No. 20-10211

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRISTOPHER LISCHEWSKI,
Defendant-Appellant.

On Appeal From the United States District Court for the
Northern District of California, Case No. 3:18-cr-203-EMC
Honorable Edward M. Chen

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

JURISDICTION, TIMELINESS, AND BAIL STATUS

This appeal is from a judgment of conviction for violating the Sherman Act, 15 U.S.C. § 1. The judgment is final. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The court (Edward M. Chen, J.) entered judgment on June 30, 2020. ER104.[1] Appellant filed his notice of appeal that same day. ER111. This Court has jurisdiction under 28 U.S.C. § 1291. Appellant has not sought bail pending appeal. He self-surrendered on August 17, 2020.

ISSUES PRESENTED

1. Does the per se rule in Sherman Act criminal cases violate the Fifth Amendment Due Process Clause and the Sixth Amendment jury trial guarantee by barring evidence on the "unreasonableness" element of the offense and by deciding that element as a matter of law rather than submitting it to the jury?

2. Did the district court err in refusing to instruct the jury, in accordance with *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), that to obtain a conviction under the Sherman Act the government had to prove that appellant intended to unreasonably restrain competition?

3. Did the district court err in instructing the jury that the agreement element of a price-fixing conspiracy can be satisfied by a "mutual understanding"?

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[1] Appellant's Excerpts of Record are cited as "ER." District court filings are cited by docket number and page. Transcripts are cited by date and page. Exhibits are cited as "EX."

4. Did the district court err in instructing the jury that appellant could be convicted for "indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime," an incomplete form of aiding and abetting liability?

5. Did the district court err in giving a *Pinkerton* instruction in a single-count conspiracy case?

6. Did the district court err in instructing the jury that price-fixing agreements have a harmful effect on competition and "lack . . . any redeeming virtue," after barring appellant from presenting evidence that the alleged restraint on trade in this case caused no harm?

7. Did the district court err in admitting an email under the business records exception that purported to paraphrase statements that the author recalled appellant making?

8. Did the district court err in admitting a prejudicial hearsay email that purported to quote appellant, for the ostensible non-hearsay purpose of its effect on the state of mind of the email's recipients, none of whom was a defendant?

9. Does the cumulative prejudice from the instructional and evidentiary errors require reversal?

INTRODUCTION

This is a price-fixing case involving canned tuna. Appellant Lischewski, the former CEO of Bumble Bee, denied participating in the charged conspiracy. The

government called four cooperators and offered a number of documents in its case. Lischewski presented economic data and his own testimony. The jury instructions on the principal contested element of the offense--Lischewski's participation in the alleged agreement--were a central legal battleground in the district court.

Unlike most offense instructions, standard conspiracy instructions emphasize what the government does *not* have to prove and what does *not* constitute a defense.[2] The district court instructed the jury on these usual points. But the court went further. Guided by the ABA's model criminal antitrust instructions,[3] the court told the jury that "[i]t is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results," ER18; that, if a price-fixing agreement was proven, "the fact that the defendant or his coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objective, is no defense," ER21; that "[t]he agreement is the crime, even if it is never carried out," ER21; that, if the agreement was proven, "it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all competition,"

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[2] *E.g.,* Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, Instructions 8.20, 8.23 (2010) ["Ninth Circuit Instructions"].

[3] American Bar Association, Model Jury Instructions in Criminal Antitrust Cases (2009) ["ABA Instructions"].

ER21; that "the conspiracy is unlawful even if it did not extend to all goods sold by the conspirators or did not affect all of their customers," ER21; that "[t]he government does not have to prove that any member of the conspiracy actually took some overt action to further or accomplish the alleged conspiracy or that the defendant actually fixed prices," ER28; that "the mere agreement or understanding, whether formal or informal, to fix prices constitutes the offense, so it is not necessary for the government to prove that the alleged conspiracy was ever actually carried out or that its objective was ever accomplished," ER28; and that "[i]t is not necessary for the government to prove that the defendant knew that an agreement, combination, or conspiracy to fix prices, as charged in the indictment, is a violation of the law," ER31.

None of these instructions should have been given. In the absence of a contrary defense argument, there was no need to tell the jury, again and again, what the government did not have to prove and what did not constitute a defense. The instructions served only to suggest that the government's burden was easily satisfied. But once the district court decided to give the instructions, it was essential to define precisely and unambiguously what the government *did* have to prove. Instead, the court expanded the grounds for conviction in three significant ways. First, it repeatedly told the jury that the government had to prove an agreement "or mutual understanding." ER19, 21, 22, 24, 28. This was serious error. A "mutual

understanding" may amount to an agreement, but it can also mean nothing more than a commonly held view. In the context of this case, the latter meaning had crucial significance; during the period of the alleged conspiracy, fish costs skyrocketed, and it was "mutually understood" by everyone in the industry that prices had to rise accordingly. Such a commonly held view falls short of the "agreement" that forms the heart of conspiracy. An agreement requires an affirmative meeting of the minds; a "mutual understanding" does not.

Second, the district court gave an instruction captioned "individual liability" that amounted to an incomplete aiding and abetting instruction. The instruction told the jury in part that Lischewski could be found guilty if he either "directly participat[ed] in the conspiracy" or "indirectly or directly authoriz[ed], order[ed], or help[ed] a subordinate perpetrate the crime." ER30. This instruction originated with an old Supreme Court case that addresses a different issue: whether corporate officers acting on behalf of the corporation can be held criminally liable under the Sherman Act. Divorced from its original context, the instruction hinted at aiding and abetting, but omitted critical elements this Court has held must be proven to establish accomplice liability.

Third, the district court gave a confusing and superfluous *Pinkerton* instruction. ER29. In *Pinkerton v. United States*, 328 U.S. 640 (1946), the Supreme Court held that a conspirator is liable for reasonably foreseeable crimes committed

by his co-conspirators in furtherance of the conspiracy. *Pinkerton* thus holds a conspirator liable for certain substantive crimes committed by his co-conspirators. It has no application where the only crime charged is the conspiracy itself. The instruction, particularly in conjunction with the erroneous "individual liability" instruction, could only have confused the jury on the core issue: whether Lischewski joined an agreement to fix prices.

In a fourth way as well, the district court's instructions tilted the playing field in the prosecution's favor. The court ruled before trial that the charged price-fixing conspiracy was subject to the per se rule, rather than the rule of reason. The court thus barred Lischewski from presenting evidence of economic benefits and lack of harm that flowed from the alleged restraint on trade, and it instructed the jury that it "need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it." ER18.

If any instruction on the point were needed, that would have sufficed. But the court did not stop there. It told the jury that "Section 1 of the Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are unreasonable restraints of trade. Conspiracies to fix prices are deemed to be unreasonable restraints of trade and therefore illegal, without consideration of the precise harm they have caused or any business justification for their use." ER18.

Thus, after barring Lischewski from presenting evidence that any restraint on trade was not harmful under the circumstances, the district court instructed the jury that the charged agreement in fact *was* harmful and "lack[ed] any redeeming virtue." The prosecution exploited this one-sided instruction in closing, arguing that Lischewski "stole a few cents at a time" from consumers; that price-fixing agreements "disrupt[] our economy and . . . prevent[] markets from operating the way that they're supposed to"; that such agreements "[c]heat[] consumers of the benefits of free competition"; and that when companies "decide they want to get together and stop competing," the "economy and consumers across the country, they all suffer, and that's why price-fixing is a felony crime." ER130-32, 135. Lischewski could not respond to these damaging remarks, which effectively portrayed the jurors as victims, because the district court had barred him from presenting contrary evidence.

Faced with this blizzard of pro-prosecution instructions, Lischewski never had a chance. After a five-week trial, the jury convicted him in a few hours. Because of the erroneous instructions, as well as faulty evidentiary rulings discussed below, his conviction should be reversed.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY.

The grand jury indicted Lischewski on a single count of conspiring to fix the price of canned tuna between November 2010 and December 2013. ER698. The indictment alleged that "[t]he combination and conspiracy engaged in by the defendant and coconspirators was an unreasonable restraint of interstate commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)." ER702. The government maintained that Lischewski, as CEO of Bumble Bee, had conspired with StarKist and Chicken of the Sea ("COSI"), the other major market participants.

Jury selection began on October 25, 2019. On December 3, the jury found Lischewski guilty. ER112-20. On June 16, 2020, the district court sentenced him to 40 months incarceration and a $100,000 fine. ER105, 109. Lischewski timely appealed. ER111. He self-surrendered on August 17, 2020. He has not sought bail pending appeal.

II. RELEVANT FACTS.

A. The Canned Tuna Market.

1. The Market Generally.

The canned tuna market had three principal competitors: Bumble Bee, StarKist, and COSI. StarKist had 35% to 40% percent of the market; Bumble Bee had 30% to 35% of the market; and COSI had 15% to 18% of the market. T.494-

98, 2169.[4] The market had two major product categories: white meat, or albacore, and light meat, or skipjack. T.492-94. White meat was more expensive than light meat. Bumble Bee had the largest percentage of the white meat market; StarKist had the largest percentage of the light meat market; and COSI had a small percentage of both. T.1525-26.[5]

None of the three competitors sold directly to consumers. Instead, they sold to outlets such as Kroger, Safeway, and Walmart. ER248-51, 1366-68; T.494-98. These large customers had considerable leverage in negotiating prices with the tuna companies. ER466-67.

Each tuna company had two sets of prices: list prices and net prices. List prices represented the upper limit of what any customer would pay. In the marketplace, almost all sales--99.97%--occurred below the list price. ER241-42, 597-98, 1339. The companies published their list prices. The companies' list prices generally matched to the penny, both before and during the conspiracy period. ER458-62, 1360-61.

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[4] Most of the remainder of the market was "private label"--canned tuna produced for a particular outlet, such as the Kirkland brand at Costco and the Great Value brand at Walmart. T.2684. Private label was not part of the alleged price-fixing conspiracy.

[5] Another category is "pouch" tuna, which is sold in a pouch. StarKist was the market leader in this category, with 80% of the market. T.1169-70. Pouch tuna was not part of the alleged price-fixing conspiracy.

The net price was the price negotiated with each customer; it almost always represented a discount off the list price. ER597-98. Bumble Bee, StarKist, and COSI issued quarterly "guidance" to their sales forces. The guidance specified the range below the list price in which sales representatives could negotiate net prices with customers. ER501-02, 599-602. Net prices to particular customers were occasionally below the minimum price in the quarterly guidance. ER275-76, 1358-59. The companies distributed their quarterly guidance to sales staff and brokers but did not make it public. ER501-02.

The companies' net prices closely tracked their cost of production. ER242-45, 1337-38. The most significant part of that cost was the cost of fish. ER245-48; EX2724, 2725.[6] In late 2010, the price of albacore and skipjack began to climb steeply. ER463-65. In 2011 and 2012, the price Bumble Bee paid for albacore rose from a low of $2175 per ton to a high of almost $3200. ER246-48, 476-77. The cost of skipjack rose from a low of $1250 per ton to a high of more than $2250. ER246-47. Bumble Bee and StarKist raised their list prices three times during the indictment period to keep pace with the increasing cost of fish, and COSI raised its list prices twice. Net prices increased as well, although they varied widely from customer to customer. ER251-64, 1340, 1346, 1352.

[6] Bumble Bee, StarKist, and COSI paid similar, but not identical, prices for fish. ER245-48.

2. Competition During the Indictment Period.

The tuna market was intensely competitive throughout the indictment period (November 2010 to December 2013). Beginning in late 2010, as the cost of tuna was starting to rise, the companies launched a price war. ER282, 415. Bumble Bee priced low on light meat to capture market share from StarKist. StarKist responded by dropping its prices on white meat, where Bumble Bee was the market leader. ER606-13, 708. In January 2011, Dan Nestojko, a Bumble Bee trade marketing executive, reported that "[w]e are finding both SK and COS bidding our pricing down at nearly every Albacore account in the country to wrestle share and volume." ER741; *see* ER511-12. A February 9, 2011 Bumble Bee board presentation stated: "Our franchise Albacore business continues to experience extreme competitive pressure as StarKist appears to have launched an all out price war to counter our recent share gains in overall tuna." ER751; *see* ER 513-16, 576-79. According to the presentation, StarKist had undertaken a "relentless attack on [Bumble Bee's] Albacore business with low price offers at all key accounts through the first half of 2011." ER760; *see* ER468-73, 513-16. StarKist priced aggressively on skipjack as well. As Scott Cameron--Bumble Bee's Senior Vice President for Sales, who pleaded guilty and testified for the government--commented in a February 9, 2011 email, "Got slaughtered on [light meat] at most all key accounts." ER777.

Materials for a May 23, 2011 Bumble Bee board meeting reported continuing fierce competition. Under the heading "Competitive Aggressiveness," the presentation stated: "Amid record breaking inflation on Albacore, we have witnessed extremely aggressive prices offered to the trade by our competitors, both Star-Kist (SK) and Chicken of the Sea (COS)." ER872. The presentation also reported competition on light meat: "The competitive market on Skipjack has also been exhaustive with market leader StarKist offering below cost pricing, driving share gains, and effectively selling themselves out of stock." ER872. Another slide referred to "aggressive competitive activity nationally by StarKist and on Albacore by Chicken of the Sea. Both are investing heavily"--meaning cutting prices to gain market share--"as volume share gains are substantially higher than value gains." ER874; *see* ER518-19. The presentation summed up: "We are facing an extremely challenging business environment in the U.S. with hyper-inflationary fish commodity costs and reckless competitive activity. The primary impact has been on tuna." ER872; *see* ER175-80, 518-19, 579-86.

On June 20, 2011, more than six months into the alleged conspiracy, Cameron reported to Lischewski: "This competitive shit that is coming out over the last few weeks is just unreal . . . . I knew June would be 'milestone' month in terms of seeing where the pricing will shake out and where competition will land, but it seems more and more like we are on an island on a number of segments," including white meat

and light meat. ER782. According to Cameron's trial testimony, StarKist and COSI were "competing at the depths of pricing." ER520; *see* ER586-88. In a June 23, 2011 email, Lischewski observed that StarKist "has been dumping prices at outrageous levels during a period of unprecedented fish price increases. Total stupidity rei[g]ns." ER182.

On July 28, 2011, Cameron wrote to Lischewski and others: "I know we have taken the high road, and I've supported this strategy for all the right reasons, however NONE of our competitors seem to have any grasp of the reality of costs. They simply seem hell-bent to inflict as much damage on our brand as possible." After describing Bumble Bee's declining market share, he declared: "With all of the recent gains by our competition over the last 3 weeks, its apparent to me that we now have a formidable threat to our franchise." ER791; *see* ER183-90, 521-29.[7] Lischewski forwarded Cameron's email to the Bumble Bee board. ER793. He noted that "[w]hile it appears SK is backing off a bit, COSI is now attacking aggressively. At the prices we are seeing, they are losing money and the attacks are not rational[]." ER793. He concluded, "It's a real battle out there and I have never seen our industry act this irrationally." ER794; *see* ER190-93, 592-96.

[7] EX199 and several other emails cited in this section were admitted solely for their effect on Lischewski's state of mind. ER521.

An August 15, 2011 board presentation prepared by Cameron and Ken Worsham (Bumble Bee's senior vice president for trade marketing, the pricing arm of the company, and, like Cameron, a government cooperator) reported that Bumble Bee "continue[s] to face an extremely challenging environment with COSI having replaced StarKist as the primary aggressor over the last quarter." ER1024. According to the presentation, "Competitive aggression is unabating. . . . StarKist dominated the first quarter [of 2011] with extremely aggressive pricing activity that continued through late May at which point they executed a list price increase (in line with Bumble Bee's increase)." COSI, on the other hand, "will not implement a price increase until 9/1 and they have been very aggressive in the albacore segment." ER1024.

A chart showed StarKist and COSI white meat prices well below Bumble Bee's. ER1030. As Lischewski testified, "There's nothing that better epitomizes the price war than this chart." ER194. StarKist had "completely irrational pricing that we were seeing from a brand that is normally priced very similar to Bumble Bee." ER194. Lischewski concluded from the chart, "There's no price-fixing. There was no price-fixing anywhere in our business that was evident by data." ER195.

A board presentation for November 15, 2011, to which Worsham and Cameron contributed, described the competitive market. ER1118; *see* ER196-99, 328-37. One chart, for the twelve weeks ending July 16, observed "a volumetric and

dollar sales slowdown in nearly all categories as Bumble Bee and StarKist are losing share to lower-priced Chicken of the Sea and Private Label." ER1143. Another chart noted that "both StarKist, Chicken of the Sea and Private Label were aggressively promoting in [the retail] channel even as costs were ratcheting rapidly higher." ER1144. A third chart declared that "[t]he higher costs--coupled with irrational competitive activity--have wreaked havoc on our U.S. shares. Following attacks by StarKist in the first half [of 2011], COSI has been the key aggressor in Q3 with volume gains driven by low prices." ER1145. Another chart stated: "Bumble Bee's share losses in albacore reflect our pricing which is in line with higher fish costs. Conversely, both StarKist and COSI average pricing remains 15% and 22%, respectively, below us." ER1146. The chart showed that between November 2010, when the price-fixing conspiracy allegedly began, and November 2011 when the board meeting occurred, the difference between Bumble Bee's prices and its competitors' prices had increased. ER336.

On January 9, 2012--more than a year into the alleged conspiracy--Worsham wrote to Lischewski and Cameron that "[c]ompetition remains less than constrained." ER1130. Worsham reported that StarKist was "driving [light meat] prices down nationally." On white meat, StarKist was "still way to[o] low" on net prices. Meanwhile, COSI is "reducing branded selling prices to regain share." He

concluded that "Q1 [2012] is shaping up to be another challenging quarter." ER1130; *see* ER404-09.

A Bumble Bee board presentation for a May 7, 2012 meeting, to which Worsham contributed, struck a similar tone. The "Tuna Products Overview" noted that "costs [were] increasing faster than pricing" and Bumble Bee had "shifted our focus to covering record high fish costs and repairing gross margins while dealing with severe category restriction." ER1241. Rising fish costs had led to higher prices, but the higher prices meant consumers bought less tuna--hence the "severe category restriction." ER338-39. The presentation observed that "[c]ompetition is showing signs of pricing rationality, but both [StarKist and COSI] are still lagging us in the market, most visibly on Albacore." ER1241. By "lagging us in the market," Worsham meant StarKist and COSI pricing was still well below Bumble Bee's and not increasing as quickly. ER341.

The presentation noted that Bumble Bee had announced a list price increase on albacore effective July 1, 2012 and planned to announce an August 27, 2012 list price increase on light meat. It added: "Competitive intel indicates a list price increase by StarKist on both Lightmeat and Albacore Tuna items effective 7/28," but "Chicken of the Sea has yet to announce any list pricing action to follow Bumble Bee or StarKist moves." ER1241. In the end, COSI did not announce a list price increase in the second half of 2012.

Following the July and August 2012 Bumble Bee and StarKist list price increases, the price war eased, but competition remained vigorous. ER381-89. On November 30, 2012, for example, emails among Worsham, Cameron, and Lischewski noted that StarKist and COSI were offering Safeway promotional pricing in the first quarter of 2013 roughly fifteen percent below Bumble Bee's price. ER1327; *see* ER202-06, 348-49. Cameron observed, "So much for competition acting more responsibly in Q1 [2013] at the peak of higher fish costs." ER1327. Lischewski noted that the cost of albacore had dropped to $2700 per ton, and he asked Worsham and Cameron, "[S]hould we be more aggressive [i.e., charge lower prices] as well?" ER1327. In January 2013--more than two years into the alleged price-fixing conspiracy--Cameron worried that "competition may be moving ahead of us," meaning offering customers more competitive pricing. ER1327.

As late as October 15, 2013--almost three years into the alleged conspiracy and just a few months before it ended--Cameron reported that COSI had undertaken "heightened/deep spending"--meaning cutting its prices--in an effort to increase its market share. Lischewski noted "how deep [COSI is] discounting" in an effort to gain market share. ER808; *see* ER538-41. And in a series of October 23, 2013 emails, Worsham, Cameron, Lischewski, and others discussed an email from a Kroger purchasing manager declaring that Bumble Bee's light meat price for Ash Wednesday 2014 was "still not good enough to get an ad," and its white meat price

was "not even in the ballpark." ER1332. A Bumble Bee sales executive reported that, according to Kroger, Bumble Bee was "the highest offer right now on Solid White. All other manufacturers are beating us." ER1332. Cameron noted that if competitors were presenting these prices to Kroger--a major customer--then "we have a competitive threat to deal with in both COS and [StarKist]." ER1331. Cameron described the competition from StarKist and COSI as "HYPER aggressive." ER1331.

3. COSI's Predatory Pricing.

COSI's low prices throughout the indictment period resulted from a feature of the retail tuna market. When a company's market share fell below fifteen percent, it risked removal from store shelves. ER290-93; T.2170-71. By 2011, COSI's market share had fallen close to that level. It thus began purchasing market share; that is, it priced its product below cost. ER290-93, 303-04, 318-23, 351-55, 1369. COSI had allocated $11 million to purchase market share by setting prices below cost. ER353-55. COSI lost $2.9 million in 2011 and $1.9 million in 2012, at least in part from below-cost pricing. ER316-17.

COSI's below-cost sales likely constituted illegal predatory pricing under California and federal law.[8] Lischewski sent the COSI CEO, Shue Wing Chan, a

[8] *See* Cal. Bus. & Prof. Code § 17043; *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318-20 (2007).

series of emails complaining about this practice. ER832, 834, 836, 838, 841, 843, 845, 847; *see* ER214-19. In one email sent June 6, 2012, for example, Lischewski wrote: "Shu Wing, I don't mean to keep peppering you with these but how can this be possible with fish cost above $2100/ton? This places the credibility of our entire industry in question." ER838. The email attached an ad from Vons, showing COSI light meat at 49 cents per can--well below COSI's cost of production. ER839-40; *see* ER305-11.

B. The Government's Case.

The government relied principally on four cooperators and a handful of emails.

1. Scott Cameron.

Scott Cameron--the same Cameron who reported fierce competition throughout the indictment period--had a change of heart when the government's investigation began. He pleaded guilty to price-fixing and became a cooperator. Cameron testified that he had conspired to fix prices with Chuck Handford of StarKist and Hubert Tucker of COSI. T.486-87. The purpose of the conspiracy, Cameron testified, was "[t]o fix and raise prices, to form agreements on when we would move, how high we would move." ER603-04.[9]

[9] Neither Handford nor Tucker was charged or testified. Nor did any other member of the alleged conspiracy testify, apart from the four cooperators. In interviews with the FBI, admitted under Fed. R. Evid. 806 to impeach out-of-court

Cameron's claim to have participated in a price-fixing agreement conflicted with the emails and board presentations described above, which portrayed intense competition. Confronted with these documents, Cameron conceded that "[w]e always competed with the brands"--i.e., StarKist and COSI. ER540.

Cameron testified that Lischewski had directed him to engage in the price-fixing and that he kept Lischewski informed of his agreements with Handford and Tucker. *E.g.*, ER544-46, 605-06. But he was vague about how this occurred. For example, although he testified that Lischewski directed him to enter into a truce with Handford in late 2010, he could not recall whether the directive was face-to-face or on the phone; he could not recall what Lischewski said to him or what he said to Lischewski; he could not recall the specifics of the conversation where he made the truce proposal to Handford; and he could not recall the specifics of the conversation in which he claimed to have reported back to Lischewski. ER554-57. Nor could he reconcile this purported "truce" with the price war that erupted at about the same time.

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statements attributed to Handford, he acknowledged obtaining information from competitors about price changes and discussing prices with them but denied agreeing to fix prices. T.2612-16.

Cameron acknowledged instances where he removed Lischewski from emails before discussing his contacts with StarKist or other sensitive information. ER530-37, 558-64, 781, 787, 788, 796, 798, 799, 801, 806.

2. Ken Worsham.

Worsham was Bumble Bee's senior vice-president for trade marketing during the indictment period. T.1499. He reported to Lischewski. T.1500. He played a key role in formulating list price increases and in preparing quarterly net pricing guidance. T.1505-14, 1924-25. Like Cameron, he reported fierce competition throughout the indictment period--and like Cameron, he changed his tune when the investigation began. Worsham pleaded guilty to conspiring with StarKist and COSI to fix prices and entered into a cooperation agreement. T.1527-28.

Worsham testified that he conspired with Handford at StarKist on 2011 net pricing guidance. T.1576-88. He claimed that after Handford left StarKist in September 2011, Lischewski "challenged me to come up with a contact at StarKist that I could obtain continued competitive information and pricing information from and with." T.1635-38.

Worsham did not act on this "challenge." Instead, on November 1, 2011, he was contacted by Steve Hodge, his counterpart at StarKist. T.1635-38. Worsham testified that he coordinated two list price increases with Hodge in 2012 (one in January and the other in July and August) and net pricing guidance in 2012 and 2013.

ER372-77; T.1664-67, 1680-81, 1685-90. The agreements stopped in late 2013 when StarKist terminated Hodge. ER375. Worsham testified that he also conspired with Mike White of COSI. T.1604-09, 1659-64, 1671-74, 2115-17.

Worsham claimed to have told Lischewski about his agreements with Bumble Bee's competitors. ER356-63, 368-77, 412-14, 424-40. But, like Cameron, he struggled to identify specific conversations. ER424-26, 441-43. Worsham sometimes removed Lischewski from emails that involved competitive information. ER378-81, 394-403, 801, 806. And he never forwarded his emails with Hodge to Lischewski. ER390-91.

3. Stephen Hodge.

Hodge was StarKist's senior vice-president for sales from 2010 until his termination in 2013. T.1163-64. He pleaded guilty to conspiring with Bumble Bee and COSI to fix prices from the end of 2011 until he left StarKist. Hodge acknowledged that, during the indictment period, he had no contact with Lischewski of any kind. ER455-57.

4. Shue Wing Chan.

Chan was CEO of COSI during the indictment period. T.2166. He left day-to-day responsibilities in mid-2013. T.2267. Chan testified under amnesty the government had given COSI and its employees in return for self-reporting COSI's price-fixing violation. T.2185-87.

Chan testified that from late 2011 through 2013, he received "jab" emails from Lischewski. In these emails, Lischewski commented on ads for COSI tuna, where COSI's price was below cost. A typical email attached an ad for COSI tuna with a comment such as "Wow!" or "Crazy." ER832, 834, 836, 838, 841, 843, 845, 847. According to Chan, at a breakfast on March 19, 2012, he assured Lischewski "that it was not my intention to run aggressive promotion because it was a loss, and I didn't want to do it except being forced." Chan testified that Lischewski "expressed his satisfaction and appreciation to my explanation." ER288. After the breakfast, Chan "fe[lt] we're on the same page," meaning that "we understand not to promote aggressively." ER289.

On June 20, 2013, Lischewski emailed Chan to comment sarcastically on a COSI press release announcing that it planned to "beat the two bigger seafood brands to gain the No. 1 position in the competitive U.S. market." ER845. Chan told Lischewski when they met later at a conference "that this is just a public relation release from my company. This is not my strategy." ER296. According to Chan, Lischewski "expressed his satisfaction with my explanation." ER296. Following another email from Lischewski, Chan testified, "my take-away is there's an understanding that we are not going to promote aggressively." ER299.

Chan formed this "understanding" even though, as he conceded, he never told Lischewski that he thought they had an understanding, Lischewski never told him

they had an understanding, and Lischewski never said that Bumble Bee would not promote aggressively. ER299-300, 302. Nor did Chan tell anyone at COSI about the understanding. ER324. The understanding, Chan acknowledged, was "inside [his] mind." ER303. COSI ran numerous promotions after Chan reached this alleged understanding with Lischewski, because "that's the nature of the market, that we need to attract--to have better price to attract consumer to come and buy our products." ER301.

5. Documents.

The government emphasized several emails that Lischewski wrote or that attributed statements to him.

First, the government contended that the "jab" emails Lischewski sent Chan complaining about below-cost pricing showed a price-fixing agreement.

Second, the government relied on an email Lischewski wrote to Douglas Hines, another Bumble Bee executive, on September 21, 2010, more than a month before the conspiracy allegedly began. The email read:

> Peace proposal:
>
> Retail 45% SW and 25% Pouch
>
> All Channel 41% SW and 20% Pouch
>
> All other open game
>
> No need for #3 brand

Call me on my cell to discuss

ER707. There was no evidence Lischewski forwarded this email to any competitor or asked Hines or anyone else to forward it. Lischewski denied that the email involved price-fixing. ER157-60. The government did not call Hines to provide his understanding of Lischewski's message.

Third, the government offered an email by Renato Curto, CEO of Tri Marine Group, which bought tuna from fishing vessels and sent it to processing plants. T.1096-97. Curto had drinks with Lischewski on August 7, 2012. He wrote an email the next night to his management team purporting to paraphrase Lischewski's comments. ER848 (EX757). At trial, Curto had no memory of the August 7 conversation, ER478-79, 481-83, 486, but the district court admitted his email as a business record, ER82-83. The key portion of the email stated: "Star Kist. He [Lischewski] says that they have no clue. But he now loves them. His people and SK people are talking constantly and have a good communication about how to go to market intelligently." ER848 (EX757). Curto conceded that these were his words, not Lischewski's. ER483-84, 488-90, 498-99. Lischewski denied making the comments Curto attributed to him. ER211-14, 221-25.

Fourth, the government presented a May 3, 2011 email from StarKist executive Joe Tuza to two other StarKist executives purporting to recount a comment by Lischewski. ER831 (EX450). The email concerned a bid StarKist, Bumble Bee,

and COSI had made for Kroger's business. In the first round of bidding, StarKist and at least one other company had offered the same price. ER446-54. But the contract had not gone to StarKist, and its executives tried to figure out why. ER810, 829, 830. One reported hearing from Kroger that Bumble Bee had gone back with a new, lower bid. ER829. Tuza quoted Lischewski as saying that "[i]f BB went back to Kroger someone 'is going to be fired.' says they are lying." ER831 (EX450).

The government did not call Tuza as a witness, and the district court declined to admit his email as a business record, a statement in furtherance of a conspiracy, or to show Lischewski's state of mind. But the court admitted the Tuza email "to show the state of mind of the parties to the e-mail who are shown on this [Handford, Hodge, and Tuza], but it is not admitted to show the defendant's state of mind or the fact that he made any particular statement." ER49-50; *see* ER56. Despite this limitation, the government used EX450 for its truth throughout the trial.

C. The Defense Case.

1. Dr. James Levinsohn.

Dr. Levinsohn analyzed data from Bumble Bee, StarKist, and COSI, and from store scanners and other point of sale data. T.2482, 2486-88. His analysis established three principal points.

First, Dr. Levinsohn showed that Bumble Bee's prices closely correlated with its cost of production, the main component of which was fish cost. This was true

from 2002 through late 2010, when the conspiracy allegedly began; it was true during the indictment period (November 2010 to December 2013); and it remained true after the alleged conspiracy had ended. ER242-45, 1337-38. Dr. Levinsohn's analysis supported the inference that price increases during the indictment period resulted from fish costs and not from a price-fixing agreement.

Second, Dr. Levinsohn showed that before, during, and after the indictment period, the retail prices charged for Bumble Bee's canned tuna differed significantly from the prices charged for its competitors' products. ER265-70. COSI was generally priced well below Bumble Bee, and StarKist tended to be priced lower as well, although not to the same extent as COSI. ER1362-65. The differing retail prices among the three companies suggest competition rather than collusion.

Third, Dr. Levinsohn established that Bumble Bee's major customers paid substantially different prices for tuna. ER251-55, 259-60, 1340-41, 1346-47, 1352-53. Pricing data for StarKist and COSI showed analogous inter-customer and intra-customer price variations. ER263-64; *see* ER 1342-43, 1348-49, 1354-55 (StarKist); ER1344-45, 1350-51, 1356-57 (COSI). These price variations among customers for the three major tuna companies support the inference that net prices were driven by individual pricing negotiations, rather than by an overall price-fixing agreement.

2. Christopher Lischewski.

Lischewski denied participating in any price-fixing agreement, directing Worsham or Cameron to do so, or knowing that they were coordinating with Bumble Bee's competitors. ER171, 220, 278-79. He described the ferocious competition in the tuna industry during the indictment period--a combination of rapidly increasing fish costs, aggressive efforts by StarKist and COSI to cut into Bumble Bee's albacore market share, and counterattacks by Bumble Bee on light meat and pouch. *E.g.*, ER168-70, 200-01, 280-84. He testified, consistent with the documents and other evidence outlined above, "We always competed aggressively." ER172.

III. RULINGS PRESENTED FOR REVIEW.

Lischewski presents the following rulings for review:

1. The district court's rulings that this case is subject to the per se rule, rather than the rule of reason. The court's rulings on this issue took three forms. First, it excluded evidence that would have supported the reasonableness of the alleged restraint on trade. ER87-88, 95-103. Second, it instructed the jury on the per se rule. ER18. Third, it rejected Lischewski's proposed rule of reason instructions.

The defense preserved these issues by objecting to application of the per se rule and urging use of the rule of reason instead, ER619, 638, 642; Doc.250 at 6-8; opposing the government's efforts to exclude evidence of reasonableness, Doc.266;

proffering evidence of reasonableness that it sought to present, ER565; objecting to the inclusion of the per se instruction, ER619, 652; Doc.407-2 at 5; and proposing rule of reason instructions, ER619, 642-50, 671-79.

2. The district court's instruction that the intent required for conviction was "the intent to advance the objective of the conspiracy--here, price fixing," and its refusal to give Lischewski's proposed instruction requiring the government to prove that he intended to unreasonably restrain competition. ER29, 96.

The defense preserved this issue by proposing an instruction requiring the government to prove that he intended to unreasonably restrain competition, ER642, 671, 680, and by objecting to an intent instruction limited to an intent to fix prices, ER619.

3. The district court's instruction that the agreement element of the conspiracy charge could be satisfied by an agreement "or mutual understanding." ER19, 21, 22, 24, 28. The defense preserved this issue by proposing this Court's model instruction 8.20, which requires proof of an agreement and omits the "mutual understanding" alternative, ER639-41; Doc.256 at 7, and objecting to the district court's failure to give Lischewski's proposed instructions, ER123-24, 165.

4. The district court's instruction on "individual liability." ER30. The defense preserved this issue by objecting to the "individual liability" instruction. ER655.

5. The district court's *Pinkerton* instruction. ER29. The defense preserved this issue by objecting to the instruction. Doc.319 at 24; Doc.407-2 at 12.

6. The district court's decision to instruct on the per se rule and its inclusion of language in that instruction about the harm caused by price-fixing agreements. ER18. The defense objected to any instruction on the per se rule. ER652; Doc.407-2 at 5.

7. The district court's admission of the Curto email (EX757, ER838) as a business record. ER82-83; *see* ER89-90. The defense preserved this issue through hearsay objections to EX757. ER84, 86, 504-05; Doc.299.

8. The district court's admission of the Tuza email (EX450, ER831) purporting to quote Lischewski, ER48-50, 56, and its refusal to strike the exhibit when the government persisted in using it improperly, ER51-53. The defense preserved this issue through hearsay objections, ER48-50, 507-08, and by a motion to strike, ER51-53.

SUMMARY OF ARGUMENT

1. The Sherman Act prohibits only "unreasonable" restraints of trade. Unreasonableness is an element of the offense. The district court ruled that the case was subject to the per se rule, under which certain restraints, including price-fixing, are conclusively presumed to be unreasonable. The court thus barred Lischewski from presenting evidence that the alleged restraint was reasonable; it refused his "rule of reason" jury instructions; and it instructed the jury on the per se rule. By precluding Lischewski from presenting evidence of reasonableness and deciding the "unreasonable" element as a matter of law, the district court violated Lischewski's Fifth Amendment right to due process and his Sixth Amendment right to have a jury determine each element of the offense.

The district court's per se ruling led to a second, related error. The court refused to instruct the jury that the government had to prove that Lischewski intended to unreasonably restrain competition. Instead, the court required proof only of an intent to fix prices. The court's mens rea instruction did not accord with *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). *Gypsum* requires that the government prove either an effect on competition coupled with knowledge that such an effect is probable or that the defendant acted with the intent to unreasonably restrain competition. *See United States v. Krasn*, 614 F.2d 1229, 1236-37 & n.8 (9th Cir. 1980).

We recognize that the Court has ruled against our position on both issues. We raise them here to preserve them for further review.

2. The district court erred in several respects in instructing the jury on the agreement element of the charged conspiracy. It permitted the jury to convict if it found either an agreement or a "mutual understanding." It gave an instruction on "individual liability" that permitted conviction even if Lischewski did not "directly" participate in the conspiracy, as long as he "indirectly or directly authoriz[ed], order[ed], or help[ed] a subordinate" to do so--in effect, an aiding and abetting instruction that omitted key elements of accomplice liability. And it gave a confusing *Pinkerton* instruction, which had no place in a single-count conspiracy case. These erroneous instructions reduced the prosecution's burden of proof, misled the jury, and damaged Lischewski's defense.

3. After barring Lischewski from presenting evidence that the alleged restraint on trade caused no harm, the court gave an instruction on the per se rule which told the jury that price-fixing conspiracies have a "harmful effect on competition" and "lack . . . any redeeming virtue." The government exploited the court's evidentiary ruling and its instruction in closing; it accused Lischewski of "st[ealing] a few cents at a time" from consumers--a category that included the jurors--and it decried the harm that the alleged conspiracy caused consumers and the economy.

4. The district court erroneously admitted two hearsay emails that purported to recount statements Lischewski had made. Lischewski could not effectively cross-examine either declarant; the government did not call one (Joe Tuza) as a witness, and the other (Renato Curto) had no independent recollection of his conversation with Lischewski, which had occurred more than nine years previously. The errors in admitting the emails prejudiced Lischewski.

5. Even if the Court concludes that the instructional and evidentiary errors outlined above are individually harmless, it should find that in combination, and in the context of a trial where Lischewski's participation in the alleged price-fixing agreement was the principal battleground, the errors require a new trial.

ARGUMENT

I. THE PER SE RULE, WHICH CONCLUSIVELY PRESUMES THAT PRICE-FIXING AGREEMENTS ARE UNREASONABLE, VIOLATES THE FIFTH AND SIXTH AMENDMENTS.

The Sherman Act, 15 U.S.C. § 1, prohibits only "unreasonable" restraints on trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The indictment acknowledges this element of the Sherman Act offense; it alleges that the charged price-fixing conspiracy was "an unreasonable restraint of interstate commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)." ER702.

The district court held before trial that the alleged price-fixing conspiracy constituted an unreasonable restraint on trade. ER87-88, 95-103. The court made

this ruling based on the "per se" doctrine, under which there is "a conclusive presumption that the restraint is unreasonable." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982). In accordance with its per se ruling, the district court excluded evidence that would have supported the reasonableness of the alleged restraint, ER87-88, 95-103; it instructed the jury on the per se rule, ER18; and it rejected Lischewski's proposed rule of reason instructions, ER619, 642-50, 671-79.

These rulings took the "unreasonable" element from the jury, prohibited Lischewski from introducing evidence addressing that element or otherwise contesting it, and decided as a matter of law that the alleged conspiracy was an unreasonable restraint. The rulings violated Lischewski's Fifth Amendment right to due process of law and his Sixth Amendment right to a jury determination on every element of the offense. *United States v. Gaudin*, 515 U.S. 506 (1995); *Francis v. Franklin*, 471 U.S. 307, 317 (1985).

The district court's invocation of the per se rule produced a second, related error: the court rejected Lischewski's proposed instruction requiring the government to prove that he intended to unreasonably restrain competition, ER642, 671, 680, and it instructed the jury instead that the intent required for conviction was "the intent to advance the objective of the conspiracy--here, price fixing," ER29. Lischewski's

instruction, based on *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), should have been given.

We recognize that this Court is bound by its precedent absolving the per se rule of constitutional infirmity, *see United States v. Sanchez*, 760 Fed. Appx. 533, 535 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 909 (2020); *United States v. Manufacturers' Association*, 462 F.2d 49, 51-52 (9th Cir. 1972), and holding that the *Gypsum* intent standard does not apply in per se cases, *see, e.g., United States v. Brown*, 936 F.2d 1042, 1045-46 (9th Cir. 1991); *but cf. United States v. Krasn*, 614 F.2d 1229, 1236-37 & n.8 (9th Cir. 1980) (in price-fixing case, referring with approval to intent instruction based on *Gypsum*). We raise these issues to preserve them for further review and to highlight the significance of the agreement element of the offense--the only obstacle to conviction once the per se rule was invoked.

II. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY ON THE AGREEMENT ELEMENT.

The district court erred in instructing the jury on the agreement element of conspiracy. It permitted the jury to convict if it found either an agreement or a "mutual understanding"--a phrase that is not found in this Circuit's model instructions. It gave an instruction on "individual liability" that permitted conviction even if Lischewski did not "directly" participate in the conspiracy, as long as he "indirectly or directly authoriz[ed], order[ed], or help[ed] a subordinate" to do so. It

gave a superfluous and confusing *Pinkerton* instruction. And after barring Lischewski from presenting evidence that the alleged agreement caused no harm, the court gave an instruction on the per se rule which told the jury that price-fixing conspiracies have a "harmful effect on competition" and "lack . . . any redeeming virtue"--an instruction the prosecution exploited in closing.

A. Standard of Review.

This Court reviews the "language and formulation" of jury instructions for abuse of discretion. When instructions are challenged as "'misstatements of law,'" the Court reviews them de novo. *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir.) (quoting *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014)), *cert. denied*, 139 S. Ct. 113 (2018). The first three instructions addressed below--the "mutual understanding" instruction, the "individual liability" instruction, and the *Pinkerton* instruction--are misstatements of law subject to de novo review. The fourth instruction (on the per se rule) is reviewed for abuse of discretion.

B. The District Court Erred in Instructing the Jury That a "Mutual Understanding" Satisfied the Agreement Element.

The "essence" of conspiracy is "an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *see, e.g., United States v. Shabani*, 513 U.S. 10, 16 (1994) ("The prohibition against criminal conspiracy . . . does not punish mere thought; the criminal agreement itself is the *actus reus*.");

United States v. Iriarte-Ortega, 127 F.3d 1200, 1200 (9th Cir. 1997) (agreement is the "essence" and "actus reus" of conspiracy) (quotation and ellipsis omitted). In a case such as this, with no overt act requirement, the agreement is for practical purposes the *only* element of the offense. As the government put the point in its trial brief, "The conspiratorial agreement itself constitutes the complete criminal offense." ER686.

The decisive significance of the agreement element required precise and unambiguous jury instructions. Precision was particularly important because the district court instructed the jury at length on what the government did *not* have to prove. But rather than instruct the jury plainly that the government had to prove an actual agreement to fix prices, the court instead instructed the jury that an agreement "or mutual understanding" would suffice. For example, the court's conspiracy instruction stated in part: "What the evidence must show in order to prove that a conspiracy existed is that the alleged members of the conspiracy in some way came to an agreement or mutual understanding to accomplish a common purpose." ER19. The court's price-fixing conspiracy instruction began: "A conspiracy to fix prices is an agreement or mutual understanding between two or more competitors to fix, control, raise, lower, maintain, or stabilize the prices charged, or to be charged, for goods or services." ER21. And the court's instruction that no overt act had to be proven stated in part: "What the antitrust laws condemn is the agreement or

understanding itself. In other words, the mere agreement or understanding, whether formal or informal, to fix prices constitutes the offense . . . ." ER28; see ER22 ("agreement or understanding"), 24 ("agreement or mutual understanding in restraint of interstate commerce as charged in the indictment").[10]

Taken by itself, the term "mutual understanding" can mean nothing more than a commonly held view--something well short of the agreement necessary for conspiracy. For example, the following exchange occurred on cross-examination of Cameron: "Q. [A]nyone who was an observer, careful observer of the industry would have understand [sic] that prices had to go up because of the increase in costs? A. That's fair." ER547. Similarly, Curto testified about a conversation with StarKist's CEO: "[I]n this world when the price of fish moves $10, everybody knows. It's published. So, yes, he may have said it or I may have said it. We have the same understanding. The market was going up." ER480. Observers of the tuna

[10] The district court drew the "agreement or mutual understanding" phrase from the ABA Instructions. The notes to those instructions state that "mutual understanding" was added "because proof of a formal agreement is not required for a conviction--only proof of a common plan or understanding is sufficient." ABA Instructions at 51. But there was no need to add "mutual understanding" to make the point that "proof of a formal agreement is not required"; the ABA instruction on conspiracy (which the district court adopted) states explicitly that "the evidence need not show that the members of the conspiracy entered into any express, formal, or written agreement." ABA Instructions at 49; *see* ER19.

industry had a "mutual understanding" that prices had to rise because of increasing fish costs--but that does not mean that they had an *agreement* to raise prices.

Similarly, anyone involved in sales or pricing at Bumble Bee and StarKist understood that if Bumble Bee tried to take light meat market share from StarKist by lowering its price, StarKist would retaliate by cutting its prices on white meat to take market share from Bumble Bee, as in fact happened. ER382-89, 802. They further understood that such a price war did not benefit either company amid rising tuna costs and thus that each company should refrain from attacking the other's core product. (Chan's unilateral "understanding" with Lischewski appears to be of this kind.) But these "mutual understandings" did not constitute an agreement to raise or maintain prices; they manifested market knowledge coupled with sound business judgment. As this Circuit's model instruction states, to prove a conspiracy "[i]t is not enough . . . that [the alleged conspirators] simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another." Ninth Circuit Instructions, Instruction 8.20.

To provide another example, everyone in the industry understood that if Bumble Bee or StarKist announced a list price increase and the other company did not follow, the increase would not hold, given the purchasing leverage of their major retail customers. For that reason, list price increases almost always occurred in lockstep--before, during, and after the indictment period. This "mutual

understanding," like the other examples, did not amount to an agreement to raise prices. It was merely a recognition of market reality.

The fundamental difference between an agreement and a "mutual understanding" in the sense these examples illustrate is that an agreement requires an affirmative meeting of the minds; a "mutual understanding" can be nothing more than a commonly held view. The notion that an agreement requires an affirmative act accords with its status as the actus reus of the conspiracy offense; it is the affirmative act of agreeing that prevents conspiracy from punishing "mere thought." *Shabani*, 513 U.S. at 16. The examples highlight the unique prejudice that the "mutual understanding" formulation causes in the antitrust context. A mutual understanding among persons that they will engage in the similar conduct of committing fraud or trafficking in illegal drugs at least requires that all intend to engage in criminal conduct. But a mutual understanding among competitors that they will engage in similar conduct--for example, that they will raise the price of canned tuna as the cost of fish rises--may be entirely permissible under the law.

A central problem with the district court's instruction is its use of the disjunctive "or" between "agreement" and "mutual understanding." The "ordinary use" of the term "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (quotation omitted). As *Loughrin* suggests, the jury would most reasonably have

inferred from the disjunctive "or" that "agreement" and "mutual understanding" had different meanings; if they meant the same thing, "mutual understanding" would be superfluous. In the context of this case, the different meaning the jury likely assigned to "mutual understanding" is the passive, "common view" sense described by the government's witnesses at trial.

The "mutual understanding" instruction reflects a common fallacy in the law of conspiracy. The essence of conspiracy is agreement. But because criminal conspiracies are clandestine, it is often difficult to provide direct evidence of agreement. Just as a defendant's intent must ordinarily be proven by circumstantial evidence of his conduct, the agreement at the heart of a conspiracy must often be proven by evidence of the conspirators' conduct. This idea dates back to the classic case of *Regina v. Murphy*, where Justice Coleridge explained that a factfinder could infer the requisite agreement based on evidence "that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act and the other another part of the same act, so as to complete it." 8 C. & P. 297, 310 (1837).

Some courts have mistakenly taken the notion that agreement can be proven by inferences drawn from conduct to mean that no agreement is needed at all. As Professor LaFave put it, "Such language . . . might be erroneously interpreted as meaning that there need only be a concurrence of wills rather than a concurrence

resulting from agreement." 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(a) (3d ed. & 2019 update). This misunderstanding sometimes "result[s] in neglect of the fundamental fact that there is an agreement to be proved." *Id*. (quotation omitted); *see also* ALI, *Model Penal Code* § 5.03 and commentary (1985) (discussing the fallacy and re-affirming the requirement of an agreement).

It is true, in short, that agreement can often be inferred from concerted action, but it is also true that, to convict, the jury must find agreement. That is the element of the offense--indeed, it is the core element of any conspiracy, including an antitrust conspiracy. The repeated "mutual understanding" instructions here, which suggested that mere shared belief and common conduct are *by themselves* sufficient for conspiracy, confused evidentiary inference with the requirements of substantive law. Those instructions provided an alternative definition of the crime of conspiracy that eliminated the core element of agreement, an error of constitutional dimension.

Griffin v. United States, 502 U.S. 46 (1991), holds that when--as here--a general verdict rests on alternative grounds, one of which has a legal error, the conviction must be vacated if it cannot be determined on which ground the jury rested its verdict. As Justice Scalia explained, when "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Id*. at 59; *see, e.g., United States v. Gonzalez*, 906 F.3d 784, 790 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1568

(2019). Because the verdict here does not show whether the jury relied on the "agreement" definition or the erroneous "mutual understanding" definition, *Griffin* requires reversal.

C. The District Court Erred in Giving the "Individual Liability" Instruction.

The district court committed a second error on the agreement element: over objection, ER655, it gave an instruction on "individual liability" that permitted the jury to convict without finding either that Lischewski participated in the conspiracy or that the elements of accomplice liability were proven.

The individual liability instruction provides:

> A corporate officer, such as a president of a company, is subject to prosecution under Section 1 of the Sherman Act whenever he knowingly participates in effecting the illegal conspiracy by directly participating in the conspiracy and/or indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime. A person is responsible for conduct that he performs or causes to be performed on his behalf.
>
> To find a defendant liable for the acts of a subordinate, you must find beyond a reasonable doubt that the defendant was aware of the existence of the charged conspiracy, that he knew that the subordinate was participating in the conspiracy, and knowingly authorized, ordered, or consented to the participation of a subordinate in that conspiracy for the purpose of furthering the conspiracy to fix prices for canned tuna sold in the United States.
>
> On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers some purpose of the conspiracy, does not thereby become a member of the conspiracy. Moreover, a person is not responsible for the conduct of

> others performed on behalf of a corporation merely because that person is an officer, employee, or other agent of the corporation.

ER30. This instruction sets out two theories of liability: "directly participating in the conspiracy"--i.e., joining the conspiratorial agreement--or "indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime."

The second theory of liability has grave flaws. The most analogous basis for liability is aiding and abetting under 18 U.S.C. § 2(a). This Court has held that aiding and abetting requires proof of the following elements: "(1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense." *United States v. Shorty*, 741 F.3d 961, 970 (9th Cir. 2013) (quotation omitted); *see, e.g., United States v. Thum*, 749 F.3d 1143, 1148-49 (9th Cir. 2014).

The individual liability instruction comes close to satisfying the first element; instead of requiring "specific intent to facilitate the commission of a [conspiracy to fix prices] by another," the instruction requires that the defendant "knowingly authorized, ordered, or consented to the participation of a subordinate in that conspiracy for the purpose of furthering the conspiracy." But the instruction omits the second element ("that the accused had the requisite intent of the underlying

substantive offense") and the fourth element ("that someone committed the underlying substantive offense"). And it does not fully satisfy the third element. That element requires proof that the defendant "assisted or participated in the commission of the underlying substantive offense." The individual liability instruction requires only that the defendant "indirectly . . . authoriz[ed]" or "indirectly . . . help[ed]" a subordinate conspire--or, to use the different language in the second paragraph, that the defendant "knowingly authorized" or "knowingly consented" to a subordinate's participation in the conspiracy. Indirectly authorizing or helping a subordinate participate in a conspiracy, or knowingly authorizing or consenting to a subordinate's participation, does not rise to the level of the defendant himself assisting or participating in the commission of the conspiracy offense.

The individual liability instruction created a form of aiding and abetting liability without satisfying the requirements of 18 U.S.C. § 2(a). The strange origins of the instruction show why it fell short. Addressing an early variant of the individual liability instruction (a variant without the most significant flaws of the instruction here),[11] this Court explained that it came from the Supreme Court's

[11] The instruction in *Brown*--unlike the instruction here--did not distinguish between "directly participating in the conspiracy" and "indirectly or directly authorizing, ordering, or helping a subordinate perpetrate the crime." The *Brown* instruction merely noted that a corporate officer could participate in a conspiracy by his own acts or by directing his subordinates to participate. In both circumstances, however, the corporate officer had to "knowingly participate in the conspiracy" and to become a "member of the conspiracy." *Brown*, 936 F.2d at 1047 n.4. The

decision in *United States v. Wise*, 370 U.S. 405 (1962). *See Brown*, 936 F.2d at 1047-48. But *Wise* presented a different question: whether the Sherman Act "appl[ies] to corporate officers acting in a representative capacity." *Wise*, 370 U.S. at 406. The Supreme Court disposed of this question easily; it held that the phrase "every person" in 15 U.S.C. § 1 includes corporate officers, regardless of the capacity in which they act. *See id*. at 416. The Court was not asked to, and did not, establish a substantive standard for liability based on the acts of another person.

D. The District Court Erred in Giving a *Pinkerton* Instruction.

The individual liability instruction was particularly damaging because the district court coupled it with a superfluous and confusing *Pinkerton* instruction. In *Pinkerton v. United States*, 328 U.S. 640 (1946), the Supreme Court held that a conspirator is liable for reasonably foreseeable crimes committed by his co-conspirators in furtherance of the conspiracy. *See, e.g., Gonzalez*, 906 F.3d at 791-92; Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, Instruction 8.25 (2010).

Pinkerton has no application when--as here--the defendant is charged only with the conspiracy itself and not with any substantive crimes in furtherance of the

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individual liability instruction in this case permitted conviction without requiring that Lischewski become a member of the conspiracy. It thus created a form of aiding and abetting liability.

conspiracy. Nonetheless, the district court instructed the jury, over objection, Doc.319 at 24; Doc.407-2 at 12, that "a person who knowingly joins an existing conspiracy, or participates in part of the conspiracy, with knowledge of the overall conspiracy, is just as responsible for actions of other members of the same conspiracy that were committed while the person was a member of the conspiracy, as long as the actions were committed during the course and in furtherance of the conspiracy and fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement." ER29.

This instruction had no place a single-count conspiracy case. The question was whether Lischewski joined the alleged price-fixing conspiracy in the first place, not whether, having joined the conspiracy, he could be held liable for the acts of his co-conspirators. The Supreme Court has long held that "[a] conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U.S. 607, 613 (1946); *see, e.g., United States v. Neilson*, 471 F.2d 905, 908 (9th Cir. 1973). The *Pinkerton* instruction, particularly in conjunction with the erroneous individual liability instruction, created the confusion *Bollenbach* warned against.

E. The District Court Erred in Instructing the Jury That Price-Fixing Agreements Are Harmful After Barring Appellant From Showing Lack of Harm.

The district court determined that the per se rule applied to this case and barred Lischewski from presenting evidence that any restraint on trade was reasonable and caused no harm. ER87-88, 95-103. Over objection, ER652; Doc.407-2 at 5, it also instructed the jury that, if it found the government had proven a price-fixing agreement, "you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it," ER18.

If anything needed to be said about the per se rule, that was enough. But the court added that "Section 1 of the Sherman Act makes unlawful certain agreements that, *because of their harmful effect on competition and lack of any redeeming virtue*, are unreasonable restraints of trade. Conspiracies to fix prices are deemed to be unreasonable restraints of trade and therefore illegal, without consideration of the precise harm they have caused or any business justification for their use." ER18 (emphasis added).

This was an unfair instruction. Having tied Lischewski's hands by prohibiting him from showing the jury that the alleged restraint on trade caused no harm, the district court handed the prosecution a club by instructing the jury that the alleged

restraint had a "harmful effect on competition" and "lack[ed] . . . any redeeming virtue."

The government swung that club in closing. It argued that Lischewski "stole a few cents at a time" from consumers; that price-fixing agreements "disrupt[] our economy and . . . prevent[] markets from operating the way that they're supposed to"; that such agreements "[c]heat[] consumers of the benefits of free competition"; and that when companies "decide they want to get together and stop competing," the "economy and consumers across the country, they all suffer, and that's why price-fixing is a felony crime." ER130-32, 135. These arguments bore the imprimatur of the court's instruction, and--thanks to the court's rulings excluding contrary evidence--Lischewski could not respond.

These arguments are particularly remarkable because the government argued to the district court, in successfully excluding Dr. Levinsohn's proposed testimony that the alleged conspiracy had no effect on the price of canned tuna, that "any opinions regarding benefits or lack of effects flowing from the conspiracy . . . is [sic] improper and inadmissible." ER625-26; *see* ER690-91. Having excluded evidence of lack of harm as irrelevant, the government took advantage of the district court's instruction to argue that the alleged restraint on trade in fact caused harm. That instruction, and the other instructions discussed above, crippled the defense.

III. THE DISTRICT COURT ERRED IN ADMITTING TWO PREJUDICIAL HEARSAY EMAILS.

The district court erroneously admitted two hearsay emails that purported to recount statements Lischewski made. Lischewski could not effectively cross-examine either declarant; the government did not call one (Joe Tuza) as a witness, and the other (Renato Curto) had no independent recollection of his conversation with Lischewski, which had occurred more than nine years previously. The errors in admitting the emails prejudiced Lischewski and require reversal.

A. Standard of Review.

Evidentiary rulings are reviewed for abuse of discretion. *See United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011).

B. The District Court Erred in Admitting EX757.

EX757 (ER848) is an email Curto wrote on the night of August 8, 2012, purporting to recount a discussion he had with Lischewski over drinks the night before (August 7, 2012). The district court admitted the email as a business record under Fed. R. Evid. 803(6). ER81-82.

This Court has expressed skepticism about emails as business records. *See Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994) (email not a business record because "E-mail is an ongoing electronic message and retrieval system," rather than a "regular, systematic function" of a business). Other courts too have observed that "[e]mail . . . is typically a more casual form of

communication than other records usually kept in the course of business, such that it may not be appropriate to assume the same degree of accuracy and reliability." *United States v. Cone*, 714 F.3d 197, 219 (4th Cir. 2013) (quotation omitted).

Courts that have considered whether emails qualify as business records have required strict compliance with the following requirements: the email "must have been: (a) made at or near the time by . . . a person with knowledge; (b) kept in the course of a regularly conducted business activity; and (c) made as part of the regular practice of the business." *United States v. Daneshvar*, 925 F.3d 766, 777 (6th Cir. 2019) (affirming exclusion of email); *see, e.g., Cone*, 714 F.3d at 219-20. Even if these requirements are satisfied, an email must be excluded as hearsay if the party opposing admission shows that "the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6)(E).

The Curto email satisfied none of these requirements. First, Curto was "a person with knowledge" of his conversation with Lischewski, but he did not write the email "at or near the time" of the conversation. Instead, he wrote the email a full day later, ER482, by which time--as he acknowledged in the email itself--"[m]y memory is fading . . . If something else comes to my mind I'll let you know . . ." ER849 (ellipses in original). A day's delay might be "near the time" for purposes of Rule 803(6) under some circumstances, but it was not here.

Curto testified that he did not take notes over drinks with Lischewski. ER481. He added that "normally, yes, what I do when I meet with people, I don't go around with a notepad and take notes. So when I finish the day, I try to scribble on a piece of paper what I considered the most important points, and then at some point I put all these papers together and I write a memo; or I call my people, we have a meeting, and talk about it." ER76-77. The district court observed that Curto "has testified that he used--his best recollections is he would use notes, and that provides some assurance of reliability and accuracy. And that informs the nearness-in-time requirement under . . . 803(6)(A)." ER83. But there was no evidence that Curto "scribble[d] on a piece of paper" his recollections of the conversation with Lischewski before he went to bed on August 7. Although he alluded to using his notes to prepare the email, ER485, his description of the interval between the end of the August 7 get-together and writing the August 8 email made no mention of any scribbling, ER482-83. No notes were ever produced.

Second, there is no evidence that the email was kept in the course of a regularly conducted business activity or "made as part of the regular practice of the business." "A record is considered as having been kept in the regular course of business when it is made pursuant to established procedures for the routine and timely making and preserving of business records, and is relied upon by the business in the performance of its functions." *United States v. Foster*, 711 F.2d 871, 882 (9th

Cir. 1983). There was no evidence that EX757 was "made pursuant to established procedures for the routine and timely making and preserving of business records"; to the contrary, Curto acknowledged that there was no "policy" of Tri Marine to make emails such as EX757. ER80. While *Curto* may have had a practice of writing emails about his conversations with tuna industry figures, that is not enough; it is the *business itself*--here, Tri Marine--that must require the creation and maintenance of the document. *See, e.g., City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 937 (9th Cir. 1995); *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 705-06 (E.D. Va. 2004) ("The fact that an employee 'routinely' takes meeting notes and keeps them, is quite different than whether a company policy directs the employee to do so."). Here, "there was no sufficient evidence that [Tri Marine] required such records to be maintained" or that Curto had a "business duty to make and regularly maintain records of this type." *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997); *see* ER81-82 ("Q. . . . You did not have a business duty to make those emails; correct? It was up to you whether you were going to write down these emails; fair? A. It's not a business duty. It's just our practice to talk about what we learned.").

Finally, the "method [and] circumstances of preparation" of the Curto email "indicate a lack of trustworthiness." Fed. R. Evid. 803(6)(E). Curto had the conversation at issue over drinks with Lischewski. He did not take contemporaneous

notes. By the time he wrote the email, his "memory [wa]s fading." ER849. Curto "c[ould] not say" if the email was "very accurate or not," although his intention was to be accurate. ER78. The words in the email were his words, not Lischewski's. ER483-84; *see* ER490 ("Certainly I'm not saying that these are his words. I'm not saying that."). One comment attributed to Lischewski--that Lischewski "now loves [StarKist]"--was "[d]efinitely" Curto putting his own spin on it. He "may have misunderstood" another alleged remark. ER490.

For these reasons, EX757 does not satisfy Rule 803(6) and should not have been admitted. The district court's error in admitting the email damaged Lischewski's defense. It was one of few alleged statements by Lischewski that even arguably supported an inference that he was aware of collusion with StarKist. And the prosecution, recognizing the email's significance, emphasized it in closing argument, ER144-45, and in rebuttal, ER150-51.

C. The District Court Erred in Admitting EX450.

The prosecutor began her opening with a flourish. In May 2011, she declared, Bumble Bee had just won a $1.5 million contract with Kroger. ER573. The prosecutor continued:

> The defendant, Christopher Lischewski, was the CEO of Bumble Bee. He was in charge of the whole company, but what was the defendant's reaction to winning important business, this $1.5 million contract? "Someone is going to be fired." Think about that for a moment. "Someone is going to be fired."

> The defendant talked about firing someone at his own company, his own employee who won an important contract. And that's not all. Who did he say it to? He said it to his biggest competitor, StarKist.
>
> Now, why did the defendant react this way and why did he say it to StarKist, his competitor, the company that Bumble Bee was supposed to be competing against to win the contract? Because the defendant had a secret agreement with StarKist to raise prices. He was part of a price-fixing conspiracy designed to increase the price of canned tuna sold at grocery store shelves all across this country, and Bumble Bee winning this contract was not part of their plan.
>
> Now, let me be clear. No one actually got fired but during the course of this trial, you will learn how those six simple words speak volumes. See, talking about firing people was something that the members of the conspiracy said to each other, said when they had to admit fault. It was an admission that you hadn't followed the rules and that you had to make it right.

ER574-75.

This opening riff rested entirely on EX450, an email in which Joe Tuza--a StarKist executive whom the government did not call as a witness at trial--purported to recount a statement by Lischewski. ER831. But EX450 had not been pre-admitted. When the government offered it during trial, the defense made a hearsay objection, ER507-08, and the district court agreed, ruling that the document was "not admissible as to Defendant's state of mind and not admissible to prove he made that statement [i.e., the 'someone is going to be fired' statement]," ER56. Rather than exclude the email entirely, however, the court held it "admissible to show state of mind of parties to the e-mail." ER56.

This was pure fiction. No one cared about the "state of mind of parties to the e-mail"--three StarKist executives, only one of whom (Hodge) testified at trial. The email was important for one reason only: because it depicted Lischewski making what the government considered an inculpatory statement. That is how the government used it in opening. And that is how the government continued to use it, even after the district court ruled it inadmissible for that purpose. When the government offered EX450, during Hodge's direct, it first asserted that the court had admitted the email for its truth as a co-conspirator statement. ER48-49. That was incorrect, and, after the matter was discussed in the jury's presence, the email was admitted with a limiting instruction. ER49-50. The government then plowed ahead, examining Hodge about the meaning of Lischewski's alleged statement. The district court overruled further objections, ER50, and it denied a motion to strike the exhibit, ER51-53.

In moving to strike, defense counsel observed: "I want the record to reflect that through the entire time that there were questions about that email [EX450], the bottom e-mail [containing Tuza's rendition of Lischewski's alleged 'someone is going to be fired' statement], which was not admissible to prove the truth, was up on the screen the entire time. And the prosecutor took her time formulating questions and asking questions to maximize the amount of time that that line could be up on

the screen. It was clearly calculated in order to use it for an improper purpose." ER51-52.

The government returned to this tactic when cross-examining Lischewski. The government was free to ask Lischewski if he had told Tuza that someone was going to be fired, without displaying the email.[12] But the government did not stop there. It again displayed EX450 to the jury and took Lischewski through the statement Tuza ascribed to him. ER232-33, 235. Although the district court noted that the government was "getting close to the line," ER238, it again overruled Lischewski's objections, ER237-38. The government structured the cross-examination so that the questioning about EX450 ended the day, ER235; the jury went home with the email fresh in its mind.

The government used Tuza's email for its truth again in closing. It displayed EX450 and exhorted the jury to "[n]ote how in this e-mail Joe Tuza writes (reading): 'According to CL, if Bumble Bee went back to--'" ER137. The defense objected, and the district court again instructed the jury that the email was "admitted for purposes going to the state of mind of those participants in the e-mail and not to prove the truth of any matter asserted in it." ER137. Undeterred, the prosecutor resumed: "Note how Joe Tuza wrote (reading): 'According to CL, if Bumble Bee

[12] When asked about the alleged statement on cross-examination, Lischewski testified that he did not recall making it. ER235.

went back to Kroger, someone is going to be fired.'" ER138. Although the prosecutor referred in passing to "how Steve Hodge understood these words," ER138, that was camouflage. No one cared how Hodge understood the words. What mattered--the reason the government displayed the email over and over--was the statement Tuza attributed to Lischewski.

Limiting instructions can be a useful tool, but they are not a "sure-fire panacea." *United States v. Haywood*, 280 F.3d 715, 724 (6th Cir. 2002). This Court has observed that "[w]hen [the facts at issue] are so readily subject to misinterpretation by a jury . . . a curative or protective instruction [is] of dubious value." *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978); *see, e.g., United States v. Hill*, 953 F.2d 452, 458 (9th Cir. 1991). As the Second Circuit noted in finding a limiting instruction insufficient to cure prejudice from erroneous admission of hearsay evidence, a court should not presume that jurors follow such instructions where they "require[] jurors to perform mental acrobatics." *United States v. Gomez*, 617 F.3d 88, 96 (2d Cir. 2010) (quotation omitted); *see also United States v. Hearn*, 500 F.3d 479, 483-85 & nn. 1, 2, and 4 (6th Cir. 2007) (despite three instructions that out-of-court statements were not offered for their truth, prosecutor argued statements for their truth in closing; conviction reversed for Confrontation Clause violation).

So it is here. After seeing the government use EX450 for its truth in opening, in examining Hodge, in cross-examining Lischewski, and in closing, no juror could perform the "mental acrobatics" of confining the email's significance to its effect on the state of mind of three StarKist executives who were not on trial. The jurors unavoidably considered Tuza's email for its truth--that Lischewski in fact had made the "someone is going to be fired" statement. The district court's error in allowing EX450 before the jury was prejudicial and requires reversal.

IV. THE CUMULATIVE EFFECT OF THE DISTRICT COURT'S ERRORS DENIED APPELLANT A FAIR TRIAL.

This Court recognizes that "[i]n some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). Where there are several trial errors, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *Id*. (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988)); *see, e.g., Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007).

If the Court concludes that the instructional and evidentiary errors outlined above are individually harmless, it should find that in combination, and in the

context of a trial where Lischewski's participation in the alleged price-fixing agreement was the central battleground, the errors require a new trial.

CONCLUSION

For the foregoing reasons, the Court should vacate Lischewski's conviction and remand to the district court for a new trial.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument. Argument will permit counsel to address the complex legal and factual questions that this case presents.

DATED: September 25, 2020

Respectfully submitted,

/s/ John D. Cline
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STATEMENT OF RELATED CASES

Counsel is not aware of any related cases before this Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-1

Case No. 20-10211

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief contains 13,823 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ John D. Cline
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I hereby certify that the bound copy of the Brief for Appellant provided to the United States Court of Appeals for the Ninth Circuit is identical to the version submitted electronically.

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