

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
VS.	)	No. CR 13-00246-CRB-1
	)	
MOHAMMED REZAIAN,	)	
	)	
Defendant.	)	
_____	)	

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
VS.	)	No. CR 13-00587-CRB-1
	)	
DANIEL ROSENBLEDT,	)	
	)	
Defendant.	)	
_____	)	

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
VS.	)	No. CR 14-00534-CRB-1
	)	
JOSEPH J. GIRAUDDO,	)	
	)	
Defendant.	)	San Francisco, California
_____	)	Monday, May 7, 2018

**TRANSCRIPT OF PROCEEDINGS**

Reported By: BELLE BALL, CSR 8785, CRR, RDR  
Official Reporter, U.S. District Court

(Additional cases and appearances continued, next page)



**APPEARANCES, CONTINUED:**

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For Defendant Grinsell:

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**BY: LEWIS P. FEUCHTBAUM, ESQ.**

For Defendant Cullinane:

LAW OFFICES OF DORON WEINBERG  
523 Octavia Street  
San Francisco, California 94102

**BY: DORON WEINBERG, ESQ.**

Also Present:

JILL SPITALIERI  
U.S. Probation

1 Monday - May 7, 2018

1:00 p.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling Criminal Action CR-13-0246, USA  
4 versus Mohammed Rezaian; Criminal Action 13-0587, USA versus  
5 Daniel Rosenbledt; Criminal 14-0534, USA versus Joseph J.  
6 Giraudo; USA versus Raymond A. Grinsell, and USA versus Kevin  
7 B. Cullinane.

8 Counsel, please step forward and state your appearances.

9 Can the clients remain seated?

10 **THE COURT:** Of course, as long as they are identified.

11 **MR. NIESPOLO:** George Niespolo and Jennifer Fisher  
12 here on behalf of Daniel Rosenbledt, who is present in court,  
13 Your Honor.

14 **THE COURT:** Okay, thank you.

15 **MS. AGRE:** Good afternoon, Your Honor. Lyn Agre on  
16 behalf of Mohammed Rezaian, who is present in court.

17 **MR. WEINBERG:** Good afternoon, Your Honor. Doron  
18 Weinberg for Kevin Cullinane, who is present.

19 **MR. FEUCHTBAUM:** Good afternoon, Your Honor. Louis  
20 Feuchtbaum for Ray Grinsell, who is present in court.

21 **MR. JACOBS:** Good afternoon, Your Honor. Matt Jacobs  
22 here on behalf of Mr. Giraudo, who is present here in court. I  
23 also have my colleagues, Craig Seebald and Chris James.

24 **MR. MAST:** And good afternoon, Your Honor. Andrew  
25 Mast on behalf of the United States.

1           **PROBATION OFFICER SPITALIERI:** Good afternoon, Your  
2 Honor. Jill Spitalieri for Probation.

3           **THE COURT:** So the purpose of today's hearing -- which  
4 I think may be self-evident -- is to hear argument and to see  
5 whether the Court's in a position to determine what the  
6 sentencing guidelines are for each of the five defendants here.

7           Obviously, there are a total of 23 defendants. So this  
8 process, while it applies to the five people here, I don't know  
9 that I'm going to go through the same processes to the others.  
10 Because their guideline range is lower, there are stipulations  
11 with respect to amounts, and there's less -- the Court's  
12 determinations are not as complicated with respect to those  
13 individuals as it is with respect to these individuals.

14           I note, however, that of the five who are in front of me  
15 today, three have stipulated to certain aspects of the  
16 sentencing guidelines; two have not. And when I say "haven't  
17 stipulated," I'm not saying -- they have stipulated to some  
18 things. I mean, obviously, they have stipulated to the base  
19 offense level by entering a plea. But after that, there's some  
20 differences between the parties.

21           And I think it would be useful -- number one, I think it's  
22 necessary to establish a guideline range before determining  
23 what the sentence should be. That's first.

24           Secondly, I think it's useful to be able to determine, if  
25 I can, the sentencing guideline range in advance of the

1 sentencing hearing, the full sentencing hearing, because after  
2 making certain determinations, an attorney may or may not  
3 choose to make certain arguments, may or may not choose to cast  
4 it one way or the other. So, I think it's helpful to everybody  
5 involved. And that's what the procedure is this afternoon.

6 What I intend to do is to go in the order that I suggest  
7 in the sentence -- well, no, no, no. Well, maybe yes, yes,  
8 yes. I don't know. I'm going to start with Mr. Giraud. And  
9 then after that, we will see where we are.

10 So Mr. Jacobs, you are standing up, so I assume you  
11 anticipated that I would want to start with your client. Is  
12 that why you are up? Or do you have another matter that you  
13 want to --

14 **MR. JACOBS:** I was being respectful of the Court.

15 **THE COURT:** Well, you don't have to be that respectful  
16 of the Court. No, I appreciate it, and I know you were, but --  
17 the way I thought I would do it, by the way, is to go through  
18 the objections that have been raised in the -- to the  
19 presentence report. I think that's the formal process of  
20 addressing the objections to the presentence report. Because  
21 everybody's had -- I mean, the record speaks for itself.

22 But they've had a presentence report; they've had an  
23 opportunity to object to the presentence report. They have  
24 filed a memorandum. The government has filed a response. They  
25 filed a reply. The government has filed a further response.

1 And the -- and the defense, for the most part, has filed  
2 further reply.

3 So we've had, like, a number of rounds of briefing to  
4 which are attached exhibits, at least as far as the government  
5 is concerned in their presentation. So I have before me a lot  
6 of materials. Which, by the way, I would say is very helpful,  
7 because unlike the two other judges who have sentenced in what  
8 I will call related cases, I did not have a trial. And having  
9 a trial makes a big, big difference in terms of sentencing.  
10 That is to say, in terms of access to information.

11 So my access to information comes basically from  
12 submissions by the government in terms of their exhibits, their  
13 charts and so forth, and responses to that information by the  
14 defense. That is the context in which the sentencing process  
15 is moving.

16 Forward. So with that, are we ready to proceed,  
17 Mr. Jacobs? Do you have some other --

18 **MR. JACOBS:** We are.

19 **THE COURT:** And by the way, I have the afternoon. No  
20 one is going to be cut off.

21 **MR. JACOBS:** Okay.

22 **THE COURT:** Well, I say that in advance. But I do, at  
23 3:00, have to take a 15-minute recess, because I have to  
24 preside over a reentry graduation. Which is a wonderful thing,  
25 a wonderful thing. So I'm going to do that.

1 But other than that, I'll go as late as we need to go this  
2 evening because, as we also know, I have scheduled the  
3 sentencings commencing at 9:00 a.m. tomorrow. I believe they  
4 will take place then, but I'm -- obviously, circumstances can  
5 change, if they do. But I don't anticipate that they will.

6 I've also sent out a notice -- which may have been a  
7 little bizarre, or seem that way -- to all the defendants in  
8 the case so that if they wish to attend tomorrow, or their  
9 lawyer, they may do so.

10 Now, the reason -- I just want to tell you what the reason  
11 is, because it's not to cause undue embarrassment to the five  
12 defendants I'm sentencing. It is for the following: I intend  
13 to state my views as to the nature of the crime, and what are  
14 referred to as general deterrence. Because I think both of  
15 those factors are common to all 23 defendants. And I don't  
16 have the patience to say the same thing 23 times. This job  
17 does require some repetition.

18 Also I want to say it once, and I'm going to incorporate  
19 those remarks into all my sentencings of the 23 defendants.  
20 And clearly, if a defendant's counsel wishes to comment on  
21 those factors, they'll have that opportunity. So it was  
22 basically a notice, and an invitation for them to be here, or  
23 an invitation to comment. But, you know, all these proceedings  
24 are public. There's a transcript of them. And anybody should  
25 have -- will have the ability to review it.



1           Okay. Mr. Jacobs.

2           **MR. JACOBS:** So, by way of proceeding, Your Honor, I  
3 thought I would just make a couple of general observations.  
4 And then, I think the real issues to be addressed are volume of  
5 commerce, role in the offense, bid rigging enhancement.

6           And so I'll make a couple of general comments, and then  
7 turn it over to Mr. Seebald to talk about volume of commerce.  
8 And then I can come back on role in the offense.

9           So I will say -- and I hear the Court, that the Court  
10 wishes to make a determination about the guidelines. And,  
11 understood, and I think typical. There is precedent for the  
12 Court to not get caught up in deciding the guidelines if the  
13 sentence would not otherwise be affected, as the Court may have  
14 indicated.

15           There's also certainly a basis here to say that there's  
16 been a failure of evidence on certain points that affect the  
17 guidelines. But the *Cantrell* case, 2006, Ninth Circuit, would  
18 give the Court authority not to get caught up in the  
19 guidelines.

20           But, but we're here for that purpose. So let me dive in.

21           First of all --

22           **THE COURT:** Let me make an observation about that,  
23 because I'm not sure I didn't share -- and I put it in the  
24 past-tense -- your observation that: Why get involved in, in  
25 this process if it's not going to make a difference?

1           And in thinking about it, I actually think that's  
2 incorrect. I actually think I have -- I have to get involved,  
3 if I intend to somehow use the guideline range in order to make  
4 certain determinations. It doesn't make a difference within  
5 the guideline range.

6           I think under 6A1.3 -- let's just take, as an example,  
7 volume of commerce. If, if I said that the volume of commerce  
8 was under \$1 million, which has significance in this sentencing  
9 guideline range, I don't have to say it was 986,000 or 226,000,  
10 or whatever sum it was, because it doesn't make any difference.  
11 And I don't have to go through that exercise.

12           But when there is a challenge to the guideline range,  
13 should it be -- is it commerce more than a million? Is it  
14 commerce more than 10 million? Then I think I'm under an  
15 obligation to make a finding. And that finding is either  
16 supported by the evidence, or it isn't. And it's either  
17 challengeable or not, depending on the evidence.

18           And I think I have to allow -- which is what I'm doing  
19 now -- the parties to have an evidentiary record, one way or  
20 the other, to support a finding that the Court makes.

21           So even if, as an example, if I were to make a finding  
22 it's less than a million, which is what you're suggesting I do,  
23 the government -- the government would say: Hey, Judge, we're  
24 requesting a finding here.

25           I mean, I think both sides get it. I mean, the guidelines

1 are there for both sides. The government and the defense.

2 So all I'm saying to you, Mr. Jacobs, is while I bought  
3 into your theory -- actually, welcomed it -- at the outset, it  
4 is not where I come out today after thinking about it.

5 I have to tell you, Mr. Jacobs, I have spent more time on  
6 these sentencings than any other sentencings I've had in 21  
7 years. There's no question about it. And it's not because  
8 this is the most serious offense that has come across my table.

9 But, it is a complicated offense. And it's complicated in  
10 any number of ways. It's complicated by the age of some of the  
11 defendants. It's complicated by the health of some of the  
12 defendants. It's complicated by the history of some of the  
13 defendants.

14 So I do want you to know, and I'm not -- I'm not saying  
15 anything that may not be obvious, but I want you to know that I  
16 treat this with great seriousness. And I appreciate what has  
17 been written. And, yeah, I've read it all. I don't know that  
18 I've followed it all, but I've read it all. And I don't want  
19 to bring it all up out here, but it's a lot of material.

20 And it's not that it was burdensome. It was -- you know,  
21 sentences are individualized. When the day is over, somebody  
22 is going to be sentenced. That person must live with that  
23 sentence. That person must live with the sentence; the family  
24 must live with the sentence; the public must live with the  
25 sentence; the victims must live with it. It is much larger

1 than what happens, than the words that are pronounced in a  
2 courtroom. They don't end at the doors. They go much further  
3 than that.

4 And maybe in the run-of-the-mill case, sometimes it just  
5 ends at the door. But this is not that. And the efforts that  
6 the parties have devoted on both sides suggests that it's not.

7 Okay.

8 **MR. JACOBS:** I very much appreciate that, Your Honor.  
9 And having lived through this with Mr. Giraud over the last  
10 seven or eight years, that's why we pled open. Because we knew  
11 that the Court would take these issues seriously.

12 So, just a couple of observations, to begin.

13 **THE COURT:** Yes.

14 **MR. JACOBS:** Going back to January, we were getting  
15 prepared to send our submissions to the Probation office and  
16 the government, and realized that DOJ had not provided any of  
17 the material that they were giving to the Probation Office.  
18 The argument -- the documents to us.

19 So we called the probation officer. And she referred to  
20 us the government, I think appropriately.

21 We called Mr. Mast, and he told us that the government  
22 would decline to produce the material that had been provided to  
23 the Probation Office. We cited the local rule that suggests  
24 otherwise, and the government's answer was that they did not  
25 think that they were bound by that. And they were not going to

1 tell us.

2 So, I thought to myself, okay, I have dealt with the  
3 Department of Justice many times. Maybe this is just typical  
4 Antitrust Division overreaching. But what's the secret? Why  
5 would it be that the government would not want to share with us  
6 what they were telling the Probation Officer?

7 We've now been able to piece a little bit together and one  
8 of the things that struck me, at least, is that Mr. Grinsell's  
9 302, which had been prepared well in advance of the Probation  
10 Officer's report, had not been produced to the Probation Office  
11 or to us prior to the Probation Officer's report.

12 And Mr. Grinsell's 302 had a lot of information that was  
13 very helpful to us, and contradictory to the government's  
14 theory that this was a vast conspiracy that Mr. Giraud was at  
15 the top of, and organizing, and directing other people.

16 The government is trying to put -- and I know the Court is  
17 well aware of this context -- trying to put an eighty-year-old  
18 man in prison for more than three years. This is serious  
19 business. And I'm not sure why the division would think that  
20 it is subject to different rules than the rest of us. And in  
21 some regards, it's as if the government has not had to prove a  
22 case before, or put on evidence.

23 So the materials, for example, that were due to the PSR in  
24 support of the sentencing would have been due 45 days before  
25 the PSR was prepared. With respect to the filing of sentencing

1 memos in this court, the Court set those deadlines eight months  
2 ago. So the -- before the sentencing date, all materials in  
3 support of sentencing would have been due April 19th. And yet,  
4 it wasn't until Thursday evening at 9:00 p.m. that the Court --  
5 sorry -- that the government provided us 30, in our filing that  
6 we made this morning, 32 gigabytes -- it's actually 37, I'm  
7 told, gigabytes of information. And, only provided that after  
8 being called out for not having put in evidence.

9 It's astonishing to me that the government, with eight  
10 months to prepare, did not think to put in evidence that would  
11 support its calculations or its volume of commerce.

12 There is no way that we can -- now, I know Mr. Mast will  
13 say: Well, some of that was produced in discovery. Maybe most  
14 of it was. But we cannot absorb 37 gigabytes in one court day.

15 Now, we're not asking for a continuance. I don't want a  
16 continuance, and I'm sure the Court does not want a  
17 continuance. But to force us to deal with 37 gigabytes of  
18 material which we couldn't rebut or even address in the time  
19 period would be error on the part of the Court. The proper  
20 remedy, in our view, would be to exclude that material.

21 Second, the government has still failed to come forward  
22 with witnesses subject to cross-examination under the disputed  
23 302s. A 302 taken by an FBI agent, where they write down some  
24 things and not other things, particularly where there's a lack  
25 of indicia of credibility because the stories have changed, is

1 not evidence. Evidence is someone being subject to  
2 cross-examination in a hearing.

3 Again, the government had eighth months to prepare, but  
4 has not -- and we've --

5 **THE COURT:** Well, let me ask about that.

6 For purposes of sentencing, the question is: Relevant  
7 information. That's as it's defined in the guidelines. And  
8 next to it or within it is, is the qualifier that it must be  
9 credible, worthy of belief, whatever exactly the term is in  
10 6A1.3 -- maybe it would be helpful to use the language of the  
11 guideline rather than make it up.

12 Okay. So it's called "Information," and it says (As  
13 read):

14 "The Court must consider relevant information, without regard  
15 to its admissibility under the rules of evidence applicable at  
16 trial, provided that the information has sufficient indicia of  
17 reliability to support its probable accuracy."

18 Okay, so that's the standard. And it's not that it's  
19 subject to cross. It's not that it's admissible. It's a  
20 different standard.

21 Now, that's only part of your point. Your major point, I  
22 think, is that there's no way to test its credibility. Its  
23 reliability. And I have that in mind.

24 **MR. JACOBS:** (Nods head)

25 **THE COURT:** But I want us all to be operating under

1 the same standards, and make sure that the words that we use  
2 when we discuss this is within -- that we have at least a  
3 common understanding as to what the standard is.

4 **MR. JACOBS:** I agree with Your Honor about the  
5 standard. And so it's not that it would be improper to rely on  
6 a 302, if it weren't contested. We -- we rely on their 302s as  
7 evidence, because they're not contested. But we have a number  
8 of people who have come forward who have clearly changed their  
9 stories. We've, you know -- could go into detail, but that's  
10 spelled out in our briefs. And these are obviously people who  
11 have a significant incentive to tilt their testimony in a way  
12 that is favorable to the government, since the government is  
13 making recommendations on their sentencing before Your Honor.

14 So where we've raised serious questions about their  
15 credibility, the government could have, should have come  
16 forward -- we said it in our opening brief. Where it's  
17 contested, you need to come forward with witnesses. They  
18 haven't done that. I don't see anybody they're ready to call  
19 to the stand today.

20 Third is we know that a number of the records that they're  
21 relying on are inaccurate. Put aside admissibility, their own  
22 -- the testimony of some of the people who prepared them say  
23 that they're inaccurate in at least some respects.

24 With respect to the volume of commerce, the government had  
25 eight months. Did they come forward with an expert to say:



1 This is how volume of commerce should be calculated? Did they  
2 come forward with other cases beyond the related cases where  
3 VOC wasn't contested, and where people had either stipulated or  
4 not challenged the volume of commerce?

5 So, I don't think that there's any excuse for the  
6 government, with as much time as they had, to be as unprepared  
7 as they were for the hearing. And to just say: Okay, accept  
8 at face value.

9 We're here. Mr. Giraud, I can assure the Court, is  
10 extremely remorseful about this crime. But we're here because  
11 we have never been able to get the government to move past the  
12 statement: Well, other people agreed to that, so we're not  
13 even open to discussion.

14 But, I think that it would be helpful to get into a  
15 discussion specifically of volume of commerce. So if I could,  
16 Mr. Seebald --

17 **MR. MAST:** Your Honor, may I be heard?

18 **THE COURT:** Yeah.

19 I want to give the government the opportunity to respond  
20 to your remarks.

21 **MR. JACOBS:** Sure. Thank you, Your Honor.

22 **MR. MAST:** Your Honor, a few things.

23 The first of which is this morning, in Mr. Giraud's reply  
24 brief, he contends the government dumped gigabytes of data in a  
25 way that would violate his due process. Nothing could be

1 further from the truth.

2 The government identified every document supporting  
3 Giraudo's volume-of-commerce calculation in February, by Bates  
4 number, and submitted that to Mr. Giraudo, and submitted it to  
5 the Probation Department.

6 Giraudo has had the discovery which identifies -- which --  
7 you know, he can pick out the particular documents that the  
8 government had identified. And he's had that discovery for  
9 three years. There hasn't been a single new document submitted  
10 to the Court in the government's submissions. None of it is  
11 anything other than what's been identified to Mr. Giraudo and  
12 the Probation Department in the list of rigged properties that  
13 supports its volume of commerce.

14 So he has had ample time to challenge specific properties,  
15 to challenge whether a property should be included on that  
16 list. And has not done so. He's, instead, presented sort of  
17 one-off challenges. And each time, the government has been  
18 able to refute that that property should come off the list.  
19 Each time, the government has been able to come forward with  
20 the specific evidence that Mr. Giraudo refers to, and indicate  
21 why that property should remain on that list.

22 Next, as it pertains to witness 302s, as the Court alluded  
23 to, hearsay is permissible at a sentencing hearing if it has an  
24 indicia of reliability. Here, the witnesses have consistently  
25 identified Mr. Giraudo as the leader/organizer in this offense;

1 have consistently described the conspiracy; even in their  
2 sentencing memoranda, have indicated the role of the Big 5, the  
3 role of Mr. Giraud.

4 Now, Mr. Giraud could have requested an evidentiary  
5 hearing, but didn't do so. And the Court can consider those  
6 302s, given their consistency, given their overall reliability,  
7 in determining the guidelines calculation, whether that  
8 pertains to volume of commerce, whether that pertains to  
9 leader/organizer, or whether it pertains just to the 3553(a)  
10 factors of Mr. Giraud's involvement and culpability.

11 The final point I want to make is just that volume of  
12 commerce has been contested in these related cases. The trial  
13 of Mr. Rasheed and Mr. Marr before Judge Hamilton -- I'm sorry,  
14 Mr. Rasheed was before Judge Donato. Of Mr. Florida (Phonetic)  
15 before Judge Donato as well. These were contested sentencing  
16 proceedings, and the Court accepted the government's  
17 methodology. So the government has submitted a proposed  
18 methodology that's been used by courts in this district, and  
19 would submit that it's appropriate methodology here.

20 **MR. JACOBS:** If I can make two quick observations,  
21 Your Honor?

22 **THE COURT:** Of course.

23 **MR. JACOBS:** First, this is about evidence. This is  
24 about what's in the court record. This is not about they sent  
25 us some discovery months ago where for three years -- we have

1 had -- there's so much material in this case, Your Honor, that  
2 to guess what the government would be relying on -- the issue  
3 is what did they put into evidence. And there was nothing put  
4 into evidence until Thursday at 9:00 p.m. to support these  
5 transactions. So we have not had time to, and it would take  
6 quite a while to, go through them and rebut them.

7 Now, listen, Your Honor, we're not saying that all of the  
8 transactions are -- are wrong. Certainly, there were some  
9 payoffs, there were a lot of transactions that Mr. Giraud was  
10 involved in. But we know that there are errors. We found 13  
11 just over the weekend, that we've cited in our papers filed  
12 this morning. We know that there is other indicia of  
13 unreliability. But it's the government's burden.

14 And so when Mr. Mast says: Well, the defense could have  
15 requested an evidentiary hearing... The defense could have  
16 requested an evidentiary hearing to put on government  
17 witnesses? The government bears the burden of proof. We put  
18 them on notice that these things were in dispute and lacked  
19 credibility. They have to come prove it. And their failure to  
20 do so is the flaw here.

21 **THE COURT:** Okay. Thank you. Anything?

22 **MR. MAST:** Your Honor, just, the submission that was  
23 provided to the Court was used to basically address what the  
24 government anticipated, is that rather than having a set of  
25 objections that -- had a comprehensive set of objections from

1 the defendant in which he contested a number of properties,  
2 we're getting these dribs and drabs of objections.

3 So, now the government has put forth its evidence. It's  
4 already identified that long ago to the defendants. Now it's  
5 there for the Court to examine, should it need to, on a  
6 contested transaction. But it's not anything new. It's not  
7 anything that the defendant hasn't already been put on notice  
8 of, long ago.

9 And just with regard to the 302s, I think Your Honor can  
10 glean from those submissions the consistency of these  
11 witnesses' story.

12 **THE COURT:** I mean, just to make one observation on  
13 the 302s, just because a 302 is contested doesn't mean that the  
14 Court can't consider it without the aid of cross-examination or  
15 without the aid of other arguments.

16 In other words, you take a look at a document, you may  
17 come to the conclusion that it's contested. I mean, the  
18 defense says: This person's a liar, this person can't be  
19 believed, this person's changed his story. All of which, by  
20 the way, may be true.

21 But, I have the 302 in front of me. And then I try to  
22 see: Is the 302 consistent with other information? Because  
23 there are many ways in which fact-finders can operate. One is  
24 through the art of cross-examination. But that's not  
25 guaranteed in a sentencing hearing. And it's not -- and it's

1 not guaranteed, just because a defendant rises to complain  
2 about the accuracy of the information. It doesn't just flow  
3 from that. Otherwise we would have sentencing hearings that  
4 would go on -- and this might -- for years. It doesn't work  
5 like that.

6 What it does is I see something, and it's challenged. And  
7 by the way, I have a lot of challenges from this group  
8 (Indicating) about information that the Court received. And  
9 those challenges can be legitimate. They can be legitimate. I  
10 mean, I'm not saying -- I'm not saying they're fabricated. To  
11 the contrary. They could be legitimate challenges.

12 And so I take a look at it and see, is there other  
13 information that corroborates it or puts it in question?

14 So anyway, I just want to make that observation for the  
15 302s because, Mr. Jacobs, whenever you and I disagree on  
16 something, I'm going to say I disagree with you. Because it's  
17 -- because when I was a defense lawyer, I learned that it's a  
18 lot better to know exactly what the judge is thinking than to  
19 try to have to guess and to make arguments that aren't  
20 convincing to a judge.

21 I think you may have a number of good arguments. I think  
22 you have a number of arguments that I don't ascribe to.

23 So my job up here, I'm to decide what I think is a good  
24 argument, what is not, and then come to some conclusion. That  
25 is what I'm going to do. And I'm not going to be shy about

1 telling either party what I think as we go along. Because I  
2 have some thoughts.

3 So, thank you. But I know you want to turn to your volume  
4 of commerce person.

5 **MR. JACOBS:** Thank you.

6 **THE COURT:** Welcome.

7 **MR. SEEBALD:** Good afternoon.

8 **THE COURT:** Good afternoon.

9 **MR. SEEBALD:** Craig Seebald. Thank you for letting me  
10 address volume of commerce.

11 **THE COURT:** And just so you can see how we operate in  
12 this district, I've got a question to ask you at the beginning.

13 **MR. SEEBALD:** Okay.

14 **THE COURT:** As I read through the papers, your papers  
15 and those of some of the other counsel here, you question the  
16 basic mythology -- mythology -- methodology -- maybe it is  
17 mythology -- methodology of how one arrives at the volume of  
18 commerce. And there's no question, the volume of commerce  
19 amount determination is significant in antitrust calculations.  
20 It's at the core.

21 Once you pass the base offense level of 12 and you make a  
22 determination as to whether or not the bid-rigging enhancement,  
23 SOC, is applied, you then go to the volume of commerce. And it  
24 dictates, one, the adjusted offense level, and two, it has some  
25 bearing on the fine.

1           **MR. SEEBALD:** (Nods head)

2           **THE COURT:** So I'm appreciative of that, that  
3 structure.

4           So, back to the methodology. As I understand it, defense  
5 takes the position -- not all defendants, but I -- I -- I think  
6 you do -- that it is wrong to compute the -- as a starting  
7 point, or perhaps ending point, the purchase price of the  
8 property -- and we can get into purchase price plus payoffs or  
9 purchase price, not payoffs -- it's wrong to use that as a  
10 point. And, and rather, rather, the methodology that should be  
11 used would be: Look at the -- look at a couple of things.

12           One, you would look at what the payoffs were. And two,  
13 look at the degree of participation of any individual  
14 defendant, because under the volume-of-commerce analysis one  
15 can take -- make the argument that the defendant's personal  
16 participation in a particular transaction is guidance for  
17 whether or not to apply the volume of commerce. That is what I  
18 understand your argument to be.

19           So I know you are about to argue, and I want you to know  
20 that at least you can correct me in your argument -- and I'll  
21 turn to you in a minute -- if you think I don't understand your  
22 argument. But that's, that is as I understand it.

23           **MR. SEEBALD:** (Nods head)

24           **THE COURT:** So I go back to the first point. And I  
25 try to understand why it is wrong, incorrect, in the volume of



1 commerce, to accept the Department of Justice's interpretation,  
2 which is that the purchase price of the entire property should  
3 be considered. Because they say it's not like a sale of a  
4 component part, like wheels in a -- in a station wagon or a  
5 car. You're selling the whole thing.

6 Now, true, you're selling the whole car. But it's the  
7 price of the steering wheels that are fixed. In this case,  
8 it's the price of the property that is fixed in some manner.  
9 And while one can say that it doesn't necessarily mean that the  
10 price is fixed in toto, or completely by the bid rigging  
11 system, that's not really the test for volume of commerce,  
12 because the question is: What volume of commerce was affected?

13 I wish I had it right --

14 **MR. SEEBALD:** No, that's correct.

15 **THE COURT:** 2R1. What volume of commerce was affected  
16 by the transaction. And again, it's hard to see why you  
17 wouldn't use the purchase price as a component.

18 And I'll give you two examples, and you can tell me why  
19 I'm wrong.

20 One, a house is listed for sale. The encumbrance on the  
21 house -- and we're just talking about first deeds of trust. We  
22 don't have to get into seconds and other encumbrances and so  
23 forth, but let's get the simple case first. The property has  
24 an encumbrance of 500,000.

25 And let's also say that while there was some arrearage,

1 obviously, in the payment, because it wouldn't be in  
2 foreclosure if it weren't, we're not going to talk about that  
3 right now. We're just going to talk about a \$500,000  
4 encumbrance. And, we are going to talk about a fair market  
5 value -- and I'll get to that in a minute -- of 600,000, or 7.  
6 Doesn't make any difference. But where the house itself isn't,  
7 as the colloquial expression is, under water. That is to say  
8 that it could be sold on an open market, a fair market, for  
9 \$700,000 or \$600,000. It could be sold for more than the  
10 encumbrance.

11 Okay. Now, that's step one. That's sort of the given in  
12 the case. Now we go to step two. And step two is we will  
13 assume for this argument that a defendant has, through  
14 agreement, provided that he will be the only one bidding on the  
15 property. And that he then bids X sum of money. We'll make it  
16 easy, \$510,000. And, and secures the property.

17 So, if we stop a moment and say, well, what has happened  
18 at that point, we can say what at that point is that if the  
19 property were worth 600,000, the defendant got a \$90,000  
20 windfall. And by the way, I'm just sort of rounding out.  
21 About a \$90,000 windfall. If it were \$700,000, he would get a  
22 \$190,000 windfall. Okay. That's the result of the bid  
23 rigging. If, in fact -- and that's if the fair market value  
24 were greater than the price of the encumbrance.

25 Now, we can say, well, a couple of things. Let's say he

1 had to pay \$25,000 to other prospective bidders, for them not  
2 to bid. Or 50,000, or some sum. But less than the fair market  
3 value. Because one has to assume that he wouldn't pay the fair  
4 market value in terms of payoffs, because he would simply, he'd  
5 net zero on that transaction. But he pays something for it, in  
6 order to have what I call clear sailing, in order to bid.

7 Okay. There it is. That's one type of case. Do you  
8 measure the volume of commerce as the \$25,000 that he paid in  
9 bids -- in payoffs? Do you measure it by the difference  
10 between the fair market value of that property and what he paid  
11 for it? How do you measure the volume of commerce?

12 And I would -- well, let me just finish my whole  
13 hypothetical.

14 **MR. SEEBALD:** Okay.

15 **THE COURT:** Sorry that you're going to have to listen  
16 to this. But hopefully, if I tell you about it, I won't have  
17 to tell all the other people about it.

18 Okay. So we need to know: How do you measure the volume  
19 of commerce in that situation? Now, that's sort of the easy  
20 situation from the Court's point of view, because it seems to  
21 me that the only way you can do it is by -- is by the -- in  
22 total of the purchase price, maybe plus -- plus the payoffs or  
23 not.

24 And the reason is you don't know the fair market value of  
25 the property because there wasn't a market that was allowed to

1 operate as a fair market would be. That's what's called an  
2 auction. That's why they have auctions, to determine the fair  
3 market value. And this was an auction that was -- that was  
4 impeded or defeated by the actions of the defendant. So that  
5 is one scenario.

6 Now I'll give you another scenario, which, by the way, the  
7 second one I think is the more realistic scenario. And that's  
8 this: Again, the house has a \$500,000 encumbrance. But there  
9 were a lot of reasons why a house could have a \$500,000  
10 encumbrance. First, the initial loan could have been 500,000,  
11 but maybe it was 250 or 3. And then there were the penalties,  
12 and the interest, and the costs of sale, and the taxes, and da,  
13 da, da, da, da, that got it up. What would the bank be willing  
14 to take?

15 Well, we know what the bank would be willing to take,  
16 because the bank would be willing to take, I think, what it  
17 listed as the minimum bid. And I could be wrong, but I think  
18 that is the way it works. The minimum bid can be and  
19 frequently was less than the overall encumbrance of the  
20 property.

21 And the overall encumbrance of the property can be  
22 measured by not only what the bank had secured as the first  
23 deed of trust; it could be a second deed of trust. It could be  
24 any number of things, because the second deed of trust and  
25 subsequent deeds of trust would be wiped out by the foreclosure

1 in the first deed of trust. As I remember from my real estate  
2 deals when I was in private practice. Maybe it's changed, and  
3 maybe my memory is gone. But at any rate, that's the way it  
4 sort of worked.

5 Foreclosure on the first would -- would terminate the  
6 interests of the second and third. But there may be  
7 differences in that, and I don't know that it makes a  
8 difference here.

9 So what I think we look at in a situation like that is  
10 maybe the bank would be willing to take \$300,000 for the  
11 property, as a minimum bid. Now, remember, it's the same  
12 property that's worth 600,000.

13 So the bidder comes in, the same scenario, pays 25,000,  
14 becomes the same person to -- becomes the sole bidder. And he  
15 bids 350. 400. Some other sum. But, under the encumbrance.  
16 And he gets the property. First of all, it's at the minimum  
17 bid. And, and secondly, reflecting a basic truth that isn't  
18 really reflected in anything I read, which is for the most  
19 part, banks don't want to own real estate; they want to make  
20 loans. They are not -- you know, they're not an REIT, they're  
21 not a real estate investment company. Though, of course, they  
22 do invest in real estate. But they invest in real estate as  
23 lenders, not as owners. And therefore, they could. And.

24 If your answer to the question is -- to my question is:  
25 Hey, remember, Judge, you said it was worth \$600,000, the banks

1 could get it and sell it for 600,000. By the way, not to put  
2 too fine a point on it, that's exactly what they thought they  
3 were doing. That's what the foreclosure sale was all about.  
4 Bring in the public, and see what the property will bring.

5 So, admittedly, they can always pull it back. But pulling  
6 it back doesn't make them whole. And they're still stuck with  
7 -- they may be able to, by the way, foreclose out the second  
8 and third deed of trust. And from that point of view, maybe  
9 it's better, maybe it isn't. I don't know. And they take  
10 possession of the property, rather than the owner of the  
11 property having possession.

12 But that is a mixed bag to a bank. A bank wants to, as a  
13 general rule, liquidate its real estate holdings in these types  
14 of loans. For a variety of reasons which, again, I never did  
15 any banking, but I have to believe it goes to their loss ratio  
16 quotas, it goes to their liquidity quotas, it goes to what  
17 they're entitled to lend, it goes to their pool of investments.  
18 After all, a bank owns more than one house. And as a general  
19 rule, it lends on more than one house; they lend on a pool of  
20 houses. And so some will bring in more; some will bring in  
21 less. The ones that bring in more pay for the ones that end up  
22 way underwater. And that's generally the way it works. It's  
23 an overall pool, overall pool of investments. So you can't  
24 quite look for determining the volume of commerce as to what  
25 the banks listed as the minimum bid for which they would take

1 the property.

2 So that brings me back to the point that we start with:  
3 How, then, do you really measure the volume of commerce  
4 affected if you choose some measurement other than what the  
5 government has chosen as what they believe to be their  
6 preferred measure?

7 So, with that, I know it may be not the argument you  
8 anticipated to make.

9 **MR. SEEBALD:** Nope.

10 **THE COURT:** But I now turn it over to you, because  
11 those are the questions in my mind that have to be answered in  
12 order for me to understand your theories.

13 **MR. SEEBALD:** Okay. Well, let me start with your  
14 second hypothetical. And I start with also the guideline which  
15 talks about volume of commerce. It's the commerce attributable  
16 to that defendant. What he could impact. And where you have a  
17 minimum that the bid would accept. And as I understand in all  
18 these properties we're talking about, that was the case, where  
19 the minimum was something -- the minimum was in effect for all  
20 these properties.

21 So none of these defendants could affect the sales price  
22 below that minimum. If the minimum was \$300,000, the house was  
23 never going to sell for below \$300,000, because the bank was  
24 going to take it off. So that could not be affected. So it  
25 has to be a number, the volume of commerce has to be a number

1 that is something that the defendants could affect.

2 They couldn't affect -- so a 300,000 min, that house would  
3 never sell for \$280,000. It would never sell for \$290,000. It  
4 could sell for 320, it could sell for 350 --

5 **THE COURT:** I'm going to stop you, or you lose me,  
6 you've lost me.

7 Let's say you have your 300,000. Your argument is: Look,  
8 the \$300,000 can't be affected because they were going to take  
9 it away. They were going to take it off.

10 **MR. SEEBALD:** Correct.

11 **THE COURT:** To which I ask you the question: Well,  
12 does that mean they can't sell their house? Why are they not  
13 affected?

14 Let's say you've got a \$300,000 asset, but you need  
15 \$301,000 to sell it. Or \$300,000 to sell it. And I get  
16 everybody in a room and I say you know what? Let me tell you  
17 about this guy, he's got a \$300,000 house, let's wait a week,  
18 let's wait a month, let's wait six months. We'll get it for  
19 less.

20 Question: Have you affected the \$300,000 house? I think  
21 you have. I think that's exactly. If you take all the bidders  
22 out, you've affected the -- you've affected \$300,000. So  
23 that's where you lose me in your argument.

24 **MR. SEEBALD:** But of course, the houses we're talking  
25 about are houses that sold. We're counting just houses that



1 were sold. So we have to look at the fact that these  
2 defendants couldn't affect any part of the sales price that was  
3 part of the minimum.

4 **THE COURT:** Should we measure -- should I measure,  
5 should I include in the measure then those houses that weren't  
6 sold?

7 **MR. SEEBALD:** No, I don't think the government's  
8 proposing that, so I don't think you should. We're just  
9 looking at those houses that were sold --

10 **THE COURT:** They were affected, weren't they?

11 **MR. SEEBALD:** Yeah, but that's not part of what they  
12 are asking us to do.

13 **THE COURT:** No; isn't that part of the conspiracy?  
14 Isn't -- in other words, isn't it part of their bid-rigging  
15 conspiracy that they prevented fair bids at the fair market --  
16 they prevented bids at the fair market value? And isn't that  
17 an example of where they could have done it?

18 You may say there is no evidence of that in the record. I  
19 don't know whether there is or not. But I'm just doing the  
20 analytical -- at least, my version of the analysis that brings  
21 into question what you just said.

22 **MR. SEEBALD:** Yeah. Well, my answer is exactly what  
23 you anticipated. That -- you presented a hypothetical. I'm  
24 not aware of any evidence in the record -- they're not pushing  
25 that, so I don't think that's something we should focus on. We

1 are focusing on the houses that sold and what commerce was  
2 impacted by the defendants' conduct.

3 And I'm saying the minimum price on all these houses had  
4 minimum prices. That wasn't impacted. The banks got that  
5 minimum price. It is some measure above the minimum price that  
6 should be counted.

7 **THE COURT:** So do you concede, then, that the volume  
8 of commerce in your theory is maybe the difference between the  
9 minimum price and, and the price that it was obtained at plus  
10 payments?

11 In other words, minimum price, 300. Take my hypothetical.  
12 Minimum price, 300. Do I have -- and it sold for 500. Sold  
13 for 500. It didn't sell for 5. Minimum price 300 -- now I'm  
14 getting lost in my own hypothetical. Which, if you know me,  
15 you would say: That's typical; he can't carry it forward.

16 I'm trying to figure out that if -- if he gets the house  
17 for more than the minimum, is the delta between the minimum bid  
18 and what he paid a component of the volume of commerce?

19 Got that? I think I said it right. At least I tried to.  
20 Well, he buys it for 500. Minimum bid, 300. That 200,000, is  
21 that part of it? Is that part of the value of commerce?

22 **MR. SEEBALD:** Let me say one thing. I don't think the  
23 spreads were ever that big. But for purposes of the  
24 hypothetical, yeah --

25 **THE COURT:** Would they be included --

1           **MR. SEEBALD:** I would say yes, but it would be --  
2 you've got to look at the payoffs. Because the payoffs were  
3 the sum indication of what that amount over the minimum price  
4 was reflective of what the market price would be.

5           **THE COURT:** I'm sorry; once more.

6           **MR. SEEBALD:** My point is, yes, in concept, it is --  
7 it's the difference between the minimum price and -- in -- our  
8 proxy for determining that is the payoffs, the payoffs that  
9 were made not just to one bidder, but to others, that that made  
10 up --

11          **THE COURT:** Now let me talk about the payoffs.

12          **MR. SEEBALD:** Okay.

13          **THE COURT:** Because there are a lot of ways payoffs  
14 are made that I've seen. One is -- and by the way, there's  
15 something we can say that we'll all agree upon. The value of  
16 the -- the amount of the payoffs will be less than the fair  
17 market value of the property. Because once they approach and  
18 equal the fair market value of the property, there is no reason  
19 for anybody to pay them off. Hey, I'll pay you \$50,000 if you  
20 don't bid. But the house is not worth \$50,000. So, you're not  
21 going to get it. So, we know that.

22          Now the question is: If you just rely on the payoffs,  
23 themselves, we know it will be less than the fair market value  
24 of the property. Because you won't have a sale if it's equal  
25 to the fair market of the property.

1           So why are the payoffs -- though they may be an indication  
2 of some of the economic commerce that's affected, it may not be  
3 the whole thing. That's A. I'll get to B.

4           B, where the payoffs are traded, are trade -- traded to --  
5 You bid on this, I'll give you that, it's -- when it's *quid pro*  
6 *quo*, when the trade-offs are not monetary trade-offs but,  
7 rather, allocation trade-offs to bid on other properties, and  
8 then a person to refrain from bidding on the other property, it  
9 becomes incalculable.

10           In other words -- because it's favors. And it's  
11 estimates. And it's unknown in terms of its economic value.  
12 And that's another aspect of why trade-offs are poor  
13 measurements of the volume of commerce.

14           **MR. SEEBALD:** Well, to those two points, I would say  
15 for the first point -- I would say for the first point, I'm not  
16 sure that that's the case, that the -- what you said, that we  
17 should presume that the payoffs are not indication of the  
18 difference between the minimum bid and the actual value. It's  
19 their burden. If that's the case, let them show evidence. I  
20 think we're talking about hypotheticals.

21           **THE COURT:** I'm just using logic. I'm just saying you  
22 wouldn't be able, with a straight face, to come up and tell me  
23 the payoffs equal the fair market of the property, because why  
24 would -- why would I go into a conspiracy where I have to pay  
25 somebody the exact same price that I would pay Bank of America

1 for the property? It's useless bid rigging. It's useless. It  
2 has no economic value to me.

3 One thing I would say, these people are sophisticated real  
4 estate entrepreneurs. And if they saw -- and I know, being a  
5 homeowner myself, I know you can make a bad real estate  
6 investment. However, they made a life of real estate  
7 investments. They studied it. They participated with great  
8 frequency at foreclosure sales. And if one looks at the end  
9 result, they made very wise economic decisions in acquiring  
10 real estate. Across the board.

11 I'm not saying in these particular cases, because I know  
12 you have some issues as to these particular cases. But I'm  
13 saying given the scope of the bid-rigging conspiracy, and given  
14 the devotion of time and effort to achieving the results of  
15 this conspiracy, they wouldn't do it unless it made them some  
16 money.

17 And I'm not trying to give a QED argument, therefore it  
18 made sense. I'm just saying I can't understand why they would  
19 possibly contrive a system where the payouts equal the fair  
20 market value of the property.

21 Why? Why? Just give me a reason why.

22 **MR. SEEBALD:** Well, because they knew they had to pay  
23 off -- they were looking to get the house, right? And they  
24 were trying to get it. And so the person who was forgoing the  
25 rate had a sense of how much the house was going for, and they

1 needed to be paid some level to compensate for how much the  
2 house would have gone for in a competitive market, for  
3 instance. So --

4           **THE COURT:** That's the problem with banks. You know,  
5 we talk about a buying seller (sic) and a buying buyer in an  
6 open market, and that's how you set values in a real estate  
7 business. But these sellers were not -- they were your  
8 normative bank sellers. But they weren't the same thing as  
9 those individuals who normally sell property. That is to  
10 say -- with a qualification. They were a particular type of  
11 seller. Maybe that's the fair way to say it. A particular  
12 type of seller, where they had a number of components for their  
13 costs in the property.

14           And also, I'll grant you, there was the potential of real  
15 estate -- of appreciation in the market. And especially in  
16 California, we can take judicial notice that almost every  
17 property, at least in certain areas, over time became more  
18 valuable. Not all.

19           But indeed, these properties -- and again, you make this  
20 point. You say: These sales were necessitated by -- by the  
21 banks. By the way the banks charged.

22           **MR. SEEBALD:** (Nods head)

23           **THE COURT:** And a lot of these wouldn't have happened,  
24 had sales occurred absent the certain banking practices. I'm  
25 not here to comment on the banking practices. And I suggest

1 that you shouldn't, either, only because it -- it -- it's by  
2 the bye. It is what it is.

3 But the fact of the matter is that banks engaging in those  
4 practices have perhaps much greater leverage -- or much -- they  
5 have a cost schedule for any given piece of property that's  
6 very different from the normal what I call non-bank seller of  
7 property. Because a lot of what their encumbrance was, I'll  
8 characterize it as soft fees. They will be rate increases,  
9 they'll be penalties, they'll be interest.

10 None of which, by the way -- I've overstated it. Some of  
11 which would not be, in the -- in the consideration of your  
12 normative seller of his or her own house. Whatever they paid,  
13 they paid. That's the cost they have into the house. If  
14 they've done improvements, that's a cost they have in the  
15 house. Had to get a loan, paid interest, that's a cost they  
16 have in the house. They want to recover it all, I understand  
17 that. But those are hard costs, hard, because it's the  
18 seller's costs.

19 For a bank, some are hard, some are soft. They may be all  
20 in the books. I'll grant you that. They're all there. But  
21 are they real costs? Well, there's no question that if I  
22 loaned you \$200,000, we start with that, that's \$200,000.  
23 That's money in, money out. Or that's money out.

24 So now, after that, everything is, yeah, a lost  
25 opportunity to invest the money in a different place at a

1 different rate of interest, failure to make payments on time,  
2 on and on and on. I characterize those, from the lender's  
3 point of view, as soft costs.

4 **MR. SEEBALD:** (Nods head)

5 **THE COURT:** And therefore, as soft costs, they are  
6 more likely written off than the hard costs. Though that may  
7 be a bit of a fiction, and it would depend on the individual  
8 bank, and it would depend on the individual market at the time.  
9 And the practices at the time. I understand all that. I  
10 understand all that.

11 **MR. SEEBALD:** (Nods head)

12 **THE COURT:** But, I interrupt. Go ahead.

13 **MR. SEEBALD:** Well, I guess the second point was you  
14 suggested that there might be, like this notion of bid  
15 rotation, that you somehow would get compensated by, oh, well,  
16 on the next time around.

17 But that really wasn't the situation here. You had  
18 numerous players, and just was an ad hoc decision as to who was  
19 going to be there and what the partnership would be on that  
20 given day and who might get a payoff. It wasn't a sense, in a  
21 classic bid rotation case. And we'll get into that more when  
22 we talk about the bid rotation. So I don't think there was  
23 these payoffs in terms of, oh, forbearance on a future bid.  
24 That was not the case.

25 But I guess coming back to the fundamental point, I think



1 if you look at the purchase price, the entire purchase price,  
2 it really is overstating the volume of commerce. We have --  
3 the situation is we have an ad hoc agreements by guys that are  
4 going -- individuals going to these foreclosure auctions every  
5 week. They are handing money around, about properties.  
6 There's a minimum price that they can't affect. So it's  
7 something -- the volume of commerce can't be the full price.  
8 It's got to be some smaller portion that really was something  
9 that the defendants, themselves, could affect. It's not the  
10 full price. These guys didn't have the ability to affect the  
11 whole price.

12 We can't ignore these minimum prices. Every one of these  
13 properties we're talking about, as far as I know, had minimum  
14 prices. They could only affect some amount above that minimum  
15 price. We have put forward that you should look at the amount  
16 of the payoff. The government says it's the whole thing or  
17 nothing. All I'm saying is they've got the burden of proof and  
18 I think they are overstating --

19 **THE COURT:** I don't think they're going to say it's  
20 nothing.

21 **MR. SEEBALD:** Yeah, I'm sure they're not. But --

22 **THE COURT:** So let me ask you.

23 **MR. SEEBALD:** Yeah.

24 **THE COURT:** Do you have a case that says that?

25 **MR. SEEBALD:** Do I have a case that says that?

1           **THE COURT:** Yeah, a case in the law. Do you have --  
2 is there some case that I should look at that says what you've  
3 just said?

4           **MR. SEEBALD:** Not a case. I think we've pointed to  
5 some of the sentencing decisions in the component cases. I  
6 would rely on that.

7           I think one of the things that you see in all of this and  
8 you see in the government's paper, there's not a lot of volume  
9 of commerce decisions out there that are particularly relevant.  
10 So unfortunately, I think the answer to your question to many  
11 of those questions like that is there's not a lot out there --

12           **THE COURT:** Not yet.

13           **MR. SEEBALD:** Not yet.

14           **THE COURT:** That's rather a pessimistic view for the  
15 defense to take. And I won't ask you to take that. Okay. I  
16 appreciate it.

17           Do you want to respond?

18           **MR. MAST:** Yes, Your Honor.

19           I think the -- the volume of commerce is actually a lot  
20 simpler than it's being made out to. It states -- it's  
21 attributable to an individual participant in the conspiracy,  
22 the volume of commerce done by him or his principal in goods or  
23 services that were affected by the violation. Here the goods  
24 or services -- goods in this case -- are foreclosed homes.

25           There's no price-fixing case where the price-fixing fixes

1 the entire product or the entire price of the product. In  
2 every instance, the price-fixing is increasing what would be  
3 the cost the seller would provide, absent the price-fixing.  
4 But the volume of commerce is designed so you don't have to do  
5 that gain-or-loss analysis.

6 The volume of commerce in the commentary makes clear, it  
7 says that offense levels are not based directly on the damage  
8 caused or profit made by the defendant, because damages are  
9 difficult and time-consuming to establish. That's the  
10 commentary under the background of the -- of 2R1.1.

11 What the volume of commerce does is say: You look to the  
12 good that is price fixed or rigged. You take the price of that  
13 good and in this case, the price of the payoff, to measure the  
14 volume of commerce that's done by the affected product. Here,  
15 the affected product is clearly foreclosed homes.

16 I think it's notable to address what the government is not  
17 contending is counted. Here, it does not include properties in  
18 which Giraudo took a payoff, received a payoff not to bid.  
19 It's only counting the purchases that he made. It doesn't  
20 include every purchase he made during the duration of the  
21 conspiracy, only the ones in which it has evidence.

22 The litigation on volume of commerce where you do have  
23 decisions are cases in which the Court says once you have a  
24 violation, and you show that violation, you can pretty much  
25 presume that the good is affected throughout the duration of

1 the conspiracy.

2 Here, the government took a much more conservative  
3 approach, and said that: We're not going to count every single  
4 purchase that Giraudo makes during the conspiracy. We're only  
5 going to account for the purchases he makes where we have  
6 evidence of bid-rigging on that particular transaction.

7 The volume of commerce proposed by the government does  
8 also not include the properties that he was not involved in,  
9 nor does it include the price that the property was resold  
10 after it was flipped or rehabilitated.

11 So the volume of commerce is actually a much simpler task  
12 than calculating the loss or the gain. And the guidelines  
13 account for that. So what the government's methodology  
14 proposes is quite simple.

15 You count the purchase price of the sale at the auction;  
16 you count the payoff because that's a good measurement of what  
17 that would have gone for at the -- but for the bid-rigging. I  
18 think Your Honor is correct that it would have gone higher in a  
19 fair competitive market, but the evidence we have is the price  
20 of the payoff. And therefore, you attribute that to the volume  
21 of commerce. And then you add it all up together, and you get  
22 36.6 million between San Francisco and San Mateo County, and  
23 there's your volume of commerce.

24 You don't need to bring in experts, you don't need to  
25 bring in what would have this been, but for price-fix -- or the

1 rigged conduct. You just take the sale of the rigged product,  
2 and that's your affected commerce.

3 **THE COURT:** Okay. So let's move on to -- well, yes.

4 **MR. SEEBALD:** I don't know if you are moving there --

5 **THE COURT:** Well, no, I want to go -- I want to  
6 resolve this. And then I want to move on to the other  
7 objections. So.

8 **MR. SEEBALD:** I think this fits in with this, is the  
9 proportionality point. We haven't talked about that. Because  
10 I think that's very important to the volume of commerce. All  
11 of these houses, properties we're talking about, were purchased  
12 by not just one person. Joe didn't buy all these houses. It  
13 was two, three, four or five people buying these houses.

14 And going back to the language of the --

15 **THE COURT:** If they are part of the conspiracy, if  
16 they are part of the conspiracy, then can you attribute that  
17 sale to Mr. Girauda?

18 **MR. SEEBALD:** No, because under the guidelines, it is  
19 -- the guidelines made -- and there's actually -- there's some  
20 criticism of the guidelines out there on this point, that they  
21 didn't go there. But they didn't go there. It is sales  
22 attributable to that defendant.

23 They don't take the joint-and-several-liability parts;  
24 they say what was attributable to that defendant.

25 **THE COURT:** Well, it says: Done by him or his

1 principal.

2 **MR. SEEBALD:** Done by his principals.

3 **THE COURT:** Okay, so let me go to the government.

4 What is your argument that if it were -- if Mr. Girauda  
5 didn't, himself, buy X piece of property, but somebody else  
6 did, is it your view that the somebody else who did it is his  
7 principal?

8 **MR. MAST:** Not just a general co-conspirator in this  
9 case. But when he formed a joint venture agreement with four  
10 other partners, primarily the defendants who are here today,  
11 but also other -- other co-defendants and other individuals who  
12 weren't charged, when he forms a joint venture agreement, that  
13 joint venture becomes the principal purchasing the property.

14 It's actually not very different from the more standard  
15 price-fixing case where you have a CEO, you have a senior  
16 vice-president of sales, and then you have a sales manager.  
17 And each of them are attributed the volume of commerce that  
18 their company is doing. And they all get that same volume of  
19 commerce, because it's him or their principal.

20 So --

21 **THE COURT:** So it's -- so the defense is right, it's  
22 not based -- you can't base it on a conspiracy theory. You  
23 base it on joint-venture theory.

24 **MR. MAST:** Right, Your Honor.

25 **THE COURT:** Joint-venture theory in which the entity,

1     itself, is the --

2             **MR. MAST:** That's correct, Your Honor.

3             **THE COURT:** -- is the -- the conspiracy -- is the --  
4     is basically the conspiracy to purchase in San Mateo County and  
5     in San Francisco County.

6             **MR. MAST:** Right. And just to be clear, if Mister --  
7     to use defendants as an example, if Mr. Rezaian and  
8     Mr. Grinsell arranged an agreement not to bid, and purchased  
9     that property with two other co-conspirators, that would not be  
10    attributed to Mr. Girauda.

11            But if Mr. Girauda and Mr. Rezaian and Mr. Grinsell formed  
12    a joint-venture agreement and paid others not to bid, purchased  
13    that property, the whole purchase price is attributed to each  
14    of those defendants.

15            **THE COURT:** That's how you did it.

16            **MR. MAST:** Correct.

17            **THE COURT:** Okay.

18            **MR. SEEBALD:** But this isn't a joint venture. It's  
19    not a corporation. These are several guys that happened to  
20    show up that day, and ad hoc, decided to buy a house and split  
21    the house between them. Or among them. So, you're really  
22    taking advantage that you get to double, triple, quadruple  
23    account for this. Again, the guidelines talk about what is  
24    under you.

25            I think if the government wants to prove a principal case,

1 then I think we need to prove it. Tell us on each one of these  
2 transactions, who was each one's principal. I think you can't.

3 This goes back to what Mr. Jacobs was saying --

4 **THE COURT:** I think he said it. I think he's  
5 disclosed it. Whether he's right or not is another issue. He  
6 said that each of the five people act as the principal, as each  
7 other's principal, provided that the agreement is, what,  
8 between themselves, or they're acting -- they are acting  
9 together to prevent a sale at the fair market value by  
10 discouraging, through payments or otherwise, bidding from  
11 someone who's outside the joint venture.

12 **MR. MAST:** (Nods head)

13 **THE COURT:** That's their argument.

14 **MR. MAST:** (Nods head)

15 **THE COURT:** That's their argument. They didn't charge  
16 it as a joint venture.

17 **MR. MAST:** That's correct, Your Honor.

18 **THE COURT:** They charge it as a conspiracy.

19 Didn't you? I mean, I have to take a look at it but I --  
20 aren't Counts 1 and 6 conspiracies?

21 **MR. MAST:** They're bid-rigging counts. And it's not  
22 charge -- we're not charging --

23 **THE COURT:** I don't have the indictment. Somewhere I  
24 have the indictment. I always have the indictment somewhere.

25 What does it say? You know it better than I. Count 1,



1 what does it say?

2 **MR. MAST:** It's a bid-rigging, that they entered into  
3 a conspiracy to rig bids.

4 **THE COURT:** It's like a 182, whatever it's called.  
5 It's a conspiracy.

6 **MR. MAST:** And it is a worthwhile point that the  
7 government did not charge just the mere forming of a joint  
8 venture. And even though there was evidence that these joint  
9 ventures were formed for anti-competitive purposes, that they  
10 were formed to suppress competition as a general sense, but  
11 those properties are not included in Mr. Giraudo's list.

12 **THE COURT:** Let's assume for the moment, let's assume  
13 for the moment that I subscribed to the defense theory that the  
14 joint venture doesn't work. It's a conspiracy, and therefore,  
15 we're guided by looking at 2R1.1. Okay? As to what was the  
16 volume of commerce done by him or his principal, but that --  
17 let's take done by him.

18 **MR. MAST:** Uh-huh.

19 **THE COURT:** Let's just take Mr. Giraudo. What is it?  
20 Using your purchase price, da, da, da, da, da, da, da, doing  
21 your valuation, what does it all add up to?

22 **MR. MAST:** It wouldn't change, Your Honor, because  
23 we've only attributed the commerce that Mr. Giraudo  
24 participated in the rigged sale.

25 **THE COURT:** So you say it's the same.

1           **MR. MAST:** Correct. And I think -- one example -- and  
2 this defendant is not present, but Mr. Appenrodt --

3           **THE COURT:** Why do you need the joint venture?

4           **MR. MAST:** The joint venture is just an illustration  
5 of when these partners were forming together, they were acting  
6 as one another's principals.

7           **THE COURT:** Well, I don't know. I mean, maybe, and  
8 maybe not. I mean, the problem with a joint venture -- a joint  
9 venture obviously can be a conspiracy.

10           But I'm trying to figure out, you know, a joint venture, a  
11 complicated legal theory out there. It's not a crime. A  
12 conspiracy is nice and easy. It is an agreement by two or more  
13 people to violate the law. Clearly, we have a conspiracy.  
14 There is nobody around who has said there's no conspiracy here.  
15 They pled guilty to a conspiracy. So it's a conspiracy.

16           Now, the question is: Is it more than that? I don't  
17 know. I don't want to say right now, but I'm trying to figure  
18 out if it's that, if it's just that, what is Mr. Giraud's  
19 volume of commerce? What is it? How much?

20           **MR. SEEBALD:** Can I --

21           **THE COURT:** I'm really asking the government. You're  
22 quite right, the government has to prove it. Because they're  
23 saying it's more than 10 million.

24           **MR. MAST:** Yes. And --

25           **THE COURT:** Well, okay, wait a minute. Wait, slow

1 down. I should say that to myself.

2 Anyway, how much is it?

3 **MR. MAST:** It is, Mr. Giraudo --

4 **THE COURT:** Just a conspiracy. Forget the language of  
5 it. In other words, Jones bids on it. And he's a member of  
6 the conspiracy. But he's not Mr. Giraudo. How much is it?  
7 How much is just what Mr. Giraudo did?

8 Let's assume for a moment there is no conspiracy. Let's  
9 just start with that. Mr. Giraudo goes out and he buys off  
10 people, not to bid. And none of them are charged, and none of  
11 them -- they're all out there somewhere.

12 We say: Okay, Mr. Giraudo, here...

13 And he comes in and says: Well, you know, I did make an  
14 agreement with two or more people to do this, da, da, da. And  
15 so, you know, guilty.

16 What is the volume of commerce? In this case, what's the  
17 volume of commerce?

18 **MR. MAST:** 36.6 million.

19 **THE COURT:** And how do you -- how are you able to say  
20 that?

21 **MR. MAST:** Because those represent the transactions  
22 which Mr. Giraudo participated in the rigging of the property  
23 that he purchased.

24 **THE COURT:** Okay. So that's his -- so, so, that's his  
25 participation. He participated in each and every of the

1 \$36 million of housing --

2 **MR. MAST:** Right.

3 **THE COURT:** -- provided that you subscribe to the  
4 government's theory that it's the purchase price plus any  
5 payoffs. And that's how we get to the valuation. That's  
6 called real simple.

7 **MR. MAST:** Correct.

8 **THE COURT:** Okay.

9 **MR. SEEBALD:** Can I offer you an alternative  
10 calculation?

11 **THE COURT:** I think you should.

12 **MR. SEEBALD:** Yes. I would like to.

13 So under our calculation, if you -- you start with the  
14 \$36 million. And there were -- as I mentioned, probably  
15 20 percent of the properties, we question whether Joe Giraudo  
16 was involved in. Some of them, he might have taken an interest  
17 after the fact, after the conduct occurred. You eliminate  
18 those, and then you give the proportionality, you come down to  
19 a number below \$10 million. To be exact, 9,000,000.

20 **THE COURT:** 9,000,000 --

21 **MR. SEEBALD:** \$9,031,175. But below 10 million

22 **THE COURT:** Below 10 million, if you take into account  
23 the proportionality.

24 **MR. SEEBALD:** If you take in the proportionality, we  
25 don't need to get to the statute of limitations, we don't have

1 to get to any of the other arguments. You're below 10 million.

2 **THE COURT:** So I've got an easy answer to that. I  
3 just think you are absolutely wrong in taking into account the  
4 proportionality.

5 I don't see anything in any law which says -- other than  
6 -- I do see it, by the way, in terms of the fine that's going  
7 to be imposed, and so forth. But I don't see anything in terms  
8 of volume of commerce as you -- is that you take a look and see  
9 just how much he participated in. There's nothing there.  
10 There's nothing there. Okay. There's no -- there's no  
11 proportionality test.

12 I have to give you credit for thinking about it. But, but  
13 it's not in the law. There's no measure of the volume of  
14 commerce -- it's like, how guilty, in that sense, what  
15 proportion did he share in -- for example, you could have a  
16 thing: Look, they stole \$1,000, but Mr. Defendant in front of  
17 you is only going to get \$10 out of it, so that's the measure.  
18 Huh-uh. That's not there. That's just not there.

19 So, rather than spending your capital arguing that  
20 argument to me, it's not going to work. And clearly, if you  
21 take the proportionality out, you get over 10 million. And it  
22 will be the finding of this Court that -- that pursuant to  
23 2R1.1(b) (2), the Court finds that the volume of commerce was  
24 greater than 10 million, and would add four points for -- as a  
25 specific offense characteristic.

1           And now I would like to turn on role in the offense, to  
2 role in the offense.

3           And by the way, just so everybody -- I don't know -- feels  
4 better or feels worse, I'm going to write an opinion as to how  
5 I came to these different decisions. I mean, I think I have  
6 said something about it now. But I want to, I want to give you  
7 a reasoned decision as to what -- how I came to the calculation  
8 I came.

9           My obligation here, before sentencing, is to come to a  
10 decision. And I think I've done that, in order to aid the  
11 sentencing process.

12           Mr. Weinberg, you're standing up, so I assume --

13           **MR. WEINBERG:** I am, because the Court has heard  
14 argument and made a ruling on an issue.

15           **THE COURT:** As to Mr. Giraudó.

16           **MR. WEINBERG:** Only as to Mr. Giraudó?

17           **THE COURT:** Well, I'm making it as to Mr. Giraudó. I  
18 haven't heard from you. I don't want to hear from you now. I  
19 want to move through each defendant. And you may be able to  
20 say something to me that either differentiates your client, or  
21 suggests to me that I'm wrong about what I've done with  
22 Mr. Giraudó. And I'll listen to both of them.

23           **MR. WEINBERG:** Fair enough.

24           **THE COURT:** But I think I would focus on your client,  
25 Mr. Jacobs.

1           Okay, here we go to the next thing, which I think is -- by  
2 the way, just to address the bid-rigging issue so you don't  
3 spend any time on that, I believe it is appropriate to put a  
4 bid-rigging one-point enhancement. I have read Judge Posner's  
5 case. Judge Posner's case is different from this case.

6           And I will in my written opinion explain why the  
7 differences are significant, and why I'm adding one point for  
8 bid-rigging, pursuant to 2R1.1(b)(1). It's a matter of law, in  
9 large part. Though you've given a factual narrative. And  
10 that's the Court's ruling in that regard.

11           Okay. So, on to role in the offense, 2B -- what is it?  
12 4B, 3B? 4B.

13           **MR. MAST:** 2B1.1.

14           **THE COURT:** 2B1.1. Role in the offense. What?

15           **MR. MAST:** Am I incorrect on that?

16           **MR. DEF1:** It's 2R1.1, Your Honor.

17           **MR. MAST:** I'm sorry.

18           **THE COURT:** No, no, role in the offense.

19           **MR. MAST:** 3B1.1.

20           **THE COURT:** 3B1.1. Isn't it?

21           **MR. JACOBS:** 3B1.1. Apologies, Your Honor.

22           **THE COURT:** 3B1.1. Aggravating role. In this case,  
23 the Probation Department and government urge that I apply (a).  
24 That Mr. Giraudo was an organizer or leader of a criminal  
25 activity that involved five or more participants, or was

1 otherwise extensive.

2 As I understand your objection, it's not that it did not  
3 involve five or more participants. Is that right? You concede  
4 that aspect of it. You say he wasn't the organizer or leader  
5 of the criminal activity.

6 You're not saying both, are you?

7 **MR. JACOBS:** I think what I would say is there was no  
8 organization, there was no organized criminal activity that  
9 involved that many people. Obviously, there were that many  
10 participants in the auctions, and there were five partners. So  
11 it's a --

12 **THE COURT:** And also, it's otherwise extensive.

13 **MR. JACOBS:** Yes.

14 **THE COURT:** It's hard to look at this case and say it  
15 wasn't extensive.

16 **MR. JACOBS:** That's not our point, Your Honor.

17 **THE COURT:** I spent one year in hearings. So I think  
18 it was extensive.

19 Okay, go ahead.

20 **MR. JACOBS:** Your Honor, the *United States v. Weaver*,  
21 which is a Seventh Circuit case, Judge Flaum, 2013, talks about  
22 what you have to have in order to have a role in the offense  
23 enhancement. And there are a number of factors, but there are  
24 four at least that stand out to me.

25 One is: You have to have a hierarchy. You have to have



1 an organization with somebody at the top, and somebody in the  
2 middle, and somebody at the bottom. A hierarchy.

3 Two, you have to tell people what to do. You have to give  
4 instructions.

5 And then you have to -- three, you have to be able to  
6 enforce those instructions -- coerce people, persuade them,  
7 whatever -- in order to effectuate the instructions that were  
8 given.

9 And four, you have to recruit people to the scheme.

10 And then lastly, there's one other here, which is:  
11 Claimed right to a larger share of the fruits of the scheme.

12 In this case, Your Honor, we know from much of the  
13 evidence that's been put forward, and I don't think there can  
14 really be a reasonable dispute about it, that those factors  
15 don't exist.

16 First of all, with respect to hierarchy. Mr. Grinsell, in  
17 his interview with the FBI, talked about there being five  
18 parties. That people were paid in equal shares depending on  
19 what their investment was. That people would decide  
20 individually whether or not they would participate in a  
21 particular joint venture. There was no criminal organization.  
22 They worked together.

23 Among the five, some would go out and look at the  
24 property, some would run title searches. Some would show up at  
25 the auction. Some would focus on the rehabilitation.

1 Mr. Rosenbledt.

2 **THE COURT:** How is that not a criminal organization?

3 You mean that some of the things that they did weren't

4 motivated by the criminal organization.

5 **MR. JACOBS:** These are guys just working together.

6 It's not an organization designed to carry out and effectuate a

7 criminal -- a criminal act.

8 **THE COURT:** Yes, it is.

9 **MR. JACOBS:** They are all participating -- sorry.

10 **THE COURT:** Why isn't it?

11 **MR. JACOBS:** Because there's no one at the head.

12 There's no hierarchy. They're all making --

13 **THE COURT:** That's a different point. I heard you

14 about that. I'm trying to figure out why it's not a criminal

15 organization. Even assuming -- whatever the hierarchy is, you

16 talked about they go out, they look at the property, and so

17 forth. I think what you're saying to me is that is consistent

18 with there being no organization. Absolutely right. Of

19 course, it's consistent with it. But just because it's

20 consistent with it doesn't mean it doesn't -- it's not -- it's

21 not -- it doesn't -- it doesn't satisfy the indicia of how it

22 was run. It does.

23 In other words, the absence of that might actually suggest

24 there was no criminal conspiracy. If they didn't bother

25 looking at the properties, and they just bid, I don't know what

1 that would mean. I mean, I don't know that it would mean that  
2 -- it would mean that it was probably a poorly functioning  
3 organization, to me, because they had no idea what they were  
4 bidding on.

5 Just because a criminal organization is inept doesn't  
6 negate its existence. Nor that they are ept -- if that's a  
7 word -- doesn't prove their criminal organization but, it may  
8 be an indication of how they operated. So I don't think that  
9 proves anything to me.

10 **MR. JACOBS:** So Your Honor, the point that I'm making  
11 and maybe I'm not making artfully enough is that yes, there is  
12 a conspiracy here. Right. But not every conspiracy is subject  
13 to the application of this guideline (Indicating).

14 So, yes, they went out, and they did different things as  
15 part of it. But it's not -- it's not a hierarchy, it's not an  
16 organizational hierarchy in the sense that someone is at the  
17 top, directing what other people have to do or need to do.

18 So, you know, Mr. Appenrodt was also interviewed by the  
19 FBI on December 4th, I believe it was. And first of all, he  
20 described Mr. Rezaian and Rosenbledt as the -- to the extent  
21 anyone was a ringleader, and I'm not sure there was, but  
22 Mr. Appenrodt at least described those two gentlemen, not  
23 Mr. Giraud, as the ringleaders.

24 He also said that -- he gave two examples. He was only  
25 aware of two deals that had ever been done that he was aware of

1 where there was a payoff. And they're interesting.

2 The first one involved a confidential informant -- I think  
3 it's actually in the public record in the government's filings,  
4 but I won't say the name -- in which -- Mr. Giraudo. So  
5 Mr. Giraudo -- this is 2010 -- was home sick. And he was out  
6 for most of that year because he was ill. And so  
7 Mr. Appenrodt, as I think the Court knows, volunteered to help  
8 out and go to the auctions in his stead.

9 And I'll come back to the recruitment point in a minute.

10 But Mr. Giraudo said: Why don't you go offer this other  
11 fellow \$5,000.

12 And according to Mr. Appenrodt, he came back, and the guy  
13 said no. So he went back to Mr. Giraudo: The guy said no, he  
14 didn't want the \$5,000. And that was the end of it.

15 Mr. Giraudo didn't say: Go enforce, enforce the rules  
16 against him. You know, take some physical action, threaten  
17 him. Or even, go back to him at all. That was the end of it.  
18 So the hallmarks of instructing people what to do -- of  
19 coercing people to fall in line in a conspiracy are absent  
20 here.

21 The second instance that Mr. Appenrodt was aware of was a  
22 \$30,000 payment that happened, and that involved Mr. Rezaian's  
23 sister. And Mr. Giraudo, as far as Mr. Appenrodt was aware,  
24 was not involved in that payoff, collecting money or giving the  
25 money.

1           Again, Mr. Grinsell said they had equal -- they decided  
2 equally. And he was not aware of Mr. Giraudo ever trying to  
3 punish anyone if they didn't participate in the conspiracy.

4           Now, that's an interesting point, in and of itself, I  
5 think, because the punishment that he said he wasn't aware of  
6 Mr. Giraudo doing was about bidding up someone else in  
7 retaliation for failing to accept a payoff.

8           Now, of course, bidding up in this instance would actually  
9 be pro-competitive. So I'm not sure how it would cut if people  
10 did that. We know that other people would bid other people up  
11 in the -- in the auctions.

12           **THE COURT:** Well --

13           **MR. JACOBS:** But --

14           **THE COURT:** When you say "pro-competitive," that's a  
15 euphemism for an open market, right? That's the way it was  
16 supposed to work.

17           The auctions I've gone to or seen, actually, you can call  
18 them pro-competitive. But what happens is that somebody bids a  
19 dollar, and then somebody bids a dollar fifty. Yes. That's  
20 the way it's supposed to work. It didn't work in this case.

21           But are you saying it never worked in this case? Or there  
22 were times when it did work?

23           **MR. JACOBS:** What I'm saying is that the mechanism of

24 --

25           **THE COURT:** (Inaudible)

1           **MR. JACOBS:** That if you saw enforcement or  
2 coercion -- of course, there's -- you know, with respect to  
3 other people -- I don't think we need to get into this because  
4 it really wasn't Mr. Giraudo -- there was physical threats.  
5 But there's no suggestion that Mr. Giraudo ever did that.

6           So the suggestion would be that somehow he was enforcing  
7 the scheme by bidding up the price on other people.

8           **THE COURT:** No, I think it's also saying that, look,  
9 Mr. Giraudo's sitting there, arguably, with an enormous pot of  
10 money. Both his -- well-documented -- or his, combined with  
11 four other people.

12           **MR. JACOBS:** Yes.

13           **THE COURT:** That's who's bidding against you. So he  
14 could say -- though I don't know what the evidence is, he could  
15 say to a prospective bidder: Well, let's see. I don't think  
16 you should bid on this, because if you do, I'm going to tell  
17 you what's going to happen.

18           Maybe he didn't say this; maybe somebody else said it.

19           What's going to happen is that there's approximately  
20 \$500 million in a pot. And we're going to devote whatever is  
21 necessary to outbidding you. Or, making you pay so much more  
22 money than you want to pay that you'll end up very unhappy,  
23 getting -- paying that top dollar for the property. One or the  
24 other.

25           Now, he doesn't threaten to break your legs. He doesn't

1 threaten any type of physical harm. What he says is: To play  
2 the game, you have to realize who the players are. And the  
3 player on this side of the ledger is somebody who has so much  
4 more money than you do, and is willing to devote it to this  
5 enterprise.

6 That's, as I understand, a lot of the evidence to be in  
7 this case. Because they exist in different forms, including  
8 statements by defendants made in their plea agreements and -- I  
9 mean, made during the course of their presentence reports. So  
10 there's a lot of that type of evidence.

11 And I just think either, one, you have to recognize it and  
12 say: Well, yeah, that is a form of coercion -- as I think it  
13 clearly is, hard to say that it's not, or -- so I admit that.  
14 And then you could say: But it's all unreliable. It's all  
15 untrue.

16 If that's what you're saying -- if that's what I'm  
17 hearing -- and my hearing is so much affected. So if that's  
18 what I'm hearing I understand that argument. But I don't -- I  
19 don't think you want to rely on the argument that there was  
20 never a threat of physical violence here, and therefore, that's  
21 missing from the equation.

22 Though, I think it's true. I don't know of any threats of  
23 physical violence.

24 **MR. JACOBS:** Your Honor, I think we need to focus on  
25 the facts of this case, not some theoretical: Well, you could

1 bid up. What Mr. Grinsell said in his 302 is that he never saw  
2 Mr. Giraudo bidding up people in retaliation.

3 And I will say to your point -- I do disagree with your  
4 point -- that that's supposed to be what's happened, is that if  
5 you don't like somebody buying a property, you're supposed to  
6 bid more. That is not a --

7 **THE COURT:** (Inaudible)

8 **MR. JACOBS:** That is not a --

9 **THE COURT:** Or threaten --

10 **MR. JACOBS:** -- that I'm going to bid more money and  
11 buy the house.

12 **THE COURT:** Or tell them at the outset: If you bid,  
13 I'm going to outbid you. What about that? It's called  
14 excluding somebody from the market by a threat. And the threat  
15 you are utilizing is the threat that you'll -- that you will  
16 not acquire this property at the price you think you should  
17 acquire this property, because we can outbid you.

18 And so, why, why would you possibly go into this process  
19 of bidding on the property when you're going to either, one,  
20 not get the property, or two, pay more than you want to pay in  
21 connection with the property? And.

22 I think you can always argue -- I'll agree with you, you  
23 can always argue you never have to pay more than what you want  
24 to. But remember, the idea here is to get the property less  
25 than the fair market value. Otherwise, it makes no sense.



1           **MR. JACOBS:** Well, I will just say to that point --  
2 and I know it was discussed in the last discussion -- the  
3 actual methodology here was to buy the properties, and to rehab  
4 them, and then sell them. So, so all the properties were  
5 redone, and then resold.

6           **THE COURT:** Welcome to California. I mean --

7           **MR. JACOBS:** I understand, Your Honor. But it's  
8 not -- these were not properties that were just flipped. So --

9           **THE COURT:** No, no, not flipped in the same  
10 transaction. I'm not even suggesting that. No, no, no, but  
11 California, you buy low, you sell high. Actually, in  
12 California, you buy high and you sell higher.

13           **MR. JACOBS:** That's been my experience, yes.

14           **THE COURT:** But be that as it may, properties can be  
15 rehabilitated. You can put in \$100,000 and get \$400,000 in a  
16 recovery. Anybody who's staged a house recently knows how that  
17 works. You know. And why they put in -- why did they spend  
18 \$50,000 to stage their house? They put it in because they get  
19 \$150,000 more money. Find me the real estate agent who tells  
20 me: Don't bother staging the house. I haven't found one yet.  
21 Of course, I haven't looked. But we all have children. And  
22 they are confronting this issue every day. But I'm not trying  
23 to draw evidence from that, Mr. Jacobs. Neither my children  
24 nor yours.

25           Go ahead.

1           **MR. JACOBS:** But Your Honor, the context here is  
2 important. Remember that the government is coming forward and  
3 saying that Mr. Giraudo should receive a four-point enhancement  
4 for this offense, when other people -- including people who  
5 were engaged in physical threats, according to their own  
6 evidence -- receive three. So you would have to show somehow  
7 that Mr. Giraudo was more, more coercive, more -- more  
8 threatening to people in whatever form it took than other  
9 people. And there certainly is no evidence of that.

10           In fact, according to Mr. Grinsell's testimony when he was  
11 interviewed by the FBI, the real activity in these auctions  
12 picked up much more significantly and was much more overt in  
13 2010. Well, during 2010, Mr. Giraudo was ill and barely  
14 attending the auctions at all. And according to Mr. Grinsell  
15 his influence had significantly waned because he wasn't there,  
16 and he was just talking to Mr. Appenrodt over the telephone.

17           The other hallmark is recruitment. Okay, we don't really  
18 have any evidence of Mr. Giraudo recruiting people to the  
19 scheme. The only person who could possibly fall into that  
20 category is Mr. Appenrodt, himself. But Mr. Appenrodt didn't  
21 bid on his own behalf. Mr. Appenrodt simply -- Joe was sick.  
22 Mr. Appenrodt had been helped, had been given loans and money  
23 by Mr. Giraudo throughout his life. And he offered to go and  
24 show up at these auctions.

25           **THE COURT:** What about Mr. Grinsell telling

1 Mr. Giraudo that he would come back -- when he finds out that  
2 Mr. Giraudo had actually -- the argument is, according -- if  
3 you accept what Mr. Grinsell says, that he had -- that  
4 Mr. Giraudo went to him and said: You see these properties  
5 that you acquired? Well guess, what, I made this payoff and  
6 that payoff and that payoff.

7 And then, and then, he said: You can join us. You can  
8 join us. Or you can keep -- keep fighting this thing and see  
9 what, see how it develops.

10 Why isn't that a recruitment?

11 **MR. JACOBS:** Your Honor these guidelines -- a  
12 four-level enhancement, obviously the most serious enhancement,  
13 you have to look at it in the context of the case and what the  
14 government has offered for other people, and the evidence about  
15 those other people.

16 These guidelines were intended, I believe -- and I think  
17 there's -- we've given you some case law on this point -- was  
18 intended for sophisticated drug conspiracies for when somebody  
19 is not complying, they have their legs broken. It's for Mafia  
20 organizations. These were guys standing around on the  
21 courthouse steps.

22 **THE COURT:** It -- it doesn't say that. I mean, my  
23 familiarity with the guidelines, I don't for a moment think  
24 that that type of person isn't included in this enhancement.  
25 But it's not limited to that person. They're saying: Look,

1 I'm sorry, we do disagree. I'll tell you why. They say, if  
2 you're the organizer, if you are the leader, and you have in  
3 your group five or more people, that's worthy of an enhanced  
4 punishment. Nothing to do with breaking your legs.

5 I mean, the indications that you've given me, the five  
6 things that you've given me are -- are hallmarks or are  
7 characteristics, if they exist -- and I'll correct you if they  
8 don't exist -- of whether a person is the organizer or the  
9 leader. But, they're not the -- the qualifiers.

10 In other words, they don't say you have to find these five  
11 things; if you don't find these five things, they're not --  
12 he's not the organizer or leader. They don't say that. I  
13 don't think they're exclusive.

14 Now, I haven't read the case. So I mean, maybe they say:  
15 If you don't have any of those things, you can't find somebody  
16 to be the organizer/leader, even if he admits he is. I don't  
17 know. Maybe that's right --

18 **MR. JACOBS:** Your Honor, these are -- clearly, the  
19 guidance that courts are giving, and I think you can find these  
20 in many other cases, and they are cited in our brief.

21 Also, I'll say it again. We are talking here about a  
22 context where the government has offered three points to  
23 Mr. Rezaian and Mr. Grinsell and the others. Where you have  
24 evidence of Mr. Grinsell saying: The ringleaders were other  
25 people.

1           **THE COURT:** So the argument is it's disproportionate.  
2 That the government has defined -- by offering three points to  
3 these people, the government has defined what it means when it  
4 -- when it says an organizer or leader. That's the argument.

5           **MR. JACOBS:** Well, I mean, I would submit, Your Honor,  
6 that these -- that this enhancement (Indicating) doesn't apply  
7 to any of these people. These were guys who were partners;  
8 they worked together, whatever. But yes, clearly there is a  
9 disproportionality here.

10           Why is there disproportionality? It's because the Justice  
11 Department Antitrust Division has an amnesty program. They are  
12 trying to incentivize people to plead guilty and agree to their  
13 plea agreements.

14           We have accepted responsibility. Mr. Giraudo came in and  
15 pled guilty before many of the other people who did sign plea  
16 agreements with the government.

17           But by failing to play ball with the government, they are  
18 clearly seeking to punish Mr. Giraudo. And I would  
19 respectfully submit to the Court that that would be a travesty  
20 of justice here. You can't distinguish Mr. Giraudo from  
21 Mr. Rezaian from Mr. Rosenbledt.

22           **THE COURT:** Okay, that's the point. Not whether or  
23 not he pled on day one or day ten. I don't think that's the  
24 issue.

25           I think the issue is: Are people treated differently,

1 notwithstanding the fact that their roles are the same, by  
2 virtue of the fact that they plead later, or something like  
3 that.

4 Are you going to penalize somebody for pleading where the  
5 only distinction in their conduct is the timing of their plea.  
6 That's the argument, as I understand it.

7 Okay, I think we should hear from the government. Answer  
8 all of his points, if you can.

9 **MR. MAST:** Certainly, Your Honor.

10 **THE COURT:** Or address them all. I don't think you  
11 can answer them.

12 **MR. MAST:** First, just on the comment that a  
13 leader/organizer enhancement wouldn't be applicable to  
14 antitrust offenses. In the antitrust guidelines it says: For  
15 example, if the sales manager organizes or leads a price-fixing  
16 activity of five or more participants, the four-level increase  
17 at 3B1.1(a) should be applied.

18 So I think that's covered by the guidelines. And it's not  
19 solely for drug offenses. And it doesn't solely contemplate  
20 physical violence as a form of coercion.

21 The second point is on sort of the -- the alleged  
22 disproportionality between leader/organizer and  
23 manager/supervisor provisions that are in Mr. Grinsell and  
24 Mr. Rosenbledt, Mr. Rezaian, and what the government will argue  
25 for Mr. Cullinane.

1           Giraudó is distinct in this conspiracy. He resolved  
2 disputes in a payoff involving himself and Mr. Pessah, a  
3 co-conspirator and a confidential informant. When Mr. Pessah  
4 believed that he was entitled to more money, they called up  
5 Mr. Giraudó.

6           When Mr. Giraudó and his partners arranged for a secret  
7 auction for a property in San Bruno, but another  
8 co-conspirator, Mr. Leith Salma, learned that this auction was  
9 occurring, he called Mr. Cullinane and insisted that he be  
10 entitled to a payoff for that auction.

11           Mr. Cullinane said: I've got to call Mr. Giraudó, who  
12 initially denied the -- the request, but then assented later.

13           And the likewise occurred when Mr. Lipton and Mr. Goodman  
14 disputed their partnership stake in a property purchased with  
15 Mr. Rezaian and others. Mr. Giraudó was called to settle the  
16 dispute.

17           Mr. Giraudó tries to compare himself to Mr. Rezaian, and  
18 say: Mr. Rezaian was worse than I was. It's true that  
19 Mr. Rezaian did use physical intimidation at the auctions. But  
20 Mr. Rezaian followed Giraudó's lead as reported by other  
21 witnesses. Mr. Thea (Phonetic) indicated that whenever he made  
22 a payoff agreement with Mr. Rezaian, Mr. Rezaian checked with  
23 Mr. Giraudó first. Mr. Appenrodt was there on behalf of  
24 Mr. Giraudó taking instructions from him with regard to how  
25 much to bid, when to purchase a property. It really was acting

1 at the behest and on behalf of Mr. Giraudo.

2 So there is a basis to conclude that Mr. Giraudo was the  
3 most influential, and had the most sway at the auctions. In  
4 fact, informing the group that the government refers to as the  
5 "Big 5," Mr. Grinsell initially resisted. It was Mr. Grinsell  
6 and Mr. Giraudo working together.

7 Mr. Rezaian approached Mr. Giraudo and wanted to join the  
8 group. Mr. Grinsell offered his sort of opposition.

9 Mr. Giraudo said: No, we're going bring him in. Happened  
10 again with Mr. Rosenbledt and then again with Mr. Cullinane,  
11 where Mr. Giraudo was making that call as to who is part of  
12 that group.

13 So the government submits that a leader/organizer  
14 enhancement for Mr. Giraudo is not only warranted under the  
15 law, but also warranted in respect to the others who have  
16 pleaded guilty in this case.

17 **THE COURT:** Anything further?

18 **MR. JACOBS:** Your Honor, two points. One, almost  
19 everything -- I don't know that I could trace it now, on the  
20 spot, but I think almost everything that was just said was  
21 based on the interview of Mr. Salma.

22 And we have, as we indicated, profound objections to the  
23 Court relying on those -- on that testimony for the reasons  
24 stated. Believe that it's not credible, and shouldn't be  
25 relied on.



1           Secondly, I'm --

2           **THE COURT:** What about Mr. Grinsell? I have his  
3 statement as to -- as to the encounter he had with Mr. Giraudo.  
4 That's not based on this other 302. That's his own statement.

5           I mean, I have to -- the problem I have is I have to  
6 discount basically what every other conspirator said about your  
7 client. You know. And, and some of the activities that were  
8 observed.

9           But, go ahead. I don't think it rests on one 302, is what  
10 I'm saying. Maybe I misunderstood you, Mr. Jacobs.

11           **MR. JACOBS:** I said most of what was said -- and I  
12 admit, I can't trace every single statement.

13           **THE COURT:** Fair enough.

14           **MR. JACOBS:** But there's a lot of what Mr. Grinsell  
15 said that would -- I would urge the Court to go back and read  
16 that, and the discussion about all the partners acting equally.

17           This idea that Mr. Giraudo was resolving a dispute is some  
18 kind of a novelistic fantasy that the government has. These  
19 guys were partners, yes. They stood around; they agreed to  
20 make payments. They would routinely check with one another  
21 about what to do. But there is no evidence, no credible  
22 evidence, Your Honor, in the full context of this case, that  
23 Mr. Giraudo was directing the activities of the other.

24           And in fact, I'll point again to what Mr. Grinsell said,  
25 that it was Rezaian and Mr. Rosenbledt who were the

1 ringleaders.

2 And I would respectfully submit to Your Honor that the  
3 government would not be in here asking for the four-point  
4 enhancement, were it not for the fact that we didn't sign their  
5 plea agreement. In fact, they offered us a three-point  
6 enhancement for Mr. Giraud.

7 So, I would submit, on that basis.

8 **THE COURT:** That's an interesting point. Do I take  
9 into consideration -- I don't think so. I mean, I don't think  
10 I can. I don't think I should take into consideration what the  
11 government's position was in plea --

12 **MR. JACOBS:** What I think the Court can take into  
13 consideration, Your Honor, is the disparate treatment of  
14 different people.

15 **THE COURT:** I can do that. But I think I have to just  
16 ignore your last comment.

17 **MR. JACOBS:** That's fine, Your Honor.

18 **THE COURT:** You won't feel offended if I do.

19 **MR. JACOBS:** I will not feel offended.

20 **THE COURT:** All right. I'm going to take a recess  
21 now. I'll come back and rule on that. I think then -- and  
22 I'll set the sentencing guideline range. I do want to look at  
23 what you suggested I should look at.

24 And then I want to move to -- I think only -- I think I  
25 can deal with the objections of three of the defendants next,

1 because there are plea agreements, and I can deal with that so  
2 they can have their objections noted or, you know, sustained or  
3 object.

4 I should say one other thing that you haven't said is the  
5 criminal history overstatement. And to that, I agree with you.  
6 And I'm setting the guideline range at -- I believe it's  
7 overstated. It warrants a departure. And I'm going place  
8 Mr. Giraudo in Criminal History Category I.

9 So, there we are. You made the argument in your papers.

10 **MR. JACOBS:** Understood, Your Honor. Thank you.

11 **THE COURT:** Okay. So I'm going to take a recess until  
12 3:15. I then am going to address three of the four defendants,  
13 and set their guideline range. And then I will entertain  
14 arguments from Mr. Cullinane's counsel as to what his guideline  
15 range should be.

16 Okay?

17 **MR. JACOBS:** Thank you.

18 **MR. MAST:** Thank you.

19 **THE COURT:** All right. We are in recess.

20 (Recess taken from 2:48 p.m. to 3:19 p.m.)

21 **THE CLERK:** Please come to order. Court is back in  
22 session. Please be seated.

23 **THE COURT:** Okay, let the record reflect, That the  
24 parties are present.

25 Returning now to Mr. Giraudo, the Court has reviewed the

1 evidence on the matter of whether or not the four-level  
2 enhancement is warranted. The Court finds that it is  
3 warranted.

4 However, the Court will set forth its reasons and what it  
5 has relied on in an opinion to be issued, which -- you know,  
6 within a short period of time subsequent to the sentencing.

7 So I believe that has actually addressed all of the  
8 objections. Is there an objection that I haven't addressed?

9 **MR. JACOBS:** I don't believe so, Your Honor.

10 **THE COURT:** I don't believe so.

11 **MR. MAST:** I don't believe so.

12 **THE COURT:** Okay. So that would mean that  
13 Mr. Giraudo's adjusted guideline range is 18, and his Criminal  
14 History Category is I. For purposes of sentencing.

15 Let me now turn to Mr. Grinsell. Unlike Mr. Giraudo,  
16 Mr. Grinsell has entered a plea pursuant to a plea agreement.  
17 That agreement finds that the volume of commerce was greater  
18 than 10 million, and less than 50 million. And the Court  
19 adopts that, that agreement.

20 Let's see. Are there other objections?

21 **MR. MAST:** Your Honor, I don't think there are any  
22 objections that affect the offense level for either  
23 Mr. Grinsell, Mr. Rezaian or Mr. Rosenbledt. There were a  
24 number of -- I would almost call them clarifications in the  
25 presentence report. But my understanding from defense counsel

1 is that the PSR, as written, lodging the clarifications, is  
2 fine.

3 **THE COURT:** Acceptable?

4 **MR. FEUCHTBAUM:** That's correct, Your Honor.

5 **THE COURT:** I wanted to say something. So, I am  
6 mindful of your client's health issues.

7 **MR. FEUCHTBAUM:** (Nods head)

8 **THE COURT:** I'm mindful of it. Now, and I plan on  
9 addressing it at the time of sentencing.

10 **MR. FEUCHTBAUM:** (Nods head)

11 **THE COURT:** I -- I don't want you to take anything  
12 from that in terms of what I'm going to do. But I'm aware of  
13 it.

14 **MR. FEUCHTBAUM:** (Nods head)

15 **THE COURT:** And mindful of it.

16 **MR. FEUCHTBAUM:** Thank you.

17 **THE COURT:** Mindful of all of these with respect to  
18 all of the defendants, but yours in particular.

19 **MR. FEUCHTBAUM:** Thank Your Honor.

20 **THE COURT:** It would be wrong not to single him out,  
21 because I think from a health point of view, he stands in a  
22 singular position.

23 **MR. FEUCHTBAUM:** Thank you, Your Honor.

24 **THE COURT:** Okay. Thank you.

25 Moving then -- I don't want to move to Mr. Cullinane until

1 the end. Mr. Rosenbledt.

2 Hello, Mr. Niespolo.

3 **MR. NIESPOLO:** Good afternoon.

4 **THE COURT:** It's not evening yet. I understand. But,  
5 it is afternoon.

6 This also was a product of a plea agreement. In the plea  
7 agreement, the parties agree that the volume of commerce was  
8 \$26,915,817. That's the agreement. The Court accepts that.

9 I don't think -- are there any objections that you feel I  
10 have to address, Mr. Niespolo? I don't.

11 **MR. NIESPOLO:** There are not objections, Your Honor,  
12 but you've raised an issue today that if you'd like to hear  
13 from me about the role of the offense issue, and if counsel for  
14 the government doesn't have an objection, I do have just a  
15 couple of comments about that. But if you --

16 **THE COURT:** About -- well, let me just pull your plea  
17 agreement.

18 **MR. NIESPOLO:** It is in the plea agreement.

19 **THE COURT:** Well, you know, the problem I have, I  
20 start from the proposition -- I start from the proposition that  
21 a plea agreement is -- not that it's binding on the Court, but  
22 it's the parties' expectations. That, it is. It's an  
23 expectation. Unless -- it is the parties' expectation,  
24 depending on exactly what's said in the plea agreement.  
25 Sometimes it said: I understand you're going to do X, but I

1 want to argue it's Y.

2 **MR. NIESPOLO:** Yeah.

3 **THE COURT:** That's obviously --

4 **MR. NIESPOLO:** I appreciate that.

5 **THE COURT:** -- an expectation. So I don't want to  
6 upset an expectation unless it's something that clearly I  
7 should do in order to come to an appropriate sentence.

8 **MR. NIESPOLO:** No, I don't -- I understand the Court's  
9 position. And I -- if you want to hear from me, I would be  
10 happy to say something about it.

11 **THE COURT:** I don't think you need to, so I'm not --  
12 and by the way, I'm not determining sentences today. I'm sure  
13 you all know that. I'm not determining what the sentence  
14 should be. I'm determining what the guideline range is.

15 **MR. NIESPOLO:** Right.

16 **THE COURT:** That's all.

17 **MR. NIESPOLO:** Okay.

18 **THE COURT:** Thank you.

19 **MR. NIESPOLO:** You're welcome.

20 **MR. MAST:** Thank you.

21 **THE COURT:** So we go to Mr. Rezaian? I always  
22 mispronounce his --

23 **MS. AGRE:** Rezaian, Your Honor.

24 **THE COURT:** Rezaian, sorry about that. Okay.  
25

1 And in this plea agreement, the volume of commerce is  
2 \$24,727,000. The guideline range is -- the adjusted guideline  
3 offense level is 17, I

4 Is there anything that I need to determine in terms of the  
5 guideline range?

6 **MS. AGRE:** I don't believe so, Your Honor.

7 **MR. MAST:** Nothing from the government.

8 **THE COURT:** So I will impose sentence tomorrow. Thank  
9 you.

10 And I guess that leaves us with Mr. Cullinane and  
11 Mr. Weinberg.

12 And as noted, there is no plea agreement. This is  
13 different from other cases in two, I would say, material  
14 aspects. One is the absence of a plea agreement, and the other  
15 is a plea to only one count of the superseding -- or the  
16 indictment, I don't know if it's a superseding indictment --

17 **MR. MAST:** Just -- no superseding indictment. Just  
18 one indictment.

19 **THE COURT:** Okay. One count, and that is of  
20 significance in terms of some of the considerations that the  
21 Court must make.

22 So, in -- in reviewing the differences of opinion between  
23 the parties, the government believes that the volume of  
24 commerce is approximately 17 million. Maybe it's different. I  
25 got some email that suggested it was different.



1           **MR. MAST:** I think we -- I believe we were at 18.

2           **THE COURT:** You were at 18.8 million.

3           **MR. WEINBERG:** 18.5 what is they put in Exhibit 8.

4           **MR. MAST:** 18.5 is correct.

5           **THE COURT:** Okay, 18.5. For some reason, our  
6 presentence report found 17 million.

7           **MR. MAST:** My understanding is that the presentence  
8 report only included the transactions from San Mateo County.  
9 Mr. Cullinane was not charged in San Francisco.

10           I believe there were two transactions that were involved  
11 in San Francisco that the government believes would be included  
12 as related conduct.

13           **THE COURT:** As relevant conduct.

14           **MR. MAST:** As relevant conduct, yes.

15           **THE COURT:** Okay. So that's --

16           **MR. MAST:** It's not material to the guidelines.

17           **THE COURT:** It's not material to the guidelines. The  
18 issue that the Court has to determine is whether or not it's  
19 more than 10 million.

20           **MR. WEINBERG:** Well, I understand that the Court heard  
21 argument on the issue of volume of commerce, and decided the  
22 broader issue with respect to Mr. Giraud. So I understand  
23 that the Court has its inclination about the question of what  
24 constitutes volume of commerce.

25           I did, however, want to say a couple of things.

1           **THE COURT:** Yes, sure.

2           **MR. WEINBERG:** One is that I think that both the  
3 government's approach and the Court's interpretation is  
4 contrary to the purposes stated by the background comments to  
5 the Guideline 2R1.1, which states that --

6           **THE COURT:** What? 2R --

7           **MR. WEINBERG:** 2R1.1, bid rigging. If you look at --  
8 after the application notes -- I think my memo may refer to it  
9 as an application note. It's actually the background comments  
10 following the application notes. It's the second paragraph.

11           And what it describes is why volume of commerce is  
12 determined so broadly, and why they don't bother to get into  
13 finer -- you know, finer points of how much profit was made,  
14 et cetera.

15           In explanation of that, the guidelines state that (As  
16 read):

17 "The agreements among competitors covered by this section are  
18 almost invariably covert conspiracies that are intended to and  
19 serve no purpose other than to restrict output and raise  
20 prices, and that are so plainly anti-competitive that they have  
21 been recognized as illegal, per se."

22           What this deals is with a group of manufacturers or  
23 sellers getting together and artificially raising their prices  
24 by artificially limiting --

25           **THE COURT:** Right.

1           **MR. WEINBERG:** -- the distri- -- so that the public,  
2 the general public is victimized, and has to pay more for a  
3 product than it should have to pay for. Money is taken from  
4 the pockets of ordinary people. That's very different than  
5 what we have here.

6           What we have here -- and I don't want -- I mean, I think  
7 the Court knows that I would be happy to talk about the  
8 background of the case, but I gather the Court doesn't want to  
9 hear that. What we have here --

10           **THE COURT:** What I want to hear is -- I understand  
11 this is a different kind of anti-competitive behavior. I  
12 appreciate that. But what you have to explain to me is: Given  
13 that it's a different kind, why is it -- why is the different  
14 kind of anti-competitive behavior any the less harmful to -- to  
15 whomever are the victims?

16           Why is it any the less harmful, that I rigged the price, I  
17 rigged the price of my components, or the product, itself, so  
18 that the public pays more for it.

19           **MR. WEINBERG:** Right.

20           **THE COURT:** That's bad. And that's exactly what  
21 you've addressed.

22           Now let's say I rigged the price so that the victim, the  
23 owner of the property or the product, gets less for it.

24           **MR. WEINBERG:** But that's not who suffered. The  
25 owners of the --

1           **THE COURT:** Pardon?

2           **MR. WEINBERG:** The owners of the property did not  
3 suffer here. They were long ago evicted, long ago foreclosed.

4           **THE COURT:** The owners of the banks -- owners or  
5 banks, or who's ever --

6           **MR. WEINBERG:** Owners -- lenders or bankers who  
7 suckered people into mortgages they couldn't afford, forced  
8 them to pay prices they couldn't afford. Eventually, and  
9 inevitably, those people defaulted. And then the bank swooped  
10 in and sold whatever they could for however much money they  
11 could. They made minimum demand -- they made demands: We will  
12 not sell the property for less than this. In every case, they  
13 got that demand, and usually more.

14           That is a difference in quality that is very substantial,  
15 and I don't think the Court would fail to recognize that. This  
16 is a different kind of activity.

17           **THE COURT:** A different kind.

18           **MR. WEINBERG:** It is a very different kind.

19           **THE COURT:** You think it's the Court's role to look at  
20 the conduct of the victims, and make a judgment as to whether  
21 or not they ought to be subject to antitrust conduct?

22           **MR. WEINBERG:** Well, there's two different aspects to  
23 this. One of them is the antitrust laws, and it's an  
24 interpretation. And I think the Court can make a distinction  
25 there, because the background tells you: This is what we're

1 concerned about. We're concerned about purveyors, producers,  
2 sellers, artificially jacking up their prices to take advantage  
3 of the public.

4 That's not what we have here. So from the guidelines,  
5 themselves --

6 **THE COURT:** Who lost? Who lost on this?

7 **MR. WEINBERG:** I'm sorry?

8 **THE COURT:** Who lost? Who are the victims?

9 **MR. WEINBERG:** Well, now, that's a good question.

10 **THE COURT:** Well, that's my question. Whether it's  
11 good or not --

12 **MR. WEINBERG:** Who was victims? What you have is  
13 banks who victimized everybody else, and tried to get back as  
14 much as they could. And the government swooped in to give them  
15 billions --

16 **THE COURT:** Yeah, but you say they're not --

17 **MR. WEINBERG:** -- to give them billions, and rescue  
18 them while they left all those foreclosed and evicted people  
19 out on the streets.

20 And we have these folks (Indicating) coming along --

21 **THE COURT:** So tell me who the true victims were.

22 I know who the beneficiaries were. I know who was able to  
23 get -- who benefited from this conspiracy. And they were your  
24 client, and everybody else who's been charged or pled guilty.

25 They are the beneficiaries of it. Because they get a piece of

1 property, less than the fair market value of the property,  
2 either as an exchange, or having paid some money. They're the  
3 beneficiaries of it.

4 But if you want to say that the true victims are not the  
5 -- the banks which have, quote, "gouged," end quote, the  
6 consumer and acted in that particular way, I'm interested in  
7 your view as to who were the victims.

8 Who are the victims?

9 **MR. WEINBERG:** Well, I actually think --

10 **THE COURT:** Somebody's got to be a victim. But maybe  
11 this is a victimless crime. But I don't think so.

12 **MR. WEINBERG:** I don't think so. Like, if you saw  
13 today's *New York Times*, there's an editorial piece in there  
14 about the revelations we've gotten from Sean Hannity, and his  
15 involvement in buying up distressed properties and selling  
16 them. And there's reference back to what happened back in  
17 2007, -8 and -9.

18 And what these banks did was they -- this was after the  
19 foreclosures. I'm not talking about how they got these people  
20 into these ridiculous mortgages they couldn't afford, and then  
21 tranced them off and sold them as prime-value investments,  
22 which they plainly weren't, and they all collapsed.

23 But, when the banks got back all of these properties,  
24 among the many things that they did was sell whole chunks of  
25 them to institutions like IndyMac Bank. And they didn't --

1 IndyMac didn't have to go to auction. They just made a deal  
2 with the bank to pay the bank as a little as they possibly  
3 could, so the bank could get some money out.

4 We're only dealing here with a relatively small tiny  
5 number of the hundreds of thousands of properties in this  
6 country that were foreclosed upon, evicted, and are still  
7 boarded up. We're talking about the tiny percentage of them  
8 that went to auction.

9 And on those -- on those properties, the bank, instead of  
10 giving them to IndyMac for the minimum price, put them on the  
11 market in the hope of getting a little bit more. And so it  
12 got -- instead of getting 5,000, they got 3,000 more. Or  
13 instead of getting 10, they got 7. That's the crime that we  
14 are talking about sending somebody to prison for three years.

15 I don't think that is a crime with a significant victim  
16 that needs this Court's support and rescue. This is -- the  
17 only victims here are the banks that could have made more, that  
18 didn't, and it's their -- you know. And it's not any  
19 individual, any homeowner, any foreclosed, evicted -- you  
20 know -- person out on the streets. They're banks. They made  
21 enormous gambles with people's monies, lost those gambles, and  
22 got rescued. And all we're being charged with is not rescuing  
23 them enough.

24 And in terms of the volume of commerce, that's the nature  
25 of the offense. And I know that's a 3553(a) issue, because it

1 is a question of nature and circumstance of the offense, even  
2 if you don't look at it as: Is this an antitrust violation?

3 I say it's a minimal antitrust violation.

4 But, it's an antitrust violation, you'll say.

5 Okay. What's the nature and circumstance of the offense?  
6 We'll talk about that tomorrow.

7 But this does go to nature and circumstance of the  
8 offense. Because what happened at these mortgage foreclosure  
9 auctions was simply that people said, you know: Let's give the  
10 banks as much as they want, and no more.

11 Okay. That's what the agreements were. And what we're  
12 now charging them with is the astronomical multiples of what  
13 they did. If you look at -- this is Exhibit A (Indicating) to  
14 the government's reply memorandum which they gave on Thursday.  
15 Arrived at my office on Friday.

16 But Exhibit A, if you will look at just Page 1, these are  
17 the Kevin Cullinane property lists. And if you look at the  
18 third and fourth items on it, for example, there's a piece of  
19 property in Millbrae in which the winning bid was \$633,000, and  
20 the payoff was \$3,000.

21 **THE COURT:** Is what?

22 **MR. WEINBERG:** \$3,000. So for a \$3,000 payoff,  
23 Mr. Cullinane is being taxed with \$633,000 of volume of  
24 commerce. That's the payoff. 3,000, on 633.

25 The very next one down, a property in South San Francisco,



1 a winning bid of \$529,000. What's the total payoff? \$3,000.  
2 Again, \$3,000 payoff is being taxed as a \$529,000 volume of  
3 commerce.

4 We go down the bottom, No. 7. We have a property in  
5 San Mateo, which is -- winning bid was \$410,000. The payoff  
6 was \$2,500.

7 And that's the kind of disproportion you get when you deal  
8 with --

9 **THE COURT:** I'm trying to figure out the  
10 disproportion. It cost -- I understand that he paid 2,500 or  
11 3,000 or something on a big piece of property, to get somebody  
12 not to bid.

13 Isn't that right?

14 **MR. MAST:** That's correct.

15 **THE COURT:** So --

16 **MR. WEINBERG:** But the volume --

17 **THE COURT:** Let's take those figures. And you're  
18 saying that it's disproportionate because it only cost him  
19 \$2,500 to stop the market from operating.

20 **MR. WEINBERG:** With all respect, Your Honor, I think  
21 the Court is coming at it from the wrong direction.

22 The point is: The concept of charging for the payoff is  
23 that's theoretically what the bank would have gotten if it  
24 hadn't gone to another conspirator.

25 **THE COURT:** No, no, nobody says that.

1           **MR. WEINBERG:** That's --

2           **THE COURT:** No, no, no. No. The \$2,500 -- listen.  
3 If they could pay the bank \$2,500, and have a perfectly legal  
4 setup -- Mr. Cullinane comes in, and he bids \$600,000 for the  
5 piece of property. Whatever it is. Whatever that is. And he  
6 pays 2,500.

7           Nobody is suggesting that if he paid -- if he bid 600,000  
8 plus 2,500, he would have gotten the property. Because there  
9 would have been another bidder. And so the question is between  
10 the two bidders -- or more, but two bidders -- what would the  
11 ultimate price of the property be?

12           They're not paying the payoffs just because they could  
13 either pay the bank or their friends. They're paying their  
14 friends in order not to compete with them in acquiring the  
15 property.

16           **MR. WEINBERG:** Because the value to that agreement,  
17 that value, if -- the -- the value is based on what the  
18 property is really worth to the two participants in that  
19 contract.

20           **THE COURT:** Right. I agree.

21           **MR. WEINBERG:** Okay. And the difference is only  
22 \$2,500.

23           **THE COURT:** How do you know what it's worth?

24           **MR. WEINBERG:** That's -- everything -- anything else  
25 beyond that is pure speculation. It's only worth \$2,500 --

1           **THE COURT:** One thing you don't have to speculate. I  
2 said, counsel: There's one thing you don't have to speculate.  
3 Do you know what that is? It's worth more than 2,500. Because  
4 if it were just worth 2,500, they wouldn't have done it.

5           **MR. WEINBERG:** But it couldn't have been much more  
6 than 2,500 because --

7           **THE COURT:** Well, I don't know. You're right --  
8 you're right; I don't know whether it was 2,600 or 50,000. And  
9 the reason I don't know is because there wasn't a fair  
10 foreclosure sale.

11           **MR. WEINBERG:** That -- that -- that suggests that --  
12 that the Court believes that these people who it has just  
13 finished calling sophisticated, skilled, highly-experienced  
14 businessmen didn't know the value of what they were doing.

15           **THE COURT:** No, it suggests they would -- they would  
16 -- no, I don't think it suggests -- anyway, Mr. Weinberg, I  
17 think you and I and Mr. Jacobs and perhaps everybody seated at  
18 that table have a different view from the Court as to how to  
19 calculate damages.

20           **MR. WEINBERG:** I was hoping to share my view with the  
21 Court.

22           **THE COURT:** I appreciate that.

23           **MR. WEINBERG:** Okay.

24           **THE COURT:** I appreciate that.

25           **MR. WEINBERG:** All right. The other thing that's

1 problematic about it is the differences among the defendants.

2 Mr. Cullinane at 18 million is in the exact same category  
3 as people with 26 million, 36 million, twice as much. And it's  
4 just a broad category that is irrational, that his level of  
5 enhancement is the same as people who may have done 10 million,  
6 or in some cases, \$18 million more than he did.

7 So I have a lot of trouble with volume of commerce which  
8 doesn't really fit these facts.

9 **THE COURT:** Well, volume of commerce is not the  
10 determinative factor in terms of his role in the offense. I  
11 mean, it may be an indication --

12 **MR. WEINBERG:** Well, three -- four levels is a lot.

13 **THE COURT:** Yeah, but that's a different --

14 **MR. WEINBERG:** Four levels is a lot.

15 **THE COURT:** Not what we're talking about. We're  
16 talking about his role in the offense. We're not talking about  
17 the volume of commerce. The volume of commerce has some -- may  
18 have some bearing on the role in the offense. May or may not,  
19 I don't know. But he's lumped with four other people. There's  
20 no question you're right. Some had more commerce; some had  
21 less commerce.

22 **MR. WEINBERG:** I'm suggesting that in addition to the  
23 fact that the amounts of money involved were so small in  
24 proportion to the volume of commerce that's being charged, with  
25 the fact that in every case there were numbers people involved

1 who were receiving only a portion of the benefit, and because  
2 of the disparities within these enormously broad categories,  
3 that the volume-of-commerce enhancement, a 4 is an uneasy and  
4 improper fit for Mr. Cullinane.

5 **THE COURT:** Mr. Mast.

6 **MR. MAST:** A few things, Your Honor.

7 Most of these arguments strike me as more applicable to  
8 3553(a) arguments that I think the government will be able to  
9 respond to tomorrow. There's no provision in the guidelines  
10 that suggest that if the victim is a lender or bank, that the  
11 volume-of-commerce calculations are different.

12 So the government submits that a volume of commerce over  
13 10 million, and indeed, an \$18 million volume of commerce is  
14 warranted in this case.

15 Secondly, I would like to address that while the vast  
16 majority of victims in this case were the lenders and  
17 beneficiaries of the homes, there were homeowner victims when,  
18 on occasion, the auction price of the sale exceeded the debt  
19 that was owed to the bank.

20 There are not any on Mr. Cullinane's property list, but I  
21 did want to make clear that there were homeowner victims in  
22 this case, as a whole.

23 And I think I'll leave it at that, Your Honor.

24 **MR. WEINBERG:** I believe that Mr. Mast was able to  
25 identify one, in the case of Mr. Cullinane.

1           **MR. MAST:** I actually -- I don't think Mr. Cullinane  
2 -- if I misspoke, I apologize. I don't think Mr. Cullinane had  
3 any homeowner victims.

4           **MR. WEINBERG:** Suggested that he might. Doesn't  
5 matter.

6           **THE COURT:** Actually, suggested -- suggested he  
7 doesn't.

8           **MR. MAST:** He doesn't.

9           **MR. WEINBERG:** I know. I'll take that. But in the  
10 memo, he suggested that there was.

11           (Multiple speakers)

12           **THE COURT:** All he's saying that is that case, while  
13 it doesn't apply to Mr. Cullinane because had he no homeowner  
14 victim, isn't true about the overall conspiracy. There were  
15 some in which they were -- anyway --

16           **MR. MAST:** And that was my point, Your Honor.

17           **THE COURT:** All right. So, the Court finds that the  
18 volume of commerce is greater than \$10 million. And that --  
19 part B is greater than -- no, greater than \$10 million,  
20 warranting a four-level harassment.

21           **MR. MAST:** Yes, Your Honor.

22           **THE COURT:** And finds that it's warranted that he is a  
23 manager, that -- his role in the offense. Have we --

24           **MR. MAST:** Your Honor, I think probably Mr. Weinberg  
25 would want to address that point a little further.

1           **MR. WEINBERG:** I would like to be heard.

2           **THE COURT:** I'm sorry; we haven't gotten to that yet.  
3 Apologize.

4           Go ahead, Mr. Weinberg.

5           **MR. WEINBERG:** Thank you.

6           **THE COURT:** I thought you had addressed it, but no,  
7 you hadn't. Clearly, you hadn't.

8           Go ahead. Role in the offense.

9           **MR. WEINBERG:** Thank you. First, I would like to  
10 state the obvious. I don't think there is any probative value  
11 to the fact that several other people who might be considered  
12 comparable to Mr. Cullinane have stipulated to their role in  
13 the offense. Because, as one of the things that the Court is  
14 going to hear a lot about tomorrow makes clear, is that people  
15 were put in a position where in order to resolve their cases  
16 and in order to get the benefit of cooperation and substantial  
17 assistance, people were compelled not only to accept the  
18 government's version of their role in the offense and the  
19 government's version of the volume of commerce, but also to  
20 plead guilty to mail fraud which they did not commit.

21           **THE COURT:** Let me say something about that, because I  
22 have -- no surprise -- a view of it.

23           I understand that when you negotiate a disposition, you're  
24 handed a series of statements, specific offense  
25 characteristics, whatever it is that's sort of the meat of the

1 charge, to which you are told: You must acknowledge the truth  
2 of these matters.

3 Okay. And my response -- and that's true. I mean, you  
4 are generally served up -- occasionally not, occasionally not,  
5 but for the most part you are served up a -- what I would call  
6 essentially a non-negotiable plate, smorgasbord, of specific  
7 offense characteristics.

8 So how do I treat that? Because I think that it becomes  
9 interesting for sentencing purposes. I treat it the following  
10 way.

11 One, I treat it that it is binding on the defendant who  
12 pled guilty to it. And I say that, because if you don't agree  
13 with that, you have nothing in this system.

14 If you say: Well, he was forced to say this and forced to  
15 say that so we want a hearing, and we want to disregard it, you  
16 can say goodbye to pleas. Because the government is getting  
17 very little -- maybe they're getting an avoidance of a jury  
18 trial, so I don't want to say it's not -- nothing. But it is a  
19 nightmare for the government.

20 And why bother, if they're going to have to fight  
21 everything, including the plea that you all agreed to? It's  
22 almost not worth the candle. Go to trial on everything.  
23 Nobody wants to go to trial on everything. Ninety-eight  
24 percent don't. So there's no reason for me -- that's one --  
25 for me not to hold it against the particular defendant.



1           Number two, what I do in recognition of what I think that  
2 set -- those sets of circumstances, is not find it persuasive  
3 against any other defendant. Which is exactly what you're  
4 saying.

5           So I'm giving you one thing -- actually, I'm giving you  
6 two things because you never entered a plea -- I mean, you  
7 entered a plea, but you didn't agree to any of these specific  
8 events, characters. So you're in a different position.

9           **MR. WEINBERG:** I agree. I just to make that point and  
10 I'm glad the Court -- (Inaudible)

11           **THE COURT:** And I'm not going to consider that A, B  
12 and C did X, and therefore, that's evidence that you did X.  
13 That is, that they agreed to X, and therefore, that's evidence.

14           That's not the government's position, by the way. The  
15 government takes a very different position from the way I take  
16 it. But they're stuck with me, as are you. And that just  
17 happens to be my position.

18           Okay. So, go ahead, Mr. Weinberg.

19           **MR. WEINBERG:** Thank you for that, Your Honor.

20           With regard to Mr. Cullinane and his role in the offense,  
21 I think a couple of things are at issue. One of them is the  
22 question of, you know, collective punishment, or collective  
23 guilt.

24           Mr. Cullinane is identified as one of the "Group of 5."  
25 The Group of 5 did X, Y and Z, and therefore, Mr. Cullinane is

1 being taxed what the Group of 5 reputedly did. It's not  
2 individual responsibility; it's not his own conduct; it's not  
3 what he personally did. It's: He's one of the Group of 5, and  
4 this is what the Group of 5 did.

5 And I don't believe that role in the offense is a  
6 collective thing. I don't think role in the offense is guilt  
7 by association, that because you're identified with X, and X is  
8 a leader, you're identified with what X did.

9 Mr. Cullinane should only be punished for what he did.  
10 Did he, himself, exercise control over people who were  
11 participants in the criminal conduct?

12 **THE COURT:** Well, that's --

13 **MR. WEINBERG:** Not: Did the people with whom he was  
14 identified exercise such control? Or did he, you know, benefit  
15 from such control, whatever.

16 It's: Did he play the role of, you know, of a manager in  
17 this enterprise?

18 You know a number of things. You know that he was almost  
19 never at the actual --

20 **THE COURT:** Pardon?

21 **MR. WEINBERG:** Very, very rarely at the actual  
22 auctions. Agent Wynar said that he was rarely seen there. He  
23 wasn't out there making deals; he wasn't out there talking to  
24 people.

25 If you think that intimidation and deal-making was going

1 on, he was -- he was part of it much less than any of the other  
2 people in that group of 5, and generally not out there very  
3 much, according to Agent Wynar. I think I cited that in my  
4 memorandum.

5 And the evidence of his actually having exerted any  
6 leadership or pressure, the only thing that you have are two,  
7 two elements. One of them is Laith Salma, who claims that he  
8 was pressured into making a deal by Mr. Cullinane. And then  
9 there was other people that Mr. Cullinane got to do things for  
10 him.

11 Well, the Laith Salma allegation stands alone, and it  
12 doesn't fit any of the other patterns in this case. It's a  
13 \$150,000 agreement between Mr. Cullinane and Mr. Salma's  
14 father. And it has to do with a brokerage fee for a property  
15 Mr. Salma -- which was paid by check, and identified as a  
16 brokerage fee. There is no other transaction in this case in  
17 which anybody paid \$150,000 or anything remotely like it to  
18 anybody else. And Mr. Cullinane is charged with half of that  
19 amount.

20 But that incident with Mr. Salma, who claims that his  
21 father was pressured into making this deal, is the only example  
22 that the government gives of some action by Mr. Cullinane of --

23 **THE COURT:** No, they cited Troy Kent.

24 **MR. WEINBERG:** I'm sorry?

25 **THE COURT:** They cited Troy Kent.

1           **MR. WEINBERG:** No, no. Troy Kent did something. He  
2 did it on behalf of Mr. Cullinane, supposedly. Or, or Bob  
3 Guglielmi did something on behalf of Mr. Cullinane. Or the  
4 secretary did something, handed an envelope. That's the second  
5 category.

6           I'm separating Mr. Salma, who is the only person who  
7 claims that Mr. Cullinane pressured or led or directed anybody.

8           The other is a grab-bag of situations in which  
9 Mr. Cullinane had somebody appear for him at auction, or had  
10 somebody come to his office to pick up money, or had somebody  
11 deliver money to somebody else. That's not criminal  
12 participation. That's not controlling the activities of other  
13 criminal participants. Having your secretary give somebody an  
14 envelope, even if true -- and let me add that caveat to all of  
15 this.

16           Even if true, asking your secretary give Mr. Salma an  
17 envelope of cash when he arrives is not involving your  
18 secretary as a criminal participant. Asking somebody to stand  
19 at a site to make a bid for you is not involving somebody as a  
20 criminal participant.

21           **THE COURT:** Well, depending -- that's a function of  
22 whether that person knows what the illegal activity was. I  
23 mean --

24           **MR. WEINBERG:** It depends. You don't --

25           **THE COURT:** Okay, but Troy Kent knew what -- I think;

1 maybe I'm wrong -- knew what -- what the \$9,000 -- whatever he  
2 was asked to do by Mr. Cullinane, he knew what it was about.  
3 So no, he's not a secretary. He's a member of the conspiracy  
4 that your client tells: Go to this place, or do this thing,  
5 and give me the money.

6 That's -- that's org- -- that's a role of a -- not of the  
7 leader; that's a role of a manager. Or supervisor.

8 Is it not?

9 **MR. WEINBERG:** No -- that -- that is a completely  
10 artificial view, with all respect, Your Honor. To have  
11 somebody -- even if true. And that's the problem. Assuming  
12 it's true --

13 **THE COURT:** I understand. If it's not true --

14 **MR. WEINBERG:** All of these allegations are just, you  
15 know, self-serving hearsay by people making deals with the  
16 government. But we're not litigating those; we're not having  
17 an evidentiary hearing.

18 But even if true, on one occasion telling somebody: Give  
19 the money to that person, please, is not control. It's -- it's  
20 an arrangement. People do that every day in every walk of  
21 life.

22 **THE COURT:** Controls are always arrangements.

23 **MR. WEINBERG:** Sorry?

24 **THE COURT:** Controls are always arrangements. That's  
25 how you -- that's how you communicate, or that's how a control

1 is put into effect. You make an arrangement.

2 **MR. WEINBERG:** The word loses its meaning. If every  
3 time you ask somebody to do something in a particular way you  
4 thereby control them, then the word "control" means nothing in  
5 this context. Then you don't have leaders --

6 **THE COURT:** No, no --

7 **MR. WEINBERG:** You don't have leaders who are  
8 controlling, if all it takes is to suggest to somebody they  
9 deliver money.

10 **THE COURT:** If I say to Smith: Go out, pick up the  
11 money. You know, there's that term called "bagman" "bagman."  
12 The bagman is the person who gets the money, gives the money,  
13 and so forth.

14 If I say: Hey, you go get the money... Maybe I say it  
15 nicely: Would you like to go get the money? Or --

16 **MR. WEINBERG:** Interpolating facts.

17 **THE COURT:** -- something like that. But the person's  
18 the bagman. He's a bagman. He is -- there is evidence then  
19 that he is being controlled or supervised by the person giving  
20 him the directions. If he knows what the illegal purpose is.  
21 That's how bagmen operate.

22 **MR. WEINBERG:** Your Honor --

23 **THE COURT:** I'm wrong, Mr. Jacobs?

24 **MR. JACOBS:** (Nods head)

25 **THE COURT:** Mr. Jacobs thinks I'm wrong. I want to

1 know -- Mr. Jacobs has had an illustrious career as an  
2 Assistant U.S. Attorney. He can tell me why bagmen don't  
3 operate that way.

4 Go ahead, Mr. Jacobs.

5 If you don't mind, Mr. Weinberg, I just want to hear from  
6 Mr. Jacobs, if he's going to give me his critique as we hear  
7 the argument.

8 Come on up.

9 **MR. JACOBS:** I don't think there's evidence here that  
10 there were bagmen used. I don't think that fits the facts.  
11 And just the fact that somebody in some transaction -- you  
12 could -- you could --

13 **THE COURT:** By the way, I said it's like a bagman. I  
14 said it's like a bagman.

15 **MR. JACOBS:** Okay.

16 **THE COURT:** It's like a collector of funds. That's  
17 what I said.

18 **MR. JACOBS:** The problem, Your Honor, here, is that it  
19 proves too much. Because you could take a random fact -- we  
20 have I don't know how many hundreds of 302s here. And you can  
21 pick out one fact here and one fact here, and say: Oh, yes,  
22 that's the leader or organizer. And you could do it literally  
23 in every case.

24 So the problem is, based on the evidence that has been  
25 articulated here as to my client and as to Mr. Cullinane, you

1 could give a four-level enhancement -- or in the case of  
2 Mr. Cullinane, lucky enough, I suppose, to get three -- for  
3 literally every defendant in every conspiracy. And that is  
4 not, respectfully, what the guidelines were intended to do.

5 And I think that that is the point that Mr. Weinberg is  
6 making, to me, it seems quite eloquently.

7 **THE COURT:** Oh, I -- I -- okay.

8 So what about that? In other words, he's saying: Look,  
9 the government is sort of cherry-picking its facts out of the  
10 morass of 302s. And sure, you know, he picked up the money.  
11 Let's assume he picked up the money for -- that makes him,  
12 quote, the bagman? Because you could almost say that about  
13 everybody, because everybody was picking up everybody's else  
14 money, or doing things all in a -- that's the *modus operandi* of  
15 the conspiracy. Therefore, it shouldn't single him out for an  
16 aggravating role in the offense. That's what Mr. Weinberg is  
17 saying.

18 Right?

19 **MR. WEINBERG:** Thank you.

20 **THE COURT:** Right.

21 **MR. WEINBERG:** And thanks, Mr. Jacobs, as well.

22 **THE COURT:** Okay. There we go.

23 What's your answer to that? Because that sounds like  
24 that's a legitimate argument.

25 **MR. MAST:** Your Honor, the facts of this case show



1 that it is not just the one-off example of passing money  
2 between someone else at the direction of Mr. Cullinane.  
3 Mr. Cullinane, as a member of the Big 5 -- there's a chorus of  
4 witnesses who will tell the story of how they impacted the  
5 auctions.

6 But it's not just the collective Big 5 influencing the  
7 auctions. It's Mr. Cullinane sending another individual on his  
8 behalf to engage in bid-rigging conduct, and to pay off  
9 agreements and receive payoff agreements.

10 This is an unindicted co-conspirator is. It's distinct  
11 from Mr. Appenrodt and Mr. Giraudó. But, this individual  
12 attended and worked on behalf of Mr. Cullinane for his profit  
13 as part of his membership in the Big 5.

14 So it's not a one-off scenario where Mr. Cullinane in one  
15 instance is directing someone else to give \$9,000 to another  
16 co-conspirator. It's a regular part of his role at the  
17 auction. And so a three-level enhancement is warranted.

18 A four-level enhancement in this case is not warranted.  
19 He did not carry the same influence as Mr. Giraudó within that  
20 group.

21 But, that group, as a whole -- and I think the statements  
22 from witnesses are consistent -- controlled the auctions. They  
23 set up the system, and required others to play by those rules.

24 So in this case, a three-level enhancement would be  
25 warranted.

1           **MR. WEINBERG:** The problem is "They, they, they. The  
2 Big 5 this, they did this, they did that."

3           The question is: What did Mr. Cullinane do? And what it  
4 comes down to: Is on one occasion, if true, he asked somebody  
5 to deliver money to somebody else.

6           And then there is this phantom allegation that B.G. went  
7 to auctions for Mr. Cullinane. B.G. was never interviewed.

8           **THE COURT:** Pardon?

9           **MR. WEINBERG:** B.G. was never interviewed. There was  
10 no statement from B.G. acknowledging -- recognizing that what  
11 he did -- that this is what he did.

12           There are people who say that B.G. showed up, and they  
13 think he was working for Cullinane. That's all they have.  
14 That's all they have.

15           **MR. MAST:** B.G. is the unindicted co-conspirator. And  
16 Mr. Weinberg is correct that he was not interviewed. But we  
17 did receive multiple statements from multiple witnesses that  
18 this unindicted co-conspirator was working on behalf of  
19 Mr. Cullinane, entered into payoff agreements on behalf of  
20 Mr. Cullinane, was aware of what was going on.

21           So it's not -- I do give some credit to the idea that if a  
22 secretary is given an envelope of cash without knowing what is  
23 in there, that might not be enough to subscribe a  
24 manager/supervisor. But that's not what this scenario is.

25           **THE COURT:** I don't know how I'd give any credibility

1 to B.G. Somebody who is not fully identified, somebody who has  
2 not been interviewed, somebody who was simply observed. Though  
3 I don't question the observation, but the observations are: He  
4 did this and he did that --

5 **MR. WEINBERG:** (Inaudible)

6 **THE COURT:** Or she. And by the way, this is who told  
7 that person to do it.

8 I don't know.

9 **MR. WEINBERG:** Exactly.

10 **THE COURT:** I don't know. That -- there, I'm  
11 divining -- am I not divining what the directions were, and  
12 that they came from Mr. Cullinane, and what the understanding  
13 was and so forth? I -- I -- I have a hard time putting that in  
14 the pot of evidence justifying the enhancement. So, I'm not  
15 going to.

16 The question is: Taking that out, what do you have?  
17 That's the question.

18 **MR. WEINBERG:** What you have is one delivery of  
19 \$9,000.

20 **THE COURT:** Is that it?

21 **MR. WEINBERG:** And we don't know what the context was.  
22 And the secretary -- there's a Ninth Circuit case -- *King* I  
23 believe it is, it's cited in one of my memos -- that says, you  
24 know, innocent employees who run errands don't count.

25 **THE COURT:** I don't think Troy Kent is that. Is he?

1           **MR. MAST:** No, no, Your Honor.

2           **THE COURT:** Don't I get to sentence him?

3           **MR. WEINBERG:** Two things. They made two different  
4 allegations. Troy Kent is the \$9,000 --

5           **THE COURT:** Yeah, that's what --

6           **MR. WEINBERG:** An allegation that a secretary handed  
7 an envelope to Laith Salma.

8           **THE COURT:** No. I mean, a secretary's a secretary. I  
9 mean, I don't want to sound sexist. It could be a male  
10 secretary, as well as a female secretary.

11           **MR. WEINBERG:** Mr. Mast said: Well, maybe that's not  
12 enough. The Ninth Circuit says clearly, that's not enough.

13           **THE COURT:** So we still have -- so we have the \$9,000.  
14 Do we have anything else?

15           **MR. WEINBERG:** That's all we have.

16           **MR. MAST:** So what I would submit, Your Honor, is that  
17 Mr. Cullinane's involvement in this core group of bidders is  
18 enough to apply the enhancement in this case, because  
19 specifically, this group was the group that was setting the  
20 rules. And Mr. Cullinane benefited from that involvement in  
21 that group.

22           **THE COURT:** Okay. Got it. Submission?

23           **MR. WEINBERG:** Submitted.

24           **MR. MAST:** Yes, Your Honor.

25           **THE COURT:** We're going to take five minutes. I'll be

1 back.

2 **MR. WEINBERG:** Thank Your Honor.

3 **THE COURT:** Anything else, Mr. Weinberg, before you  
4 wind up? Because I don't want to have to go back twice.

5 **MR. WEINBERG:** I'm getting wound up for tomorrow,  
6 Your Honor, but done for today.

7 **THE COURT:** Okay. You were wound up on guidelines.  
8 Five minutes.

9 (Recess taken from 4:03 p.m. to 4:09 p.m.)

10 **THE CLERK:** Please come to order; court is back in  
11 session.

12 Please be seated.

13 **THE COURT:** I want to take a look at the submissions  
14 on this issue before ruling. However -- so that means I'm not  
15 going to do it now. I will take a look at it this evening.  
16 And before sentencing tomorrow -- and I think you're on for  
17 1:00 -- I will advise you as to the Court's decision in that.

18 So, as I understand it, everybody's guideline -- all  
19 objections have been addressed, and everybody's guideline is  
20 set. Objections are noted. And we can proceed tomorrow with  
21 sentencing.

22 (Off-the-Record discussion between counsel)

23 **THE COURT:** I scheduled it in a -- as indicated. I  
24 don't know if anybody has any questions about that. But that's  
25 -- I don't know how long it's going to take for sentencing.

1           You can address all the 3553(a) factors, including, of  
2 course, the guidelines. I don't want to preclude anybody from  
3 doing that. But I'm not going to revise -- don't use it as an  
4 opportunity to convince the Court that the guideline  
5 determination is wrong. You can use it -- you can say: It's  
6 wrong, and therefore the sentence should be X.

7           But, you know, I try to -- I mean, realize you're  
8 addressing one person, and a record, but one person. So I can  
9 listen to it and digest so much, and whatever it is, it is.

10           Also, you should be mindful of the fact that I have read  
11 the presentence reports. That I have read the character  
12 letters. I have read the documents, especially as they pertain  
13 to each individual's individualized situation. I've read them.  
14 Because sentencing is individualized. So I'm mindful of it.  
15 And obviously, you should address it where you think it's  
16 significant.

17           Okay? And again, as I said, just to restate it, that in  
18 the event I give a sentence of confinement, I will stay -- I  
19 will allow a defendant to voluntarily surrender, and give an  
20 adequate amount of time for the Bureau of Prisons to designate  
21 a facility.

22           Okay. So is there anything further to bring to the  
23 Court's attention?

24           **MR. MAST:** Nothing from the government.

25           **MR. WEINBERG:** No, Your Honor.

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**THE COURT:** Anything from any defendant?

(No response)

**THE COURT:** No. Okay. I'll see you tomorrow at 9:00  
a.m. Thank you.

(Proceedings concluded)

**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

*Belle Ball*

\_\_\_\_\_  
/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Wednesday, May 9, 2018