IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-4342

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MIJA S. ROMER,
Defendant-Appellant.

No. 97-4343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KHEM C. BATRA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellants appeal final judgments and a sentence in these consolidated criminal cases. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court (Hon. Leonie M. Brinkema) had jurisdiction under 18 U.S.C. § 3231, 15 U.S.C. § 1 (Mija S. Romer ("Romer") and Khem C. Batra ("Batra")), and 18 U.S.C. §§ 371, 1344 (Romer). Final judgment was entered in both cases on April 18, 1997. JA 16, 35. Notices of appeal were filed on April 18, 1997 (Romer), and April 28, 1997 (Batra). Ibid.

STATEMENT OF THE ISSUES

1. Did the evidence support the jury's interstate commerce finding on the antitrust count?

2. Did a supplemental jury instruction on interstate commerce correctly state the law?

3. Was the jury adequately instructed concerning the legality of partnerships?

4. Were a newspaper article and testimony about a plea agreement properly admitted?

5. Was there a variance between charge and proof concerning Romer's bank fraud?

6. Was there sufficient evidence that Romer conspired to defraud the Internal Revenue Service?

7. Did the trial court properly sentence Romer, giving enhancements for bid-rigging and obstruction of justice.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition.

On September 12, 1996, a five-count indictment was filed in the Eastern District of Virginia, charging appellants Romer and Batra with violating section 1 of the Sherman Act, 15 U.S.C. 1 (count 1), and charging Romer with violating 18 U.S.C. § 1344 (count 4) and 18 U.S.C. § 371 (count 5).[1] JA 37-50. After a

[1] Romer and Batra were also charged in other counts. Batra alone was charged on count 2 (mail fraud, 18 U.S.C. §§ 2, 1341), and he was acquitted after a jury trial. Romer alone was charged in count 3 (mail fraud, 18 U.S.C. §§ 2, 1341); during trial, the court granted Romer's Rule 29 motion for a judgment of acquittal on count 3. Batra as well as Romer was charged on count 5 (conspiracy to defraud the IRS); after a bench trial, Romer was convicted and Batra was acquitted on count 5.

jury trial, Romer and Batra were convicted on count 1 of violating the Sherman Act. Romer was convicted after a bench trial on count 4 (bank fraud), and on count 5 (conspiracy to defraud the Internal Revenue Service). Romer and Batra were sentenced on April 18, 1997, and judgments were entered the same day. JA 16, 35.

B. Statement of Facts.

1. Appellants Romer and Batra are real estate speculators who bought houses and other real estate at Northern Virginia foreclosure auctions. They participated in a conspiracy to limit bidding competition at certain public foreclosure auctions. Pursuant to the conspiracy, Batra, Romer and other coconspirators held second, private auctions to rebid among the conspirators certain properties won by them at public auction. The difference between the public sale price and the top bid at the second, secret sale was divided among the participants in the second sale. The effect of the conspiracy was to lower artificially the price that the homeowners and/or creditors received for their properties and to divide the amount that otherwise would have gone to these victims among the conspirators. JA 96. The indictment listed nine properties "among others" auctioned between May 1993 and April 1995 on which one or both of the appellants bid as part of the conspiracy, and the evidence at trial showed that appellants participated in additional auctions subject to the conspiracy. JA 41, 1498-99 (chart listing properties).

Joseph Buonassissi, an attorney who conducts numerous

foreclosure auctions in Virginia (JA 76), testified that, in Virginia, property sold at foreclosure under a deed of trust must be sold at public auction. JA 78. The sale generates funds to pay the lender who holds a deed of trust on the property, and also to pay any other liens on the property and, if there are enough proceeds, to pay the owner of the property. JA 78, 92. The trustee who conducts the foreclosure sale is required to conduct the sale to generate the highest possible price, and accordingly Buonassissi employs a professional auctioneer. JA 78, 82-83, 96. The lender initiates foreclosure, appointing the trustee to conduct the sale by auction. After the sale, the trustee delivers a trustee's deed to the successful purchaser, and disburses the funds received from the buyer to lenders, lien holders, and former owners. JA 92. The parties stipulated that foreclosure proceedings on 12 properties subject to the conspiracy were initiated by lenders located out-of-state, and the proceeds from 11 properties subject to the conspiracy were remitted out-of-state. JA 51-53.

Leo Gulley joined the conspiracy not to compete against certain other bidders at public foreclosure auctions in November 1991, when another conspirator, Lawrence Rosen, told him during bidding that if Gulley would let Rosen have it, they "could work it out later." JA 124-25. After the auction, five or six bidders went to a picnic table near the courthouse and each submitted a slip as to what they were willing to bid over and above the public auction price. JA 125. Rosen explained to Gulley that the highest bidder would get the property, and the

other bidders would get a prorated share of the high-bid amount. JA 126. Gulley received $1500 as his prorated share, and he continued to participate in the conspiracy until September 1994. JA 126-28. Gulley stated that there was no explicit agreement before every auction but the agreement carried forward; there was a "kind of an understanding that you could sit in on the second auction." JA 130, 185-86. Different people attended different auctions, but the conspiracy included about ten people, including Romer and Batra. JA 129.

The first rigged auction that Gulley participated in with appellant Batra was held in 1993, for a property in Burke, Virginia. JA 130-31. Gulley identified a note that Batra had sent Gulley regarding the Burke property, setting out who bid on it at the second auction and the pay-offs those bidders received; Gulley also identified the $1,560 pay-off check that Gulley received from Batra. JA 132-134. As to Romer, Gulley remembered attending in November 1993 a second, secret auction with her for a home at 6825 Lamp Post Lane, Alexandria. JA 134, 137. Gulley identified at trial his notes on the auction and the $1558 pay-off check that he received from Romer. JA 135-36. After she learned about the government's investigation, Romer asked for that check back, so that she could tear it up; Romer also told Gulley that if he could not return the check, he should say that it was for something other than the pay-off, such as for furniture. JA 155-56.

In addition, Gulley attended second, secret auctions with Romer in November 1993 for 5114 Cliffhaven Drive, Annandale and

in December 1993 for 3058 Sugar Lane, Vienna (JA 137-38, 139-40, 186),[2] as well as for 5803 Royal Ridge Drive, Unit Q, Springfield, in March 1994, at which Romer was the high bidder (JA 148-50). At the Royal Ridge second auction, there was a discussion about whether pay-offs should be made in cash to avoid showing a paper trail of the second auction, and some people did take their payments in cash. JA 150-51. In fact, after Gulley won the second auction for 803 Mosby Hollow Drive in September 1994, in which Romer participated, Gulley was required to pay off the other conspirators in cash immediately. JA 151-53. Finally, Gulley testified about an auction of a property on Lee-Jackson Highway, at which a man he did not know offered to pay Gulley and others $5000 each not to bid. Gulley collected $5000 from the man, and Romer and conspirator Ken Arnold told Gulley that he should split it with the other conspirators, like other bids; but Gulley disagreed and kept the entire amount. JA 153-55; see also JA 409-10, 414-37 (Romer claims share saying "this is ongoing partnership").

Alexander Giap was a member of the conspiracy (JA 198) who later became a government informant and secretly taped conversations with his co-conspirators between March 1994 and May

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[2] On Cliffhaven, Gulley's recollection was supported by his notes, which showed who bid and the amounts bid in the second auction, as well as his calculation of the amount owed to him by the winner. JA 138-39. On Sugar Lane, Gulley's recollection was supported by a check he received from Rosen, and a note from Rosen calculating Gulley's and Romer's prorated share of the difference between the public price and the second auction bid. JA 144-47.

1995. JA 203-05.[3] Giap testified that there was an "assumed agreement" among the conspirators that whenever they met at a public auction, they would not bid against each other, in order to make money at the later secret "coffee" auction. JA 198. Sometimes members of the group would arrive early to discuss what properties they were interested in, and who was and was not "in." JA 659. Not every member was present at every auction that Giap attended; conspiracy members would let the others know they were "interested" by various signals, such as whispering, bumping elbows, or putting in a bid. JA 198-99, 643, 657, 664, 666. Giap joined the conspiracy at the same auction that Gulley did. JA 193-96.

Giap met Batra because Giap's wife worked in Batra's travel agency. Giap explained to Batra how the conspiracy worked (JA 624, 632) and Batra asked to be introduced to the group. JA 201-02, 624-25, 630. Giap participated with Romer and Batra in rigging 11 auctions. The tapes of the public and coffee auctions held for five properties were played for the jury, and revealed Batra and Romer participating in the coffee auctions. JA 216-48, 254-310, 352-82, 389-404.[4]

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[3] Giap pleaded guilty to three felonies: wire fraud, bank fraud, and bid-rigging. JA 189. The fraud offenses were peculiar to Giap and did not involve appellants. JA 559. The government terminated its use of Giap to tape conversations in May 1995, when it learned of the bank fraud. JA 205. Appellants incorrectly suggest (D.Br. 7 n.2) that the government knew in 1994 about Giap's fraud offenses.

[4] The government introduced the actual written bid slips from a number of the coffee auctions. JA 323-27, 382-84, 469-70. It also introduced the pay-off checks for 9100 Arlington Boulevard, in which Batra participated. JA 339-41.

The tapes recorded the conspirators discussing making payoffs in cash so that there is "less paper trail" because what they were doing could be considered collusion. Romer explicitly concurred in this plan, pursuant to which it was agreed that "you can't report it on your taxes." JA 275-78, 288-89. As the winner of the Royal Ridge coffee auction, Romer in fact did make payoffs in cash. JA 327, 331-36; see also JA 666 (Giap testifies to "cash rule"). The tapes also recorded Romer and Batra explaining how the conspiracy worked to new members, Jessica Park and Cindy Shams. Romer told Park to write just the premium on the slip of paper, and that she would have to make payoffs in cash. JA 366-70. Romer added "we don't want any check writing between us. If we get caught by IRS, we'll be dead." JA 373. In addition, the conspirators were recorded discussing whether Batra would be required to make payoffs on a property he bought on Morning Ride Circle. Batra claimed that he had made a mistake in buying the property, but his co-conspirators thought that no exceptions should be allowed. JA 386-89, 390-93; see also JA 491-92.

On October 1, 1994, the Washington Post published an article (JA 1363-63C) about a civil settlement related to a criminal prosecution of a foreclosure auction bid-rigging conspiracy in the District of Columbia. During a recorded discussion of this article, Romer asked whether Giap and others had read the article and then said that she wanted "to remind everybody" not to mention their agreement to others because "we can go to jail for it." JA 452-57. Despite their concern over the Post article,

however, the conspirators continued to bid non-competitively and hold coffee auctions. JA 458-59, 468-69.

After the government executed search warrants at Arnold's house and others on April 12, 1995 (JA 693, 1048), Romer called Giap and said the group needed to meet to get their "stories straight." JA 472. Giap recorded his conversation with Batra the following day. JA 473-493. Batra told Giap that he had gone through his files and thrown out a folder cover on which he had written the payoffs he made on the first property he bought. JA 475, 478, 489-90. Batra also talked to Giap about what Batra's "story" would be and noted that "[t]he Government doesn't know anything about coffee table." JA 480, 484-85.

Giap, Romer, Batra, and Gulley met about five days later. JA 493-528. Romer was very upset when Giap told her that he had kept records of cash payoffs as well as of payments by check, and had given these records to federal investigators. Ibid. Romer explained: "Without the cash ones I didn't think they would have anything on me" (JA 506), and she worried aloud that there was no innocent explanation for the payoffs (JA 507, 527). Romer characterized the agreement: "it's mutual agreement. That we sort mutually agreed not to bid the price up." JA 508, 512. Romer agreed with Batra and Giap that, although they never sat down before the auction and decided who would bid, they did have "gestures, actions." JA 509. Romer asked Giap: "If you cut a deal with them try not to admit on everything, just maybe." JA 520. And Batra added, "What they ask you. You don't remember anything." JA 521. Finally, Batra asked co-conspirator Alan

Shams, who had not heard about the search warrants, to cross out Batra's name if it appeared in Shams' files, and Shams agreed. JA 529-31.[5]

2. Both appellants testified at trial. Romer admitted that she had attended and bid at the second auctions on 10 properties. JA 796-868. Indeed, she admitted that in "those days" she usually carried a $10,000 bidder's deposit "to be able to participate on the second auction just in case I get invited." JA 819. Romer also stated that, if she bid at all, she stopped bidding "early on." JA 870. She admitted that in general, if you joined the group, you were not supposed to bid against the other members. JA 874.

Batra also admitted attending second auctions or receiving pay-offs on 6 properties. JA 263-69, 957, 974-78, 1021-22, 1031, 1036. He also admitted that he had explained how the conspiracy worked to Cindy Shams at the McWhorter Place second auction and told her that the price that everyone wrote down at the second auction was the price that they would have been willing to pay at the public auction. JA 1041-42; see also JA

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[5] Donald Kotowicz, the third co-conspirator who testified for the government, joined the conspiracy in August 1991 and described the conspiracy in the same terms as Giap and Gulley. JA 683-84, 689-90. He recalled the agreement continuing through 1994 and involving a half dozen people (JA 685), and he testified about rigging two bids with Batra (JA 685-86, 688-89) and an attempt to rig another one with Romer (JA 690-91). Noel Park Futrell also testified about dealings with Romer at foreclosure auctions. She stated that Romer approached her at a foreclosure auction and asked her not to bid against Romer; in return, Romer would not bid against Park at the next auction. JA 714-15. Park did not comply. She told Giap about the conversation with Romer. JA 715-16.

368-69 (tape). Finally, Batra admitted that, after he learned of the investigation, he destroyed a file cover on which he had written the amounts he had paid three people on the first house he bought (JA 1007, 1052-57) and that he told Shams to scratch out his name on Shams' files (JA 1058).

3. With respect to the bank fraud count that was tried to the court, and also to impeach Romer's credibility, the government presented evidence concerning a real estate loan that Romer had obtained from Burke and Herbert Bank and Trust Company in October 1993. JA 880-81. In response to the bank's request for her tax return, Romer, who is a CPA, sent a copy of what purported to be her 1992 Form 1040, but which was in fact a bogus return manufactured by her in response to the bank's request. It overstated her income by $85,000 and misstated the source of her income. JA 883-888. At the bench trial, the banker testified that Romer also lied to him concerning her income prior to obtaining the loan or submitting the Form 1040. JA 1244-45.

4. The jury convicted both Romer and Batra on the Sherman Act count (count 1). After a bench trial, the court convicted Romer of bank fraud (count 4) and conspiracy to defraud the Internal Revenue Service (count 5). JA 1472, 1481; see also J.A. 1391-98 (denying motions for judgments of acquittal).

The court sentenced Batra to a 3-year term of probation, with a special condition of probation of 90 days' imprisonment, to be followed by 3 months' home detention. He was also ordered to pay $8,377 as restitution but found unable to pay a fine. JA 1434-35, 1437-39.

In sentencing Romer, the court concluded that her volume of commerce was not high enough to warrant an increase in her base offense level (10), but added one point for submitting non-competitive bids. JA 1403-11, 1455; see U.S.S.G. § 2R1.1(b). The court denied any downward adjustment for acceptance of responsibility, in light of Romer's untruthful testimony at trial. JA 1450. Because Romer, a CPA, failed to inform the probation officer of all of her assets, the court increased the offense level for the antitrust offense by two levels, for obstruction of justice. JA 1442-45, 1451, 1455-58. The court then grouped the antitrust and tax conspiracy offenses under U.S.S.G. § 3D1.2(c); Romer agreed that this grouping was done properly. JA 1442. The resulting offense level after grouping was level 14 (JA 1461-62). Noting that the case was "aggravated" because Romer, an intelligent and well-educated woman who is a CPA, knowingly and intentionally committed acts of fraud and failed fully to disclose her assets at sentencing (JA 1462), the court sentenced Romer, within the Guidelines range, to 18 months in prison on each count, to be followed by concurrent 3-year and 1-year terms of supervised release on the fraud counts and the antitrust count, respectively. JA 1463. The court also ordered, on the bid-rigging count, $7,269 restitution and a fine of $20,000. JA 1464.

SUMMARY OF ARGUMENT

1. The evidence amply supported the jury's finding on the interstate commerce element of the antitrust offense, under either an "in the flow of commerce" or "affecting commerce"

theory. The foreclosure auctions that were the object of the bid-rigging conspiracy were initiated by lenders outside Virginia and proceeds from the auctions were returned to the out-of-state lenders. Public bidding was a necessary part of the foreclosure process because Virginia law required it. Under Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-85 (1975), foreclosure auction bidding was in the flow of commerce because the bidding is "an integral part of an interstate transaction" and auction bidding is "inseparabl[e] * * * from the interstate aspects" of the foreclosure process.

Further, foreclosure auction bidding substantially affected interstate commerce. Nine rigged auctions in which Batra and Romer participated generated over $1 million to satisfy debts held by out-of-state lenders; the conspiracy and others like it had the potential to affect even larger amounts of foreclosure proceeds. In addition, the conspiracy substantially impacted other interstate commercial activities, such as out-of-state advertising and out-of-state bidders and buyers.

United States v. Lopez, 514 U.S. 549 (1995), on which appellants heavily rely, involved a statute that the Court held exceeded Congress' Commerce Clause authority, applying an "affecting commerce" standard. In contrast, the Court has previously held that Congress had authority under the Commerce Clause to enact the Sherman Act. Indeed, Lopez makes clear that it does not apply to statutes like the Sherman Act that directly regulate commerce and that explicitly require a case-by-case finding of interstate commerce nexus.

The trial court's supplemental instruction on interstate commerce was a correct statement of the law, which properly instructed the jury to apply the law to the facts of this case.

2. The court properly refused two jury instructions concerning joint ventures and partnerships. Those proposed instructions were not supported by the law or evidence, were confusing, or were adequately covered by other instructions.

The court did not abuse its discretion in admitting a newspaper article that was discussed by the conspirators on tapes played to the jury. It was highly relevant, and the jury could not have misconstrued it, in view of the court's cautionary instructions. The court also properly allowed testimony about a coconspirator's plea agreement. The court gave the jury a cautionary instruction, and the government did not emphasize the witness' promise of truthfulness.

3. There was no variance between the proof at trial and Romer's indictment on bank fraud. The indictment listed one part of a scheme to defraud, and the government was entitled to prove additional aspects of the same scheme. The court cited both aspects of the fraud in deciding Romer's guilt, and noted that Romer could not have been surprised when the entire scheme was proved at trial. Even if there was a variance, it was harmless because Romer was informed of the charges against her and was able to prepare her defense. Moreover, she could not be prosecuted twice for the same offense because the fraud is clearly described in the indictment.

The evidence was sufficient to convict Romer of tax conspiracy

(18 U.S.C. 371). The taped conversations established that Romer agreed with Rosen to defraud the IRS, and a reasonable jury could conclude that others, including Gulley, were also members of the conspiracy. The fact that the conspiracy had the additional goal of making it more difficult to detect bid-rigging was not a defense; as long as conspiracy to defraud the United States is one purpose of the conspiracy, the conspiracy violates § 371.

4. Romer was correctly sentenced. A one-point enhancement is given for bid-rigging, to reflect the fact that volume of commerce is often understated in such offenses. Here, Romer and her conspirators manifestly rigged bids; and Romer's volume of commerce was in fact understated. The one-level enhancement served its intended purpose.

Departure was not an issue in this case, and therefore the court properly did not discuss departure. Romer's sentence was arrived at after the three "counts resulting in conviction" were grouped and combined (see U.S.S.G. § 3D1.1(a)) without need for departure. The enhancement for more than minimal planning was appropriate in view of Romer's creation of a bogus document to carry out her bank fraud. And an increase for obstruction of justice was appropriate for Romer's serious failure to inform the probation officer of assets that were required to be reported. This information was relevant to determining Romer's ability to pay fines, restitution, and other items; the court made an adequate finding of materiality.

ARGUMENT

I. THE EVIDENCE SUPPORTED THE JURY'S INTERSTATE COMMERCE FINDING

The jury was instructed that it must find beyond a reasonable doubt as to the Sherman Act offense "that the trade or commerce restrained by the conspiracy was either [1] in the flow of or [2] substantially affected interstate commerce." JA 1204, 1213-17; see, e.g., McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 241-42 (1980); Estate Construction Co. v. Miller & Smith Holding Co., 14 F.3d 213, 221 (4th Cir. 1994). Appellants contend (D.Br. 22-27) that the evidence at trial did not support the jury's finding on this element.

This Court should review the evidence in the light most favorable to the government and should affirm if any rational jury could have found the appellants guilty beyond a reasonable doubt. United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). The jury's verdict should stand if the evidence was sufficient to establish the interstate commerce element under either an "in commerce" or "affecting commerce" theory. Griffin v. United States, 502 U.S. 46 (1991); Turner v. United States, 396 U.S. 398, 420 (1970). For the reasons stated in the district court's comprehensive opinion (JA 1391-98), the jury properly convicted appellants on the Sherman Act count. See United States v. Ashley Transfer & Storage Co., 858 F.2d 221, 226 n.3 (4th Cir. 1988)(interstate commerce is a "nonissue in most Sherman Act cases," because of inherent effects of trade restraint in a national economy), cert. denied, 490 U.S. 1035 (1989).

A. Flow of Commerce. In considering whether the government

proved that the appellants' activities were "in commerce," the jury had to decide whether bidding at foreclosure auctions is "an integral part of an interstate transaction" and whether such bidding is "inseparabl[e] * * * from the interstate aspects" of the foreclosure process. Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-85 (1975); see also McLain, 444 U.S. at 244 (describing Goldfarb as a flow of commerce case). Activities in the flow of interstate commerce "need have but minimal impact upon the commerce to `affect' it, since by definition they are a very part of the stream." United States v. Foley, 598 F.2d 1323, 1329 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980).

The evidence amply met this "in commerce" test.[6] The parties stipulated (JA 51-53) that the lenders that initiated 12 of the foreclosures that were subject to the conspiracy were located outside of the Commonwealth of Virginia. Those foreclosures, which involved substantial amounts of commerce (JA 1393-94), were conducted by trustees selected by the out-of-state lenders, pursuant to documentation and instructions received from those lenders, including bidding instructions. JA 82, 113-16, 765. While the foreclosure auctions are primarily advertised in Virginia, they are also advertised in the District of Columbia, and prospective bidders come from outside Virginia. JA 81-82, 100 (trustee got inquiries from Maryland; saw copies in D.C. of Journal in which he advertised foreclosure properties; published

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[6] Appellants do not challenge the interstate commerce jury instructions, with the exception of the supplemental instruction discussed infra, Part II.

on occasion in Washington Post and Times). When the trustee receives funds from the successful bidders, including the conspirators, he disburses the proceeds to the lender for whom the trustee foreclosed -- in this case, the parties stipulated disbursements to 11 out-of-state lenders or the Resolution Trust Corporation -- and any surplus proceeds are paid to first to lien holders and then to the former owners, wherever located. JA 92.

Thus, goods and services involved in the Northern Virginia foreclosure process are in interstate commerce -- whether banking services (in their foreclosure aspect), or funds being paid by trustees to out-of-state lenders and other mortgage or lien holders and to former owners. And the bidding at foreclosure was an clearly an integral part of those interstate transactions. Under state law, foreclosures on a deed of trust could only be conducted pursuant to public auction. JA 78.

To paraphrase Goldfarb,[7] "the transactions which create the need for the [bidding] in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade * * * is present because, in a practical sense, [public bidding is] necessary in real estate [foreclosure] transactions. * * * Thus [auction bidding] is an integral part of an interstate transaction" and "this [auction bidding] * * * [is] inseparab[le] * * * from the interstate aspects of real estate transactions." 421 U.S. at

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[7] Goldfarb involved a Bar Association minimum fee schedule for attorneys performing title examinations; lenders required the title examinations. 421 U.S. at 784.

783-85 (footnotes omitted). See JA 1392-96 (mem. opinion); United States v. Guthrie, 814 F. Supp. 942, 944-46 (E.D. Wash. 1993)(foreclosure auction bid-rigging scheme; jury could find that scheme was "in commerce" for purposes of Sherman Act where "out of state banks initiated the foreclosure process on the properties, selected the trustees to conduct the foreclosure sales, instructed the trustees on the conduct of the sales, and finally, received the sale proceeds from the trustees"), aff'd 17 F.3d 397 (9th Cir.)(table), cert. denied, 513 U.S. 823 (1994); see also United States v. Robertson, 514 U.S. 669 (1995)(gold mine found to be engaged in interstate commerce because mine purchased at least some of its equipment and supplies out-of-state; successfully sought workers from out-of- state; and shipped some gold out-of-state).

This Court found the "in commerce" requirement was met on similar facts in United States v. Foley, 598 F.2d at 1327-31 (also finding substantial effect on commerce), a case that involved a conspiracy to fix real estate commissions. This Court held that the activities of the real estate brokers were "an integral part of an identifiable stream of interstate real estate transactions," where the evidence showed a variety of interstate contacts, including financing for brokered purchases from out-of-state lending institutions and brokers "facilitat[ing]" and "drawing in" interstate lending and loan guarantee transactions. 598 F.2d at 1329-30. In this case, similarly, there was an "identifiable stream" of interstate real estate transactions, including interstate lending transactions. And, unlike Foley,

where the brokers merely facilitated those transactions, in this case, the bidders were an essential part of the transaction, because, under Virginia law, without public bidding, no foreclosure could take place.

Appellants' reliance on Dominion Parking Corp. v. Baltimore & Ohio R.R., 450 F. Supp. 441, 444-46 (E.D. Va. 1978), is misplaced. In that case, the article allegedly in commerce was a parking lot, which obviously did not physically move across state lines. Although documents relating to the parking lot did move across state lines, the article allegedly in interstate commerce did not. In this case, by contrast, there is no question that relevant goods and services moved in commerce across state lines. See Guthrie, 814 F. Supp. at 946, n.1 (distinguishing Dominion Parking). Appellants' alternative suggestion (D.Br. 24) that the proof of what constitutes interstate commerce should be different in criminal and civil antitrust cases ignores the fact that the relevant statutory language ("in restraint of trade or commerce," 15 U.S.C. 1) is the same in both a civil and criminal suit.[8]

Finally, appellants argue that as non-institutional bidders they were not "necessary" to the functioning of the foreclosure process (D.Br. 24), because the lenders would have bid if appellants and their coconspirators had not. But the relevant inquiry is whether bidding at foreclosure auctions is "integral"

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[8] Appellants also argue that McLain held that the "in commerce" test had not been met in that case. D.Br. 24 n.9. But the Court did not reach the issue and merely decided that there was enough evidence on the "affecting commerce" theory to withstand a motion to dismiss.

to and "inseparable" from the interstate transactions (see Goldfarb, 421 U.S. at 783-84) -- and of course it is. As an activity in the flow of commerce, the bidding can be, and has been, regulated by Congress through the Sherman Act.

B. Affecting Commerce. An alternate means of meeting the Sherman Act commerce requirement is to show that an activity, while wholly local in nature, nevertheless substantially affects commerce. McLain, 444 U.S. at 241-42. The government does not have to show that the illegal activities actually affected interstate commerce; "proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful." Summit Health Ltd. v. Pinhas, 500 U.S. 322, 330 (1991); McLain, 444 U.S. at 242-43. Sherman Act jurisdiction has expanded with expanding notions of congressional power, and the Sherman Act's reach is coextensive with the reach of congressional power. Pinhas, 500 U.S. at 328-29 & nn.7-10.

Further, the government is not confined to showing that the activity infected by the unlawful acts affects interstate commerce; it is sufficient if the class of cases to which the case belongs affects interstate commerce. Hammes v. Aamco Transmission, Inc., 33 F.3d 774, 781 (7th Cir. 1994) (Posner, C.J.) (discussing Pinhas). This is true because "[i]n an industry or section, however immense, in which most units of production are small * * * an insistence by the courts that each cartel be shown to have a demonstrable effect on interstate commerce would allow the entire industry to be cartelized,

piecemeal, with impunity." Ibid. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States." Fry v. United States, 421 U.S. 542, 547 (1975), quoted at 33 F.3d 781; see also Pinhas, 500 U.S. at 332-33 (allegations about restraint on individual physician; Court looked to reduction in provision of ophthalmological services in the Los Angeles market).

In this case, there is no question about substantial effect on interstate commerce, even considering only appellants' activities where illegal bid-rigging was proved. As the district court noted (JA 1397):

> The nine auctions in which the two defendants participated generated over one million dollars of proceeds to satisfy debts held by out-of-state lenders. The nature of the conspiracy threatened the ability of lenders, creditors and former homeowners to fully recoup their losses. Therefore, the Court finds that there was sufficient evidence to demonstrate a "not insubstantial" potential effect on interstate commerce created by defendants' activities.

While the court correctly found the dollar amount of proceeds returned to out-of-state banks to be sufficient to support the jury's finding, other interstate commercial activities were also impacted by the bidding process, such as out-of-state advertising, out-of-state bidders and buyers, and transfer of documents relating to the bidding process across state lines. See Foley, 598 F.2d at 1329-31 (out-of-state purchasers, advertising, financing, and government guarantees of mortgages).

Appellants argue that interstate commerce was not even potentially harmed in this case because out-of-state banks

typically bid the amount of the outstanding loan and collect all that is due to them, and thus are not affected by corruption of subsequent bidding. D.Br. 26-27. But this contention is factually inaccurate because the government showed an actual and potential effect on interstate commerce as a matter of practical economics. In a depressed market, lenders often bid less than the amount of the outstanding loan; this actually occurred in at least one of the cases subject to the conspiracy. See JA 766-771 (9363 Peter Roy Court). Thus, the government showed both actual harm to interstate commerce from appellants' activities, and potential harm from other foreclosure sales. In addition, it can fairly be assumed that former property owners and possibly even lien holders, who are routinely harmed by foreclosure bid-rigging schemes, are located not only in Virginia but also in other sections of the metropolitan area, in Maryland and D.C. Finally, there can be no question that if Congress set out to regulate -- for example, by requiring record-keeping on all bidders -- all foreclosure auctions where an out-of-state lender is seeking to foreclose, it could do so under the Commerce Clause. See Pinhas, 500 U.S. at 332-33 (power of Congress to regulate peer-review process means that abuse of that process confers sufficient nexus with interstate commerce). Thus, the Sherman Act may regulate anticompetitive behavior in the same context.

C. Effect of Lopez decision. Appellants claim (D.Br. 27-29) that the decision below is "out of phase" with United States v. Lopez, 514 U.S. 549 (1995). This is a silly argument. In Lopez, the Supreme Court held that the Gun-Free School Zones Act

exceeded Congress' Commerce Clause authority. But it is a little late in the day to challenge the constitutionality of Section 1 of the Sherman Act. See Pinhas, 500 U.S. at 328-29 & nn.7-10 (discussing expansion since 1890 of scope of commerce provisions of Sherman Act). The constitutionality of the statute is settled and not open to further discussion. See United States v. Bailey, 112 F.3d 758, 766 (4th Cir.)(refusing to revisit statutes previously declared constitutional by Supreme Court), cert. denied, 66 U.S.L.W. 3262 (U.S. Oct. 6, 1997)(No. 97-5484). In any event, Lopez was an "affecting commerce" case, and does not address the "in flow" prong of the Sherman Act. United States v. Johnson, 114 F.3d 476, 479 n.2 (4th Cir.), cert. denied, 66 U.S.L.W. 3262 (U.S. Oct. 6, 1997)(No. 97-5726). Further, Lopez carefully distinguished statutes, like the Sherman Act, that contain "a jurisdictional element that would ensure, through case-by-case inquiry" an effect on interstate commerce. 514 U.S. at 561. Finally, Lopez distinguishes statutes that regulate economic enterprise and commercial transactions: "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 514 U.S. at 559-61. This Court has confirmed that the problems presented by the statute at issue in Lopez do not arise where the government, by statute, must show a nexus with interstate commerce, and where a general regulatory statute bears a substantial relation to commerce. United States v. Crump, 120 F.3d 462, 465-66 (4th Cir. 1997); United States v. Wells, 98 F.3d 808, 811 (4th Cir. 1996); United States v. Leshuk, 65 F.3d 1105,

1112 (4th Cir. 1995).[9]

II. THE COURT'S SUPPLEMENTAL JURY INSTRUCTION ON INTERSTATE COMMERCE PROPERLY STATED APPLICABLE LAW

Appellants complain that a supplemental jury instruction on interstate commerce given in response to a question from the jury "was confusing and prejudicial." D.Br. 29. Since appellants failed to object to this instruction when it was given (JA 1310), they can prevail on appeal only if they can establish plain error. United States v. James, 998 F.2d 74-78 (2d Cir.), cert. denied, 510 U.S. 958 (1993); see also, infra, at 27-28. In fact, the court's supplemental instruction contains no error, plain or otherwise.

In response to the jury's question (JA 1321), the court told the jurors to look carefully at the instructions it had previously furnished them (JA 1307-09), reinstructed on burden of proof (JA 1309-10), and said (JA 1308-09):

> I'm going to try to give you some analogies that may help you in thinking about this.
>
> Let's say you had a situation where three Volvo dealers here in Virginia decided that they were going to get together and, rather than be in competition with each other, they were going to try to have an agreement about the various prices that they would pay to Volvo of America for their cars and the price that they would sell them for.

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[9] Appellants claim (D.Br. 28-29) that the Sherman Act should not be enforced against them because states have the primary responsibility for enforcing criminal law. Lopez of course does not stand for such a broad proposition. In support, they assert that Virginia makes price-fixing "unlawful." D.Br. 28 n.10. But the Virginia antitrust statute (Va. Code § 59.1-9.1 et seq.) is a civil statute only. See § 59.1-9.8, -9.11. And appellants offer no support for the unprecedented suggestion that Congress intended state civil antitrust statutes to preempt criminal Sherman Act enforcement.

> Now, there are no Volvos manufactured in Virginia. The agreement was formed here in Virginia. The effect is going to be initially on the sale of Volvos in Virginia, but Volvos have to come across state lines to get here. That kind of an agreement, although formed in the state, is going to have an impact on interstate commerce. Why? Because part of the goods that are involved here are shipped from out of state in state.
>
> I indicated to you that one of the things you have to look at in this case is the extent to which you find that there are out-of-state aspects of the real-estate foreclosure process. All right?
>
> In other words the first question you have to be looking at is, is the real estate foreclosure process, here in Virginia, is it an activity which can be considered to be an interstate activity? Does it affect interstate commerce in that are there indicia of goods or -- money is a good -- traveling, or debt -- debt is a good -- traveling in an interstate fashion from out of the state into the state or from into the state to out of the state.
>
> If that is part of real estate foreclosure transactions in the general sense, then you have to see whether or not in the specific real estate foreclosures that are at issue in this case is there evidence, again, always beyond a reasonable doubt in your mind, of such interstate activity going on.

Appellants claim that the Volvo analogy prejudiced them because cars are mobile, while real estate is not. D.Br. 30-31. But the jury instruction makes clear that the government was alleging that funds and debts were the goods in the flow of interstate commerce, not real estate.

They also complain (D.Br. 31) that the instruction diverted the jury's attention from "the activities of the defendants" by instructing the jury to consider if the foreclosure process in an interstate activity. But the court properly told the jury to consider if funds move in interstate commerce as part of the foreclosure process, and then whether in this case the foreclosure activities ("the specific real estate foreclosures

that are at issue in this case") were in the flow of commerce. Far from "direct[ing] the verdict," the court correctly told the jury that it had to decide if appellants' activities were in commerce.

III. THE COURT CORRECTLY INSTRUCTED THE JURY ON THE LEGALITY OF PARTNERSHIPS

Appellants complain (D.Br. 31-34) that two requested jury instructions concerning joint ventures were improperly denied. Appellants do not identify these instructions by number or record reference. From the quotations provided in their brief, they appear to be referring 1) to a definition xeroxed from Black's law dictionary that Batra's counsel faxed to the court (D.Br. 32-33; J.A. 1080, 1082) and 2) to Batra's proposed instruction 69 (D.Br. 33-34; J.A. 1310A).

Appellants did not object, before the jury retired, to the court's failure to give the language from Instruction 69 that they now cite, or the dictionary definition of joint venture. Fed. R. Crim. P. 30 provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." The objection must be made after the instruction is given; it is not enough merely to propose an instruction. See, e.g., United States v. Arthurs, 73 F.3d 444, 448 (1st Cir. 1996); United States v. Tringali, 71 F.3d 1375, 1380 (7th Cir. 1995), cert. denied, 117 S. Ct. 87 (1996). If the party fails to object, the matter will be reviewed only for plain

error, and reversal will occur only in the "exceptional case." United States v. McCaskill, 676 F.2d 995, 1001-02 (4th Cir.), cert. denied, 459 U.S. 1018 (1982). In this case, the district court did not abuse its discretion, or commit plain error, when it refused to give the instructions in question.[10]

1. The district court properly refused to read the dictionary definition of joint ventures to the jury. That term was used only by John Adsit (see JA 1082-83) and he was not referring to any arrangement with appellants. JA 904. The court ruled: "[t]he only term that has been used in this case has been partnership. * * * [Using the term joint venture is] going to add a degree of confusion that I don't think is appropriate the way the case came in." JA 1082. Instead, the court decided "I am going to use the partnership language" (ibid.), and it thereupon instructed (JA 1206)(emphasis added):

> I also want to advise you that flipping property [i.e. immediately reselling] -- it's been discussed many times in this case -- or holding a secondary auction is not, per se, a violation of the [A]ct nor is forming a partnership or an agreement to bid on a contract necessarily a violation of the [A]ct.

Thus, Batra received the instruction that the evidence supported. The jury was instructed concerning appellants' theory of the case, and the court's decision not to elaborate further was well within its discretion. United States v. Lozano, 839

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[10] Further, as to the timely objection that Batra did make -- Batra's attorney stated that the court should "consider giving the jury the defense's theory of the case, at least for some of these transactions it involved joint bidding or group bidding versus bid rigging" (JA 1232-33) -- the court had adequately met this request with an instruction that a "an agreement to bid on a contract" is not necessarily illegal (JA 1206).

F.2d 1020, 1024 (4th Cir. 1988).

2. As to Batra's claim (D.Br. 33) that the jury should have been instructed that the government must prove that "the defendants were competitors with one another" (J.A. 1310A (text of Instr. 69)), this statement is not an accurate statement of the law. The government does not have to prove that the bidders were actual competitors; potential competitors can also rig bids. United States v. Sargent Electric Co., 785 F.2d 1123, 1127 (3d Cir. 1985)("actual or potential competitors"), cert. denied, 479 U.S. 819 (1986). The court gave a correct definition of bid-rigging (JA 1205-06), which followed closely the ABA Antitrust Section's Sample Jury Instructions in Criminal Antitrust Cases at 19 (1984).

As to the court's failure to include the portion of Instruction 69 that gave examples of what partners do -- such as share research or pool resources (JA 1310A) -- these aspects of partnership are common knowledge, and there was no need for the court to belabor the facets of partnership (see United States v. Park, 421 U.S. 658, 675 (1975)) once it had told the jury clearly that "forming a partnership or an agreement to bid on a contract" is not per se a violation. Appellants had an opportunity to, and did, bring examples of what partnerships can lawfully do to the jury's attention in closing argument.

IV. THE TRIAL COURT PROPERLY ADMITTED A NEWSPAPER ARTICLE AND A WITNESS' PLEA AGREEMENT.

A. The Newspaper Article. During tape-recorded conversations, the conspirators discussed an October 1, 1994,

Washington Post article that referred to criminal convictions in the District of Columbia for rigging of foreclosure auctions. The article generated extensive discussion among the conspirators concerning whether their actions were similar to those of the D.C. defendants and therefore illegal. See, e.g., JA 451-58. Although they were aware of the D.C. convictions, the conspirators, including Batra and Romer, continued with their bid-rigging activities, while making changes to lessen the likelihood of detection. See, e.g., JA 451-59. The government introduced a copy of the Post article (JA 1363-63C), arguing that is was relevant as the basis for the discussions and actions of the coconspirators. JA 447.[11] Batra's counsel objected on the narrow ground that his client was not involved in the conspiracy after October 1, 1994 (JA 448), but Romer's counsel said that he intended to introduce the article if the government did not. JA 447. The court rejected the withdrawal claim, admitted the document as to both defendants (JA 449-50), but cautioned the jurors that the settlements referred to in the Post article did not involve any of the conspirators in this case and that the article was about conduct that "may or may not be similar to the conduct involved here" and that the conduct occurred in D.C., not in Virginia. JA 449-451.

During a conference after the jury had been instructed but before it began deliberating, Batra's counsel reiterated his

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[11] Both Batra and Romer testified as to their reactions to the Post article, so the text was useful to understanding their testimony as well. See, e.g., JA 816, 822-24, 1010-11.

objection to introduction of the Post article, claiming for the first time that the article was "inflammatory." JA 1234. The court responded that it would give the jury a supplemental cautionary instruction (JA 1235), and did so (JA 1237-38):

> I want you to understand that that article was only allowed into evidence, not to prove the guilt or innocence of any of the defendants in this court or to establish that there was, in fact, a conspiracy in this District. It simply was introduced in the area of the reactions to the article and certain comments that may have been made about it. It doesn't prove anything. It's important that you recognize that, because it does include untested information. It includes hearsay, and it was not offered for the truth of its contents in that respect.

Both appellants now claim error, asserting that the "inflammatory" article "directed the jury to convict the defendants" on the basis of irrelevant facts, and that the article was inadmissible hearsay. D.Br. 34-35.[12] In fact, since the jury heard the conspirators discussing the article during a recorded conversation, the article itself was cumulative and could not have been "inflammatory." In any event, the article did not "direct" the jury to do anything; and the trial court properly explained to the jury that the article contained potential hearsay and was not being admitted for the truth of its contents. See, e.g., Walter N. Yoder & Sons, Inc. v. NLRB, 754

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[12] Romer admits that she did not object. D.Br. 34, n.12. Since she stated at trial that she intended to introduce the article, she "cannot now complain of what [s]he received." United States v. Guthrie, 931 F.2d 564, 567 (9th Cir. 1991)(invited error doctrine).

This Court will defer to a trial court's balancing of claims of prejudice under Fed. R. Evid. 403, unless it is an arbitrary or irrational exercise of discretion. Garraghty v. Jordan, 830 F.2d 1295, 1298 (4th Cir. 1987).

F.2d 531, 534 (4th Cir. 1985) (evidence that otherwise is hearsay can be admitted if not offered to prove truth of the matter asserted; in that case, it is not hearsay); Fed. R. Evid. 801(c). Appellants never asserted at trial that the article was irrelevant, except to the limited extent that Batra claimed withdrawal, an assertion not renewed on appeal, so they cannot assert this claim now, absent plain error. And of course the article was highly relevant -- it was the document that prompted extensive discussions among the coconspirators about the legality of their own conduct and led them to change their methods. The jury was entitled to examine the document discussed at length on the tape recordings.[13] Finally, since the jury was instructed that the article was not to be considered for the truth of its contents, and that, in any event, it had nothing to do with the defendants or Virginia, it can hardly have "inflam[ed]" (D.Br. 34) the jury. United States v. Rivera-Gomez, 67 F.3d 993, 999 (1st Cir. 1995)("jurors are not children, and our system of trial by jury is premised on the assumption that jurors will scrupulously follow the court's instructions").

B. Evidence concerning Giap's Plea Agreement and Guilty Plea. During his direct examination, Alexander Giap stated that he was testifying at trial because "[p]art of [his] plea agreement is to

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[13] Appellants also complain (D.Br. 35 n.15) that the article suggested to the jurors that bid-rigging is "necessarily" a federal offense, although in Virginia there is also a state civil statute. What difference this would make to a properly instructed jury is unclear. In any event, the jury was told that the article concerned only D.C. and was not to be considered for the truth of its contents.

cooperate with the investigation." JA 189. He described the terms of his plea agreement, including providing truthful cooperation with the Government. Ibid. Appellants did not object to this testimony and the government did not introduce a copy of the plea agreement, or read from the agreement.[14]

The district court had approved Giap's testimony concerning his plea agreement prior to trial (JA 58-68) because appellants had stated that they "intend to go after [Giap's] background extensively" (JA 58) and that "the details of Giap's criminal activities are critical to a theory of our case" (JA 59, Batra's counsel). Indeed, Romer's counsel explicitly stated that he thought it was "fair" that the government be allowed to go into the details of the plea bargain. JA 66, 68. Finally, the court cautioned the jury about Giap, mentioning him by name as "someone who provides evidence against someone else * * * to escape punishment for his own misdeeds or crimes"; and the court warned the jury that Giap's testimony "must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated." JA 1198.

Appellants now claim that they were prejudiced by evidence of Giap's plea agreement, because it suggested that since Giap was guilty, defendants were also guilty. D.Br. 36-37. However, Romer explicitly agreed to this evidence, and Batra failed to

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[14] Prior to Giap's testimony, Batra's counsel received assurance that the statement of facts supporting the plea agreement would not go to the jury. JA 67. He then stated that he was "still a little troubled by the plea agreement itself * * * [with] caption * * * going in." Ibid. But the jury did not see the plea agreement either.

object at trial. They therefore either cannot complain at all, or can only complain of plain error. In fact, there was no error. This Court has considered the possibility that testimony about a plea agreement has the effect claimed by appellants. However, it has concluded that such testimony is admissible so long as the prosecutor does not imply through his questions that the government has special knowledge of the veracity of the witness, the trial judge instructs the jury to be cautious in evaluating the witness' testimony, and the promise of truthfulness is not overly emphasized by counsel. United States v. Henderson, 717 F.2d 135, 137-38 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984). The Henderson requirements, including the cautionary instruction, were fully met in this case. Indeed, testimony concerning the plea agreement was particularly appropriate in this case, since appellants had stated that they intended to launch a full-scale attack on Giap's credibility. If the government had not brought out Giap's plea agreement, it would have appeared that the government was being less than forthright with the jury, hoping to hide the details of Giap's criminal history.

V. THERE WAS NO VARIANCE BETWEEN THE PROOF AT TRIAL AND THE INDICTMENT CONCERNING ROMER'S BANK FRAUD

Romer was convicted, after a bench trial, of violating 18 U.S.C. 1344 (bank fraud).[15] The fraud occurred in 1993 when

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[15] Section 1344 prohibits "knowingly execut[ing] or attempt[ing] to execute, a scheme or artifice --

(1) to defraud a financial institution; or

Romer applied for a real estate loan from Burke and Herbert, an FDIC-insured bank. JA 880-81. Romer met with Mr. Burke, the bank chairman, who asked her the amount of her income. She told him that it was about $90,000 the prior year. The banker asked her that day for a copy of her income tax return. JA 1244-45.[16] The bank approved the loan, relying in part on Romer's oral representation about her income, before it received a copy of Romer's tax return because Romer "seemed to be a very truthful person." JA 1247-1248. Subsequently, Romer submitted a false 1992 Form 1040, which supported Romer's oral statement about her income, about two weeks after the loan was approved. In fact, Romer had not filed a 1992 tax return at that time, and when she ultimately did file a 1992 return, it reflected not an adjusted gross income of $81,666, as shown on the bogus form, but a negative income ($-4800).[17] JA 883-88. Mr. Burke testified that if he had received a Form 1040 showing that Romer's income was actually a negative $4800, he would have turned down the loan or found out "why the two figures didn't agree." JA 1251.

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(2) to obtain any of the moneys, funds * * * owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

[16] Romer asserts that court sustained an objection to this evidence and refused to allow testimony about Romer's statement to the banker. D.Br. 13, 38 (citing JA 255-57; these references are in error, and appear to refer to JA 1245-47), 40. This assertion is simply incorrect; the court allowed the questioning.

[17] The false tax return showed the income as coming from Romer's accounting firm, but no such firm was mentioned on the tax return she eventually filed with the IRS. JA 884, 886-87.

Romer now argues that the only evidence the government could adduce to prove bank fraud in this case was evidence concerning the false income tax return because that was the only evidence cited in the indictment. Romer contends that evidence about her false oral statement to Mr. Burke was either a constructive amendment of the indictment or a prejudicial variance. D.Br. 37-41. But while Romer objected to testimony concerning the oral representation on the ground that the indictment was "limited to the income tax return itself" (JA 1244), she never expressly made the variance and constructive amendment arguments she now makes in this Court and, therefore, must establish plain error. United States v. Young, 470 U.S. 1, 15 (1985). But even assuming that she did properly preserve the arguments she now makes, she was not prejudiced by any error and any error was harmless.

Romer's false oral statement was in fact encompassed within the terms of paragraphs 2 and 3 of the indictment. Those paragraphs alleged that 1) in or about October 1993, 2) in the Eastern District of Virginia, 3) Romer engaged in a scheme or artifice to defraud and obtain money of a financial institution by means of false and fraudulent representations 4) by applying for a loan 5) in the amount of $80,000 6) from Burke and Herbert, 7) an FDIC-insured bank. JA 46. The government was allowed, based on this detailed description of the offense, to prove the fraudulent scheme both by evidence of the false tax return alleged in the indictment and the false oral statement. As the district court noted, Romer was "on more than sufficient notice as to * * * the scheme for which she was being brought before

the Court," which "certainly would cover the oral representation." JA 1285.

Indeed, Romer's false oral statement was an integral part of the scheme described in the indictment. Romer had told Mr. Burke that her income was $90,000, and she obtained a loan on that representation. As part of her continuing plan to obtain and retain the loan proceeds and in response to the bank's explicit request for her tax return, she provided the false tax return in order to bolster her earlier false representations, and to avoid jeopardizing her loan. While Mr. Burke was unable to say that he would have called the loan based only on a discovery that Romer had a negative income (JA 1251), Romer did not know this; and a bank does not have actually to suffer a loss under 18 U.S.C. 1344. See, e.g., United States v. Silvano, 812 F.2d 754, 760 (1st Cir. 1987)(mail fraud). Thus, both the oral statement and bogus tax return were interrelated parts of a fraudulent scheme.

Contrary to Romer's assertions (D.Br. 39, 40), the court did not rely exclusively on the false oral statement to convict Romer of bank fraud. The court stated (JA 1285):

> [T]here's again unequivocal evidence that the bank, both Mr. Burke and Mrs. Ellis, at some point wanted that tax return filed as part of the entire file, I think the filing of such a false tax return with a bank, even after the fact, still could be construed as an act to defraud the bank.

Even if a variance occurred when the trier of fact relied in part on additional evidence of fraud not alleged in the indictment, Romer was not prejudiced and any error was harmless. United States v. Quicksey, 525 F.2d 337, 341 (4th Cir. 1975),

cert. denied, 423 U.S. 1087 (1976).[18] Romer suffered no prejudice because she was "definitely informed as to the charges against [her], so that [she] may be enabled to present [her] defense and not be taken by surprise by the evidence offered at the trial." Ibid., quoting Berger v. United States, 295 U.S. 78, 82 (1935).[19] Romer was well aware that her false oral representation was a key part of her scheme to defraud the lender, and cannot be surprised if the representation was taken by the trier of fact as further evidence of the scheme alleged in the indictment.

Finally, Romer's argument that the evidence constituted a constructive amendment of the indictment is incorrect. Such an amendment occurs when either court or government "broadens the possible bases for conviction beyond those presented by the grand jury." United States v. Williams, 106 F.3d 1173, 1176 (4th Cir.), cert. denied, 1997 U.S.L.W. 3257 (Oct. 6, 1997)(No. 96-9412). The amendment is reversible error because it amounts to deprivation of the Fifth Amendment guarantee of indictment by a

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[18] A variance occurs when the evidence "at trial supports] a finding that the defendant committed the indicted crime, but the circumstances alleged in the indictment to have formed the context of the defendant's actions differ in some way nonessential to the conclusion that the crime must have been committed." United States v. Floresca, 38 F.3d 706, 709 (4th Cir. 1994).

[19] The second consideration in determining prejudicial variance -- that the defendant be protected against another prosecution for the same offense (Quicksey, 525 F.2d at 341) -- similarly is not implicated here. The indictment clearly describes the particular bank fraud, and Romer could not be prosecuted again for the same offense.

grand jury. Ibid. In this case, no such broadening of the indictment occurred; Romer was convicted of the bank fraud set out in the indictment. At most, additional evidence about the charged scheme was introduced that was not set out in the indictment, and the introduction of such additional evidence is not itself a constructive amendment. See, e.g., United States v. Knuckles, 581 F.2d 305, 312 (2d Cir.) (constructive amendment only where prosecution relies on a complex of facts distinctly different from that which grand jury set forth in indictment), cert. denied, 439 U.S. 986 (1978).

VI. THE EVIDENCE WAS SUFFICIENT TO CONVICT ROMER OF CONSPIRACY TO DEFRAUD THE IRS (18 U.S.C. 371)

Romer claims (D.Br. 41-44) that the district court erred in denying her motion for a judgment of acquittal as to Count 5, arguing that the evidence was not sufficient to convict. Count 5 charged a conspiracy to defraud the IRS in violation of 18 U.S.C. 371.[20] This Court will review the evidence in the light most favorable to the government, and will affirm if any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Tresvant, 677 F.2d at 1021.

The indictment alleged that Romer from about March 22, 1994, through at least August 14, 1995, participated in a conspiracy to defraud the Internal Revenue Service by agreeing to make illegal

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[20] Such a conspiracy (often called a Klein conspiracy) requires proof that: 1) the agreement existed, 2) an overt act by one of the conspirators in furtherance of the objectives was committed, and 3) the conspirator joined the agreement and intended to defraud the United States. United States v. Tedder, 801 F.2d 1437, 1446 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987).

payoffs in cash rather than by check to avoid reporting that cash as income on tax returns. JA 48. The conspiracy was formed on March 22, 1994, when Romer met with Batra, Giap, Rosen and Gulley in Giap's office to conduct a second, secret auction. JA 255. Rosen brought up the subject of whether premiums would be paid in cash (JA 275-77):

> the question is whether the successful bidder * * * [i]s going to expect to have a receipt. * * * See, none of you guys pay income tax anyway so it doesn't it's a moot point to you. * * * Well look if I'm the successful bidder * * * [d]o I put on my income tax * * * that I paid you a thousand dollars for this property. * * * If I do, you'd better be reporting that thousand dollars. So now are we, is this money being reported or not? That's the question. We've done it both ways and the new new rule we started to follow was it's not reported. * * * And the reason the reason is less paper trail.

Gulley then stated: "Alright so what we're saying we go cash and you don't add it to the basis of the property." Romer responded: "Right," and Rosen, Giap and Gulley concurred. JA 277. Romer then stated, "So cash? Are we doing cash?" Rosen and Romer both agreed with Rosen noting "you can't report it on your taxes." JA 277-278. Romer later reaffirmed the agreement, saying: "Everything that we do from now on has gotta be cash. * * * Because we don't want any check writing between us. If we get caught by IRS, we'll be dead." JA 373. The evidence further showed that, as alleged in the indictment, overt acts in furtherance of the conspiracy in the form of cash payments of premiums took place after the March 22, 1994 agreement was made. See, e.g., JA 296-301, 333-35 (Royal Ridge); 351, 367-68 (McWhorter Place).

In convicting Romer of Count 5, the court stated that on the

basis of Romer's unequivocal statement that "[i]f we get caught by IRS, we'll be dead" and other evidence, there is "no doubt in my mind" that Romer "clearly had in her mind a plan to use this cash-payment program as a means to avoid paying taxes. And * * * I think you have a conspiracy here." JA 1289-90.

Romer now argues that there was no conspiracy because "every other coconspirator [testified] that they were paying and intended to pay their taxes." D.Br. 13, 41-43.[21] Romer cites statements by Giap, Gulley, Arnold and Kotowicz about their intention to pay taxes (D.Br. 42). The evidence, including the tapes set forth above, however, clearly established a conspiracy between Rosen and Romer. This evidence, alone, is enough to prove agreement and sustain the verdict. And Gulley's taped comments cited by Romer (D.Br. 42) were equivocal -- he said that he reports cash to avoid attracting the IRS' attention and that he was not "trying" to cheat the IRS, but was "concerned about the paper trail" (JA 289). But he did not say that he reported all cash, and he appeared to recognize that the effect of the scheme was to cheat the IRS. Indeed, Gulley testified that after the Royal Ridge auction, the group discussed using cash to avoid a "paper trail" of the second auctions, and in fact used cash that day. JA 148, 150-51, 182-83. In light of Gulley's statement on the tape -- to "go cash and * * * don't add it to

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[21] The indictment was phrased more precisely than an agreement not to pay taxes. It alleged an agreement that second, secret auction payoffs be made in cash and making such payoffs in cash, as well as that cash payoffs would not be reported on income tax returns and would not be included in the auction winner's stated cash basis in the property. JA 48-49.

the basis of the property. * * * Alright that's okay" (JA 277) -- the trier of fact could reasonably conclude that Gulley agreed not to report the pay-offs from the coffee auctions to the IRS or the increase in basis resulting from pay-offs, as alleged in the indictment.

Romer also argues (D.Br. 43-44) that the government failed to show intent to defraud the IRS, because the agreement not only allowed the conspirators to avoid taxes but had the additional benefit of making it more difficult to detect bid-rigging (JA 288-89). But a "conspiracy to defraud the United States need not be the main objective of the conspirators. A conspiracy may have multiple objectives, but if one of the objectives, even a minor one, is the evasion of federal taxes, the offense is made out, even though the primary objective may be concealment of another crime." United States v. Collins, 78 F.3d 1021, 1037-38 (6th Cir.)(citing Ingram v. United States, 360 U.S. 672, 679-80 (1959)), cert. denied, 117 S. Ct. 189 (1996). See also, e.g., United States v. Furkin, 119 F.3d 1276, 1280-81 (7th Cir. 1997); United States v. Vogt, 910 F.2d 1184, 1202 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991)(impeding IRS need only be "one purpose" of Klein conspiracy); United States v. Browning, 723 F.2d 1544, 1546-49 (11th Cir. 1984).

Here, the evidence showed that one of the conspiracy's purposes was to "thwart the IRS's efforts to determine and collect income taxes." Vogt, 910 F.2d at 1202. The March 22, 1994 discussion quoted above made clear that the participants were agreeing not to report to the IRS the money that changed

hands at the coffee auctions, either as basis or income. JA 275-278 ("it should be clear * * * you can't report it on your taxes"). Thus, impeding the IRS was not merely a "collateral effect" of the agreement as Romer asserts (D.Br. 43-44, quoting Vogt), but one of its purposes.

VII. THE TRIAL COURT PROPERLY SENTENCED ROMER

Romer, but not Batra, assigns errors concerning sentencing. D.Br. 44-49. None has merit.[22]

A. One-Point Enhancement for Submitting Non-Competitive Bids. Both Romer and Batra received a one-point enhancement under U.S.S.G. § 2R1.1(b)(1), which provides that "[i]f the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level." J.A. 1405-06. Three other members of the conspiracy previously sentenced by Judges Bryan and Hilton received the same increase. JA 1499. Relying on Note 6 to the Antitrust Guideline, § 2R1.1, Romer claims (D.Br. 44-45) that she did not submit complementary bids, involving bid rotation, and therefore should not have been assessed a one-point enhancement.

Note 6 does not address the one-point enhancement for submitting "non-competitive bids." That enhancement is discussed in Background commentary, which makes clear the one-level increase for submitting non-competitive bids does apply to Romer.

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[22] The applicable Guidelines are the 1994-1995 edition, including amendments effective November 1, 1994. On review, this Court gives due deference to the district court's opportunity to judge the credibility of witnesses and accepts findings of fact unless clearly erroneous; it also gives due deference to the district court's application of the guidelines to the facts. 18 U.S.C. 3742(e).

"The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with pre-guidelines practice, the Commission has specified a 1-level increase for bid-rigging." U.S.S.G. § 2R1.1, comment (backg'd). There is no question in this case that the volume of commerce understated the seriousness of Romer's offense. Only properties on which the conspirators were successful bidders at the second auction were attributed to them in calculating volume of commerce. See JA 1499. In Romer's case, only one sale was attributed to her, with a volume or commerce of only $159,200, and this resulted in no increase in her offense level under § 2R1.1(b)(2). JA 1499-1500. Romer, however, had participated in at least 11 auctions (see JA 1498-1499) as a member of the conspiracy, where she could have competed honestly but did not. The one-level increase for bid-rigging operated as intended, to reflect the seriousness of her participation.

Romer's reliance on United States v. Heffernan, 43 F.3d 1144 (7th Cir. 1994), is misplaced because that case involved facts completely different from this case. In Heffernan, the conspirators fixed their steel drum prices and then, as part of their business, used those fixed prices in bids submitted to some potential customers. The Court found the 1-level increase for bid-rigging inapplicable. "There was no agreement on who would bid, only on what the bid would be." Id. at 1146. Here, by contrast, no uniform prices were submitted by the conspirators, and they participated in a public, courthouse-steps bidding

process. Unlike Heffernan, they did agree, through use of various signals, on who was going to bid, and who was going to drop out, or remain silent. See supra, at 7, 9. Thus, they "rigged" the bids, in the traditional sense, giving the appearance of competition -- by bidding, dropping out of the bidding, or remaining silent -- even though such competition did not exist.[23] This amounted to "bid-rigging" under § 2R1.1.

B. Grouping the Offenses. Romer complains (D.Br. 45) that she received an "eighteen month sentence for bank fraud and . . . tax conspiracy" that "exceeds the U.S.S.G. range." She claims that the 18-month sentence could only be achieved by departure, and that the court failed to state its reasons for departing. Ibid. This argument is frivolous. The eighteen month sentence was imposed because the court grouped the antitrust and tax conspiracy pursuant to U.S.S.G. § 3D1.2(c), and then combined them with the bank fraud count under U.S.S.G. § 3D1.4. See JA 1521. When the probation office did the grouping calculation (ibid.) -- a calculation to which Romer expressly agreed (JA 1442) -- it arrived at a combined adjusted offense level of 13. That office, however, did not make any adjustment for obstruction of justice. JA 1518-20. The court later concluded that an

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[23] In a complementary bidding scheme, the members collect the benefits of membership in the conspiracy by being allowed to place winning, non-competitive bids in some sort of rotation. See U.S.S.G. § 2R1.1, comment. (n.6). In this case, the bidders collected their benefits as a result of the second auction. But in both cases, public bidding that is intended to obtain the best price and that the public believes is honest is, in fact, rigged. And the effect on volume of commerce can be understated, in the manner described by the Background commentary.

adjustment was required for Romer's obstruction of justice, and increased the antitrust offense level by two levels. JA 1442-50, 1458. When the combined offense was calculated, the resulting offense level was 14. JA 1478. At level 14, the sentence range applicable to Romer is 15-21 months and her 18-month sentence is clearly within the guideline range, not a departure.

Romer also complains (D.Br. 47) about the enhancement for more than minimal planning applied to the bank fraud count. See JA 1519. The court correctly rejected her argument that she engaged in a spontaneous act, pointing out that Romer not only lied to the bank about her income when asked, but went to the trouble of creating and submitting a bogus tax return. JA 1453. Finally, Romer makes a truncated argument about acceptance of responsibility. D.Br. 47. The court, which had an opportunity to assess Romer's state of mind during her trial testimony, did not abuse its discretion in concluding that no credit should be awarded on this ground because, inter alia, of Romer's untruthful testimony at trial. JA 1450-51; see also JA 1461, 1506 (presentence report denying credit; accepted by court). Indeed, an acceptance of responsibility credit is almost never appropriate if an enhancement for obstruction of justice is assessed. U.S.S.G. § 3E1.1, comment. (n.4).

C. Obstruction of Justice. Romer objects (D.Br. 47-49) that the court increased Romer's offense level by two levels, for obstruction of justice. See U.S.S.G. § 3C1.1; JA 1442-46, 1451, 1455-58, 1462. Romer failed to inform the Probation Office of credit card lines of credit amounting to more than $36,000, prior

to the time the Presentence Report was prepared, although this information is clearly required to be reported. JA 1442, 1516. In addition, she failed to inform the office of seven properties she sold in 1996, the proceeds of which exceeded $400,000, although the Probation Office form asks for any assets with a cost or fair market value of more the $1000 disposed of within the last three years. See JA 1442-43, 1457, 1517. She also failed to include in her February 11, 1997, financial statement the proceeds from the February 1, 1997, sale of a time-share property in Florida, from which she received proceeds of $4,521 (JA 1456, 1516). The probation officer discovered the latter transaction in April 1997, when she obtained Romer's checking account balance from Romer's bank. When questioned by the probation officer about her failure to list the Florida property on her financial statement, Romer did not dispute that it should have been reported, but said she must have forgotten because "it wasn't very much money." JA 1516. At sentencing, Romer claimed she did not try to hide anything by failing to include the lines of credit and the time-share proceeds or failing to report the earlier $400,000 in sale proceeds, but "[i]n the whole scheme of things, it was not significant." JA 1456-57. The court responded (JA 1457-58, 1462):

> Well, I have problems with somebody who's a CPA being that lax in remembering details, especially in a context that's as important as a presentence investigation, and so quite frankly, Ms. Romer, I just don't accept that argument as a credible one. * * * [I am unable] to accept your statement that you merely forgot to fully disclose all of your assets.

U.S.S.G. § 3C1.1 authorizes a 2-level increase in offense

level if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the * * * sentencing of the instant offense." Application Note 3(h) states that this enhancement applies to "providing materially false information to a probation officer in respect to a presentence * * * investigation for the court." Application Note 5 defines "material" evidence as evidence that, "if believed, would tend to influence or affect the issue under determination."

Romer now asserts that the court erred because her "oversight" was "inadvertent" and because the court did not make a specific finding that Romer's various failures were material. But the court concluded that Romer's claims of inadvertence were not worthy of belief; this credibility determination, which was doubtless fortified by the court's observation of Romer's testimony at trial, is entitled to great deference by this Court. United States v. Locklear, 829 F.2d 1314, 1317 (4th Cir. 1987).

Further, there is no question that the financial information was material. The probation officer needed accurate information as to Romer's financial status to determine Romer's ability to pay the fines, restitution, costs of imprisonment or supervision, and special assessment for which she was potentially liable. See United States v. Hicks, 948 F.2d 877, 886 (4th Cir. 1991) (probation officer needs an accurate statement concerning defendant's finances to impose a fine). In fact, the court did not require Romer to pay for the costs of her imprisonment or supervision, based on her limited resources. JA 1464.

In any event, the district court made an adequate finding of materiality, noting that financial "details" are important in the "context" of a presentence investigation. JA 1457-1458. Romer did not object that a more detailed finding of materiality should have been made. And even if the district court's finding on materiality were insufficiently detailed, this Court does not require a remand for explicit findings of materiality, in the context of providing false presentence information to a probation officer, where the record "sufficiently indicates an implicit finding of materiality." United States v. Saintil, 910 F.2d 1231, 1233 (4th Cir. 1990). United States v. Dunnigan, 507 U.S. 87 (1993), on which Romer relies, relates to the findings required where perjury at trial is the basis for an obstruction of justice enhancement under U.S.S.G. § 3C1.1. In that situation, explicit findings as to each element of the offense are needed, because of the difficulty in separating honest misstatements under the pressure of trial, owing to "confusion, mistake, or faulty memory," from perjury. 507 U.S. at 95. At the sentencing stage, by contrast, there is no similar excuse for failure to provide accurate financial information, and Dunnigan does not purport to address sentencing adjustments for obstruction of justice other than those based on perjury.

CONCLUSION

The appellants' convictions and Romer's sentence should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 1997, I caused two copies of the foregoing Brief of Appellee United States to be served by first class mail, postage prepaid, on:

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A D D E N D U M

STATUTORY ADDENDUM

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides in relevant part:

> 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

18 U.S.C. § 371 provides in relevant part:

> If two or more persons conspire * * * to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice --
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.