Nos. 04-4752, 04-4876, 04-4877

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, Cross-Appellee
v.

GOSSELIN WORLD WIDE MOVING N.V. and THE PASHA GROUP,

Defendants-Appellees, Cross-Appellants

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

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT AND
ANSWERING BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE

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INTRODUCTION AND SUMMARY OF ARGUMENT

1. Defendants conspired with U.S. freight forwarders and others to raise the through rates charged to the Department of Defense (DOD) to transport the household goods of DOD civilian and military personnel between the United States and Germany. As we explained in our initial brief, the Shipping Act does not preclude a criminal Sherman Act prosecution of this price fixing.

First, because defendants conspired with U.S. freight forwarders to fix *through* rates, the antitrust exemption in section 7(a)(4) of the Shipping Act for an "agreement or activity concerning the foreign inland segment of through transportation" simply does not apply. 46 U.S.C. app. § 1706(a)(4). In any event, section 7(a)(4) immunizes only agreements that include ocean common carriers or marine terminal operators, and defendants' conspiracy did not include such entities. Defendants' agreement is not subject to Federal Maritime Commission (FMC) regulation and, therefore, falls outside the antitrust immunity provided by the Shipping Act.

Second, section 7(a)(2) of the Shipping Act, 46 U.S.C. app. § 1706(a)(2), does not confer antitrust immunity on an agreement to fix through rates when there is no evidence and no reasonable basis to believe that it was made pursuant to an agreement on file with the FMC or was exempted from filing by section 16 of the Shipping Act, 46 U.S.C. app. § 1715.

Third, section 7(c)(1), 46 U.S.C. app. § 1706(c)(1), which precludes the retroactive removal or alteration of antitrust immunity, has no application to an agreement that was never immune from the antitrust laws. Thus, defendants' claims that the Shipping Act exempts their price fixing from a Sherman Act prosecution are erroneous. Their arguments cannot be reconciled with the specific offense charged in the Information, the stipulated facts, and the plain language of the Shipping Act.

2. Defendants argue as cross-appellants that the conspiracy to defraud count of the Information should have been dismissed because it fails to allege or prove that offense. But the Information is legally sufficient; the guilty pleas and stipulated facts establish fraud; and any argument that the facts do not establish fraud is waived by the conditional plea agreements. The only argument defendants did not waive – that the "charged conduct is immune from prosecution" (JA 39, 53) by the Shipping Act – is unavailing because the Shipping Act does not preclude a prosecution for conspiring to defraud the United States pursuant to 18 U.S.C. § 371.

Defendants also claim that the fine they agreed to pay in their conditional plea agreement and that was imposed by the district court exceeds the statutory maximum. But defendants received the sentence that they bargained for, including

the fine. Indeed, they even agreed to the loss calculations from which their fines were calculated. JA 42, 56. Having agreed on the amount of loss, defendants cannot now argue that the sentence – based on double the agreed on loss pursuant to 18 U.S.C. § 3571(d) – exceeds the statutory maximum.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE ANTITRUST COUNT

A. The Charged Agreement Does Not Concern "The Foreign Inland Segment" As Required For Immunity Under Section 7(a)(4) of the Shipping Act

1. Defendants' claim that the charged antitrust conspiracy "falls squarely within the language" of section 7(a)(4) of the Shipping Act (Deft. Br. 17) ignores the express language of the Information, the stipulated facts, and the Shipping Act itself. Count One of the Information expressly charges a "conspiracy to eliminate competition by fixing and raising *through* rates filed with [DOD]." JA 23 (emphasis added). Thus, the only agreement at issue in this case is defendants' agreement with U.S. freight forwarders to fix prices on the bids for *through* rates submitted to DOD by those forwarders. That agreement was amply pled in the Information and proved by the stipulated facts. SoF 24-31; JA 74-76 (defendants fixed the through rate); SoF 5, 18; JA 68, 72 (freight forwarders who were party to

the agreement are U.S. companies); SoF 8; JA 69 (Ocean transport services are part of the agreed-on through rates fixed by the parties); SoF 10; JA 70 (defendants procured for the U.S. freight forwarders the rates for ocean transport services as part of the through rates quoted by freight forwarders). It is irrelevant that defendants also enlisted certain German agents to threaten a boycott of U.S. freight forwarders who "me-tooed" the prime through rates submitted to DOD in the first round of bidding which defendants believed were too low. Deft. Br. 17-18. Even that agreement concerned through rates. But that agreement to boycott is *not* the offense charged in the Information – as the district court found, JA 191-92 – and the defendants' agreement went far beyond it. Accordingly, defendants' claims that the government's version of the facts "might make George Orwell proud" (Deft. Br. 21) and that the government has somehow altered the SoF (Deft. Br. 4), simply mask their own attempts to deny not only what they did, but what the Information charges and what the SoF proves.[1]

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[1] The district court found that defendants' attempt to turn the conspiracy from one devised and implemented by them into one devised by local German agents and forced upon the defendants is not supported by the SoF. JA 191-92. Gosselin's Managing Director was conferring with Pasha and their other competing landed rate provider ("UCC-1") to raise the me-too rates before Gosselin's Managing Director helped the local German agents prepare their January 8 demand letter threatening a boycott. JA 72-74; *see* Deft. Br. 7-8, nn. 3-4. Thus, the district court concluded that "the additional facts that Defendants supply, concerning an initial price-fixing agreement among German agents [is] not

The stipulated facts show that, after contacting the two competing landed rate providers – Pasha and "UCC-l" – to see whether they would agree to raise me-too rates, JA 72-74, Gosselin's Managing Director was not content to wait to see if the threatened boycott by German agents, which he instigated, would be effective in forcing U.S. freight forwarders to "me-too" at rates higher than the prime through rates submitted by "FF-1" in the initial round of bidding.[2] Rather, Gosselin and Pasha also agreed with FF-1 that FF-1 would cancel its rates in the 12 channels of concern to the defendants "if no other freight forwarder me-tooed those prime rates or filed any rate below the second low level." JA 74-75. For unless FF-1 canceled its prime rates, DOD would ship as much as possible at that lower rate. Defendants then directed other U.S. freight forwarders not to "me-too" FF-1's prime through rates but rather to file at a higher rate. JA 75. Finally, they

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within the Statement of Facts," JA 191, and alleged facts concerning "another agreement with German agents that influenced their actions . . . [is] outside the factual record and this Court cannot consider them in its analysis." JA 192.

[2] Since cheating by participants in antitrust conspiracies is common (*see*, *e.g.*, *United States v. Andreas*, 216 F.3d 645, 679 (7th Cir. 2000) (noting that members of the lysine cartel "cheated each other when they could")), Gosselin may have feared that one or more of the boycotters would break ranks. In any event, the stipulated facts state that the boycott letter involved only "12 of the largest German agents," not all German agents. SoF 22; JA 73. Thus, other companies might have been available to carry the traffic the 12 agents were threatening to boycott.

directed any U.S. freight forwarders that filed "me-too" rates lower than the second-low level to cancel those rates, which the freight forwarders did. *Id.* These facts establishing a price-fixing agreement among defendants and U.S. freight forwarders to fix *through* rates constitute the offense charged in the Information. No other agreement, including an agreement on a foreign inland segment or the threatened boycott by German agents, is charged in the Information.

Since the only antitrust offense charged in the Information is the offense of fixing the levels of the *through* rates submitted by U.S. freight forwarders to DOD, defendants' conduct is not immunized from prosecution by section 7(a)(4), which exempts only "agreement[s] or activit[ies] concerning the foreign inland segment of through transportation." 46 U.S.C. app. § 1706(a)(4). DOD did not solicit bids for a foreign inland segment, and the rigged bids it received pursuant to the charged agreement were not for a foreign inland segment. Rather, the rigged bids DOD received were pursuant to the price-fixing agreement concerning *through* rates charged in the Information.[3]

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[3] Defendants also mistakenly claim that "antitrust exemptions apply to each of the other segments of the transportation of household military goods in addition to the foreign inland segment." Deft. Br. 22. No law exempts foreign port agents' services, or U.S. port agency services, liftvan charges, or foreign general agent services. There is a limited antitrust immunity for motor carriers' U.S. domestic

2. Contrary to defendants' claim, Deft. Br. 20-23, the plain language of section 7(a)(4) does not exempt an agreement to fix through rates.

First, in order to understand whether an "agreement or activity" is exempted from the antitrust laws by section 7(a)(4), one must first understand what the "agreement or activity" at issue is. As we have already noted, the only "agreement or activity" at issue in this case is the agreement to fix *through* rates – not some other rate – as charged in the Information. If Congress wanted to exempt from the antitrust laws any agreement on through rates as long as that through rate included a foreign inland segment, it could have said so directly. Instead, Congress carefully limited the exemption to "any agreement or activity concerning the foreign inland segment of through transportation." 46 U.S.C. app. § 1706(a)(4).

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joint rates where different carriers provide different parts of the overall carriage, but there is no provision for single-line rate making for household goods. 49 U.S.C. § 13703(a)(1)(A),(B),(G); *Clark & Reid Co. v. United States*, 851 F.2d 1468, 1469-70 (D.C. Cir. 1988); Agreement of Household Goods Carriers' Bureau Committee of the American Moving and Storage Association (only agreement for household goods on file with Surface Transportation Board [STB] contains no provision for collective single line rates). Nothing in any statute permits U.S. freight forwarders or anyone else to fix their through rates. And in the limited cases where the Shipping Act and the Interstate Commerce Act grant immunity, it is coupled with concomitant regulation by a responsible federal agency – either the FMC or the STB – to ensure that those agreements are not unduly restrictive of competition. 46 U.S.C. app. §§ 1705(g); 1715; 49 U.S.C. § 13703(a)(2),(3),(5) (joint rates must be submitted to STB for approval and can only be approved if the agreement furthers transportation policy and is in the public interest).

Given the express language of the statute, the charged agreement to fix through rates is not exempt from the antitrust laws.

Defendants observe that Congress used the term foreign "inland segment" in section 7(a)(4) – a term not defined in the Shipping Act – instead of the term "inland portion," which is defined in the Shipping Act as "the *charge* to the public by a common carrier for the nonocean portion of through transportation," Deft. Br. 21, quoting 46 U.S.C. app. § 1702(12) (emphasis added by defendant).[4] But the fact that section 7(a)(4) may cover agreements relating to matters other than "charges" for transportation service does not advance defendants' case. Nothing in the statute or its history suggests that the term foreign "inland segment" should have any broader reading than the one apparent on its face, *i.e.*, an agreement that concerns the "segment" of through transportation that is both "foreign" and "inland." Congress did not define "foreign inland segment" because it apparently assumed that the usual and ordinary meaning of the words would be understood by the courts.

3. Finally, defendants' rule of lenity argument (Deft. Br. 32-34)

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[4] The Shipping Act defines both "inland portion" and "inland division," 46 U.S.C. app. § 1702(11) ("the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier"), because the distinction between them is important for section 7(b)(2), which is not at issue here.

misrepresents the government's argument, misunderstands the rule of lenity, and ignores the stipulated facts. First, the government has never argued that the rule of lenity "does not apply in antitrust cases." Deft. Br. 33. Rather, the point is that the offense charged in the Information – an agreement to fix *through* rates – is plainly not exempted from the antitrust laws by a statute that, on its face, exempts only agreements concerning a foreign inland segment of a through rate. There is nothing ambiguous about section 7(a)(4) as applied to the facts in this case, and no reason to invoke the rule of lenity.

Defendants attempt to avoid the well-established rule that exemptions from the antitrust laws are to be strictly construed by suggesting that the rule of lenity trumps that rule in criminal cases. But "[t]he rule of lenity, like other canons of construction, extends no further than the functions it serves. It does not preclude the implementation of the criminal law every time a statute needs construction, for all enactments require elucidation." *United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988). "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan v. United States*, 364 U.S. 587, 596 (1961). "The rule of lenity applies only if, '*after* seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what

Congress intended.'" *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (citations omitted, emphasis added). The rule of lenity, therefore, does not displace the established rules of statutory construction, including those providing that statutes be read in their entirety, and that exemptions from the antitrust laws be strictly construed.

Defendants also claim to be entitled to "lenity" based on the mistaken assertion that "the entire record in this case confirms that Defendants relied on *Tucor*" and that the government's "observation" to the contrary "is neither accurate nor relevant." Deft. Br. 33. Defendants provide no record citation establishing this alleged reliance on *Tucor*. Indeed, they have relied on alleged facts not in the record while simultaneously falsely accusing the government of doing the same. Defendants are correct, however, in their grudging concession that reliance on *Tucor* would be irrelevant to the issue of lenity in any event. Deft. Br. 34.

4. Contrary to defendants' argument (Deft. Br. 29-30), the decisions in *Tucor*[5] do not help them because the agreement in *Tucor* was very different from

[5] *United States v. Tucor Intern., Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999).

that here.[6] As the courts in *Tucor* found, the defendants before those courts were trucking companies that did business entirely within the Philippines. *Tucor*, 189 F.3d at 835-36. They conspired among themselves to raise the prices they charged to U.S. freight forwarders for transportation entirely within the Philippines. 35 F. Supp. 2d at 1175. There was no claim that the Philippine truckers conspired with U.S. freight forwarders, as each of the *Tucor* courts made clear. *Id.* at 1183, 1184; 189 F.3d at 835-36; *United States v. Tucor Intern., Inc.*, 238 F.3d 1171, 1176 (9th Cir. 2001) (*Tucor II)* (agreement concerned activity "exclusively" and "entirely" within the Philippines). Based on these facts, the Ninth Circuit held that section 7(a)(4) "exempts from criminal prosecution those engaged in trucking household

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[6] In citing the *Tucor* indictment (Deft. Br. 29), the defendants mischaracterize it by omitting the critical language emphasized below (*see* JA 82):

> 2. . . . the defendants and others entered into and engaged in a combination and conspiracy to suppress competition by fixing prices for moving services supplied *in connection with the transportation of military shipments of house goods* between the Philippines and the United States.

Defendants also ignore entirely the critical charging paragraph of the indictment (*id.*, emphasis added):

> 3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial term of which was to increase *to* U.S. freight forwarders *and* the United States Department of Defense the prices paid for moving services.

goods to and from points entirely within a foreign country as part of 'through transportation' to the United States." 189 F.3d at 835.

In this case, defendants did not operate solely within a foreign country, did not limit their agreement to companies that did so, and did not limit their agreement to the foreign inland segment. Indeed, Pasha is a U.S. company whose subsidiary is a U.S. freight forwarder that provides services to DOD. JA 24-25. And defendants persuaded U.S. freight forwarders to join in their conspiracy to fix through rates submitted to DOD. Those through rates, of course, included segments of transportation services wholly within the United States,[7] as well as transportation services elsewhere. The co-conspirator U.S. freight forwarders were thus participants in the conspiracy involving, among other things, transportation within the United States and not, as in *Tucor*, victims of a conspiracy among foreign truckers involving transportation entirely within a foreign country.[8] Therefore, even assuming that *Tucor* was correctly decided, it

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[7] "U.S. flag ocean common carriers are required to provide the ocean transportation segment of an ITGBL move." JA 69. The household goods subject to defendants' price-fixing agreement entered U.S. territory for most purposes as soon as they were loaded onto a U.S. flag carrier. *Patterson v. Eudora*, 190 U.S. 169, 176 (1903); *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953). Thus, most of the through transportation at issue in this case is transportation in the United States.

[8] Defendants once again attempt to cast themselves as mere victims of the "foreign service providers" (German agents), Deft. Br. 32, despite the district

involved a completely different agreement from the agreement charged in the Information here. Accordingly, nothing in *Tucor* supports defendants' claim that their agreement to fix *through rates* is exempted from the antitrust laws by section 7(a)(4) of the Shipping Act.

B. Even if the Charged Agreement Concerned a Foreign Inland Segment, It is Not Immunized by Section 7(a)(4)

In our opening brief, we argued that section 7 of the Shipping Act does not exempt from the antitrust laws an agreement concerning a foreign inland segment to which no ocean common carrier (or marine terminal operator) is a party. Assuming the Court decides to reach this issue (*see* Gov. Br. 33-34), defendants' responses to this argument ignore the plain purpose of the Shipping Act as well as the language and structure of that act. Deft. Br. 23-29.

In *Tucor*, the Ninth Circuit held that the Shipping Act conferred antitrust immunity on a price-fixing cartel consisting entirely of Philippine trucking companies that operated wholly within the Philippines and were not subject to any form of FMC regulation. To say the least, this is a strange result since Congress's purpose in enacting the Shipping Act was to promote, protect, and encourage the ocean transportation of U.S. import and export commerce on U.S. flag carriers. 46

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court's finding that such a claim is unsupported by the stipulated facts. JA 191-92, n.1, *supra*.

U.S.C. app. § 1701. As the Supreme Court recently re-affirmed, judges should not surrender their common sense when interpreting a statute, *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 468-69 (2004), and if the statutory "language reasonably permits an interpretation consistent with" the statute's intent, the court should accept it. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2372 (2004).[9] Indeed, the Federal Maritime Commission has recently stated its belief that "the rational of *Tucor* is incorrect." *Non-Vessel Operating Common Carrier service Arrangements*, 69 Fed. Reg. 75850, at 75851 (December 20, 2004).

Nevertheless, defendants rely on the result in *Tucor* – indeed they seek to extend it – to claim that their unregulated agreement to fix through rates should receive antitrust immunity under section 7. But a reading of the Shipping Act as a whole, consistent with its purpose and structure – *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) ("a statute is to be considered in all its parts when construing any one of them"); *Beecham v. United States*, 511 U.S. 368, 372 (1994); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733-

[9] Defendants' criticism (Deft. Br. 32-33) of the Supreme Court's holding in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004), that a statute should be interpreted consistent with the intent of Congress if the statutory language "reasonably permits" such an interpretation, is either based on a fundamental misunderstanding of that decision or is addressed to the wrong court.

36 (1973) – shows that Congress did not exempt agreements like the defendants' from the antitrust laws.

l. As discussed in the government's opening brief, Govt. Br. 24-30, Congress intended to grant antitrust immunity only to conduct that was subject to some sort of FMC regulation. The government also showed that the primary purpose of the Shipping Act was to assist U.S. flag carriers. 46 U.S.C. app. § 1701. In their briefs, defendants largely ignore both of these points in claiming that their unregulated agreement to fix through rates should receive antitrust immunity under section 7. However, the statutory language, particularly when examined in light of the clear purpose of the Shipping Act, does not support their claim.

Sections 4 through 7 of the Shipping Act create a unified whole that describes the agreements to which the Act applies, and for which exemptions are granted when and only when they are either filed with the FMC or expressly exempted from filing. The agreement in this case is not one of the agreements within the scope of the Shipping Act – it was neither filed with the FMC nor exempted from filing. Govt. Br. 34-40.

Section 4 defines the kinds of agreements that are within the scope of the Shipping Act. Subsection 4(a) provides that "[t]his chapter applies to agreements

by or among ocean common carriers" (then lists the specific types of agreements that the "chapter," *i.e.*, the Shipping Act, covers); and subsection (b) provides that "[t]his chapter applies to agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers . . ." (again, listing the specific agreements covered). In light of the clarity of the statutory text, defendants' attempt to avoid the import of section 4 by claiming that the government's argument is "based on the *caption* . . . of Section 4" (Deft. Br. 24) is incorrect.[10]

Section 5, which defendants do not discuss or even cite, provides that "[a] true copy of every agreement entered into *with respect to an activity described in section 1703(a) or (b) [section 4] of this title* shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States." 46 U.S.C. app. § 1704(a) (emphasis added). Thus, only the agreements that are described in section 4 are

[10] Moreover, "the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute," *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998), quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947), particularly where, as here, the legislative history demonstrates that the title "does not reflect careless, or mistaken, drafting." *Almendarez-Torres*, 523 U.S. at 234.

the subject of the filing provisions of section 5. *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950, 954 (9th Cir. 1991) ("The true copy requirement of section 5 applies only to agreements that fall within the scope of section 4").

Section 6, in turn, provides the framework for the FMC's oversight of those agreements filed under section 5, including the standards governing FMC review of the agreement, and authorization for the FMC to sue to enjoin any agreement that "is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." 46 U.S.C. app. §§ 1705(a)-(h).

The antitrust exemptions in section 7 coincide with sections 4 and 5. The exemptions provided in section 7(a)(1) and (2) address agreements either filed under section 5 or excepted from filing under section 16 (giving the FMC authority to except section 5 agreements from filing[11]), and the exemptions in sections 7(a)(3)-(5) concern agreements relating to transportation to be performed in foreign countries, which section 5 specifically excepts from filing. Thus, the point of exemptions (3)-(5) is that they relate to foreign-to-foreign transportation which is expressly excepted from filing by section 5(a) and not, therefore, subject

[11] 46 U.S.C. app. § 1715, *see* discussion at pp. 26-30, *infra*.

to oversight under section 6. If the agreements were required to be filed and were effective under sections 5 and 6, they would be exempt under sections 7(a)(1) and (2).

Defendants' agreement on through rates, however, does not fall within any provision of section 4 or 5. It is neither required to be filed, nor excepted from filing by section 5(a). Indeed, defendants have not pointed to anything that provides for FMC oversight of NVOCC agreements to fix rates – whether through rates or otherwise. The only way in which the FMC regulates NVOCCs is by requiring each NVOCC to publish its individual tariff (*see* section 8, 46 U.S.C. app. § 1707), and by prohibiting discriminatory conduct – illegal rebates, preferences, etc. – in connection with such tariffs. Section 10, 46 U.S.C. app. § 1709. Those regulations do not cover agreements by NVOCCs. Indeed, section 10 specifically provides that the only "agreements" to which it applies are those "required to be filed under section 1704 [section 5] of this title." 1709(a)(2)(3).

Thus, defendants are wrong in broadly claiming that "Congress has exempted from the antitrust laws various components of through transportation in order to give the FMC an unimpeded ability to regulate this industry, using a set of laws and regulations designed specifically to deal with the unique features of the international shipping industry." Deft. Br. 22-23 (citing pronouncements from

legislative history of prior Congresses that failed to enact the legislation).[12] The reason Congress did not choose to regulate or exempt agreements by NVOCCs is that the industry Congress was concerned about in the Shipping Act was the U.S. shipping industry – ocean common carriers – not freight forwarders, non-vessel operating common carriers, or local German landed rate providers, movers, and booking agents. 46 U.S.C. app. § 1701 (stating statutory purpose).

2. Defendants are wrong in their claims that the government's reading of section 7(a)(4) cannot "be reconciled with" section 7(a)(3), and would "render superfluous" section 7(b)(1). Deft. Br. 26. These sections do not negate the clear language and import of sections 4 and 5.

Section 7(a)(3) provides immunity for "any agreement or activity that

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[12] Although defendants have claimed that the government's interpretation of the Shipping Act is "audacious" (JA 102) and "convoluted" (Deft. Br. 29), the government's interpretation of the Shipping Act has been consistent since that statute was enacted. For example, in 1988, while Charles F. Rule, now counsel for Pasha, was the Assistant Attorney General of the Antitrust Division, the Division filed comments in an FMC proposed rulemaking proceeding that are consistent with the arguments in this brief. Comments of the Department of Justice before the FMC in Docket No. 87-24, *Proposed Rulemaking Concerning Foreign to Foreign Agreements under the Shipping Act of 1984*, filed February 8, 1988. Relying on sections 4 and 5 of the act, the Division argued that the FMC should not adopt the proposed rule because "[n]either the language of the Act nor its legislative history allows the Commission to immunize illegal agreements in trades it recognizes it cannot police." *Id.* at pp. 3-4. And the FMC did not adopt the rule precisely for the reasons given by the Department of Justice. 53 Fed. Reg. 50264 (Dec. 14, 1988).

relates to transportation services within or between foreign countries." The defendants say that this shows Congress's intent to immunize entities other than ocean common carriers and thus undermines the government's argument that section 7(a)(4) is limited to agreements by or among ocean common carriers. Deft. Br. 26. But section 7(a)(3), like section 7(a)(4), can and should be harmonized with sections 4 and 5. Ocean common carriers, as defined in the Shipping Act, are vessel-operating persons holding themselves out to the general public to provide transportation by water between the U.S. and a foreign country. 46 U.S.C. app. §§ 1702(6), (16). Such carriers can come within the scope of both sections 4 and section 7(a)(3) when they participate in an agreement that concerns only foreign-to-foreign transportation. In that case, Congress specifically provided that the agreement is not subject to the filing requirements of section 5 and is exempt from the antitrust laws under section 7(a)(3) – even though the ocean common carriers might otherwise be subject to the Shipping Act.

Indeed, examination of section 7(a)(3) shows that granting immunity to defendants' through rates in this case makes no sense. In section 5, Congress said that agreements concerning transportation wholly within or between foreign countries did not have to be filed. Section 7(a)(3) then provides a concomitant antitrust immunity for those agreements "*unless that agreement or activity has a*

direct, substantial, and reasonably foreseeable effect on the commerce of the United States" (emphasis added), in which case immunity is withheld. Congress made a different choice with respect to agreements like the defendants' that have a clear effect on U.S. commerce, because they are part of "through transportation." When properly read in conjunction with sections 4 and 5, what Congress did in section 7(a)(4) was immunize an agreement "by or among ocean common carriers" concerning only "the foreign inland segment" of a through rate. In this way, Congress ensured that the overall through rate agreement to which the ocean common carriers were parties would still be filed under section 5 – and still be subject to FMC oversight. In this case, however, where no agreement was filed, reviewed, or exempted, because no ocean common carrier was a party to it, the FMC has no jurisdiction over the charged conspiracy and there is no immunity.

Defendants also mistakenly claim that section 7(b)(1), which provides that there is no antitrust immunity for agreements "with or among air carriers, rail carriers, motor carriers or common carriers . . . with respect to transportation within the United States," would be superfluous if the Shipping Act only exempted agreements by or among ocean common carriers in the first place. Deft. Br. 26. The "agreement with" language in section 7(b)(1) is necessary to prevent inland carriers from obtaining antitrust immunity under the Shipping Act. Section

4(a) of the Shipping act authorizes "agreements by . . . ocean common carriers," and thus would include agreements between ocean common carriers and one or more domestic carriers such as truck or rail lines. *See* Govt. Br. 40. Congress did not want to immunize that kind of agreement concerning transportation within the United States, however, and so it provided that an "agreement with" a domestic carrier does not have antitrust immunity.[13] In explicitly providing that agreements "among" inland carriers do not receive immunity, Congress sought to clarify and ensure that, when U.S. inland carriers enter into agreements concerning intermodal transportation, their conduct is fully subject to the antitrust laws. The relevant Senate committee report of the Congress that enacted the 1984 Shipping Act explains that "[t]he principal purpose of subsection (b) is to make clear that the bill does not confer antitrust immunity for agreements between an ocean common carrier and groups of inland carriers, or among inland carriers alone, concerning intermodal movements."[14] S. Rep. No. 98-3, at 30 (1983) (Senate Committee on

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[13] Section 7(b)(1) works in tandem with section 7(b)(2). The ocean common carriers cannot negotiate collectively with the inland carriers (7(b)(1)), and they also cannot agree among themselves on inland divisions that they might then force upon the inland carriers (7(b)(2)).

[14] Section 4(a) "clarifie[d] both the authority of ocean common carriers to fix through intermodal rates and the Commission's jurisdiction over those intermodal rates and services. There is however, no authorization for ocean carriers collectively to negotiate rates, divisions, contracts or routes with carriers providing

Commerce, Science, and Transportation on S. 504); *accord*, S. Rep. 97-414, at 34 (1982) (Committee on Commerce, Science, and Transportation on S. 1593); H.R. Rep. 97-611 pt. 2, at 33 (1982) (this section "ensures that no antitrust immunity is conferred upon air carriers, motor carriers, or common carriers by water not subject to this Act. Moreover, common carriers subject to this Act will receive no immunity for discussions or agreements leading to the fixing of the United States, inland-leg portion of a through rate").

Thus, section 7(b)(1) was enacted because Congress was concerned with agreements between ocean common carriers and inland carriers, or agreements otherwise concerning "intermodal" transportation that might impinge on the regulatory authority of other federal agencies, that were unregulated by the FMC, or that otherwise would impede competition for U.S. inland rates. Contrary to defendants' contention, therefore, limiting the exemptions in section 7(a) to agreements by or among ocean common carriers or marine terminal operators does not render section 7(b)(1) "superfluous."

3. As the government pointed out in its opening brief, Govt. Br. 36-37,

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transportation within the United States; these negotiations for inland rates and services must be negotiated one-on-one. Thus, the jurisdiction of the ICC (Interstate Commerce Commission) over inland carriers is unaffected." S. Rep. No. 98-3, at 22 (1983).

three Committees of the 98th Congress that passed the Act, including the Conference Committee, explained that the immunities of section 7 are co-extensive with those of section 4: "section [4] states the coverage of the bill. It lists the types of agreements to which the bill applies. When read in connection with section 5 and 7, the effect is to remove *the listed agreements* from the reach of the antitrust laws as defined in the bill." H.R. Conf. Rep. No. 98-600, at 28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 283, 284 (emphasis added). At the time of this report, sections 4, 5, and 7, including section 7(a)(4) were in the bill in their present form. *See* H. R. Rep. No. 98-600, at 5-9. Thus, when the Conference Committee said that sections 4, 5 and 7 were to be read together, it was plainly including section 7(a)(4).

Although defendants claim that the government "typically" relied on legislative history of prior Congresses, Deft. Br. 27, it is defendants who rely on largely irrelevant history from prior Congresses.[15] Defendants also misrepresent

[15] At Deft. Br. 23 n.7, and elsewhere, defendants cite language in the 1982 versions of the bill which related to a proposed "blanket exemption" that would have covered even unfiled agreements. The House Judiciary Committee made "major changes" to that provision, however, so that antitrust immunity would be conferred "only on agreements and conduct properly submitted to the regulatory processes of the Act." H. R. Rep. 97-611, pt. 2, at 6, 32-33 (1982). Its proposed version was enacted with only a minor amendment in the following Congress. H.R. Conf. Rep. 98-600, at 37 (1984).

the legislative history when they rely on changes in S. 1593 from 1981 to 1982 to claim that Congress deliberately eliminated the word "solely" from section 7(a)(4), and thus intended to include agreements broader than those covering only the foreign inland segment. Deft. Br. 27-28. The language defendants cite from the 1981 version of S. 1593, which provided immunity to "any agreement or activity that relates solely to transportation services between foreign countries," is not the precursor to 7(a)(4), as defendants claim (Deft. Br. 27-28), but to section 7(a)(3). And that language, including the word "solely," was retained by Congress as section 8(a)(4) in the 1982 bill, *see* S. 1593, at 56 (May 25, 1982). Section 8(a)(4) was subsequently enacted, albeit with the "direct effect" clause substituted for the word "solely," as section 7(a)((3), not 7(a)(4). *See* H.R. Rep. 98-53, pt. 2, at 32-33 (1983); H.R. Conf. Rep. 98-600, at 37 (1984).

In fact, in 1981, S. 1593 did not have a provision comparable to section

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Moreover, some of the very reports defendants cite provide unequivocally that sections 3, 4, and 7 of the bill (sections 4, 5, and 7 of the Act) are to be read together, H.R. Rep. 98-53, pt. 1, at 30 (1983), and this purpose was not altered when the Act was passed in 1984, as the Conference Committee Report makes clear. Finally, the government has no quarrel with language from the legislative history stating that "the antitrust laws will have no place *with respect to activities and agreements authorized or prohibited under this bill.*" Deft. Br. 23, n.7 (emphasis added). The issue, however, is what agreements Congress ultimately authorized or prohibited under the Act – and, as enacted, the Shipping Act did not authorize agreements among NVOCCs.

7(a)(4). It was added, as we noted in our brief (Govt. Br. 28 n.12), at the request of a group of shipowners, as section 8(a)(7) in the 1982 bill. And, as defendants recognize, that section provided immunity for "any agreement or activity concerning the inland portion of any intermodal movement occurring outside the United States, though part of transportation provided in a United States import or export trade." S. 1593, at 56 (May 25, 1982). As defendants concede, this provision was "subsequently tweaked and ultimately became section 7(a)(4)." Deft. Br. 28. Defendants do not claim that the subsequent "tweak[ing]" changed the essential meaning of section 7(a)(4) from that of section 8(a)(7) in the 1982 bill. And the language of the 1982 bill, like the final version of section 7(a)(4), makes clear that Congress intended in section 7(a)(4) to immunize only the "inland portion" of "any intermodal movement occurring outside the United States," not the entire intermodal movement itself. Thus, section 7(a)(4) provides immunity for agreements concerning the "foreign inland segment" or "portion" of through transportation, not agreements concerning "through transportation" itself.

II. SECTION 7(a)(2) DOES NOT IMMUNIZE DEFENDANTS' AGREEMENT

Section 7(a)(2) of the Shipping Act, 46 U.S.C. app. § 1706(a)(2), states that "[t]he antitrust laws do not apply to . . . any activity or agreement within the scope

of this chapter . . . undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 . . . from any filing or publication requirement of this chapter." Defendants claim immunity under this section although their agreement is not "within the scope of" the Shipping Act, not on file with the FMC, and not exempted from filing by section 1715. Their claim of immunity cannot be reconciled with the plain language of section 7(a)(2).

1. Defendants claim that section 7(a)(2) is not limited to agreements and activities of ocean common carriers as defined in section 4 of the Shipping Act. Deft. Br. 38. But section 7(a)(2) plainly states that it applies to agreements and activities "within the scope of this chapter," which "chapter" sections 4(a) and (b) define as applying only "to agreements by or among ocean common carriers" or "marine terminal operators." 46 U.S.C. app. § 1703(a), (b). Their agreement is not of either kind. Indeed, defendants apparently concede (Deft. Br. 40 n.20) that *Tucor*, on which they otherwise heavily rely, and on which the district court relied (JA 202-03), agreed with the government's interpretation of section 7(a)(2). Specifically, *Tucor* found that section 7(a)(2) exempts only those agreements and activities by or among ocean common carriers that are set out in section 4. 35 F.

Supp. 2d at 1178-79; 189 F.3d at 837; *see also* 69 Fed. Reg. at 75851 (FMC says "the rationale of *Tucor* is incorrect and [] its direct precedential value is limited to section 7(a)(4) of the Shipping Act").

Section 7(a)(2) covers "activities" as well as "agreements," and defendants argue that there are no "activities" within the scope of section 4. Deft. Br. 39. If that were true, however, the filing requirement of section 5(a) would have no meaning, since it requires the filing of "[a] true copy of every agreement entered into with respect to *an activity described in section [4]*." 46 U.S.C. app. § 1704(a) (emphasis added). As we explained in our opening brief, Govt. Br. 32 n.13, those are the same "activities" to which section 7(a) refers, so section 7(a)(2) in its entirety is limited by section 4.

2. Even if section 7(a)(2) referred to activities not within the scope of section 4, defendants' argument would fail because it ignores the crucial distinction between the "activity" that forms the basis of the Information – their conspiracy to fix through rates – and the activity subject to the section 16 exemption on which they rely – the publishing of an individual NVOCC's tariff. The two are entirely distinct activities, and the former was certainly not on file with the FMC and in effect within the meaning of section 7(a)(2); nor did defendants have a reasonable basis to conclude that it was "exempt under section

[16] from filing." 46 U.S.C. app. § 1706(a)(2). Contrary to defendants' claim, Deft. Br. 36, heading 1, the FMC has not "Exempted From Filing And Publication *Agreements* For the Transportation Of Military Household Goods." (Emphasis added.) Indeed, the FMC is not authorized to exempt such agreements under the Shipping Act. *See* pp. 15-19, *supra*. The Shipping Act does not cover NVOCC agreements to fix rates, and the FMC has not authorized or immunized such agreements.

The only exemption the FMC has granted to NVOCCs is an exemption from publishing their *individual* tariffs. Exemptions from tariff publication are in a separate part of the FMC's regulations (*see* 46 CFR pt. 520, implementing section 8 of the Shipping Act) from exemptions for agreements (*see* 46 CFR pt. 535, implementing section 5 and extending only to agreements by or among ocean common carriers). NVOCCs have no authority to fix rates or even to file joint tariffs. Exemptions from individual tariff filing or publication do not provide authorization, and certainly no immunity, for collusive agreements as to what the rates in those tariffs should be.

3. Defendants mistakenly claim that, had they been required to file their tariffs, they would have had to disclose their agreement to fix through rates in that tariff as a "practice." Deft. Br. 37. From this erroneous premise, they conclude

that, because the FMC's tariff filing exemption "obviates the need for Defendants to file tariffs [i]t follows then that Defendants' conduct is immune." *Id.* A complete reading of both section 8 and the regulation on which defendants rely not only demonstrates the error of their claim but in fact provides further evidence that only ocean common carriers and their sanctioned conferences are authorized to fix rates and receive antitrust immunity.

First, section 8 of the Shipping Act – which is the source of the FMC tariff publication exemption, but which defendants ignore – provides that "*each* common carrier and conference" shall keep open to public inspection tariffs showing "*its* rates, charges, classifications, rules, and practices between all points or ports on its own route . . ." 46 U.S.C. app. § 1707(a)(1) (emphasis added). This language shows that, except for "conferences," section 8 demands individual publication of tariffs. Thus, an exemption from section 8's requirements is not an exemption for collective action by NVOCCs which, by definition, are not part of "conferences." 46 U.S.C. app. § 1702(7).

Moreover, the term "practices" refers to the services provided for the published rate, and not, as defendants suggest, to an agreement on how the published rate was derived in the first place. Thus, the "practices" to which section 8 refers are those implemented under a tariff, not those antecedent to the

tariff filing.[16] The term "practice" is defined by the FMC under the broader definition of "tariff" at 46 CFR § 520.2 (the portion of the definition that was omitted by defendants is emphasized):

> The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier or conference and, *in the case of conferences, must be restricted to activities authorized by the basic conference agreement*.

Only "conferences" – which are defined in the Shipping Act as "an association of *ocean common carriers* permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff," 46 U.S.C. app.§ 1702(7) (emphasis added) – can file joint tariffs; collective rate making by non-ocean common carriers or conferences are neither "practices" within the meaning of this regulation, nor authorized by the Shipping Act itself.

The FMC's decision to exempt NVOCCs from publishing their individual

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[16] *See generally, American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223-24 (1998); *see also* 46 U.S.C. app. § 1707(a)(1)(D) (explaining that tariffs shall "state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part of the aggregate of the rates or charges").

The term "practice" is used in numerous federal statutes in conjunction with tariff filing provisions, and the broad reading defendants urge in this case would have ramifications well beyond this case. *See* 47 U.S.C. § 203(a); 15 U.S.C. § 717c(c); 16 U.S.C. § 824d(c); 49 U.S.C. § 11101(f).

rates for military household moves (because DOD already provides adequate notice of those rates), therefore, did not provide an exemption for any and all illegal acts that may have occurred in the process of establishing those tariff rates. Defendants' claim that, had they been required to file their individual tariffs as section 8 provides, they would have disclosed their collusive arrangements with freight forwarders is disingenuous.

4. Finally, the fact that the FMC recently took pains, in enacting new tariff filing exemptions, to make clear that the tariff filing exemption did not exempt any underlying collusive activity (*see* Deft. Br. 41-42, citing *Non-Vessel-Operating Common Carrier Service Arrangements*, 69 Fed. Reg. 75850 (Dec. 20, 2004)), does not advance defendants' cause here. The FMC was merely ensuring that the erroneous decisions of the district court in this case and *Tucor* would not be perpetuated or mistakenly relied on by others in the new tariff exemption regulations. *Id.* at 75851; *see* pp. 14, 28, *supra*. This does not mean that defendants were justified in believing that their conduct was exempt. Indeed, the only existing case at the time of defendants' conduct was *Tucor*, which, as defendants apparently concede (Deft. Br. 40 n.20), said, albeit in *dicta*, that defendants would have no immunity under section 7(a)(2).

III. SECTION 7(c)(1) DOES NOT RETROACTIVELY IMMUNIZE AGREEMENTS THAT WERE NEVER FILED WITH THE FMC OR EXEMPTED FROM FILING

Section 7(c)(1) provides that "any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination." 46 U.S.C. app. § 1706(c)(1). Nothing in this language provides immunity simply because a defendant may "in good faith believe" that he has it. *See* Deft. Br. 44; JA 205 (district court opinion). Acceptance of defendants' assertion that any denial of immunity "can only occur prospectively," even if sections 7(a)(2) and 7(a)(4) are wholly inapplicable to their conduct (Deft. Br. 43), would mean that any claim of immunity, no matter how frivolous, whether made in good faith or bad, could have only prospective effect. This is not what section 7(c) provides. Rather, section 7(c)(1) requires that immunity "set forth under subsection (a) of this section [7(a)(1)-(6)]" must have existed prior to the judicial decision or other act removing that immunity. 46 U.S.C. app. § 1706(c)(1). As the House Judiciary Committee explained, section 7(c)(1) "provides assurance that a person receiving immunity when an agreement enters into effect not lose that immunity, retroactively, if the agreement is later rejected, modified, or terminated. No order of the Commission or a court can

remove the immunity for the period prior to the rejection, termination, or modification of the agreement." H.R. Rep. 97-611 pt. 2, at 33.

The district court turned section 7(c)(1) on its head. It held that, "even assuming *arguendo*, that Defendants did not have immunity under the antitrust laws, Section 1706(c)(1) would grant Defendants retroactive immunity." JA 204. Thus, instead of applying section 7(c)(1) as Congress intended, to keep a court from retroactively removing antitrust immunity, the district court invoked section 7(c)(1) to retroactively grant antitrust immunity for conduct that never otherwise had it. This misapplication of section 7(c)(1) to provide immunity for conduct that never was immune in the first place should be corrected.

IV. THE DISTRICT COURT PROPERLY REFUSED TO DISMISS COUNT TWO

Defendants largely abandon the only argument their plea agreements allow them to make regarding Count Two. The plea agreements only authorize defendants to argue that the "charged conduct is immune from prosecution under 46 U.S.C. § 1701, *et seq.*" JA 39, 53. Defendants now argue, however, that the Information was insufficient to charge a conspiracy to defraud and that the evidence was insufficient to prove that offense. Deft. Br. 44-66. In fact, the Information is sufficient to charge a violation of 18 U.S.C. § 371. And although

defendants' plea agreements preclude any challenge to the sufficiency of the government's evidence, their guilty pleas and the stipulated facts constitute an admission of guilt to the charged offense and provide all the facts necessary to establish guilt even if their admission of guilt were ignored. Finally, to the limited extent they address the only issue they preserved in the plea agreements, the argument that the Shipping Act precludes this prosecution ignores the plain language of that statute.

A. The Information Was Sufficient

An indictment or information is sufficient if it sets forth the elements of the offense and fairly informs the defendant of the charges against him. *Hamling v. United States*, 418 U.S. 87, 117 (1974). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself," as long as it is accompanied by a "statement of the facts and circumstances as will inform the accused of the specific offense . . . with which he is charged." *Id.* at 117-118; *accord United States v. Wicks*, 187 F.3d 426, 427 (4th Cir. 1999).

In this case, the Information charges defendants with violating 18 U.S.C. § 371. Section 371 is written in the disjunctive and prohibits two distinct types of conspiracies. *United States v. Helmsley*, 941 F.2d 71, 90 (2d Cir. 1991); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993). The first part of

the statute, commonly referred to as the "offense clause," prohibits conspiring to commit offenses that are specifically defined in other federal statutes. The second part of the statute, and the part at issue in this case, is generally referred to as the "defraud clause," and prohibits conspiring to defraud the United States. *United States v. Hurley*, 957 F.2d 1, 3 (1st Cir. 1992); *United States v. Tuohey*, 867 F.2d 534, 536 (9th Cir. 1989); *United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986). "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery, or at least by means that are dishonest." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). Thus, Section 371 "is not confined to fraud as that term has been defined in the common law. It reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" *Dennis v. United States*, 384 U.S. 855, 861 (1966) (citations omitted); *accord United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986). "Three elements comprise a conspiracy under [section] 371: '(1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objectives, and (3) an intent on the part of the conspirators to agree, as well as to defraud the United States.'" *Tedder*, 801 F.2d at 1446 (citation omitted).

The Information in this case was sufficient to charge a violation of Section 371. It charged that defendants "did unlawfully, willfully and knowingly combine, conspire and agree to defraud the United States by increasing the rates paid by the Department of Defense ("DOD") for the transportation of household goods owned by U.S. military and civilian DOD personnel . . . from Germany to the United States during the IS-02 cycle to levels higher than would have prevailed in the absence of the conspiracy." JA 32.[17] The Information then described in substantial detail the object of the conspiracy and the overt acts undertaken to further it. For example, the Information states that defendants conspired to raise me-too rates to levels at or above the second-low level in the IS-02 cycle and then conspired to provide misleading information to DOD to ensure that no shipments were tendered to U.S. freight forwarders that had filed me-too rates below the second-low level. JA 33-34.

Thus, the Information charges the existence of an agreement, overt acts by

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[17] Defendants claim that they did not have the requisite "specific intent to defraud the government." Deft. Br. 48, citing a "specific intent" requirement of other circuits. But the Information charges that they "unlawfully, willfully and knowingly" agreed to defraud the United States (JA 32), and defendants admitted that they acted "unlawfully, willfully and knowingly" in their pleas and in the stipulated facts. JA 51, 53, 78. No further allegation concerning intent, and no further proof of intent, was required. *See generally*, *Bates v. United States*, 522 U.S. 23, 25, 29-33 (1997); *United States v. Yermian*, 468 U.S. 63, 68-74 (1984).

the conspirators in furtherance of that agreement, and that the defendants acted "unlawfully, willfully and knowingly" in agreeing to defraud the United States. JA 32. There can be no serious claim that the Information was insufficient in setting forth the elements of the crime, or that it failed to provide adequate notice to defendants to enable them to prepare a defense. Indeed, defendants do not cite any case holding that such allegations are insufficient to charge a violation of 18 U.S.C. § 371.

B. Defendants Waived Their Right To Claim That The Evidence Was Insufficient To Establish A Fraud Violation

While defendants claim that the Information and stipulated facts are insufficient to prove that they conspired to defraud the United States, this argument was (1) waived in the plea agreement, (2) is foreclosed by their guilty pleas, (3) and ignores the factual admissions in the stipulation.

1. As we have already noted, defendants reserved only one argument in the conditional plea bargain agreements: that the Shipping Act precludes this prosecution. JA 39, 53. If defendants had wanted to compel the government to prove the violation charged in the Information, they could have refused to plead guilty and gone to trial. Alternatively, they could have refused to agree to any plea bargain agreement that did not allow them to challenge the sufficiency of the

evidence pled in the Information and agreed to in the stipulation. Instead, however, they forfeited any right to challenge the sufficiency of the evidence by agreeing to conditional plea agreements that did not preserve this issue for judicial review. They cannot escape the consequences of this forfeiture by complaining about the sufficiency of the evidence in this Court.

2. Moreover, since defendants admit their guilt, they have no basis for arguing that the evidence is insufficient to prove their guilt. Paragraph 3 in both plea agreements in this case specifically provides that each "defendant will plead guilty *because the defendant is in fact guilty of the charged offenses*. The defendant admits the facts set forth in the statement of facts filed with this plea agreement and agrees that those facts establish guilt for the offenses charged beyond a reasonable doubt." JA 40, 54 (emphasis added). And after the district court in this case denied defendants' motions to dismiss the conspiracy to defraud count in the Information, both defendants pled guilty as the plea agreements required them to do. As the Supreme Court noted in *United States v. Broce*, 488 U.S. 563, 570 (1989), a guilty plea is both "a confession which admits that the accused did various acts," and "an 'admission that he committed the crime charged against him'" (citations omitted). Having admitted by their guilty pleas that they defrauded the United States as charged in the Information, they cannot complain

now that the evidence is insufficient.

3. Finally, defendants' insufficiency argument runs afoul of the stipulation. As the court explained in *United States v. Muse*, 83 F.3d 672, 679 (4th Cir. 1996), "[b]ecause a stipulation induces the government not to offer evidence to prove the facts involved in the stipulation, a defendant may not argue at trial or on appeal that the stipulation is insufficient to prove beyond a reasonable doubt the facts or elements to which he has stipulated." Among other things, defendants agreed that the facts described in the stipulation "establish" that the defendants "did unlawfully, willfully and knowingly combine, conspire and agree to defraud the United States by increasing the rates paid by DOD for the transportation of military household goods during the IS-02 cycle to levels higher than would have prevailed in the absence of their conspiracy." JA 78. This stipulation conclusively establishes that they conspired to defraud the United States. *Id.*

C. The District Court Correctly Held That The Shipping Act Does Not Provide Immunity For Fraud

The Shipping Act plainly states that the exemption it creates is limited to the "antitrust laws," and specifically names the antitrust statutes in Title 15 – and only the antitrust statutes in Title 15. 46 U.S.C. app. §§ 1702(2), 1706(c)(2). The Shipping Act never mentions the federal fraud statute – by name or by code

designation. Accordingly, the express language of the Shipping Act fully supports the district court's conclusion that the statute does not preclude a prosecution for a violation of 18 U.S. C. § 371.

Defendants' primary argument to the contrary is that the Shipping Act's exemption from prosecution under the antitrust laws renders that conduct "lawful" for any and all purposes. Deft. Br. 45, 51.[18] That is not what the Shipping Act says, or what it purports to do, and defendants point to no language of the Act itself or its history to support such a claim. The reason why Congress exempted certain agreements and activities authorized by the Shipping Act from the antitrust laws is that those agreements and activities violate, or could be viewed as violating, the antitrust laws. Since Congress was substituting regulation for antitrust enforcement (*see* Govt. Br. 24-30), it did not want government or private antitrust enforcement to interfere with the operation of its regulatory scheme. Thus, it provided that "[*t]he antitrust laws do not apply* to" certain agreements and activities within the scope of the Shipping Act. 46 U.S.C. app. § 1706(a) (emphasis added).

Notably, Congress did not say that such agreements and activities are

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[18] Contrary to defendants' claim, Deft. Br. 46-47, the district court properly framed the issue as whether the government had stated a basis for fraud independent of the Sherman Act violation. JA 175, 205.

always, or ever, "legal," or that other federal laws do not apply to such agreements. Accordingly, while Congress did not want the antitrust laws to "apply" to the agreements and activities described in section 7 of the Shipping Act, there is no reason to believe that Congress wanted other laws not to apply. For example, nothing in the text or legislative history of the Shipping Act suggests that Congress intended to allow defendants to cheat the United States out of millions of dollars in violation of 18 U.S.C. § 371 simply because the antitrust laws do not apply to the underlying agreement or activity. As defendants themselves argue elsewhere in their brief (Deft. Br. 28), even if "Congress did not really mean what it said in" the Shipping Act, "no court can properly 'rescue Congress from its drafting errors.' *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004)."

Moreover, defendants' argument is especially unconvincing since they admitted in the stipulation that they defrauded the United States, and now concede that their conduct would constitute fraud and could be prosecuted as fraud if the antitrust laws applied to that conduct. Deft. Br. 51. Having admitted that their conduct is fraudulent, they can be convicted of conspiring to defraud the United States regardless of whether or not the antitrust laws also "apply" to their conduct. In *United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990), the

court affirmed a conviction for conspiring to commit an offense against the United States in violation of 18 U.S.C. § 371 notwithstanding the defendants' contention that a fraud "conspiracy cannot stand where the underlying charge of fraud, based on an alleged effort to violate Section 1 of the Sherman Act, does not in itself constitute a criminal offense because a single economic entity cannot conspire with itself and Section 1 of the Sherman Act does not proscribe attempts." *See also General Electric Co. v. MV Nedlloyd*, 817 F.2d 1022, 1028 (2d Cir. 1987) (Shipping Act does not give FMC authority to immunize carriers from liability for negligence). Accordingly, the fact that the Sherman Act may not "apply" to the agreement at issue in this case does not preclude a Section 371 prosecution. *Id.*

Defendants also claim that they were simply engaged in profit maximizing and that to prosecute them for that is basically un-American. Deft. Br. 52-53. But they are not being prosecuted for profit maximizing. They are being prosecuted for conspiring to defraud the United States. A company that makes a unilateral decision to profit maximize and submit a high bid for a government contract has every right to do so, though it runs the serious risk of not being selected to perform the contract. On the other hand, if, as in this case, two or more companies conspire to cheat the United States by getting the low rate that competitive bidding produced eliminated and provide "misleading information to DOD" in furtherance

of their conspiracy to eliminate the low rate (JA 76), they have conspired to defraud the United States, not simply engaged in unilateral profit maximizing.[19] And nothing in *Tucor* changes that result. *See* Deft. Br. 60, 65. *Tucor* held that defendants could not be prosecuted under the antitrust laws; it said nothing about the fraud statute.

The analysis applied in Double Jeopardy cases also supports the district court's conclusion that the dismissal of antitrust charges does not preclude a prosecution for fraud, even if the charges are based on exactly the same conduct. Indeed, defendants concede (Deft. Br. 47), as they must, that the district court was correct in holding that, where the same conduct violates two different criminal statutes, the government can prosecute and punish that conduct under both statutes, as long as each statutory provision "requires proof of a fact which the other does not." *Albernaz v. United States*, 450 U.S. 333, 337 (1981) (quoting

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[19] In this case, defendants did engage in "deceit, craft or trickery"– and not simply because DOD thought defendants were complying with the antitrust laws. *See* Deft. Br. 53-54. DOD did not receive the honest, independently derived me-too bids as federal procurement law and DOD regulations provide (*see* Govt. Br. at 47 & n.21) because defendants conspired with and directed freight forwarders to file higher me-too rates and to withdraw their previously filed lower rates, and because the conspirators affirmatively provided misleading information to DOD so that DOD could not ship any traffic at the lower rates – leading DOD to pay significantly more for military movements than it would have in the absence of the conspiracy. SOF 31, 41, JA 72-78.

Blockburger v. United States, 284 U.S. 299, 304 (1932)); *accord Whalen v. United States*, 445 U.S. 684, 691 (1980). Thus, there is no "fundamental injustice" in prosecuting defendants under 18 U.S.C. § 371, as defendants contend. Deft. Br. 60 (citing nothing in support of that allegation).

In *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 223-24 (4th Cir. 1988), this Court held that the Double Jeopardy Clause did not preclude a defendant from being prosecuted for a violation of 18 U.S.C. § 371 notwithstanding a prior acquittal on a Sherman Act count based on the same conduct. In that case, the district court had, at defendant's request, dismissed a fraud count as multiplicitous and sent only the Sherman Act count to the jury which then acquitted on the antitrust count. This Court examined the elements of the two offenses and concluded that the Sherman Act and Section 371 define separate offenses. "The two statutes serve separate and distinct purposes. The Sherman Act prohibits collusive activity in restraint of trade. Section 371 forbids the perpetration of fraud against the United States government." *Ashley Transfer & Storage*, 858 F.2d at 223. Thus, even though the fraud count was based on "substantially the same evidence" as the antitrust count, this Court held that the defendant could be tried on the fraud count. *Id.* Similarly, in *United States v. Dixon*, 509 U.S. 688, 699-700 (1993), the Supreme Court expressly held that the

Double Jeopardy Clause does not preclude a criminal prosecution notwithstanding the fact that the "same conduct" was at issue in an earlier criminal prosecution. So long as the elements of the subsequent offense are different from the elements of the prior offense under the *Blockburger* test, the subsequent prosecution is not precluded.

None of the cases defendants cite (Deft. Br. 60-66) undermines this well-established Supreme Court test. For example, the Sixth Circuit conceded in *United States v. Minarik*, 875 F.2d 1186, 1194 (6th Cir. 1989), that its holding was contrary to the law of another circuit, and both the Sixth Circuit and this Circuit have declined to follow *Minarik* in other factual contexts. *See United States v. Kraig*, 99 F.3d 1361, 1366-68 (6th Cir. 1996); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091-92 (4th Cir. 1993). *Bridges v. United States*, 346 U.S. 209 (1953), held that a wartime extension of the statute of limitations for some fraud offenses was inapplicable to other offenses. But the decision assumed that Bridges could have been prosecuted for both violations within the statute of limitations. Finally, in *United States v. Beachner Constr. Co.*, 729 F.2d 1278 (10th Cir. 1984), the court held that a prior Sherman Act and mail prosecution precluded a subsequent prosecution for mail fraud and antitrust violations. The court's analysis of the Double Jeopardy issue in that case appears to be based on

the "same conduct" test that was expressly repudiated by the Supreme Court in *Dixon*. Thus, to the extent *Beachner* held that mail fraud charges that were not involved in the first trial were barred by the Double Jeopardy Clause, the case conflicts with both *Ashley Transfer* and *Dixon* and cannot be followed.

V. THE DISTRICT COURT PROPERLY IMPOSED A FINE OF $4.6 MILLION ON EACH DEFENDANT ON THE FRAUD COUNT

The district court properly rejected defendants' efforts to avoid paying the fine they expressly agreed to pay if their motions to dismiss the conspiracy to defraud count were denied.

A. Defendants Admitted That Their Conduct Caused a $2.3 Million Loss

Despite their express agreement to recommend a fine of $4.6 million based on a $2.3 million loss to DOD, the defendants claim that they cannot be sentenced to pay $4.6 million because this amount represents more than twice the $1 million pecuniary loss referred to in the stipulated facts. But the SoF is only part of the record that the defendants and the government agreed would be used by the court in determining the appropriate sentence in this case. The plea agreements also provide (JA 43, 57):

> The United States and the defendant[s] jointly submit that this plea agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, will provide sufficient information concerning the defendant, the crimes

> charged in this case, and the defendant's role in the crimes to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553.

Thus, the plea agreements as well as the SoF form the factual basis for the sentence in this case. And in their plea agreements, defendants admitted that the fine on the Section 371 Count is "based on the $2.3 million loss to the Department of Defense for Code 4 ITGBL shipments from Germany to the United States." JA 42, 56. Because the plea agreements admit that DOD suffered a pecuniary loss of $2.3 million occasioned by their fraud, defendants agreed to "recommend jointly" to the court that:

> the court impose a sentence requiring the defendant[s] to pay . . . $4.6 million for Count 2 . . . based on the $2.3 million loss to the Department of Defense for Code 4 ITGBL shipments from Germany to the United States, see U.S.S.G. § 8C2.4(a)(3) and 18 U.S.C. 3571(d).

JA 42, 56. The SoF does not take precedence over these admissions, which defendants knowingly made and agreed to be bound by at sentencing. Thus, the stipulation as to a $2.3 million loss occasioned by defendants' conduct and the commitment to recommend that the court impose on each of them a fine of $4.6 million (two times that loss), pursuant to both the statute and the sentencing guidelines, should bind the defendants if the court accepts the agreed-on recommended sentence. *Cf.* U.S. Sentencing Guidelines Manual ("U.S.S.G.") §

1B1.2 (2004) (where plea agreement contains a stipulation specifically establishing a more serious offense than the offense of conviction, the sentence is to be calculated in reference to the stipulated offense).[20]

B. Defendants Have Not Shown That Their Fine Exceeds the Statutory Maximum

Even if the $2.3 million loss referred to in the plea agreements does include losses for relevant conduct other than the offense of conviction, the use of that amount to calculate the $4.6 million fine did not result in an illegal sentence. 18 U.S.C. § 3571(d) provides:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

The statute does not define the term "offense" or expressly limit it to the "offense of conviction." Nor do defendants cite any authority – and we are aware

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[20] Defendants cited *Blakely v. Washington*, 124 S.Ct. 2531, 542 U.S. _____ (2004) to the trial court (JA 252-53), but have not relied on it here. *Blakely*, of course, has no application where the district court's findings are based on an amount of loss that the defendants themselves admitted. 124 S.Ct. at 2537; *United States v. Booker*, S.Ct. No. 04-104, Stevens slip op. at 3, 20; Breyer slip op. at 3 (January 12, 2005).

of none – limiting the term "offense" in 18 U.S.C. § 3571(d) in such a manner.[21] The sentencing guidelines, on the other hand, to which the plea agreements refer as the appropriate basis for calculation of the sentence, provide that, in the context of a conspiracy conviction of a corporation, "offense" means "the offense of conviction *and all relevant conduct*." U.S.S.G. §8A1.2, cmt. n.3(a) (emphasis added), also n.3(i) (defining "pecuniary loss" with reference to Chapter Two[22]). Again, we are unaware of any authority, and the defendants do not provide any, that holds that the sentencing guidelines are inconsistent with section 18 U.S.C. § 3571(d) in this regard. *See United States v. Painter*, 375 F.3d 336, 338, 339 & n.3 (5th Cir. 2004) (deriving definition of "loss" as used in 18 U.S.C. § 3571 from Guidelines sections 2B1.1 and 8A1.2 cmt. n.3(i)). Accordingly, the sentence

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[21] In the case defendants rely on under the Victim and Witness Protection Act, 18 U.S.C. § 3579 (1988), the statute provided for restitution to victims of "such offense," and the defendant – unlike the defendants here – denied engaging in the relevant conduct on which the fine was based and did not stipulate to the loss on which the fine was calculated. *Hughey v. United States*, 495 U.S. 411, 412, 414 (1990). *See also United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000) ("more diffuse estimates of loss may be appropriate for purposes of relevant conduct under the Sentencing Guidelines, but restitution tracks 'the recovery to which [the victim] would have been entitled in a civil suit against the criminal").

[22] In Chapter 2, the term "actual loss" is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense," (*see* § 2B1.1 cmt. n.3(A)(i)), and, again, "offense" refers to the general definition in § 1B1.1 cmt. n.1(H) (*see* § 2B1.1 cmt n.2(A)), where it is defined as "the offense of conviction and all relevant conduct."

imposed was within the statutory maximum even if it included relevant conduct.

CONCLUSION

The district court's order dismissing Count One should be reversed. The conviction and sentence on Count Two should be affirmed.

Respectfully submitted.

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