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 RESPONSE TO DEFENDANTS' MOTION FOR A FURTHER BILL OF PARTICULARS

The Government submits this memorandum in response to defendants' motion for a further bill of particulars.

The Government has already provided substantial information in its voluntary Bill of Particulars and agrees to respond to some of the requests contained in the proposed order attached to defendants' motion papers, as set forth below. As a result, the recognized purposes of a bill of particulars have been more than satisfied. Defendants have been sufficiently informed of the nature of the charges against them so that they can prepare their defense, avoid prejudicial surprise at trial and plead double jeopardy as a bar to further prosecution for the same offense.

The Government strongly opposes the defendants' requests which in varying forms call for particulars with respect to all acts in furtherance of the conspiracies charged in this criminal action. These requests call for information substantially beyond what is necessary to satisfy the purposes of a bill of

particulars. They seek to discover all the evidence the Government intends to produce at trial to prove the charges already particularized. Providing such detailed particulars will have the affect of unnecessarily and unfairly restricting the Government's proof at trial. For the above reasons, the Government respectfully requests the Court to deny defendants' motion for particulars beyond those the Government has already provided.

I

PRELIMINARY STATEMENT

The two-count felony indictment in this case, which was returned on April 19, 1996, 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). Commodity ferrosilicon products are alloys of iron and silicon, used primarily in the production of steel and cast iron to improve the properties of the finished product such as its strength and corrosion resistance. Silicon metal is used as

an alloying agent in the production of secondary and primary aluminum.

Defendants entered pleas of not guilty at the arraignment on May 2, 1996. At the pretrial conference which followed the arraignment, this Court set a schedule which, among other things, called for all voluntary discovery to be completed by May 30, 1996. The Government has provided the following voluntary discovery:

1. Statements by the defendants, pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure;

2. Documents produced in the course of the grand jury investigation which resulted in this indictment, pursuant to Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure. Approximately 85 file drawers of documents, which include 15 file drawers produced by defendant SKW, have been made available for inspection and copying;

3. A voluntary Bill of Particulars in response to defendants' requests. (A copy of the Bill of Particulars is attached hereto as Exhibit A.) The bill lists all individual and corporate co-conspirators referred to in each count of the indictment and the approximate date each of them entered the conspiracy. (¶ 1,2,19 and 20) The bill also identifies, 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. (¶ 4,10,11,22,27 and 28.) (The bill states that the Government objects to providing particulars with respect to any other meetings and telephone conversations between and among the co-conspirators in furtherance of the conspiracy.); and

4. Arguably exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

Additionally, the Government will file a supplemental Bill of Particulars responding to items 1, 2, 4-8, 11, 12 and 14-18 of defendants' proposed order (Exhibit D to defendants' papers). In substance, the supplemental bill will state that the term of the conspiracy charged (in each count of the indictment) was to agree to fix the floor and/or transactional prices and that all sales during the relevant period set forth in the indictment were the subject of and affected by the agreement to fix prices. (The supplemental Bill of Particulars is attached hereto as Exhibit B.)

The voluntary Bill of Particulars responded to items 9 and 19 by referring to the indictment which sets forth the time period covered by each count. The bill also responded in detail to items 3, 4, 10, 13, 14 and 20. For the reasons given below, the Government objects to providing any further particulars for those items to which the Government has already responded.

II

DEFENDANTS ARE FULLY INFORMED OF THE CHARGES AGAINST THEM AND ARE NOT ENTITLED TO FURTHER PARTICULARS

Defendants have moved for a further bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure. Their proposed order contains 20 requests, to many of which the Government has provided substantial information in its voluntary and supplemental bills of particulars. The remaining requests call for evidence of all acts in furtherance of the conspiracies charged, including other meetings, telephone conversations, price announcements, price quotations and sales transactions. In making those requests, defendants ignore the proper scope of a bill of particulars, which is to clarify the charges insofar as that may be necessary. Rather, they impermissibly seek all the evidence the Government will produce to prove those charges. One of their stated goals is to limit or "freeze" the Government's proof at trial which they incorrectly argue is a legitimate purpose of a bill of particulars. The Government strongly opposes defendants' motion for particulars beyond those already provided.

Whether a bill of particulars should be provided at all, and, if ordered provided, its specificity are matters within the sound discretion of the court. Wong Tai v. United States, 273 U.S. 77, 82 (1927); United States v. Torres, 901 F.2d 205, 234

(2d Cir.), cert. denied, 498 U.S. 906 (1990) (citing United States v. Panza, 750 F.2d 1141, 1148 (2d Cir. 1984).

The purpose of a bill of particulars is to inform defendants of the nature of the charges against them so that they can (1) prepare their defense; (2) avoid prejudicial surprise at trial; and (3) plead double jeopardy as a bar to any further prosecution for the same offense. Wong Tai, 273 U.S. at 82; Torres, 901 F.2d at 233-34; United States v. Conesa, 899 F. Supp. 172, 176 (S.D.N.Y. 1995).

An important consideration in deciding whether particulars should be granted is the sufficiency of the information already available to defendants prior to trial. Conesa, 899 F. Supp. at 176; United States v. Young & Rubicam Inc., 741 F. Supp. 334, 349 (D. Conn. 1990). "Generally, if the information sought by defendant is provided in the indictment or in some acceptable alternate form, no bill of particulars is required." United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987) (citing United States v. Matlock, 675 F.2d 981, 986 (8th Cir. 1982) and United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 466 (4th Cir. 1979)).

The indictment in this case together with the particulars already furnished and other discovery sufficiently inform defendants of the nature of the charges against them so that they can prepare their defense, avoid surprise at trial and plead double jeopardy. As a result, the purpose of a bill of particulars has been satisfied in this case.

A bill of particulars is not a general investigative tool for the defense, nor is it a device to compel disclosure of all the Government's evidence prior to trial. Torres, 901 F.2d at 234 (citing Hemphill v. United States, 392 F.2d 45, 49 (8th Cir.), cert. denied, 393 U.S. 877 (1968)); Conesa, 899 F. Supp. at 176. When considering whether to order a bill of particulars "[t]he important question is whether the information sought is necessary, not whether it is helpful." United States v. LaMorte, 744 F. Supp. 573, 577 (S.D.N.Y. 1990) (citing United States v. Guerrerio, 670 F. Supp. 1215, 1224 (S.D.N.Y. 1987) and United States v. Payden, 613 F. Supp. 800, 816-18 (S.D.N.Y. 1985.)

Contrary to the defendants' assertion (Fuzak Affirmation ¶ 17), limiting or "freezing" the Government's proof at trial is not a valid purpose of a bill of particulars. Defendants cite no authority to support their position. In fact, courts have refused to grant bills of particulars that "unduly restrict the government's presentation of its case or unduly restrict the government in presenting its proof at trial. Young & Rubicam, 741 F. Supp. at 349; United States v. Litman, 547 F. Supp. 645, 654 (S.D.N.Y. 1982).

The Government objects to providing further particulars with respect to all acts in furtherance of the conspiracy which is what is at the core of many of the defendants' requests, including 3-8, 10, 13-18 and 20. These requests are directed at the evidence of the charges rather than the nature of the charges. In making these requests, defendants demonstrate that

what they seek is to discover the details of and to limit the Government's proof at trial.

This is not a complex case. There are two defendants. There are two counts. The duration of each of the conspiracies is less than two years. There will not be a large number of witnesses and the trial will not be long.

The defendants primarily rely on two antitrust cases to support their requests for particulars of acts in furtherance, United States v. Greater Syracuse Bd. of Realtors, 438 F. Supp. 376 (N.D.N.Y. 1977) and United States v. Exolon-ESK, et al, 94-CR-17S (W.D.N.Y.). Exolon, in turn, relies on Greater Syracuse and on United States v. Bestway Disposal Corp., 681 F. Supp. 1027 (W.D.N.Y. 1988). Defendants' reliance is misplaced.

Defendants, at page 4 of their memorandum of law, contend that it is well-settled in the Second Circuit that criminal antitrust cases require greater particularization and quote from Greater Syracuse, 438 F. Supp. at 380. However, the quote does not support that proposition. Rather, it says that courts have recognized that criminal antitrust cases are different from the "ordinary" criminal case. The next two lines in the paragraph defendants quote from state that the decision whether to grant particulars in a criminal antitrust case is discretionary and should be made on a case-by-case basis. "Unfortunately, for the sake of gleaning some basic principles from those cases, the uniformity ends there. On the matter of requests for Bills of Particulars, the cases reach such diverse results, as could be

expected when dealing with matters of discretion, that their use as precedents in this case is, for the most part, futile." Id. As will be illustrated below, the Greater Syracuse court followed that principle and ordered no particularization in a later criminal antitrust case.

All three cases, Greater Syracuse, Exolon and Bestway, differ from this one in that no substantial particulars had been provided by the Government in those cases. In Greater Syracuse, no particulars had been provided and the court ordered particularization of some overt acts because of the limited allegations contained in the indictment. 438 F. Supp. at 380-381. The Greater Syracuse court subsequently had an opportunity to reconsider the issue of particulars in a criminal antitrust action. See United States v. All States Asphalt, Inc., 86-CR-186 (N.D.N.Y. decided April 24, 1987.) (A copy of the opinion is attached hereto as Exhibit C.) In reviewing requests for particulars similar to the requests in this case, the court in All States stated:

> Defendants are not entitled to be apprised of the overt acts which the government will present at trial in support of the conspiracy charged. Overt acts are not elements of a Sherman Act violation; the government need not prove any other than the act of conspiracy to sustain a conviction. United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 224 & n.59 (1940). Therefore, overt acts are deemed evidentiary in nature and need not be disclosed by the government in advance of trial. Here, unlike United States v. Greater Syracuse Board of Realtors, 438 F. Supp. 376 (N.D.N.Y. 1977), the indictment

> contains allegations of acts in furtherance of the conspiracy. This is sufficient; no further acts need be asserted.

Id. at 3.

It is significant that the indictment in All States, (a copy of which is attached hereto as Exhibit D), does not contain the specificity or detail with respect to acts in furtherance of the conspiracy of the indictment in this case taken together with the voluntary and supplemental bills of particulars.

Exolon is distinguishable from this case. Exolon was a more complex case. The antitrust count, one of four counts, charged five defendants, two corporations and three individuals, with engaging in a conspiracy lasting more than seven years. This case has two defendants and conspiracies of far shorter duration. More importantly, much of the particularization ordered by the court in Exolon has already been provided in this case. Additionally, half of the particulars ordered in Exolon (items 2-5, 9 and 10) related to allegations in the Exolon indictment that are not contained in the indictment in this case.

Bestway in no way supports defendants' requests for particulars with respect to all acts in furtherance of the conspiracies charged. To the contrary, the Bestway court did not order the Government to furnish information with respect to meetings or other acts in furtherance. Bestway charged an allocation and division of customers for refuse removal services. The particulars the court ordered the Government to furnish in

that case included specifying "whether it alleges that the defendants allocated or agreed to allocate specific customers to specific defendants" and "whether it alleges defendants refrained from soliciting specific customers or refrained from quoting prices to specific customers". Bestway 681 F. Supp. at 1029. Analogous information has already been provided to the defendants in this case.

The defendants' reliance on United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) and United States v. Bortnovsky, supra, is also misplaced. Those two cases are inapposite to the circumstances of discovery herein for two basic reasons. First, the Government had provided no particulars. Second, the courts found that defendants had not been sufficiently informed of the crimes charged.

In Davidoff, a RICO case, the Government alleged extortion as a predicate act and then charged four acts of extortion as further substantive crimes. The discovery consisted of the Government supplying the defendant a huge quantity of documents. At trial, the Government proved extortionate acts, under the RICO count, apart from those charged in the substantive counts, which had not been previously disclosed.

Similarly in Bortnovsky, the Government in response to a discovery request supplied the defendant a large quantity of undifferentiated documents relating to insurance claims submitted by the defendant. At trial the Government submitted proof of falsity with respect to a limited number of such claims. The

defendant had been completely misled about the Government's case.

The Government, herein, has informed the defendants exactly what acts they committed that constitute a violation of law. They and co-conspirators agreed to fix prices of commodity ferrosilicon products and silicon metal. The agreement, without more, is a crime under Section 1 of the Sherman Act. No overt act need be charged or proven. Greater Syracuse, 438 F. Supp. at 380. In addition, the Government has disclosed the terms of the agreements, the parties to the agreements, the dates the agreements were entered into and a series of overt acts taken in furtherance of the agreements. All that remains is the evidence the Government intends to introduce at trial. The defendants are not entitled to this information. Torres, supra.

Davidoff and Bortnovsky are further distinguishable. The documents made available to defendants for inspection and copying in this case, unlike the situation in Davidoff and Bortnovsky, are not intended as a substitute for a bill of particulars. Rather, they supplement the information contained in the bills (and go a long way toward providing defendants with the evidentiary detail they improperly seek by requests for particulars). Moreover, the detailed particulars provided by the Government, which, among other things, identify all the unindicted co-conspirators and set forth the approximate time, place and participants in twelve meetings at which defendants and co-conspirators discussed and agreed to fix prices, provide defendants with a detailed road map to assist them in reviewing

the documents made available by the Government.[1] This road map has already led them to notes and other documents reflecting what occurred at several of the meetings identified in the particulars and reflecting other meetings or conversations involving the defendants and co-conspirators. For example, in the voluntary Bill of Particulars, David Beistel of Elkem Metals Company is identified as a co-conspirator and is identified as a participant in meetings with defendant Charles Zak on February 4, 1991 in Zurich, Switzerland and on May 20, 1991 in Pittsburgh, Pennsylvania. The files containing documents produced to the grand jury by Mr. Beistel include notes describing what happened at those meetings as well as notes describing other conversations between Mr. Beistel and Mr. Zak. Defendants will readily find other documents of similar significance by using the particulars already provided by the Government.

[1] Defendants' review of documents was further aided by a list of all the individuals and companies that provided documents in the course of the grand jury investigation. Several of the individuals on the list are identified as co-conspirators.

III

CONCLUSION

For the reasons stated, the Government respectfully requests the Court to deny defendants' motion for particulars beyond those the Government has already provided.

Dated: New York, New York
June 13, 1996

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