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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA, )

Plaintiff, )

VS. )

CHRISTOPHER LISCHEWSKI, )

Defendant. )

No. C 18-0203 EMC

San Francisco, California  
Wednesday, June 3, 2020

**TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS**

**APPEARANCES:** (via Zoom Video Conferencing)

For Plaintiff:

U.S. DEPARTMENT OF JUSTICE  
Antitrust Division  
450 Golden Gate Avenue  
Box 36046, Room 10-0101  
San Francisco, California 94102

**BY: LESLIE A. WULFF  
MIKAL J. CONDON  
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For Defendant:

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**BY: ELLIOT R. PETERS, ESQ.  
CHRISTOPHER C. KEARNEY, ESQ.  
ELIZABETH K. MCCLOSKEY, ESQ.  
NICHOLAS S. GOLDBERG, ESQ.**

Also Present:

Christopher Lischewski  
Catheryn Grier, U.S. Probation

Reported by:

Katherine Powell Sullivan, CSR #5812, CRR, RMR  
Official Reporter - U.S. District Court

P R O C E E D I N G S

Wednesday, June 3, 2020

2:30 p.m.

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**THE CLERK:** Court is now in session. The Honorable Edward M. Chen is presiding.

Calling Criminal Action 18-203, United States of America versus Christopher Lischewski.

Counsel, please state your appearances for the record, beginning with Government's counsel.

**MS. WULFF:** Good morning, Your Honor. Leslie Wulff on behalf of the United States. I'm joined by my colleagues Mikal Condon and Manish Kumar.

**THE COURT:** Good morning, Ms. Wulff.

Good morning, everyone. Or good afternoon, actually.

**MS. WULFF:** Good afternoon, Your Honor.

**MR. PETERS:** I was going to say good afternoon. Good afternoon, Your Honor. Elliott Peters along with my colleagues Chris Kearney, Nick Goldberg, and Elizabeth McCloskey on behalf of Chris Lischewski. And Mr. Lischewski is on the line, on the screen, participating with us also.

**THE COURT:** All right. Thank you, Mr. Peters.

And good afternoon, Mr. Lischewski.

Okay. And Ms. Grier is here from Probation. You're muted.

**MS. GRIER:** Good afternoon, Your Honor.

1           **THE COURT:** All right. Good afternoon.

2           Okay. First question is a procedural question, and that  
3 is whether we should proceed without Mr. Lischewski being  
4 physically present.

5           I will note that, at least as of this time, at this  
6 moment, hearings cannot be conducted in person because --  
7 without seriously jeopardizing public health and safety. And,  
8 as you may know, on top of the pandemic, we now have some civil  
9 unrest that has caused the courthouse to close physically. And  
10 so there's no possible way that we can have a live hearing at  
11 this date.

12           The defendant has consented to proceeding today with what  
13 we're going to talk about, which is the guideline range,  
14 guideline calculations, and nothing more than that.

15           And so one question is whether this is, in fact, a part of  
16 a sentencing hearing. If it is, under the CARES Act, we have  
17 to both get consent and find that we can't delay this without  
18 serious harm to the interests of justice.

19           I think there was a fair argument that was made the last  
20 time we were on a telephonic conference that Mr. Lischewski has  
21 now been under verdict for some time and wants to get on and,  
22 in the interests of moving things forward, wants to proceed  
23 with sentencing and doesn't want to delay matters.

24           I don't think I necessarily have to reach that question  
25 because my intent today is to exchange our views, perhaps

1 express some preliminary questions and views about the  
2 sentencing. But I am not intending to rule definitively on the  
3 question, and I will have a chance -- a full chance for any  
4 parties to add anything they wish at the sentencing hearing  
5 which is currently scheduled for -- July 16th, is it?

6 **MR. PETERS:** It's June 16th, Your Honor.

7 **THE COURT:** I'm sorry, June. Every month is flying by  
8 here. June 16th.

9 So I am going to proceed. And I do want to take argument.  
10 And I have lots of questions, and I'm sure you'll have lots to  
11 say. And I may express a tentative view depending on how  
12 things go, but I think a final decision will await when we have  
13 a full sentencing hearing on the 16th.

14 So let's talk about the guideline discussion. There are  
15 three enhancements here that we should talk about.

16 **MS. WULFF:** Your Honor?

17 **THE COURT:** Yes.

18 **MS. WULFF:** I'm sorry to interrupt you, but before we  
19 begin, could we just have the defendant state on the record  
20 that he consents to proceeding by video today even if it isn't  
21 a sentencing?

22 **THE COURT:** All right. That's fair.

23 Mr. Lischewski, do you consent to proceeding under the  
24 current circumstances?

25 **THE DEFENDANT:** I do consent to that.

1           **MS. WULFF:** Thank you, Your Honor.

2           **THE COURT:** All right. Anything further?

3           **MS. WULFF:** The Government's only point is that if  
4 this -- the defendant raised in their papers that under  
5 43(b)(3) that if this is purely a legal hearing where we  
6 discuss the guidelines but don't make any calculations, then  
7 that could be a legal hearing and not a sentencing.

8           So, but if the Court is going to make any ruling or make  
9 any determinations about the facts in the PSR or anything like  
10 that, then we should -- for the record, we should make the  
11 CARES Act finding.

12           **THE COURT:** All right. Well, let me do this. At this  
13 point I'm not intending to rule --

14           **MS. WULFF:** Okay.

15           **THE COURT:** -- and so we don't need a CARES Act  
16 finding. But if I do decide to making a finding of rule, I  
17 will then refer back to the CARES Act. And if I forget, I'm  
18 sure you will remind me.

19           **MS. WULFF:** I definitely will. Thank you, Your Honor.

20           **THE COURT:** Okay. But I would like to have a  
21 discussion. There are lots of issues to discuss.

22           And the first one is a threshold question, and that is the  
23 burden of proof, the question of whether the preponderance of  
24 the evidence standard or the clear and convincing standard  
25 applies.

1           And -- and part of that question, also, I'd like to hear  
2 your views as to whether or not we look at each enhancer, and  
3 subject each of those to potential examination and perhaps a  
4 differential burden of proof, or must we aggregate them and  
5 treat them all the same once we look at the totality? The test  
6 being whether there's an extremely disproportionate effect.

7           And so let me ask, since the defendant -- I think I'd like  
8 defense counsel to go first and give you a chance to respond.

9           The Government had filed a memo citing some case law, in  
10 particular the *Treadwell* and the *Berger* case, as examples of,  
11 at least with respect to -- well, saying that, for instance,  
12 loss -- amount of loss caused by the conspiracy is something  
13 sort of wrapped up in the conspiracy allegation, and it goes to  
14 the extent of the fraud or conspiracy, whatever the nature of  
15 the charges were and, therefore, it is not subject to  
16 enhancement -- enhanced review under the clear and convincing  
17 test.

18           So I'd like to get your response to that.

19           **MR. PETERS:** Thank you, Your Honor. Elliott Peters on  
20 behalf of Mr. Lischewski.

21           Addressing the burden of proof, let's start out talking  
22 about Ninth Circuit law and some of the cases that you  
23 mentioned. *U.S. versus Allen* makes it absolutely clear that  
24 it's the Government's burden to prove facts which could be  
25 involved enhancing sentence.

1           *Berger*, which the Court mentioned, cites the *Restrepo* case  
2 to enunciate the extremely disproportionate effect on the  
3 sentence and that if there was an extremely disproportionate  
4 effect on the sentence, a heightened standard of clear and  
5 convincing evidence would be required.

6           The *Berger* court then stated, I think somewhat fairly,  
7 that since then the jurisprudence of the Ninth Circuit has not  
8 been a model of clarity on this issue. Of course, *Berger* and  
9 *Allen* were fraud cases, they weren't antitrust conspiracy  
10 cases. And that starts to matter.

11           But we get to *Treadwell*, which is a 2010 Ninth Circuit  
12 case, and the Ninth Circuit said that:

13           "Whether a sentencing impact causes a disproportionate  
14 effect warranting clear and convincing proof necessitates  
15 a look at the totality of the circumstances.

16           Circumstances considered include..."

17           And then there are six of them listed. And I'm going to  
18 just walk through those and we'll talk about them because  
19 that's the test. It's this totality of the circumstances test.

20           One, whether the enhanced sentence falls within the  
21 maximum sentence permitted under the statute. Here it doesn't.  
22 The enhanced sentence is 121 months, which is in excess of the  
23 10-year statutory maximum. So that's number one.

24           Number two, whether it negates the prosecution's burden of  
25 proof for the crime alleged in the indictment. In all candor,

1 Your Honor, I don't know what that means, but I don't think  
2 that this -- these enhancements negate the prosecution's burden  
3 of proof for the crime alleged. I'm not even sure what's that  
4 intended to say, but we're not hanging our hat on it.

5 **THE COURT:** Although, that seems to be one of the  
6 critical -- with what I read from the Ninth Circuit is that the  
7 extent of the conspiracy is measured, to a certain extent, by  
8 the extent of the commerce, how much commerce was affected; you  
9 know, presumably, how much harm was affected.

10 And that's one of the things that one can glean from these  
11 cases, that that is a factor that, at least in a conspiracy,  
12 whether it's fraud or antitrust, and maybe it does make a  
13 difference, that --

14 **MR. PETERS:** Boy, it makes a difference. But, Your  
15 Honor, you're on number four and I'm only on number two.

16 **THE COURT:** Well, I was on the second factor. Whether  
17 the increase in the sentence is based on the extent of the  
18 conspiracy. Isn't that the one you just read?

19 **MR. PETERS:** No, that's number four.

20 Number two is whether it negates the prosecution's burden  
21 of proof for the crime alleged in the indictment.

22 **THE COURT:** Oh, oh, oh. Okay. I see.

23 **MR. PETERS:** I'm definitely going to address that  
24 point, Your Honor --

25 **THE COURT:** Yeah.



1           **MR. PETERS:** -- if I could have just a moment.

2           **THE COURT:** All right.

3           **MR. PETERS:** Number three, whether the facts offered  
4 create a new offense. We don't allege that they create a new  
5 offense.

6           Four, whether -- and this is the one that relates to the  
7 extent of the conspiracy. And the cases that the Government  
8 relies on, like *Berger*, are all fraud cases; mail fraud/wire  
9 fraud cases.

10           Those cases require proof of a scheme to defraud someone  
11 of money or property or, in some cases, the intangible right to  
12 honest services. That is an element of the allegation. That  
13 is part of the charge. And that is within the scope of the  
14 charged conspiracy. You have to identify what the money or  
15 property is. And it's, therefore, readily identifiable in  
16 sentencing to try to prove what we're talking about.

17           This is an antitrust conspiracy, and the Government told  
18 the Court numerous times, and the Court instructed the jury in  
19 great detail, that no reference to whether a single sale took  
20 place at a fixed price or a colluded price was part of the  
21 case. The Government didn't have to prove that. They argued  
22 against the admissibility of evidence based on that. All that  
23 had to be proven was an agreement.

24           There is nothing about the extent or scope of this  
25 conspiracy that was charged or proven at trial which relates to

1 the volume of commerce that was affected by the defendant's  
2 actions. It is entirely separate, and it is not properly  
3 analogized to mail or wire fraud. And there's no case which  
4 does that. And then --

5 **THE COURT:** How is that different -- in a wire fraud  
6 case, if you can prove wire fraud was committed with the intent  
7 to obtain money, you don't necessarily have to prove the amount  
8 of money to get a conviction. Maybe it informs sentencing or  
9 something. But wouldn't that be true in a wire fraud case,  
10 that the actual amount defrauded is not necessarily an element  
11 that needs to be proven?

12 **MR. PETERS:** No, but you have to identify what the  
13 property is. And there has to be a specific intent to cause  
14 that kind of harm.

15 Here, all that has to be proven is that someone joined a  
16 conspiracy. They don't -- there doesn't have to be an  
17 allegation that they contemplated any particular type of harm  
18 or kind of harm.

19 In fact, as the Second Circuit said in the *SKW Metals*  
20 case, a conspiracy can exist even if it does not succeed in  
21 affecting prices. So this -- this factor is not -- does not  
22 tip in favor of a lower burden of proof, the extent of the  
23 conspiracy. I think that fraud cases are distinguishable.

24 And then you get to five and six, whether the increase in  
25 the number of --

1           **THE COURT:** Let's go back to number four. What would  
2 be an example of something that is based on the extent of the  
3 conspiracy? What's an example of that?

4           **MR. PETERS:** In the antitrust context?

5           **THE COURT:** Yeah.

6           **MR. PETERS:** The way this case was tried, under the  
7 per se rule with instructions that all you had to do was join  
8 an agreement, that wouldn't be -- I don't think it's possible  
9 under these circumstances to say that the volume of commerce  
10 that the -- is part and parcel of the extent of the conspiracy.

11           I really do think a fraud case is different because you  
12 have to allege and prove a specific intent to defraud someone  
13 out of --

14           **THE COURT:** Yeah, no, I understand your point,  
15 Mr. Peters. I'm asking not this case, but give me an example  
16 of a factor that is based on the extent of the conspiracy that  
17 would fall into this exception, where you wouldn't count --  
18 what's an example of something that the Government would want  
19 to enhance with and you can come back and say no, no, no, that  
20 is based on the extent of the conspiracy?

21           So it's not volume. What could it be? Can you think of  
22 anything that this would apply to?

23           **MR. PETERS:** I think that if you had a conspiracy to  
24 engage in securities fraud, for example, and engage in insider  
25 trading, that the amount of money that was the object of the

1 fraud that was contemplated by the defendant in undertaking  
2 that activity, that would be within the scope of the  
3 conspiracy, part of the specific intent requirement.

4 I think that the same would probably be true of a  
5 garden-variety mail fraud case, where someone makes  
6 misrepresentations.

7 If I use the wires to defraud someone out of a million  
8 dollars, then it's part and parcel of the conspiracy that the  
9 loss under a different part of the Sentencing Guidelines under  
10 the fraud table is -- is part of the extent of the conspiracy.  
11 That's what I was charged with.

12 Here, the Government distanced themselves and consistently  
13 claim that harm, actual fixing of prices, actual pricing was  
14 something that they didn't have to touch in this case. And the  
15 per se rule got them there, and Your Honor instructed the jury  
16 in a very detailed way about that.

17 And to now say, oh, yeah, that was part and parcel of the  
18 case we charged, when the prosecutors consistently told the  
19 Court, and the Court accepted it, that it had nothing to do  
20 with the case that was charged, the evidence was excluded on  
21 that basis, I just don't see any logic for allowing them to  
22 have the lower standard of proof when -- and you have to  
23 consider the other factors, Your Honor.

24 *Treadwell* says it's a totality of the circumstances test.  
25 And you've got to look at the magnitude of the enhancement.

1 You go -- it's a total of 18 points. The volume of commerce is  
2 12 points. You go from ten months -- I mean, the next factor,  
3 number five, says whether the increase in the number of offense  
4 levels is less than or equal to four.

5 Four? Here, we've got 18. And we're talking about a  
6 disproportionate affect on the sentence.

7 Number six, whether it doubles the sentence. It  
8 multiplies the sentence by a factor of ten here. Doubles it.

9 And the purpose of this totality of the circumstances  
10 test, Your Honor, is to ascertain whether this enhancement has  
11 a disproportionate effect on the sentence. And the  
12 enhancements take it from 10 to 16 months, which is a level 12,  
13 to 30 months, which is 97 to 121 months in excess of the  
14 statutory maximum, which is one of the factors to be considered  
15 here.

16 So I really do think that -- you know, we have to keep our  
17 eyes on the purpose of this test, which is to determine whether  
18 it has a disproportionate affect on the sentencing. And I've  
19 never seen a case where at trial the prosecutor said we don't  
20 have to prove any such thing, but then in sentencing you go  
21 from 10 months to almost 100 months as the lower end of the  
22 guidelines.

23 Boy, is -- now, I also want to say under -- and we'll get  
24 to this point, but whatever the burden is, they haven't come  
25 close to meetings it, and they can't. And that's --

1           **THE COURT:** We'll get there.

2           **MR. PETERS:** I don't want to jump ahead.

3           **THE COURT:** We'll get there. We'll get there.

4           Let me ask the Government to respond on the burden of  
5 proof question.

6           **MS. CONDON:** Yes, Your Honor. Hi. Mikal Condon on  
7 behalf of the United States. I'm having slight technical  
8 problems, so I apologize. I'm trying to get the Court and  
9 Mr. Peters on the same screen. I apologize for that.

10           **THE COURT:** Okay. Well, you don't need Mr. Peters.

11           **MS. CONDON:** To respond quickly, with respect to  
12 Mr. Peters' claim that we have argued this as a per se case  
13 and, therefore, did not prove that sales were affected, it is a  
14 per se case. That does not mean we didn't prove that sales  
15 were affected, and we can address that later when we discuss  
16 the volume of commerce.

17           With respect to the standard, loss is an appropriate  
18 metric. Loss is in a metric that the guidelines commission, in  
19 drafting the Sentencing Guidelines, determined was an  
20 appropriate measure of the seriousness of a fraud offense.

21           And by the same factor in drafting the guidelines, the  
22 commission found that the volume of commerce in an antitrust  
23 case serves as a measure of the seriousness of an antitrust  
24 case.

25           **THE COURT:** There's no doubt about that. The question

1 is, does the burden of proof that the Government has -- the  
2 Government has the burden of proof. You would admit that.

3 The question is whether it's by preponderance or clear and  
4 convincing. That's the question. That's why we're here. It's  
5 in the guidelines. I've got to look at it.

6 **MS. CONDON:** Absolutely, Your Honor. All I meant was,  
7 when looking at these Ninth Circuit authorities and looking at  
8 the Court's own opinion and -- I will mispronounce this -- the  
9 *Nosal* case, the Courts that have addressed this issue in fraud  
10 cases have determined that where an enhancement like loss or  
11 like the direct antitrust corollary, volume of commerce,  
12 reflects the seriousness of the underlying criminal conspiracy,  
13 they are not subject to clear and convincing evidence. They  
14 are, instead, subject to the preponderance of the evidence  
15 burden of proof.

16 And it's the Court's -- it's the Government's position  
17 that, just as this Court found in *Nosal* and just as the Ninth  
18 Circuit has repeatedly found with respect to fraud, and they  
19 haven't made this distinction that Mr. Peters is making here,  
20 and it is not clear in those cases that the exact amount of  
21 fraud that was subject to a preponderance standard at  
22 sentencing was proven at trial, this distinction is not made in  
23 those cases.

24 All that they have found is that where an enhancement  
25 relates to the scope of the criminal conspiracy, it is not

1 subject to a clear and convincing evidence standard regardless  
2 of the factors set forth in *Treadwell*.

3 **THE COURT:** So you -- you take the position that  
4 that -- whether it relates to the extent of a conspiracy, which  
5 was factor number four or whatever it is in *Treadwell*, sort of  
6 overrides everything? That no matter how much the enhancement  
7 is, whether it doubles, triples, ten times the sentence,  
8 whether it enhances the sentence by four levels, ten levels,  
9 twelve levels, if that factor relates to the nature and extent  
10 of the conspiracy, it kind of gets -- you apply the lower  
11 standard, the --

12 **MS. CONDON:** Your Honor, that's how -- I'm sorry, were  
13 you --

14 **THE COURT:** Yeah. I take it that's your position.

15 **MS. CONDON:** Two parts, though. I would say our  
16 position is, first, that that is -- our position is that when  
17 it relates to the scope of the conspiracy, it is preponderance.

18 Our second position would be that we meet the factors  
19 anyway.

20 **THE COURT:** All right. Well, let's go to the -- I'm  
21 still stuck on the first one.

22 You evidently don't think much of Mr. Peters' distinction  
23 between fraud conspiracy, where the amount of the fraud or  
24 identification of property is more ingrained in part of the  
25 cause of action, part of the elements of the crime, as compared



1 to a per se antitrust violation where you don't have to prove  
2 any effect.

3 You can still be guilty of antitrust violation,  
4 price-fixing, even if there were no effect. I understand you  
5 believe that was proven. But do you see any case law -- well,  
6 I guess that's the question.

7 Is there case law outside the fraud context where this  
8 analysis has been used? That is, the nature and extent of the  
9 conspiracy renders the burden of proof to be preponderance, not  
10 clear and convincing, because it's an antitrust case even in an  
11 antitrust price fixing. Is there any case law on that?

12 **MS. CONDON:** I'm not aware of any case law  
13 specifically on the point of -- as to addressing this issue in  
14 an antitrust context where the volume of commerce is at issue.  
15 But I do know that many of the cases that Mr. Peters cited in  
16 the antitrust context did use a preponderance standard, not a  
17 clear and convincing standard, without analysis.

18 But I would like to go back to the fraud comparison that  
19 we're making here. There may need to be a loss in fraud. And  
20 it is different when there is -- you know, the agreement is a  
21 crime. But the amount of loss is not -- is not an element of  
22 the crime.

23 So the courts are still finding in fraud cases that the  
24 Sentencing Guidelines' use of loss and gain to reflect the  
25 amount -- that the harm of the conspiracy can be proven by a

1 lower standard at sentencing. This is not all something that  
2 is found by a jury beyond a reasonable doubt and then later  
3 proved up at sentencing.

4 **THE COURT:** So help me understand. What does this  
5 factor mean? I mean, some of the factors about which standard  
6 of proof to apply are intuitively obvious. It triples the  
7 sentence as compared to a slight increase. If it only  
8 increased by two levels, I -- I can understand that.

9 Why -- I'm trying to understand the rationale for this.  
10 If it is based on the extent and nature of the conspiracy, why  
11 does that make it -- can you explain to me logically why that  
12 impacts the burden of proof?

13 I'm missing something. I know you didn't make the law,  
14 but maybe you can explain to me --

15 **MS. CONDON:** I was going to point that out, Your  
16 Honor.

17 I think it is because, Your Honor, the process  
18 implications that would otherwise come into play if it's not  
19 related to the conspiracy that was charged and proved at  
20 trial -- those due process considerations do not come into  
21 play. And that's what the courts have said.

22 Enhancements based on the scope of the conspiracy neither  
23 negate the presumption of innocence nor alter the burden of  
24 proof, and they do not hold the defendant responsible for any  
25 offenses for which he was not convicted at trial.

1           **THE COURT:** Well, then is that where there's an  
2 argument that Mr. Peters makes that -- you know, at least in  
3 fraud you've got to identify the property, you have to prove,  
4 you know, something specific there. Maybe not the amount.

5           Whereas, in antitrust you don't even have to prove the  
6 existence of any loss and, therefore, it is kind of like a new  
7 element being introduced into the equation. And, therefore,  
8 maybe that's why kind of a due process notion favors -- or  
9 militates in favor of a higher standard of proof.

10           **MS. CONDON:** I don't believe so, Your Honor. The  
11 defendant was charged with a criminal conspiracy. He was found  
12 guilty by a jury of a criminal conspiracy.

13           The Sentencing Commission found that the appropriate  
14 measure of the seriousness of the criminal offense to which  
15 he's been found guilty is the volume of commerce. And that  
16 relates directly to the extent of the criminal conspiracy that  
17 a jury found him guilty of. I don't think that there's a  
18 distinction between that and a loss that also needn't be proven  
19 by a jury as to a specific amount.

20           **THE COURT:** All right.

21           Well, let me ask you, Mr. Peters, if there's kind of a due  
22 process notion, it is -- I think it's true that, in prosecuting  
23 a fraud case, the Government doesn't have to prove the amount  
24 of the loss.

25           I mean, they maybe have to identify some property or the

1 property. They don't have to get into valuation, you don't  
2 have to know much about it. And so that wasn't -- the amount  
3 wasn't proven at trial.

4 So it is a new element. I mean, it is a new thing that  
5 would have to be proven in sentencing. And if you're, you  
6 know, saying as a matter of due process, well, it was already  
7 part of the earlier trial, it's not a big deal, that's why we  
8 can go to a lower standard of proof, what -- I guess I don't  
9 know -- why would you distinguish between -- why would the  
10 Court -- I know you would, but why would the Court distinguish  
11 between a fraud conspiracy and an antitrust conspiracy when the  
12 Government will have to prove anew, at sentencing, the amount  
13 of loss, whether it's by fraud or whether it's by price-fixing?

14 Why should the standard be different -- the standard of  
15 proof be different?

16 **MR. PETERS:** Well, I want to make three points, Your  
17 Honor.

18 One, they do have to prove it at sentencing. The question  
19 is simply by what standard --

20 **THE COURT:** Yeah.

21 **MR. PETERS:** -- and so what's the rationale. And I  
22 appreciate the Court's exploring what's the logic for the  
23 heightened standard.

24 I want to remind everyone that the -- that this is one of  
25 six factors of a totality of the circumstances test. But

1 the -- and I -- but I want to get back to what I said before.

2 In a wire fraud or a mail fraud case, a specific intent is  
3 required to defraud someone of a particular type of property,  
4 which has to be identified. And then the Sentencing Guidelines  
5 talk about intended loss.

6 So the inquiry is very, very close to what was proven at  
7 trial. And, therefore, I think that what the courts are saying  
8 is there's less of a concern when you've gotten so close.

9 You've identified the property. You had a specific intent to  
10 deprive someone else of it. And then the Court has to decide  
11 the exact amount of that property for purposes of applying the  
12 fraud table, that it's a preponderance of the evidence  
13 standard.

14 Here -- and the Government capitalized on this tactically  
15 at trial. All they had to prove was at some point during this  
16 almost three-year period Mr. Lischewski joined a conspiracy.  
17 And they didn't have to prove that a single sale was affected  
18 by it.

19 So it is more attenuated from the issue not only of  
20 whether there was volume of commerce affected, but how much  
21 volume of commerce was affected. And I think that attenuation  
22 makes it appropriate for due process reasons, particularly  
23 where the effect on the sentence is so great. That's why it's  
24 important to emphasize that it's part of a six-part test.

25 If you're going to take -- increase the guideline sentence

1 by this much when it didn't -- this issue didn't have to be  
2 touched or even gotten near at trial, the Government should be  
3 able to come up with evidence by a clear and convincing  
4 standard. And I think it's extremely logical, actually, to  
5 look at it that way.

6 And I think the distinction between fraud cases, which  
7 involve specific intent, identification of property, and  
8 intended loss for purposes of sentencing, I think that  
9 distinction really makes a lot of sense here where the proof at  
10 trial had nothing to do with volume of commerce and  
11 Mr. Lischewski could have been convicted without there having  
12 ever been a single sale affected by it.

13 You couldn't get convicted of mail fraud unless you were  
14 specifically intending to deprive someone else of money,  
15 property, or somebody's right to honest services. It couldn't  
16 happen. But in this case you could. And there aren't any  
17 antitrust cases on point.

18 **THE COURT:** There are not. There are no cases.

19 **MR. PETERS:** I agree with the Government on that. We  
20 have not found an antitrust case addressing this question of  
21 the burden of proof in this context.

22 **THE COURT:** That's somewhat astounding. But, yeah, I  
23 didn't see it in there, so I was wondering whether there is.

24 All right. Well, okay. That's -- this is helpful.

25 Let's talk about the substantive question, putting aside

1 exactly what the burden of proof is on the question of volume  
2 of commerce here.

3       Again, there seems to be a bit of a split in the case law.  
4 It seems like the majority rule is stated in the *SKW Metals*  
5 case -- I think that's a Second Circuit case -- where it's  
6 whether or not -- not everything sold necessarily is counted in  
7 the volume during the conspiracy period, but it merely has  
8 to -- the conspiracy merely acts on or influences negotiation,  
9 sale price, volume or other transactional terms.

10       Any influence on sales is enough. You don't have to show  
11 loss in the sense of -- it seems like you don't have to show  
12 loss as you would in a civil damages case. Just that they were  
13 affected.

14       And then on top of that, in the Eleventh Circuit, the  
15 *Giordano* case says that once a conspiracy is found to have been  
16 effective during a certain period, there's a rebuttable  
17 presumption that all sales were affected by, quote-unquote, the  
18 conspiracy, and then the defendant then may rebut that  
19 presumption. So although it's not an automatic rule that all  
20 sales are, it seems like it doesn't take much.

21       And I -- the Government's showing here was that the  
22 agreements were broad based, they affected list price. Even  
23 though that was not the ultimate price, there was testimony  
24 that that affected the beginning -- the starting point of  
25 discussions.

1 Price guidance. There was -- I think there was testimony  
2 that guidance for every quarter was affected. Promotional  
3 sales, a 10 for 10.

4 So I guess my question is, even under the slightly more  
5 demanding standard of *SKW Metals*, why hasn't the Government met  
6 its burden of showing, at least as a presumptive beginning,  
7 that all sales during the conspiracy period, given the  
8 multi-level nature of the alleged, and I think proven,  
9 conspiracy, price-fixing conspiracy, affected -- really, you  
10 can say affected all sales during the period?

11 **MR. PETERS:** I gather that's a question for me, Your  
12 Honor.

13 **THE COURT:** Yes. You're right.

14 **MR. PETERS:** And, as always, I appreciate the Court's  
15 being so prepared.

16 Let me start out by talking about the case law. *Giordano*  
17 can't be the law in the Ninth Circuit because it would  
18 contradict *Allen* to give -- to have some kind of burden on the  
19 defendant. *Allen* makes clear the defendant doesn't have a  
20 burden.

21 *Giordano* and, to some degree, *SKW*, at least a concurrence  
22 in *SKW* proposes this rebuttable presumption. It's our view  
23 that's flatly inconsistent with Ninth Circuit law, so that  
24 can't be the standard.

25 *Hayter Oil*, the Sixth Circuit case, is certainly the



1 minority view. That basically makes it a layup. It just says  
2 all sales during the conspiracy period are countable. I think  
3 that's clearly not the law, or shouldn't be the law.

4 In *SKW Metals*, the Second Circuit makes the point that a  
5 conspiracy can exist even if it does not succeed in actually  
6 affecting prices or if it fails to influence market  
7 transactions.

8 So let's talk then about this conspiracy and the fact  
9 record and the Government's burden of proving it.

10 **THE COURT:** But what would be the test? If you don't  
11 buy *Hayter* and you don't buy *SKW*, you don't buy the presumption  
12 in *Giordano*, what -- are you saying that -- and I don't think  
13 you're saying it has to be proven transaction by transaction.

14 What is the -- if you were the Court, how would you  
15 articulate what "influence" means or "affected" means?

16 **MR. PETERS:** I would just stick with the language of  
17 the guidelines. Has the Government proven by, insert legal  
18 standard that the Court settles upon, that Mr. Lischewski's  
19 activities in this conspiracy affected the volume of commerce?  
20 And if so, how much?

21 **THE COURT:** What does "affected" mean? That's the  
22 question. How do you define "affected"?

23 **MR. PETERS:** I'd say that if the desire was to -- if  
24 the conspiracy was to raise prices, that it actually caused  
25 sale prices to be higher than they otherwise would have been.

1           **THE COURT:** And how would you -- I mean --

2           **MR. PETERS:** Not on -- I'm sorry, I didn't mean to  
3 interrupt.

4           **THE COURT:** Doesn't that run into -- I mean, imagine  
5 doing that -- that's a whole trial. That's what many civil  
6 trials are about, using complicated economic analysis. Because  
7 then you have to factor out everything else; right?

8           It's not just a straight line in a graph. You've got to  
9 say what prices would have been considering there was a  
10 recession going on, considering there were increases in costs  
11 going on, considering there were multiple entries of -- you  
12 know, you've got to do some kind of multi-regression analysis  
13 or something to factor all this out, and it becomes very  
14 complicated.

15           And then you have -- if there were clear agreements not to  
16 do 10 for 10, but sometimes it was broken, sometimes it was  
17 not, sometimes it was on, sometimes it was not, you then have  
18 to kind of search the record and make almost a  
19 transaction-by-transaction or month-by-month analysis as to  
20 when the 10 for 10 was off the table, effectively, and when did  
21 people disobey the 10 for 10.

22           Isn't that exactly what the guidelines doesn't want to  
23 encourage? I mean, it really is a full trial, at this point,  
24 if you're going to go and look at, you know, the economic  
25 consequence of each aspect of the alleged conspiracy,

1 especially in a case like this where there's multi levels.

2 **MR. PETERS:** Your Honor, I think the Court,  
3 respectfully, is making it more complicated than it needs to be  
4 in a way which sort of dilutes the Government's burden.

5 We're prepared to argue it on the existing record. We're  
6 not asking for another trial of calling witnesses. But you can  
7 look at the existing record and apply common sense and say  
8 whether they met their burden, but they do have to prove it.  
9 And they had the opportunity to put in evidence, and there's  
10 evidence which proves that there wasn't an effect on pricing.

11 And it's also -- you know, the Government likes to pick  
12 and choose a little bit what this conspiracy was. A big focus  
13 of it was on this: Let's stop the price war. Let's raise the  
14 white flag. Let's have a truce. Let's stop competing so  
15 irrationally.

16 Now they ignore that. They just want to talk about list  
17 prices, even though not a single can of tuna was ever sold at a  
18 list price. And they want to talk about guidance which were  
19 guardrails, but they didn't affect the sales of tuna.

20 I mean, let's look at the evidence. We put in these  
21 charts from Professor Levinsohn that shows that the pricing was  
22 all over the place with different -- different retailers paid  
23 different prices. Sometimes they paid different prices on the  
24 same day.

25 And this is not a case -- and I think everybody would have

1 to agree with this -- where this conspiracy was, okay, we'll  
2 sell it for \$1.72. And, you know, there's been plenty of  
3 conspiracies involving price-fixings where there was a price  
4 that was fixed. This isn't one. The idea was, hey, let's not  
5 compete so hard.

6 But then the evidence -- the statistical evidence from  
7 Professor Levinsohn, some of which they kept out at trial but  
8 is now all properly before the Court, shows pricing that is all  
9 over the place.

10 And then you have this one chart that we highlighted from  
11 Professor Levinsohn where he studied, based on this massive  
12 increase in costs, this unprecedented increase in fish costs  
13 during the conspiracy period.

14 He studied, well, what would you predict the prices to  
15 have been based simply on the increase in costs? And he -- he  
16 prepared this chart, which the Court has, which shows that the  
17 actual prices being charged by Bumblebee during this period  
18 were lower than he would have predicted based simply on the  
19 costs.

20 Now, I want to talk about what the evidence is from  
21 Safeway because the Government tries to rely on this evidence  
22 from Safeway.

23 First of all, I want to say there's a lot more retailers  
24 than Safeway. How do they get to claim that they've satisfied  
25 their burden of proof that every sale during this period to

1 every retailer -- Walmart, Stop & Shop, Kroger's -- that they  
2 were all affected by this conspiracy when they've produced,  
3 including in sentencing, by declaration or pie chart or  
4 whatever, nothing about any other retailer other than Safeway?

5 And what does the Safeway person say? He says that he  
6 negotiated based upon costs; that these retailers like Safeway,  
7 they're so powerful that they demand, "give me your costs," and  
8 then Bumblebee had to submit its costs. And it was based on  
9 the costs and the negotiation that Safeway established a price.

10 The idea that Bumblebee said, "Oh, here's our list price,"  
11 and Safeway said, "Fine, we'll pay the list price," that never  
12 ever happened.

13 So the negotiation takes place on complete transparency,  
14 and this fellow from Safeway, who's, you know, one-twentieth of  
15 the market or something, he says that they had to raise their  
16 private label during this period because the fish costs drove  
17 up the price.

18 And then you look at Levinsohn's analysis and he shows  
19 prices are all over the place and the prices are lower than you  
20 would have expected.

21 And so the Government's burden of proof, whether it's --  
22 whether it's preponderance or clear and convincing, they don't  
23 have evidence that prices that people actually paid, that these  
24 retailers actually paid, were, in fact, affected.

25 And I think we have a clear enough understanding of what

1 that word "affected" means. They were influenced. They were  
2 changed. What they were was the result of an agreement to fix  
3 prices as opposed to other market forces.

4 And the Government has the burden of proving that, and  
5 they haven't even attempted to do so with anyone but Safeway.  
6 And even with Safeway, I think that they failed.

7 **THE COURT:** Well, what about the evidence that there  
8 were a cessation and diminution of 10 for 10s?

9 **MR. PETERS:** There were diminution of 10 for 10s  
10 because the cost of fish got so much higher that it was no  
11 longer economically feasible --

12 **THE COURT:** Well, that might be your interpretation.

13 **MR. PETERS:** -- to do 10 for 10s.

14 **THE COURT:** That might be your interpretation. Their  
15 interpretation was that that was one of prime -- or one of the  
16 very specific subjects of the, quote, agreement.

17 **MR. PETERS:** But, Your Honor, I get it. I know that's  
18 the theory. But -- but I do think we all have to accept as a  
19 factual baseline here that there was an unprecedented rise in  
20 fish costs.

21 And when the costs -- when the cost of buying the fish and  
22 canning it and transporting it gets to a point that you can't  
23 do 10 for 10s without losing money, you can't just say, oh,  
24 they stopped doing 10 for 10s, it must have been the result of  
25 an agreement to fix prices.

1 Safeway, when they stopped offering 10-for-10 promotions,  
2 had 100 percent visibility into Bumblebee's pricing, they --  
3 and Bumblebee's cost structure. They --

4 **THE COURT:** Well, you're making a jury argument now,  
5 Mr. Peters, and you lost that jury argument. So you're not  
6 answering my question.

7 If I find -- and I think the jury found -- that the 10 for  
8 10s was one example of things that were diminished, not just  
9 because of costs, because a lot of that was below cost anyway,  
10 but was done because of the agreement, you would agree that at  
11 least some money, maybe we don't know how much, but there was  
12 some effect.

13 Are you saying there was no effect, whatsoever, even on  
14 the 10-for-10 disengagement?

15 **MR. PETERS:** Well, Your Honor, I want to answer your  
16 question because you've been very clear that you want me to.

17 If you want me to assume that the -- that the absence of  
18 10 for 10s or the decrease in frequency of 10 for 10s was the  
19 result of a price-fixing agreement, then -- and then your  
20 question is, were the 10 for 10s affected by the agreement, I'd  
21 have to say the answer was yes. But that's based on the  
22 assumption that you asked me to make. I don't think that  
23 that's been proven, but Your Honor may disagree with me.

24 **THE COURT:** Well, but then --

25 **MR. PETERS:** But, yeah, of course.

1           **THE COURT:** Let me ask the Government the question  
2 then. Let's say that's one of your stronger points for 10 for  
3 10, because that's something concrete, but we have no idea of  
4 the volume of that.

5           I mean, how do we know whether that affected, you know,  
6 just a million dollars' worth of commerce? You know, there's  
7 no charts here. There's no evidence that show, well, here's  
8 how much volume, what the sales were in a normal time when we  
9 had the typical 10 for 10 discounts, and here's what the result  
10 was and the pricing changes, you know, that were correlated or  
11 causally connected to the diminution of 10 for 10s. I didn't  
12 see any of that evidence.

13           **MS. CONDON:** No, Your Honor, because it's the  
14 Government's position that the witness testimony introduced at  
15 trial went well beyond the 10 for 10s with respect to an effect  
16 on commerce.

17           And Counsel has been talking for a long time and has made  
18 a number of points that the Government would like to rebut, but  
19 one of them is with respect to the evidence that was introduced  
20 at trial about the effect on commerce. I would also like to  
21 address counsel's points on what the case law means.

22           But, sticking to the evidence, the witnesses, the  
23 co-conspirators, testified that they originally agreed to  
24 discontinue the 10 for 10, but that they then entered into a  
25 list price increase.



1 Mr. Baribeau did explain, contrary to Mr. Peters'  
2 explanation of his testimony, that Safeway paid a percentage  
3 off list prices and that as list prices increased Safeway's net  
4 cost increased by that same percentage.

5 The co-conspirators testified that they subsequently  
6 entered into two other list price increases and that for the  
7 entire duration of the conspiracy the conspirators agreed on  
8 quarterly guidance. They agreed on guardrails, and the  
9 guardrails were the starting point for negotiations with  
10 retailers.

11 And if the Court goes back and looks at all of the cases  
12 that have addressed this "affected," what "affected" means,  
13 each and every one of those evidentiary facts is an effect on  
14 commerce.

15 Increasing a list price, just like increasing the sticker  
16 price on a car, increases the starting point for the  
17 negotiation. Increasing the guardrail and including  
18 promotional points that retailers can give affects commerce.

19 All of this is an effect on the sale of canned tuna.

20 **THE COURT:** Was there any evidence that the -- I'm  
21 trying to remember now -- that the quarterly guidance  
22 agreement, which, presumably, would, one would think, have the  
23 net effect of raising net prices because part of the  
24 understanding is that you won't go too deep; right? You're not  
25 going to go too far off or there's a limit to how far off list

1 price you would go.

2 I'm trying to remember, and maybe it didn't because that  
3 wasn't part of the trial, but is there any evidence that shows  
4 that that, in fact, did have an effect?

5 **MS. CONDON:** That they were fixing quarterly guidance?

6 **THE COURT:** Well, that the guidance agreements, the  
7 limits that they agreed to, actually had an impact on real  
8 prices.

9 **MS. CONDON:** Well, Your Honor, I think it's important  
10 to just separate out, quickly, what affected commerce is from  
11 what a gain or loss is, because prices don't have to go up for  
12 there to be an effect on commerce. That's not what affected  
13 commerce means.

14 If a bunch of people get together in a room and say we're  
15 going to hold tight, we are never going to go below five  
16 dollars, that's our agreement, and they stick to five dollars,  
17 or even if they slip a little bit below five dollars because  
18 affected commerce can be cheated commerce too --

19 **THE COURT:** Right. So it doesn't have to be a rise.  
20 It's just that it still has, presumably, some impact -- it  
21 wouldn't -- prices wouldn't be as low -- would be lower than  
22 they would have been but for the agreement.

23 **MS. CONDON:** Your Honor --

24 **THE COURT:** It could be low low, it could be medium  
25 low, it could be even, it could be high. You know, I

1 understand your point. You don't have to prove an affirmative  
2 gain. It could be just not going so deep.

3 **MS. CONDON:** Yes, Your Honor. The witnesses did  
4 testify --

5 **THE COURT:** My question was there -- was there any --  
6 I don't think -- I don't recall, it wasn't required at trial,  
7 but is there any evidence in the record that real-world effect  
8 happened on prices?

9 **MS. CONDON:** Yes.

10 **THE COURT:** They weren't as low as they would have  
11 been?

12 **MS. CONDON:** Yes, Your Honor. The conspirators  
13 testified that they fixed the quarterly guidance, which also  
14 required them to raise the guardrails.

15 And then, with respect to Professor Levinsohn's charts, we  
16 did introduce two rebuttal charts that were working off of the  
17 same lines that Professor Levinsohn used that showed that  
18 the -- it was a straight line across, and it showed that the  
19 majority of the prices fell above the fixed quarterly guidance.

20 **THE COURT:** This is -- remind me, was that a trial  
21 exhibit?

22 **MS. CONDON:** Yes, Your Honor. I don't know what it is  
23 this exact second, but we will be able to provide that for you  
24 either on this call or shortly thereafter.

25 **THE COURT:** So you're saying you do have a kind of

1 rebuttal to Professor Levinsohn's chart?

2 **MS. CONDON:** Yes, Your Honor. We did introduce  
3 evidence that rebutted Professor Levinsohn's chart. If you  
4 would like me to -- Ms. Wulff believes it's 16B and 17B.

5 But I would also like to address counsel's argument with  
6 respect to Professor Levinsohn's testimony and the effect of  
7 that testimony, if the Court would like to hear it.

8 **THE COURT:** Yeah. Go ahead.

9 **MS. CONDON:** With all due respect to Professor  
10 Levinsohn's credentials, he did not present any evidence that's  
11 relevant to the Court's determination here today.

12 The chart that they put in their sentencing memo -- I'd  
13 like to focus specifically on that chart for a second, and then  
14 take a step back and talk about the entirety of Professor  
15 Levinsohn's testimony.

16 **THE COURT:** Yeah.

17 **MS. CONDON:** The chart that's attached to their  
18 responsive sentencing memo conflates two vastly different fish  
19 costs.

20 And I'm sure the Court remembers incessant testimony on  
21 the difference between solid white and chunk light. Those are  
22 different fishes and they're sold for different prices. And so  
23 conflating the two of them into a single chart has a very  
24 misleading effect of flattening the results.

25 But, also, Professor Levinsohn's testimony was all but-for

1 prices. And that's meaningless because the conspirators  
2 testified that there was a conspiracy, and then in the absence  
3 of a conspiracy, the prices would have been lower than they  
4 were with the agreement.

5 So that means that the but-for pricing is irrelevant  
6 because the prices that are indicated on that chart would have  
7 been lower because the conspirators said there was an agreement  
8 to raise prices and that's why the prices went up.

9 And, finally, that specific chart is also bad data because  
10 it took a control period of low costs and compares it to a  
11 conspiracy period of high costs, which is not appropriate  
12 controlling.

13 **THE COURT:** I thought that was the purpose of his --  
14 his exercise, was to say, if it were based on costs, one would  
15 expect prices to follow a certain pattern and that that pattern  
16 actually wasn't followed; prices were actually lower than one  
17 would have thought if it were based just on cost.

18 **MS. CONDON:** The period of time that it's comparing to  
19 is not a period of time that is comparable to the conspiracy  
20 period because, as Counsel has pointed out repeatedly, there  
21 was no comparable period of fish cost percentages to tuna  
22 prices.

23 **THE COURT:** Say that again.

24 **MS. CONDON:** I'm not sure I can, Your Honor. Hold on  
25 a second.

1           **THE COURT:** Okay.

2           **MS. CONDON:** The problem with Zoom is the people with  
3 economic degrees aren't in the same room as me.

4           But, in any event, Your Honor, it's the Government's  
5 position that Professor Levinsohn's but-for testimony --  
6 Professor Levinsohn testified he wasn't a member of the  
7 conspiracy, he wasn't aware of any of the evidence that was  
8 introduced at trial by any of the conspirators. He had a  
9 below-marginal understanding of how the tuna industry worked,  
10 and all he did was do but-for numbers.

11           The conspirators testified at trial there was a conspiracy  
12 to raise prices, and consistent with that conspiracy, they  
13 raised every level of prices. That's the relevant evidence.

14           **THE COURT:** And was there testimony that this affected  
15 all commerce that was transacted? All light tuna -- I forget  
16 exactly how it's applied, but the class of tuna, the canned  
17 tuna we're talking about during the three years of conspiracy?

18           **MS. CONDON:** Your Honor, I would go further and say  
19 that the testimony affected several forms of commerce that the  
20 Government has backed out of its commerce calculation.

21           **THE COURT:** Right. But of the ones that you are  
22 claiming the \$1 billion in sales for, was it your position that  
23 the testimony said covered all of that? In other words, either  
24 by way of guidance, quarterly guidance, or 10 for 10s  
25 restrictions, or list price increases, that that affected all

1 sales during the conspiracy period?

2 **MS. CONDON:** Yes, Your Honor. The evidence from the  
3 co-conspirators would reflect -- I believe what the Court is  
4 asking is, they testified about quarterly guidance and they  
5 testified about list prices. Did they say that those list  
6 prices and quarterly guidance affected all forms of tuna that  
7 we are now claiming were affected? And the answer is yes.  
8 There is --

9 **THE COURT:** During the entire period? So, in other  
10 words, if there was an agreement for certain months but not  
11 other months, that's not the case here, that for every month  
12 during the period every sale was touched?

13 **MS. CONDON:** Yes, Your Honor. That's -- that's the  
14 effect of a list price, and that's the effect of quarterly  
15 guidance.

16 **THE COURT:** But the list price was agreed to three  
17 times; right? Is that right?

18 **MS. CONDON:** Yes, Your Honor. But once set, that  
19 collusive list price affected sales at that price point until  
20 another list price was set.

21 So each of those list prices had the effect of -- I'm  
22 saying "effect" a lot. Each of those list prices would affect  
23 commerce at that collusive list price until another collusive  
24 list price was entered.

25 **THE COURT:** But there was enough -- those three cover

1 the entire period?

2 **MS. CONDON:** Yes, Your Honor. The first agreement was  
3 entered into in March of 2011, and it was effectuated in June.  
4 And then there were two -- I'm sorry, also of 2011. And then  
5 the next two were in 2012, that started in January of 2012 and  
6 leap-frogged until August of 2012. The final list price  
7 implemented in August of 2012 was in effect well beyond the  
8 conspiracy period.

9 **THE COURT:** So your position is that the effect would  
10 find its way through both list price increases that were in  
11 effect throughout the entirety of the period through -- also  
12 affected through the conspiracy with respect to guidance, which  
13 covered the entirety of the period, right, of the conspiracy?

14 **MS. CONDON:** Your Honor, the guidance started at the  
15 beginning of the conspiracy and, actually, as I think a  
16 relevant point, Mr. Worsham and Mr. Hodge testified that they  
17 had agreed to the first quarter of 2014 guidance before  
18 Mr. Hodge was terminated.

19 So we've actually stopped all of our calculations at the  
20 end of the conspiracy, but that guidance effect would continue  
21 through the first quarter of 2014.

22 **THE COURT:** But the main thing is it affected all  
23 sales during the conspiracy period. And then you have the  
24 restrictions on promotions, which is a little bit trickier  
25 because that's kind of sporadic and episodic to a certain



1 extent, but...

2 **MS. CONDON:** Well, Your Honor, I'd like to address  
3 that point, if I may.

4 **THE COURT:** Yep.

5 **MS. CONDON:** It's a point that's been addressed by  
6 other courts and notably *Hayter Oil*. The effect of a  
7 conspiracy has an effect even on what I would call cheated  
8 sales.

9 And I can read you the *Hayter Oil* explanation and then  
10 explain how well it correlates to the conspiracy that the jury  
11 found in this case. The *Hayter* court found that, quote:

12 "Even when prices were falling from agreed-upon  
13 levels, either because of cheating or to meet a price set  
14 by a non-conspirator, the conspirators constantly were  
15 attempting to influence those prices through meetings or  
16 telephone calls before prices got way out of line. Thus,  
17 the resulting price would have been affected by the  
18 conspiracy and would not necessarily be the same as a  
19 free-market price."

20 As Your Honor will recall, a vast majority of the evidence  
21 introduced at trial were these jabs based on, frequently, 10  
22 for 10 pictures that one or the other conspirators would take  
23 of advertisements or on-shelf pricing.

24 The ability to call your competitor because you're in a  
25 conspiracy with him and say, "This isn't cool, stop doing it,"

1 has an effect on commerce.

2 **THE COURT:** So the jabs had a deterrent effect, is  
3 what you're saying; and, therefore, it affected prices. So  
4 people would have really gone crazy and gone into an aggressive  
5 price-cutting mode if it weren't for the jabs.

6 **MS. CONDON:** Yes, Your Honor. And Mr. Chan testified  
7 about his understanding of what Mr. Lischewski meant when he  
8 would be jabbed. And the co-conspirators testified about how  
9 they would respond to jabs. They would respond and explain  
10 that the jab either was in line with guidance or that it was a  
11 promotional price that was run by the retailer so that it  
12 wasn't met with an act of aggression.

13 And the ability to have that relationship and carry on  
14 that relationship, even through purported evidence of cheating  
15 or instances of potential cheating, has an effect on commerce.

16 **THE COURT:** All right. Let me ask you -- we've got to  
17 move on. I want to ask you about the case law.

18 Mr. Peters says that these other cases from out of  
19 circuit, *SKW* and certainly *Hayter* and the presumption --  
20 rebuttable presumption of *Giordano* are inconsistent with Ninth  
21 Circuit law because the burden of proof should always stay, in  
22 his view, with the Government on matters such as this.

23 What's your response to that? And what do you think is  
24 the proper test here?

25 **MS. CONDON:** I'll answer the *Allen* question first,

1 Your Honor.

2 I don't believe that *Allen* stands for the proposition that  
3 it's been cited for, and I don't believe that Ninth Circuit law  
4 in any way is inconsistent with the adoption of any of the  
5 standards that have been set out by any of the other circuits.

6 Defendant is conflating burden shifting, which is what the  
7 *Allen* court was dealing with, with a rebuttal presumption.

8 In the *Allen* court -- in the *Allen* case, the Government  
9 argued that the defendant had the burden of proving by the  
10 preponderance of the evidence that a particular enhancement  
11 shouldn't be found. That's not what the Government's arguing  
12 here.

13 The Government is arguing, and has never argued anything  
14 other than, it has the burden. I mean, we do argue that the  
15 burden should be preponderance, but other than that, we are not  
16 saying it's not our burden to meet.

17 But we are arguing that if we have met our burden by the  
18 preponderance of the evidence to demonstrate the  
19 conspiracy-affected commerce, then the burden shifts to the  
20 defendant under all of these other cases, which are not  
21 inconsistent with Ninth Circuit case law. Then the burden  
22 shifts to the defendant to prove the rare or isolated  
23 unaffected sale. The *Allen* case does not mandate otherwise.  
24 And the Seventh Circuit in *Andreas* explains why it is  
25 acceptable.

1           **THE COURT:** What about *Giordano*, which has a seemingly  
2 broad -- more broad rebuttable presumption? That is, it starts  
3 with a presumption that all sales were affected without -- you  
4 wouldn't have even had to show all the things you just  
5 mentioned, and that the rebuttal then lies with the defendant?  
6 What's your view of that?

7           **MS. CONDON:** Your Honor, I read *Giordano* slightly  
8 differently, which is that there was a burden that needed to be  
9 met before the presumption fell into place.

10           And, in fact, I -- I don't read any of these cases as  
11 necessarily setting up separate standards. My review of the  
12 case law is that *Hayter Oil* was the first case to address what  
13 volume of affected commerce meant.

14           And following *Hayter Oil*, the other circuits -- *Giordano*,  
15 *Andreas*, *SKW* -- those courts have looked at what *Hayter Oil*  
16 found and they've simply refined it. And I find them all to be  
17 very consistent.

18           The finding is that, pursuant to the standard, the  
19 Government has a burden to prove that commerce was affected.  
20 And if it can prove that it was a pervasive conspiracy that  
21 vastly affected all commerce, the burden then shifts to the  
22 defendant to carve out the isolated sales that didn't.

23           And there's a variety of cases -- you can look at the  
24 cases and see the circumstances that led to it. The famous  
25 example is the *SKW* concurring opinion that says if a

1 conspirator receives a phone call from his brother-in-law, he's  
2 going to sell it to his brother-in-law at cost without any  
3 thoughts of the conspiracy.

4 Some of the other conspiracies look at types of products,  
5 for example, that were not affected by the conspiracy. So if,  
6 for example, there was a conspiracy affecting precious metals  
7 and the Court found that gold was affected but not platinum, it  
8 would exclude all platinum sales. That's just not the case  
9 here. The conspiracy that we proved at trial affected all  
10 sales of canned tuna.

11 And the Government has backed out other types of fish  
12 products that it believes were touched upon by the conspiracy.  
13 There was evidence at trial that pouch was an influencer, that  
14 pouch was influenced by the conspiracy. We did not include  
15 pouch in our sales.

16 But the defendant -- other than making broad proclamations  
17 that no one testified about any effect on commerce, they  
18 haven't said that there was a single sale that wasn't affected  
19 by the conspiracy.

20 **THE COURT:** All right. I'll give you a quick chance  
21 to respond, Mr. Peters, then I want to move on to the other  
22 factors here.

23 You're muted.

24 **MR. PETERS:** Got it. Thank you, Your Honor. Let me  
25 just make a couple of points.

1           You started out by asking Counsel what the proof was on 10  
2 for 10s. I don't believe that question was ever answered in  
3 any specific way because there is no proof of an effect on  
4 commerce from this 10 for 10 theory.

5           What we get, instead, really, is a lot of argument by  
6 counsel speculating about the effect on commerce and then an  
7 attempt to minimize the only real evidence in the record  
8 analyzing numerically whether there was an effect on commerce.  
9 And that comes from Professor Levinsohn.

10           And I'm not going to repeat that testimony, but the charts  
11 show that prices are all over the place, that costs were going  
12 up, and that you would expect prices to be higher if, in fact,  
13 they had been affected by a conspiracy.

14           Counsel argued -- and I don't really understand the  
15 argument, but there was a reference to these jab emails.

16           And this is an example, I think, of how they're asking the  
17 Court to speculate. You were told the jabs affected prices  
18 because without the jabs Chicken of the Sea would have engaged  
19 in lower, more aggressive pricing, so it had an effect on  
20 pricing. Well, that's just purely speculative. Where is the  
21 evidence to establish that by any burden of proof?

22           We're told that the list prices affected Safeway's prices.  
23 Here's Mr. Baribeau, a question by Ms. Condon:

24                   "Mr. Baribeau, does Safeway use the list prices in  
25 negotiations?"

1 "A. No."

2 So I really do think -- you know, one thing I took away --  
3 and, obviously, I read Your Honor's *Nosal* opinion closely. One  
4 thing it seemed like Your Honor was clear about in *Nosal* was  
5 the Government actually has to prove an enhancement.

6 They have to provide evidence in a somewhat precise way  
7 and not in a ridiculous way that turns this into a three-week  
8 trial, but like let's see evidence. The only retailer they  
9 have any evidence of is Safeway. And what that shows is that  
10 the cost information was transparent to Safeway and they  
11 negotiated.

12 The idea that, oh, the co-conspirators said it affected  
13 prices, which we heard like 16 times, that's entirely general  
14 and it doesn't really prove anything, particularly in light of  
15 the documentary evidence.

16 So, Your Honor, whatever the burden is, the Government --  
17 the Government hasn't met it when it comes to volume of  
18 commerce. They proved -- they got the jury.

19 Yes, Your Honor I made jury arguments. The jury  
20 ultimately didn't accept them. And what their verdict was, was  
21 a -- was a decision that Mr. Lischewski had joined a conspiracy  
22 at some point in time that was in violation of the antitrust  
23 laws.

24 There was no proof. The jury never found that there was  
25 an effect on commerce, and there isn't proof in the record to

1 prove that.

2           **THE COURT:** Well, let me ask you a simple question.  
3 There was testimony that -- nobody sells at list prices. I  
4 understand that. I understand there's all that. But there was  
5 testimony that list price had some effect. It is a starting  
6 point. And from that, you get guidance and you get discounts.  
7 It's not totally irrelevant. It has some meaning in the  
8 market. Maybe it's just the benchmark that's to start with and  
9 you negotiate down from there.

10           But when -- *SKW* talks about effect having a, quote, broad  
11 and open-ended range of influences and that sales can affect --  
12 quote-unquote, be affected by conspiracy when the conspiracy  
13 merely acts upon or influences negotiations. If it merely  
14 influences negotiations. It doesn't have to dictate. Doesn't  
15 have to say what the ultimate outcome is. If it had some  
16 influence, in fact, any influence of sales -- italicized  
17 "any" -- why isn't that enough?

18           There was testimony -- and I don't think it was doubted --  
19 that list prices have something to do. They're not completely  
20 irrelevant.

21           **MR. PETERS:** I mean, I think the reality is -- I mean,  
22 if you think about it, why does Safeway get the cost  
23 information? They don't have to accept a list price increase  
24 in order to negotiate the price. They get all of the cost  
25 information.



1           If Bumblebee wants to negotiate a particular price or even  
2 raise its list price, Safeway knows every bit of the cost  
3 structure, and then they negotiate from there. And what's the  
4 result from that? That there are prices all over the place.

5           So, yes, there was some conclusory testimony about that  
6 from the cooperating witnesses, but I don't think that -- I  
7 don't think that there's evidence to satisfy the burden of  
8 proof to say that, oh, because the list price was raised, every  
9 sale was affected by that because it was generally the starting  
10 point in negotiations.

11           Mr. -- I don't think -- there's no proof with any other  
12 retailer other than Safeway. And, Your Honor, logically, if  
13 you're going to accept some list -- the customer comes and  
14 you're buying something for \$1.50, the customer comes in and  
15 says, "Ah, our new list price is \$1.87," and you say, "Okay,  
16 show me your costs," do you really care what they say that  
17 their list price is? What you care is what the history is and  
18 what's changed in terms of the costs.

19           And that's what the record is about the negotiations. I  
20 don't think that these customers like Walmart and Safeway cared  
21 what the list price was at all. And if they did, why were they  
22 asking for and receiving these cost line items?

23           **THE COURT:** Well, that may be a bargaining tool to  
24 come off the list price. Sort of like when you walk into a car  
25 dealership, it's always useful to know the dealer's invoice and

1 all that sort of stuff. But, you know, you also look at the  
2 sticker price. You know --

3 **MR. PETERS:** Your Honor, I'm sorry --

4 **THE COURT:** There's a lot of --

5 (Unreportable simultaneous colloquy.)

6 **THE COURT:** There's a lot of psychology out there,  
7 social psychology, about anchoring and everything else.  
8 There's tons of, you know, social psychologists that will tell  
9 you that -- and you know this because you negotiated many  
10 settlements -- you know, your opening demand has an impact on  
11 what the -- where it may go or your counteroffer. I mean,  
12 sometimes it frames things.

13 So the idea that list prices are completely irrelevant,  
14 why not just do away with them?

15 **MR. PETERS:** Your Honor, respectfully, the car  
16 analogy, the settlement analogy -- when I walk into a car  
17 dealership's office, I haven't been buying cars, plural, every  
18 day from them for the last five years. And I don't also  
19 simultaneously sell the exact same cars that they're selling  
20 and am familiar with the subject. It's not a fair analogy.

21 Because a Stop & Shop, a Walmart, a Kroger's, they sell  
22 their private-label product, they get cost information that  
23 way. They get cost information from the tuna companies in  
24 order to establish the cost. I really don't think they -- why  
25 would they care what the list price is? It isn't a negotiation

1 like if I walk --

2 **THE COURT:** So list price is -- you think --

3 **MR. PETERS:** -- into a car dealership and say, "Oh,  
4 there's the sticker price." These people know the cost  
5 structure backward and forwards and --

6 **THE COURT:** So all they need is cost. They don't need  
7 list price?

8 **MR. PETERS:** They don't need it. They get --

9 (Unreportable simultaneous colloquy.)

10 **THE COURT:** Why --

11 **MR. PETERS:** What I want -- if I go to the car  
12 dealership, what I want is to know what that car dealer bought  
13 the thing for. I want to know that a heck of a lot more than I  
14 want to know the list price, because then I know how to  
15 negotiate.

16 And that's what these retailers had, and that's what they  
17 insisted on getting.

18 **THE COURT:** All right. Let's go on to the next issue,  
19 which would be leadership role.

20 Given the testimony -- and I know you take issue with the  
21 credibility of Mr. Cameron, Mr. Worsham and the whole, you  
22 know, contradiction and about where he was and when and all  
23 that, but if you take that testimony and you credit it, would  
24 you agree that there was evidence that Mr. Lischewski had a  
25 major role and a leadership role as one directing them and

1 telling them what to do, and overseeing the prices, the list  
2 price increases and price guidance?

3 **MR. GOLDBERG:** Thank you, Your Honor. Nick Goldberg  
4 for Mr. Lischewski --

5 **THE COURT:** Yeah.

6 **MR. GOLDBERG:** -- and the role.

7 And I think -- you know, let me start by taking a step  
8 back, because you have to be really specific when you're  
9 talking about the evidence and the testimony that the  
10 Government relies upon for the role enhancements.

11 I don't think you can paint it with a broad brush and say  
12 if you credit all of their testimony, would -- would a role  
13 enhancement apply. And there's a couple of reasons for that.

14 One is the jury verdict itself doesn't get you there on  
15 the role enhancement because, as Mr. Peters mentioned, it only  
16 finds membership, whether Mr. Lischewski joined. So I'm not  
17 here to reargue the jury verdict. But the jury verdict doesn't  
18 get you the role.

19 When you look at Mr. Worsham and Mr. Cameron's testimony,  
20 I think you actually have to start at the beginning. And I  
21 want to take them separately because they're separate issues  
22 raised by each of them.

23 And when you look at what Mr. Cameron said as relevant to  
24 the role enhancement, he starts talking about Mr. Lischewski's  
25 role in interviews that the Government recorded in their own

1 notes starting in 2015.

2 And in an August 20, 2015, interview -- this is Trial  
3 Exhibit 2439, at pages 238 through 239. This is the  
4 Government's notes of an interview that Mr. Cameron had with  
5 Bumblebee's lawyers. Here's what he said, quote:

6 "S. Cameron may say that he does not believe that  
7 C. Lischewski knew the details of his conversations with  
8 competitors because S. Cameron does not spend too much  
9 time in San Diego, California.

10 "S. Cameron may explain that C. Lischewski did not  
11 tell S. Cameron directly to obtain information from  
12 competitors but that it was implied by the things  
13 C. Lischewski said."

14 So starting in 2015, Cameron says, "No, Lischewski did not  
15 tell me directly to obtain information." Then his cooperation  
16 begins.

17 And I don't want to rehash this whole thing, but we know  
18 that he met with the prosecutors. He and his lawyers met with  
19 the prosecutors more than 20 times. I can't give you the  
20 precise number because he couldn't even remember all of the  
21 times that he met with the Government in the one week leading  
22 up to his trial testimony, but it was more than 20 times.

23 In one of those interviews, in a January 2017 interview,  
24 in-person interview with Mr. Cameron, Ms. Wulff, and Mr. Kumar  
25 sitting there, again from the Government's own notes, Trial

1 Exhibit 2457A, here's what he says:

2 "Cameron does not currently recall telling Lischewski  
3 he kept in touch with Cameron. When Cameron reported  
4 competitive intelligence coming from Handford, he does not  
5 currently recall specifically referencing Handford to  
6 Lischewski."

7 Then after all of those meetings, his testimony completely  
8 shifts. It goes from Mr. Lischewski did not directly tell me  
9 to obtain information from competitors, from denying even  
10 telling Mr. Lischewski that he kept in touch with Handford, to  
11 what the Government really is asking the Court to credit for  
12 purposes of sentencing, which is this conclusory,  
13 highly-scripted testimony on direct examination where he says  
14 that in -- in the fall of 2010, Mr. Lischewski supposedly told  
15 him to make contact with Starkist to signal a truce.

16 Your Honor, you probably remember this. Mr. Peters  
17 cross-examined Mr. Cameron extensively about those  
18 conversations, but he could not provide, literally, a single  
19 detail, not one, corroborating that testimony on whether  
20 Mr. Lischewski actually directed him to do that.

21 Here's what he said. This is the trial transcript at page  
22 729, lines 8 through 14:

23 "Q. Well, based on what you've testified to, you said  
24 that your boss was telling you to do something illegal; is  
25 that right?

1       **"A.** That's correct.

2       **"Q.** But you don't remember any of the specifics of the  
3 conversation; is that right?

4       **"A.** That's correct."

5       He couldn't even remember any details supporting his  
6 testimony that he had told Mr. Lischewski that he had reached a  
7 truce with Handford. This is at page 730, lines 21, page --

8               **THE COURT:** Let me ask you, Mr. Goldberg -- you know,  
9 we could be here all day, and I understand you want to  
10 highlight parts of testimony, but the bottom line is these  
11 arguments were made, the cross-examination was done.

12       There was an ample opportunity to impeach the testimony of  
13 Mr. Cameron as well as Mr. Worsham, but the jury found what it  
14 did. Yes, true, they didn't have to find leadership. They  
15 didn't have to find the specifics. But they did find -- they  
16 had to find some truth in what these witnesses said.

17               **MR. GOLDBERG:** I don't agree with that, Your Honor. I  
18 think what they had to find, and what Your Honor instructed  
19 them, was that at some point along the line Mr. Lischewski  
20 joined the conspiracy. I don't think they had to credit their  
21 testimony.

22       In fact, we put in the article from one of the trade  
23 publications which quoted the jury foreperson saying that they  
24 didn't credit that testimony. So I don't think they had to  
25 credit it. I don't think it's -- at least at this stage, it

1 doesn't answer the question at all.

2           **THE COURT:** Well, how could he be a member -- let me  
3 ask you, how could he be a member, which the jury did find,  
4 you --

5           **MR. GOLDBERG:** Yes, yes.

6           **THE COURT:** How could he be a member and not be a  
7 leader? I mean, it is clear, is it not, that -- is there a  
8 dispute that he did have to prove list price and guidance?

9           **MR. GOLDBERG:** No. In fact, Mr. Lischewski testified  
10 he approved the list prices, but the evidence -- I think the  
11 undisputed evidence on that point was that he had been  
12 approving Mr. Worsham's recommendations on list prices for a  
13 better part of two decades, for 15 years, before the conspiracy  
14 started.

15           And we put in proof, in fact, that for at least two and, I  
16 think, all three of the list price increases, the conversation  
17 that Mr. Worsham claims to have had with Mr. Lischewski about  
18 those list price increases occurred after Starkist had publicly  
19 announced its list price increase.

20           So I don't think -- I take your point, Your Honor, and I  
21 understand the jury found that Mr. Lischewski joined the  
22 conspiracy. The question for the Court is: Has the Government  
23 met its burden of proof to establish that he was the organizer  
24 or leader?

25           He's the only one they tried to seek to impose this



1 enhancement. And the evidence they rely upon is this  
2 highly-scripted conclusory testimony that's inconsistent with  
3 prior statements. There's no details supporting it. It's  
4 inconsistent with the documentary evidence. And I don't think  
5 that the jury's verdict gets them there. I really don't.

6 And I think Worsham, quite frankly, is worse than  
7 Handford. I'm happy to go into it.

8 But I think, Your Honor, I respectfully submit that, in  
9 looking at these enhancements, you play an important role in  
10 determining whether they've met their burden of proof. And  
11 what they've submitted here just doesn't do it.

12 **THE COURT:** All right. Let me ask the Government.

13 If one were to question the credibility of the two main  
14 witnesses, Worsham and Cameron, what evidence is there that the  
15 defendant was an organizer or leader of the conspiracy?

16 **MS. WULFF:** Thank you, Your Honor. I'll address this  
17 point for the Government.

18 **THE COURT:** Okay.

19 **MS. WULFF:** If the Government -- if the Court is to  
20 set aside all the witness testimony, which the Government  
21 doesn't think is reasonable -- and I can return to that, but  
22 I'll address the Court's question.

23 If you're to only look at the documents, the Court could  
24 look at Exhibit 228, which is an exhibit from November 2011,  
25 which was right after Mr. Handford left Starkist and

1 Mr. Worsham first made contact with Mr. Hodge. It was that  
2 time of transition. If the Court remembers, Mr. Hodge  
3 reaffirmed Starkist's commitment to the conspiracy.

4 The defendant wrote an email, and he said -- he referred  
5 to Mr. Hodge's reaffirmation as a white flag and directed  
6 Mr. Cameron and Mr. Worsham to come up with a plan that does  
7 not send the wrong signals for the rest of the year. He told  
8 them not to be aggressive and to -- to do so for the rest of  
9 2011 and into 2012.

10 So that's an example of defendant directing Cameron and  
11 Worsham to implement the price-fixing -- to continue to  
12 implement the price-fixing conspiracy by implementing a plan, a  
13 pricing plan, that kept the conspiracy in place.

14 I could go on and look at Exhibit 147, which is an email  
15 from January 2012 -- excuse me, 2011, going a little bit back  
16 in time, Your Honor, but this was around the time that fish  
17 costs started to spike and the parties needed to negotiate  
18 their first price increase as compared to previously when they  
19 had reached an agreement to cease fire.

20 But that's how the conspiracy started. At this time they  
21 were actually meeting to increase prices. And this is the  
22 email chain where defendant asked Mr. Cameron to find out what  
23 SK is -- what is SK planning to do. He asked him to find out  
24 will they announce a list price increase, and how soon?

25 And, of course, Mr. Cameron did so. He called

1 Mr. Handford, his contact at Starkist, to talk to him about  
2 their plans for a list price increase, and then continued to  
3 have those conversations with Mr. Handford and report back to  
4 defendant. Another --

5 **THE COURT:** Remind me, did Handford so corroborate or  
6 testify?

7 **MS. WULFF:** Mr. Handford didn't testify, Your Honor.

8 **THE COURT:** That's right. He didn't testify.

9 **MS. WULFF:** But Mr. Hodge testified about the  
10 conversations that he had with Mr. Handford at that time.

11 Another example of defendant being a leader, organizer,  
12 that, again, ignores all testimony, but just the documents,  
13 Exhibit 179, which is an email from May 2011, where  
14 defendant -- this is an email about the Kroger bid where the  
15 parties tied and then Bumblebee came back in the rebid and  
16 actually was the cheating party there and -- with a lower price  
17 and won the rebid. And you'll recall that Starkist was  
18 frustrated about that.

19 There was the email talking about defendant's conversation  
20 in Brussels or -- in Europe with Joe Chusa. But Exhibit 179 is  
21 an internal email where defendant emails Mr. Cameron and says,  
22 "Please tell me we are not being aggressive on the Kroger bid."  
23 So, again, directing Mr. Cameron as to what to do with  
24 Bumblebee's pricing.

25 Does the Court want more documentary examples or --

1           **THE COURT:** Well, I just wanted you to highlight what  
2 it would be if one were to disregard the testimony of the two  
3 main cooperators.

4           **MS. WULFF:** So at that point I believe we're left with  
5 the documents, so I can keep going.

6           I would direct the Court --

7           **THE COURT:** No, I mean, you have the peace proposal  
8 document.

9           **MS. WULFF:** It's like the Court read my mind. That  
10 was going to be the next --

11           **THE COURT:** And then you have the Curto testimony.

12           **MS. WULFF:** Then I have the Curto testimony, Your  
13 Honor, and Document 157, which Mr. Curto introduced, which was  
14 an email where -- describing a conversation the defendant had  
15 with Mr. Curto in August 2012, where defendant bragged about  
16 the close relationship between his employees and Starkist  
17 employees and said that they were talking constantly.

18           You also have the testimony of Shue Wing Chan, who the  
19 Government -- the Court didn't exclude, so we're talking about  
20 the testimony from Shue Wing Chan that defendant jabbed him  
21 with examples of Chicken of the Sea's aggressive prices and  
22 then followed up with in-person conversations.

23           There was the breakfast meeting at Milton's where Mr. Chan  
24 and the defendant reached an understanding that Chicken of the  
25 Sea would not continue its aggressive pricing.

1           You also have their other in-person conversation in  
2 Chicago, at the trade association meeting, which is documented  
3 in an email as well. I don't have that exhibit number handy.

4           And then, lastly, I would say David Roszmann, Your Honor,  
5 who testified briefly about defendant's attempts to recruit him  
6 into the conspiracy.

7           So even if we were to ignore Cameron and Worsham, which  
8 the Government highly disputes and thinks is not reasonable,  
9 there's plenty of evidence.

10           **THE COURT:** All right. Let me go to the obstruction  
11 of justice.

12           **MR. GOLDBERG:** Your Honor, may I briefly -- there was  
13 a lot --

14           **THE COURT:** Briefly.

15           **MR. GOLDBERG:** I don't want to test your patience, so  
16 if you're not willing to hear it, I'm happy to shut up, but I  
17 feel compelled to at least ask.

18           **THE COURT:** If you would respond to these documents  
19 and -- that's what I'd be curious, if you have some comment  
20 about the documents.

21           **MR. GOLDBERG:** Absolutely. Sure, Your Honor.

22           So, first of all, as a meta point, I don't think any of  
23 those exhibits gets them to organizer or leader. I think, at  
24 most, you get to participation, which is what, ultimately, the  
25 jury found. We obviously disputed that at trial.

1 I don't think the documents -- even when you read them as  
2 the Government does in this highly stilted manner, they don't  
3 get you to organizer or leader. They just don't.

4 **THE COURT:** Well, but don't they get you to the point  
5 where it tends to corroborate at least some of what the two  
6 witnesses said?

7 **MR. GOLDBERG:** Well --

8 **THE COURT:** If your position is that they lied through  
9 their teeth throughout the entirety, Mr. Lischewski didn't know  
10 a thing about this, and yet you have a document -- you have  
11 several documents that, you know, the Government argues is some  
12 insight into what he knew, where he was, it tends to  
13 corroborate some of the testimony.

14 **MR. GOLDBERG:** I understand Your Honor's point that  
15 you have to be specific about what they're talking about. They  
16 cite exhibit numbers and they read snippets of emails, but they  
17 don't read them in context.

18 Take, for example, Exhibit 147, where Mr. Lischewski  
19 says -- where they say they point to the portion of the email  
20 where he says, "What is SK planning to do?" And then -- which  
21 on its face is asking for competitive intelligence. It doesn't  
22 show that he's organizing or leading anything. They admit that  
23 it's Cameron and Worsham having a conversation.

24 **THE COURT:** What about 228?

25 **MR. GOLDBERG:** 228 is when -- it's November 16, 2011.

1 The day before that, there's a Bumblebee board deck, which they  
2 completely ignore, at a board meeting with Mr. Lischewski  
3 present, where the data that Mr. Cameron presents to the board  
4 shows empirically that Starkist had begun to raise its prices.

5 And so Mr. Lischewski, after seeing that, the day after,  
6 writes this email saying we don't want to signal in the market  
7 aggressiveness which could plunge us back into a price war.

8 Again, it's highly ambiguous. There's a ton of context  
9 that's important to understand. They gloss over all of it.  
10 And I don't think even reading it that way supports a role  
11 enhancement. I really I don't.

12 **THE COURT:** Well, it shows, at the very least, that he  
13 was involved in pricing, indirectly, pricing.

14 **MR. GOLDBERG:** Your Honor, I think that it's  
15 important -- this goes back to the cases, *Holden* -- there's no  
16 doubt that Mr. Lischewski was a good, high-functioning CEO who  
17 was a hands-on manager. That is categorically not supposed to  
18 count against him for this role enhancement.

19 The law is crystal clear. They have to show that he  
20 organized others for the purpose of committing the crime. The  
21 fact that he was involved in pricing, the fact that he had task  
22 lists, the fact that he had meetings with people, all of that  
23 is what you would expect from a good CEO. It is not a basis to  
24 impose a role enhancement.

25 **THE COURT:** Well, not per se. But the more hands-on

1 one is, the more likely one knew what was going on.

2 **MR. GOLDBERG:** Which might support, arguably, a jury  
3 verdict of participation. I don't think it can be credited to  
4 support a role enhancement.

5 And, in fact, the Third Circuit in *United States versus*  
6 *Starnes* held that the District Court was correct in giving,  
7 quote, no weight, end quote, to the defendant's position in  
8 considering the role enhancement.

9 **THE COURT:** All right. Thank you.

10 **MR. GOLDBERG:** Thank you.

11 **THE COURT:** Let's go to obstruction.

12 I guess a question that comes up in many cases is at what  
13 point does testimony, testifying at trial, become a basis for  
14 obstruction of justice at the risk of penalizing one's  
15 constitutional right to testify?

16 I mean, I understand when one testifies at trial and gets  
17 convicted, it's -- you know, it's almost automatic that the  
18 jury didn't believe that testimony unless there was, you know,  
19 somehow testimony that was unexpected.

20 But, I mean, this would seem to come up in every instance  
21 where there's a conviction and somebody's testified.

22 **MS. WULFF:** I think that one might be directed to the  
23 Government, Your Honor.

24 **THE COURT:** Yeah. Yeah.

25 **MS. WULFF:** So I'll speak to that as well.



1           The Court has just as much experience with this as anyone  
2 else, Your Honor. You sit in -- or preside over cases where  
3 defendants testify and juries return a guilty verdict. And,  
4 certainly, in not all those cases does the Government seek an  
5 enhancement for obstruction of justice.

6           The difference between this case and those cases and what  
7 the Government is relying on here is the fact that the  
8 defendant didn't just provide an unembellished denial. He  
9 didn't just simply state, "No, I didn't participate in a  
10 price-fixing conspiracy." He went above and beyond that, Your  
11 Honor.

12           During his three days of testimony he told -- he made  
13 affirmative false statements and he provided a completely  
14 alternate version of events. So this is something that's far  
15 more than just -- than just a simple denial, Your Honor.

16           And the Supreme Court has looked at this issue in  
17 *Dunnigan*, and the Ninth Circuit has followed the *Dunnigan*  
18 holding in several other cases. And in *Dunnigan*, the Court  
19 said that there's -- there's no situation in which a right to  
20 testify includes a right to commit perjury.

21           And it held that finding or -- excuse me -- adjusting  
22 sentences under the guidelines using obstruction of justice  
23 where the defendant testifies falsely does not in any way chill  
24 defendant's ability to exercise their constitutional right.

25           It noticed that, in fact, a defendant's willingness to

1 perjure himself to avoid criminal liability in some instances  
2 suggests a heightened need for criminal punishment as compared  
3 to a defendant who did not perjure himself and showed more  
4 respect for the function of the courts and the judicial  
5 proceedings.

6 So here, again, we're talking about a defendant who told  
7 an affirmative version or an alternate version of events, went  
8 above and beyond a denial, and provided that extensively over  
9 three days of testimony.

10 It wasn't just a single question or a single answer or  
11 even two or three or four. It was three days of testimony,  
12 Your Honor.

13 **THE COURT:** So if you were to take a bank robbery  
14 case, defendant takes the stand and simply denies that he  
15 was -- he committed the robbery, that's one thing. But if he  
16 then says, and to prove it, I was at XYZ's house or I was in  
17 another -- you know, that's the line between obstruction and  
18 nonobstruction, when one testifies and gets convicted?

19 **MS. WULFF:** Your Honor, I can't draw some sort of  
20 bright line in terms of whether it's one question or two. But,  
21 yes, I believe the Court is getting at it.

22 An instance where the bank robber says, "No, I didn't  
23 commit the bank robbery" is one situation. And a situation  
24 where the bank robber then invents some other story about how  
25 he was at his grandma's house and has his grandma testify that

1 he was at her house -- I don't know what his story is, but he  
2 invented some other story and tells an alternate version of  
3 reality, that's a situation where that's more similar to what  
4 the defendant did here.

5 **THE COURT:** All right. Let me hear from defense.

6 **MS. McCLOSKEY:** Your Honor, Elizabeth McCloskey on  
7 behalf of Mr. Lischewski.

8 The Government's response, exactly in response to your  
9 question, the Government wants to talk in broad brushes. It's  
10 simply the fact that he testified in his defense, the fact that  
11 he denied being involved in the conspiracy, the Government  
12 wants you to believe that that's enough to find that he  
13 obstructed justice.

14 **THE COURT:** So where would you draw the line?

15 **MS. McCLOSKEY:** If the Government -- if the Government  
16 can meet its burden of showing that the defendant made specific  
17 false testimony, that's where the line is. And here the  
18 Government tries hard. It throws a lot at the wall.

19 But its pleadings are misleading. It misleadingly quotes  
20 Mr. Lischewski's testimony, and it cannot show that he  
21 testified falsely about something material and with the purpose  
22 of obstructing justice, which is exactly what the law requires  
23 the Government to do.

24 **THE COURT:** All right. What about -- what about his  
25 explanation, his testimony about the peace proposal?

1           **MS. McCLOSKEY:** Sure. Mr. Lischewski testified that  
2 that email was an internal discussion that he was having with  
3 Doug Hines, his CEO -- his COO, about how Bumblebee would  
4 respond to questions that it was getting from potential buyers.

5           You'll recall that this is an email that Mr. Lischewski  
6 sent to Mr. Hines. And though the later forward was -- Your  
7 Honor excluded it, it was then forwarded to a fish buyer named  
8 W.H. Lee.

9           The evidence --

10           **THE COURT:** To pass on. To pass on to -- was it  
11 Starkist?

12           **MS. McCLOSKEY:** That's not clear at all from  
13 W.H. Lee's email. And, in fact, W.H. Lee told the Government  
14 that he never forwarded it and he didn't understand that that's  
15 what Mr. Hines was sending it to him for. So there's no  
16 evidence in the record.

17           But even the evidence that the Government has from  
18 W.H. Lee himself is not that he was supposed to forward that  
19 on -- that he understood that he was to forward that on to  
20 Starkist or that he did that.

21           In this case the only evidence in the record is what  
22 Mr. Lischewski testified to regarding his intention in sending  
23 that email. There's no evidence from Mr. Hines; the Government  
24 didn't call him. There's no evidence from Mr. Lee; the  
25 Government didn't call him.

1           So the only evidence in the record is that Mr. Lischewski  
2 sent that. It was an internal discussion. There's nothing in  
3 that -- they can't point to any testimony that Mr. Lischewski  
4 gave regarding that email that is false.

5           **THE COURT:** And if I, as a finder of fact, were to  
6 find that his testimony in that regard was not credible about  
7 the email, would that be grounds to find obstruction?

8           If that piece of testimony was -- I found to be false,  
9 what would your legal conclusion be?

10           **MS. McCLOSKEY:** No, because the testimony would also  
11 have to be -- he would have to willful -- he would have to  
12 intend to obstruct justice by testifying to that, and I don't  
13 think that that's a finding that can be made based on  
14 Mr. Lischewski's testimony about that document.

15           **THE COURT:** I would have to find that he intended to  
16 obstruct justice or intended to tell a falsehood under oath?

17           **MS. McCLOSKEY:** The testimony -- it's the *Lofton* case,  
18 the Ninth Circuit's *Lofton* case, that he had to tell it with  
19 the purpose of obstructing justice, that it was false testimony  
20 made for the purpose of obstructing justice.

21           And even if you don't find the explanation credible,  
22 there's nothing that leads us to believe that Mr. Lischewski  
23 intended to obstruct justice by testifying what he intended to  
24 communicate via that email.

25           **THE COURT:** And what does that mean? If something is

1 false testimony under oath at trial, how could something not be  
2 intended -- and it was material, how could something be false,  
3 material, and intentionally false, and not intended to be  
4 obstructive? Can you explain that to me?

5 **MS. McCLOSKEY:** Well, I want to respond to one thing  
6 you just said, which is whether it was material. I mean, here,  
7 this email was sent months before even the Government alleges  
8 that the conspiracy started.

9 The email was sent in September 2010. The conspiracy  
10 didn't even, according to the Government's story, start until  
11 November. And there's no evidence that Mr. Lischewski was  
12 making any efforts to start the conspiracy in this earlier time  
13 period. So there's no -- there's no reason to believe that  
14 even if that testimony were false, that it was material.

15 **THE COURT:** All right. But let's -- let's assume for  
16 a moment that I were to find it is material, was false, and  
17 knowingly false. Just explain to me, how could that be not an  
18 intent to obstruct justice?

19 **MS. McCLOSKEY:** But I think that takes us back to the  
20 question of, if the defendant is going to be penalized, if the  
21 Court is going to find that he obstructed justice merely by  
22 testifying, that's not what the law allows. I mean, the law  
23 doesn't allow us to penalize him simply for testifying in his  
24 own defense.

25 **THE COURT:** So where do you draw the line? When does

1 this guideline come into play?

2 **MS. McCLOSKEY:** I think the bank robbery analogy that  
3 you made is apt. And -- and, you know, here, Mr. Lischewski  
4 didn't, for example, create -- you know, say, "I wasn't -- "I  
5 didn't send that email, someone else sent it," didn't tell some  
6 demonstrably false lie like a bank robber saying, "No,  
7 actually, I was at my mom's house when the bank robbery took  
8 place." It has to be a clear lie.

9 **THE COURT:** So it must be a demonstrably false lie?

10 **MS. McCLOSKEY:** Yes, I think that's what the case law  
11 holds.

12 **THE COURT:** And what case -- what's the best case for  
13 that proposition?

14 **MS. McCLOSKEY:** Well, I think that -- I think that the  
15 *Bronston* case makes clear that it can't just be, you know,  
16 misleading or nonresponsive testimony. It has to be something  
17 that is literally false. And I think that may be the most  
18 on-point case.

19 **THE COURT:** Okay.

20 **MS. WULFF:** Your Honor, can I address *Bronston*?

21 **THE COURT:** Yeah. Go ahead.

22 **MS. WULFF:** Sure. Thank you, Your Honor.

23 I think what the Court is looking for in its questions to  
24 defense counsel goes to the part of whether defendant's  
25 testimony was willful.

1           And there -- and this sort of -- this intent question that  
2 the Court is looking at goes -- is what the Ninth Circuit has  
3 called the willfulness of defendant's testimony. And it's  
4 distinguishing cases between -- of willful testimony from those  
5 of accident or mistake.

6           And I think that's what *Bronston* looks at. *Bronston* is a  
7 case -- a Supreme Court case, but it involves a defendant's  
8 testimony in a series of -- it's about three or four questions.  
9 I forget the precise number, but it's about three or four  
10 questions about the scope of defendant and his company's assets  
11 in a bankruptcy proceeding.

12           And defendant answered one of those questions, and the  
13 statement that he gave was factually correct. It was about the  
14 company's assets in Switzerland during a certain time period.  
15 But the question had been about the defendant's assets in  
16 Switzerland, not the company's assets. And so the Court there  
17 found that that wasn't enough.

18           And what the Court is looking at in *Bronston* is this issue  
19 that it's hard to say that that defendant's testimony was  
20 willfully false. It could have very well been an accident, a  
21 mistake. He might have misunderstood the question. And the  
22 Court even comments that the Government could have clarified  
23 the record to make sure that defendant understood whether he  
24 was talking about his assets or the company's assets. You  
25 know --



1           **THE COURT:** There was no intent. It was not willfully  
2 false.

3           **MS. WULFF:** Exactly, Your Honor. And that's how --  
4 that's very different from here. We're not looking at, again,  
5 just three or four questions where there's some question about  
6 whether defendant understood what he was doing.

7           **THE COURT:** Well, but by that token even what you call  
8 an unembellished denial under oath would be false. "I didn't  
9 do the bank robbery." Well, the jury found that he did do the  
10 bank robbery. Is that obstruction of justice?

11           **MS. WULFF:** I'm -- the Government isn't taking the  
12 position that that is obstruction of justice because, again --  
13 and it went far beyond that. So I don't think we have to  
14 answer whether any other government agency or government  
15 attorney would bring an obstruction adjustment in that case  
16 because that's not the case at hand and the Government hasn't  
17 done so here.

18           **THE COURT:** All right. Well, this has been helpful.  
19 As I said, my intent was to glean the parties' position and  
20 test your positions. In fact, I probably wouldn't rule anyway  
21 because I need to look at more -- you know, I'm going to take a  
22 second look at some of the cases and some of the record cites  
23 that you've given me.

24           I will be prepared to discuss and rule on this and  
25 everything else at the sentencing hearing. So I'm going to

1 leave it at that.

2 And I will say -- let's see. We have scheduled this,  
3 Angie, for -- when are we? 16th in the morning; right?

4 **THE CLERK:** Yes, Your Honor at 9:30. 9:30 on the  
5 16th.

6 **THE COURT:** Okay. And we'll be governed by the  
7 General Order and the rules that now apply, the restricted  
8 numbers in the courtroom. So we'll have to work out logistics.

9 I think it's advisable for counsel to work out with us in  
10 advance all logistics, because everybody in the courtroom who  
11 wants to participate will have to have a device and headphones  
12 or earphones. We can't use speakers because then we'll get a  
13 feedback when you have multiple devices in the same room. So  
14 it'll be a little tricky, but that's -- that's what's going to  
15 happen.

16 So we probably -- Angie, you might maybe want to schedule  
17 a call with counsel in advance. And I don't know if Buzz needs  
18 to be there or somebody else. Might want to get together  
19 earlier, definitely earlier, to try to set up and make sure it  
20 works.

21 **THE CLERK:** Yes. We can do that even 45 minutes in  
22 advance of the sentencing time.

23 **THE COURT:** Okay. All right. Why don't we plan on  
24 that. And other than that, I've got all the briefs and  
25 materials here, and we'll proceed to the full sentencing

1 hearing on the 16th.

2 **MR. PETERS:** Your Honor, if I may, so we should plan  
3 to be there, those of us who are going to be in attendance, at  
4 9 o'clock then?

5 **THE COURT:** Well, we're scheduled for 9:30? Right,  
6 Angie?

7 **THE CLERK:** Yes, we are.

8 **THE COURT:** You should be there before that to set up.  
9 At the very latest 8:45, I'd say, because we want to make sure  
10 it all works. Because there are obviously going to be people  
11 interested, and we want to make sure that they can tune in and  
12 they can hear you and we can hear each other.

13 **THE CLERK:** Your Honor, I believe there is a limit of  
14 ten people.

15 **THE COURT:** Yeah. That's right. That's why we need  
16 to set this up, so that those who want to participate by Zoom  
17 can watch and listen in, because there will be, I'm sure, a  
18 number of people who will want to do that.

19 We also have to work out who will constitute the ten  
20 people. We started talking about that last time. And who  
21 Mr. Lischewski wants, I think, under the protocol, up to two  
22 family members or friends can attend.

23 We're not going to be able to fit all the attorneys here  
24 because we're already up to 11 or 10 or something.

25 And so Probation will appear by remote. Right, Ms. Grier?

1           **THE CLERK:** Correct.

2           **MS. GRIER:** That's correct, Your Honor. I will appear  
3 remotely.

4           **THE COURT:** And the court reporter will appear  
5 remotely, so you don't have to worry about those two slots  
6 being taken up.

7           But, really, beyond Angie and me, there are eight  
8 positions that can be in the courtroom. I'd like you all to  
9 talk about that and see -- you know, and some of those,  
10 obviously, should be for Mr. Lischewski and his family.

11           And so -- but I'd like you to see if you can work that  
12 out. It may mean that some of you are going to have to  
13 participate -- some of the attorneys may have to participate by  
14 videoconferencing.

15           So it is a hybrid situation where we have up to ten people  
16 live in the courtroom, others will appear by Zoom. And I guess  
17 we'll also use the webinar function so that some can still  
18 appear remotely. And if you want to make comments, you can do  
19 so. Others will be [audio disruption] hand is raised and  
20 therefore recognized.

21           **MS. WULFF:** Thank you, Your Honor. [Audio  
22 disruption.]

23           **THE COURT:** Can you hear us? It might be your...  
24 Okay. Go ahead, Ms. Wulff.

25           **MS. WULFF:** We'll confer with Ms. Meuleman and

1 Mr. Peters about how we'll get to ten, Your Honor.

2 **THE COURT:** Yeah.

3 **MS. WULFF:** We'll do that, and that is something we'll  
4 obviously do well before 8:45 on Tuesday --

5 **THE COURT:** Yes.

6 **MS. WULFF:** -- June.

7 **THE COURT:** Okay.

8 **MR. PETERS:** And if there are going to be so-called  
9 victims participating, can we find out who those people are  
10 going to be by a date certain?

11 And then, also, we're going to need to discuss, because  
12 they're someone -- I mean, are they going to participate by  
13 Zoom or are they going to be part of the ten?

14 **THE COURT:** Well, so that's the question. Yeah.

15 **MS. WULFF:** Sorry, Your Honor. The Government did  
16 reach out to victims' counsel. We have obligations under the  
17 CVRA to notify them of things. And the Court's approved our  
18 procedure where we post dates on the website.

19 So we've reached out to them. They are conferring amongst  
20 themselves to figure out -- I believe, and I don't want to  
21 speak out of turn, but I believe they're going to be content  
22 appearing telephonically or videographically --

23 **THE COURT:** Okay.

24 **MS. WULFF:** -- rather than in person. But they are  
25 working that out to see if they need one of the ten spots in

1 the courtroom.

2 So I can ask them perhaps to tell us by -- what? --  
3 today's June 3rd. We have -- maybe I can ask them -- what's  
4 today? Today is Wednesday. Maybe I can ask them to tell us by  
5 Monday whether they want to be in the courtroom or whether  
6 they'll be satisfied with a video appearance.

7 **THE COURT:** All right.

8 **MS. WULFF:** Would that appease you, Mr. Peters?

9 **MR. PETERS:** I'm not asking to be appeased. I'd just  
10 like to know who's going to be speaking as a so-called victim  
11 at sentencing. And I'd like to know that sufficiently in  
12 advance of the sentencing, but Monday would be good.

13 And then I also think once we know who's going to be  
14 speaking, then we need to figure out whether they're going to  
15 be part of the ten or whether people are going to be shuffling  
16 in and out or whether -- I think it's preferable, really, for  
17 the lawyers and Mr. Lischewski and his family and the Court and  
18 the court staff to be present in the courtroom. And if there's  
19 some lawyer or executive from one of these large retailers, I  
20 would think that they could -- that their right to address the  
21 Court could be vindicated on Zoom.

22 And, hopefully, they'd prefer that, but if not, then we're  
23 going to have to negotiate and figure that out, too, which is  
24 why it would be good to know by Monday. I think that's a good  
25 suggestion. But I don't want to know just whether they just

1 want to appear in person or by Zoom. I'd like to know who they  
2 are.

3 **MS. WULFF:** I don't know if that's something that the  
4 Government can ask them to do in advance, to commit to whether  
5 or not they want to speak.

6 If they're going to appear by video, victims have a right  
7 to be heard at the hearing and I -- the Government can't, I  
8 don't think, guarantee that we've spoken to every victim and  
9 that only the victims we've spoken with are the victims who  
10 want to speak.

11 I think that in order for it to be a truly public  
12 proceeding, where victims can speak, a victim on Zoom should --  
13 should be allowed to speak. But the Government can look into  
14 that. Frankly --

15 **THE COURT:** Well, you can at least provide Mr. Peters  
16 with a list of who you know are going to be in one way or  
17 another.

18 **MS. WULFF:** Okay.

19 **THE COURT:** It may be there are some last-minute  
20 people, but I think it's fair. And if you get wind of others,  
21 I think you ought to pass that on.

22 **MS. WULFF:** Sure. I will do that.

23 So, Mr. Peters, I think some of them are probably even  
24 listening to me promise that they'll tell me by Monday. But I  
25 will ask them to tell me by Monday close of business, and the

1 Government will get back to you.

2 **THE COURT:** Yeah. What we'll need to know, hopefully  
3 by Monday, is whether somebody wants to appear other than by  
4 Zoom, live, because then we would have to put aside at least  
5 one slot.

6 **MS. WULFF:** And that's what I had asked them to focus  
7 on already, so I'm sure they'll be ready for that answer.

8 **THE COURT:** All right. Anything else that we need  
9 to -- any other logistics we need to talk about?

10 **MR. PETERS:** Not that I'm aware of, Your Honor. Thank  
11 you for --

12 **THE COURT:** So know that you'll have to bring your own  
13 device, headset and headphones, because you'll be listening.  
14 Our sound system in the courtroom will be off, so we won't be  
15 through the speaker system. We're going to be talking to each  
16 other through the audio channel of Zoom.

17 So it'll be like Nuremberg, almost, or something. It's  
18 going to be a little strange in that sense. But,  
19 unfortunately, we can't marry the two systems together, at  
20 least at this point.

21 **MS. WULFF:** And we use the WiFi that's just available  
22 in the courtroom, Your Honor?

23 **THE COURT:** Yeah. Hopefully, that'll support -- you  
24 know, it should. It should.

25 **MS. WULFF:** Okay.



