

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : S2 00 Cr. 583 (DC)  
v. : Filed: 5/2/01  
FRANK H. RUSSO and FHR, INC., : Violations: 15 U.S.C. § 1  
 : 18 U.S.C. § 371  
Defendants. :

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INFORMATION

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

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

1. Frank H. Russo and FHR, Inc. are hereby made defendants on the charge stated below.

I. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

2. Frank H. Russo ("Russo") resided in Brooklyn, New York. He was the owner and president of FHR, Inc.

3. 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.

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, Stuart Libertoff, Alan R. Adelson, Thomas M. Ryan, Arthur Bohrer, William Greenspan, David Salomon, John DiCarlo, Vincent DiCarlo, Nick Penachio Co., Inc., Irving Libertoff, Inc., West Side Foods, Inc., M & F Meat Products Co., DiCarlo Distributors, 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, FHR and co-conspirators purchased substantial quantities of food, including frozen food, for resale to the NYCBOE from brokers, who ordered goods on behalf of FHR and co-conspirators from suppliers located throughout the United States. These suppliers commonly shipped the goods ordered by the brokers directly to FHR.

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 \$21 million from FHR.

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 Nick Penachio Co., Inc. ("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 FHR 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) Russo and certain 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 TO COMMIT MAIL FRAUD 18 U.S.C. § 371

The United States of America further charges:

18. Frank H. Russo ("Russo") is hereby made a defendant on the charge stated below.

#### V. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

19. Russo was a resident of Brooklyn, New York. Russo was the owner and president of Chef's Choice, Inc. ("Chef's Choice"). Chef's Choice, located in Brooklyn, New York, sold meat, primarily to commercial customers.

20. Odyssey House, Inc. ("Odyssey House") was a not-for-profit residential substance abuse treatment organization located in Manhattan. Odyssey House received a significant portion of its funding from the State of New York. As a condition of that funding, the State of New York required Odyssey House to solicit at least three competitive bids before it purchased any items which, in the aggregate, totaled at least \$3,000 during any 60-day period. Before purchasing most food items, Odyssey House solicited bids on a monthly basis from potential suppliers for dozens of food items, including meat.

21. 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 Aaron Lugo (“Lugo”), the director of operations at Odyssey House, who had primary responsibility for purchasing food, including meat, and Arthur Goldberg (“Goldberg”), a salesman for Loeb & Mayer, Inc., a competitor of Chef’s Choice.

## VI. DESCRIPTION OF THE OFFENSE

22. From approximately late 1993 until approximately April 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 commit offenses against the United States of America, to wit, to violate Title 18, United States Code, Sections 1341 and 1346, all in violation of Title 18, United States Code, Section 371.

23. It was a part and object of the conspiracy that the defendant and co-conspirators, having devised and intending to devise a scheme and artifice to (a) defraud Odyssey House; (b) obtain money and property from Odyssey House by means of false and fraudulent pretenses, representations, and promises; and (c) deprive Odyssey House of its right to the honest services of Lugo; executed the scheme and artifice by and through the use of the United States mails, in violation of Title 18, United States Code, Sections 1341 and 1346.

## 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:

24. In approximately late 1993, Goldberg, who had been supplying meat to Odyssey House for a few years, contacted Russo to discuss the circumstances under which Russo could also become a supplier of meat to that organization. Goldberg told Russo that he had been regularly paying kickbacks to Lugo, the purchasing agent for Odyssey House, and indicated that Lugo would expect to receive kickbacks from Russo were Russo to become a supplier of meat to Odyssey House. Goldberg explained to Russo that, because Odyssey House's meat orders were growing, Lugo needed to solicit and receive bids from competing suppliers before awarding meat contracts. Goldberg told Russo that he had offered to find Lugo an additional supplier for Odyssey House, and proposed that he and Russo coordinate their companies' bids to Odyssey House so as to divide the available meat orders between them. Russo agreed to become a supplier of meat to Odyssey House under the conditions described by Goldberg.

25. Thereafter, from approximately late 1993 until approximately April 1998, Russo submitted bids to Odyssey House that he coordinated first with Goldberg so as to divide the available meat orders between Chef's Choice and Loeb & Mayer, Inc., or submitted bids to Lugo with the expectation that Lugo would adjust the prices so as to divide those orders.

26. In addition, during the same period, Russo regularly paid cash kickbacks to Lugo. The kickbacks ensured that Chef's Choice would continue to be asked to bid for contracts to supply meat to Odyssey House, and discouraged Lugo from seeking to do business with other potential suppliers.

27. Russo usually gave Lugo the kickbacks monthly, either in Lugo's office in Manhattan or at nearby restaurants. The amount of each kickback was calculated according to a percentage, usually 5%, of the value of orders that Odyssey House had placed that month with Chef's Choice. From late 1993 through April 1998, Chef's Choice received contracts totaling approximately \$550,000 from Odyssey House, and Russo paid Lugo approximately \$27,500 in kickbacks.

28. In exchange for the kickbacks, Lugo caused Odyssey House to issue purchase orders to and pay invoices from Chef's Choice. These documents were often sent between Odyssey House and Chef's Choice via the United States mails.

#### 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:

29. From approximately late 1993 to approximately April 1998, on numerous occasions Russo met with Lugo at various locations in Manhattan to pay him cash kickbacks.

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

Dated:

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