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.	)	
	)	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
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The United States of America, by and through its attorneys, submits this Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Indictment (docket nos. 89-91) on the ground that this prosecution is precluded by a Conditional Leniency Agreement entered into on January 15, 2003 between the United States Department of Justice's Antitrust Division and Stolt[1] (the "Conditional Agreement") (GX 1). For the reasons set forth below, Defendants' Motions to Dismiss should be DENIED.

I.

INTRODUCTION

In Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 187 (3d Cir.), cert. denied, 127 S. Ct. 494 (2006), the Third Circuit both reversed an order enjoining the United States from indicting Stolt and defendant Richard Wingfield, and provided guidance as to how this Courtshould handle the disputed issue of the effect of the Conditional Agreement once Stolt and

[1] Unless otherwise stated, references to "Stolt" include all three Stolt entities indicted in this case: Stolt-Nielsen S.A. ("SNSA"), and two of its subsidiaries, Stolt-Nielsen Transportation Group Ltd. (Liberia) and Stolt-Nielsen Transportation Group Ltd. (Bermuda) (collectively "SNTG").

Wingfield were indicted:

> Therefore, if the 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."

Id. at 187–88 n.7. The issues raised by the Third Circuit were never addressed in the prior civil proceeding and can only be resolved by an evidentiary hearing. The Court of Appeals also emphasized the importance of Stolt's obligation of "strict compliance" with the Conditional Agreement's requirement of "'full, continuing and complete cooperation'" with the Government's investigation. Id. at 180. The Government believes that an evidentiary hearing will establish the following facts that answer each of the issues raised by the Third Circuit, and will also establish that Stolt failed to provide full and complete cooperation as required by the Conditional Agreement.

From at least as early as August 1998, Stolt and its senior executives were deeply involved in a billion-dollar, worldwide customer allocation scheme with their two biggest competitors, Odfjell Seachem AS ("Odfjell") and Jo Tankers B.V. ("Jo Tankers"). This scheme was devised and orchestrated at Stolt by defendant Samuel Cooperman, then Chief Executive Officer of defendant SNTG. After the conspiracy was firmly established, Cooperman delegated responsibility for Stolt's day-to-day management of the conspiracy to defendant Wingfield, SNTG's Managing Director of Tanker Trading, and other company employees.

The conspiracy operated without any major problems until early 2002, when Paul

O'Brien, SNTG's Senior Vice President and General Counsel, found a copy of a 2001 memorandum anonymously left on his office chair. The memorandum, addressed to Wingfield and prepared at the direction of SNSA's Chairman, Jacob Stolt-Nielsen, Jr., discussed the financial benefits associated with Stolt's involvement in the conspiracy. O'Brien reported his discovery of the memorandum to Cooperman and advised him that he believed Stolt was engaged in an agreement with Odfjell to allocate customers in violation of the antitrust laws.

Despite O'Brien's report, Cooperman did not arrange for an independent investigation, did not alert SNSA's Board of Directors, and did not terminate, discipline or reassign any Stolt employee who had been involved in the conspiracy. O'Brien left Stolt in March 2002 because of Stolt's and Cooperman's "refusal to cease its ongoing criminal conduct." (GX 10A, Complaint, O'Brien v. Stolt-Nielsen Transportation Group Ltd. and Cooperman, CV 02-0190051S (Conn. Super. Ct., Stamford/Norwalk J.D.) (June 18, 2002) ¶ 17). Thereafter, Wingfield and his top subordinate, Bjorn Jansen, continued to discuss the agreement, customers and upcoming contracts with their co-conspirators at Odfjell and Jo Tankers, assuring them that the conspiracy would continue.

By November 22, 2002, however, Stolt and Cooperman knew that their illegal conduct was likely to become the subject of a criminal investigation. Stolt hired experienced counsel to ask the Antitrust Division to grant it and its executives conditional leniency – a type of immunity or amnesty. But the Division's Leniency Program requires leniency applicants to have taken prompt and effective action to terminate their part in the illegal activity being reported upon discovering it. When it signed the Conditional Agreement, Stolt expressly pledged that it had done just that. However, Stolt's continued involvement in the conspiracy for nine months after

O'Brien had discovered it disqualified Stolt from receiving leniency.

Stolt misrepresented in the Conditional Agreement that it had taken prompt and effective action to terminate its involvement in the conduct being reported upon its initial discovery. And Stolt subsequently provided false information and withheld evidence concerning its continued involvement in the conspiracy. Shortly after the Conditional Agreement was executed, the Division obtained credible evidence that Stolt had breached the Agreement and, as a matter of fairness to Stolt, suspended its obligation to cooperate under the Agreement pending the Division's investigation into the matter. When the Division learned the truth, it revoked Stolt's leniency and sought Stolt's indictment, as the express terms of the Conditional Agreement allowed it to do. To this day, neither Stolt nor Wingfield has acknowledged the conspiracy's continued existence from March to November 2002. Nor has Cooperman ever admitted to the Division his participation in the conspiracy before or after March 2002.

This Court should not, as Stolt has requested, pretermit or curtail an evidentiary hearing by relying on the district court's prior decision in conducting the instant proceeding. The Court of Appeals, after all, instructed this Court to "consider the Agreement anew," Stolt-Nielsen, 442 F.3d at 187 n.7 (emphasis added), and also directed an inquiry very different from that conducted in the prior civil case. The Government believes that an evidentiary hearing will resolve the issues raised by the Third Circuit by establishing that: (1) Stolt, through O'Brien, discovered the conspiracy in early 2002; (2) Stolt, through Wingfield and Jansen, continued its involvement in the conspiracy for nine months after O'Brien's discovery but never revealed this fact to the Government; and, therefore, (3) Stolt did not comply with its obligations pursuant to the Conditional Agreement because, among other things, it (a) did not take prompt and effective

action to end its involvement in the conspiracy after O'Brien discovered it, and (b) failed to cooperate fully with the Government.

II.

STATEMENT

A. The Conspiracy, Its Discovery and Stolt's Response

Prior to 1998, Stolt and its main competitors, Odfjell and Jo Tankers, had occasional agreements to allocate customers and fix prices on various parcel tanker shipping routes. In August 1998, Cooperman met in Stolt's London offices with Bjorn Sjaastad, Odfjell's Chief Executive Officer, along with several of their subordinates to forge a more comprehensive cartel agreement. During this meeting, Cooperman and Sjaastad entered into a global customer allocation agreement to maintain the "status quo" and not compete for each other's customers on deep sea trade routes around the world. The CEOs directed their subordinates to create and exchange customer lists to carry out the agreement. Those lists were then provided to lower-level employees of both firms with instructions to abide by the agreement and not go after each other's business. In circumstances where it was necessary for Stolt and Odfjell to bid against each other, the subordinates were directed to discuss prices before submitting the fraudulent bids.

During this same time, representatives of Stolt and Odfjell each also had discussions with representatives of Jo Tankers in which they agreed not to compete for customers on various trade lanes around the world. The conspiratorial discussions with Jo Tankers involved fewer customers, were less frequent than those between Stolt and Odfjell and did not involve the exchange of customer lists, but the arrangement was the same – the companies would not compete for one another's customers and, where necessary to carry out the agreement, prices

were discussed and fraudulent bids with intentionally high prices were submitted to create the appearance of competition. In a meeting in January 1999, Cooperman, Sjaastad and their subordinates met with their counterparts at Jo Tankers in Amsterdam and discussed, among other things, ways in which the three companies could maintain their respective market shares and suppress and eliminate competition.

The charged conspiracy was a hard-core cartel agreement confirmed both by documentary evidence and the testimony of Odfjell and Jo Tankers representatives.

After organizing the cartel at Stolt, Cooperman entrusted its day-to-day operation to subordinates. In January 2001, that responsibility was given to Wingfield when he was promoted after thirty years of employment to serve as Stolt's Managing Director of Tanker Trading. Within two months of assuming this role, Wingfield and Jansen met with Odfjell executives in Texas to discuss issues that had arisen with the conspiracy as a result of, among other things, consolidation of allocated customers. At the meeting, Wingfield reaffirmed the customer allocation scheme, and updated customer lists were negotiated and exchanged over the following weeks. In May 2001, Jansen met with Cooperman and described in detail his and Wingfield's collusive contacts with Odfjell. Cooperman responded by assuring Jansen that he and Wingfieldhad his approval to continue carrying out the agreement.

While the customer lists were being updated following the Texas meeting, Wingfield directed Jansen and the business directors to conduct an analysis of the financial benefit of the conspiracy to Stolt. Jansen summarized their findings in a memorandum, which he faxed to Wingfield on April 10, 2001 (the "Jansen Memo"). (GX 2). In this memo, Jansen advised Wingfield that he and the business directors strongly believed that it was preferable to continue

to "coop" with Odfjell rather than to "go to war" with Odfjell. (Id.). He explained that if Stolt were to "break the coop," it would take a long time to "put it back together" and that "we will suffer a reduction of rates in general." (Id.).[2]

In early 2002, Paul O'Brien, then Stolt's Senior Vice President and General Counsel, found a copy of the Jansen Memo left anonymously on his office chair. O'Brien had worked for SNTG for eleven years and was responsible for supervising and directing all of the company's legal affairs. He also was directly responsible for overseeing its compliance with antitrust and other federal laws and regulations. (GX 10A ¶ 5). During part of his employment, O'Brien served as Senior Vice President of the Projects and Legal Department. In this capacity, he was a member of SNTG's Management Board of Directors which was responsible for recommending, overseeing and implementing defendant SNTG's business strategies. (Id. ¶ 6).

In February 2002, O'Brien advised Cooperman that he had discovered the Jansen Memo and that he believed Stolt was engaged in an express agreement with Odfjell to allocate customers, as evidenced by the memorandum, and that this agreement was in violation of the antitrust laws. (GX 6, Nannes, TR2 at 104; GX 26, Transcript, July 27, 2004, O'Brien v. Stolt-Nielsen Transportation Group Ltd. and Cooperman, CV 02-0190051S (Conn. Super. Ct., Stamford/Norwalk J.D.), Testimony of Paul O'Brien at 99). Cooperman responded by appointing himself to "investigate" O'Brien's discovery. One of Cooperman's first acts was to summon Jansen, the author of the document, to his office for a private meeting. He chastised Jansen for putting evidence of the agreement into writing and called Wingfield "stupid" for

[2] While Jansen did not know it at the time, he later learned that this analysis was conducted at the direction of Jacob Stolt-Nielsen, Jr., Chairman of SNSA.

asking for the written report. (GX 24A, Declaration of Bjorn Jansen, Jan. 7, 2004 ¶1).

O'Brien, dissatisfied with Cooperman's failure to initiate an independent investigation and to terminate Stolt's participation in the cartel, submitted his resignation to Cooperman on March 1, 2002. (See GX 5, Nannes, TR1 at 113; GX 8, Memorandum from O'Brien to Cooperman, Mar. 1, 2002; GX 10A ¶17; GX 10B, Amended Complaint, O'Brien v. Stolt-Nielsen Transportation Group Ltd. and Cooperman, CV 02-0190051S (Conn. Super. Ct., Stamford/Norwalk J.D.) (Nov. 1, 2002), Count 1 ¶¶ 17, 23, Count 2 ¶ 25, Count 3 ¶ 19). A few days later, Cooperman accepted the resignation – warning O'Brien of his duty "not to disclose 'confidential information'" of the company. (GX 9, Letter from Cooperman to O'Brien, dated Mar. 7, 2002). O'Brien subsequently sued Stolt for constructive termination, alleging that Stolt did not stop its antitrust violations even after he brought those violations to Cooperman's attention. (See GX 10A, Count 1 ¶¶ 17–18, Count 3 ¶¶ 18–19, 22; GX 10B, Count 1 ¶¶ 17–18, Count 3 ¶¶ 18–19, 22).

Cooperman's actions after O'Brien's resignation indicate that he sought to cover-up and prevent further disclosure of the conspiracy rather than uncover and terminate all illegal activity. Cooperman did not employ counsel (internal or outside) to conduct an independent investigation, or disclose the conspiracy's discovery to SNSA's Board of Directors, notwithstanding the fact that SNSA is a publicly-traded company, or report the cartel activity to the Government. Moreover, he did not terminate, discipline or reassign any Stolt employee who had been involved in the conspiracy, including Wingfield and Jansen;[3] and he did not prevent Wingfield and Jansen

[3] Stolt's prior antitrust compliance policy was in effect while Cooperman and other Stolt officials were fully involved in the conspiracy. Thus, their activities were in violation of the prior policy as well as the laws. Among the consequences for violating the prior policy were

from continuing to meet alone with their co-conspirators, although Cooperman learned of at least one such meeting.

Instead, Cooperman implemented a revised antitrust compliance policy, which included seminars for employees. Additionally, on March 14, 2002, Stolt had e-mails sent under Wingfield's name to the company's business partners (but not to co-conspirators Odfjell or Jo Tankers) informing them that the company would adhere strictly to its revised antitrust policy. (GX 11, E-mails from Wingfield to Business Partners, dated Mar. 14, 2002). Cooperman also met privately with Stolt's business directors and explained that the parcel tanker shipping market was an oligopoly and suggested that there were many legitimate business reasons for Stolt not to compete for business from Odfjell's customers.[4] Neither Cooperman nor anyone else at Stolt ever arranged for an independent investigation of the conspiracy until things began to unravel in November 2002.

Notwithstanding Stolt's new antitrust compliance policy, Wingfield met separately in Texas with Odfjell and Jo Tankers representatives in late March 2002, unaccompanied by counsel. At his meeting with representatives of Odfjell, Wingfield advised them that Stolt was having problems with a former employee and that as a result, the company had issued a revised antitrust policy. Wingfield assured his counterparts at Odfjell, however, that the "status quo"

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demotion, reduction in pay and termination. (GX 25, Stolt-Nielsen Transportation Group Antitrust Compliance Handbook, June 2000 at 9).

[4] Given that both Cooperman and the Business Directors to whom he was speaking were fully aware of Stolt's involvement in the conspiracy, Cooperman's motives in giving this oligopoly lecture are suspect. Read in light of his "investigative report" in which he falsely states that Jansen claimed that his memo related to legitimate business activities rather than conspiratorial activities (see infra pp.11-12), this appears to have been an effort by Cooperman to suggest to the business directors similar false explanations for evidence of collusion.

agreement would continue, but that contacts would have to be more limited and be made by Wingfield and Jansen. Wingfield gave representatives of Jo Tankers many of the same assurances in their meeting. Wingfield also expressly told Jo Tankers that Stolt was having internal problems because O'Brien had discovered the company's antitrust activities.

After Wingfield told Stolt's co-conspirators that the conspiracy would continue, he e-mailed copies of the revised antitrust policy to those firms. (GX 12, E-mails from Wingfield to Odfjell and Jo Tankers, dated Apr. 8, 2002). However, unlike the e-mails Wingfield sent weeks earlier to Stolt's business partners, the e-mails to Odfjell and Jo Tankers notably did not state that Stolt intended to comply with its new policy. Instead, the e-mails referred to Wingfield's "recent discussions" with the competitors – discussions in which he had told them the conspiracy would continue, albeit with fewer lines of communication. (Compare GX 11 with GX 12).

Wingfield reiterated Stolt's intention to continue in the cartel during a June 2002 meeting he and Jansen had with Odfjell in London. Wingfield told Odfjell that O'Brien was the former employee who had discovered the conspiracy, but assured them that their status quo agreement would continue and that O'Brien was prohibited from disclosing what he knew about it by the attorney-client privilege.

Cooperman prepared a two-page report on his "investigation." (GX 13, Memorandum from Cooperman to SNSA Board of Directors re: Internal Investigation, dated Aug. 12, 2002). He was, of course, well-positioned to know the facts given his personal participation in the formation of the cartel in 1998 and his supervision of its subsequent operation. Nevertheless, the report did not disclose Stolt's or Cooperman's own participation in the cartel, said that employees interviewed denied an "ongoing" conspiracy, and asserted that the Jansen Memo

discovered by O'Brien referred to independent business activity rather than cartel activity. Moreover, Cooperman, after consultation with SNSA Chairman, Jacob Stolt-Nielsen, Jr., did not disclose O'Brien's allegations to the SNSA Board at its April 2002 meeting.

By the time the Board met in August 2002, an independent member of SNSA's Board of Directors had obtained anonymously a copy of the complaint in O'Brien's lawsuit and insisted that Cooperman address the issues raised therein. Cooperman then read to the Board from his two-page investigation report and said that O'Brien's lawsuit was baseless and that Stolt was not involved in an ongoing conspiracy. Cooperman again did not reveal Stolt's and his own long-standing participation in the conspiracy.

On November 22, 2002, the Wall Street Journal, after making inquiries at Stolt, published an article about Stolt, including O'Brien's lawsuit and his charges of Stolt's antitrust violations. (GX 14, James Bandler and John McKinnon, "Stolt-Nielsen Unit is Probed for Traffic with Iran," Wall St. J., Nov. 22, 2002). SNTG hired outside attorney John Nannes, formerly a Deputy Assistant Attorney General of the Antitrust Division. Cooperman briefed Nannes on November 22, 2002, emphasizing the oligopolistic nature of the parcel tanker market and the revised Stolt antitrust compliance program, but did not disclose Stolt's and his own participation in the cartel. (GX 5, Nannes, TR1 at 109-114, 125-130). After discussing the Antitrust Division's Leniency Program and its requirements, Nannes finally asked Cooperman whether an internal investigation would reveal facts providing a sufficient basis to seek leniency. Cooperman only said he "thought" it would. (GX 5, Nannes, TR1 at 132). Shortly thereafter, Cooperman falsely reported to SNSA's Board of Directors that "possible antitrust violations by SNTG" during 2000-2001 had come to his attention "for the first time," just ten days earlier.

(GX 15, Memorandum from Cooperman to SNSA Board of Directors, dated Nov. 25, 2002).

B. The Conditional Agreement

The same day the Wall Street Journal article appeared, Nannes contacted the Antitrust Division about leniency. The Division's Corporate Leniency Policy provides that the Division will agree not to prosecute an applicant corporation that reports its illegal antitrust activity to the Division and meets all of the Policy's stated conditions. (GX 3, Antitrust Division Corporate Leniency Policy, Aug. 10, 1993). Among those conditions are that the reporting corporation must truthfully represent that "upon its discovery of the illegal activity being reported, [it] took prompt and effective action to terminate its part in the activity," and that once conditionally accepted into the Program the corporation will give the Division "full, continuing and complete cooperation." (GX 3 ¶ B.4; see also GX 1 ¶¶ 1–2). As set forth in Stolt's Conditional Agreement, a failure to satisfy any condition expressly allows the Division to void the agreement and prosecute the corporation "without limitation." (GX 1 ¶ 3). 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." (GX 3 ¶ C; see also GX 1 ¶ 4). The Policy and a model leniency agreement are publicly available and are widely known to antitrust counsel.[5]

Throughout the extensive negotiations between Stolt and the Division, Deputy Assistant Attorney General James Griffin repeatedly reminded Nannes and Stolt that if Stolt had not

[5] Division officials also have discussed and explained the Leniency Policy in numerous public speeches which are collected on the Division's public web site. http://www.usdoj.gov/atr/public/speeches/speeches.htm. Nannes, as a former Division Deputy Assistant Attorney General, was familiar with both the Policy and the speeches. (See GX 5, Nannes, TR1 at 105).

complied with the prompt termination condition, Stolt would not qualify for leniency and any conditional leniency agreement made would be revoked. (See GX 5, Griffin, TR1 at 204-07; GX 6, Nannes, TR2 at 58). Nannes knew that the Division's Agreement with Stolt was "conditional"; that "the representations by Stolt are stated in the letter and are conditions of the leniency agreement"; and that if "the conditions aren't met, the Antitrust Division has the right to revoke" the Conditional Agreement. (GX 6, Nannes, TR2 at 58).[6]

On January 15, 2003, Stolt and the Division signed the Conditional Agreement. (GX 1). The Agreement makes clear that it is conditioned on Stolt's truthful representation that it had taken prompt and effective action to terminate its participation in the conspiracy and on Stolt's compliance with its full cooperation obligations, which are expressly set forth in the Conditional Agreement. (GX 1 ¶¶ 1–2). The Agreement further states that a subsequent Government determination that Stolt violated the Conditional Agreement – including any of the conditions – would void the Conditional Agreement and allow a criminal prosecution of Stolt. (GX 1 ¶ 3). The Conditional Agreement also contemplated leniency for any Stolt employees who admitted their participation in the illegal conduct, provided they themselves fully and truthfully cooperated with the Division's ongoing investigation of the illegal activity being reported. (GX 1 ¶ 4).

Stolt's post-Agreement cooperation was limited. Nannes admitted Stolt's participation in a conspiracy with Odfjell and Jo Tankers prior to March 2002. (See GX 5, Nannes, TR1 at

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[6] That Stolt understood that the Agreement was conditional is also clear from a press release issued after Stolt signed the Conditional Agreement in which Stolt explained that the company "has been granted conditional amnesty . . . by the Antitrust Division of the U. S. Department of Justice," and that its amnesty was "subject to the conditions of the amnesty programs, including continued cooperation." (GX 16, Press Release, Stolt-Nielsen Transportation Group, "Stolt-Nielsen Transportation Group Granted Conditional Amnesty in Parcel Tanker and Inland Barge Investigations," Feb. 25, 2003).

155–57, 166; GX 6, Nannes, TR2 at 22, 39–40). He later identified dates of certain meetings and Stolt participants, but never attributed any information he proffered to any particular Stolt employee, including Wingfield or Cooperman. (GX 5, Nannes, TR1 at 164–171). Stolt produced two executives for interviews accompanied by Nannes. (GX 6, Nannes, TR2 at 13). The first, Andrew Pickering, provided information regarding the conspiracy through 2000.[7] The second, Jansen, lied and falsely corroborated Nannes' proffer that Stolt's participation in the cartel ended after O'Brien's discovery.[8] Thereafter, when the Government learned that Jansen had lied, Jansen obtained his own counsel and recanted his earlier lies, admitting that he and Wingfield continued to meet and conspire with Stolt's competitors until the fall of 2002. (See GX 24A ¶¶ 4-5; GX 24B, Declaration of Bjorn Jansen, Jan. 7, 2004 ¶¶ 8–12). Stolt also submitted documents, all of which would have been subject to a grand jury subpoena. Stolt never disclosed its participation in the conspiracy after March 2002.

In April 2003, less than three months after the Conditional Agreement was signed, the Division learned from credible sources that Stolt had continued participating in the conspiracy until as late as November 2002.[9] On April 8, 2003, as a matter of fairness to Stolt, the Division suspended Stolt's obligation to cooperate under the Agreement while it investigated whether Stolt had violated the Agreement's prompt termination condition. Finally, on March 2, 2004, the

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[7] Pickering was the Managing Director, Tanker Trading, at Stolt until the end of 2000 when he traded jobs with Wingfield and, with Cooperman's approval, his role as key Stolt conspirator also was passed to Wingfield.

[8] The Division does not contend that Nannes knew his proffer was false.

[9] In October 2003 and June 2004, Odfjell and Jo Tankers, along with several of their executives, pleaded guilty and admitted that they had participated with Stolt in a global customer allocation conspiracy until November 2002. (See GX 17A–C, GX 18A, B).

Division withdrew its leniency to Stolt and announced its intent to indict both Stolt and Wingfield for violations of the Sherman Antitrust Act.[10]

C. The Civil Case

Stolt and Wingfield brought civil suits in this district, asking for an injunction to bar their indictment on the ground that the Division had breached the Conditional Agreement. The Division replied that the district court had no authority to issue such an injunction and should dismiss the case. The district court, however, disagreed and held a brief evidentiary hearing – with Griffin and Nannes as the sole witnesses – focusing mainly on whether Stolt and the Division had agreed on the date when Stolt discovered the conspiracy.[11] In a decision on January 14, 2005, the district court held that the Division had failed to show that there was any agreement on the discovery date and that the Division had breached the Conditional Agreement. It permanently enjoined the United States from indicting Stolt and Wingfield for participation in the parcel tanker conspiracy.

The Court of Appeals reversed. Stolt-Nielsen, 442 F.3d 177 (3d Cir.), cert. denied, 127 S. Ct. 494 (2006). The Court held that "the District Court lacked authority to employ the extraordinary remedy of enjoining the Government's indictments of Stolt-Nielsen and

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[10] During the period April 2003 – March 2004, Stolt requested and was afforded numerous opportunities to meet with Division officials before a decision was made to withdraw the conditional leniency. (See GX 5, Griffin, TR1 at 211–13; GX 6, Nannes, TR 2 at 73-74, 79–80).

[11] The Division, bound by Rule 6(e), Fed. R. Crim. P., and concerned about disclosing information to subjects of a grand jury investigation, did not openly present grand jury evidence of Stolt's breach of the Conditional Agreement. Instead, the Division submitted such evidence to the court in camera and ex parte. The district court allowed the Division to submit the evidence, but later expressly refused to consider it. (GX 19, Order dated June 8, 2004, Stolt-Nielsen v. United States, Civ. No. 04-CV-537 (E.D. Pa.)).

Wingfield," and it reversed and remanded with instructions to dismiss the complaints. Id. at 187. The Court of Appeals, anticipating a subsequent indictment of Stolt and Wingfield and their motions to dismiss the indictment based on the Conditional Agreement, also gave the district court guidance on how to proceed in those circumstances. First, it noted that "[b]ecause the judgment is reversed, it lacks preclusive effect." Id. at 187 n.7. Second, the Court of Appeals said:

> Therefore, if the 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."

Id. at 187–88 n.7. Just as the Court of Appeals anticipated, the Government has indicted and the defendants have moved to dismiss.[12]

III.

ARGUMENT

A. The January 15, 2003 Agreement Is Conditional

The Conditional Agreement is a type of non-prosecution agreement. Non-prosecution agreements, like plea bargains, are contracts and, for purposes relevant here, should be 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). Thus, a leniency

[12] All references in this memorandum to arguments made by Stolt include related arguments made by Wingfield and Cooperman.

agreement should be read according to its plain meaning. See In re Tops Appliance City, Inc., 372 F.3d 510, 514 (3d Cir. 2004). 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).

Under the plain language of the Conditional Agreement, Stolt's prompt termination of its involvement in the conspiracy was a critical prerequisite to its receiving leniency. As the introductory paragraph of the Conditional Agreement clearly states, "[t]his agreement is conditional and depends upon [Stolt] satisfying the conditions" listed in the next two numbered paragraphs. In the first paragraph Stolt represents, among other things, that it "(a) took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." In the next paragraph, entitled "Cooperation," Stolt pledges to provide seven types of "full, continuing and complete cooperation to the Antitrust Division." (GX 1 ¶¶ 1–2).

The conditional nature of the Agreement is further emphasized in paragraph 3, which states that Stolt's leniency is expressly "[s]ubject to 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). This paragraph further provides that,

if at any time the Division determines that Stolt has violated the Conditional Agreement, it "shall be void," that the Division "may revoke the conditional acceptance of [Stolt] into the Corporate Leniency Program," and "thereafter initiate a criminal prosecution against [Stolt] without limitation." Id.

The Third Circuit recognized the obviously conditional nature of the Agreement by noting that the Government's promise not to prosecute Stolt "was, of course, subject to Stolt-Nielsen's strict compliance with the aforementioned conditions. . . ." Stolt-Nielsen, 442 F.3d at 180 (emphasis added). Indeed, the Third Circuit has instructed this Court to hear evidence and evaluate facts central to whether defendants have complied with these very conditions. See id. at 187–88 n.7.

B. The Evidence at the Hearing Will Establish that Stolt Breached the Conditional Agreement

While the presentation of evidence is, of course, for the hearing rather than this pre-trial memorandum, the Government wishes now to outline the key elements of what we expect the evidence to show.[13]

[13] While the Government assumed the burden of proof in the civil case, the Third Circuit has held that the party alleging breach bears the burden of proving it by a preponderance of evidence. United States v. Floyd, 428 F.3d 513, 515–16 (3d Cir. 2005); United States v. Roman, 121 F.3d 136, 142 (3d Cir. 1997). However, other circuits have placed the burden of proof on the Government, regardless of which party alleges breach. Castaneda, 162 F.3d at 836; United States v. Gerant, 995 F.2d 505, 508 (4th Cir. 1993); United States v. Verrusio, 803 F.2d 885, 891 (7th Cir. 1986). In any event, the Government believes that it will prove that Stolt breached the Conditional Agreement and that it will not be necessary to reach this issue.

1. The Date on which Stolt Discovered Its Anticompetitive Activity

Stolt's General Counsel, Paul O'Brien, discovered the conspiracy in early 2002 when he found a copy of the Jansen Memo left anonymously on his chair.[14] In that memorandum, Jansen reported that he, with input from the firm's business directors, had concluded that Stolt would make more money by continuing the conspiracy with Odfjell: "There is a 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). O'Brien, who was responsible for Stolt's antitrust compliance and well-versed in the company's business strategies after eleven years of employment, believed (correctly) that the Jansen Memo showed an illegal agreement between Stolt and its largest competitor to collude rather than compete for business. (See GX 6, Nannes, TR2 at 104; GX 26 at 99). Thus, shortly thereafter, O'Brien reported his discovery of the memorandum to Cooperman. O'Brien told Cooperman that he thought the activity described in the memorandum violated the law (id.), and asked Cooperman to arrange for an independent

[14] In a 1998 Policy Statement, the Division defined discovery 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, Gary Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, The Corporate Leniency Policy: Answers to Recurring Questions (Apr. 1, 1998) (the "1998 Policy Statement") at 3-4). Stolt does not dispute this definition. (Stolt Mem. 13.)

Furthermore, the Division has the right to decide the qualifications for leniency. The conditions in the Leniency Policy were established for both important public policy and practical prosecutorial reasons. As a matter of good public policy, it would be inappropriate to grant leniency to a company that continues its criminal behavior even after counsel's discovery of it. (See GX 5, Griffin, TR1 at 191). Further, as an investigative tool, evidence obtained from potential witnesses whose credibility is so damaged will have less value. (See id. at 191-92; see also, e.g., United States v. Brechner, 99 F.3d 96, 99-100 (2d Cir. 1996) ("[A] cooperating defendant's truthfulness about his own past conduct is highly relevant to the quality of his cooperation.").

investigation and to stop the criminal conduct. (GX 10B, Count 3 ¶ 19). O'Brien's discovery of the conspiracy is also evidenced by Wingfield's subsequent statements to co-conspirators at Odfjell and Jo Tankers. Wingfield alerted these other cartel members to O'Brien's discovery of the conspiracy, but assured them that O'Brien's discovery would not interfere with its continuation, explaining to Odfjell that the attorney-client privilege would keep O'Brien quiet.

2. The Defendants' Subsequent Actions

Stolt and Cooperman declined to initiate an independent investigation and failed to stop the company's participation in the parcel tanker conspiracy. When Cooperman learned of O'Brien's discovery of the Jansen Memo, he criticized Jansen and Wingfield – not for participating in the cartel, but only for putting evidence of Stolt's cartel activities in writing. And while Stolt made some changes to its obviously ineffective antitrust compliance program, it made no changes that would have risked exposing Stolt's and Cooperman's wrongdoing, such as terminating, disciplining or reassigning Wingfield and Jansen.

Thereafter, Wingfield was still permitted to meet with competitors without counsel. In March 2002, he met separately with Odfjell and Jo Tankers representatives in Texas. He told Odfjell that, while Stolt had adopted a revised antitrust compliance policy, the "status quo" would continue with cartel contacts limited to himself and Jansen. After advising Jo Tankers that Stolt was having internal problems because O'Brien had discovered the company's antitrust activities, Wingfield likewise assured Jo Tankers that cartel contacts, although limited, would continue. At a meeting with Odfjell in London in June, Wingfield repeated Stolt's intent to continue to participate in the cartel. At another meeting with Odfjell in October 2002 and during various telephone discussions with Jo Tankers and Odfjell, Wingfield and Jansen disclosed

prices, promised not to compete for particular customers, and discussed and resolved instances of cheating on the status quo agreement. Stolt's and Wingfield's cartel participation did not stop until well into November 2002, when the Wall Street Journal made public their illegal activity.

3. Whether Stolt Took Prompt and Effective Action to Terminate

Cooperman's actions after O'Brien's resignation indicate that he sought to cover-up and prevent further disclosure of the conspiracy rather than uncover and terminate all illegal activity. Stolt, through Wingfield, its top executive responsible for parcel tanker shipping, and Jansen, his key subordinate, continued the cartel from the date of O'Brien's discovery of it until the public exposure of the cartel in November 2002. As such, Stolt did not take prompt and effective action to terminate cartel participation.[15] After O'Brien's discovery of the cartel and before its public disclosure, Stolt and Cooperman: (1) never commissioned an independent investigation of O'Brien's discovery; (2) never disciplined Wingfield or Jansen for prior cartel activities; (3) never transferred Wingfield or Jansen to positions with no responsibility for parcel tanker pricing or, at the very least, ones which required no contact with competitors; (4) never objected to Wingfield and Jansen continuing to meet alone with cartel members outside of the presence of legal counsel, although Cooperman learned of at least one such meeting; (5) never told the SNSA Board of Directors of the firm's long-standing participation in the conspiracy; (6) kept the truth about the company's illegal conduct from the Board, even after one independent director learned

[15] In the 1998 Policy Statement, the Division provided guidance to leniency applicants, like Stolt, on the meaning of their obligation to take "prompt and effective action to terminate their illegal activity upon discovery." (GX 4 at 3). Indeed, as Stolt conceded (Stolt Mem. 12–13), a leniency applicant must "refrain[] from further participation [in the conspiracy] unless continued participation is with Division approval." (GX 4 at 3).

from an anonymous source about O'Brien's lawsuit and allegations of Stolt's participation in illegal conduct, and assured the Board in August 2002 that O'Brien was a disgruntled employee whose allegations were baseless; and (7) again in November 2002, made misrepresentations to the SNSA Board about SNTG senior management's knowledge of and participation in the conspiracy.

And while it is true that Stolt promptly adopted and circulated among its employees a revised antitrust compliance policy, this policy failed to constrain its key conspirators, Wingfield and Jansen, who were just as promptly making clear to Odfjell and Jo Tankers that this policy would not prevent Stolt's continued participation in the cartel. The fact that Stolt's new antitrust policy reduced what had previously been the large number of Stolt employees who had been aware of and involved in the conspiracy to just a few does not establish that Stolt was engaging in good faith efforts to discover and terminate the illegal activity. The evidence is to the contrary.

Stolt cannot avoid responsibility for its participation in the illegal conspiracy because a corporation is liable for the acts of its agents within the scope of their authority, whether or not authorized. United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970); see also Continental Baking Co. v. United States, 281 F.2d 137, 149-50 (6th Cir. 1960). The Stolt agents involved in this conspiracy were neither rogue employees nor low-level corporate functionaries. Cooperman, SNTG's CEO and later its Chairman, who was responsible for Stolt's role in the formation of the conspiracy in 1998 and who supervised its subsequent operation, failed to take the appropriate action to contain Wingfield because to do so risked revealing the existence of the conspiracy and his own participation in it. Cooperman took

no significant action to prevent Wingfield, Stolt's highest-level tanker trading executive, from continuing to participate in the cartel until November 2002. Accordingly, the law and fairness dictate that Stolt be held responsible for the actions of these high-level executives.

C. Stolt's Arguments for Dismissal as a Matter of Law Are Unsound

Stolt makes a number of arguments for immediate dismissal of the Indictment as a matter of law. (Stolt Mem. 22–55.) All are mistaken. Most are based on interpretations of the Conditional Agreement that ignore both its plain language and the Third Circuit's opinion, or on factual findings in the civil case that are irrelevant.[16]

1. Stolt Did Not Have License to Violate the Law until January 15, 2003

Stolt first argues (Stolt Mem. 23–25) that the Conditional Agreement gave it leniency for any illegal conduct up to the January 15, 2003 date of the Conditional Agreement. This argument is inconsistent with its obligation under the Agreement to take prompt and effective action to terminate the conspiracy and contradicts the Third Circuit's instructions. Stolt-Nielsen, 442 F.3d at 187-88 n.7.

Stolt's argued interpretation that the Agreement granted it conditional leniency for conduct prior to January 15, 2003 must be read in light of Stolt's express representation that it took prompt and effective action to terminate its participation in the conspiracy when it

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[16] Stolt's lengthy discussion of the findings in the civil case misses the point that those findings did not address the three issues identified as relevant by the Third Circuit, ignores that court's direction to consider the issues presented anew, and were made by a judge who expressly declined to review the extensive grand jury submission provided by the Government (see GX 19) and who, the Third Circuit held, had no authority to do anything other than dismiss the complaints for failure to state a claim upon which relief could be granted.

discovered it. If, as the Government contends the evidence will establish, O'Brien discovered the conspiracy in early 2002, then that date triggered Stolt's obligation to take prompt and effective action. Stolt's contended interpretation then cannot be correct, because it reads out of the contract both the requirement that Stolt must have ceased its illegal activity when it first was discovered, and the Division's express right to verify Stolt's eligibility for leniency.[17]

The Third Circuit recognized this when it instructed this Court to consider "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." Stolt-Nielsen, 442 F.3d at 187 n.7. If the defendant is correct in contending that the leniency granted to them was a license to continue to violate the law until the date the Agreement was executed, the Third Circuit would have had no reason to issue those instructions to the court that would hear defendants' motions to dismiss. Because the Government has never argued that this conspiracy continued after the Agreement was executed, the Third Circuit clearly understood that the leniency contained in the Agreement was conditioned on Stolt having ceased the activity upon discovery, not upon execution of the Agreement.

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[17] As already noted, contract terms must be construed so as to render none "nugatory." CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc., 381 F.3d 131, 137 (3d Cir. 2004); H.C. Lawton, Jr., Inc., 755 F.2d 324,328 (3d Cir. 1985). 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.").

Finally, defendants knew months before signing the January 15, 2003 Agreement that, as a matter of Division policy, leniency agreements are always conditioned upon prompt and effective action to terminate. In fact, Stolt's antitrust compliance seminars, which were conducted after O'Brien's discovery, discussed the Division's Leniency Policy and correctly explained that prompt termination meant "[s]top illegal activity immediately upon discovery." (GX 20, Slide from Stolt Antitrust Compliance Seminar Presentation, Apr. 2002).

2. The Government Did Not Revoke the Agreement Based on Oral Representations of Stolt Counsel

The Government did not, as Stolt argues (see Stolt Mem. 25–28), revoke its leniency on the basis of any oral representation by Nannes concerning Stolt's termination of the conspiracy. Regardless of any representations by Nannes, by signing the Conditional Agreement, Stolt itself represented that it took prompt and effective action to cease the illegal conduct upon discovery.[18] Moreover, as the Court of Appeals explained, the key issues for this Court to determine "anew" are when Stolt discovered its participation in the conspiracy and whether it took prompt and effective action to stop that participation. Stolt-Nielsen, 442 F.3d at 187-88 n.7.

3. Nannes' "Discovery" of the Conspiracy Is Irrelevant

Stolt's claim that its obligation to take prompt and effective action was not triggered until the conspiracy was discovered by Nannes in January 2003 (Stolt Mem. 28–31) is likewise incorrect. As the Third Circuit recognized, the date of "discovery" is a disputed issue of fact. It

[18] The only true significance of what occurred at meetings prior to signing the Conditional Agreement is to confirm that Stolt was fully aware of the Government's concerns and the fact that the Agreement was expressly conditioned on it satisfying the Leniency Program requirements. The Government made sure at those meetings that Stolt agreed to assume the risk of going forward and losing its leniency if O'Brien's allegation that the company continued to conspire proved true. (See GX 5, Griffin, TR1 at 204).

has always been the Government's contention, and the hearing evidence will prove, that Stolt discovered the conspiracy when O'Brien, its own General Counsel, discovered the cartel in early 2002. If that is correct, the issue of discovery is settled, and Nannes' discovery of the same illegal activity a year later is irrelevant. Stolt cannot avoid the reality of O'Brien's discovery and restart the discovery clock by bringing in new counsel (hired many months after O'Brien's discovery) to conduct his own investigation.

4. The Government Is Not Prohibited from Proving that O'Brien Discovered the Conspiracy

The contention that the Government "cannot prove" that O'Brien discovered the cartel in early 2002 (Stolt Mem. 31–36) is premature. Only after all the evidence is presented at the hearing can this Court decide whether O'Brien discovered the cartel at that time. To the extent Stolt argues that attorney-client privilege will prevent O'Brien from saying anything useful on this subject, it misconceives the scope of attorney-client privilege. The privilege only shields communications between O'Brien and Stolt employees that are within its proper scope. It does not prevent the Government from introducing evidence not protected by the privilege. For example, O'Brien's discovery of the conspiracy through the Jansen Memo does not implicate attorney-client privilege and, even if it did, Stolt long ago waived the privilege by admitting that O'Brien discovered the memorandum and discussed it with Cooperman. (GX 5, Nannes, TR1 at 113, 129; GX 6, Nannes, TR2 at 104).[19] Nor does it prevent the testimony of Odfjell and Jo Tankers representatives about Wingfield's admissions in March and June 2002 that O'Brien had discovered the conspiracy.

[19] In fact, at a hearing in O'Brien's wrongful termination action against Stolt, Stolt itself called O'Brien as a witness. (See GX 26).

5. The Agreement Need Not Specify the Discovery Date

Stolt also argues (Stolt Mem. 32–35) that a dispute over the discovery date could have been avoided if the Conditional Agreement could have specified an exact date, relying on a leniency agreement in a prior case that contained a discovery date. But Stolt signed the Conditional Agreement at issue here. As the Third Circuit emphasized, that Agreement contains Stolt's express representation that it took prompt and effective action to terminate its involvement in the conspiracy "upon discovery." Stolt-Nielsen, 442 F.3d at 179–80. If, as the evidence will establish, O'Brien discovered the conspiracy in early 2002, that is when discovery occurred and that is when Stolt should have, but did not, take prompt and effective action to terminate its participation in the conspiracy. Thus, Stolt made a material misrepresentation in the Conditional Agreement that it did sign, and therefore, breached that Agreement.

6. Stolt Did Not Take Prompt and Effective Action to Terminate

Stolt's claim that, even if it discovered the conspiracy in February 2002, it took prompt and effective action to terminate its participation (Stolt Mem. 36–45) is unsound. As a factual matter, the claim is plainly premature on a motion to dismiss without a hearing; rather, this is a matter for the Court's determination on the evidence presented at the hearing. Stolt is also mistaken in suggesting that, as a matter of law, its establishment of a revised compliance program constituted prompt and effective action to terminate. The evidence will demonstrate that there were many actions that Stolt and Cooperman could have taken, but did not, had they been serious about promptly and effectively terminating their participation in the cartel. And what Cooperman did do indicates that his primary concern was not terminating Stolt's

participation in the cartel, but rather preventing Stolt's and his own participation from being detected by independent members of the SNSA Board of Directors or the Government.

7. Stolt Failed to Cooperate Fully

Stolt's argument that it fully cooperated with the Government after signing the Conditional Agreement (Stolt Mem. 45–50) is also without merit. The adequacy of Stolt's cooperation – which included: (1) reporting a crime that was public and already being investigated by the Division; (2) producing documents that otherwise were fully obtainable by a grand jury subpoena; and (3) producing a senior executive who lied about the continuation of the conspiracy after O'Brien's discovery of it – is a disputed issue of material fact that cannot be decided without a hearing. Suffice it to say, there is strong evidence – notably Stolt's post-agreement refusal to admit that it participated in the conspiracy after O'Brien's discovery – that Stolt did not fully cooperate. This failure to cooperate constitutes a separate, independent basis for revocation of the agreement.

8. Defendants' Benefit of the Bargain Argument Fails as a Matter of Law and Fact

Finally, Stolt maintains that, even if it did breach the Conditional Agreement, it is still entitled to leniency because the Government "received the benefit of its bargain." (Stolt Mem. 50–55.) This argument is incorrect as a matter of law and fact.

The Government bargained for an agreement that granted leniency only if Stolt strictly complied with all of the Leniency Policy's conditions. See Stolt-Nielsen, 442 F.3d at 180. But Stolt was not eligible to receive leniency because its involvement in the conspiracy continued for

nine months after O'Brien discovered it.[20] Thus, whether the Government received useful information from Stolt after the conditional grant of leniency does not change the fact that Stolt was ineligible to receive leniency in the first place. Any other interpretation of the Conditional Agreement would pervert the Government's Leniency Policy by allowing ineligible applicants like Stolt, which misrepresent facts to obtain leniency and then withhold relevant information, to go free while their co-conspirators who provide full and truthful cooperation are "rewarded" by being required to plead guilty, pay fines, and go to jail.[21]

In any event, Stolt's misrepresentations plus its failure to disclose fully its involvement in the conspiracy impeded the grand jury's investigation and amounted to a material breach of the Agreement. Specifically, because Stolt failed to disclose the true duration of the conspiracy, and provided a witness who lied about the duration of the conspiracy, the Government found it necessary to (1) spend additional time and resources to learn the truth about the extent of this conspiracy; (2) immunize co-conspirators that it otherwise could have prosecuted; and (3) make deals with other co-conspirators that were less favorable than they would have been but for

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[20] Stolt argues (Stolt Mem. 49–50) that it should have been given the opportunity to "cure" its breach of the Conditional Agreement. But it fails to explain how it could have cured its breach if, as the Government contends, it was never eligible for leniency in light of its failureto take prompt and effective action after O'Brien discovered the conspiracy. In any event, Stolt requested and was afforded numerous meetings with Division officials before the Conditional Agreement was revoked.

[21] Stolt assumed the risk that if conditional leniency was denied or revoked, "any documentary or other information provided by [Stolt or any Stolt executive] . . . may be used against [Stolt] in any . . . prosecution," as the Conditional Agreement expressly provides (GX 1 ¶ 3), and as Nannes acknowledged. (See GX 6, Nannes, TR2 at 60).

Stolt's deceit.[22] Indeed, to this day 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. (GX 6, Nannes, TR2 at 31, 52–53). 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.[23] (GX 1 ¶ 2(a)). This failure to disclose all relevant evidence forced the Government to look elsewhere and bargain for evidence to prove the truth.

The Third Circuit has repeatedly held that a defendant who, like Stolt, provides incomplete or misleading information breaches a plea agreement requiring a complete disclosure of truthful information. For example, in Skalsky, 857 F.2d 172 (1988), the Third Circuit reviewed a district court finding that Skalsky materially breached his non-prosecution agreement

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[22] Defendants wrongly suggest that the Government's successful prosecutions resulted solely from Stolt's cooperation. In fact, those "successful" prosecutions were guilty pleas by Stolt's co-conspirators who, unlike Stolt, provided truthful and complete evidence. Because Stolt failed to admit that the conspiracy continued until November 2002, the Government had to exclude the volume of commerce that was affected by the conspiracy after March 2002 in calculating the Sentencing Guidelines' fine ranges for co-conspirators who provided such information. See U.S.S.G. 1B1.8 and 2R1.1. Also, as a result of defendants' dissembling, the Government found it necessary to file motions to depart from the Guidelines based on substantial assistance in each case it did bring. (See GX 17A–C, GX 18A, B).

[23] For example, as the Government will prove, when Stolt provided Jansen for interview in February 2003, Jansen falsely stated that the conspiracy did not continue past March 2002, and specifically withheld evidence that both he and his direct superior, Wingfield, continued conspiratorial activity into late 2002. Wingfield knew about Jansen's lies but did not disclose those lies to the Government. Stolt is, of course, responsible for the actions (or inactions) of its senior managers Wingfield and Jansen. See United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970); Continental Baking Co. v. United States, 281 F.2d 137, 149-50 (6th Cir. 1960).

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).[24]

That the Division may have obtained some useful information or evidence from Stolt does not relieve Stolt from its breach. In Carrara, for example, 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

[24] 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).

108. Stolt's misrepresentations and omissions placed the Government in the same position. See 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.).[25]

The cases cited by defendants are inapposite. In Castaneda, defendant's omissions were unintentional and did not prejudice the Government because "the relatively little that Castaneda omitted was already known to the government . . . [and] must be classified either as cumulative or surplusage." 162 F.3d 832, 839 (5th Cir. 1998). Here, Stolt never provided any information about the conspiracy operating after March 2002, and Stolt's misrepresentations, intentional omissions, and Jansen's lies, cannot be viewed as either "cumulative or surplusage." In United States v. Fitch, 964 F.2d 571, 575-77 (6th Cir. 1992), the Sixth Circuit held that the Government could not void the agreement and prosecute Fitch for the immunized crimes because the agreement lacked any provision allowing the Government to declare it "null and void" and, therefore, the Government was "limited to its contractually agreed-upon remedy of prosecuting Fitch for perjury." In contrast, the Conditional Agreement in this case clearly provided that in the event of breach the "Agreement shall be void" and the Government could then prosecute Stolt "without limitation." (GX 1 ¶ 3).

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[25] See, e.g., 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.") (emphasis added); Flores, 975 F. Supp. at 740, 745 (false statements by defendant during Government interviews resulted in breach, even though he had provided "substantial assistance in the investigation or prosecution of another person") .

D. Cooperman and Wingfield Cannot Establish Either a Legal or Equitable Right to Leniency

Cooperman and Wingfield were the Stolt executives with primary responsibility for Stolt's participation in the illegal conspiracy prior to O'Brien discovering it. Both also were personally responsible for Stolt's continued involvement in the conspiracy after O'Brien's discovery – Wingfield for his actual participation in continued cartel activities, and Cooperman for his efforts to prevent discovery of his own and Stolt's long-standing involvement in the illegal conspiracy, efforts which led to Stolt's ineffective compliance program and enabled Wingfield's conduct. Moreover, neither provided self-incriminating information to the Government, nor has Cooperman ever admitted his involvement in the conspiracy. Under these circumstances, neither the law of contracts nor the law of equity recognizes their leniency claims.

1. Cooperman and Wingfield Are Not Entitled to Leniency as Third-Party Beneficiaries of the Agreement

Neither Wingfield nor Cooperman was a party to the Agreement between Stolt and the Division. Nonetheless they erroneously claim a contractual right to immunity as third-party beneficiaries to Stolt's void Conditional Agreement.

Third-party beneficiaries have no rights under a contract that is void as to the contract signatory from whom they claim rights. Restatement (Second) of Contracts, § 309 (1981); Williston & Lord, A Treatise on the Law of Contracts, § 37.23 at 144 (4th ed. 2000). Moreover, "one who seeks to enforce a contract as a third party beneficiary is bound by the terms and conditions of the agreement and has no greater rights than those of the contracting party. . . . A third party simply cannot accept the benefits, and at the same time attempt to avoid the burdens or limitations, of a contract." Process and Storage Vessels, Inc. v. Tank Service Inc., 541 F.

Supp. 725, 733 (D. Del. 1982) (citations omitted). Thus, the law expressly recognizes that third-party beneficiary rights may be conditional. Williston, § 37.24 at 157–58 ("it should be 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.") (footnotes omitted).[26]

The Agreement at issue in this case was conditional, and because Stolt failed to satisfy the pre-conditions to receiving leniency, the Agreement is void. There is, therefore, no contract on which Cooperman, Wingfield or any other Stolt employee can rely. See Central Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098, 1102 (3d Cir. 1996) (citation omitted) ("[t]hird-party beneficiaries are generally subject to the same defenses that the promisor [the Division] could raise in a suit by the promisee [Stolt]"); United States v. Lopez, 944 F.2d 33, 37 (1st Cir. 1991) (third party "could assert no right to performance under an agreement which was never enforceable between the contracting parties due to the failure of a condition precedent; . . .").[27]

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[26] In light of the Conditional Agreement's specificity in paragraph 4 that any employee rights were subject to Stolt's full and continuing cooperation, there is also no merit to Cooperman's suggestion (Cooperman Mem. 22 n.7) that paragraph 4 should be read to create an unstated but implied right to immunity through "acceptance by conduct." See United States v. Benchimol, 471 U.S. 453, 455 (1985) (what parties in fact agree to in written agreement controls questions of breach, not "such implied-in-law terms as were read into this agreement by the Court").

[27] After requiring that they obtain separate counsel, the Division entered into separate non-prosecution/cooperation agreements with lower-level Stolt managers who participated in the conspiracy up until March 2002 but were not involved in its continuation after O'Brien's discovery. Revocation of Stolt's Conditional Agreement did not affect the Division's separate agreements with these individuals.

2. Cooperman's and Wingfield's Claims of Detrimental Reliance Are Wrong

Cooperman and Wingfield also argue, apart from third-party beneficiary law, that as a matter of fairness they should have leniency because they detrimentally relied on the Conditional Agreement. (Cooperman Mem. 33; Wingfield Mem. 33–35.) But as a matter of fairness generally, and of detrimental reliance law particularly, their claims fail.

Purely as a matter of equity, Cooperman and Wingfield cannot seek leniency on the basis of any claim of "fairness." Nannes specifically advised them that "the success of the strategy in protecting the company and the individuals was dependent upon their candor and cooperation and the forthcomingness of the employees in telling [him] what had previously transpired." (GX 5, Nannes, TR1 at 160).

Both Cooperman and Wingfield likewise were personally aware of the Leniency Policy's requirements for the company and the individuals. Those requirements had been discussed during Stolt's antitrust compliance seminars attended by both Cooperman and Wingfield, and Wingfield's own notes reveal his understanding that leniency depended on the company having "ended promptly" its conspiratorial conduct when it "[f]irst found out" about it. (GX 23, Pages dated Nov. 25, 2002 from Wingfield Business Journal). Yet Wingfield never provided the Government with any information concerning the conspiracy's continuation after O'Brien discovered it.

Nannes also reviewed the requirements of the Leniency Program at his initial meeting with Cooperman on November 22, 2002. (GX 5, Nannes, TR1 at 113–14, 131). But rather than own up to his misconduct, Cooperman explained all the legitimate reasons why Stolt might speak

to its competitors (GX 5, Nannes, TR1 at 111–112), knowing full well those were not the real reasons for most of Stolt's communications with its co-conspirators.

Furthermore, Cooperman and Wingfield are the Stolt personnel primarily responsible for Stolt's continued participation in the conspiracy for months after O'Brien discovered and reported it, and so they are the Stolt employees primarily responsible for Stolt's failure to fulfill the Conditional Agreement's pre-condition of prompt termination upon discovery.

Wingfield, of course, continued conspiring until November 2002, assuring his co-conspirators that it was business as usual, that O'Brien could be silenced and that the conspiracy would continue. Wingfield also was not forthcoming with Nannes about Stolt's continued participation in the conspiracy after March 2002 - even after Stolt's obligation to cooperate under the Agreement was suspended in April 2003, Wingfield failed to alert Nannes to the truth.[28] (See GX 6, Nannes, TR2 at 31, 77-78). Thus, Wingfield's deception was not just a one-time event, but rather a continuing effort over a period of several months to prevent exposure of facts that would disqualify him and the company from receiving leniency.

And for his part, Cooperman chose not to report Stolt's anti-competitive activity to the Antitrust Division in February 2002, when O'Brien discovered it, but instead tried to keep secret what he and Stolt had done by refusing to authorize an investigation and failing to notify the

[28] The Government will also prove that Wingfield knew that Jansen lied in his first interview when he falsely told the Government the conspiracy ended by March 2002. Not only did Wingfield fail to notify the Government (either through Nannes or directly) about this lie, but he failed to disclose his very own participation in the conspiracy through November 2002, less than one month before Stolt sought leniency.

SNSA Board.[29] Only in November 2002, when the conspiracy was about to become public, did Cooperman seek approval from SNTG's Board to approach the Division for leniency. And in reporting the matter to SNSA's Board, Cooperman was far from candid, falsely telling Board members that "for the first time" ten days earlier he learned of "possible antitrust violations by SNTG during 2000-2001," and that he sought an investigation to determine if such information was true. (GX 15).[30]

The net effect of this conduct was to cause SNSA's Board of Directors to oversee Stolt's application for a leniency to which Stolt, Cooperman and Wingfield had no right. Because Cooperman and Wingfield caused the creation of an agreement which should never have existed, they may not now claim fairness as the basis for relief to them in this case.

In any event, to prove detrimental reliance, Cooperman and Wingfield must show that they materially changed their position to their detriment in reliance on an alleged promise; i.e., that they were harmed. Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 416 (3d Cir. 1990); Government of Virgin Islands v. Springette, 614 F.2d 360, 365 (3d Cir. 1980). This they cannot do.

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[29] If Stolt and Cooperman had instituted an antitrust compliance program that had been effective in terminating Stolt's participation in the conspiracy after O'Brien discovered it in early 2002, it's failure to come forward to the Division at that time would not have made it ineligible for leniency in November 2002. However, by failing to come forward when O'Brien discovered the illegal activity, both Stolt and Cooperman assumed the risk that the conspiracy would continue and that Stolt and its executives would be ineligible for leniency.

[30] Citing Plaster v. United States, 605 F. Supp. 1532 (W.D. Va. 1985), Cooperman and Wingfield both wrongly argue that the fact that they were available to be interviewed at any time proves the Government acted unreasonably in this matter. That case is distinguishable, because, in contrast to the obligations imposed on the defendants here, Plaster's only obligation was "to agree to testify." Id. at 1535.

The fact that either Cooperman or Wingfield might have disclosed information that implicated Stolt in the conspiracy is irrelevant, because unless they incriminated themselves they cannot show "that a fair trial would no longer be possible." Government of Virgin Islands, 614 F.2d at 365. And while they claim to have provided "incriminating information and documents" to the Government (Wingfield Mem. 35; see also Cooperman Mem. 33), they fail to substantiate this claim. Cooperman, who never talked to the Government, identifies no documents that he produced. And his lack of candor in his dealings with an independent member of SNSA's Board of Directors, with the entire Board, and in his initial discussion with Nannes concerning the conspiracy, all demonstrate his unwillingness to admit truthfully his role in the conspiracy.[31] Wingfield, who also never talked to the Government, relies on production of the customer allocation lists and his "personal journals." (Wingfield Mem. 20.) However, both Stolt's and Wingfield's counsel have admitted that all of the documents that Wingfield gave to Nannes were corporate business records obtainable by subpoena. (GX 21, Black, TR at 53–54, 60, 65; GX 6, Nannes, TR2 at 9, 79). See also In re Grand Jury Proceedings, 55 F.3d 1012 (5th Cir. 1995) ("daytimers" reflecting daily business activities of corporate executive deemed corporate not personal records). As custodians of Stolt's business records, neither Cooperman nor Wingfield could invoke the Fifth Amendment "to refuse production although their contents tend to [in]criminate him." Braswell v. United States, 487 U.S. 99, 110 (1988).

[31] Cooperman seeks credit for conduct of others by merging his actions with theirs. For example, without any further explanation, he refers to "information and documents provided by Cooperman, Wingfield and other SNTG employees" (Cooperman Mem. 14) prior to January 8, 2003 and to "the substantial incriminating information provided by SNTG, Cooperman, Wingfield and other SNTG employees." (Cooperman Mem. 16.) He also seeks recognition for providing customer allocation lists obtained from others. (Cooperman Mem. 12–14.)

The Division received Stolt's information from Nannes but did not "know who gave the information to Mr. Nannes." (GX 5, Griffin, TR1 at 218). At the April 2004 hearing, Stolt disclosed for the first time that Wingfield had given Nannes information "that went from Mr. Wingfield through the company to the Government" (GX 22, Terwilliger, TR at 67), but Stolt did not attribute any information it gave the Government to Wingfield or anyone else. (GX 5, Griffin, TR1 at 218). Thus, Cooperman's and Wingfield's claim that they gave the Government evidence that incriminated them is completely unsupported.[32]

IV.

CONCLUSION

An evidentiary hearing is necessary to answer the questions posed by the Third Circuit in Stolt-Nielsen, 442 F.3d at 187 n.7: when did Stolt discover its involvement in the conspiracy, what did it do after that discovery, and whether Stolt complied with its contractual obligation to take prompt and effective action to terminate its involvement in the conspiracy upon discovery. That hearing, the Government believes, will establish that Stolt, through its General Counsel O'Brien, discovered the conspiracy in early 2002, that Stolt continued its participation in the conspiracy after O'Brien's discovery but never told the Government about the conspiracy's continued existence from March through November 2002, and that Stolt therefore breached its

[32] Paragraph 4 of the Conditional Agreement sets forth contract rights and obligations for individuals, independent of those of the corporation. While some of those obligations require the Government to make a request for assistance, paragraph 4 (d) requires an individual leniency applicant to "otherwise voluntarily provid[e] the United States with any material or information, not requested in [paragraphs] (a) - (c) . . . that he or she may have relevant to the anticompetitive activity being reported." (GX 1 ¶ 4(d)) (emphasis added). Because Wingfield has never told the truth about personally continuing the conspiracy until November 2002 and never notified the Government that Jansen lied, he likewise cannot meet the express requirements for individual leniency.

obligations under the Conditional Agreement to take prompt and effective action to terminate its involvement in the conspiracy upon discovery and to fully disclose its illegal conduct. Accordingly, the Government was fully justified in revoking Stolt's Conditional Agreement and obtaining the Indictment.

Because the Government was justified in revoking the Conditional Agreement, Wingfield and Cooperman cannot rely on it. Nor should they be allowed to, given their personal responsibility for Stolt's continuation in the conspiracy after O'Brien's discovery. Therefore, defendants' motions to dismiss must be denied.

Respectfully submitted,

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Dated: January 3, 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.	)	
	)	

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of January, 2007, a copy of the Government's Memorandum of Law in Opposition to Defendant's Motions to Dismiss the Indictment and proposed Order, has been sent by express mail to counsel of record for the defendants as follows:

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