UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

v. : 96 CR 71 S

SKW METALS & ALLOYS, INC. and CHARLES ZAK, :

Defendants. :

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GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR DISCLOSURE OF INFORMATION

The Government submits this memorandum in opposition to defendants' motion for disclosure of information.

The Government has provided the defendants with extensive discovery in this case and fully satisfied the disclosure requirements of the Federal Rules of Criminal Procedure and its obligation to produce exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. All that remains is the grand jury testimony of the Government's trial witnesses, which is governed by the Jencks Act, 18 U.S.C. §3500. The Government will provide defendants with copies of the transcripts of the testimony of such witnesses seven days before trial. At the same time, the Government will give notice of the general nature of any evidence it intends to introduce at trial pursuant to Fed. R. Evid. 404(b). For the above reasons, defendants' motion should be denied.

PRELIMINARY STATEMENT

The two-count felony indictment in this case charges SKW Metals & Alloys, Inc. (SKW) and Charles Zak, its executive vice president, with conspiring to fix prices of commodity ferrosilicon products from late 1989 until mid 1991 and, separately, with conspiring to fix prices of silicon metal from the spring of 1991 until late 1992, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). It alleges, in each count, that for the purpose of forming and effectuating the charged conspiracy, the defendants and co-conspirators met at various hotels to discuss and fix prices of commodity ferrosilicon products (Count One) and silicon metal (Count Two).

The Government has fully complied with Fed. R. Crim. P. 16(a)(1)(A) by providing statements of the defendants. It has complied with Fed. R. Crim. P. 16 (a)(1)(C) by making available for inspection and copying all documents produced to the grand jury, including invoices from defendant SKW and most of its co-conspirators. The defendants have reviewed those documents and copied whichever ones they saw fit to copy.

The Government has provided extensive particulars in three separate bills, including the names of all individual and corporate co-conspirators. The particulars also identify, separately for each count, the approximate dates and locations of and participants in the meetings "at various hotels to discuss and fix prices of commodity ferrosilicon products" (silicon metal in Count Two) referred to in paragraphs 4 and 17 of the

indictment. Seven meetings are identified for Count One and five meetings are identified for Count Two.

The Government is aware of its obligation under Brady and its progeny and the continuing nature of such obligation. The Government has thus far and will in the future fulfill that obligation in a timely manner.

Defendants have everything they need to prepare for trial. Jencks Act statements and Brady impeachment material will be disclosed in sufficient time to permit defendants to make the intended use of such material in cross examining Government witnesses.

ARGUMENT

The defendants, in their Memorandum of Points and Authorities, have cited no authorities for most of the discovery they request in their motion for disclosure of information. They have cited no authority for their requests ((3) and (4)) that the Government produce "any statements attributed to Mr. Zak, which were made in interviews, statements and/or testimony by third parties;" and "any statements made by co-conspirators." As they well know, the law in the Second Circuit and in other Circuits that have addressed this issue is contrary to their position.

The defendants have cited no case that holds that Jencks Act statements (Request 5) or Brady impeachment material (Requests 1 and 2) must be produced at least 60 days prior to trial. Again, the law in the Second Circuit is contrary to their position.

Finally, defendants cite no case that holds that the Government must give notice, at least 60 days before trial, of the general nature of any evidence it intends to introduce pursuant to Fed. R. Evid. 404(b). (Request 6)

Where defendants have cited cases, frequently those cases are not on point or they stand for the opposite point. For example, they cite four cases that they relied on in their bill of particulars motion, United States v. Bortnovsky, 820 F.2d 572, 575 (2d Cir. 1987); United States v. Exolon ESK, No. 94-CR-00017(S); United States v. Bestway Disposal Corp., 681 F. Supp. 1027, **1029** (W.D.N.Y. 1988); and United States v. Greater Syracuse Board of Realtors, 438 F. Supp. 376, **380** (N.D.N.Y. 1977). Defendants' Memorandum at 3, 9. Bortnovsky and the decision and order in Exolon, annexed as Exhibit D to defendants' moving papers, say nothing about the matters at issue in this motion. Bestway and Greater Syracuse Board of Realtors directly contradict defendants' position with respect to disclosure sixty days before trial. In Bestway, the court held that any Brady materials that also constituted Jencks Act statements need not be turned over until the appropriate time provided for in 18 U.S.C. §3500. 681 F. Supp. at **1030.** In Greater Syracuse Board of Realtors, the court denied a request for accelerated production of Jencks Act statements. 438 F. Supp. at **383.**

Requests 1 and 2

Defendants move for an order requiring the Government to respond to defendants' earlier made specific requests for information which they have characterized as exculpatory under Brady and to disclose such information at least sixty days before trial. The Government is aware of its obligation under Brady to provide exculpatory information and the continuing nature of such obligation. The Government has fulfilled that obligation in a timely manner.

Requests 1-9 on pages 5 and 6 of Defendants' Memorandum call for information that is not exculpatory. However, we note that the Government has made available all of the pricing data within its possession, including invoices from SKW and most of its co-conspirators. That data is responsive to requests 1, 3 and 7. We also note that any evidence that the conspirators may have discussed other matters **in addition** to price fixing is neither exculpatory nor relevant to the charges herein. (Requests 2, 8 and 9) The Government has made available all documents in its possession reflecting contacts between competing suppliers relating to dumping matters and buying or selling of product.

With respect to requests 1-8 on pages 6 and 7 of Defendants' Memorandum, the Government has already provided any information that is arguably exculpatory. The Government has responded to requests 5 and 6.

A case recently decided in the Northern District of New York, United States v. Walker, 922 F. Supp. 732, 741

(N.D.N.Y. 1996), states that "it is well-settled in this Circuit that Brady establishes no general right of pretrial discovery, nor does it give rise to any pretrial remedies. In short, Brady does not create a discovery rule." (citations omitted) The court, in Walker, concluded that neither Brady nor Giglio v. United States, 405 U.S. 150, 154 (1972) (dealing with impeachment material) require pretrial disclosure. Id. All that is required is that defendants receive exculpatory and impeachment material at a time when it can be used effectively at trial, i.e., before cross examination. Id. The Government will disclose seven days before trial any information in its possession that might be used to impeach a Government witness.

Defendants' motion for the production of Brady impeachment material at least 60 days before trial should be denied.

Requests 3 and 4

Defendants move for the production of statements attributed to Mr. Zak by third parties and statements made by co-conspirators. Defendants argue that because Fed. R. Crim. P. 16(a)(1)(A) obligates the Government to provide the defendant's own statements, the "logic and rationale behind that rule should apply to the statement of any third person who has repeated any statement attributed to" the defendant. Defendants' Memorandum at 15.

Defendants cite no authority for their request. Indeed, whether logical or not, the law in this circuit is absolutely clear. The defendants' failure to disclose the controlling and

unfavorable authority is disturbing. The statements of co-conspirators, regardless of whether they contain statements attributed to the defendant, are not discoverable under Rule 16(a). In Re United States, 834 F.2d 283, 286 (2d Cir. 1987); United States v. Percevault, 490 F.2d 126, 128-32 (2d. Cir 1974).

The Jencks Act has been recognized as the exclusive procedure for discovering statements made by Government witnesses. In Re United States, 834 F.2d at 286 (citing United States v. Covello, 410 F.2d 536, 543 (2d Cir.), cert. denied, 396 U.S. 879 (1969).

Defendants' motion for production of statements attributed to Mr. Zak by third parties and statements of co-conspirators should be denied.

Request 5

Defendants move for the production of Jencks Act statements at least 60 days prior to trial. The Government has offered to provide this material seven days before trial. That will provide ample time, in the context of a trial involving two counts, two defendants and a relatively small number of substantive witnesses, for defendants to make appropriate use of such material.

The Jencks Act is not intended to be a discovery device. "Disclosures are required by the Jencks Act only for impeachment purposes." In Re United States, 834 F.2d 283, 286,n.2 (2d Cir. 1987) (citations omitted).

The general rule concerning discovery of statements of Government witnesses is that the Jencks Act controls, and a "district court ha[s] no inherent power to modify or amend the provisions of that Act." Id. at 287.

Defendants' motion for Jencks Act statements to be turned over at least sixty days before trial should be denied.

Request 6

Defendants move for the production of Fed. R. Evid. 404(b) information 60 days before trial.

Rule 404(b) provides in pertinent part that:

> [U]pon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

It is well settled that Rule 404(b) is not a rule of discovery and entitles defendant only to notice of the general nature of extrinsic act evidence the Government intends to introduce at trial. United States v. Richardson, 837 F. Supp. 570, 575 (S.D.N.Y. 1993).

The Government offers to give notice of the general nature of any such evidence seven days before trial.

Defendants' motion should be denied.

CONCLUSION

For the reasons stated, the Government respectfully requests the Court to deny all the requests in defendants' motion for disclosure of information.

Dated: New York, New York
September 17, 1996

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