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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA

CASE NO. CR 14-00534 CRB

17 v.

**UNITED STATES' RESPONSE TO  
DEFENDANT JOSEPH GIRAUDO'S  
SENTENCING MEMORANDUM**

18 JOSEPH GIRAUDO,  
19 Defendant.

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1 **ARGUMENT**

2 Defendant Joseph Giraudo rigged over 200 hundred properties at San Mateo and San  
3 Francisco foreclosure auctions. Giraudo’s volume of commerce, as measured by the winning bid  
4 and payoff amount for each property he purchased, exceeds \$36 million.<sup>1</sup> This justifies a four-  
5 level enhancement to his offense level under the Antitrust Guidelines. U.S.S.G. §2R1.1.

6 Giraudo rigged more properties than any of the other 22 co-conspirators charged and  
7 convicted in the related cases. Yet he contends that his volume of commerce is somehow lower  
8 than those codefendants who (with only one exception) stipulated to volume of commerce in  
9 their plea agreements. Giraudo’s volume of commerce is readily ascertainable, and his attempts  
10 to obfuscate and distort his volume of commerce should be rejected. Specifically, Giraudo’s  
11 volume of commerce (1) is not limited by the statute of limitations; (2) appropriately includes the  
12 purchase price of each rigged property in addition to the payoff amount; (3) should not be  
13 lessened, to the extent Giraudo had a partial ownership stake in a rigged property; and (4) is  
14 supported by voluminous evidence, provided to Giraudo more than three years ago, establishing  
15 Giraudo’s involvement in each of the rigged properties attributed to him.

16 Likewise, consistent with the Presentence Report, a one-level enhancement is justified  
17 because Giraudo’s conduct involved the submission of non-competitive bids, and a four-level  
18 enhancement is warranted because Giraudo was a leader of the conspiracies. Giraudo was the  
19 most culpable member of two bid-rigging conspiracies in which 23 defendants have pleaded  
20 guilty. Giraudo’s volume of commerce—and ultimate sentence—should reflect his culpability.

21 **I. VOLUME OF COMMERCE**

22 **A. Giraudo’s Volume Of Commerce Is Readily Ascertainable And**  
23 **Demonstrates His Greater Culpability**

24 Determining volume of commerce is necessary in order to calculate Giraudo’s offense  
25 level. U.S.S.G. §2R1.1. It also provides insight into Giraudo’s culpability. Indeed, as Judge  
26 Donato indicated at a recent sentencing of a corporate defendant, the volume of commerce is the  
27 “earmark for the injury” for antitrust crimes. *See* Sentencing H’ring, *United States v. Nichicon*,

28 <sup>1</sup> This figure does not include the value of the rigged properties he *did not purchase* because he accepted a  
payoff not to bid.

1 No. 17-CR-368 JD, 4/11/18 Tr. 35:9-10. Additionally, calculating the volume of commerce is  
 2 possible without expert testimony or an evidentiary hearing. *See United States v. SKW Metals &*  
 3 *Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999) (Determining the volume of affected commerce for  
 4 purposes of sentencing “does not require a sale-by-sale accounting, or an econometric analysis,  
 5 or expert testimony.”).

6 In February, the government submitted a list of rigged properties to Giraudo and  
 7 Probation, in which the government identified the rigged properties attributed to Giraudo’s  
 8 volume of commerce and the relevant evidence showing Giraudo’s involvement. Although  
 9 Giraudo contends the government has not met its burden, apart from isolated examples,  
 10 addressed below, Giraudo does not challenge the accuracy of the government’s list.<sup>2</sup> Rather,  
 11 Giraudo challenges the government’s methodology to determine volume of commerce. As  
 12 discussed below, these arguments should be rejected.<sup>3</sup>

13 **B. Properties Giraudo Rigged More Than Five Years Before The Indictment**  
 14 **Are Appropriately Included in Giraudo’s Volume of Commerce**

15 Giraudo seeks to exclude more than \$16 million in commerce based on his involvement  
 16 in rigging 48 auctions because the auctions occurred more than five years before he was indicted.  
 17 Dkt. 313, at 20. But Giraudo was charged with, and pleaded guilty to, participating in two  
 18 separate, ongoing conspiracies to rig bids at foreclosure auctions in San Mateo and San

19 <sup>2</sup> Exhibit Y to the Mast Declaration is the underlying evidence establishing the basis to include the  
 20 properties identified in Giraudo’s list of rigged properties. The government identified this evidence to  
 21 Giraudo in February and Giraudo has been in possession of the evidence for more than three years.

22 <sup>3</sup> At the April 19, 2018 status hearing, the Court inquired whether calculating the defendants’ volumes of  
 23 commerce was necessary if it would not have an impact on the Court’s sentence. Status H’ring, 4/19/18,  
 24 Tr. 14:11-15:8. While it remains an open question “whether, and under what circumstances, district  
 25 courts may find it unnecessary to calculate the applicable Guidelines range,” *United States v. Cantrell*,  
 26 443 F.3d 1269, 1279, n. 3 (9th Cir. 2006), the Supreme Court “has made clear that the Guidelines are to  
 27 be the sentencing court’s starting point and initial benchmark,” and that courts “must begin their analysis  
 28 with the Guidelines and remain cognizant of them throughout the sentencing process.” *Molina-Martinez*  
*v. United States*, 136 S.Ct. 1338, 1345 (2016) (internal citations and quotation marks omitted). Thus, if  
 the Court is not inclined to determine Giraudo’s volume of commerce and corresponding offense level  
 under the Guidelines, it should make clear on the record that Giraudo’s volume of commerce would not  
 have impacted his sentence. For example, here, regardless of the methodology employed to calculate  
 volume of commerce, the Court can readily determine Giraudo’s relative culpability in comparison to his  
 codefendants: Giraudo purchased more rigged properties, and accepted more payoff money to refrain  
 from bidding, than any other defendant in this case. Dkt. 307, Ex. B. Giraudo’s sentence should reflect  
 his relative culpability even if the Court does not determine his volume of commerce.

1 Francisco that spanned from 2008 until 2011. Properties Giraudo rigged before the statute of  
2 limitations are appropriately included in his volume of commerce calculation. *See United States*  
3 *v. Grice*, 319 F.3d 1174, 1178-79 (9th Cir. 2003) (when a defendant is involved in a conspiracy,  
4 conduct that predates the statute of limitations should be considered so long as the defendant or  
5 his co-conspirators committed an act in furtherance of the conspiracy within the statute of  
6 limitations period). There is no factual or legal basis to exclude commerce outside of the  
7 limitations period.

8 Giraudo's assertion that he pleaded guilty to "ad hoc independent" bid-rigging  
9 agreements, *see* Dkt. 313, at 14, finds little support in the record. A "defendant's plea of guilty  
10 conclusively admits all factual allegations of the indictment." *United States v. Benson*, 579 F.2d  
11 508, 509 (9th Cir. 1978). Here, the indictment charged Giraudo with participating in two bid-  
12 rigging conspiracies—not ad hoc independent bid-rigging agreements. *See* Dkt. 1. Moreover, at  
13 Giraudo's guilty plea hearing, the government identified the elements it would prove at trial:  
14 "one, the conspiracy to suppress and restrain competition described in the Indictment existed at  
15 or about the time alleged. . . second, that the defendant knowingly became a member of the  
16 conspiracy. And third, that the conspiracy . . . substantially affected interstate commerce" Plea  
17 H'ring, Sep. 19, 2017, Tr. 17:22-18:6. Giraudo stated, without any ambiguity, that he agreed the  
18 government could prove such a conspiracy beyond a reasonable doubt. Plea H'ring, Sep. 19,  
19 2017, Tr. 18:7-11. Giraudo's assertion that he was involved in "ad hoc agreements" indicates he  
20 has not fully accepted responsibility for his conduct.

21 If there was any doubt that Giraudo's guilty plea did not establish that he participated in  
22 ongoing conspiracies, the evidence of continuing conspiracies is substantial. Giraudo explained  
23 to co-conspirator Laith Salma the rules of the conspiracies, including the requirement that  
24 bidders had to tell the Big 5 when they were interested in a property. Dkt. 307, Ex. U at 3.  
25 Giraudo acknowledges this rule existed in his sentencing memo. Dkt. 313, at 14 n. 24. And  
26 Giraudo advised a confidential informant, CHS-RG, that they should be discreet about making  
27 payoffs at the auctions, and if CHS-RG was ever questioned by law enforcement about their bid-  
28 rigging conduct, to deny knowing Giraudo. Ex. Y, (evidence regarding 882 King Dr.

1 (1D011.001\_part1.wav at 45:53-46:42)). Conspiracy rules and a pre-planned cover story are not  
2 indicative of “ad hoc” bid-rigging agreements.

3 Moreoever, even if Giraudo rigged 200 properties on an “ad hoc” basis, it would not  
4 reduce his volume of commerce because every rigged property would be “acts of related  
5 conduct” properly considered in calculating his offense level. U.S.S.G. §1B1.3; *see also United*  
6 *States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999) (in sentencing, court may consider “acts of  
7 related conduct for which the defendant was not convicted”).

8 *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), cited by Giraudo, does not counsel otherwise.  
9 *Kokesh* held that disgorgement actions were subject to a five-year limitations period because  
10 disgorgement constituted a penalty as defined by the applicable statute of limitations. 137 S. Ct.  
11 at 1643. Nothing in *Kokesh* implies that a court cannot consider “acts of related conduct” when  
12 sentencing a criminal defendant, and indeed, as Giraudo acknowledges, the Ninth Circuit has  
13 repeatedly held—both pre- and post-*Kokesh*—that “relevant conduct” may include conduct that  
14 occurred outside the limitations period. Dkt. 313, at 22 n. 32 (citing *United States v. Williams*,  
15 217 F.3d 751, 753-54 (9th Cir. 2000) and *United States v. Stewart*, No. 16-50093, 2018 WL  
16 1476942, at \*2 (9th Cir. Mar. 27, 2018) (unpublished)).

17 Thus, there is no basis to exclude volume of commerce based on the statute of  
18 limitations.

19 **C. Giraudo’s Volume of Commerce Appropriately Includes The Purchase Price**  
20 **of the Rigged Property**

21 Unlike every other defendant in this case, Giraudo erroneously contends that his volume of  
22 commerce calculation should exclude the purchase price of the rigged property.<sup>4</sup> This contention is  
23 belied by the Antitrust Guidelines, which state that “the volume attributable to an individual  
24 participant in a conspiracy is the volume of commerce done by him or his principal in goods or  
25 services that were affected by the violation.” U.S.S.G. §2R1.1. The commentary to the Guidelines  
26 make clear that volume of commerce is distinct from gain to the defendant or loss to victims.  
27 U.S.S.G. §2R1.1 (“The offense levels are not based directly on the damage caused or profit made by

28 <sup>4</sup> Even Cullinane, who also pleaded without a plea agreement, does not contend that his volume of  
commerce is based on the payoff amounts. *See* Dkt. 297 at 4-5.



1 the defendant because damages are difficult and time consuming to establish. The volume of  
2 commerce is an acceptable and more readily measurable substitute.”).

3 Indeed, if Giraudo’s offense level was determined by gain or loss, such as under the Fraud  
4 Guidelines, his offense level and sentencing exposure would be substantially greater. *See* U.S.S.G.  
5 §2B1.1; *see also United States v. VandeBrake*, 679 F.3d 1030, 1034 (8th Cir. 2012) (upholding  
6 district court’s upward variance and imposition of a 48-month sentence in a price-fixing case because  
7 the Antitrust Guidelines range determined by volume of commerce was significantly lower than  
8 fraud Guidelines range based on loss).<sup>5</sup>

9 Other judges in this district have included the purchase price of rigged properties in the  
10 volume of commerce calculation. Both Judge Hamilton and Judge Donato used the purchase price of  
11 the foreclosed home (plus the payoff) to determine the volume of commerce in contested sentencing  
12 proceedings arising from similar bid-rigging conspiracies in Contra Costa and Alameda counties.<sup>6</sup>  
13 *See, e.g., Sentencing H’rng of Robert Rasheed*, No. 14-CR-582 JD, 4/26/17 Tr. 4:1-12. Indeed,  
14 Judge Hamilton accepted this basis to calculate volume of commerce for a defendant who  
15 pleaded guilty to bid rigging in Contra Costa, Alameda, and San Francisco counties. *See, e.g.,*  
16 *United States v. Shiells*, No. 14-CR-571 PJH, Dkt. 65 (Judgment). Thus, this methodology has  
17 already been used for Giraudo’s coconspirators.

18 Giraudo contends that attributing the entire price of the rigged property is akin to counting  
19 the price of a vehicle in price-fixing cases involving component auto-parts. Not so. Giraudo and his  
20 co-conspirators rigged the auctions for foreclosed homes; they did not fix prices of component parts,  
21 such as a shingle or doorknob used to rehabilitate purchased properties before resale. And notably,

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22 <sup>5</sup> The Antitrust Guidelines are likewise lenient in that they do not “attribute the sales of each member of  
23 the conspiracy to all others.” *United States v. Heffernan*, 43 F.3d 1144, 1147 (7th Cir. 1994).

24 <sup>6</sup> In fact, the government’s recommended volume of commerce for Giraudo is conservative because it has  
25 not taken the position that *all* of Giraudo’s purchases at the auctions were “affected commerce.” *See e.g.,*  
26 *United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001) (“While a price-fixing conspiracy is  
27 operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants  
28 during that period are “affected” by the conspiracy.”) (emphasis in original). And, here, Giraudo’s  
conduct drove away would-be competitors from the auction and therefore likely affected auction prices  
even in the absence of a payoff agreement because he faced less competition. *See e.g., Dkt. 307, Ex. Q at*  
1 (“Salma exited the foreclosure market because of unfair and illegal business practices occurring at the  
auctions.”). Nor does the proposed calculation hold Giraudo liable for rigged auctions he did not  
participate in even though they were part of the charged conspiracies to which he pled.

1 the government does not contend that Giraudo's volume of commerce is based on the resale price of  
2 the “flipped” property, which would be considerably higher.

3 The goods affected by the Giraudo’s violation are the properties rigged at the foreclosure  
4 auctions. Accordingly, Giraudo’s volume of commerce should include the purchase price of the  
5 rigged property as well as the payoff.

6 **D. Giraudo’s Ownership Stake In the Property Does Not Limit His Volume Of**  
7 **Commerce**

8 Giraudo also contends that his proportional ownership stake in each property he rigged  
9 provides a basis to limit his volume of commerce. It does not. Giraudo is responsible for the  
10 volume of commerce done by himself and done by his joint-venture partnerships. *See*  
11 2R1.1(b)(2) (“[T]he volume of commerce attributable to an individual participant in a conspiracy  
12 is the volume of commerce done by him or his principal in goods or services that were affected  
13 by the violation.”).

14 When Giraudo purchased rigged properties pursuant to a partnership or joint venture  
15 agreement (most frequently a joint venture agreement between the Big 5), the joint venture  
16 functioned as Giraudo’s principal. Hence, the “commerce done by him or his principal” is the  
17 commerce done by Giraudo and Giraudo’s joint ventures. That a joint venture creates a  
18 principal-agent relationship is uncontroversial. *See* 46 Am. Jur. 2d Joint Ventures § 36 (“In  
19 accordance with the general rule that each member of a joint venture is deemed to be the agent of  
20 the other when acting in furtherance of the common objective, coventurers are agents of each  
21 other as to third parties for all acts within the scope of the enterprise, including wrongful acts, if  
22 the joint venturer has authority to act.”); *see also* Judicial Council of California Civil Jury  
23 Instruction 3712 (2018) (“Each of the members of a joint venture, and the joint venture itself, are  
24 responsible for the wrongful conduct of a member acting in furtherance of the venture.”).

25 Therefore, all partners or coventurers are jointly and severally liable for partnership obligations,  
26 irrespective of their individual partnership interests, because joint and several liability arises

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28 //

1 from the partnership or joint venture. *Myrick v. Mastagni*, 185 Cal.App.4th 1082, 1091 (2010);  
 2 *see also Second Measure, Inc. v. Kim*, 143 F. Supp. 3d 961, 971 (N.D. Cal. 2015).<sup>7</sup>

3         Attributing the entire purchase price of a rigged property purchased pursuant to a joint  
 4 joint venture agreement to Giraudo's volume of commerce is no different than the typical  
 5 volume-of-commerce calculation in antitrust cases, where a CEO, a Vice President of Sales, and  
 6 Sales, and a Senior Vice President are all be each wholly liable for the volume of commerce  
 7 done by their organization.<sup>8</sup> Likewise, in the Alameda and Contra Costa bid-rigging cases,  
 8 Judges Hamilton and Donato held that each member of an organization was responsible for the  
 9 total value of the rigged auctions they participated in on behalf of their principals, even where  
 10 they had no equity in the rigged property. *See e.g.* Sentencing H'ring of Michael Marr, No. 15-  
 11 CR-580 PJH, 3/21/17 Tr. 21:14-24; Sentencing H'ring of Robert Rasheed, No. 14-CR-582 JD,  
 12 4/26/17 Tr. 9:7-13; 11:1-7. And Jim Appenrodt, who purchased properties on Giraudo's behalf,  
 13 stipulated to a volume of commerce based on the price of the rigged property (and payoff) even  
 14 though he did not retain any ownership interest in the property.<sup>9</sup> *See* Dkt. 270.

15 <sup>7</sup> Giraudo misunderstands the government's reliance on *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006).  
 16 Dkt. 319, at 20. *Texaco* stands for the proposition that a joint venture is regarded as a single entity.  
 17 *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) ("joint ventures [are] regarded as a single firm."). Thus,  
 18 Giraudo is responsible for the volume of commerce affected by the joint venture -- the principal. And,  
 19 while a single firm is incapable of conspiring with itself for purposes of § 1 of the Sherman Act, the  
 20 government did not attribute properties purchased by Giraudo's joint ventures where no bid rigging  
 21 occurred to Giraudo's volume of commerce, even though the joint ventures were formed for  
 22 anticompetitive purposes, i.e., to stave off competitive bidding. In other words, if Giraudo formed a joint  
 23 venture (among the Big 5 or otherwise) and the joint venture acquired a property *without a payoff*, the  
 24 property was **not** added to Giraudo's volume of commerce. Instead, the properties specified on Giraudo's  
 25 list of rigged properties represent transactions in which Giraudo, or his joint venture, paid off another  
 26 bidder to buy the property.

27 <sup>8</sup> *See, e.g., United States v. AU Optronics Corporation, et al.*, 09-CR-0110 SI, Dkt. 963, at 10 (Sentencing  
 28 Hearing Transcript) (court agreeing with \$2.34 billion VOC per defendant, the same volume of commerce  
 as their corporate employer also convicted at trial); *compare United States v. Serra*, 08-CR-349-J-327  
 TEM, Dkt. 16 with *United States v. Gill*, 08-cr-351-J-32 TEM, Dkt. 18 (Senior Vice President and  
 Marketing and Pricing Director each stipulated to same volume of commerce as their corporate employer)

29 <sup>9</sup> Giraudo's reliance on *United States v. Mitsubishi Corp.*, No. CR 00-33 (E.D. Penn. April 19, 2001) and  
 30 *United States v. JPMorgan Chase & Co.*, 2016 WL 7530414 (D. Conn. Dec. 1, 2016) is unavailing. Both  
 31 cases are inapposite because they involve volume of commerce calculations for corporate defendants, not  
 32 individuals. Moreover, in *Mitsubishi*, Mitsubishi did not engage in price fixing of graphite electrodes  
 33 directly, but rather owned 50 percent of UCAR International, the entity that sold the price-fixed products.  
 34 The government agreed to recommend that Mitsubishi's volume of commerce be limited to 50 percent of  
 35 UCAR International's U.S.-based sales of the price-fixed product, but recommended that UCAR be

1           Girauda is responsible for the volume of commerce done by him or his principal.  
 2 U.S.S.G. 2R1.1(b)(2). When he rigged a property, even if he only owned a percentage  
 3 property, his volume of commerce appropriately reflects the winning bid and payoff  
 4 regardless of Girauda’s personal ownership stake in the property. There is no basis to  
 5 Girauda’s volume of commerce based on his ownership stake in the property.

6           **E.       The Government Has Presented Unrebutted Evidence Sufficient to Show**  
 7           **Girauda Rigged of Hundreds of Properties.**

8           The evidence presented by the government is more than sufficient to establish the scope  
 9 and magnitude of Girauda’s bid-rigging conduct, including the number of rigged properties and  
 10 total volume of commerce attributable to him. As Girauda has conceded, the standard of proof  
 11 for facts offered at sentencing is a preponderance of the evidence. Dkt. 313, at 18; *see also*  
 12 *United States v. Marr*, No. CR 14-00580, Dkt. 435, at 5 (Order Determining Volume of  
 13 Commerce Under U.S.S.G. § 2R1.1) (“[D]efendant was convicted of two counts of bid rigging,  
 14 and the preponderance of the evidence standard is appropriate for calculating the cumulative  
 15 ‘volume of commerce done by him’ that stems from the offense of conviction.”) (citing *United*  
 16 *States v. Hymas*, 780 F.3d 1285, 1290-91 (9th Cir. 2015)).

17           Girauda has long been on notice and in possession of the government’s evidence showing  
 18 the scope and magnitude of his conduct. He has had the property list—which includes citations  
 19 to the relevant evidence for each rigged property—for over three months. Dkt. 307, Ex. A. And  
 20 through the discovery provided to him by the government, he has had access to the underlying  
 21 evidence for years.

22           \_\_\_\_\_ responsible for all of its U.S.-based sales of graphite electrodes. *See United States v. Mitsubishi Corp.*,  
 23 No. CR 00-33 (E.D. Penn. April 19, 2001) Dkt. 164 (available at [https://www.justice.gov/atr/case-](https://www.justice.gov/atr/case-document/file/504471/download)  
 24 [document/file/504471/download](https://www.justice.gov/atr/case-document/file/504471/download) and *United States v. UCAR*, No. CR 98-177 (E.D. Penn. April 19, 2001),  
 25 U.S.’ Sentencing Memorandum (available at [https://www.justice.gov/atr/case-document/governments-](https://www.justice.gov/atr/case-document/governments-sentencing-memorandum-3)  
 26 [sentencing-memorandum-3](https://www.justice.gov/atr/case-document/governments-sentencing-memorandum-3)). Thus, the volume of commerce in *Mitsubishi* was not prorated by  
 27 defendant, instead UCAR and Mitsubishi were both responsible for the same volume of commerce while  
 28 Mitsubishi partially owned UCAR. And in *JP Morgan*, the fine was calculated based on doubling the  
 loss to the victims—not the volume of commerce. *See* 15 U.S.C. § 1 (alternative fine provision  
 authorizes fine based on the loss caused to the victims if such loss exceeds \$100 million). Moreover, JP  
 Morgan “cooperated extensively with the investigation,” providing “complete and accessible trade data,  
 allowing for a fair and expeditious resolution to this matter.” *JPMorgan Chase*, 2016 WL 7530414, at \*1,  
 3. No such cooperation took place here.

1           Giraudo has nonetheless failed to rebut the ample evidence showing his participation in  
 2 rigging hundreds of properties. Exhibit A to the government’s sentencing memorandum details  
 3 the 206 properties for which the government seeks to hold him accountable.<sup>10</sup> Dkt. 307-2. The  
 4 evidence identified by the government overwhelmingly establishes Giraudo’s involvement in  
 5 rigging each property. Some of this evidence includes:

- 6           • The BlackBerry ledger that Rezaian used to contemporaneously track payoffs,  
 7 including who was involved in the payoff, the payoff amount, and the property to  
 8 which the payoff pertained;
- 9           • Rezaian’s computer, which he likewise used to document payoffs, and which also  
 10 frequently included the price at which the property sold at the public auctions;
- 11           • Audio-video recordings made by confidential informants or an undercover FBI agent,  
 12 that captured Giraudo and his coconspirators engage in bid-rigging conduct;
- 13           • FBI 302 reports memorializing interviews conducted by the government with  
 14 cooperating defendants and informants explaining how Giraudo was involved in  
 15 rigging particular properties; and
- 16           • Documents produced by the trustee companies that administered the foreclosure  
 17 auctions, which show the purchase price, winning bidder, and individual or entity that  
 18 took title to the property.

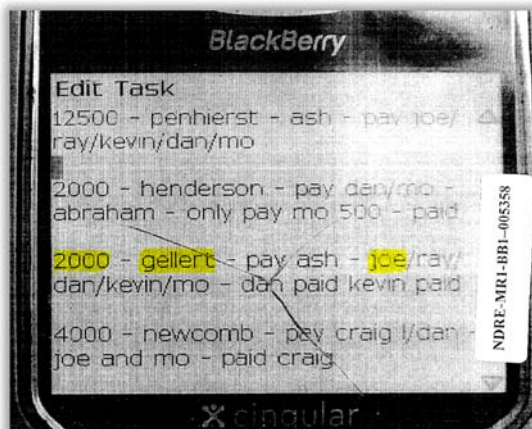
19 Thus the “evidentiary howitzer”<sup>11</sup> identified in Exhibit A is more than sufficient to establish that  
 20 Giraudo was involved in rigging each property attributed to his volume of commerce. For  
 21 example, entry #59 of Exhibit A (Dkt. 307-2, at 10) itemizes the volume of commerce figures  
 22 attributable to Giraudo for 974 Gellert Blvd. in Daly City with citations to supporting evidence,  
 23 which include:

24 //

25 <sup>10</sup> Of course, this list of 206 properties rigged between August 2008 and January 2011 is likely just a slice  
 26 of a much-larger universe of rigged properties that Giraudo participated in during his decades of bid-  
 27 rigging at Bay Area foreclosure auctions. *See, e.g.*, Dkt. 307-6, at 1-2 (interview report documenting co-  
 28 conspirator Abraham Farag’s description of being solicited by Giraudo and accepting his offer to enter  
 into a bid-rigging agreement in 2003).

<sup>11</sup> *See* Dkt. 248, at 10 (Order Denying Motion To Sup. Further Evidence As Fruit Of The Poisonous Tree)

- NDRE-MR1-BB1-005358, which contains this entry from Rezaian's BlackBerry:



- NDRE-MR-VP-000070, which contains this entry from Rezaian's computer:

974 GELLERT BLVD  
 DALY CITY  
 4/1/10  
 Sold for \$360,300  
 Sold to Joe/Ray/Dan/Kevin/Dave S  
 Paid JACK ASH \$2000  
 TOLD DAVID we paid out \$12,500 (\$2500 per person)

- 1D219.001\_part1.wav, an audio-video recording made by a confidential informant in which Giraudo's co-conspirator James Appenrodt explains (from 06:45 to 07:01 of the recording) that he has an envelope full of cash from Giraudo that he is going to deliver to the informant; and
- NDRE-FBI-0364, a handwritten note to the informant, signed by Giraudo, that accompanied Giraudo's payoff:

9749 Gellert St. 2000  
 I didn't know this was owed to you.  
 4 1/2 St. San Bruno 2000 -  
 Total 4000  
 J. Giraudo

1 In the face of this substantial volume of credible evidence showing Giraudo's  
2 involvement in each of the 206 properties listed in Exhibit A, the defense limits its rebuttal effort  
3 to a single footnote, claiming that the government "makes a series of factual errors that should  
4 undermine the Court's confidence in the accuracy of the government's calculations." Dkt. 313,  
5 at 22 n.34. In support of this claim, Giraudo contends three properties, 1319 Monte Diablo, 950  
6 Old Mission Road, and 1788 45th Street were improperly included on the government's list.  
7 Giraudo fails, however, to show that any of those three rigged properties should not be attributed  
8 to his volume of commerce:

9 Regarding 1319 Monte Diablo, Giraudo argues that the payoff records from Rezaian's  
10 BlackBerry, which state "Sold to Joe/Ray/Dan gave Joe my share; Paid Florance \$2000" indicate that  
11 "Giraudo was not involved until after the sale, and any payoff, was completed." Dkt. 313, at 22 n.34.  
12 First, Rezaian's notes suggest that Rezaian provided his ownership stake in the property to  
13 Giraudo—not that Giraudo was not involved in the payoff agreement. And second, even if Giraudo  
14 was not involved in the payoff agreement when it was negotiated, he certainly profited from it when  
15 he received an ownership stake in the property purchased at an anticompetitive price. Giraudo is  
16 included on the joint venture agreement for 1319 Monte Diablo. Ex. Y (documents pertaining to  
17 1319 Monte Diablo). Additionally, cooperating witnesses confirmed that each of the partners to  
18 a joint venture agreement property was responsible for paying a percentage of the payoffs  
19 corresponding to their ownership interest. *See, e.g.*, Dkt. 306, Ex. H at 8. Giraudo became  
20 responsible for the payoff once he joined the joint venture.

21 Giraudo also contends that 950 Old Mission Road should not count towards his volume  
22 of commerce because Rezaian's BlackBerry which states, "Pay mo – florance," does not identify  
23 Giraudo. But Giraudo purchased 950 Old Mission Road pursuant to a joint venture agreement  
24 with co-conspirator Florence Fung, and Rezaian indicated during an interview that he refrained  
25 from bidding at the auction for 950 Old Mission Road in exchange for \$3,000. Ex. Y  
26 (documents pertaining to 950 Old Mission Road).

27 Lastly, Giraudo argues that the rigged auction at 1788 45th Street in San Francisco should  
28 not count towards his volume of commerce because he is not listed as a member of the joint

1 venture agreement for the property. But Keith Goodman confirmed that Giraudo was involved  
2 in negotiating the payoff agreement for 1788 45<sup>th</sup> Street with co-conspirator Craig Lipton.  
3 Specifically, Lipton agreed to pay Giraudo to refrain from bidding on a property located on  
4 Trumbull Street, and Giraudo would pay Lipton to refrain from bidding on the auction for 1788  
5 45<sup>th</sup> Street. Ex. Y (documents pertaining to 1788 45<sup>th</sup> Street). This is corroborated by  
6 documents produced by Lipton. *Id.* Therefore, even if Giraudo did not retain an ownership  
7 interest in 1788 45<sup>th</sup> Street, he was intimately involved in the payoff negotiation, and the  
8 property is appropriately included in his volume of commerce.

9 While Giraudo claims that these three examples represent “just a slice of the errors,” he  
10 has failed to identify a single property that should be excluded from his volume of commerce.  
11 The Court need not undertake “a sale-by-sale accounting” to determine Giraudo’s volume of  
12 commerce. *See SKW Metals & Alloys, Inc.*, 195 F.3d at 91. Based on the voluminous evidence  
13 identified in Exhibit A, and the absence of any countervailing evidence, the government has met  
14 its burden and established Giraudo’s involvement in rigging each of the 206 properties attributed  
15 to him, including the 106 affecting his volume of commerce.

## 16 17 **II. ENHANCEMENTS FOR BID RIGGING AND ROLE IN THE OFFENSE**

### 18 **A. Giraudo Submitted Non-Competitive Bids**

19 Giraudo’s offense level is appropriately increased by one point under the sentencing  
20 guidelines because Giraudo participated in “an agreement to submit non-competitive bids.”  
21 U.S.S.G. §2R1.1(b)(1). Giraudo’s contention that the enhancement applies only to bid-rotation  
22 bid-rigging schemes misreads the Guideline, but even under Giraudo’s reading, the one-point  
23 increase applies.

24 First, the § 2R1.1 commentary justifies the one-point increase because “volume of  
25 commerce is liable to be an understated measure of seriousness in some bid-rigging cases.” Such  
26 is the case here where Giraudo’s volume of commerce is based on rigged properties he  
27 purchased, but does not include the properties in which he accepted money not to bid against  
28 others. *See* §2R1.1 cmt. 6 (“If for example, the defendant participated in an agreement not to



1 submit a bid . . . his volume of commerce would be zero, although he would have contributed to  
 2 harm that possibly was quite substantial.”). Thus, Giraudo’s volume of commerce—which does  
 3 not account for any of the 100 auctions in which he received payoffs totaling over \$230,000 not  
 4 to bid—inevitably understates the seriousness of his conduct. PSR ¶ 23; Dkt. 307, Ex. A.<sup>12</sup>

5 Second, Giraudo’s reliance on *United States v. Heffernan*, 43 F.3d 1144 (7th Cir. 1994),  
 6 is misplaced. Dkt. 313, at 29. There, the defendant “conspired with executives of competing  
 7 companies to sell the most common type of drums at identical prices to two large buyers,” which  
 8 the court found “indistinguishable from ordinary price fixing, in which competitors get together  
 9 and agree to sell at a uniform price.” *Heffernan*, 43 F.3d at 1150. But here, unlike in *Heffernan*,  
 10 Giraudo and his co-conspirators did not agree to submit identical bids; they designated winning  
 11 bidders, and thereby “eliminated all competition rather than just price competition.” *Id.* at 1147.  
 12 When Giraudo refrained from bidding in exchange for a payoff, no commerce is attributed to  
 13 him even though he had a significant effect on commerce. This is precisely the type of conduct  
 14 that *Heffernan* designated as warranting of the enhancement for the submission of non-  
 15 competitive bids. *See id.* at 1147-48. Other courts, including judges sentencing defendants in  
 16 related matters, have done the same. *United States v. Romer*, 148 F.3d 359, 363 (4th Cir. 1998)  
 17 (upholding one-point increase for bid rigging at foreclosure auctions because it was “not  
 18 persuaded that § 2R1.1(b)(1) is limited to bid-rotation cases”); *see, e.g.*, Sentencing H’ring of  
 19 Robert Rasheed, No. 14-CR-582 JD, 4/26/17 Tr. 32:15-18.

## 20 **B. Giraudo Was A Leader Of The Bid-Rigging Conspiracies**

21 Giraudo’s role in the offense warrants a four-level enhancement because he was a leader  
 22 of the conspiracies. Giraudo contends that the statements from multiple co-conspirators made  
 23 during interviews with the government cannot establish he was a leader because those statements  
 24 were not subjected to cross-examination. But “hearsay is admissible at sentencing, so long as it  
 25 is accompanied by some minimal indicia of reliability.” *United States v. Littlesun*, 444 F.3d  
 26 1196, 1200 (9th Cir. 2006) (citation and internal marks omitted). Here, despite Giraudo’s

27 <sup>12</sup> The total value of these properties, coupled with the total amount of payoffs associated with those  
 28 properties (of which Giraudo personally received \$232,132.77) is \$36,776,990.00. Govt. Sentencing  
 Memo Ex. A. (Dkt. 307).

1 assertions to the contrary, the statements from co-conspirators regarding Giraudo's and the Big  
2 5's control over the auctions are consistent. For example, Giraudo contends that the statements  
3 of Laith Salma have shifted dramatically from the start to the conclusion of the investigation.  
4 But Salma described Giraudo as "the King" of the Big 5 when he was first approached by the  
5 FBI in January 2011 and again when he was re-interviewed in December 2017.<sup>13</sup>

6 Giraudo tacitly acknowledges that the Big 5, collectively, were the ring leaders of the  
7 conspiracy. *See* Dkt. 319, at 9 (citing testimony of a former prosecutor describing "the five  
8 ringleaders in the case: Giraudo, Grinsell, Kevin [Cullinane], Mo Rezaian, and Dan  
9 [Rosenbledt]"). But he argues that he cannot be a leader because witnesses identified Rezaian as  
10 the "auction rigger" who controlled the auctions by intimidation, threats, and bribes. Dkt. 319, at  
11 7. But Rezaian's managerial role in the conspiracies is not mutually exclusive with Giraudo's  
12 leadership role. For example, the fact that Rezaian explained the rules of the conspiracy to Laith  
13 Salma's brother does not mean Giraudo did not explain the rules of the conspiracy to Salma  
14 himself. *Compare* Dkt. 307 Ex. Q at 2 with Gir. Resp. Ex. 4. Moreover, multiple witnesses  
15 indicate that Giraudo served as a mentor to Rezaian and that Giraudo directed Rezaian at the  
16 auctions. *See* Dkt. 307, Exs. N and P (Rosenbledt and Rezaian himself describe Giraudo as a  
17 mentor to Rezaian); *see also* Ex. V (Thia indicated that before entering payoffs with Rezaian,  
18 Rezaian would check with Giraudo); Ex. J (Lipton indicated that Rezaian took directions from  
19 Giraudo). The fact that Rezaian used physical intimidation, whereas Giraudo used economic and  
20 verbal intimidation does not mean Giraduo was subservient to Rezaian. *See* Dkt 307, Ex. T at 10

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21 <sup>13</sup> The role of the Big 5 and Giraudo is also well-documented in the sentencing memoranda of  
22 many of Giraudo's co-conspirators. For example, Jim Doherty participated in the bid rigging  
23 conduct "as directed" by Giraudo and Rezaian. *United States v. Doherty*, No. 11-CR-797, Dkt.  
24 60, at 3. Abraham Farag learned that "the Big Five had enough capital to buy every property  
25 sold at the auctions, and if someone did not play by their rules, the Big Five would bid up every  
26 property that person wanted to buy." *United States v. Farag*, No. 14-CR-534, Dkt. 300, at 10.  
27 Bob Williams indicated that "he was given the choice to go along with the group or be blocked  
28 from auction purchases." *United States v. Williams*, No. 13-cr-00388, Dkt. 44, at 6. Lydia Fong  
indicated her dealings with the Big 5 "mirror the experience" of others who were dominated by  
the Big 5 at the auctions. *United States v. Fong*, No. 12-CR-301, Dkt. 52, at 3. And Kuo Chang  
indicated that a "group of men said if you don't do it the way we do business here, you will not  
be able to get any property." *United States v. Chang*, No. Dkt. 44-1, at 2.

1 (Salma recounting Giraudo screaming at him, calling him a “punk kid,” telling him that, “[y]ou  
2 don’t make the rules”). Indeed, when Special Agent Wynar witnessed an argument between  
3 Rezaian and Thia escalate into a fight, he perceived Giraudo as using Rezaian to intimidate other  
4 bidders. Suppression Hearing, 1/17/17 Tr. 106:11-107:4.

5 The statements from co-conspirators are consistent: Giraudo had more influence and  
6 control than anyone else at the San Mateo and San Francisco auctions. Accordingly, a four-level  
7 enhancement based on Giraudo’s role in the offense is warranted.

8 **III. THE GOVERNMENT’S RECOMMENDED SENTENCE IS APPROPRIATE AND**  
9 **NOT GREATER THAN NECESSARY IN LIGHT OF THE FACTORS SET OUT**  
10 **UNDER 18 U.S.C. § 3553(A)**

11 A sentence of 37 months is, consistent with the § 3553(a) factors, appropriate and not  
12 greater than necessary. Giraudo was the lead orchestrator and principal in the systematic  
13 corruption of the San Francisco and San Mateo County auctions. Giraudo not only bullied and  
14 corrupted scores of uninitiated bidders who stumbled into his domain and acquiesced to his rules,  
15 but he also effectively repelled countless honest bidders from participation in a public process  
16 that lies at the core of our financial and legal systems. Giraudo led the wholesale subversion of  
17 the foreclosure process in two of the most economically-significant real-estate markets in the  
18 world. He did so year after year, unabashedly, on the steps of public courthouses, for the  
19 personal enrichment of himself and his coconspirators.

20 A sentence of 37 months is further merited by Giraudo’s conspicuous lack of sincere  
21 remorse for his conduct. In that way, too, he stands apart from his 22 codefendants. Giraudo  
22 unapologetically equates his crimes with “passing \$5,000 back and forth while standing around  
23 and waiting for an auction to begin.” Dkt. 319, at 19. And he minimizes the seriousness of his  
24 offenses, asking rhetorically: “Might some banks have made an additional \$5,000 on the sale of a  
25 foreclosed property and might that have slightly increased the value of a portfolio they were  
26 going to package and sell to investors? Perhaps.” *Id.*

27 There was nothing benign about Giraudo’s conduct. The bid-rigging conspiracies that he  
28 led amounted the hostile takeover of a public process. Many of Giraudo’s victims were financial  
institutions, but the fact that Giraudo does not sympathize with the victims of his offense does

1 not provide a basis for leniency. Moreover, Giraudo’s victims included homeowners whose  
 2 properties were being foreclosed on—individuals who, more likely than not, were already  
 3 experiencing one of the lowest, most financially-vulnerable moments of their lives.<sup>14</sup> Giraudo  
 4 meanwhile, after decades of holding sway at the auctions, has amassed a fortune.

5 Giraudo is both the most culpable and, as illustrated by his own pleadings, least  
 6 remorseful member of bid-rigging conspiracies in which 22 other defendants have been  
 7 convicted. He deserves a substantial sentence that will adequately reflect the seriousness of his  
 8 misconduct, promote respect for the law, and afford adequate deterrence to future bid-rigging  
 9 offenses and white-collar crime generally.

### 10 CONCLUSION

11 For the foregoing reasons, the United States respectfully requests that this Court  
 12 sentences defendant Joseph Giraudo to (1) 37 months of custody, (2) serve three years of  
 13 supervised release, and (3) pay a criminal fine of \$366,633, a \$200 special assessment, and  
 14 \$248,799.44 in restitution.

15  
 16 Dated: May 3, 2018

Respectfully submitted,

17 /s/ ANDREW J. MAST  
 18 United States Department of Justice  
 19 Antitrust Division

20 <sup>14</sup> Giraudo claims that to “the extent these homeowners did not get their equity back and the price  
 21 exceeded the mortgage, they should blame the banks and not Joe Giraudo.” Dkt. 319, at 10. In fact,  
 22 homeowners were also victims when the foreclosed property sold at auction in excess of the outstanding  
 23 loan amount. In those circumstances, the homeowner would have received more money absent the  
 24 defendants’ bid rigging. *See, e.g.*, Ex. Z (showing the winning bid for 237 Randolph Street in San  
 25 Francisco exceeded the amount of unpaid debt). In the Alameda and Contra Costa County bid-rigging  
 26 cases that recently concluded before Judge Hamilton, the court ordered hundreds of thousands of dollars  
 27 in restitution payments to dozens of former homeowners. And in some cases, individual homeowners  
 28 will receive over \$25,000 in restitution. *See, e.g.*, *United States v. Yeganeh*, No. 15-CR-339 PJH, Dkt.  
 112 (Judgment); *see also United States v. McKinzie*, No. 11-CR-424 PJH, Dkt. 102-1 (Judgment).