UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR THE DECLARATION OF A MISTRIAL OR A NEW TRIAL

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Defendant Akshay Aiyer respectfully submits this Reply Memorandum of Law in further support of his Motion for a Judgment of Acquittal or, in the Alternative, for the Declaration of a Mistrial or a New Trial pursuant to Federal Rules of Criminal Procedure 29 and 33 and a renewal of arguments made by Mr. Aiyer during earlier stages of the proceedings based upon the full trial record.

ARGUMENT

I. The Court Should Enter A Judgment Of Acquittal For Mr. Aiyer Pursuant To Rule 29 Because The Evidence Presented At Trial Was At Least As Consistent With Innocence As With Guilt.

In his Opening Brief, Mr. Aiyer sets out in detail the body of evidence, including the testimony given by the cooperators as to each challenged transaction, that demonstrated the Government's failure to prove beyond a reasonable doubt that Mr. Aiyer committed the antitrust crime charged. (*See* ECF No. 196, Motion for a Judgment of Acquittal or, in the Alternative, for the Declaration of a Mistrial or a New Trial ("Motion"), at Section II.) In its response, the Government largely ignores that body of evidence and instead relies on a smattering of conclusory, generic, vague, or contradictory statements made by the cooperators and other witnesses, which statements were undermined and overcome by the specific evidence that supports a finding of Mr. Aiyer's innocence. In this section, Mr. Aiyer addresses evidentiary citations offered by the Government, viewed in the light most favorable to the prosecution, and shows how the record, read as a whole, is substantially more consistent with Mr. Aiyer's innocence as opposed to guilt. As such, the evidence presented at trial was insufficient to support the verdict, which must fail under Rule 29.

As the Government points out, and Mr. Aiyer does not dispute, the assessments made by juries are afforded considerable deference by courts under Rule 29. (*See* ECF No. 204, Opposition to Motion for a Judgment of Acquittal or, in the Alternative, for the Declaration of a

Mistrial or a New Trial pursuant to Federal Rules of Criminal Procedure 29 and 33 ("Opposition" or "Opp."), at 22-23.) The Government attempts to use this concept of jury deference as a shield for the defects that plague the testimony on which it relies to prove the existence of an illegal antitrust conspiracy. Courts' deference to the determinations of jurors is not unlimited, however, and "specious inferences are not indulged, because it would not satisfy the Constitution to have a jury determine that the defendant is *probably* guilty." *United States v. Pauling*, 256 F. Supp. 3d 329, 334 (S.D.N.Y. 2017), *aff'd*, 924 F.3d 649 (2d Cir. 2019) (quoting *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008)) (emphasis in original); *see also United States v. Valle*, 807 F.3d 508, 515 (2d Cir. 2015). If the evidence presented at trial, when "viewed in the light most favorable to the prosecution[,] gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *Pauling*, 256 F. Supp. 3d at 334. Because "a conviction based on speculation and surmise alone cannot stand," the Government therefore "must do more than introduce evidence at least as consistent with innocence as with guilt." *United States v. Finnerty*, 474 F. Supp. 2d 530, 537 (S.D.N.Y. 2007), *aff'd*, 533 F.3d 143 (2d Cir. 2008) (internal citations and quotations omitted); *see also United States v. Cassese*, 428 F.3d 92, 103 (2d Cir. 2005).

A. Evidence Regarding The Ruble And The Zloty.

The episodes involving trading in the ruble and zloty cannot form the basis of criminal liability because the Government failed to prove the existence of any illegal agreement. The trial record contains ample support for the conclusion that the Rand Chat Room members' trading in the ruble and the zloty resulted from the traders' independent decision-making. (*See* Motion at Section I(B)(1).)

At most, the evidence regarding the ruble and zloty episodes showed the sharing of information among the Rand Chat Room participants, including numerous instances in which Mr. Cummins and Mr. Katz independently decided to quote prices to *avoid* winning the business. The Government cannot, and does not, dispute that the per se label is inapplicable to the dissemination of pricing information. *See United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 113 (1975) ("[T]he dissemination of price information is not itself a per se violation of the Sherman Act."); *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978) ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 600-601 (1925) (permitting exchange of customer information among competitors for their individual use to protect their business interests).

As detailed in the Motion, there was insufficient evidence that Mr. Aiyer reached an agreement with any of the other Rand Chat Room members regarding the prices they would show if a customer asked for a quote in the ruble or the zloty. (*See* Motion at 26, 37-38.) Nor was there evidence that other Rand Chat Room members disclosed their prices to Mr. Aiyer for the purpose of allowing him to win customer business at prices that harmed the customers. Although Mr. Katz suggested that the alleged coconspirators "knew what [they] had to do in different situations" to help Mr. Aiyer and the other Rand Chat Room members (*see* Opp. at 50), the specific episodes presented by the Government at trial failed to support this generic testimony.

The November 22, 2011 ruble episode, for example, is the single date presented by the Government on which Mr. Aiyer "told" Mr. Katz what ruble price to quote. Mr. Katz contacted

Mr. Aiyer and the ruble trader at Citi, through Mr. Cummins, to receive help with ruble pricing and to determine if either trader had any interest in the transaction. (Trial Tr. at 1232:7-15, 1233:4-9 (Katz).) In this instance, Mr. Aiyer told Mr. Katz not to show a *worse* price than Mr. Aiyer showed but instead to show the same price that Mr. Aiyer quoted. (*See* GX-139 at 20:19:20-20:19:36 (Mr. Aiyer: "26 … 28"; Mr. Katz: "i will show worst"; Mr. Aiyer: "make it 28 … i just changed mine also").) Mr. Aiyer sought the business at the specific price at which he was willing to trade, but was indifferent to whether he did so directly or through Mr. Katz. This episode—the only one in which Mr. Aiyer arguably told Mr. Katz what price to show—provides no support for the Government's proposition that Mr. Aiyer and Mr. Katz agreed on prices in order to deprive the customer of the possibility of a better price. (*See* Opp. at 45.)

In two instances—February 28, 2012 and November 22, 2011, discussed above—Mr. Aiyer appears to have changed his bid after learning that Mr. Cummins or Mr. Katz were also bidding. The Government offered no non-speculative explanation for either change. As to the February 28, 2012 episode, Mr. Cummins did not testify that his *purpose* in disclosing his bid to Mr. Aiyer was to allow Mr. Aiyer to change his bid and win the customer business at a price more favorable to himself, much less that he did so pursuant to an agreement to benefit Mr. Aiyer and disadvantage the customer. Mr. Aiyer also changed his bid on November 22, 2011, shortly before Thanksgiving, but Mr. Katz made clear that he and Mr. Aiyer were both aiming to avoid being the winning bidder. (*See* Trial Tr. at 1277:12-1278:15 (Katz).) Mr. Katz further confirmed that Mr. Aiyer "price[d] [the transaction] on his own." (Trial Tr. at 1234:16-18 (Katz).) The disclosure of bids might be deemed an improper interference with the bidding process, but it does not therefore constitute criminal antitrust bid rigging. *See Phillips Getschow Co. v. Green Bay Brown Cty. Prof'l Football Stadium Dist.*, 270 F. Supp. 2d 1043, 1050 (E.D.

Wis. 2003) (holding that "improperly, even illegally, disclos[ing] a sealed bid" during the bidding process "does not amount to a violation of §1" of the Sherman Act); *see also Granite Partners, L.P. v. Bear, Stearns & Co*., 58 F. Supp. 2d 228, 237 (S.D.N.Y. 1999) (allegations that the defendants "engag[ed] in a conspiracy to exchange 'lowball,' accommodation bids," thereby "forestall[ing] a competitive auction" did not amount to per se bid rigging).

B. Other Individual Episodes.

In the Motion, Mr. Aiyer discussed the trading episodes about which the Government presented evidence at trial and showed that in no instance did the Government prove a per se price fixing or bid rigging violation. In its Opposition, the Government does not attempt to rebut Mr. Aiyer's detailed analysis, but instead largely confines its discussion to three "examples." (Opp. at 27, 35.) Even in this limited discussion, the Government presents only portions of testimony, and its own conclusions about Bloomberg chat language, ignoring details that show that the evidence as a whole is at least as consistent with innocence as with guilt.

The tables below demonstrate the contrast between testimony the Government excerpted in its Opposition and the conflicting testimony the Government chose to omit. When viewed side by side, it is clear that the testimony offered at trial is a least as consistent with innocence as with guilt, and therefore that a reasonable jury must necessarily entertain a reasonable doubt that Mr. Aiyer was engaged in a conspiracy to fix prices and rig bids.

1. *November 4, 2010.*

As explained in the Motion, on November 4, 2010, both Mr. Aiyer and Mr. Katz were approached for a price in a ruble transaction and, according to Mr. Katz's own testimony on cross examination, individually quoted prices that were solely the product of their respective independent judgment. (*See* Motion at 42.) The Government disregards Mr. Katz's cross examination testimony concerning this independent pricing and includes in its Opposition only

the direct examination testimony, excerpted in part below, that supports its contention that Mr. Katz and Mr. Aiyer coordinated their bidding. (Opp. at 27-28, 35-37.) When viewed in its totality, however, Mr. Katz's testimony about November 4, 2010 is at least as consistent with innocence as it is with guilt and therefore insufficient to support a conviction under Rule 29.

<table>
<tr><th colspan="2">November 4, 2010</th></tr>
<tr><th>Testimony Quoted by the Government</th><th>Testimony Omitted by the Government</th></tr>
<tr><td>Q. Mr. Katz, did you have an agreement with the defendant with respect to certain dollar/ruble transactions?
A. Yes.
Q. Was it part of your underlying agreement with the defendant?
A. Yes, it was.
Q. What did you and the defendant agree to do on this transaction?
A. We agreed -- once we determined that we were both being asked a price by the same customer, we agreed what bid we were going to show them between the two of us. … We discussed it and then came up with a two rates that we were going to show.
(See Opp. at 28 (citing Trial Tr. at 933:16-934:4 (Katz)))</td><td>Q. And Mr. Aiyer tells you what price he quoted. Isn't that right?
A. Correct.
Q. 30.99. Now, that was his price, wasn't it?
A. Yes.
Q. He didn't ask you for any advice on that, did he?
A. No.
Q. You didn't give him any advice on that, not on the ruble.
A. No.
(Trial Tr. at 1241:11-19 (Katz))</td></tr>
<tr><td>Q. What did you understand the point of the defendant showing you his price?
A. So that I would go with the rate below that, so that he would win.
Q. Did you follow through with what you understood the defendant wanted?
A. Yes. …
(See Opp. at 28, 36 (citing Trial Tr. at 935:7-25 (Katz)))</td><td>Q. So you decide, with [Mr. Aiyer] having done 30.99, that you would go 30.98, correct?
A. Correct.
Q. And that was your decision, to go 30.98, yes?
A. Yes.
(Trial Tr. at 1241:20-24 (Katz))</td></tr>
</table>

The Government also points to the Bloomberg chat from this date in which Mr. Katz wrote, "conspiracies are nice," and Mr. Aiyer responded, "hahaha … prolly shudnt puot this on perma chat." (Opp. at 37.) This, according to the Government, is evidence of Mr. Aiyer's

"consciousness of guilt." (*Id.*) The Government does not acknowledge, however, Mr. Katz's admission on cross examination that the "conspiracies" referenced in that exchange never occurred. (Trial Tr. at 1243:23-1244:12 ("Q. So you are the one who said 'conspiracies are nice,' right? A. Correct. … What I'm referring to [in the quote] is into the switch it up now and then, to trick the customer into keep coming back to us. … Q. And that's something you didn't do. A. Correct.") (Katz).)

2. *September 23, 2011*.

In its Opposition, the Government contends that the September 23, 2011 episode demonstrates how "Defendant and Cummins coordinated their bidding to mask their demand, with the intention to stabilize or lower price." (Opp. at 29.) The Government relies on Mr. Cummins' conclusory testimony that he and Mr. Aiyer were attempting not to "represent that much demand" on the buy side, (*id.* (quoting Trial Tr. at 262:18-263:15 (Cummins)), and Bloomberg chat language from this date. Although Mr. Cummins recited careful answers on direct and redirect regarding this episode, when pressed about this concept of one trader hiding interest for another trader on cross examination, Mr. Cummins was clear that it had no impact on the visible supply or demand on Reuters. (*See* Trial Tr. at 653:10-654:6 (Cummins).) This testimony was ignored by the Government.

The language from the chat further demonstrates that the *purpose* of Mr. Aiyer's and Mr. Cummins' trading on September 23, 2011 was not to keep the price low. On this date, Mr. Cummins and Mr. Aiyer learned that they both needed to buy USD/TRY and that they both had bids in the market. (*See* GX-128 at 16:59:14-16:59:48.) Mr. Aiyer explained that he was "eating lunch," and the two traders discussed pulling their bids. (*Id.* at 16:59:22-16:59:56.) Mr. Cummins ultimately pulled his bid at a price of 1.8410, and then Mr. Aiyer placed a *higher* bid at the price 1.8416, with additional interest hidden for Mr. Cummins. (*Id.* at 16:59:07-17:00:13.)

The narrative that Mr. Cummins and Mr. Aiyer were attempting to "stabilize or lower [the] price" is inconsistent with the traders' willingness to place higher bids, and therefore prices less favorable to themselves as buyers, on Reuters.

Given the admitted lack of impact on supply or demand caused by one trader hiding for another trader on Reuters, and the Bloomberg chat language's incompatibility with the purpose advanced by the Government, the evidence presented at trial about this date is at least as consistent with innocence as with guilt.

3. *January 18, 2012.*

As explained in the Motion, the trading episode on January 18, 2012 involved stop-loss orders executed by Mr. Aiyer, Mr. Cummins, and Mr. Williams. (*See* Motion at 65.) The Government asserts in its Opposition that Mr. Aiyer and Mr. Cummins coordinated their trades on Reuters in an effort to drive down the price of USD/ZAR in order to trigger a customer stop-loss order. (*See* Opp. at 29-31.) The Government focuses on the Bloomberg chat from that date in which the three traders discussed stop-loss orders and Mr. Aiyer said, "im sure between us … we take it out," to which Mr. Cummins responds, "better get to weork." (*Id.* at 30-31.) The Government also characterizes Mr. Aiyer's statement made in a Bloomberg chat later in the day, "btw … salute to first coordinated … zar effort," as Mr. Aiyer's "congratulations on [his and Mr. Cummins'] efforts" in their trading activity that day. (*Id.* at 38.) This, according to the Government, apparently constitutes "strong evidence that Defendant knew what he was doing: coordinating with his competitor to affect price, which is price fixing." (*Id.*)

The Government ignores Mr. Cummins' testimony— despite its being highlighted in the Motion—explicitly stating that Mr. Cummins made independent decisions as to when and how to trade and had no knowledge of Mr. Aiyer's trading activity. (*See* Motion at 68-69.) The

evidence presented at trial with respect to January 18, 2012 demonstrates only that the traders exchanged information and subsequently engaged in unilateral trading. The chat excerpts the Government highlights—"between us … we take it out" and "salute to first coordinated … zar effort"—are consistent with this benign interpretation. Therefore, the evidence as a whole is at least equally consistent with innocence as it is with guilt.

<table>
<tr><th colspan="2">January 18, 2012</th></tr>
<tr><th>Testimony Quoted by the Government</th><th>Testimony Omitted by the Government</th></tr>
<tr><td>A. … And Akshay says, "I'm sure between us we take it out," meaning we have got enough to sell to push the market through 95. And I say "better get to work," like, okay, let's do it.
(See Opp. at 31 (citing Trial Tr. at 230:7-11 (Cummins)))</td><td>Q. Okay. Those weren't coordinated, right? You did what you wanted to do. Nobody told you to trade, nobody told you not to trade, correct?
A. Yes.
Q. You're not coordinating anything?
A. Yes.
Q. You're not trying to drive through a stop, are you?
A. I am not.
Q. And so far as you know, Mr. Aiyer isn't trying to drive through a stop?
A. Correct.
(Trial Tr. at 558:15-25 (Cummins))</td></tr>
<tr><td>A. … So these are the details of a trade I did in the Reuters Matching system, the Reuters Dealing system that shows that at a specific time I sold to a bid in the market U.S. dollars against South African rand at 7.9619 in the amount of $1 million.
Q. When you say you sold, was that an aggressive order or a passive order?
A. I was the aggressor.
Q. And the price of 7.9619, was this above or below the stop level?
A. This is above.
Q. And how far above the stop is this?
A. 119 pips.
…
A. These are the details of a trade I did in the Reuters Matching, in the dollar South Africa market where I sold $3 million at 7.96 where I was the aggressor.
Q. And this price, was it above or below the stop level?
A. Above.</td><td>Q. Okay. And is it fair to say that you don't know what [Mr. Aiyer's] trading was during the course of the day in dollar/rand?
A. That is fair.
Q. And that's the entire day. I'm even talking about the rest of the day. You don't know what his trading was.
A. I did not.
(Trial Tr. at 559:4-9 (Cummins))</td></tr>
<tr><td></td><td>Q. So you made the decision on your own, before you were back on the chat, to begin to sell dollars as part of your hedging, is that fair? … [W]hen Mr. Aiyer asks you 'CC, you there? That's at 19:54:24, and you say 'yo' at 19:54:29. That was after</td></tr>
</table>

Q. Now let's take a look at the next block of trades that are highlighted. Could you describe for the jury what this shows? A. This is a group of eight or ten trades that I sold dollars in each case against South African rand at prices ranging from 7.9575 down to 7.95 in various amounts. Q. And what was the stop level again? A. 7.95. Q. So did your trading here trigger the stop level? A. Yes. … Q. So let's take a look at the next three highlighted trades, please, and tell the jury what's happening here in these trades. A. So in these trades I am selling dollars against South Africa again, from 7.95 down to 7.9475, and in each case I am the aggressor again. (*See* Opp. at 31 (citing Trial Tr. at 232:6-234:10 (Cummins)))	you actually started to hedge, isn't that right? A. That's after I started selling, yes. … Q. You decided to do that on your own. A. Yes. (Trial Tr. at 565:2-566:3 (Cummins)) Q. And as a result of your trading beforehand at higher prices, you were then able to give your customer a better price than you would have if you had not done that trading, isn't that fair? A. Yes. Q. And that was trading that you did on your own. Mr. Aiyer didn't tell you what to do. Actually, no one told you what to do. Is that fair? A. Yes. You know, you are able to give a higher price, but you can't give a higher price than the stop-loss level. Q. I understand that. That would mean … that you can't give the customer more than 7.95 … but if you had waited and it went down to 7.94 or 7.93 or, God forbid, 7.92, your later trading could redound and would redound to the detriment of your customer, correct? A. Yes, that's correct. Q. And you avoided that by these trades. A. Yes. (Trial Tr. at 570:9-571:3 (Cummins)) Q. You made your independent decisions as to when to trade, correct? A. As to when to trade, yes. (Trial Tr. at 571:14-16 (Cummins))

In addition to the three trading episode "examples" it highlights, the Government discusses other trading episodes in passing in its Opposition. These discussions, like the examples discussed above, feature favorable testimony and ignore the evidence that undermines or flatly contradicts the Government's position. Several of these episodes are discussed below.

4. *March 16, 2012*.

The Government argues that March 16, 2012—one of the dates involving "iceberg" orders—demonstrates "Defendant's and his co-conspirators' intent to affect price and the means by which they effectuated their agreement." (Opp. at 47.) As explained in the Motion, in the trading episode on this date, Mr. Aiyer announced his position in the USD/TRY in hopes of matching off, after which Mr. Cummins—having determined that he did not have an offsetting position—independently volunteered to hide additional interest to his outstanding bid on Reuters on Mr. Aiyer's behalf. (*See* Motion at 62.)

In its Opposition, the Government points to Mr. Cummins' testimony, excerpted below, describing his and Mr. Aiyer's trading in this episode as an attempt to affect supply and demand. (*See* Opp. at 48-49.) The Government ignores, however, Mr. Cummins' testimony admitting that his addition of interest to his existing bid on Reuters had no impact on the supply and demand visible to the market. (*See* Trial Tr. at 653:10-654:6 (Cummins).)[1] Given the admitted lack of impact on supply or demand caused by Mr. Aiyer's and Mr. Cummins' trading on March 16, 2012, the testimony concerning this date is at least as consistent with innocence as with guilt.

March 16, 2012	
Testimony Quoted by the Government	**Testimony Omitted by the Government**
A. … Someone buys some dollars from Akshay, in the dollar/Turkish lira market. I let him know that I'm in the market trying to buy, show him my bid. I bid for the both of us and eventually I'm able to buy our dollars back at the price I had in the market. … So, again, we need to buy dollars, so that means	Q. … Now, if someone joined with you at the same price, and maybe not even knowingly, if I put in the same price, the same bid that you had on Reuters, it doesn't show that there are two people trading, does it? A. No, it does not. Q. So when you took that chart and you showed one person and you said, well, if I

[1] Mr. Katz also admitted on cross examination, when questioned about an iceberg episode on December 21, 2011, that whether one person or two people hide supply or demand has no competitive significance, since the market cannot see the number of participants supporting any bid or offer at any particular price. (*See* Trial Tr. at 1369:25-1371:7.)

we both have demand to buy dollars. So we prefer a lower price. And I suggest that since I'm already in the market, maybe I could bid for both of us so that if the market sees that this is already demand -- if the market sees additional bidding, that would indicate more of a demand. That might push the price against us, push the price higher or lower to a less desirable price for us. So I suggest that I will bid for the both of us and hide some so that the market only sees this, so there's less risk of the market moving against us.

Q. Thank you. Mr. Cummins was this conduct part of your understanding with Mr. Aiyer?

A. Yes.

(*See* Opp. at 48-49 (citing Trial Tr. at 268:11-15; 268:18-269:2; 269:3-5 (Cummins)))

take some volume for someone else at the same price, it would be the market doesn't see two people. They see one person. But that would be the same if someone put the same price that you did. The market only sees one person, correct?

A. That's correct. You are anonymous, so it doesn't denote that one person is bidding for one and there is a second person bidding for one. The bid shows for the total aggregate of two.

Q. But it does not show, oh, there are two sellers out there.

A. You are correct.

Q. So to the extent that was an impression that you gave on direct, it would be inaccurate, is that correct?

A. If that was the impression, yeah, that would be inaccurate.

(Trial Tr. at 577:24-578:17 (Cummins))

Q. Now, I think that your testimony -- and tell me if this is accurate -- was that, by doing this with Mr. Aiyer, you were confusing the market or tricking the market as to the supply or the demand that was out there, correct?

A. Yes. This would have the effect of not allowing someone on the other side of the market to see that there was additional demand at whatever -- at 50.

Q. But the additional demand under Reuters can be completely hidden, isn't that correct?

A. That is true.

Q. So from the perspective of the market, there isn't additional demand out there. They see whatever the Reuters amount is and there is some amount behind it or at the same price which would be seen at Reuters, and there is no confusion, isn't that correct?

A. That is what they see, as you described.

Q. So they don't see any increased demand, any increased supply, anything along those lines, correct?

A. Correct.

	Q. And they don't see it because you are permitted to do that on Reuters. A. Yes, I'm permitted to do the -- use the "hide" function. (Trial Tr. at 653:10-654:6 (Cummins))

5. *December 12, 2012.*

Many of the episodes challenged by the Government at trial involved spoofing or cancelled trades, neither of which—as the Government has conceded—constitutes an antitrust violation, whether conducted alone or in combination with others. (*See* Motion at 54-55.) Nonetheless, the Government in its Opposition points to December 12, 2012 as evidence of Mr. Aiyer's "collusion" with the other members of the Rand Chat Room to "move [a] price in a particular direction." (Opp. at 49.) The idea that this episode demonstrates price "collusion" is completely undermined, however, by the fact that Mr. Aiyer was apparently unaware of Mr. Cummins' spoofing and, as a result, paid Mr. Cummins' spoof offer by accident—a fact the Government omits from its discussion of the episode. (*See* Trial Tr. at 655:7-12 (Cummins).) Moreover, the Government ignores the fact that it agreed, and the Court instructed the jury, that coordinated spoofing is not an antitrust violation. Viewed in its totality, even in the light most favorable to the Government, the evidence concerning the spoofing episode on December 12, 2012 is as consistent with innocence as with guilt and cannot support Mr. Aiyer's conviction under Rule 29.

December 12, 2012	
Testimony Quoted by the Government	**Testimony Omitted by the Government**
Q. Let's focus on that line at 20:47:41, where you say pull that bid, AA. You see that? A. Yes.	Q. And you made the decision to spoof, right? Nobody told you to. You didn't consult with anyone, at least in this group, before you decided to do that, right? A. That's right. (Trial Tr. at 654:22-25 (Cummins))

Q. Describe for the jury, in supply and demand terms, what does that do if Mr. Aiyer pulls his bid? A. That cancels the price in the market. So the bid is the demand to buy, so if you cancel, or pull, that bid in the market, the market will then -- you are trying to allow the market to trade lower, cancel your interest to buy. Q. When you say "trade lower," what does that mean in terms of price? A. A lower price. (*See* Opp. at 49 (citing Trial Tr. at 326:14-327:9 (Cummins)))	Q. And I think you testified about this. Mr. Aiyer had out either a snake or some other completely legitimate technique, and he actually hit your spoof. Is that right? A. That's correct. Q. No prearranged anything. A. That's correct. (Trial Tr. at 655:7-12 (Cummins))
	Q. Now, you testified on direct that this conduct was problematic because you and Mr. Aiyer were working together to push the price lower toward our buying interest. Is that correct? A. Yes. Q. But your spoofing was done all on your own, right? A. The spoofing was done on my own. Q. And Mr. Aiyer didn't ask you to spoof for him. A. He did not. Q. And you didn't ask Mr. Aiyer to spoof for you. A. That's correct. (Trial Tr. at 656:9-19 (Cummins))
	Q. So you don't know one way or another whether [Mr. Aiyer] went back in the market and when he went in the market and what he did. Is that fair? A. Yes. Q. So you don't know whether he went into Reuters and bought at the exact same price … You have no idea. A. I do not know. (Trial Tr. at 658:15-22 (Cummins))

6. *May 8, 2012.*

The Government asserts in its Opposition that Mr. Aiyer's and Mr. Cummins' trading activity on May 8, 2012 supports a theory of "coordination and agreement." (Opp. at 52.) In this episode, Mr. Aiyer announced, "I have 2 pm usd zar fix lhs"—a statement described at trial as

often signaling an invitation to match off—to which Mr. Cummins replied, unsolicited, "wil ensure there are offersin there." (*See id.*) The Government asserts that Mr. Cummins' statement in the chat, followed by the $10 million offer Mr. Cummins subsequently placed during the fix window, and Mr. Cummins' testimony at trial that this conduct was "part of [his] understanding with Mr. Aiyer," are consistent with the charged price fixing and bid rigging conspiracy. (*See id.*)

The Government's characterization of the May 8, 2012 episode does not take into account Mr. Cummins' testimony on cross examination, excerpted below, which included admissions that he and Mr. Aiyer had no agreement to engage in the conduct that occurred on that date. (Trial Tr. at 584:24-585:9 (Cummins).) Furthermore, the Government fails to account for Mr. Cummins' admission that nobody in the market at the time saw the offers that he volunteered to place, because they were not the best offers in the market and his admission that his conduct did not affect the fix rate. (*See* Trial Tr. at 586:12-587:6 (Cummins).) When Mr. Cummins' direct examination testimony is viewed in conjunction with his admissions on cross examination, it is apparent that the evidence offered by the Government is no more consistent with guilt than it is with innocence.

May 8, 2012	
Testimony Quoted by the Government	**Testimony Omitted by the Government**
Q. … Mr. Cummins, was this conduct [on May 8, 2012] part of your understanding with Mr. Aiyer? A. Yes. (*See* Opp. at 52 (citing Trial Tr. at 316:3-5 (Cummins)))	Q. Now, at 17:58:08, you say "will ensure there are offers in there." What were you referring to? A. I'm referring to the fact that I will place offers in the market in order to create the perception that there are sellers in the market. Q. And no one asked you to do that, did they? You are just volunteering it here. A. Yes.

	Q. And you had no agreement that you would do that or not do that. You offered to do that here, correct? A. I offered to do that, yes. (Trial Tr. at 584:24-585:9 (Cummins))
	Q. …Were your offers the best offers? Were they seen by anyone? So – A. They were not. Q. -- far as you know. Pardon me? A. They were not the best offers in the market. Q. They were not the best offers in the market. And that was true during this time period, is that right? A. That is true. Q. So nobody in the market saw the offers that you put in as a volunteer. Is that correct? A. Yes. Q. So, it didn't affect the fix, that is, whatever you did as a volunteer? A. It did not affect the calculated rate. Q. And it didn't affect whatever Mr. Aiyer traded at, correct? A. That's correct. (Trial Tr. at 586:12-587:6 (Cummins))

Viewed in its totality and in the light most favorable to the Government, the evidence presented at trial purportedly demonstrating a conspiracy to fix prices and rig bids is, at best, at least as consistent with innocence as with guilt. The Government has therefore failed to meet the Rule 29 standard, and the Court should enter a judgment of acquittal on Mr. Aiyer's behalf.

II. The Court Should Have Ruled Before The Case Was Submitted To The Jury That Trading Episodes Involving The Ruble And Zloty And Involving Trading On Reuters Were Not Per Se Antitrust Violations.

A. The Court Was Required To Characterize The Challenged Conduct After Consideration Of The Context And The Potential Competitive Effects.

Before and during trial, Mr. Aiyer sought a determination that all or most of the conduct with which he was charged is not classic per se price fixing or bid rigging, and thus cannot be prosecuted criminally. (*See* Motion at 18-20.) Mr. Aiyer's requests were based on Supreme

Court and Second Circuit precedent, which requires the Court to evaluate, and thereafter characterize, the actual conduct underlying the allegations, including the specific instances of trading-related conduct that the Government presented in its case-in-chief at trial. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,* 441 U.S. 1, 9 (1979) ("*BMI*"); *Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 71-72 (2d. Cir. 1988).

In responding to Mr. Aiyer's Motion, the Government ignores this argument altogether. Instead, the Government asserts—as it has since Mr. Aiyer was indicted—that its inclusion of the terms "fixing prices" and "rigging bids" in the Indictment renders the application of the per se label appropriate. (Opp. at 2 ("In the indictment, the government alleged that Defendant entered into a horizontal price-fixing and bid-rigging conspiracy with his competitors, a *per se* violation of the Sherman Act."); *see id.* at 6 ("In its indictment, the government alleged a horizontal price-fixing and bid-rigging conspiracy, a *per se* violation of the Sherman Act.").)

The Government's position comes down to this: Mr. Aiyer was in a horizontal per se illegal conspiracy with the alleged coconspirators because the Government declares this to be true. But the argument that allegations of "price fixing" and "big rigging" are sufficient to warrant per se treatment, without any further inquiry, is contrary to law and would effectively immunize all Sherman Act charges from judicial scrutiny. In fact, "the mere talismanic invocation of the term 'price-fixing' … is [insufficient] to bring the *per se* rule to bear." *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 596 (S.D.N.Y. 1989); *see also Integrated Systems & Power, Inc. v. Honeywell Int'l, Inc.*, 713 F. Supp. 2d 286, 290 (S.D.N.Y. 2010) ("While Plaintiff repeatedly asserts that Defendant's conduct constitutes a 'horizontal conspiracy,' and therefore is a *per se* violation, this characterization is a legal conclusion that the Court does not accept as true on a motion to dismiss."); *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275,

296 (S.D.N.Y. 1998) ("Affixing certain labels to alleged conduct is insufficient to invoke *per se* treatment"). Simply put, the Government's allegations cannot replace the Court's scrutiny.

The Court was required, at some point prior to the jury's deliberations, to determine and declare for the parties whether the actual behaviors underlying the Indictment, if proven to have occurred, are per se illegal or subject to the rule of reason. The characterization determination required the Court to consider the allegedly anticompetitive behaviors in context and to review the conduct's likely economic effects. *Apex Oil Co.*, 713 F. Supp. at 595 ("The decision whether to apply the Rule of Reason or the *per se* rule is a question of law even though it is predicated on a factual inquiry into the restraint's competitive effect.") (internal citations and quotations omitted). This preliminary analysis is separate and apart from the question of whether the Government's evidence sufficiently established that the conduct occurred as alleged.

Ignoring these principles, the Government claims that an "elaborate economic analysis … is impermissible under the *per se* rule," (Opp. at 3), and that "lack of anticompetitive effects is no defense" to per se conduct. (*Id.* at 5.) The Government misconstrues Mr. Aiyer's argument. Mr. Aiyer has never suggested that an elaborate inquiry into the reasonableness or benefits of the challenged behaviors was required *if,* and *after*, the Court determined that the challenged trading behaviors were per se illegal. However, the fundamental question—whether or not the challenged conduct is governed by the rule of reason or is per se illegal—has never been answered by this Court.[2] (Motion at 18-20.) For the Court to have satisfied its preliminary obligation, it was required to consider the economic realities of the conduct at issue. *See Volvo*

[2] In its Opposition, the Government declares that "the Court found that the indictment properly alleged a *per se* violation of the Sherman Act and denied Defendant's motion to dismiss the indictment," (Opp. at 6-7), but this only points to the precise problem. At no point did the Court conduct the analysis that was required in order to conclude not just that the Government had alleged a per se violation but that the conduct at issue, if it occurred, would in fact be a per se violation. (*See e.g.,* ECF No. 66, Motion to Dismiss Hearing Tr. at 40:2-9 (denying Mr. Aiyer's motion and reasoning that the Court could not make a determination about the challenged conduct without first hearing the "evidence [the Government] will offer at trial concerning the trading activity on those dates.").)

N. Am. Corp., 857 F.2d at 71-72 ("[D]etermining when a practice should be so characterized can be very difficult, and may involve a fair amount of sophisticated economic inquiry.") (citing Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, Section 4.4, at 128); *see also BMI,* 441 U.S. at 14. ("The Sherman Act has always been discriminatingly applied in the light of economic realities.") (internal citations and quotations omitted)).

As further detailed in Mr. Aiyer's opening brief (*see* Motion at 14-17), courts in multiple jurisdictions, including the Second Circuit, have acknowledged the requirement of characterization and, in undertaking this analysis, have closely examined the actual conduct underlying the allegations. *See Volvo N. Am. Corp.*, 857 F.2d at 71-72 (requiring the district court, on remand, to conduct an extensive characterization analysis); *Ratino v. Medical Service of District of Columbia (Blue Shield)*, 718 F.2d 1260, 1272 (4th Cir. 1983) (ordering the district court, on remand, to "carefully scrutinize" the two distinct behaviors charged under a single count); *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1009-13 (7th Cir. 2012) (separately considering the three challenged behaviors and determining that none of the behaviors warranted per se condemnation).

B. Conduct Involving Trading In The Ruble And Zloty Does Not Constitute Per Se Price Fixing Or Bid Rigging.

1. *The Relationship Between Mr. Aiyer And The Other Rand Chat Room Members In These Currencies Was Predominantly Vertical.*

In its Opposition, the Government devotes significant attention to Mr. Aiyer's "suggestions" that he and his alleged coconspirators were vertically aligned for the trading episodes involving the ruble and the zloty. (*See* Opp. at 1, 6-17.) First, the Government relies on the allegations in the Indictment and conclusory statements from the cooperators that the Rand Chat Room members were traders at rival banks and thus "competitors." Second, the Government presents the argument that Mr. Aiyer could not have served as a supplier in the

ruble because he traded with Mr. Katz in only one ruble episode presented at trial. Third, the Government cites the testimony of certain customers that they viewed Mr. Aiyer and the other Rand Chat Room members as competitors.

The Government's responses on this issue are overly simplistic and fail as a matter of law and fact. The witnesses and evidence at trial showed that the alleged coconspirators' relationship was predominantly vertical, and that Mr. Aiyer served as an actual or potential supplier to Mr. Katz, Mr. Cummins, and Mr. Williams in the ruble, and to Mr. Cummins in the zloty. The Court, therefore, should have declared that episodes of trading in the ruble and the zloty do not constitute per se antitrust violations,[3] and these episodes should have been removed from the jury's consideration. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* 551 U.S. 877, 882 (2007) ("[V]ertical price restraints are to be judged by the rule of reason.").

In attempting to refute Mr. Aiyer's verticality arguments, the Government once again relies on the allegations in the Indictment for the proposition that the Rand Chat Room members were traders at competing banks. (*See, e.g.,* Opp. at 6 ("The indictment alleged that Defendant and his co-conspirators were traders at 'rival banks, … who were in continuous competition with each other in the FX market: they competed with each other to win customer orders, … and they competed in the interdealer market, including on electronic platforms, as they sought to offset positions resulting from customer orders.") (internal citations omitted).) The language in the Indictment, however, cannot control the Court's characterization analysis of the actual challenged conduct. (*See supra* at Section II(A).)

[3] The Government contends that "[t]he jury had the opportunity to weigh the evidence, assess the credibility of the witnesses, and consider Defendant's narrative" that Mr. Aiyer acted as a supplier for the other Rand Chat Room members. (Opp. at 10-11, 17.) Whether or not the alleged coconspirators were in a vertical or horizontal relationship, however, was not a question for the jury, and, indeed, the jury was not asked to address this issue. The Court was required to decide this issue as part of its preliminary characterization analysis.

The Government similarly focuses on the cooperators' statements that they "were traders at competing banks who traded similar menus of emerging market currencies."[4] (Opp. at 7.) According to the Government, these generic statements trumped the overwhelming evidence of a vertical relationship between Mr. Aiyer and the other Rand Chat Room participants: "Neither the [chat room participants'] varying levels of skill in trading those currencies, nor their varying levels of interest in trading those currencies, changes the fact they were at the same level of the market structure." (*Id.* at 13.) But the Government's argument contradicts *In re Sulfuric Acid*, discussed in the Motion at 15-16, a Seventh Circuit case that supports the proposition that a superficial understanding of market structure is not dispositive on the issue of the nature of the parties' relationship. *See In re Sulfuric*, 703 F.3d at 1008-1010 (at-issue shutdown agreements transformed defendant producers' relationship from competitors to both competitors and supplier-distributor, based on producers' differing access to customers and levels of interest in production, rendering the rule of reason appropriate).

The Government further contends that the relationship between Mr. Aiyer and the other Rand Chat Room members could not have been vertical because "in the trading episodes presented at trial regarding ruble, in only one episode did Defendant 'supply' ruble to another co-conspirator[.]" (Opp. at 14.) This argument is nonsensical and inconsistent with the trial testimony. Professor Lyons testified, without equivocation, that in almost every instance in which Mr. Katz engaged in a ruble transaction with a customer after checking with Mr. Aiyer on

[4] The Government references a similar statement from its expert, Dr. DeRosa, that Mr. Aiyer and the other Rand Chat Room members competed with one another for customer business and in the interdealer market. (Opp. at 7.) But the Government fails to address Dr. DeRosa's testimony to the contrary. (Trial Tr. at 108:7-17 ("So it's like the dealer's just sitting there constantly getting into these predicaments all day long, right. It's a very tiring job. And they could get out of the position by going … to a group of dealers with whom they do a lot of business and ask for prices. But at that point, … they are a customer of the foreign exchange market.") (DeRosa); Trial Tr. at 124:1-2 ("Sometimes a large part of the dealer's business is trading with smaller banks that are not really market makers.") (DeRosa).)

the price at which he would trade, Mr. Katz immediately transferred the ruble position to Mr. Aiyer. (*See* Trial Tr. at 1728:10-1729:2 ("We found that in 13 out of the 14 cases [in the data set], [Katz] passed the ruble position on to Mr. Aiyer.") (Lyons).) This pattern establishes that the *purpose* of Mr. Katz's price discussions with Mr. Aiyer was to ensure Mr. Katz's ability to promptly exit a risk position in the ruble, should he acquire such a position. The Government's presentation of a handful of instances in which Mr. Katz was not successful in obtaining the customer's business does not alter the nature of his relationship with Mr. Aiyer.

As Professor Lyons testified, determining that a particular party functions as a supplier does not require the supplier to serve in that role in every one of its distributor's transactions. (*See* Trial Tr. at 1817:20-1818:4 ("Supplying liquidity is a before-the-fact thing. If I tell you, if you trade, I will take it at these prices, then somebody knowing that you will take the trade allows them to quote to a customer differently even if they choose not to trade with you and use that liquidity.") (Lyons).) The Government's cooperators were very clear on this point: Mr. Aiyer served as a back stop for transactions involving the ruble—a currency that the other Rand Chat Room members had no interest in trading. (*See* Trial Tr. at 1126:13-15 (Katz); Trial Tr. at 519:14-520:4 (Cummins); Trial Tr. at 1126:10-12 (Katz); *see also* Motion at Section I(B)(1).)

The Government also places great weight on certain customers' testimony, which it claims demonstrates that the Rand Chat Room members were at the "same level of the market." (Opp. at 8.) That the "customers viewed Defendant, Katz, and Cummins as competitors" (*id.* at 12), is of no significance to the legal analysis. Customers rarely have all the relevant facts about their suppliers. What controls is the Court's assessment, based on all the facts, of the economic realities of the relationship and the competitive significance of the alleged restraint. *Abadir & Co. v. First Miss. Corp.*, 651 F.2d 422,

427 (5th Cir. 1981) ("It has already been noted that antitrust law is concerned not with superficial technical appearances, but with practical economic substance.") (citations omitted).

The requirement that the Court consider the economic substance of the parties' relationship and the challenged restraint, rather than relying on formalism, is also supported by Second Circuit case law addressing dual-distribution arrangements. In *Copy-Data Systems Inc. v. Toshiba America, Inc.*, for example, a customer-distributor alleged that a supplier-distributor engaged in per se illegal conduct by discontinuing its relationship with the customer-distributor in order to distribute products itself. 663 F.2d 405, 406-08 (2d Cir. 1981). The Second Circuit held that the per se rule was not applicable to the alleged restraint because of the dual-distribution structure of the parties' relationship. *Id.* at 411. In reaching its conclusion, the court acknowledged that the parties were horizontally situated in some respects:

> In the instant case[,] we have dual distributorship -- a business structure in which one party, in this case TAI, operates a branch or dealership *on the same market level* as one or more of its customers. Since TAI was a supplier of Copy-Data, the parties were vertically related. Since both Copy-Data and TAI were engaged in the wholesale distribution of copiers, they were also horizontally related.

Id. at 408 (emphasis added). The fact that the parties were "on the same market level," and thus competitors in some respects, was not dispositive. *Id.* The court refused to engage in formalism, and instead focused on the competitive significance of the alleged restraint. *Id.* at 409-410. [5]

[5] In its Opposition, the Government mischaracterizes the October 14, 2010 trading episode in an attempt to shoehorn it into its narrative that Mr. Aiyer and Mr. Katz were horizontally situated with respect to the ruble. The Government asserts that, despite the fact that the customer never approached Mr. Aiyer for a ruble price, "the customer was [Mr. Aiyer's] ultimate counterparty." (Opp. at 14, fn.1.) There is no support in the trial record for this conclusion. As discussed in the Motion, Mr. Aiyer had no control over what prices the banks that approached ICAP quoted to the ultimate end-user, if they quoted any price at all. It was these banks, not Mr. Aiyer, that were in direct competition with Mr. Katz. In any event, as discussed in *Copy-Data Sys., Inc.*, the fact that parties are "on the same market level" is not dispositive.

The Fifth Circuit, in *Abadir & Co. v. First Mississippi Corp.*, a case upon which the Second Circuit's holding in *Copy-Data Sys., Inc.* is based, also refused to apply the per se label to certain alleged restraints, notwithstanding the fact that the dual-distribution arrangement between the parties contained horizontal elements. 651 F.2d 422, 425 (5th Cir. 1981). There, a dealer of commodities brought price fixing claims against a publicly traded corporation that produced and distributed chemicals. The dealer contended that the producer's refusal to sell its products unless the dealer agreed to territorial restrictions was per se illegal. Notwithstanding the fact that the producer was in competition with its distributors, and that the producer "d[id] not occupy the traditional manufacturer position in the chain of [ ] distribution," the court found the restraint at issue to be a vertical agreement. *Id.* at 425.

The evidence at trial concerning the ruble and zloty episodes, and case law from the Second Circuit and elsewhere, supports a finding of verticality, or at least, a mixed horizontal and vertical relationship, and per se scrutiny is therefore inappropriate.

C. Conduct Involving Trading In The Interdealer Market Does Not Constitute Per Se Price Fixing Or Bid Rigging.

In its discussion of the alleged interdealer coordination, the Government asserts, first, that the allegations of per se price fixing and bid rigging in the Indictment control and prohibit any further inquiry by the Court, and second, that the lack of proof that the Rand Chat Room members formed a formal joint venture precludes rule of reason treatment.

As for its first argument, the Government repeats the mantra that because the Indictment uses the terms "fixing prices" and "rigging bids," the challenged behaviors must constitute per se price fixing and bid rigging. (*See* Opp. at 19 ("Defendant's argument that the Court must characterize Defendant's conduct, … ignores jurisprudence where the Supreme Court has already characterized horizontal price fixing and bid rigging as per se illegal[.]").) Thus,

according to the Government, any further inquiry into the challenged behaviors is prohibited. (*See id.* at 20-21.) Mr. Aiyer does not dispute that "horizontal price fixing and bid rigging [is] per se illegal." (Opp. at 19.) Nor does Mr. Aiyer dispute that procompetitive justifications cannot be considered in a per se case.6 (*See id.* at 20.) What the Government fails to acknowledge is that the Court has never ruled that the interdealer behaviors, if they occurred as alleged, would constitute per se price fixing or bid rigging. To make such a determination, the Court needed to evaluate the behaviors in context and the behaviors' likely effects. (*See supra* at Section II(A).)

The majority of the challenged episodes of Reuters trading involved spoofing and fictitious trades, which do not constitute antitrust violations. (See Motion at Section II(A)(2)(ii).) The Government asserts contradictory positions in its Opposition, acknowledging that "spoofing and fake trades were relevant to show Defendant's relationship with his coconspirators and his state of mind," and were not themselves antitrust violations, but then later in the same paragraph suggesting that spoofing and fictitious trades "can[not] escape antitrust scrutiny." (Opp. at 21 ("[A]ny suggestion that spoofing or fake trades can escape antitrust scrutiny simply because the conduct tricked others into increasing supply and demand is incorrect").) The Government's stance in its Opposition that spoofing and fictitious trades should be subject to antitrust scrutiny

[6] The Government additionally argues that "in *per se* cases[,] effect, or lack thereof, is irrelevant." (Opp. at 20.) This assertion is contrary to the law. Evidence of effects, or lack thereof, is relevant to the question of whether Mr. Aiyer entered into an agreement with the requisite intent. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 (1986) ("The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist."); *U.S. Gypsum Co.,* 438 U.S. at 446 (defining intent as a function of "requisite anticompetitive effects" and the defendant's "knowledge of [those] likely effects").

is inconsistent with its position, and the Court's jury instruction, at trial.[7] (*See* Trial. Tr. at 1918:12-1919:15, 1920:8-12 (Calle; Koeltl, J.); id. at 2142:16-2143:1 (Koeltl, J., Jury Instruction).)

The Government further contends that Mr. Aiyer's trading in the interdealer market does not merit rule of reason treatment because Mr. Aiyer and his alleged coconspirators never formed a formal joint venture and that, consequently, the ancillary restraints doctrine does not apply. (*See* Opp. at 17-19.) As the Government concedes in its Opposition, however—by acknowledging that "*most*," but *not all*, "of Defendant's citations are to joint venture cases" (*id.* at 18 (emphasis added))—there is no requirement that the participants be parties to a formal joint venture agreement for a Court to consider the procompetitive justifications for the challenged behaviors *prior to* making a characterization determination. *See Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.) ("A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then the court must apply the Rule of Reason to make a more discriminating assessment."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) ("[A restraint] that is part of an integration of the economic activities of the parties and appears capable of enhancing the group's efficiency, is to be judged according to its purpose and effect."). Instead, if a collaborative arrangement exists, the Court must then determine whether there is a "plausible relationship" between the challenged restraint and the procompetitive rationale. *See, e.g.*, *Medical Center at Elizabeth Place LLC v. Atrium Health Sys.*, 922 F.3d 713,

[7] The Government's reliance on *Alaska Electrical Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44 (S.D.N.Y. 2016) is misplaced. There, the court was determining, on a motion to dismiss, whether the plaintiffs sufficiently alleged antitrust injury in a case that appears to undertake a *rule of reason analysis*. The behavior at issue, among other things, involved the defendants' flooding of the market with *their own activity* in order to manipulate a benchmark rate that was then incorporated into financial instruments *purchased by end-users*. *Id.* at 51-52. The conduct in *Alaska Pension Fund* therefore is very different from the evidence of spoofing and fictitious trades introduced at trial, and the court's discussion of antitrust injury cannot guide the Court here.

726 (6th Cir. 2019) (a defendant need only show a "plausible procompetitive rationale for the restraint" to avoid evaluation under the per se rule); *In re Sulfuric*, 703 F.3d at 1010-11 ("[E]ven price fixing by agreement between competitors … [is] governed by the rule of reason, rather than being per se illegal, if the challenged practice when adopted could reasonably have been believed to promote 'enterprise and productivity.'").

The Government insists that, even if there was a valid joint venture, the interdealer behaviors at issue in this case were "not reasonably necessary to achieve the proffered procompetitive benefits." (Opp. at 19.) For the "staying out of the way" episodes, for example, the Government asserts that "when the conspirators shared their risk positions to match off, and then subsequently found out that they were in the same direction …, such that they could not match off, the conspirators could have chosen at that point not to coordinate." (Opp. at 20.) This argument ignores the fact that if a trader uses information to disadvantage another trader when a mutually advantageous transaction is not possible, this behavior deters information sharing altogether, and this reduces the possibility of mutually advantageous procompetitive transactions.

Not surprisingly, the Government elects to ignore the testimony on front-running and its integral connection to the "staying out of the way" episodes. As Mr. Cummins testified, there was an expectation that a party without a risk position would refrain from front-running a party seeking to eliminate his risk position after the two traders exchanged position information. (*See* Trial Tr. at 693:3-13 ("Q. Now, when you did that, when you disclosed to people what your position was, … and you're telling them what you're looking to do, either sell or to buy, you're giving them information that they can use against you. Isn't that right? A. Yes, it is. Q. But your expectation would be: If you want to trade with me, other side, you're not going to go against me because then I'll stop reaching out to you. Isn't the fair? A. That's fair."

(Cummins); *see also* Trial Tr. at 1716:23-1719:2) (Lyons).) Without this understanding, traders would not have been willing to share information with each other, making it less likely that they would have engaged in direct trading. (*See* Trial Tr. at 1387:4-1388:7, 1389:15-1390:4 (Katz); DX-324-T at 1:3-8, 4:12-20.)

III. The Court Should Grant Mr. Aiyer A New Trial Pursuant To Rule 33.

Nothing in the Government's Opposition alters the need for a new trial to safeguard Mr. Aiyer's rights. The Government agrees that "a district court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29." (Opp. at 53.) While the Government urges that a court must exercise its Rule 33 authority sparingly, the Government fails to come to terms with the fact that courts in the Southern District of New York have granted new trials to defendants for reasons less grave than those presented here—principally, the risk of a verdict tainted by improper evidence, among several other grounds enumerated in the Motion. *Cf., e.g.*, *United States v. Ferguson,* 49 F. Supp. 2d 321 (S.D.N.Y. 1999), *aff'd* 246 F.3d 129 (2d Cir. 2001); *United States v. Galanis*, 366 F. Supp. 3d 477 (S.D.N.Y. 2018); *United States v. Finnerty*, 474 F. Supp. 2d 530 (S.D.N.Y. 2007), *aff'd* 533 F. 3d 143 (2d Cir. 2008).

A. The Jury's Verdict Likely Was Tainted By Evidence Not Properly Submitted To The Jury.

As discussed above, the Government's evidence at trial was insufficient to sustain its Rule 29 burden, and its case should be dismissed. Even if certain trading episodes are found to have passed Rule 29 muster, however, others plainly did not. Moreover, many of the trading episodes about which the Government introduced evidence at trial involved the ruble or zloty or trading on Reuters. The Court should have ruled before the case was given to the jury that these episodes could not be the basis for a finding of criminal liability. (*See supra* at Section II.) To the extent that *any* of this evidence should have been excluded, a new trial is necessary to protect

against the risk of a verdict based on improper evidence. A new trial is warranted when irrelevant, prejudicial evidence may have tainted the verdict. *See United States v. Guiliano*, 644 F.2d 85, 88-89 (2d Cir. 1981); *United States v. DiNome,* 954 F. 2d 839, 845 (2d Cir. 1992).

The Government, citing *United States v. Napolitano*, 564 F. Supp. 951, 954-55 (S.D.N.Y. 1982), claims that the principles of *Guiliano* do not apply because this proceeding is a "single-count, one-defendant" case, whereas *Guiliano* involved multiple counts and defendants. (Opp. at 55.) The Government's view, however, is overly formalistic and ignores the logic of the case law. *Guiliano* supports the principle that a new trial is appropriate where there is a "distinct risk that the jury was influenced in its disposition … by improper evidence." *Guiliano*, 644 F.2d at 85, 88-89 (2d Cir. 1981). That this case pertains to a single count with several distinct types of evidence rather than multiple counts with several distinct types of evidence is of no moment. The Government's "kitchen sink" approach of including disparate types of evidence in a single comspiracy count, including evidence that cannot support the crime charged in the count, should not then shield the Government from judicial scrutiny of the very risk that approach created. The fact that this case involves one count and one defendant does not at all diminish the risk that evidence that did not tend to prove the crime charged was improperly considered.

Indeed, the risk of impropriety may be even greater in this single-count case for reasons that the Government's own legal authority suggests. In *Napolitano*, the defendant argued that the RICO count, on which the jury acquitted, "subliminally influenced" the jury to find the defendant guilty as to the two other counts charged. *Napolitano*, 564 F. Supp. at 954. Unpersuaded, the court reasoned that "the fact that [the defendant] was acquitted of the RICO count is itself a strong indication that [the jury] was able to separately consider the evidence." *Id*. No such indication of the careful consideration or categorization of evidence exists here.

Instead, as in *Guiliano*, the jury was presented with a barrage of evidence, much of which should have been excluded, and there is no way to gauge how the evidence was considered or which evidence formed the basis of the jury's verdict.

This serious risk of a tainted verdict is reason enough to grant a new trial.

B. The Prejudicial Content Of The Government's Summations Exacerbated The Likelihood Of A Misled Jury And Tainted Verdict.

The Government's summations capitalized on chat excerpts with inflammatory language but no relation to the challenged trading activities, likely misleading the jury and creating confusion as to which evidence related to the crime as charged. (*See* Motion at Section III(C).) The Government's improper reliance on prejudicial sound bites was its reaction to a critical evidentiary problem for the Government's case: no facts were established through testimonial evidence that connected the chat messages to any antitrust conspiracy. With only the chats to advance its case, the Government elected to present the most inflammatory lines in its summations, along with the Government's own say-so as to their meaning. (*See id*.) For the separate but related reason that the Government's summations were improper and prejudicial, a new trial is warranted.

In its Opposition, the Government argues that, "to the extent that the statements were subject to multiple interpretations," the Government had broad latitude as to the inferences it may reasonably suggest to the jury during summation. (Opp. at 57 (internal quotations and citations omitted).) While it may be that the Government enjoys a certain latitude with respect to inferences, the possibility of multiple interpretations and differing inferences is precisely what the Government foreclosed with its declaration that the chats "speak[ ] for [themselves]." (*See* Trial Tr. at 2098:3-4 (Hart); *see also* Trial Tr. at 1944:14-17 ("'conspiracies are nice' … speaks for itself") (Chu); Trial Tr. at 1953:24 (same) (Chu); Trial Tr. at 1953:25-1954:2 ("'Probably

shouldn't put this on perma chart.' Again, speaks for itself." (Chu); Trial Tr. at 1955:6-10 ("' … I think between us we can run ZAR.' … speaks for itself.") (Chu); *see also* Motion at Section III(C).)

The Government further argues, without any citation to the trial transcript, that the excerpts show the "Defendant's degree of trust with his co-conspirators ('chat of trust')" and the "Defendant's intent to coordinate his trading with his co-conspirators ('salute to first coordinated ZAR effort')." (*See* Opp. at 58.) This assertion exemplifies the very issue with the Government's summations—the exploitation of ambiguous language, for which the Government offers only its own say-so about its meaning.

The Government also makes the argument that the "co-conspirator testimony … linked these comments [the excerpts] to relevant elements of the broader conspiracy such as their coordinated trading, shared confidence and motivation." (*Id.*) As a threshold matter, none of these so-called "elements" are legal elements of the crime charged. (*See* Opp. at 1 (itemizing elements of the crime).) More troublingly, as discussed in the Motion, the witness testimony relating to 24 of the 37 sound bites the Government referred to in summation revealed the opposite of "link[ing]" these excerpts to a conspiracy. Mr. Katz's and Mr. Cummins' testimony affirmatively showed a lack of connection between the chat excerpts and any price fixing or bid rigging. (*See* Trial Tr. at 920:3-21 (establishing that "chat of trust" meant "[d]on't go out and start talking to people and potentially get anyone in trouble … We trusted each other") (Katz); Trial Tr. at 571:5-16 (establishing that "salute to the first coordinated ZAR effort" related only to "an exchange of information" that led to "certain trading" that Mr. Cummins admitted was independent) (Cummins).)

The improper, inflammatory content of the Government's summations, coupled with the Government's commentary that the chat language "speaks for itself," rises to the level of prejudice that warrants a new trial.

C. The Verdict Was Contrary To The Weight Of The Evidence.

The Government fails to respond to Mr. Aiyer's argument that the body of evidence in this case, which was largely circumstantial, did not give rise to the inferences urged by the Government. The inherent ambiguity of the chat language, which discussed equally ambiguous trading activity, should not be resolved in the Government's favor in light of the numerous admissions disproving any theory of coordination with respect to specific trading episodes. (*See* Motion at Section III(F) (citing 11 such examples of episodes with admissions from Mr. Katz and Mr. Cummins that were inconsistent with any antitrust conspiracy).) The Government refuses to engage with these problems of proof and responds only with the conclusory statement that "the verdict was well supported by both direct and circumstantial evidence," without any legal or factual citations. (Opp. at 65.) The verdict reached in this case necessarily entailed inferential leaps by the jury that the evidence simply did not permit. That the verdict was contrary to the weight of the evidence is also grounds for a new trial.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Aiyer's Rule 29 motion and enter a judgment of acquittal and/or grant Mr. Aiyer's Rule 33 motion and order a new trial as to any part of the charge remaining.

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By: /s/ Martin Klotz

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