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

REPLY BRIEF FOR APPELLANT

John D. Cline
LAW OFFICE OF JOHN D. CLINE
50 California Street, Suite 1500
San Francisco, CA 94111
Telephone: (415) 662-2260

Attorney for Defendant-Appellant
CHRISTOPHER LISCHEWSKI

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

INTRODUCTION

The government insists that the evidence was so "overwhelming" that all errors may be disregarded as harmless.[1] The government makes this argument in almost every criminal appeal. It is sometimes right. But not here.

From beginning to end of the alleged conspiracy, Bumble Bee board presentations, emails, and other documents--the materials available to Lischewski at the time--described fierce competition. A.Br.11-19. StarKist lowered its price on albacore to challenge Bumble Bee's lead position in the white meat market. Bumble Bee attacked StarKist on dark meat. COSI engaged in predatory pricing to purchase market share and maintain its place on store shelves. Cameron and Worsham, who later became the government's star cooperators, repeatedly decried the cutthroat competition. Confronted with his documents at trial, Cameron conceded that "[w]e always competed with the brands [StarKist and COSI]." 3-ER-540. Shue Wing Chan, the government's third star cooperator, acknowledged at trial that COSI ran promotions during the alleged conspiracy 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." 2-ER-301. The government's account of the "overwhelming" evidence ignores all of this.

---

[1] Answering Brief for the United States ["G.Br."] at 2, 60. Lischewski's opening brief is cited as "A.Br." The parties' excerpts of record are cited as "ER," "SER," and "FER."

The government also ignores the economic data presented by Yale economist Dr. James Levinsohn. A.Br.26-27. That data confirms what the contemporaneous documents show: that the canned tuna market was intensely competitive before, during, and after the alleged conspiracy; that prices were driven by the cost of fish; and that negotiations with large customers such as Kroger, Safeway, and Walmart, which had greater bargaining power than Bumble Bee and the other tuna companies, led to significant variation in net prices between customers and even between a single customer's purchasing centers.

The government notes that Lischewski does not challenge the sufficiency of the evidence. G.Br.1, 2, 25-26, 32-33, 39. But there is a critical difference between sufficiency and harmlessness. On sufficiency review, this Court must accept the credibility of the government's witnesses and draw all inferences in the government's favor. *See, e.g., United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc). In other words, the Court would have to accept at face value the testimony of Cameron and Worsham that they conspired with Lischewski to fix prices, despite reams of documents and economic data proving the contrary. That deference to their testimony, despite its utter implausibility, renders a sufficiency challenge futile.

By contrast, appellate courts making harmless error assessments do not view the evidence in the light most favorable to the prosecution. *See, e.g., United States v. Hands*, 184 F.3d 1322, 1330 n.23 (11th Cir. 1999) ("Harmless error analysis,

unlike a determination of the sufficiency of the evidence, does not require us to view witnesses' credibility in the light most favorable to the government."); *Taylor v. United States*, 414 F.2d 1142, 1144-45 (D.C. Cir. 1969) (same). Appellate courts evaluating the effect of an error must recognize that jurors may disbelieve a prosecution witness because of impeachment, the witness' demeanor, or the inherent implausibility of the witness' testimony. *See, e.g., United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (error prejudicial where government's case relied on cooperators, whose credibility the jury had "ample reason . . . to question").

Under these standards, none of the instructional and evidentiary errors Lischewski has identified was harmless. The single count had a single disputed element: Lischewski's alleged agreement to fix prices. The evidence on that element weighed heavily in favor of the defense. The government--at trial and in its brief--relies mostly on the testimony of cooperators Cameron, Worsham, and Chan, but the jury had "ample reason . . . to question" their credibility. *Kaiser*, 609 F.3d at 567. The torrent of instructions advising the jury what the government did *not* have to prove and what did *not* constitute a defense (A.Br.3-4) made it especially important that the district court instruct the jury precisely on what the government *did* have to prove. In these circumstances, the erroneous instructions--all of which bore directly on the agreement element--cannot be found harmless. Nor can the erroneous

admission of the hearsay emails be disregarded. The errors denied Lischewski a fair trial.

ARGUMENT

I. THE "MUTUAL UNDERSTANDING" INSTRUCTIONS.

A. Preservation.

The government insists (G.Br.19-20) that Lischewski did not preserve the "mutual understanding" error, even though he proposed a correct instruction, 4-ER-639-41, 670, and objected to the district court's refusal to give his instructions, 2-ER-123-24, 165; FER-5-6--an objection the district court acknowledged, 2-ER-124 ("Right. And you've reserved that right in the papers.").

The government omits an important point. *After* the defense had proposed using this Court's model instructions on conspiracy--which do not contain the "mutual understanding" alternative--the district court rejected those instructions and determined that it would use the ABA model antitrust instructions[2] instead. The court declared that it would "closely adhere to the ABA Model Instructions (criminal and civil editions)" and that "[a]ny proposed modifications of or additions to the ABA Model Instructions must be justified as [sic] by the facts of this case or supported by binding U.S. Supreme Court or Ninth Circuit authority." 4-ER-662.

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

Once the district court made that determination, the defense switched to the ABA Instructions--from which the district court derived the "mutual understanding" language--although it continued to object to the court's refusal to give the proposed defense instructions. *E.g.*, FER-5-6. Any further objection to the "mutual understanding" phrase would have been futile, because no "binding U.S. Supreme Court or Ninth Circuit authority" squarely prohibits it, and the error in giving that instruction does not depend on "the facts of this case."

Given the district court's wholesale adoption of the ABA Instructions, the defense preserved the "mutual understanding" issue by proposing correct instructions and objecting to the district court's refusal to give those instructions. *See, e.g., Hunter v. Sacramento*, 652 F.3d 1225, 1231-32 (9th Cir. 2011). Lischewski "propos[ed] alternative instructions that made the grounds for [his] position clear, citing relevant authority." *Id*. at 1231 (quotation omitted); *see, e.g., Glover v. BIC Corp.*, 6 F.3d 1318, 1327 (9th Cir. 1993) (same). Nothing more was required.

Even if Lischewski had failed to preserve his objection to the "mutual understanding" instructions, de novo review would be appropriate. This Court has applied de novo review in the absence of an objection when it is "presented with a question that is purely one of law and where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States*

v. Lillard, 935 F.3d 827, 833 (9th Cir. 2019) (quotation omitted). The "mutual understanding" instruction presents a pure question of law, and the government suffers no prejudice from Lischewski's asserted failure to raise the issue below. The government has not suggested that either it or the district court would have taken a different position with respect to that language if Lischewski had specifically called attention to it (indeed, the district court's adoption of the ABA Instructions leaves little doubt that it would not have done so), and the government has had a full opportunity to defend that language on appeal.

B. Merits.

Every agreement is a "mutual understanding." But not every mutual understanding is an agreement. Some mutual understandings are nothing more than commonly held views.[3] That is the fundamental problem with the jury instructions in this case; they permitted the jury to convict if it found a mutual understanding that did not rise to the level of an agreement. The instructions' repeated pairing of "agreement" with "mutual understanding," separated by the conjunction "or," heightened the danger that the jury would construe "mutual understanding" this way, because the "ordinary use" of the term "or" is "almost always disjunctive, that is, the

[3] The government uses "understanding" in this sense. It refers to a "settled understanding of conspiracy"--by which it means a commonly held view of conspiracy law, not an actual agreement on what constitutes a conspiracy. G.Br.22.

words it connects are to be given separate meanings." *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (quotation omitted).

The government asserts that "[a]greement and understanding are synonymous terms." G.Br.21. But that is not true. Two gas station owners can have a mutual understanding that gas prices need to rise because the cost of oil is increasing, but that does not mean they have an agreement to raise prices. The opening brief has other examples of mutual understandings that do not amount to agreements. A.Br.38-40. Because not every mutual understanding is an agreement, the instructions permitted conviction for conduct that is not criminal. To illustrate the point, imagine a statute that made it a crime to kill eagles. The defendant kills a condor. The court instructs the jury that the prosecution must prove that the defendant killed "an eagle or a bird of prey." The first part of the instruction--"eagle"--would be correct, but the second part--"bird of prey"--would impermissibly expand the statute. Under *Griffin v. United States*, 502 U.S. 46 (1991), a conviction based on a general verdict would be reversed, even though one ground for conviction--"eagle"--is correct. *See id*. at 59; *United States v. Gonzalez*, 906 F.3d 784, 790 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1568 (2019). The same principle applies here.

The government cites a handful of cases over the past century and a half that have used "agreement" and "mutual understanding" interchangeably. G.Br.21-22.

But none of those cases considers whether "mutual understanding" has a broader meaning than "agreement." Some cases merely repeat jury instructions without comment on the "mutual understanding" language. In other instances, the government plucks language from appellate opinions--a notoriously unreliable source of jury instructions. *See, e.g., Byrd v. Illinois*, 423 F.3d 696, 711 (7th Cir. 2005) (jury instructions should not be "patched together from snippets of appellate opinions taken out of context") (quotation omitted). The government's cases provide no guidance on the specific question presented here.

The government tries to characterize "agreement or mutual understanding" as a "unitary phrase"--a combination of words that has acquired a single meaning. G.Br.21. But the examples the government gives--"cease and desist," "null and void," "covenant and agree"--are well-established terms of art in which two words are joined by the conjunction "and."[4] "Agreement or mutual understanding" has no such settled meaning, and the conjunction "or" indicates that the terms are not synonyms.

The sole example the government offers of a unitary phrase with the conjunction "or"--"evade or avoid"--involved interpretation of a regulation

[4] The same is true of other examples the cases cite, such as "arbitrary and capricious" and "aid and abet." *See United States v. Atilla*, 966 F.3d 118, 125 (2d Cir. 2020).

underlying a criminal charge. In an effort to broaden the scope of the criminal prohibition, the government argued that "avoid" had a different meaning than "evade." *United States v. Atilla*, 966 F.3d 118, 125-26 (2d Cir. 2020) (cited at G.Br.21). Although the court acknowledged that "evade" had a "slightly more nefarious connotation" than "avoid," *id*. at 126 n.1, it nonetheless treated the terms as a unitary phrase and rejected the government's argument, *id*. at 126. Here, by contrast to *Atilla*, the question is how the jury understood the repeated "agreement or mutual understanding" jury instructions, not how broadly a criminal provision should be read. Particularly in the context of this case, the jury likely believed that "mutual understanding" had a broader meaning than "agreement."

The jury was especially likely to interpret "mutual understanding" to mean something different than "agreement" because the phrase served no evident purpose other than to supplement that term. According to the ABA Instructions, "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 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* 1-ER-19. Given that instruction, the jury was unlikely to view "mutual understanding" as obliquely making the same point.

The government cites other instructions that, in its view, prevented the jury from viewing "mutual understanding" as anything other than a synonym for "agreement." G.Br.23, 25-26. But none of those instructions--about "mere similarity of conduct," for example--precluded the jury from interpreting "mutual understanding" more broadly than "agreement." Those other instructions were especially unlikely to eliminate confusion because the district court repeated the "agreement or mutual understanding" formulation three separate times, 1-ER-19, 21, 24, and "agreement or understanding" twice more, 1-ER-22, 28. That repetition of the phrase throughout the offense instructions drove home to the jury the distinct significance of a "mutual understanding." Far from a "two-sentence instruction" that was a "small part of the court's final instructions," *United States v. Kleinman*, 880 F.3d 1020, 1035 (9th Cir. 2018) (cited at G.Br.25), the "agreement or mutual understanding" phrase appeared repeatedly and went directly to the sole disputed element in the case.

The trial evidence and the government's closing argument heightened the prejudice from the erroneous "mutual understanding" instructions. For example, Chan testified to his purported "understanding" with Lischewski. *E.g.*, 2-ER-289, 299-303, 324. The government in closing referred repeatedly to Chan's alleged "understanding." 14-SER-3243-45, 3336-37, 3341-42. The "mutual understanding" instructions may well have led the jury to conclude that Chan's alleged

"understanding" with Lischewski did not have to rise to the level of an agreement to subject Lischewski to liability.

II. THE "INDIVIDUAL LIABILITY" INSTRUCTION.

A. Preservation.

The government maintains that Lischewski not only failed to object to the "individual liability" instruction, but actually requested the language that is the focus of the appeal. G.Br.27-28. The government again ignores critical parts of the record. Lischewski clearly objected to the "individual liability" instruction.

That instruction first surfaced in the government's initial set of proposed instructions, as part of the government's proposed instruction on "knowing participation" in a price-fixing conspiracy. 15-SER-3446-50. The government's proposal included a modified version of the ABA Instructions' model instruction on "Corporate Officer--Individual Liability." ABA Instructions at 101. The initial defense proposed instructions contained no such instruction. Doc.256.

Soon after the parties submitted these proposed instructions, the district court ruled that it would follow the ABA Instructions absent contrary authority from the Supreme Court or this Court. 4-ER-661-62. In the next round of proposed instructions, the government again requested the individual liability instruction, with revisions to the ABA instruction that, according to the government, brought it into in line with *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991). 15-SER-3416-

17; FER-72. The government's proposed instruction included the same two theories of liability that appeared in the final instructions, albeit with slightly different wording. The government's instruction stated in relevant part:

> A person may knowingly join a price-fixing conspiracy in many ways. Among other ways, a person may knowingly enter into an agreement directly with competitors regarding prices. Alternatively, he may knowingly authorize, encourage, direct, order, or consent to the participation of someone he manages or supervises in the conspiracy. A person who knowingly authorizes, encourages, directs, orders, or consents to the participation of someone he manages or supervises in the conspiracy is just as responsible as any other member of the conspiracy.

15-SER-3416.

The defense objected to the proposed government instruction as "unnecessary," "unsupported by evidence in this case," "duplicative of the instruction on 'Knowingly,'" and "confusing." 4-ER-655. The defense noted that in a recent case which (like this one) involved the prosecution only of an individual, the government had objected successfully to the individual liability instruction on grounds equally applicable to Lischewski's case. *Id*. (citing *United States v. Bai*, No. 3:09-cr-00110 (N.D. Cal. Dec. 9, 2013), Doc. 1246). If--but only if--the district court overruled Lischewski's objection to *any* individual liability instruction, the defense proposed an instruction adapted from the ABA Instructions. 4-ER-655-57.

The district court rejected the defense objections to the individual liability instruction and, in its next set of proposed instructions, included such an instruction

based on the defense language. FER-57. The government objected to one phrase in the proposed instruction--"as distinguished from his own acts." FER-52. The court accepted the government's revision and removed that phrase. FER-11. The court's final "individual liability" instruction reflected the government's proposed change. 1-ER-30. Shortly before the end of the trial, the defense renewed all previous objections to the court's instructions. FER-5-6.

The defense objections to the government's proposed individual liability instruction brought squarely to the district court's attention the flaws in that instruction: it was unnecessary and confusing. Lischewski either entered into an agreement to fix prices or he did not; instructing the jury that he could be liable if he authorized, ordered, or helped a subordinate participate in the conspiracy (an incomplete aiding and abetting theory) was bound to leave the jury confused about the grounds on which it could find Lischewski guilty. The error in giving the instruction was preserved.

B. Merits.

Federal criminal liability must rest on statute; there are no common law federal crimes. *See, e.g., United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 490 (2001) ("[F]ederal crimes are defined by statute rather than by common law."); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181 (1994) (same). Under the federal criminal code, a person can commit the crime

himself; he can aid and abet the crime, 18 U.S.C. § 2(a); or he can willfully cause another to commit the crime, 18 U.S.C. § 2(b).

These three potential statutory grounds for criminal liability meant that Lischewski could himself enter into a price-fixing agreement, or he could aid and abet another person who entered into a price-fixing agreement, or he could willfully cause another person to enter into a price-fixing agreement. No other theory of federal criminal liability was available.

The individual liability instruction mentioned the first theory of liability (that Lischewski himself entered into a price-fixing agreement); it stated that "[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." 1-ER-30. This portion of the instruction was redundant, given the conspiracy instructions that preceded it, but at least it described a recognized, statutory basis for criminal liability.

The same cannot be said for the second theory of liability--that Lischewski "indirectly or directly authoriz[ed], order[ed], or help[ed] a subordinate perpetrate the crime." 1-ER-30. This theory does not require Lischewski himself to enter into the unlawful agreement--to "directly participat[e] in the conspiracy." Instead, it makes him liable for the acts of his subordinates--it is the subordinate who

"perpetrate[s] the crime."[5] But on what statutory basis does that derivative liability rest? The instruction does not meet the requirements for aiding and abetting liability under 18 U.S.C. § 2(a), A.Br.44-46, and the government disclaims that theory in any event, G.Br.30. Nor does the government rely on 18 U.S.C. § 2(b), and for good reason: liability under that provision requires willfulness, which the district court's instruction omits. As the government's brief makes clear, the second theory of liability in the "individual liability" instruction has no statutory basis. It is a forbidden common law theory of federal criminal liability.

The government purports to find support for the instruction in *United States v. Wise*, 370 U.S. 405 (1962). G.Br.30-31. But *Wise* says nothing about a corporate officer's criminal liability for the acts of his subordinates. The sole question in the case--and the only issue discussed--was whether the term "persons" in the Sherman Act includes individual corporate officers acting in their official capacity. *See* 370 U.S. at 407.[6] The Court did not attempt to define the circumstances under which a

[5] As the government explained this theory to the district court, "the defendant himself may not . . . independently agree with someone else at another company, but he can direct people at his own company to agree with people at other companies." FER-43.

[6] The Court's footnote reference to aiding and abetting liability, 370 U.S. at 412 n.4 (cited at G.Br.30), did not refer to a corporate officer's liability for the acts of his subordinates. In context, the footnote apparently alluded to an argument by the corporate officers that the government sought to hold them liable for aiding and abetting the corporation's offense. The Court did not address that contention.

corporate officer could be held liable for a Sherman Act conspiracy. It merely noted in passing that an officer who joined an unlawful conspiracy was subject to prosecution regardless of his representative capacity and regardless of his role--that is, "be he one who authorizes, orders, or helps perpetrate the crime." *Id*. at 416. Nothing in the Court's opinion suggests that the officer can be found criminally responsible without either personally joining the conspiratorial agreement or satisfying the requirements for liability under 18 U.S.C. §§ 2(a) or 2(b).

The government insists that the "individual liability" instruction was necessary because "[o]therwise, corporate officers could evade liability by orchestrating conspiracies through indirect gestures that are just as effective and inculpatory as direct commands." G.Br.30. Even if the government were correct, that would not permit the district court to create a common law theory of federal criminal liability. But the government is wrong in any event. The court instructed the jury that it did not need evidence that "the members of the conspiracy entered into any express, formal, or written agreement," 1-ER-19, or that the conspirators "directly stated what their object or purpose was, or the details of it, or the means by which the object was to be accomplished," *id*. It told the jury that "[t]he agreement itself may have been entirely unspoken." 1-ER-19. It declared that "[d]irect proof of a conspiracy may not be available" and that a conspiracy "may be disclosed by the circumstances or by the acts of the members." 1-ER-19; *see* 1-ER-20 (same).

These and other instructions left no doubt that the jury could infer the existence of a conspiracy from "indirect gestures" no less than from "direct commands." The "individual liability" instruction was not necessary to make this point.

The "individual liability" instruction was unnecessary and confusing. The instruction permitted the jury to convict without finding that Lischewski personally joined the agreement to fix prices. As Lischewski correctly argued to the district court, ER655-57, the court should not have given the instruction.

III. THE *PINKERTON* INSTRUCTION.

A. Preservation.

The government argues that Lischewski did not preserve his objection to the *Pinkerton* instruction and in fact proposed that instruction himself. G.Br.34-35. The government mischaracterizes the record.

The government proposed an instruction on the "knowingly joined" element of the conspiracy, based on the ABA Instructions, which provided in part:

> But 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 as if he had been one of the originators of the conspiracy or had participated in every part of it.
>
> If you find that the defendant joined the conspiracy, then the defendant remains a member of the conspiracy and is responsible for all actions taken in furtherance of the conspiracy until the conspiracy has been completed or abandoned or until the defendant has withdrawn from the conspiracy.

15-SER-3413. Lischewski objected to the quoted language, which (as he put it) "contain[ed] the *Pinkerton* charge." FER-68. He proposed a "knowingly joined" instruction that omitted this language. FER-66-68.

The district court rejected Lischewski's objection and included the *Pinkerton* language in its next set of proposed instructions. FER-56. Lischewski again objected. 4-ER-618. He argued, however, that if the court insisted on giving such an instruction, it should include the limitations on liability found in *Pinkerton* itself: the defendant was liable only for reasonably foreseeable acts of his co-conspirators, done in furtherance of the conspiracy and while the defendant was a member of the conspiracy. 4-ER-617. The district court again refused the defense request to remove the quoted language, but it agreed to add the *Pinkerton* limitations. FER-9-10; 1-ER-29.

To sum up: Lischewski objected twice to the *Pinkerton* language (and renewed those objections at the end of the case, FER-5-6). FER-66-68; 4-ER-617-18. He proposed the limitations from *Pinkerton* only as a less-preferred alternative, if the court overruled his objection to the quoted language. He thus preserved his objection to that language.

B. Merits.

The government defends the *Pinkerton* instruction because it "captured th[e] principle" that "when one joins an existing conspiracy, he takes it over as is and

becomes liable for all that has gone before or may happen later." G.Br.36 (quotations omitted). The point, though, is that this asserted "principle" has no application in this case. The indictment charged a single count of conspiracy under the Sherman Act. The offense consisted solely of the agreement; it did not even require an overt act. As the district court put it, "The agreement is the crime, even if it is never carried out." 1-ER-21; *see* 1-ER-28 (same). Once the jury found that Lischewski joined the conspiracy, that was the end of its inquiry; it had no need to determine whether he was "responsible" for the "acts" of other conspirators.

The government asserts that the *Pinkerton* instruction refuted Lischewski's alleged defense "that he could not have participated in the conspiracy because he never directly contacted Cameron and Worsham's counterparts at StarKist and COS." G.Br.37. There are three problems with this argument. First, Lischewski did not argue that he could not have conspired because he never directly contacted Cameron and Worsham's counterparts; his defense was that he never joined a price-fixing agreement and was unaware that Cameron and Worsham had done so (if in fact they did). 1-ER-25 (theory of defense instruction).

Second, if that *had* been his defense, the *Pinkerton* instruction would not have addressed it, because that instruction only made Lischewski responsible for the acts of his alleged co-conspirators *if* the jury found that he had joined the conspiracy. In other words, by its terms the instruction had no significance unless the jury had

already found Lischewski guilty (which is part of the reason the instruction was unnecessary and confusing).

Third, other instructions addressed this alleged "defense" far more directly than the *Pinkerton* instruction. The court instructed the jury, for example, that "to establish the existence of a conspiracy, the evidence need not show that the members of the conspiracy . . . met together," 1-ER-19; that the agreement "may have been entirely unspoken," *id.*; that a conspiracy may be formed "without all parties . . . knowing who all the other members are," *id.*; and that "[a] person may become a member of a conspiracy without full knowledge of . . . the identity of all of its members," 1-ER-29. In light of these (and other) instructions, the *Pinkerton* instruction was not needed to refute Lischewski's alleged defense.

The *Pinkerton* instruction served no purpose in the context of this case. But it was bound to confuse the jury, particularly in conjunction with the erroneous "individual liability" instruction. The district court erred in giving it.

IV. THE PER SE INSTRUCTION.

A. Preservation.

The government's preservation argument (G.Br.40-41) again omits significant portions of the record.

Lischewski objected to application of the per se rule. 4-ER-619, 638, 642; Doc.250 at 6-8. He sought to present evidence that the alleged restraint on trade was

not unreasonable and caused no harm. 3-ER-565-70.[7] And he proposed rule of reason jury instructions. 4-ER-619, 642-50, 671-79. In accordance with current law, the district court held that the per se rule applied. 1-ER-95, 102. It barred Lischewski from presenting evidence on the reasonableness element or the absence of harm. 1-ER-87-88. And it declined to give Lischewski's proposed rule of reason instructions.

Once the district court had made those rulings, there was no need for it to tell the jury anything about the per se rule. All it had to do was instruct the jury that an agreement to fix prices is illegal; the reasonableness or unreasonableness of the agreement would never enter the jury's consideration. At the government's request, however, FER-75-76, and in accordance with its decision to follow the ABA Instructions absent controlling law to the contrary, the district court chose to give the ABA per se instruction, FER-55 (citing ABA Instructions at 54); 1-ER-18.

---

[7] The government asserts that Lischewski never sought to present evidence of reasonableness or lack of harm, that he agreed that as a general matter price-fixing harms the economy, that he "disavowed contrary evidence," and that he "represented below that he simply wanted to present evidence that no conspiracy existed." G.Br.40, 45. This misstates the record. In fact, Lischewski argued that the rule of reason should apply, and he sought to present evidence that the alleged restraint at issue was reasonable and not harmful. 3-ER-565-70. Only after the district court rejected the rule of reason, held that the per se rule applied, and excluded evidence of reasonableness and lack of effects (1-ER-87-88) did Lischewski restrict his economic evidence to the issue of whether a conspiracy existed. *E.g.*, 15-SER-3436 & n.1. Lischewski did not "disavow" evidence of reasonableness and lack of harm; the district court excluded it at the government's request.

Lischewski objected repeatedly to the per se instruction, arguing that it was unnecessary in light of the court's rulings on the per se rule. 4-ER-652; 15-SER-3387; FER-40. Those objections preserved the issue for this Court's review.

B. Merits.

The per se instruction was unnecessary and intensely prejudicial. The district court barred Lischewski from presenting evidence that the alleged price-fixing agreement caused no harm--that is, that it did not produce higher prices for consumers. In making this ruling, the court accepted the government's argument that evidence "regarding benefits or lack of effects flowing from the conspiracy . . . is improper and inadmissible." 4-ER-625-26; *see* 4-ER-690-91.

After the evidence had closed, the district court reversed course. It told the jury in its final instructions that price-fixing agreements have a "harmful effect on competition" and "lack . . . any redeeming virtue." 1-ER-18. The government used the instruction to argue 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." 2-ER-130-32, 135.

The government seems baffled that Lischewski could view this sequence of events as unfair. G.Br.41-43. But it is obviously unfair to bar the defense from showing that an inculpatory fact did *not* exist and to then instruct the jury that it *did* exist. And it is even more unfair when the government exploits this combination of rulings by arguing the inculpatory fact in closing in inflammatory terms.

V. THE HEARSAY EMAILS.

A. EX757.

The government alludes in a footnote to this Court's skepticism about emails as business records, G.Br.46 n.4 (citing *Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994)), but it cites cases from two other Circuits recognizing their potential admissibility, *id*. (citing *United States v. Daneshvar*, 925 F.3d 766 (6th Cir. 2019), and *United States v. Cone*, 714 F.3d 197 (4th Cir. 2013)). Having cited *Daneshvar* and *Cone* for the proposition that emails can be business records, however, the government ignores what those cases actually say.

The government gives the following parenthetical for *Daneshvar*: "excluding emails where proponent 'did not offer a qualified witness.'" G.Br.46 n.4 (quoting *Daneshvar*, 925 F.2d at 777 n.3). In focusing on a footnote in the opinion, the government overlooks the part that is pertinent here: the court declared that "an email is not a business record for purposes of the relevant hearsay exception simply because it was sent between two employees in a company or because employees

regularly conduct business through emails; such evidence alone is insufficient to show that the email is a record, made as 'a regular practice' of the company, Fed. R. Evid. 803(6)(C), and that 'the record was kept in the course of a regularly conducted activity of a business,' *id*. at 803(6)(B)." 925 F.3d at 777. Because the proponent had not satisfied either of these requirements, the court of appeals found that the district court properly excluded the email. *See id*.

Cone is to similar effect. The Fourth Circuit noted that emails "present unique problems of recent vintage in the context of the business records exception" and 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." 714 F.3d at 219 (quotation omitted). The court rejected the government's argument that the emails at issue were admissible as business records merely because the district court found that that they were "kept as a 'regular operation of the business.'" *Id*. at 220 (quoting district court).

Daneshvar and *Cone* speak to a central problem with admitting Curto's email as a business record: there was no evidence that the business--Tri Marine--had a regular policy of preparing emails such as EX757. Curto himself claimed to have such a policy, but he conceded that Tri Marine itself did not. 1-ER-80. The most he could say was that "[w]hether in writing or verbally . . . our team is always

communicating. We need to know what's happening. And so whether it's from me to any of them or from any of them to any of the rest of the team, there is always communication going back and forth." 1-ER-75. But this kind of routine, everyday "communication going back and forth" does not have the regularity and the reliability necessary to satisfy Rule 803(6); if it did, emails among company employees would become routinely admissible as business records, and the proscription against admission of hearsay would be eviscerated in many federal cases. *See, e.g., Versata Software, Inc. v. Internet Brands, Inc.*, 2012 U.S. Dist. LEXIS 92920, at *24-*25 (E.D. Tex. July 5, 2012) ("If occasional communications among employees of a business that relate to the operation of the business were to qualify as business records for purposes of Rule 803(6), that would convert the exception for 'business records' into an exception for 'business communications' and would open the door to a vast array of communications within a business, contrary to the conventional understanding of the business records exception.") (citing *Monotype*).

The government ignores this Court's decision in *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929 (9th Cir. 1995) (cited at A.Br.53). But that case underscores why the Curto email is not a business record. According to *Long Beach*, Rule 803(6) requires (among other things) that a document be "'made pursuant to established company procedures for the systematic or routine and timely making and

preserving of company records.'" *Id*. at 937 (quoting *Clark v. City of Los Angeles*, 650 F.2d 1033, 1037 (9th Cir. 1981)). The document in that case--notes prepared by an Exxon executive--were made in the regular course of the company's business, but the proponent did not show that the notes "were made pursuant to company procedures." *Id*.; *see, e.g., United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983).

The Curto email suffers from the same defect as the notes in *Long Beach*: the government did not establish that it was "made pursuant to [Tri Marine] procedures," and Rule 803(6) thus does not apply. *See, e.g., 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."); *In re Oil Rig "Deepwater Horizon"*, 2012 U.S. Dist. LEXIS 3406, at *20 (E.D. La. Jan. 11, 2012) ("[T]he sending or receiving employee must have been under an obligation imposed by his employer to send or receive the email at issue."); *Park W. Radiology v. CareCore Nat'l LLC*, 675 F. Supp. 2d 314, 333 (S.D.N.Y. 2009) (Rule 803(6) does not apply to emails at issue because "[t]he CareCore and DRA employees were not under an obligation to create the emails as a record of regularly conducted business activity."); *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997) ("Here, while it may have been Carey's routine business practice to make such records, there was no sufficient evidence that Merrill Lynch required such records to be maintained. This was fatal to the

government's proffer on this ground because, in order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type.").

The government falls back on harmless error. G.Br.50-51. It relies in part on the testimony of cooperators Cameron and Worsham. As shown above and in the opening brief, however, their testimony was heavily impeached and contradicted by a mountain of contemporaneous documents and economic data. There is "ample reason . . . to question" their credibility. *Kaiser*, 609 F.3d at 567.

The government argues as well that Chan's testimony about his alleged "understanding" is sufficient by itself to render the error in admitting Curto's email harmless. G.Br.51. That is wrong for two reasons. First, Chan's testimony about his unilateral "understanding" provided scant evidence--and certainly not overwhelming evidence--that he and Lischewski had an agreement to fix prices.

Second, the government acknowledged in pretrial proceedings that the jury could only find Lischewski guilty of the charged conspiracy if it found that the conspiratorial agreement lasted the entire period alleged in the indictment--from November 2010 through December 2013 (4-ER-702). FER-18 (**MS. WULFF:** "The agreement has to last from November 2010 to December 2013, Your Honor. **THE COURT:** And it would not have to involve all three producers? **MS. WULFF:** It would not have to involve all three producers, Your Honor, as long as

the conspiracy lasted for the entire time period."). The district court agreed. 1-SER-271 (court states that the conspiracy "will be defined . . . number one, by the time frame, which is spelled out in the Indictment, so they cannot find a conspiracy that lasted half that long. It's got to be the length of time that's spelled out."); FER-20-21 (same); 1-ER-16, 26 (instructions define charged conspiracy in part by reference to the period November 2010 to December 2013).

Lischewski's alleged "understanding" with Chan ran only from March 19, 2012 (the date of a breakfast at which, according to Chan, he and Lischewski discussed the "jab" emails, 10-SER-2249-57) until mid-2013, when Chan stepped away from running COSI and stopped talking with Lischewski, 10-SER-2283. Because the alleged Chan-Lischewski "understanding" spanned only about one-third of the charged conspiracy period, it cannot alone even sustain the verdict, much less provide overwhelming evidence that renders errors harmless.

B. EX450.

The government misconstrues Lischewski's argument concerning the Tuza email (GX450). G.Br.52-59. The email may have had a theoretical nonhearsay use, for its effect on the state of mind of Hodge and the other StarKist recipients. But the probative value of that nonhearsay use was vanishingly small, given that none of the recipients was a defendant and only one--Hodge--testified at trial. The danger that the jury would use the email for its truth--a danger that the prosecutor's opening

statement exacerbated and that the government exploited throughout the trial--far outweighed that limited probative value. The problem is not (as the government suggests) that the district court's limiting instructions were poorly formulated; it is that no such instructions could prevent the jury from using the email for its truth. *See, e.g., United States v. Hill*, 953 F.2d 452, 458 (9th Cir. 1991); *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978).

The Tuza email never should have been admitted. Once its unfair prejudicial impact became clear, as the government continually sought to use the email for its truth, the district court should have granted Lischewski's motion to strike. 1-ER-51-53.

VI. CUMULATIVE ERROR.

The government tries to atomize the errors Lischewski has identified and treat each one as harmless. Even in isolation, the errors were prejudicial. Viewed cumulatively, they rendered the trial profoundly unfair. The case involved a single count with a single disputed element--Lischewski's alleged agreement to fix prices. The objective evidence--documents written during the indictment period and economic data--show intense competition. That evidence contradicts the testimony of the government's cooperators. The district court gave all the usual conspiracy instructions, highlighting what the government does not have to prove and what does not constitute a defense, and it added a fusillade of pro-prosecution instructions

drawn from the ABA Instructions. Under those circumstances, the cumulative prejudice from the erroneous instructions and evidentiary rulings--all of which bore directly on the agreement element--ensured that Lischewski would be convicted. He should receive a new trial.

CONCLUSION

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

DATED: January 19, 2021

Respectfully submitted,

/s/ John D. Cline
John D. Cline

Attorney for Appellant
CHRISTOPHER LISCHEWSKI

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-1

Case No. 20-10211

I certify that this reply brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief contains 6933 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
John D. Cline

CERTIFICATE OF SERVICE
When All Case Participants Are Registered For
The Appellate CM/ECF System

United States Court of Appeals Docket Number 20-10211

I hereby certify that on the 19th day of January, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John D. Cline
John D. Cline

CERTIFICATION

United States Court of Appeals Docket Number 20-10211

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

/s/ John D. Cline
John D. Cline