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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

18 Cr. 333 (JGK)

5 AKSHAY AIYER,

6 Defendant.

7 -----x

Trial

8 March 12, 2020
9 11:45 a.m.

10 Before:

11 HON. JOHN G. KOELTL,

12 District Judge

13
14 APPEARANCES

15
16 U.S. DEPARTMENT OF JUSTICE
Antitrust Division

17 BY: KEVIN B. HART
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18
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Attorneys for Defendant

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1 (Case called)

2 THE COURT: Good morning all.

3 This is the defendant's motion for acquittal under
4 Rule 29 and for a new trial under Rule 23. I am familiar with
5 the papers. I will listen to argument.

6 MR. KLOTZ: Good morning, your Honor.

7 THE COURT: Good morning.

8 MR. KLOTZ: I will try not to belabor points that
9 we've argued in the past and focus on what I think are new
10 arguments that we're advancing, particularly in connection with
11 the Rule 29 motion but that also has implications for the Rule
12 23 motion as well.

13 The point I want to emphasize this morning, and I
14 guess running into the afternoon because we are just at about
15 noon, is that our contention is that the evidence submitted by
16 the government does not satisfy the Rule 29 standard to show
17 that any of the episodes of conduct were in fact criminal. I
18 am not going to go through every one of them. I think we did
19 address every single one of them in the briefs that we
20 submitted, but I am going to talk about three groups with a
21 couple of illustrations of each to indicate what I mean.

22 First starting with the ruble transactions, it is our
23 contention that there was absolutely no evidence with respect
24 to the ruble of any agreement that could be construed as an
25 agreement to fix prices or rig bids. There was no evidence of

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1 any agreement by the parties on what price to bid to customers
2 who came to one or more of them simultaneously. There was no
3 evidence on who was to have the winning bid, there was no
4 evidence as to any agreement to move the price up or down, and
5 there was repeated evidence during the cross-examination of the
6 cooperating witnesses that they set their prices independently.

7 What there was ample evidence of was sharing of
8 information about pricing because Mr. Katz and Mr. Cummings
9 were uncomfortable pricing the ruble, were afraid of losing
10 money on ruble transactions, and were reluctant to quote prices
11 to customers in the ruble unless they were confident that they
12 would turn around and pass those positions to Mr. Aiyer. Also
13 the evidence in the record was overwhelming that Mr. Aiyer was
14 far more competent than either of them in trading the ruble,
15 knew more about pricing, had a dramatically higher volume of
16 ruble trades and had the best prices in the market.

17 In that context there is nothing at all illegal about
18 the information sharing with respect to pricing in the ruble.
19 To the extent there was any agreement at all, the agreement was
20 a standing agreement that Mr. Aiyer would take positions
21 acquired by either Mr. Katz or Mr. Cummings if they were the
22 winning bidder in a ruble transaction. There is absolutely
23 nothing illegal about that.

24 We have scoured the record for any evidence of any
25 kind of illegality with respect to what the parties agreed on

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1 the ruble, and I submit there is one, and only one, piece of
2 evidence and that is that on one occasion, and only one,
3 Mr. Katz, and only Mr. Katz, testified that his agreement was
4 with Mr. Aiyer was that if Mr. Aiyer was bidding on a ruble
5 transaction, Mr. Aiyer was supposed to be the winning bidder
6 and Mr. Katz understood that he was supposed to put in a less
7 attractive bid.

8 THE COURT: Was that the November 4th, 2010,
9 transaction?

10 MR. KLOTZ: I believe it was in connection with that
11 November 4th, 2010, transaction that he said that.

12 I submit that that testimony has to be completely
13 discounted for a whole host of reasons. First of all, there is
14 no evidence in any written document -- there is no chat
15 evidence involving Mr. Aiyer that there was any such agreement.
16 There is no evidence whatsoever of Mr. Aiyer on any occasion
17 asking Mr. Katz to give a less favorable price to a customer.
18 There is no evidence of Mr. Aiyer saying to Mr. Katz, *We have*
19 *this agreement. Let's all follow it.* This is simply one
20 statement by Mr. Katz and I believe it was in the same portion
21 of testimony that Mr. Katz was asked, *Well, did you actually*
22 *discuss this with Mr. Aiyer.* He said, *Well, no, we have been*
23 *in the business a long time. We all knew what the deal was*
24 *supposed to be.* That I submit is not evidence of an agreement.
25 That is evidence of Mr. Katz's understanding.

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1 I think there is that evidence that even that
2 understanding is completely contradicted by other evidence.
3 The evidence was compelling that Mr. Katz couldn't compete in
4 the ruble because he felt uncomfortable in pricing ruble
5 transactions and unilaterally decided that he didn't want to
6 compete. Mr. Aiyer didn't need any agreement from Mr. Katz not
7 to compete in the ruble. Mr. Katz was not an effective
8 competitor. For Mr. Katz to say, I had an agreement that I
9 wouldn't compete in the ruble is like my saying that I have an
10 agreement with Ms. Sher that I will be taller than she is. It
11 is not a subject that an agreement is needed on.

12 The agreement also, if you think about it, makes no
13 sense whatsoever from either parties' point of view.
14 Mr. Katz's testimony that there was an agreement that he would
15 give the worst bid would only make sense if there was some quid
16 pro quo that he got in exchange. There was no testimony of any
17 quid pro quo.

18 THE COURT: That is not necessarily true of course. A
19 customer comes to three banks for a bid. Mr. Aiyer and the
20 other alleged conspirators have employment with their
21 respective banks. They can't very well say, *Oh, I am not very*
22 *good at my job and so I am not even going to bid.* They don't
23 do that. What do they do? They talk amongst themselves about
24 what the bids may be.

25 Now, it certainly is basic conspiracy law that you

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1 don't have to sit around a table and sign an agreement.
2 Conspiracies are often formed not that way. Isn't it up to the
3 jury to determine whether there was an agreement or
4 understanding to fix prices or rig bids? You say the evidence
5 was overwhelming that there was no agreement, but that is
6 really a jury question based upon all of the facts of all of
7 the trades and everything that people said about the trades.

8 Let me go back one step in the analysis. You said you
9 were going to concentrate just on a few transactions. That's
10 fine of course. If of all the transactions that have been
11 discussed there was any one which was an example of an
12 understanding to fix prices or rig bids, the government would
13 have proven the charge, wouldn't it?

14 MR. KLOTZ: Not necessarily for several reasons.

15 THE COURT: Why?

16 MR. KLOTZ: If I started with the ruble, I am going to
17 go on to trading --

18 THE COURT: No, no. Let's just stay on the ruble for
19 a moment.

20 MR. KLOTZ: If they have proven one ruble transaction
21 that there was an illegal agreement and that is all they
22 proved, the case is out on statute of limitations grounds.

23 THE COURT: Oh --

24 MR. KLOTZ: Done.

25 THE COURT: -- they would also have to establish that

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1 there was an overt act in furtherance of the conspiracy that
2 occurred within the statute, and they point to a couple of
3 transactions on May 20th, I believe.

4 MR. KLOTZ: Right. Not involving the ruble.

5 THE COURT: Right. A transaction within the statute
6 of limitations doesn't even itself have to be an illegal
7 transaction if in fact it was in furtherance of the conspiracy;
8 right?

9 MR. KLOTZ: Correct.

10 THE COURT: So if they have proven one ruble
11 transaction that was an example of price fixing or bid rigging
12 that was pursuant to an agreement, with all of the evidence
13 that is out there that would have been enough; right?

14 MR. KLOTZ: On the record presented to the jury, I
15 submit the answer is no. Because there wasn't any -- if you
16 grant my argument, the Reuters trading episodes ought to be out
17 of the case if you just look at the ruble.

18 THE COURT: No. I am not on the Reuters evidence
19 about hiding demand if you will. I am just on the ruble
20 transactions. If the government proved that one of those ruble
21 transactions was in fact pursuant to an understanding to fix
22 prices or rig bids, that would have been enough; right?

23 MR. KLOTZ: Well, there is a second reason why I don't
24 think that it would have been enough and that goes to the Rule
25 33 motion.

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1 THE COURT: We're on the Rule 29 motion.

2 MR. KLOTZ: I understand. For Rule 29 purposes if
3 they showed an illegal transaction in the ruble and if they
4 showed that either that transaction or some other related
5 transaction pursuant to the same agreement occurred within the
6 statute of limitations --

7 THE COURT: An overt act.

8 MR. KLOTZ: An overt act.

9 -- then that would appear to satisfy for Rule 29
10 purposes.

11 THE COURT: Okay.

12 MR. KLOTZ: The standard but not for Rule 33 purposes
13 which I will get to.

14 THE COURT: How do you explain the February 28th,
15 2012, transaction? There is the discussion between the
16 defendants, Williams and Cummings, about the prices that they
17 are showing on the ruble and the defendant has the best price;
18 but after talking to Williams and Cummings about their prices,
19 he then drops his price to the disadvantage of the customer and
20 gets the bid.

21 MR. KLOTZ: That was going to be one of my examples to
22 address, your Honor.

23 THE COURT: Okay. You say, among other things, in
24 your papers that it can't be price fixing because these people
25 are in a vertical relationship rather than a horizontal

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1 relationship. Customer comes with the same transaction to
2 three separate bankers. The bankers discuss the price that
3 they are going to give to the customer. The defendant lowers
4 his price when he finds out that his two competitors are
5 offering even worse prices for the customer and then gets the
6 bid, gets the deal, gets the transaction.

7 Now, can you really credibly argue that those three
8 bankers are in a vertical relationship to each other?

9 MR. KLOTZ: Absolutely, your Honor. The conversation
10 starts with Mr. Cummings who does not have responsibility for
11 pricing the ruble at his bank -- the guy who does is apparently
12 is not there -- going to Mr. Aiyer and saying I need a help on
13 a ruble right. That is a vertical relationship. He is asking
14 somebody to, A, give him advice in an area where he doesn't
15 know what he is doing, and B, to be prepared to take the
16 position off his hands if the customer deals with him.

17 The testimony was -- Mr. Katz didn't testify about
18 this. So it is Mr. Cummings' testimony. So the testimony was
19 that the prices were completely independent. There was no
20 discussion among Katz -- not Katz -- Cummings and Williams.

21 THE COURT: Hold on.

22 In order to establish, one would think, that there was
23 a conspiracy to fix prices or rig bids, you don't need the
24 written agreement or the admission. It becomes a question for
25 the jury as to whether in fact there was an agreement or

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1 understanding to fix prices or rig bids. So the jury is
2 presented with what these people did and what they said at the
3 time. And then the parties are perfectly free to argue to the
4 jury, as you did, that there was no agreement or understanding;
5 and then the jury can look at the evidence of what these people
6 did and come to its conclusion as to whether the government had
7 proved this understanding or agreement to fix prices or rig
8 bids. What happened? What actually happened in the
9 transaction? A customer comes to three bankers who present
10 themselves as independent, established huge banks and the
11 customer comes for bids.

12 Now, certainly the jury would be entitled to consider
13 the testimony by the customer, that the customer of course was
14 looking for the best bid. Does the customer get the best bid?
15 The three bankers talk to each other, show their bids, and the
16 banker who has the best bid for the bank is able to get it even
17 better when that banker finds out what the other two bids are.
18 Now, you can argue that that is not price fixing or bid rigging
19 but that was certainly the gist of the evidence.

20 The jury was instructed: Here is what price fixing
21 is. Here is what bid rigging is. The instructions came right
22 out of Judge Sand and the ABA Antitrust Section Model Charges.
23 I don't recall that there was any substantive objection to the
24 charges. So the jury was properly instructed: Here is what
25 price fixing is and here is what bid rigging is. And they

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1 looked at this evidence and said, *Price fixing; bid rigging.*

2 MR. KLOTZ: Can I make a number of points with respect
3 to January 28th?

4 THE COURT: Sure.

5 MR. KLOTZ: First of all, there is a critical piece
6 missing from what the parties did, which is this transaction
7 doesn't involve Katz.

8 THE COURT: It doesn't involve?

9 MR. KLOTZ: Katz. So Cummings is the relevant
10 witness. Cummings did not testify, *I had an agreement that*
11 *Aiyer would win this bid.* You don't have to have a written
12 agreement that he is a party to the agreement if there was an
13 agreement. For sure if he was prepared to testify, The reason
14 I did this was because I had an agreement with Aiyer, the
15 government would have asked him that question. That is not
16 what he testified.

17 THE COURT: My recollection is that there was
18 testimony by Mr. Cummings that he preferred to call it an
19 understanding.

20 MR. KLOTZ: Not with respect to the ruble. He gave
21 that general testimony but he did not say that with respect to
22 ruble. In this case, moving on to the second point that your
23 Honor made and it links back to something that you said
24 earlier, each of these people is at a big institution and
25 customers come to them whether they are comfortable with the

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1 currency or not. They are not at liberty to say, Sorry, I am
2 not going to quote you on that. They have to say something.
3 What they are permitted to do is what Cummings in particular
4 did all the time. They are permitted to quote a deliberately
5 unattractive price because they don't want the business. That
6 is what Cummings testified he did in this case. He said, *When*
7 *I heard that Aiyer was bidding this and Williams was bidding*
8 *this, I decided to bid the other thing intending to lose the*
9 *business but not to look foolish in what I quoted.* That was
10 the testimony. There was no testimony we had an agreement.
11 There was no testimony we had an agreement that Aiyer was going
12 to win. There was no testimony that the understanding was that
13 we would disclose our prices to Aiyer so he could get a better
14 price.

15 THE COURT: I am sorry. When three bankers get
16 together and they discuss the prices that they are going to
17 quote and you look at the three prices and you know that two of
18 the prices are going to be the losing bids and one price is
19 going to be the winning bid but can even be reduced some to the
20 advantage of the bank and the disadvantage of the customer, the
21 point is that one of the bankers who is showing the losing bids
22 has to say, Well, I deliberately did that independently in
23 order to lose the bid. That's what the banker has to say.

24 MR. KLOTZ: He doesn't have to say it. That is what
25 he did say under oath. That was Cummings' testimony.

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1 As to Mr. Aiyer changing his bid, there was no
2 testimony whatsoever as to why. There was a perfectly
3 plausible and legal explanation as to why.

4 THE COURT: What was that?

5 MR. KLOTZ: There was testimony in the record that
6 larger transactions get worse pricing than smaller ones because
7 of the greater risk, and Mr. Aiyer found out as a result --

8 THE COURT: But he told the other two bankers what the
9 price was that he had determined.

10 MR. KLOTZ: For a \$5 million transaction.

11 THE COURT: And then after talking and finding out
12 what the proposed bids were of the other bankers, he reduced
13 it.

14 MR. KLOTZ: After learning that the customer had gone
15 to two other bankers also with a \$5 million transaction and
16 after saying to both of them, *If she trades with all of us, I*
17 *will take your positions.* The standard on Rule 29 is when you
18 are talking about inferences if the inference that is
19 consistent with innocence is as strong as the inference that is
20 consistent with guilt, then a reasonable jury has to have had a
21 reasonable doubt. With respect to changing the price here,
22 there was no direct testimony. You are being asked to make an
23 inference, and there is a perfectly plausible inference about
24 why he might have changed the price.

25 Again, circling back so we have the context here. Mr.

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1 Cummings does not go to Mr. Aiyer knowing that Mr. Aiyer has
2 been approached for this transaction for the purpose of let's
3 all figure out who is going to bid what. As far as knows, he
4 is the only person who has been asked. He goes to Mr. Aiyer
5 for the purpose of saying, *I am over my head here. What should*
6 *I tell the customer?*

7 THE COURT: But they all learn that they have all been
8 given the same transaction by the same customer so that they
9 were all bidding on the same transaction.

10 MR. KLOTZ: They don't know that it is a single \$5
11 million transaction. They know they have been asked to bid on
12 five million, but they don't whether the customer is trading
13 five or 15. That according to the testimony potentially
14 influences the price quote.

15 THE COURT: Go ahead.

16 MR. KLOTZ: I will not go into the other ruble --
17 well, I will go into the other ruble transactions quickly.

18 October 14th is the one where Aiyer is approached by a
19 broker for a price and the critical fact here is that the
20 broker is not the customer's broker. This is October 14, 2010.
21 Mckenzie is the customer. They go to Katz and they apparently
22 go to multiple other banks and those multiple other banks go to
23 a broker and the broker go to Aiyer. In that transaction,
24 Aiyer is not competing with Katz and he is not competing with
25 the other banks because nobody has asked him to quote the price

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1 to the customer. He has been asked to quote prices to other
2 banks. In that situation his relationship to the other banks
3 is a purely vertical relationship. He is under no obligation
4 to quote any of them and if he decides to quote any of them, he
5 is perfectly free to quote different prices to different
6 people. Favor somebody he likes. Disfavor somebody he doesn't
7 like. There simply is no horizontal competition on
8 October 14th, 2010.

9 Then I will go back to November 4th, which is the one
10 we started with. The testimony was that Mr. Aiyer gave his
11 price, 30.99 rubles to the dollar, completely independently.
12 He had given that to the customer without talking to Mr. Katz.
13 Katz's testimony was that his price quote of 30.98 he arrived
14 at independently, one presumes for the same reason that
15 Cummings arrives at lower prices when he doesn't want to get a
16 transaction; but there is no testimony that those prices were
17 coordinated. There is no testimony that Aiyer's price was
18 artificially high or low or unfavorable or whatever it was.
19 For all the testimony shows it was the absolutely best price
20 anybody to get into the market. So there is no evidence of any
21 injury to the customer certainly much less intent to injure a
22 customer in that circumstance. Those are the best examples
23 that the government has. None of them stand up to scrutiny of
24 showing the elements of the offense.

25 January 12th, 2018, shows the same pattern. That is

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1 the stop loss.

2 THE COURT: Do you mean January 18, 2012?

3 MR. KLOTZ: Sorry. January 18th, 2012. That is the
4 stop-loss transaction. What happens with the stop-loss
5 transaction is there is no question that the parties shared
6 information about having stop-loss orders. They shared all
7 kinds of information about what was happening in the market.
8 There is nothing illegal about that information sharing.

9 There was testimony from Mr. Cummings, the
10 government's witness, that if you knew that prices were
11 approaching a stop-loss level, one of the strategies that was
12 advantageous both to you and to the customer was to trade in
13 advance of that based on a prediction of what was going to
14 happen.

15 THE COURT: Sure. That was a defense argument on. On
16 the other hand, one could read the chats as an effort by the
17 defendant and others to drive the price down to run a stop so
18 that their transaction would be triggered. Yes, I understand
19 the defense argument that this was all a helpful, good trading
20 strategy to save the customer money. On the other hand, the
21 jury could find more persuasive that the defendant and others
22 were attempting to drive the price down to run a stop in order
23 to trigger the transactions that they otherwise had and which
24 wouldn't be triggered unless they ran the stop.

25 MR. KLOTZ: There is another piece to the defense

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1 argument, your Honor, and that piece is there is no testimony
2 that the parties coordinated their trading to run the stop. On
3 the contrary, Mr. Cummings testified repeatedly on
4 cross-examination that his trading was not coordinated with Mr.
5 Aiyer's. We presented expert testimony to that, too. Now, if
6 Mr. Cumming had said, I had an agreement with Mr. Aiyer that we
7 were going do drive the price down through the stop level and
8 by golly that is what we did, and I were here arguing, Well,
9 that is not very believable because here are inferences that
10 you could draw to the contrary, then I think your Honor's
11 argument would make perfect sense. That is not what Cummings
12 testified. There is an evidentiary link missing in the
13 evidence that the government presented. There was no evidence
14 of coordinated trading.

15 Indeed, when Cummings was talking about what he did,
16 it was consistently about his own conduct and only his own
17 conduct -- here is what I was trying to do with my trading and
18 here is the only reason I did it the way I did, but not any
19 implication of Mr. Aiyer being involved in that. On
20 cross-examination he said, *Nope, I had no idea what trading Mr.*
21 *Aiyer was doing. I was not coordinating my trading with Mr.*
22 *Aiyer.* If you say, Well, a jury could infer from the facts and
23 circumstances, we're back to where we were before I submit,
24 which is if you have one inference that is consistent with
25 innocence, namely, parties who know certain information are

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1 likely to act in a particular way unilaterally and another
2 inference that is consistent with guilt, the Rule 29 standard
3 says that that is not sufficient evidence. A reasonable jury
4 has to have had a reasonable doubt as to that.

5 Then the final category of trades is the Reuters
6 trade, which was on the one hand the most numerous of the
7 government examples; but on the other hand, the majority of the
8 examples were examples of spoofing and canceled trades, which
9 the government conceded and your Honor quite properly
10 instructed the jury that these are not antitrust violations.
11 If you take those out of the picture, you then have two or
12 three examples of iceberg orders. You have two or three
13 examples of iceberg orders where although Katz or Cummings or
14 both of them said, *Oh, this was the purpose and this was to*
15 *disguise the volume of supply or demand in the market*, in every
16 single instance on cross-examination, they agreed that there
17 was no change whatsoever in the perceived supply and demand
18 that customers saw in those instances. I submit that those
19 instances are just silly.

20 Then you have a handful of instances where one person
21 or another stays out of somebody else's way while they are
22 trading. I think four or five instances spread over two and a
23 half years and umpteen thousand different transactions. In a
24 context where all of these people are sharing information
25 because they have an extraordinarily economically important,

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1 completely legal buy-sell relationship among each other and I
2 think you cannot infer in those circumstances that it was the
3 intent of the parties to manipulate price. I think the most
4 you could conceivably infer -- I don't think even this works --
5 is that what is going on with those very limited number of
6 Reuters trades is what was going in Apex Oil, which is you have
7 in a dealer market a couple of people who were both dealers and
8 who were both counterparties and competitors ganging up to
9 disadvantage another party who was a counterparty and
10 competitor, and the Court held that is not a per se violation.

11 As I say, I will breeze through the other examples as
12 well, I don't think any of the government's examples stand up
13 to scrutiny. I think the entire case can be dismissed on Rule
14 29 grounds. Then my argument is even if the entire case can't
15 be dismissed on Rule 29 grounds, if any of these groups of
16 episodes, theories of what the offense was went to the jury
17 improperly, then you've got prejudice to the defendant because
18 you can't tell whether the jury convicted on a permissible
19 theory or impermissible theory.

20 THE COURT: Before you get to that, the first part of
21 your brief, pages 1 to 33, it seemed to me to be an argument
22 that the Court erred in denying the motion to dismiss portions
23 of the indictment in rejecting your motions in limine. I think
24 you even say that essentially in the brief that you made these
25 arguments before.

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1 Am I right?

2 MR. KLOTZ: Yes, your Honor, that is why I didn't
3 address it today.

4 THE COURT: Okay.

5 MR. KLOTZ: I felt I have done my best to persuade
6 your Honor on this. I have been unsuccessful.

7 THE COURT: If that is true, pages 1 through 33 of
8 your brief are a motion for reconsideration.

9 MR. KLOTZ: I think in effect that is what they are.
10 Hopefully we put it more persuasively this time through than
11 prior times through. I felt we had to make the argument less
12 there be some argument down the road that we waived that
13 argument because we didn't reraise it on Rule 29 motion.

14 THE COURT: Isn't that an untimely motion for
15 reconsideration?

16 MR. KLOTZ: I think it is perfectly permissible as
17 part of a Rule 29 motion.

18 THE COURT: The gist of the first part of the belief
19 is that the Court should have engaged in a sophisticated
20 economic analysis of all of the transactions deciding which
21 ones were in fact per se price fixing or bid rigging; and only
22 after the Court had engaged in that sophisticated economic
23 analysis should the Court have allowed evidence of that
24 transaction to go to the jury.

25 Is that fair?

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1 MR. KLOTZ: I put it a little bit differently. First
2 of all, the level of sophistication of the analysis is going to
3 vary from situation to situation. What your position was is
4 the Court needs to do sufficient analysis to reach a conclusion
5 whether the conduct actually at issue, not just as alleged in
6 the indictment, amounts to a personal violation of the
7 antitrust laws.

8 THE COURT: What criminal cases do you rely on for
9 that proposition?

10 We have an indictment that alleges price fixing and
11 bid rigging. In the civil context there are motions for
12 summary judgment, which don't exist in the criminal context.
13 In the criminal context we have an indictment, we have a motion
14 to dismiss, we have the charge to the jury which asks them
15 whether the government has proven the elements of the offense
16 beyond a reasonable doubt and here are the elements of the
17 offense and the offenses here were price fixing and bid rigging
18 and there is no issue raised in the briefs that the elements of
19 the offense were not properly given to the jury. So what cases
20 in the criminal context do you rely on for the notion that
21 there had to be this proceeding of some sort in which the Court
22 went through a "sophisticated economic analysis" before either
23 allowing evidence in or the charge to the jury?

24 The cases that you rely on are civil cases with
25 sophisticated transactions such as licensing deals and the like

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1 rather than what could be described as straightforward
2 allegations of price fixing or bid rigging. So tell me the
3 cases that I should look at in the criminal context that say
4 that the Court has to go through a sophisticated economic
5 analysis of alleged price fixing or bid rigging before giving
6 the case to the jury or admitting the evidence. What are the
7 criminal cases and I will go and look at them carefully?

8 MR. KLOTZ: So in this our motions to dismiss, your
9 Honor, we cited criminal cases at the time --

10 THE COURT: Just tell me.

11 MR. KLOTZ: It's the --

12 THE COURT: Tell me what the major criminal case --

13 MR. KLOTZ: There is only one criminal case in which a
14 Court dismissed an indictment because it found that the conduct
15 at issue was not governed by the per se rule.

16 THE COURT: Because it was not price fixing or bid
17 rigging.

18 MR. KLOTZ: Right. That case was reversed on appeal.
19 So that is a criminal case. We also cited--

20 THE COURT: Hold on. Hold on. Hold on. That is what
21 I am trying to get. The only case which you rely on as you
22 think comparable was a district court case that was reversed on
23 appeal. Not great authority.

24 MR. KLOTZ: It isn't that case. Great authority --

25 THE COURT: Hold on. Hold on.

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1 All I am asking simply is if I were to write an
2 opinion supporting your view that I should have gone through a
3 sophisticated economic analysis in order to be able to look at
4 such things as the total effect on competition of the
5 transactions involved in this case, what cases do I cite in the
6 criminal context that would support that proposition?

7 MR. KLOTZ: The cases you would cite would not be
8 criminal cases. They would be civil cases that stand for
9 propositions --

10 THE COURT: Hold on. Hold on. Hold on.

11 First, the procedural context is noticeably different
12 in the criminal and in the civil context for good reasons.
13 Even if I were to go to the civil context, it appeared to me --
14 I think I said this on the motion to dismiss -- that the cases
15 that you were relying on were cases where the transactions were
16 complicated arrangements among parties, including licensing
17 agreements and the like -- *BMI, Apple* -- not comparable to the
18 transactions here where you have at least three major banks,
19 competitors for customer bids, discussing what they were
20 bidding to a customer.

21 So you say no criminal cases, but then on the
22 substance what cases do you think -- I will look at them
23 carefully -- are most comparable to your argument that you need
24 a sophisticated economic analysis of the total transaction to
25 see whether it really is price fixing or bid rigging?

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1 MR. KLOTZ: So I think to answer your Honor's question
2 I don't know that I can cite a case that I would call
3 comparable on the facts. Although, I disagree that any
4 suggestion the facts in this case are simple and
5 straightforward. I think they are incredibly complex. What I
6 think there is no disagreement about, though, is the
7 determination of whether a conduct is governed by the per se
8 rule or the rule of reason is a question of law for the Court.

9 THE COURT: I am not quite sure --

10 MR. KLOTZ: We cited --

11 THE COURT: Hold on.

12 I am not quite sure you correctly captured whether
13 there is any disagreement. The Supreme Court has told us that
14 price fixing and bid rigging are in fact per se violations of
15 the Sherman Act; right? Both the Supreme Court and the Second
16 Circuit.

17 MR. KLOTZ: Both the Supreme Court and the Second
18 Circuit have also said that agreements that on their face are
19 price fixing and bid rigging aren't necessarily per se
20 violations because the label is not determinative and it takes
21 an analysis.

22 THE COURT: The jury was not asked, "Are these per se
23 violations?"

24 MR. KLOTZ: Correct, and they shouldn't have been.

25 THE COURT: Right. They are asked, *Was this price*

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1 *fixing or bid rigging?* They were then properly instructed, no
2 objection, here are the elements of price fixing and the
3 elements of bid rigging. So that as a matter of fact the jury
4 was asked: Is this price fixing? Here is what price fixing
5 is. The government must establish beyond a reasonable doubt
6 that this was price fixing or beyond a reasonable doubt that
7 this was bid rigging. If they said no, then they find for the
8 defendant.

9 MR. KLOTZ: If that is what they were asked to do--

10 THE COURT: Well, they were, weren't they? They were
11 properly instructed this is price fixing, this is bid rigging,
12 do you find the government has proven this beyond a reasonable
13 doubt.

14 MR. KLOTZ: That would demonstrate by itself only that
15 the conduct appeared to be price fixing and bid rigging in the
16 sense that the Supreme Court and the Second Circuit have held
17 that that doesn't establish a per se violation. That doesn't
18 mean it is not subject to the rule of reason.

19 THE COURT: I am sorry.

20 MR. KLOTZ: It can't be dispositive on this.

21 THE COURT: I don't understand that argument. I
22 really don't.

23 MR. KLOTZ: Our argument is that it is for the Court
24 to determine whether the conduct is governed by the per se rule
25 or rule of reason. And if it is governed by the rule of reason

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1 as we submit it is, it can't be the subject of criminal
2 prosecution.

3 THE COURT: Hold on. Hold on.

4 I had thought that we agreed that the Supreme Court
5 and the Second Circuit have held that price fixing and bid
6 rigging are violations of the criminal violations of the
7 Sherman Act. You don't even have to talk about per se
8 violations. All you have to do is to understand that the
9 Supreme Court and the Second Circuit have said price fixing and
10 bid rigging are criminal violations of the Sherman Act. Here
11 is the definition of price fixing. Here is the definition of
12 bid rigging. The government must prove beyond a reasonable
13 doubt all of the elements of price fixing and/or bid rigging.

14 MR. KLOTZ: If that were the correct analysis, your
15 Honor, then the defendants in BMI could all be sent to jail.
16 Because the Court there said, *What these people have done, no*
17 *question about it, is price fixing.* But that doesn't end the
18 analysis. Those are the cases that we have cited.

19 THE COURT: Okay.

20 MR. KLOTZ: Now, what our argument is, and this
21 circles back to why did we waste 33 pages of our main brief, we
22 made a motion to dismiss presenting these arguments and your
23 Honor said, and I thought fairly, *I don't have enough*
24 *information to make this judgment at this point. I am not*
25 *persuaded that there is anything to the argument, but I*

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1 *certainly don't have enough information at this point.* I think
2 we renewed the argument at the motion in limine stage and
3 again -- I don't want to characterize what your Honor found --
4 what I heard your Honor to find was I still don't have enough
5 information to make this determination. Now at the close of
6 the evidence, I think enough information is there and our
7 submission is it is for the Court to decide, because it didn't
8 go to the jury and shouldn't have gone to the jury, is this
9 conduct a pro se violation or not. That's what we ask you to
10 rule on in part on the Rule 29 motion.

11 THE COURT: Okay.

12 MR. KLOTZ: I think that covers everything I wanted to
13 cover unless your Honor has further questions.

14 THE COURT: I had a few more.

15 You say in your brief that the jury was likely
16 confused about the legal standard. You don't point to any
17 defect, if you will, in the jury instructions that were made
18 and brought to the Court's attention. The jury instructions
19 were based as I said before on Judge Sand's instructions and
20 the ABA Antitrust Model instructions. So I don't understand
21 the basis for saying that the jury was likely confused about
22 the legal standard. The test surely is was the jury properly
23 instructed on the law, was there an objection that the Court
24 should have sustained and didn't or changed the jury
25 instruction in some way or was there clear error in the jury

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1 instructions. The brief doesn't point to what was wrong in the
2 jury instructions.

3 MR. KLOTZ: No. On that point, your Honor, we're not
4 contending that the jury instructions were wrong. I think
5 we're speaking to a more equitable side of the Rule 33 motion
6 of is there a sense here that the outcome was unfair and
7 inappropriate. Certainly my concern based on everything that
8 happened with the jury was that the case was not given the
9 close attention that it should have been given and that it
10 would have been very easy notwithstanding a correct jury
11 instruction for the jury to have been over influenced by
12 testimony from Mr. Cummings with his head hung about how he did
13 wrong and testimony repeatedly about spoofing and canceled
14 trades and the fraudulent nature of them.

15 Your Honor gave the jury instruction we asked for in
16 both of those cases. No dispute. We did ask that the spoofing
17 and canceled trades evidence be excluded altogether. your
18 Honor is right that argument is not based on a disagreement
19 about the adequacy of the jury instructions because we didn't
20 object to them.

21 THE COURT: With respect to the issue of wrong, I
22 haven't done a word check; but I would have thought that the
23 use of the word "wrong" was far more prevalent in the
24 cross-examination than it was in the direct examination. The
25 cross repeatedly said:

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1 *Nothing wrong with that, was there?*

2 *Nope.*

3 *Nothing wrong with that, was there?*

4 *Nope.*

5 *Nothing wrong with that, was there?*

6 Far more than in the direct.

7 MR. KLOTZ: But it was --

8 THE COURT: Sorry?

9 MR. KLOTZ: It was provoked by the direct, your Honor,
10 when the witness testifies it was wrong.

11 THE COURT: Hold on. Hold on.

12 If in fact it was "provoked" by the direct, where was
13 the objection?

14 MR. KLOTZ: There was no objection because within
15 limits I think that was a permissible question for the
16 government to put.

17 THE COURT: If it is a permissible question for the
18 government to put and the defense used it far more, then I am
19 at a loss to understand why --

20 MR. KLOTZ: Can I have a minute, your Honor.

21 THE COURT: Sure.

22 (Pause)

23 MR. KLOTZ: Thank you.

24 THE COURT: Sure.

25 MR. KLOTZ: Mr. Baio suggests I make two more points.

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1 With respect to whether the conduct was wrong, the
2 prosecution eliciting it was wrong on direct is not directly
3 comparable to the defense eliciting it wasn't wrong on cross
4 for this reason: When the witness testifies that the conduct
5 was wrong, that does not mean it was illegal. When the defense
6 however elicits the testimony it was not wrong, that does mean
7 it is not illegal. So there is a different issue with respect
8 to both.

9 Then with respect to what it was we wanted your Honor
10 to do with respect to the Reuters transactions and the issue of
11 characterizing the conduct as either per se or subject to the
12 rule of reason --

13 THE COURT: Hold on. Before you get to the per se, if
14 you thought that it was wrong for the government to ask a
15 question that elicited testimony on direct that what the
16 witness did was wrong --

17 MR. KLOTZ: Agreed. But my point is --

18 THE COURT: -- there should have been an objection if
19 you thought it was wrong. A moment ago you told me it wasn't
20 really wrong for the government to elicit that on direct.

21 MR. KLOTZ: My point is the weight of what the
22 government elicited over and over again and came back to in its
23 summations pushed the jury in a particular direction even
24 though the testimony itself is not necessarily improper in the
25 right context.

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1 THE COURT: Go ahead.

2 MR. KLOTZ: So the second point of what was it that we
3 wanted your Honor to do with respect to judging whether conduct
4 was a per se violation or a rule of reason violation, we think
5 your Honor actually did that with the instruction you gave on
6 spoofing and canceled trades. You in effect determined this
7 behavior whether you like it or not is not an antitrust
8 violation -- not a per se antitrust violation.

9 THE COURT: Not in and of itself.

10 MR. KLOTZ: Yes. We wanted your Honor to make the
11 same determination with respect to other categories of behavior
12 and other categories of evidence.

13 THE COURT: In this case you have an alleged
14 conspiracy among bankers at three major banks who talk to each
15 other and cooperate with each other in a variety of ways. Some
16 of which -- I know you disagree -- can be characterized as
17 price fixing or bid rigging. Some of which you disagree that
18 they are price fixing or bid rigging. In deciding the motion
19 to dismiss, one of the things that I said was in a conspiracy
20 case everything that the conspirators do with each other
21 doesn't necessarily have to be the substantive violation of the
22 law that is the object of the conspiracy.

23 Their dealings with each other in the same way that
24 you would have a RICO conspiracy or other kinds of conspiracy.
25 The way in which the conspirators deal with each other are

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1 inextricably intertwined with the conspiracy that is charged.
2 So they become admissible for reasons such as the way in which
3 the conspirators deal with each other, an ongoing relationship
4 of trust and confidence and all of the other reasons that the
5 Court of Appeals points to for introducing the way in which the
6 conspirators deal with each other during the period of the
7 conspiracy.

8 So you point to spoofing. I gave an instruction on
9 spoofing and I gave an instruction on canceled trades and I
10 explained how they can be relevant to the proof in the case.

11 MR. KLOTZ: I think your Honor gave that instruction
12 less the jury misunderstand and think we can convict based on
13 spoofing and canceled trades alone. Now, our contention is --

14 THE COURT: I think I gave exactly the instruction you
15 asked for on spoofing and canceled check.

16 MR. KLOTZ: I think you did. Although, I said we had
17 previously for reasons of--

18 THE COURT: It was a good instruction.

19 MR. KLOTZ: -- undue prejudice asked that the evidence
20 be excluded altogether. With respect to ruble trades and
21 trading on Reuters again it was our position that for reasons
22 of prejudice because we don't think these can be antitrust
23 violations, they should have been excluded altogether.

24 THE COURT: You complain that I excluded evidence of
25 pro-competitive explanations, but the brief does not go through

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1 the specific evidence that I excluded. I generously included
2 when it was brought to my attention evidence which could be
3 arguably evidence of pro-competitive effects of the transaction
4 if I thought it was necessary to understand the whole
5 transaction and to put the transaction into context and also to
6 support a defense argument that if there was no effect you can
7 read that back into the intent of the parties. So it is not
8 clear to me what the specific evidence that could have had any
9 effect on the trial was that was in fact excluded.

10 MR. KLOTZ: Your Honor allowed us in one instance that
11 I remember, and there may have been a couple of others, to put
12 in evidence through Professor Lyons of lack of anticompetitive
13 effect; but we were prepared to have Professor Lyons testify as
14 to each and every transaction on Reuters. There was no effect
15 from these and we think that would have been powerful evidence
16 and that was excluded. We offered it for precisely that
17 reason. It goes to the intent of the parties. It's an odd
18 pricing fixing conspiracy for sure when the participants in the
19 conspiracy never successfully fix a price or influence or price
20 or whatever. That suggests maybe that wasn't their intent. We
21 got to do that in one or two cases, but we didn't get to make
22 that case across the board.

23 THE COURT: You complain in your brief about the
24 government's summation, but there was never an objection to the
25 government's summation.

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1 MR. KLOTZ: There was not an objection to the
2 government's summation. Again, I think we're speaking in that
3 argument to the equity portion of Rule 33. And our sense,
4 which we urge your Honor to adopt, that the outcome here was
5 not an appropriate outcome.

6 THE COURT: Thank you.

7 MR. KLOTZ: Thank you, your Honor. I appreciate your
8 Honor's indulgence. I have taken quite a bit of time.

9 THE COURT: Oh, no, this is perfectly fine. Perfectly
10 fine.

11 Government.

12 MS. CALLE: Your Honor, I will just touch on a few
13 points. The grand jury in this case returned an indictment
14 that alleged bid rigging and price fixing. The motion to
15 dismiss was brought alleging that this indictment didn't allege
16 a bid rigging and price fixing conspiracy. Your Honor denied
17 that motion.

18 What is at issue at trial was whether evidence came in
19 this front of jury that could support a finding that the
20 defendant agreed in a conspiracy to fix prices and rig bids.
21 We presented evidence of coordinated pricing to customers,
22 which we spent some time discussing. A customer viewed these
23 entities as they view themselves as competitors. They
24 coordinated their pricing to those customers. the Customers at
25 times were advantaged as we talked about in the February 28th,

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1 2012, episode. This kind of coordination between competitor
2 banks as to the price to quote to a customer is bid rigging.
3 We presented evidence of coordinated conduct in the interdealer
4 platform, which courts in this circuit have consistently held
5 is price fixing, bid rigging conduct.

6 THE COURT: Let's pause on that for a moment.

7 MS. CALLE: Sure.

8 THE COURT: The transactions you are talking about
9 under that branch of your argument is essentially the
10 transactions on Reuters where one alleged conspirator would
11 hide the bid for another; right?

12 MS. CALLE: It includes that. It also excludes
13 conduct where would one would say, I have this position. I
14 have this position. Okay, you have twice the amounts so you go
15 first. I won't trade against you. So withholding bids in a
16 bid-suppression manner.

17 THE COURT: You say that courts have held that that is
18 per se price fixing or bid rigging. What are the most
19 analogous cases that you think support that proposition with
20 respect to hiding the demand?

21 MS. CALLE: I think *Usher* case would also be
22 applicable to hiding demand. In *Usher* you had instances where
23 one trader was trading against the other. In the instances of
24 hiding demand that we had here, one would say, Okay, I will
25 pull mine because we're trading the same way and then would

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1 proceed to say, You pull yours now and I will hide your demand
2 instead. So in the *Usher* case you didn't have that added step
3 you will hide the demand in the same language, but the same
4 conduct of withdrawing demand from the market or withdrawing
5 supplies as to effect price is very analogous to what we sought
6 here.

7 THE COURT: *Usher* was just a decision on the motion to
8 dismiss it; right? I eventually resulted in acquittal.

9 MS. CALLE: Yes. Although, not a criminal case, it
10 was per se case, which is the *In Re Foreign Exchange* case as
11 well. So it was similar conduct. It also held it was per se
12 conduct.

13 THE COURT: *For Ex* was which court?

14 MS. CALLE: Southern District, your Honor. I can
15 provide you with that.

16 THE COURT: Discussions with respect to who goes
17 first, who takes the bid, who steps back, the cases that you
18 think are most persuasive on that subject are what?

19 MS. CALLE: *Usher* and *In Re Foreign Exchange*, your
20 Honor. Those dealt with the trading on the interdealer
21 platform and coordinated placing of bids and offers on the
22 platform.

23 THE COURT: Do you contend that I don't even have to
24 reach those transactions if I find that there is price fixing
25 and bid rigging on the ruble transactions?

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1 MS. CALLE: Your Honor, I believe that all of them are
2 per se violations. To Mr. Klotz's point the ruble transactions
3 were outside the statute of limitations so with the same caveat
4 that the government did in fact prove that the conspiracy
5 persisted through the 2013 time period when the statute of
6 limitations ran, then that would suffice.

7 THE COURT: With respect to the activities within the
8 statute of limitations that would bring the conspiracy within
9 the statute of limitations, it is the two trades on May 20th?

10 MS. CALLE: With respect to particular transactions
11 there is also testimony from the co-conspirators that their
12 conspiracy continued through the statute of limitations period.
13 The jury was very clearly instructed on this statute of
14 limitations issue as for the exhibits from the May 20th, 2013,
15 transactions.

16 THE COURT: I know. The jury was very attentive.
17 They focused on, among other things, the May 20th transactions.

18 MS. CALLE: There were also communications entered
19 into the record, communications between the co-conspirators as
20 to customer orders during the 2013 time period as well.

21 THE COURT: Within the statute of limitations?

22 MS. CALLE: Yes, your Honor.

23 THE COURT: In your brief you really didn't address
24 the statute of limitations. It was referred to in the
25 defendant's brief and I don't recall it really being addressed

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1 in your brief.

2 MS. CALLE: Your Honor, we can provide the pin sites
3 in a subsequent filing if you would like.

4 THE COURT: Yes.

5 What do you say that the testimony was as to the
6 continuation of the conspiracy into --

7 MS. CALLE: I believe -- I will look at the specific
8 language so I don't misquote what Mr. Katz and Mr. Cummings
9 testified that their conspiracy continued through May. I think
10 maybe as through June or July of 2013 as alleged in the
11 indictment.

12 THE COURT: Yes. You can give me the pin sites that
13 you are referring to by Monday. If defense has something they
14 want to say in response, they can do that by Tuesday.

15 Go ahead.

16 MS. CALLE: As I was arguing that the coordinated
17 interdealer trading office reports a finding that there was a
18 bid rigging and price fixing conspiracy. What was before the
19 jury were instructions --

20 THE COURT: The two cases that you rely on for that
21 proposition are *Usher* and *In Re For Ex*?

22 MS. CALLE: For the particular -- courts have
23 particularly addressed trading on the interdealer platform and
24 those two courts address it.

25 THE COURT: Any Second Circuit or Supreme Court

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1 decisions?

2 MS. CALLE: *Gelboim* dealt with the LIBOR transactions
3 which dealt with whether they were horizontal competitors in
4 the market agreeing to set the price of the LIBOR benchmark
5 rate. *Gelboim* is 823 F.3d.

6 THE COURT: Sorry. Which?

7 MS. CALLE: *Gelboim*, second Circuit opinion, your
8 Honor.

9 THE COURT: Yes.

10 Go ahead.

11 MS. CALLE: The jury then was, as your Honor discussed
12 with Mr. Klotz, adequately instructed on elements of bid
13 rigging and price fixing. The jury was also instructed as to
14 how they might consider spoofing and fake trades. The jury was
15 also instructed as to information sharing. The jury was also
16 instructed as to independent decision-making.

17 THE COURT: In your brief when you talk about spoofing
18 and canceled trades, you refer to my decision on the motion to
19 dismiss and the language about inextricably intertwined and to
20 the jury instructions. In the course of that, you say that
21 spoofing and canceled trades were "direct evidence" of the
22 conspiracy.

23 What does that mean?

24 MS. CALLE: It means it was evidence of a conspiracy
25 and it showed their intent and showed the background of the

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1 conspiracy that they could consider it as evidence of the
2 conspiracy existed.

3 THE COURT: What does that mean?

4 MS. CALLE: That when determining whether there was an
5 agreement between them, for instance, when one said, I will put
6 in a fake bid, they can consider that as evidence of the
7 relationship between the conspirators.

8 THE COURT: I have a question in my mind as to what
9 you mean by direct evidence, presumably something different
10 from circumstantial evidence. I would have thought that direct
11 evidence would be direct evidence of an agreement to fix prices
12 or rig bids not simply evidence of the way in which the
13 conspirators worked together or established trust with each
14 other, operated together. So I had a question what you really
15 meant by direct evidence. It appeared to go further than
16 inextricably intertwined with the evidence of the conspiracy in
17 this case. This was direct evidence which suggests that it is
18 direct evidence of price fixing or bid rigging.

19 MS. CALLE: Your Honor, that was not our intention.
20 Our intention was what we had captured in our motion in limine,
21 which we had agreed in the jury instructions and the way that
22 the jury was so instructed.

23 THE COURT: Okay.

24 MS. CALLE: To the extent there was confusion, we are
25 not changing our position in any way.

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1 THE COURT: Go ahead.

2 MS. CALLE: The jury had adequate basis to render
3 their verdict after being sufficiently instructed. We've
4 discussed several examples in our brief. We've added on the
5 February 28th, 2012 episode.

6 If you had specific questions as to particular
7 episodes, I am happy to answer those at this time.

8 THE COURT: No.

9 MS. CALLE: I want to address a couple points that
10 Mr. Klotz brought up in terms of pro-competitive
11 justifications. As the *Apple* case makes very clear,
12 pro-competitive justifications are not permitted to be
13 considered in a pro se case except in a case of a very narrow
14 line of it cases that address joint ventures. There was no
15 joint venture here.

16 Your Honor, in going on our motion to exclude evidence
17 of a joint venture stated that as a matter of law you didn't
18 have evidence before you to conclude that there might have been
19 a joint venture but invited defendant to proffer evidence if he
20 wanted to make a joint venture defense. He never did that. He
21 never asked for an instruction as to a joint venture or as to
22 ancillary. So there was no consideration that ought to have
23 been given to any pro-competitive benefits. In a pro se case
24 pro-competitive justifications are no excuse at all under well
25 established Supreme Court precedent.

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1 Is there anything else under Rule 29, your Honor, that
2 you have questions on?

3 THE COURT: No.

4 MS. CALLE: As to Rule 33 I think you sufficiently
5 covered the points about whether it was wrong. I think it was
6 very clear the instruction that was given as to wrong or
7 immoral. Again, we set forth the basis of the high standard
8 for evaluating whether there was error in the government's
9 summations. Both sides put forward their theory of the case
10 and there was no objection to the government's summations
11 either.

12 We covered the pro-competitive justifications and I
13 think that is most of what you covered as to the Rule 33 with
14 Mr. Klotz. Again, I am happy to answer any questions as to
15 that motion as well.

16 THE COURT: Nope.

17 MS. CALLE: Thank you.

18 MR. KLOTZ: Nothing further, your Honor.

19 THE COURT: I will take the motions under advisement.
20 Thank you all.

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