IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 00-1570, 00-1571

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SKW METALS & ALLOYS, INC. and CHARLES ZAK,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

In its initial sentencing decision reversed by this Court in United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 89-95 (2d Cir. 1999)(SKW I), I JA 596, 599-602,[1] the district court had found that the price-fixing conspiracy had been "successful" only during two brief periods of time in 1991. And it erroneously determined whether the conspiracy was "successful" by looking to whether the conspirators were making sales at or above their agreed-on price. SKW I, 195 F.3d at 89-90, I JA 599-600. It then compounded its error by including in the volume of commerce during the two periods it found that the conspiracy was "successful," only those sales made at or above the floor price. 195 F.3d at 89-90, I JA 599-600. In reversing the district court's initial sentencing decision, this Court expressly rejected all of the reasons given by the

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[1] "JA" refers to the joint appendix filed in this Court; volume numbers are indicated in Roman numerals. "SKW Br." and "Zak Br." refer to briefs of appellees in this Court. "Gov. Br." refers to the government's main brief on this appeal. All references to the Sentencing Guidelines are to the 1990 edition.

district court for excluding the sales that it did. 195 F.3d at 89-92, I JA 599-601. Nevertheless, on remand, the district court once again excluded from the volume of commerce exactly the same sales that it had excluded before and for exactly the same reasons that this Court had found erroneous in SKW I.

In the government's opening brief, we compared what the district court said on remand in determining the volume of commerce affected by the antitrust violation in this case, with what the district court had said in support of its initial sentencing decision. Our point was that what the district court said on remand repeated its earlier mistakes and was completely inconsistent with what this Court had plainly held when it reversed the district court's initial sentencing decision in SKW I.

In their briefs, however, both defendants-appellees SKW Metals & Alloys, Inc. (SKW) and Charles Zak (Zak) simply ignore what the district court said on remand. Instead, they attempt to change the subject from how the district court violated this Court's mandate to how their highly selective and inaccurate view of the evidence supports their arguments concerning the amount of commerce affected by the violation. But while appellees might prefer to bury their heads in the sand rather than acknowledge what the district court expressly said on remand, their attempt to change the subject is simply not responsive to our arguments.

A. Whether The Conspirators Adhered To Their Agreed-on Prices Does Not Determine Whether Sales Were Affected By The Antitrust Violation

In SKW I, this Court expressly held that "a conspiracy need not achieve its specific goals or targets in order to affect commerce for sentencing purposes [under U.S.S.G. § 2R1.1]." 195 F.3d at 90, I JA 600. Rather, "[s]ales can be 'affected' by a conspiracy when the conspiracy

merely acts upon or influences negotiations, sales prices, the volume of goods sold, or other transactional terms." Id. And, "[w]hile a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy." Id. (emphasis in original). As we explained in our first brief (Gov. Br. 13-15, 21-25), the district court on remand once again refused to include in its volume of commerce calculations any sales made during periods the conspirators were not adhering to their agreed-on prices. Nothing that appellees argue can change the fact that the district court's sentences on remand cannot be reconciled with what this Court held in SKW I.

1. SKW and Zak argue that this Court should review the district court's decision on remand only for factual errors, using a clearly erroneous standard, and they assert that under this standard there was no error. See, e.g., SKW Br. 21-23, 35; Zak Br. 31, 33-34, 37-38. However, as we explained in our main brief, the sentencing court repeated on remand the precise legal errors that it had made in its initial decision. These legal errors alone require reversal of the sentencing orders entered on remand. This Court may review whether a sentence was imposed "in violation of law" or "as a result of an incorrect application of the sentencing guidelines" (18 U.S.C. § 3742(e)(1)-(2), (f)(1)), and review of legal errors is de novo. United States v. Burgess, 180 F.3d 37, 41 (2d Cir. 1999).

Neither SKW nor Zak address what the district court actually said on remand or attempt to reconcile those statements with what this Court said in SKW I. Specifically, they never explain how, in light of this Court's decision in SKW I, the district court could exclude from the volume of commerce affected by the conspiracy those sales made during periods the "parties [failed] to adhere to the previous target prices" or failed to "abid[e] by a set floor price." See I JA 224, 225.

They cannot dispute that the court made these rulings; so they simply ignore them.

Instead of addressing the district court's legal errors, SKW and Zak present a highly colored version of the evidence. They appear to argue that the district court should have found no period in which the conspiracy influenced sales prices, negotiations, volume of goods sold, or other transactional terms, and they defend the court's decision on that basis. See, e.g., SKW Br. 27, 28, 37; Zak Br. 29-31, 36-37. Even assuming that their re-interpretation of the evidence has any relevance to the issue of whether the district court's decision on remand complied with this Court's mandate, defendants' view of the evidence is wrong.

2. One obvious problem with defendants' argument is that they try to prove too much. Their apparent claim that the conspiracy never influenced any sales ignores the fact that the district court found that the conspiracy affected sales during two periods in 1991. Defendants did not appeal that determination and they cannot challenge it now. In any event, defendants' claim that the conspirators did not achieve the agreed-on floor price (see, e.g., SKW Br. 23 (claiming producers did not expect floor prices to hold), 23-24 (asserting that sales below floor prices show conspiracy ineffective), 24-25 (asserting that witnesses did not believe floor price could be maintained), 25 (asserting that imports kept floor prices from holding), 26 (arguing that floor prices not implemented), 27 (asserting non-conspirators did not believe floor prices were in effect); Zak Br. 16-19, 27, 29) is simply irrelevant.[2] SKW I, 195 F.3d at 89-92, I JA 599-601.

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[2] SKW states (SKW Br. 28) that its "average sales price for 50% ferrosilicon was always below the floor price," citing two SKW charts (reproduced V JA 2672-73). These charts, however, apply only to January to June 1991. About 87.5% of SKW's prices for the first three-quarters of 1990 were, in fact, at or above the floor price. See I JA 536-78; Gov. Br. 21-22. During the 21-month conspiracy period, SKW's sales at or above the agreed floor price were $14.9 million out of total commodity ferrosilicon (FESI) sales of $32.2 million. See I JA 449-591; Gov. Br. 22, n.7. As we noted in our main brief, during the conspiracy period, 73.9% of

Nor are defendants free to reargue the existence of the conspiracy at this late date. See, e.g., Zak Br. 11-13, 25, 28. See also SKW Br. 41-43 (claiming that conspirators' meetings were legitimate under Noerr-Pennington doctrine). The existence of the conspiracy was settled by the guilty verdict and this Court summarily rejected a challenge to the sufficiency of the evidence supporting that verdict in SKW I. 195 F.3d at 87 n.2, I JA 598 n.2. This issue cannot be re-litigated now.

Defendants also argue that the conspiracy could not have influenced sales prices, negotiations, volume of goods sold, or other transactional terms because (1) the conspirators planned to abandon their floor price if it cut into their volume, and they in fact lowered the floor price on one occasion (SKW Br. 24-26, 29-30; Zak Br. 28); (2) foreign imports drove up supply and cut domestic producers' market shares (SKW Br. 25-26; Zak Br. 14, 18-19); (3) the evidence did not show how the conspiracy was implemented within the conspiring companies (SKW Br. 26; Zak Br. 19-25); and (4) trial witnesses characterized the agreement as "foolish" and "crazy" (SKW Br. 28; Zak Br. 26-27). However, a floor-price agreement, even if modified or not fully implemented, can still influence price, negotiations, or other transactional terms. SKW I, 195 F.3d at 90, I JA 600. Further, defendants exaggerate the influence of imports; the district court found that Minerais, a major importer, was a member of the conspiracy. I JA 438-40; see also III JA A925-29 (Gov. Ex. Nos. 2, 3, 6 & 8 (documents showing Minerais' cooperation in conspiracy)). And SKW relies on incomplete market share data in arguing that the conspirators had a declining market share. SKW excludes from its market share calculations not only Minerais

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SKW's sales were above the pre-conspiracy price, although this was a period of significant oversupply. Gov. Br. 22, n.7.

but Globe (SKW Br. 26), which was in fact a conspirator. See II JA A56-57.

And whatever the after-the-fact views of some conspirators about the wisdom of the conspiracy, the government presented unchallenged documentary evidence that, subsequent to the time the floor-price agreements were reached, the coconspirators' commodity ferrosilicon (FESI) prices increased or held steady, rather than falling, although this was a period of oversupply. See Gov. Br. 5-8.[3] If the conspiracy had no impact on prices (see, e.g., Zak Br. 11), prices should have declined. Indeed, as this Court held in SKW I, if the conspiracy affects the negotiations, such as prices quoted by the conspirators, this alone is sufficient to prove that the conspiracy is influencing prices, because a higher starting point for negotiations is likely to affect the eventual sales price. 195 F.3d at 90-91, 93, I JA 600-01; see also Plymouth Dealers' Ass'n of N. Cal. v. United States, 279 F.2d 128, 132-34 (9th Cir. 1960). The evidence was clear that the prices quoted by the conspirators were affected by the floor prices agreed on by the conspirators. Gov. Br. 4-8. As for defendants' attempt to show that the conspirators did not communicate with fellow workers about the conspiracy, this is consistent with the secretive nature of an illegal price-fixing conspiracy, and is unpersuasive in light of the pricing evidence.

SKW baldly asserts that the government "offered no evidence on the market impact of [SKW's] pricing or sales" at the first sentencing and that the government presented "[n]o new

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[3] We note that SKW incorrectly states that this Court held that the conspiracy was "on and off " again. SKW Br. 20 (citing SKW I, 195 F.3d at 86), 23, 29. In fact, the Court was merely describing one witness' (Beistel's) testimony concerning his view of the conspiracy after he joined it "[t]oward the end of 1990." SKW I, 195 F.3d at 86, I JA 598. Other evidence, including Beistel testimony and Elkem documents, establish that the conspirators tried to charge the agreed-on price when possible and negotiated from that price when not possible. Gov. Br. 4-8, 21-24. Thus, the conspiracy influenced sales from its start in late 1989 until it ended in 1991. Id.

evidence" in support of its position at the second sentencing. It claims that the government stood by its "per se" theory on remand, without citing evidence of influence of the conspiracy on commerce. SKW Br. 4, 10, 36-37; see also Zak Br. 2, 5-6, 33-35. This is disingenuous. The government briefed the issue thoroughly at sentencing, citing extensive trial testimony and documentary evidence. See, e.g., I JA 45-54 (government memorandum on remand). However, it did not introduce new evidence at sentencing, because the trial record contained all the evidence necessary to determine the issue. See also I JA 201 (district court instructs defendants to brief on remand "what the record bears out"). In addition to the trial testimony and documentary evidence, the record included American's price lists (Gov. Ex. Nos. 41-48, III JA 959-89) and computer runs of SKW invoice data for 1989, 1990 and 1991, which set out SKW's sales throughout the conspiracy period (D. Ex. Nos.V-11, W-11, X-11; I JA 449-591, V JA A2539-2671). Further, on remand, the government provided the court with the dollar value of SKW sales it believed should be counted, and a chart showing SKW's sales made at or above the pre-conspiracy price, broken down by month, for the entire duration of the conspiracy.

In short, the government met the burden of proof[4] imposed on it by this Court's opinion, and, had the district court applied the correct standard, SKW's FESI sales throughout the period of the conspiracy would have been included for purposes of calculating volume of commerce attributable to SKW and Zak under U.S.S.G. § 2R1.1. The government was entitled to have the evidence considered under the proper standard. Indeed, applying the correct legal standard noted

[4] In determining whether the government met its burden of proving the volume of commerce by a preponderance of the evidence (SKW I, 195 F.3d at 91, I JA 600), the evidence must be viewed in the light most favorable to the government. United States v. Ruggiero, 100 F.3d 284, 291 (2d Cir. 1996); United States v. Paccione, 949 F.2d 1183, 1208-09 (2d Cir. 1991). SKW cites no authority in support of its contrary argument (SKW Br. 16, 34).

by this Court in SKW I to the facts in this record, any finding of fact involving the volume of commerce that does not include essentially all sales made from the start of the conspiracy in late 1989 until its end in 1991 would be clearly erroneous. Gov. Br. 20-25.

B. The Government Did Not Waive Its Objection To The District Court's Use Of Floor Price In Calculating The Volume Of Commerce For The Two 1991 Periods The Court Selected

Defendants also claim that the government forfeited its opportunity to provide the district court with evidence as to the total SKW sales during the two periods in 1991 selected by the district court, and that therefore the government cannot not now claim that the district court erred in including only SKW sales above the floor price. SKW Br. 44-47; Zak Br. 39-41. Initially, SKW (but not Zak) asserts that the court on remand directly instructed the government to address this point. SKW Br. 9, 17, 44. However, a review of the cited colloquy shows only that the district court observed that each party would be given an opportunity to reply to the other; no directive was given as to what was to be covered in the reply. See I JA 201-02.

Contrary to defendants' assertions (e.g., SKW Br. 10, 13, 17, 45; Zak Br. 39-41), the government on remand provided the court with a list of all SKW sales above the pre-conspiracy price (39 cents) for each month of the conspiracy. I JA 63. Accordingly, that list not only proved the government's point that the conspiracy influenced prices for basically its entire duration, but also provided the district court with accurate SKW sales figures for any month in which the court believed that the conspiracy influenced prices. Thus, when the court ruled on May 8, 2000, and the government objected to the district court's use of the floor price (I JA 229-30, 234), the court had a pleading before it that showed that its earlier figure of $361,443 for the two periods could not possibly be correct. Indeed, SKW's sales at more than the pre-

conspiracy price for March and June 1991, alone, were more than $1.6 million. See Gov. Br. 14-15; I JA 63, 230-31. Further, government counsel, during the telephonic conference at which the court read its opinion, brought this evidence to the court's attention, citing the $1.6 million figure. I JA 230-31. The court was not free to disregard this information. Accordingly, its finding as to SKW sales, which did not take into account this record evidence, was based not only on legal error but was also clearly erroneous.

As to the district court's refusal to consider the information presented by the government's letter of May 9, we believe that this refusal was an abuse of discretion for several reasons. First, as we have already noted, the court did not ask the government to calculate those sales. See I JA 201-202 (court's instructions to government counsel on remand). Moreover, the sales data were already in evidence (D. Ex. X-11, V JA A2539-2671), and all that needed to be done was to add up the sales made during the periods selected by the judge. This calculation could be done both easily and quickly, as evidenced by the fact that the district court had made the calculations itself at the first sentencing. Finally, the government examined the data and provided the district court with the relevant sales the very next day. In short, there was simply no reason why the district court should have refused to base its decision on readily available evidence in the record.

SKW claims that the sales figures provided by the government in the May 9 letter were "irrelevant" and appears to be saying that the data included sales outside the two periods designated by the court. SKW Br. 13 & n.6, 17-18, 46. But the data were obtained from a computer data base provided by defendants to the government and court (D. Ex. X-11, V JA A2539-2671), and the data correspond to the correct periods. Accordingly, the sales figures, far

from being "irrelevant," were obtained from a source whose reliability SKW can hardly challenge, and are directly on point. Defendants also claim (e.g. SKW Br. 46) that they never had a chance to show that these "gross" figures should be reduced by items such as freight costs. This issue, far from being new, however, was addressed by the Probation Office on the initial appeal, and only minor adjustments were made by that Office. See Gov. Br. 28 n.11. Ultimately, the district court did not make allowances for these claimed adjustments in arriving at its sales figure at either the first or second sentencing and defendants did not appeal that decision. II JA A117-18. Accordingly, they cannot complain now.

C. This Court Should Enforce Its Mandate

Defendants argue (SKW Br. 47-50; Zak Br. 34, 41-43) that the government should not ask this panel to revise the rule enunciated in the first appeal in this case. In fact, our basic argument is that this Court should enforce, not revise, its prior opinion. The Court in SKW I examined all of the reasons given by the district court for its initial sentences, and it expressly rejected the district court's reasoning as incorrect. For exactly the same reasons, this Court must reverse the sentences that the district court imposed on remand, because those sentences are based on the same legal errors noted in SKW I.

Nor does the "law of the case" doctrine (SKW Br. 47)[5] preclude this panel from doing

[5] "[L]aw of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power" (Messinger v. Anderson, 225 U.S. 436, 444 (1912); see also United States v. United States Smelting Ref. & Mining Co., 339 U.S. 186, 198 (1950)). Thus, this Court has the power to revisit the SKW I rule in the appropriate circumstance. However, we are not asking this Court to disregard the general practice. Rather, we ask the Court to reject the district court's approach in this case as inconsistent with this Court's mandate.

what the Court already did in SKW I. Specifically, in SKW I, this Court expressly stated that the Sixth Circuit's ruling in United States v. Hayter Oil Co., 51 F.3d 1265 (6th Cir. 1995) "is generally in accord with the analysis we adopt." SKW I, 195 F.3d at 91, I JA 600. To be sure, the Court in SKW I remanded the case to the district court to allow it to determine if the conspiracy in this case "was a non-starter, or if during the course of the conspiracy there were intervals when the illegal agreement was ineffectual and had no effect or influence on prices." Id. But this Court did not require "a sale-by-sale accounting, or an econometric analysis, or expert testimony" to prove that the conspiracy was effectual. Id. Rather, the Court recognized that even a rather ineffectual conspiracy can influence "negotiations, sale prices, the volume of goods sold, or other transactional terms" if only by stabilizing prices in a falling market. Id. at 90-91 & n.7; I JA 600. Our ultimate point in this case -- beyond the district court's obvious failure to carry out this Court's mandate -- is that the evidence plainly established that the conspiracy had that sort of influence throughout its duration. Indeed, as the Seventh Circuit noted in United States v. Andreas, 216 F.3d 645, 678 (7th Cir. 2000), and Judge Newman noted in his concurring opinion in SKW I (195 F.3d at 93, I JA 601), its almost impossible for a price-fixing agreement not to influence sales during the entire period the agreement exists. We simply ask the Court to clarify that, based on the evidence in this record, this case is not one of the very rare cases (if such a case is even possible) in which a price-fixing agreement has no effect or influence on prices.

CONCLUSION

The case should be remanded to the district court with instructions to impose sentences based on a volume of commerce that includes all FESI sales made by SKW during the entire period of the conspiracy.

Respectfully submitted.

A. DOUGLAS MELAMED
Acting Assistant Attorney General

MELVIN LUBLINSKI
EDWARD FRIEDMAN
JOHN W. McREYNOLDS
Attorneys
Department of Justice
Room 3630
26 Federal Plaza
New York, New York 10278

JOHN J. POWERS, III
MARION L. JETTON
Attorneys
Department of Justice
Room 10534
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-2414

DECEMBER 2000.