UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 12 CR 567-4
v.	)	
	)	Judge Ronald A. Guzman
	)	
WILLIAM BOEHM	)	

MOTION OF THE UNITED STATES TO ADMIT EVIDENCE PURSUANT TO FED.R.EVID. 801(d)(2)(E)

The UNITED STATES OF AMERICA, by its attorney, ZACHARY T. FARDON, United States Attorney for the Northern District of Illinois, moves this Court to admit certain statements against defendant WILLIAM BOEHM pursuant to Fed. R. Evid. 104(a), 801(d)(2)(E) and *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978).

I. INTRODUCTION

This submission begins by providing an overview of the scheme that will be established at trial. It then discusses the law governing the admissibility of coconspirator statements under Rule 801(d)(2)(E), and outlines some of the evidence establishing the scheme in this case. Finally, it summarizes the evidence supporting the admission of co-schemers' and agents' statements. Based on the following, the government seeks admission of statements pursuant to Rule 801(d)(2)(E) and requests a pretrial ruling of admissibility from the Court, in accord with *United States v. Santiago*, 582 F.2d 1128, 1130-31 (7th Cir. 1978) and established practice

in this Circuit. *See United States v. Alviar*, 573 F.3d 526, 540 (7th Cir. 2009); *United States v. Harris,* 585 F.3d 394, 398, 400 (7th Cir. 2009).

II. OVERVIEW OF THE CHARGED SCHEME

On July 24, 2012, a federal grand jury returned a 16-count indictment against defendants Mastro, Allen, Theotikos, and Boehm. The indictment charged defendants Mastro, Allen and Theotikos (hereinafter, collectively "defendants") with multiple counts of mail and wire fraud, in violation of Title 18, United States Code, Sections 1341 and 1343. The indictment also included a count against defendant Boehm, based upon his materially false, fictitious, and fraudulent statements to agents of the Federal Bureau of Investigation during an interview concerning the fraudulent auction scheme, in violation of Title 18, United States Code, Section 1001.

The indictment charges that defendants Mastro, Allen, Theotikos, Co-Schemer A, other auction house employees, and others participated in a scheme to defraud customers of Mastro Auctions, by deceiving bidders into believing that Mastro Auctions conducted auctions according to practices that ensured fair and competitive auctions and that applied equally to all auction participants, and further intended to deceive auction participants into believing that greater market demand existed for items sold by Mastro Auctions than actually was the case. In fact, defendants and their co-schemers engaged in a series of practices designed to fraudulently inflate prices paid by bidders and protect the interests of consignors and sellers at the expense of bidders. In order to conceal the fact that shill bidding

was engaged in, and facilitated by the Auction House, defendants, including defendant Boehm, caused "Auction Results" to be made available to customers, in which they falsely represented inflated auction results by stating that items had actually sold, when in fact, the items had not sold. In order to further conceal the scheme, prior to July 2007, defendant Boehm partially deleted and destroyed bidding records. The scheme itself is described more fully below.

III. GOVERNING LAW

Rule 801(d)(2)(E) provides that a "statement" is not hearsay if it "is offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Admission of such coconspirator statements against a defendant is proper where the government establishes by a preponderance of the evidence that: (1) a conspiracy or joint venture existed; (2) defendant and the declarant were members of the conspiracy or joint venture; and (3) the statements were made during the course and in furtherance of the conspiracy or joint venture. *United States v. Cruz-Rea*, 626 F.3d 929, 937 (7th Cir. 2010).[1]

Statements are admissible as nonhearsay under Rule 801(d)(2)(E) notwithstanding the lack of any formal conspiracy charge, as long as the requirements of the rule are met. *See, e.g., United States v. Rea*, 621 F.3d 595, 604

[1] No Sixth Amendment confrontation issues are posed by the use of a non-testifying coconspirator's statements, offered for their truth against a defendant. Such statements are not testimonial, and therefore are not subject to the Confrontation Clause. *United States v. Nicksion*, 628 F.3d 368, 374 (7th Cir. 2010) (citing *Davis v. Washington*, 547 U.S. 813, 823-24 (2006) and *Crawford v. Washington*, 541 U.S. 36 (2004)); *see also United States v. Hargrove*, 508 F.3d 445, 448-49 (7th Cir. 2007) (coconspirator statements are neither hearsay nor testimonial).

(7th Cir. 2010); *United States v. Moon*, 512 F.3d 359, 363 (7th Cir. 2008). Further, the legal principles governing admissibility of coconspirator statements under Rule 801(d)(2)(E) apply not only to conspiracies but also to joint ventures (such as the fraud scheme in this case), even though the venture was not formally charged as a conspiracy. *See, e.g., United States v. Jackson*, 540 F.3d 578, 592 (7th Cir. 2008) (applying 801(d)(2)(E) to bank fraud scheme); *United States v. Kelley,* 864 F.2d 569, 573 (7th Cir. 1989).

1. Existence of and Membership in the Conspiracy

Under *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), the trial judge must preliminarily determine whether statements by a coconspirator of the defendant will be admissible at trial under Federal Rule of Evidence 801(d)(2)(E). In making this determination the judge must decide "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy . . . ." *Id.* at 1143 (quoting *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977)); *see also United States v. Hoover*, 246 F.3d 1054, 1060 (7th Cir. 2001). If the Court determines the statements are admissible, the jury may consider them for any purpose. *United States v. Thompson*, 944 F.2d 1331, 1345 (7th Cir. 1991).

Under *Santiago*, the government must make a preliminary offer of evidence to show: 1) a conspiracy existed; 2) the defendant and declarant were members of the conspiracy; and 3) the statements sought to be admitted were made during and in furtherance of the conspiracy. *Santiago*, 582 F.2d at 1134-35; *see also, e.g., United*

States v. Alviar, 573 F.3d 526, 540 (7th Cir. 2009). According to *Bourjaily v. United States*, 483 U.S. 171, 176-81 (1987), the court can consider the statements in question (the statements to be admitted) to determine whether the three *Santiago* criteria have been met.

Seventh Circuit cases construing *Bourjaily* have held that properly admitted hearsay, including statements admitted under the coconspirator exception to the hearsay rule (Fed. R. Evid.801(d)(2)(E)), may be used to prove what another person did or said that may demonstrate their membership in the conspiracy. *United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994) ("[W]hile only the defendant's acts or statements could be used to prove that defendant's membership in a conspiracy, evidence of that defendant's acts or statements may be provided by the statements of co-conspirators."); *United States v. Martinez de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990) (en banc).

While the Court may consider the proffered statements themselves as evidence of both the existence of a conspiracy and a defendant's participation in it, *United States v. Bourjaily*, 483 U.S. 171, 178, 180 (1987); *United States v. Harris*, 585 F.3d 394, 398-99 (7th Cir. 2009), the contents of the proffered statements alone are not sufficient to establish the existence of a conspiracy and a defendant's participation. There must also be some supporting evidence or facts corroborating the existence of the conspiracy and defendant's participation. *Harris*, 585 F.3d at 398-99. The evidence showing the existence of a conspiracy and a defendant's membership in it may be either direct or circumstantial. *See United States v.*

Johnson, 592 F.3d 749, 754-55 (7th Cir. 2010); *United States v. Irorere*, 228 F.3d 816, 823 (7th Cir. 2000).[2]

There is no requirement, for admissibility under Rule 801(d)(2)(E), that the government establish all elements of "conspiracy" such as a meeting of the minds and an overt act. *United States v. Coe*, 718 F.2d 830, 835 (7th Cir. 1983); *United States v. Gil*, 604 F.2d 546, 548-50 (7th Cir. 1979). The government need only establish the existence of a joint venture for an illegal purpose (or for a legal purpose using illegal means) and participation in the joint venture by the defendant and the maker of the statement at issue (as well as that the statement was in furtherance of the venture). "[I]t makes no difference whether the declarant or any other 'partner in crime' could actually be tried, convicted and punished for the crime of conspiracy." *Gil*, 604 F.2d at 549-550; *see also Coe*, 718 F.2d at 835.

[2] The coconspirator statement rule does not apply when a statement is not being offered for the truth of the matter asserted, and thus does not constitute "hearsay" as defined by Rule 801(c). Accordingly, statements by alleged coconspirators may be admitted against a defendant, without establishing the *Bourjaily* factual predicates set forth above, when such statements are offered to show, for instance, the existence, the illegality, or the nature or scope of the charged conspiracy. *See United States v. Guyton*, 36 F.3d 655, 658 (7th Cir. 1994) (statement that defendant was out of cocaine was not hearsay because it was not offered for its truth but as evidence of membership in conspiracy); *United States v. Herrera-Medina*, 853 F.2d 564, 565-66 (7th Cir. 1988) ("war stories" about the drug trade were not offered for the truth); *United States v. Van Daal Wyk*, 840 F.2d 494, 497-98 (7th Cir. 1988) (statements had non-hearsay value in establishing knowledge of and membership in conspiracy); *United States v. Tuchow*, 768 F.2d 855, 867-69 (7th Cir. 1985) (pre-conspiracy statements admissible to set forth scope of the anticipated conspiratorial scheme).

While there is thus a distinction between conspiracy law and admissibility under Rule 801(d)(2)(E), certain principles of general conspiracy law are relevant to the Rule 801(d)(2)(E) inquiries. For instance, "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Salinas v. United States*, 522 U.S. 52, 63 (1997); *see also United States v. Longstreet,* 567 F.3d 911, 919 (7th Cir. 2009); *United States v. Jones*, 275 F.3d 648, 652 (7th Cir. 2001). The government need not prove that a defendant knew each and every detail of the conspiracy or played more than a minor role in the conspiracy. *United States v. Curtis*, 324 F.3d 501, 506 (7th Cir. 2003). Further, a defendant joins a criminal conspiracy if he agrees with another person to one or more of the common objectives of the conspiracy; it is immaterial whether the defendant knows, has met, or has agreed with every coconspirator or schemer. *Longstreet,* 567 F.3d at 919; *United States v. Jones*, 275 F.3d 648, 652 (7th Cir. 2001).

A defendant (or other declarant) may be found to have participated in a conspiracy even if he joined or terminated his relationship with other conspirators at different times than another defendant or coconspirator. *United States v. Noble*, 754 F.2d 1324, 1329 (7th Cir. 1985); *see also United States v. Handlin*, 366 F.3d 584, 590 (7th Cir. 2004) ("it is irrelevant when the defendant joined the conspiracy so long as he joined it at some point"). Under Rule 801(d)(2)(E), a coconspirator's statement is admissible against conspirators who join the conspiracy after the statement is made. *United States v. Sophie*, 900 F.2d 1064, 1074 (7th Cir. 1990). A

conspirator who has become inactive or less active in the conspiracy nevertheless is liable for his conspirators' further statements unless he openly disavows the conspiracy or reports it to the police. *See United States v. Feldman*, 825 F.2d 124, 129 (7th Cir. 1987).

The government is not required to prove the identity of the declarant; nor must the declarant's identity be confirmed in the statement itself. *See United States v. Bolivar*, 532 F.3d 599, 604-05 (7th Cir. 2008). Rather, the government need only prove (from the statement, the context and/or other evidence) that the declarant was in fact a coconspirator. *Id.*

2. The "In Furtherance of" Requirement

In determining whether a statement was made "in furtherance" of the conspiracy, courts evaluate the statement in the context in which it was made and look for a reasonable basis upon which to conclude that the statement furthered the conspiracy. *See Cruz-Rea,* 626 F.3d at 937; *United States v. Johnson*, 200 F.3d 529, 533 (7th Cir. 2000). Under the reasonable basis standard, a statement may be susceptible to alternative interpretations and still be "in furtherance" of the conspiracy. *Cruz-Rea*, 626 F.3d at 937-38. The "coconspirator's statement need not have been made exclusively, or even primarily, to further the conspiracy" in order to be admissible under the coconspirator exception. *Id.* at 937 (quotations and citations omitted). That statements were made to a government cooperating witness or undercover agent does not bar admission of statements otherwise "in furtherance"

of the conspiracy. *United States v. Mahkimetas*, 991 F.2d 379, 383 (7th Cir. 1993); *see also United States v. Ayala,* 601 F.3d 256, 268 (4th Cir. 2010).

"Courts have found a wide range of statements to satisfy the 'in furtherance' requirement." *United States v. Cozzo*, 2004 WL 1151630 *2-3 (N.D. Ill. 2004) (collecting cases). In general, a statement that is "part of the information flow between conspirators intended to help each perform his role" satisfies the "in furtherance" requirement. *United States v. Alviar*, 573 F.3d 526, 545 (7th Cir. 2009) (quotations and citations omitted). *See also United States v. Gajo*, 290 F.3d 922, 929 (7th Cir. 2002). These include statements made:

- to conduct or help to conduct the business of the scheme, *United States v. Cox*, 923 F.2d 519, 527 (7th Cir. 1991); *see also United States v. Johnson*, 200 F.3d 529, 533 (7th Cir. 2000);[3]

  to recruit potential coconspirators, *Cruz-Rea*, 626 F.3d at 937-38; *United States v. Haynes*, 582 F.3d 686, 705 (7th Cir. 2009), abrogated on other grounds by *United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012);

- to identify other members of the conspiracy and their roles, *Alviar,* 573 F.3d at 545;

- to plan or to review a coconspirator's exploits, *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985);

- as an assurance that a coconspirator can be trusted to perform his role, *United States v. Sophie*, 900 F.2d 1064, 1073-74 (7th Cir. 1990); *see also United States v. Bustamante*, 493 F.3d 879, 890-91 (7th Cir. 2007);

[3] Statements that prompt the listener to act in a manner that facilitates the carrying out of the conspiracy are also made "in furtherance" of the conspiracy. *See United States v. Monus*, 128 F.3d 376, 392 (6th Cir. 1997).

- to inform and update others about the current status of the conspiracy or a conspiracy's progress (including failures), *United States v. Rea*, 621 F.3d 595, 605 (7th Cir. 2010); *Alviar*, 573 F.3d at 545;

- to control damage to an ongoing conspiracy, *United States v. Johnson,* 200 F.3d 529, 533 (7th Cir. 2000); *United States v. Molinaro,* 877 F.2d 1341, 1343-44 (7th Cir. 1989)*; United States v. Van Daal Wyk*, 840 F.2d 494, 499 (7th Cir. 1988);

- to conceal a conspiracy where ongoing concealment is a purpose of the conspiracy, *Gajo*, 290 F.3d at 928-29; *United States v. Kaden*, 819 F.2d 813, 820 (7th Cir. 1987); *see also United States v. Maloney*, 71 F.3d 645, 659-60 (7th Cir. 1995);

- to reassure or calm the listener regarding the progress or stability of the scheme, *Sophie*, 900 F.2d at 1073; *Garlington v. O'Leary*, 879 F.2d 277, 284 (7th Cir. 1989);

- to report conspirators' status and in turn receive assurances of assistance from coconspirators, *United States v. Prieto*, 549 F.3d 513 (7th Cir. 2008);

- "describing the purpose, method or criminality of the conspiracy," *United States v. Ashman*, 979 F.2d 469, 489 (7th Cir. 1992).

Finally, it has long been the rule that any statement made by a conspirator during and in furtherance of a conspiracy is admissible against all coconspirators. *Beeson v. United States*, 90 F.2d 720 (7th Cir. 1937); *United States v. Lindemann*, 85 F.3d 1232, 1238 (7th Cir. 1996); *see also United States v. Rivera,* 136 Fed. Appx. 925, 926 (7th Cir. 2005) ("Whether any other conspirator heard (or, in this instance, saw) that statement is irrelevant; agency, not knowledge, is the theory of admissibility."*).*

IV. THE EVIDENCE REGARDING THE EXISTENCE OF THE CHARGED SCHEME AND THE DEFENDANT'S PARTICIPATION IN THE SCHEME

At trial, the government's evidence will establish that defendants Mastro, Allen, Theotikos, Co-Schemer A, other auction house employees, including defendant Boehm, and others schemed to defraud Auction House customers by engaging in a series of fraudulent auction practices in order to fraudulently inflate prices paid by bidders and protect the interests of consignors and sellers at the expense of bidders. As set forth below, the evidence that proves the existence of the scheme is strong and meets the preponderance of the evidence standard applicable at this stage of the proceedings.[4] The evidence includes expected witness testimony from co-defendant William Mastro, who is cooperating with the government in hopes of receiving a reduced sentence, and former Mastro Auctions employees, Brian Marren and Walter Tomala, both who received immunity from prosecution in exchange for their complete and truthful cooperation. The evidence will also include documents such as bidding records, customer invoices, accounting documents, emails, handwritten notes and other business records.

[4] The government is not detailing all of its evidence that would go to show the existence of the scheme or defendant's and other declarants' participation in it. Rather, this proffer highlights for the Court some of the government's evidence in order to establish, by a preponderance of the evidence, the existence of the scheme and the roles of the various co-schemers. Thus, this proffer does not list all of the government's witnesses, nor does it provide all of the evidence that will be presented by those witnesses who are named.

A. Evidence Regarding the Scheme to Fraudulently Inflate Prices Paid by Bidders and Protect the Interests of Consignors and Sellers

The government's evidence demonstrating that defendants engaged in a scheme to fraudulently inflate prices paid by bidders and to protect the interests of consignors and sellers at the expense of bidders and to further conceal the scheme includes Auction House records, including bidding histories, customer invoices, emails, accounting documents, and witness testimony. Specifically, the government anticipates presenting evidence at trial that beginning in or about 2001 and continuing until February 2009, defendants and others artificially inflated the prices of auction items through "shill bidding." Defendants and others placed, and caused to be placed, shill bids for the purpose of artificially inflating the price of an item in the auction through the use of bidding accounts that (i) were not registered to the person placing the bid; (ii) were in the name of a fictitious individual; and (iii) were actually Mastro Auctions' corporate bidding account, defendants' and their co-schemers' own personal accounts, and accounts of employees and friends. Defendants and their co-schemers ensured that when a shill bid was the highest bid at the end of an auction, that item would not be purchased by the shill bidder. Instead, defendants and their co-schemers canceled the sale of the item or offered it to the next-highest bidder. Defendants also facilitated certain consignors' use of shill bids by taking various actions when a consignor's shill bid was the winning bid for an item, including (i) directing Mastro Auctions employees to return the auction item to the consignor, rather than delivering it to the consignor's nominee who had

"won" the auction, (ii) waiving fees due to Mastro Auctions, including the hammer price, buyer's premium, and seller's fee; and (iii) when fees were imposed, causing the consignors, not the consignor's nominees in whose names the winning bids were submitted, to pay the fees associated with the transaction, and directing Mastro Auctions employees, to modify records to charge the consignor with fees associated with the purported sale of the auction item.

Witness testimony and documentary evidence will demonstrate that certain bidding accounts in particular were used to place fictitious bids. Among these accounts, were accounts in the name of Individual F.D. and Fictitious Individual C.H. The bidding records associated with accounts used to place shill bids reflect that these accounts placed the winning bid on certain lots at auction. Records further demonstrate that customer invoices were prepared containing the name associated with the bidding account, which reflected the dollar amount owed for items purportedly won by a particular bidder and corresponding fees. Accounting records will further demonstrate postings made to the Auction House's general ledger reflecting the cancellation of a sale or a "buyback."

Following an auction, defendant Boehm, Walter Tomala, and others received instructions from Mastro, Allen, and other Auction House employees concerning how to handle items that were won by a shill bidder and not a legitimate bidder. In order to conceal the fact that shill bidding was engaged in, and facilitated by the Auction House, defendants, including defendant Boehm, caused "Auction Results" to be made available to customers, in which they falsely represented inflated

auction results by stating that items had actually sold, when in fact, the items had not sold. The scheme was further concealed when, prior to July 2007, bidding records, namely, underbidder records, were deleted and destroyed.

B. Evidence Regarding Defendant's Participation in the Scheme

The government's evidence of defendant's participation in the scheme includes testimony from co-defendant Mastro, Walter Tomala, and Brian Marren, and documentary evidence establishing not only the scheme itself, but defendant's facilitation of fraudulent bidding practices through the manipulation of the auction software, posting false auction results, and the deletion of records to conceal shill bidding.

1. Testimony of Co-defendant William Mastro

Co-defendant Mastro is expected to testify that, as part of the scheme, he personally used various bidding accounts, including the bidding account in the name of Individual F.D., to place fictitious bids, which had the effect of artificially inflating the price of an item. Co-defendant Mastro will testify that he spoke to defendant Boehm and told him that he needed a "dead paddle," a paddle associated with an inactive account, which he could use in order to place shill bids. After co-defendant Mastro told defendant Boehm what he needed, defendant Boehm told Mastro that he could use the account of Individual F.D., who was a friend of defendant Boehm's. Indeed, co-defendant Mastro used the account of Individual F.D. so frequently that individuals at the Auction House joked about its use. It is

further anticipated that Mastro will testify that, at the conclusion of an auction, invoices for the account belonging to F.D. and others, were given to Mastro.

It is further expected that co-defendant Mastro will testify that, in or around 2003, he began to feel embarrassed about his use of the F.D. account and, in an effort to conceal shill bids he had placed using the F.D. account, co-defendant Mastro asked defendant Boehm to destroy all Auction House underbidder records associated with the F.D. account. Co-defendant Mastro further requested Boehm to maintain all historical and future winning bid information, but delete all historical and future underbidder records for all accounts. It is expected that co-defendant Mastro will testify that he told defendant Boehm his reason for wanting underbidder information destroyed, namely, that he did not want there to be any evidence of shill bidding. In response, defendant Boehm told co-defendant Mastro that he would be able to fulfill his request.

It is further anticipated that co-defendant Mastro will testify that after he made the initial request to defendant Boehm to destroy all historical and future underbidder information, he followed up with defendant Boehm on several occasions. Defendant Boehm eventually told Mastro that his request had been completed and the underbidder records had been destroyed.

It is further anticipated that co-defendant Mastro will testify that, during a telephone call which occurred after defendant Boehm was interviewed by the FBI, defendant Boehm told Mastro not to worry because he took care of it. Boehm also told Mastro that he told the FBI that the bidding records were in a landfill.

2. Testimony of Walter Tomala

Walter Tomala, Mastro Auctions' former accountant, is also expected to testify at trial. Tomala will testify that, shortly after the close of an auction, he typically received written notes regarding "no sales" and "washes." The term "no sale" was used in reference to the purchase of an item at auction which was subsequently canceled. In such instances, a buyer did not have to pay for an item which was won at auction. Tomala may also testify to his understanding that the auction software precludes an individual from bidding on his or her consignments using their account. Instead, certain customers had "buy back accounts" or "buy back guys," which they used to bid on their own consignments. Tomala will testify that he made various adjustments to accounts based on the instructions contained in notes he received from Allen, Mastro, and others.

Tomala is further expected to testify that, at the close of an auction, defendant Boehm was responsible for ensuring that the final auction data from the auction program was uploaded into the accounting system in order to produce consignor statements and invoices. After Boehm printed the invoices, Tomala sent the invoices to the winning bidders. If an adjustment was made prior to Boehm uploading the auction data to the accounting system, meaning a no sale or buyback, he notified Boehm so that he could make the appropriate change in the auction system. It is further anticipated that Tomala will explain some of the emails or notes in which Boehm was requested to make an adjustment following an auction. Such adjustments were carried out to conceal the scheme to defraud.

Tomala is also expected to testify regarding other means by which the scheme was concealed. For example, at the end of each auction, auction results were posted on the company's website. Tomala understood that Boehm was responsible for compiling auction results at the close of every auction. According to Tomala, the auction results were not adjusted to reflect "no sales" or "buy backs."

3. Testimony of Brian Marren

The government anticipates that Brian Marren will also testify about the scheme to defraud. With respect to defendant's involvement in the scheme, and, more specifically, efforts to conceal the scheme, Marren is expected to that in about August or September 2008, shortly before resigning from Mastro Auctions and after hearing that the FBI had interviewed defendant Boehm, Marren had a conversation with defendant Boehm regarding the Mastro Auctions bidding records. Marren will testify that they specifically discussed the ongoing investigation of Mastro Auctions being conducted by the FBI. During the conversation, defendant Boehm told Marren words to the effect of, "I don't think you have anything to worry about." When Marren asked defendant Boehm to provide him with access to the bidding records, defendant Boehm told Marren that the old bidding records were in a landfill since Mastro replaced the computer system several years ago. Marren will further testify that if someone attempted to conduct a search of the bidding records, the existing records for the time period prior to 2007 would reflect only the winning bidder and the amount paid. A search of bidding records from 2007 to approximately 2009 would show all bids placed.

4. Documentary Evidence

The government anticipates that it will present several different types of documentary evidence at trial which will establish that defendant participated in the scheme to defraud auction house customers. For example, the government

intends to introduce evidence establishing that accounts in the names of Individual F.D. and Fictitious Individual C.H. were used to place shill bids. It is anticipated that these records will corroborate the testimony of witnesses who will testify regarding the use of these accounts to place shill bids and defendant's actions in creating these accounts and destruction of evidence of bids placed using these accounts. The government also intends to introduce customer invoices to demonstrate that invoices were prepared reflecting that these shill accounts actually won items for which the individual associated with the account was seemingly billed. Through the introduction of accounting records, the government will demonstrate how adjustments were made to the general ledger to handle items that were purportedly won by these accounts, but not actually sold and for which payments were not received.

Finally, through emails and handwritten notes, the government will establish that defendant Boehm participated in the scheme by making adjustments to the auction software and otherwise concealing the fact that items were not sold to a legitimate bidder as represented. For example, according to one handwritten note, Boehm was instructed to move a lot won on a given bidder's account (a shill) and to place it on the account of another bidder (often times the underbidder). In an email sent from co-defendant Allen to defendant Boehm, Allen requested defendant to modify certain bidding records. Another email sent from Allen to Boehm and Tomala contained a request to "eliminate" a transaction where an account in the name of a consignor's nominee (a shill account) won a lot consigned by the

consignor. Still another email from Tomala to defendant Boehm requests defendant Boehm to make certain changes (to the auction software) before invoices were done, including withdrawing lots that did not meet a (hidden) reserve, moving lots from one paddle (bidding account) to another paddle, and otherwise handling items that were treated as "no sales."

V. CO-SCHEMER STATEMENTS

The statements between the co-schemers made in furtherance of the scheme that the government intends to offer at trial fall into several categories, all concerning subjects that were integral to the scheme and its success.[5] These statements will be introduced through testimony of the cooperating co-defendant, co-schemers and business records as described above.[6]

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[5] The government is not detailing each and every proposed coconspirator statement of each witness or document but rather a representative sample of the statements from each witness and/or document. Further, by presenting statements attributed to particular witnesses, the government is not committing to call each of the witnesses for each of the statements attributed. Of course, the government is committed to establishing the *Bourjaily* predicates at trial and the ultimate admissibility of coconspirator statements is governed by the trial evidence.

[6] A number of out-of-court statements from these sources will be admissible without regard to the coconspirator hearsay rule, because they are statements of the defendant[s], statements not offered to prove the truth of the matter asserted, or for other reasons. A defendant's own statements, for example, are admissible against him pursuant to Rule 801(d)(2)(A), without reference to the coconspirator statement rule. *United States v. Maholias*, 985 F.2d 869, 877 (7th Cir. 1993). The coconspirator statement rule is also not implicated where the relevant verbal declaration is not a "statement" within the meaning of Rule 801(a). This rule defines "statement" as "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person as an assertion." Thus, a statement which is incapable of verification, such as an order or a mere suggestion, is not hearsay and does not invoke a Rule 801(d)(2)(E) analysis. *See, e.g., United States v. Tuchow*, 768 F.2d 855, 868 n.18 (7th Cir. 1985).

The coschemer statements offered at trial will concern the subjects listed below.

Statements Made to Further the Scheme

Mastro is anticipated to testify regarding conversations between him and defendant in which he request the use of a dead paddle, which he could use to place fictitious bids. Tomala is anticipated to testify regarding communications in which he or defendant Boehm were requested to make adjustments following an auction—whether it be to the auction software, invoices, and/or consignor statements. These adjustments were all done in furtherance of the scheme.

Statements Made to Conceal the Scheme

Mastro and Marren are both expected to testify regarding conversations with the defendant regarding the concealment of the scheme, including by destroying evidence of underbidder records, making adjustments to auction software, and statements made concerning the FBI's investigation of fraudulent auction practices engaged in by the Auction House.

As is evident from their description, all such statements were made in furtherance of the conspiracy. Under the case law summarized above, all of these statements are properly admissible as coconspirator statements under Fed.R.Evid. 801(d)(2)(E).

VI. CONCLUSION

The United States respectfully requests that this Court find, based upon this proffer, that coconspirator statements are admissible pending the introduction of evidence to support this proffer.

Respectfully submitted,

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