IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
v.	)	
	)	NO. 06-cr-466
STOLT-NIELSEN S.A., et al.	)	
	)	Filed: August 20, 2007

GOVERNMENT'S PROPOSED CONCLUSIONS OF LAW

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I.

INTRODUCTION

1. On September 6, 2006, a federal grand jury returned an Indictment charging Stolt-Nielsen S.A. ("SNSA"), Stolt-Nielsen Transportation Group Ltd. (Liberia), Stolt-Nielsen Transportation Group Ltd. (Bermuda) (collectively "SNTG" and together with SNSA, "Stolt"), Samuel A. Cooperman and Richard B. Wingfield with violating Section 1 of the Sherman Act. 15 U.S.C. § 1.

2. On November 22, 2006, defendants filed motions to dismiss the Indictment, pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure, arguing that a January 15, 2003 agreement between the Antitrust Division and Stolt (the "Conditional Agreement") precluded the Antitrust Division from bringing the Indictment.

A. Third Circuit Directive

3. In this proceeding, the Court has followed the Court of Appeals directive that:

> if appellees assert the Agreement as a defense after they are indicted, the District Court must consider the Agreement anew and determine the date on which Stolt-Nielsen discovered its anticompetitive conduct, the Company's and Wingfield's subsequent actions, and whether, in light of those actions, Stolt-Nielsen complied with its obligation under the Agreement to take "prompt and effective action to terminate its part in the

anticompetitive activity being reported upon discovery of the activity."

Stolt-Nielsen S.A. v. United States, 442 F.3d 177, 187 n.7 (3d Cir.), cert. denied, 127 S. Ct. 494 (2006).

4. When a judgment is reversed, it is deprived of all conclusive effect. Id. (citing Joseph A. ex rel. Wolfe v. Ingram, 275 F.3d 1253, 1266 (10th Cir. 2002)). Thus, the Court gives no weight to Judge Savage's findings and conclusions in the prior civil proceeding (which were based on a two-witness hearing), to which defendants refer throughout their proposed findings of fact and conclusions of law.

5. The Court held an evidentiary hearing and received testimony from numerous witnesses, voluminous documentary evidence and heard argument of counsel. The Court is now prepared to answer the three critical questions posed by the Third Circuit: (1) when Stolt discovered its anticompetitive conduct, (2) what actions, if any, Stolt took and (3) whether Stolt's actions satisfied the express terms of the Conditional Agreement to take "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." (Stolt-Nielsen, 442 F.3d 177 at 181; see also GX-1 ¶ 1(a)).

6. The Court is also prepared to determine whether Stolt provided the Government with full, continuing and complete cooperation as required by the Conditional Agreement. (See GX-1 ¶ 2).

B. Standard and Burden of Proof

7. A majority of the Circuits (including the Third Circuit) has set the standard of proof for establishing breach of a non-prosecution or plea agreement at preponderance of the evidence. Compare, e.g., United States v. Wells, M.D., 211 F.3d 988, 995 (6th Cir. 2000) (proof

of breach by preponderance of evidence); United States v. Castaneda, 162 F.3d 832, 836 (5th Cir. 1998) (same); United States v. Roman, 121 F.3d 136, 142 (3d Cir. 1997) (same); United States v. Gerant, 995 F.2d 505, 508 (4th Cir. 1993) (same); with, e.g., United States v. Gregory, 245 F.3d 160, 164 (2d Cir. 2001) (whether government's decision to revoke cooperation agreement was reasonable); United States v. Gonzales-Sanchez, 825 F.2d 572, 578 (1st Cir. 1987) (proof by "adequate evidence"); United States v. Verrusio, 803 F.2d 885, 891 (7th Cir. 1986) (proof beyond a reasonable doubt is not required).

8. Defendants mistakenly rely on the district court's decision in United States v. Skalsky, 621 F. Supp. 528, 530 (D.N.J. 1985), in asserting that the standard for establishing breach is clear and convincing evidence. In Skalsky, the Third Circuit merely held that the lower court's finding that Skalsky had materially breached his non-prosecution agreement "was not clearly erroneous," without ever addressing whether the lower court's application of a clear and convincing standard was correct. United States v. Skalsky, 857 F.2d 172, 179 (3d Cir. 1988).

9. The Court sees no reason to depart from the majority and concludes that the standard of proof for establishing breach of the Conditional Agreement is preponderance of the evidence.

10. In this Circuit, the party alleging breach bears the burden of proof. United States v. Floyd, 428 F.3d 513, 515-16 (3d Cir. 2005); United States v. Roman, 121 F.3d at 142. The Government, however, has assumed the burden of proving by a preponderance of the evidence that Stolt breached the Conditional Agreement.

II.

THE COURT'S ROLE AS FACT-FINDER

11. The Court has considered all of the evidence, including the testimony of over twenty witnesses and thousands of pages of documentary evidence. The Court has weighed the relevant evidence, drawn reasonable inferences, and has made credibility determinations as reflected in the findings of fact. These determinations were made in accordance with the following principles of law:

A. Witness Credibility and Weight of Evidence

12. Credibility of witnesses is determined from several factors, including witness demeanor and manner while on the witness stand, relation to a party in the case, self-interest, motives and state of mind. See, e.g., Hoffa v. United States, 385 U.S. 293, 312 n.14 (1966); United States v. Universal Rehab. Serv., Inc., 205 F.3d 657, 666 (3d Cir. 2000). Among other things, in assessing the credibility of the Stolt employee witnesses, including Bjorn Jansen, the Court considered their status as employees of defendant Stolt and their motive to provide testimony helpful to defendants.

13. In assessing the credibility of defendant Richard Wingfield, the Court considered his status as a defendant in this criminal case. When a defendant takes the stand, "his credibility may be impeached and his testimony assailed like that of any other witness." Portuondo v. Agard, 529 U.S. 61, 69 (2000) (internal quotations and citation omitted). The interests of the defendant, however, may seriously affect the credibility of the defendant's testimony and may create a motive to testify falsely. See Reagan v. United States, 157 U.S. 301, 305-6 (1895) (when witness is a defendant, fact that his interest is greater than that of any other witness affects

evaluation of his credibility); United States v. Martin, 525 F.2d 703, 706 (2d Cir. 1975) (same).

14. The Court has considered the inconsistencies, if any, in the testimony of all the witnesses – both the defense witnesses and the Government witnesses – and has given their testimony the weight it deems proper in light of all other evidence. See Piraino v. Int'l Orientation Resources, Inc., 137 F.3d 987, 991 n.2 (7th Cir. 1998) ("[I]t is within the district judge's discretion to believe or disbelieve testimony based on the overall credibility of the witness; a misleading statement does not require the judge to disbelieve everything the witness says."); Champion Papers, Inc. v. N.L.R.B., 393 F.2d 388, 394 (6th Cir. 1968) ("A factfinder – jury, judge or administrative agency – is not barred from finding elements both of truth and untruth in a witness' testimony."); see also United States v. Boone, 279 F.3d 163, 189 (3d Cir. 2002) ("witness' testimony is not insufficient to establish a point simply because he or she later contradicts or alters it").

15. Uncorroborated testimony of a cooperating coconspirator is sufficient to satisfy the Government's burden of proof here because such testimony may be sufficient to support a conviction, which requires a greater burden of proof. See Boone, 279 F.3d at 188 (citation omitted); United States v. Turner, 319 F.3d 716, 721 (5th Cir. 2003) ("As long as it is not factually insubstantial or incredible, the uncorroborated testimony of a co-conspirator, even one who has chosen to cooperate with the government in exchange for non-prosecution of [sic] leniency, may be constitutionally sufficient evidence to convict.") (internal quotations and citation omitted) (emphasis added); see also United States v. Perez, 280 F.3d 318, 344 (3d Cir. 2002) (following "Supreme Court in holding that uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction.") (citing United States v.

DeLarosa, 450 F.2d 1057, 1060 (3d Cir. 1971) (internal quotations omitted)).

16. In assessing the credibility of the Jo Tankers B.V. ("Jo Tankers") and Odfjell Seachem AS ("Odfjell") witnesses, each of whom was a coconspirator of the defendants, the Court concludes that on the critical factual issues in this case, their testimony was corroborated by defense admissions, by the testimony of other witnesses including Stolt employees, and by contemporaneous documentary evidence from the files of defendant Stolt and its coconspirators, Odfjell and Jo Tankers. (See, e.g., Gov't Proposed Findings of Fact ("Gov't FOF") 265-296). The Court finds that their testimony was more than sufficient to satisfy the Government's standard of proof on the factual issues in this case.

17. Expert testimony is weighed by the Court in the same manner as other testimony. See, e.g., Drysdale v. Woerth, 153 F. Supp. 2d 678, 689 (E.D. Pa. 2001). "The fact finder is free to accept or reject expert testimony as it deems proper, even if such testimony is uncontroverted." Id. (citation omitted). In assessing the credibility of defendants' expert witness, the Court considered, among other things, his motive and bias in favor of defendants.

18. Unlike testimony, questions posed to witnesses by counsel are not evidence. See United States v. McCarthy, 54 F.3d 51, 55-56 (2d Cir. 1995); Rock v. Nat'l R.R. Passenger Corp., No. Civ. A. 04-1434, 2005 WL 1899503, at *8 (E.D. Pa. Aug. 9, 2005); Calvert v. Doctor Pet Ctr, Inc., No. Civ. A. 93-4956, 1995 WL 541826, at *1 (E.D. Pa. Sept. 11, 1995).

19. The Court has disregarded any proposed defense findings based upon questions of counsel rather than the witness' testimony, e.g., defendants have improperly proposed findings based on facts found in counsel's questions asking a witness whether he was aware of certain facts, to which the witness responded he was not. For example, Stolt has proposed the following

finding: ". . . Unknown to Mr. Haugsdal, Mr. Holsen had informed the Division that Odfjell reduced its rates . . . ." (Stolt Proposed Findings of Fact ("Stolt FOF") 393). In fact, what Mr. Holsen had informed the Division is not in evidence and Stolt is improperly basing its proposed finding solely on the question of counsel, to which Mr. Haugsdal replied "No, I'm not aware of it." (Haugsdal, 6/12/07 p. 215 lines 14-19).

20. Evidence admitted for a limited purpose is considered for that purpose only. Fed. R. Evid. Rule 105; see also, e.g., United States v. Butch, 256 F.3d 171, 176 n.4 (3d Cir. 2001) ("for the limited purpose for which . . . evidence has been received, you may give it such weight as you feel it deserves"); Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1117 (8th Cir. 1985).

21. Documents that were admitted not for their truth, but for a limited purpose will be relied upon solely for that purpose. Defendants' reliance on any such document for any other purpose is improper. For example, in Stolt FOF 418–420, Stolt repeatedly relies on documents not admitted for the truth to support its proposed findings. (E.g., DX-2543) (limited purpose - fact of communication). In considering any proposed findings improperly based on documents admitted for limited purposes, the Court has given such documents the weight they deserve.

B. Inferences

22. The Court may infer consciousness of guilt from false exculpatory statements of a defendant. See Government of Virgin Islands v. Testamark, 570 F.2d. 1162, 1168 (3d Cir. 1978); United States v. Chaney, 446 F.2d 571, 576 (3d Cir. 1971) (exculpatory statements when shown to be false are circumstantial evidence of guilty consciousness and have independent probative value); see also United States v. Hudson, 717 F.2d 1211, 1215 (8th Cir. 1983); United

States v. Kirk, 584 F.2d 773, 778-790 (6th Cir. 1978). "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." Williamson v. United States, 512 U.S. 594, 599-600 (1994).

23. For example, the Court has considered the fact that Wingfield made a false exculpatory entry in his business journal concerning his discussions with Nilsen of Odfjell about the Sasol bid. Wingfield wrote that he "told [Nilsen] won't discuss" Sasol (GX-26B.5747), when in fact he admitted on cross examination that he had a number of discussions with Nilsen about Sasol on the day bids were submitted. (See Gov't FOF 139-144). The Court concludes that this false entry by Wingfield is strong evidence of his consciousness of guilt, i.e., Wingfield knew that his discussions with Nilsen concerning the Sasol bid in October 2002 were conspiratorial, but tried to conceal them.

24. The Court also considered the false statements defendant Cooperman made following O'Brien's discovery of the Jansen Memo. For example, Cooperman wrote a report in which he stated that he conducted an investigation in February 2002, that Stolt business directors denied knowledge of ongoing antitrust violations, and that Wingfield and Jansen denied the Jansen Memo involved Stolt's illegal agreement with competitors. (GX-13B, at 2-3). Cooperman's statements were shown to be false in light of the testimony of Stolt business directors. (See Gov't FOF 39-48). Cooperman also made false statements to SNSA's Board of Directors both in August and November 2002. (See Gov't FOF 116-121, 255-258). Cooperman's false statements were intended to conceal evidence of the conspiratorial agreement and the fact that the Jansen Memo contained an analysis of that conspiracy, and the Court has considered them in assessing the other evidence of Cooperman's conduct following O'Brien's

discovery of the conspiracy.

25. An adverse inference should not be drawn against the Government where an absent witness' testimony would be cumulative and the witness was not peculiarly within the control of the Government. See United States v. Drozdowski, 313 F.3d 819, 824 n.3 (3d Cir. 2002); United States v. Jones, 404 F. Supp. 529, 546 (E.D. Pa. 1975). A missing witness inference likewise should not be drawn where the uncalled witness is available to both parties. See Johnson v. United States, 291 F.2d 150, 155 (8th Cir. 1961); McClanahan v. United States, 230 F.2d 919, 925 (5th Cir. 1956); cf. United States v. Jackson, 257 F.2d 41, 44 (3d Cir. 1958) ("in passing upon this question of equal availability, the trial Judge is called upon to take into account all of the attendant facts and circumstances bearing upon the situation of the witnesses with relation to the parties, respectively").

26. In this case, the Court declines defendants' invitation to infer that Knut Holsen's testimony would have been adverse to the Government simply because the Government did not call him (see, e.g., Stolt FOF 392, 405, 719): First, contrary to defendants' assertions, Holsen was not solely in the Government's control. Defendants themselves were free to call Holsen – and indeed had Holsen under subpoena prior to the hearing – but chose not to call him. (See May 3, 2007 Stipulation and Order Regarding Subpoenas by Stolt-Nielsen to Employees of Odfjell Seachem and Odfjell USA, Inc. (Doc. No. 159); see also, e.g., Unites States v. Keller, 512 F.2d 182, 186 (3d Cir. 1975) ("It is perfectly proper to comment on failure of defense to call a potentially helpful witness . . . ."). Second, Holsen's testimony would have been cumulative. Government witnesses Nilsen and Haugsdal – who participated directly in rigging the Sasol bid with Wingfield – testified about Holsen's role in Sasol. (See Gov't FOF 136-137, 154). Stolt

witness Vogth Eriksen testified about Holsen's call to complain about Sasol, supporting and corroborating the Government's other evidence. (See Gov't FOF 136-137, 453).

III.

THE CONDITIONAL LENIENCY AGREEMENT

A. Construed According to Principles of Contract Law

27. The January 15, 2003 Agreement conditionally admitted Stolt into the Division's Corporate Leniency Program and is a type of non-prosecution agreement. (GX-1).

28. Non-prosecution agreements, like plea bargains, are binding contracts and, as such, are construed under general principles of contract law. United States v. Baird, 218 F.3d 221, 229 (3d Cir. 2000); United States v. Castaneda, 162 F.3d 832, 835 (5th Cir. 1998).

29. As such, the Conditional Agreement should be read according to its plain meaning. See In re Tops Appliance City, Inc., 372 F.3d 510, 514 (3d Cir. 2004) ("while the plain-meaning rule is not absolute, the words used, even in their literal sense, are the primary, and ordinarily most reliable, source of interpreting the measure of any writing . . .") (internal quotations and citation omitted).

30. And, "like any contract, [it] should be construed as a whole, so that various provisions of the contract are harmonized and none are rendered meaningless." United States v. Schilling, 142 F.3d 388, 395 (7th Cir. 1998) (internal quotations and citations omitted); accord United States v. Skalsky, 857 F.2d 172, 176 (3d Cir. 1988); H.C. Lawton, Jr., Inc. v. Truck Drivers, 755 F.2d 324, 328 (3d Cir. 1985) (contract to be read as a whole; contract terms "must be construed so as to render none nugatory") (internal quotations and citation omitted); see also CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc., 381 F.3d 131, 137 (3d Cir. 2004).

31. Accordingly, while enforcing what "[t]he plea agreement explicitly states," the Third Circuit explained in United States v. Carrara, 49 F.3d 105, 107 (3d Cir. 1995), that "[s]pecific performance requires that the court enforce every portion of the agreement, which most specifically here includes the government's right to withhold its [promised downward departure] motion because Carrara gave false testimony." See also New Wrinkle, Inc. v. John L. Armitage & Co., 238 F.2d 753, 757 (3d Cir. 1956) ("[O]ne of the basic canons of contract construction . . . is that the Court must look to the whole instrument, and ascertain the intention of the parties by an examination of all that they have said, rather than of a part only.").

B. Stolt's Required Performance Under the Conditional Agreement

1. Prompt and effective action to terminate upon discovery

32. In paragraph 1(a) of the Conditional Agreement, Stolt represented that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." (GX-1 ¶ 1(a)). The truth of this representation is a condition precedent of the Agreement. (See infra Gov't Proposed Conclusions of Law ("Gov't COL") 35-36, 38-40).

2. Full, continuing and complete cooperation

33. In paragraph 2 of the Conditional Agreement, Stolt agreed "to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to," seven specified types of cooperation. (GX-1 ¶ 2(a)-(g)). One of these types of cooperation was that Stolt provide "a full exposition of all facts known to [Stolt] relating to the anticompetitive activity being reported." (GX-1 ¶ 2(a)).

C. Antitrust Division's Required Performance Under the Conditional Agreement

1. Not to prosecute

34. In paragraph 3 of the Conditional Agreement, the Antitrust Division agreed "conditionally to accept [Stolt] into . . . the Corporate Leniency Program" and, pursuant to that Program, "not to bring any criminal prosecution against [Stolt] for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." (GX-1 ¶ 3).

2. Right to verify

35. The Division's performance, however, was expressly conditioned on Stolt's successful performance of its obligations. (GX-1 ¶ 3). Paragraph 3 of the Conditional Agreement states that the Government's performance is "[s]ubject to the verification of [Stolt's] representations in paragraph 1 above [prompt termination], and subject to its full, continuing and complete cooperation, as described in paragraph 2." (GX-1 ¶ 3).

36. The Division's right to verify and determine whether Stolt actually qualified for leniency was prospective, i.e., the Division would determine after the Conditional Agreement was signed whether Stolt's representation that it took prompt and effective action to terminate was true. (See GX-1 ¶ 3).

3. Right to declare void and revoke conditional acceptance into Corporate Leniency Program

37. The Conditional Agreement further provides that, if at any time the Division determines that Stolt has violated the terms, the Agreement "shall be void, and the Antitrust Division may revoke the conditional acceptance of [Stolt] into the Corporate Leniency Program [and] . . . may thereafter initiate a criminal prosecution against [Stolt], without limitation." (GX-

1 ¶ 3).

D. Conditional Agreement Did Not Grant Stolt Leniency

1. Leniency to the date of the Agreement granted only if Stolt first strictly complied with its obligations

38. The Agreement clearly provides that the Agreement is conditional: "This agreement is conditional and depends upon [Stolt] satisfying the conditions. . . ." (GX-1, preamble).

39. Thus, on the date it was signed, the Conditional Agreement did not grant Stolt leniency for its illegal conduct up to the January 15, 2003 date of the Agreement. Rather, it conditionally accepted Stolt into the Corporate Leniency Program and promised leniency through January 15, 2003 if, and only if, Stolt first strictly satisfied its obligations. To conclude otherwise is inconsistent with the express terms of the Conditional Agreement and would read out of the contract both the requirement that Stolt must have ceased its illegal activity upon its discovery, and the Division's express right to verify Stolt's eligibility for leniency. See Stolt-Nielsen, 442 F.3d at 180 (Government's promise not to prosecute "was, of course, subject to Stolt-Nielsen's strict compliance with the aforementioned conditions. . ..") (emphasis added).

40. Stolt counsel, John Nannes, understood the conditional nature of the Agreement (see Gov't FOF 363-364), and explained all of the conditions of the Leniency Program to Stolt counsel and Cooperman at a meeting on November 22, 2002. (See Gov't FOF 249-250, 254, 365-366). Wingfield and Cooperman also understood that the Agreement was conditional, as evidenced by a November 25, 2002 entry in Wingfield's business journal recording a meeting he had with Cooperman about the Leniency Program. (See GX-26C.5790.A; Gov't FOF 419).

2. If leniency granted, granted to date of certain legal withdrawal

41. If Stolt had strictly complied with its obligations under the Conditional Agreement, it would have received protection from prosecution for its conduct up to the date of the Agreement, rather than the earlier date when it was required to terminate its own part in the conspiracy. (See GX-1 ¶ 3). This is because an applicant's "termination" for leniency purposes, i.e., termination of its own activity, might not constitute legal withdrawal from the conspiracy. (See GX-1 ¶ 1(a); Gov't FOF 353; infra Gov't COL 62-64).

42. A conspiracy exists if there is a common scheme in which defendant participated. Bourjaily v. United States, 483 U.S. 171, 183 (1987). A conspirator is liable for the acts of his coconspirators that were taken in furtherance of the conspiracy, Pinkerton v. United States, 328 U.S. 640, 647-48 (1946), and he remains "liable for . . . his co-conspirators' acts as long as the conspiracy continues unless he withdraws prior to the conspiracy's termination." United States v. Kushner, 305 F.3d 194, 198 (3d Cir. 2002).

43. "Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal." United States v. Steele, 685 F.2d 793, 803 (3d Cir. 1982); see also United States v. Jackson, No. 93-57-4, 1995 WL 27161, at *2 (E.D. Pa. Jan. 20, 1995) (arrest and incarceration have been found not to constitute withdrawal from a conspiracy where there was no clear notification to co-conspirators that the defendant abandoned the conspiracy). "The defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals." United States v. Antar, 53 F.3d 568, 583 (3d Cir. 1995) (citations omitted) (emphasis added). Until a coconspirator legally withdraws from a continuing conspiracy, like the customer allocation conspiracy in this case, that conspirator is

"consciously offending," even if he has terminated his own illegal conduct. Hyde v. United States, 225 U.S. 347, 368-70 (1912).

44. A confession to the authorities (like Stolt's signing the January 15, 2003 Conditional Agreement), however, is clear evidence of withdrawal. See United States v. DePeri, 778 F.2d 963, 979-80 (3d Cir. 1985).

45. Accordingly, assuming Stolt first had complied strictly with its obligations, the Conditional Agreement provides non-prosecution coverage until that clear withdrawal date to give protection for any "conscious offending," Hyde, 225 U.S. at 370, that may have occurred prior to that date by the Stolt's failure legally to have withdrawn earlier.

E. Stolt's Directors, Officers and Employees

46. Paragraph 4 of the Conditional Agreement provides that subject to Stolt's "full, continuing and complete cooperation," Stolt's directors, officers and employees will not be prosecuted for their participation in the conspiracy if they fulfill individual cooperation obligations, including, but not limited to five specified types of cooperation. (GX-1 ¶ 4). One of these types of cooperation is that the individual "otherwise voluntarily provid[e] . . . any materials or information, not requested in . . . this paragraph, that he or she may have relevant to the anticompetitive activity being reported." (GX-1 ¶ 4(d); see also GX-3 ¶ C (If a corporation qualifies for leniency, its "directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.")). Accordingly, Cooperman and Wingfield, as officers and employees of Stolt, were intended third-party beneficiaries of the Conditional Agreement. (See infra Gov't COL 93-99).

F. Integration Clause

47. Paragraph 5 of the Conditional Agreement states that "[t]his letter constitutes the entire agreement between the Antitrust Division and [Stolt], and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein." (GX-1 ¶ 5).

48. Accordingly, evidence of meetings and telephone discussions between Stolt counsel and the Division before January 15, 2003 is relevant only to the extent that it informs the Court's decision on what the parties understood language in the Conditional Agreement to mean.

49. For example, evidence regarding meetings and discussions Stolt counsel had with the Division prior to signing the Conditional Agreement confirms Stolt's awareness that the Agreement was expressly conditioned on Stolt's first satisfying the requirements of the Corporate Leniency Program, and those requirements are set forth in the Conditional Agreement. (Compare GX-1 ¶ 3 with GX-3, at 2-3; see also Gov't FOF 333-341).

50. The evidence further shows that Stolt's counsel, Nannes, was aware of the Division's policy statements that provide guidance and explain the meanings of various terms in the Conditional Agreement, including "discovery" and "prompt and effective action to terminate," and that the parties' intended those terms to have the meanings set forth in the Division's policy statements. (See Gov't FOF 323, 325, 327, 332, 345).

IV.

STOLT BREACHED THE AGREEMENT'S CONDITION PRECEDENT OF PROMPT AND EFFECTIVE ACTION TO TERMINATE

51. For the reasons stated below, in paragraph 1(a) of the Conditional Agreement, Stolt falsely represented that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity."

A. The Anticompetitive Activity Being Reported: Worldwide Customer Allocation Scheme

52. The term "anticompetitive activity being reported" is defined in the Conditional Agreement as "possible collusive activity or other conduct violative of the Sherman Act in the parcel tanker industry involving transportation to and from the United States." (GX-1 ¶ 1) (emphasis added).

53. Contrary to defendants' claims, the word "involving" does not mean "limited to." The principal meaning of the word "involving" is "including." See American Heritage Dictionary of the English Language (4th ed. 2000) at 921, definition 1 ("involve" (and its participial form "involving") means "to contain as a part; include.").

54. Stolt has defined the activity it reported as "a customer-allocation conspiracy . . . carried out through the exchange of customer lists . . . ." (Stolt Reply Mem. in Supp. of Mot. to Dismiss (Doc. No. 108), at 9). Those customer allocation lists, which Stolt states it provided as part of its report to the Government, involve customers on every major trade lane around the world, i.e., customers whose shipments were between foreign ports, as well as customers with shipments to and from the United States. (See GX-37; GX-38; GX-39A; GX-41).

55. Accordingly, the Court concludes that the term "anticompetitive conduct being

reported" is not limited to cartel activity on U.S. trade routes, but includes the full worldwide scope of the defendants' conspiracy. Stolt's performance under the Conditional Agreement (truthful representations and cooperation) applies to the very worldwide customer allocation scheme it reported.

B. The Date of Discovery: When O'Brien Found and Read the Jansen Memo in January 2002

56. The term "discovery" is not defined in the Conditional Agreement. Contrary to defendants' assertions, there is no basis to conclude that "discovery" under the Conditional Agreement requires "smoking gun" evidence, or any other specific quantum of evidence, such as knowledge of facts sufficient to establish conclusively a per se violation of the antitrust laws.

57. Rather, the parties intended the term "discovery" to have the meaning contained in the Antitrust Division's policy statement issued April 1, 1998 (the "1998 Policy Statement"). (See GX-4; Stolt Proposed Conclusions of Law ("Stolt COL") 46). Discovery is defined by the Division in the 1998 Policy Statement as occurring "at the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) were first informed of the conduct at issue." (GX-4, at 3-4) (emphasis added).

58. At the time the Conditional Agreement was signed, there was no way for the Government to know with certainty the earliest date on which either Stolt's Board of Directors or its corporate counsel was first informed of its conduct. (See Gov't FOF 324, 353). Thus, the Conditional Agreement defines discovery as an event rather than a specific date. Whether the Government could have included a specific date of discovery in the Conditional Agreement is irrelevant because discovery as defined was meaningful to the parties. Accordingly, defendants' reference to the language in a leniency agreement involving Christies International plc is

inapposite. (See Gov't FOF 354).

59. The Court concludes that Stolt discovered its anticompetitive activity in January 2002 when its then general counsel, Paul O'Brien, found and read a copy of the Jansen Memo (GX-2) – a document both Jansen and Wingfield concede is an analysis of the conspiracy – which had been left anonymously on O'Brien's desk. (See Gov't FOF 34, 414). In that memorandum, Jansen reported to Wingfield that he and Stolt's other business directors had concluded that Stolt would make more money by continuing the conspiracy with Odfjell: "There is a fairly strong sense among people here that the continued coop is preferable . . . [to] going to 'war' . . . [because] a net gain from going to war is not easily seen." (GX-2, at 2). Jansen explained that if Stolt were to "break the coop" and "go to war" with Odfjell, Stolt would "suffer a reduction in rates" and it would "take a long time to put it back together." (Id.). These terms, on their face, reflect Stolt's involvement in an illegal agreement with Odfjell, not a unilateral decision not to compete, and given his positions with and history at Stolt, O'Brien was especially equipped to understand this. (See Gov't FOF 23-27, 29-36). Indeed, Nannes testified that Cooperman told him O'Brien reported that Stolt was engaged in an "express agreement with Odfjell to allocate customers," "as exhibited in the Jansen [Memo]" in violation of the law. (See Gov't FOF 37-38).

60. The Court also bases its conclusion that O'Brien discovered the conspiracy on the evidence of Stolt's reaction to O'Brien's discovery. (See Gov't FOF 37, 38, 422). Stolt's reaction to O'Brien's discovery - claiming it dramatically toughened its antitrust policy - belies its claim that O'Brien did not discover the conspiracy. (See Gov't FOF 51-56). Wingfield's subsequent statements to coconspirators at Odfjell and Jo Tankers wherein he alerted them to

O'Brien's discovery of the conspiracy also support the Court's conclusion. (See Gov't FOF 65-68, 77, 78, 90).

61. Accordingly, the Court finds that the date of discovery is January 2002, when O'Brien found and read the Jansen Memo. That event triggered Stolt's obligation to have taken prompt and effective action to terminate its role in the conspiracy.

C. Actions Stolt Took Were Not Prompt and Effective Action to Terminate Its Part in the Anticompetitive Activity

1. Meaning of prompt and effective action to terminate

62. The phrase "prompt and effective action to terminate" is not defined in the Conditional Agreement. The parties intended interpretation of this phrase to be guided by the Division's 1998 Policy Statement. (See Gov't FOF 348-349).

63. The 1998 Policy Statement provides express guidance to leniency applicants on the meaning of their obligation to take "prompt and effective action to terminate their illegal activity upon discovery." Specifically, a leniency applicant must either legally withdraw or "refrain[ ] from further participation [in the conspiracy] unless continued participation is with Division approval." (GX-4, at 3; see also Gov't FOF 350-352).

64. Stolt concedes this understanding of its obligation. (Stolt Mem. in Supp. of Mot. to Dismiss (Doc. No. 90), at 12–13). In fact, during antitrust compliance seminars Stolt conducted after O'Brien's discovery, Stolt's counsel discussed the Division's Leniency Policy and explained that prompt termination meant "[s]top illegal activity immediately upon discovery." (GX-30 (Slide from Stolt Antitrust Compliance Seminar Presentation, Apr. 2002), at 21; see also Gov't FOF 350).

2. Stolt failed to take prompt and effective action to terminate because Wingfield and

Jansen continued to conspire

65. For the reasons below, the Antitrust Division sufficiently demonstrated that Stolt continued to engage in conspiratorial conduct long after O'Brien's January 2002 discovery of the cartel, and so it failed to take prompt and effective action to terminate its part in the conspiracy as required under the Conditional Agreement.

a. Wingfield and Jansen continued to have conspiratorial meetings and discussions with Jo Tankers and Odfjell until November 2002

66. Although Stolt issued a revised antitrust policy in response to O'Brien's discovery, there is sufficient evidence that when Wingfield was sent to meet with his coconspirators at the March 2002 NPRA meeting, he informed them of the difficulty O'Brien was causing, but assured them the conspiracy would continue. (See Gov't FOF 60-82). Wingfield repeated that message during a meeting with Odfjell in June 2002. (See Gov't FOF 87-91).

67. There is also sufficient evidence that despite its revised antitrust policy, Stolt continued to abide by the terms of the allocation agreement until November 2002, through the activities of both Wingfield and Jansen. (See, e.g., Gov't FOF 100-113, 193-215 (SK Corp.), 122-160 (Sasol), 161-176 (October Heathrow Meeting), 177-192 (Shell-Pecten), 216-246 (lack of competition)).

68. Section 1 of the Sherman Act prohibits "[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 . . . ." 15 U.S.C. § 1. "The existence of an agreement is "[t]he very essence of a section 1 claim," In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3d Cir. 2004) (quotation omitted), i.e., the crime is the illicit agreement and an overt act to carry the conspiracy

into effect is not an essential element of the crime. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 402 (1927).

69. Defendants' suggestion that Wingfield's and Jansen's conduct in 2002 was not conspiratorial, but amounted to mere "information exchanges" or "complaints" (see Stolt COL 76-77), misses the point. For purposes of this hearing, it is undisputed that there was an antitrust conspiracy, i.e., an illicit agreement, beginning at least as early as August 1998 and continuing until March 2002. The Government need not prove that a conspiracy existed, only that the existing conspiracy continued, e.g, there was some overt act beyond March 2002. See, e.g., United States v. U.S. Gypsum Co., 600 F.2d 414, 418 (3d Cir. 1979) (to bring antitrust conspiracy into statutory period, no requirement that the Government prove a new agreement, only some overt act to show conspiracy continued); Safarik v. United States, 62 F.2d 892, 896 (8th Cir. 1933) (in a continuing conspiracy, proof of an overt act is necessary to establish continued existence of the conspiracy). Wingfield's and Jansen's discussions of customers and bids with Odfjell and Jo Tankers show that the conspiracy, in fact, continued beyond March 2002. (See supra Gov't COL 67).

70. Among the overt acts beyond March 2002 were agreements concerning bidding to Shell-Pecten and SK Corp. in November 2002. Defendants' suggestion that if there was no quid pro quo between Wingfield and Jo Tankers on the Shell-Pecten and SK contracts, the communications were not conspiratorial is wrong. Although the evidence shows that there was a quid pro quo (see Gov't FOF 177-192, 198-202), even if there was not, evidence in a conspiracy must be viewed as a whole, and the communications on each contract independently were

intended to and did reduce competition in furtherance of the conspiracy. See American Tobacco Co. v. United States, 147 F.2d 93, 106 (6th Cir. 1944) ("[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.").

71. Furthermore, that Stolt did not bid on Jo Tanker's Shell-Pecten contract is legally irrelevant. When he gave prices to Wingfield on the Shell-Pecten contract, van Westenbrugge understood that Stolt would not be competing for Jo Tankers' contract. That knowledge enabled Jo Tankers to submit prices to Shell-Pecten without worrying about competition from one of it's largest competitors. See United States v. W.F. Brinkley & Son Constr. Co., Inc., 783 F.2d 1157, 1160 (4th Cir. 1986) (by giving competitor amount to bid, low bidder gained knowledge that competitor would not be competing for contract, and such conduct constituted bid rigging in violation of antitrust laws).

b. Stolt's revised antitrust policy did not effectively terminate its participation in the conspiracy

72. The Court declines to adopt Stolt's argument that its revised antitrust policy was sufficient to satisfy its obligation to take prompt and effective action to terminate its illegal conduct. (See Stolt COL 88-97).

73. Stolt's revised antitrust policy does not satisfy the Conditional Agreement's requirement that it take prompt and effective action to terminate its illegal conduct upon its discovery because Wingfield, the executive in charge of Stolt's parcel tanker shipping business and the company's key representative in the conspiracy, and Jansen, his chief subordinate in the conspiracy, never abided by the policy and continued to carry out the conspiracy in the same manner and with the very same executive from Odfjell and Jo Tankers as they did before

O'Brien's discovery. Cf. U.S.S.G. § 8C2.5(f)(3)(A) (a compliance program for purposes of the sentencing guidelines, is presumed ineffective "if an individual within high-level personnel of the organization . . . participated in . . . the offense."); U.S.S.G. § 8B2.1(b)(3) (in order to have an effective compliance program, a corporation "shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew . . . has engaged in illegal activities . . .") (emphasis added).

74. Moreover, it is apparent that Stolt did not apply its revised antitrust policy to Wingfield and Jansen, as it did to other Stolt employees. For example, Stolt's approach to lower-level employee contacts with competitors stands in marked contrast to its approach to Wingfield, who was permitted - even directed - to meet competitors, unaccompanied, unsupervised and with no minutes or other written record of the discussions. (See Gov't FOF 89, 175-176, 433-438). Additionally, Cooperman and Stolt failed to take any action at all when Humphreys informed him that Wingfield committed a blatant violation of the revised policy by speaking to Odfjell about Sasol the morning the final bids were submitted. (See Gov't FOF 147-151, 156, 439-443). Finally, just as Cooperman took no action in response to Wingfield's violation, Wingfield admitted that he likewise took no action when he witnessed Jansen violate the antitrust policy by discussing a complaint regarding Equatorial, a Stolt-allocated customer, with Nilsen during the October London meeting. Nor did he make any report of Jansen's violation to Stolt counsel, as required by the policy. (See GX-29; Gov't FOF 171, 172, 174, 262h., 302e., 444).

3. Stolt is responsible for the conspiratorial conduct of Wingfield and Jansen

75. A corporation is liable for the antitrust violations of its employees acting within the scope of their employment or apparent authority, even though those actions were contrary to company policy and his actual instructions. United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970); United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406-07 (4th Cir. 1985); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972); United States v. Armour & Co., 168 F.2d 342, 343-44 (3d Cir. 1948) (finding employer liable for illegal acts of employees, even though employer had cautioned against such actions: employer must "stand or fall with those whom he selects to act for him").

76. Because Wingfield was Stolt's Managing Director of Tanker Trading, its highest ranking executive in charge of the company's parcel tanker shipping business, and Stolt's key representative in the conspiracy prior to March 2002, Odfjell and Jo Tankers had every reason to believe he had the authority to continue the conspiracy, notwithstanding the revised antitrust policy, and that Wingfield and Jansen were not acting as rogue employees.

77. Accordingly, Stolt is liable for continued participation in the conspiracy because Stolt's agents Wingfield and Jansen continued to participate in the conspiracy.

V.

STOLT BREACHED THE AGREEMENT'S COOPERATION PROVISION

78. For the reasons below, the Antitrust Division sufficiently demonstrated that Stolt failed to provide the "full, continuing and complete cooperation" required under the Conditional Agreement. (See GX-1 ¶ 2).

79. In construing cooperation provisions contained in plea and non-prosecution

agreements, the Third Circuit has repeatedly held that a defendant who provides incomplete or misleading information breaches a plea agreement requiring a complete disclosure of truthful information. For example, in United States v. Skalsky, 857 F.2d 172 (1988), the Third Circuit reviewed a district court finding that Skalsky materially breached his non-prosecution agreement by failing to disclose completely all information concerning his dealings with a grand jury target. Noting that Skalsky gave the Government "misleading answers" that "threw the agents off the scent" (the court never characterized the answers as untruthful), the court concluded that Skalsky's information was "a far cry from the 'complete, truthful and accurate information and testimony' contemplated by his agreement with the government," and amounted to a "material[] breach[]" of the agreement because "the grand jury's investigation . . . was severely hampered by Skalsky's incomplete and evasive testimony." Id. at 178-79 (citation omitted) (emphasis added). Accord United States v. Gonzalez-Sanchez, 825 F.2d 572, 578 (1st Cir. 1987) ("[T]he failure of the defendant to fulfill his promise to cooperate and testify fully and honestly releases the government from the plea agreement"); United States v. Reardon, 787 F.2d 512, 516 (10th Cir. 1986) (defendant's failure to provide a "full and truthful accounting" and "statement of all knowledge" of the crime constitutes breach of the plea agreement); United States v. Flores, 975 F. Supp. 731, 742 (E.D. Pa. 1997) (same).

80. That the Division obtained useful information or evidence from Stolt does not relieve Stolt from its breach. In this regard, the Court finds instructive case law concerning whether the Government breached a plea agreement by refusing to request a sentencing departure after determining that a defendant breached his cooperation obligations. For example, in United States v. Carrara, the defendant "cooperated with the government and gave information

by which the government was able to convict several individuals. That is undisputed." 49 F.3d 105, 106 (3d Cir. 1995) (emphasis added). But the defendant subsequently lied in an affidavit and, when he later admitted the lie, the Government refused to request a downward departure as it had promised in the plea agreement. Id. In rejecting the defendant's claim that the Government had "reap[ed] the benefits of the plea agreement," the Third Circuit explained that "to the extent that the government benefitted from information Carrara provided, the government was also put in the unenviable position of having to ascertain what aspects of Carrara's testimony were true and what aspects were lies." Id. at 108.

81. Stolt failed to disclose to the Government that it continued to participate in the antitrust conspiracy after the March 2002 NPRA meetings until November 2002. Stolt also failed to disclose any of the details of its continued participation, i.e., Wingfield's and Jansen's conspiratorial activities during that period. (See Gov't FOF 381-388). These omissions were material to the Government's investigation and constituted a material breach of Stolt's obligation to cooperate contained in paragraph 2(a) of the Conditional Agreement.

82. Accordingly, Stolt breached paragraph 2(a) of the Conditional Agreement because it failed to provide "a full exposition of all facts known to [Stolt] relating to the anticompetitive activity being reported." (GX-1 ¶ 2(a)).

VI.

THE ANTITRUST DIVISION PROPERLY REVOKED THE AGREEMENT

83. The Antitrust Division properly revoked the Conditional Agreement on March 2, 2004 when it advised Stolt that the Conditional Agreement was void for two reasons: (1) Stolt had falsely represented in the Conditional Agreement that it had taken prompt and effective

action to terminate its involvement in the conspiracy upon discovery; and (2) Stolt had failed to provide the "full, continuing and complete cooperation" required by the Conditional Agreement because it had not disclosed its full involvement in the conspiracy. (See DX-20).

A. Conditional Agreement Is Void upon Stolt's Breach

84. Both because Stolt's representation in the Agreement that it took prompt and effective action to terminate its part in the conspiracy is not true, and because Stolt failed to provide the Antitrust Division with full and complete cooperation, the Conditional Agreement is void and the Division was entitled to prosecute Stolt without limitation. (See GX-1 ¶ 3).

B. Stolt's Breach Was Material

85. The materiality of Stolt's breach is determined not by its ultimate effect, but by whether its breach could have had a material effect on the investigation itself. See United States v. Skalsky, 616 F. Supp. 676, 682 (D.N.J. 1985) (statement need only have "a tendency to influence, impede, or hamper grand jury from pursuing the investigation"); accord United States v. Isabella, 582 F. Supp. 1534, 1535 (E.D. Pa. 1984) (in a perjury case, to be material, Government need not prove statement actually influenced, impeded or hampered).

86. Stolt's misrepresentations and omissions indeed had a material effect on the Government's investigation. Because Stolt failed to disclose the true duration of the conspiracy, and provided a witness, Jansen, who lied about the duration of the conspiracy, the Government: (1) spent significant additional time and resources to learn the truth about the extent of this conspiracy; (2) immunized coconspirators who otherwise could have been prosecuted; and (3) made deals with other coconspirators that were less favorable than they would have been but for Stolt's deceit, including the exclusion of volumes of commerce that were affected by the

conspiracy after March 2002 (see U.S.S.G. §§ 1B1.8 and 2R1.1), and the filing of motions to depart from the Sentencing Guidelines based on substantial assistance. (See GX-18A–C; GX-19A, B; Gov't FOF 381-388, 403-406).

C. Government Did Not Receive the Benefit of Its Bargain

87. The Government bargained for an agreement that granted leniency only if Stolt strictly complied with all of the conditions of the Leniency Policy. See Stolt-Nielsen, 442 F.3d at 180. Whether the Government received useful information from Stolt after the conditional grant of leniency does not change the fact that Stolt was always ineligible to receive leniency because it had not taken prompt and effective action to terminate its part in the conspiracy on discovery.

88. In addition, Stolt has never provided the Government with any information that the conspiracy and Stolt's participation in it continued after March 2002, even though such information would have been "important," i.e., material, to the Government. (See Gov't FOF 384). Thus, Stolt did not provide "a full exposition of all facts known to [Stolt] relating to the anticompetitive activity being reported," an explicit benefit stated in the Conditional Agreement for which the Government bargained. (GX-1 ¶ 2(a); see also United States v. Davis, 393 F.3d 540, 547 (5th Cir. 2004) ("The government did not receive the honest, truthful disclosure of information that it had bargained for" even though the information it did receive resulted in a conviction.); United States v. Gerant, 995 F.2d 505, 509 (4th Cir. 1993) (defendant's benefit of the bargain argument "ignores the express condition in the nonprosecution agreement that [defendant] would come forth with complete truthfulness and candor.").

D. Although Not Required, Defendants Received Sufficient Opportunity to Cure

89. Defendants fail to cite any case in which a party or third-party beneficiary was held to have an "opportunity to cure" a contract that was fatally defective because the promisee failed to satisfy a condition precedent. But see United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985) (once Government determined that defendant had lied, i.e., failed "to fully and honestly cooperate" under his plea agreement, Government not required to call him to grand jury to see if he would tell complete truth there); United States v. Flores, 975 F. Supp. 731, 743 (E.D. Pa. 1997) (in view of prejudice already suffered, Government not required to afford an opportunity to correct lies and omissions); United States v. Hoffenberg, 908 F. Supp. 1265, 1280 (S.D.N.Y. 1995) ("The government may permit a defendant to cure his dishonesty, but it is not required to do so and certainly need not do so continuously."). Indeed, Stolt's failure to take prompt and effective action made it irreparably ineligible for leniency, and there was no "cure" for this fatal defect.

90. In any event, defendants were provided whatever opportunity to cure to which they might have been entitled because the Antitrust Division's April 8, 2003 letter expressly provided Stolt "an opportunity to present its position" (see DX-11; Gov't FOF 394-397), and thereafter, the Division met with Nannes on several occasions, during which meetings Nannes provided evidence - including entries from Wingfield's 2002 business journal - that, he argued, confirmed Stolt ended its conspiratorial conduct by March 2002 (see Gov't FOF 398, 399), and the Government met with Stolt's current counsel on several occasions, all prior to revocation of the Conditional Agreement. (See Gov't FOF 401). Cooperman, who was in charge of the leniency application, and Wingfield, whose journals Nannes used to claim the conspiracy ended in March 2002, had whatever opportunity to cure to which they might have been entitled through

Nannes when he responded to the Division's April 8, 2003 suspension letter.

E. Government Revoked the Conditional Agreement Because of Information It Learned Only after the Agreement Was Signed

91. Contrary to defendants' suggestion, the Government does not allege that it was fraudulently induced by Stolt to enter into the Conditional Agreement. Nor does the Government claim that it revoked the Conditional Agreement because of a material misrepresentation. (See, e.g., Stolt COL 98-99, 107-111).

92. Also contrary to defendants' suggestion, the Government did not revoke the Conditional Agreement based upon information it knew when it signed the Agreement. The Conditional Agreement only required Stolt truthfully to represent that it had taken prompt and effective action to terminate its involvement in the conspiracy, but what particular action it took was within the company's discretion. Only after signing the Conditional Agreement did the Government learn that the actions Stolt had taken did not amount to prompt and effective action to terminate its participation in the conspiracy. (See Gov't FOF 389-393, 403-406).

VII.

NEITHER COOPERMAN NOR WINGFIELD IS ENTITLED TO LENIENCY

A. Cooperman and Wingfield Have No Rights as Third-Party Beneficiaries Because the Conditional Agreement Is Void

93. If the parties to an agreement intend that a third-party be a beneficiary of the agreement, that third-party is entitled to enforce its rights under the agreement. Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 526 n.11 (3d Cir. 1996).

94. Under paragraph 4 of the Conditional Agreement, Cooperman and Wingfield, as employees of Stolt, were intended beneficiaries of the Agreement.

95. However, "a third party beneficiary contract, no less than any other contract, must be valid and enforceable in the first instance in order for it to give rights to anyone." 13 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 37:23, at 144 (4th ed. 2000) ("Williston"). Moreover, "the alleged beneficiary's rights, like the rights of the promisee, are absolutely defined by the terms of the contract." Id. at 146-47. And it is "no less true of third party beneficiaries than of the directly contracting parties that, if a promise is in terms conditional, no one can acquire any rights under it unless the condition happens or is performed or excused." Id. § 37:24, at 157-58.

96. The requirement of "prompt and effective action" in Stolt's Conditional Agreement is an express condition precedent. (See supra Gov't COL 35, 38-40). This condition precedent applies to the entire Agreement, including any third-party rights the Agreement might contemplate. Not only does the Agreement expressly state that it is "conditional and depends upon [Stolt] satisfying the conditions set forth [therein]," the Agreement also refers to itself throughout as "this Agreement," including four times in paragraph 4, the third-party paragraph. Nothing in paragraph 4 suggests that "any leniency, immunity or non-prosecution" would be granted to any Stolt employee other than "under this Agreement." Thus, the Agreement is conditional and can exist only as a whole, and if the Conditional Agreement is void, so is paragraph 4.

97. When Stolt breached the Conditional Agreement by its failure to satisfy an express condition precedent – to have taken prompt and effective action – it also eliminated any possible third-party beneficiary rights for Cooperman and Wingfield. See, e.g., Central Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098, 1102 (3d Cir. 1996)

(third-party beneficiary generally subject to same defenses promisor could raise in a suit by promisee); United States v. Lopez, 944 F.2d 33, 37 (1st Cir. 1991) (third-party beneficiary can assert no rights under contract that is unenforceable "due to the failure of a condition precedent"); Williston §§ 37:23, 37:24.

98. The Court is aware of no case in which a contract that was void and unenforceable due to failure of a condition precedent was nonetheless read as either being severable in favor of a third-party, providing a third-party an opportunity to cure, or making to a third-party an offer that may be accepted by conduct. Such exceptions would swallow the general rule, stated above, that a third-party beneficiary must first have a valid and enforceable contract on which to rely in order to claim any rights.

B. Cooperman and Wingfield Are Not Entitled to Leniency Because Stolt Failed to Cooperate Fully

99. Paragraph 4 conditions the non-prosecution of Stolt employees not only on satisfaction of their own obligations to cooperate, but also on Stolt's "full, continuing and complete cooperation. . .." (GX-1 ¶ 4). Assuming the Agreement was not otherwise void, because Stolt did not satisfy its obligation to provide the Government with full, continuing and complete cooperation (see supra Gov't COL 78-82), Cooperman and Wingfield are not entitled to leniency.

C. Neither Cooperman nor Wingfield Can Claim Detrimental Reliance

100. In order to claim the equitable relief of detrimental reliance, the claimant must have "clean hands . . . relative to the matter in which he seeks relief. . .." Monsanto Co. v. Rohm & Haas, Co., 456 F.2d 592, 598 (3d Cir. 1972) (citing Bein v. Heath, 47 U.S. 228, 247 (1848)).

101. Neither Cooperman nor Wingfield has clean hands concerning Stolt's eligibility

for leniency. After O'Brien discovered the conspiracy, both were informed of the Conditional Leniency Program and its requirement that Stolt's eligibility depended upon Stolt having taken prompt and effective action to terminate the conspiracy once O'Brien discovered it. (See GX-30, at 21; GX-26C.5790.A; see also Gov't FOF 254, 299e., 350, 364, 418). Each is responsible for the continuation of the conspiracy that rendered Stolt ineligible for the leniency to which they now claim entitlement.

102. Wingfield – who was the top Stolt executive in charge of parcel tanker trading and who continued to carry out the conspiracy – does not have clean hands. As such, Wingfield is ineligible for equitable relief.

103. Cooperman - who allowed Wingfield to continue to conspire – does not have clean hands: Cooperman continued to send Wingfield to meet alone with coconspirators, thus providing him with the opportunity to conspire; Cooperman concealed the conspiracy, which resulted in a revised antitrust policy that failed to constrain Wingfield; and Cooperman failed to act when confronted with evidence that Wingfield was continuing to have bid-day discussions with Odfjell regarding Sasol. (See Gov't FOF 40-48, 59-60, 76, 88, 94, 116-121, 148-151, 156). That inequitable (as well as illegal) conduct made Cooperman and Stolt ineligible for leniency, because Stolt could never meet the Conditional Agreement's requirement of prompt and effective action to terminate. As such, Cooperman is ineligible for equitable relief.

104. Because Cooperman, SNTG's CEO and Chairman, knew or was willfully ignorant that Wingfield continued to conspire, he is responsible for Wingfield's conduct. See United States v. Flores, 454 F.3d 149, 155 (3d Cir. 2006) (criminal liability may be imposed on a person who recognized the likelihood of wrongdoing, but consciously refused to take basic

investigatory steps to learn the truth); United States v. Leahy, 445 F.3d 634, 652-653 (3d Cir. 2006); United States v. Wasserson, 418 F.3d 225, 239 (3d Cir. 2005); United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986). When a company president (or Chairman of the Board like Cooperman) "has knowledge that 'a subordinate' is involved in a price-fixing conspiracy and takes no action to stop it, he may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates." United States v. Gillen, 599 F.2d 541, 547 (3d Cir. 1979); see also United States v. Wise, 370 U.S. 405, 408-09 (1962).

105. Cooperman's hands are unclean for the additional reason that he obstructed SNSA's independent Board of Directors – the only people who could insist on independent verification that the illegal conduct had in fact stopped – from knowing of and dealing with the conspiracy on its own terms. Instead of reporting O'Brien's discovery to the Board, Cooperman hid the existence of the illegal conduct by purporting to investigate on his own, and by preparing an investigative report containing intentionally false and misleading statements. (See Gov't FOF 42-48). He later directly misled the Board by telling its members that O'Brien's claims that Stolt had participated in an illegal scheme and failed to put an end to it were without merit. (See Gov't FOF 116-121, 255-258).

106. It is because of the choices Cooperman made that Stolt could not qualify for the Corporate Leniency Program. Cooperman's actions fully satisfy "the primary principle guiding application of the unclean hands doctrine . . . that the alleged inequitable conduct must be connected, i.e., have a relationship, to the matters before the court for resolution." In Re New Valley Corp., 181 F.3d 517, 525 (3d Cir. 1999).

D. Wingfield Independently Breached the Agreement By Failing to Cooperate Fully

107. Paragraph 4 of the Conditional Agreement sets forth conditions pursuant to which Stolt directors, officers and employees may receive leniency. Among the conditions, an employee must "fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity" Stolt reported. (GX-1 ¶ 4)**.** The required cooperation includes "otherwise voluntarily providing the United States with any materials or other information, not requested in [other subparagraphs], that he or she may have relevant to the anticompetitive activity being reported." (GX-1 ¶ 4(d)).

108. Paragraph 4 includes a provision permitting the Government to revoke the right to amnesty of any individual who "fails to comply fully with his/her obligations," even though the Conditional Agreement remains in effect. (GX-1 ¶ 4).

109. Even assuming the Conditional Agreement remained in effect, Wingfield lost any protection he may have had under paragraph 4 because he violated his obligation to cooperate. (See GX-1 ¶ 4(d)). Wingfield violated his obligation to cooperate by: (1) providing false information to the Government through Stolt counsel that Stolt withdrew from the conspiracy in March 2002 when Wingfield met separately with Odfjell and Jo Tankers at the NPRA meeting; (2) withholding from the Government evidence of his conspiratorial activities after March 2002; and (3) failing to inform the Government when he learned Jansen had lied about when Stolt withdrew from the conspiracy. (See Gov't FOF 260, 261, 385, 400).

110. Although Wingfield never met with the Government, he knowingly used Stolt counsel as a conduit to provide the Government with information. Consequently, when Wingfield provided false or misleading information to Stolt counsel, he was, in effect, providing

that false or misleading information to the Government. (See Gov't FOF 385-388, 399).

111. Although paragraph 4(d) of the Conditional Agreement did not obligate Wingfield to contact the Government directly when Jansen told Wingfield he had lied to the Government about when Stolt withdrew from the conspiracy, it did obligate Wingfield to voluntarily inform the Government about Jansen's lies in some manner, for example, by again using Stolt counsel as his conduit.

112. Wingfield's actions constituted an independent breach of paragraph 4 of the Conditional Agreement.

VIII.

CONCLUSION

113. For the reasons set forth above, the Government's decision to revoke the January 15, 2003 Conditional Leniency Agreement is supported by law and the evidence. Accordingly, defendants' motions to dismiss the Indictment are denied.

Respectfully submitted,

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Dated: August 20, 2007

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
v.	)	
	)	NO. 06-cr-466
STOLT-NIELSEN S.A., et al.	)	
	)	Filed: August 20, 2007

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of August, 2007, a copy of the Government's Proposed Conclusions of Law has been sent by first-class mail to counsel of record for the defendants as follows:

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