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 POST-HEARING BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT

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I. INTRODUCTION

In the history of its highly successful Corporate Leniency Policy, the Antitrust Division has never revoked a conditional leniency agreement – until now. Even in this case, it did so only when confronted with compelling evidence that Stolt[1] had breached its contractual obligations in the January 15, 2003 Conditional Leniency Agreement (the "Conditional Agreement"). In determining whether Stolt breached its obligations, the significant issues before the Court are: (1) the date on which Stolt discovered its anticompetitive conduct, (2) Stolt's, Cooperman's and Wingfield's subsequent actions, and (3) "whether, in light of those actions, Stolt-Nielsen complied with its obligation under the Conditional Agreement to take 'prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity.'" See Stolt-Nielsen S.A. v. United States, 442 F.3d 177, 187 n.7 (3d Cir.), cert. denied, 127 S. Ct. 494 (2006).

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[1] Defendants Stolt-Nielsen S.A. ("SNSA"), and its subsidiaries, Stolt-Nielsen Transportation Group Ltd. (Bermuda) and Stolt-Nielsen Transportation Group Ltd. (Liberia) (collectively "SNTG"), are collectively referred to as "Stolt" unless otherwise indicated.

There can be little doubt that Paul O'Brien, Stolt's longtime general counsel, discovered the conspiracy in late January 2002 when a copy of a conspiratorial document, a memo evaluating the financial benefit of the conspiracy to Stolt (the "Jansen Memo"), was left anonymously on his desk. O'Brien's swift departure in March 2002, the nearly simultaneous adoption of what Stolt claims was a greatly enhanced antitrust compliance policy, Wingfield's explanation to Odfjell and Jo Tankers that the new policy was the result of problems caused by O'Brien, and admissions by Stolt counsel John Nannes, all are compelling proof of O'Brien's discovery.

The serious dispute is whether Stolt's response to O'Brien's discovery constituted prompt and effective action to terminate its involvement in the conspiracy. Defendants maintain that Stolt satisfied this condition precedent by instituting a revised antitrust policy and telling their coconspirators at the March 2002 meeting of the NPRA trade association that the conspiracy was over. The Government contends, however, that when Wingfield met with his coconspirators at the NPRA meetings as Cooperman directed, Wingfield told them that despite O'Brien's discovery of the conspiracy Stolt would continue to honor their illegal agreement, which Stolt did until the Wall Street Journal exposed Stolt's illegal conduct on November 22, 2002.[2]

In this memorandum and the accompanying proposed findings of fact and conclusions of law, the Government explains the evidence that proves that Stolt breached the Conditional Agreement. The Government also explains why neither defendant Wingfield nor defendant Cooperman should be protected from prosecution in light of their conduct. First, however, the

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[2] Stolt's failure to disclose its continued conspiratorial activities to the Government constitutes a separate breach of its cooperation obligations under the Conditional Agreement (See GX-1 ¶ 3) and a separate ground for the Government's revocation of the Conditional Agreement.

Government wishes to address the question the Court raised in closing arguments: why should it believe the Government's case rather than defendants' version of the facts?

A. Defendants Had the Motive and Ability to Continue to Conspire after O'Brien Discovered their Illegal Conduct

There is no dispute that the defendants violated the antitrust laws from August 1998 to March 2002 by participating in a worldwide customer allocation conspiracy with their largest competitors, Odfjell Seachem AS ("Odfjell") and Jo Tankers B.V. ("Jo Tankers"). Cooperman organized the conspiracy on behalf of Stolt and insulated himself by delegating day-to-day responsibility for the conspiracy to his subordinates: initially, Andrew Pickering, and then Wingfield, who took over responsibility for the day-to-day conspiratorial activities in 2001.

Defendants' motive to continue to conspire after O'Brien discovered the April 2001 Jansen Memo revealing their illegal conduct is clear from the document itself: there was more profit in collusion than competition. The Jansen Memo explains that competition would result in a "reduction in rates," which Wingfield admitted would mean lower profits, and if Stolt were to "break the coop," it would take a long time to "put it back together." (GX-2, at 2). An outbreak of competition would have a domino effect that could quickly disrupt the market and the allocation pattern that had served the conspirators so profitably. Cooperman understood this when he launched the allocation agreement in 1998, and Wingfield understood this when he became responsible for carrying out the conspiracy in 2001. And both were willing to expose themselves, their subordinates, and the company to criminal liability to carry out this profitable arrangement.

Since they were motivated by profits, the only reason for defendants to stop conspiring

would be if they faced an unacceptable risk of getting caught. But even when O'Brien discovered the Jansen Memo and the conspiracy, defendants firmly concluded there was little risk of exposure because they believed the attorney-client privilege prevented O'Brien from revealing Stolt's illegal cartel conduct. In fact, that is the message Wingfield delivered to his coconspirators at the March NPRA and June London meetings.

Stolt's belief that O'Brien would not disclose Stolt's illegal conduct initially held true. In O'Brien's June 2002 civil suit for constructive termination – which was not reported publicly – he alluded only generally to illegal activities by Stolt, but did not refer to the antitrust laws at all. (See GX-10A). Only after O'Brien filed an amended complaint in November 2002, publicly alleging for the first time that Stolt had violated U.S. antitrust laws (see GX-10B), did Stolt and Cooperman seek leniency. Stolt's belief that O'Brien could not disclose its illegal conduct also explains Cooperman's decision to conceal his knowledge of or involvement in the conspiracy from the independent members of SNSA's Board of Directors, even after O'Brien filed suit in June 2002. Cooperman engaged in such deception because he believed that O'Brien could not expose the conspiracy and his participation in it.

Defendants also knew they had minimized the risk of exposure when Wingfield informed Odfjell and Jo Tankers of Stolt's revised antitrust policy, because Wingfield assured both Odfjell and Jo Tankers that the policy was the result of an internal problem at Stolt caused by a former employee and would have no effect on their illegal agreement. Neither Odfjell nor Jo Tankers had reason to doubt Wingfield's assurances because Wingfield and Jansen, who had been carrying out Stolt's part in the conspiracy prior to the new policy, continued to carry out the conspiracy in the months that followed.

In fact, the continuation of the conspiracy helped ensure that defendants' involvement in it would not be disclosed by either Odfjell or Jo Tankers. As long as Jo Tankers and Odfjell continued to be complicit with Stolt and profit from the illegal agreement, they had no motive to expose Stolt. If Wingfield had told them that the conspiracy was over without first seeking amnesty – as defendants claim happened – Stolt's withdrawal would have posed a serious risk that Jo Tankers or Odfjell would race to the Government seeking leniency and exposing Stolt's crimes. Only by having Wingfield assure Odfjell and Jo Tankers that Stolt remained committed to the conspiracy – as the Government's witnesses testified – could Stolt and Cooperman hope to obviate exposure by them. Indeed, Cooperman's decision not to seek leniency in March 2002 shows that he was confident Stolt would not be exposed by Jo Tankers or Odfjell – precisely because Wingfield had delivered the message that despite O'Brien's discovery and the need to issue a revised antitrust policy, the agreement could be kept under wraps and continue as it had.

Defendants also had the opportunity to continue carrying out the conspiracy despite the revised antitrust policy because Wingfield and Jansen were permitted – indeed sent – by Cooperman and Reginald Lee, SNTG's CEO, to meet alone with their coconspirators after March 2002. And it is no coincidence that no agendas were written and no minutes were prepared for those meetings, nor were admittedly improper discussions reported to Stolt's general counsel as expressly required by the revised policy. Thus, Cooperman allowed Wingfield and Jansen to continue the profitable and long-standing conspiracy, albeit in a more discreet fashion, until the O'Brien problem went away.

Wingfield also was able to continue conspiring despite the fact that the revised antitrust policy restricted contacts by lower-level employees. By its very nature, the conspiracy required

little contact among the parties. Once customer lists were exchanged, the conspiracy could be carried out easily without much discussion – the companies simply did not solicit or bid to one another's customers. In fact, Odfjell continued to carry out and abide by the conspiracy between March and November 2002, principally by not bidding to Stolt customers, without the knowledge of Stolt's lower-level employees. Furthermore, because Wingfield had knowledge of Stolt's prices – and the testimony of Stolt employees and Stolt documents prove he had such knowledge – he did not need the participation of lower-level employees to continue the conspiracy.

Finally, Wingfield was willing to "risk" the consequences of violating the revised antitrust policy because he knew that the policy did not apply to him. That is evident not only from the fact that Cooperman continued to send him to meet with coconspirators without any supervision, but from the fact that when his violation of the revised policy was reported to Cooperman, nothing happened.

When Stolt business director William Humphreys told Cooperman that Wingfield had been talking to Odfjell about the Sasol contract on the morning bids were due, Cooperman should have questioned Wingfield about the discussion. But, by Wingfield's own admission, Cooperman did nothing – Cooperman did not even mention Wingfield's conversations with Odfjell when they met behind closed doors just minutes after Humphreys reported Wingfield. Cooperman's utter failure to act explains why Wingfield almost immediately took yet another call from Odfjell and discussed Sasol pricing. And days later, when Stolt learned Odfjell had won the Sasol contract because Stolt's bid numbers were just "slightly higher" than Odfjell's, Cooperman again took no action and Stolt failed to investigate Wingfield's bid-day conversations with Odfjell. Instead, within a week, Stolt management again sent Wingfield to

meet privately with Odfjell in London.

Wingfield admitted that, at that meeting, he again failed to comply with the antitrust policy. When Jansen complained to Odfjell about competition from Odfjell's agent in South Africa for Stolt's allocated customer Equatorial – a blatant violation of the revised policy – and Nilsen replied that he would "look into it" (see Government's Proposed Finding of Fact ("Gov't FOF") 170-174), Wingfield admittedly stood by and did nothing. He also failed to report Jansen's improper conduct to Stolt's general counsel, as required by the policy.

And if the revised antitrust policy applied to all Stolt employees – as Stolt and Cooperman argue – Jansen, who admitted he violated the policy through November 2002, surely should have been fired, demoted, or at least disciplined – penalties enumerated in the policy. Instead, he was placed on administrative leave in 2003, remains on Stolt's payroll, and has since collected almost $1 million in unearned salary from Stolt.

It does not make sense for any of this conduct to have taken place after March 2002 if Stolt's revised compliance policy, with all of its attendant policing mechanisms and consequences, was effective. Nor would it make sense if Cooperman truly had been committed to implementation of the revised policy. Rather, all of this conduct demonstrates that Stolt and Cooperman intended the revised policy to apply only to lower-level employees, while allowing the company's continued participation in the conspiracy.

B. The Testimony of the Government Witnesses is Credible And Supported by Contemporaneous Documentary Evidence

As the Court recognized, the credibility of the witnesses is critical to deciding this matter. In this case, virtually all the witnesses in the Government's direct case were current and former

employees of Jo Tankers and Odfjell, the coconspirator companies. While the Court expressed skepticism about believing the very people Stolt "turned in" pursuing its amnesty application, in conspiracy cases such as this, direct evidence can come only from coconspirators. And in this case, the Government called as witnesses not just one, but every person who participated with Wingfield in the conspiracy until November 2002: Bjorn Sjaastad, Morten Nystad, Erik Nilsen and Jarle Haugsdal of Odfjell, and Hendrikus van Westenbrugge and Hugo Finlay of Jo Tankers, as well as Bjorn Jansen, Wingfield's chief subordinate at Stolt. While any one witness may have a motive to fabricate, when all these witnesses from different companies testified that the conspiracy continued until November 2002, the evidence becomes overwhelming. It is also highly unlikely that this many witnesses, some no longer even employed by the coconspirator companies, could have tailored their testimony to support one another.

Moreover, three of the Government's witnesses entered guilty pleas and were incarcerated, admitting they conspired with Stolt until November 2002. For example, van Westenbrugge from Jo Tankers testified that in November 2002, he provided Wingfield price guidance so that Stolt could bid higher than Jo Tankers on the Shell-Pecten contract. Not only did van Westenbrugge plead guilty and go to jail for his conduct, but his testimony was corroborated by Finlay, who stated that van Westenbrugge asked Finlay to give him freight rates to provide to Wingfield. The fact that Wingfield got prices from Jo Tankers in November 2002 also supports the Odfjell witnesses' testimony that Wingfield continued his conspiratorial activities with Odfjell as well. Odfjell and Jo Tankers also pleaded guilty to conspiring until November 2002, thereby exposing themselves to higher civil treble damage claims by their customer victims, see 15 U.S.C. § 16(a) – something they would not have done if they had

stopped conspiring in March, as defendants claim.

The testimony from Jo Tankers and Odfjell witnesses also is supported by the testimony of Stolt's own employees and by Wingfield's own admissions. For example, Humphreys, a current Stolt employee[3] with absolutely no motive to lie, supported the testimony of Odfjell witnesses that Wingfield gave Odfjell the prices that Stolt had bid to Sasol.[4] Witnessing Wingfield discuss rates so upset Humphreys that he walked out of Wingfield's office in utter disbelief that "this was happening, all these events at the eleventh hour, 59th minute," despite his report to Cooperman. (See Gov't FOF 152, 153). And Jansen, still on Stolt's payroll and who attended Wingfield's post-March 2002 meetings with Nilsen and Haugsdal, also testified that the agreement continued after March 2002.

Moreover, Wingfield himself testified that he told Odfjell that the revised antitrust policy did not mean that Stolt was going to go after all Odfjell's customers, and admitted that it stood to reason that Odfjell likewise would not go after all Stolt's customers. It was Wingfield who testified that there were "a lot" of calls from Odfjell concerning the Sasol contract in October

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[3] Humphreys and the other Stolt employee witnesses testified pursuant to individual non-prosecution/cooperation agreements the Division had entered into with them, so that they were protected from prosecution in exchange for their truthful cooperation, whether Stolt's Conditional Agreement remained in place or not. As a matter of prosecutorial discretion, however, even if a company's conditional leniency agreement was revoked, the Division would elect not to prosecute individual employees, including employees who did not have separate non-prosecution/cooperation agreements, so long as they had already provided full and complete cooperation prior to revocation and, in the Division's view, were not responsible for the revocation.

[4] Humphreys did not witness Wingfield providing Stolt's rates to Odfjell, but apparently witnessed Wingfield discussing Odfjell's Sasol rates with Nilsen. This supports Nilsen's and Haugsdal's testimony that, after telling them that it was too late for Stolt to withdraw its bid, Wingfield called again and disclosed Stolt's prices so that Odfjell could bid below them.

2002, and that he assumed Odfjell thought the agreement was still on at that point. And it was Wingfield who testified that he met with Odfjell in London's Heathrow Airport just one week later, when Jansen openly asked Nilsen to look into the situation regarding Stolt's allocated customer Equatorial and Nilsen agreed. Wingfield's admissions corroborate the Government's witnesses that it was business as usual.

This testimony is also corroborated by contemporaneous documentary evidence. In white collar crime cases, a single document, whose meaning sometimes is not readily apparent, can reveal the existence of an illegal agreement – or in this case, the continuation of the illegal agreement past March 2002. Despite the heightened alert at Stolt not to create incriminating evidence after O'Brien resigned, there are several Stolt documents in this case, discussed below, for which the only reasonable explanation is that the conspiracy continued after March 2002. There are also Odfjell and Jo Tankers documents created in 2002 – long before there could have been any motive to fabricate or lie – that show unequivocally that after March 2002 Odfjell and Jo Tankers continued to behave in a manner consistent with the existence of an ongoing conspiracy with Stolt. And Wingfield's own business journal entries demonstrate his continued participation in the conspiracy. Finally, what happened in the market between March and November 2002 corroborates the testimony of the many witnesses who testified that the conspiracy continued. Had Stolt withdrawn from the conspiracy at the NPRA meetings, bid results would have reflected it. Yet despite Stolt's substantial effort to show a change in competition among the coconspirator companies following the NPRA meetings, the evidence shows there was none. Not a single deep sea contract on the allocation lists changed hands during that entire eight-month period in violation of the allocation agreement.

II.

SUMMARY OF FACTS

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

The conspiracy was formed in August 1998 when representatives of Stolt and Odfjell, the world's two largest parcel tanker shipping companies, met and agreed to allocate customers, rig bids and fix prices. Defendant Cooperman and his top subordinate, Andrew Pickering, met in Stolt's London Offices with Odfjell's Bjorn Sjaastad, Atle Knutsen and Erik Nilsen. At that meeting, Stolt and Odfjell agreed to maintain the "status quo" and not compete for each other's customers on deep sea trade routes around the world, and further agreed to create and exchange customer lists to carry out the agreement. (See Gov't FOF 1-3,7).[5]

After organizing the cartel, Cooperman entrusted its day-to-day operations to Pickering and his subordinates. (See Gov't FOF 5, 6, 18). Thereafter, the agreement, which encompassed over 150 customers worldwide, operated as intended. Typically, the coconspirator companies simply did not bid on COAs for one another's customers. If circumstances required Stolt or Odfjell to bid against one another, they would submit fraudulent bids to create the appearance of competition between them, discussing prices first if necessary. (See Gov't FOF 8-10).

Stolt and Odfjell also each had discussions with representatives of Jo Tankers in which

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[5] The agreement covered contracts of affreightment ("COAs") on deep sea trade routes worldwide. COAs are typically long-term contracts involving multiple shipments to various ports on a trade route. Spot cargoes, which typically involve single shipments to a particular port, were not included in the agreement. Contracts for customers on regional routes were also excluded from the agreement and the allocation lists. (See Gov't FOF 11-14). In 2000, however, Stolt and Odfjell agreed to allocate regional business, but only in the Gulf of Mexico, and left the negotiation of customers covered and the implementation of the agreement to the lower-level executives responsible for that trade area. (See Gov't FOF 14)

they agreed not to compete for certain customers on various trade lanes around the world. While customer lists were not exchanged and fewer customers were involved, the arrangement with Jo Tankers was the same: the companies would not compete for agreed-upon customers and, where necessary to carry out the illegal agreement, prices were discussed and bids with intentionally high prices were submitted. (See Gov't FOF 6).

In February 2001, Wingfield replaced Pickering as Stolt's Managing Director of Tanker Trading and Stolt's key conspirator. (See Gov't FOF 15). Several things happened when Wingfield took over: (1) Wingfield and Jarle Haugsdal of Odfjell agreed that there were too many conspiratorial contacts among lower-level employees and that such communications should be limited to their top executives (see Gov't FOF 19); (2) Wingfield informed his subordinates that future conspiratorial discussions would be limited to Jansen and himself so that he could have more control over the conspiracy (see Gov't FOF 20, 21); and (3) Wingfield met with Nilsen and other Odfjell executives to reaffirm the conspiracy and to create and exchange updated customer lists. (See Gov't FOF 17).

Wingfield also decided that Stolt should analyze the financial benefit of the conspiracy to determine whether it should continue to participate, and directed that Jansen and the business directors conduct such an analysis. (See Gov't FOF 23-27). Jansen summarized their findings in the Jansen Memo, which he faxed to Wingfield on April 10, 2001. (See GX-2). Jansen advised Wingfield that he and the business directors strongly believed that it was preferable to continue to "coop" with Odfjell rather than "go to war" with Odfjell, and 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 in rates in general." (Id., at 2) (emphasis in original). Soon after sending this Memo,

Jansen discussed the conspiracy with Cooperman. Stolt continued to participate in the conspiracy. (See Gov't FOF 28).

In January 2002, O'Brien found a copy of the Jansen Memo, which had been left anonymously on his desk. (See Gov't FOF 34). O'Brien promptly reported his discovery of the Jansen Memo to Cooperman, stating that he believed it showed that Stolt was engaged in an express agreement with Odfjell to allocate customers in violation of U.S. antitrust laws. (See Gov't FOF 38).

Cooperman's first response was to appoint himself – the instigator and overseer of the conspiracy at Stolt – to "investigate" O'Brien's discovery. (See GX-13B). Cooperman's first "investigative" step was to call Jansen to his office and chastise him for putting evidence of the agreement in writing, calling Wingfield "stupid" for asking for the written report and Jansen "stupid" for sending it. (See Gov't FOF 40). Cooperman also discussed the Jansen Memo with Wingfield (see Gov't FOF 299a., 301a.) and held private meetings with Stolt's business directors, who had participated in the conspiracy. During those meetings, Cooperman explained to the business directors 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. (See Gov't FOF 42).

Cooperman prepared a two-page report on his February 2002 "investigation" (GX-13B), in which he falsely stated that the Jansen Memo was not a conspiratorial document and that Jansen had told him that the Memo related to independent business activity. (See id., at 2; see Gov't FOF 48). In the report, Cooperman also falsely stated that the business directors denied any knowledge of an "ongoing" conspiracy (see id.; see Gov't FOF 45-47), when in fact, he

never even asked them any questions about the conspiracy.[6] (See Gov't FOF 46-47). Cooperman continued the pretense that there was no conspiracy when, in August 2002, he reported on the matter to the SNSA Board, and told them that the civil suit O'Brien had filed alleging that Stolt violated the law was baseless. (See Gov't FOF 119-121).

Understandably dissatisfied with Stolt's response to his discovery of a worldwide customer allocation agreement, O'Brien resigned from Stolt on March 1, 2002. (See Gov't FOF 49; see GX-8). Cooperman accepted the resignation (see GX-9), and thereafter had Stolt issue a revised antitrust compliance policy, which included seminars and certificates of compliance by employees. Stolt also e-mailed the policy to its business partners, informing them that the company would adhere strictly to it. (See GX-11).

Nothing was done to inform Jo Tankers or Odfjell about Stolt's new policy until Cooperman and others decided to send Wingfield alone to the NPRA meetings at the end of March 2002 to personally advise Stolt's coconspirators of the situation. (See Gov't FOF 59). At his meeting with Odfjell, Wingfield told Sjaastad and Nystad that Stolt was having problems with a former employee who was threatening to expose the conspiracy and that, as a result, Stolt had issued a revised antitrust policy. He assured them, however, that the new policy would not affect the conspiratorial agreement, that it would be business as usual, and emphasized that the two companies would have to be more careful in their future conspiratorial dealings. (See Gov't FOF 66-67). In a separate meeting, Wingfield gave representatives of Jo Tankers many of the

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[6] Cooperman has suggested that his report was not false because Stolt's wrongdoing was not "ongoing." But Cooperman's report states that he conducted his investigation "during February 2002" (GX-13B, at 2), a month before Stolt claims it withdrew from the conspiracy. Moreover, the business directors denied that Cooperman asked them about their knowledge of wrongdoing. (See Gov't FOF 46, 47).

same assurances, telling them that Stolt was having internal problems because O'Brien had discovered the company's antitrust violations. (See Gov't FOF 77, 78). During a later meeting he and Jansen had with other Odfjell representatives in London in June 2002, Wingfield reiterated Stolt's intention to continue the cartel and Stolt's belief that O'Brien could not disclose the cartel agreement because of the attorney-client privilege. (See Gov't FOF 90, 91).

Stolt, Odfjell and Jo Tankers continued to honor the agreement into November 2002. Not a single allocated deep sea COA changed hands between Stolt and either Odfjell or Jo Tankers between March and November 2002. (See Gov't FOF 219-245). During that period, Wingfield and Jansen continued to have conspiratorial discussions, when necessary, with both Odfjell and Jo Tankers on various customers located around the world. For example, in one instance when Stolt decided to violate the agreement by secretly bidding to Odfjell's allocated customer Sasol – to show that Stolt would "steal" an Odfjell customer – Wingfield backed down after Odfjell learned about Stolt's bid. Wingfield provided Stolt's bid prices to Odfjell so as not to jeopardize the continuation of the conspiracy because Odfjell told him it would be a "deal breaker" if Stolt won the Sasol contract. (See Gov't FOF 141, 154). Wingfield and Jansen met with Haugsdal and Nilsen in London just one week after the Sasol bid and discussed other issues related to the agreement, and ultimately resolved certain old disputes. (See Gov't FOF 161-169). Around that same time, Wingfield obtained commitments from both Odfjell and Jo Tankers not to compete for SK Corp., a major Stolt customer, and Wingfield agreed that Stolt would not compete against Jo Tankers for its customer, Shell-Pecten. (See Gov't FOF 208-210, 199-202, 181-190).

By November 2002, Stolt's efforts to hide the conspiracy started to fail. First, O'Brien filed an amended complaint against Stolt and Cooperman, publicly alleging for the first time that

they had violated U.S. antitrust laws. (See GX-10B). Stolt also learned about possible law suits by customers. (See Gov't FOF 247, 248). Then, on November 22, 2002, the Wall Street Journal published an article about Stolt, including O'Brien's charges of Stolt's antitrust violations. (GX-14). Only when faced with that imminent threat of exposure and criminal prosecution, did Stolt hire outside attorney John Nannes, formerly a Deputy Assistant Attorney General of the Antitrust Division, to contact the Division to discuss an application for conditional leniency. (See Gov't FOF 249, 250, 254).

B. The Conditional Agreement

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). 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" (GX-3 ¶ B.3), 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, determination of whether Stolt actually qualified for leniency was prospective, i.e., the Government would determine after the Conditional Agreement was signed whether Stolt's representation that it took prompt and effective action to terminate was true. (See GX-1 ¶ 3). If Stolt failed to satisfy any condition, the Conditional Agreement would be void, and the Division could revoke Stolt's conditional acceptance into the Program and prosecute the corporation "without limitation." (GX-1 ¶ 3). Once a corporation qualifies for

leniency under Part B of the Leniency Program,[7] 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. (See GX-3 ¶ C; GX-1 ¶¶ 3-4). The Policy and a model leniency agreement are publicly available and are widely known to antitrust counsel. (See Gov't FOF 316, 317, 320).

The same day the Wall Street Journal article appeared, Nannes contacted the Antitrust Division on behalf of an unnamed client. Later, when Nannes identified Stolt as his client, the Division told Nannes that it was aware of the Wall Street Journal's report of O'Brien's allegations, and warned that if Stolt had not complied with the prompt termination condition, Stolt would not qualify for leniency. (See Gov't FOF 250, 332-334). Nannes assured the Division that – as Stolt had stated to the Wall Street Journal (see GX-14) – O'Brien's allegations that Stolt failed to stop its conspiratorial conduct were baseless. Nannes stated that after O'Brien reported his discovery of the Jansen Memo to Cooperman, Stolt took steps to revise its antitrust policy and advised its coconspirators "that the company no longer would participate in the conduct." (See Gov't FOF 337). As proof, Nannes provided the Division with e-mails Wingfield sent to Odfjell and Jo Tankers after the NPRA meetings attaching Stolt's revised policy (GX-12), which Nannes claimed "provided unequivocal evidence or proof that the company had in fact terminated its conduct in March and April." (See Gov't FOF 337). Throughout the negotiations, the Division repeatedly reminded Nannes and Stolt that if Stolt had not complied with the prompt termination condition, Stolt would not qualify for leniency and any

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[7] In the Conditional Agreement, the Division agreed conditionally to accept Stolt into Part B of the Corporate Leniency Program. (See GX-1 ¶ 3).

conditional agreement would be revoked. (See Gov't FOF 333-340).

Both Nannes and Stolt understood that the Division's Agreement with Stolt was conditional; that Stolt's representations in the Agreement are conditions precedent of the Agreement; and that if the conditions are not met, the Division had the right to revoke the Conditional Agreement. (See Gov't FOF 338, 340, 363). Wingfield and Cooperman also understood the agreement was conditional, as evidenced by a November 25, 2002 entry in Wingfield's journal recording a meeting he had with Cooperman about the Leniency Program. (See GX-26C.5789.A-90.A; see Gov't FOF 418).

On January 15, 2003, Stolt and the Division signed the Conditional Agreement (GX-1), which contained the conditions reviewed with and acknowledged by Nannes and Stolt during negotiations. (See Gov't FOF 342-367). Stolt provided the following cooperation to the Division pursuant to its obligations under the Agreement. First, Nannes admitted Stolt's participation in a conspiracy with Odfjell and Jo Tankers prior to March 2002. (See Gov't FOF 377). 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. (See Gov't FOF 377, 387). On February 5, 2003, Stolt produced Pickering and Jansen for interviews, accompanied by Nannes. (See Gov't FOF 372). As was its practice, the Government conducted those interviews pursuant to individual immunity/cooperation agreements. During his interview, Jansen lied and falsely told Division attorneys that Stolt's participation in the cartel ended after O'Brien's discovery (see Gov't FOF 374), a lie he reported to Wingfield following his interview. (See Gov't FOF 376). Stolt also submitted documents, including customer allocation lists, all of which would have been subject to a grand jury subpoena. (See Gov't FOF

368-371). Stolt, Cooperman and Wingfield never disclosed any evidence of Stolt's participation in the continuation of the conspiracy after March 2002. (See Gov't FOF 382-385).

In April 2003, less than three months after the Conditional Agreement was signed, the Division interviewed Hugo Finlay of Jo Tankers. Finlay did not know what information Stolt or anyone else had provided to the Division. Finlay told the Government that Wingfield did not withdraw from the conspiracy at the NPRA meeting and, instead, that he and Jo Tankers continued conspiring with Stolt until as late as November 2002. (See Gov't FOF 389, 393). On April 8, 2003, as a matter of fairness to Stolt, the Division suspended Stolt's obligation to cooperate under the Conditional Agreement while it investigated whether Stolt had violated the Conditional Agreement's prompt and effective termination condition. (See DX-11). Thereafter, Jansen obtained his own counsel and recanted his earlier lies – which he told the Government he had discussed with Wingfield – and admitted that he and Wingfield continued to meet and conspire with Stolt's competitors until the fall of 2002. (See Gov't FOF 259-261). In July 2003, Odfjell executives, who had no knowledge of what information Stolt or others had provided the Government (see Gov't FOF 265, 266), corroborated the information Jansen and Finlay had provided regarding the NPRA meetings and the continuation of the conspiracy.

The Government did not act precipitously before revoking the Conditional Agreement. On March 2, 2004, only after conducting a lengthy investigation and obtaining additional evidence that Wingfield – the Managing Director of Stolt's parcel tanker shipping business and the company's key representative in the conspiracy – continued to have conspiratorial meetings and discussions with the very same executives from Odfjell and Jo Tankers with whom he conspired prior to O'Brien's discovery, did the Division revoke Stolt's conditional admission

into its Corporate Leniency Program. (See DX-20). The Division advised Stolt that the January 15, 2003 Conditional Agreement was void for two reasons: (1) Stolt had falsely represented in the Conditional Agreement that it had taken prompt and effective action to terminate its involvement in the conspiracy upon discovery; and (2) Stolt had failed to provide the "full, continuing and complete cooperation" required by the Conditional Agreement because it had not disclosed its full involvement in the conspiracy. (Id.). As the result of Stolt's breach, the Conditional Agreement was void, and the Government sought and obtained Stolt's indictment in this case. The Government also determined that, under the circumstances of this case, it was appropriate to charge Wingfield, because he continued to carry out the conspiracy for Stolt, and Cooperman, the company's chairman, because he was responsible for Stolt's failure to take action that would have prevented Wingfield from continuing to conspire, and because he knew or was willfully ignorant of Wingfield's continued illegal conduct.

III.

PROOF THAT O'BRIEN DISCOVERED THE CONSPIRACY AND THAT STOLT NONETHELESS CONTINUED THE CONSPIRACY THEREAFTER IS COMPELLING

A. O'Brien Discovered the Conspiracy

The first factual determination required by the Court of Appeals is when Stolt discovered the anticompetitive activity it reported, i.e., a conspiracy to allocate customers on deep sea trade lanes around the world. The conclusion that Paul O'Brien, Stolt's then Senior Vice President and General Counsel and Senior Vice President of Legal and Projects, discovered the conspiracy in January 2002 through the Jansen Memo is supported by the testimony of O'Brien (see Gov't FOF 414, 415), the Jansen Memo itself (GX-2), admissions by both Cooperman and Wingfield,

and testimony by Nannes in the civil case before Judge Savage.

Contrary to defendants' assertions, there is no basis to conclude that "discovery" for purposes of an amnesty application requires "smoking gun" evidence or any other specific quantum of evidence. Rather, for purposes of eligibility for conditional leniency, the Antitrust Division has broadly defined "discovery" as when corporate counsel is "first informed" of the conduct.[8] (See GX-4 ¶ IIA(2); Gov't FOF 323).

During his tenure at Stolt, O'Brien became intimately familiar with Stolt, its corporate structure and practices, its parcel tanker shipping business and the responsibilities of its executives, including Cooperman and Wingfield. (See Gov't FOF 32). In carrying out his legal and business responsibilities, O'Brien also became knowledgeable about the parcel tanker industry generally, including its competitive structure, Stolt's competitors, industry practices, and legitimate agreements among parcel tanker shipping companies. (See Gov't FOF 31-33). To a knowledgeable industry participant such as O'Brien, the illegal nature of the cooperation between Stolt and Odfjell discussed in the Jansen Memo was obvious.

The Jansen Memo itself – a document which both Jansen and Wingfield concede was an analysis of the conspiracy (see Gov't FOF 23, 24, 26) – clearly was sufficient to "inform" O'Brien of the illegal conduct. Indeed, the document on its face reflects that Stolt was involved in an illegal agreement with Odfjell, which is exactly what O'Brien told Cooperman. Nannes testified before Judge Savage that Cooperman told him O'Brien reported that Stolt was engaged

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[8] The 1998 Policy Statement provides that "[g]enerally, the Division will consider the corporation to have discovered the illegal activity 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 ¶ IIA(2)).

in an "express agreement with Odfjell to allocate customers," "as exhibited in the Jansen [Memo]," in violation of the law. (See Gov't FOF 416) (emphasis added). Cooperman's admission to Nannes is undeniable proof that O'Brien discovered the conspiracy.

Moreover, Nannes' claim that when he first reviewed the Jansen Memo he was unable to make a conclusive determination that it was a conspiratorial document is irrelevant. While O'Brien had over ten years' experience at Stolt and extensive knowledge of the industry and Stolt's lawful arrangements with its competitors, Nannes had just been retained and had no experience at Stolt or in the industry. The only information he had was misleading information provided to him by Cooperman during their day-long meeting on November 22, 2002. Cooperman spent most of that meeting talking about oligopoly, explaining why Stolt and its competitors independently chose not to compete, and detailing many legitimate reasons they had to communicate regularly. (See Gov't FOF 250, 251). In these circumstances, it is not surprising that Nannes would claim he was uncertain that the Jansen Memo was a conspiratorial document. Nannes claimed that he was able later to determine that a conspiracy existed from the "smoking gun" customer list. (See Gov't FOF 253). The Jansen Memo, however, is far more explicit about the existence of the conspiracy than the customer list, which simply consisted of customer names in columns. (See GX-39A). As Pickering, who was responsible for Stolt's allocation list, testified, the meaning of the list would be clear, without explanation, only "to someone in the business." (See Gov't FOF 370).

Cooperman's reaction to O'Brien's discovery of the Jansen Memo further shows that O'Brien understood that the Memo related to the customer allocation conspiracy that Cooperman himself had helped organize. Cooperman called Jansen on the carpet about the Memo – not

about the conspiracy, but because Jansen created a paper trail of the conspiracy – telling Jansen that he was "stupid" for sending the Memo and that Wingfield was "stupid" for asking for it. (See Gov't FOF 40). Cooperman also created a false explanation for the conspiratorial language in Jansen's Memo in his February 2002 investigative report, the substance of which he later provided to Stolt's counsel and the Board of Directors. (See GX-13B). In his report, Cooperman falsely stated that he questioned both Jansen and Wingfield concerning the Jansen Memo and that they categorically denied that it involved illegal conduct. (Id.). Cooperman's report is contradicted by both Jansen and Wingfield, who admitted that the Jansen Memo is a conspiratorial document, which Cooperman himself knew. (See Gov't FOF 7, 24, 26, 48). Jansen expressly contradicted Cooperman's version of their meeting, and testified that during the conspiracy Cooperman himself referred to the allocation agreement by the very terms in the Jansen Memo – "status quo" and "cooperation." (See Gov't FOF 7, 48). Stolt's reaction to O'Brien's discovery – making what defendants claim was a dramatic toughening of its antitrust policy – also belies its claim that O'Brien did not discover the conspiracy. Indeed, Wingfield's statements to Jo Tankers and Odfjell that O'Brien was threatening to blackmail Stolt and expose their agreement and, as a result, Stolt had to issue a revised antitrust compliance program (see Gov't FOF 65-68, 77, 78, 90), amounts to an admission by Wingfield that O'Brien discovered the conspiracy. Stolt would not have feared O'Brien's disclosure of something he did not know.

B. Stolt Continued to Conspire after O'Brien's Discovery

1. Wingfield Assured Coconspirators at the NPRA And June Meetings that the Agreement Was On

Finlay, van Westenbrugge, Sjaastad and Nystad all testified that Wingfield told them at

the March 2002 NPRA meeting that, because of problems being caused by a former employee who was threatening to expose their illegal agreement, Stolt had issued a revised antitrust policy. Wingfield assured them, however, that despite the new policy, Stolt remained committed to their customer allocation scheme and it would continue as it had in the past, and emphasized that they have to be more careful about future conspiratorial communications.[9] (See Gov't FOF 65-67, 77, 78, 82). Their testimony is supported by documentary evidence, testimony of Stolt witnesses and Wingfield's own admissions.

Wingfield testified that Cooperman and Lee sent him to meet with Odfjell and Jo Tankers at the NPRA meeting to advise them of Stolt's revised antitrust policy. (See Gov't FOF 60). While Wingfield claimed he told them that the conspiracy was over, he admitted on cross-examination that as soon as he had told Nystad and Sjaastad about the policy, he assured them that "didn't necessarily mean we were going to contact all of their customers" and further admitted "if it worked one way, it was going to work the other way;" i.e., he also expected Odfjell not to compete for Stolt's customers. (See Gov't FOF 73, 269a.). In fact, telling a coconspirator in a long-standing customer allocation agreement that you will not be going after their customers constitutes a continuation of the conspiracy, and conveys the message that it will

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[9] Van Westenbrugge testified that Wingfield limited future discussions to "severe matters," which he claimed meant legitimate issues regarding Jo Tankers' and Stolt's co-service agreement. (See Gov't FOF 292). Van Westenbrugge's testimony on this matter is inconsistent both with other testimony he has given (see Gov't FOF 292a.) and with his own subsequent illegal discussions with Wingfield. (See Gov't FOF 292b.). It also is belied by Stolt's admission that discussions about the co-service agreement were not limited to Wingfield and van Westenbrugge, and that Finlay, Cleary and their subordinates continued to handle co-service agreement issues just as they always had. (See Gov't FOF 292c.). More importantly, if Wingfield had told van Westenbrugge that the agreement was over, van Westenbrugge would have had to inform Finlay, who was one of Jo Tankers' representatives in the conspiracy (see Gov't FOF 296), but there is no evidence that van Westenbrugge ever did so.

be business as usual – just as so many witnesses testified. Since Stolt, Odfjell and Jo Tankers had been allocating customers for years, Odfjell and Jo Tankers would rightly understand Wingfield to mean – when he admittedly told them that Stolt would not compete for all their customers despite the revised policy – that Stolt would continue to honor their customer allocation scheme. There is simply no other explanation of why Wingfield would discuss Stolt's intentions with his coconspirators.

Other Stolt witnesses corroborate that Wingfield's message was that Stolt would continue not to compete against Odfjell and Jo Tankers despite its revised policy. First, Jansen testified that Wingfield reported telling Odfjell that Stolt's revised antitrust policy did not mean that Stolt was going to war with Odfjell, and that Jansen understood Wingfield's statement as an instruction not to compete for Odfjell's customers. (See Gov't FOF 262a.). Moreover, there is a remarkable parallel between the message Wingfield testified he gave to his coconspirators at the NPRA meetings and the message Cooperman gave to the business directors during their February 2002 oligopoly meetings – it makes sense not to go after competitors' customers and for them not to go after Stolt's. (See Gov't FOF 42). This parallel is not a coincidence, but rather gives rise to a compelling inference that, when Cooperman sent Wingfield to meet with Odfjell and Jo Tankers at the NPRA, he did not want to break the allocation agreement and directed Wingfield to convey the message that Stolt's revised antitrust policy did not mean that Stolt planned to compete for their customers. This inference is supported by Cooperman's decision to delay talking to Odfjell and Jo Tankers until Wingfield could meet with them personally, rather than inform them immediately and in a more direct manner that the agreement was off. (See Gov't FOF 57-60, 431, 432). A decision by Cooperman to have Wingfield carry the message that the

conspiracy continued would also be consistent with Cooperman's practice of distancing himself from direct conspiratorial contacts by delegating such responsibility to his subordinates, including Wingfield. Finally, there is no evidence Cooperman ever told the business directors when he met with them to contact their competitors and tell them the agreement was over, or to respond to future contacts by Odfjell or Jo Tankers by saying the agreement was over. (See Gov't FOF 42, 46-48). This, too, would have conveyed the message that Stolt was complying with its new policy, but that clearly was not the message Cooperman wanted to send to Stolt's coconspirators.[10]

Nilsen and Haugsdal of Odfjell testified that when they met Wingfield in London in June 2002, he assured them that O'Brien could not disclose their illegal conduct because of the attorney-client privilege, and reiterated the message that the conspiracy continued. (See Gov't FOF 90). Their testimony also is corroborated by evidence of a Stolt act in furtherance of the customer allocation agreement that took place less than a week after the June meeting.

Nilsen testified that, within days of the London meeting, Wingfield or Jansen called him and asked him to submit a high bid to Stolt's allocated customer, SK Corp., and Nilsen agreed. (See Gov't FOF 107-112). Nilsen's testimony is corroborated by contemporaneous Odfjell documents and entries in Wingfield's own business journal. Wingfield's journal dated June 17,

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[10] Wingfield did not bring a copy of the antitrust policy to give to Jo Tankers or Odfjell at the NPRA. Instead, on April 8, 2002, Wingfield sent them e-mails attaching a copy of the revised antitrust policy, and only because they requested it. (See GX-12). Moreover, Wingfield failed to include in these e-mails two things included in e-mails he sent almost a month earlier to Stolt's non-conspirator business partners: an attachment about dawn raids conducted in another antitrust case and the message that Stolt would comply with the new policy "without deviation." (See GX-11). Wingfield's omission corroborates the Government witnesses' testimony that Wingfield assured them that Stolt would continue to honor their illegal agreement despite the revised policy.

2002 contains an entry "58/62," along with notations "Houston" and "SK to USA guidance." (See GX-26A.5634; see Gov't FOF 108). Stolt employees testified that providing "guidance" is a term used at Stolt to refer to providing prices to a coconspirator to use in intentionally high bids to one another's customers in order to carry out the conspiracy. (See Gov't FOF 10, 110). Wingfield's reference to Houston is significant because Houston is the only port for which Odfjell bid to SK, while Stolt's bid to SK included shipments to both Houston and New Orleans. (See Gov't FOF 110). On June 18, 2002, Nilsen sent an e-mail to a subordinate, Hallvard Edvardsdal, "Subject: 'SK to USA,'" with the identical numbers, "58/62," and instructions to bid above these prices to SK. (See GX-56; see Gov't FOF 109). Nilsen could not have obtained the prices "58/62" from SK or its broker because Stolt's existing prices actually were $58/$60/$63. (See Gov't FOF 112). The Nilsen e-mail and Wingfield's journal entry dated one day earlier, and containing the identical prices and references to "guidance" and "Houston," all strongly corroborate the testimony of Odfjell witnesses both that Wingfield never told them the conspiracy was over at the June meeting in London, and, in fact, Stolt continued to carry out the conspiracy by rigging the SK bid just one week later.

2. Wingfield Continued to Have Conspiratorial Meetings and Discussions with Jo Tankers and Odfjell until November 2002

a. Wingfield Rigged the Sasol Contract

Sasol is the paradigm of the failure of Stolt's revised antitrust policy and of the successful continuation of the conspiracy: Stolt continued to participate in the profitable customer allocation scheme; Wingfield was able to rig bids without the direct knowledge or participation of lower-level employees; and Stolt's revised antitrust policy did not apply to Wingfield and

Cooperman.

In late June 2002, O'Brien sued Stolt and Cooperman for constructive termination. (See Gov't FOF 114, 115). Humphreys – the Stolt business director responsible for the Sasol bid – explained that Stolt wanted to demonstrate that it would steal a contract from Odfjell "in light of the situation" Stolt was in at that time. (See Gov't FOF 126). Thus, in August 2002, Stolt decided to compete for Odfjell's Sasol contract. (See Gov't FOF 125, 126).

Expecting Odfjell to learn what Stolt had done only after the contract was awarded, Wingfield prepared a false excuse to offer Odfjell as to why taking the Sasol contract was not a violation of the allocation agreement. He explained in an October 1, 2002 e-mail to Niels G. Stolt-Nielsen, SNSA's CEO, that, in order to avoid retaliation by Odfjell, what Stolt would say "publicly (and ot [Odfjell] will pick up on this) is that this is regional business and not part of main fleet business" (GX-72), i.e., that the Sasol contract was not subject to the allocation agreement. Because the allocation agreement covered main fleet (deep sea) business and not regional business,[11] this e-mail demonstrates that Wingfield was describing a coded message that he intended to give to Odfjell to convince it that Stolt's bid on Sasol was not a violation of the agreement. If, as defendants claim, there was no agreement at that time, there was no need to send any such message. Notably, Wingfield could provide no explanation for his plan to signal Odfjell that the business was regional (see Gov't FOF 135) – a message that would have meaning only to Odfjell.[12]

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[11] The only exception was the 2000 Gulf of Mexico subsidiary agreement, which was not involved in Sasol. (See supra footnote 5).

[12] Stolt's economic expert attempted to explain this e-mail by saying that, in an oligopoly market, Stolt would still have an interest in sending a message that the Sasol bid was an isolated

The defendants do not dispute the Odfjell witnesses' testimony that they did learn that Stolt had submitted an initial bid to Sasol and they called repeatedly to complain about Stolt's bid. And Stolt witnesses specifically corroborate that testimony. Nils Vogth-Eriksen, Humphreys's subordinate, testified that Knut Holsen – the Odfjell trade lane manager responsible for Sasol – was the first Odfjell employee to call to complain. Vogth-Eriksen deflected Holsen's call, saying that Humphreys was not in the office. (See Gov't FOF 136).

Nilsen testified that when Holsen was unable to reach Humphreys and resolve the matter,[13] Holsen asked him to follow up with Wingfield.[14] (See Gov't FOF 137). Nilsen called

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incident and did not portend a bidding war. (Stolt FOF 424). This is belied by the message itself. While Stolt could have used any number of explanations for going after Sasol, such as excess capacity or needed volume, Wingfield instead chose the only explanation that would convey to Odfjell that the agreement continued despite the bid.

[13] Vogth-Eriksen's testimony about how he handled the Holsen call also calls into question the effectiveness of Stolt's revised policy. Vogth-Eriksen did not tell Holsen to stop calling about Sasol because the agreement was over – a simple act that would have clearly communicated his and Stolt's adherence to the policy. Instead, he put Holsen off by saying Humphreys was not in at the time. (See Gov't FOF 136). This, of course, invited further calls from Odfjell, which in fact took place.

[14] Defendants attempt to make much of the fact that the Government did not call Holsen to testify and argue that the Court should make the inference that his testimony would have been adverse to the Government's case. This argument is without merit. First, Holsen was not solely in the Government's control. Defendants themselves were free to call Holsen – and indeed had Holsen under subpoena prior to the hearing – but chose not to call him. (See Stipulation and Order Regarding Subpoenas by Stolt-Nielsen to Employees of Odfjell Seachem and Odfjell USA, Inc. filed May 3, 2007) (Doc. No. 159). See United States v. Drozdowski, 313 F.3d 819, 825 n.3 (3d Cir. 2002) (An absent witness, whose testimony would be cumulative, does not lead to adverse inferences against the Government, unless the witness was peculiarly within the power of the Government); United States v. Jones, 404 F. Supp. 529, 546 (E.D. Pa. 1975). Second, Holsen's testimony would have been cumulative. Stolt witness Vogth-Eriksen testified that Holsen called to complain about Stolt's bid to Sasol (see Gov't FOF 271d.), and Government witnesses Nilsen and Haugsdal – who participated directly in rigging the Sasol bid with Wingfield – testified about Holsen's role in Sasol. (See Gov't FOF 136, 154). Accordingly, the Government chose not to call a third witness, Holsen, who had no direct contact with Wingfield.

Wingfield, told him a bid by Stolt was a breach of their agreement and demanded that Wingfield retract Stolt's bid. (See Gov't FOF 140, 141, 144). Wingfield attempted to rebuff Nilsen, stating that he could not withdraw the bid because it was being handled by Stolt's black empowerment partner. (See Gov't FOF 144). Not getting satisfaction from Wingfield, Nilsen enlisted Haugsdal to call Wingfield, and Haugsdal asked Odfjell CEO Bjorn Sjaastad to call Cooperman, to try to get Stolt to comply with the agreement and refrain from stealing this important Odfjell customer.[15] (See Gov't FOF 145).

Both Humphreys and Wingfield corroborated Nilsen's and Haugsdal's testimony that they made numerous calls to Stolt the day bids were due, October 11, 2002. (See Gov't FOF 139, 143, 152). Jansen also corroborated Nilsen and Haugsdal. Jansen testified that Nilsen called him to complain about Stolt's bid to Sasol and he transferred the call to Wingfield. (See Gov't FOF 139). Later that day, Wingfield told Jansen that Odfjell had complained that a bid by Stolt would be a "deal breaker" (see Gov't FOF 141) – an impossibility if there was no deal to break. And Wingfield himself admitted that Odfjell's complaints about Sasol in October were evidence that Odfjell believed the conspiracy continued. (See Gov't FOF 142). Thus, Odfjell was conducting itself in accordance with the terms of the conspiracy, i.e., complaining about Stolt's cheating. That Stolt's coconspirator Odfjell believed that the conspiracy continued – as late as October 2002 – is incontrovertible proof that Stolt failed to take prompt and effective

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[15] Sjaastad placed a call to Cooperman, but was told he was out of the office. (See Gov't FOF 145). Defendants attempted to discredit Sjaastad's testimony by showing that it was Lee, not Cooperman, who was out of the office that day. Whether Sjaastad called Lee or Cooperman is irrelevant. The import of Sjaastad's call is that – on October 11, 2002 – he believed that Stolt was still engaged in the customer allocation agreement with Odfjell, just as Wingfield promised him at the March NPRA meeting.

action to terminate its role in the conspiracy.

Defendants asserted throughout the hearing that Wingfield could not continue the conspiracy without the knowledge and participation of lower-level employees. The testimony of Stolt employee Humphreys proves defendants' argument is wrong. Humphreys testified that he routinely kept Wingfield informed of Stolt's earlier bid proposals to Sasol (see Gov't FOF 129),[16] and that he specifically discussed Stolt's intended final bid prices with Wingfield on the morning of the bid. Humphreys told Wingfield that Stolt could reduce its prices further, but Wingfield said "[L]et's leave it as is." (See Gov't FOF 146). Thus, Wingfield clearly had all the pricing information he needed to rig the bid with Odfjell.

The only real factual dispute is whether all these calls culminated in Wingfield giving Odfjell Stolt's Sasol bid rates to permit Odfjell to underbid Stolt in furtherance of the conspiracy. Nilsen's and Haugsdal's testimony that Wingfield gave Stolt's Sasol prices to Haugsdal, which Odfjell used to retain the contract, is supported by the testimony of Humphreys, a Stolt witness.[17] Humphreys' testimony also clearly demonstrates that Cooperman and Stolt failed to do anything in the face of Wingfield's plain violation of Stolt's revised antitrust policy and, as a result, Wingfield continued freely to violate the policy.

The morning final bids were due, Wingfield confided in Humphreys that he had just

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[16] When confronted by this on cross-examination, Wingfield testified that he recalled, five years later, that he did not open the attachment to an e-mail Humphreys sent him showing Stolt's final quote. (See Gov't FOF 300b.). Wingfield's professed ability to recall this exculpatory detail – in light of his professed inability to recall critical events (see Gov't FOF 299-300) – is not credible.

[17] Defendants' contention that Odfjell adjusted its prices because Sasol gave Odfjell a "last look" at the bid prices is pure speculation, totally unsupported by the testimony of any witness or document. (See Gov't FOF 155).

spoken to Odfjell, who had learned of Stolt's initial bid to Sasol and was upset by it. (See Gov't FOF 147). Humphreys immediately reported this improper discussion to Cooperman. Cooperman told Humphreys that Wingfield should not be speaking to the competition, and Humphreys then observed Cooperman walk directly to Wingfield's office and close the door, and from a side window, saw Cooperman and Wingfield talking. (See Gov't FOF 148). As Wingfield admitted on cross-examination, however, Cooperman never even mentioned the Odfjell call (see Gov't FOF 149) – a blatant disregard of Wingfield's clear violation of Stolt's revised antitrust policy. Wingfield and Cooperman did discuss Stolt's bid, however, and Cooperman approved of Wingfield's decision not to lower Stolt's prices. (See Gov't FOF 149).

The result of Cooperman's failure to act in response to Humphreys' complaint is evident. Humphreys testified that shortly after Cooperman left Wingfield's office, Humphreys was in Wingfield's office when Wingfield's secretary announced another call from Nilsen. (See Gov't FOF 152). Wingfield admitted he did not refuse the call, nor did he tell Nilsen that he could not discuss the Sasol contract (see Gov't FOF 140) – appropriate actions under the revised policy – nor did Wingfield have any explanation for his failure to do so. Rather, to Humphreys' astonishment, Wingfield took Nilsen's call without hesitation.[18] (See Gov't FOF 153). When Humphreys then observed Wingfield discussing freight rates with Nilsen, he testified that he "couldn't believe this was happening, all these events at the eleventh hour, 59th minute" and he left Wingfield's office in disgust because he "just had enough." (See Gov't FOF 152). Since his

[18] Counsel's proffered explanation in closing argument, that perhaps Wingfield did not want to alienate Odfjell with whom Stolt had to discuss legitimate matters, is unsupported by any testimony, is no excuse for discussing prices to a particular customer, and is incredible – what could alienate Odfjell more than taking one of its major customers?

earlier report to Cooperman obviously had no effect, Humphreys never even bothered to report this call to Cooperman or anyone else.[19] (See Gov't FOF 153).

Finally, Stolt has no documentary evidence that Wingfield's improper discussions with Odfjell were ever reported to Stolt's general counsel, even though Cooperman knew about at least one of them.[20] In short, the revised policy – with its 130 certificates of compliance and the creation of an incentive for "whistle blowers" – is meaningless if, when an employee blows the whistle, no one listens. Cooperman's failure to act was compounded by his failure to investigate after Stolt lost this critical bid to Odfjell by only a slim margin – and bears a striking similarity to Cooperman's failure to investigate O'Brien's initial complaint. Neither Cooperman nor anyone else in senior management investigated why Stolt lost this all-important bid, or what Wingfield discussed during his numerous bid-day conversations with Odfjell, despite knowing at least one took place. (See Gov't FOF 156). Indeed, the entire sequence of events – the repeated Odfjell calls, Cooperman's failure to follow up on Humphreys' report of Wingfield's conversation with Odfjell, Wingfield's price discussion with Nilsen immediately after meeting with Cooperman, and the utter failure of Cooperman and Stolt to investigate why Stolt lost this crucial contract by

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[19] Wingfield's exculpatory entry in his business journal stating that he "told [Nilsen] won't discuss" Sasol (see GX-26B.5747), is obviously false, since Wingfield admits that he had several telephone calls with Nilsen about Sasol. (See Gov't FOF 304). This false entry is strong evidence of Wingfield's consciousness of guilt. See Government of Virgin Islands v. Testamark, 570 F.2d. 1162, 1168 (3d Cir. 1978); United States v. Chaney, 446 F.2d 571, 576 (3d Cir. 1971) (exculpatory statements when shown to be false are circumstantial evidence of guilty consciousness and have independent probative value); see also United States v. Hudson, 717 F.2d 1211, 1215 (8th Cir. 1983); United States v. Kirk, 584 F.2d 773, 778-790 (6th Cir. 1978).

[20] A single e-mail from Reggie Lee stating that Odfjell heard about the black empowerment initiative and called Wingfield about it (DX-1609) is hardly a report of the multiple Odfjell phone calls, or Wingfield's discussions with them.

a slim margin after Wingfield discussed the contract with Odfjell – demonstrates that Cooperman knew or was willfully ignorant that Wingfield continued to discuss bids to allocated customers after O'Brien's discovery. Indeed, Cooperman's conduct regarding Sasol confirms that he decided in March 2002 that the revised policy would not apply to Wingfield so that Wingfield could continue to carry out the conspiracy for Stolt.

Stolt attempted to rebut the overwhelming evidence that Wingfield rigged the Sasol bid by claiming that Odfjell's final prices to Sasol were 7 percent below Stolt's final prices. Stolt argues from that "fact" that Odfjell did not get Stolt's prices from Wingfield because, had it done so, it would have underbid Stolt by less. But because Stolt's factual premise is wrong, so too is its argument. In fact, shortly after the bids were submitted, Sasol informed Humphreys that Stolt lost the bid because its rates "were similar or 'just slightly higher'" than Odfjell's, not because Stolt's bid was 7 percent higher. (See GX-204 (emphasis added); see also Gov't FOF 157, 158d.). What Sasol reported in October 2002 is exactly what would be expected if Wingfield had given Stolt's rates to Odfjell. (See Gov't FOF 158d., 160).

Stolt attempts to undermine Sasol's report to Humphreys by citing hearsay evidence (admitted not for its truth) that Odfjell reduced its initial proposal by 14 percent, i.e., from approximately 7 percent above Stolt's bid to 7 percent below it. (See Stolt FOF 419, 420). But Stolt's own evidence and proposed findings prove that Odfjell did not reduce its prices by 14 percent. Stolt demonstrative exhibit DD-9, comparing Odfjell's prices in its initial proposal with Odfjell's final prices, shows Odfjell's price reductions for its various rates ranged from just 3.5 percent to a maximum of 9.4 percent (see Stolt FOF 416) – far less than the 14 percent

average reduction Stolt claims.[21] Moreover, if Odfjell's initial bid prices averaged approximately 7 percent higher than Stolt's, as Stolt claims, Odfjell's subsequent price reductions of 3.5 percent to 9.4 percent could not result in final prices 7 percent less than Stolt's. To the contrary, such reductions produce prices comparable to Stolt's – just as Sasol reported to Humphreys.[22]

b. Wingfield Met Odfjell in London to Discuss Conspiratorial Matters Just One Week after Rigging the Sasol Bid

On October 18, 2002, one week after he rigged the Sasol bid, Wingfield met with Nilsen and Haugsdal at Heathrow Airport.[23] (Gov't FOF 161). This meeting both corroborates the

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[21] Sasol produced a similar chart around the time of the bids that indicates Odfjell's price changes ranged from an increase of 1.2 percent to a decrease of no more than 6.9 percent. (See DX-2541, at 195; see Gov't FOF 158).

[22] Because Odfjell quoted different rates to each of the six discharge ports, while Stolt quoted the same rate to each port but added different lump sum fees, their bids cannot be compared on a price by price basis. Instead, Stolt cites a 2006 hearsay declaration by Sasol employee McCormack (on which Stolt's expert witness relied) and a comparison of two select simulations prepared by McCormack to support its claim that Odfjell reduced its prices by 14 percent to underbid Stolt by 7 percent. (See Stolt FOF 417-420). Any suggestion that Odfjell reduced its initial rates by 14 percent is, of course, wrong, as Stolt's own price comparison proves. And the two Sasol simulations Stolt offered did not, as Stolt claims, "compare . . . apples-to-apples" by applying the rates to "three typical Sasol shipments" (see Stolt FOF 417, 418), because each simulation analyzed three completely different shipments. (Compare DX-2541, at 194 (using Jouf, Madinah and Mekka v200104) with DX-2543, at 202 (using Najran, Jizan and Mekka v200204)). Nor did the simulations Stolt cites compare rates for all of Sasol's shipments. Moreover, that Stolt chose to rely on hearsay evidence not admitted for its truth (see DX-977 (McCormack Declaration); see DX-2543 (Sasol simulation)), rather than present any Sasol witness who could explain its significance (despite Stolt's obvious access to Sasol employees), is reason enough to disregard that evidence.

[23] In defense of the decision to send Wingfield to meet alone with his coconspirators, defendants claim that Wingfield met with Odfjell in June and October for legitimate purposes, i.e., to discuss matters relating to the Brazil-Africa-Japan trade lane (the "BAJ"). This claim is undermined by the testimony of Cleary, the Stolt business director responsible for the BAJ, that he was never told of the October meeting either before or after it took place. (See Gov't FOF

testimony of Odfjell witnesses that the Sasol bid was rigged, and demonstrates that the conspiracy continued just as Wingfield promised at the NPRA and June 2002 meetings. Moreover, the testimony of Nilsen and Haugsdal that conspiratorial matters were discussed at this Heathrow meeting is corroborated both by contemporaneous Stolt and Odfjell documents and the admissions of Wingfield himself.

First, if, as Wingfield claims, he had told Odfjell that "deal breaker" or not, Stolt would not withdraw its Sasol bid or give Odfjell its prices, it is hard to imagine that Odfjell would have agreed to meet with Wingfield one week later, let alone have the friendly dinner meeting that even Wingfield concedes took place. (See Gov't FOF 141, 161, 238).

Second, although he tried to minimize them, Wingfield admitted that conspiratorial matters were discussed during the Heathrow meeting. He testified that Jansen complained that low prices being quoted in the market by Odfjell's South African agent were affecting Stolt's ability to maintain higher prices in contract renegotiations with its allocated customer Equatorial, and that Nilsen promised to follow up on Stolt's complaint. (See Gov't FOF 170, 171). This was not the first time that Stolt had policed its customer allocation agreement with regard to Equatorial. Jansen testified that he also had complained to Odfjell about Equatorial by telephone and in person at the June meeting, and that Wingfield also had called Odfjell to complain about Equatorial on at least one occasion after March 2002. (See Gov't FOF 173). Just as Cooperman failed to act on Wingfield's violation of the company's revised policy when they spoke behind closed doors one week earlier, Wingfield did absolutely nothing when Jansen violated the policy

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166). In any event, the issue here is not whether Wingfield engaged in legitimate discussions with Odfjell: it is whether they also discussed conspiratorial matters.

by discussing the Equatorial account with Nilsen. He did not stop the conversation, chastise Jansen, report Jansen's violation, nor tell Nilsen not to check into the complaint (see Gov't FOF 172) – all steps he should have taken if the conspiracy truly were over. Wingfield's entire explanation was that he thought Jansen's complaint was a mere "throwaway" remark. (See Gov't FOF 172).

Stolt's complaint about Equatorial was not the only conspiratorial matter discussed at the Heathrow meeting. Nilsen and Haugsdal testified there also was discussion of an Odfjell complaint about Stolt's activities in the Gulf of Mexico. As had been Odfjell's practice throughout the conspiracy, prior to the meeting Nilsen's subordinates had been asked if they had any issues for Nilsen to raise with Stolt. (See GX-49; GX-51-53; see Gov't FOF 162-164). The day before the meeting, Nystad's subordinate sent Nilsen an e-mail complaining that Stolt had stolen Odfjell's GE contract ("[l]ast year") and Dow Mexico contract in violation of the subsidiary allocation agreement between Odfjell and Stolt concerning regional trade in the Gulf of Mexico, which had been the subject of disputes for some time. (See GX-53; see supra note 5). Nilsen and Haugsdal testified that Nilsen relayed the complaint to Wingfield at the meeting, then Nilsen tore off the part of the internal Odfjell e-mail explaining the issue and gave it to Wingfield. Wingfield agreed to check into the matter (see Gov't FOF 165), and Nilsen testified about the follow-up calls Wingfield made to him. After the meeting, Wingfield called Nilsen and confirmed that Odfjell's complaints were valid and promised to be the future Stolt contact for this aspect of the allocation agreement. (See Gov't FOF 167). Wingfield also resolved this and another older issue Stolt raised regarding sublets on a Dow contract from the United States to South America. (See Gov't FOF 169). If Wingfield had told Odfjell that the agreement was

over, Nilsen would have had no reason to solicit complaints. And if Stolt's action on the Sasol contract had made clear that Stolt was out of the conspiracy, Nilsen would not have raised these complaints just one week later.

Not only is Nilsen's and Haugsdal's testimony about the October Heathrow meeting corroborated by contemporaneous Odfjell documents (see GX-49; GX-51-53), but Nilsen's testimony that Wingfield responded to Odfjell's complaint is corroborated by a November 1, 2002 Stolt e-mail that Ray Long, the Stolt business director responsible for the Gulf of Mexico trade area, forwarded to Jansen shortly after the Heathrow meeting. (See GX-54). The e-mail, which Long forwarded to Jansen without comment, explains the circumstances surrounding Stolt's having taken the Dow Mexico and GE contracts from Odfjell (id.) – the very contracts about which Wingfield had promised to check in response to Nilsen's complaint. Long testified that he provided Jansen with the information about the GE and Dow Mexico contracts because Jansen had requested it. (See Gov't FOF 168). Significantly, Jansen had no responsibility for this trade lane and Long did not report to Jansen. (See Gov't FOF 168). There was no logical reason for Jansen to have asked Long for this information other than to enable Wingfield to respond to Odfjell's complaint raised at the London meeting.[24]

c. Wingfield Rigged the Shell-Pecten and SK Contracts

(1) Wingfield Agreed Not to Compete Against Jo Tankers on Shell-Pecten and Obtained Jo Tankers' Commitment to Protect Stolt on the SK Contract

[24] Long's failure to question Jansen's suspicious request and the absence of any record that he reported it to anyone also calls into question the effectiveness of Stolt's revised policy, which ostensibly made all employees into "whistle blowers" who were required to report such conduct. (See GX-29, at 179063).

Van Westenbrugge testified that he participated in at least four conspiratorial discussions with Wingfield on the Shell-Pecten (U.S. Gulf to Far East) and SK Corp. (Far East to U.S. Gulf) contracts after the March 2002 NPRA meeting, and that he provided Wingfield prices for Stolt to bid above Jo Tankers on the Shell-Pecten contract. His testimony is corroborated by the testimony of Finlay, by Jo Tankers and Stolt documents, and by contemporaneous entries in Wingfield's business journal.

(a) Shell-Pecten Contract

In the fall of 2002, Jo Tankers was in contract renegotiation discussions with an important customer, Shell-Pecten. (See Gov't FOF 177-179). Van Westenbrugge testified that in October 2002, Wingfield called and told him that Shell-Pecten had asked Stolt to bid against Jo Tankers on the contract. Wingfield asked for Jo Tankers' prices so Stolt could submit an intentionally higher bid. (See Gov't FOF 180-182). Van Westenbrugge and Finlay both testified that following Wingfield's call, van Westenbrugge asked Finlay for Jo Tankers' Shell-Pecten prices to give to Wingfield. (See Gov't FOF 183). Finlay's October 30, 2002 e-mail to van Westenbrugge corroborates their testimony. (See GX-69; Gov't FOF 185). In that e-mail, Finlay informed van Westenbrugge that Jo Tankers wanted a "10% increase" in prices to Shell-Pecten. (See GX-69; Gov't FOF 185). Finlay then explained what it would take to ensure Stolt's bid would be higher than Jo Tankers' proposed rates, i.e., Jo Tankers' current rate "+10%" and "+ $10," a "safety margin," i.e., an amount another owner (Stolt) should add to its bid to allow Jo Tankers to achieve its 10 percent increase. (See GX-69; Gov't FOF 185). To hide the fact that his e-mail discussed giving prices to competitor Stolt, Finlay wrote "in order to be higher than these rates . . . an ownmer (sic) would need to offer . . .." (GX-69 (emphasis added); see Gov't

FOF 185). The only reason Finlay would provide this detailed rate information to van Westenbrugge, who typically did not receive such information, was so van Westenbrugge could tell Wingfield what Stolt needed to bid to ensure it bid prices higher than Jo Tankers. (See Gov't FOF 185).

Van Westenbrugge testified that he provided that information to Wingfield on November 1, 2002 (see Gov't FOF 187, 188), a fact corroborated both by a Wingfield e-mail (GX-70),[25] and a contemporaneous entry in Wingfield's business journal. (GX-26B.5768). Remarkably, Wingfield's journal entry contains the same information that Finlay told van Westenbrugge would ensure that an "owner's" bid would be higher than Jo Tankers' bid. Wingfield's contemporaneous journal entry contains reference to "+10%" and "+$10" – the same figures Finlay wrote in his October 30, 2002 e-mail that an "owner" would need to offer in order to bid higher than Jo Tankers. (Compare GX-69 with GX-26B.5768; see also Gov't FOF 189). Wingfield also noted "no laytime bank" (GX-26B.5768), a practice of holding – or "banking" – monies owed as penalties for delays while a ship is in port until a final accounting can be made. This is a clear reference to van Westenbrugge's testimony that he told Wingfield that Jo Tankers was "not interested to implement; a laytime bank . . ." for Shell-Pecten. (See Gov't FOF 188, 189). Wingfield could not have gotten that information from any source other than Jo Tankers.[26]

(b) SK Corp. Contract

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[25] GX-70 is an October 31, 2002 e-mail from Wingfield to van Westenbrugge thanking him for his call and saying that they would speak first thing in the morning.

[26] These notations are made beneath a reference to "BAC," i.e., Brian Cleary, the Stolt business director responsible for Shell-Pecten, but Cleary testified that he did not recall giving this information to Wingfield, nor was it likely he would have done so since Stolt was not asked to bid on the contract. (See Gov't FOF 190).

Stolt ultimately did not submit a quote for the Shell-Pecten contract, despite Wingfield's claim to van Westenbrugge. Wingfield's reason for leading van Westenbrugge to believe otherwise was that Stolt wanted Jo Tankers' commitment not to compete on Stolt's SK contract. Van Westenbrugge testified that during the same call on November 1, 2002 in which he gave Wingfield the Shell-Pecten prices, Wingfield asked if Jo Tankers was interested in the SK Corp. contract and made it clear that this was important business for Stolt.[27] (See Gov't FOF 199).

On November 1, 2002, the same day van Westenbrugge advised Wingfield what to quote for Shell-Pecten, in response to Wingfield's inquiry regarding SK, he sent an e-mail to a subordinate inquiring whether SK had asked Jo Tankers to bid for this business. (See GX-62). Several days later, van Westenbrugge contacted that subordinate with instructions not to bid for the SK contract. (See GX-63). Finlay testified that van Westenbrugge explained to him that, despite Finlay's interest in this business, Jo Tankers would not offer for the SK contract in exchange for Wingfield's agreement not to compete for Shell-Pecten. (See Gov't FOF 201).

Although van Westenbrugge testified he did not believe Wingfield's commitment not to compete on Shell-Pecten was a quid pro quo for Jo Tankers' agreement not to compete for SK, his claim is belied not only by the timing of the two events, by Finlay's testimony and the contemporaneous documentary evidence as set forth above, but it is also belied by van Westenbrugge's own admissions. Van Westenbrugge rightly testified that – when he learned on the evening prior to his testimony that Wingfield had deceived him about Stolt being asked to bid by Shell-Pecten – he felt that Wingfield had taken him "for a ride." (See Gov't FOF 202).

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[27] Indeed, Wingfield's concern about competition by Jo Tankers on this important Stolt contract is corroborated by his own admission that he had contacted van Westenbrugge months earlier to gauge Jo Tankers' interest in it. (See Gov't FOF 198).

Wingfield duped him into backing off the SK contract under the pretense that Stolt would back off the Shell-Pecten contract in return. The fact that Wingfield obtained Jo Tankers' commitment not to compete for SK and asked Jo Tankers for prices to bid on Shell-Pecten shows that – as late as November 2002 and despite the revised antitrust compliance policy – Wingfield continued to have effective collusive discussions with competitors.

(2) Wingfield also Rigged the SK Contract with Odfjell

Nilsen and Edvardsdal testified that Wingfield also asked Odfjell in November 2002 to support Stolt on Stolt's allocated SK contract. (See Gov't FOF 208). Nilsen testified that Wingfield gave him Stolt's rates and they agreed that Odfjell should add $2 to $3 onto Stolt's targeted rate. (See Gov't FOF 208). Edvardsdal testified that Nilsen instructed him to bid $47/$48 to SK, prices which Nilsen said were $2 to $3 higher than numbers Stolt intended to bid. (See Gov't FOF 209).

This testimony is supported by Odfjell's bid to SK and by contemporaneous internal Stolt documents. Odfjell's November 15, 2002 bid to SK, submitted by Edvardsdal, was $48 for 5,000-7,999 tons and $47 for 8,000-10,000 tons. (See GX-64, at 77429 ¶ 13). Internal Stolt e-mails copying Wingfield show that in late October 2002 Stolt planned to offer SK $45, i.e., $2-3 lower than Odfjell's bid. (See GX-59, at 069281).

Stolt's argument that the SK contract could not have been rigged because Stolt dropped its price significantly from its existing (2001) contract price is not supported by the evidence. Stolt's 2001 SK contract price, the result of prior bid-rigging discussions with Odfjell (see Gov't FOF 100-102), was almost 50 percent higher than the market price in mid-2002. Thus, SK had asked Stolt for a "give back" of $1 million to $1.5 million on the 2001 contract. (See Gov't FOF

104). When Stolt refused, SK threatened to (and ultimately did) put the contract back on the market to force Stolt to agree to renegotiate the 2001 price. (See Gov't FOF 193). In the end, Stolt reduced its inflated 2001 rates somewhat, but far less than SK requested. (See Gov't FOF 212). Finally, any reduction in Stolt's offer on the 2002 contract was not because of competition from its coconspirators. Stolt ultimately reduced its offer, but only because of competition from MTMM and Aurora, not Jo Tankers or Odfjell. (See Gov't FOF 212).

3. The Conspiracy Continued Without Direct Knowledge and Participation of Lower-Level Employees

Stolt claims that it could not have continued to participate in the conspiracy without the knowledge and participation of its lower-level employees. It produced several employee witnesses who testified that after March 2002: they no longer spoke to competitors; they had no knowledge of conspiratorial activities; and Wingfield did not determine Stolt's final prices on contracts. The evidence does not support Stolt's contention and, in fact, is entirely consistent with the Government's position that Stolt's revised compliance program removed all employees except Cooperman, Wingfield and Jansen from the ongoing conspiracy.

First, the agreement between Stolt and Odfjell required that they not compete for customers on the allocation lists. (See Gov't FOF 8). It did not require extensive communication between the companies to operate successfully, because in most instances the coconspirator companies simply did not bid on a contract allocated to the other. (See Gov't FOF 8). Moreover, as the Government proved, Odfjell continued to honor the agreement on other contracts during 2002, even without discussion with Stolt. (See Gov't FOF 216-218).

Second, Wingfield had largely eliminated lower-level employees' direct involvement in

the conspiracy after he took charge in 2001 and directed that future conspiratorial contacts be limited to Jansen and himself. (See Gov't FOF 447). Indeed, Stolt employees who testified they no longer spoke to competitors after Stolt implemented its revised policy admitted on cross-examination that Wingfield had ended their conspiratorial communications well before that. (See Gov't FOF 447). Wingfield's actions in 2001 limiting communications were not an effort to end this conspiracy, but were made by agreement with Odfjell because the two companies had become concerned that too many people were involved in and knew of their illegal discussions. (See Gov't FOF 449). This 2001 direction to lower-level employees did not impair Stolt's and Odfjell's ability to continue their conspiratorial activities prior to O'Brien's discovery – Stolt admits the conspiracy continued until March 2002. The 2002 compliance policy's toughening of Wingfield's 2001 ban on lower-level conspiring thus changed – and cost Stolt – little.

Third, defendants' claim that Wingfield was cut off from the bidding process when Stolt revised its compliance policy is untrue. As the Sasol and SK Corp. bids demonstrate, Wingfield was kept well informed of important contract negotiations, including Stolt's pricing. (See Gov't FOF 129, 196, 313). This is not surprising: after all, Wingfield was Managing Director of Tanker Trading and responsible for all of Stolt's parcel tanker shipping operations. Moreover, Wingfield did not need to direct his subordinates not to bid or tell them what to bid in order to carry out his conspiratorial activities regarding Sasol, SK Corp. or Shell-Pecten. He simply provided Stolt's prices to Odfjell on the Sasol contract (allowing Odfjell to retain the contract by bidding lower) and SK Corp. (so Odfjell could put in a high, complementary bid for Stolt), and he got Jo Tankers to agree not to bid for SK Corp. using the ruse that Stolt would submit a high, non-competitive bid to Shell-Pecten in return. (See Gov't FOF 154, 198-202, 208). In each

instance, Wingfield successfully carried out the conspiracy without the direct participation or knowledge of his subordinates.

4. There Is No Merit to Stolt's Claim that Competition Broke Out after the March 2002 NPRA Meetings and Thus the Conspiracy Must Have Ended

a. Stolt's Unsuccessful Effort to Show Competition after the 2002 NPRA Meetings

Stolt claims that after the March 2002 NPRA meetings, the conspirator companies began competing vigorously. If this were true, there would be bid results reflecting it. But Stolt's evidence fails to show even a single deep sea contract that changed hands after March 2002 in violation of the allocation agreement.

Nonetheless, throughout the hearing, Stolt and its employee witnesses attempted to mislead this Court into concluding there was competition inconsistent with the conspiratorial agreement after March 2002. For example, they testified that Stolt took four regional contracts that had been allocated to Odfjell pursuant to their subsidiary agreement involving the Gulf of Mexico, but only on cross-examination did they admit that three of those four contracts involved competition prior to March 2002, during the time Stolt admits it was still conspiring (see Gov't FOF 225-226), and that contracts in the Gulf of Mexico often were the subject of dispute.[28] (See Gov't FOF 14, 221, 226). In other instances, their testimony concerned competition for spot shipments or new business that was not even subject to the allocation agreement. (See Gov't FOF 12, 223-224, 233-234). Indeed, the willingness of Stolt's witnesses to provide such

[28] Disputes over what was covered by the allocation agreement occasionally resulted in claims of cheating, but did not have any impact on the successful operation of the conspiracy.

misleading testimony calls into question their credibility on other matters.[29]

(1) Stolt's Purported Successful Competition

Stolt identified six contracts it claims it took from Odfjell after the NPRA meetings.[30] Two of those contracts (BP and Tricon) were not subject to the agreement at all. BP was a spot contract. (See Gov't FOF 223). Tricon was new business, previously done through spot contracts, and was not included on any allocation list. (See Gov't FOF 224).

Three were regional contracts in the Gulf of Mexico (BP, GE and Mitsui) that involved quotes by Stolt before the NPRA meetings in March 2002. (See Gov't FOF 225).

The sixth contract (Dow) also involved regional business in the Gulf of Mexico, which was not included in the customer allocation lists exchanged between Stolt and Odfjell. This regional business, although the subject of the subsidiary agreement reached in 2000, had been subject to dispute even prior to March 2002. (See Gov't FOF 226). Moreover, this contract was discussed between Nilsen and Wingfield at the October 2002 London meeting and, in discussions following that meeting, Wingfield promised to take responsibility for this subsidiary agreement. Wingfield and Nilsen later resolved this and another old dispute regarding sublets on a Dow U.S. to South America contract. (See Gov't FOF 169).

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[29] For example, Stolt employee Thomas Confrey testified that after March 2002 Wingfield directed him to obtain "gold level accounts" and to compete against Jo Tankers and Odfjell to do so. This testimony is incredible in view of Confrey's admission on cross-examination that whatever direction he got from Wingfield was well before the March 2002 revised antitrust policy (see Gov't FOF 309), when even Wingfield admits there was a conspiratorial agreement.

[30] Stolt could identify no contract it took from Jo Tankers after the NPRA meetings.

(2) Odfjell's and Jo Tankers' Purported Successful Competition

In an effort to show that its coconspirators began competing after March 2002, Stolt also identified three contracts it claims Odfjell took from Stolt (Methanex/Waterfront, Oxiquim and Rhodia) and one it claims Jo Tankers took (Exxon Mobil). This evidence likewise does not withstand scrutiny.

First, Odfjell was not awarded the Methanex/Waterfront contract: a non-conspirator company, Ultragas, competed against Stolt and won the business. Odfjell did not bid, but merely provided freight service as it was obligated to do under a co-service agreement it had with Ultragas on that trade lane. (See Gov't FOF 229).

On Oxiquim, Odfjell only quoted for the regional trade portion of the contract, thus honoring its agreement with Stolt. (See Gov't FOF 230). Oxiquim later added a "first right of refusal" for Odfjell to carry cargo on a deep sea route as well (see DX-1751), but the "backbone" of the contract was regional (See DX-4068, at 0E031130 Subject 1), and the contract did not require Odfjell to carry any deep sea cargo. (See GX-112; see Gov't FOF 230).

The Rhodia contract was a logistics contract that combined storage with shipping on two trade lanes – one allocated to Odfjell (Europe to South America) and one allocated to Stolt (Europe to Asia). Rhodia's decision to have a single carrier for both trade lanes effectively disqualified Stolt, since Stolt did not provide service from Europe to South America, and so Odfjell was entitled to the business by default. (See Gov't FOF 231).

Moreover, the fact that Wingfield called Nilsen to complain about Oxiquim (see Gov't FOF 169) and Jansen complained to Nilsen about Rhodia (see Gov't FOF 173) also shows that the conspiracy remained in place after March 2002. If, as defendants claim, the conspiracy had

really ended in March 2002, such complaints would not have been warranted or made.

Stolt's claim that Jo Tankers took Exxon Mobil from it (the only instance of purported competition by Jo Tankers) is contradicted by the testimony of Stolt's own employee witness, Wayne Harrison, that Stolt never had a contract with Exxon Mobil, but merely provided spot shipping. (See Gov't FOF 232). Accordingly, when Exxon Mobil decided to put a contract on the market for this business, any one of the conspirators was free to compete for this new business under terms of the conspiracy that had existed before March 2002.

(3) Unsuccessful Efforts at Purported Competition

Stolt also incorrectly claims that evidence of six unsuccessful quotes to Odfjell customers (Sasol, Copene, Celanese, Shell-Pecten,[31] Agility, Celmex) shows aggressive new competition against Odfjell after March 2002.[32] Each supposedly competitive quote was unsuccessful however, and as we have shown in Section III.B.2.a. above, Stolt's loss of Sasol resulted from Wingfield's bid rigging with Odfjell.

The Copene contract was spot business not covered by the conspiracy. (See Gov't FOF 233). Stolt's bids to Celanese and Shell-Pecten were not true competition because, as Stolt's employees admitted on cross-examination, Stolt's ships could not service the ports. (See Gov't FOF 234, 235). Stolt did bid unsuccessfully on the Celmex contract but failed, both because it bid too high and because, again, its ships were too big to provide the required service. (See

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[31] As noted elsewhere, in some instances contracts on different trade routes for the same customer were allocated to different companies. Shell-Pecten's contract for the Far East to U.S. Gulf trade was Jo Tankers' business; Shell-Pecten's contract for South America and the Caribbean was Odfjell's business.

[32] Stolt introduced no evidence of unsuccessful efforts to take contracts from Jo Tankers.

Gov't FOF 236). Finally, Stolt did not even submit a proposal to Agility until late November, after it approached the Government for amnesty. (See Gov't FOF 237).

(4) Retention of Existing Contracts in the Face of Purported Competition

Stolt also claims as evidence of competition its retention of six existing contracts (Occidential Chemical, Foskor, Maroc Phosphore, Sasol (trans-Atlantic), Equatorial and SK) after March 2002. This evidence likewise fails to support to its defense.

Stolt provided no evidence that Odfjell ever bid for Occidental. (See Gov't FOF 240). Foskor was not a Stolt allocated customer. (See Gov't FOF 241). Maroc Phosphore was a customer allocated to both Stolt and Odfjell, and there is no evidence that Stolt's prices dropped as a result of competition from Odfjell. (See Gov't FOF 242).

Odfjell bid intentionally high on the Sasol trans-Atlantic contract. This is an example of how a company, without talking to a coconspirator, might intentionally bid high on a contract to maintain a loyal customer's good will. Sasol was a customer allocated to Odfjell on certain trade lanes and to Stolt on other trade lanes. When Sasol asked Odfjell to bid on business allocated to Stolt, Odfjell wanted to submit a bid to maintain its good relationship with Sasol. Without discussing the matter with Stolt, Odfjell abided by the agreement by submitting alternative bids – an intentionally high price to ship freight from the Stolt terminal, where the customer currently stored its product, and a competitive bid to load shipments at the terminal it knew Sasol would not use (see Gov't FOF 217, 243) – and thus misled the customer into believing it was competing against Stolt.

Finally, Equatorial and SK were the subject of collusion between Stolt and Odfjell to

ensure Stolt would face no competition. (See Sections III.B.2.b.-c. above).

(5) Bid Results Show the Conspiracy Continued

Stolt's failure to take a single allocated deep sea contract from either Odfjell or Jo Tankers more than refutes its claim that its employees competed aggressively against Odfjell and Jo Tankers. Stolt's failure, when combined with Odfjell's and Jo Tankers' failure to take a single allocated deep sea contract from Stolt in violation of the agreement, demonstrates that it was business as usual after Wingfield met with his coconspirators at the March 2002 NPRA meetings.

b. Odfjell Refrained from Competing for Stolt Customers in Compliance with the Illegal Customer Allocation Agreement

In addition to Stolt's failed effort to show any change in competition after the March 2002 NPRA meetings, there is testimony and contemporaneous documentary evidence that Odfjell abided by the agreement by refraining from bidding to Stolt allocated customers. Odfjell's subsidiary, Odfjell Logistics, which packaged multiple services in a single bid, was frustrated in its efforts to quote for logistics packages to Chevron Phillips, SK Corp., and a Sasol trans-Atlantic contract.

Odfjell's decisions to support Stolt on both the SK contract and Sasol trans-Atlantic contract have already been discussed. (See Sections III.B.2.a.-c. above). Nystad and Knutsen both testified that in August 2002, Odfjell Logistics also wanted to submit a proposal to Chevron Phillips combining freight service from Houston to Europe with terminal service that was not allocated.[33] Nilsen and Nystad would not permit them to submit a proposal that included the

[33] Although Stolt's existing freight contract with Chevron Phillips did not expire until June 2003 (DX-499), it was not unusual for customers to explore alternatives well before an

freight service, however, because that was business that belonged to Stolt. (See Gov't FOF 216). This testimony is corroborated by contemporaneous Odfjell documents. (See GX-83 ("the shipping portion cannot easily be ours the way things are – let us discuss"); GX-84 ("enthusiasm [from Odfjell] is limited due to the fact Stolt is doing most, if not all of this . . . I [have] notified both [Odfjell Logistics employees] we are not there to jeopardize any arrangements"); GX-85 (". . . we need to discuss whether to offer to Chevron TA or not. We [have] certain obligations and these must be clarified before we decide how to proceed on the shipping")).

5. Credibility of the Witnesses

As the Court recognizes, direct evidence in a conspiracy case can come only from the coconspirators themselves. Indeed, the Third Circuit follows the "Supreme Court in holding that uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction." United States v. DeLarosa, 450 F.2d 1057, 1060 (3d Cir. 1971) (citing United States v. Perez, 280 F.3d 318, 344 (3d Cir. 2002) (internal quotations omitted). In this case, the Government called as witnesses the individuals Stolt identified as coconspirators, because they were the very same people with whom Stolt continued to conspire after March 2002. Indeed, the Government called everyone with whom Wingfield had conspiratorial meetings and discussions after March 2002: his subordinate, Jansen, van Westenbrugge and Finlay of Jo Tankers, and Sjaastad, Haugsdal, Nilsen and Nystad of Odfjell. These witnesses – three of whom pleaded guilty and served jail time – all provided direct evidence that the conspiracy continued after the NPRA meetings until November 2002, when the threat of public exposure of Stolt's crime compelled it to seek amnesty. Odfjell and Jo Tankers likewise pleaded

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existing contract's expiration date. (See Gov't FOF 216).

guilty to conspiring until November 2002. (GX-18A; GX-19A).

Wingfield's testimony was defendants' only direct evidence that the conspiracy ended after March 2002. The fact that six witnesses who had worked for Odfjell and Jo Tankers and Jansen, his own colleague at Stolt, all support the Government's account of the facts is powerful.

At the time Jo Tankers and Odfjell witnesses initially provided evidence to the Government, none of them knew the evidence Stolt or the other company had provided the Government. (See Gov't FOF 265, 266, 282). Specifically, they had no knowledge that Stolt had told the Government that Stolt had ended its participation in the conspiracy after the March 2002 NPRA meetings. Without this knowledge, they could have not have appreciated the significance of the evidence they provided concerning the continuation of the conspiracy until November 2002, and had no motive to fabricate such evidence. Nor did Jo Tankers or Odfjell know that the other had told the Government the conspiracy continued until November 2002, and it is incredible that they could fabricate the same story.

Moreover, Sjaastad, Haugsdal and van Westenbrugge no longer even work for Odfjell and Jo Tankers. It is illogical to think that these six Odfjell and Jo Tankers individuals – now working for five different companies in five different countries – could coordinate their testimony, supported by Jansen of Stolt. And while there are inconsistencies in their recollections of details of events that took place over five years ago, every witness testified that Wingfield continued to conspire after March 2002.

Finally, in no instance does the Government rely solely on the testimony of these seven coconspirator witnesses. Their testimony is corroborated not only by testimony of other Odfjell witnesses, Knutsen and Edvardsdal (see Gov't FOF 72c., 106, 109, 113, 206-210, 218, 268), but

also by the testimony of Stolt employee Humphreys (see Gov't FOF 126, 146-148, 152, 153, 271a.-c.), and on significant points by Wingfield himself. (See Gov't FOF 139-143, 271e.-f.). And as we have shown, there is abundant Stolt, Odfjell and Jo Tankers contemporaneous documentary evidence buttressing their testimony.

C. Stolt Failed to Take Prompt and Effective Action to Terminate the Conspiracy

1. Cooperman and Stolt Delayed an Independent Investigation and Allowed the Conspiracy to Continue

Cooperman did not end Stolt's participation in the conspiracy when he learned in early February 2002 that O'Brien had discovered the customer allocation conspiracy that Cooperman helped organize in 1998. (See Gov't FOF 41-48, 116-121). Rather, he took steps to conceal Stolt's ongoing participation in the conspiracy. Simply not reporting its illegal conduct to the Division upon O'Brien's discovery would not have disqualified Stolt from the Leniency Program, so long as it took prompt and effective action to terminate its part in the conspiracy once O'Brien discovered it. However, the steps taken by Cooperman allowed the conspiracy to continue without public exposure. Further, while Cooperman as an individual may have wished to conceal his own criminal conduct after O'Brien's discovery, Cooperman was not just any employee and not just any member of the conspiracy. He was the Chairman of SNTG, the leader and standard setter of the company. He had responsibilities for the company as a whole that lower-level employees did not have. Thus, the steps he took were not just his own steps, but steps taken on behalf of the company. He was also one of the founders of the conspiracy, approved his subordinates' participation in the conspiracy, and thus, should have taken a decisive, unequivocal lead in ending the conspiracy.

Instead of informing Odfjell and Jo Tankers that the agreement was over, Cooperman met privately with each of the business directors at Stolt and explained to them the theory of oligopoly and how, for both companies to profit, it made sense for Stolt to stay away from Odfjell customers and for Odfjell likewise to stay away from Stolt's. (See Gov't FOF 41, 42). While this might be true in theory, Stolt and its coconspirators did not compete for one another's customers because of their customer allocation scheme, not because the industry was an oligopoly. Telling Stolt's business managers to end their direct contacts with Odfjell and Jo Tankers while at the same time encouraging them not to compete for their customers was essentially a direction to continue to comply with the terms of the conspiracy.

Following his oligopoly lectures to the business directors, Cooperman then created a fictitious "report" of their meetings, in which he claimed he conducted an investigation into O'Brien's concerns regarding the Jansen Memo and concluded they were meritless. (See GX-13B, at 2). Several Stolt witnesses testified that statements in Cooperman's report were false. (See Gov't FOF 44-48). The only person who did not directly contradict the statements in Cooperman's sham report was Wingfield, who made conflicting statements as to whether he even discussed the Jansen Memo with Cooperman and, after objections from counsel, then claimed he could not recall what they discussed. (See Gov't FOF 299a.).

Cooperman continued to make false and misleading statements about the existence of the conspiracy when an independent member of SNSA's Board of Directors first learned of O'Brien's lawsuit and directly confronted Cooperman about it. (See Gov't FOF 116-118; GX-75). Cooperman's failure to come clean to the independent members of the Board delayed an independent investigation and thus permitted Stolt's criminal conduct to continue until the Wall

Street Journal disclosed details of O'Brien's allegations in November 2002.

2. Stolt's Revised Antitrust Policy

Only after O'Brien resigned on March 1, 2002 did Cooperman and Stolt take specific action to revise Stolt's antitrust policy. But, contrary to defendants' arguments, the steps Stolt took, i.e., issuing a revised antitrust handbook, holding antitrust seminars, and requiring 130 employees to sign confirmations of compliance with the revised policy, were not prompt and effective action because Wingfield – the Managing Director of Stolt's parcel tanker shipping business and the company's key representative in the conspiracy – and Jansen, his chief subordinate in the conspiracy, continued to have conspiratorial meetings and discussions with the very same executives from Odfjell and Jo Tankers as they had before O'Brien's discovery. Moreover, Cooperman's conduct after O'Brien's discovery is evidence that Cooperman did not intend to stop Wingfield from continuing to conspire. Indeed, Wingfield's meetings and discussions continued until the Wall Street Journal exposed Stolt's illegal conduct on November 22, 2002. Thus, the revised policy had no effect on Stolt's participation in the conspiratorial agreement, just as Wingfield had assured Odfjell and Jo Tankers at the March 2002 NPRA meetings.

3. Stolt is Responsible for Wingfield's Conspiratorial Conduct

During closing arguments, the Court raised the question whether Wingfield was a rogue employee and whether Stolt was responsible for Wingfield's continued criminal conduct. This is not a case where the company did everything it could to take prompt and effective action to terminate its illegal conduct and, despite such good faith efforts, a lower-level person in one of its far-flung offices continued to have conspiratorial contacts with his counterpart at a

coconspirator company. While a company generally is responsible for the acts of its agents, as an exercise of prosecutorial discretion, the Division in such a case would not revoke the company's admission into the Leniency Program if it was otherwise persuaded that the company and its high-level management had done everything that could reasonably be expected of them to terminate the company's involvement in the conspiracy. But the facts of this case fully support the Division's decision to revoke Stolt's admission into the Leniency Program. This case involves the continued conspiratorial activities of Wingfield, the Managing Director of Tanker Trading at Stolt, the highest-ranking executive in charge of the company's parcel tanker shipping business, and Stolt's key representative in the conspiracy, who continued to carry out the conspiracy with the very same executives at Odfjell and Jo Tankers he had conspired with prior to O'Brien's discovery.

The law of corporate liability for the criminal acts of its executives is clear. A corporation is liable for the antitrust violations of its employees acting within the scope of their employment or apparent authority, even though those actions were contrary to company policy. United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970); see also United States v. Armour & Co., 168 F.2d 342, 343 (3d Cir. 1948). Since Wingfield, as Managing Director of Tanker Trading, was the highest-ranking executive at Stolt responsible for parcel tanker shipping, there was every reason for Odfjell and Jo Tankers to think that his continuation of the conspiracy – notwithstanding the revised antitrust policy – was the true Stolt policy. And Stolt is liable accordingly.

Stolt also argues that, because its revised antitrust compliance policy resulted in the termination of illegal conduct of most of its employees, it thereby took prompt and effective

action to terminate the conspiracy. Stolt's revised policy cannot satisfy the Conditional Agreement's requirement of prompt and effective action to terminate upon discovery when Wingfield and Jansen, the high-ranking executives responsible for the day-to-day operation of the conspiracy at Stolt prior to its discovery, continued to carry out the conspiracy in the same manner and with the very same coconspirators after discovery. Stolt's revised antitrust policy cannot be considered effective because Wingfield and Jansen never abided by it, but continued to carry on the illegal agreement after March 2002. Cf. U.S.S.G. § 8C2.5(f)(3)(A) (a compliance program is not effective for purposes of determining a corporate fine under the Sentencing Guidelines "if an individual within high-level personnel of the organization . . . participated in . . . the offense."). The Sentencing Guidelines provide further guidance, stating that in order to have an effective compliance program, a corporation "shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew . . . has engaged in illegal activities . . .." U.S.S.G. § 8B2.1(b)(3) (emphasis added). This Stolt clearly failed to do.

4. Stolt Did Not Apply the Revised Policy to Wingfield or Jansen

The startling difference in how Stolt applied the revised antitrust policy to lower-level employees and how it applied that policy to Wingfield also indicates that the antitrust policy was never intended to end Wingfield's conspiratorial contacts but, rather, was an effort to create a policy that appeared effective because Stolt could point to compliance by 130 lower-level employees. For example, lower-level employees were strictly instructed to avoid industry events or social contact with competitors – one employee stopped socializing with a neighbor who worked for a competitor, and Reginald Lee ordered another employee to stop participating in a

weekend rock band because a competitor's employee was a member. (See Gov't FOF 437, 438).

Stolt's draconian approach to lower-level employee contacts with competitors stands in marked contrast with its approach to Wingfield, who was permitted, even directed, to meet with competitors, unaccompanied, unsupervised and with no minutes or other written record of the discussions. While there may have been legitimate reasons for Wingfield to continue to meet with competitors, there was no reason for Cooperman and Stolt to send him to meet with his Odfjell and Jo Tankers coconspirators unaccompanied but for Jansen, a fellow conspirator. There were any number of steps Stolt could have taken to ensure Wingfield was abiding by the revised antitrust policy. It could have prohibited the meetings altogether, or insisted that they be held in Stolt's offices, where the legal department could observe the contacts. It could have used independent brokers to handle many of the sublet issues, including those on the BAJ, which Stolt claims necessitated the meetings in June and October. Stolt counsel could have sent a draft of the proposed written sublet agreement on the BAJ trade lane to Odfjell in June, and thereafter handled the discussions regarding that matter. Any of these simple and obvious steps, some of which were adopted after Stolt's amnesty application, would have eliminated the need for Wingfield and Jansen to meet with their coconspirators, and would have ensured true compliance with Stolt's revised antitrust policy.

Finally, Cooperman and Stolt failed to take any action at all when informed that Wingfield committed a blatant violation of the revised policy by speaking to Odfjell about Sasol the morning final bids were being submitted. As Wingfield admitted, after Humphreys reported this violation to Cooperman, Cooperman immediately met with Wingfield but never even mentioned it. With no admonition from Cooperman, Wingfield felt free to take yet another call

from Nilsen and discuss Sasol pricing. After being alerted to Wingfield's discussions with Odfjell on Sasol, a contract Stolt lost to Odfjell by a slim margin, Stolt management, at the very least, should have hesitated before sending Wingfield to meet Odfjell in London a week later, but did not.

Just as Cooperman had taken no action when he knew Wingfield had violated the policy, Wingfield admitted that he likewise took no action when he witnessed Jansen violate the antitrust policy by discussing with Nilsen a complaint regarding Equatorial, a Stolt-allocated customer, during the October London meeting. Nor did he make any report of Jansen's violation to Stolt counsel, as required by the policy. (See GX-29, at 179063).

Despite Stolt's professed "zero tolerance" compliance policy, nothing happened following these blatant violations of the policy. Neither Wingfield nor Jansen was demoted, reprimanded or fired – penalties provided by the policy for violations. (See id., at 179076). Indeed, even after Jansen admitted in 2003 that he violated the policy, he was placed on administrative leave with full pay and, though he performs no work for the company, Stolt has paid him almost $1 million since that time.

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

Even if the Conditional Agreement remained in effect, Wingfield lost any protection under paragraph 4 of the Agreement, which requires individuals to "fully and truthfully cooperate with the Antitrust Division in its investigation," (GX-1 ¶ 4), including voluntarily providing relevant information when not specifically asked to do so. (Id. ¶ 4(d)). Wingfield violated his obligation to cooperate by: providing false information that Stolt withdrew from the conspiracy in March 2002; withholding evidence of his conspiratorial activities after March 2002; and

failing to inform the Government when he learned Jansen had lied about when Stolt withdrew from the conspiracy.

Wingfield claims he never "lied to" or "misled" the Government because he was not required to come forward and provide material information to the Government without being asked. (Defendant Wingfield's Proposed Conclusions of Law ("Wingfield COL") 35, 37-43). This argument is inconsistent with Wingfield's claim that he is entitled to amnesty because he provided the Government with useful information.

Wingfield concedes that any useful information for which he claims credit he provided to the Government only through Stolt counsel, John Nannes (Wingfield COL 33), and Wingfield testified that he "had in total something like 12 or more interviews or meetings with Mr. Nannes, both before January 15th and indeed afterwards." (See Gov't FOF 386, 387). Because Wingfield knowingly used Nannes as his conduit for providing information to the Government pursuant to the Conditional Agreement, false information he provided Nannes was false information he provided to the Government, and material information he withheld from Nannes was material information he withheld from the Government. Nannes testified that Wingfield never told him that he continued to conspire with Stolt and Odfjell after March 2002 (see Gov't FOF 384, 385), and that he was informed that Stolt withdrew from the conspiracy in March 2002. (See Gov't FOF 380, 384, 385). Wingfield cannot claim credit for what he told Nannes without accepting responsibility for lying to and misleading Nannes about his conspiratorial activities after O'Brien's discovery. When he learned Jansen had lied to the Government, paragraph 4(d) of the Conditional Agreement required Wingfield to voluntarily inform the Government of Jansen's lie in some manner, for example, by again using Nannes as his conduit.

IV.

LEGAL ARGUMENT

A. Standard and Burden of Proof

A majority of the Circuits (including the Third Circuit) has set the standard of proof for establishing breach of a non-prosecution or plea agreement at preponderance of the evidence. Compare, e.g., United States v. Wells, M.D., 211 F.3d 988, 995 (6th Cir. 2000) (proof of breach by preponderance of evidence); United States v. Castaneda, 162 F.3d 832, 836 (5th Cir. 1998) (same); United States v. Roman, 121 F.3d 136, 142 (3d Cir. 1997) (same); United States v. Gerant, 995 F.2d 505, 508 (4th Cir. 1993) (same); with, e.g., United States v. Gregory, 245 F.3d 160, 164 (2nd Cir. 2001) (whether government's decision to revoke cooperation agreement was reasonable); United States v. Gonzales-Sanchez, 825 F.2d 572, 578 (1st Cir. 1987) (proof by "adequate evidence"); United States v. Verrusio, 803 F.2d 885, 891 (7th Cir. 1986) (proof beyond a reasonable doubt is not required). Defendants' reliance on the district court's decision in United States v. Skalsky, 621 F. Supp. 528, 530 (D.N.J. 1985), is misplaced, because the Third Circuit merely held that the lower court's finding that Skalsky had materially breached his non-prosecution agreement "was not clearly erroneous," without ever addressing whether the lower court's application of a clear and convincing standard was correct. United States v. Skalsky, 857 F.2d 172, 179 (3d Cir. 1988).

In the Third Circuit, the party alleging breach bears the burden of proof. United States v. Floyd, 428 F.3d 513, 515-16 (3d Cir. 2005); Roman, 121 F.3d at 142. However, the Government assumes the burden of proving by a preponderance of the evidence that Stolt breached the

Conditional Agreement.[34]

B. Defendants' Leniency Was Expressly Conditional

A criminal corporation like Stolt, which has engaged in extensive violation of the antitrust laws, has no right to avoid criminal investigation or prosecution. Nonetheless, the Division offers such firms an opportunity to avoid indictment. But they must first ask for and qualify for leniency. A corporate leniency agreement, unlike a plea agreement, does not require the corporation to waive any constitutional rights or privileges. The corporation is not required to plead guilty to any offense, and no criminal sanction is imposed. Because an application for leniency is essentially a plea for mercy, only those who qualify should receive its rewards; those who do not qualify should remain subject to prosecution and conviction like any other criminal defendant.

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 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

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[34] Even when measured against the clear and convincing standard that defendants argue applies in this case (Stolt-Nielsen's Proposed Conclusion of Law 9), the Government has met its burden of proof.

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. (GX-1, preamble). 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." (Id. ¶ 1). In the next paragraph, entitled "Cooperation," Stolt pledges to provide seven types of "full, continuing and complete cooperation to the Antitrust Division." (Id. ¶ 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. . . ." (Id. ¶ 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.) Again, the Third Circuit recognized Stolt's obligation to strictly comply with these conditions when it instructed this Court to hear evidence and evaluate facts central to the issue whether defendants complied with their obligations under the Conditional Agreement.

Stolt-Nielsen, 442 F.3d at 187-88 n.7.

C. Stolt Was Not Entitled to Violate the Law until January 15, 2003

The defendants argue that the Conditional Agreement gave them leniency for any illegal conduct up to the January 15, 2003 date of the Conditional Agreement. But as the Court of Appeals said, any leniency granted for conduct prior to January 15, 2003 "was, of course, subject to Stolt-Nielsen's strict compliance with the aforementioned conditions . . .." Id. at 180 (emphasis added). In this case, the critical "aforementioned" condition is that once Stolt discovered its participation in the conspiracy, it was required to take prompt and effective action to end it. Id. at 179. Thus, the Court of Appeals 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 Conditional Agreement." Id. at 187 n.7. If the defendants were granted leniency without limitation to the date the Conditional Agreement was executed, the Third Circuit would have had no reason to issue those instructions, because the Government has never argued that the conspiracy continued after the Conditional Agreement was executed. O'Brien discovered the conspiracy in January 2002, and that event triggered Stolt's obligation to take prompt and effective action. Accepting defendants' interpretation in those circumstances would, by contrast, disregard the Court of Appeals' instructions, and read out of the contract both the requirement that Stolt must have ceased its illegal activity upon its discovery, and the Division's express right to verify Stolt's eligibility for leniency.[35]

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[35] As already noted, contract terms must be construed so as to render none "nugatory." CTF Hotel Holdings, Inc., 381 F.3d at 137; H.C. Lawton, Jr., Inc., 755 F.2d at 328. Accordingly, while enforcing what "[t]he plea agreement explicitly states," the Third Circuit explained in

The Government recognizes this Court's concern about why the Conditional Agreement provides protection up to the date of the Agreement, rather than some earlier date. The answer is that to be eligible for the Corporate Leniency Program, an applicant such as Stolt must have terminated its part in the illegal activity upon discovery. But an applicant's "termination" for leniency purposes might not constitute legal withdrawal from the conspiracy. (See GX-4, at 3). As the Court of Appeals has explained: "[m]ere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal." United States v. Steel, 685 F.2d 793, 803 (3d Cir. 1982). Rather, "[t]he defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals." United States v. Antar, 53 F.3d 568, 583 (3d Cir. 1995) (citations omitted) (emphasis added). In the absence of a full confession or a statement of abandonment, the applicant would remain criminally liable for the acts of its coconspirators until it does legally withdraw. See Pinkerton v. United States, 328 U.S. 640, 647-48 (1946) (each member of a conspiracy is liable for the actions of coconspirators when such actions are undertaken in furtherance of the goals of the conspiracy). In fact, every day in which a leniency applicant has not legally withdrawn from a continuing conspiracy, that applicant is "consciously offending" – even if it has terminated its own illegal conduct. Hyde v. United States, 225 U.S. 347, 369-70 (1912).

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.").

A confession to the authorities (like Stolt's signing the January 15, 2003 Conditional Agreement), however, is clear evidence of withdrawal. See United States v. DePeri, 778 F.2d 963, 979-80 (3d Cir. 1985). Accordingly, the Division provides non-prosecution coverage until that clear withdrawal date to give protection for any "conscious offending," Hyde, 225 U.S. at 370, that may have occurred prior to that date by the applicant's failure to have legally withdrawn earlier. (See Gov't FOF 352).

Finally, it is irrelevant that, as Stolt claims, a dispute over the discovery date could have been avoided if the Conditional Agreement had specified an exact date. Stolt signed the Conditional Agreement at issue here. That Conditional 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. Indeed, not specifying an exact discovery date puts the emphasis in the Conditional Agreement precisely where it should be – on what Stolt did after discovery to promptly and effectively terminate its involvement in the conspiracy, regardless of the exact date that discovery occurred. Since O'Brien discovered the conspiracy in early 2002, that is when Stolt should have, but did not, take prompt and effective action to terminate its participation in the conspiracy.

D. The Agreement Is Not Limited to Transportation to and from the United States

Even though the heart of the defendants' defense is that they promptly shut down a worldwide conspiracy, they also argue the Conditional Agreement is limited to transportation to and from the United States. This argument is wrong. An essential element of the Conditional Agreement is Stolt's representation that it took prompt and effective action to terminate its part in the "anticompetitive activity being reported." The Conditional Agreement, in turn, defines

"anticompetitive activity being reported" as "conduct . . . involving transportation to and from the United States." (GX-1 ¶ 1) (emphasis added). Contrary to defendants' claims, the word "involving" does not mean "limited to."[36] In fact, Stolt has defined the activity it reported as "a customer-allocation conspiracy . . . carried out through the exchange of customer lists . . .." (Stolt's Reply Mem. in Supp. of its Mot. to Dismiss, at 9). Those customer allocation lists, which Stolt states it provided as part of its report to the Government, involve customers on every major trade lane around the world, i.e., customers whose shipments were between foreign ports as well as customers with shipments to and from the United States. (See, e.g., GX-37-38; 39A; 41 (allocation lists)). Thus, the term "anticompetitive activity being reported" is not limited to cartel activity on U.S. trade routes, but also includes the full worldwide scope of the defendants' conspiracy.

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

Defendants argue that even if Stolt breached the Conditional Agreement, it is still entitled to leniency because the Government "received the benefit of its bargain." 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 never eligible to receive leniency because its involvement in the conspiracy continued for nine months after O'Brien discovered it. Thus, whether the Government received useful information from Stolt after the conditional grant of leniency does not change the fact that Stolt

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[36] The principal meaning of the word "involving" is "including." See American Heritage Dictionary of the English Language (4th ed. 2000) at 921, definition 1 ("involve" (and its participial form "involving") means "to contain as a part; include.").

was always ineligible to receive leniency. 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 coconspirators who provide full and truthful cooperation are "rewarded" by being required to plead guilty, pay fines and go to jail.[37]

The materiality of Stolt's breach is determined not by its ultimate effect, but by whether its breach could have had a material effect on the investigation itself. See United States v. Skalsky, 616 F. Supp. 676, 682 (D.N.J. 1985) (statement need only have a "tendency to influence, impede, or hamper the grand jury from pursuing the investigation"); accord United States v. Isabella, 582 F. Supp. 1534, 1535 (E.D. Pa. 1984) (in perjury case, to be material, the Government need not prove statement actually influenced, impeded or hampered). Stolt's misrepresentations and admissions had that tendency. Because Stolt failed to disclose the true duration of the conspiracy, and provided a witness, Jansen, who lied about the duration of the conspiracy, the Government found it necessary to: (1) spend additional time and resources to learn the truth about the extent of this conspiracy; (2) immunize coconspirators that it otherwise could have prosecuted; and (3) make deals with other coconspirators that were less favorable than they would have been but for Stolt's deceit. Moreover, 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

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[37] As Nannes acknowledged, 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. (See GX-1 ¶ 3; Gov't FOF 363-365 (emphasis added)).

Guidelines' fine ranges for coconspirators 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-18A–C; 19A–B).

Stolt's claim that the Government's successful prosecutions resulted solely from Stolt's cooperation is exaggerated at best. In fact, those "successful" prosecutions were guilty pleas by Stolt's coconspirators who, unlike Stolt, provided truthful and complete evidence. 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. (See Gov't FOF 384). Thus, Stolt did not provide "a full exposition of all facts known to [Stolt] relating to the anticompetitive activity being reported," an explicit benefit stated in the Conditional Agreement for which the Government bargained. (See GX-1 ¶ 2(a)). This failure to disclose all relevant evidence forced the Government to look elsewhere 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 United States v. Skalsky, 857 F.2d 172 (1988), the Third Circuit reviewed a district court finding that Skalsky materially breached his non-prosecution agreement by failing to disclose completely all information concerning his dealings with a grand jury target. Noting that Skalsky gave the Government "misleading answers" that "threw the agents off the scent" (the court never characterized the answers as untruthful), the court concluded that Skalsky's information was "a far cry from the 'complete, truthful and accurate

information and testimony' contemplated by his agreement with the government," and amounted to a "material[] breach[]" of the agreement because "the grand jury's investigation . . . was severely hampered by Skalsky's incomplete and evasive testimony." Id. at 178-79 (citation omitted) (emphasis added).[38]

That the Division obtained 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 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

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[38] 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).

conviction).[39]

The cases defendants rely on are inapposite. In United States v. Castaneda, 162 F.3d 832, 839 (5th Cir. 1998), the 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." Id. at 839. 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).

F. Neither Wingfield Nor Cooperman Is Entitled To Dismissal Under the Law of Third-Party Beneficiaries or Detrimental Reliance

1. Third-Party Beneficiaries

It is settled law that the rights of claimed third-party beneficiaries of a contract (Cooperman and Wingfield) stand or fall with those of the contract signatory upon whom they

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[39] 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") .

rely (Stolt). When Stolt breached the Conditional Agreement by its failure to satisfy an express "condition precedent" – to have taken prompt and effective action – it also eliminated any possible third-party beneficiary rights for Cooperman and Wingfield. Restatement (Second) of Contracts, § 309(1) & (2) (1981); 13 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 37:23, at 144, 146-49 (4th ed. 2000); Central Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F. 3d 1098, 1102 (3d Cir. 1996); United States v. Lopez, 944 F. 2d 33, 37 (1st Cir. 1991) (third-party beneficiary "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").

Citing Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984), Cooperman and Wingfield claim that their rights under paragraph 4 of the Conditional Agreement are not subject to Stolt's obligation to take prompt and effective action. Schneider is inapposite, however, because it is a collective bargaining case where, because of the impact on the national labor policy, the Supreme Court has decided that general rules of construction applicable to third-party beneficiaries are not applicable to employee benefit plans that are third-party beneficiaries of collective bargaining agreements. See Lewis v. Benedict Coal Corp., 361 U.S. 459, 470-71 (1960), followed in Schneider, 466 U.S. at 371 n.11.

Even under Schneider, courts look to the contract's language to determine whether "the parties to the agreement[] at issue . . . intended to condition the [third-party beneficiary's] contractual right" on the promisee's (Stolt's) performance. 466 U.S. at 371. The Court in Schneider read the collective bargaining agreement as creating the employer's duty to fund the benefit plan independent of the union's performance. Id. at 368-69. The Conditional Agreement

which Stolt signed, on the other hand, expressly states: it is "conditional and depends upon [Stolt] satisfying the conditions set forth," including the prompt and effective representation; that the government retained the right to "verif[y] [Stolt's] representations;" and that "this Agreement shall be void" if Stolt violated the Conditional Agreement. Thus, the Conditional Agreement makes clear that it can only exist as a whole. Therefore, if Stolt never qualified because it failed to take prompt and effective action, there is no Conditional Agreement, and no leniency for anyone.[40]

For these same reasons, Cooperman's and Wingfield's additional claim that paragraph 4 of the Conditional Agreement is "severable" from the rest of the Conditional Agreement is also wrong. Indeed, they cite no case, and we are aware of none, in which a contract was severed for the benefit of a non-contracting third-party. Such a result would swallow the general rule, stated above, that a third-party beneficiary must have a valid enforceable contract on which to rely. Cooperman and Wingfield similarly fail to cite any case in which a third-party beneficiary was held to have had an "opportunity to cure" a contract that was fatally defective because the promisee failed to satisfy a condition precedent. In any event, Cooperman and Wingfield had whatever "opportunity to cure" to which they were entitled. See infra note 45.

Finally, Cooperman's and Wingfield's "acceptance by conduct" argument is unsound for the same reason: the Conditional Agreement on which it rests is void because of Stolt's failure to take prompt and effective action to terminate. Defendants cite no authority – and we are aware of none – where non-signatories to a void contract nonetheless have been held to receive from

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[40] See also infra Section F.2. (discussion of "detrimental reliance"). But see supra note 3 (explaining how the Division would exercise its prosecutorial discretion with respect to employees who provided cooperation prior to the revocation of leniency).

that void agreement an offer which they accepted by conduct.

2. Detrimental Reliance

The equitable doctrine of detrimental reliance is equally inapplicable to Cooperman and Wingfield. Both knew as early as April 2002 that eligibility for the Government's Leniency Program depended on Stolt having taken prompt and effective action to terminate once O'Brien discovered the conspiracy. (See GX-30, at 21 (slide from April 2002 Stolt Antitrust Compliance Seminar Presentation attended by Cooperman and Wingfield and setting out termination requirement); GX-26C.5789A.-90.A (Nov. 25, 2002 Wingfield business journal entry); see also Gov't FOF 350, 418). Instead, Wingfield continued to conspire – and Cooperman allowed him to do so: Cooperman continued to send Wingfield alone to meet with coconspirators, thus providing him with the opportunity to conspire; Cooperman concealed the conspiracy, which resulted in a revised antitrust policy that failed to constrain Wingfield; and Cooperman failed to act when confronted with evidence that Wingfield was continuing to have bid-day discussions with Odfjell regarding Sasol.[41] That inequitable conduct made them and Stolt ineligible for

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[41] Criminal liability may be imposed on a person who recognized the likelihood of wrongdoing, but consciously refused to take basic investigatory steps to learn the truth. See United States v. Flores, 454 F.3d 149, 155 (3d Cir. 2006); United States v. Leahy, 445 F.3d 634, 652-653 (3d Cir. 2006); United States v. Wasserson, 418 F.3d 225, 239 (3d Cir. 2005); United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986). Knowledge of criminal conduct may be imputed to a person who "either had actual knowledge or 'deliberately closed his eyes to what otherwise would have been obvious to him concerning the fact in question.'" Flores, 454 F.3d at 155 (citing United States v. Stewart, 185 F.3d 112, 126 (3d Cir. 1999)) (emphasis added); see also Leahy, 445 F. 3d at 652-653. Since Cooperman had started the conspiracy, he knew exactly what Wingfield's call with Nilsen about Sasol meant. Even if Cooperman was uncertain, Humphreys' report was cause for alarm, as it was to Humphreys. Cooperman's failure even to ask Wingfield about his Sasol conversation with Nilsen shows he either condoned Wingfield's behavior or deliberately closed his eyes to it.

When a company president (or Chairman of the Board like Cooperman) "has knowledge that 'a subordinate' is involved in a price-fixing conspiracy and takes no action to stop it, he may

leniency, because Stolt could never meet the Conditional Agreement's requirement of prompt and effective action to terminate. Detrimental reliance requires clean hands, e.g., Monsanto Co. v. Rohm & Haas Co., 456 F.2d 592, 598 (3d Cir. 1972), which neither Cooperman nor Wingfield possesses.

Wingfield could continue to conspire only because Cooperman first withheld his own knowledge of the conspiracy and Wingfield's participation in it, and then affirmatively acted to deceive SNSA's independent Board of Directors to prevent them from investigating O'Brien's claims and learning the truth. Had the Board learned the truth, it could have taken appropriate steps to ensure that Wingfield did not continue to conspire. Instead, because of Cooperman's deception, Stolt's revised antitrust policy permitted Wingfield, who had been conspiring on Stolt's behalf since early 2001, to continue to meet alone with the very same competitors with whom he had been conspiring. That enabled Wingfield to assure them that O'Brien's discovery did not mean the end of the allocation agreement, and it allowed Wingfield to continue to implement the conspiracy.

Cooperman – an instigator of the illegal conspiracy – purported to conduct his own "investigation" into the matter in February 2002. He prepared a report of this investigation (GX-13B), in which he falsely stated that he had interviewed Jansen and Stolt's business directors and that each denied any "ongoing" violations of the antitrust laws. (Id., at 2). In fact, the conspiracy was ongoing in February 2002 – even defendants do not contend it ended until after Stolt issued its revised antitrust policy and sent Wingfield to the NPRA meetings at the end of March 2002.

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not insulate himself from liability by leaving the actual execution of the scheme to his subordinates." United States v. Gillen, 599 F.2d 541, 547 (3d Cir. 1979); see also United States v. Wise, 370 U.S. 405, 408-09 (1962).

And the Stolt business directors testified that Cooperman never even asked them about the conspiracy, but that he spent the large part of their meetings on his oligopoly lecture. (See Gov't FOF 42). Cooperman also created a false explanation for the Jansen Memo in the report, stating that Wingfield and Jansen unequivocally denied it was a conspiratorial document, and claiming instead it was an analysis of independent business decisions. (GX-13B, at 2). Jansen testified this was not true and Cooperman clearly understood the conspiratorial nature of the document. (See Gov't FOF 48).

Cooperman brought a copy of his false investigative report to an August 12, 2002 meeting of the SNSA Board of Directors, when he was asked to report on O'Brien's initial complaint. (See Gov't FOF 119). Cooperman falsely told the Board that he had investigated O'Brien's allegations about the company's participation in a conspiracy and assured them that O'Brien's claims were without merit. (See Gov't FOF 119; see also GX-78, at 445459 ("In short the investigation found no ongoing violations of antitrust laws.")). When asked "why he did not investigate prior violations of the antitrust law," Cooperman responded that "the purpose of the investigation was to determine the validity of O'Brien's allegations of ongoing antitrust violations." (GX-78, at 445459). As Cooperman knew (but the Board did not), his "investigation" occurred in February while the conspiracy was in full force; he never attempted to find out from Stolt's business directors if they had engaged in any violations; and his "investigation" consisted of providing a false exculpatory explanation for the Jansen Memo, which Cooperman knew discussed the conspiracy. (See Gov't FOF 44-48). Only after the Wall Street Journal exposed the illegal conspiracy in November 2002 did Cooperman ask for an independent investigation, and even then he falsely told the Board that "for the first time" ten

days earlier he had learned of "possible antitrust violations by SNTG during 2000-2001," and had arranged for an investigation in order to determine whether Stolt had violated the antitrust laws, a fact well-known, but concealed, by him. (GX-16) (emphasis added).

In short, Cooperman did not engage in the thorough house-cleaning he claims. Rather, his conduct after O'Brien's discovery and his refusal to expose the conspiracy and his own role in it prevented Stolt from ensuring that its illegal conduct did not continue – as it did until November 2002. It is because of the choices Cooperman made that Stolt could not qualify for the Corporate Leniency Program.[42] Cooperman's actions fully satisfy "the primary principle guiding application of the unclean hands doctrine . . . that the alleged inequitable conduct must be connected, i.e., have a relationship, to the matters before the court for resolution." In Re New Valley Corp., 181 F.3d 517, 525 (3d Cir. 1999). Cooperman cannot equitably claim responsibility for and attempt to benefit as the "initiator" of Stolt's compliance policy, and at the same time avoid responsibility for the actual consequences – that the conspiracy continued – of those actions. Because the very eligibility of the company for the Leniency Program depended on the effectiveness of Cooperman's (and thus Stolt's) actions, and Cooperman prevented Stolt from taking prompt and effective action to terminate its part in the conspiracy, Cooperman cannot himself be heard to complain.

G. The Government Properly Revoked Stolt's Conditional Leniency

When the Division signed the Conditional Agreement in January 2003, it had absolutely

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[42] By concealing the conspiracy in order to prevent disclosure of his own criminal conduct, Cooperman not only assumed the risk that the company (and thus he) would not later qualify for leniency, he also willfully exposed his subordinates, whom he brought into the conspiracy, to the same risk of criminal prosecution.

no knowledge that Stolt had continued to conspire for nearly nine months after O'Brien discovered the illegal conduct. The Division was aware of O'Brien's allegations, however, including his allegation that Stolt's illegal conduct had continued because the company failed to conduct an independent investigation, and, even though Stolt had publicly denied them (see GX-14), the Division discussed those allegations with Nannes, Stolt's attorney, before signing the Agreement. (See Gov't FOF 333, 334, 338). Nannes assured the Division that "O'Brien's allegations were not credible," noting that O'Brien had a "history of animosity" toward Stolt management and was using his "lawsuit to try to extort a settlement, a substantial amount of money" from Stolt. (See Gov't FOF 335). Additionally, to rebut O'Brien's allegations, Nannes explained that Stolt had adopted and rigidly enforced a revised antitrust compliance program, and had withdrawn from the conspiracy in March 2002. (See Gov't FOF 336, 337). He further advised the Division that Cooperman had interviewed employees with knowledge of the illegal conduct (see Gov't FOF 339), and that all such individuals remained in Stolt's employ. (See Stipulation and Order filed June 22, 2007) (Doc. No. 267). Nannes also emphasized that since O'Brien had left Stolt in March 2002, he could not have had any first-hand knowledge about Stolt's participation in any criminal activity after that date. And, having fully aired the issue, Stolt was willing to make the required representations in the Conditional Agreement, knowing the consequences if they turned out to be false. Under these circumstances, the Division reasonably decided to conditionally accept Stolt into the Leniency Program.

If, as Stolt represented, its illegal activity had in fact ceased upon discovery, then we would not be here today, and Stolt's failure to conduct an independent investigation, or terminate, discipline or reassign any employees would be irrelevant. The Division would not

disqualify a leniency applicant whose illegal activity ended promptly after it was discovered merely because the applicant did not take any particular action. The Conditional Agreement only required Stolt truthfully to represent that it had taken prompt and effective action to terminate its involvement in the conspiracy, but what particular action it took to do so was within the company's discretion.

After the Division signed the Conditional Agreement, however, it learned several critical facts that led it to conclude that, in fact, the actions that Stolt had taken did not amount to prompt and effective action to terminate its participation in the conspiracy. What the Division did not know at the time it signed the Conditional Agreement was that at the March 2002 NPRA meetings, Wingfield actually told his coconspirators that Stolt's revised antitrust policy would not end their illegal agreement. The Division learned of this fact for the first time in April 2003 – nearly three months after conditionally accepting Stolt into the Leniency Program – from Jo Tankers' Finlay. Finlay also outlined two contracts that he said Wingfield rigged in November 2002. (See Gov't FOF 286, 287). If what Finlay told the Division was true, then Stolt's representation in the Conditional Agreement of prompt and effective action would be false, and the company would not qualify for leniency.

The Government therefore acted fairly: it sent Stolt a letter on April 8, 2003, that both relieved Stolt of its cooperation obligations under the Agreement until the issue of Stolt's eligibility was resolved, and expressly provided Stolt "an opportunity to present its position" on the issue. (DX-11). Thereafter, the Government met with Nannes on several occasions, during which meetings Nannes provided evidence that, he argued, confirmed that Stolt ended its conspiratorial conduct by March 2002. That evidence included entries from Wingfield's 2002

business journal. (See Gov't FOF 398, 399).[43] Nannes and Stolt's current counsel also were provided opportunities to meet with Division officials in Washington, including the Assistant Attorney General, prior to revocation of the Conditional Agreement, and each time insisted that the illegal conduct had ended in March 2002.[44]

What the Division did not know in January 2003, but has learned since it suspended Stolt's cooperation obligation on April 8, 2003, is that Cooperman hid the existence of the conspiracy from the Board of Directors, conducted a phony investigation of O'Brien's discovery of the conspirary, and prepared a false and misleading investigative report to conceal his knowledge of and participation in the conspiracy. The Division also since has learned that Wingfield never withdrew from the conspiracy at NPRA; that Cooperman did not apply the revised compliance program to Wingfield, Jansen or himself; that Wingfield and Jansen, in fact, continued to conspire into November 2002; and that Cooperman either knew of or purposely turned a blind eye to the continued illegal conduct. Thus, what the Division now knows, but did not know when it entered the Agreement, is that the actions Stolt did take – including revising its compliance program, conducting seminars, and obtaining over 130 certificates of compliance –

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[43] One such piece of evidence was Wingfield's October 2002 journal entry concerning Nilsen's calls regarding Sasol that stated he "told [Nilsen] won't discuss." (GX-26B.5747). As we now know, this entry was false because Wingfield never refused to talk to Nilsen about Sasol and, in fact, spoke to Nilsen and Haugsdal a number of times the day the bids were due. (See Gov't FOF 304, 399).

[44] Under these circumstances, defendants had whatever "opportunity to cure" to which they were entitled. Cooperman, who was in charge of the leniency application, and Wingfield, whose journals Nannes was using to claim the conspiracy ended in March 2002, each had an opportunity to cure through Nannes, just as they claim to have cooperated through Nannes, when he responded to the Government's April 8, 2003 suspension letter. In any event, Stolt's failure to take prompt and effective action made it irreparably ineligible for leniency, and there was no "cure" for this fatal defect.

did not prevent Wingfield and Jansen, the executives Cooperman had entrusted with day-to-day management of the conspiracy, from continuing to carry out the conspiracy in the same manner and with the very same coconspirators after O'Brien's discovery.

As the Division's March 2, 2004, letter revoking Stolt's conditional acceptance into the Leniency Program makes clear, it was because of what the Division learned after the Conditional Agreement was signed – that Stolt failed to take prompt and effective action – that Stolt's conditional acceptance was revoked. (DX-20). Nowhere in that letter, or in the Division's April 8, 2003 suspension letter, does the Division suggest that it was revoking Stolt's conditional acceptance because it failed to conduct an independent investigation or discipline its employees. That Stolt failed to do any of those things is relevant only to rebut defendants' argument that what Stolt did do, in and of itself, amounted to prompt and effective action regardless of what Wingfield or Jansen had done.[45]

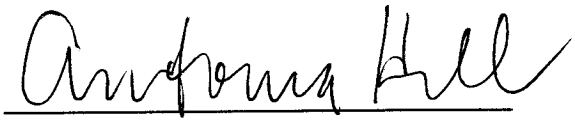
[45] Defendants' assertions notwithstanding, the Division does not insist on retention of experienced antitrust counsel or any particular type of investigation for an applicant to receive leniency. All the Division requires of its leniency applicants, by whatever means are effective, is compliance with the terms of the agreement, including the representation that the applicant took prompt and effective action to terminate the illegal activity being reported.

VI.

CONCLUSION

The Government submits that its decision to revoke the January 15, 2003 Conditional Leniency Agreement is supported both by law and the evidence. Accordingly, the Government respectfully requests that the Court deny defendants' motions to dismiss the Indictment.

Respectfully submitted,



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Dated: August 20, 2007

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of August, 2007, a copy of the Government's Post-Hearing Brief in Opposition to Defendants' Motions to Dismiss the Indictment has been sent by first-class mail to counsel of record for the defendants as follows:

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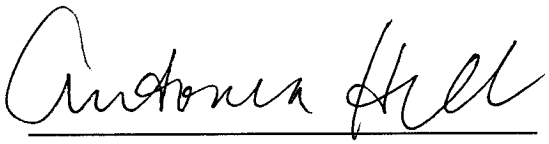

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