

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA)	Criminal No. 3-95CR-294-R
)	
v.)	Filed: 12/4/95
)	
MRS. BAIRD'S BAKERIES, INC. and)	Violation: 15 U.S.C. § 1
FLOYD CARROLL BAIRD,)	
)	
Defendants.)	

**GOVERNMENT'S RESPONSE TO DEFENDANTS' PRETRIAL MOTION
AND BRIEF TO REQUIRE DISCLOSURE OF EVIDENCE ADVERSELY
AFFECTING THE CREDIBILITY OF GOVERNMENT WITNESSES**

The United States of America, by its undersigned attorneys, hereby responds to Defendants' Pretrial Motion and Brief to Require Disclosure of Evidence Adversely Affecting the Credibility of Government Witnesses. The government is aware of its obligation to disclose exculpatory evidence, Brady v. Maryland, 373 U.S. 83 (1963), and potential impeachment evidence, Giglio v. United States, 405 U.S. 150 (1972). As a result, on November 2, 1995, the government provided each Defendant with a significant amount of material arguably discoverable under Brady and its progeny. Furthermore, the government is aware of its continuing duty to disclose evidence favorable to the Defendants and will promptly do so if any additional Brady material is discovered during trial preparation.

Below, the government responds specifically to each request contained in the Defendants' motion. Paragraph numbers of this response correspond directly to the numbering of the request in the motion.

1. Any agreement, expressed or implied, not to prosecute the witness for any crime or crimes, or to otherwise recommend leniency or favorable treatment.

The government has provided Defendants with relevant immunity orders and a plea agreement relating to potential government witnesses.

2. Any agreement, expressed or implied, not to prosecute a third party of concern to the witness for any crime or crimes, or to otherwise recommend leniency or favorable treatment. Such third party includes the company by which the witness is employed.

The Defendants have been notified that four related corporations; Flowers Industries, Inc., Flowers Baking Company of Tyler, Inc., Schott's Bakery, Inc., and Mrs. Boehme's Holsum Bakery, Inc., have been granted leniency pursuant to the Corporate Leniency Policy of the Antitrust Division dated August 10, 1993. The government is unable to identify any other "third party of concern to the witness", as used in the Defendant's request.

3. The substance of any written communications between the government and any agents, representatives, or attorneys of Flowers Bakery relating to any deals or understandings entered into between Flowers and the government whereby Flowers may expect immunity or other favorable treatment in return for its cooperation or testimony in this or any other prosecution.

The June 1, 1994 letter granting Flowers Industries, Inc., et. al, corporate leniency and the July 31, 1995 letter granting Mrs. Boehme's Holsum Bakery, Inc. corporate leniency contain all the agreements between Flowers and the government which relate to the prosecution of this case, and have been provided to Defendants.

4. Any agreement, expressed or implied, to provide favorable treatment or consideration such as money, a job, a new start, or any concession to the witness himself or to a third party of concern to the witness.

Other than the information already provided, and the routine payment of appearance fees and travel expenses for those witnesses who appeared before the grand jury, the government is not aware of any such agreement.

5. Any agreement, expressed or implied, to contact any state or federal agency, bureau, department, or other unit to put in a good word for the witness or to suggest that the witness receive any sort of favor, benefit, compensation, or consideration.

Other than the information already provided, and the routine processing of payments for appearance fees and travel expenses for those witnesses who appeared before the grand jury, the government is not aware any such agreement.

6. Any agreement, expressed or implied, to recommend to any state or federal agency, bureau, or department, or other unit, that any friend, relative, or employer of the witness receive any sort of favor, benefit, compensation, or consideration.

Other than the information already provided, the government is unaware of any such agreement.

7. The terms of any plea bargain between the witness and the government or any state.

The government has provided Defendants with the plea agreement between the United States and Charles W. Johnson dated September 27, 1995.

8. The terms of any agreement whereby the witness would become an agent of, or cooperate with, any governmental entity to provide information or evidence relevant to the detection or prosecution of a crime.

Other than the information previously provided, the government is unaware of any such agreement.

9. The terms of payment and a list of all payments made or to be made to the witness in connection to the cooperation referred to in number eight above.

Other than the routine payment of an appearance fee and reimbursement for travel expenses to any witness who was summoned to appear before the grand jury, the government is unaware of any such payment.

10. Information in the possession of the government or available to the government as to the criminal history of the witness including all arrests whether convicted or not.

The government is currently searching its files in order to learn the criminal history of its potential witnesses and will provide the information when it is received and verified.

11. Any agreement, expressed or implied, that any property of the witness will be returned or the forfeiture proceedings will not be instituted against any such property.

The government is unaware of any such agreement.

12. In an unnumbered request, Defendants asked for any consideration

or promise of consideration made by any government representative to any government witness.

The government has provided Defendants with this information.

13. In this second unnumbered request, Defendants request disclosure of any threats, pressure, coercion, or intimidation made by any agent of the government that relates to a witnesses' ability or willingness to provide testimony, information or cooperation.

The government is unaware of any type of threats, pressure, coercion or intimidation made by an agent of the government, other than the promises of leniency previously disclosed to Defendants, which would affect the ability or willingness of a witness to provide testimony, information, or cooperation in this case. The government is aware of the allegations made by defense counsel that a former prosecutor in this office told Stanley Oler and his attorney that "I don't remember is not an acceptable answer" during a recess from Mr. Oler's August 17, 1994 appearance before the grand jury. The government does not have any reason to believe that the alleged statement, if made, did, or will, affect Mr. Oler's ability and willingness to provide accurate testimony, information or cooperation in this case.

14. In this third unnumbered request, Defendants asked for disclosure of all crimes, misconduct, or bad acts which the government has reason to believe have been committed by any government witness or by the corporation for which any government witness is employed.

To the extent it exists, relevant prior misconduct by any potential government witness either has been turned over to the Defendants, or will be turned over to Defendants along

with the disclosure of Jencks Act statements.

15. In this fourth unnumbered request, Defendants request disclosure of any information reflecting that Flowers Baking Co., any government witness, or any company for which any government witness has been employed has been the subject of any sanction such as cease and desist orders, consent decrees or orders, or other administrative orders of the Antitrust Division of the Department of Justice or the Federal Trade Commission.

Cease and desist orders, consent decrees and other official sanctions imposed by either the Anitrust Division of the Department of Justice or the Federal Trade Commission are a matter of public record and, therefore, equally available to the government and defendants. See U.S. v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985), cert. denied 474 U.S. 1086 (1986). (Brady does not oblige the government to provide defendants with evidence that is available equally to the defense and the prosecution.)

CONCLUSION

The United States reiterates that it is aware of its obligations under Brady and its progeny. All such information has been, or will be, produced to the Defendants. However, the Defendants are not entitled to use Brady as a discovery tool to gain general access to the prosecution's files. Consequently, insofar as Defendant's motion requests information not authorized under Brady, their motion must be denied.

Respectfully submitted,

_____/s/_____
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ORDER

The Court, having considered the Defendants' Pretrial Motion and Brief to Require Disclosure of Evidence Adversely Affecting the Credibility of Government Witnesses and the Government's Response hereby finds that the motion should be denied.

IT IS SO ORDERED this ____ day of _____, 1995.

JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Government's Response to Defendants' Pretrial Motion and Brief to Require Disclosure of Evidence Adversely Affecting the Credibility of Government Witnesses and Order were mailed via Federal Express on the ____ day of December 1995, to

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