

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : S1 00 Cr. 0584 (JSR)

v. : Filed: February 20, 2001

NICHOLAS A. PENACHIO and : Violations: 15 U.S.C. § 1
NICK PENACHIO CO., INC., : 18 U.S.C. § 1503
: 18 U.S.C. § 371
Defendants. :
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INFORMATION

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

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

1. Nicholas A. Penachio and Nick Penachio Co., Inc. are hereby made defendants on the charge stated below.

I. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

2. Nicholas A. Penachio ("Penachio") resided in Mount Kisco, New York. He was a co-owner and the president of Nick Penachio Co., Inc.

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

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

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 \$563,000 from Penachio Co.

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 certain 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 certain 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 certain 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 certain 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 certain co-conspirators refrained from bidding or submitted intentionally high, complementary bids on specified parts of contracts to supply frozen food to the NYCBOE;

(f) With Penachio's knowledge and approval, certain 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 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 certain 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 had completed a contract to furnish and deliver to the warehouse three frozen food items -- breaded chicken patties, chicken miniatures, and breaded chicken pieces -- that defendant paid by check approximately \$47,000 to each of four co-conspirator companies, including Penachio Co., that had agreed not to bid competitively for those contracts; and

(i) An officer of Penachio Co., acting with Penachio's knowledge and approval, 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 -- SHERMAN ACT CONSPIRACY (15 U.S.C. § 1)

The United States of America further charges:

18. Nicholas A. Penachio ("Penachio") and Nick Penachio Co., Inc. ("Penachio Co.") are hereby made defendants on the charge stated below.

19. Paragraphs 2 through 9 of Count One of this Information are repeated, realleged, and incorporated in Count Two as if fully set forth in this Count.

20. 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 John DiCarlo, Gordon Kerner, DiCarlo Distributors, Inc., Landmark Food Corp., Selwyn Lempert ("Lempert"), Steven Kanowitz, Kanowitz Fruit & Produce, Inc., Harry Levy, Clifton Fruit & Produce, Inc., David Axelrod, Toby Unger, Baiardi Chain Food Corp, Michael Beberman, and John Doody.

V. TRADE AND COMMERCE

21. During the period covered by this Count, Penachio Co. and co-conspirators purchased substantial quantities of food, including produce, for resale to the NYCBOE from suppliers located throughout the United States, or from wholesalers who obtained their goods from suppliers located throughout the United States.

22. From approximately 1991 until approximately April 1999, pursuant to contracts that are the subject of this Count, the NYCBOE purchased approximately \$87 million of produce from members of the conspiracy, including approximately \$25.3 million from Penachio Co.

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

VI. DESCRIPTION OF THE OFFENSE

24. From approximately 1991 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).

25. 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 produce to the NYCBOE.

26. 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) From approximately 1991 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 produce to the NYCBOE. These meetings were held at different sites in or near New York City, including the offices of Penachio Co. in the Bronx;

(b) The defendants and certain co-conspirators designated which co-conspirators would be the low bidders, among the co-conspirators, on specified parts of contracts to supply produce to the NYCBOE;

(c) The defendants and certain co-conspirators discussed and agreed on the prices or price levels they would bid on specified parts of contracts to supply produce 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;

(d) The defendants and certain co-conspirators refrained from bidding or submitted intentionally high, complementary bids on specified parts of contracts to supply produce to the NYCBOE;

(e) With Penachio's knowledge and approval, certain 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 produce to the NYCBOE;

(f) Co-conspirators John DiCarlo and DiCarlo, Inc. joined the conspiracy in approximately 1997. Prior to that time, DiCarlo, Inc. had bid competitively on particular bids to supply food, including frozen food, produce, and groceries, to the NYCBOE. The defendants and certain co-conspirators initially discussed offering \$100,000 or more in cash to induce DiCarlo, Inc. not to bid competitively. Ultimately, Landmark, which for some years had been designated to be the low bidder among the conspirators for contracts to supply produce to schools in Manhattan, agreed to relinquish Manhattan to DiCarlo, Inc. in exchange for \$100,000 in cash per bid cycle. DiCarlo, Inc. then agreed to take Landmark's place as the low bidder among the conspirators for future NYCBOE contracts to supply produce to schools in Manhattan, and to stop bidding competitively for contracts to supply frozen food to the NYCBOE; and

(g) An officer of Penachio Co., acting with Penachio's knowledge and approval, 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.

VII. JURISDICTION AND VENUE

27. 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.

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

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

The United States of America further charges:

28. Nicholas A. Penachio ("Penachio") and Nick Penachio Co., Inc. ("Penachio Co.") are hereby made defendants on the charge stated below.

29. Paragraphs 2, 3, and 9 of Count One of this Information are repeated, realleged, and incorporated in Count Three as if fully set forth in this Count.

VIII. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

30. The Department of Citywide Administrative Services of the City of New York ("DCAS") was the agency that provided support to various municipal

entities that served the public, including the entities responsible for overseeing hospitals, jails, homeless shelters, and other facilities. DCAS became responsible for providing this support in July 1996 when it replaced the New York City Department of General Services. Through its Division of Municipal Supply Services, DCAS conducted competitive bidding on behalf of several New York City entities (collectively the "DCAS entities"), including the Health and Hospitals Corporation ("HHC"), the Department of Juvenile Justice ("DJJ"), the Department of Correction ("DOC"), the Department of Homeless Services ("DHS"), the Human Resources Administration ("HRA"), and the Administration for Children's Services ("ACS").

31. DCAS sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including produce and frozen foods. Each of the produce and frozen foods bids was divided into parts, usually geographically by borough. With respect to the award of produce contracts, the company bidding the lowest aggregate price for each particular part of a contract usually received an award for that part. With respect to the award of the frozen food contracts, DCAS usually awarded those contracts on an item-by-item basis. The term of most of the contracts for the supply of produce was one month; the term of the contracts for the supply of frozen food was one year. Toward the expiration of the contract period, DCAS again solicited bids.

32. The primary food contracts awarded by DCAS were requirements contracts that obligated the vendors to supply and deliver food at the stated prices for the contract period. Individual municipal facilities placed orders as needed, usually once or twice a week.

33. DCAS 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.

34. 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 Selwyn Lempert ("Lempert"), Harry Levy, Clifton Fruit & Produce, Inc., Michael Beberman, and Jitney, Ltd.

IX. TRADE AND COMMERCE

35. During the period covered by this Count, Penachio Co. purchased substantial quantities of food, including frozen food, for resale to the DCAS entities from brokers, who ordered goods on behalf of Penachio Co. from suppliers located throughout the United States. These suppliers commonly shipped the goods ordered by the brokers directly to Penachio Co. In addition, Penachio Co. purchased substantial quantities of food, including produce, for resale to the DCAS

entities from suppliers located throughout the United States, or from wholesalers who obtained their goods from suppliers located throughout the United States.

36. From approximately the early-to-mid-1990s until approximately April 1999, pursuant to contracts that are the subject of this Count, the DCAS entities purchased approximately \$20 million of food, primarily produce and frozen foods, from members of the conspiracy, including approximately \$10 million of food, primarily produce and frozen foods, from Penachio Co., which it supplied mainly to the jails maintained by the DOC on Rikers Island.

37. The activities of the defendants and co-conspirators with respect to the sale of food to the DCAS entities, including the sale of produce and frozen foods pursuant to contracts that are the subject of this Count, were within the flow of, and substantially affected, interstate trade and commerce.

X. DESCRIPTION OF THE OFFENSE

38. From approximately the early-to-mid 1990s 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).

39. 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 produce and frozen foods to the DCAS entities.

40. 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 submission of bids for the supply of produce, the defendants and co-conspirators discussed and agreed how to bid so as to divide upcoming contracts to supply produce to the DCAS entities;

(b) In approximately May 1998, the defendants also discussed and agreed with co-conspirators how to bid so as to divide the items scheduled in a bid to supply frozen food to certain of the DCAS entities that was opened on May 19, 1998;

(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 produce to the DCAS entities;

(d) The defendants and co-conspirators designated which co-conspirators would be the low bidders, among the co-conspirators, on specified parts of a contract to supply frozen food to the DCAS entities;

(e) The defendants and co-conspirators discussed and agreed on the prices or price levels they would bid on specified parts of contracts to supply produce to the DCAS agencies, and then bid accordingly;

(f) The defendants and co-conspirators discussed and agreed on the prices or price levels they would bid on specified parts of a contract to supply frozen food to the DCAS agencies, and then bid accordingly;

(g) The defendants and co-conspirators refrained from bidding or submitted intentionally high, complementary bids on specified parts of contracts to supply produce to the DCAS entities;

(h) The defendants and co-conspirators refrained from bidding or submitted intentionally high, complementary bids on specified parts of a contract to supply frozen food to the DCAS entities;

(i) With Penachio's knowledge and approval, co-conspirators gave substantial amounts of cash to Lempert, an employee of Penachio Co., with the understanding that he would use the cash to pay potential bidders not to bid competitively on particular contracts to supply produce to the DCAS entities. Lempert then offered to pay, and in fact paid, substantial amounts of money to potential competitors, both in cash and by checks issued by Penachio Co., in exchange for their agreement not to bid competitively for those produce contracts; and

(j) An officer of Penachio Co., acting with Penachio's knowledge and approval, 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.

XI. JURISDICTION AND VENUE

41. 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.

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

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

The United States of America further charges:

42. Nicholas A. Penachio (“Penachio”) and Nick Penachio Co., Inc. (“Penachio Co.”) are hereby made defendants on the charge stated below.

43. Paragraphs 2, 3, and 9 of Count One of this Information are repeated, realleged, and incorporated in Count Four as if fully set forth in this Count.

XII. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

44. The Nassau County Department of General Services (“Nassau DGS”) was the agency responsible for managing procurement on behalf of the agencies of Nassau County, New York, including the agency that administered the Nassau County correctional facilities.

45. Nassau DGS sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including produce and dairy items.

The company bidding the lowest price for the contract usually received an award of that contract. The term of the contracts for produce and dairy items was usually one month. Toward the expiration of the contract period, Nassau DGS again solicited bids.

46. The primary food contracts awarded by Nassau DGS were requirements contracts that obligated the vendors to supply and deliver food at the stated prices for the contract period. The facilities whose contracts were handled by the Nassau DGS placed orders as needed, usually once or twice a week.

47. Nassau DGS 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.

48. 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 Selwyn Lempert ("Lempert"), Michael Beberman, and Jitney, Ltd.

XIII. TRADE AND COMMERCE

49. During the period covered by this Count, Penachio Co. purchased substantial quantities of food, including produce and dairy items, for resale to the Nassau County correctional facilities, whose contracts were handled by the Nassau

DGS, from suppliers located throughout the United States, or from wholesalers, who obtained their goods from suppliers located throughout the United States.

50. From approximately 1996 until approximately April 1999, pursuant to contracts that are the subject of this Count, the Nassau County correctional facilities purchased approximately \$1 million of food, primarily produce and dairy items, from Penachio Co.

51. The activities of the defendants and co-conspirators with respect to the sale of food to the Nassau County correctional facilities, including the sale of produce and dairy items pursuant to contracts that are the subject of this Count, were within the flow of, and substantially affected, interstate trade and commerce.

XIV. DESCRIPTION OF THE OFFENSE

52. From approximately 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).

53. 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 produce and dairy items to the Nassau County correctional facilities.

54. 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 submission of bids for the supply of produce and bids for the supply of dairy items to the Nassau County correctional facilities, the defendants and co-conspirators discussed and agreed how to bid so as to divide upcoming contracts. In general, they agreed that, at least among the co-conspirators, Penachio Co. and another company would alternate being the low bidder for the monthly produce contract. In addition, they agreed that, at least between Penachio Co. and a third co-conspirator, those two companies generally would alternate being the low bidder for the monthly contract for dairy items;

(b) The defendants and co-conspirators discussed and agreed on the prices or price levels they would bid for contracts to supply produce and dairy items to the Nassau County correctional facilities, and then bid accordingly; and

(c) The defendants and co-conspirators refrained from bidding or submitted intentionally high, complementary bids for contracts to supply produce and dairy items to the Nassau County correctional facilities.

XV. JURISDICTION AND VENUE

55. 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.

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

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

The United States of America further charges:

56. Nicholas A. Penachio (“Penachio”) and Nick Penachio Co., Inc. (“Penachio Co.”) are hereby made defendants on the charge stated below.

57. Paragraphs 2, 3, and 9 of Count One of this Information are repeated, realleged, and incorporated in Count Five as if fully set forth in this Count.

XVI. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

58. The Newark Public Schools operated the public school system in Newark, New Jersey. That system, the largest in New Jersey, serviced approximately 44,000 students and operated more than 80 facilities. The Newark Public Schools served more than 7 million meals each year, and spent about \$7 million annually on food and milk. The Newark Public Schools' annual budgets were funded by the federal, state, and city governments, including funding pursuant to the National School Lunch Act of 1946.

59. The Newark Public Schools sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including produce. The company bidding the lowest total price for the produce contract usually received an award of that contract. Toward the expiration of the contract period, the Newark Public Schools again solicited bids.

60. The primary food contracts awarded by the Newark Public Schools were requirements contracts that obligated the vendors to supply and deliver food at the stated prices for the contract period. The schools maintained by the Newark Public Schools placed orders as needed, usually once or twice a week.

61. 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 Selwyn Lempert (“Lempert”), Michael Beberman, and Jitney, Ltd.

XVII. TRADE AND COMMERCE

62. During the period covered by this Count, Penachio Co. purchased substantial quantities of food, including produce, for resale to the Newark Public Schools from suppliers located throughout the United States, or from wholesalers who obtained their goods from suppliers located throughout the United States.

63. From approximately 1995 until approximately April 1999, pursuant to contracts that are the subject of this Count, the Newark Public Schools purchased approximately \$2.6 million of food, primarily produce, from members of the

conspiracy, including approximately \$1.7 million from Penachio Co., through its affiliate Hahn Food Products Corp. ("Hahn Food").

64. The activities of the defendants and co-conspirators with respect to the sale of food to the Newark Public Schools, including the sale of produce pursuant to contracts that are the subject of this Count, were within the flow of, and substantially affected, interstate trade and commerce.

XVIII. DESCRIPTION OF THE OFFENSE

65. From approximately 1995 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).

66. 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 produce to the Newark Public Schools.

67. 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 submission of bids for the supply of produce, the defendants and co-conspirators discussed and agreed how to bid so as to divide

upcoming contracts. In general, they agreed that, at least between Penachio Co. (and Hahn Food) and another company, those two companies would alternate being the low bidder;

(b) The defendants and co-conspirators discussed and agreed on the prices or price levels they would bid for contracts to supply produce to the Newark Public Schools, and then bid accordingly; and

(c) The defendants and co-conspirators refrained from bidding or submitted intentionally high, complementary bids for contracts to supply produce to the Newark Public Schools.

XIX. JURISDICTION AND VENUE

68. 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.

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

COUNT SIX -- OBSTRUCTION (18 U.S.C. § 1503)

The United States of America further charges:

69. Nicholas A. Penachio (“Penachio”) and Nick Penachio Co., Inc. (“Penachio Co.”) are hereby made defendants on the charge stated below.

70. Paragraphs 2, 3, and 9 of Count One of this Information are repeated, realleged, and incorporated in Count Six as if fully set forth in this Count.

71. In approximately June 1998, Penachio and Penachio Co., having knowledge of the grand jury investigation, did corruptly influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice in the federal grand jury sitting in the Southern District of New York, by endeavoring to withhold, conceal, alter, or destroy certain records in existence as of June 26, 1998 and which were commanded by a grand jury subpoena duces tecum dated June 26, 1998 issued to Penachio Co., and which were material to the grand jury's investigation, in violation of Title 18, United States Code, Section 1503.

72. Specifically, Penachio destroyed Penachio Co. documents known as “drivers’ run sheets” for 1997. The drivers’ run sheets identified by invoice number the deliveries that each Penachio Co. truck made each day. They were created and maintained in the ordinary course of the business of Penachio Co.

73. In approximately September 1999, Penachio and Penachio Co., having knowledge of the grand jury investigation, did corruptly influence, obstruct, or impede, and endeavor to influence, obstruct, or impede, the due administration of justice in the federal grand jury sitting in the Southern District of New York, by endeavoring to withhold, conceal, alter, or destroy certain records which predated September 8, 1999 and which were commanded by a grand jury subpoena duces tecum dated September 8, 1999 issued to Penachio Co., and which were material to the grand jury's investigation, in violation of Title 18, United States Code, Section 1503.

74. Specifically, Penachio authorized Selwyn Lempert, an employee of Penachio Co., to destroy an accounts payable file maintained by Penachio Co. that contained documents relating to transactions in 1996 between Penachio Co. and a co-conspirator to whom Penachio Co. made payments in connection with the conspiracy described in Count Three of this Superseding Information.

IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1503

COUNT SEVEN -- CONSPIRACY TO COMMIT MAIL FRAUD
(18 U.S.C. § 371)

The United States of America further charges:

75. Nicholas A. Penachio ("Penachio") and Nick Penachio Co., Inc. ("Penachio Co.") are hereby made defendants on the charge stated below.

76. Paragraphs 2, 3 and 9 of Count One of this Information are repeated realleged, and incorporated in Count Seven as if fully set forth in this Count.

77. 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.

XX. DESCRIPTION OF THE OFFENSE

78. From approximately 1994 until approximately June 1998, the exact dates being unknown to the United States, the defendants and co-conspirators did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree to devise a scheme and artifice to defraud and obtain money from numerous customers of Penachio Co., and to deprive numerous customers of Penachio Co. of the

intangible right of the honest services of their employees, by means of false and fraudulent pretenses, representations, and promises, which scheme and artifice were executed by and through the use of the United States mails, in violation of 18 U.S.C. § 1341 and § 1346, all in violation of 18 U.S.C. § 371.

XXI. 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:

79. From approximately 1994 until approximately June 1998, Penachio authorized sales representatives of Penachio Co. to pay kickbacks to certain employees (the “corrupt employees”) of certain of the company’s customers.

80. In addition, during the same period, Penachio authorized sales representatives of Penachio Co. to join with certain of the corrupt employees in embezzling money from their employers, by causing Penachio Co. to issue false and fraudulent invoices to those customers, which the corrupt employees then caused their employers to pay. The invoices were false and fraudulent in that they purported to seek payment for food items that had not been delivered and were not intended to be delivered. In many cases, the corrupt employees caused the false and fraudulent invoices to be paid by signing the invoices, thereby attesting to the receipt of the items identified on the invoices at their employer’s facility when, in fact, their employer had not received any merchandise. The employers usually sent payments to Penachio Co. via the United States mails. After Penachio Co. had been

paid, Penachio or his sales representatives gave the corrupt employees approximately one-half of the value of the false and fraudulent invoices in cash.

81. In general, the customers that received false and fraudulent invoices from Penachio Co. were not-for-profit organizations. They included Odyssey House, Inc., a not-for-profit residential substance abuse treatment organization located in Manhattan, which received approximately 145 false and fraudulent invoices totaling approximately \$280,000 from 1994 until the spring of 1998; Bronx Lebanon Hospital, which received approximately 60 false and fraudulent invoices totaling approximately \$20,000 from January 1998 until the spring of 1998; Lutheran Medical Center, located in Brooklyn, New York, which received approximately 69 false and fraudulent invoices totaling approximately \$92,000 from 1996 until the spring of 1998; and Concerned Parents of Jamaica, a not-for-profit organization that operated a day care center in Queens, New York, which received approximately 18 false and fraudulent invoices totaling approximately \$9000 from 1996 until the spring of 1998. In addition, the Nassau County Correctional Center, the jail maintained by Nassau County in East Meadow, New York, received approximately 26 false and fraudulent invoices totaling approximately \$40,000 in 1996 and 1997.

XXII. 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:

82. From approximately 1994 until June 1998, Penachio and co-conspirators caused Penachio Co. to issue approximately 318 false and fraudulent invoices totaling approximately \$441,000 to various customers. The customers that received these false and fraudulent invoices usually paid them by sending checks via the United States mail to Penachio Co.

83. From approximately 1994 until June 1998, Penachio or co-conspirators paid corrupt employees approximately one-half of the value of the false and fraudulent invoices in cash. Some of the payments took place at the Penachio Co. offices in the Bronx.

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

COUNT EIGHT -- CONSPIRACY (18 U.S.C. § 371)

The United States of America further charges:

84. Nicholas A. Penachio ("Penachio") and Nick Penachio Co., Inc. ("Penachio Co.") are hereby made defendants on the charge stated below.

85. Paragraphs 2, 3, and 9 of Count One of this Information are repeated, realleged, and incorporated in Count Eight as if fully set forth in this Count.

86. 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.

XXIII. DESCRIPTION OF THE OFFENSE

87. From at least as early as 1994 until approximately November 1999, the exact dates being unknown to the United States, the defendants 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, and to commit offenses against the United States, to wit, to violate Sections 7201 and 7206(1) of Title 26, United States Code, all in violation of Title 18, United States Code, Section 371.

88. It was a part and object of the conspiracy that the defendants 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 Penachio Co. and other federal taxes due and owing from Penachio Co., by impeding and impairing the IRS's ability to determine accurately the income and expenses of Penachio Co., by, among other things, overstating the

company's cost of goods sold so as to conceal the generation and accumulation of substantial amounts of cash which were never reflected on the company's books and records, which cash was partly used to pay a substantial number of "off the books" employees.

89. It was a further part and object of the conspiracy that the defendants and co-conspirators would and did attempt to evade and defeat a substantial part of the income tax due and owing to the United States by certain employees of Penachio Co. and by certain employees of certain customers of Penachio Co., in violation of Title 26, United States Code, Section 7201.

90. It was a further part and object of the conspiracy that Penachio caused Penachio Co. unlawfully, willfully, and knowingly to make and subscribe to U.S. Income Tax Returns for an S Corporation, Forms 1120S, for the tax years 1995, 1996, 1997, and 1998, each of which was verified by a written declaration that it was made under penalties of perjury, and which income tax returns Penachio and Penachio Co. did not believe to be true and correct as to every material matter, insofar as each of them substantially overstated Penachio Co.'s true cost of goods sold and substantially understated its true total income, its true salaries and wages, and its true ordinary income, in violation of Title 26, United States Code, Section 7206(1).

91. It was a further part and object of the conspiracy that Penachio would and did unlawfully, willfully, and knowingly attempt to evade and defeat a

substantial part of the income tax due and owing to the United States by him and his spouse, by failing to report approximately \$100,000 in personal expenses that Penachio Co. had paid on his behalf, on the joint U.S. Individual Income Tax Returns, Forms 1040, filed by him and his spouse for 1995, 1996, 1997, and 1998, in violation of Title 26, United States Code, Section 7201.

**XXIV. 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:

92. From approximately January 1995 until at least June 1998, Penachio authorized employees of Penachio Co. to issue checks totaling approximately \$1.7 million to a variety of payees, each of which was falsely classified as a “purchase” in Penachio Co.’s books and records. The classification was false because, after the checks were written, they were cashed by an officer or employee of Penachio Co. at a bank where Penachio Co. had arranged to cash checks issued by the company to third parties. With Penachio’s knowledge and approval, a substantial portion of the cash generated in the manner described, approximately \$1.35 million, was then used to pay substantial numbers of Penachio Co. employees “off the books.” Penachio also caused Penachio Co. not to issue any Forms W-2 or Forms 1099 to these employees and to fail to pay the appropriate federal employment taxes for them. In addition, Penachio used some of the cash generated in the manner described to pay kickbacks to employees of certain customers of Penachio Co. and

distributed the balance among himself and other members of his family who worked at Penachio Co.

93. From at least as early as 1994 until approximately June 1998, Penachio approved Penachio Co.'s paying "off the books" compensation totaling approximately \$318,000 to at least three of its employees by authorizing those employees to submit, and Penachio Co. to pay, false and fraudulent requests for reimbursement of expenses the employees had purportedly incurred in the course of their employment. These reimbursement claims were primarily for the reimbursement of purported purchases on behalf of the business, but also included some claims for purported entertainment expenses. The value of the checks issued by Penachio Co. to these employees as reimbursement of expenses was not included in any Forms W-2 or 1099 issued by the company.

94. From approximately 1995 until approximately June 1998, Penachio caused Penachio Co. directly to pay a total of approximately \$60,000 of his personal expenses, primarily purchases of antiques and art, by issuing company checks. The checks were falsely classified as "purchases" in Penachio Co. books and records. The value of the checks was not included in any of the Forms W-2 or 1099, or any Schedule K-1 (Shareholder's Share of Income, Credits, Deductions, etc.) filed by Penachio Co. with the Internal Revenue Service and was not reported by Penachio as income on his federal tax returns.

95. From approximately June 1996 until June 1998, Penachio caused Penachio Co. to pay a total of approximately \$148,000 to a co-conspirator in connection with the bid-rigging conspiracy charged in Count Three herein. In order to disguise the payments to the co-conspirator and to permit Penachio Co. to treat them as legitimate business expenses in its books and records and on its tax returns, Penachio caused Penachio Co. to classify the payments as purchases by creating false and fraudulent documents that purported to reflect the sale of produce by the co-conspirator to Penachio Co. when, in fact, no such transactions had occurred.

XXV. 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:

96. Between 1995 and June 1998, Penachio caused Penachio Co. to issue to various payees and then convert into cash numerous checks totaling approximately \$1.7 million that were false classified as “purchases” in the company’s books and records. Most of the cash was given to numerous Penachio Co. employees as “off the books” compensation; some of it was given to employees of certain Penachio Co. customers as kickbacks and some of it was retained by Penachio or given to members of his family.

97. From at least as early as 1994 until June 1998, Penachio and Penachio Co. paid certain employees of Penachio Co. "off the books" by authorizing for payment, and paying, false and fraudulent monthly claims for reimbursement of expenses.

98. On or about September 18, 1996, September 17, 1997, September 17, 1998 and November 4, 1999, Penachio caused Penachio Co. to file false and fraudulent U.S. Income Tax Returns for an S Corporation, Forms 1120S, for the years 1995, 1996, 1997, and 1998, respectively, wherein the company failed accurately to report its true total income, its true cost of goods sold, its true salaries and wages, and its true ordinary income.

99. On or about November 4, 1996, October 16, 1997, October 14, 1998, and October 18, 1999, Penachio filed false and fraudulent U.S. Individual Income Tax Returns, Forms 1040, for the years 1995, 1996, 1997, and 1998, respectively, wherein he and his spouse failed to report all of their income.

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

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