

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : Criminal No.: 00 CR. 583

v. : Filed: May 31, 2000 (Under Seal)

NICHOLAS A. PENACHIO; : Violation: 15 U.S.C. § 1

STUART LIBERTOFF; : Seal Lifted: June 1, 2000

ALAN R. ADELSON; : :

THOMAS M. RYAN; : :

ARTHUR BOHRER; : :

WILLIAM GREENSPAN; : :

DAVID SALOMON; : :

JOHN DICARLO; : :

FRANK H. RUSSO; : :

NICK PENACHIO CO., INC.; : :

IRVING LIBERTOFF, INC.; : :

WEST SIDE FOODS, INC.; : :

M & F MEAT PRODUCTS CO.; : :

DICARLO DISTRIBUTORS, INC.; : :

FHR, INC., : :

Defendants. :

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INDICTMENT

SHERMAN ACT CONSPIRACY
(15 U.S.C. § 1)

The Grand Jury charges:

1. Nicholas A. Penachio, Stuart Liberto, Alan R. Adelson, Thomas M. Ryan, Arthur Bohrer, William Greenspan, David Salomon, John DiCarlo, Frank H.

Russo, Nick Penachio Co., Inc., Irving Libertoff, Inc., West Side Foods, Inc., M & F Meat Products Co., DiCarlo Distributors, Inc. and FHR, Inc. are hereby indicted and made defendants on the charge stated below.

I. THE RELEVANT PARTIES AND ENTITIES

During the period charged in this Indictment:

2. Defendant Nicholas A. Penachio was a resident of Mount Kisco, New York. Penachio was the president and a co-owner of Nick Penachio Co., Inc.

3. Defendant Stuart Libertoff was a resident of Hewlett, New York. Libertoff was the president and a co-owner of Irving Libertoff, Inc.

4. Defendant Alan R. Adelson was a resident of New York, New York. Adelson was a co-owner of West Side Foods, Inc.

5. Defendant Thomas M. Ryan was a resident of East Meadow, New York. Ryan was the president and a co-owner of West Side Foods, Inc.

6. Defendant Arthur Bohrer was a resident of Tenafly, New Jersey, and of Palm Beach Gardens, Florida. Until 1998 he was the president and a co-owner of A. Bohrer, Inc. ("Bohrer, Inc."), a New Jersey corporation located in Moonachie, New Jersey. Bohrer, Inc. was a vendor of food, primarily frozen food and groceries.

7. Defendant William Greenspan was a resident of Edison, New Jersey.

Greenspan was the director of purchasing at Bohrer, Inc.

8. Defendant David Salomon was a resident of Cranford, New Jersey. Salomon was the president of M & F Meat Products Co.

9. Defendant John DiCarlo was a resident of Shoreham, New York. DiCarlo was a vice president of DiCarlo Distributors, Inc.

10. Defendant Frank H. Russo was a resident of Brooklyn, New York. Russo was the owner and president of FHR, Inc.

11. Nick Penachio Co., Inc. ("Penachio Co.") was a New York State corporation located in the Bronx, New York. Penachio Co. was a vendor of food, primarily produce and frozen food.

12. Irving Libertoff, Inc. ("Libertoff, Inc.") was a New York State corporation located in Brooklyn, New York. Libertoff, Inc. was a vendor of food, primarily frozen food and groceries.

13. West Side Foods, Inc. ("West Side") was a New York State corporation located in the Bronx, New York. West Side was a vendor of food, primarily meat and frozen food.

14. M & F Meat Products Co. ("M & F") was a New Jersey corporation located in East Orange, New Jersey. M & F was a vendor of food, primarily frozen food, produce, dairy products, and groceries.

15. DiCarlo Distributors, Inc. ("DiCarlo, Inc.") was a New York State corporation located in Holtsville, New York. DiCarlo, Inc. was a vendor of food, primarily frozen food, produce, dairy products, and groceries.

16. FHR, Inc. ("FHR") was a New York State corporation located in Brooklyn, New York. FHR was a vendor of food, primarily meat and frozen food.

17. The Board of Education of the City of New York ("NYCBOE") was the entity responsible for operating New York City's public school system, the largest in the United States. Its annual budgets, which approached \$10 billion, were funded by the federal, state, and city governments. It serviced a student population of nearly 1.1 million and operated more than 1,500 facilities. It served approximately 640,000 lunches and 150,000 breakfasts every school day, the majority of which were subsidized by various government programs, primarily those programs established pursuant to the National School Lunch Act of 1946 and administered by the United States Department of Agriculture.

18. The NYCBOE solicited bids from, and awarded contracts to, vendors of food on a regular basis. The primary food contracts awarded by the NYCBOE were requirements contracts that obligated the vendors to supply and deliver food at the

stated prices for the contract period. Both public and non-public schools received food pursuant to these contracts. Individual schools placed orders as needed, usually once or twice a week.

19. The NYCBOE sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including frozen food, produce, and groceries. Each of these bids and contracts was divided into parts, usually geographically by borough. The company bidding the lowest price for a particular part of a contract usually received an award for that part. The term of most of these contracts varied from three to six months. Toward the expiration of the contract period, the NYCBOE again solicited bids for the supply of food.

20. In addition to the contracts described in Paragraphs 18 and 19, the NYCBOE occasionally sought bids and awarded contracts for furnishing and delivering specified quantities of grocery and frozen food items to be warehoused.

21. The NYCBOE required bidders to certify, under penalty of perjury, that, among other things, the prices in their bids had been arrived at independently without collusion, consultation, communication, or agreement for the purpose of restricting competition as to any matter relating to such prices, with any other bidder or with any competitor.

22. Whenever in this Indictment reference is made to any act, deed, or transaction of any corporation, such allegation shall be deemed to mean that the corporation engaged in such act, deed, or transaction by or through its officers, directors, agents, employees, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

23. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof. These included Selwyn Lempert ("Lempert"), Arthur Goldberg, Barry Mayer, Loeb & Mayer, Inc., Alan Schneider, Paul Schneider, Food Service Purchasing Agency, Inc. d/b/a Pennco, Leonard Nash, Bohrer, Inc., and John Doody.

II. TRADE AND COMMERCE

24. During the period covered by this Indictment, Penachio Co., Libertoff, Inc., Bohrer, Inc., West Side, M & F, DiCarlo, Inc., and FHR purchased substantial quantities of food, including frozen food, for resale to the NYCBOE from brokers, who ordered goods on behalf of Penachio Co., Libertoff, Inc., Bohrer, Inc., West Side, M & F, DiCarlo, Inc., and FHR from suppliers located throughout the United States.

These suppliers commonly shipped the goods ordered by the brokers directly to Penachio Co., Libertoff, Inc., Bohrer, Inc., West Side, M & F, DiCarlo, Inc., and FHR.

25. From approximately May 1996 until approximately April 1999, pursuant to contracts that are the subject of this Indictment, the NYCBOE purchased approximately \$126 million of frozen food from members of the conspiracy, including approximately \$563,000 from Penachio Co., \$25 million from Libertoff, Inc., \$17 million from Bohrer, Inc., \$19 million from West Side, \$9 million from M & F, and \$21 million from FHR. After DiCarlo, Inc. joined the conspiracy in approximately 1997, it sold no frozen food to the NYCBOE as a result of the conspiracy charged in this Indictment.

26. The activities of the defendants and co-conspirators with respect to the sale of food to the NYCBOE, including the sale of frozen food pursuant to contracts that are the subject of this Indictment, were within the flow of, and substantially affected, interstate trade and commerce.

III. DESCRIPTION OF THE OFFENSE

27. From approximately May 1996 until approximately April 1999, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate

trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

28. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to rig bids and allocate contracts for the supply of frozen food to the NYCBOE.

29. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things:

(a) Prior to the May 1996 opening of bids for contracts for the supply of frozen food to the NYCBOE for the period of July through December 1996, certain of the defendants and other co-conspirators met to discuss and agree to divide among themselves those contracts;

(b) From that point forward, until approximately April 1999, the defendants and co-conspirators participated in meetings or conversations where they discussed and agreed how to bid so as to divide upcoming contracts to supply frozen food to the NYCBOE. These meetings were held at different sites in or near New York City, including the Crowne Plaza LaGuardia Hotel in Queens; the Ramada Inn

or Courtyard by Marriott at LaGuardia in Queens; the offices of one of the co-conspirators at the Bronx Terminal Market; a meeting room available to the businesses operating at the Hunts Point Food Distribution Center in the Bronx; and a food trade show at the Meadowlands in East Rutherford, New Jersey;

(c) Certain of the defendants and co-conspirators designated which co-conspirators would be the low bidders, among the co-conspirators, on specified parts of contracts to supply frozen food to the NYCBOE;

(d) Certain of the defendants and co-conspirators discussed and agreed on the prices or price levels they would bid on specified parts of contracts to supply frozen food to the NYCBOE, and then bid accordingly. As a result, some of the members of the conspiracy sometimes raised the prices in their bids by 10% or more;

(e) Certain of the defendants and co-conspirators refrained from bidding or submitted intentionally high, complementary bids on specified parts of contracts to supply frozen food to the NYCBOE;

(f) Certain of the defendants and co-conspirators gave substantial amounts of cash to co-conspirator Lempert, an employee of Penachio Co., with the understanding that Lempert would use the cash to pay one or more potential bidders not to bid competitively on particular contracts to supply food to the NYCBOE;

(g) Defendants John DiCarlo and DiCarlo, Inc. joined the conspiracy in approximately 1997. Prior to that time, DiCarlo, Inc. bid competitively on particular bids to supply food, including frozen food, produce, and groceries, to the NYCBOE. Certain of the defendants and co-conspirators initially discussed offering \$100,000 or more in cash to induce DiCarlo, Inc. not to bid competitively. Ultimately, Lempert, acting on behalf of the conspirators, reached an agreement with DiCarlo, Inc., that if DiCarlo, Inc. would stop bidding competitively for contracts to supply frozen food to the NYCBOE, then arrangements would be made among the companies that supplied produce to the NYCBOE, including Penachio Co., for DiCarlo, Inc. to be the low bidder for future NYCBOE contracts to supply produce to schools in Manhattan;

(h) Certain of the defendants and co-conspirators shared the net profits earned on contracts to furnish and deliver specified quantities of frozen food items to be warehoused by giving each other money or free merchandise. For example, in 1997, after one defendant had completed a contract to furnish and deliver to the warehouse three frozen food items -- breaded chicken patties, chicken miniatures, and breaded chicken pieces -- that defendant paid by check approximately \$47,000 to each of four defendants or co-conspirators that had agreed not to bid competitively

for those contracts; and

(i) Certain of the defendants and co-conspirators falsely certified, under penalty of perjury, that, among other things, the prices in their bids had been arrived at independently without collusion, consultation, communication, or agreement for the purpose of restricting competition as to any matter relating to such prices, with any other bidder or competitor.

IV. JURISDICTION AND VENUE

30. The aforesaid combination and conspiracy was formed and carried out,

in part, within the Southern District of New York within the five years preceding the filing of this Indictment.

IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1

A True Bill

_____/s/_____
Foreperson

_____/s/_____
JOEL I. KLEIN
Assistant Attorney General

_____/s/_____
JAMES M. GRIFFIN
Deputy Assistant Attorney General

_____/s/_____
SCOTT D. HAMMOND
Director of Criminal Enforcement

Antitrust Division
U.S. Department of Justice

_____/s/_____
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Southern District of New York

_____/s/_____
RALPH T. GIORDANO
Chief, New York Office

_____/s/_____
REBECCA MEIKLEJOHN

_____/s/_____
DOUGLAS M. TWEEN

_____/s/_____
MARY ANNE F. CARNIVAL

_____/s/_____
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SOUTHERN DISTRICT OF NEW YORK MAY 31, 2000
Returned into the District Court by the Grand Jurors and filed.