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

13 UNITED STATES OF AMERICA

14 v.
15

16 JAVIER SANCHEZ,

17 Defendant.
18

Case No. CR 4:14-00580 PJH

**GOVERNMENT'S SUPPLEMENTAL
SUBMISSION REGARDING VOLUME
OF COMMERCE**

Court: Hon. Phyllis J. Hamilton
Date: November 29, 2017
Time: 1:30 p.m.
Place: Courtroom 3, 3rd Floor
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1 Javier Sanchez should receive a four-point adjustment to his offense level because his
2 volume of commerce is between \$10 million and \$50 million. His total volume of commerce is
3 \$18,324,431, which includes four categories of rigged properties, purchased by Community
4 Fund, for which Sanchez participated in some act in furtherance of the conspiracy. In an effort
5 to reduce his volume of commerce below \$10 million, Sanchez has offered arguments,
6 unsupported by the Guidelines, which would require a certain heightened type of involvement in
7 acquiring a property in order for that property to “count.” Sanchez has also attempted to
8 minimize his role in relation to certain properties, an effort which is both irrelevant to the
9 Guidelines calculation and unsupported by the evidence.

10 At the November 8 sentencing hearing, the Court asked the government to submit the
11 documentation supporting a “third category” of volume of commerce for Sanchez: rigged
12 properties (won by Community Fund) where Sanchez wrote a round sheet or made payoff
13 notations on another Community Fund round sheet. This submission provides those documents,
14 as well as additional argument explaining why the properties should be included in Sanchez’s
15 volume of commerce. Because Sanchez indicated that he intends to reargue the inclusion of the
16 “second category” of properties (where Community Fund had two representatives in a round,
17 including Sanchez, and the other Community Fund representative won the round), the
18 government includes a brief argument addressing that category as well.

19 **ARGUMENT**

20 Sanchez’s volume of commerce is \$18,324,431. Section 2R1.1 of the Sentencing
21 Guidelines provides that an individual’s volume of commerce is “the volume of commerce done
22 by him or his principal in goods or services that were affected by the violation.” Applying this
23 standard, Javier Sanchez could fairly be held accountable for all of Community Fund’s \$79
24 million volume of commerce, representing the purchase price of the rigged properties
25 Community Fund (Sanchez’s principal) acquired and the bid-rigging payoffs it owed in

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1 connection with those properties.¹ Nonetheless, the government has taken a more limited
2 approach, and the requested \$18,324,431 volume of commerce represents the public auction
3 purchase price (\$17,301,224) and payouts owed (\$1,023,207) for only the rigged properties won
4 by Community Fund (*i.e.*, commerce done by Community Fund in goods affected by the
5 violation) for which Sanchez participated in an act in furtherance of the bid rigging conspiracies.
6 This figure breaks down into roughly four categories:

7 (1) Category 1: Properties where Sanchez personally won a round for rigged property
8 (\$8,814,022, including \$8,385,515 paid in the public auction and \$428,507 in payouts)

9 (2) Category 2: Properties where Sanchez participated in a round that a Community Fund
10 representative won; in many occasions, Sanchez ultimately purchased the property for
11 Community Fund (\$4,820,332, including \$4,524,332 paid in the public auction and
12 \$296,000 in payouts)

13 (3) Category 3: Properties where Sanchez wrote a round sheet (or, in one instance, a note
14 summarizing a payoff)² (\$4,082,577, including \$3,811,377 paid in the public auction and
15 \$271,200 in payouts)

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19 ¹ At Gregory Casorso's sentencing hearing, the Court requested that the government
20 include payoff amounts for each category. It is appropriate to include payoffs in the volume-of-
21 commerce calculation because the payoffs are part of the commerce done by Sanchez or
22 Community Fund in the goods affected by the violation. Put otherwise, the payoffs are part of
23 what Community Fund paid for each property; they are the amounts Community Fund agreed to
24 pay in the round (or negotiated payoff) for the property. It does not matter that the payoffs were
25 owed to members of the conspiracy, rather than to the beneficiaries. They are part of what was
26 paid for the rigged house either way.

24 Moreover, excluding the payoffs would have a perverse result because the defendants
25 would get a windfall for properties where they suppressed the bidding more at the public auction
26 and instead made greater payoffs to acquire the property. For example, a house that sold for
27 \$100,000 plus a \$10,000 round payoff would increase volume of commerce much more than a
28 property where the bidding stopped at \$10,000 and then a \$100,000 payoff in the round ensued.

² The property for which Sanchez wrote a note summarizing a payoff, rather than a round
sheet is 1600 98th Street. Supporting documents are attached as Exhibit B-18 to the Loeb
Declaration.

1 (4) Category 4: Properties where Sanchez made payoff notes on a colleague's round sheet or
2 sales summary (\$607,500, including \$580,000 paid in the public auction and \$27,500 in
3 payouts)³

4 That said, it is not necessary to parse the volume of commerce this way (Sanchez could
5 fairly be held liable for the entire \$79 million in commerce done by Community Fund, and
6 certainly for the \$18,324,431 for properties where he was involved). Because defense counsel
7 raised questions during the meet-and-confer process about why certain properties were included,
8 the parties used categories to better identify specific disputed areas. In the end, though, there is
9 no need for categories.

10 Moreover, including only the properties included in the above four categories is a
11 conservative approach for reasons additional to the fact that the government is not seeking to
12 apply the entire \$79 million Community Fund volume of commerce to Sanchez. The
13 government is not, for example, asking the Court to include every property where Sanchez wrote
14 some note on one of Marr's typed ledgers. The government also excluded several properties
15 where Sanchez made only minimal payoff notes on the round sheet. The standard of proof here,
16 moreover, is not beyond a reasonable doubt, but a preponderance of the evidence. *See United*
17 *States v. Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010).⁴

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20 ³ The government understands that the Court referred to this category as part of "Category
21 3" at the November 8 hearing. It has been separated from Category 3 because the arguments for
22 including Category 4 are somewhat distinct from those for including Category 3.

23 ⁴ The preponderance of the evidence standard is appropriate here because the volume-of-
24 commerce enhancement would not have a "disproportionate impact" on sentencing, as defined in
25 *Treadwell*, 593 F.3d at 1000-01. The Ninth Circuit has "has "repeatedly held that sentencing
26 determinations relating to the extent of a criminal conspiracy need not be established by clear
27 and convincing evidence." *Id.* at 1001 (citation omitted). Under this circuit's totality-of-the-
28 circumstances test, the requested enhancement does not raise due process concerns because it
does not "negate[] the presumption of innocence" or "alter[] the burden of proof" for the
underlying offense. *Id.* at 1000. Nor does the enhancement hold Sanchez "responsible for any
offenses for which [he has] not been convicted by a jury" or "more than double[] the length of
the sentence." *Id.* at 1000-01. The four-point enhancement is based purely on the extent of the
conspiracies in which Sanchez was convicted of participating.

1 The government understands that Sanchez agrees on the properties that are included in
2 the first two categories, which the Court indicated it intended to include in the volume-of-
3 commerce calculation. At the November 8 hearing, the Court indicated that the government
4 should submit the documents supporting the properties in the final two categories if it wished to
5 have them included in Sanchez's volume of commerce. As requested, those documents are
6 attached as Exhibits B and C. The government has also included a spreadsheet listing each
7 property included in its volume-of-commerce calculation by category, attached as Exhibit A.
8 The spreadsheet includes the totals by category and breaks out the amounts paid at the public
9 auction and the payout amounts.

10 After briefly outlining Categories 1 and 2, the remainder of the submission focuses on
11 justifications for including the properties in Categories 3 and 4. All of the justifications are
12 additional to the basic argument that the Guidelines provide that all commerce done by either
13 Sanchez or Community Fund can be used to calculate Sanchez's offense level. Based on the
14 parties' meet-and-confer session, the government understands that the defense does not dispute
15 that Community Fund won every property included in Categories 1-4 and that there is evidence
16 of bid rigging for each property. Thus, all of the properties in Categories 1-4 represent
17 commerce done by Community Fund in goods affected by the violation, and all can be fairly
18 attributed to Sanchez, regardless of his specific role in rigging each property.

19 Sanchez's effort to parse the set of properties further and require a particular type of
20 involvement finds no support in the Guidelines and is frequently based on speculation that
21 artificially minimizes his central role in the two conspiracies.

22 **A. Categories 1 and 2 (\$13,634,354 Volume of Commerce)**

23 Categories 1 and 2 concern properties purchased by Community Fund where Sanchez
24 indisputably participated in the bid-rigging transactions. For some properties (Category 1 -
25 \$8,814,022 volume of commerce), he was the winner of the secondary round. *See, e.g.*, Loeb
26 Decl. Ex. D-1 (documents relating to 1364 93rd Avenue, Oakland). In others (Category 2 -
27 \$4,820,332 volume of commerce), Community Fund purchased the rigged property, Sanchez
28 participated in the round, and another Community Fund employee may have been listed as the

1 winner on the round sheet. *See, e.g.*, Loeb Decl. Ex. D-2 (documents relating to 2026 109th
2 Ave, Oakland). For all of these properties, Sanchez participated in the rounds – acts in
3 furtherance of the conspiracy. In half of the “Category 2” instances (17 of 34 properties, or
4 \$2,478,963 out of the \$4,820,332 volume of commerce), Sanchez not only participated in the
5 round, he also signed the receipt of funds (ROF) on Community Fund’s behalf, officially buying
6 the property for Community Fund, another act in furtherance of the conspiracy.⁵

7 Whether or not Sanchez is listed as the winner of the round on the round sheet should not
8 influence whether the property counts toward his volume of commerce. It was increasingly
9 Michael Marr’s practice during the conspiracy to have two “seats” in a round. *See, e.g.*, Loeb
10 Decl Ex. E (Trial Tr. 2246:22-2247:4). For a property that Marr planned to acquire, having a
11 second seat reduced the payoff he had to make to buy the property because that additional
12 participant would dilute the shares of the payoffs owed to the other round participants. *Id.* at
13 660:19-25; 690:24-691:1)(undercover FBI agent’s explanation of seats); 1478:14-20 (Wesley
14 Barta’s explanation of multiple seats). It did not matter which of the two “seats” happened to be
15 the winner – the result was the same: Community Fund ended up with the property. There
16 should not be an artificial distinction made in which Sanchez is held responsible for properties
17 where he placed the last bid in the round so that Community Fund won the round and those
18 where he and Marr coordinated the round such that the other Community Fund representative
19 was the one to make the highest bid in the round. The result was the same, and Sanchez was
20 involved in the bid rigging for Community Fund in either instance.

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26 ⁵ The government’s understanding is that the Court has not requested all supporting
27 documents for Categories 1 and 2. As articulated at the hearing, Sanchez continues to dispute
28 only whether he should be held responsible for the Category 2 properties as a whole, not whether
a particular property belongs in Category 2. The government can submit supporting documents
for Categories 1 or 2 should the need arise.

1 And, as noted, this category includes over \$2.4 million worth of properties where the evidence
 2 makes clear that Sanchez was involved not just in the rigging, but in actually acquiring the
 3 property as well.⁶ For these properties, Sanchez participated in the round, another member of
 4 Community Fund is nominally listed as the winner on the round sheet, and Sanchez was the one
 5 to sign the ROF, officially purchasing the property for Community Fund. These properties
 6 exemplify why it did not matter which Community Fund participant ended up the high bidder in
 7 the round; Sanchez could still officially buy the property for Community Fund, completing the
 8 transaction. Community Fund's round participants were essentially interchangeable.⁷

9 **B. Category 3 (\$4,082,577 Volume of Commerce)**

10 Category 3 includes round sheets authored by Sanchez where his name is not listed
 11 among the participants in the round. Some of the round sheets list another Community Fund
 12 employee as a participant in the round; some simply say "Marr" (and, in some cases, another
 13 Community Fund employee's name is on the receipt of funds). The existence of a round sheet
 14 written by Sanchez proves that he was there at the courthouse with an active role, taking notes on
 15 the round (and perhaps participating, where the listed participant is "Marr").

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17 ⁶ The properties within Category 2 where Sanchez is the sole Community Fund
 18 representative on the ROF are 424 Caswell Ave, Oakland; 10214 Royal Ann St, Oakland; 35
 19 Cary Court, Oakland; 2008 Warner Ave, Oakland; 7007 Weld St, Oakland; 571 South N St,
 20 Livermore; 1040 89th Ave, Oakland; 3634 Reflections Dr, Pleasanton; 1133 Meadow Lane #91,
 21 Concord; 4013 Meadow Lake St, Antioch; 247 Highway Ave, Bay Point; 3357 South Lucille
 22 Lane, Lafayette; 135 Francis Court, Oakley; 5235 Victor Ave, El Cerrito; 2349 Riverview Dr,
 23 Concord; 524 2nd St, Richmond; and 1333 S. 7th St, Rodeo. The supporting documents for these
 24 properties are included as Exhibits D-3 to D-19.

25 ⁷ During Gregory Casorso's sentencing hearing, the Court raised questions regarding
 26 whether a property might count for two individuals' volume of commerce if Community Fund
 27 had two employees in a round. The answer is yes, and it is appropriate to do so. Again, volume
 28 of commerce can be the amount of commerce done by an individual's principal, so Community
 Fund's entire volume of commerce could set the offense level for any Community Fund
 employee convicted of participating in the bid-rigging conspiracies. In many antitrust cases,
 multiple employees may be involved in, for example, selling a price-fixed product. The product
 need not count toward only one employee's volume of commerce. Similarly, if two burglars
 work together to rob a house, both of them would have their offense level determined based on
 the value of property taken – and that property would be counted to determine both burglars'
 offense level. *See* U.S.S.G. § 2B2.1(b).

1 At the November 8 sentencing hearing, Sanchez suggested that these round sheets were
2 simply after-the-fact summaries created by Sanchez later as part of some low-level bookkeeping
3 function. That contention is not supported by the evidence. In fact, the evidence at trial showed
4 the opposite. Sanchez told other conspirators to write “Marr” on round sheets in place of his
5 name when he was participating in rounds. *See* Loeb Decl. Ex. E (Trial Tr. 1969:9-1970:5).
6 Barta observed Sanchez taking notes during rounds. *Id.* at 1436:10-16; 1513:19-21. Barta also
7 turned his round sheets and sales summaries in to Sanchez. *Id.* at 1436:10-16, 1496:15-24.
8 Neither Barta nor any other witness testified that Sanchez’s duties included recopying other
9 Community Fund employees’ round sheets. Sanchez was responsible for calculating payoffs
10 owed, and, as seen on many of Barta’s round sheets, Sanchez wrote payoff calculations directly
11 on Barta’s round sheet. *See, e.g.*, Loeb Decl. Ex. F (Ex. 132). He did not have to recopy
12 anything.

13 Sanchez pointed to the fact that these round sheets include only each bidder’s final bid to
14 support his claim that the round sheets were not created contemporaneously. But many
15 participants in the rounds created round sheets – contemporaneously – that included only the
16 final bid, not every bid. At trial, the government introduced round sheets written by Wesley
17 Barta, Gregory Casorso, Douglas Ditmer, Danli Liu, and John Shiells, that fit this model – as do
18 most of Sanchez’s round sheets. *See, e.g.*, Loeb Decl. Ex. F (Exs. 70-22 (Barta), 74-01
19 (Casorso), 225 (Sanchez), 506 (Ditmer), 553 (Liu), 707 (Shiells)). Writing down the final bid
20 only was just a different style of taking notes – because, in the end, the final bid was all that
21 mattered.

22 In his argument that the round sheets he wrote were after-the-fact round summarizes,
23 Sanchez also attempted to discount the significance of his role tabulating round payoffs. The
24 evidence does not support characterizing Sanchez’s role as a low-level administrative function.
25 The evidence at trial (included in the government’s sentencing memorandum) established that
26 Michael Marr himself would collect and review his employees’ round sheets, and only later
27 turned that responsibility over to Sanchez – and no one else. *See* Gov’t Sent’g Mem. at 4, 11
28 (Dkt. 358). Marr had an office full of employees, but he chose Sanchez – who was talented at

1 valuing properties, was heavily involved in the bid rigging, and helped reconcile debts with
2 coconspirators – to be the employee to collect round sheets and to calculate payoffs.

3 In any event, though, even if it were true that these round sheets were after-the-fact
4 summaries, Sanchez would be participating in an act in furtherance of the conspiracy in
5 connection with these properties. That is more than sufficient to include the property in
6 Sanchez’s volume of commerce. And the Guidelines do not create some rule that an employee
7 has to contribute in a particular high-level way in order for commerce to be attributed to him or
8 her.

9 In sum, the evidence submitted to the Court in Exhibits B1– B18 show that Sanchez was
10 unquestionably involved in an act in furtherance of the bid rigging of these properties, purchased
11 on behalf of Community Fund. There is substantial evidence that he wrote these round sheets
12 during the round, but even if he did not, his involvement is more than sufficient to include them
13 in his volume of commerce figure under the Guidelines.

14 **C. Category 4 (\$607,500 Volume of Commerce)**

15 Category 4 consists of three rigged properties where Sanchez wrote notations relating to
16 payoffs on round sheets written by other Community Fund employees. Barta identified several
17 examples of Sanchez’s handwriting at trial, including Sanchez’s handwriting on one of the
18 documents at issue.

19 (1) For 9859 Broadmoor Drive (Ex. C-1), Sanchez wrote the payoff calculations for the
20 losing bidders in the round on the right-hand side of Barta’s round sheet.

21 (2) For 21 West Lake Drive (Ex. C-2), Sanchez wrote the names and amounts owed to
22 two other bidders on the right-hand side of Barta’s round sheet.

23 (3) For 2408 Bella Vista Avenue (Ex. C-3), Sanchez wrote the numbers under each
24 bidder’s name and bids, representing the payoffs owed. Barta specifically identified
25 these numbers as written by Sanchez. (Loeb Decl. Ex. E (Trial Tr. 1571:21-1572:15)).

26 These three properties should be included in Sanchez’s volume of commerce because
27 they were purchased by Community Fund, and Sanchez participated in an act in furtherance of
28 the bid rigging by calculating and tracking the payoff amounts. As with Category 3 properties, it

1 is no defense that Sanchez's contribution regarding these properties was purportedly minor or
2 after the fact.

3 **CONCLUSION**

4 Applying Sanchez's arguments to reduce his volume of commerce below \$10 million
5 would result in a volume of commerce figure that understates his role in the offense even more
6 than volume of commerce already inherently does (in a bid rigging case such as this). *See*
7 U.S.S.G. § 2R1.1 comment. (n.6). Sanchez is one of the most culpable figures in these
8 conspiracies, in part because of his extensive participation across the East Bay. His volume of
9 commerce should reflect this fact. For the foregoing reasons, the Court should determine that
10 Sanchez's volume of commerce is \$18,324,431 and apply a four-point adjustment to his offense
11 level.

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13 DATED: November 15, 2017

Respectfully submitted,

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