

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,)
)
v.)
)
Jason R. Brannon and)
J & R Properties, LLC)
)
Defendants.)

Criminal No 12-00139

DEFENDANT’S SENTENCING MEMORANDUM

NOW COMES Jason Brannon and submits this memorandum to aid the court in considering all the factors identified in 18 U.S.C. § 3553(a) so as to “impose a sentence sufficient, but not greater than necessary” to comply with the purposes of sentencing. The applicable range under the advisory Sentencing Guidelines is merely one factor that the Court must consider when imposing sentence, and the Court “may not presume that the Guidelines range is reasonable.” *Gall v. United States*, 552 U.S. 38, 50 (2007). A guidelines sentence is not reasonable in this case.

1. The offense conduct.

Alabama permits non-judicial foreclosure when the mortgage contains a power of sale clause. Upon default in payment of the mortgage, the power of sale clause allows the lender to foreclose on the property to satisfy the underlying debt. After giving notice to the borrower and by publication in a newspaper of general circulation of intent to sell the property at foreclosure, an attorney for the lender conducts a public auction of the property in front of the Mobile County Courthouse. Usually the lender bids in the amount of the mortgage, and fees, including attorney’s fees, and then entertains bids from the public. Real

estate investors routinely review foreclosure sale notices and evaluate the state of the title and the location, price and condition of the property in deciding whether to attend a foreclosure auction and how much to bid. Any member of the public may attend the auction and bid. The successful bidder is awarded the property and receives title. Foreclosure of the first lien extinguishes all junior liens. In the one year period following a foreclosure sale the borrower and other interested parties may redeem the property by tendering the amount paid at the foreclosure sale. (Ala Code §35-10-1 et. seq.)

Beginning in the 1990s and running at least through 2010¹ a core group of real estate investors (most are now defendants or targets) agreed among themselves not to bid up the auction prices at Mobile courthouse foreclosure auctions. Rather than bid at the public auction, members of the group often – but not always – stood silently by while one member of the group made a minimum bid on the property. Members of the general public could and often did attend foreclosure auctions and bid. On occasion these outsiders attended auctions regularly enough that they became aware of the conspiracy and joined it. When one of the conspirators was awarded a property, and others in the group were interested in obtaining the property, there would be a second, private auction. At the second auction interested members would write on a slip of paper the amount they would pay to purchase the property. The high bidder was awarded the property and paid the others a fee for forbearing from bidding at the first auction. See description of similar conspiracy in *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998)

¹ As discussed below, Jason Brannon and his father Robert joined the ongoing conspiracy in October 2004 and ceased participation in August 2007.

In general, the formula for second auction payments worked as follows. Assume a successful bid price at the courthouse foreclosure auction of \$100,000 and that four members of the group were interested in obtaining the property at the second auction. These four persons submitted written bids of (a) \$101,000; (b) \$102,000; (c) \$103,000 and (d) \$105,000. The high bidder (d) would pay (a) \$250 ($\$1,000 / 4$); (b) \$500 ($\$2,000 / 4$); and (c) \$750 ($\$3,000 / 4$). As a result, the total price that (d), the high bidder, would pay for the property was \$101,500.

Beginning in 1996 Jason Brannon was employed as a title researcher at Bay Title in Mobile, and became acquainted with real estate investors who purchased property at foreclosure auctions. Robert Brannon, Jason's father, was a farmer in Mississippi. In 2003 he sold four chicken houses and a 12 acres parcel of his land. At Jason's suggestion, Robert Brannon and his son formed J&R Properties for the purpose of purchasing real estate investment property, using the profit from the sale of the farm property. The Brannons began to participate in Mobile foreclosure auctions to acquire rental property, learned of the ongoing conspiracy, and joined it.

2. As an initial step in sentencing the court should consult the Sherman Act guideline.

The sentencing guidelines for the Sherman Act violation produce a dramatically different result than those which apply to the mail fraud violation. The defendant submits that the Sherman Act guidelines most closely reflect the underlying conduct. While U.S.S.G. §3D1.3 directs that the court initially consult the guidelines for the count which produces the

highest base offense level, in this case the court should vary from the mail fraud guidelines and consult the Sherman Act guidelines.

Here there was only one course of conduct – suppression of competition at Mobile foreclosure auctions which had the effect of holding down the prices bid in at auction. The use of the mails – the mailing of deeds or checks – did not occur in all of the transactions and was purely incidental to the scheme. The defendant does not contend that his conduct did not violate both the Sherman Act and the mail fraud statute, but suggests that the real offense conduct was the suppression of competition in violation of the Sherman Act. Commentary 19(C) to U.S.S.G. §2B1.1 suggests that “[t]here may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.” This is such a case.

3. The Sherman Act guidelines should be applied

The Sherman Act (15 U.S.C. §1) sentencing guidelines, U.S.S.G. §2R1.1, which apply to the facts underlying count one of the indictment, are as follows:

i. Base Offense Level, U.S.S.G. §2R1.1(a)	12
ii. Conduct involved non-competitive bids, U.S.S.G. §2R1.1(b)(1)	+1
iii. Volume of commerce, U.S.S.G. §2R1.1 (less than \$1MM) (PSR ¶23)	0
Offense Level Total:	13
Acceptance of responsibility	-2
Total Offense	11

Guideline sentencing range 8 – 14 months (Criminal History I)

4. *The court should sentence in a way which avoids unwarranted sentencing disparities*

Not only do the Sherman Act guidelines more accurately describe the real offense conduct, but the government's charge bargaining in related cases involving members of the Mobile bid rigging conspiracy shows that the Sherman Act guideline is the appropriate measure of culpability. In *United States v. Harold Buchman*, 11-00249-CG and *United States v. Allen French*, 11-00251-CG the co-conspirators pled guilty to Sherman Act counts only. In other related cases, set out below, pleas were entered as to both Sherman Act and mail fraud counts but the government agreed to recommend sentences in line with the Sherman Act guidelines.

Besides the Brannons, six individuals who participated in the Mobile foreclosure auction bid rigging conspiracy have entered guilty pleas and are awaiting sentencing. The two major participants have not yet been charged. The government has apparently granted immunity to a third major participant, A. J. Beach. While the Brannons are the first defendants to come before the court for sentencing, the sentence which the court imposes on them should be crafted in recognition of the "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6)

The defendant understands that the joint recommendations which the government and six guilty co-conspirators make at their sentencing hearings will not bind the court. However, the court should be aware that the plea agreements with the foreclosure auction

co-conspirators differ significantly from the agreements typically seen in this district. In each case these plea agreements expressly bar the parties from advocating for a term of imprisonment or a fine amount which is different from that jointly presented. Because of the structure of the agreements the court at sentencing in these related cases will not hear advocacy regarding §3553(a) factors. While not binding on the court, the co-conspirators' plea agreements are highly relevant because they express the government's position on how the Sherman Act and mail fraud guidelines should be applied to the members of the overall Mobile foreclosure auction conspiracy.

The material terms of the agreements in the related Mobile foreclosure auction cases are as follows:

United States v. Harold Buchman, 11-00249-CG. Buchman was an owner of M&B Builders² which was in the business of buying real estate at Mobile foreclosure auctions. From at least May 2001 until at least August 2007 he engaged in the conspiracy to suppress competition at the foreclosure auctions. (Doc. 1) Buchman was charged with a single Sherman Act conspiracy count. M&B Builder's other owner, and Buchman's son who participated in the auction transactions, were not charged. Buchman and the government agreed that the volume of commerce attributable to Buchman's conduct was more than \$1,000,000. (Doc. 3 p. 6) The parties agreed to the imposition of a \$21,141 fine; restitution of not less than \$36,000; a guideline sentencing range of 12-18 months. They further agreed to jointly advocate a sentence of 6 months in a prison camp, with no SRT. (Doc. 3, p. 6 -7)

² The corporation was charged with both Sherman Act and mail fraud violations. *United States v. M&B Builders, Inc.*, 11-00250-CG. The company was fined \$250,000 and ordered to pay restitution in the amount of \$18,345. (Doc. 20)

United States v. Bobby Threlkeld, 11-00338-CG. Threlkeld was in the business of buying real estate at Mobile foreclosure auctions. Beginning at least as early as May 2001 and continuing thereafter until at least December 2006 he engaged in the conspiracy to suppress competition at the auctions. (Doc. 1) Threlkeld pled guilty to both Sherman Act (15 USC § 1) and mail fraud violations. The parties agreed that the Sherman Act guidelines called for total offense level of 13. Threlkeld and the government agreed that the volume of commerce attributable to Threlkeld's conduct was \$477,000. The agreed mail fraud guidelines called for a loss amount of more than \$70,000 and a total offense level of 17. (Doc. 3 p. 7) The parties agreed to the imposition of a \$5,000 fine; restitution of not less than \$21,334; and a guideline sentencing range of 15-21 months. The parties agreed to jointly advocate a sentence of 8 months in a prison camp. (Doc. 3, p. 8-9)

United States v. Allen French, 11-00251-CG. French also engaged in the conspiracy of buying real estate at Mobile foreclosure auctions beginning at least as early as May 2001 and continuing until at least December 2010. (Doc. 3, p.3) French pled guilty to a single Sherman Act (15 USC § 1) count. The parties agreed that the Sherman Act guidelines called for total offense level of 13 and agreed that the volume of commerce attributable to French's conduct was less than \$1,000,000. (Doc. 3 p. 6) The government and French agreed to jointly recommend the imposition of a \$20,000 fine; restitution of not less than \$23,000; and a guideline sentencing range of 8 - 14 months. The parties further agreed to jointly advocate a sentence of 8 months in a prison camp. (Doc. 3, p. 7)

United States v. David Bradley, 12-00130-CG. Bradley was in the business of buying real estate at Mobile foreclosure auctions and began participating in the conspiracy to

suppress competition at the auctions at least as early as June 2003 and continued in it until at least September 2008. (Doc. 2, p. 3) Bradley pled guilty to both Sherman Act (15 USC § 1) and mail fraud counts. The parties agreed that the Sherman Act guidelines called for total offense level of 15 and that the volume of commerce attributable to Bradley's conduct was \$2,700,720.³ Bradley and the government agreed that the mail fraud guidelines be based on a loss of more than \$400,000 with a total offense level of 23. (Doc. 2 p. 7) The parties jointly recommended that no fine would be imposed; restitution of not less than \$43,916; and a guideline sentencing range of 33 - 41 months. The parties further agreed to jointly advocate a sentence of between 18 and 26 months in a prison camp. (Doc. 2, p. 8-9)

United States v. Lawrence Stacey, 12-00083-CG. Stacey began participating in the conspiracy to suppress competition at Mobile foreclosure auctions at least as early as May 2002 and continued in the conspiracy until at least January 2007. (Doc. 3, p. 3) Stacey pled guilty to both Sherman Act (15 USC § 1) and mail fraud counts. The parties agreed that the Sherman Act guidelines called for total offense level of 13 and that the volume of commerce attributable to Stacey's conduct was \$180,230.92. Stacey and the government agreed that the mail fraud guidelines be based on a loss of more than \$30,000 with a total offense level of 15. (Doc. 3 p. 7) The parties agreed to jointly recommend a fine of \$10,000; restitution of not less than \$1,500; and a guideline sentencing range of 12-18 months. The parties further agreed to jointly advocate a sentence of 6 months in a prison camp. (Doc. 3, p. 8-9)

United States v. Steven Cox, 12-00084-WS. Cox began participating in the conspiracy to suppress competition at Mobile foreclosure auctions at least as early as

³ The government contends the volume of commerce attributable to the Brannons is \$799,317. (PSR ¶ 21)

January 2004 and continued in the conspiracy until at least May 2010. (Doc. 2, p. 3) Cox plead guilty to both Sherman Act (15 USC § 1) and mail fraud counts. The parties agreed that the Sherman Act guidelines called for total offense level of 13 and that the volume of commerce attributable to Cox's conduct was \$720,594. Cox and the government agreed that the mail fraud guidelines be based on a loss of more than \$120,000 and a total offense level of 19. (Doc. 2 p. 7) The parties agreed to recommend a fine of \$10,000; restitution of not less than \$82,100.71; and a guideline sentencing range of 16 - 21 months. The parties agreed to jointly advocate a sentence of 12 months in a prison camp with no SRT. (Doc. 3, p. 8-9)

The co-conspirator most closely comparable to Brannon in the volume of commerce affected (\$700,000) and loss is Steven Cox, except that Cox engaged in the conspiracy for a six year period and did not end his participation until May 2010.

5. Section 3553(a) factors suggest that the court impose a non-guidelines sentence.

The defendant urges the court to consider the following in connection with fashioning a sentence which is sufficient, but not greater than necessary to achieve the statutory purposes of sentencing.

a. Late entry and early exit from conspiracy.

The plea agreements of the co-conspirators show that Harold Buchman, for the benefit of M&B Builders, joined the already ongoing conspiracy in May 2001. The defendant would expect the evidence to show that Oscar Anez (who to-date has not been charged) and Michael Barbour devised the foreclosure scheme in the 1990s, in which they were joined by A. J. Beach. In addition to Buchman, French, Cox, Bradley, Threlkeld, Stacy and others all became involved in the conspiracy by 2004.

Jason Brannon and his father Robert Brannon formed J&R Properties in 2004 for the purpose of investing the proceeds of the sale of Mississippi farm property in the buying, rehabilitating, and then renting or selling residential property. After unsuccessfully participating in a number of Mobile foreclosure auctions Jason Brannon became aware of the conspiracy and the Brannons subsequently joined it.

The first rigged transaction in which they participated was in October 2004 and the last transaction in which they participated was in August 2007. The foreclosure auction conspiracy continued after the withdrawal of the Brannons with the participation of Cox, Bradley, French, Stacey, Anez, Barbour and others. During the time in which the Brannons participated in the conspiracy they received payments from co-conspirators on 15 occasions. The Brannons company, J&R Properties, also purchased 8 foreclosure properties and made payments to co-conspirators. These transactions are detailed below in the discussion of loss.

b. Voluntary and complete cooperation with grand jury.

In late 2010 the Brannons and J&R Properties were served with grand jury subpoenas for records connected to the Mobile foreclosure auction investigation. They gathered all of the relevant documents and produced them to the grand jury. From January 2011 forward the Brannons have sought to settle the case with the prosecution and agreed to a tolling of the statute of limitations.

c. Voluntary meeting with prosecutors and full disclosure.

On August 31, 2011 Jason Brannon met with prosecutors and an agent in Atlanta. At that meeting Brannon answered question, reviewed documents, and detailed his involvement and that of co-conspirators in the foreclosure auctions. In subsequent meetings with the

government in Mobile he again reviewed documents and provided additional information regarding his conduct and that of others, including the leading members of the conspiracy who have not yet been charged.

d. *Continued willingness to cooperate.*

Brannon stands ready to testify and continue to provide complete and truthful information about his conduct and that of third parties including members of the conspiracy who have not yet been charged.

Defendants regularly express post-indictment contrition and promise to mend their ways. In this case, however, the court can look at Jason Brannon's actions in making the individualized assessment of character required in sentencing. See *Koon v. United States*, 518 U.S. 81, 113 (1996)(noting that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue”). *Koon* further instructed sentencing courts to “make a refined assessment of the many facts that bear on the outcome, informed by its vantage point and day-to-day sentencing experience.” 518 U.S. at 82.

Jason Brannon ceased participation in the bid rigging conspiracy in August of 2007. The co-conspirators who will come before the court for sentencing later continued in the conspiracy, some up until 2010. Brannon's cessation of criminal conduct, coupled with his pre-indictment acknowledgement of culpability and voluntary cooperation with investigators and prosecutors constitutes strong evidence that the risk of recidivism is extremely low.

6. Even applying U.S.S.G. §2B1.1, the actual monetary loss/gain is less than \$120,000

The PSR states that during the Brannons participation in the conspiracy they were involved in a total of 28 transactions. The total money exchanged among all conspirators in these 28 transactions was \$243,412. (PSR ¶21) However, \$80,119 of this amount was reversed among the co-conspirators when the foreclosed property was redeemed by the owner.

i. Payments received by Brannon from co-conspirators

The Brannons participated in 15 second auctions in which they were not the successful bidder, but received “second auction” payments from co-conspirators. The total of payments made to all co-conspirators in these 15 transactions was \$167,755.28. However, three of the most valuable properties - involving \$80,119 of the total payments - were redeemed by the owners. The ‘second auction’ payments made on these redeemed properties were returned by the high bidder to the other participants. Consequently the net (\$167,775.28 - \$80,119) gain to all of the coconspirators participating in these 15 transactions was \$87,636.28.

The Brannons received a total of \$46,414.71 from their participation in these 15 second auction transactions. They returned the funds which they received from three redeemed transactions (\$46,414.71 - \$23,174) resulting in a net gain of \$23,240.71 in transactions in which they were not the successful bidder. (See transaction mentioned in PSR ¶ 16)

ii. Payments made by Brannon to co-conspirators

The Brannons were the successful bidders at second auctions on 13 properties, for which they made payments to co-conspirators in the total amount of \$75,657.

iii. Total payments

The total net payments received by the Brannons at second auctions, \$23,240.71, and the total they paid to others at second auctions, \$75,657, is \$98,897.71. This sum falls within the range of U.S.S.G. § 2B1.1(b)(1)(E), more than \$70,000 to \$120,000, which calls for a 8 level increase in the base offense level.⁴

7. Inability to pay a fine in addition to restitution.

Once the court orders restitution, Jason Brannon does not have the ability to pay a fine. He has no equity in his home and no appreciable assets. While J&R Properties⁵ owns a number of rental houses which (when occupied) generate income with which to service the mortgage and pay for taxes and maintenance, these properties are mortgaged. Any equity in the properties is encumbered by an overarching \$375,734.45 judgment which was entered on January 15, 2013 against Robert M. Brannon, Jason R. Brannon, and J&R Properties, LLC. *Hancock Bank v. Triple B Investments, LLC et al.* Civil Action no 12-0162-C (So. Dist. Ala).⁶ The judgment, recorded in the Mobile County Probate Court (Book 6997 Page 826), is unsatisfied and constitutes a lien against all of the defendants' property.

⁴ Applying this loss figure under U.S.S.G. §2B1.1 the total offense level is 14 with a guideline sentencing range of 15-21 months.

⁵ U.S.S.G. §8C1.1 provides a fine on a corporate entity should not be in an amount "...substantially jeopardizing the continued viability of the organization."

⁶ The underlying transaction did not involve foreclosure auctions. In November 2008 Triple B Investments borrowed \$1.3MM from Hancock Bank which it used to purchase 32 real properties from Regions Bank. The loan was secured by the properties and was personally guaranteed by the Brannons and J&R (cont'd next page)

8. *Recommended sentence*

In light of all of the facts of the case, including the nature of the crime and the characteristics of the defendant, a sentence of 6 months confinement, coupled with order of restitution, meets the statutory goals of sentencing.

/s/ Arthur J. Madden, III
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Deana L. Timberlake-Wiley, Esq.
Atlanta Field Office
Antitrust Division
United States Department of Justice
75 Spring St. S.W., Suite 1176
Atlanta, GA 30303

/s/ Arthur J. Madden, III
Arthur J. Madden, III

Properties LLC. Despite the fact all payments had been made on the note, Hancock refused to roll the note over when it came due; foreclosed on the properties; and obtained a \$375,734.45 deficiency judgment. Interest on the judgment is accruing at the rate of \$90 per day.