

States is certainly in a better position than defendants to guard the interest of taxpayers. The United States opposes the proposal. The United States apparently believes that the threat of having its \$139 million judgment go unsatisfied is more serious than the alternative risk of "wasting" \$2 million of taxpayers' money. Conversely, if defendants' arguments on appeal are without merit and the appeal fails, then the defendants ought to bear the financial burden of the appeal, including the cost of the supersedeas bond.

## VI. CONCLUSION

The question of whether to approve or deny defendants' proposal is within the Court's discretion. See, e.g., *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755, 758-60 (D.C.Cir.1980); *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) ("the court may . . . exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond"). A high priority of the Court should be to ensure the collectability of plaintiff's judgment. Error, if at all, should be on the side of protecting plaintiff's stake.

Defendants bear the burden of justifying a departure from the ordinary requirement of a supersedeas bond. *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d at 1191 ("[i]f a court chooses to depart from the usual requirement of a full security supersedeas bond to suspend operation of an unconditional money judgment, it should place the burden on the moving party to objectively demonstrate the reasons for such a departure"); *United States v. Kurtz*, 528 F.Supp. 1113, 1115 (E.D.Pa.1981) ("[O]nly 'extraordinary circumstances' will support the provision of security other than a supersedeas bond. . . . It is the appellant's burden to demonstrate objectively that posting a full bond is impossible or impracticable. . . ."). See also *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 636 F.2d at 760 ("a full supersedeas bond should be the requirement in normal circumstances, such as

where there is *some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full* upon ultimate disposition of the case and where posting adequate security is practicable" [emphasis added]).

The Court, therefore, finds that the defendants did not meet their burden, and their proposal was denied. The discussion above highlighting defendants' financial position, pending legal proceedings and mediocre credit rating raises at least a reasonable uncertainty as to whether the judgment will be satisfied upon conclusion of the appeal. It is also relevant that defendants are not without recourse. They have every right to obtain a conventional supersedeas bond as contemplated by Fed.R. Civ.P. 62(d), and to then have their arguments heard on appeal. Accordingly, for all these reasons defendants' motion was denied by the order entered on September 23, 1988.



## UNITED STATES of America

v.

## SEVILLE INDUSTRIAL MACHINERY CORPORATION, et al., Defendants.

Crim. No. 87-31.

United States District Court,  
D. New Jersey.

Jan. 21, 1988.

Sentencing Opinion Oct. 4, 1988.

Defendants charged with criminal violations of Sherman Act and for defrauding the United States sought to dismiss indictment as legally insufficient. The District Court, Sarokin, J., held that: (1) agreement between defendants was per se violation of Sherman Act; (2) agreement was not cured by later competitive auction; (3) agreement would support charge of fraud against United States; and (4) counts were not multiplicitous.

Motions denied.

*e reasonable likelihood of debtor's inability or inability to pay the judgment in full disposition of the case and adequate security is practicable]*).

fore, finds that the defendant met their burden, and denied. The discussion of defendants' financial position in proceedings and mediation at least a reasonable basis to whether the judgment upon conclusion of so relevant that defendant's recourse. They have a conventional superintended by Fed.R. then have their argument. Accordingly, for defendants' motion was entered on September

NUMBER SYSTEM

TES of America

v.

TRIAL MACHINERY  
et al., Defendants.

No. 87-31.

District Court,  
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1, 1988.

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action; (3) agreement  
of fraud against  
(4) counts were not

### 1. Monopolies $\S$ 12(2)

Agreement between bidders at bankruptcy auction, not to competitively bid, to hold later auction, and split profits resulting from later auction, was per se violation of Sherman Act. Bankr.Code, 11 U.S.C.A.  $\S$  701 et seq.; Sherman Anti-Trust Act,  $\S$  1, 15 U.S.C.A.  $\S$  1.

### 2. Monopolies $\S$ 12(2)

Bid rigging is a per se violation of the Sherman Act. Bankr.Code, 11 U.S.C.A.  $\S$  701 et seq.; Sherman Anti-Trust Act,  $\S$  1, 15 U.S.C.A.  $\S$  1.

### 3. Monopolies $\S$ 12(2)

Postbankruptcy auction by parties to agreement, who agreed to deliberately bid low at bankruptcy auction, then hold new auction and split profits, did not cure their per se violation of Sherman Act. Bankr.Code, 11 U.S.C.A.  $\S$  701 et seq.; Sherman Anti-Trust Act,  $\S$  1, 15 U.S.C.A.  $\S$  1.

### 4. Monopolies $\S$ 31(1.4)

Indictment which alleged Sherman Act violation sufficiently alleged general intent mens rea and was adequate to avoid motion to dismiss; indictment alleged that bidders at bankruptcy auction had entered into agreement, understanding, and concert of action to refrain from bidding at the auction for the purpose of purchasing commercial equipment at artificially low and non-competitive prices. Bankr.Code, 11 U.S.C.A.  $\S$  701 et seq.; Sherman Anti-Trust Act,  $\S$  1, 15 U.S.C.A.  $\S$  1.

### 5. Conspiracy $\S$ 33(2)

Agreement between bidders at bankruptcy auction not to competitively bid, to hold later auction between themselves, and to split profits was conspiracy to defraud United States; in light of bankruptcy court and bankruptcy trustee's position between debtor and creditor, Government was target of the fraud. 18 U.S.C.A.  $\S$  371.

### 6. Bankruptcy $\S$ 3008

Bankruptcy trustee was an agent of the bankruptcy court.

### 7. Conspiracy $\S$ 33(1)

Indictment and Information  $\S$  129(1)

Monopolies  $\S$  29

Agreement not to competitively bid at bankruptcy auction, hold later auction and then split profits, could support criminal liability for both conspiracy to defraud

United States and under Sherman Act; counts were not multiplicitous since Sherman violation could be perpetrated on any victim while conspiracy count required United States to be victim. Bankr.Code, 11 U.S.C.A.  $\S$  701 et seq.; Sherman Anti-Trust Act,  $\S$  1, 15 U.S.C.A.  $\S$  1; 18 U.S.C.A.  $\S$  371.

### 8. Indictment and Information $\S$ 127

Counts of a complaint are multiplicitous if each count requires proof of same facts at trial.

### 9. Criminal Law $\S$ 569

Antitrust and fraud defendants failed to advance any evidence demonstrating bad faith in their prosecution, and did not identify others similarly situated who had not been prosecuted, requiring rejection of selective prosecution claim.

Todd P. Leff, Antitrust Div., U.S. Dept. of Justice, Philadelphia, Pa., for the United States.

Stanley A. Teitler, P.C., New York City, for defendants Yoder Machinery Co. and Timothy A. Yoder.

Andrew K. Ruotolo, Jr., Mountainside, N.J., for defendants Carney Machinery, Inc. and Michael J. Carney.

J. Michael Farrell, Sleet & Farrell, Woodbury, N.J., for defendants Martin Mayer-son and Mayerson Machinery Mart, Inc.

Barry I. Fredericks, Hackensack, N.J., for defendants Bernard B. Seville and Seville Industrial Machinery Corp.

Larry J. Silverman, Budd, Lerner, Gross, Picillo, Rosenbaum, Greenberg & Sade, New York City, for defendants Henry I. Zeisel and Zeisel Machinery Co., Inc.

Michael R. Koblenz, Mound, Cotton & Wollan, New York City, for defendant R.M.E. Machinery Sales, Inc.

Wendell B. Alcorn, Cadwalader, Wickersham & Taft, New York City, for defendants Norman Finkelstein and All State Machinery Corp.

Brian J. Neary, Hackensack, N.J., for defendant Eugene Bell and Globe Metal Working.

Richard A. Norris, Norris, McLaughlin & Marcus, Somerville, N.J., for defendant Johnson Machinery Co.

Charles H. Nugent, c/o F. Hartman, Morrestown, N.J., for defendants Albert S.

Hernberg and Martin Electric Tool & Salvage Co., Inc.

Anthony Napolitano, Probststein & Napolitano, New York City, for defendant Centre Machinery Co., Inc.

Mark A. Klugheit, Dechert, Price & Rhoads, Philadelphia, Pa., for defendants Joseph Weiswasser and Metalworking Equipment Co.

Thomas J. Curley, Jr., Goodwin, Procter & Hoar, Boston, Mass., for defendant Wigglesworth Machinery Co.

Edward A. Geltman, Squire, Sanders & Dempsey, New York City.

Beatriz Souviron D'Amico, Federal Defender, Office of the Federal Public Defender, Newark, N.J.

### OPINION

SAROKIN, District Judge.

The defendants in this criminal antitrust case move for dismissal of the indictment. The motion is denied.

### BACKGROUND

On September 10, 1987, a grand jury indicted nineteen corporate and seventeen individual defendants<sup>1</sup> for violating federal antitrust law and for conspiring to defraud the United States. The court has accepted guilty pleas from, and sentenced, a number of the defendants. The remaining defendants now move to dismiss the indictment for legal insufficiency. Because defendants contend that the facts alleged in the indictment, even if proved beyond a reasonable doubt, do not charge a violation of federal law, the court must review the allegations.

On December 2, 1985, a company called S & S Corrugated was declared bankrupt under Chapter 7 of the bankruptcy code. The United States Bankruptcy Court for the Southern District of New York entered an order on February 12, 1986 authorizing the trustee to hold an auction of S & S Corrugated's commercial equipment. That auction, administered by the Daley-Hodking Corporation under the trustee's supervision, occurred on March 11, 1986. The bankruptcy court entered an order on March 14 confirming and approving the auction and authorizing the trustee to execute documents consummating the sale.

1. The nineteen corporate defendants are dealers of commercial equipment. Most of the seven-

According to the indictment, the defendants agreed before the public auction not to bid against one another, and implemented their plan at the auction. Then, immediately after the auction, the defendants held their own private auction of the equipment they had just purchased. Once all items were resold at the private auction, the defendants divided up and shared the difference between the higher prices paid at the private auction and the lower prices paid at the public bankruptcy auction. That difference was in excess of \$75,000.

Count One of the indictment charges a violation of the Sherman Act, 15 U.S.C. § 1. The defendants' plan, according to the indictment, was a "combination and conspiracy in unreasonable restraint of interstate trade and commerce." It had the effects of restraining and eliminating competition among the defendants, enabling the defendants to pay artificially low prices for equipment at the public auction, and depriving S & S Corrugated and its creditors of full compensation and the benefits of free competition.

Count Two charges a violation of 18 U.S.C. § 371, which forbids conspiracies to defraud the United States. The theory of the indictment is that the defendants defrauded the United States "by impeding, impairing, obstructing and defeating the lawful government function of the Bankruptcy Court in the due administration and enforcement of the Bankruptcy Code," and by deceiving the bankruptcy court into believing that the bids submitted at the auction were products of full and fair competition. The indictment charges the commission of a large number of overt acts in furtherance of the conspiracy, including defendants' attendance at the auction, agreement not to bid competitively, agreement to rebid privately any item bought at the public auction, attendance at the private auction, bidding at the private auction, payment for items, and sharing of the second auction's profits.

### DISCUSSION

Moving to dismiss the indictment in its entirety, the defendants now argue that the indictment fails to charge a violation of 15 U.S.C. § 1 or of 18 U.S.C. § 371, that the counts of the indictment are multiplicitous, and that the indictment represents an impermissibly selective prosecution. The court considers each contention in turn.

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## I. *The Sherman Act*

### A. Bid Rigging as a Per Se Violation

[1] Under 15 U.S.C. § 1, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." As written, the Sherman Act is of extraordinary breadth. Indeed, it would appear to render illegal even the simplest commercial contract, since the contracting parties' agreement to trade with one another entails, for the purposes of their transaction, an implicit agreement to trade with no other. Despite the Act's breadth, the Supreme Court has upheld the Sherman Act over the objection that it is unconstitutionally vague. See *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed.1232 (1913).

The Court, however, has also narrowed the reach of the Sherman Act to restraints of trade which are unreasonable:

[Section 1 of the Act] necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

Standard Oil Co. v. United States, 221 U.S. 1, 60, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911) (emphasis added). Applying this "rule of reason" over the years, the courts became so familiar with certain patterns of anticompetitive business conduct that they began to apply to those patterns conclusive presumptions of unreasonableness. See Northern Pacific Railway v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) ("there are certain

agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"). Application of this conclusive presumption of unreasonableness to certain anticompetitive behavior has become known as the "per se doctrine." See also *United States v. Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927).

[2] It is beyond question that bid rigging is a *per se* violation of the Sherman Act. See, e.g., United States v. H & M, Inc., 565 F.Supp. 1, 2 (M.D.Pa.1982) (bid rigging is a "per se violation[] which go[es] to the heart of the Sherman Act"); United States v. Koppers Co., 652 F.2d 290, 294 (2d Cir.1981), cert. denied, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981); United States v. Brighton Building and Maintenance Co., 598 F.2d 1101, 1106 (7th Cir.1979), cert. denied, 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979); United States v. Portsmouth Paving, 694 F.2d 312, 317 (4th Cir.1983); United States v. Rubbish Removal, Inc., 602 F.Supp. 595, 602 (N.D.N.Y.1984). Indeed, "in cases involving behavior such as bid rigging, which has been classified by courts as a *per se* violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" United States v. Koppers Co., 652 F.2d at 294 (quoting United States v. Brighton Building, 598 F.2d at 1106).

Defendants attempt to distinguish their alleged behavior from classic bid rigging on the grounds that their alleged scheme involved no pre-auction fixing of prices and allowed for unfettered competition at the second, private auction. However, neither of these features, even if true, removes the alleged scheme from the domain of the *per se* violation. In the first place, courts have repeatedly held that a simple agreement not to bid is itself a *per se* antitrust violation, even in the absence of prior price fixing. “[W]here two or more persons agree that one will submit a bid for a



project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act." *United States v. W.F. Brinkley and Son*, 783 F.2d 1157, 1161 (4th Cir.1986) (emphasis added). See also *United States v. Portsmouth Paving*, 694 F.2d 312, 325 (4th Cir.1982) ("[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. § 1" (emphasis added)); *Swift & Co. v. United States*, 196 U.S. 375, 400, 25 S.Ct. 276, 281, 49 L.Ed. 518 (1905) ("[t]he defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete").

More importantly, the alleged scheme of the defendants is indistinguishable from schemes which courts have held per se violative of the Sherman Act. In *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899), six manufacturers of cast-iron pipe formed an "association" to protect themselves from the adverse effects of the competition that normally existed between them. The association first divided their sales region into "pay" territory, in which each association member had to pay a bonus to the other members for his sales, and "free" territory, in which the members could sell freely without paying a bonus. However,

[t]he system of bonuses, as a means of restricting competition and maintaining prices, was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and, except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to the highest bonus for division among the others getting the contract.

*United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir.1898) (emphasis added), mod. and aff'd, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). In other words, the members of the association bid for the right to be the low bidder, and the association split the premium that each member was willing to pay for the advantage of no

competition from other association members. The scheme in *Addyston Pipe* is therefore the mirror image of the alleged scheme of the defendants in this case; the only important distinction is that the *Addyston Pipe* conspirators competed before the public bidding, while these defendants allegedly competed after the public bidding.

The Supreme Court held that the association's scheme was an illegal combination in restraint of trade. In doing so, the Court emphasized that the illegality of the association's activity flowed from the scheme's effect not only on the actual public bidding, but on the members' freedom to compete at that bidding:

It is also urged that as but one contract would be awarded for the work proposed at any place, and therefore only one person would secure it by virtue of being the lowest bidder, the selection by defendants of one of their number to make the lowest bid as among themselves could not operate as any restraint of trade.... This takes no heed of the purpose and effect of the combination to restrain the action of the parties to it so that there shall be no competition among them to obtain the contract for themselves.... It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded.

175 U.S. at 244-45, 20 S.Ct. at 108-09 (emphasis added). It is crucial to note that in *Addyston Pipe*, as in the case before the court, there was free competition among the members of the association; the Supreme Court did not view this private competition as salvaging the corrupt agreement. Similarly, this court cannot attach any legal significance to the defendants' post-auction competition. That competition has no effect whatever on the illegality of the agreement not to compete at the public auction.

*United States v. Walker*, 653 F.2d 1343 (9th Cir.1981), cert. denied, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982), is

other association members in *Addyston Pipe* is the image of the alleged defendants in this case; the contention is that the *Addyston* competitors competed before the sale of these defendants after the public bidding. The court held that the association was an illegal combination in restraint of trade. In doing so, the Court held that the illegality of the association was derived from the scheme's restriction of the actual public bidding, not the freedom to compete at

what, as but one contract for the work proposed. Therefore only one person could win it by virtue of being the lowest bidder; the selection by defendant of their number to make the sale as among themselves was as any restraint of trade. It takes no heed of the fact that the combination to restrain trade of the parties to it will be no competition to obtain the contract for the sale. It is the effect of the combination to limit and restrict each of the members to the sale in the ordinary way, and to act upon the volume or price of the commodity.

20 S.Ct. at 108-09 (emphasizing that it is crucial to note that in the case before the Court, the competition among the association; the Supreme Court view this private combination as the corrupt agreement. The court cannot attach criminal liability to the defendants' combination. That competition is not on the illegality of the combination to compete at the public

*Walker*, 653 F.2d 1343, 455 U.S. 908, 57 L.Ed.2d 446 (1982), is

another case which presents facts virtually indistinguishable from the case before the court. In *Walker*, the defendant made payments to a number of his competitors to prevent them from bidding competitively at a timber sale administered by the United States Forest Service. The defendant was convicted of conspiring to defraud the United States through bid rigging. The economic effect of the scheme in *Walker* is identical to the effect of the scheme charged in this case. Whether would-be competitors split the economic premium which results from restrained competition before or after the bidding process is a matter only of timing, not of legality. Both schemes are equally violative of the Sherman Act.

[3] Any argument that the unlawfulness of the agreement not to bid competitively was cured by the defendants' alleged post-auction competition is refuted by *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir.1970). In *Bensinger*, a restaurant twice accepted bids for the sale and installation of a dishwasher. It rejected all of the bids received in the first round, and then accepted a bid after reopening the bidding process. The government prosecuted defendant for rigging bids at the first bidding. The defendant argued that it could not be convicted of rigging bids at the first bidding, since the restaurant rejected all of the rigged bids. The court rejected this argument. *Bensinger* therefore reinforces the proposition that a Sherman Act violation occurs when competitors agree to bid noncompetitively. Just as the *Bensinger* defendant could not escape criminal liability by the fortuity that its corrupt plan did not succeed, the defendants in this case cannot escape criminal liability by the fortuity that other innocent bidders attended the public auction or that the alleged co-conspirators valued the purchased equipment sufficiently to trigger competitive bidding at their private auction. Their alleged crime was nothing more and nothing less than their agreement not to compete.

696 F.Supp.—23

## B. Mens Rea

[4] Defendants contend that the indictment fails to allege specific intent, and that this deficiency requires dismissal of the indictment. The answer to this contention is that the indictment's failure to allege specific intent is not a deficiency. In *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), the Supreme Court held that "action undertaken with knowledge of its probable consequences and having the requisite anti-competitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." 438 U.S. at 444, 98 S.Ct. at 2877 (emphasis added). The Court thus chose general intent as the *mens rea* standard for antitrust crimes, explicitly rejecting a specific intent standard. This court therefore concludes that the indictment adequately charges the requisite level of criminal intent by alleging an "agreement, understanding and concert of action" to refrain from bidding "for the purpose of purchasing commercial equipment at artificially low and noncompetitive prices." Indictment at ¶ 14.

## II. Conspiracy to Defraud the United States

[5] Defendants attack Count Two of the indictment on the grounds that it fails to charge a violation of 18 U.S.C. § 371. That statute provides that

[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Defendants' theory is that their alleged scheme defrauded, if anyone, only the creditors of S & S Corrugated, but not "the United States or any agency thereof."

Defendants rely on two recent Supreme Court decisions: *McNally v. United States*, — U.S. —, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), and *Tanner v. United States*, — U.S. —, 107 S.Ct. 2739, 97 L.Ed.2d 90

(1987). In *McNally*, the Supreme Court resolved an issue long debated in the district and circuit courts by holding that the mail fraud statute, 18 U.S.C. § 1341, is "limited in scope to the protection of property rights," as opposed to the intangible right of the citizenry to good government. 107 S.Ct. at 2880. In *Tanner*, the Court held that a conspiracy to defraud a private entity that receives "financial assistance and some supervision" from the United States is not a conspiracy to defraud the United States under § 371. 107 S.Ct. at 2752-53.

Neither of these cases is of any assistance to defendants. Defendants argue that the indictment is prohibited by *McNally* because it charges a deprivation only of an intangible right to the integrity of the bankruptcy courts, rather than of a tangible property interest. However, the *McNally* opinion will not support such a contention. The statute at issue in that case was 18 U.S.C. § 1341, the mail fraud statute. The Supreme Court was careful to note in its opinion that the scope of the mail fraud statute is narrower than the scope of 18 U.S.C. § 371, the statute at issue in this case. 107 S.Ct. at 2881 n. 8. Indeed, the *McNally* Court endorsed the use of 18 U.S.C. § 371 against schemes directed at the deprivation of intangible rights to governmental integrity. *Id.* Defendants' reliance on *McNally* is therefore wholly misplaced. See also *Tanner v. United States*, 107 S.Ct. at 2751 ("the fraud covered by the statute 'reaches "any conspiracy for the purpose of impairing obstructing, or defeating the lawful function of any department of Government"' (citations omitted)).

*Tanner* is of no greater help to defendants. In *Tanner*, the defendants fraudulently obtained a loan from a private bank. That loan was guaranteed by the federal Rural Electrification Administration. The government obtained an indictment of defendants for conspiring to defraud the United States by fraudulently procuring the loan. The Court held that the defrauded private bank did not, by virtue of a limited amount of supervision by a federal

agency, become "the United States or any agency thereof" for the purposes of § 371.

[6] *Tanner* is readily distinguishable from the case before the court. In the first place, the target of the fraud in *Tanner* was a private intermediary between the government and the defendants. In this case, by contrast, the target of the alleged fraud was the government agency itself, which functioned as intermediary between the defendants and the private creditors. See Indictment, Count Two at ¶¶ 2, 3. More importantly, unlike the charge in *Tanner*, this indictment charges that the defendants directly impaired government agents in their carrying out of the bankruptcy court's lawful functions. A bankruptcy court is a unit of the United States District Court charged with jurisdiction of any case arising under the bankruptcy code. 28 U.S.C. § 151. A bankruptcy trustee is an agent and officer of the bankruptcy court. See *Callaghan v. Reconstruction Finance Corporation*, 297 U.S. 464, 468, 56 S.Ct. 519, 521, 80 L.Ed. 804 (1936); *Red Carpet Corporation v. Miller*, 708 F.2d 1576, 1579 (11th Cir.1983); *In re Power*, 115 F.2d 69, 72 (7th Cir.1940). In this case, the bankruptcy court is the actual seller of a debtor's property at a bankruptcy auction. *In re Blue Coal Corporation*, 59 B.R. 157, 160 (Bkrtcy.M.D.Pa. 1986). Furthermore, the bankruptcy trustee was appointed by the bankruptcy court and was explicitly authorized by bankruptcy court order to hold the auction of S & S Corrugated's equipment. Defendants' argument based on *Tanner* must therefore fail, since the alleged fraud in this case was perpetrated directly on an agency of the United States. Count Two of the indictment properly charges a violation of 18 U.S.C. § 371.

### III. Multiplicity and Selectivity

[7] Defendants argue that the two counts of the indictment are multiplicitous and that the indictment itself represents an impermissibly selective prosecution. Both arguments are meritless.

[8] Counts of a complaint are multiplicitous if each count requires proof of the

Cite as 696 F.Supp. 986 (D.N.J. 1988)

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on an agency of the  
t Two of the indict-  
es a violation of 18

#### d Selectivity

rgue that the two  
ent are multiplicitous  
it itself represents an  
e prosecution. Both  
ess.

nplains are multiplici-  
quires proof of the

same facts as each other count. That is  
simply not the case here, for

an overt act is required for a § 371 con-  
viction, but not for a Sherman § 1 viola-  
tion. The two statutes, besides requiring  
proof of a fact that the other does not,  
serve separate and distinct purposes.  
Sherman § 1 is aimed at avoiding collu-  
sive activity to restrain trade; the United  
States need not be the victim. In con-  
trast, § 371 forbids fraud practiced  
against any federal government agency.  
Because the essence of one offense is  
anti-competitive activity and of the other,  
deceptive acts, each of which impose di-  
verse social harms, ... the two charges  
are not multiplicitous.

4 *United States v. Walker*, 653 F.2d 1343,  
1351 (9th Cir.1981), *cert. denied*, 455 U.S.  
908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982).  
The court finds the reasoning of *Walker*  
persuasive, and concludes that the two  
counts of the indictment are not multiplici-  
tous.

[9] A defendant claiming impermissibly  
selective prosecution by the government  
bears a heavy burden of proof. He or she  
must overcome the principle that "the  
choice of whom to prosecute and the strate-  
gy of prosecution are generally matters  
left wholly to the government's control."  
*United States v. Herman*, 589 F.2d 1191,  
1210 (3rd Cir.1978), *cert. denied*, 441 U.S.  
913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979).  
Thus defendants must make the twin show-  
ing

(1) that while others similarly situated  
have not generally been proceeded  
against because of conduct of the type  
forming the basis of the charge against  
[them], [they have] been singled out for  
prosecution, and (2) that the govern-  
ment's discriminatory selection of [them]  
for prosecution has been invidious or in  
bad faith, *i.e.*, based upon such impermis-  
sible considerations as race, religion, or  
the desire to prevent [their] exercise of  
constitutional rights.

2. Defendants have also moved for extensive dis-  
covery from the government. The court con-  
cludes, however, that the government is under  
no obligation to provide the defendants with  
any materials or information other than that

*United States v. Berrios*, 501 F.2d 1207,  
1211 (2nd Cir.1974).

Defendants do not advance the slimmest  
piece of evidence suggesting bad faith in  
their prosecution. Nor have they identified  
others similarly situated who have not been  
proceeded against for the same conduct.  
Accordingly, the court must reject the con-  
tention that the indictment must be dis-  
missed as the product of impermissibly se-  
lective prosecution.

#### CONCLUSION

The court finds no deficiency in the in-  
dictment. Defendants' motion to dismiss it  
must therefore be denied.<sup>[2]</sup>

#### SENTENCING OPINION

If the evidence presented in this case is  
indicative of the ethics of this or any seg-  
ment of the business community, then we  
should weep for its existence and fear for  
its future.

A group of bidders at a bankruptcy auc-  
tion formed a ring for the express purpose  
of eliminating competition and buying  
cheaply. After acquiring the items at ex-  
tremely low prices, the members of the  
ring then conducted their own private auc-  
tion. The monies received at the private  
auction over and above those bid at the  
public auction were divided among the ring  
members. In essence, the monies which  
should have and would have gone to the  
creditors in the bankruptcy proceeding  
were divided among the ring members.  
Even those who made no bid and bought  
nothing were compensated solely for not  
competing at the public auction.

The pursuit of greed did not end there  
however. Certain of the ring members  
proceeded to hold a second, secret private  
auction having excluded some of the lesser  
companies from the circle, thereby cheating  
their own partners. They, in turn, divided  
the additional proceeds derived at the sec-

which it must disclose under *Brady v. Maryland*,  
373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215  
(1963), the Jencks Act, 18 U.S.C. § 3500(b), and  
F.R.Crim.P. 16, and that which it has already  
promised to disclose voluntarily.



ond private auction among the remaining members.

Defendants argue and the evidence presented indicates that this is a common and long standing practice. Some defendants seek to rationalize and justify it as a legitimate partnership or joint venture. It is, however, nothing but an illegal conspiracy to deprive the bankruptcy court of monies it otherwise would have received, if competitive bidding had not been suppressed and thwarted by this scheme.

The success of any public auction depends upon honest and competitive bidding. There may be occasions in which two or more persons may legitimately pool their resources in order to submit a bid. However, in this case the practice had no such legitimacy. It served merely to deprive the bankruptcy court of the benefit of such competitive bids and divert the benefits to the bidders who comprised the illegal ring. The ring members made no contribution to the ring other than their promise not to compete against other ring members at the public auction.

The problem of sentencing posed by this matter is particularly troublesome. The current debate over the constitutionality of the new sentencing guidelines does not challenge one of the underlying premises of the guidelines—that historically white collar criminals have been treated with far greater leniency than the poor and minorities who needed more and took less, but have been punished more harshly. These defendants are all businessmen, men with families, many educated, active in their communities in charities and good works.

In considering the appropriate sentences, the court explored whether it would be feasible to make the defendants account and pay over to the bankruptcy trustees the ill-gotten gains at these sales. However, it appears that most of those debtor estates have been long closed, and it would be virtually impossible to resurrect them and disburse the monies to the rightful recipients.

Absent that alternative the court considered fines, community service and imprisonment. Severe penalties seem appro-

priate here because of the blatant and continuous nature of the conduct. If this practice is as prevalent as is conceded, then firm measures are necessary to bring it to a screeching halt. The failure of the parties to recognize and acknowledge the evil of their conduct is as disturbing as the conduct itself.

In imposing sentences the court has individualized the sentences based upon the respective conduct and background of each defendant.



**The SOUTHLAND  
CORPORATION, Plaintiff,**

**v.**

**ASHLAND OIL, INC., et al.,  
Defendants.**

**Civ. No. 88-0700.**

**United States District Court,  
D. New Jersey.**

**Oct. 6, 1988.**

Purchaser of chemical plant sued vendor seeking declaration that vendor was strictly liable to purchaser in contribution or indemnity under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 for hazardous waste cleanup costs, and sought declaration of liability for indemnification under the purchase contract. On cross motions for partial summary judgment, the District Court, Clarkson S. Fisher, J., held that: (1) private parties falling within the scope of CERCLA are free to enter into agreements whereby they are indemnified or held harmless by another party; (2) contract in instant case was not sufficient to transfer all waste disposal liabilities to the purchaser; (3) equitable considerations would be applicable in allocating the amount of contribution between the parties, but did not preclude