

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

BEHR IRON & STEEL, INC.

No. 16 CR 50015

Judge Iain D. Johnston

PLEA AGREEMENT

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, ZACHARY T. FARDON, and defendant BEHR IRON & STEEL, INC., through JOHN MENNE, and defendant's attorney, MATTHEW SCHELP, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

The parties to this Agreement have agreed upon the following:

Charge in This Case

2. The information in this case charges defendant with, while being an employer, willfully violating a regulation prescribed pursuant to Title 29, Chapter 15 of the United States Code relating to Occupational Safety and Health, and that violation caused the death of an employee, in violation of 29 U.S.C. § 666(e).

3. Defendant, by its board of directors, has authorized in a corporate resolution on February 25, 2016, John Menne to act on its behalf in this matter and to enter into a guilty plea on behalf of the defendant. A copy of the corporate resolution is attached to, and incorporated as part of, this plea agreement.

4. Defendant, through John Menne, has read the charge against defendant contained in the information, and that charge has been fully explained by defendant's attorney.

5. Defendant, through John Menne, fully understands the nature and elements of the crime with which defendant has been charged.

Charge to Which Defendant Is Pleading Guilty

6. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the information, which charges defendant with, while being an employer, willfully violating a regulation prescribed pursuant to Title 29, Chapter 15 of the United States Code relating to Occupational Safety and Health, and that violation caused the death of an employee, in violation of 29 U.S.C. § 666(e).

Factual Basis

7. Defendant will plead guilty because defendant is in fact guilty of the charge contained in the information. In pleading guilty, defendant admits the following facts and that those facts establish defendant's guilt beyond a reasonable doubt:

a. In general, on or about March 10, 2014, at South Beloit, Illinois, in the Northern District of Illinois, Western Division, defendant, which was an employer, that is it was engaged in business affecting interstate commerce and had employees, willfully violated a regulation prescribed pursuant to Title 29, Chapter 15 of the United States Code relating to Occupational Safety and Health, and that violation caused the death of an employee, in violation of 29 U.S.C. § 666(e).

b. More specifically, defendant willfully failed to provide lockout/tagout protection, as required under 29 C.F.R. § 1910.147, and confined space protection, as required under 29 C.F.R. § 1910.146, for defendant's employees who were cleaning a shredder discharge pit, and those violations caused the death of Victim A, an employee of defendant, when Victim A got caught in a moving unguarded conveyor belt.

c. The Occupational Safety and Health Administration, or OSHA, was the division of the United States Department of Labor responsible for enforcement of the Occupational Safety and Health Act. OSHA promulgated regulations found in 29 C.F.R. § 1910.147 that required employers to adopt and use safety procedures that would ensure that dangerous machines would be properly shut off and not able to be started up again prior to the completion of maintenance or servicing work. Safety procedures included placing a lock on the power source of the machine and a tag on the lock warning that the machine could not be operated until the warning was removed and identifying the employee who has the key to the lock. OSHA also promulgated regulations found in 29 C.F.R. § 1910.146 that addressed the need to protect employees from entering a confined space without safe permit space entry operations. Essentially, the regulations required that an employer put in place certain protections, such as proper air condition and ventilation and access to rescue and emergency equipment, before an employee could enter a confined space. Defendant knew that it was required to follow these regulations.

d. Defendant, a wholly owned subsidiary of Joseph Behr & Sons, Inc., was a high volume ferrous and nonferrous scrap processor based in Rockford, Illinois. Defendant and Joseph Behr & Sons had entered into a management and services agreement whereby Joseph Behr & Sons agreed to provide, among other things, safety, environmental and security services. Defendant had a facility in South Beloit, Illinois, known as the Behr Beloit facility, that recycled metals contained in such things as automobiles and refrigerators.

e. The Behr Beloit facility contained a shredding machine and a sorting process. Metals shredded in the shredding machine fell onto a conveyor belt located under the shredding machine. The conveyor belt was located approximately ten feet underground in the shredder discharge pit. The discharge pit was approximately six feet long and six feet wide. The shredded metals were then moved by the conveyor belt out of the discharge pit and through a sorting process. Some of the shredded metals fell onto the ground of the discharge pit near the conveyor belt. One or two of defendant's employees working on the shredding machine were required to clean the discharge pit daily.

f. In order to clean the discharge pit, the employees had to enter the pit by climbing down a wooden ladder and entering the discharge pit. The employees then shoveled shredded materials on the floor of the discharge pit onto the conveyor belt. While employees cleaned the discharge pit, the conveyor belt continued to run. There was no lock or operable emergency shut off switch in the discharge pit for the conveyor belt, and the conveyor belt had no guards designed to

protect employees. Employees working in the discharge pit were not adequately trained to use the shredder or the conveyor belt and defendant had not developed and implemented confined space protection for employees entering the discharge pit. These conditions constituted violations of the OSHA regulations described above. Defendant knew that it was not providing lockout/tagout protection, as required under 29 C.F.R. § 1910.147, or confined space protection, as required under 29 C.F.R. § 1910.146.

g. On March 10, 2014, Victim A was in the discharge pit (a confined space that on March 10, 2014, defendant had not put in place safe permit space entry operations) cleaning the pit by shoveling shredded materials on the ground onto the moving and unguarded conveyor belt. Victim A's arm was caught by the unguarded conveyor belt. Victim A was pulled into the machinery and killed.

Maximum Statutory Penalties

8. Defendant understands that the charge to which defendant is pleading guilty carries the following statutory penalties:

a. A maximum sentence of 5 years of probation. This offense also carries a maximum fine of \$500,000 pursuant to 18 U.S.C. § 3571(e).

b. Defendant understands that the Court must order restitution to the victim of the offense in an amount determined by the Court.

c. In accord with Title 18, United States Code, Section 3013, defendant will be assessed \$25 on the charge to which defendant has pled guilty, in addition to any other penalty imposed.

Sentencing Guidelines Calculations

9. A violation of 29 U.S.C. § 666(e) is a Class B misdemeanor. 18 U.S.C. § 3559(a)(7). The sentencing guidelines do not apply to a Class B misdemeanor violation, *see* U.S.S.G. § 1B1.9, and the parties acknowledge that the Court may impose any sentence authorized by 29 U.S.C. § 666(e).

Agreements Relating to Sentencing

10. The government and defendant agree to recommend that the Court impose a term of 5 years' probation and order defendant to pay restitution of \$350,000 to Victim A's estate in lieu of a fine. Defendant agrees to pay the restitution at the time of sentencing. With regard to the conditions of probation, the parties agree that as one condition of probation defendant must comply with the terms contained in the Stipulation and Settlement Agreement entered into on December 7, 2015, in the case of Thomas Perez, Secretary of Labor, United States Department of Labor vs. Behr Iron & Steel, Inc., and Behr Peoria, Inc., OSHA Docket Nos. 15-0523, 15-0605, 14-1437. Other than the agreed term and conditions of probation and the amount of restitution, the parties agree that the Court remains free to impose the sentence it deems appropriate.

11. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and may impose a sentence up to the maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, the defendant will have no right to withdraw its guilty plea.

12. Regarding restitution, defendant acknowledges that pursuant to 18 U.S.C. § 3663A, the Court must order defendant to make full restitution in an amount equal to the cost of necessary funeral and related services for Victim A. Defendant also agreed to pay additional restitution, arising from the offense conduct set forth above, totaling \$350,000, pursuant to Title 18, United States Code, Sections 3663(a)(3) and 3664.

13. Restitution shall be due immediately, and paid pursuant to a schedule to be set by the Court at sentencing. Defendant understands that pursuant to 18 U.S.C. § 3664(k), it is required to notify the Court and the United States Attorney's Office of any material change in economic circumstances that might affect its ability to pay restitution.

14. Defendant agrees to pay the special assessment of \$25 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

15. Defendant agrees that the United States may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613, and 3664(m), notwithstanding any payment schedule set by the Court.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

16. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 16 CR 50015.

17. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

Waiver of Rights

18. Defendant understands that by pleading guilty it surrenders certain rights, including the following:

a. **Trial rights.** Defendant has the right to persist in a plea of not guilty to the charge against it, and if it does, it would have the right to a public and speedy trial.

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge

sitting without a jury, defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

ii. If the trial is a jury trial, the jury would be composed of twelve citizens from the district, selected at random. Defendant and it's attorney would participate in choosing the jury by requesting that the Court remove prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges.

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of proving defendant guilty beyond a reasonable doubt, and that the jury could not convict defendant unless, after hearing all the evidence, it was persuaded of defendant's guilt beyond a reasonable doubt. The jury would have to agree unanimously before it could return a verdict of guilty or not guilty.

iv. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, whether or not the judge was persuaded that the government had established defendant's guilt beyond a reasonable doubt.

v. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and defendant's attorney would be able to cross-examine them.

vi. At a trial, defendant could present witnesses and other evidence in defendant's own behalf. If the witnesses for defendant would not appear voluntarily, defendant could require their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

b. **Waiver of appellate and collateral rights.** Defendant further understands it is waiving all appellate issues that might have been available if defendant had exercised defendant's right to trial. Defendant is aware that Title 28, United States Code, Section 1291, and Title 18, United States Code, Section 3742, afford a defendant the right to appeal defendant's conviction and the sentence imposed. Acknowledging this, defendant knowingly waives the right to appeal defendant's conviction, any pre-trial rulings by the Court, and any part of the sentence (or the manner in which that sentence was determined), including any fine within the maximum provided by law, in exchange for the concessions made by the United States in this Agreement. In addition, defendant also waives defendant's right to challenge defendant's conviction and sentence, and the manner in which the sentence was determined, in any collateral attack or future challenge, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness or ineffective assistance of counsel, nor does it prohibit defendant from seeking a reduction of sentence based directly on a change in the law that is applicable to defendant and that, prior to the filing of defendant's request for relief, has been

expressly made retroactive by an Act of Congress, the Supreme Court, or the United States Sentencing Commission.

19. Defendant understands that by pleading guilty it is waiving all the rights set forth in the prior paragraphs. Defendant's attorney has explained those rights to defendant, and the consequences of defendant's waiver of those rights.

Presentence Investigation Report/Post-Sentence Supervision

20. Defendant understands that the United States Attorney's Office in its submission to the Probation Office as part of the Pre-Sentence Report and at sentencing shall fully apprise the District Court and the Probation Office of the nature, scope, and extent of defendant's conduct regarding the charge against defendant, and related matters. The government will make known all matters in aggravation and mitigation relevant to sentencing, including the nature and extent of defendant's cooperation.

21. Defendant agrees to truthfully and completely execute a Financial Statement (with supporting documentation) prior to sentencing, to be provided to and shared among the Court, the Probation Office, and the United States Attorney's Office regarding all details of defendant's financial circumstances, including defendant's recent income tax returns as specified by the probation officer. Defendant understands that providing false or incomplete information, or refusing to provide this information, may be used as a basis for denial of a reduction for acceptance of responsibility pursuant to Guideline § 3E1.1 and enhancement of defendant's sentence for obstruction of justice under Guideline § 3C1.1, and may be

prosecuted as a violation of Title 18, United States Code, Section 1001 or as a contempt of the Court.

22. For the purpose of monitoring defendant's compliance with defendant's obligations to pay a fine during any term of supervised release or probation to which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions, correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of supervised release or probation to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

23. Defendant agrees to cooperate with the United States Attorney's Office in collecting any unpaid fine for which defendant is liable, including providing financial statements and supporting records as requested by the United States Attorney's Office.

24. The United States agrees not to seek additional criminal charges in the Northern District of Illinois against defendant or any current director, officer or employee of defendant, or any parent, affiliate or subsidiary companies of defendant relative to the allegations contained in the Information. However, nothing in this

Agreement limits the United States in prosecution of defendant in other districts or for crimes not alleged in the information.

Conclusion

25. Defendant understands that this Agreement will be filed with the Court, will become a matter of public record, and may be disclosed to any person.

26. Defendant understands that defendant's compliance with each part of this Agreement extends throughout the period of defendant's sentence, and failure to abide by any term of the Agreement is a violation of the Agreement. Defendant further understands that in the event defendant violates this Agreement, the government, at its option, may move to vacate the Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

27. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

28. Defendant and defendant's attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

29. Defendant acknowledges that defendant has read this Agreement and carefully reviewed each provision with defendant's attorney. Defendant further acknowledges that defendant understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: _____

ZACHARY T. FARDON
United States Attorney

JOHN MENNE
BEHR IRON & STEEL, INC.
Defendant

SCOTT R. PACCAGNINI
Assistant U.S. Attorney

MATTHEW SCHELP
Attorney for Defendant