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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>MICHAEL MARR, et al.,<br><br>Defendants. | No. CR 14-00580 PJH<br><br>**DEFENDANTS' BRIEF IN SUPPORT OF (1) PROPOSED INSTRUCTION ON "UNREASONABLE RESTRAINT" AS AN ELEMENT OF THE BID-RIGGING CHARGE AND (2) REQUEST TO ADMIT EVIDENCE AS TO WHETHER THEIR ALLEGED AGREEMENT RESULTED IN AN UNREASONABLE RESTRAINT OF TRADE** |

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## INTRODUCTION

Based on legal grounds that this Court has not previously considered, defendants move for an instruction informing jurors that defendants may not be found guilty of the charged Sherman Act bid-rigging violation unless, in addition to finding the presence of the agreement alleged in the indictment, the prosecution has established beyond a reasonable doubt that the purported agreement resulted in an unreasonable restraint on trade.[1] Defendants further move for an order permitting them to introduce evidence that the agreement alleged in the Count One bid rigging did not result in an unreasonable restraint on competition in the relevant foreclosure auction market.[2]

Defendants' request responds to a paradox in the law of anti-trust.[3] Over a century ago, the Supreme Court declared that Section 1 of what was then the Antitrust Act, now the Sherman Act, does not prohibit all combinations in restraint of trade, but only those which result in an *unreasonable* such constraint. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Unreasonableness of restraint has been a necessary element of a criminal violation of Section 1 ever since, as reflected in its inclusion as an element in the indictment in this case. Indeed, this Court recites unreasonableness of restraint as a necessary element whenever it takes a guilty plea from a defendant to the Count One bid-rigging charge.

The last half century has seen a series of decisions from our highest court holding unequivocally that a criminal defendant has a Due Process right to have a jury, not a judge, decide whether every element of a charged offense, as well as every fact needed to support a conviction, has been proven beyond a reasonable doubt. Furthermore, any instruction that effectively takes that decision from jurors by directing them to rely on a "conclusive presumption" to establish the

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[1] In a separate filing, defendants have submitted a proposed instruction incorporating this required element of a Section 1 offense under the Sherman Act. If the Court determines that the jury must be instructed on the element of unreasonable restraint, defendants are prepared to submit additional instructions on the rule of reason.

[2] At the time of filing the present brief, defendants are also filing a motion *in limine* seeking admission of the same evidence on an alternative theory. *See* Defendants' Motion *In Limine* to Admit The Testimony of Jeffrey Andrien.

[3] That anti-trust law is prone to paradox is not a novel charge. *Cf.* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978).

existence of an element is unconstitutional.

Decades before the Supreme Court began expanding the protections afforded a criminal defendant by the rights to Due Process and a jury trial, however, it had issued a ruling flatly at odds with the constitutional jurisprudence that the Court would later develop. In *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940), relying on prior precedent, the Court ruled that price-fixing in any form was, *per se*, a combination in restraint of trade, and thus constituted a criminal violation of Section 1. The Court therefore reversed a Seventh Circuit decision voiding the defendants' convictions on the ground that the element of the unreasonableness of the restraint had not been submitted to the jury. *Id*. at 211. *Socony-Vacuum* supported development of a "conclusive presumption" that as a matter of law certain combinations constitute unreasonable restraints of trade under Section 1. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (citing *Socony Vacuum* and related cases, and stating that price-fixing is "*conclusively presumed* to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [emphasis added]; *accord*, Pretrial Order 2, Dkt. 135, at 2: Bid-rigging is within *per se* category of combinations subject to conclusive presumption of unreasonableness, citing *Northern Pacific Ry. Co.* )

Thus, the paradox. Combinations in restraint of trade that are deemed *per se* violations of Section 1 trigger a conclusive presumption that the element of unreasonableness has been proven, yet conclusive presumptions that an element has been proven in a criminal case are *per se* violations of the Due Process clause.

The Supreme Court has yet to address the doctrinal conflict between its more recent Due Process jurisprudence and the *per se* rule previously enunciated in *Socony*. The Ninth Circuit last issued an opinion on the issue in 1972, well before conclusive presumptions had been clearly proscribed by the high court. Furthermore, Supreme Court decisions of more recent vintage have eroded the *Socony's* bright-line categorization of all price setting agreements as Sherman Act violations. The defendants here can proffer substantial evidence that the agreement among them charged in Count One did not result in an anti-competitive suppression of prices paid for foreclosed

properties sold at county auctions. The element of unreasonableness that must be proven in every case charging a criminal violation of Section 1 must be decided by the defendants' jury under proper instructions.

## I. THE UNREASONABLENESS OF AN ALLEGED ILLEGAL RESTRAINT OF TRADE IS AN ELEMENT OF EVERY SECTION 1 VIOLATION

### A. The Fountainhead: *Standard Oil of New Jersey, et. al. v. United States*

The foundation for anti-trust law over the past century is the 1911 opinion of the Supreme Court in the *Standard Oil* case, reported at 221 U.S. 1, in which the government challenged the monopolistic practices of the Standard Oil Trust and the Standard Oil Company over the previous four decades, resulting in a judgment that the Company had to be effectively broken into thirty-eight different and independent corporate entities.

The Supreme Court was called upon to decide what are the elements of an anti-trust violation under Section 1 of the Sherman Act, originally passed in 1890 as the Anti-trust Act, which both then and now reads in relevant part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 221 U.S. at 49. The Court sought guidance in its task of statutory interpretation "by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-trust Act." *Id*. at 51. Interpreting Section 1 in the light of the pre-existing legal principles which informed it, including the right to contract freely, the Court concluded that the statute "evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." *Id.* at 60. Consequently, "the standard of reason which had been applied at the common law...was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." *Id*.

The holding that Section 1 penalizes not mere restraints of trade but only those which result in

an "unreasonable" or "undue" anti-competitive effect was demonstrated by the Court's rejection of the government's reading of the statute, *viz.*, "[T]hat the language of the statute embraces every contract, combination, etc., in restraint of trade, and... simply imposes the plain duty of applying its prohibitions to every case within its literal language." *Id.* at 63. The Court flatly rejected this governmental position as "assuming the matter to be decided," instead ruling that it was to be "determined by the light of reason ... *in every given case* whether any particular act or contract was within the contemplation of the statute." *Id*. at 64. (Emphasis added.) The Court underlined its holding by noting that "unaided by the light of reason, it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious." *Id*. at 68.

**B. The *Standard Oil* Definition of Unreasonableness as a Necessary Element of a Section 1 Violation Remains the Law**

Consistent with the decision in *Standard Oil*, both the Supreme Court and the lower federal courts have repeatedly recognized that an essential element of a claim under Section 1 of the Sherman Act is that the alleged restraint of trade was "unreasonable." *See, e.g., N.W. Wholesale Stationers v. Pac. Stationery & Printing Co*., 472 U.S. 284, 289 (1985) ("[E]very commercial agreement restrains trade. *Whether this action violates Section 1 of the Sherman Act depends on whether it is adjudged an unreasonable restraint*.") (Emphasis added); *In re McNulty*, 597 F.3d 344, 351 (6th Cir. 2010) (stating that a criminal charge under Section has "two essential elements: (1) That defendants entered into a contract, combination or conspiracy; and (2) That such contract, combination or conspiracy amounted to an unreasonable restraint of trade or commerce"); *Levine v. Cent. Florida Med. Affiliates, Inc*., 72 F.3d 1538, 1545–46 (11th Cir. 1996) ("Section 1 prohibits only those agreements that unreasonably restrain competition, *Standard Oil Co. v. United States*, 221 U.S. 1, 58–64 (1911), thus, the unreasonableness of the agreement is the second element of a section 1 claim.") (Parallel citations omitted); *Shaw v. United States*, 371 F. Supp. 2d 265, 272 (E.D.N.Y. 2005) (listing the elements of a criminal charge under Section 1, including that "the agreement unreasonably restrained trade or commerce"); *First Delaware Valley Citizens Television, Inc. v. CBS,*

*Inc.*, 398 F. Supp. 925, 927 (E.D. Pa. 1975) ("There are two essential elements to any Section 1 offense: (1) a contract, combination or conspiracy, resulting in (2) an unreasonable restraint of trade").

Both the government and this Court have recognized that unreasonableness is a necessary element of the Count One bid-rigging charge in this case because, as noted above, the indictment against the defendants in paragraph eight alleges an "unreasonable restraint of interstate trade and commerce" as an element of the offense, and the Court has recited that element when taking the guilty pleas from many of the defendants in related cases.

## II. DUE PROCESS GUARANTEES THAT A NECESSARY ELEMENT OF A CRIMINAL OFFENSE BE DECIDED BY A JURY AND CANNOT BE ESTABLISHED BY OPERATION OF A "CONCLUSIVE PRESUMPTION"

Thirty-one years after *Northern Pacific's* reaffirmation in a civil case of the application of a conclusive presumption of unreasonableness to price fixing arrangements, the Supreme Court decided *Carella v. California*, 491 U.S. 263 (1989). In *Carella*, the defendant was charged and convicted of embezzling a rental vehicle based on jury instructions which stated:

> (1) "Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle;"
>
> (2) "Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented."

*Id*. at 264.

These instructional presumptions were based on statutory language to the same effect. *Ibid.* The state appellate court affirmed the conviction, a disposition that the Supreme Court considered "plainly at odds with prior decisions of this Court…" *Id.* at 265. The per curiam opinion in *Carella* summarized those prior decisions:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Jury instructions relieving States of this burden violate a defendant's due process rights. *See Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.
>
> *We explained in Francis and Sandstrom that courts should ask whether the presumption in question is mandatory, that is, whether the specific instruction, both alone and in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts*. *See Sandstrom, supra*, at 514.

*Id*. at 265 (emphasis added.).

Turning to the instructions in issue, the Court noted:

> The prosecution understandably does not now dispute that the instructions in this case were phrased as commands, for those instructions were explicit and unqualified to that effect and were not explained elsewhere in the jury charge to be merely permissive. Carella's jury was told first that a person "shall be presumed to have embezzled" a vehicle if it is not returned within 5 days of the expiration of the rental agreement; and second, that "intent to commit theft by fraud is presumed" from failure to return rented property within 20 days of demand.

*Id.*

The Court's holding as to the unconstitutionality of the conclusive presumptions embodied in the instruction was unequivocal:

> These mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses with which Carella was charged. The instructions also relieved the State of its burden of proof articulated in *Winship*, namely, proving by evidence every essential element of Carella's crime beyond a reasonable doubt. The two instructions violated the Fourteenth Amendment.

*Id.* at 266.

Six years after *Carella*, in *United States v. Gaudin*, 515 U.S. 506 (1995), the Supreme Court

found it unconstitutional for a court to take the element of materiality from the jury and decide it as a question of law on a case by case basis. *See id*. at 511 ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.") The right to a jury verdict on every fact needed to prove guilt of the charged offense has only become stronger since *Gaudin*. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (ruling that the rights to Due Process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'") (quoting *Gaudin*, 515 U.S. at 510.)

Applying the *per se* rule of *Socony Oil* in the present case would be more patently unconstitutional than the procedures condemned in both *Carella* and *Gaudin*. To begin, although unreasonableness is indisputably an element of the bid-rigging charge in Count One, that element would never be mentioned in the Court's jury instructions; the decision as to whether unreasonableness had been proved would be removed entirely from the jury's consideration by judicial fiat. That is a clear violation of *Gaudin* and *Apprendi*.

But that is not the worst of it. In *Gaudin*, the trial judge made a case-specific decision as to whether materiality had been proved beyond a reasonable doubt. While the wrong party—judge rather than jury—decided that issue, at least the existence of the necessary element of materiality was being decided by some party. But under the *Socony* decision, the trial judge him or herself also would be barred from addressing the reasonableness of the combination at issue by the operation of a conclusive presumption of unreasonableness. A judgment as to whether the element of reasonableness had been proven would thereby be taken from the trial judge as well, who like the jurors in *Carella* would be "*require[d]to find the presumed fact if the [government] proves certain predicate facts…"* 491 U.S. at 265. (Emphasis added.)

The issue of the reasonableness of the combination in restraint of trade alleged in Count One thus must be decided by the jury under appropriate "rule of reason" instructions from the Court.

## III. NINTH CIRCUIT PRECEDENT FROM 1972 RELATING TO THE PRESENT CLAIM IS NOT CONTROLLING BECAUSE IT HAS BEEN EFFECTIVELY OVERRULED

Defendants recognize that the argument they advance in this motion was raised in skeletal form and rejected forty-five years ago in *United States v. Manufacturers' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49 (9th Cir.1972) (hereafter, "*Manufacturers*.") The *Manufacturers'* opinion preceded by years, and in some instances by decades, the high court's decisions in *Sandstrom, Francis, Carella, Gaudin,* and *Apprendi*. As an en banc panel of the Ninth Circuit held in *Miller v. Gammie,* 335 F.3d 889 (9th Cir.2003) (en banc), "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Id*. at 893; accord, *Lair v. Bullock,* 798 F.3d 736, 745 (9th Cir. 2015). The same rule authorizes the district courts to disregard a prior circuit authority that has been effectively overruled. *Miller*, 335 F.3d. at 900; *accord,* United *States v. Broussard,* 611 F.3d 1069, 1072 (9th Cir. 2010). *See also Miller*, 335 at 900 (approving view expressed by Justice Scalia in law review article "... describing lower courts as being bound not only by the holdings of higher courts' decisions but also by their "mode of analysis.") (Citation omitted.)

As discussed further below, the reasoning and mode of analysis employed by the Supreme Court over the last sixty years contravenes that employed by the Ninth Circuit in 1972 in *Manufacturers.* This Court, therefore, is bound by the higher court's reasoning and should permit jurors to consider, and rule on, evidence bearing on the issue whether defendants' alleged agreement was reasonable.

### A. The *Manufacturers'* Decision

In *Manufacturers*, the defendants argued that by treating the Sherman Act charge under the *per se* rule, the court applied a conclusive presumption in violation of *Morissette v. United States*, 342 U.S. 246 (1952), thereby violating their right to a jury trial on an offense element. In rejecting that argument, the Ninth Circuit reviewed then-existing Supreme Court precedent, including *Socony-Vacuum, supra,* before ruling:

> [T]he [Supreme] Court has interpreted a broad and inclusive statute, and since the earliest days of the Act, has enunciated two distinct rules of substantive law: (1) certain classes of conduct, such as price-fixing, are, without more, prohibited by the Act; (2) restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable. The first rule, in light of the second, defines certain classes of pernicious conduct as unreasonable. Roughly restated, the per se rule establishes a conclusive presumption that certain types of conduct are unreasonable. See, *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). This restatement, however, is no more than a pedagogic instrument, since the substantive rules of antitrust are no more rules of evidence than the substantive rules of any legal area.
>
> *Morissette*, *supra*, is inapposite. The per se rule does not operate to deny a jury decision as to an element of the crime charged, since "unreasonableness" is an element of the crime only when no per se violation has occurred. To put it differently "reasonableness" must be viewed as a legal term, and not in its ordinary sense. When the Court describes conduct as per se unreasonable, they do no more than circumscribe the definition of "reasonableness."

462 F.2d at 52.

### B. Subsequent Supreme Court Precedent Wholly Undermines the Analysis and Ruling in *Manufacturers*

#### 1. Reasonableness as Offense Element

The Court's reasoning in *Manufacturers* is substantively flawed and irreconcilable with the Supreme Court's Due Process jurisprudence for a host of reasons. To begin, Congress either made "unreasonableness" an element of a section 1 offense or did not; it cannot be an element in one factual context and not in another. Furthermore, *Manufacturers*' statement in 1972 that "[t]he per se rule does not operate to deny a jury decision as to an element of the crime charged, since 'unreasonableness' is an element of the crime only when no per se violation has occurred" is at odds with Supreme Court decisions running from *Standard Oil* in 1911 through *Wholesale Stationers* in 1985. *See also United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (discussing interpretation of Section 1 in criminal context, Court states that "courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for

interpretation is criminal or civil.").

Alternatively, the quoted sentence from *Manufacturers* simply means that "unreasonableness" is an element that goes to the jury only when a non-*per se* case is alleged—which, under Department of Justice policy, is never is in a criminal case. In this view, when an indictment alleges facts that, if proven, establish what has been held judicially to be a *per se* violation, unreasonableness need not be proven; there has been a prior determination as a matter of law that those predicate facts prove unreasonableness beyond a reasonable doubt. But judicial reliance on the indictment's allegations rather than the evidence to remove "reasonableness" from the jury's consideration does not make unreasonableness any less an element of a criminal antitrust offense, or, as previously discussed, the injury to the defendant's Due Process rights any less substantial. And designating "reasonableness" as merely a "legal term," as did the Court in *Manufacturers*, is sheer wordplay.

In support of the head-scratching view that unreasonableness is an element of the offense except when it isn't, *Manufacturers* invoked and discussed both *Standard Oil* and *Northern Pacific Railway*. Yet while S*ocony-Vacuum* adopted the *per se* rule as to "price fixing," it in no way departed from *Standard Oil*'s holding that such conduct was illegal because it was necessarily and inherently unreasonable, as required for proving a statutory violation. *See Socony-Vacuum*, at 310 U.S. at 213-14 (discussing *Standard Oil*); *see also id*. at 218 (quoting and approving *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940) for proposition that "Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition.")

Similarly, in *Northern Pacific*, a civil case, the Court reiterated the *per se* rule's application to "price-fixing," and identified a number of traditional practices (significantly not including "bid-rigging") that purportedly met that criteria. *Id.* at 5. As previously discussed, however, the Court in doing so firmly and expressly stated that the rule constituted a conclusive presumption not of general "illegality" under the Sherman Act, but of *unreasonableness*—the very element that was established in *Standard Oil* as applicable to *all* cases charged under section 1 of the Act. *Ibid*.

Given the above, *Manufacturers*' effort to characterize reasonableness as something other

than an offense element is spurious. *See N.W. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, *supra* ("[E]very commercial agreement restrains trade. Whether this action violates Section 1 of the Sherman Act depends on whether it is adjudged an unreasonable restraint.")[4]

**2. Fallibility of the *Per Se* Presumption**

Any doubt about the *per se* rule's status as a conclusive presumption now prohibited by *Carella* and related precedent is set to rest by the evolution of the Supreme Court's analysis of the rule both before and after *Manufacturers*. That case law makes clear that the *per se* rule is a highly useful albeit inexact standard that will sometimes result in an unwarranted finding of a Section 1 violation, as a case-specific inquiry in those instances would find the alleged combination in question in fact did not result in an unreasonable restraint of trade. Whether reasons of convenience justify such erroneous judgments of liability in the civil context—the Supreme Court has increasingly said they do not—they are plainly impermissible in a criminal case.

In *Socony-Vacuum*, the Court adopted the *per se* rule on the view that certain agreements, including a price-fixing agreement, were always and inherently unreasonable and thus a violation of the Sherman Act, regardless of the agreements' effect on prices or any other evidence on which the defendant might rely. *Id.*, 310 U.S. at 210-18. In *Northern Pac. Ry. Co. v. U.S.*, *supra*, the Court in the civil context took largely the same view but implicitly acknowledged that the *per se* rule might, on occasion, condemn agreements that were, in fact, reasonable. Nevertheless, the Court explained,

[4] *United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001) is apparently the last federal Court of Appeals case to consider an argument that application of the *per se* rule in a criminal matter applies a conclusive presumption in violation of the Due Process clause. In rejecting the claim, *Giordano* relied on extra-Circuit authority as well as the Ninth Circuit's decision in *Manufacturers*. *Id*. at 1143-44. But *Giordano* cannot and should not control or influence the Court's decision in this matter. While it purported to recognize the import of *Gaudin* and *Francis*, *supra*, *Giordano* refused to regard the rule as a conclusive presumption at all by invoking and applying the same faulty analysis—that unreasonableness is not an element in cases charged as *per se* violations of section 1 violations—that *Manufacturers* employed. *See Giordano*, 261 F.3d at 1144. The Court did not consider Supreme Court authority establishing beyond doubt that reasonableness is an element of a section 1 offense, or that in mandating a finding of unreasonableness, the *per se* rule sometimes gets it wrong. (*See* discussion below.) In any event, *Giordano* and the cases it cites are not binding authority in this Circuit. Given their analytical flaws, there are valid and persuasive reasons to disregard them. *See Environmental Protection Information Center, Inc., v. Pacific Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001).

concerns with expedience justified the rule's continued application:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

*Id*., 356 U.S. at 5 (quoted in Pretrial Order 2, Dkt. 135, at 5.)[5] *Cf. United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607–08 (1972) (observing that horizontal market divisions are examples of per se illegality because they are business relationships "that, in the court's experience, virtually always stifle competition").

Well after *Manufacturers* was decided in 1972, however, the Supreme Court went further in recognizing that application of the *per se* rule could sometimes label a given restraint unreasonable when, as a factual matter, it was not. Thus, in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court stated,

> The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609–610, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972). And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context. *Id.*, at 609, n. 10, 92 S.Ct., at 1134, n.10; *Northern Pacific R. Co. v. United States, supra*, 356 U.S., at 5, 78 S.Ct., at 518.
>
> The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. *As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and*

[5] The appellants in *Manufacturers* did not press any argument based on the less than perfect reliability of the *per se* rule, as acknowledged in *Northern Pacific*.

> *litigation efficiency, we have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable.*

*Id*. at 343 (emphasis added). *See also Northwest Wholesale Stationers, at* 472 U.S. at 289-90 (characterizing agreement subject to *per se* rule as those which "always *or almost always* tend to restrict competition and decrease output.") (Emphasis added); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50, n. 16 (1977) ("*Per se* rules ... require the Court to make broad generalizations.... Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.").

Consistent with the recognition that applying the *per se* label to certain restraints can be factually unfair to a given defendant, the Supreme Court in the civil context has continued to recognize, as in *Arizona*, that *per se* treatment very often fails to examine the detailed economic reasons (for example, competitive effects) that would make an agreement legal or illegal under the Sherman Act. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2714-20 (2007). *See also ibid.* (holding that an agreement that contemplates vertical minimum resale price fixing is no longer subject to *per se* treatment under the Sherman Act, but will instead be tested under the rule-of-reason analysis that weighs the procompetitive and anticompetitive effects of the agreement). Indeed, the past 30 years of Supreme Court precedent demonstrate a strong trend away from the *per se* approach and toward the fact-specific rule-of-reason approach—at times including cases of alleged price-fixing. *Id*. at 2721-22. *See also FTC v. Actavis, Inc.*, __ U.S. __, 133 S.Ct. 2223, 2237 (2013) (market allocation judged under the rule of reason); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5, 8 (2006) (price fixing judged under the rule of reason); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (requiring rule of reason for restrictions on price advertising); *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n. 39 & 110 (1984) (applying rule of reason to horizontal restraints that were the kind of restrictions on output and price that are ordinarily deemed illegal *per se*, because the justifications may be procompetitive). As the Court stated in *California Dental Ass'n*, *supra*, 526 U.S. at 779: "[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively

obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."

The Court's acknowledgment in *Arizona* that the *per se* rule may not "match" the reality of a given case before a court or jury does much to explain the Court's growing reluctance to rigidly apply the rule. It also makes clear that there inevitably will be instances in which conduct within the scope of the rule will not result in an unreasonable restraint of trade. Thus, use of the rule, the purpose of which is to achieve business certainty and efficiency, can result in the conviction of innocent defendants. And while it might have been the case that those who keep their rental cars well past the return dates are "almost always" those who intend to embezzle, that statistical probability obviously was of no moment to the Court in *Carella*; the Court ruled that the government had to prove that Carella personally had that mental state.

Of equal importance, the view that the *per se* presumption does not describe conduct that is necessarily and inherently unreasonable (*compare Socony-Vacuum, supra*) means that the facts in a given case, including one involving a supposed price-fixing agreement, may *not* support a finding that the alleged restraint of trade was unreasonable. That being so, unreasonableness is not merely a "legal term," *see Manufacturers*, 462 F.2d at 52, but rather an element that is subject to factual dispute, one that, after *Winship*, *Apprendi*, and related precedent, must be proven to jurors beyond a reasonable doubt. Stated otherwise, in the wake of this post-*Manufacturers* precedent, Due Process requires a "full blown" inquiry into reasonableness, *see Arizona*, 457 U.S. at 343, regardless of the cost or difficulty. Where liberty is at stake in a criminal case, nothing short of proof beyond a reasonable doubt of every element of the charged offense can pass constitutional muster.

**3. Expanding Notions of Due Process**

As previously discussed, it bears emphasis that, at the most basic level, the Supreme Court's decisions from *Winship* through *Sandstrom, Francis, Carella* and *Apprendi* effected a sea change in understanding and applying a criminal defendant's right to Due Process. The approval of a *per se* analysis, as set forth in the S*ocony-Vacuum*, simply cannot be squared with those much more recent

decisions.

The Court's pronouncements concerning the nature and scope of Due Process was much more guarded when *Manufacturer*s was decided. As noted, the defendants in that matter relied on *Morisette v. United States*, *supra*, to argue that the trial court's adoption of the per se rule applied a conclusive presumption in violation of their right to a jury trial. But *Morisette* did not expressly rest its condemnation of conclusive presumptions on the Due Process clause, or rule that they improperly relieved the prosecution of its burden of proving all elements beyond a reasonable doubt, as set forth in *Winship*. The high court's decision in *Winship* and the other cases discussed in Argument II, *supra*, through *Apprendi*, disapproved such presumptions on far more extensive and fundamental grounds.

Hints of the expansive Due Process analysis were apparent in *United States v. Gypsum*, 438 U.S. 422 (1978), where the Supreme Court ruled that a defendant's state of mind is an element of criminal antitrust offense that must be established by the evidence and cannot be taken from the factfinder by means of a legal presumption. *Gypsum* was a rule of reason case, such that the defendants had no reason to challenge application of the *per se* rule, as opposed to the intent instruction, as a prohibited presumption. But while it recognized the validity of the *per se* rule as applied in other contexts, the Court cautioned that courts must tread particularly carefully when applying the Sherman Act in a criminal case. *Id*. at 439.[6]

Importantly, and consistent with the concern expressed in *Gypsum*, the Supreme Court apparently has not affirmed a conviction in a criminal antitrust case based on application of the *per se*

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[6] The decision in *Manufacturers* defies the concerns expressed in *Gypsum* by suggesting that conclusive presumptions may be less acceptable in civil cases than in criminal prosecutions:

> The standard in non-criminal cases is somewhat different. Conclusive presumptions which result in arbitrary classifications are deemed invalid. *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926). The legislature may not employ conclusive presumptions to legislate a fact which is at odds with actualities. *Heiner v. Donnan*, 285 U.S. 312 (1932).

*Manufacturers*, 462 F.2d at 50 n.1 (Parallel citations omitted).

rule since *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945) (Court affirms guilty plea to price fixing charges based on *per se* theory of liability.) Indeed, in the interest of basic fairness, and even in the *civil* context, the Supreme Court has declined to accord *per se* treatment to conduct that had traditionally been branded as unreasonable under the *per se* rule. *See* discussion in subsection 2, above.

The Court's later decision in *Carella*, however, flatly precludes reliance on the *per se* rule here. Judicial application of the rule necessarily violates the Due Process Clause because it (1) precludes jury consideration of whether the facts proved establish an element of the charged offense, and (2) relieves the government of its burden of proof as articulated in *Winship*.

## IV. APPLICATION OF A CONCLUSIVE PRESUMPTION COULD NOT BE DEEMED HARMLESS ERROR IN THE PRESENT "BID-RIGGING" CONTEXT

Not every due process violation at trial requires that a subsequent criminal conviction be vacated. In *Carella*, the Supreme Court reversed a state appellate ruling that had upheld the trial court's use of a conclusive presumption. But the Court also observed that, "'In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury.... In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, 'every fact necessary' to establish every element of the offense beyond a reasonable doubt.'" *Id.* at 266 (Quoting *Rose v. Clark*, 478 U.S. 570, 580-81 (1986).) Accordingly, the Court in *Carella* remanded to the state court to determine whether the constitutional error had been harmless. Invoking the test described in *Rose*, the Court ruled that the judgment against the defendant would require reversal if any rational jury could find the predicate acts but fail to find the fact presumed. *Ibid*.

Were this Court to exclude evidence that defendants' conduct did not result in an unreasonable restraint of trade and to instruct in accordance with the *per se* presumption, however, that ruling could not be deemed harmless error under the highly demanding test set forth in *Carella*. If permitted to consider the evidence proffered by defendants in support of their previous motion to adjudicate this case pursuant to the rule of reason (Dkt. 66 [motion]; Dkt. 101 [reply]), including the

declaration of Jeffrey S. Andrien, a rational juror could certainly find both a competitive justification for the agreement alleged in the indictment and that such agreement was reasonable within the meaning of the Sherman Act. *See also* Defendants' Motion *In Limine* to Admit the Testimony of Jeffrey Andrien.

**CONCLUSION**

For the foregoing reasons, defendants respectfully request that the Court (1) instruct jurors that defendants may not be found guilty of the charged Sherman Act bid-rigging violation unless, in addition to finding the presence of the agreement alleged in the indictment, the prosecution has established beyond a reasonable doubt that the purported agreement resulted in an unreasonable restraint on trade; and (2) permit them to introduce evidence that the agreement alleged in the Count One bid rigging did not result in an unreasonable restraint on competition in the relevant foreclosure auction market.

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