criminal
4 activity he perpetrated. Relatedly, the Court should also order Marr to make full restitution, rather than
5 allow him to retain the bid-rigging payoffs he earned at the helm of the largest participant in the
6 conspiracy.

7 **2. The Proposed Sentence Affords Adequate Deterrence**

8 An important consideration for the Court is whether the punishment will adequately deter future
9 violations of the antitrust laws and white collar crime generally. *See* 18 U.S.C. § 3553(a)(2)(B) (courts
10 should consider "adequate deterrence to criminal conduct" in selecting a sentence. The background to
11 the applicable Guidelines explains the Commission's intent that individuals who rig auctions should
12 ordinarily go to prison:

13 [P]rison terms for these offenders should be much more common, and usually
14 somewhat longer, than typical under pre-guidelines practice. Absent adjustments,
15 the guidelines require some period of confinement in the great majority of cases
16 that are prosecuted, including all bid-rigging cases . . . in very few cases will the
17 guidelines not require that some confinement be imposed.

18 *Id.* §2R.1.1 comment. (backg'd).

19 Marr's role as the leader of the conspiracies requires a strong message of deterrence. Marr
20 should be held liable for recruiting others into the conspiracies, perpetrating the bid rigging relentlessly,
21 and leveraging his employees' participation to increase the share of payoffs owed to his organization.
22 The proposed sentence of 57 months will deter other real estate investors throughout the industry who
23 may be tempted to enrich themselves through bid rigging and other white-collar crimes. It will promote
24 respect for the law.

25 Antitrust crimes are inherently difficult to detect, hatched in conspiracies and based on
26 agreements that, as here, were often formed with a wink or a nod. Marr took steps to conceal what
27 evidence there was even further, stashing the bid-rigging ledgers in his office attic. When the FBI
28 interviewed him in 2011, he said he did not know anything about round sheets, had never participated in
a round, and was not aware if any of his employees had done so. Loeb Decl. ¶ 30. Investigating Marr's
conduct took years and substantial public resources. All of these facts increase the need for deterrence.

1 The more difficult criminal conduct is to detect and investigate, the more important a higher sentence
2 becomes. Because hard-to-detect offenses allow many perpetrators to avoid prosecution, optimizing
3 deterrence requires that those who *are* caught are punished more severely. Otherwise, a criminal can
4 weigh the low risk of detention and a light sentence and decide that the crime is worth the risk.

5 **3. The Proposed Sentence Avoids Unwarranted Sentencing Disparities**

6 Section 3553(a)(6) directs the Court to consider “the need to avoid unwarranted sentence
7 disparities among defendants with similar records who have been found guilty of similar conduct.” 18
8 U.S.C. § 3553(a)(6). One point of comparison is Glenn Guillory, whom the Court recently sentenced to
9 18 months in prison, a low-end Guidelines sentence. The trial evidence against Guillory showed that he
10 had rigged approximately 20 properties (of which he bought 12) – less than *two percent* of Marr’s total.
11 He had a single employee, his son. Marr’s far more extensive participation and leadership role should
12 not receive the same low-end Guidelines treatment. He should receive a sentence at the top.

13 Thomas Joyce’s sentence further underlines the need for a high-end Guidelines sentence to
14 adequately capture Marr’s unique culpability. Joyce also received a low-end Guidelines sentence. He
15 participated in the conspiracy at coconspirator’s Leslie Gee’s direction, earning \$15 per hour and
16 eventually a minority percentage of some of the payoffs his boss earned from the rounds. He acquired
17 zero properties for himself (and fewer than ten for his boss). Marr is many, many times more culpable
18 than Joyce, and a high-end Guidelines sentence would reflect that.

19 **4. No Downward Variance Is Warranted**

20 Marr’s case does not present any reasons for a downward variance. While he may have little
21 criminal history, this is a trait shared by most antitrust defendants (including defendants sentenced to the
22 Guidelines in this case) and is already accounted for by the criminal history calculation. This provides
23 no reason to vary downward because the antitrust guideline accounts for such a typical offender. *See*
24 *United States v. Carter*, 560 F.3d 1107, 1121-22 (9th Cir. 2009).

25 Marr will likely protest that he never intended to harm competition. Day after day, he sent
26 employees to the courthouse to cut off the bidding at the public auction, choosing to enrich himself and
27 his coconspirators rather than simply compete for properties at the auction. Marr was described at trial
28 as a smart businessman. It strains credibility to believe that he would have so meticulously devoted his

1 company to bid rigging day after day were it not more profitable than the alternative. And there can be
 2 no question that Marr intended to rig bids and devoted his substantial resources wholeheartedly to the
 3 effort – and used the bid-rigging conspiracy to amass a million-dollar payday for himself, along with
 4 hundreds of houses.

5 In assessing Marr’s background and personal characteristics under 18 U.S.C. § 3553, the
 6 government expects that Marr will emphasize that he is 61 years old. That age, however, does not
 7 present the sort of extraordinary circumstance that would warrant a variance. *See United States v. Carty*,
 8 520 F.3d 984, 991 (9th Cir. 2008) (*en banc*) (deviation from a Guidelines sentence must be “sufficiently
 9 compelling to support the degree of the variance”) (citation omitted). White-collar crimes such as bid
 10 rigging can be performed regardless of one’s physical capabilities. Marr should not be allowed to
 11 commit a crime as a mature adult, with substantial assets and influence at his disposal, and then argue
 12 that he is entitled to a lower sentence than a younger offender. Assuming he serves his full term of 57
 13 months, he would be released at the age of 66. He has no major ailments or mental or emotional health
 14 issues. PSR ¶¶ 70-73. He has several decades’ worth of real estate investment and business experience,
 15 real estate holdings, and the means to earn a significant legitimate income in real estate. PSR ¶ 83.

16 CONCLUSION

17 Marr is the most culpable member of two conspiracies that have resulted in over 40 convictions
 18 for the systematic corruption of the foreclosure auctions across the East Bay during the depths of the
 19 financial crisis. The United States respectfully requests that this Court sentence Marr to 57 months in
 20 prison, three years of supervised release, a fine of \$3,980,003.85, restitution in the amount of
 21 \$1,785,403.88, and a \$200 special assessment.

23 DATED: October 11, 2017

Respectfully submitted,

24 /s/ Alexis J. Loeb

25 Albert B. Sambat

26 Micah L. Rubbo

Alexis J. Loeb

27 Michael A. Rabkin

Trial Attorneys

Antitrust Division

28 U.S. Department of Justice