

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA | : | S3 00 Cr. 583 (DC) |
| v. | : | Filed: 5/2/01 |
| STUART LIBERTOFF and IRVING LIBERTOFF, INC., | : | Violations: 15 U.S.C. § 1 18 U.S.C. § 371 |
| Defendants. | : | |

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SUPERSEDING INFORMATION

The United States of America, acting through its attorneys, charges:

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

1. Stuart Libertoff and Irving Libertoff, Inc. are hereby made defendants on the charge stated below.

I. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

2. Stuart Libertoff resided in Hewlett, New York. He was the president and a co-owner of Irving Libertoff, Inc.

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

4. 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.

5. 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.

6. 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.

7. In addition to the contracts described in Paragraphs 5 and 6, the NYCBOE occasionally sought bids and awarded contracts for furnishing and delivering specified quantities of grocery and frozen food items to be warehoused.

8. 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.

9. Whenever in this Count 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.

10. 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. They included Nicholas A. Penachio, Frank H. Russo, Alan R. Adelson, Thomas M. Ryan, Arthur Bohrer, William Greenspan, David Salomon, John DiCarlo, Vincent DiCarlo, Nick Penachio Co., Inc. ("Penachio Co."), FHR, Inc., West Side Foods, Inc., M & F Meat Products Co., DiCarlo Distributors, Inc. ("DiCarlo Inc."), 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, A. Bohrer, Inc., and John Doody.

II. TRADE AND COMMERCE

11. During the period covered by this Count, Irving Libertoff, Inc. and co-conspirators purchased substantial quantities of food, including frozen food, for resale to the NYCBOE from brokers, who ordered goods on behalf of Irving Libertoff, Inc. and co-conspirators from suppliers located throughout the United States. These suppliers commonly shipped the goods ordered by the brokers directly to Irving Libertoff, Inc.

12. From approximately May 1996 until approximately April 1999, pursuant to contracts that are the subject of this Count, the NYCBOE purchased approximately \$126 million of frozen food from members of the conspiracy, including approximately \$25 million from Irving Libertoff, Inc.

13. 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 Count, were within the flow of, and substantially affected, interstate trade and commerce.

III. DESCRIPTION OF THE OFFENSE

14. From approximately May 1996 until approximately April 1999, the exact dates being unknown to the United States, 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).

15. 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.

16. 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, the defendants and 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 Penachio Co. in the Bronx; 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) 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) 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) 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) 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) Co-conspirators John DiCarlo, Vincent 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. 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) The defendants and certain 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 co-conspirator company had completed a contract to furnish and deliver to the warehouse three frozen food items -- breaded chicken patties, chicken miniatures, and breaded chicken pieces -- it paid by check approximately \$47,000 to each of four co-conspirator companies that had agreed not to bid competitively for those contracts; and

(i) Stuart Liberto 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

17. 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 Information.

COUNT TWO -- CONSPIRACY 18 U.S.C. § 371

The United States of America further charges:

18. Stuart Libertoff is hereby made a defendant on the charge stated below.

V. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

19. Stuart Libertoff was a resident of Hewlett, New York. Stuart Libertoff was the president and a co-owner of Irving Libertoff, Inc., a company located in Brooklyn, New York. Irving Libertoff, Inc. sold groceries and frozen food, primarily to institutional customers.

20. Various persons, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

VI. DESCRIPTION OF THE OFFENSE

21. From approximately 1996 until approximately 1998, the exact dates being unknown to the United States, the defendant and co-conspirators did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree to

defraud the United States of America and the Internal Revenue Service ("IRS") by impeding, impairing, defeating, and obstructing the lawful governmental functions of the IRS in the ascertainment, evaluation, assessment, and collection of federal income taxes and other federal taxes, in violation of Title 18, United States Code, Section 371.

22. It was a part and object of the conspiracy that the defendant and co-conspirators would and did defraud the IRS by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in ascertaining, evaluating, assessing, and collecting federal income taxes due and owing from certain employees of Irving Libertoff, Inc., and payroll and other federal taxes due and owing from Irving Libertoff, Inc.

VII. THE MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

23. From approximately 1996 until approximately 1998, Stuart Libertoff and co-conspirators caused Irving Libertoff, Inc. to pay to approximately seven of its employees a portion of their total compensation in cash "off the books." The payments ranged in amount from approximately \$20 to \$300 per week, and in total averaged approximately \$70,000 a year. Stuart Libertoff also caused Irving Libertoff, Inc. to fail to include the cash portion of the compensation in the Forms W-2 or Forms 1099 it issued to those employees and in the corresponding reports it

made to the IRS documenting the compensation of those employees. As a result, those employees received substantial income that they failed to report on their federal, state, and local income tax returns. Stuart Libertoff and co-conspirators also caused Irving Libertoff, Inc. to fail to pay the appropriate federal employment taxes for those employees.

VIII. OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

24. On numerous occasions between approximately 1996 and approximately 1998, Stuart Libertoff or a co-conspirator made cash payments to certain employees of Irving Libertoff, Inc.

IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371

Dated:

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