EXHIBIT 2

[PART 2]

Brief for Respondent in *People v. Gilman*, No. 472 (N.Y.A.D. 1st Dep’t Feb. 11, 2009), at 72-119, *also available at* 2009 WL 7400106 (N.Y.A.D. 1st Dep’t Feb. 11, 2009)

Dep't 2008); People v. Caballero, 34 A.D.3d 690, 691 (2d Dep't 2006); Phillips, 11 A.D.3d at 407; People v. Faines, 297 A.D.2d 590, 595 (1st Dep't 2002).

The deferential nature of analysis "is the same regardless of whether the finder of fact was a judge or a jury [citation omitted] because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record." People v. Lane, 7 N.Y.3d 888, 890 (2006).

B. The Evidence Overwhelmingly Established the Elements Charged.

Defendants' weight-of-the-evidence challenge founders on the threshold question of whether an acquittal would not have been unreasonable: an acquittal in this case would have been unreasonable in view of the overwhelming evidence presented.

In order to establish a Donnelly Act violation under the trial court's instructions — which were supplied by both parties (Defendants' Request to Charge (hereinafter "Def. Req."); People's Request to Charge (hereinafter "Peo. Req.")) — the People were required to prove, beyond a reasonable doubt, that: (1) the charged conspiracy existed at or about the

time alleged; (2) the defendants knowingly joined the conspiracy; and (3) the defendants joined with the intent to unreasonably restrain competition (Def. Req. 5; Peo. Req. 3).

Defendants focus mainly on the first element, with their challenges falling into two categories: (1) that MGB was not bid-rigging; and (2) that the conspiracy was not horizontal.

1. The charged conspiracy existed.

To meet the first element, the trial court required the People to prove "an agreement or understanding" between two or more persons, including "at least two or more competitive insurance carriers in the excess casualty market," to fix prices, allocate customers, or rig bids (Def. Req. 7–9; Peo. Req. 2, 4, 9).

A price-fixing conspiracy, as defined by the trial court, is "an agreement or mutual understanding between two or more competitors to fix, control, raise, lower, maintain, or stabilize the prices charged or to be charged for products or services" (Def. Req. 16; see Peo. Req. 11). A customer allocation conspiracy is "an agreement or understanding between competitors not to compete for the business of a particular customer or customers (Def. Req. 18; Peo. Req. 15).

> Bid rigging is an agreement between two or more persons to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of bids. Bid rigging may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition among them.

(Def. Req. 19; see Peo. Req. 13.)

The People proved — through the testimony of numerous co-conspirators[26] (MGB brokers and underwriters) and several non-conspirators (including two insurance company executives), and a wealth of documentary evidence (including conspirators' meeting notes, Broking Plans and emails) — that MGB operated a sophisticated bid-rigging system, motivated by PSA kickbacks. Together with its partner markets — whose demands were communicated through the LBC teams at Monday Morning Meetings and by underwriters directly — MGB agreed to "fix, control, raise, lower, maintain, or stabilize" premium rate increases and allocate clients (generally on the basis of incumbency). To implement the

[26] The accomplice witness corroboration requirement (C.P.L. § 60.22), does not apply in prosecutions under the Donnelly Act. See Gen. Bus. Law § 347. But lack of corroboration is certainly not an issue here.

agree-upon prices and allocations, MGB orchestrated a sophisticated bid-rigging scheme. Defendants' "ABC" system simultaneously eliminated competition and created the false appearance of it (thus discouraging any negotiation between the client and the pre-selected winner).

The mechanics of the scheme were well-developed: weekly meetings to decide on rate increases and client allocations, efforts to groom the client victims' price expectations, a written game plan to coordinate sham bidding for each transaction, and carefully controlled implementation of that game plan vis-a-vis each carrier.

a. MGB was bid-rigging.

For the most part, defendants do not explicitly relate their arguments to the charged elements of the crime. However, several of their contentions appear to be directed toward the conclusion that MGB was not bid-rigging.

i. The client victims wanted competitive bidding.

Defendants argue that their bid-rigging scheme was simply a way to provide their clients with what they wanted. Defendants claim that MGB "prepared broking plans in conjunction with Client Advisory," that

the "[b]roking plans and target prices also were shared with Marsh clients," and, accordingly, that the Broking Plans "reflected the client's desires" (App. Br. 19, 69).

The record does not support these assertions. Seven MGB brokers testified that, to the contrary, Broking Plans were not shared with the client or Client Advisory (Apr. Tr. 613, 949; May Tr. 2562; Sept. Tr. 10604, 11535; Oct. Tr. 13044; Nov. Tr. 15651; Dec. Tr. 17063). In fact, when brokers inadvertently revealed Broking Plans to clients, the clients were "pretty dumbfounded . . . that here they're attending underwriter meetings to attract competitive bids from various [carriers] and here was a Marsh Global Broking employee sitting with a program already defined. . . with respect to [carriers] and premiums" (Nov. Tr. 15652–53 (discussing Ex. 3-T at 4); see Sept. Tr. 11534–35; Dec. Tr. 17063, 18107–08; Ex. 96 (GBC to head of MGB: "Here's the original [Broking Plan] (As I mentioned, I do not put in targets, for fear that an LBC brings this to the Client meeting and lays it on the table.)"). Several risk managers employed by the commercial victims testified that they were not even aware that a "Broking Plan" or a so-called "target" price existed (Apr. Tr. 284, 688; May Tr. 2186; June Tr. 5744–45, 6777, 6829; Sept. Tr. 10659).

All seventeen of the risk managers who testified believed that Marsh was soliciting multiple competitive bids for their contracts, and trusted that the premium quotes they received were genuine competitive offers.[27]

Furthermore, it makes no sense that a client would knowingly pay for purposefully noncompetitive quotes, or that MGB would go to the trouble of providing sham quotes if the client were willing to accept the pre-selected carrier and price without competition.

Defendants also suggest that Marsh clients wanted to remain with their incumbent carriers. Of course, even if true, this would not mean that a client would wish to renew at any price, or that the client would accept the incumbent's offer without negotiation if the client were aware that the offer was not a product of competition. Notably, clients' attachment to their incumbent carriers was not so strong as to prevent defendants from moving all or virtually all of the potential renewal

---

[27]Apr. Tr. 247–53, 267, 277, 285–87, 317–18, 679, 686–87, 705, 776–7, 1777–1779, 1786–87, 1791; May Tr. 2115–16, 2121–38, 2151–58, 2929–41, 2949–60, 3051–52, 3061–69, 3078–79, 3085–87, 4211–22, 4230–31, 4238, 4243–44, 4497–98, 4501–06, 4509–10, 4564–65, 4577–78, 4584; June Tr. 4827–48, 4863–66, 4893–95, 5724, 5739, 5744–45, 5750–59, 5765, 5779, 5831–36, 6067, 6258–59, 6268, 6284, 6288, 6355, 6721, 6759–76, 6800–01; July Tr. 7859–67, 7879–82, 7890–91, 7902–05; Aug. Tr. 9030, 9047–52; Sept. Tr. 10659, 10714, 10727, 10730–31; Nov. Tr. 14905–33, 15016.

accounts of carriers that rebuffed PSA demands (Apr. Tr. 917-920; May Tr. 2372-78, 3326-31, 3608-11; June Tr. 5356–63, 5658–59; Aug. Tr. 8641-8642, 9248-50; Oct. Tr. 13839–45, 13858–61; Exs. 4-F, 4-K at 3). Indeed, defendants' collusive system was premised on the carriers' desire for protection of their renewal quotes from competition. If clients were not prepared to switch to other carriers, there would be no need for carriers to buy protection from defendants (at the exorbitant price of ten percent of gross revenue).

Even if defendants were correct that some clients wished to award their contracts to the target carrier at the target price ("Scenario A"), other clients clearly did not ("Scenario B") — a fact defendants' "ABC" system was designed to address. To some risk managers who testified at trial, incumbency was irrelevant (see, e.g., May Tr. 4230); to others, incumbency was one among many factors to consider in deciding between bids (see, e.g., May Tr. 2128). One of the risk managers who testified most extensively explained that a long-term relationship with a carrier is much more important for high-claim-volume types of insurance, like workers' compensation, than for types of insurance where claims are rare, like excess casualty insurance (June Tr. 5738–39). Whatever value

incumbency may have had, it in no way detracts from the fact that some Marsh clients, including those who testified at trial, wished to award their insurance contracts on the basis of competitive bids — "Scenario B." The People were not required to prove that the client victims would have selected the winning bid on the basis of price alone (Def. Req. 19; Peo. Req. 13).

Accordingly, the record — and common sense — belie defendants' claim that Marsh clients approved of their bid-rigging system.

ii. MGB requested and underwriters provided purposefully noncompetitive quotes.

Defendants claim that the People presented no proof of "fake" quotes (App. Br. 37–39). An agreement to engage in a bid-rigging is a violation of the Donnelly Act, regardless of whether it materializes in the form of "fake" quotes. "The agreement itself is a crime. Whether the conspiracy is ever carried out . . . does not matter" (Peo. Req. 4).

In this case, however, there was plenty of evidence that underwriters submitted sham quotes. Dozens of MGB brokers and underwriters testified about soliciting and submitting purposefully non-competitive "B

quotes."[28] Documentary evidence of email communications and meetings among the conspirators provided numerous illustrations. In the Unova placement (Statement of Facts, Part G.9, supra), for instance, a GBC requested "something higher" than the incumbent's quote (Ex. 24-E). An LBC fabricated a "Quote Confirmation" containing a higher price, and asked a Zurich underwriter to "fax back this 'fake' quote" (Exs. 24-G, 24-H), which the underwriter did (Ex. 24-I).[29] In fact, defendants admit in their appellate brief that "in 'B' situations," underwriters "provided quotes which they knew would not win the business" (App. Br. 65).

---

[28]Apr. Tr. 650-51; May Tr. 3348-49; June Tr. 4637, 5359-60, 5859, 6530-31, July Tr. 7145-46; Aug. Tr. 8511, 9556-57, 9581; Sept. Tr. 10746-47, 10217-19, 11272-72; Oct. Tr. 12848-49, 13639-40, 13884-85; Nov. Tr. 15512-14; Dec. Tr. 17278-79, 18008-09.

[29]See also Ex. 5-I ("Please offer a high protective quote on this. . . . I am faxing over a copy of AIG's lead, so you make sure you quote a protective."); Ex. 21-L ("AIG already quoted it[,] so just give me a bad price with a higher per occ. attachment and then we can be done with this"); Ex. 67 ("Chubb has quoted $310,000 . . . . Please offer a much higher quote."); Ex. 74 ("Please over price your indications . . . This is a fake quote."); Ex. 154-C (McNenney: "I need a B quote. I'll leave Zurich's quote on your chair"); Ex. 171-B ("[AIG quoted] $195,000 - Can you get me a dummy quote from Zurich?"): Ex. 3-T at 4 (McNenney instructed brokers to be "careful that alternative 'B' doesn't beat incumbents quote."); see Statement of Facts, Parts E.2, F, G, supra.

Defendants, however, seek to excuse submission of intentionally losing bids in response to MGB's requests, by arguing that the sham bidders would not have won the business or would not have bid at all under competitive circumstances, on account of differences in pricing, disinterest in a particular type of risk, higher costs than the incumbent, and/or satisfaction with current profits and desire to avoid increasing revenues[30] (App. Br. 7–8, 10–12, 15, 20, 29, 61, 63, 64, 66–68, 85).

The factual premise of this argument might have been true in some cases (e.g., Dec. Tr. 17263–65 (offering a "high-ball" quote on an account the underwriter would otherwise decline)), but it was false in others. During the Fortune Brands placement (Statement of Facts, Part G.5, supra), McNenney persuaded an ACE underwriter to rescind a competitive bid and submit a higher one. The President of ACE observed

[30]The only facially plausible (and non-collusive) reason defendants offer to explain the carriers' disinterest in competing for profitable accounts is that they did not wish to increase their premium-to-surplus ratios, because they would thereby make themselves appear less financially stable (Dec. Tr. 18737–40 (defendants' expert)). However, none of the underwriter witnesses offered such an explanation for their conduct. The record suggests that, to the contrary, the underwriters endeavored to retain incumbent accounts, win some new accounts (see, e.g., Statement of Facts, Part G.5, supra), and increase premium prices (see, e.g., Dec. Tr. 17748), all of which would have undesirably increased premium-to-surplus ratios under defendants' theory.

in a memorandum to the head of MGB that "there have been accounts that we have been interested in but Marsh did not have us slotted" (Ex. 175-W at 4 (demanding that MGB allocate a larger portion of the excess casualty market to ACE).) AIG was interested in competing for the Constellation Brands contract (Part G.8, supra), but refrained and submitted a B quote. Defendants' policy of setting the "target" price with ninety-five percent certainty that the slotted winner can be replaced (Ex. 3-B-1 at 5; Ex. 3-T at 5; Nov. Tr. 15564, 15584) necessarily meant that other carriers must have been willing to compete for the account at, if not below, the "target" price.

Ironically, the success of MGB's collusive system depended on the potential for competition among the sham bidders. Defendants needed the threat of competition to persuade carriers to cooperate. A monopolist would have an interest in charging high prices, but, unlike the cartel members here, a monopolist would have no reason to share its loot with MGB or to accede MGB's demands for (wasteful and illegal) B quotes. See Statement of Facts, Part E.2 (discussion of defendants' means of enforcing cartel policies). Without competition, there would be no need for the carriers to pay defendants to restrain competition. Without a threat,

there would be no need to buy protection. See Ex. 98 (Memo from head of MGB: "2003 Priorities . . . Use emerging competition to enforce [carrier] control.")

Moreover, defendants' arguments to the effect that the People failed to prove that bidding results would have been different under hypothetical competitive circumstances, are legally irrelevant and at odds with the trial court's instructions. A conspiracy "about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding" is a bid-rigging conspiracy, and "it does not matter whether the prices agreed upon were high, low, reasonable, or unreasonable or whether the parties to the conspiracy could or could not have performed any of the activities that were bid-rigged" (Peo. Req. 13–14).

"[T]he law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition." 12 Areeda & Hovenkamp, ¶ 2030b, at 212–13 (2d ed. 2005); see Rattenni, 81 N.Y.2d at 172–73 (holding that per se illegal customer allocation may involve "actual or potential" competitors); Palmer v. BRG of Georgia, 498 U.S. 46, 49 (1990) ("[T]he District Court and the Court of

Appeals erred when they assumed that an allocation of markets . . . by competitors is not unlawful unless the market in which the two previously competed is divided . . . The defendants in Topco had never competed in the same market, but had simply agreed to allocate markets."). If, for example, "two firms agree to rig future bids on a particular type of construction contract, it would not be a defense that previously one of the firms had never built this kind of project or had never done so in this geographic market." 12 Areeda & Hovenkamp, ¶ 2004d at 69; see United States v. MMR Corp., 907 F.2d 489, 498 (5th Cir. 1990) ("MMR's alleged inability to ultimately get the job because it lacked adequate bonding capacity does not afford . . . a defense under section 1 of the Sherman Act . . . because MMR was a competitive threat."); United States v. W.F. Brinkley & Son Construction, 783 F.2d 1157, 1159–60 (4th Cir. 1986) (holding that providing a "safe" number to a competitor, who had independently decided not to compete but wished to submit a bid to avoid offending the project engineer, was bid-rigging, and noting that a contrary rule "would lead to self-serving testimony in virtually every bid rigging trial").

Bid-rigging is a per se violation of the Donnelly Act, even where the party submitting the fake bid is incapable of performing the contract at any price. Reicher, 983 F.2d at 170 ("Despite its ultimate inability to perform the contract, Giolas held itself out as a competitor for the purposes of rigging what was supposed to be a competitive bidding process. This is exactly the sort of 'threat to the central nervous system of the economy' [quoting Socony-Vacuum], that the antitrust laws are meant to address."); United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1262 (7th Cir. 1975) (finding illegal bid-rigging despite the sham-bidder's inability to perform the contract); see also Socony-Vacuum, 310 U.S. at 224 n.59 ("[I]t is well established that a person 'may be guilty of conspiring, although incapable of committing the objective offense.'").

> Suppose a firm defends a bid-rigging charge by proof that its real intention was not to submit a bid at all, but that it honored a rival's request to submit a high bid, just to make the overall bidding appear more competitive than it was in fact. Has the offeror of the 'throwaway' bid violated § 1? On the facts as stated, it is possible that no injury has occurred. Presumably the addition of a bid that is too high to be selected has no bearing on the selection of a winner or the size of its bid.
>
> However, if the presence of the throwaway bid was thought to have no impact at all, we would

> not expect it to be solicited in the first place. Thus, the problem is easily resolved once we see that the purpose of the 'throwaway' bid is to add legitimacy to the appearance of other bids. The throwaway bid, which will be unreasonably high, will operate so as to make the selected bid seem more reasonable or else to ensure that the process appears to have produced a sufficient number of bidders. To the extent the throwaway bid adds this appearance of legitimacy, it makes the cartel more likely to succeed. . . .
>
> Further, accepting as a defense that a participant in a bid-rigging conspiracy would not have bid at all had bidding been competitive would invite the defense frequently. In each case the fact finder would have to determine a counter-fact: whether the defendant would have bid had bidding been competitive rather than collusive. No such solicitude is owed to one who willingly participates in the felony of another, making it more likely to succeed, and presumably profiting from it.

12 Areeda & Hovenkamp ¶ 2000c, at 72–73 (2d ed. 2005). Defendants offer no authority for their contrary view, that the People were required to prove what would have happened in a hypothetical competitive bidding situation.

In seeming contradiction of their view that they were not bid-rigging because the bidders would not have competed anyway, defendants also suggest that they were not bid-rigging, because the bidders really were

competing. Defendants argue that the "bona fide, losing quotes" provided by their underwriter partners (App. Br. 61, 71) were "consistent" with underwriting guidelines and risk appetites (App. Br. 64). They note that "B quotes sometimes won the business from incumbent carriers" (Part V.A.2.c.i at 64), that the People did not prove that incumbency rates increased (Parts IV.B.5 at 44, V.A.2.e at 78), and that there was sometimes "yelling" and "bickering" between underwriters and MGB as to what price was "reasonable" for the winning bid (Parts IV.A.4.a at 24–25, IV.A.4.c at 27).

These observations do not undermine the People's proof of bid-rigging. Given the underwriters' willingness to deviate from their guidelines to win business, along with their unwillingness to deviate from submitting the non-competitive B quotes actually confirms the intentionally noncompetitive nature of these bids. As the scheme did not always work as planned, and clients occasionally bound B quotes, underwriters would have been foolish to submit B quotes that were not "safe" to bind, should the need arise (see Dec. Tr. 17281–82). Underwriting guidelines and risk appetites did not prevent underwriters from inflating the price.

Moreover, the absence of proof of increased incumbency rates is irrrelevant. While incumbency was a useful device for "fairly" and conveniently allocating customers, the conspirators' motivation was profit, not incumbency protection per se. As previously discussed, MGB could not permit any one insurer to achieve monopoly power without forfeiting its leverage to extract kickbacks from that insurer. Furthermore, MGB's ability to take incumbent business away was a useful "stick" with which to keep its cartel partners in line. Profit-maximizing underwriters wished to inflate premium prices as much as MGB would permit. A selected incumbent insurer would have an incentive to push MGB to raise the protected "target price," until the insurer's marginal benefit from such effort equaled the marginal cost arising from the risk that MGB would become angry and allocate the customer to a non-incumbent. Whether all of these competing incentives, and other factors, would result in a higher or lower incumbency retention rate is not clear. Bickering over "target prices" tends to show that so-called "target" prices were negotiated (fixed) between MGB and their underwriter partners, and were not unilateral opening bid suggestions by MGB on behalf of its clients, as the "target" label might suggest.

In any event, the fact that the conspirators may not have intended to, or succeeded in, suppressing all competition does not relieve defendants from criminal liability. See Socony-Vacuum, 310 U.S. at 220, 224 n.59 ("It is the . . . conspiracy . . . which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. And the amount of interstate or foreign trade involved is not material . . . . Price-fixing agreements may or may not be aimed at complete elimination of price competition."); 12 Areeda & Hovenkamp, ¶ 2002h, at 36 (2d ed. 2005) ("[C]artels are subject to numerous imperfections that affect their operations and make many of them unstable. But these facts should not obscure the more central point that even a highly imperfect cartel can be both profitable to members and costly to consumers."). The trial court, therefore, correctly instructed that the People were not required to prove that the conspiracy was carried out, successful or consistently followed (Peo. Req. 4–5).

Relatedly, defendants urge that "providing carriers with target prices and coverage goals was entirely appropriate and standard throughout the industry" and that, therefore, their practice of providing carriers a "target price" and a "target carrier" ("a preferred carrier"), who

was not "guaranteed" the business, is not bid-rigging (Part V.A.2.c.iii at 69–70). Defendants, of course, were not convicted of "target pricing" (a term that is not mentioned anywhere in the trial court's instructions); they were convicted of bid-rigging. A person soliciting competitive bids must, of course, convey to potential bidders what is being bid upon (i.e., the coverage sought). The person may even start the bidding by suggesting a price (and calling it a "target price"). However, when, as here, a person conveys to the potential bidders which of them has been selected as the "target" winner, sets the "target" price, and then solicits sham bids to protect the pre-selected winner at the fixed price, that person has engaged in bid-rigging (even if such efforts were not always successful). Defendants were convicted of illegal conduct, and not "an Improper Lexicon," as they would have it (App. Br. 35).

iii. Defendants' claim that they lacked an economic motive is without merit.

Defendants make various arguments to the effect that their participation in a bid-rigging scheme made no economic sense (App. Br. 27–31, 48–49, 80). Economic sense, however, is not a prerequisite to conviction under the Donnelly Act: "if the parties present us with an

irrational but unambiguous agreement, they are embraced by the contract-combination-conspiracy language of Sherman Act § 1." 6 Areeda & Hovenkamp, Antitrust Law, Vol. VI, ¶ 1411, at 66 (2d ed. 2003). In any event, defendants' economic arguments are meritless.

As previously described (Statement of Facts, Part C, supra), defendants were quite strongly motivated by their premium-sharing agreements with the carriers. Defendants maintain, incorrectly, that the fact that they placed more business with AIG than with their other "partner markets," despite receiving a smaller cut from AIG than from the others, shows that they were not allocating customers to maximize kickbacks (App. Br. 80). To the contrary, this fact reflects nothing more than AIG's undisputed market dominance. Without AIG's participation, the cartel would not have worked. AIG thus had the leverage to negotiate lower protection fees.

Defendants argue that their "top priorities in placing excess casualty insurance were breadth of coverage and financial security" (App. Br. 27–28). Even if true, such priorities would hardly disprove that defendants were motivated to raise price. Selling clients as much coverage as possible, from the most financially stable carriers available,

seems quite consistent with the objective of maximizing the premium the client pays.

Defendants also point to evidence that they promoted ACE and Zurich as competitors to AIG (App. Br. 29–31). This too is entirely consistent with their interest in maximizing kickbacks. If AIG were to gain a monopoly, there would be no need for AIG to be paying MGB for protection. Potential competition among the cartel members made MGB's bid-rigging services valuable to them, worth entering a PSA agreement.

Defendants further maintain that they could not have inflated premiums without losing their customers to other brokers (App. Br. 80). This is also incorrect, for many reasons. The commercial victims hired Marsh to obtain many types of insurance for them, as a package deal. Excess casualty insurance was but one component. See 12 Areeda & Hovenkamp, ¶ 2002f8, at 32 (2d ed. 2005) ("[P]rice fixing often succeeds best in markets for 'intermediate' goods or services that make up only a small portion of the value of the finished product."). A long-term relationship with Marsh (i.e., Marsh's incumbency, as opposed to the incumbency of any particular excess casualty carrier) was important to the customers.

Defendants concede that MGB had reached kickback agreements "with virtually all of the major carriers that wrote lead umbrella excess casualty coverage for major corporations" (App. Br. 48). It seems unlikely that these same partners would jeopardize the collusive scheme and their relationships with the "world's largest excess casualty insurance broker" (App. Br. 15, 28) by submitting lower bids to competing brokers. Gilman punished such behavior by having other carriers undercut the noncompliant carriers' renewal bids (Ex. 3-Y; Nov. Tr. 15957). Indeed, there was rarely broker competition (June Tr. 6460, 8365). In 2002 alone, MGB was able to raise renewal premiums by 150 percent (Ex. 3-T at 6; Nov. Tr. 15667–68) and operate at an 83 percent profit margin (Ex. 3-B). On the rare occasions where there was potential broker competition, MGB asked its partners for an especially low price to ensure that Marsh would retain the business. Enjoying little, if any, competition and admittedly inelastic demand (App. Br. 6, 14–15), MGB was in an ideal position to raise prices. Defendants admit that MGB had the "power to move all or a significant part of a carrier's business" (App. Br. 28 (emphasis in original)) — a power premised on Marsh clients' inability to simply do business with the carrier through a competing broker. Furthermore,

other brokers and non-partner markets may have been satisfied to free-ride on the inflated prices created by defendants' cartel.

b. Defendants conspired with at least two or more competitive insurance carriers.

At defendants' request, the court adopted the requirement that, in order to meet the first element of the Donnelly Act violation, the People must prove that defendants conspired with "at least two or more competitive insurance carriers in the excess casualty market" (Def. Req. 9). It is not clear that defendants were entitled to such an instruction with respect to bid-rigging, as opposed to price-fixing or customer allocation. See People v. Schwartz, 160 A.D.2d 964 (2d Dep't 1990) ("[The defendant, who submitted multiple bids,] was, by arrangement with the administrator, the only competitor for the contracts in question, and thereby committed per se anticompetitive acts of bid rigging."). But, in any event, the People's evidence met the requirement overwhelmingly, as defendants appear to concede.

Defendants also concede that AIG, Zurich and ACE were "horizontal competitors" (App. Br. 5). Defendants specifically admit that these carriers only provided B quotes on risks that satisfied their underwriting

preferences, risks for which they would have been willing to provide coverage (App. Br. 37–40). The carriers' status as competitors in the excess casualty insurance market, particularly for the lead umbrella contracts, is well-documented in the record. AIG was interested in virtually any excess casualty risk (June Tr. 6599–6603; Dec. Tr. 17412; Ex. 14-F, 25-G). Zurich could compete with AIG on the vast majority of these accounts (Oct. Tr. 14441). MGB used the threat of potential competition from Zurich to keep AIG in line (Sept. Tr. 10042, 10610–11). ACE was also a competitive threat to AIG (Oct. Tr. 13986 (discussing Exs. M-BKG, M-BKH); Ex. M-MD (AIG email listing would-be renewal accounts lost to ACE, and reasons why); Dec. Tr. 17823, 17835–36). In July 2003, ACE's President emailed the head of MGB, expressing ACE's desire to win accounts from AIG, complaining that ACE was not "slotted" for accounts in which it was interested, and demanding that MBG allocate ACE a larger share of the lead umbrella market relative to AIG and Zurich (Ex. 175-W at 4 (observing that AIG had $800 million of the market and Zurich had $200 million, and seeking "a commitment from Marsh for $200M in premium next year coming largely from lead positions"); see also Ex. 175-M (ACE executive reporting to ACE

President: "We need a few more lead umbrella policies from Marsh. I have already let them know we need at least [$]12.5 [million] from them. We are getting excess layers from Marsh for the most part since their model protects incumbency . . . .").

Defendants do point out that "only a few [carriers] were willing to write the lead excess layer" (App. Br. 10), but this establishes nothing more than that these carriers had an oligopoly. The differences in underwriting preferences among the carriers, which defendants mention (App. Br. 11–12, 15), do not negate their status as competitors. These differences merely reflect non-price competition, as the head of ACE's excess casualty division explained in a 2003 email (Ex. M-TR):

> [W]e have obviously encountered very aggressive competition particularly from AIG. . . . We are being faced with an increased level of competition on a number of fronts: broadened coverages, aggressive attachment and aggregate positions, the use of 50M in capacity essentially giving away the 25x25 [i.e., offering a $50 million lead umbrella layer, essentially giving away what would have been a $25 million excess layer over the typical $25 million lead umbrella layer], and of course pricing.

Furthermore, the carriers' underwriting guidelines, for the most part, were just guidelines and not binding rules; the carriers were willing to

ignore the guidelines in order to compete for attractive accounts (Aug. Tr. 8369-70; Sept. Tr. 10768-69, 11134; Oct. Tr. 14536–38; Dec. Tr. 17235-37).

Having conceded that AIG, Zurich and ACE were horizontal competitors (as defendants must, in view of the record), defendants acknowledge "the carriers' decisions to engage in the charged conduct" (App. Br. 3), i.e., the carriers' decisions to knowingly and intentionally enter an agreement "to restrain competition in the sale of excess casualty insurance by means of bid rigging, price fixing and customer allocation" (Indictment 3). Defendants specifically recognize "some [MGB] cooperators' solicitation of 'losing' quotes" (App. Br. 52) and admit that underwriters supplied "quotes which they knew would not win the business" (App. Br. 65). As detailed in the People's Statement of Facts, underwriters at each of the three major excess casualty carriers — AIG (Statement of Facts, Part F.1, supra), Zurich (Part F.2, supra), and ACE (Part F.3, supra) — had committed themselves to defendants' bid-rigging conspiracy. The summarized insurance placement transactions illustrate and corroborate the underwriters' participation (Statement of Facts, Part G, supra).

Thus, the conceded proof established that defendants conspired with "at least two or more competitive insurance carriers in the excess casualty market" (Def. Req. 9).

Defendants' argument that the People failed to prove a "horizontal agreement to restrain competition" (App. Br., Part V.A.2) is based on erroneous construction of antitrust law (and some tangential factual inaccuracies), at odds with the charged elements binding on the "thirteenth juror."

Defendants contend first that the People presented "no direct evidence of a horizontal agreement between competing carriers" because the People "did not elicit testimony about a single conversation or documentary exchange between two carriers" (App. Br. 54).

This argument is premised on a misinterpretation of the "contract, agreement, arrangement or combination" element of a Donnelly Act violation. Here, at defendants' request, the trial court correctly instructed: "To establish a criminal agreement, the People must prove that there was a meeting of the minds and mutuality of purpose to fix prices, rig bids, or allocate customers" (Def. Req. 8). As the trial court clarified, this does not mean that the People must prove an express

agreement between the conspirators (Peo. Req. 2–3). The People must prove, merely, "that the members of the conspiracy, in some manner, came to a mutual understanding" to fix prices, allocate customers or rig bids (Peo. Req. 5). The requisite agreement or mutual understanding "may be shown if the proof establishes a concert of action, with all the parties working together understandingly with a single design for the accomplishment of a common purpose" (Peo. Req. 2).

The People presented plenty of direct evidence of the requisite "agreement or mutual understanding" among the competing carriers. As discussed (Statement of Facts, Part F), underwriters at AIG, Zurich and ACE testified (and admitted in their cooperation agreements) to their mutual understanding and commitment to the "ABC" system of bid-rigging. Defendants challenge the credibility of only one of these underwriters, John Mohs (App. Br. 41–42). Notably, Mohs was one of three AIG underwriters who testified to participating in the system. In any event, defendants' doubts about Mohs' credibility are insubstantial.[31]

---

[31]Mohs testified that when he needed to produce a quote at a certain price pursuant to the bid-rigging scheme — such as the inflated "winning" quote he submitted for Agere's account (Statement of Facts, Part G.2, supra) — he would arbitrarily adjust the values of different variables in his underwriting formulas until running the numbers produced the

The People presented further direct evidence of agreement. Two insurance company executives who were not cooperating witnesses, Clive Tobin and Michael Flaherty, testified to Gilman's admissions that he ran a multi-carrier bid-rigging conspiracy (Statement of Facts, Part C). Defendants claim (App. Br. 45) that Tobin and Flaherty were not credible, because Tobin discussed the conversation with his key employees and "told them we were not to be part of such arrangements" (July Tr. 7828–29), but did not immediately notify his board of directors and law enforcement, and because Flaherty merely made "internal disclosures and [had] subsequent discussions with the Attorney General's Office" (May Tr. 4376). It is not clear what defendants find implausible about these responses, particularly in light of defendants' power in the excess casualty insurance market. Certainly, defendants' scheme would not have

---

requisite "documentation" (Dec. Tr. 17398–17406, 17915–16, 17920; Exs. 5-Y, 5-BB). Mohs also testified that AIG underwriters used a particular rating worksheet for B quotes, which received only cursory underwriting (Dec. Tr. 17280, 17305, 17531). On cross-examination, Mohs agreed that, for one particular transaction, this worksheet produced a lower number than his regular worksheet, and that this result was "100 percent contrary" to his testimony that the worksheet used for B quotes produced higher numbers (Dec. Tr. 17556, 17729–30, 17926). Mohs never "conceded that on th[e] fundamental issue of whether B quotes were rigged to lose, his direct testimony was 'not correct' and, in fact, '100 percent contrary' to the truth," as defendants incorrectly assert (App. Br. 42).

flourished as it did, if insurance professionals were eager to report them to authorities.

Defendants also suggest that Gilman was lying to impress Tobin ("puffing") (App. Br. 72). However, it is implausible that Gilman sought to impress Tobin by falsely claiming to operate an illegal bid-rigging scheme. The more likely explanation is that he was doing exactly what he appeared to be doing: inviting Tobin to join.

In any event, the People's proof that defendants conspired with multiple carriers certainly does not hinge on Gilman's confessions to Tobin and Flaherty alone. There was more direct evidence. In late 2003, McNenney instructed the new head of ACE's excess casualty division, non-cooperating witness Jonathan Zaffino, on the mechanics of the conspiracy (Oct. Tr. 13590–94), prompting a complaint (Ex. 141). ACE President Susan Rivera had been similarly instructed, by Gilman, as evidenced in the testimony and contemporaneous notes of former LBC, and later GBC, Robert Stearns (Nov. Tr. 15512–20; Ex. 4-WWW).

Defendants' doubts about Stearns' credibility (App. Br. 74–76) are unfounded. Defendants suggest that Stearns misunderstood Gilman. This is not plausible. Although Stearns had only recently joined MGB at

the time of the meeting, he had worked in the casualty insurance broking business at Marsh since 1987, and he continued to work for MGB until his resignation in 2005 (Nov. Tr. 15478–80). Moreover, Stearns' clear contemporaneous notes (Ex. 4-WWW) reflect exactly the statements to which he testified. Defendants themselves rely on Stearns' veracity (App. Br. 69–70). Stearns' testimony and notes are corroborated by the subsequent conduct of ACE President Rivera and by ACE underwriter Abrams' testimony that she participated in the bid-rigging conspiracy (Statement of Facts, Part F.3, supra) and by documentary evidence that ACE provided B quotes on specific transactions (Part G, supra). Whatever inconsistencies defendants perceive in Stearns' testimony about McNenney's directive to "[r]equest 'B' quotes early b/c last week of every month markets only focus on 'live' opportunities vs. quoting B's (careful that alternative 'B' doesn't beat incumbents quote — its not always price, it could be attachment point or coverage)" are immaterial (Ex. 3-T at 4; 15591, 15657). Stearns did not perceive any illogic — nor was there any illogic (for reasons discussed in Point II.B.1.a.ii, supra) — in MGB sharing Rivera's interest in building up ACE as a potential competitor to AIG (Dec. Tr. 16822). Had the People called Rivera, as defendants

suggest, she might well have asserted her Fifth Amendment privilege, and, in any event, her testimony would have been cumulative.[32]

Gilman and McNenney also discussed the scheme with numerous cooperating witnesses, both brokers (see Statement of Facts, Part E.2, supra) and underwriters (Part F, supra). Defendants offer no good reason to reverse the trial judge's determination that these witnesses were credible. After all, the trial court was aware of their status as cooperating witnesses, and had observed and listened to them firsthand. The conspirators' descriptions of the defendants' scheme were consistent, detailed, and corroborated by documentary evidence (e.g., Ex. 4-XX).

Thus, the People provided a wealth of direct evidence that defendants conspired with multiple carriers. However, building on their erroneous view that the People failed to present any direct evidence, defendants argue that "the Donnelly Act charge could only be sustained if there was unambiguous circumstantial evidence that such an agreement necessarily existed," and "[t]here was none" (App. Br. 55). Even if

---

[32]Were this not the case, it would be defendants who could be expected to call her. Notably, defendants did not call a single one of their former colleagues at MGB. They called only an insurance expert in their defense.

defendants were correct about a lack of direct evidence, the circumstantial evidence alone would lead, inescapably, to the inference that multiple insurers joined the conspiracy.

So, for example, the unequivocal testimony and documentary evidence that MGB repeatedly solicited, and AIG, Zurich and ACE underwriters repeatedly provided, purposefully noncompetitive quotes (Statement of Facts, Parts E.2, G) — sometimes employing mutually understood code (e.g., "B") — permits no reasonable doubt the underwriters were acting pursuant to an agreement or mutual understanding. "A strong inference of coordinated behavior arises when a participant actively seeks to lose a bid. Deliberate sacrifice of a contract implies an unusual confidence that the winning party will return the favor." 6 Areeda & Hovenkamp, Antitrust Law, ¶ 1420b, at 139–40 (2d ed. 2003). Indeed, AIG, Zurich and ACE returned the favor to each other over and over again, not bothering to fully or accurately underwrite the risk. "Sham bidding has been inferred from formulating a bid without checking costs . . . ." Id.

This circumstantial evidence was corroborated by a mountain of other circumstantial evidence, including a motive for the carriers to

collude (to increase revenue and recoup costs associated with paying "PSA" kickbacks to MGB (Statement of Facts, Part C, supra); the opportunity to conspire (the effective agents of carriers, MGB's AIG Team, Zurich Team and ACE Team were enjoying uninhibited communication during the entire indicted period, veiled by the LBC teams' ostensible status as representatives of Marsh clients)) (Part D, supra); underwriter complaints that the burdens and benefits of conspiracy were not being fairly allocated among carriers (Part F.3, supra); cryptic or coded communications (e.g., McNenney's requests for "honey" (Part E.2, supra)); a dramatic rise in prices (Ex. 3-B; Ex. 3-T at 6; Nov. Tr. 15667–68); attempts to charge high prices foiled by unexpected competitive bids[33];

[33]For example, in 2003, Vivendi Universal asked Marsh for competing quotes from multiple carriers in order to obtain a good price for its lead umbrella layer (Apr. Tr. 1777-79; Nov. Tr. 15092; Exs. 26-C, 26-H, 26-J, 26-K). MGB slotted AIG, the incumbent, to win, and ACE to provide a "back-up" quote (Apr. Tr. 988, 1005; Exs. 26-D, 26-E). AIG responded with a $1,250,000 quote, and ACE responded with a $1,350,000 quote. Vivendi was unsatisfied, and Client Advisory contacted ACE directly, obtaining a quote of of $1,000,000 (for the same coverage ACE itself had just quoted at $1,350,000). AIG was compelled to match the competitive ACE bid. (Apr. Tr. 1280, 1301; Exs. 26-L, 26-M, 26-AA.) When Client Advisory obtained another bid directly from ACE, for $925,000 (Ex. 26-S), AIG was again forced to meet it in order to keep the account (Ex. 26-U). This saved Vivendi a total of $325,000, but made MGB brokers quite angry (Ex. 26-S ("[AIG] will be so angry and so am I !!!!!!!!!!!!!!!!!!!!!!"); Ex. 26-T ("I am livid about this. [Client Advisory] *&^% me on this.")).

and underwriters required to attend meetings with clients they knew they could not win (Parts F.1, F.2, supra).

Defendants apparently take the position that the People's overwhelming direct and circumstantial proof of competing underwriters' mutual commitment to, and understanding of, the illegal bid-rigging scheme cannot establish a horizontal conspiracy, because the underwriters' agreement was created and maintained through the intermediary efforts of defendants and MGB. This is wrong.

Defendants (App. Br. 71) invoke the "wheel" metaphor used in Kotteakos v. United States, 328 U.S. 750, 755 (1946), where the Supreme Court described several separate conspiracies that share a common conspirator as "separate spokes meeting at a common center . . . without the rim of the wheel to enclose the spokes." In that case, eight "separate and independent groups, none of which had any connection with any other" each "dealt independently" with one Simon Brown in submitting false loan applications. Id. at 754-55. The Supreme Court analogized: "Thieves who dispose of their loot to a single receiver — a single 'fence' — do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a 'fence' to make them such." Id. at 755–56.

Dickson v. Microsoft, 309 F.3d 193 (4th Cir. 2002), cited by defendants, held that a rimless wheel of separate vertical agreements without a mutual conspiracy could not be considered a per se illegal horizontal restraint. Id. at 204 n.12 (noting that the plaintiff "does not argue that its allegations are sufficient to demonstrate ['overlap of key actors, methods and goals'] but instead only advocates our adopting the concept of a rimless wheel conspiracy"). Spectators' Communication Network v. Colonial Country Club, 253 F.3d 215, 224 (5th Cir. 2001), also cited by defendants, held likewise.

None of these authorities, however, stand for the proposition that a horizontal conspiracy cannot be formed through a vertically-related intermediary. In fact, other authorities affirmatively hold to the contrary.

In Interstate Circuit v. United States, 306 U.S. 208 (1939), a retailer, Interstate, sent each of several distributors a copy of a letter addressed to all of them. The letter advised each distributor recipient that, in order to secure continued favorable treatment from Interstate, it would need to impose certain restraints on Interstate's competitors. Each of the distributors agreed to impose the requested restrictions. The

Supreme Court addressed the question of whether an illegal conspiracy existed among the distributors:

> [An] agreement [of the distributors among themselves] for the imposition of the restrictions . . . was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. . . .
>
> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Id. at 226–27; see also Leegin, 127 S.Ct. at 2717 ("[Vertical agreements] may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel."). Here, defendants' underwriter accomplices accepted defendants' invitation to join a bid-rigging conspiracy, knowing that the cooperation of multiple insurers was essential to the success of the scheme.

In Toys "R" Us v. F.T.C., 221 F.3d 928 (7th Cir. 2000), Toys "R" Us ("TRU") separately asked each of several major toy manufacturers to refrain from selling certain toys to TRU's competitors. Each manufacturer eventually agreed, with the understanding, based on TRU's assurances, that the other manufacturers would do the same. TRU "then supervised and enforced each toy company's compliance with its commitment" and "served as a central clearinghouse for complaints about breaches in the agreement." Id. at 932–33. The Seventh Circuit held that this "network of vertical agreements" established a horizontal conspiracy, because each manufacturer acceded a restraint that was not in its independent profit-maximizing interest, on the condition that "it could be sure its competitors were doing the same thing." Id. at 930, 936. Thus, "the essence of the agreement network TRU supervised was horizontal." Id.

Here, submission of fake bids would not have been in the insurers' interest acting independently. Indeed, the testimonial and documentary evidence established that underwriters submitted B quotes with the mutual understanding that other underwriters would return the favor (regarding AIG, see May Tr. 3306–08, 3316-17, 4158–59; July Tr. 7145-46;

Aug. Tr. 8453-55; Dec. Tr. 17277; Exs. 1-O, 1-U, 1-X; regarding Zurich, see (Sept. Tr. 10747; Oct. Tr. 13830–31, 13884-85, 13909–10; Nov. Tr. 14413-15; Dec. Tr. 18171; Exs. 1-L, 1-V, 4-SSS, 114; regarding ACE, see Nov. Tr. 15512–16; Ex. 175-W). In fact, the evidence of an agreement in defendants' case was much stronger than the evidence of an agreement in Interstate or Toys "R" Us, because the de facto representatives of the competitors (the AIG, ACE and Zurich Teams of LBCs) were sitting together in the ringmaster's offices, monitoring and coordinating the competitors' concerted efforts.

Illegal acts do not become innocent when committed through an agent. See Penal Law § 20.00. If horizontal competitors were free to collude simply by using a third party as common agent, the antitrust laws could hardly be more easily circumvented.

Defendants claim that the trial court in this case drew an inference of horizontal agreement among insurers from "the same ambiguous circumstantial evidence" before the federal district court in In re Insurance Brokerage Antitrust Litigation, 2007 WL 2533989, 15 (D.N.J., Aug. 31, 2007) where the trial court dismissed a Sherman Act class action

against Marsh and many other insurance broker and insurer carrier defendants (App. Br. 55–56). This is inaccurate.

First of all, Brokerage is decision of law (on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim). To the extent that defendants are asking this court to conduct weight-of-the-evidence review under legal requirements different from or additional to the elements charged by the trial court, their contentions should be summarily rejected. See Danielson, 9 N.Y.3d at 349, 350 ("[T]he reviewing court must weigh the evidence in light of the elements of the crime as charged to the other jurors, even when the law has changed between the time of trial and the time of appeal."); Byrd, 51 A.D.3d at 276 (same). In any event, this Court drew the opposite conclusion of law in Cuomo v. Liberty Mutual Holding Company, 52 A.D.3d 378, 379 (1st Dep't 2008) ("The Attorney General stated valid claims against [the defendant insurance carriers] for their participation in a bid-rigging scheme in violation of the Donnelly Act."), based on allegations that Liberty and other insurers participated in MGB's bid-rigging scheme.[34]

---

[34]Brokerage is presently pending on appeal in the Third Circuit (argument is scheduled for April 20, 2009). However, after the plaintiffs filed their notice of appeal, the Marsh and Zurich related parties elected

Furthermore, the allegations in Brokerage are materially different from the proof here. The Brokerage plaintiffs (who are not the victims here) alleged that the carriers paid the brokers (not the defendants here) to restrain competition from "all other insurers not privy to the arrangement," but not to restrain competition among themselves. Id. at 15. The Brokerage plaintiffs did not allege any "discernable method of allocation" of business among the participating carriers. Id. at 16. Here, by contrast, the conspiring carriers had reached a mutual understanding and commitment to fix rates and reciprocally allocate clients among themselves through cooperative sham bidding pursuant to a mutually adopted protocol. Indeed, the trial court rejected defendants' specific invitation to apply the Brokerage holding to the facts here (Sent. Tr., 4/17/08, at 2).

c. Reciprocal submission of "B quotes" was not mere "conscious parallelism."

Defendants observe, correctly, that conscious parallel conduct of competitors, that can be viewed as the plausible result of independent

---

to settle. Therefore, it is not clear whether the Third Circuit will ever address the district court's reasoning upon which Gilman and McNenney rely.

business decisions, does not establish a horizontal conspiracy in absence of additional circumstances (such as motive, opportunity, or other "plus factors") tending to show a commitment to a common scheme (App. Br. 60–61). In Bell Atlantic v. Twombly, 127 S.Ct. 1955 (2007), the plaintiff customers "rest[ed] their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among [potentially competing service providers]." Id. at 1970. The plaintiffs alleged that each of multiple incumbent service providers (who had previously enjoyed a government-sanctioned monopoly) did not attempt to expand into the others' geographic territories, and that each reacted with hostility toward upstarts in its own territory. The Supreme Court observed that such parallel conduct may be "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," and held, therefore, that "[a] statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim." Id. at 1964, 1966.

Here, the trial court correctly instructed that if similar mutually-beneficial actions were taken "independently and solely as a matter of

individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate and independent actions tended to achieve the same result" (Peo. Req. 3).

Justice Yates relied on the following instruction:

> The fact that various persons engaged in similar conduct does not, in and of itself, establish the existence of a conspiracy or arrangement or combination. This is true even if they did so knowing that others were following similar practices. Similarity of business practices or even the fact that the defendants may have charged identical prices for the same goods and services does not automatically establish a conspiracy or arrangement or combination because such practices may be consistent with ordinary competitive behavior in a free and open market. On the other hand, where it is a fact that similar practices were followed by a number of persons, with each being aware that the other is doing so is a piece of evidence which you may consider along with other evidence in the case in determining whether an unlawful conspiracy or arrangement or combination existed.
>
> In determining whether to find such a conspiracy, you should consider whether the different persons adopting similar practices did so because of their own independent judgment as to what was in their own best economic interest. In deciding this, you should consider whether the practices employed made sense in light of the

> industry conditions, and whether the benefits from those practices were dependent on other persons doing the same thing. In order to find a conspiracy or arrangement or combination based on consciously similar actions, you must find additional circumstances that make it unlikely that those similar courses of action resulted from the exercise of independent business judgment. In short, you must find that those engaged in similar actions were a group, acting together, rather than individual competitors who happen to have done the same thing.

(Def. Req. 10).

Defendants' effort to characterize their insurer partners' participation in a bid-rigging conspiracy as simply an example of "mere conscious parallelism" is completely unpersuasive and, quite correctly, was rejected by the fact-finder. The People's case established, by both direct and clear circumstantial evidence, that defendants and their partners participated in an mutual agreement to bid-rig. See 6 Areeda & Hovenkamp, ¶ 1410a, at 60 (2d ed. 2003) (explaining that a court should first consider direct evidence that defendants exchanged commitments or collaborated, then if direct evidence is insufficient examine circumstantial evidence, and last, if still undecided, consider whether the behavior is

interdependent and agreement is more probable than not in the actual business context).

Moreover, defendants' arguments do not make sense intrinsically. Defendants observe that the insurers were engaged in the "parallel conduct" of supplying "quotes which they knew would not win the business" (App. Br. 61, 65). They suggest that each insurer was supplying "bona fide, losing quotes" as a matter of independent business judgment (App. Br. 62–63, 71). The independent business reason proffered by defendants is that each insurer knew that "Marsh brokers had promised multiple quotes to their clients" and decided to supply "genuine, but predictably losing quotes" in order to "curry favor" and maintain a "good relationship" with MGB (App. Br. 65).[35] To the extent that winning MGB's "favor" meant securing a greater share of the benefits of MGB's bid-rigging scheme, the argument does not advance defendants' position. Even if MGB's favors were benign, the motive would be entirely consistent with an intent to participate in a bid-rigging scheme. And, in any event, the existence of an independent business motive does not "exclude" (App.

---

[35]Defendants maintain that their accomplice underwriters supplied "predictably losing quotes to all of their brokers" (App. Br. 65). This may have been the case, but it was not a subject of this prosecution.

Br. 62) an inference of conspiracy. See 6 Areeda & Hovenkamp, ¶ 1413a, at 80 (2d ed. 2003) ("While the oligopolist might independently wish to raise its price by the same amount as its rivals, so could the member of an explicit price-fixing conspiracy. But in the latter case the presence of an independent motive hardly disproves the conspiracy."). As the trial court instructed, only action taken "solely" as a matter of individual business judgment "without any agreement or arrangement or understanding among the parties" precludes an inference of conspiracy (Peo. Req. 3). It would certainly undermine antitrust policy to allow the creators of an illegal bid-rigging scheme to exculpate themselves by showing they made their co-conspirators participate to "appease" them. Antitrust policy does not allow even the reluctant participant to employ that excuse. See id., ¶ 1408c, at 46–47 ("Cartels are very dangerous to society and [the reluctant participant] has entered into a concerted restraint of trade with anticompetitive results offensive to Sherman Act policy. Some cartels would remain uncontrolled if coercion meant that no conspiracy existed.").

Thus, the People's evidence overwhelmingly established a bid-rigging conspiracy among MGB and multiple competing excess casualty

insurance carriers. Defendants' contrary position is founded on legal error and an unreasonable interpretation of the evidence.

2. Defendants Joined the Conspiracy.

The second element of the Donnelly Act violation required the People to prove that each defendant knowingly and voluntarily joined the conspiracy, or some part of the conspiracy (Peo. Req. 7–8). While "[i]t is not necessary that a defendant be fully informed as to all the details of the conspiracy . . . or its scope in order to be a member," the defendant must know the "essential nature of the plan" (Def. Req. 13; Peo. Req. 7).

Defendants do not dispute their own participation in the conspiracy (they dispute only the illegal nature of the conspiracy and the participation of multiple competing insurers). Given defendants' roles as creators, propagators, and enforcers of the conspiracy, the second element of the Donnelly Act violation was well-established.

3. Defendants Intended to Rig Bids, Allocate Customers or Fix Prices.

The third element required the People to prove that each defendant joined the conspiracy with a "specific intent" to rig bids, fix prices, or allocate customers (Def. Req. 15; see Peo. Req. 9, 14). It was not necessary

for the People to prove that defendants knew that these activities were illegal (Peo. Req. 16). See Penal Law § 15.20[2]; United States v. U.S. Gypsum Co., 438 U.S. 422, 446 (1978).

Defendants do not argue that they lacked the requisite intent to bid-rig (except to the extent that such an argument is encompassed in their position that MGB was not bid-rigging). They make no claim of mistake or accident. Indeed, it is inconceivable that the People could have proven the extensive bid-rigging scheme alleged and defendants' participation therein, without simultaneously demonstrating that defendants knew what they were doing. "Mens rea seems inherent in such an offense." 2 Areeda & Hovenkamp, ¶ 303c3, at 46–47 (3d ed. 2007) (discussing U.S. Gypsum, 438 U.S. 422).

In sum, the evidence overwhelmingly established the three elements of a Donnelly Act violation, to wit: MGB, AIG, Zurich and ACE were all involved in a bid-rigging conspiracy; defendants joined the bid-rigging conspiracy (created, propagated and enforced it, actually); and defendants' participation in the bid-rigging conspiracy was knowing and intentional.