IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	**CRIMINAL NO. 95-414-A**
v.	)	
	)	
	)	
DONALD M. KOTOWICZ,	)	**FILED: [SEPTEMBER 27, 1995]**
	)	
Defendant.	)	

STATEMENT OF FACTS

1. From approximately September 1991 through approximately April 1995, defendant DONALD M. KOTOWICZ (KOTOWICZ) participated with a group of real estate speculators and investors in Northern Virginia in a conspiracy to rig bids at public real estate foreclosure auctions by not bidding against each other at auctions and then holding second, secret auctions at which the conspirators rebid the property and split among them the difference between the public and secret auction prices. The conspiracy is explained further below.

2. In certain instances when real estate located in the Commonwealth of Virginia is sold, the sale is conducted by public auction. When a deed of trust, commonly called a mortgage, is foreclosed upon in the Commonwealth of Virginia, the property frequently is sold at a public auction in order to protect the interests of the mortgage holder and the homeowner.

3. When a mortgage is foreclosed, the mortgage holder uses a trustee, pursuant to provisions in the original mortgage documents, to conduct the sale of the property by public auction. Notices of public auctions held in the Commonwealth of Virginia are published in newspapers of general circulation in a wide geographic area. Such notices are regularly

published and advertised in newspapers that are distributed in the District of Columbia and Maryland, as well as in Virginia.

4. After required notice of an auction is given, the trustee holds the auction on the date and time specified.

5. The bidding at the public auction often opens at the amount owed by the homeowner to the lender. The trustee stops the bidding when the highest price reached by competitive bidding is offered. The high bidder pays a deposit to the trustee (typically 10% of the opening bid price) in the form of a cashier's or certified check. The trustee then executes a Memorandum of Sale indicating the property address, the date of the auction, the high bidder, the high bid amount, and the amount of the deposit paid. The Memorandum of Sale is needed by the high bidder to complete the settlement of the property transaction, which usually occurs within 15 days of the auction. At settlement of the property transaction, the high bidder takes title to the property.

6. Information about properties listed for foreclosure sale, such as the assessed value of the property, original and outstanding loan amounts, and outstanding liens, taxes or judgements against the property, can be obtained from public and commercially available sources. By using the information found in these sources and other information about real estate values in a given area, and by visiting and inspecting the property, a potential bidder can usually estimate at what price the bidding on a given property will start, how much equity a homeowner has in a property, and the resale value of the property. With this information, a potential bidder can determine the attractiveness of a particular property to be sold at auction, and how high he or she would be willing to bid to acquire that property.

7. When a property is sold by public auction, any amount paid for the property above the amount owed to the lender(s) represents the homeowner's equity in the property and goes to the homeowner. Hence, from an equity standpoint, it is in the homeowner's interest for the public auction price to attain the highest price.

8. From approximately the late 1980s through the present, KOTOWICZ has been a real estate investor in Northern Virginia. He has attended foreclosure auctions from approximately September 1991 for the purpose of purchasing properties to repair and resell.

9. From approximately September 1991 through approximately April 1995, KOTOWICZ participated with other real estate speculators in a conspiracy to rig bids at certain public real estate foreclosure auctions in Northern Virginia.

10. The conspiracy consisted of a continuing agreement, understanding, and concert of action among KOTOWICZ and his co-conspirators, the substantial terms of which were to agree to refrain from bidding at public foreclosure auctions, and then to conduct second, secret auctions open only to members of the conspiracy for the purpose of rebidding the properties won at the public auctions and dividing the proceeds of the second auction among themselves.

11. Based on their own research of properties, members of the conspiracy determined which auctions they were interested in attending. Often, members of the conspiracy only attended auctions of properties in which they were interested.

12. If the members of the conspiracy present at an auction were able to meet before the auction began, a bidder was designated for the group of conspirators, and only the designated bidder would bid at the public auction.

13. If the members of conspiracy were unable to meet before the auction began, any one of several courses of action were followed. A member of the group of conspirators would circulate among the bidders and tell members of the group of conspirators to let another member "bid it [the property] in" or "take it." Other times, public bidding by one group member served as a signal to other group members not to bid. Occasionally, one of the group simply told another member, out loud during the bidding, to "take" the property.

14. By agreeing not to bid against each other and then obtaining the properties at the public auction, the members of the group of conspirators were able to buy those properties at prices lower than what they would have had to pay at a fully competitive auction.

15. If the designated bidder won the property at the public auction, the group of conspirators then went elsewhere to hold a second, secret auction among themselves. These second auctions were held on the grounds and in the cafeteria areas of the courthouses where the public auctions were held, in a conspirator's home, and in a conspirator's office.

16. Bidding at the second auction was open only to members of the conspiracy and usually was conducted by written bid. Each conspirator wrote down on a piece of paper the amount, or "premium," above the public auction price he or she was willing to pay for the property. The conspirator with the highest amount written down won the property. The premium amount bid by the highest bidder at the second auction was the group's illicit profit, and it was divided among them by the winner of the second auction based on a predetermined formula. The deposit paid by the public auction winner was reimbursed by the second auction winner by either cash or check at the close of the second auction or soon thereafter.

17. The public auction winner assigned the bid rights to the property to the second, secret auction winner, usually by either executing a document assigning the public auction bid to the second auction winner, or by so indicating on the Memorandum of Sale. The second auction winner could then take the property to settlement as if he or she won it at the public auction. In some instances, the designated public auction winner also won the second auction and no assignment was necessary.

18. The second auction winner made the payoffs to the other conspirators shortly after the property was taken to settlement. The payoffs were determined according to the following formula:

Payoff = [High Premium Bid ÷ (Sum of the Losing Premium Bids)] × Individual Premium Bid

19. The following example of how the conspiracy worked is drawn from the auction of the property at 9100 Arlington Boulevard in Fairfax, Virginia, held on or about May 27, 1993.

a. <u>The Public Auction.</u> Four members of the conspiracy, including KOTOWICZ, were present at this particular auction. Pursuant to an agreement to refrain from bidding at this auction, one of the co-conspirators, who was the designated bidder, won the property with a bid of $110,100.

b. <u>The Secret Auction.</u> Each of the four co-conspirators present at the public auction attended the second auction and three of them submitted written premium bids. One of the conspirators submitted his secret auction premium bid jointly with another conspirator. The premium bids were:

Conspirator A	$20,000	Conspirator B	$8,500	Conspirator C	$5,500

KOTOWICZ was Conspirator B. The high bidder at the second auction, Conspirator A, who also was the designated public auction bidder, won the property and took it to settlement.

c. The Payoffs. Using the formula established by the conspirators for distributing the secret auction proceeds, Conspirator A made the following payoffs to the other conspirators:

	Payoff	=	**[High Premium Bid**	÷	**(Sum of Losing Premium Bids)]**	×	**Individual Premium Bid**
Conspirator B	$12,000	=	($20,000	÷	$14,000)	×	$8,500
Conspirator C	$8,000	=	($20,000	÷	$14,000)	×	$5,500

20. The conspirators made payoffs to each other with both cash and checks. Payoff checks, drawn on federally insured banks, were mailed by the conspirators to each other via the U.S. Postal Service, and deposited in federally insured banks. Cash payoffs were likewise withdrawn from, and deposited into, federally insured banks.

21. The victims of auction bid rigging are the persons or entities who would have received more money for the property sold if there had been a fully competitive auction. The victim usually is the homeowner, but the lender may also be a victim if, for example, the lender discounts the note, *i.e.*, reduces the opening bid below what is actually owed, and the conspirators win the property for an amount below the balance owed to the lender. Second and third trust holders also can be victims if the suppressed public auction price does not yield enough money to pay those note holders.

22. The business activities of KOTOWICZ and his co-conspirators were within the flow of, and substantially affected, interstate trade and commerce. For example, mortgage

holders located in states other than Virginia held mortgages on foreclosed properties, used trustees to conduct the foreclosure sales, and received proceeds from the foreclosure sales.

HELEN F. FAHEY
UNITED STATES ATTORNEY

By: ____________/S/_________________
Justin W. Williams
Chief, Criminal Division

ANNE K. BINGAMAN
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

By: ____________/S/_____________________
James T. Clancy

___________/S/______________________
Joseph A. Capone

Trial Attorneys
Antitrust Division
United States Department of Justice

Seen and agreed:

___________/S/___________________
DONALD M. KOTOWICZ

__________/S/____________________
David T. Ralston, Jr., Esquire
Counsel for Defendant KOTOWICZ